

Construction Law in Canada: Top Ten Issues to Consider

Canada's construction and PPP markets continue to be active, particularly in the energy, transportation and health care sectors. As demand for construction services grows, and in part due to slower activity in the U.S.A. and the European debt crisis, a number of American and other international owners, consultants, and construction companies are pursuing investments and development opportunities in Canada. Recent mandates of our Construction and Infrastructure practice group include work for Pattern Energy, Target, Samsung, Vale, PetroChina, Hochtief, and Dragados, as they expand their presences in Canada. These and other international players bring strong industry expertise to the Canadian marketplace, and while Osler has a more generic "Doing Business in Canada Guide" that is available on our website, this "top ten" list is only a selected overview on some of the more common issues that we are asked to advise on in relating to construction law matters.

1. Jurisdictional Differences within Canada

Canada is a federal parliamentary democracy in which the Canadian constitution enumerates law-making powers as either a federal or provincial area of jurisdiction; however, depending on the type of project and the jurisdiction of the parties, both jurisdictions may be applicable in certain contexts, such as the application of occupational health and safety legislation on federal projects.

Other construction-related legal issues that will vary by jurisdiction and that we are often asked to advise upon include limitation periods, latent defects, liens and retainage/holdback, licensing, drug and alcohol testing, workers' compensation, and environmental compliance. While similarities exist across Canada's 10 provinces and 3 territories, as well at the federal level for federal projects, there are many important variations in the legislation to consider, particularly in Québec which is governed by the Québec Civil Code and is unique in Canada.

2. GC, Design, and Trade Licensing

While most provinces do not impose licence requirements *per se* on general contractors, many do require licensing for specialized trades or activities; as well, some municipalities require a business licence for certain types of work done within their jurisdictions. At the trade level, the *Trades Qualification and Apprenticeship Act* (Ontario) prevents any person, subject to certain exceptions, from working in a certified trade (e.g. as an electrician) unless he or she holds a certificate of qualification, and no person shall employ a person in a certified trade who does not hold a certificate of qualification. In this regard, as long as the general contractor's involvement in these activities is limited to contracting or subcontracting with third parties, and conducting the necessary due diligence, it will simply have to ensure that subcontractors hold appropriate licences for the applicable trade.

However, if the general contractor is itself providing engineering and/or architectural services, in the course of performing under design-build or EPC contracts, it will need to consider whether it requires certification from the applicable organization of design professional. Each province has a separate organization for engineers and architects. The individuals performing the engineering or architectural services would also need to obtain licences from the applicable provincial organization. Another approach that we have seen with some of our contractor clients is to partner with or subcontract to an entity who is a licensed design professional in the appropriate jurisdiction.

3. Importance of Local Knowledge and Domestic Content Requirements

While not as comprehensive as “buy American” policies, there are some markets and contexts within Canada in which local or domestic content is considered.

In Ontario, Infrastructure Ontario recently incorporated requirements into its request for qualifications documents for developers wishing to compete for design-build-finance-maintain contracts, motivated in part by the increasing number of international consortia and concerns from local contractors. These requirements include submitting narratives showing a comprehensive understanding in delivering construction projects in Ontario, resourcing the project, understanding of the Ontario Building Code and other relevant Canadian standards, and health and safety issues. Partnerships BC is playing close attention to these developments as well.

In the electricity context, Ontario’s Feed-In Tariff program maintained a minimum domestic content requirement of 50% for wind projects and 60% for certain solar projects, which was the specific subject of a negative decision of the World Trade Organization. As a result, the Ontario Power Authority has revised (but not eliminated) its domestic content targets in its latest RFP.

Québec continues to maintain a domestic content requirement for its wind projects that was not the subject of the WTO ruling and which therefore continues unchanged.

4. Procurement Traps

Unique to Canada is a contract-based approach to tendering and requests for proposals that does not exist in the United States of America, and that is applicable to the private sector as well as public sector at every level of the construction pyramid, depending on the terms that are drafted. If a tendering model of procurement is selected, the receipt of bids in response to a request for bids creates binding “process” contracts with those bidders (sometimes referred to as “Contract A”), while the ensuing contract award creates a second and separate set of obligations between the owner and successful bidder (Contract B). On the other hand, if a request for proposals model is chosen, no such contractual obligations are created although a possible free-standing implied duty of fairness may arise, depending on the particular province and RFP wording at issue, and which could require the issuing body to consider each party’s proposal fairly. Regardless of which procurement model is chosen, public bodies should also ensure that their procurements are drafted and conducted consistent with the terms of any applicable purchasing by-laws, policy directives, and trade treaty obligations. Not surprisingly, a substantial body of jurisprudence has developed in Canada that typically reviews the wording and intent of the applicable procurement document, the relevant

duties of each party, the conduct of the parties, and the consequences for any breach or failure to comply with applicable obligations.

5. Standard Form Design and Construction Documents

The Canadian Construction Documents Committee (CCDC) is a national joint committee best known for the development, production and review of standard contracts, forms and guides. Other Canadian organizations promulgating standard form contracts include the Ontario Architects Association (OAA) and the Royal Architectural Institute of Canada (RAIC) for design documents, and the Construction Owners Association of Alberta (COAA) for EPC documents.

The CCDC documents, like the AIA documents in the U.S.A., are commonly used as precedent documents for Canadian construction contracts. In our experience, owners tend to view the CCDC standard form documents as being contractor-friendly and often revise aspects of the CCDC documents through the use of supplementary conditions (common terms include addressing construction liens, setting a standard of care, modifying the indemnity clause, confidentiality, confirming document and site review, defining what constitutes substantial completion); on larger projects, owners may use a customized form of contract.

6. Lien Legislation and Statutory Declarations

Each province has lien legislation that requires statutory holdbacks (“retainage” in American parlance), creates lien rights, and creates trust claims. For example, holdback percentages, trust rules (somewhat similar to states with trust fund statutes), lien registration deadlines (which are generally strictly enforced) will differ depending on the province. In Québec, equivalent lien language exists in the Civil Code, and a lien is referred to as a “legal hypothec”. Special rules apply to federal lands. One marked difference with U.S. practice is that lien waivers are, in general, unenforceable in Canada (with a few narrow exceptions in a few provinces); as a result, owners are liable to maintain the proper holdback and often require contractors, in addition to searching title, to provide periodic statutory declarations to evidence the fact that subcontractors have been paid.

If a lien has been registered against title to lands, it is possible to post appropriate security (generally a bond or letter of credit) with the court, in exchange for removing the lien from title.

7. Navigating Labour and Employment Issues

“At-will” employment does not exist in Canada and, as such, an employer cannot terminate an employee’s employment without notice (or pay in lieu), unless the employer has “just cause,” which is a very high standard. Employees who are terminated without cause are guaranteed certain minimum entitlements under applicable employment standards legislation as well as potential common-law and/or contractual termination entitlements.

The employment standards legislation in each jurisdiction sets out mandatory minimum conditions of employment governing areas such as hours of work, overtime pay, minimum wages, holidays, vacations, employee benefit plans, pregnancy, parental leave and other leaves of absence, notice of termination of employment, and severance and termination pay. Certain categories of employees

may be exempt from certain standards. As a result of these varying legislative requirements, U.S. employee policies on the above issues need to be adapted for use in Canada.

Employees who are addicted to drugs and alcohol are considered to be disabled and thus drug and alcohol testing can raise human rights concerns. Appellate courts in different provinces have issued seemingly contradictory decisions about an employer's ability to conduct pre-employment drug testing. Random drug and alcohol testing has largely been found to violate human rights legislation, but may be permitted in certain circumstances, such as where the employer can demonstrate that testing is required for safety reasons.

Canada's provinces and territories have no-fault insurance systems to compensate employees for workplace injuries and most (but not all) employers must participate in these systems, as opposed to the private insurance programs which would be typical in the United States. Generally, an employee may not sue an employer for personal injury or an accident arising out of and in the course of employment, but rather can claim compensation from the no-fault insurance accident fund. The workers' compensation board in each province is responsible for the applicable legislation and has broad powers of enforcement. As an example, in British Columbia, the *Workers Compensation Act* is administered by WorkSafeBC. Under the *Workers Compensation Act*, a contractor may be liable for premiums owed by a Subcontractor, so it is prudent to request a "Clearance Letter" which will confirm if the subcontractor's accounts have been paid up. This approach is typical for most provinces, and owners typically ask for contractors to supply this certificate as part of each progress payment.

Occupational health and safety legislation across Canada requires employers to provide workers with a safe workplace. Most provinces also impose a number of specific duties (i.e., preparation of a written occupational health and safety plan and establishment of a joint health and safety committee certified members of which may order a work stoppage where dangerous circumstances exist). In most jurisdictions, a worker has the right to refuse unsafe work, and some jurisdictions require employers to comply with specific obligations regarding workplace violence and harassment. Fines for violations of health and safety legislation can be significant and are rising. Recent changes to Canada's Criminal Code provide for the prospect of criminal charges for senior managers, officers and directors of corporations for health and safety violations.

8. Compliance with Health and Safety

Each of the Canadian provinces legislatively imposes obligations on project participants in regard to health and safety. Generally speaking, all health and safety legislation, at the provincial and federal level, imposes significant responsibilities on each participant in a construction project. As an example, in Ontario, where an owner undertakes a construction project, the owner may also become a "constructor" or "principal contractor" (or other terms to that effect) and hence assume additional responsibilities and potential liabilities; such role may generally be delegated to the contractor through contract. It is important that project participants understand the extent of the responsibilities which may be imposed upon them by the appropriate legislation and regulations.

In addition, recent changes to Canada's Criminal Code provide for the prospect of criminal charges for senior managers, officers and directors of corporations for health and safety violations. A criminal conviction may result in a jail sentence. In recent years, a number of jurisdictions in Canada have added requirements to protect workers from workplace violence and harassment.

9. Limitation Periods and Limitations of Liability

Most provinces have limitation legislation that limits the duration of liability for breaches of contract and tort claims. British Columbia's *Limitation Act* generally limits liability to two years from the date on which a person had the right to bring a claim with an ultimate 15 year limitation. Ontario's *Limitation Act* takes a similar approach. Limitation periods in many provinces may be varied between commercial parties through contract.

In addition, the law relating to limitation of liability clauses has recently been reviewed by the Supreme Court of Canada; the true construction approach adopted by the court necessitates express and unambiguous drafting regarding limitations of liability.

10. Taxes

Canada's tax regime for businesses (and individuals) is largely governed by the federal *Income Tax Act* (ITA) and its regulations, as well as by the sales tax, corporate tax and other laws of the provinces and territories. When establishing a business in Canada to carry on construction or development activities, a non-resident will have to decide whether to conduct its business in Canada through a branch operation or a Canadian subsidiary. More general considerations include capital taxes, the taxation of individuals, tax matters for partnerships and joint ventures and sales and commodity taxes.

Income earned by a non-resident that is not subject to ordinary income tax may still be subject to a withholding tax at a rate of 25% (unless reduced or eliminated by an applicable tax treaty) on certain Canadian source income. This includes management fees, interest, dividends, rent royalties and some distributions from trusts. A recent amendment to the ITA eliminates withholding tax on most interest payments paid to persons dealing at arm's length with the payor. Thereafter, the payees will need to file a tax return to recover the withheld amount assuming that they can show that they do not have a permanent establishment in Canada. This withholding can affect payment to operations and maintenance providers who are based outside of Canada but who service projects in Canada.

Regarding sales taxes, the federal government in Canada imposes a value added "Goods and Services Tax" (GST) at the rate of 5% applied to most goods and services sold in Canada, including construction services. Many of the provinces in Canada also add their own provincial level sales tax (PST). While some provinces administer their PST separately from the federal GST, the provinces of Nova Scotia, New Brunswick, Newfoundland and Ontario have combined their respective provincial sales taxes with the GST to create a harmonized sales tax (HST). Contractors are required to collect these various value added taxes and are in turn entitled to claim a tax credit.

One should consider Canada as a collection of local markets with the variation between provincial practices and industry sectors. In addition to this top-ten list, there are a number of additional issues to be considered in undertaking construction and infrastructure projects in Canada, including consultation, partnerships, and hiring of first nations/aboriginal groups, immigration issues, customs issues, NAFTA and international trade rules.

We would be pleased to speak to you to assess your needs and provide advice that is commensurate with your activities in Canada.

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