

Canada

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LOCAL MARKET

Foreign pursuit of the local market

- 1 | If a foreign designer or contractor wanted to set up an operation to pursue the local market, what are the key concerns they should consider before taking such a step?

All designers and contractors, including foreign contractors and designers, must comply with local employment legislation in setting up an operation and with the applicable regulatory licensing requirements in the provinces or territories where they intend to practise.

REGULATION AND COMPLIANCE

Licensing procedures

- 2 | Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

A foreign architect or engineer cannot practise without a licence from the applicable provincial or territorial body. Information on the licensing requirements for foreign architects and engineers is made available by the Canadian Architectural Certification Board and Engineers Canada. Penalties for practising without the necessary licence include fines, imprisonment, injunctions and prohibitions against collecting fees for unlicensed services.

The licensing of contractors is also regulated provincially. With some notable exceptions, most provinces do not generally require contractors to be licensed with the exception of Quebec, which has a scheme requiring all contractors to be licensed. Additionally, British Columbia requires that residential builders be licensed. In Ontario, residential builders must register with Tarion Warranty Company, which is the province's new home warranty provider.

Competition

- 3 | Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

Generally, there are no advantages afforded to domestic contractors over foreign contractors in procurement arrangements, though certain 'Canadian content' requirements may be specified. Further, with respect to tendering for government projects, there are many international agreements that import various requirements for government procurements by requiring transparency and fairness, among other things. This includes the Canada – European Union Comprehensive Economic and Trade Agreement, the Canadian Free Trade Agreement and the Canada – United States – Mexico Agreement.

Competition protections

- 4 | What legal protections exist to ensure fair and open competition to secure contracts with public entities, and to prevent bid rigging or other anticompetitive behaviour?

Anti-corruption legislation in Canada exists to address both domestic and international bribery and corruption in the engineering and construction industry relating to procurement, misappropriation, fraud, asset misappropriation, and bribery of domestic and foreign officials.

The federal Competition Act makes it an offence to participate in arrangements such as bid rigging, bid rotation, cover bidding and market division in procurement of government construction contracts.

The Competition Act imposes individual liability for many of these offences. For example, bid-rigging provisions prohibit bidders from agreeing not to submit a bid and from submitting bids that are the product of an agreement between bidders.

Bribery

- 5 | If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

The federal Corruption of Foreign Public Officials Act (CFPOA) makes it an offence, punishable by fines and imprisonment, to bribe foreign officials to induce them to influence a foreign state action in awarding construction and engineering contracts. The maximum term of imprisonment for the bribery of foreign officials is 14 years. The Criminal Code also creates offences punishable on indictment for bribing, or attempting to bribe, government officials in connection with the procurement of construction contracts.

The government's Integrity Regime backstops anti-corruption measures through a system of excluding from eligibility a person or entity convicted under federal anti-corruption legislation for the award of government contracts.

The Province of Quebec has instituted a number of specific measures aimed at combatting corruption and collusion in the construction industry based on recommendations arising out of the Charbonneau Commission's Report.

Although not strictly speaking a component of the Canadian anti-corruption regime, civil and common law liability for fraud, breach of fiduciary duties, asset misappropriation in relation to procurement and participation in domestic construction and engineering contracts also serve to enhance the integrity of the industry.

Reporting bribery

- 6 | Under local law, must employees of the project team members report suspicion or knowledge of bribery of government employees and, if so, what are the penalties for failure to report?

No person is obligated to report violations of anti-bribery and anti-corruption provisions under either the CFPOA or the Criminal Code. This legislation also does not require any self-reporting. However, whether a corporation has self-reported is a factor that may be considered by a prosecutor in its determination of whether negotiating a remediation agreement (ie, deferred prosecution agreements as a means of resolving criminal charges against businesses) is in the public interest.

Political contributions

- 7 | Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

There is no express restriction under local law that prevents contractors or design professionals from working with public agencies because of their financial support for political candidates or parties. However, the bribery and corruption offences are broadly worded and may capture a political contribution in certain circumstances. For example, the Criminal Code states that it is an offence for a person or an entity, to retain a contract with the government, to directly or indirectly give any valuable consideration for the purpose of promoting the election of a candidate or party of candidates (section 121(2) of the Criminal Code; see <https://laws-lois.justice.gc.ca/eng/acts/C-46/page-30.html#h-117813>).

Compliance

- 8 | Is a construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) subject to the same anti-corruption and compliance as government employees?

Pursuant to the Criminal Code, it is an offence for anyone who is an agent to receive a secret commission by directly or indirectly demanding or accepting any reward, advantage or benefit for doing or not doing any act relating to the affairs or business of the agent's principal. This provision applies to both the public and private sectors and may be applicable to construction managers or other construction professionals where they act as an agent (section 426 of the Criminal Code; see <https://laws-lois.justice.gc.ca/eng/acts/C-46/page-89.html#h-122942>).

With respect to conflicts of interest, in practice, many contracts with government entities impose detailed disclosure obligations and conflict of interest guidelines on project participants.

Other international legal considerations

- 9 | Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

Foreign contractors should seek legal advice to best evaluate any additional obstacles to doing business that they may face in their particular circumstance.

CONTRACTS AND INSURANCE

Construction contracts

- 10 | What standard contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

Standard contract forms are widely used in Ontario on a variety of construction projects. The Canadian Construction Document Committee (CCDC) Contract Forms are widely used for the construction aspects of projects. The Stipulated Price Contract is the most common standard form contract used for most projects in Ontario. The CCDC also has a series of subcontract forms that are regularly employed. Alternatively, the Canadian Construction Association also offers a series of standard construction contract forms.

The most commonly used form for the retainer of a prime consultant is the Royal Architectural Institute Contract Form, RAIC 6. Where an engineer is the prime consultant, the contracting forms of the Association of Consulting Engineers of Canada are adopted, most notably, form ACEC 2.

Payment methods

- 11 | How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

The typical method and timing of payment for construction work is by way of submission of regular progress claims during the course of the project, which are often contractually due and owing 30 to 45 days after submission. The payment mechanism is usually triggered by certification by the registered professional with jurisdiction over the project.

In Ontario, prompt payment provisions under the Construction Act require invoices to be provided to the owner on a monthly basis, unless the contract provides otherwise. Under this legislation, the owner must then pay the contractor within 28 calendar days of receiving the invoice, subject to the owner's right of delivering a notice of non-payment.

Contractual matrix of international projects

- 12 | What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

Construction projects involve multiple parties (owners, designers, general contractors, subcontractors, labourers and suppliers) and can take on a variety of structures. Design – build structures are commonly used, for example, in the industrial sector or on repetitive residential or commercial projects.

On larger public projects (eg, hospitals, tunnels, bridges and highways), the public – private partnership model is sometimes employed. This is known as the P3 model in British Columbia and the alternative financing and procurement model in Ontario. These projects are usually subject to oversight by a provincial body (Partnerships BC in British Columbia and Infrastructure Ontario in Ontario), which are entities that comprise various skilled professionals familiar with project development, design and construction.

PPP and PFI**13 | Is there a formal statutory and regulatory framework for PPP and PFI contracts?**

Where government entities are involved as project sponsors or owners, the project is usually subject to a dense and comprehensive contractual arrangement between the public entity and the other project participants.

On most public – private partnership projects the provincial government has developed a very detailed standard format for public projects, particularly infrastructure projects. The form is amended in some significant ways from project to project to meet individual conditions and requirements.

Specialised federal and provincial government agencies promote and oversee the use of P3 projects; for example, Infrastructure Ontario in Ontario and Partnerships BC in British Columbia.

Joint ventures**14 | Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?**

Liability and responsibility may be allocated among parties based on their private contracting arrangements, which assign both risks and rewards between the partners for the duration of the project.

Tort claims and indemnity**15 | Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?**

Under common law applicable in both British Columbia and Ontario, parties are free to limit their liability in any way they see fit. There is no statutory prohibition to defining the limit of liability in contracts.

Liability to third parties**16 | Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?**

Under Canadian common law, the doctrine of privity of contract prevents third parties from bringing a claim under a contract to which it is not a party. Therefore, third parties cannot rely on a breach of a construction contract as the basis for a claim against a contractor. However, contractors may still be liable to third parties in tort.

Insurance**17 | To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?**

Insurance is often a key source of any recovery that is going to be made for negligence on a construction project. Contractors are afforded a wide range of insurance coverage options, including professional liability insurance for consultants, general liability insurance for the builders and trades, course of construction insurance for any physical damage to property during construction and pollution liability insurance for various environmental hazards.

It is important to obtain the advice of a skilled insurance broker on each project concerning the nature and extent of the insurance coverage necessary for each project to ensure that contractors have an informed and reasonable insurance programme.

LABOUR AND CLOSURE OF OPERATIONS**Labour requirements****18 | Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?**

Although there are no clear laws outlining the minimum amount of local labour that is necessary on a particular project, there are fairly comprehensive measures in place that pertain to hiring foreign workers.

Before hiring a temporary foreign worker, most employers must obtain a labour market impact assessment (LMIA). An LMIA confirms that there is a demonstrable need in the labour market that cannot be fulfilled by a Canadian or permanent resident. In other words, the foreign workers must possess unique skills or knowledge for an employer to be granted permission to hire a temporary worker. Employers may obtain an LMIA by applying to Employment and Social Development Canada.

Employers can also access express entry pool candidates, which are skilled workers or tradespersons who apply through the Federal Skilled Worker Programme or the Federal Skilled Trades Programme. Express entry is a system used to manage applications.

Local labour law**19 | If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?**

In Canada, employers may not terminate employees at will. If an employee is dismissed from employment without just cause, such as when a position is no longer necessary, an employer is required to provide notice of termination or pay in lieu of notice. This notice must comply with the applicable federal or provincial employment standards legislation, including the statutory minimums.

Labour and human rights**20 | What laws apply to the treatment of foreign construction workers and what rights do they have? What are the local law consequences for failure to follow those laws?**

Foreign construction workers are afforded the same protection under federal and provincial labour laws as local labour.

In both British Columbia and Ontario, there are several statutes and codes that apply to the employment of construction workers. These include the Employment Standards Acts and regulations, human rights codes and labour relations codes. These laws provide various rights and protections for construction workers, including regulations with regard to working conditions and remuneration, protection against discrimination and contract bargaining rights. Workers are also protected by comprehensive health and safety legislation.

Employers are subject to a wide range of consequences for failing to follow employment laws, including fines, prosecution, the issuance of compliance orders and civil actions by employees.

Close of operations

- 21 | If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

Foreign corporations operating in both Ontario and British Columbia must apply for an extra-provincial licence to carry on business in those provinces. If a foreign contractor wishes to close operations, it must terminate its licence to operate as a foreign corporation by filing an application under the relevant authority. A foreign contractor must also consider all outstanding tax liabilities and the status of all accounts with the Canada Revenue Agency. It is important that foreign contractors seek legal advice to ensure that all tax liabilities are properly discharged.

PAYMENT

Payment rights

- 22 | How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

A contractor or subcontractor can secure payment in several ways. The most efficient way to do this is to ensure that all contracts include the requisite terms and conditions to require payment in a timely manner. In addition, the Builders Lien Act (British Columbia) and the Construction Act (Ontario) permit project participants to file liens against the property on which the construction project is located, and to require security to be posted or payment to be made before the charge against the property is removed.

'Pay if paid' and 'pay when paid'

- 23 | Does local law prohibit construction contracts from containing terms that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the owner, thereby causing the subcontractor to bear the risk of the owner's non-payment or late payment?

'Pay when paid' clauses, which stipulate that a subcontractor is entitled to be paid only when and to the extent that the primary contractor has been paid by the owner, are generally enforceable in British Columbia and Ontario, if properly drafted.

Contracting with government entities

- 24 | Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

Government agencies cannot assert sovereign immunity as a defence for non-payment of a contractor. Both Ontario (Crown Liability and Proceeding Act 2019) and British Columbia (Crown Proceeding Act 1996) have enacted legislation that provides that the Crown may be liable in tort as a normal person would be.

Finally, in Ontario, the Construction Act specifically states that the Crown is bound by the legislation, subject to certain lien provisions that prevent a lien from attaching to the Crown or municipal premises.

Statutory payment protection

- 25 | Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Contracts for major projects generally contain provisions that pertain to project interruptions or cancellations. Further, in Ontario (under the Construction Act) and British Columbia (under the Builders Lien Act),

unpaid contractors who have supplied services or materials in respect of an improvement may enforce a lien despite the non-completion, abandonment or termination of the contract or subcontract.

FORCE MAJEURE

Force majeure and acts of God

- 26 | Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

Contracting parties are free to negotiate the terms of a force majeure provision, which will be enforced by the courts in British Columbia and Ontario.

If a particular event is not captured by the force majeure provision in a contract, parties may be able to seek relief from contractual performance under the doctrine of frustration that, according to the Supreme Court of Canada, occurs when 'performance of the contract becomes "a thing radically different from that which was undertaken by the contract"' (*Naylor Group Inc v Ellis-Dan Construction Ltd*, 2001 SCC 58 at paragraph 53). If a contract is frustrated, the parties are released from future or continuing obligations under the contract.

DISPUTES

Courts and tribunals

- 27 | Are there any specialised tribunals that are dedicated to resolving construction disputes?

There are no specialist courts in British Columbia to hear construction disputes, although in Ontario there are some construction lien masters (although currently only in Toronto).

Dispute review boards

- 28 | Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

Contracting parties are increasingly using dispute review boards to efficiently resolve disputes on an advisory, mandatory and interim basis.

Mediation

- 29 | Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

Mediation has been widely used for the resolution of disputes in the construction industry since the early 1990s. It has been highly successful and continues to have broad application today. In fact, mediation is often mandated in complex construction cases. Although mediators have a wide range of experience, many are retired judges, senior lawyers and other professionals.

Confidentiality in mediation

- 30 | Are statements made in mediation confidential?

Yes, mediation is commonly held on a without prejudice basis.

Arbitration of private disputes

- 31 | What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

Arbitration is frequently used to resolve construction disputes in both British Columbia and Ontario. The courts tend not to be equipped or

have the desire to hear complex commercial disputes in the construction and infrastructure industries, so mediation and arbitration have largely occupied this field.

Governing law and arbitration providers

- 32 | If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

Although many international arbitration providers are regularly used in Canada, the most common are: the International Chamber of Commerce, the International Centre for the Settlement of Investment Disputes, ADR Chambers and the ADR Institute of Canada.

Dispute resolution with government entities

- 33 | May government agencies participate in private arbitration and be bound by the arbitrators' award?

In Canada, it is common for government agencies to participate in private arbitration. All arbitration proceedings, including those involving government agencies, are subject to arbitration legislation that is enacted in each province.

Arbitral award

- 34 | Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

In Canada, the enforcement of foreign arbitral awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention) and the UNCITRAL Model Law On International Commercial Arbitration (the Model Law). Canadian courts may refuse to enforce a foreign arbitral award in limited circumstances, as outlined in article V of the New York Convention and article 36 of the Model Law.

Limitation periods

- 35 | Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

The limitations statutes in British Columbia and Ontario provide for a two-year period from the date of discovery of a cause of action, with an ultimate limitation period of 15 years from the date of the wrongful act in question.

ENVIRONMENTAL REGULATION

International environmental law

- 36 | Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

Although Canada participated in the Declaration of the United Nations Conference on the Human Environment that adopted the Stockholm Declaration of 1972, the declaration was not adopted in Canada and it is thus not legally binding. However, Canada is a signatory to other United Nations environmental initiatives, such as the United Nations Framework Convention on Climate Change, and has ratified the Paris Agreement.

With respect to local laws, there are both federal and provincial requirements for certificates of approval to proceed with a project where the project presents a threat to waterways or fisheries, in the case of federal legislation or where the lands in question are historically contaminated. With regard to historically contaminated lands, provincial legislation requires certificates of authorisation for projects on such land to proceed.

Local environmental responsibility

- 37 | What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

At the federal level, Environment and Climate Change Canada is the regulatory authority that exercises jurisdiction over specific environmental areas, such as fisheries, nuclear energy, migratory birds and species at-risk legislation. However, Canadian provinces have enacted legislation that pertains to broader environmental protection issues and that detail the duties and liabilities imposed on parties responsible for the creation of environmental hazards. In Ontario, the primary legislation is the Environmental Protection Act, which is administered by the Ontario Ministry of the Environment, Conservation and Parks. In British Columbia, the key legislation is the Environmental Management Act, which is administered by the British Columbia Ministry of the Environment and Climate Change Strategy.

Both federal and provincial legislation maintain strict enforcement regimes that provide for various types of orders and that also allow for the prosecution of environmental offenders.

CROSS-BORDER ISSUES

International treaties

- 38 | Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Canada is a signatory of the new Canada – United States – Mexico Agreement, which came into force on 1 July 2020. Canada has also ratified numerous foreign investment promotion and protection agreements with individual countries. A full list of these trade and investment agreements can be found on the government of Canada's website. Although these agreements vary, 'investment' is generally broadly defined to include any kind of asset owned or controlled either directly or indirectly through an investor, including movable and immovable property; shares, stocks and bonds; money; goodwill; and intellectual property rights.

Tax treaties

- 39 | Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

To prevent double taxation, the Canadian government has entered into numerous tax treaties with various jurisdictions. As every tax treaty is different, it is important to review the relevant treaties in detail and consult with a tax professional to ensure that tax liabilities are properly discharged. A full list of Canada's tax treaties can be found on the Department of Finance's website.

Currency controls

40 | Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

Not applicable.

Removal of revenues, profits and investment

41 | Are there any controls or laws that restrict removal of revenues, profits or investments from your jurisdiction?

Not applicable.

UPDATE AND TRENDS**Emerging trends**

42 | Are there any emerging trends or hot topics in construction regulation in your jurisdiction?

With respect to regulation of the industry, the federal government has recently changed the way it operates its federal construction projects by introducing a prompt payment regime at the federal level. This new federal legislation is based on similar amendments made to the Construction Act in Ontario, which introduced both prompt payment and adjudication regimes.

Numerous provinces across Canada have now either enacted prompt payment legislation or are undergoing their own review of construction legislation to determine whether similar amendments should be made. In particular, some form of prompt payment legislation has been introduced in the provinces of Nova Scotia, Saskatchewan, Manitoba and Alberta, though not all of this prompt payment legislation has come into force at this time.

Coronavirus

43 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 pandemic has had a marked though varied impact on the construction industry in Canada. Starting in March 2020, various measures were implemented by the government to shut down segments of the construction industry for periods of time. However, many provincial governments deemed certain categories of construction projects to be 'essential'.

In relation to relief, parties to a construction contract are limited to the rights and remedies available to them under the contracts they have entered into. It is best practice for parties to carefully scrutinise the language of the contract to determine the scope of any applicable entitlement in the circumstances.



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