The Year in Review

Volume 54 *International Legal Developments Year in Review: 2019*

Article 29

February 2024

Canada

Jesse Goldman

Julia Webster

Jacob Mantle

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

Canada

JESSE GOLDMAN, JULIA WEBSTER, AND JACOB MANTLE

This article surveys significant legal developments in Canada during 2019.

I. 2019 Amendments to Canadian Trade Remedy Legislation[1]

A. INTRODUCTION

Since June 2019, Canada has enacted a number of amendments to Canadian trade remedy legislation and administrative policy that target alleged dumping in the Canadian steel sector.[2] These amendments are largely a result of the 2019 Safeguard Inquiry (Safeguard Inquiry) conducted by the Canadian International Trade Tribunal (CITT).[3]

On April 3, 2019, the CITT released its report to the government of Canada and recommended against imposing safeguard measures on five of seven steel products that were subject to provisional safeguard measures (CITT Report).[4] In light of the recommendation by the CITT, the government of Canada sought to boost protections for Canadian producers of steel products by other means.[5] As a result, these legislative amendments have heightened commercial uncertainty for importers and exporters of goods destined for Canada.

B. THE 2019 CANADIAN SAFEGUARD INQUIRY

The CITT largely rejected the imposition of definitive steel safeguards and, in particular, recommended against imposing tariffs or quotas on hot-rolled sheet, pre-painted steel, concrete reinforcing bar, wire rod, and energy tubular products.[6] But the Tribunal recommended a tariff-rate-quota on heavy-plate and stainless steel wire with the exception of goods from

1. The authors of this article are: Jesse Goldman (Partner), Julia Webster (Senior Associate), Jacob Mantle (Associate), of Borden Ladner, and Gervais, LLP in Toronto, Ontario, Canada.
2. Order Imposing a Surtax on the Importation of Certain Steel Goods, SOR/2018-206 (Can.).
3. *Id.*
4. Canadian International Trade Tribunal, *Inquiry into the Importation of Certain Steel Goods*, Inquiry No. GC-2018-001 (April 3, 2019).
5. *See, e.g.*, *Final Safeguards to be Imposed to Protect Canadian Steel Workers*, DEP'T OF FIN. CAN. (April 26, 2019), https://www.fin.gc.ca/n19/19-046-eng.asp (noting the Government of Canada's promise to conduct "a timely and targeted review of dumping cases to boost protections through higher duties").
6. *Inquiry into the Importation of Certain Steel Goods*, *supra* note 4.

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

Korea and certain other countries.[7] Shortly after the CITT Report was released, the government of Canada announced safeguards on heavy-plate and stainless steel wire in the form of a tariff-rate-quota and imposed these measures on May 13, 2019.[8] The measures remain in force until May 13, 2021 and are liberalized while in effect pursuant to Canada's obligations as a member of the World Trade Organization.[9]

As a result of the Safeguard Inquiry, the government announced a targeted review of dumping cases to boost protections, the introduction of a more robust steel import regime, flexibility for the CBSA to address alleged distortions in foreign markets, and flexibility to develop a framework to help guide the CBSA in determining when trade remedies should be self-initiated.[10]

1. *Amendments to the Customs Tariff and Canadian International Trade Tribunal Act*

In June 2019, the government announced amendments to Canadian law, eliminating limitations on Canada's ability to re-impose safeguard measures on imported goods.[11] The amendments were made to the Customs Tariff[12] and the Canadian International Trade Tribunal Act[13] and permit the government of Canada to re-impose provisional safeguard measures on any of the steel products targeted in the Safeguard Inquiry at any time.[14]

These amendments are contrary to Canada's obligations under the Agreement on Safeguards,[15] that prohibit a member country from re-imposing safeguards for two years on the products that were subject to provisional safeguard measures.

C. Amendments to the Special Import Measures Regulations

On July 19, 2019, the government of Canada announced legislative amendments to the Special Import Measures Regulations (SIMR),[16] to allow

7. *Id.*
8. *Final Safeguards to be Imposed to Protect Canadian Steel Workers*, *supra* note 5.
9. *Final Safeguard Measures Imposed on the Importation of Certain Steel Goods*, CAN. BORDER SERVICES AGENCY (May 10, 2019), https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn19-08-eng.html.
10. *Final Safeguards to be Imposed to Protect Canadian Steel Workers*, *supra* note 5.
11. *Government Takes Additional Steps to Stand Up for Canada's Steel Industry and Its Workers*, DEP'T OF FIN. CAN. (June 3, 2019), https://www.canada.ca/en/department-finance/news/2019/06/government-takes-additional-steps-to-stand-up-for-canadas-steel-industry-and-its-workers.html.
12. *See* Customs Tariff, S.C. 1997, c. 36 (Can.).
13. *See* Canadian International Trade Tribunal Act, R.S.C., 1985, c. 47 (4th Supp.) (Can.).
14. *Notice of Ways and Means Motion to introduce an Act to amend the Customs Tariff and the Canadian International Trade Tribunal Act*, DEP'T OF FIN. CAN. (May 30, 2019) https://www.fin.gc.ca/drleg-apl/2019/nwmm-amvm-0619-bil.pdf.
15. Agreements on Safeguards, 1869 U.N.T.S. 154, Art. 7 § 5 (2019.).
16. *See* Special Import Measures Regulations, SOR/84-927 (Can.).

the Canada Border Services Agency (CBSA) to disregard input costs supplied by foreign exporters in a dumping investigation in two situations: (1) where there are transactions between associated parties for inputs that are a significant factor in production;[17] and (2) where the CBSA determines there is a particular market situation.[18] In the case of significant inputs sourced from associated parties, the amendments require that the CBSA replace those input costs with the "greater of" certain amounts provided for in the SIMR.[19]

D. Amendments to Canada Border Services Agency Memorandum D14-1-8

On July 19, 2019, the CBSA revised Memorandum D14-1-8: Re-investigation and Normal Value Review Policy–Special Import Measures Act (SIMA) (Re-Investigation Policy.)[20] The update is the only guidance provided by the government of Canada on the CBSA's conduct of "normal value reviews" against specific exporters, which have been conducted since June 2018.[21]

The update to the Re-Investigation Policy includes the following guidance: (1) how to commence an investigative process to update normal values;[22] (2) the factors that the CBSA will consider when determining whether to initiate a country-wide re-investigation or a normal value review of a specific exporter;[23] and (3) the criteria that the CBSA will employ to determine whether to issue retroactive assessments on importations of goods subject to anti-dumping or countervailing duty measures.[24]

E. Amendments to the SIMA Handbook

The CBSA's enforcement of Canada's anti-dumping and countervailing duty measures is directed in part by internal policy communicated by the SIMA Handbook, which was last updated in the fall of 2019 to reflect legislative amendments and current CBSA policy.[25] The SIMA Handbook serves as a guide to the CBSA Trade and Anti-dumping Programs Directorate in administering the Special Import Measures Act (SIMA).[26]

17. *Id.* § 11.2(1).
18. *Id.* § 11.2(2).
19. *Id.* § 11.2(1).
20. Can. Border Services Agency [CBSA], *Re-investigation and Normal Value Review Policy – Special Import Measures Act (SIMA)*, Memorandum D14-1-8 (July 19, 2019) [hereinafter Re-Investigation Policy].
21. Trade Policy Review Body, *Trade Policy Review: Canada*, WTO Doc. WT/TPR/M/389/Add.1 at 156 (August 23, 2019).
22. Re-investigation Policy, *supra* note 20, at 4.
23. *Id.* at 3.
24. *Id.* at 6.
25. *See* Can. Border Services Agency [CBSA], *Special Import Measures Act (SIMA) Handbook* (Sept. 17, 2019).
26. *See* Special Import Measures Act, R.S.C. 1985, c. S-15 (Can.).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

The updates to the SIMA Handbook in 2019 include: (1) providing guidance on substituting costs of significant inputs sourced from associated parties; (2) providing criteria for determining the existence of a particular market situation; and (3) providing criteria regarding constructed input costs where a particular market situation exists.[27]

In assessing related party transactions and determining what constitutes a "significant input," inputs should be significant in relation to the overall inputs used in production of the good.[28] The SIMA Handbook instructs the CBSA to limit its analysis to purchases of primary inputs and to exclude secondary or other inputs.[29]

In determining whether a particular market situation exists in the exporting country, the CBSA must consider the factors listed in the SIMA Handbook. For example, the CBSA will consider: government regulations, taxation policies, government support programs, the presence and activities of state-owned or state-controlled enterprises, distorted input costs, volatility in the economic conditions of an exporter's home market, the acquisition of production inputs or processing services that do not reflect market-based costs, and any other circumstances that may or may not result from government intervention.[30]

Pursuant to the SIMA, the CBSA must disregard any sales of like goods for use in the country of export that "does not permit a proper comparison" with the sale of the goods to an importer in Canada due to the existence of a particular market situation.[31]

If the CBSA makes a finding of a particular market situation, the CBSA will disregard the acquisition price of an input that does not reasonably reflect the actual costs of that input.[32] The amendments to the SIMA Handbook describe the CBSA's procedure to disregard certain acquisition prices[33] and provide a hierarchy of five costs used to determine the input cost in the country of export.[34] The hierarchy intends for the CBSA to use input costs that "are most closely tied to the country of export and the costs of inputs within that country."[35] The CBSA will use the first price for input costs in the hierarchy that allows for a proper comparison.[36]

27. *See Special Import Measures Act (SIMA) Handbook*, *supra* note 25.
28. *See id.* at 346.
29. *See id.*
30. *See id.* at 315.
31. Special Import Measures Regulations, *supra* note 16, at 8.
32. *Id.*
33. *Id.* at 316–17.
34. *Id.* at 346–47.
35. *Id.* at 347.
36. *Id.*

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

II. Cannabis Legislation and the Canadian Criminal Code Amendment of October 2018: Impact on Immigration to Canada in 2019[37]

On October 17, 2018, the Cannabis Act[38] came into force, regulating the use, possession, purchase, and growing of cannabis in Canada. In addition, the Cannabis Act prescribes new prohibitions, obligations, and offences for unauthorized activities related to possession, distribution, sale, importing, exporting, and production of cannabis.[39] Under the Cannabis Act, individuals may purchase and possess authorized cannabis, and may grow and cultivate up to four cannabis plants per dwelling house.[40] Cannabis that is not produced or sold in accordance with the legislation remains prohibited and is defined as "illicit."[41] Punishment for offenses set out in the Cannabis Act range from small fines[42] to long prison terms[43] depending on their severity and purpose.

On December 18, 2018, amendments to the Criminal Code[44] came into force, as part of an overhaul of impaired driving provisions, to include both alcohol and drug impairment. This legislation significantly increased penalties and had the effect of raising the maximum sentence for impaired driving to a term of imprisonment of up to ten years.[45]

The combined effect of the Cannabis Act and the amendments to the Criminal Code concerning impaired driving offenses has caused considerable concern for visitors to Canada, non-citizen permanent residents, and other individuals seeking temporary entry. Pursuant to section 36 of the Immigration and Refugee Protection Act (IRPA),[46] inadmissibility for criminality is set out in two categories: criminality and serious criminality. A foreign national is inadmissible on grounds of criminality for having been convicted in Canada of an offense punishable under an Act of Parliament, or if convicted abroad, of a foreign offense that would constitute a crime if committed in Canada.[47] Serious criminality is defined by immigration legislation as an offense, either committed in Canada or abroad, for which the maximum term of imprisonment is at least ten years.[48] This distinction is important because the consequences of inadmissibility due to serious criminality are more severe. Individuals who

37. The author of this section is Sergio Karas, Managing Partner at Karas Immigration Law Professional Corporation in Toronto, Ontario, Canada.
38. *See* Cannabis Act, .C. 2018, c.16 (Can.).
39. *See id.*
40. *Id.* § 12(4)(b).
41. *Id.* § 8(1)(b).
42. *Id.* § (8)(2).
43. *Id.* § 10(5).
44. *See* Criminal Code, R.S.C. 1985, c. C-46, at § 320.12(b) (Can.).
45. *Id.* § 320.19(1)(a).
46. Immigration and Refugee Protection Act, S.C. 2001, c. 27, at § 36.
47. *Id.* § 36(1).
48. *Id.* § 36(2).

have been convicted of serious criminality offenses do not have access to deemed rehabilitation provisions in the IRPA that are designed to alleviate the severe consequences of inadmissibility. Persons inadmissible for simple criminality, who have been convicted abroad of only one offense can benefit from deemed rehabilitation, if more than five or ten years have elapsed since the completion of their sentence, depending on whether the offense is punishable by summary conviction or by indictment. But persons who are inadmissible for serious criminality are precluded from benefiting in that way.[49]

In the case of foreign offenses, the authorities must assess inadmissibility for convictions imposed abroad by comparing the essential elements of the offense committed outside of Canada with those of a Canadian offense.[50] This sometimes constitutes fertile ground for litigation.[51]

Permanent residents who have been convicted of an offense and sentenced to a term of imprisonment of six months or more lose their right to appeal a deportation order to the Immigration Appeal Division.[52]

The current inadmissibility enforcement policy by Canada Border Services Agency is that impaired driving convictions imposed prior to December 18, 2018—the date the Criminal Code amendments came into force—are still considered simple criminality.[53] But offenses committed or sentences imposed after that date are considered serious criminality.[54]

The amendments to the Criminal Code, in conjunction with the Cannabis Act, impose a heavy burden on persons convicted after the legislation came into force and have severe impact on non-citizen permanent residents and persons seeking temporary entry to Canada.

III. Tax Me If You Can: Cross-Border Supplies Through E-Commerce[55]

A. Recent Tax Developments outside Canada or Internationally

The value-added tax (VAT) and sales taxes revenue base has been eroded by the new digital economy. The traditional model for out-of-jurisdiction suppliers to register to charge, collect, report and remit these taxes in the customer's jurisdiction based on a physical nexus or presence no longer makes sense in the e-commerce context, where the border is seamless and

49. *Id.* § 36(3)(c).
50. *Id.* §§ 34–39.
51. *See, e.g.* Hill v Canada (Minister of Employment and Immigration), [1987] FCJ No 47, 1 Imm LR (2d) 1 (Can.).
52. Immigration and Refugee Protection Act, *supra* note 46, § 36(1)(a).
53. *I was convicted of driving while impaired by alcohol or drugs. Can I enter Canada?*, Gov't of Can. (Jan. 30, 2020), http://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=152&top=8.
54. *Id.*
55. The author of this section is Jamie M. Wilks, Co-Chair at McMillan LLP in Toronto, Ontario, Canada.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

the destination jurisdiction may be penetrated without such a physical presence.[56]

Recognizing this fact in *South Dakota v. Wayfair, Inc.*,[57] the U.S. Supreme Court in 2018 overturned the Court's 1992 decision in *Quill Corp. v. North Dakota*,[58] that required retailers only to collect sales taxes in North Dakota when they had a physical presence in the state. In *Wayfair*, the Court found a limited economic connection with South Dakota (exceeding a certain sales threshold annually, either less than $100,000 (USD) or 200 or more separate transactions) would be sufficient for a supplier in another U.S. state to be required to register as a collection agent for South Dakota sales tax.[59]

To address this problem in the VAT context, the OECD adopted guidelines in 2017 (OECD VAT Guidelines) to set forth internationally agreed principles and standards for the VAT treatment of the most common types of international transactions, with a particular focus on trade in services and intangibles.[60] In particular, they "also include recommended principles and mechanisms to address the challenges for the collection of VAT on cross-border sales of digital products that had been identified in the context of the OECD/G20 Project on Base and Erosion and Profit Shifting (the BEPS Project)."[61]

By eliminating the physical nexus threshold for foreign VAT registration, the OECD VAT Guidelines would prevent the loss of VAT revenues caused by consumers failing to fulfill their legal obligations to self-assess, report, and pay the VAT on import transactions (or where applicable, taxing international transactions not previously taxable).[62] They would also eliminate an unfair competitive advantage that foreign suppliers have over domestic suppliers.[63] Despite commonly being referred to as the "Netflix tax," in many cases it is not a new tax at all, but a more effective way of ensuring VAT collection and payment, because consumers did not, as a practical matter, self-assess and pay the VAT as legally required.

56. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2103 (2018).

57. *Id.*

58. *See* Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

59. *Wayfair*, 138 S. Ct. at 2089.

60. *See* Org. for Econ. Cooperation & Dev. [OECD], *International VAT/GST Guidelines* (2017), https://www.oecd-ilibrary.org/docserver/9789264271401-en.pdf?expires=1590203230&id=id&accname=guest&checksum=99DFE8BF66AE4900D00943ED8199A0E0.

61. *Id.* (stating in the forward that these recommended principles and mechanisms were also included in the 2015 OECD Guidelines); *see also* Org. for Econ. Cooperation & Dev. [OECD], *Addressing the Tax Challenges of the Digital Economy, Action 1: 2015 Final Report* (2015), https://www.oecd-ilibrary.org/docserver/9789264241046-en.pdf?expires=1590203899&id=id&accname=guest&checksum=20EB10B5D086CA0EA883A6D9ECD34B71.

62. *International VAT/GST Guidelines*, *supra* note 60, at 71.

63. *Id.* at 22 (noting that one of the fundamental taxation principles of the OECD VAT Guidelines is neutrality in international trade and "[i]t is particularly important that the application of the rules of international supplies does not produce a tax advantage when compared with comparable domestic transactions").

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

Countries have adopted their VAT to the new reality of e-commerce to impose VAT collection, reporting, and remittance obligations on foreign suppliers with limited nexus to their jurisdictions. In 2017, Australia enacted a so-called "Netflix tax," requiring non-resident online vendors to register for, and report, and remit the GST[64] collected from Australian consumers.[65] New Zealand introduced a similar regime in 2016.[66] The EU started down this road in 2015.[67]

As part of the BEPS Project, members of the Inclusive Framework on BEPS delivered an Interim Report in March 2018 known as Tax Challenges Arising from Digitalization–Interim Report 2018.[68] One important conclusion was to review the impact of digitalization on nexus and profit allocation rules for income tax purposes, with a commitment to continue working together towards a final report in 2020 aimed at providing a consensus-based long-term solution.[69]

To this end, the Inclusive Framework released a public consultation document, Addressing the Tax Challenges of the Digitalisation of the Economy, with proposals on February 13, 2019 for comments by March 1, 2019 (Consultation Document).[70] There were three main proposals to move away from the traditional nexus test of "permanent establishment" under international income tax treaties to determine whether to impose income taxation in a jurisdiction on a foreign business.[71]

The first one is the "user participation" proposal under which a certain proportion of the "non-routine" or "residual" profit of a business would be allocated to jurisdictions based on where users are located.[72] Second, a "marketing intangibles" proposal would allocate profits based on the extent of the functional link between marketing intangibles, such as customer data, customer relationships, and customer relationships with users in the market jurisdiction, where the intangibles and value of the intangibles are created.[73]

---

64. *See, e.g.*, Julia Kagan, *Goods and Services Tax*, INVESTOPEDIA (April 6, 2020), https://www.investopedia.com/terms/g/gst.asp (explaining that the acronym GST means Goods and Services Tax which is the name for the Australian and Canadian VAT).

65. *See Tax and Superannuation Laws Amendment (2016 Measures No.1) Act 2016* (Cth) (Austl.).

66. *See* Goods and Services Tax Act 1985 (N.Z.), *amended by* Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Act 2016 (2016 No 21).

67. *See, e.g.*, Council Implementing Regulation 1042/2013, 2013 O.J. (L 284) 1; *see also* Council Directive 2017/2455, 2017 O.J. (L 348) 7; Council Implementing Regulation 2017/2459, 2017 O.J. (L 348) 32.

68. *See* Org. for Econ. Cooperation & Dev. [OECD], *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS* (2018), http://dx.doi.org/10.1787/9789264293083-en.

69. *Id.* at 212.

70. *See* Org. for Econ. Cooperation & Dev. [OECD], *Addressing the Tax Challenges of the Digitalisation of the Economy*, at 29 (2019), https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf.

71. *See id.* at 22.

72. *Id.* at 9–10.

73. *Id.* at 11–12.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

The third proposal is based on a "significant economic presence," with revenue generated on a sustained basis as the basic factor, but this factor alone would not be sufficient to establish nexus.[74] Other factors would be considered, such as (1) the existence of a user base in, and associated data input from, a jurisdiction; (2) whether digital content is derived from the jurisdiction; (3) whether billing and customer payments are in the local currency; (4) use of local language; (5) responsibility for after-sales services to customers in the jurisdiction; and/or (6) sustained marketing and sale promotion activities targeted at potential customers in the jurisdiction.[75]

While this effort to reach an international agreement remains in progress, France moved unilaterally in 2019 to impose a three percent Digital Services Tax (DST) on revenues attributable to France for digital online intermediation and advertising services supplied by large businesses with annual revenues exceeding 750 million euros and "qualifying" French revenues of at least 25 million euros.[76] In view of these thresholds, the three percent tax on revenues imposed by France clearly targets giant U.S. online technology companies: Google, Apple, Facebook, and Amazon (colloquially referred to as the GAFA tax for this reason).

As a result, U.S. business groups, lawmakers, and President Trump have complained that it unfairly targets large U.S. digital businesses, but not their French competitors.[77] In retaliation, President Trump specifically suggested that the United States would impose tariffs on French goods imported into the United States, including wines.[78] The Office of the U.S. Trade Representative (USTR) launched an investigation of the French DST earlier this year under section 301 of the U.S. Trade Act of 1974, as amended.[79] The USTR completed the first segment of its investigation and concluded that the French DST unfairly discriminates against large U.S. digital online businesses and requested comments by January 6, 2020 on the imposition of $2.4 billion of retaliatory tariffs on French goods imported into the United States.[80]

74. *Id.* at 16.

75. *Id.*

76. *See* Loi 2019-759 du 24 juillet 2019 portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés [Law 2019-759 of July 24th, 2019 on the creation of a tax on digital services] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 25, 2019, p. 2–3, 5.

77. *See, e.g.*, *US to Probe Proposed French Tech Tax, Concerned it 'Unfairly' Targets American Companies*, CNBC (Jul. 10, 2019), https://www.cnbc.com/2019/07/11/us-to-probe-proposed-french-tech-tax.html.

78. *See, e.g.*, *Trump Threatens tariffs against 'Foolish' Macron*, BBC NEWS (Jul. 27, 2019), https://www.bbc.com/news/world-us-canada-49131301.

79. *See Conclusion of USTR's Investigation Under Section 301 into France's Digital Services Tax*, OFF. OF THE U.S. TRADE REP. (Dec. 2, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/conclusion-ustr%E2%80%99s-investigation.

80. *Id.*

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

B. Canadian Developments and Trends

1. *Overview of the VAT in Canada*

There are federal and provincial VAT regimes in Canada.[81] At the federal level, there is currently the five percent GST imposed under Part IX of the Excise Tax Act (Canada) (ETA).[82] Certain provinces have eliminated their retail sales taxes and harmonized their sale taxes with the federal VAT, combining a provincial VAT rate with the federal VAT rate to impose a harmonized sales tax (HST).[83]

Currently, Ontario (thirteen percent HST) and the four Maritime provinces of New Brunswick, Nova Scotia, Newfoundland and Labrador, and Prince Edward Island (each fifteen percent HST) participate in the HST regime.[84] The HST is imposed under Part IX of the ETA.[85] Finally, at the provincial level, Québec has its own VAT, known as the Québec Sales Tax (QST), currently at the 9.975 percent rate.[86] The QST is harmonized with the GST/HST regime.[87]

2. *The "Netflix Tax" Adopted for QST*

In the 2018 Québec budget (Budget), the Minister of Finance of Québec (Finance) proposed to amend and modernize Title I of An Act respecting the Québec Sales Tax (QST Act)[88] to adopt a "Netflix" QST. Out-of-province businesses would be required to register for the QST and collect QST from "specified Québec consumers" in Québec on taxable supplies, including those made through digital platforms or e-commerce, despite the businesses not having any physical presence or carrying on business in Québec (Out-of-Province Suppliers).[89] In order to prevent the Québec government from continuing to lose millions of dollars in QST revenues annually, as the result of consumers not fulfilling their legal obligations to self-assess, report, and pay the QST directly to Revenue Québec, the Government imposed the burden of collection and remittance on the Out-of-Province Suppliers as the Government's collection agent.[90]

These Out-of-Province Suppliers would not have to register under the existing QST registration regime (General QST Registration).[91] A separate,

81. *See* Excise Tax Act, R.S.C. 1985, c. E-15 (Can.).
82. *Id.* § 218.
83. *See Sales Tax Rates by Province*, Retail Council of Canada (2020), https://www.retailcouncil.org/resources/quick-facts/sales-tax-rates-by-province/.
84. *See id.*
85. *See id.*
86. *See id.*
87. *See id.*
88. *See* Act Respecting the Québec Sales Tax, CQLR c T-0.1 (Can.).
89. *See id.* at § 22.
90. *See id.* at § 477.2.
91. *See Suppliers Located Outside Canada Who Are Not Registered for the GST/HST*, Revenu Québec (2018), https://www.revenuquebec.ca/en/businesses/consumption-taxes/gsthst-and-

simplified QST registration (Simplified QST Registration)[92] and compliance regime would be established under the QST Act. If an Out-of-Province Supplier is registered under the General QST Registration, then the Simplified QST Registration would be inapplicable. In implementing these measures, Finance explicitly applied the principles and guidelines from the OECD VAT Guidelines.[93]

Under the QST amendments passed into law in 2018,[94] these changes came into effect on:

- January 1, 2019, in respect to Out-of-Province Suppliers who are located outside of Canada (Foreign Suppliers),[95] and
- September 1, 2019, in respect to Out-of-Province Suppliers located in Canada outside of Québec (Canadian Out-of-Province Suppliers).[96]

In the case of Out-of-Province Suppliers generally (both of the above groups), the Simplified QST Registration and compliance apply to taxable supplies of services and intangible personal property (IPP) to "specified Québec consumers" (defined below).[97] In addition, in the case of the Canadian Out-of-Province Suppliers, Simplified QST Registration and compliance are also required for taxable supplies of goods.[98] In the case of Foreign Suppliers, the Canadian customs authority (or its designated agent) collects QST from consumers at the border on goods imported into Canada, rendering QST collection by the Foreign Suppliers unnecessary.[99] The requirement to register under the Simplified QST Registration could also apply to a business operating an intermediary digital platform, known as a "specified digital platform," that controls key elements of the transaction, such as billing, transactions terms and conditions, and delivery terms, through which an Out-of-Province Supplier makes taxable supplies in Québec of IPP or services.[100]

---

qst/special-cases-gsthst-and-qst/suppliers-outside-quebec/qst-registration-for-suppliers-outside-quebec/suppliers-located-outside-canada-who-are-not-registered-for-the-gsthst/.

92. *See id.*

93. Gov. of Québec, *The Québec Economic Plan: Additional Information 2018-2019*, at A9 (March 2018), http://www.budget.finances.gouv.qc.ca/budget/2018-2019/en/documents/EconomicPlan_1819.pdf.

94. *See* An Act to improve the performance of the Société de l'assurance automobile du Québec, to better regulate the digital economy as regards e-commerce, remunerated passenger transportation and tourist accommodation and to amend various legislative provisions, SQ 2018, c. 18, s.?78 (Can.).

95. *See* Act Respecting the Québec Sales Tax, *supra* note 88, § 477.2.

96. *See id.*

97. *See Suppliers Located Outside Canada Who Are Not Registered for the GST/HST*, *supra* note 91.

98. *See id.*

99. *See Imports of Property*, REVENU QUÉBEC (2018), https://www.revenuquebec.ca/en/businesses/consumption-taxes/gsthst-and-qst/special-cases-gsthst-and-qst/imports/imports-of-property/.

100. *See* Act Respecting the Québec Sales Tax, *supra* note 88, § 477.2.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

There is an exception from the Simplified QST Registration requirement for a "small supplier," whose sales to Québec consumers do not exceed $30,000 annually.[101] Out-of-Province Suppliers registered under the Simplified QST Registration charge and collect QST on taxable supplies made in Québec to "specified Québec consumers"[102] (persons whose usual place of residence is in Québec and are unregistered under the General QST Registration).[103] To establish the person's usual place of residence, one or more pieces of information obtained by the Out-of-Province Suppliers in the ordinary course of business that reasonably support this conclusion would be acceptable, such as the customer's billing, home or business address or payment-related bank information, Internet Protocol address, or location of a landline telephone service.[104]

There would be simplified invoicing requirements for QST, as customers would not need to obtain prescribed documentary information to claim input tax refunds (applicable to QST-registered businesses).[105] There would be simplified electronic quarterly QST returns and remittances due within one month of the end of each calendar quarter.[106]

If the billing and QST are in a prescribed foreign currency (either the U.S. Dollar or Euro),[107] then the Out-of-Province Supplier may elect to report and remit the QST in the prescribed foreign currency. Otherwise, the foreign currency would be required to be converted into Canadian Dollar in an acceptable manner (that could be the value of the consideration for the supply converted into Canadian currency using the exchange rate applicable on the last day of the quarterly reporting period).[108] The Simplified QST Registration and streamlined QST compliance procedures enacted in Chapter VIII.1, Title I of the QST Act follow the guidelines set out by the OECD VAT Guidelines.[109]

3. *Will the Canadian Government Adopt "Netflix Tax" for GST and HST?*

In the federal Conservative Government's budget released on February 11, 2014, the Government proposed to open consideration of the "Netflix" GST/HST to public consultation.[110] With the federal election approaching

101. *See id.* § 477.5.
102. *See id.* §§ 477.2, 477.6. (noting a customer could prove that it is not a "specified Québec consumer" by providing its General QST Registration number, which the Out-of-Province Supplier could verify on Revenue Quebec's QST registration search site).
103. *See id.* §§ 477.4, 477.6.
104. *See id.* § 477.3.
105. *See id.* § 477.7.
106. *See id.* §§ 477.8, 477.10.
107. Regulation Respecting the Québec Sales Tax, CQLR c T-0.1, r 2 at § 477.15R1 (Can.).
108. *See* Act Respecting the Québec Sales Tax, *supra* note 88, § 477.15.
109. *International VAT/GST Guidelines*, *supra* note 60, at 38.
110. Dep't of Fin. Can., *Economic Action Plan 2014*, at 257 (Feb. 11, 2014), https://www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf (noting the Economic Action Plan 2014 proposes to continue efforts to address international aggressive tax avoidance by . . . "[i]nviting

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

later that year, the Conservative government's next federal budget in 2015 made no mention of this proposal, nor did subsequent federal budgets by the Liberal Government after they won election in October 2015.

Politically, there were inherent risks in what millions of Canadian voters would, as a practical reality, view as a "new" tax, despite the existing obligations on consumers to self-assess, report, and pay the GST/HST directly to the Canada Revenue Agency (CRA) on imported taxable supplies of IPP and services.[111] In view of the almost complete lack of compliance by consumers, the Netflix GST/HST regime would impose new taxes and costs on consumers, by requiring Foreign Suppliers, who do not have a physical presence or carry on business in Canada, to register and collect the GST/HST. Under the existing rules, these Foreign Suppliers are not required to register for the GST/HST and to charge and collect GST/HST.[112]

The recently re-elected Liberal government may be emboldened to move forward with this initiative. In the run-up to the election, the Liberal platform document released in September 2019 (Liberal Platform) endorsed the work of the OECD VAT Guidelines "to ensure that international digital corporations whose products are consumed in Canada collect and remit the same level of sales taxation as Canadian digital corporations."[113] This endorsement highlights the competitive disadvantage that the current GST/HST regime puts Canadian suppliers in vis-à-vis Foreign Suppliers. As far as Canadian consumers are concerned, purchasing from the Foreign Suppliers saves them the costs of paying GST/HST (five percent to fifteen percent of the price), putting unfair downward pricing pressure on the Canadian suppliers (who, unlike their foreign competitors, are registered for the GST/HST and charging and collecting GST/HST). No jurisdiction wants to treat its own domestic businesses worse than foreign businesses and put them at an unfair competitive disadvantage. This consideration alone would warrant remedial action.

There is also the massive loss of GST/HST revenues because the current regime simply does not work. Enforcement by the CRA against millions of consumers and their transactions each year is impractical. The collection costs of enforcement against a multitude of consumers entering into a high number of transactions, each owing a relatively small amount of tax per transaction, would outweigh the benefits of collecting such unpaid GST/HST. Moreover, from a political perspective, it would probably be a non-starter to seek to collect unpaid GST/HST directly from consumers and voters. According to a cost analysis conducted by Canada's Office of the

input from the public on issues related to international tax planning by multinational enterprises and other cross-border tax integrity issues, such as ensuring the effective collection of sales tax on e-commerce sales to Canadians by foreign-based vendors").

111. Excise Tax Act, R.S.C. 1985 §§ 217(a), 217(c.1)(ii).

112. *See id.* § 240(1)(c).

113. Michael Geist, *Tax Policy Confusion: What Digital Taxes Are on the Canadian Government's Agenda?* MICHAELGEIST.CA (Dec. 17, 2019), http://www.michaelgeist.ca/2019/12/tax-collection-confusion-what-digital-taxes-are-on-the-canadian-governments-agenda/.

Parliamentary Budget Officer (PBO) published on September 25, 2019, requiring Foreign Suppliers to collect GST/HST on e-commerce sales could add over $1 billion (CAD) annually to Government revenues by 2028–2029.[114] In the meantime, while Foreign Suppliers registered under the Simplified QST Registration charge and collect QST from Québec consumers on taxable supplies of services and IPP, those same Québec consumers would probably not pay any GST.

4. *What about a Special Canadian DST (Corporate Tax)?*

According to the Liberal Platform, the federal Liberal government would "make sure that multinational tech giants pay corporate tax on the revenue they generate in Canada."[115] The government would consider imposing a corporate tax that would "replicate" the French DST by imposing a three percent tax on business revenues relating to Canada derived from advertising and digital intermediation services provided by large technology companies with global revenues of at least $1 billion (CAD) and Canadian revenues exceeding $40 million (CAD).[116] According to a cost analysis conducted by the PBO published on September 29, 2019, the "Canadian DST" would be implemented by April 1, 2020, and is projected by 2028–2029 to generate an additional $1.2 billion (CAD) of revenues annually. If the Canadian Government proceeds with this measure, the USTR could respond with a trade investigation like the one against the French DST, resulting in retaliatory tariffs against Canadian imports.

5. *Enforceability of Netflix QST under Québec Law*

Under section 92 of Canada's Constitution Act of 1867 (Constitution), the Québec Government clearly has the constitutional authority to impose laws that tax consumers directly,[117] and that affect property, businesses, and transactions within the province. Nevertheless, the issue remains whether section 92 of the Constitution extends so far as to enable Québec to impose QST registration, collection, reporting, and remittance requirements on Out-of-Province Suppliers without a presence in Québec or insufficient nexus with Québec under traditional legal tests (such as carrying on business in the province). Even if constitutionally valid, the laws could be inapplicable to a particular extraterritorial party under the principles in

114. Off. of the Parliamentary Budget Officer, *Cost Estimate of Election Campaign Proposal* (Oct. 11, 2019), https://www.pbo-dpb.gc.ca/web/default/files/Documents/ElectionProposalCosting/Results/33240992_EN.pdf?timestamp=1590351479032.
115. *See, e.g.*, *Terence Corcoran: Liberals join global profit pillaging push with digital tax grab*, FINANCIAL POST (Oct. 2, 2019), https://business.financialpost.com/news/election-2019/terence-corcoran-liberals-join-global-profit-pillaging-push-with-digital-tax-grab.
116. *Taxation of the Digitized Economy*, KPMG 1, 18 (May 15, 2020), https://tax.kpmg.us/content/dam/tax/en/pdfs/2020/digitalized-economy-taxation-developments-summary.pdf.
117. Reference re Québec sales tax, [1994] 2 SCR 715 (Can.).

Unifund Assurance Co. of Canada v. Insurance Corp of British Columbia.[118] These principles consider the degree of connection between the legislating jurisdiction and the party outside the jurisdiction affected, and "order and fairness," such as not being subject to overlapping legislative regimes from multiple jurisdictions.[119]

In the *Unifund* decision, the Supreme Court of Canada discussed its 1979 decision in *R. v. Thomas Equipment Ltd.*[120] In that case, the New Brunswick manufacturer of farm machinery, Thomas Equipment, contracted with an Albertan dealer to sell and promote its machinery in Alberta. Under an Alberta statute, the supplier (Thomas Equipment) had to repurchase unsold farm equipment and parts on the termination of its dealership agreement with the Alberta dealer.[121] On termination, Thomas Equipment refused to repurchase the unsold inventory and was prosecuted for this contravention of the Alberta statute.[122]

At issue was whether Thomas Equipment was subject to the Albertan law. The majority pointed out that the parties had made more than a "simple contract for the sale of goods." Title, ownership, and the right to the goods remained with Thomas Equipment until full payment was made by the dealer for the goods purchased.[123] In addition, Thomas Equipment provided free of charge to the Alberta dealer promotional material required to advertise its equipment and parts.[124] The Supreme Court found that Thomas Equipment could be prosecuted under the Albertan law.[125]

There is a case currently before the courts considering whether British Columbia's mandatory provincial retail sales tax (PST) registration and collection regime for a seller in another province is legally enforceable against a retailer in Alberta selling to consumers in B.C.[126]

While the U.S. Supreme Court's decision in *Wayfair* would appear, on its face, to be helpful to Québec, it is not legally binding in Canada and the context of the decision is in a different constitutional framework than in Canada. The decision in *Wayfair* focused on addressing a gap in U.S. constitutional law that had arisen in the sales tax collection framework due to the rise of e-commerce and the growth of interstate transactions and was aimed at closing the inability of state governments to collect sales taxes on these transactions.

---

118. Unifund Assurance Co. v. Insurance Corp. of British Columbia, [2003] 2 SCR 63, 71 (Can.).
119. *Id.* at 65, 96.
120. *See* R. v. Thomas Equipment Ltd., [1979] 2 R.C.S. 529 (Can.).
121. *See id.* at 529.
122. *See id.* at 542.
123. *See id.* at 538.
124. *See id.*
125. *See id.* at 544–45.
126. *See* Fitter International Inc v British Columbia, [2019] AJ No 1774, 2019 ABQB 990 (Can. Alta. Q.B.).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

In Canada, however, the same gap does not exist. Since 1997, provincial governments have had the opportunity to participate in the HST system that allows the collection of the provincial portion of sales taxes on transactions between provinces.[127] The HST would not necessarily plug the gap for sales from abroad, but it would be unfair to single out Foreign Suppliers from a foreign country, relying on some of the principles enunciated in *Unifund*. Moreover, where the party affected is outside Canada, there is an additional hurdle to consider. There is a common law rule that prevents provinces from exercising their jurisdiction internationally. On that basis, a provincial legislature has an even higher hurdle to overcome than the federal Parliament in seeking to regulate a Foreign Supplier.

A longstanding rule of international law is that one country will not permit the enforcement of the tax laws of another country through its courts (known as the Revenue Rule).[128] Due to the Revenue Rule, a foreign court may refuse to enforce a foreign judgement in Québec for the assessment against a Foreign Supplier of uncollected QST.

In view of those numerous Out-of-Province Suppliers who have registered under the Simplified QST Registration, enforcement against them may be much easier, particularly with respect to Canadian Out-of-Province Suppliers, due to their agreement to participate as a QST collection agent and presumably submit to the QST laws.

6. *Enforceability of Netflix GST under Federal Law*

Unlike Québec and other provinces, Parliament has a certain amount of incidental power to extend its reach extraterritorially, under the common law and section 3 of the Statute of Westminster of 1931.[129] The common law rule is based on the international law principle of territoriality sovereignty.

The Revenue Rule may present an impediment to enforcement in a Foreign Supplier's jurisdiction.

127. *See, e.g.*, Julia Kagan, *Canada's Harmonized Sales Tax—HST*, INVESTOPEDIA (May 3, 2020), https://www.investopedia.com/terms/h/harmonized-sales-tax.asp.

128. *See, e.g.*, Brenda Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty-First Century*, 16 DUKE J. OF COMP. & INT'L LAW 79, 79 (2006).

129. *See* Croft v. Dunphy, [1933] AC 156 [16] (Eng.).

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW