ACTRA

U.S. 'Runaway' Productions and the Canadian Industry

Due to Canada's strong infrastructure, Canada will continue to be an attractive location for U.S. service production, as long as the Canadian dollar remains weak compared to its U.S. counterpart. Tax credits designed to attract foreign service productions do not violate international trade obligations. U.S. companies take a considerable amount of money from the Canadian marketplace and it is appropriate for them to produce in Canada.

Background to the Incentives Provided for Foreign Service Production

After heavy lobbying by Canadian service producers and U.S. companies in Canada (such as Disney), the Canadian government created the Foreign Services Production Tax Credit (FSPTC) with effect retroactive to November 1997. The FSPTC is designed to attract foreign producers to shoot in Canada. It provides a tax credit of 11% of eligible Canadian labour expenses, to a maximum of 5.5% of the production budget. The program is mirrored in B.C. and Ontario, providing a 22% credit (to a maximum of 11% of budget). Since the benefit is a credit against taxes otherwise payable, only a Canadian-based company can claim it. Since 1998, foreign productions in Canada have also been able to benefit from a tax shelter scheme. Together, the tax credit and tax shelter provide an incentive of roughly 9% of the budget.

In 1997, the cultural argument made in support of the FSPTC was that it would provide valuable work opportunities for Canadian talent and technicians, a chance to "work with the best" and to "practice their craft." This would enable our Canadian infrastructure to continue to grow and develop. It was argued that this would ensure the talent, equipment and expertise were available to Canadian producers for their Canadian projects. Besides, went the economic argument, the FSPTC was merely replacing an existing tax benefit with a system clearly beneficial to Canadians, since it is based on labour expenditures in Canada. It was about putting dollars into the pockets of Canadians.

While Canada intends to close the tax shelter at the end of the current year, the industry is working to modify the incentive system to provide a 9% incentive, since that rate is competitive with the 9-12% offered in Australia, and the 10-15% available in the United Kingdom.

Legality of Tax Credit Incentive Programs

SAG has joined with others in a Petition to the U.S. Commerce Department urging the imposition of retaliatory tariffs against films and television programs that have been produced in

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Canada using “illegal subsidies.” As a consequence of the Byrd Amendment adopted by Congress during the battle about Canadian softwood lumber imports, any such retaliatory duty could be turned over to the “domestic American producer that launched the action.” SAG argues that its members are losing work, despite the fact total income in its jurisdiction has risen every year in the past decade, except during the commercial strike. However, income from theatrical features did decline 1.8 % between 1999 and 2000.

The foreign services tax credit, and credits provided for Cancon production fully conform with Canada’s trade obligations. Further, Canada is free under the rules of WTO and NAFTA to subsidize domestic producers, and a Canadian presence is required in all cases to obtain the credit.

Under the FTA/NAFTA cultural exemption, a party is authorized to retaliate against a measure of the other party that “would have been inconsistent with the agreement” save for the exemption clause. Since tax incentives for domestic producers are not prohibited by FTA/NAFTA, it is possible Canada could challenge any U.S. decision to impose tariffs against “subsidized” films or television programs imported from Canada.

However, the U.S. government and Congress have both made clear that domestic rules apply, regardless of international obligations, so even if the Americans accept that Canada is not violating trade rules, that would not halt the U.S. action.

ACTRA’s overall position is that all countries should be free to support their own culture as they see fit. That’s why we argue for cultural exemptions in trade agreements, and for a new international instrument on cultural diversity that would provide a legal foundation for the support measures. We have said that if the U.S. wishes to provide incentives for their own production, they are free to do so. However, the proposal to apply retaliatory tariffs when programs produced in Canada under the incentive system are imported into the U.S. is another thing entirely.

How Much U.S. Production is Shot in Canada?

According to the CFTPA, total production activity in Canada in 2001 was $5.0 billion, of which $1.8 billion was foreign location production. Comparable figures for 2000 were $4.4 billion, with $1.5 billion foreign location production. In 1999, of the $3.9 billion production activity, $1.1 billion was foreign location production. Foreign location production grew almost four times from 1994 to 2001. It has increased each year in that period, including 6.5% in 1997, the year in which there was uncertainty about whether incentives would continue.

According to the Canadian Audiovisual Certification Office, the total Canadian budgets of the films and television programs that were eligible for the FSPTC were $1.1 billion in 2000. The balance of the foreign production reported in the CFTPA data was ineligible for the FSPTC.

It is impossible to balance these figures of the value of U.S. production in Canada with the figures produced in the U.S. The Monitor study prepared by SAG and DGA estimated the value of production that “ran away to Canada,” to be $3.55 billion (U.S. $2.24 billion). They applied multipliers to arrive at their "$10 billion annual problem." Even with all of the English-language television and film production in Canada in 1999 added to the foreign production, you can account only for $2.55 billion. Only when you add all of the English-language production, with all foreign service production reported in the CFTPA data, with the portion of budgets expended outside Canada reported by CAVCO, do you equal the Monitor figure.

Defining Runaway Production

The discrepancy in figures arises in part because the Monitor Study used public reports of the value of productions, which are often inflated for publicity purposes. More importantly, there are different definitions of what constitutes a 'runaway' production. The U.S. unions argue that many productions we consider Canadian, and which qualify for the domestic tax credit system, are actually 'runaway' production. They say that if the creative impetus and major financing comes from the U.S., it really should be produced there. We say that since these projects meet the Canadian content point criteria, they are Canadian, regardless of the storyline. So, Canada produces more movies-of-the-week than are produced in the whole U.S., but many of these qualify as Cancon.

Reaching a Conclusion

The value of Canada's feature film market, including rental, sales and theatrical release is roughly $1.7 billion, of which 97% represents foreign films distributed in Canada. These are primarily U.S. movies. The purchase by Canadian broadcasters of programming rights for U.S. television programs and movies is valued at more than $500 million. Thus, Canadians spend more than $2 billion (U.S.$1.3 billion) a year on U.S. movies and television programs, an amount greater than the total value of U.S. production undertaken here. In other words, even with the tax credit, the U.S. gains more from Canada than the value of its productions shot here.

As a recent review by the U.S. Commerce Department indicates, foreign location production in Canada is encouraged by a number of factors. The existence of a strong production infrastructure, including a pool of professional talent is key. The weak value of the Canadian dollar and the relatively lower costs of doing business mean that Canada has a strong competitive advantage over U.S. locations.

Even if the FSPTC were eliminated, Canada would continue to enjoy a significant cost advantage over U.S. locations and Canada's infrastructure remains attractive. It is likely producers would continue to take advantage of it.

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What is ACTRA doing?

The Film and Television Action Committee (FTAC) filed a petition asking the U.S. Commerce Department to investigate the legality of Canadian film and television subsidies on Tuesday, December 4, 2001.

ACTRA does not support the Countervailing Tariffs petition. The SAG Board of Directors back in August approved signing the petition by a narrow vote of the Board. However, the newlyelected SAG President Melissa Gilbert and her new Vice President Mike Farrell do not support the petition. Of course, some SAG members support it individually. Again, back in August, ACTRA issued a news release on the subject (which can be found in the news releases section of the ACTRA website at www.actra.ca). ACTRA disputes the figures the Americans use to estimate the size of 'runaway production.'

While ACTRA doesn't support the Countervailing Tariffs petition, we recognize the legitimate right other countries have to attempt to protect their own culture and jobs. If the U.S. wants to institute their own system of wage-based tax credit subsidies and incentives, we don't oppose that. We're also confident that even if a system of subsidies in the U.S. were initiated, it would have little or no effect on the level of foreign-service production in Canada, because of the cheap Canadian dollar, and because productions can find the professional talent and the infrastructure they need to film here.

ACTRA has continued to assert publicly that our incentives don't break any FTA, NAFTA or WTO rules. We issued a news release in August, 2001. We're working at building our relationships with our sister unions in the U.S. and in other English-speaking countries. And in February 2002, we're hoping to host a meeting of performers' unions from the UK, the U.S., Australia and Ireland to discuss global protection of performers' rights – because that's the real issue that this petition and rally activity is all about.

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