

Making Sense of the Canadian Digital Tax Debate

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Abstract

Few Canadian digital policy issues have proven as confusing as the ongoing debate over digital taxation. While there is general agreement that a neutral tax policy should apply to the online world, the issue has been muddled by both nomenclature and corporate efforts to use digital tax policy for competitive advantage. With politicians fearing voter backlash over the perception of increased taxes, Canadian digital tax policy has struggled to keep pace, leading to a predominantly hands-off approach. The result is an uneven digital policy playing field that leaves domestic firms disadvantaged and government coffers missing out on hundreds of millions of dollars. This chapter seeks to unpack the digital tax policy debate by examining the various meanings, the core policy choices, and the potential to develop a fair digital policy structure. The chapter begins with a discussion of digital sales taxes, followed by corporate income taxes, and the finally mandated contributions by companies active in the digital economy, including online service providers and Internet access providers.

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The most obvious example of confused policy-making involves the taxation of digital services such as Netflix. The term “Netflix tax” has been politically toxic for many years, dating back to the 2015 federal election campaign when then prime minister, Stephen Harper, pledged that, if re-elected, his government would not institute a “Netflix tax” (Geist, 2019a). The Liberals responded with a “no Netflix tax” promise of their own (Geist, 2019a), which became government policy when Justin Trudeau was elected and became prime minister a few months later. Yet the words “Netflix tax” mean different things to different people, including digital sales taxes, corporate taxes, or mandated contributions in support of Canadian content production.

The confusion is nicely illustrated by an exchange between NDP MP Peter Julian and Prime Minister Justin Trudeau during question period in the House of Commons in 2018. Julian asked:

Speaking of letting the wealthy off the hook, the government seems more than happy to let web giants continue to make huge profits without contributing to the Canadian economy. While the rest of the world is trying to make these companies pay, the Liberals are doing the opposite. They are making deals with Netflix and other companies, and offering massive tax breaks. Canadians pay their taxes and expect companies to do the same. When will the Liberals start making web giants pay their fair share? (House of Commons, 2018, p. 16751)

Trudeau responded:

Mr. Speaker, the NDP is proposing to raise taxes on the middle class, which is something we promised we would not do and have not done. We explicitly promised in the 2015 election campaign that we would not be raising taxes on Netflix. People may

remember Stephen Harper's attack ads on that. They were false. We actually moved forward in demonstrating that we were not going to raise taxes on consumers, who pay enough for their Internet at home. (House of Commons, 2018, p. 16751)

Julian's question seems to refer to corporate income taxes, while Trudeau's response takes aim at either sales taxes or mandated cultural contributions. Beyond the confusion, the conversation mainly considered the Internet from a content consumption perspective while, from education to government, it became an integral part of Canadians' daily lives to enact their citizenship. As such, this chapter seeks to unpack the digital tax policy debate by examining its various meanings, the related core policy choices, and the potential to develop a fair digital policy structure. The chapter begins with a discussion of digital sales taxes, followed by corporate income taxes and, finally, the mandated contributions by companies active in the digital economy, including online service providers and Internet access providers.

Digital Sales Tax

The prospect of extending sales taxes—namely GST/HST in Canada—to digital sales has emerged as a challenging policy issue in countries around the world. The basic principle is relatively straightforward: sales taxes should be applied equally to the sales of all goods (and services for those countries that tax both goods and services) without regard for whether the good or service is tangible or intangible, or sold by a domestic or foreign firm. The need for equal application of sales tax policy is aimed at ensuring that equivalent goods and services are treated equally. Moreover, there is concern that applying sales tax collection obligations solely to domestic firms could place them at a marketplace disadvantage since foreign firms would enjoy a perceived cost advantage for consumers given the “tax free” status of their goods or services.

The need to address the digital sales tax issue was raised in Canada in 2014 when the Conservative government used its budget bill to launch a public consultation on the matter (Geist, 2015). Years later, the Liberal government advised that Canada was awaiting an international agreement on digital sales taxes before implementing any domestic reforms. In 2018, Finance Minister Bill Morneau indicated

that the government would support a quick resolution of the issue, but that provincial digital sales tax initiatives would not spark a matching federal tax until the global issues were resolved (Curry, 2018).

The ongoing delays reflect the realization that creating a global sales tax system that requires foreign providers to register and remit sales taxes is fraught with complexity (Dourado, 2018). Registration requirements alone create new costs that some businesses may be unwilling to bear. In order to avoid burdening small businesses, countries may set a revenue threshold before registration and collection requirements kick in. In fact, some businesses may simply decide to avoid or block the taxing market altogether, leading to services that either decline to sell locally or increase their prices to account for the regulatory cost burden.

The complexity of digital sales tax collection was highlighted by government officials at a 2016 hearing of the House of Commons Standing Committee on Canadian Heritage (CHPC):

E-commerce sales by foreign-based companies can present a challenge for proper sales tax collection. Foreign-based Internet vendors' businesses with no physical presence in Canada are generally not required to collect GST/HST on their sales. Instead, in the case of physical goods that are purchased online and shipped to Canada by post or courier, the applicable customs duties and GST/HST would generally be collected by the Canada Border Services Agency at the time the goods are imported.

In cases other than the importation of physical goods, the GST/HST legislation imposes a general requirement to self-assess the tax. For businesses that would be entitled to recover any tax payable by claiming input tax credits, there is generally no requirement to self-assess tax on such imports. The challenges related to the proper collection of sales tax on digital supplies by foreign-based vendors are not unique to Canada. It's a difficult issue for all jurisdictions with a sales tax. (CHPC, 2016, paras. 11–12)

Indeed, the challenges of imposing a general sales tax requirement on foreign digital firms became readily apparent in 2018 when the Province of Quebec became the first Canadian jurisdiction to establish digital sales tax collection and remission requirements (Quebec Ministry of Finance [QMF, 2018, p. 137]). Yet despite assurances that

digital sales taxes are relatively easy to implement, the Quebec plan demonstrates the complexity associated with requiring thousands of online companies around the world to implement dozens or even hundreds of new tax requirements.

The provincial government established a lightweight registration system for foreign companies to ease the administrative burden associated with signing up for provincial sales tax collection. But while the basic framework raises few concerns, enforcement presents an enormous challenge as tax authorities try to persuade online businesses with no presence in the province to register, collect, and remit the applicable sales tax. The government promised to work with businesses to assist with compliance in the first year, but thereafter it warned that “the penalties provided for in the existing tax legislation will be imposed on non-resident suppliers that have not complied with the new obligations” (QMF, 2018, p. 137).

For some businesses, the cost of compliance with the provincial requirements may far exceed the actual tax payments. Without a global standard, the Quebec government has arbitrarily set the threshold for sales tax registration and collection at \$30,000 in provincial revenues. That is low compared to many other countries that have adopted digital taxes: the Japanese threshold is over \$120,000, the Saudi Arabian threshold is over \$340,000, the Swiss threshold is over \$135,000, and the New Zealand threshold is over \$55,000 (Geist, 2018a).

Many businesses may also have to rework their customer relationships in order to collect increased personal information. For example, some digital services may not currently gather detailed geographic information on their subscribers, but the Quebec tax rules effectively mandate the collection and use of location-based information.

With a 9.75 percent tax rate, the low threshold sets the bar at less than \$3,000 in annual sales taxes for some businesses, meaning compliance costs alone could easily exceed the tax revenues and cause some companies to rethink providing service in the province. That points to at least one tax trade-off: the benefits of increased tax revenues set off against decreased consumer choice as some businesses exit the Quebec market.

The enforcement challenges extend to consumers, some of whom may try to avoid paying provincial sales taxes by claiming residency elsewhere. The government has identified measures to

target sales tax evaders, with penalties of \$100 or 50 percent of the applicable sales tax (Geist, 2018a). In order to identify instances of sales tax evasion, the government plans to collect customer information from out-of-country operators such as Netflix, though it is unclear how it will compel those companies to hand over subscriber lists or other relevant data.

The sales tax issue has been framed by some as a “tax holiday” for companies (NDP, 2018a). Yet the reality is that, when applicable, sales taxes are paid by consumers, not companies. Companies resident in Canada are merely required to collect and remit the applicable sales taxes. The tax does not come out of earnings or represent a gain for the companies who act as intermediaries by collecting the sales tax and remitting it to the government.

In fact, for some digital companies, even the collection and remittance of the sales tax is borne by their users. For example, Uber, the popular ride-sharing service, advises its Canadian drivers that they are required to collect and remit sales tax. Once a driver has obtained a sales tax identification number, Uber will facilitate the collection of the sales tax with each ride and provide a weekly breakdown of the sales tax collected in the prior week to its drivers. The sales tax collected by Uber on behalf of its drivers is paid to the drivers, who are required to file an annual sales tax declaration to the Canada Revenue Agency (CRA) along with any sales tax owing. In other words, sales taxes are paid by riders, but the annual filings fall to the drivers, with Uber facilitating the process by initially collecting the applicable sales tax (Uber, n.d.). A similar system is used by Airbnb, whose lodging providers may also be subject to municipal occupancy taxes (Airbnb, n.d.).

As governments race to catch up to the growth of e-commerce, there has long been a seeming inevitability to the imposition of digital sales tax. However, the experience to date demonstrates that, for the moment, shifting sales tax to a global Internet environment remains easier said than done.

Corporate Income Tax

The debate over “Netflix taxes” has also included discussion over whether the company must pay corporate income tax in Canada. The income tax issue was raised by the NDP in 2018, who called on the government to ensure that Internet companies pay taxes on

profits made in Canada (NDP, 2018b). While the income tax issue is an important one, it is not a digital tax issue per se. Rather, it reflects ongoing corporate tax challenges that implicate all multinational companies that strategically structure themselves in the most tax advantageous manner.

Further, the debate on the issue is not limited to Canada. Countries around the world struggle with the same question (Alberici, 2018; Leahy, 2017). Indeed, the issue was raised at the Canadian Senate committee hearing on the issue, with an official from the CRA commenting:

It is also important to understand the current corporate tax system, which is essentially based on the notion of a permanent establishment, which is a traditional concept. For example, when a company does business in another country and has employees and plants in that country, it clearly has a permanent establishment. The general concept of taxation is based on these notions.

A company that does business in another country and sells digital products does not necessarily have a physical presence. Consequently, some important questions arise with respect to income taxation. The key question is whether these permanent establishment concepts on which tax treaties are based still represent the best way to tax those businesses and to determine whether value is being created in the source country by those electronic transactions. If that is the case, one must determine the approach that should be used to tax properly, but also to ensure that the ultimate result is not double taxation of the business in question.

This therefore requires discussions at the international level, such as those currently being held at the OECD, for example. I think the OECD communiqués attest to the fact that the various OECD members have agreed to take time to analyze this question. The ideal solution is to come up with joint and coordinated options or new standards to prevent double taxation. (Senate Standing Committee on Transport and Communications, 2018, paras. 55–57)

In 2019, the corporate income tax issue emerged as a federal election issue as several political parties committed to establishing a special tax on digital companies. For example, the Liberal Party promised

to implement a 3 percent tax on revenues in Canada of large technology companies. The Conservatives introduced a similar plan for a 3 percent tax on large tech companies that provide social media, search, and online marketplace services (in other words, Facebook, Google, and Amazon, but not Netflix). But the Conservative platform also noted that the preference would be for those companies to invest and further establish themselves in Canada. If they do so, the Conservative Party promised to waive the extra tech company corporate tax (Geist 2019b).

While the prospect of implementing a Canadian digital specific corporate tax remains uncertain, a similar proposal in France has drawn the ire of the US government. In December 2019, the United States threatened to implement billions in retaliatory tariffs against France if it proceeded with a 3 percent tax on digital companies. The United States argued that the proposal discriminated against US companies (Palmer, 2019).

In other words, the income tax question is not limited to Canada, nor to digital companies. There is a general consensus on the need to address income tax standards to ensure fair taxation without double payment in multiple jurisdictions.

Mandated Contributions or Taxes in Support of Canadian Culture

While the application of sales taxes to companies such as Netflix may be relatively uncontroversial, the use of the tax system or other regulated payments in furtherance of other government policies has proven far more divisive. For example, in June 2019, then-Canadian Heritage Minister Pablo Rodriguez seemingly embraced a mandated contribution requirement, stating that “everyone has to contribute to our culture. That’s why we’ll require web giants to create Canadian content [and] promote it on their platforms” (Rodriguez, 2019). The comment marked a significant shift in government policy. Where previously it had emphasized the need for contributions that may vary depending on the type of service, Rodriguez appeared to be making an explicit endorsement of requirements for digital streaming services to provide funding for the creation of Canadian content (Geist, 2018b).

The Canadian cultural sector has relied on three key arguments in support of mandated contribution requirements: (1) the system is

necessary to ensure that investment in Canadian film and TV production is not placed at risk, (2) digital streaming services benefit from an unfair advantage, and (3) other jurisdictions, such as the European Union (EU), have already implemented mandated contributions for digital media providers.

This chapter provides an alternate perspective: (1) investment in television and film production in Canada is at an all-time high; (2) the same rules apply to foreign and domestic online video services, and the Canadian broadcasting sector is actually the recipient of significant regulatory advantages; and (3) comparisons to the EU's approach are selective and inapt.

First, regarding investment, the data demonstrates that there is no Canadian content emergency. The most recent industry data confirms that the total value of the Canadian film and television production sector nearly reached \$9 billion in 2018, an all-time record, with overall production increasing by 5.9 percent. Notably, the increased funding came primarily from distributors and foreign financing, not from broadcasters (CMPA, 2018).

Second, the same rules apply to foreign and domestic online video services. Proponents argue that services such as Netflix enjoy an unfair advantage because they face no mandatory contribution requirements, while broadcasters and broadcast distributors (BDUs) face regulations that require contributions (30 percent of revenues for broadcasters, 5 percent of revenues for BDUs). The critics of the current system argue that the Netflix investment in Canada is below either percentage and that the absence of required contributions creates an uneven playing field (CMPA, 2019).

However, the most apt comparison to Netflix is not to broadcasters or BDUs, but rather to competitive online video services. These services, whether Canadian or foreign, are all subject to the same requirements—namely, no mandated Canadian content contributions. For example, Bell's Crave, which frequently promotes US programming such as *Seinfeld* and *The Sopranos*, does not face any Canadian content contribution or spending requirements. In fact, the Canadian Radio-television and Telecommunications Commission (CRTC) even created a "hybrid model" in 2015 that allows for video distribution through BDU systems and the Internet without any Canadian-content requirements (Dobby, 2018).

In reality, Canadian broadcasters and BDUs benefit from significant regulatory advantages. Indeed, while some prefer the

comparison to broadcasters or BDUs (arguing that the service feels similar to Canadian subscribers), the reality is that both Canadian broadcasters and BDUs are subject to mandated contributions as part of a regulatory quid pro quo in which they receive significant benefits for being part of the regulated system. Both broadcasters and BDUs have benefited from limited competition due to foreign investment restrictions, which caps the percentage that foreign companies may own of Canadian broadcasters or BDUs.

For broadcasters, other advantages include simultaneous substitution, which allows Canadian broadcasters to replace foreign signals with their own. The industry says this policy alone generates hundreds of millions of dollars in revenues for Canadian broadcasters (CRTC, 2016a). Moreover, Canadian broadcasters benefit from must-carry regulations, which require BDUs to include many Canadian channels on basic cable and satellite packages. These rules provide guaranteed access to millions of subscribers, thereby increasing the value of the signals and the fees that can be charged for their distribution (CRTC, 2019). They also enjoy market access protection, which has shielded Canadian broadcasters from foreign competition, such as HBO or ESPN, for decades (Sokic, 2019), as well eligibility for Canadian funding programs, for which companies like Netflix may be ineligible (Buckner, 2019).

BDUs also enjoy their own set of advantages over online service providers. These include bundling benefits, which allow BDUs to bundle less popular Canadian channels with more popular US signals, thereby guaranteeing more revenues (CRTC, 2016b). They are also beneficiaries of copyright retransmission rules, which create an exemption in the *Copyright Act* to allow BDUs to retransmit signals without infringing copyright. This retransmission occurred for many years without any compensation (Canadian Communications Systems Alliance Inc, 2018).

Third, comparisons to the EU are selective and inapt. Proponents point to European regulation as evidence that others have introduced domestic content regulatory requirements on services such as Netflix and say that Canada should follow suit. They argue that Europe envisions requirements that 30 percent of the Netflix catalogue constitute European programming and seek a similar mandate in Canada (Friends, 2020). However, the European rules, which do not take effect until 2020, do not include Europe-wide mandated payments. Indeed, the European Commission (EC) states:

The new rules clarify the possibility for Member States to impose financial contributions (direct investments or levies payable to a fund) upon media service providers, including those established in a different Member State but that are targeting their national audiences. This would be a voluntary measure for Member States, not an obligation at EU level. (EC, 2018, para. 24)

Moreover, the content requirements are continent-wide, not limited to a single country. The European requirement of 30 percent incorporates all twenty-eight EU Member States (Donders et al., 2018). Once spread across all member states, the requirement is not particularly onerous since it effectively envisions a few percent of the overall catalogue per country. The percentage of Canadian content on Canadian Netflix is already comparable to the per-European country amount (Geist, 2018c). In fact, the EC emphasizes: “We also need to pay attention to new market entrants and small players. The new rules also include a mandatory exemption for companies with a low turnover and low audiences. It could also be inappropriate to impose such requirements in cases where—given the nature or theme of the on-demand audiovisual media services—they would be impracticable or unjustified” (EC, 2018, para. 29).

Supporters of mandated contributions for Canadian content production have also insisted that similar obligations be extended to Internet and wireless providers. They argue that the Internet is rapidly replacing the broadcast system in Canada and therefore should be expected to contribute in much the same manner.

This argument is not a new one. In fact, as far back as 1998, the CRTC conducted hearings on “new media” in which groups argued that the dial-up Internet was little different than conventional broadcasting and should be regulated and taxed as such (CRTC, 1998). In other words, groups have been arguing for new “Netflix taxes” well before Netflix was a global streaming service.

For example, broadcast lawyer Peter Grant, who in 2019 sat on the broadcast and telecom review panel examining Canadian communications laws, told the CRTC more than twenty years ago that if broadcast-quality video ever reached a certain level of market penetration on the Internet, the Commission should “require certain obligations about some funding as a proportion of the revenue from this particular activity to go into a fund or whatever” (CRTC, 1998, pp. 2550–2551). Grant continued by arguing that websites were the

equivalent of programming undertakings and that Internet providers were broadcast distribution undertakings (i.e., the Internet was the equivalent of cable distribution).

The argument received a modern endorsement from the CRTC in 2018 with the release of its *Harnessing Change* report. It stated: “There are numerous services in Canada that connect Canadians to content, whether through the Internet or broadcast networks, such as cable or satellite. Demand for these services is almost wholly driven by demand for audio and video content, yet the Canadian market for this content is only supported by BDUs, television programming and radio services” (CRTC, 2018, “Conclusions and Potential Options,” para. 36).

The reality, however, is that Internet use is about far more than streaming videos or listening to music. Those are obviously popular activities, but numerous studies point to the fact that they are not nearly as popular as communicating through messaging and social networks; engaging in electronic commerce or Internet banking; or searching for news, weather, and other information (CIRA, 2019; Statistics Canada, 2014). From the integral role of the Internet in our education system to the reliance on the Internet for health information (and increasingly telemedicine) to the massive use of the Internet for business-to-business communications, Internet use is about far more than cultural consumption. Yet proponents of an Internet tax envision the Internet as little more than cable television and want to implement a taxation system akin to that used for cable and satellite providers.

Precisely because the Internet is such an integral part of the daily lives of most Canadians, ensuring universal, affordable access is a competing policy goal that should not be so easily discarded. The CRTC provided little more than an unconvincing assurance that the impact of new Internet taxes would be “cost neutral”—even though Canadians who only rely on Internet access will clearly pay more under such a system.

To date, the government has indicated that it opposes an “approach that increases the cost of services to Canadians” (LeBlanc, 2018). In fact, the government rejected an Internet tax proposal last year on affordability grounds:

The Committee’s [CHPC] recommendation to generate revenue by expanding broadcast distribution levies so that they apply

to broadband distribution would conflict with the principle of affordable access. The open Internet has been a powerful enabler of innovation, driving economic growth, entrepreneurship, and social change in Canada and around the world. The future prosperity of Canadians depends on access to an open Internet where Canadians have the power to be freely innovative, communicate, and access the content of their choice in accordance with Canadian laws. Therefore, the Government does not intend to expand the current levy on broadcast distribution undertakings. (Geist, 2017, para. 3)

Notwithstanding the rejection, the Internet tax issue resurfaces again and again.

Conclusion

The past two decades have been marked by near-continuous efforts to use the digital tax issue as a policy lever to benefit one set of stakeholders over another. In the nascent days of e-commerce, a hands-off approach was promoted as an ideal mechanism to help support a relatively small commercial sector. As the digital economy has grown, the debate has gradually shifted, first toward tax fairness and a neutral, level playing field and later to using the digital economy to support sectors that have struggled to adapt to the changing environment. For Canadian digital policy-makers, the challenge is compounded by a confusing public debate with little agreement on what basic terms mean, much less how Canada should proceed.

Despite growing momentum to institute a variety of new taxes, evidence suggests that the case for many new taxes is weak. The implementation of a digital sales tax seems inevitable, though Canada should ensure that its approach is consistent with emerging international standards. Similarly, calls for a new corporate tax on digital companies should be held in abeyance until a global approach to the issue can be developed. Further, using the tax or levy system to fund the creation of Canadian content based on inaccurate claims about a level playing field places the remarkable domestic film and television production success story at risk. Making sense of the digital tax debate ultimately depends upon sensible policies, something that may prove challenging in the absence of an evidence-based analysis of the tax implications of the digital economy.

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