Borden Ladner Gervais

Construction Tariff Resource

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Procurement

Since the threats and introduction of tariffs by the U.S. government, there has been a call to action generally, with procurement in Canada garnering more headlines than any time in recent memory.

Most prominently, these threats have re-invigorated the call to reduce and eliminate barriers to internal trade within Canada. For example, on Feb. 21, 2025, Canada's federal government announced that it will be removing more than half of the remaining exceptions under the Canadian Free Trade Agreement (CFTA), which is expected to remove federal barriers to encourage more procurement opportunities for Canadian companies within Canada.

At various levels of government in Canada, officials have publicly raised plans, or the possibility of plans, to impose procurement bans or restrictions on American companies. Such plans give rise to a number of uncertainties and new complexities for procurement in Canada. For example, how these initiatives will tackle defining an "American company" will be challenging and require careful attention to the nuance in corporate structures As another example, Canadian-incorporated subsidiaries of American companies may find themselves on the wrong side of those definitions and be subject to procurement restrictions. Similarly, consortiums including one (or more) American company could be captured by those restrictions.

In this time of evolving tariffs and other restrictions, imposed or proposed, by the U.S. and Canadian governments, it is critical that governments, owners, and companies looking to do business in Canada consider and prepare for the changing landscape for procurement risks and opportunities in Canada. In particular, industry stakeholders should be considering:

- the existing domestic and international framework within which procuring authorities must operate and what flexibility is, or is not, permitted when designing a competitive procurement process;

- the inclusion, and enforceability, of limitations of liability in procurement and possibilities for challenges to decision-making and outcomes; and,
- what alternative sourcing strategies may be available and how to design opportunities in anticipation of a turbulent period in the industry.

Contract preparation

Preparing for tariffs – Contract preparation

Stakeholders in the Canadian construction industry are well aware of the many ways in which the Canadian and U.S. construction industries are reliant upon, and integrated with, one another. Canadians and Americans import and export materials and supplies for their construction projects, and certain products may cross borders several times during the manufacturing process before ultimately being delivered to a construction project for incorporation into the work.

Canadian construction projects will likely be impacted by any tariff regime imposed by the U.S., and any corresponding retaliatory tariffs imposed by Canadian governments. These impacts may include increased material costs, potential supply chain disruptions, project delays, and an increase in disputes between parties over cost escalation and potential delays.

When preparing and negotiating construction contracts, parties should consider how to create a contract that best suits their risk tolerance, and which party can best manage these risks. Parties should consider defining any potential obligations or entitlements with respect to tariffs and consider including clear and specific language in construction contracts moving forward.

Clear drafting and template contracts

Parties should ensure they are establishing clear terms around how tariffs will impact cost. Any uncertainty in the contractual language respecting the impact of tariffs on the cost of a project may lead to disputes. For example, disputes may arise with respect to whether the consequential impacts to the Contract Price (like the added time and cost to navigate changing tariffs) may be accounted for or whether only the specific direct increases resulting from any duties on imported goods for a construction project will be compensable.

If using a standard form construction contract, like those prepared by the Canadian Construction Documents Committee, parties should carefully review the template language. For example, while the current CCDC 2 2020 Stipulated Price Contract does not refer expressly to the term “tariff”, these contracts do refer to the concept of “taxes” and “duties”. The Canadian Border Services Agency identifies that a “Duty is a tariff payable on a good imported to Canada” (link) and the U.S. Customs and Border Protection identifies that a, “Customs Duty is a tariff or tax imposed on goods when transported across international borders” (link). While a tariff is not defined in the CCDC

2 2020 Stipulated Price Contract, to the extent any tariffs lead to increased Canadian duties, this will likely affect the contract price.

By contrast, the standard form CCDC 5B 2013 Construction Management Contract - for Services and Construction provides that the Construction Manager shall include the payment of duties as a "Cost of the Work"; however, whether or not the increased tariffs will be included as a Cost of the Work may depend on the terms and conditions of any subcontracts and supply agreements.

Managing the risk on new contracts

Parties considering entering into a new construction contract should consider addressing these issues expressly at the outset, including by amending standard form agreements with supplementary conditions to account for the potential risks of increased tariffs. In particular:

1. Expressly addressing the allocation of the risk of increased (or decreased) tariffs or pricing by including contractual provisions stating how any increase or decrease in tariffs applied after bid closing will impact the contract price or other compensation.
2. Parties may want to consider contractual provisions that include a process for the parties to consider and pursue alternative options and mitigation strategies should tariffs cause an increase to the project costs.
3. Consider using more collaborative contracting models (like early contractor involvement, integrated project delivery, or alliance, among others) to create additional opportunities for the parties to evaluate and adjust to tariffs as the project designs, budgets and schedules advance.
4. Specific price escalation formulas may be contemplated at the time of execution to ensure there is certainty around how the impacts of tariffs may impact price, and potentially schedule, despite uncertainty around these potential regimes at the time of execution.
5. Cash allowance and risk contingencies may be contemplated with respect to certain "at risk" elements of the project. Parties may wish to spend some additional time at the outset triaging scopes of work that are most likely to be impacted by tariffs and establishing alternative suppliers or construction methods to be implemented should the need arise.

The rise of progressive and collaborative contracts: Enhancing flexibility and risk sharing

The rise in tariff volatility will likely further accelerate the adoption of progressive and collaborative contracting models in Canada. These frameworks—including early contractor involvement (ECI) and alliance contracts—promote flexibility, transparency, and shared risk allocation between owners, prime contractors, and subcontractors.

Unlike traditional fixed-price contracts, progressive models typically include open-book pricing and cost-plus structures, allowing for transparent cost tracking and more equitable handling of tariff-related increases. This collaborative approach reduces the financial strain on individual parties and minimizes disputes over unpredictable cost fluctuations.

Industry stakeholders should consider:

- **Early collaboration:** Owners should consider adopting progressive contracting models for large-scale projects. Early contractor involvement enables joint risk assessments and flexible pricing structures that can better accommodate market volatility.
- **Cost-sharing provisions:** Owners, prime contractors and subcontractors should explore cost-sharing formulas that address tariff fluctuations. This ensures that no party bears a disproportionate financial burden.

When preparing construction contracts, construction industry stakeholders should carefully consider and understand their contracts and allocate the risks of tariffs accordingly. Conferring with experienced legal counsel will assist members of the Canadian construction industry with adequately planning for what may come next and possibly take steps that will minimize the eventual impacts on their projects.

Subcontracting and supply chain

Tariff turbulence: Where owners, prime contractors and subcontractors should focus their attention

Recent tariff increases are creating significant challenges for Canadian businesses, particularly in sectors reliant on complex supply chains and subcontracting networks, such as construction and infrastructure. As material costs fluctuate unpredictably and delivery timelines become increasingly unstable, owners, prime contractors and subcontractors are facing mounting financial and legal risks. To navigate this environment and ensure the successful delivery of projects, all parties need to actively consider the risk allocation and, where necessary, show flexibility and promote innovation.

This new reality comes at an interesting time: the Canadian market has shown a growing appetite for collaborative and progressive projects. These contracting models, coupled with the increased use of price adjustment (escalation) clauses, is signaling a shift towards more flexible and resilient risk management strategies. Owners, prime contractors and subcontractors should brace themselves in light of the coming tariff storm.

Flow-down of prime contract obligations: Ensuring alignment and accountability

Tariff escalation is intensifying the importance of well-structured flow-down provisions. These clauses typically ensure that key obligations in the prime contract—such as pricing terms, performance deadlines, and force majeure definitions—are consistently passed down to subcontractors and suppliers. Proper alignment through equivalent project relief protects both owners and prime contractors from inconsistencies that can lead to disputes or unrecoverable cost increases.

The traditional thinking is that without clear and consistent flow-down provisions, prime contractors may struggle to enforce the same performance and pricing standards at the subcontractor level. A misalignment could, for instance, leave the prime contractor exposed to unanticipated tariff-related losses, with no contractual recourse.

However, in the context of high uncertainty, it is more likely that subcontractors will push back on this typical risk allocation. This is a discussion worth having early-on between owners and prime contractors: all stakeholders have an interest in ensuring that projects are procured on the most competitive basis without jeopardizing the supply chain by transferring undue and unmanageable risk.

Where attention should be focused:

- **Innovation and flexibility:** All stakeholders should consider the risk-specific items of a project to determine whether there is ground to deviate from standard risk allocation. While owners already have plenty of tools in their toolkits (e.g. cash allowances, price adjustment (escalation) clauses, risk-share on key items, etc.), they should consider the using these to address tariff risks on key items for which the risk was typically transferred to private parties (e.g. alternatives to steel components, specialised equipment procured abroad, etc.).
- **Contractual consistency:** Owners should ensure that prime contracts contain clear and enforceable flow-down requirements to maintain consistency across the supply chain. Similarly, prime contractors should verify that their subcontracts reflect the same tariff-related protections and remedies contained under their Prime Contracts.
- **Pricing in the risk:** All links on the contractual chain should have candid frank discussions around the impact on cost that assigning risks associated with tariffs will have. Open dialogue on these risk contingencies can often provide a measurable framework within which to navigate finding alternatives and solutions.

Impact on long-lead items: Managing procurement risks proactively

Tariff volatility is significantly affecting many long-lead items—materials or equipment with extended procurement and delivery timelines. These items, often ordered months or years in advance, are now subject to unpredictable price swings. Without contractual safeguards, both owners and prime contractors risk being locked into unfavourable pricing terms that do not account for subsequent tariff increases.

Inadequate planning and protections for long-lead items can result in substantial financial exposure or delays. For example, if the prime contract requires fixed pricing for specified materials, but tariffs drive costs higher, prime contractors may be forced to absorb the difference unless there is a price escalation mechanism in place.

Where attention should be focused:

- **Proactive procurement strategies:** Owners should collaborate with prime contractors early in the procurement process to plan for tariff volatility and the associated allocation of that risk between them. This may include using early

purchase agreements or price-indexed procurement models to reduce exposure to future tariff increases.
- **Flexible pricing mechanisms:** Both parties should consider incorporating flexible pricing provisions for long-lead items (e.g. adjustments based on published tariff rates).

Price adjustment (escalation) clauses: A critical risk mitigation tool

Price adjustment clauses could become an essential tool for managing the evolving financial impact of tariff fluctuations. Traditionally used to address inflation, we can expect that clauses will be refined to specifically address tariff-related cost changes.

A well-drafted price adjustment clause should provide a clear mechanism for adjusting contract prices when the changes to tariffs or material costs exceed predefined thresholds. This protects owners from disproportionate contingencies from proponents, as well as prime contractors and subcontractors from absorbing unrecoverable cost increases. In addition, these mechanisms also provide owners with transparency and predictability regarding potential price adjustments.

Where attention should be focused:

- **Clear triggers:** Price adjustment clauses should include clear triggers for price adjustments, such as percentage increases in specified material costs or government-published tariff rates. This promotes consistency and reduces ambiguity in the application of price adjustments. For longer-term contracts, both owners and prime contractors should consider linking price adjustments to recognized market indices, where they are appropriate, such as the Statistics Canada Construction Price Index.
- **Mitigation measures:** Owners should consider including enhanced mitigation measures in their contracts, including collaborative processes between owners and contractors to identify and reduce the consequences of tariffs on the project.

Conclusion: Strengthening contractual resilience in a volatile market

To safeguard procurement stability, all stakeholders must work collaboratively to ensure that contracts reflect a balanced and transparent distribution of risk. This notably means clearly defining triggers for compensation and time extensions, maintaining consistency across all contract tiers, and considering flexible pricing mechanisms that protect against external cost shocks.

By promoting fair and consistent risk allocation, owners, prime contractors, and subcontractors can strengthen the resilience of their projects, reduce the potential for costly disputes, and preserve the financial stability of the entire supply chain.

Contract administration

The meaningful anticipated impacts of tariffs on the construction industry in Canada invite consideration of the challenge at all stages of a project's life cycle to ensure the project participants' interests are being protected. When managing construction contracts during execution, parties may wish to consider:

- **Notice requirements** – Relief provisions in construction contracts regularly require notice, such as when there is a change in contract price or contract time resulting from a change in circumstances. Subject to the specific circumstances of each contract, Canadian caselaw supports generally that notice requirements are enforceable. A failure to provide timely notice in some cases may result in a complete waiver of the claiming party's rights. As a result, attention to the required notice periods in the contract, which is usually within a specified timeframe of a triggered event or circumstance arising, should be carefully considered. Claiming parties should also be prepared to support their claims for an adjustment within the times required and it is, therefore, critical to maintain accurate project records tracking costs and increases resulting from tariffs. Moreover, parties receiving claims for relief should equally consider whether their response is due within a prescribed time limit and be mindful of deeming provisions in the event of failing to respond on time.

- **Duty to mitigate** – Notwithstanding that relief for an adjustment may be available under a contract as a result of tariffs, there is a general duty to mitigate at common law and many construction contracts contain express obligations to mitigate. In light of the imposition of tariffs, claiming parties should consider how to satisfy the duty to mitigate. Examples of ways in which these impacts may be managed include: (1) seeking alternative suppliers or non-tariffed sources; (2) bulk purchasing or advance procurement and storage of materials ahead of price increases; (3) applying for tariff exclusions or waivers where available (e.g. government relief programs that may arise); and (4) proper flow-downs of contractual obligations from the prime contract to lower tiers on the contractual pyramid. Additionally, parties should be prepared to prove their claims when seeking an adjustment that results from the imposition of tariffs. To the degree anything is expressly required by the contract, the claiming party should be prepared to provide such documentation upon demand.
- **Dispute resolution processes and limitations periods** - For further details, please see our below section on **dispute resolution process**, but parties should be mindful of their rights and obligations with respect to disputes over the impact of tariffs during project execution. The submission or claims for an adjustment may, to the degree there is disagreement, trigger the countdown on limitations periods and in prompt payment jurisdictions the parties may be obligated to commence an adjudication within prescribed time limits if there is disagreement over the amounts owing and included in proper invoices. Parties may, likewise, consider agreeing on a project mediator or referee to make interim determinations of disputes relating to adjustments required by the tariffs. Correctly establishing these regimes requires careful planning and management during project execution.
- **Payment obligations** – Progress claims may include requests for disputed amounts. Whether the entity from whom payment is requested is entitled to

withhold payment, may depend on the express terms of the contract. Construction contracts regularly contain provisions that address how disputed payments are to be addressed, including how and when payment to subcontractors and lower tiers of the contractual pyramid are owing, but run the gamut on ways of dealing with the issue. Parties should evaluate carefully their rights with respect to disputed payments and any paid-when-paid or paid-if-paid clauses that may be in their agreements.

- **Compliance with applicable law** – Construction contracts often contain a general requirement to comply with all applicable laws. In light of the ever-changing trade landscape between the Canada and U.S. parties have to remain vigilant. These changes will be especially important for parties providing fixed price work without relief for new tariffs. Industry stakeholders should also consider working with a customs broker in the event their business is impacted significantly by the tariffs in order to ensure they avoid breaching their obligations under the agreement. Canadian construction companies should be mindful of both American tariffs and retaliatory tariffs that Canada may choose to impose on American imports.
- **Performance security** – The tariffs may apply significant financial pressure on all variety of industry stakeholders (from owners all the way down the contractual chain). Performance security, such as, for example, an irrevocable letter of credit or a performance bond may provide much needed security to ensure that a contracting partner's obligations will be met. In the event defaults start happening, making a formal claim against the performance security may save a project from financial disaster. Parties should, therefore, be aware of the specific terms and requirements of any performance security in place and give notice of any defaults promptly. Documenting in writing all communications with the defaulting party is critical.

The Canadian construction industry is resilient and, particularly after having survived the global Covid-19 pandemic, agile. Care should be taken during project execution to ensure that all parties are working proactively together to find solutions for positive project outcomes. Attentive management of real-time impacts permits parties to adapt and adjust.

Disputes

2020 hindsight and rocky roads

Much like when steel and aluminium tariffs were first put into place by the U.S. in 2018, the proposed tariffs will likely lead to a spike in claims for increased payment and schedule extensions. The tariffs may lead to supply chain disruptions similar to those experienced during the COVID-19 pandemic. Suppliers affected by the tariffs may pivot to other offerings, administer layoffs or entirely cease operations. Some suppliers, and particularly those that require cross-border components, may experience delays as supply chains are reconfigured to avoid tariffs.

Impending disputes and mandatory processes

In the event contracting parties are unable to amicably resolve their differences over the impact of tariffs, they should evaluate the dispute resolution process to which they are bound. Stepped dispute resolution processes, including processes such as negotiation, mediation, and arbitration or litigation, often require a meaningful investment of time and money. Parties should evaluate how to put their best foot forward at each stage of a dispute.

Key considerations include:

- Whether advancing or responding to a claim on a construction project, the terms of the contract and the surrounding circumstances should be carefully reviewed to evaluate the feasibility of making or objecting to a claim. Anticipating and preparing for such disputes, including by committing a reasonable analysis to the strength of the claim at the outset, will permit parties to potentially resolve disagreements early and often.
- Reviewing other project agreements, including those other agreements which may apply by reference, is vital. Often times construction contracts include dozens of interrelated agreements, flowing down from the top to the bottom of the contractual pyramid. Understanding what agreements, if any, apply to your particular dispute can be critical in ensuring the correct path to resolution is selected.
- As noted in the section on **contract administration**, there will likely be specific notice requirements and steps that need to be taken to ensure rights are preserved. Generally speaking, Canadian courts will enforce notice requirements and contractual dispute resolution clauses. Failing to provide notice or failing to commence a claim in the proper forum within the time permitted may result in a waiver of claims and preclude the claiming party from seeking a determination of the matter.
- Some provincial statutes may impose specific dispute resolution processes or prevent modification of limitation periods. As such, the applicable statutory regime should be considered when evaluating the correct path to address a dispute.
- Overall, enforcement of dispute resolution processes and notice requirements within a contract will depend on the specific terms of the contract and the context in which the requirements are applied.

The usual suspects

As a result of the anticipated tariff turbulence, claims and disputes are likely to arise pursuant to the following common contractual clauses and legal principles:

1. **Tax provisions:** The contract may contain a clause allocating responsibility for cost adjustments due to increased taxes and duties. For example, GC 10.1.2 of the standard form CCDC 2 2020 Stipulated Price Contract provides for an increase or decrease to the Contract Price if taxes and duties change after bid closing. The specific language of the clause should be reviewed to determine whether the increase (or decrease) in tariffs falls under this clause, and whether a claim for an adjustment to the Contract Price can be made.

2. **Change in law provisions:** The contract may allow for an increase to the contract price, or an extension of time based on a “change of law” that affects the contractor’s ability to complete the contract. A “change in law” is usually a defined term within the contract, and the definition should be carefully reviewed to consider whether a claim can be made pursuant to this provision.
3. **Force majeure provision:** The contract may contain a provision permitting a schedule extension for any supervening event beyond the control of either party. Force majeure clauses typically contain a general catchall for supervening events followed by a defined list of events included in the definition (and potentially those expressly excluded). Unless “tariffs” or “duties” are expressly contemplated as supervening events under this clause, and particularly in light of the common inclusion of change in law provisions, it may be difficult to establish a claim under this type of provision.
4. **Frustration:** A party may argue that the contract is wholly frustrated. Frustration occurs when a supervening event occurs, without fault of either party, for which the parties made no provision in the contract, and which makes performance of the contract impossible or radically different from that which was undertaken in the contract. However, the supervening event that occurs must be so unexpected and beyond the contemplation of the parties that neither party can be said to have accepted the risk of the event taking place at the time of contracting. Frustration is a high bar and it could, depending on the circumstances, be challenging to assert that tariffs have frustrated the contract, particularly given that, as tariffs were previously imposed by the U.S. in 2018, they may reasonably be said to have been expected and within the contemplation of the parties.

Evaluating claims and potential disputes in light of the complex web of underlying statutes and common law can be challenging, but early investment in this evaluation can ultimately result in better long-term outcomes.

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