



Submission to the Government of Canada's review of the Canadian Communications Legislative Framework

About CAFDE

The Canadian Association of Film Distributors and Exporters / Association canadienne des distributeurs et exportateurs de films (CAFDE/ACDEF) is a non-profit trade organization that represents the Canadian film distribution industry and its members on matters of national interest. CAFDE activities include government consultation, outreach and engagement with an aim to bring attention to the current erosion of the film distribution policy in Canada and the cultural, social, and economic repercussions of this changing landscape. Our Association represents a variety of businesses, from small independent film distributors to large global media organizations. Current members include: CropGlass, d Films, Elevation Pictures, Entertainment One/Les Films Séville, Kinoshift, Métropole Films, Mongrel Media, Pacific Northwest Pictures, Search Engine Films, LaRue Entertainment, and MK2 | MILE END.

The Canadian film distribution industry provides consumers with access to feature films. In 2017 our industry contributed \$1.9 billion in revenues to the economy, and CAFDE members distribute the vast majority of Canadian feature films in this country. The industry includes 464 Canadian enterprises involved in Canadian film distribution with profits of \$330.2 million, contributions of \$162.7 million to wages and employs 1,305 Canadians across the country.¹ Yet this is a drop in the bucket compared to what non-Canadian companies are taking out of the industry. In order to demonstrate the dominance of non-Canadian ownership in our industry we need to look no further than current Box Office numbers. In 2017, the Box Office revenue was \$999M and of that amount, 87% of the market share went to non-Canadian distributors.

To maintain these jobs and opportunities, and to retain talent in Canada, there is a need for a revived regulatory framework that deals with the modernization of the film industry in light of digital industry changes and the declining commissions of Canadian content. Without strong Canadian film distribution companies, there will be no Canadian feature films, which will impact all facets of the industry. As a result, we are very pleased to contribute to the government's initiatives to review the *Broadcasting Act* and the *Telecommunications Act* and to modernize the regulatory framework that governs our industry.

CAFDE RECOMMENDATIONS FOR THE COMMITTEE TO CONSIDER

CAFDE recognizes the success of the regulatory framework in building the Canadian industry to date – and we would be remiss if we did not acknowledge that the policy levers currently in place in our film and television ecosystem have enabled the industry to become what it is today. However, those protections have not kept pace with technological developments and the shift of the market from territorial to global. Canada needs a revived and modernized regulatory framework with a goal to promote and support Canadian culture and drive economic growth in Canada.

¹ McGinley, Devin. *Movie & Video Distribution in Canada*. IBISWorld, 2017, p. 3, *Movie & Video Distribution in Canada*.

1. Modernize Film Distribution Policy Framework

The existing Canadian film distribution policy has established and allowed the feature film sector in Canada to exist and thrive, but the current policy is outdated and difficult to enforce.

The current film distribution policy framework was created in 1988 when the Canadian government attempted to put in place protections for the Canadian film distribution sector by fostering and growing the Canadian film industry in the face of foreign competition and announced the creation of the *Film Distribution Policy* (the “Policy”). In broad strokes, the Policy states that only Canadian-owned companies were entitled to distribute feature films in Canada; the Policy didn’t apply to the six major Hollywood studios, when those studios were releasing their own proprietary content (i.e. for which they controlled rights worldwide) as those studios already had offices, employees and a solid presence in Canada.

Until recently, this policy framework protected the 13% of the Canadian theatrical marketplace that is not controlled by Hollywood, and for the most part, the policy was adhered to. But as technological shifts impact the industry, unfortunately this is less and less true. The market for content is increasingly competitive and increasingly global. More often, Canadian distribution companies are competing not only with their US-owned studio counterparts but with primarily foreign-owned “over-the-top” or “OTT” platforms that facilitate delivery of film (and television) content directly to Canadian consumers over the internet, bypassing Canadian distribution partners. These OTT players aren’t contemplated or covered by the current policy which only addresses theatrical and home video exploitation.

Without having the force of law, foreign distributors have taken note of the legal vacuum and have begun to disrupt the existing practice of film distribution in Canada. Recent violations of the policy have been particularly vexing to Canada’s distribution and export community. For example, Well Go, the Texas, Taiwan and China-based film distributor, is amongst the most aggressive in importing film into Canada. The subsidiary company has no offices or employees in Canada and have bought Canadian rights to foreign films for theatrical distribution in contravention of the distribution policy. Recent examples include films *God of War* and *Train to Busan*.² Additionally, Hollywood studios have taken to buying North American rights to films and distributing them under their exemption (the intent of which was to cover proprietary content only).

CAFDE recommends that we can learn from the successes achieved in Quebec as a result of the protections from Quebec’s *Cinema Act* and revise the Policy with an eye to mirroring the process that has worked in Quebec while limiting disruption in the current feature film distribution landscape. To that end, CAFDE proposes that in Canada outside of Quebec, Canadian theatrical exhibitors, broadcasters and retailers selling feature films on a commercial basis **must ensure that films have been rated and certified by a Provincial Ratings Board**. In turn, Provincial Ratings Boards would be directed, via Act or Regulation that ratings cannot be provided (and thus exhibitors and retailers could not sell or screen films) unless:

² Frater, Patrick. “Well Go USA Scores China's 'God of War' for North America.” *Variety*, 20 Sept. 2016, variety.com/2016/film/asia/wellgo-usa-chinas-god-of-war-for-north-america-1201865507/.; Kay, Jeremy. “Well Go USA Entertainment Boards 'Train To Busan'.” *Screen Daily*, 9 June 2016, www.screendaily.com/distribution/well-go-usa-entertainment-boards-train-to-busan/5104736.article.

1. Such film has been submitted to the Provincial Ratings Board by (a) a Canadian-based distributor or (b) one of the six major Hollywood studios where the film in question is proprietary content of such studio (i.e. the film in question is wholly owned and controlled worldwide by the studio);
2. The submission is accompanied by the applicable distribution contract attesting to the Canadian-based distributor or grandfathered studio's right to distribute all rights in and to the film to the public in Canada.

Without a valid rating from a Provincial Ratings Board, no theatrical exhibitor, broadcaster or retailer should be permitted to exploit such film in Canada. A reasonable enforcement mechanism would need to be developed – but compliance could be assured by the Provincial Ratings Boards themselves, or on a complaints-based basis by consumers. Exhibitors and retailers would be able to provide compliance by providing a certificate from the applicable Ratings Board – such certificate to be provided by the Canadian distributor or studio booking or selling the film to the exhibitor/vendor.

2. Regulate Over-the-Top Services (OTTs)

If the Canadian creative economy (and the creative sector jobs and revenue associated therewith) are to be maintained and grown, we need to ensure that our regulatory framework provides a level playing field for all participants. Non-Canadian broadcast undertakings like the foreign-owned OTTs need to be required to commit to buying and streaming Canadian content, and in particular, Canadian feature films as well as contribute to the Canadian cultural eco-system.

Digital streaming services are growing as traditional broadcaster subscriptions are diminishing. If the creative development, production and distribution film ecosystem is to be maintained, OTTs that are operating in and earning revenues from Canadian viewers should adhere to minimum exhibition requirements as well as contribute an agreed upon percentage of their revenues from Canadian viewership for Canadian content creation. Audiences are consuming content across platforms and devices, and the diversity with which we access media will continue to shift and evolve. To that end, it is critical to establish modernized mechanisms for contributions to the Canadian cultural eco-system. All platforms that benefit from access to Canadian viewers (including OTTs as well as ISPs and WSPs that earn significant revenue from providing access to content) should be mandated to contribute in some way to funding the production of Canadian content.

Further, we would underscore the suggestions of others³ that all digital services (including OTTs, ISPs and WSPs) that sell to Canadians should collect and remit GST/HST and PST amounts to federal and provincial governments. All digital and online media services that earn subscription revenue from Canadians, sell or rent individual shows or programs, or collect advertising revenue from Canadian companies, governments or individuals should collect HST, PST, and GST where applicable.

Any aforementioned levies or contributions should be paid directly by the service provider and not by individual Canadian taxpayers and users. By incorporating these new policies, we would be taking key steps to ensure that funding for our cultural sectors continue well into the future.

³ Anderson, John. *An Over-the-Top Exemption - It's Time to Fairly Tax and Regulate the New Internet Media Services*. Canadian Centre for Policy Alternatives, 2016, pp. 1–56.

3. BROADCASTING POLICY

CAFDE proposes that the new legislative framework specifically highlight Canadian feature film in any exhibition requirements imposed on broadcasters/OTTS. We look to the government to distinguish between TV and film content in any imposed broadcast exhibition requirements, so that film isn't lost in the shuffle. We would also suggest specific requirements imposed on the CBC to ensure that the CBC license at least one new release independent theatrical feature film in prime time every month, while respecting traditional theatrical windows in Canada.

As distributors, we rely primarily on broadcasters for the dissemination of feature films to Canadians beyond the traditional theatrical window (a window which is becoming more limited in the digital era). Unfortunately, the dissemination of Canadian feature films by broadcasters has been eroding over time, an erosion which stands in sharp contrast to the spirit of Canada's Broadcasting Act and the Canadian Government's stated goals of supporting the creation, dissemination and discoverability of Canadian content for Canadians.

CAFDE recommends that the government create a new category of Canadian programming – category 7(d) for feature films. This would ensure that feature films are made available to Canadians as a protected head of programming. Historically under existing regulations, exhibition obligations have not distinguished between TV and film content and broadcasters have licensed less and less feature film generally (likely as a way to distinguish themselves from OTT players that historically have had a vast film catalogue). Ensuring that Canadian feature films have a home with broadcasters (both traditional BDUs and OTTs) will expand the audience for Canadian films and ensure their discoverability both domestically and internationally.

In addition to the above, CAFDE also proposes that the Canadian Broadcasting Corporation (CBC) as the national broadcaster, update its commitment to Canadian feature film through the regular and frequent airing of Canadian feature film following traditional releasing windows. It is recommended that the CBC be required to license at least one new release independent theatrical feature film (i.e. for which it has not participated in the financing) every month in prime time – a minimum of just 12 titles a year. In this way, the CBC would become the home for Canadian theatrical feature films.

Additionally, given that the government has indicated a sweeping review of the applicable broadcasting requirements and regulations, we would encourage the committee to consider whether broadcasting and exhibition requirements that have worked well in the traditional cable eco-system could be similarly applied in other arenas. Ensuring that Canadian content is discoverable not only via broadcasters and OTTs, but on Canadian airlines, trains and in Canadian theatres would also help to make Canadian features discoverable for all Canadians. As consolidation happens in these industries, there are fewer and fewer homes for Canadian content; ensuring that screens in our local multiplexes are supportive of Canadian features (and give them a true run) will increase these films' success here at home and abroad.

Conclusion

The recommendations we have outlined herein are our response to the changing landscape of the entertainment and content industries. As active participants in and promoters of the Canadian content ecosystem we see firsthand the challenges distributors, broadcasters and Canadian companies are facing to remain relevant in the industry and to compete with giant global entities which have access to unprecedented amounts of capital and are already dominating our domestic marketplace. We hope these

recommendations will allow our Canadian-owned companies, and the industry in general to embrace and harness new technologies to find new ways for Canadians to tell our stories to one another.

Thank you for the opportunity to provide these comments. We trust our input will be of value to the review and if you have any follow-up questions, please do not hesitate to contact us.