

ENTERTAINMENT/SPORTS

Film industry suffers impact of Canada's cultural concerns

By Ken Dhaliwal and Bob Tarantino

In the past year, there has been significant interest generated by the announcements of proposed ownership changes involving several Canadian film distribution companies, including Alliance Films (formerly Motion Picture Distribution L.P.) and ThinkFilm.

To appreciate why industry stakeholders and government officials alike are carefully following these matters, one needs to understand the regulatory framework within which such companies must operate in Canada, and the tensions created whenever non-Canadians are involved.

The high level of interest generated by these announcements has, arguably, less to do with the glitz and glamour of the film industry and more to do with mundane but potentially controversial issues such as cultural sovereignty and globalization.

The Canadian government's

established position is that film distribution in Canada is a protected cultural activity, which means that foreign investments in such activity are restricted. The origins of this policy go back decades and have evolved from the ongoing endeavour of establishing a strong indigenous Canadian film industry, free of the cultural dominance exerted by our friends to the south.

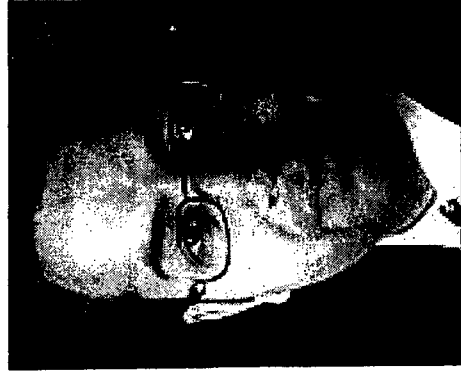
The current framework began to crystallize in 1987, and was triggered by the failed attempt of the federal government to impose limitations on which films could be distributed in Canada by foreign studios — primarily the major Hollywood studios. The rationale for the proposed limitation was that it would have the effect of increasing the control Canadian distributors had over the number of films being distributed in Canada, thereby strengthening that critical sector and ultimately leading to more Canadian films in theatres.

The response from Hollywood was, unsurprisingly, extremely negative, and the repercussions reached to the highest levels of government, including President Ronald Reagan.

However, other events soon overtook that dispute. In 1988, Investment Canada issued a directive under the *Investment Canada Act* which restricted foreign distributors to distributing films which were their "proprietary product." The directive was brief and did not define what proprietary product was, other than to refer to films in which the subject distributor was (a) the worldwide rights owner; or (b) a major investor.

More significantly, the directive did not apply to foreign distributors operating in Canada on Feb. 13, 1987 — effectively allowing all of the major Hollywood studios to continue to operate unfettered in Canada.

As a consequence of the 1988



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directive, any new foreign distributor entering Canada after Feb. 13, 1987 is subject to review by Investment Canada. The threshold for allowing entry into Canada is the "net benefit" test set out in *Investment Canada Act*, which references, among other factors, "the compatibility of the investment with national industrial, economic and cultural policy." As the stated Canadian government policy is that there are to be no new foreign distributors distributing non-proprietary product, the barrier to entry is clear.

An example of the effect of the 1988 directive and its implementation occurred in 1996 when

Dutch-owned PolyGram Filmed Entertainment applied to Ottawa to exempt it from the policy as part of its plan to set up in Canada. In its lengthy discussions with Ottawa, PolyGram offered to invest a percentage of its Canadian distribution revenue into the Canadian film industry.

The Canadian government ultimately denied PolyGram the exemption it was seeking, and it was forced to restrict its business in Canada. An E.U. complaint was filed with the World Trade Organization, although it was not pursued — partially because PolyGram was subsequently purchased by Universal Studios, which was itself owned at the time by Canadian-owned Seagram's.

The recent developments began in October of 2006, when ThinkFilm announced that it had been sold to U.S. financier David Bergstein. As a result, it was commonly believed that ThinkFilm would become non-Canadian for the purposes of the legislative framework, and as a consequence it could no longer distribute non-proprietary product in Canada.

A further ramification, of major importance to Canadian

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producers, was that, as a non-Canadian, distribution agreements entered into with ThinkFilm would no longer qualify as an acceptable distribution agreement, thereby jeopardizing the eligibility of projects to access "Canadian content" tax credits. There were also concerns reported in the media that ThinkFilm was continuing to distribute films that were not limited to proprietary product, thereby contravening the regulations - prompting speculation about whether the Heritage and Industry ministries were properly enforcing the existing framework.

In June, these rumblings forced the Minister of Canadian Heritage to state publicly that the ThinkFilm transaction would be reviewed again by her department.

In addition, earlier this year, Alliance Atlantis Communications Inc. announced it had reached a deal with CanWest Global Communications and Goldman Sachs

under which Alliance Atlantis would be acquired. As part of the deal finalized this summer, it was announced that Alliance Films - which is Canada's largest domestic film distributor - would be owned to a significant degree by U.S.-based Goldman Sachs and Toronto-based private equity firm EdgeStone Capital Partners. This announcement sparked further discussion and concerns on what impact these changes would have on Canada's large distribution entities and their ability to avoid being acquired or controlled by foreign entities.

The uncertainty in the Canadian film industry caused by just these two recent transactions has cast in stark relief the viability of the existing regulatory framework in an increasingly globalized film industry.

The extent and manner in which the interface between a dynamic industry sector and the cultural concerns of the national government will be modified may seem arcane, but the potential

Another approach would be to make promissory notes payable 10 or 15 days after demand. The court emphasized that a lender under a demand note is entitled to require immediate payment. If there is a waiting period after demand, a lender cannot require payment until the waiting period has expired. There is something to be discovered, and it cannot be discovered until the end of the waiting period.

Acknowledgments of liability under s. 13 of the new Act restart



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changes may impact on not just what is seen on our movie and television screens, but also thousands of jobs and millions of dollars in investments across the country.

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limitation periods. The acknowledgment must be in writing and signed by the person making it or its agent.

Lawyers drafting demand promissory notes need to be aware of the decision in *Hare*. There are a number of ways to deal with the result but those who are unaware, or who do nothing, are at risk.

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The defence's argument did not prevail, however. "The problem with (that) argument is that at some point in time you have to release the identity, and parliament has said that this is when the sentence is handed down," said David Coles, a partner with Boyne Clarke, who represented the CBC.

"The 'empty right' argument didn't carry the day in the court of appeal," noted Nancy Rubin, a partner with Stewart McKelvey in Halifax, who represented The Halifax Herald Limited. "Justice Fichaud confirmed that Parliament intended that the ban terminate, and there was no stay pending appeal. Just because he was a young person, one couldn't presume a ban should be granted."

The decision relied on the *Dagenais/Mentuck* test to assess the evidence, which requires proof of the "necessity" of the ban to justify intrusions in the open court principles. In *Dagenais v. Canada*



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