

# The real cost of the federal distribution bill

BY MICHAEL BERGMAN

**O**n February 13, 1987 Flora MacDonald announced that she would soon be introducing major legislation on film distribution. Her statement outlined a tough policy which included the licensing of film distributors. Foreign distributors would only get a license to distribute films in which they had a significant financial stake.

As weeks turned to months an impatient industry waited for the minister to make good on her word. Communications Canada heatedly denied that either the department or the government had given way to American pressure to abandon the distribution proposals. Various reasons were given for the delays in presenting the bill: federal/provincial jurisdictional difficulties had to be sorted out; the legislative agenda was crowded leaving little room for the bill; more consultations had to be undertaken with interested parties.

In the summer of 1987, to ease the pressure, a draft copy of the legislation was leaked. The draft was as good as Flora's word: it was tough legislation which would effectively separate Canada as a distinct film market.

But again nothing happened. The bill seemed to disappear into the never-never land of film bureaucracy. More to the point, free-trade negotiations were coming to the deadline crunch: October 5. The government could not afford to have any irritant disrupt the proceedings.

But even with the trade agreement signed, there was no sign that the legislation would soon be tabled. Once again, the culprit was free trade. Nothing would be done until the agreement had passed through the American Congress the following spring.

Finally, in June 1988, with elections imminent and a government concerned to show that it was keeping its promises, the Minister of Communications tabled draft legislation for a Film Products Importation Act. But between the announcement and the tabling "fell the shadow". The Act had been gutted to make it compatible with the free-trade agreement.

The Act never got beyond a first reading; it died on the order paper when Parliament was dissolved on October 1. All present indicators point to a Tory majority victory in the upcoming elections. It may be that a new Conservative government will reintroduce the Film Products Importation Act.

While some argue that even a weak law is better than no law, our legal columnist, Michael Bergman, makes a forceful case that a bad law is worse than no law at all.

**T**he Film Products Importation Act, introduced for first reading by Federal Communications Minister Flora MacDonald in June of this year, is a piece of legislation that if passed into law will surely bring about the decline of the Canadian film industry, not to mention an encroachment on the civil liberties of all Canadians.

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How can one bill so well intended achieve this? Perhaps it is a matter of bad drafting or little forethought or ignorance or contortions made to satisfy all interest groups. Whatever it is, it is only to be hoped that unless the bill is substantially amended it will never see the light of statutory day again.

Even a lay person carefully and thoughtfully reading the Bill can immediately identify its pitfalls.

The Bill purports to set up a regime that separates - segregates is a more appropriate word - the Canadian film distribution market from any other in the expectation that all

distributors competing for the Canadian film market will thereby do so on an equal basis.

Sections 6, 7 and 8 are the focal point, dare I say vortex, of the Bill. They read as follows:

“6. No person shall import a film product for distribution in Canada, unless that person had the right to import the film product.

7. No person shall distribute an imported film product in Canada, unless that person had the right to import the film product.

8. No person shall use or dispose of an imported film product in Canada for gain for

(a) theatrical exhibition to the public,

(b) broadcasting or other telecommunications transmission to the public, or

(c) sale or rental to the public or to any person for sale or rental to the public, unless the film product was imported by a person who had the right to import the film product.”

Summarized, these three sections state that no person can import a film product for distribution or distribute an imported film product or use an imported film product in Canada unless that person had the right to import the product. At

**SUMMARIZED, THESE THREE SECTIONS STATE THAT NO PERSON CAN IMPORT A FILM PRODUCT FOR DISTRIBUTION OR DISTRIBUTE AN IMPORTED FILM PRODUCT OR USE AN IMPORTED FILM PRODUCT IN CANADA UNLESS THAT PERSON HAD THE RIGHT TO IMPORT THE PRODUCT.**

first blush this does not make very much sense since the word “right” is not defined in these sections. One can have the right to import a film product because one is the owner or has entered into a contract with someone else or whatever. No one needs a piece of legislation to declare or confirm such rights.

However, the right which Sections 6, 7 and 8 refer to is not simply contract rights but the right which the government has given to the importer, distributor or user. The bill tells us this

at Section 2, Sub-paragraph (3) which reads as follows:

“(3) For the purposes of this Act, a person has the right to import a film product if the person has filed an affidavit under section 9 for the right to import the film product for distribution in Canada and the Minister has decided not to deny the person that right, unless the right is revoked under section 12 or 13.”

Consider the implications of this. Never before has there been a restriction on the right of Canadians to import film products for any use whatever. Film products are means of expression, cultural vehicles, part of the international trade in ideas. These vehicles are pretty much useless unless they can be distributed. Never mind that the process of distribution may be a commercial business. It is still an integral and necessary part of the means by which films can be freely, even if not for free, exhibited.

Sections 6, 7 and 8 as drafted open the door to enabling the government not only to declare who can import films, but also which films. Although some may find this interpretation

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exaggerated or obscure, it should be remembered that every attempt, even for good cause, to control the distribution of the vehicles of ideas must be suspect. The bill does not say that only Canadians can import any film product. It says that everyone, Canadians and foreigners alike, needs to secure the government’s permission to import a film product. Film products are not defined as being restricted to commercial feature films. The definition of film product found at Section 2, Sub-paragraph (1) is broad enough to

## Excerpts from the Film Products Importation Bill

“9. (1) Any person who desires to import a film product for distribution in Canada may file with the Minister an affidavit for the right to import that film product for distribution in Canada.

(2) An affidavit for the right to import a film product for distribution in Canada shall be made in the prescribed form and manner and be accompanied by the prescribed fee or a fee determined in the prescribed manner.

(3) The Minister shall deny a person the right to import a film product, if the Minister is satisfied that the person does not have a business establishment in Canada or does not meet any of the following qualifications:

(a) the person

(i) has entered into an agreement relating to the right to distribute the film product in Canada or any part of Canada, which agreement neither relates to the right to distribute the film product outside Canada nor was entered into in fulfilment of a condition or requirement, whether written or oral, to the entering into of an agreement relating to the right to distribute the film product outside Canada, and

(ii) has not entered, and will not enter, into an agreement relating to the right to distribute the film product outside Canada in fulfilment of a condition or requirement, whether written or oral, to the entering into of the agreement for Canada referred to in sub-paragraph (i) and no affiliate of that person nor any other person with whom that person is not dealing at arm’s length (within the meaning of section 251 of the Income Tax Act);

(iii) has entered into an agreement relating to the right to distribute the film product in Canada or any part of Canada in fulfilment of a condition, whether written or oral, to that person’s entering into an agreement relating to the right to distribute the film product outside Canada, or

(iv) has entered, or will enter, into an agreement relating to the right to distribute the film product outside Canada in fulfilment of a condition or requirement, whether written or oral, to that person’s entering into an agreement for Canada referred to in sub-paragraph (i);

(b) the person or any one affiliate of the person has or will have the right to distribute the film product in all media throughout the world, other than the country of origin, either at the time of the completion of principal photography of the film product or at the time the film product is to be imported, and no person, other than that person or an affiliate of that person has distributed, is distributing or will have distributed, in the twenty-six months immediately following the date of the first commercial use of the film product, the film product in any medium in any country in which that person or an affiliate of that person carries on the business of distributing film products, including the country or origin if that person or an affiliate of that person has the right to distribute the film product in any medium in that country; or

(c) the person or any affiliate of the person, prior to the making of the first answer print or first master copy of the film product, has made an investment in the film product equal to at least fifty per cent of the production costs of the film product.

(4) The Minister shall deny a person the right to import a film product, if the Minister is satisfied that the person meets only the qualification described in paragraph (3)(a) and, pursuant to the Investment Canada Act, has given an undertaking to Her Majesty in right of Canada to import for distribution in Canada only film products described in paragraph (3)(b) or (c).

(5) The minister may deny a person the right to import a film product, if the Minister (a) is satisfied on reasonable grounds that the person has, in the two years immediately preceding the date of the application, contravened section 6,7,8 or 28; or (b) is satisfied that any right of the person or an affiliate of the person was revoked pursuant to paragraph 12(1)(a).

(6) The Minister may deny a motion picture exhibitor or an affiliate of a motion picture exhibitor the right to import a film product, if the Minister is satisfied, on reasonable grounds, that the motion picture exhibitor

(a) is unfairly refusing to exhibit in theatres operated by the motion picture exhibitor film products that are distributed by any person that is not an affiliate of the motion picture exhibitor, for the purpose of preventing any person from acquiring rights to distribute film products in Canada, or

(b) is, taking in account the normal practices of the industry with regard to the exhibition of a film, including but not limited to, the selection and number of theatres and screens in which such a film is shown, the financial terms and the dates and length of playing periods, unfairly and without reasonable business justification systematically denying access to those theatres to imported film products or Canadian film products that are distributed in Canada by any person that is not an affiliate of the motion picture exhibitor; and the Minister may establish a committee to advise on the compliance of the industry with the provisions of paragraphs (a) and (b).

(7) In this section,

“motion picture exhibitor” means any person who operates five or more theatres and, for the purposes of this section, any theatre operated by an affiliate of a person shall be deemed to be operated by that person;

“theatre” means any theatre or other premises in Canada for the theatrical exhibition of film products to the public.”

**WHATEVER YOU THE READER MAY MAKE OF SECTION 9 AND ITS IMPACT ON CIVIL LIBERTIES, THERE IS NO QUESTION THAT THIS SECTION IF ENACTED WILL BRING ABOUT THE DECLINE OF THE CANADIAN FILM INDUSTRY.**

include news and information films, documentaries, shorts, educational, industrial and religious film products. The word distribution is defined in the bill to be distribution for gain of theatrical, broadcast and videocassette exhibition to the public although materials designed exclusively for television broadcast only are excluded. In other words, distributors for gain of all manner of non-theatrical and non-commercial film products must get the government's permission to import them. Distributors of imported film products to schools, churches and similar institutions will now need the government's permission to import them.

I am convinced of this by the text of Section 9 of the bill which is reprinted here.

Whatever you the reader may make of Section 9 and its impact on civil liberties, there is no question that this Section if enacted will bring about the decline of the Canadian film industry. This Section not only requires the impossible of film distributors generally and regardless of nationality, but renders it impossible for Canadian distributors to make deals to distribute outside of Canada.

Section 9 tells us that anyone who wants to import film products for distribution in Canada must file an affidavit with the appropriate Minister in the appropriate form together with the required fee (naturally it costs money to get rights which you had but for government interference).

The Minister then has 20 working days to "...decide whether or not to deny the person the right to import a film product"; Section 10, subparagraph 2 of the bill. This bill might affect the release date of imported films.

The Minister or his functionaries reviews the affidavit to make sure that it conforms with the legislation. Fortunately they do not have to do much thinking because the bill provides the Minister with very little discretion by setting out a series of alternative possibilities which requires the Minister to deny the right to import. The importer must satisfy one or more of these alternatives depending on the circumstances.

Section 9 is very difficult reading. Considerably so by the standards of most statutes. Its constant use of the negative may make its interpretation at least ambiguous to the unwary.

I believe, though, that the interpretation of Section 9 is unambiguous although unlike what the Minister intended. Subsection 3 of Section 9

establishes the criteria by which the Minister must deny a person the right to import a film product. Subsection 3 is imperative. It says "the Minister shall deny..." The Minister faced with any one of the circumstances enumerated in Subsection 3 has no choice but to deny a person the right to import a film product. The imperative nature of Subsection 3 is unlike that of Subsection 6 of Section 9 where referring to motion picture exhibitors it states "the Minister may deny..." Subsection 6 is facultative.

The curious thing about Subsection 3 is that it is expressed in the negative. The Minister's power is one of denial. He is not granting rights. This seems to presume that but for the Minister, a person has a right to import a film product. For practical purposes though, this manner of describing the Minister's interference with a person's right to import a film product is

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specious. In effect, the right to import a film product is dependent on the Minister and whether one says he/she denies permission or gives permission, the real effect is that he/she is the grantor of the right to import a film product.

Nevertheless, the fact that Subsection 3 is expressed in the negative produces some possibly unintended results.

Simply stated, Subsection 3 says that the Minister shall deny a person the right to import a film if:

- (a.) The person does not have a business establishment in Canada or fails to meet any of the following qualifications;
- (b.) Canadian distribution rights are not contingent on other distribution rights or will not be contingent on other distribution rights; or
- (c.) The person has world rights or the person has invested fifty percent (50%) of the production costs of the film.

A simplistic reading of Subsection 3 may at first suggest that a person can import a film product into Canada if he meets any one of the following criteria:

- (a.) The person has a business establishment in Canada or if he meets any one of the following:
- (b.) Canadian distribution rights are not contingent on other distribution rights or will

not be contingent on other distribution rights; or

- (c.) The person has world rights or the person has invested fifty percent (50%) of the production costs of the film.

This reading of Subsection 3 is false because it assumes that the provision is worded positively rather than negatively. If the subsection was worded in the positive then any person meeting any one of the criteria would be entitled to import a film product. However, because Subsection 3 is expressed in the negative the correct interpretation is that the Minister must deny the right to import a film product if the applying person meets or does not meet any one of the criteria. In other words, the fact that an importer has a business establishment in Canada is not sufficient if he cannot show that his right to import a film product is not contingent on foreign distribution and will not be, or, if he cannot show that he has world rights or alternatively, if he cannot show that he has invested fifty per cent of the production costs or if he can show that all of these three circumstances are inapplicable to him.

If I am right in this interpretation, and I am convinced of it, the following consequences can ensue.

The Minister must deny a person - a person is defined as an individual, partnership or corporation - the right to import a film product if that person has entered into any agreement that renders the distribution of the film in Canada contingent on the distribution of the film anywhere else. Of course this flies in the face of the reality of film distribution. It is virtually impossible to consider, let alone negotiate, the distribution of the film without considering all markets and how one relates to another. As if

**IN OTHER WORDS, A DISTRIBUTOR WHO HAS IMPORTED GODZILLA ATTACKS TOKYO INTO CANADA CANNOT THEN ENTER INTO A DISTRIBUTION AGREEMENT FOR EUROPE WHEREIN THE FACT OF EXISTING AND PREVIOUS CANADIAN DISTRIBUTION OF THE FILM AFFECTS THE EUROPEAN DISTRIBUTION AGREEMENT.**

this was not bad enough, Section 9 also requires the Minister to refuse the right to import a film product to a person who will undertake to enter into an agreement contingent on the distribution of a film in Canada once the film has already been imported into Canada. In other words, a distributor who has imported *Godzilla Attacks*

*Tokyo* into Canada cannot then enter into a distribution agreement for Europe wherein the fact of existing and previous Canadian distribution of the film affects the European distribution agreement. (It is rather typically Canadian that inherent in this is the notion that even after distribution in Canada, Canadian distribution fees will somehow be diminished and not increased by distribution elsewhere).

Section 9 sinks to new depths by requiring a Minister to refuse the right to import a film product for distribution if an affiliate of the importing person or any other non-arm's-length person has done or will do any of the naughtiness described above. Put bluntly, a Canadian distributor who undertakes joint ventures with a foreign distributor will be tarred with the same brush unless the foreign partner can show the requisite Simon-purity.

**THE IRONY OF THIS IS THAT IN A TWINNING SITUATION THE FOREIGN PRODUCER CAN FREELY EXPORT FROM CANADA THE FILM MADE HERE AS PART OF THE TWINNING, BUT THE CANADIAN COULD NOT IMPORT INTO CANADA THE OTHER FILM MADE ELSEWHERE.**

As if all of this was not bad enough, Section 9 also tells us that the Minister must deny the right to import a film product for distribution unless the importer or any of its affiliates has world rights to the film project in all media throughout the world other than the country of origin and that no other person will distribute the film during the first 26 months from the date of first commercial use. By this process the rights of the distribution majors are more or less preserved intact. It is to be noted that the bill does not define the term "world rights".

The interesting thing about this provision is that a Canadian distributor could not act as sub-distributor for a foreign world rights distributor since the Canadian would thereby violate the earlier provision of Section 9 requiring that the person importing or using the imported film product for distribution in Canada not have entered into any agreement which makes Canadian rights contingent on other distribution rights. It would seem that Canadians are thereby blocked out of the sub-distribution market.

Section 9 also tells us that the Minister shall deny the right to import a film product unless the person or its affiliate prior to making the first answer print or master copy has invested at least 50 per cent of the production costs in the film.

Just consider the impact of this on treaty or non-treaty co-production or twinings. A Canadian investing 49 per cent in a co-production made outside of Canada cannot import into Canada the film it invested in as the investment is less than 50 per cent. Typically, a Canadian distributor does not have world rights in coproductions. Typically, Canadian distribution rights in coproductions are related to or contingent on the non-Canadian distribution rights of the foreign coproducer. The irony of this is that in a twinning situation the foreign producer can freely export from Canada the film made here as part of the twinning, but the Canadian could not import into Canada the other film made elsewhere.

Getting the Minister not to deny the right to import the product, an apparent achievement in itself especially if you are a Canadian, still leaves one with a precarious existence: The Minister may at any time within two years revoke the

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**THE CAPPER OF ALL THIS HAS TO BE THE MINISTER'S DISCRETION TO DENY A MOTION PICTURE EXHIBITOR (DEFINED AS A PERSON OPERATING FIVE OR MORE THEATRES) OR ITS AFFILIATES THE RIGHT TO IMPORT A FILM PRODUCT IF THE MINISTER THINKS THAT THE EXHIBITOR IS IMPROPERLY USING OTHERWISE NORMAL AND REASONABLE BUSINESS PRACTICES TO PREVENT OTHER PERSONS FROM ACQUIRING RIGHTS TO DISTRIBUTE FILM PRODUCTS IN CANADA OR IS DENYING IMPORTERS ACCESS TO ITS THEATRES TO EXHIBIT IMPORTED OR CANADIAN FILM PRODUCTS.**

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right of importation. This may occur if the Minister is satisfied on reasonable grounds that the person did not originally have the right to import the film product or distribute an already imported film production or use an imported film product. How the Minister suddenly becomes dissatisfied when he was previously satisfied is not clear. While there is a subsequent review process, the bill does not provide any parameters on how the Minister exercises his discretion.

The capper of all this has to be the Minister's discretion to deny a motion picture exhibitor (defined as a person operating five or more theatres) or its affiliates the right to import a film

product if the Minister thinks that the exhibitor is improperly using otherwise normal and reasonable business practices to prevent other persons from acquiring rights to distribute film products in Canada or is denying importers access to its theatres to exhibit imported or Canadian film products. (I did not know that imported films were receiving insufficient screen time by exhibitors in Canada). It should be noted that the provisions governing exhibitors are independent of Subsection 3 of Section 9 described above. This tends to reinforce the notion that having a business establishment in Canada does not of itself entitle the importer and certainly not the exhibitor to the right to import, distribute or use a film product. While it may be argued that the principal exhibitors have now or in the past given nominal screen time to Canadian films, it is a far different matter to say that they or their affiliates (who are, of course, the distributors) cannot import films into Canada. By the same token, the same measure applies to a Canadian theatre chain wholly owned in Canada. Since imported films are now and for the foreseeable future a mainstay of exhibitors, it is difficult to understand how they can be held to such a requirement. It will certainly be disastrous for the small Canadian exhibitor who although unaffiliated with a foreign major will still need to comply with this part of Section 9.

For that matter, the way Section 9 is drafted and taking into account Section 7 and 8, it would seem that both the distributor and the exhibitor must file separate affidavits with the Minister and both need the wave of his hand.

The Minister may require additional information to supplement that supplied in the affidavit. If the additional information is not supplied within 60 days of a request for it, the Minister must deny the right to import the film.

Where the Minister denies the right to import a film product, he must give reasons. Where the Minister revokes the right to import a film product, he must give the person affected an opportunity to be heard.

Where the Minister denies or revokes the right to import a film product, the person affected can appeal to a review board composed of three persons selected from a 15-member panel appointed by the government. Members of the review boards are to have experience in all aspects of filmmaking. The Minister selects one person from the panel, the complainant selects another person and the two people thus appointed select a third. The review board is supposed to act within 15 days. It does not operate as a court and is not bound by technical or legal rules of evidence. It does allow people to be heard and cross-examined. The review board can uphold the Minister's decision or grant the right to import the film product.

Given the realities of the industry, I suspect this board will be quite busy.

The Bill creates a new level of bureaucracy to

deal with its application and enforcement in the person of the Films Products Secretary. He or she will keep a register of affidavits and permits granted. Customs officials will be required to advise the Minister of the importation of film products. Persons who contravene Sections 6, 7 and 8 of the Act are liable to a fine not exceeding \$200,000. Officers, directors and agents of importing corporations can also be liable to the same fine.

The Bill gives to the Minister the ability to demand that any person he believes does not have the right to import a film product cease doing so or show cause that he is not. Where that person refuses to comply the Minister can seek a Court Order against that person ordering him not to import the product or fining him \$25,000 per day of contravention.

Since the Bill sets unrealistic requirements to obtain the right to import a film product, one of three possibilities will occur:

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**PRACTICALLY SPEAKING THOUGH, THE BILL DOES NOT REALLY AFFECT THE INTERESTS OF AMERICAN DISTRIBUTORS. THEY HAVE THE WORLD RIGHTS, OR THEIR PRODUCTION ARM MADE THE FILM. THE BILL WILL SIMPLY MEAN MORE PAPERWORK FOR THEM. FOREIGN DISTRIBUTORS OTHER THAN AMERICAN DISTRIBUTORS MAY FIND THE BILL A LITTLE MORE TAXING SINCE IN MANY CASES THEY MAY NOT HAVE WORLD RIGHTS OR HAVE INVESTED 50 PER CENT OF THE FILM'S PRODUCTION COSTS. IT IS CANADIAN DISTRIBUTORS THAT ARE IN A REAL PICKLE.**

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- (a.) The government will become rich on the fines;
- (b.) The government will look the other way;
- (c.) Fewer films will be imported into Canada.

Practically speaking though, the Bill does not really affect the interests of American distributors. They have the world rights, or their production arm made the film. The Bill will simply mean more paperwork for them.

Foreign distributors other than American distributors may find the bill a little more taxing since in many cases they may not have world rights nor have invested 50 per cent of the film's production costs.

It is Canadian distributors that are in a real

pickle. The bill effectively prevents them from entering into any deals with foreign distributors since of necessity the only reason why a foreign distributor would deal with a Canadian is because the Canadian in the overall context of the world marketing of the film offers something useful in the Canadian market.

Other unintended but serious consequences may arise from the bill. For example, if a Canadian production house shoots a film outside of Canada using entirely Canadian funds and an all-Canadian cast and crew but has the answer print made outside of Canada, a Canadian distributor who is unaffiliated with the Canadian production house may have to file an affidavit with the Minister because the Canadian distributor is importing a film product into Canada.

Even more interesting and distressing is that the bill may affect the ability of Canadian production houses to obtain pre-sales and revenue guarantees for coproductions or Canadian films shot outside of Canada. Since these guarantees may be given by a foreign distributor, the right of that distributor to bring the final print into Canada may be precarious and render the guarantee questionable.

The bill as drafted is an impediment to the Canadian film industry. Its intent is worthy and given the desire of Canadian filmmakers for such legislation, their approval of it is understandable until they read the Bill itself.

One footnote to the issue of canadianizing film distribution. Quebec Cultural Affairs Minister Lise Bacon has recently announced that a provision in the Quebec Cinema Act approving a two-year old deal with the American Motion Picture Export Association of America (MPEAA) will soon come into effect. This deal together with the Quebec Cinema Act essentially reserves the right to distribute all non-English (other than dubbed or subtitled) films in Quebec to Quebec-based distributors and reserves the distribution of all other films in Quebec to Quebec distributors and MPEAA members. MPEAA members are the American distributors. The Quebec Cinema Act defines Quebec distributors as a distributor which is owned and controlled by Quebecers or has its principal operations and decision-making personnel in Quebec. This deal once in force will substantially confuse the situation since the deal contradicts the Film Products Importation bill. Under the federal bill as described above, everyone is supposed to compete for the Canadian film distribution. Under the provisions of the Quebec Cinema Act only Quebec distributors and MPEAA members can operate in Quebec. As a result, non-Quebec Canadian distributors will be shut out of the Quebec market notwithstanding the federal bill's national scope. This fragmenting of who can operate where will substantially diminish any Canadian distributor's ability to draw useful benefits from the federal bill even in its present ominous draft.