

Distribution Now!

"The import legislation (distribution bill) Flora MacDonald announced is in trouble. If it's backed down and the minister resigns, as I would assume she would, it would be very difficult for the industry. She has announced a major piece of policy and I know her heart is behind it; she's pushing it as hard as she can. If it doesn't go through it would be very difficult for her to remain in that portfolio in any event."

Stephen Roth, June 1987

Without question, distribution legislation is the hottest item on the film agenda this year. Any piece of legislation which, were it to fail in Parliament, could cause the resignation of a minister, dash the hopes distributors have been nursing for more than a decade and toll the final death knell over an independent, Canadian industry, is of considerable note.

The document which follows was received by *Cinema Canada* at the beginning of November. It was in the form of a photocopy of a typeset document in English. We believe it to be a copy of the distribution legislation as it stands at present. It would appear to be similar to draft copies of the legislation which were circulated in April of this year.

It is now commonly believed that no action will be forthcoming on the legislation until March or April, 1988 when the yes-or-no vote is taken in the U.S. Congress concerning the free-trade agreement. After that vote, regardless of the outcome (and presuming that film and television, as cultural industries, are not included in the agreement), the Canadian government will be free to act on distribution legislation.

Most important in the text which follows is the inclusion of "all media" in 9(b) which essentially opens the entire television market to Canadian distributors, precluding a foreign distributor from handling any film or TV program if the rights are shared by several partners.

It is the belief of Canadian distributors that the passage of legislation like that which follows would assure them of a vital market in Canada and provide, finally, the necessary circumstances for them to become full partners in the film and television industry. Anything short of passage would be a betrayal of all the promises made by the ministers of Communications and Finance, and by the prime minister himself in recent months, say the distributors.

2nd Session, 33rd Parliament
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The House of Commons of Canada

Bill C-

An Act respecting the importation into
Canada of film and related products

Her Majesty, by and with the advice and consent of the Senate and House of Commons, enacts as follows:

Short Title

1. This Act may be cited as the *Film Products Importation Act*.

Interpretation and Application

2.(1) In this Act

"affiliate" means an affiliated body corporate within the meaning of subsection (4).

"beneficial ownership" includes ownership through a trustee, legal representative, agent or other intermediary, but does not include ownership or holding by way of security only;

"body corporate" includes a company or other body corporate wherever or however incorporated;

"cinematographic work" means a work produced by cinematography or other analogous process, whether the work is recorded, reproduced or encoded on film, videotape, videocassette, videodisc or any other medium;

"distribution", in relation to a film product, means distribution of the film product for gain for
(a) theatrical exhibition to the general public,
(b) broadcasting or other telecommunications transmission to the general public or
(c) sale or rental to the general public or to any person for sale or rental to the general public;

"film product" means a cinematographic work or any cinematographic product derived therefrom or any version thereof, whether recorded, reproduced or encoded on film, videotape, videocassette, videodisc or any other medium.

"general licence" means a licence granted under section 8;

"import" means to import into Canada;

"Minister" means such member of the Queen's Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of this Act;

"person" includes an individual, partnership, body corporate, unincorporated organization, trustee, executor, administrator or legal representative;

"prescribed" means prescribed by the regulations.

"proprietary licence" means a licence granted under section 9.

(2) For the purposes of this Act, a film product is deemed to have been imported if

(a) it is recorded, reproduced or encoded in Canada for distribution, or for reproduction and distribution, in Canada from telecommunications originating outside Canada; or

(b) it is received in Canada for theatrical exhibition in Canada to the general public from telecommunications originating outside Canada.

(3) For the purposes of this Act, a person has a business establishment in Canada if the person, whether or not for profit,

(a) has a place of business in Canada;

(b) employs or engages an individual or individuals in Canada in connection with the business; and

(c) has assets in Canada used in carrying on the business.

(4) For the purposes of this Act, (a) a body corporate is an affiliate of a person if that person is a body corporate and

(i) one of them is the subsidiary of the other,
(ii) both are subsidiaries of the same body corporate, or
(iii) each of them is controlled by the same person; and

(b) if two bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.

(5) For the purposes of subsection (4), a body corporate is a subsidiary of another body corporate if it is controlled by that other body corporate.

(6) For the purposes of subsections (4) and (5), a body corporate is controlled by a person if

(a) securities of the body corporate to which are attached more than fifty per cent of the votes that may be cast to elect directors of the body corporate are beneficially owned by that person; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate.

3. The purpose of this Act is to regulate the importation of film products in order to encourage the development of Canada as a separate national market for the distribution of film products, to promote the distribution of film products in Canada by Canadians and to promote the production, distribution and exhibition of Canadian film products.

4. This Act is binding on Her Majesty in right of Canada or a province.

Importation, Distribution and Exhibition

5. No person shall import a film product

(a) for distribution in Canada, or
(b) for reproduction in Canada and distribution in Canada of the copies, whether or not the copies are recorded on the same medium as that on which the film product was recorded, except under the authority of and in accordance with a general licence or a proprietary licence.

6. No person shall distribute an imported film product in Canada or reproduce an imported film product in Canada, unless the film product has been imported under the authority of and in accordance with a general licence or a proprietary licence.

7. No person shall use or dispose of an imported film product in Canada, or reproduce an imported film product in Canada and use or dispose of the copies in Canada, for gain for

(a) theatrical exhibition to the general public,
(b) broadcasting or other telecommunications transmission to the general public, or
(c) sale or rental to the general public or to any person for sale or rental to the general public, unless the film product has been imported under the authority of and in accordance with a general licence or a proprietary licence.

Licences

8. (1) On application in the prescribed form and manner and payment of the prescribed fee or a fee determined in the prescribed manner, the Minister shall, subject to this Act, grant a general licence to the applicant authorizing the applicant to import film products for distribution, or for reproduction and distribution, in Canada, if the Minister is satisfied that the applicant is a Canadian and has a business establishment in Canada.

(2) The Minister may refuse to grant a general licence to an applicant, if the Minister is satisfied that the applicant or any affiliate of the applicant has, in the two years immediately preceding the date of the application, contravened or failed to comply with any provision of this Act or the regulations, any term or condition of a general licence or proprietary licence granted to the applicant or affiliate or any undertaking given pursuant to subsection 12(1).

(3) A general licence is valid for a term of twelve months commencing on the day on which the licence is granted.

(4) Every person who holds a general licence shall notify the Minister forthwith if that person ceases to be a Canadian or to have a business establishment in Canada

(5) In this section,

"Canadian" means

(a) a Canadian citizen who is ordinarily resident in Canada,
(b) a permanent resident of Canada within the meaning of the *Immigration Act, 1976*,
(c) a government in Canada, whether federal, provincial or local, or a department, board, commission or agent thereof,
(d) a partnership or unincorporated organization



- (i) a majority of the members of which are Canadians as herein defined, and
- (ii) at least two-thirds of the ownership interests in which are beneficially owned by Canadians as herein defined; or
- (e) a corporation incorporated under the laws of Canada or a province
 - (i) a majority of the directors of which are Canadians as herein defined,
 - (ii) a majority of the outstanding shares of which are beneficially owned by Canadians as herein defined, and
 - (iii) at least two-thirds of the outstanding voting shares of which are beneficially owned by Canadians as herein defined;

"voting share" means a share carrying a voting right under all circumstances or under some circumstances that have occurred and are continuing, and includes a bond, debenture or other debt obligation currently convertible into such a share and a currently exercisable option or right to acquire such a share or convertible debt obligation.

9. (1) On application in the prescribed form and manner and payment of the prescribed fee or a fee determined in the prescribed manner, the Minister shall, subject to this Act, grant a proprietary licence to the applicant authorizing the applicant to import any cinematographic work, or any film product derived from a cinematographic work, specified in the licence for distribution, or for reproduction and distribution, in Canada, if the Minister is satisfied that

- (a) the applicant has a business establishment in Canada;
- (b) the applicant or any one affiliate of the applicant has or will have the right to distribute the cinematographic work in all media throughout the world either at the time of the completion of principal photography of the cinematographic work or at the time the cinematographic work or film product is to be imported; and
- (c) no person, other than the applicant or an affiliate of the applicant, has distributed, is distributing or will have distributed, in the two years immediately following the date of the first commercial use of any film product derived from the cinematographic work, any such film product in any medium in any country in which the

applicant or an affiliate of the applicant carries on business.

(2) The Minister may refuse to grant a proprietary licence to an applicant, if the Minister is satisfied that the applicant or any affiliate of the applicant has, in the two years immediately preceding the date of the application, contravened or failed to comply with any provision of this Act or the regulations, any term or condition of a general licence or proprietary licence granted to the applicant or affiliate or any undertaking given pursuant to subsection 12(1).

10. It is a term of every general licence and every proprietary licence that the licensee shall not transfer to any person, other than a person who holds a general licence, any right to distribute, or to reproduce and distribute, in Canada any film product imported under the authority of the licence.

11. (1) It is a term of every general licence granted after the coming into force of this section that the licensee will invest in the production and distribution of Canadian film products such amount, not exceeding ten per cent of the annual gross revenue of the licensee from the distribution, or the reproduction and distribution, in Canada of film products imported under the authority of the licence, as may be prescribed or determined under the regulations.

(2) On the request of the Minister, the holder of a general licence granted after the coming into force of this section shall furnish the Minister with such information as the Minister considers necessary to verify compliance with the term of the licence referred to in subsection (1).

12. (1) No general licence or proprietary licence shall be granted to an applicant who is

- (a) a motion picture exhibitor or an affiliate of a motion picture exhibitor,
- (b) a person who sells film products at wholesale or an affiliate of such a person, or
- (c) an affiliate of a person who operates a broadcasting undertaking as defined in the *Broadcasting Act*,

unless the applicant or an affiliate of the applicant delivers to the Minister such written undertakings to Her Majesty in right of Canada as the Minister considers appropriate in the circumstances to ensure, as the case may be, that

- (d) Canadian film products have fair access to the markets served by the applicant or affiliate,

- (e) imported film products or copies thereof are offered, at fair and reasonable terms, to persons who are not affiliates of the applicant, or
- (f) affiliates of the applicant will give fair and reasonable access to imported film products or copies thereof distributed by persons who are not affiliates of the applicant.

(2) In this section, "motion picture exhibitor" means any person who operates five or more theatres or other premises in Canada for the theatrical exhibition of film products to the general public and, for the purposes of this subsection, any theatre or other premises operated by an affiliate of a person shall be deemed to be operated by that person.

13. No general licence or proprietary licence may be transferred.

14. (1) The Minister may suspend or revoke a general licence or a proprietary licence if the Minister has reasonable grounds to believe that

- (a) the licensee has ceased to be a person to whom the licence could be granted, if the licensee were then to apply for the licence,
- (b) the licensee or an affiliate of the licensee has contravened or failed to comply with any provision of this Act or the regulations or any term or condition of the licence; or
- (c) the licensee or an affiliate of the licensee has failed to comply with an undertaking given pursuant to subsection 12(1).

(2) The Minister shall not suspend or revoke a general licence or a proprietary licence, unless the licensee has been notified of the action that the Minister proposes to take and has been afforded a reasonable opportunity to make representations to the Minister in relation thereto.

Regulations

15. The Governor in Council may make regulations

- (a) exempting any film product or class of film product from the application of this Act on the basis of the length, language, intended audience or content of the film product;
- (b) prescribing what constitutes Canadian film products for the purposes of this Act;
- (c) prescribing the amount or the manner of determining the amount to be invested by a licensee for the purposes of section 11;
- (d) prescribing the form and manner of making applications for licenses under this Act, the infor-

mation to be furnished in connection therewith and the procedure to be followed in the consideration of those applications;

- (e) prescribing fees or the manner of determining fees for the purposes of this Act; and
- (f) generally for carrying out the purposes and provisions of this Act.

Enforcement

16. No person shall knowingly furnish any false or misleading information or knowingly make any misrepresentation

- (a) in an application for a general licence or a proprietary licence,
- (b) for the purpose of procuring the grant of a general licence or a proprietary licence, or
- (c) in connection with the use of a general licence or a proprietary licence.

17. Where the Minister notifies the Minister of National Revenue that the Minister requires copies of invoices of film products that have been imported or of other customs documents relating thereto for the purpose of enforcing this Act or the regulations, the Minister of National Revenue may, notwithstanding section 107 of the *Customs Act*, make such copies available to the Minister or to persons employed in the Department over which the Minister presides who have been designated by the Minister for the purposes of this section.

18. (1) Every person who contravenes or fails to comply with any provision of this Act or the regulations or any term or condition of a general licence or proprietary licence granted to that person is guilty of an offence and liable on summary conviction to a fine not exceeding ten thousand dollars or imprisonment for a term not exceeding six months or both.

(2) Where an offence under subsection (1) is committed on more than one day or is continued on more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.

(3) Where a body corporate commits an offence under subsection (1), every person who at the time of the commission of the offence was a director or officer of the body corporate is guilty of the like offence unless the act or omission constituting the offence took place without the person's knowledge or consent or the person exercised all due diligence.

Curtains for Act?

by John Timmins

On Oct. 14, 1987, Michael Wilson stood in the House of Commons during Question Period and, skillfully, neither confirmed nor denied that any new Canadian film distribution policy would be subject to retaliation under a new free-trade agreement with the United States.

It was not as easy for the Finance minister to deflect questions on the following day, but he did. On that day, the opposition had in its hands a briefing paper addressed to James Baker, U.S. secretary and Clayton Yutter, U.S. trade ambassador.

Under the sub-heading CULTURE in upper case letters, the paper, dated mid-Oct., outlined

the Canadian position on free-trade in three short paragraphs including "a promise to solve Jack Valenti's problem on film distribution within the next two weeks."

Wilson told Ed Broadbent, (NDP-Oshawa), that there was "no commitment, no understanding to solve Valenti's problem."

He reminded the house that Flora MacDonald, minister of Communications, had made a commitment to "ensure that Canada is treated as a separate market for film distribution."

"That commitment still stands," said Wilson.

Broadbent's reply: "Some of us are inclined to believe something other than that. We are going to look with interest at the Bill the minister has promised to introduce."

Repeated efforts to control what is seen on Canadian screens and where box office receipts are spent have gone down to defeat with a succession of Canadian governments. The most recent minister to try wresting control away from the Americans, who consider the Canadian feature film market a domestic market and whose product dominate 96.5 per cent of North American theatrical box office, is Communications Minister Flora MacDonald.

Her fight began in July 1986 when she succeeded Marcel Masse in the Communications portfolio. Masse, some say, was too strong and thus conveniently moved to Mines and Resources where he could be as strong as he wanted to be.

No sooner had MacDonald landed her new job when she in-

herited the Report of the Film Industry Task Force; Canadian Cinema - a Solid Base, commissioned by Masse in Nov. 1985 around the time the Parti Québécois was abandoning tough distribution legislation in Bill 109 under threat of a Quebec boycott by Jack Valenti's Motion Picture Export Association of America (MPEAA).

Authored by Stephen Roth and Marie-José Raymond and delivered to Masse in Feb. 1986, the report strongly recommended a feature film fund and the Canadianization of the film distribution industry. If Canada were going to foster an indigenous production industry and take more than three per cent of box office, we would have to create an indigenous distribution industry.

It was clear to the authors that

the seven U.S. major studios were unsympathetic to "our" problem and self-assured that cinema lay safely within the sacred realm of free-enterprise. Distribution rights, where the Majors were concerned, were non-negotiable.

Several weeks later in April 1986, the Gulf and Western-owned Paramount Pictures, one of the Majors, bought out the Canadian distribution rights of Atlantic Releasing. This effectively cut off Norstar, which had previously held sub-distribution rights from Atlantic Releasing, from many independent U.S. and foreign titles and gaining unrestricted access to the distribution of these titles in Canada.

When Norstar cried unfair