

# Top considerations for construction contracts in light of potential Canadian and U.S. tariffs

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Amid a flurry of activity over the past several days, [the U.S. and Canada have tentatively reached an agreement to delay the implementation of tariffs for at least 30 days](#). The looming U.S. tariffs, and Canada's intended retaliatory tariffs, telegraph a turbulent time ahead for the Canadian construction industry. The impact of the tariffs is uncertain, could be far-reaching, and will be complex (see our general thoughts on the matter [here](#)).

Specifically with respect to owners and contractors in the construction industry, the coming months will be critical. Industry stakeholders should be reviewing their existing agreements, and looking ahead to upcoming deals, to evaluate the impact of the tariffs on costs and schedule, contractual relief events, available performance security, and how to mitigate the potentially negative consequences of the tariffs.

All industry stakeholders should be aware that within their construction contracts, there may be strict notice requirements, change in law provisions, a duty to mitigate, and many other requirements. Missing the mark on these crucial items may result in dire financial consequences. Accordingly, here is our list of the top considerations to bear in mind.

## What construction materials/services do the potential Canadian tariffs apply to?

The implementation of the tariffs remains in flux, but both American and Canadian authorities have tipped their hand at what to expect. The pending tariffs will very likely have a direct impact on Canadian construction projects.

Prior to the U.S. and Canada agreeing to pause the tariffs, Canada announced at the Federal level that it would be imposing tariffs on [\\$30 billion in U.S. goods](#), which list of goods included lumber, plastics, tools, kitchen and washroom fixtures, furniture, and various other items. Furthermore, the Canadian Federal government announced that it intended to impose tariffs on an [additional list of imported U.S. goods worth \\$125 billion](#). The full list of these goods is anticipated to be provided by the Canadian Federal

government for a 21-day public comment period prior to implementation. Notably, the full list may ultimately include steel and aluminum products (amongst other items).

At the Provincial level, each Province may also enact their own respective tariffs against American companies and products. In light of the U.S. pausing their implementation of tariffs, [Ontario's Premier stated that Ontario will put on hold planned retaliatory measures. Ontario's measures would have included the banning of American companies from provincial procurement.](#) Similarly, [Quebec's Economy Minister announced prior to the pause that Quebec would impose a 25 per cent price increase on any American companies bidding government contracts.](#)

The scale and scope of the potential Provincial tariffs are uncertain as of now; BLG will continue to monitor and provide updates as to the U.S. and Canada's ongoing negotiations surrounding the implementation of the potential tariffs.

## Contractual relief that may be available

In light of these potential tariffs, project participants should get out their magnifying glass, dust off their contracts, and review the small print with respect to applicable contractual relief events. There may be various clauses that respond to the circumstances, including relief that contractors may wish to seek or limitations on what relief may be available.

### i. "Change-in-law" or "change-in-conditions" provisions:

While sometimes limited, construction contracts regularly provide for relief in the event of a change in law. Including this type of relief permits more competitive pricing with fewer risk contingencies factored in. Relief can come in the form of additional time to complete the work and, potentially, additional compensation to account for the increased costs that result from the change in circumstances. The crux of the issue here is how the agreement defines a "law", which may be sufficiently broad to include tariffs (e.g. a directive from a governmental entity could constitute as a change in law). By contrast, the definition of a law may be too narrow to specifically contemplate a tariff imposed by a foreign governing body or changes arising from tariffs may be expressly excluded.

The ambit of this right, if it exists, is highly variable with some contracts only providing relief if very specific changes occur while others are quite broad. For example, some governmental standard P3 contracts arguably do not permit relief for changes in law in respect of tariffs imposed by a foreign governing body since the "law" is defined to only include the applicable laws, governmental policies and directives, etc. of the contracting parties' jurisdiction. This is different from relief provided for contractors in some other industry templates such as, for example, the Canadian Construction Document Committee's stipulated price contract (the CCDC2), which may permit relief for changes made to a more broadly qualified set of applicable laws.

### ii. Force majeure events:

A force majeure event is generally an occurrence that impacts upon the cost or time required to complete a construction project and is beyond the reasonable control of the contracting parties. These clauses have, particularly since COVID, received increased

scrutiny, grown in length and complexity, and regularly expressly define the events to be considered a force majeure. Sometimes a force majeure clause is broad enough to capture a change in law as described above. Parties should be careful to evaluate what is captured under a force majeure clause and whether there is a duplication between it and the change in law clause. Additionally, the relief available may differ between the two clauses and parties should take special care to note the difference.

### **iii. Other relief / supervening events:**

Similar to a force majeure clause, some contracts contemplate specific lists of events that provide contract relief, which may include time relief and/or some level of additional compensation. Material escalation clauses may fall into this category and parties should evaluate whether such mechanisms are present in their agreements. With respect to forward looking arrangements, though these types of clauses will introduce uncertainty to the time and cost of a project, they often assist in reducing risk contingencies.

## **Barriers to accessing the relief**

Construction contracts will often, and should, set out how relief is granted or limited when qualifying circumstances arise. Often a number of limitations to relief will be present. For example:

### **i. Strict notice requirements:**

Most contracts contain a notice requirement, and pursuant to the Supreme Court of Canada decision of [Corpex \(1977\) Inc v Canada, 1982 CanLII 213 \(SCC\)](#) and subsequent cases on the matter, the courts will likely enforce strict notice requirements of an agreement. Depending on the specific language of the agreement, they generally require notice within a certain time frame from the event arising (and may also include providing sufficiently detailed information about the event or circumstance). Additionally, failure to provide notice in some cases may result in a complete waiver of the claim, while in others it may be reduced to the impact of prejudice to the other party by a delayed notice.

### **ii. Obligations to mitigate:**

There is a general duty to mitigate at common law, but many construction contracts contain specific mitigation obligations. It is unsettled at law the degree to which the mitigation must come at the expense of the mitigating party. It is likely that this expense be reasonable, but parties argue in some cases that they need not do anything that costs them additional money to meet their obligations. Steps taken to mitigate should be recorded and supported with evidence.

### **iii. Compliance with applicable law:**

Most contracts include a provision that requires the contractor to comply with all applicable laws. If a contract does not contemplate the implementation of tariffs in respect of the contractual relief options described above, then the impacts of the applicable tariffs (i.e., the “law”) may be no different than a change in corporate tax laws

for a contractor. Canadian construction companies should, therefore, be mindful of any retaliatory tariffs that Canada may choose to impose on American imports.

## Managing tariffs going forward

Ultimately, it is unknown how long the potential tariffs may last, and whether other tariffs are forthcoming. As such, parties should consider the following going forward:

- **Accessing suppliers not subject to tariffs** : Parties should consider sourcing materials from another country that is not affected by tariffs. More conscientiously, parties should consider whether a Canadian supplier could provide the goods required which may also even satisfy ESG policies for sourcing locally available goods.
- **Buying products earlier / storing them on-site** : Owners should consider pre-emptive deposits or buying of goods in the circumstances of cost-plus contracts in order to lock-in prices prior.
- **Bonding requirements** : Parties may consider implementing bonding requirements, or other performance security like letters of credit, in their contracts and supply agreements. This could mitigate potentially dire financial outcomes in the event of insolvency in the supply chain.
- **Governmental relief** : Both the U.S. and Canada may via their governmental remission programs offset tariff impacts by offering temporary relief (e.g., refund or waiver of tariffs on eligible goods or for eligible importers/consumers).

## Conclusion

Many countries around the world are (or may be in the future) facing the implementation of tariffs on both ends of supply management. At BLG, our goal is to work with owners, contractors, procurement agencies, governments and others and to help provide guidance in the face of this challenging issue. [BLG's Construction Group](#) will continue to monitor and provide updates on the potential implementation of tariffs, and is available to answer questions about how tariffs may affect those in the construction industry. Reach out to your lawyer or any of the key contacts below for assistance.

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