Transfer Pricing Rules Past Cameco and Digital Tax on Tech Giants

In this article, critically important aspects of the Canadian transfer pricing case Cameco Corporation and tax policy undercurrents of recent Canadian government proposals concerning the taxation or compensation for the provision of digital services are considered in relation to each other.

1. An Unlikely Pairing? Is There a Connection?

The connection between the Cameco Corporation transfer pricing case and Canada’s recent expressions of its intention to proceed with a “digital services” tax is not obvious. However, there is a connection, namely the fitness for fiscal purposes of legal constructions such as organizational forms and transactional arrangements, and this connection, in one way or another, is guided by doctrinaire versions of what it means to carry on business in a place. These versions of taxable presence effectively enable businesses to operate selectively both within and outside international tax jurisdictions and determine how much “income” is “attributable” to the places where they conduct business according to “permanent establishment” and “attribution of business income” notions captured by articles 5, 7 and 9 of the Model Tax Convention of the Organization for Co-operation and Development (OECD) and its outgrowths. The OECD’s most recent expression of frustration with these parameters, seen to be outmoded generally and eclipsed by modalities of digital business conduct, is in the BEPS Project and its most recent manifestations in Pillars One and Two said to be the subject of broad international agreement by the OECD on 1 July 2021.

2. Cameco Corporation

This is a relatively unremarkable case in so far as a typical corporate group structure is concerned. But the pronouncements of the Tax Court of Canada reinforcing respect for legal constructions and the diminished means for tax avoidance-based transfer pricing challenges are important.

2.1. Some preliminaries

First, a few key elements of Canadian tax law, pertinent both to understanding the legislative context of...
the Cameco Corporation case and Canada’s initiative to address business conducted digitally, will be helpful.

Canadian tax law, including as it has been adjudicated, generally respects separate legal personalities and the transactions undertaken by them for what they appear to be as a legal matter, absent evidence that the parties to the transactions do not, themselves, respect them and conduct themselves with a different effect than the legal formulations they have adopted imply.

Canada has a quasi-territorial regime for taxing foreign income earned by foreign corporations that are “foreign affiliates” and, additionally, “controlled foreign affiliates” of Canadian taxpayers, most notably shareholders that are Canadian corporations. Broadly, it entails the following features that are particularly notable for both aspects of this commentary, the Cameco Corporation case and Canada’s announced approach to digital tax.

(1) Under that regime foreign “active business income” is not taxed as long as it remains in foreign or Canadian corporate solution, whether distributed or not, as long as it is earned by affiliates residing and carrying on business in countries with which Canada has entered a tax treaty or information exchange agreement, of which there are over ninety and twenty, respectively – in other words a large proportion of the economic world. The taxation of active business income earned by residents of other countries and/or in other countries is deferred but taxed when distributed as dividends to Canadian shareholders subject to credit for foreign tax.

(2) Investment income of foreign affiliates, “foreign accrual property income”, is taxed currently in “real time” as taxable income of the Canadian shareholders for whom the affiliates are “controlled foreign affiliates” – effectively overcoming structural corporate intermediation, just as if it had a Canadian source with credit for foreign tax borne by that income. For foreign affiliates that are not “controlled foreign affiliates”, the underlying income is taxable when distributed to shareholders or possibly a proxy for it is taxed to them under what amount to foreign investment fund rules that apply to “offshore investment fund property”.

(3) Specific “base erosion” rules apply to detect Canadian source income that is actually or effectively being redirected via deductible charges, transactional markups, or the organizational assignment of customer business opportunities, to foreign affiliates in the guise for them of exempt active business income. These rules have a lot of similarity directionally and in their basic transactional underpinning to transfer pricing rules, but they are more than that. They serve to reinforce the Canadian tax system’s intrinsic respect, in the Act and via treaties, of a source country’s primary entitlement to tax business income but in that respect to prevent self-serving “re”sourcing of that income through transactions undertaken in a non-arm’s length or otherwise closely controlled setting. When these “brakes” on the exemption aspect of the foreign affiliate rules apply, redirected income is returned to the Canadian tax base as if it was property income as disqualified business income that is included in foreign accrual property income, essentially round tripped to its original or erstwhile “source” despite organizational and transactional structuring.

Foreign income earned directly by Canadian residents is taxed as it is earned without deferral, subject to credit for foreign tax that applies with intentional broad deference to the taxing rights of foreign source countries for business income and much more limited deference in the case of income from property, i.e., income in the nature of investment income.

Canada taxes non-residents who carry on business in Canada, in the first instance regardless of how those non-residents conduct their Canadian activities or whether they have a Canadian business presence. Non-residents who solicit orders or offer things for sale in Canada or who conduct certain manufacturing and processing, extractive, and real estate activities in Canada, even if not profitable in themselves because they may be promotional or preparatory, are deemed to carry on business in Canada. In both cases, those non-residents are accountable as reporting taxpayers. Typically, however, Canada’s many tax treaties modeled mostly on the OECD Model but showing certain features also of the United Nations (UN) Model, notably more expansive notions of "permanent establishment" and source country taxation by withholding tax of periodic outbound payments of among others “royalties”, limit Canadian taxation of non-residents’ business income to income attributable to a Canadian “permanent establishment” through which a business is conducted; Canada generally is an adherent of the OECD’s “Authorised OECD Approach” and has incorporated that Approach directly in its tax treaty with the United States. Other distributive rules in treaties apply among others to interest, dividends, and royalties. Frequently there are exceptions to or limitations on the preservation of Canadian source taxation for example of payments in the nature of royalties that compensate for the use of various manifestations of “intangibles” other than, generally, trademarks and franchises. Canada does not generally adopt the OECD Model article 12 renunciation of source country taxation of “royalties”, instead adopting a treaty approach that strongly reflects the approach in the UN Model which reflects an implicit understanding that payments contemplated by article 12 may be understood to be a species of business income earned without the recipient needing to be personally present in the source country.

2.2. What does this all mean?

The force and systemic inclination of Canadian income taxation is:
- to tax income that in one way or another has a close enough connection or nexus to be considered not only to arise or originate in Canada in an economic
sense but also to have its “source” in Canada according to applicable private law determinations of the source of amounts constituting income; 

– to tax foreign active business income that has its connection with business presence and activities of Canadian taxpayers in other countries, whether or not the foreign business activities are carried on in incorporated form; and

– to overlook the significance of corporate intermediation for investment income and income considered from a tax jurisdiction point of view to be in that nature as, for example, redirected income of Canadian taxpayers whether or not intrinsically business income, much as would happen if the “veils” of corporate intermediation were lifted.

But Canada adheres to private law constructions as the point of departures for applying the Income Tax Act (Canada) (the Act). A key example of this, which figured prominently in the Tax Court of Canada’s and Federal Court of Appeal’s decisions in the Cameco Corporation case, is that economically equivalent business outcomes for business conducted directly by a Canadian taxpayer or indirectly “by it” through foreign corporations, have quite different tax outcomes. The former entails no deferral of tax but source country foreign tax credit. The latter entails outright tax exemption according to rules that also preserve the character of active business income when transmitted in the form of property income, e.g., interest, that is payments among foreign affiliates that are deductible to the payers in computing their actual and deemed active business income under the generally foreign tax rules that apply to them, in which a Canadian shareholder has a substantial, i.e., “qualifying” (10% measured with reference to total votes and aggregate value) interest. That said, conceptually, there is a degree of conceptual parity in how foreign business income is taxed as long as foreign tax rates are roughly equivalent to Canadian tax rates. That is, Canada offers direct foreign tax credit on a country basis for foreign tax up to the Canadian tax that would have been exigible on that income, in a manner of speaking tantamount to the exemption that applies to income earned by foreign affiliates as long as the income is or originates as active business income of a foreign affiliate that is the original earner.

Broadly, non-residents who “carry on” or are deemed to carry on their businesses in Canada are meant at least to be Canadian tax filers and, more to the point, Canadian taxpayers with regard to income that is generated in the Canadian business environment and from Canadian markets.

2.3. The over-arching implication

In a nutshell, Canada expects to tax the business income of its residents wherever it is earned but renounces that tax it otherwise would collect as long as it is taxed elsewhere in a tax regime that Canada, via its treaty and tax agreement relations, is taken to have judged sufficiently relationally robust compared to its own. To be slightly provocative, not in so many words or in these terms, Canada taxes corporate groups according to the economic units that they are, while accommodating the “reality” of their fragmentation into separate legally distinct pieces as long as there is no material tax leakage.

2.4. Now to Cameco – What happened?

Cameco Corporation’s foreign business structure was relatively unremarkable according to the evidence presented to and accepted by the Courts, and as the Federal Court of Appeal wrote in their reasons could be described in much more economical terms than the Tax Court’s extensive and detailed exploration of the facts of the case. The Canadian parent established subsidiaries first in Luxembourg and then Switzerland to source, sell and distribute enriched uranium. The business catalyst was the significant geopolitical event in the early 1990s, entailing the release for private access of Russia’s stockpile of enriched uranium following the fall of the Soviet Union. This seemingly was perceived to threaten significant market disruption with related business implications for Cameco Corporation. In connection with two other enterprises, it secured with them what amounted to controlled access to and opportunity to distribute the enriched uranium sourced from Russian reserves. The Swiss branch of the Luxembourg affiliate that evolved into the Swiss affiliate had modest business operations of its own in Switzerland but contracted to procure necessary services provided by the Canadian parent from which it also purchased Canadian-sourced enriched uranium for sale and distribution international. It did these things, as the Tax Court found, within a corporate group structure that was neither a “sham” in the sense that it would involve deceitful misrepresentation of its circumstances according to Canadian tax law, nor out of the ordinary in relation to the structural expectations of the Canadian tax system for organizing and conducting international business via foreign affiliates. Earlier in this commentary, salient structural features of the Act were noted to the effect that foreign incorporated business income is not taxed while, generally, it remains in corporate solution, that is, in the surplus of foreign corporations that are foreign affiliates of Canadian shareholders or Canadian corporate shareholders that receive actual distributions, and only taxed, if ever, when distributed, generally, to “individuals” (including trusts) or non-residents (in this case via non-resident withholding tax). All of this further assumes, as the Courts found, that the transfer pricing for the various transfers of product and services within the group that included the Swiss business presence was sustainable according to the arm’s length standard in so far as it was expressed in section 247 of the Act, the Canadian transfer pricing “rule”. In other words, “Canadian income” was not effectively being diverted to the “offshore” of Canada.

2.5. The Cameco side of the connection to the two subjects of this commentary

On 18 February 2021, the Supreme Court of Canada brought to an end the Canada Revenue Agency’s (CRA) challenge of Cameco Corporation’s transfer pricing for a number of its taxation years in the mid-2000s by denying an application for leave to that Court brought by the tax authorities to appeal the Federal Court of Appeal’s June 2020 decision1 sustaining the taxpayer’s transfer pricing, as had the Tax Court of Canada before it in September 2018.2

The CRA essentially had sought to disregard Cameco’s foreign group structure, asserting that it was either a “sham” or that it amounted to purposeful tax avoidance undertaken with transactions that would not have been undertaken by arm’s length parties such as to justify the application of paragraphs 247(2)(b) and (d) of the Income Tax Act (Canada) (the Act).

Subsection 247(2) of the Act, the engine of Canada’s transfer pricing “rule”, has two aspects, both dealing with “transactions” (defined in that section to include arrangements and events as well as typical contractual interactions) and anticipating adjustments to the computation of a taxpayer’s income associated with transfer pricing adjustments to the “quantum” or “nature” of amounts relevant for this purpose.

One aspect, framed by paragraphs 247(2)(a) and (c), the “(a)-(c) axis”, contemplates adjustments for transactions that have comparable market analogues but for which by way of a typical transfer pricing analysis there are determined to be “terms or conditions” that would not be found in transactions involving arm’s length parties. The remedy for adjustments based on this axis is a typical transfer pricing adjustment, commonly informed by market reference points.

The other aspect, particularly contentious in Canadian transfer pricing, is found in paragraphs 247(2)(b) and (d), the “(b)-(d) axis”, which applies to transactions that “(i) would not have been entered into between persons dealing at arm’s length, and (ii) can reasonably be considered not to have been entered into primarily for bona fide purposes other than to obtain a tax benefit”. The manner in which purposeful tax avoidance is expressed is essentially the same as how “avoidance transaction” is defined in the Canadian general anti-avoidance rule in section 245 of the Act, without however the exception in section 245 for transactions not considered to be abusive of the Act (presumably because it is considered to be inherently abusive not to report the “right” amount of income in a self-enforcement tax system that has this expectation). In other words, this axis contemplates purposeful tax avoidance enabled through transfer pricing, involving transactions that arm’s length parties would not be able to undertake, for example where highly valuable “intangibles” might lose their exclusivity if disclosed to arm’s length parties, or, simply, transactions that can be configured as they are because they are able to be sculpted in bespoke ways when no third-party influences are present. The remedy for this aspect is to adjust the income of the taxpayer as if “the transaction or series entered into between the participants had been the transaction or series that would have been entered into between persons dealing at arm’s length, under terms and conditions that would have been made between persons dealing at arm’s length.”

The “(b)-(d) axis” has given rise to questions from the outset of section 247’s introduction into the Act in the late 1990s about the kind of analysis that axis entails:

- whether it sets up a hypothetical transaction as a reference;
- whether it focuses only on transactions of or that would have been undertaken by the particular taxpayer or applies to a broader range of possible alternative formulations;
- whether the “(a)-(c) axis” and “(b)-(d) axis” are separate stand-alone transfer pricing tests with separate remedies; and
- to put it in the language of the contemporary transfer pricing moment, whether it permits the tax authorities to recharacterize a taxpayer’s transactions in a different legal image and then apply the Act to what amounts to transactions substituted by the tax authorities for what actually happened even where what actually happened was properly implemented.

In the Cameco Corporation case, the tax authorities sought to apply the “(b)-(d) axis” as if it constituted a stand-alone means to adjust Cameco Corporation’s income using the transfer pricing rules but, evidently, with a mindset informed by their belief in the alternative argument of “sham”. In other words, the tax authorities sought to use the “(b)-(d) axis” as a recharacterization rule. To that end, they argued that all the foreign income was that of, and properly reportable by, the Canadian parent corporation regardless of the group’s organizational structure and transactional relationships within it.

All levels of Court, the Federal Court of Appeal and the Tax Court of Canada explicitly and the Supreme Court of Canada implicitly, by their denial of the leave-to-appeal application, disagreed. The Federal Court of Appeal and the Tax Court made important observations about the scope and contours of the Canadian transfer pricing rule in section 247 of the Act that have notable implications for the future of Canadian transfer pricing in dismissing both of the Crown’s lines of argument.

These decisions are well enough as a resource for these comments chronicled elsewhere.3 The comments in this

article will focus on the “takeaways” from this case and their implications, rather than the long path of the case which, as the Federal Court of Appeal noted, consumed 69 days of trial time over 11 months and involved 27 fact and expert witnesses between the taxpayer and the Crown.

2.6. Private law and the foreign affiliate system meet transfer pricing

The foundation of the Crown’s case was to deny the significance for tax purposes of Cameco’s foreign structure. This was clearly evident in the Crown’s assertion that all the foreign income constituted income of the Canadian parent, a very unusual posture for a typical transfer pricing case where the balance of the allocation of group income is in issue but the entitlement of all transaction participants to some measure of income would rarely if ever be denied.

Essentially, the Crown argued that Cameco’s foreign structure was unnecessary for its business operations which, in any event, the Canadian parent contributed to in material operational ways through product sales and the provision of services to the Swiss operations. To the point, the effect of the Crown’s argument, via the sham portal and by invoking the tax avoidance axis of the Canadian transfer pricing rule in paragraphs 247(2)(b) and (d), was to “lift the corporate veil” of the foreign structure with reference to its economic and business insubstantiality. Using for purposes of this commentary the contemporary jargon of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines), the Courts essentially were asked, though not in these terms, to find that Cameco’s corporate structure was not “accurately delineated” or “commercially rational”, such that the income attributed to the Swiss branch/subsidiary did not reflect “value created” there rather than by and at the parent in Saskatoon, Saskatchewan. The “(b)-(d) axis” in subsection 247(2) offered a convenient framework (as reflected by the Crown’s position) because that axis applies to transactions that would not have been undertaken by arm’s length parties and were undertaken in aid of purposeful tax avoidance. If it applies, section 247 foresees adjustments to the “quantum” and “nature” of amounts relevant to computing a Canadian taxpayer’s income. The CRA has long equated the “(b)-(d) axis” with generous licence to “recharacterize” a taxpayer’s transactions.

2.7. What the Courts found

On the basis of the evidentiary findings of the Tax Court which the Federal Court of Appeal saw no reason to question or disturb, the taxpayer’s corporate structure was respected. The Courts said that the taxpayer and its group conducted themselves in accordance with the private law constructions they used to establish themselves and engage in transactions. There was no misrepre-

sentation or deceit. In effect, “sham” is not a backdoor “lift the corporate veil” rule to be invoked according to assertions about what the business circumstances did or could have required. To address one of the points earlier, which the Courts seized on, the entire foreign affiliate aspect of the Canadian tax system in the Act is an articulation of respect for organizational and transactional forms that are economically equivalent to the same activities being conducted without them, but with different or at least differently orchestrated tax consequences.

In other words, private law constructions matter, and are to be restricted. Their darker side, however, as others have noticed, is to turn tax system into a regime of elections facilitated by selecting among private law constructions in light of the tax system features effectively to fashion one’s own bespoke tax system.6 Foreshadowing later comments, this intersection of private and tax law lies at the core of most transfer pricing controversy and enables “digital business” to carry on business everywhere and nowhere at the same time in so many cases given their lack of need for “presence” almost anywhere.

As far as the problematic “(b)-(d) axis” of subsection 247(2) is concerned, the Courts concluded that its role in the Act is to identify as an analytical heuristic an alternate transactional formulation that would achieve the same economic outcome as the “off market” transactions undertaken by a taxpayer, as an aid then to applying the typical transfer pricing regime framed by paragraphs 247(2)(a) and (c) of the Act. The “(a)-(c) axis” tests the income implications of the pricing of transactions for which there are market reference points. In effect, the “(b)-(d) axis” is a feeder of sorts to enable the “(a)-(c) axis” that reflects the normative deference of transfer pricing to comparable transactional terms and conditions to operate in the normal way but for the absence of a of a suitable comparable transaction. Effectively, as the Courts reasoned, a counter factual transactional setting must be hypothesized as an analytical expedient to accommodate within the statutory expectations otherwise of section 247 transactions actually undertaken uniquely by the taxpayer within its group, which do not have a readily apparent actual arm’s length analogue, and indeed may be possible only because they occur within a commonly controlled group. Diluting further the imagined scope of the “(b)-(d) axis”, the Courts’ interpretation of the provision was that this provision asks whether transactions sought to be brought within its ambit are of a kind that any person would have undertaken, contrary to the Crown’s assertion that the relevant inquiry was what the particular taxpayer would or would not have done in its business relations. This added more force to the implication that this axis was an heuristic or analytical expedient to assist the application of the “(a)-(c) axis” when a direct market comparable is not available and also to


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This an important finding of the Courts, most clearly articulated in the Tax Court’s reasons, because its effect is to limit section 247’s double aspect as a specific anti-avoidance rule and to severely limit the significance of the CRA’s equation of the “(b)-(d) axis” with an entitlement to “recharacterize” a taxpayer’s organizational and transactional arrangements if it detects unwarranted tax avoidance tied to transactions without a direct market analogue. The Tax Court went out of its way to say that the arm’s length standard is only a feature of Canadian law to the extent that it can be found in section 247, which reflects the Supreme Court of Canada’s notable observation in the GlaxoSmithKline transfer pricing case. The OECD Guidelines are not law in the sense of statutory law, and that the “(b)-(d) axis”, as referred to in this commentary, is not a recharacterization rule.

There are, however, even deeper implications for Canadian transfer pricing in the context of the OECD Base Erosion and Profit Shifting (BEPS) Project-induced revaluation of some of the OECD Guidelines’ featured aspects. The CRA had publicly equated some of these aspects (“accurate delineation”, “commercial rationality”, and “value creation”) to “recharacterization”. Since then, as recently as earlier this year, the CRA has sought to distinguish the dilution of the “(b)-(d) axis” by claiming, though not without a guarded acknowledgment that things may have changed, that the circumstances litigated in Cameco were somehow idiosyncratic in this regard and that this axis still has a recharacterization aspect. At a May 2021 Canadian Branch International Fiscal Association meeting, the CRA stated:

Question 4 – Section 247 Post Cameco FCA decision

Can the CRA advise on how it intends to amend its administrative policies in interpreting and applying section 247 following the Supreme Court of Canada’s decision not to hear the Crown’s appeal in The Queen v. Cameco Corporation, 2020 FCA 112 upholding the Tax Court of Canada’s decision (“Cameco”)?

CRA Response

The CRA considers the specific facts in Cameco to have been highly relevant in arriving at the decisions of the Tax Court of Canada (2018 TCC 195) and the Federal Court of Appeal (2020 FCA 112).

That said, the CRA also recognizes that these decisions may limit situations where the re-characterization provision in paragraphs 247(2)(b) and (d) could be applied.

As such, the CRA is currently reviewing its ongoing cases in light of the Cameco decision. However, the CRA will continue to consider the application of the re-characterization provision where appropriate.

The CRA will continue to administer and enforce paragraphs 247(2)(a) and (c) in a manner consistent with the guidance provided by the Federal Court of Appeal in Canada v. General Electric Capital Canada Inc. (2010 FCA 344). At paragraph 54 of the latter decision, the Court states, with respect to paragraphs 247(2)(a) and (c):

“...The task in any given case is to ascertain the price that would have been paid in the same circumstances if the parties had been dealing at arm’s length. This involves taking into account all the circumstances which bear on the price whether they arise from the relationship or otherwise.”

Additionally, as recently announced in Budget 2021…, the government intends to consult on Canada’s transfer pricing rules with a view to protecting the integrity of the tax system while preserving Canada’s attractiveness as a destination for new investment and business activity.

The Department of Finance indicated it will release a consultation paper to provide stakeholders with an opportunity to comment on possible measures to improve Canada’s transfer pricing rules. [Emphasis added.]

There is an understated but also important implication of both the Cameco decision and the CRA’s statement about the recognition of a key feature in the General Electric transfer pricing case to which the CRA refers. Among others, at issue in the General Electric case was whether intrinsic features of a corporate group are relevant in determining the circumstances of a tested taxpayer, or whether the analysis called for by the transfer pricing guidance was entirely agnostic. In other words, the question was whether the transfer pricing guidance applied to “that” taxpayer or to a taxpayer – any taxpayer – in like circumstances apart from its identity as a member of a corporate group. In biological terms the issue is whether the corporate “genes” count to determine the “make-up” of the taxpayer the circumstances of which are then measured with reference to external events. In the General Electric case, as the CRA quotes the Court and as the Federal Court of Appeal also quoted in its reasons for the Cameco decision, the corporate genes – “taking into account all the circumstances which bear on the price whether they arise from the relationship or otherwise” – are indeed a factor in establishing “who” the taxpayer is in a “comparables”-oriented or broader transfer analysis. This is, according to what somewhat colourfully, but without the implied divination, has been described generally in transfer pricing literature as the “halo effect”, arising from membership in a corporate group.

Interestingly, and possibly the source of some equivocation on the CRA’s part in its acknowledgment of the


8. For example, comments made by the Canada Revenue Agency during a Roundtable discussion at the 2018 Annual Conference of the Canadian Tax Foundation reported by Neal Armstrong summarizing comments made by Matias Milet and Jennifer Horton in a paper to which Armstrong refers; M. Milet & J. Horton, CRA goes along with new OECD transfer pricing policy of overriding the local characterization of transactions. Tax Interpretations [10 Jan. 2019], available at https://taxinterpretations.com/content/525865 (accessed 3 Aug. 2021); the CRA’s comments at that Tax Conference are reported here in Tax Interpretations: https://taxinterpretations.com/cra/severed-letters/2018-0779931c6 (accessed 3 Aug. 2021).

9. 2021 IFA Canada Tax Conference. Canada Revenue Agency Roundtable. Questions & Answers, held on May 5, 2021. (The following legend appears in the IFA record of the Roundtable: ”Please note that the following questions and answers are not official and are subject to change until they are published by CRA.”) This is also reported in Tax Interpretations, available at https://taxinterpretations.com/content/610265 (accessed 3 Aug. 2021).

effect of the Cameco decision and in that connection its reminder about what the Court found in General Electric,
is the significance of the Federal Court of Appeals generalization of the test in the “(b)-(d) axis” of subsection 247(2) of the Act:

[54] In addressing paragraph 247(2)(d) of the Act, the Crown states in paragraph 32 of its memorandum:

Pursuant to s. 247(2)(d), the court must ask what Cameco Canada would have done if it had been dealing at arm’s length from the Swiss Subsidiary. At arm’s length, Cameco Canada would not use two intermediaries, when one of them adds nothing of value. Pursuant to s. 247(2)(d), Cameco Canada can be assessed on the basis that at arm’s length, it would have purchased uranium from third parties and sold uranium directly to Cameco US without the Swiss Subsidiary as part of the economic chain.

[55] There are two problems with this proposed alternative arrangement. The first problem is that paragraph 247(2)(d) of the Act does not ask what one of the participants would have done. Rather, it asks what transaction or series of transactions would have been entered into between persons dealing at arm’s length and what would have been the terms and conditions of that transaction or series. This is not, as the Crown suggests, simply asking what one of the two participants would have done. Rather, it requires the Court to substitute for the transaction or series of transactions entered into between the participants, the transaction or series of transactions that would have been entered into between persons dealing at arm’s length.” [Emphasis added.]

That said, the last sentence of paragraph 55 quoted from the Federal Court of Appeal’s reasons, with regard to the point about identifying what amounts to a proxy, or alternate, or as the Court says “substitute” transactional paradigm not confined by a taxpayer’s own immediate situation, seems still to be consistent with the formative need to consider all relevant features of the taxpayer even if the range of transactions to consider is not limited only to those (kinds of) transactions that the particular taxpayer, however it is described, would have undertaken. In other words, just as it is the case for members of a nuclear family, any member of that or by analogy a corporate family has the genes of that family and is defined not only by their overt personal characteristics but by what they mean and where they came from in that family context. A tested taxpayer, as a corporate family member, necessarily reflects its family circumstances, and in an analysis that seeks to determine whether it and its transactions are similar or comparable to others and those of others, this point of departure for any such analysis is important.

To segue to the second theme of this commentary, essentially the CRA sought to tax Cameco and its relevant group members as an economic unity despite the effect of legal fragmentation to exclude a lot of income from being subject to tax in Canada. Taking into account the evidence concerning Cameco’s business and organizational structure and decisions and the conduct of its group members within the legal framework adopted to conduct Cameco’s business, the Canadian system applied essentially to the economic unity comprising the relevant members of the Cameco group in spite of that legal framework but guided by jurisdictional parameters that animate the taxation of international income, by excluding income that was determined, again on the evidence, not to have been earned “in Canada”. This is a result that aligns with understand-

In much starker terms, perhaps, is this not the confrontation faced by tax systems the world over by so-called “digital business” – the confrontation that has sparked deliberate and actioned interest in “digital services taxes”?

3. Canada Considers a Digital Tax

In October 2020, in its Fall Economic Statement, the Canadian government announced its intention to address incursions made on the Canadian fiscal attributable to business conducted through digital modalities. Among other things these are perceived to present a competitive disadvantage to similarly situated Canadian businesses that are fully within the Canadian tax system.

Changes were proposed to Canada’s “goods and services” “harmonized sales tax” (GST/HST) excise tax regime to specifically require and enforce the collection of GST/HST on supplies of goods and services by Canadian residents and non-residents of Canada facilitated or accomplished digitally. Among the objects of these changes were music and video streaming services, on-line market-place platforms effected through various kinds of “apps”, digital platforms for short-term accommodations, and deliveries made by non-residents via Canadian facilitation centres. The Federal Government’s initiative followed or was contemporaneous with a modest patchwork of like Provincial initiatives in Quebec, British Columbia, Saskatchewan, and Manitoba, often dubbed “Netflix tax”. The comments in this article note but will not explore much further the excise tax initiatives, except to observe that directionally in tax policy terms they are consistent and motivated by the same kinds of considerations.

In the same statement, the government indicated its intention to introduce a “digital services tax” while nevertheless maintaining its willingness to cooperate in the search for a global solution from the OECD through the ongoing Pillars One and Two work that, the government said, would if successful displace the Canadian initiative. At the time, the government said:

The government remains committed to a multilateral solution, but is concerned about the delay in arriving at consensus. The government therefore proposes to implement a tax on corporations providing digital services, with effect from January 1, 2022, which would apply until such time as an acceptable common approach comes into effect. On a provisional basis, it is estimated that the new measure would increase federal revenues by $3.4 billion over 5 years, starting in 2021-22. Further details will be announced in Budget 2021.12

The government restated its objectives as set out in the Fall Economic Statement, in the Canadian Federal Budget of 19 April 2021, and has proceeded to further develop and implement the GST/HST changes to the Excise Tax Act, Canada, which is the statutory home of the GST, with effect from 1 July 2021.

The government also announced its continuing intention, on the same terms, essentially, as advanced in the Fall Economic Statement, to proceed with a digital services tax until a satisfactory and effective multilateral solution would be achieved. In the Budget document, the government said:

The government is committed to ensuring that corporations in all sectors, including digital corporations, pay their fair share of tax on the money they earn by doing business in Canada. Increasingly, many digital companies earn revenues from the active collection and use of Canadians’ data. In the 2020 Fall Economic Statement, the government announced that it would be moving ahead to implement a tax on corporations providing digital services. This builds on the changes announced at that time to ensure that the Goods and Services Tax/Harmonized Sales Tax applies in a fair and effective manner to the growing digital economy.

Canada has a strong preference for a multilateral approach to this issue. Work is underway to reach a multilateral agreement on cross-border digital taxation by mid-2021, and Canada is optimistic about the progress made this year. However, multilateral discussions have been going on since 2013. That is why, while Canada’s hope and preference is for a multilateral solution this summer, whether or not a deal is reached, Canada intends to take action.

- Budget 2021 proposes to implement a Digital Services Tax at a rate of 3 percent on revenue from digital services that rely on data and content contributions from Canadian users. The tax would apply to large businesses with gross revenue of 750 million euros or more. It would apply as of January 1, 2022, until an acceptable multilateral approach comes into effect. This would help ensure that Canada’s tax rules capture new ways in which businesses carry out value-creating activities.

It is estimated that this measure will raise $3.4 billion in revenue over five years beginning in 2021-22.13

The government’s proposal is built on an explanation that conveys an underlying awareness of the limitations of typical international tax jurisdiction parameters as they are commonly understood.

“Commonly understood” is an important qualifier because common (sense?) but legally principled interpretations of notions like “permanent establishment”, a significant contributor to perceived international tax leakage, i.e. “base erosion”, grounded in their origins reaching back to the work of the League of Nations in the 1920s and 1930s, are constructively possible. Typically, these notions are interpreted narrowly hand in hand with private law legal organizational and transactional constructions, in relation to “bricks and mortar”, as if they amounted to prescriptive rules somehow frozen in the time of now outmoded business modalities. If, however, they are seen as indicative markers of how according to the intrinsic features and requirements of how a business actually operates (and in light of what that business is, needs to operate) and relates to markets given the nature of the business, in other words as descriptive of the circumstances to which they apply informed by the nature of those circumstances rather than as limiting about how business “must” be conducted regardless of its natural rhythm, it is much less clear that existing parameters are so bereft of utility.14 In other words, a business presence and a taxable business presence is what “that kind” of business requires, not what some other kind of business had 80 years ago because at that time to do much the same kind of thing the limitations of transportation and communication required (and indeed only offered) a “physical” nexus.

3.1. Key features of Canada’s proposed digital services tax

Canada proposes to take a constructive view of what constitutes a taxable business presence, seeing consumers active on global platforms as instrumentalities of digital goods and services providers. How the government has described it in the Budget is revealing:

Digital technology has resulted in the development of new business models and ways of creating value. In the digital economy, data is a key commodity and the collection, processing and monetization of data is a key commercial activity. New business models have developed involving online platforms that attract users through certain service offerings, collect data and content contributions from the users, and then monetize that data and content in order to earn a profit. Examples of such business models include:

- social media platforms and search engines that earn revenue from advertising that they target based on data they have gathered about their users’ interests, and
- intermediation platforms that create online markets for sellers and buyers of goods or services (e.g., taxi rides, short-term accommodations), exchange information across the platform about those on the other side of the market and facilitate transactions between them.

In these business models, the users are not mere customers of the platform or passive recipients of its services. The active participation of users, in interacting with the platform and providing data and content contributions, is a key contributor to the product offering of the platform. This user participation is a key input

12. Id., at p. 113.


in the platform business’s production process in a way similar to labour and physical capital in a more traditional business. For example:

- a search engine cannot earn advertising revenue without users to view ads and provide information allowing those ads to be targeted; and
- an accommodation platform cannot facilitate transactions without information about available apartments to share with potential renters and information about renters seeking premises to share with apartment providers.

Current tax systems, however, were generally designed for a bricks-and-mortar economy and effectively assume that value is created only in places where physical resources, like employees, facilities and equipment, are located. Given their reliance on digital technology, businesses of this type do not require a local physical presence in order to engage with users and collect their data and content. These businesses nevertheless can reasonably be considered to be conducting this part of their value-creating activity, even if it is controlled remotely, in the location of the users. This activity, however, is not always subject to local tax under current rules.

Since user-intensive commercial activity of this kind is dominated by businesses that are multinational in scope, this issue would be best addressed multilaterally. To this end, the international community has been discussing possible approaches for a number of years. In the project on Base Erosion and Profit Shifting (BEPS) undertaken by the members of the Organisation for Economic Co-operation and Development (OECD) and the G20 from 2013 to 2015, digital economy challenges were designated as Action 1 of the 15 action items. No agreement, however, was reached under Action 1 on a common approach with respect to corporate-level tax. Intensive discussions on the challenges of digitalization re-started in 2017 through the OECD-led Inclusive Framework on BEPS (which now has 139 member jurisdictions). Due to the inability to reach consensus, however, in October 2020 the target date for agreement was deferred to mid-2021.

Canada has a strong preference for a multilateral approach and so continues to work actively toward this goal with our international partners. However, there have been delays in reaching agreement and there is uncertainty about when an eventual agreed approach will come into effect. The government therefore proposes to implement an interim measure.15 “[Emphasis added.]”

The government’s critical appreciation of what a taxable business presence means, including in the traditional linguistic formulations of business presence, is noteworthy. Able to see the difference between the challenges of effec
tive tax administration, on the one hand, and the internally consistent features of coherent fiscal and tax policy on the other, the Canadian government sees Canadian consumers as the emanations and establishments of their non-resident goods and services providers. In other words, those service providers have what can be understood, in the constructive and descriptive rather than prescriptive perceptions of typical tax jurisdiction parameters, to be “permanent establishments”. In effect, consumers have a dual role, not only as consumers in their own interests but as domestic hosts – in a non-legal sense “agents” – of the entire operating businesses of their non-resident counterparties. Applying typical international tax law perceptions, effectively they are “dependent agents” in the sense contemplated by article 5(5) of the OECD and UN Models in as much as they are the instruments through which general contractual authority is exercised by the

16. In this connection, see the several references to Wilkie, supra n. 14. See also a recent decision of the French Conseil d’Etat in Consenat Interna
ble at https://www.internationallawreview.com/article/81dq2yxxch
ym/conseil-deetat-recharacterises-the-existence-of-a-pe-in-the-digi
tal-economy (accessed 3 Aug. 2021); and N. Armstrong, ValueClick – French Supreme Court finds that French staff who lined up the contracts (albeit “automatically” signed elsewhere) gave rise to dependent-agent PEs constituted by agents of a non-independent status. In affirming the position of the French tax authorities that Value-Click Ireland had an agency PE in France, the Supreme Administrative Court stated that a French company could be considered to be habitually exercising the authority to conclude contracts in the name of an Irish company “if, on an habitual basis – even if it does not formally conclude contracts on behalf of the Irish company – it decides on transactions which the Irish company merely endorses and which, once endorsed, bind it.” The Court went on to state: “[W]ith the Irish company, with the Irish company merely validating the contract by a signature which is of an automatic character.” OECD, 130 countries and jurisdictions join bold new framework for international tax reform, with attached documents, available at https://www.oecd.org/tax/beps/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm (accessed 3 Aug. 2021); and OECD, OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors (July 2021), available at https://www.oecd.org/tax/oecd-secretary-general-tax-report-g20-fi

17. However, there are many steps to take, despite the OECD’s ambitious October 2021 goal, before there will be wide agreement on what amount to global source rules and related Pillar One and Pillar Two details much less their enactment as law sufficiently universally and timely to make their adoption reliable. The “source question” –

15. Supra n. 11, Annex 7, 731.
how to determine the source of income and whether there is or ought to be a universal standard in light of countries’ different tax and private laws — has lain largely unspoken as such at the core of BEPS but indeed is “the” question intrinsic to all the “hard” international tax questions reaching back to League of Nations days and most recently before BEPS in the challenge of “intangibles” in relation to transfer pricing, in BEPS Actions 8–10, in the revisions of chapter VI of the OECD Guidelines, and in the introduction of chapter IX of those Guidelines to deal with “Business Restructurings”. With these considerations in mind, though there is no official guidance, it would be surprising and possibly unwise if Canada did not proceed with this tax initiative for now, at least, possibly recanting it later if a new world order really does emerge as enforceable law among enough countries to make it universally effective and reliable.

3.2. The mechanics

The Canadian tax initiative is such an important measure particularly in light of other countries’ like taxes and the impending design of the OECD’s Pillar One-based alternative, that it is useful to let the Canadian government describe the intended parameters of this tax. Like other “digital services taxes”, the approach taken by the government amounts to treating the typically separate questions about whether business is being carried on in a place and where it is being conducted according to how tax regimes establish taxable presence, as part of the same determination. In effect, the two notions are combined, so as to apply a tax that is fundamentally on income by taxing one of the income’s components simply because business is carried on in a market jurisdiction as evidenced by transactions with market residents. In this regard, it is helpful to recall the earlier summary of the parameters of Canadian taxation which anticipate non-residents being taxable by Canada if they carry on, or are deemed to carry on, a business by soliciting orders or offering through Canadian representation anything for sale in Canada. More broadly, the effect of “digital services taxes”, apart from excise taxes directed at the same kinds of digital events, is to dispense with “permanent establishment” notions as prescriptive determinants of tax jurisdiction where, as commonly understood, they are archaic for digital modalities of business because they contemplate ways of conducting business that those businesses neither need nor use, at least in typical ways. An alternative conception is that customers are in the nature of establishments through which business is conducted, which at least enables a traditional analytical paradigm to guide the result.

In the Budget, the government explained the design and operation of the tax this way:

The proposed tax would have the following key features.

- **Rate and Base**: The DST would apply at a rate of 3 per cent on revenue from certain digital services reliant on the engagement, data and content contributions of Canadian users. …
- **In-Scope Revenue**: The DST would apply to revenue from online business models in which the participation of users, including by the provision of data and content contributions, is a key value driver. Specifically, it would apply to revenue from:
  - **Online marketplaces**: Services provided through an online marketplace that helps match sellers of goods and services with potential buyers, whether or not the platform facilitates completion of the sale. … This category would not generally include:
    - revenue in respect of the storage or shipping of tangible goods sold through the marketplace.
    - the sale of goods and services (including the sale, licensing or streaming of digital content such as audio, video, games, software, e-books, newspapers and magazines) by a seller on its own account; and
    - trading in financial instruments and commodities.
  - **Social media**: Services provided through an online interface to facilitate interaction between users or between users and user-generated content.
    - **User data**: The sale or licensing of data gathered from users of an online interface, including anonymized and aggregated data.
- **Taxpayers**:
  - **Thresholds**: The DST would apply to business organized under various forms including corporations, trusts and partnerships. The DST would apply in a particular calendar year to an entity that meets, or is a member of a business group that meets, both of the following thresholds:
    - global revenue from all sources of €750 million or more (the threshold for country-by-country reporting under an OECD standard) in the previous calendar year; and
    - in-scope revenue associated with Canadian users of more than $20 million in the particular calendar year.

For such entities or groups, the DST would apply only to in-scope revenue associated with Canadian users in excess of the $20 million threshold.

- **Group-level calculation**: Group-level calculation of thresholds is important because a firm’s administrative capacity is linked to its overall size and the revenue-generating activities linked to Canadian users may be dispersed across multiple entities in a business group. It is anticipated that groups will generally be defined in the same manner as for country-by-country reporting.
- **Large firms**: Large firms are the focus of the proposed tax for several reasons.
  - Successful leveraging of user participation, data and content as a key value creation method in an online platform involves significant economies of scale and important network effects. […]
Larger, more mature firms are more likely to be profitable and able to bear the burden of a tax on revenue, which is not sensitive to profitability. […]

Large firms are better able to manage the burden of compliance associated with a new tax and can absorb the relevant costs over a larger amount of revenue. […]

Revenue Sourcing: When revenue of an entity is contractually related to both activities within the scope of the DST and other activities, the in-scope revenue would need to be determined on a reasonable basis. In determining an entity’s in-scope revenue associated with users in Canada (as opposed to users in another jurisdiction), two general methods would be used. Where it is possible to trace revenues to relevant users in Canada on the basis of transactional information, such tracing would be required. Where such tracing is not possible, a specified formulaic allocation would be required. Revenue sourcing principles would vary according to the nature of the revenue.

Online marketplaces: Fee revenue of online marketplaces would generally be sourced to the locations of the users who interact through the interface.

Transactionable: Fee revenue associated with a particular transaction between users (e.g., a fee set as a percentage of the transaction price or as a fixed amount per transaction, or a fee otherwise set for a particular transaction) would generally be considered to be sourced 50:50 to the locations of the buyer and seller. […] However, where the transaction is an arrangement for the performance of a tangible service in a particular location (e.g., accommodations, food delivery, taxi ride), the revenue would be sourced to the location where the service is performed.

Non-transactional: Fee revenue that is not associated with a particular transaction (e.g., interface subscription fees) and revenue from advertising goods or services listed for sale on the marketplace would be sourced to the locations of the interface users on a formulaic basis. The revenue associated with users in Canada would be considered to be equal to the total of the relevant revenue multiplied by the ratio of the number of marketplace transaction participants in Canada to the total number of transaction participants. For this purpose, the buyer and seller in a transaction would each be considered a “transaction participant” and a participant would be counted each time it participates in a transaction. This allocation reflects the fact that non-transactional interface fees are generally paid for the ultimate purpose of concluding transactions with other interface users, even if those users cannot be identified at the time the fee is paid.

Social media: Fee revenue of social media interfaces (e.g., interface subscription fees) would be sourced to the locations of the interface users on a formulaic basis. The revenue associated with users in Canada would be considered to be equal to the total of the relevant revenue multiplied by the ratio of the number of active users of the interface that are users in Canada to the total number of active users in all locations. This allocation reflects the fact that interface fees are generally paid for the purpose of facilitating interactions with other interface users, including those who do not pay fees.

Online advertising: Online advertising revenue would generally be sourced based on the location of the user who views, clicks on, or otherwise consumes the advertisement. This user would often be the same user whose data has been used to target the advertisement. As an exception, revenue of an online marketplace from advertising goods or services listed for sale on the marketplace would be sourced using the formula applicable to non-transactional marketplace fee revenue (outlined above). Outside of this exception, advertising revenue would be sourced using tracing or a formulaic basis, according to the circumstances.

Tracing: Advertising revenue would be required to be traced to viewers in Canada where possible. For example, this would include revenue from a series of advertisements that shows all or substantially all (generally 90 per cent or more) to viewers in Canada and revenue from individual advertisements that is shown to viewers in Canada (e.g., where advertising fees are contractually charged on the basis of a user viewing or clicking on the advertisement or taking some other action).

Formula: Where under a contract advertising revenue associated with users in Canada and other jurisdictions is not separately identifiable, revenue associated with users in Canada would be considered to be equal to the total contract revenue multiplied by the ratio of the number of advertisement views by viewers in Canada to the total number of advertisement views by viewers in all locations.

User data: Revenue from the sale of user data would be sourced where possible to the location of the user to whom the data relates. If particular revenue relates to data in respect of both users in Canada and users in other locations, the revenue associated with users in Canada would be considered to be equal to the total of the relevant revenue multiplied by the ratio of the number of users from which the data was collected that are users in Canada to the total number of users.

User Location:

Ordinary location: The determination of whether a user of an interface is located in Canada or some other country for purposes of revenue sourcing would generally be based on the ordinary (i.e., usual) location of an individual user and the ordinary place of business of a business user. The determination of the ordinary location, or ordinary place of business, of a user would be based on information generally available to the digital service provider. This would include such indicators as recurring data on device geolocation or internet protocol (IP) address, billing address, delivery address (where relevant), and telephone area code.

Real-time location: By exception, in the cases of advertising targeting based on the real-time location of a user and the sale of data based on the real-time location of a user, the real-time location of a user would be based on device geolocation if available, or other information if not.

Consistency: Firms would be expected to use a consistent approach in determining user location, though different approaches might be used for different services depending on differences in data availability.
Treatment for Income Tax Purposes. As with other non-income taxes, the deductibility of the DST liability of an entity in computing taxable income for Canadian income tax purposes would be determined based on general principles – e.g., whether it is incurred for the purpose of earning the entity’s income subject to Canadian income tax. DST liability would not be eligible for a credit against Canadian income tax payable.

Administration: It is proposed that firms subject to DST be required to file an annual return following the end of the reporting period, which is proposed to be the calendar year. It is contemplated that:

- one annual payment would be required after the end of the reporting period;
- a group would be able to designate an entity to file the DST return and pay the DST liability on behalf of the group; and
- to facilitate enforcement, each entity in a group would be jointly and severally liable for DST payable by any other group member.

Coming Into Force

The DST would apply as of January 1, 2022. 18 [Emphasis added.] In sum, Canada’s proposed “digital services tax” will overcome the perceived limitations on the reliable application of the Act in the international context by adopting a regime that (i) does not discriminate between Canadian and non-resident business; and (ii) provides specifically (though not using traditional language) that digital businesses will be considered to carry on business in Canada at and through their Canadian market customers who are considered to have dual roles as representatives of the digital business and in their own interest, being essentially the full metamorphosis of any digital transaction. Specific sourcing rules will apply reflecting approaches that apply in other Canadian tax contexts that trace relevant transactions or use a formula. Canada is accustomed to the formulaic allocation of business income domestically, using a two-factor formula – salary and wages, and revenue – to allocate income interprovincially otherwise using points of attribution familiar from typical bilateral tax treaties.

In effect with this proposal, Canada will overcome the limitations of the private law fragmentation of economic unities and the consequential reliance on that fragmentation and staid perceptions of taxable business presence – “permanent establishment” – to avoid taxable nexus, also overcoming the perception of Canadian tax law of what it means to carry on business in a place and the bedeviling determination of income’s source ultimately using formulas.

4. Back to the Beginning

At the outset, the connection between the implications of the Cameco Corporation decision for the future of Canadian transfer pricing and the recent initiatives taken by Canada to introduce a “digital services tax” was not obvious. However, the more closely the fundamental concerns presented by each are examined, the more obvious it is that there is indeed a close connection. In both cases, the customary significance attached to private law constructions to which tax law is accessory and notions of carrying on business in particular places traceable more or less, without material change, back to the earliest time in the modern era of “international taxation” initiated by the League of Nations in the 1920s and 1930s, to mitigate gratuitous multiple tax “costs” of trade, are seen to present challenges to what the Act means in its assertion of tax liability and how then it should be administered.

In the case of transfer pricing, the manner in which the Cameco Corporation case evidently unfolded before the Courts suggests that using the available tools, although interestingly not Canada’s general anti-avoidance rule in section 245 of the Act, the Crown sought to overcome what it considered to be the arcane and unjustified effects of private law constructions for determining where income was earned and by whom. That case reflects a fundamental doubt and mistrust of private law constructions, whatever their benefits in other contexts, to have meaningful fiscal significance. The Crown did not succeed in using the available tools and how it employed them. The government has initiated consultations about the adequacy of the transfer pricing rule in the Act and whether it needs to be refurbished, with little doubt whether it has been influenced by the various and important systemic implications of the Cameco Corporation decision discussed earlier.

To much the same effect, it is the combination of arcane, by contemporary standards of how business is conducted, tax notions of carrying on business and business presence coupled with the facility offered by private law constructions effectively, as economic geographers would say, to compress time and space, and paraphrasing the author does say, effectively to be everywhere and nowhere at the same time. Both encapsulations contemplate all of the points of access to conduct core business activities “in” relevant markets but, by the nature of business operations enabled by digital business modalities, not being or needing to be in those places in ways measured according to historical business conditions commonly thought necessary to be taxable. The same influences as underlie the Crown’s arguments and the Courts’ reactions in the Cameco Corporation case are present in this context as the description of the reasons for the “digital services tax” in the April 2021 Federal Budget specifically indicate, even to imagine for this purpose customers as the “in country” business locations – in the sense of parameters of taxation – of their vendors and service suppliers. In other words, taxability is not to be judged with reference to standards or interpretations of standards premised on what the business being conducted does not by its nature and circumstances require in the first place. It remains to be seen, however, whether Canada trusts the aspirations of the 1 July 2021 OECD-led Pillars’ “agreement” to garner the necessary universal support and to be populated with the many necessary details enacted into all countries’ tax law sufficiently to abandon its “digital services tax” before

18. Supra n. 11, Annex 7, pp. 733-737. It should be noticed that a federal election is now in process and that incomplete legislative initiatives await its outcome: if there would be a change of government whether and how initiatives of the prior government would proceed, if at all, is unavoidably uncertain.
it gets going on 1 January 2022. That is an interesting question.

Even more interesting questions for the international tax discussion arise from the Cameco Corporation case and the undercurrents of “digital services taxes” exposed for example in that kind of tax as conceived by Canada. Issues they highlight are enveloped in outgrowths of BEPS and the OECD Pillars. Why in principle are more constructive notions of what it means to carry on business in a place – indeed a willingness to regard the permanent establishment concept as descriptive of how relevant businesses are conducted from time to time rather than prescriptive about how they must be conducted according to standards that may be irrelevant to them as businesses – confined to “large businesses”? Is that only a question of efficient tax administration; are substantive jurisdictional questions so conflated with those associated with tax administration that the latter are unreasonably dictating the course of the former? If so, are there clues in the Canadian proposal about how to deal with that, and in particular the linchpin notion of “permanent establishment” and, in the digital world, its dual aspect? Could tax implemented by

source withholding from manifestations of “turnover” (studiously avoiding the typical connotations of “withholding tax”) offer suitable solutions for tax administration issues that may be less complicated and unfamiliar than commonly assumed? There is much to discuss, even with taking account of seeming global enthusiasm and aspiration for an albeit qualified global quasi-single tax system as contemplated by the 1 July 2021 announcement by the OECD.

But the fundamental questions at play are simpler – and for that, perhaps harder given how far they penetrate the more immediate and obvious topics of international tax discussion – than commonly imagined. They converge on the absence of a universal (legal) conception of the “source” of income and a general unwillingness to confront in a direct and straightforward way the recumbent fiscal significance of organizational forms and expressions of transactional interaction, both of which are the core issues addressed in the Cameco Corporation decision and underlying Canada’s proposed “digital services tax”.

At the outset, as a premise for the comments in this article, the connection between the Cameco Corporation transfer pricing case and Canada’s recent expressions of its intention to proceed with a “digital services” tax was said not to be obvious. Possibly, it is much clearer than it might seem.

19. This assumes of course that the outcome of the ongoing Canadian federal election does not change the course of this initiative.
20. See supra n. 13.