SURTAX! WHAT TO DO NOW

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On July 1, 2018, Canada imposed surtaxes on steel, aluminum, as well as certain consumer and other products from the United States. These surtaxes are temporary duties that range from 10% to 25%. Canada's "countermeasures" were made under the authority of section 53 of the *Customs Tariff*. These duties were in response to the American duties imposed on steel and aluminum products under the rubric of national security concerns.

There are many businesses in Canada that rely on American inputs to produce goods for the Canadian and export markets. The new duties will certainly be a challenge for many Canadian businesses. Finance Canada reported over 1,000 submissions on the countermeasures received by the June 15 deadline for comments. Most of these were from users or vendors of imported materials. Despite these submissions, surtaxes were ultimately imposed on most of the American products targeted in the original proposal.

For the purposes of the *Customs Tariff*, the surtaxes are considered duties payable. There are generally three possible options to recover or seek relief from the surtaxes (duties) on imported U.S. products, depending on the nature of the good and its ultimate use.

The Canada Border Services Agency ("**CBSA**") has confirmed that its Duty Relief Program will relieve the imposition of the surtaxes, and its Duty Drawback Program will allow the refund of surtaxes paid, on imported goods that are subsequently exported in the same condition or after further processing in Canada. The *Customs Tariff* separately maintains a duty Remission Program that is generally applied where necessary materials are not available from Canadian production. Each of these Programs is described in greater detail below.

The CBSA's Duty Drawback Program sets out the conditions for obtaining a refund of duties paid on imports that are subsequently exported or used in processing goods for export. Drawback may be claimed on imported goods that are (1) exported in the same condition as when imported or (2) are processed in Canada and subsequently exported, or (3) imported goods that are directly consumed or expended in the manufacture of goods for export. After importation, claims for duty drawback may be made for up to four years from the date of importation. The CBSA target for responding to drawback applications is 90 days, and interest will be paid on any drawback amounts that are not refunded within 90 days.

Duty Relief is a separate program that permits an importer to apply for upfront relief from payment of duties (including surtaxes) at the time of importation. This program covers goods imported in the same circumstances as would be eligible for duty drawback, but without requiring duty payment. The duties relief program is not retroactive. If duties have been paid, then a duty drawback application would have to be made to recover these duties.

A third potential avenue would be an application for remission of duties on the recommendation of the Minister of Public Safety and Emergency Preparedness. The process also allows for relief before paying duties, a refund of duties already paid, or both, if the remission order is granted. One relatively common situation where a remission order may be sought is where inputs that are not available in Canada are essential to the operation of a business in Canada.

Businesses should be warned that the duty relief, drawback and remission processes carry a significant documentary burden. For duty relief and duty drawback, tracking of imported inputs (or "equivalent" permitted interchangeable domestic inputs) in final products exported must be maintained. In the case of a request for duty remission, this is essentially asking for a specific and discretionary legislative order from the Governor-in-Council, and political support from all three levels of government is recommended.

Importers should be aware that even Canadian–made goods may be subject to surtaxes, if they are shipped to the United States, and undergo anything more than "minor processing" before being exported back to Canada. The *Determination of Country of Origin for the Purposes of Marking Goods (NAFTA Countries) Regulations* apply to determine whether the goods are of U.S. origin for the purposes of the Canadian countermeasures. In certain circumstances, the Regulations allow that the country of origin of the goods shall be the last NAFTA country in which the goods underwent production, even if they are substantially produced in a different NAFTA country. Partial relief from duties is available under the Canadian Goods Abroad Program, though pre-approval must be obtained from the CBSA before export of the goods from Canada, and the application must be made at least three month before exportation. This relief could be particularly important where the final imported product will be for sale or use within the Canadian domestic market.

While we all are hopeful that the trade dispute with the United States will be resolved quickly, Canadian businesses that rely on American imports to maintain production may obtain some measure of relief from surtaxes through the duty relief and duty drawback programs on goods that are subsequently exported or used in processing goods for export, and under the duty remission process for goods that are not available from production in Canada.

by Geoffrey C. Kubrick, Jonathan O'Hara and Jamie Wilks

Ottawa Contacts:

Jonathan O'Hara, 613.691.6176
jonathan.ohara@mcmillan.ca

Toronto Contacts:

Neil Campbell, 416.865.7025
neil.campbell@mcmillan.ca

Jamie Wilks, 416.865.7804
jamie.wilks@mcmillan.ca

For government relations advice, contact Tim Murphy, Managing Director at McMillan Vantage, one of Canada's leading public affairs firms.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.