

BEWARE OF STATE AND LOCAL TAXES ON REMOTE SALES INTO THE UNITED STATES

By Ian MacInnis

The recent decision of the Supreme Court of the United States (the "USSC") in *South Dakota v. Wayfair, Inc.* (No. 17-494), has substantially expanded the taxation powers of the U.S. States to collect sales tax. As a result of this decision, many Canadian businesses that sell into the United States may now be required to collect and remit State and local sales taxes, even where the business has no physical presence such as a store or warehouse in the State.

In *Wayfair*, the USSC overturned its 1992 decision in *Quill Corp. v. North Dakota*. In *Quill*, it was held that the commerce clause in the U.S. Constitution prohibits States from imposing sales tax on sellers who lack "minimum contacts" with the State, such as a store or warehouse or other place of business. In *Wayfair*, the USSC took into account the emergence of e-commerce, the Internet and the ability of businesses to conduct sales in a jurisdiction without having a physical presence. The Court found that the physical presence rule in its earlier decision in *Quill* has placed local businesses and interstate businesses that have a physical presence in the jurisdiction at a competitive disadvantage compared to Internet retailers.

South Dakota was one of many States that had ignored the constitutional issues surrounding online retailers and had enacted legislation to impose sales tax on sellers who annually had more than \$100,000 of sales or 200 separate sales transactions in the State. In *Wayfair*, the USSC ruled that this degree of activity satisfied the "minimum contact" requirement to impose the sales tax and collection obligations and satisfied the substantial nexus requirement with regard to the commerce clause of the U.S. constitution. The USSC concluded that a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term. The Court did not attempt an exhaustive definition of "minimum contact" or otherwise provide guidance on the particular degree or nature of presence required to fall within the sales tax jurisdiction of a particular State.

As a result of *Wayfair*, remote sellers, marketplace facilitators, service providers, licensors of software and other businesses that provide services and deliver products to customers in the U.S. from a



[Tammy J. Anklewicz](#)
Partner

t: 416.365.3710
tanklewicz@foglers.com



[Leonard P. Bosschart](#)
Partner

t: 416.864.7600
lbosschart@foglers.com



[Shaun M. Doody](#)
Partner

t: 416.941.8826
sdoody@foglers.com



[Peter K. Guselle](#)
Partner

t: 416.941.8818
pguselle@foglers.com

remote location may have to start complying with State and local sales and use taxes. Canadian businesses that sell online into the U.S. should consider acquiring or modifying software to track sales in determining their liability to collect and remit State and local taxes. Many States have imposed sales and use taxes that have an economic nexus test similar to South Dakota. It is reasonable to expect that many of the other remaining States might revise their tax legislation to widen their economic nexus test to something similar to South Dakota where a physical presence in the State is not required.



[Ian V. MacInnis](#)
Partner

t: 416.941.8813
imacinnis@foglers.com



[Mary Wahbi](#)
Partner

t: 416.864.7629
mwahbi@foglers.com

[Marc Weisman](#)
Partner

T: 416.864.7625
mweisman@foglers.com

Fogler, Rubinoff LLP
Lawyers
77 King Street West
Suite 3000, PO Box 95
TD Centre North Tower
Toronto, ON M5K 1G8

t: 416.864.9700
f: 416.941.8852
foglers.com