May you live in interesting times: Canadian procurement and potential bans on American companies

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This ironic curse of unknown origin seems to be our current plight, so much so that any article written today will be out of date tomorrow. Accurate predictions require a time machine, but the current uncertainty appears to be with us for the unforeseeable future.

What appears certain is that trade conflicts and the potential acquisition of Canada have galvanized Canadian spirits (with already imposed restrictions on American ones). There has been a call to action generally, with some Premiers and mayors discussing the possibility of restricting or impeding the ability of American companies to participate in certain government procurements or preferring Canadian suppliers. Of the many unanswered questions regarding potential Canadian responses, one question that stands out is what will be considered an “American company” for purposes of any procurement restrictions.

For example, if XYZ Canada Ltd. is incorporated and has its headquarters in Canada, but is a wholly owned subsidiary of, and controlled by, American company XYZ Ltd., would XYZ Canada Ltd. be sufficiently Canadian to avoid any contemplated procurement restrictions? Although there is no clear answer, the Suppliers From New York regulation (O.Reg. 117/18) under Ontario’s Fairness in Procurement Act, 2018 provides a potential hint as to what might be coming.

In response to buy American policies, in 2018 the Ontario government enacted the Fairness in Procurement Act, 2018 to provide the ability to “respond proportionally” to restrictions by American jurisdictions on participation by Ontario businesses in public procurement opportunities. By way of the Suppliers From New York regulation, the State of New York was designated as an “offending American jurisdiction” and restrictions were imposed on the use of structural iron fabricated in New York on road and bridge projects, subject to certain exceptions. For purposes of the regulation, a corporation is considered to be from New York if: (i) its head office or registered head office is located in New York; or (ii) it is directly or indirectly controlled by persons or entities located, or who ordinarily reside, in New York.

If future procurement restrictions were to apply a similar test to determine whether a corporation will be considered an American company, then it appears likely that both XYZ Ltd. and its Canadian subsidiary, XYZ Canada Ltd., would be caught.

The more recently enacted Building Ontario Businesses Initiative Act, 2022 uses much less restrictive requirements to define an “Ontario business” in its General regulation (O.Reg 422/23):

2. (1) A business that meets the following requirements is considered to be an Ontario business for the purposes of the Act:

> 1. The business is a supplier, manufacturer or distributor of any business structure that conducts its activities on a permanent basis in Ontario.
>
> 2. The business either,
>
> > i. has its headquarters or main office in Ontario, or
> >
> > ii. has at least 250 full-time employees in Ontario at the time of the applicable procurement process.

While any such restrictions may provide some push back against discriminatory policies and may also create opportunities for Canadian companies, they are also likely to raise questions with respect to the “Canadian-ness” of any proponents and suppliers. Accordingly, any proposed procurement restrictions should carefully balance:

- the desire to provide a meaningful response to policies detrimental to Canadians;
- the need for meaningful competition in procurement processes;
- avoiding loopholes that could allow an entity to avoid any restrictions by incorporating a new company in Canada simply for purposes of bidding on a project;
- ensuring that any restrictions are not overly broad, for example by restricting companies with an established presence in Canada, employing Canadian workers and using Canadian materials, based solely on the location of a parent company;
- ensuring appropriate consideration as to which entities should be subject to any restrictions (proponents, suppliers, subcontractors, equity holders in a special purpose vehicle, debt providers, etc.); and
- an exception regime that provides sufficient flexibility to address unforeseen circumstances and operational needs.

Governments need to carefully consider the one immutable law of the universe, the law of unintended consequences, as they counter-punch and try to find meaningful strategies.

Businesses need to be aware of these actions and do what they can to influence or at least to plan ahead to the extent that is possible in this unpredictable conflict. Our goal is to give our clients as much information and guidance as we can, but this fast-paced, action thriller is likely only at the opening credits.

By

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