

# Construction

*Contributing editors*

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GETTING THE  
DEAL THROUGH 

# Canada

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Canada is a federal state comprising 10 provinces and three territories, all but one of which have a common law legal system; the exception is the province of Quebec, which is a civil law jurisdiction. The Constitution allocates powers between the federal and provincial levels of government. The provinces are allocated a number of important powers, the most significant of which is the power to make laws in relation to property and civil rights in the province. Generally speaking, this head of power gives the provinces the right to legislate over any construction matters. There is a Federal Court with trial and appellate divisions, but its jurisdiction is limited to certain strictly federal matters, including construction law issues related to federal government procurement. Each province has a court system comprising a superior court with broad jurisdiction, other specialised provincial courts and a court of appeal. The final appellate court for all of the federal and provincial court systems is the Supreme Court of Canada.

## 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?

A foreign designer or contractor should consider the following:

- tax implications;
- the implications (apart from the tax implications) of having a Canadian office or subsidiary;
- whether or not the foreign designer or contractor has a large project on the books that warrants setting up a foreign office;
- the costs associated with obtaining and maintaining licences for designers (see question 2);
- the applicability of any inter-provincial trade agreement, including those relating to labour mobility; and
- the costs and administrative burden of compliance or registration (or both) with local regulatory agencies; for example, in Quebec, a foreign contractor must obtain either a general contractor or specialised contractors' licence (see question 2).

By way of further example, in Ontario, a contractor must do the following:

- register with the Ontario retail sales tax branch of the Ministry of Finance and post a guarantee of payment of retail sales tax, if the contractor does not have a permanent place of business in Ontario;
- register with the Electrical Safety Authority, if the contractor intends to carry out electrical work in Ontario;
- register with the Technical Standards and Safety Authority, if the contractor wishes to conduct business in Ontario in respect of any of the following types of work:
  - gasoline-handling contractors;
  - lift contractors (that is, installation, alteration and maintenance of lift devices);
  - energy contractors; and
  - equipment installation (requiring welding or piping systems or other pressure equipment);
- if incorporated outside Canada, obtain an extra-provincial licence;
- if carrying on business under a name other than its corporate name, register that name as a business name;
- in some Ontario municipalities, obtain a licence from the municipality; and
- comply with all regulatory requirements affecting the construction industry in Ontario.

It should be noted that these are examples only. Most registration requirements of this nature must be completed in each province in which the contractor carries on business.

## 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?

Foreign designers (that is, architects and engineers) must be licensed by the Canadian province or territory in which they intend to work. The practice of architecture and engineering is regulated separately by each province and territory through regulatory bodies established by statute. An architect or engineer cannot practise without a licence from the applicable provincial or territorial body, and penalties include fines, terms of imprisonment, injunctions and prohibitions against collecting fees for unlicensed services. International or country-specific mutual recognition agreements and international trade agreements may facilitate licensing in Canadian jurisdictions for foreign architects and engineers licensed in signatory countries.

In Ontario, a foreign engineer can apply for a temporary, provisional or limited licence. The renewal requirements for such licences vary from province to province. In British Columbia, for example, a foreign engineer can apply for a licence but will have to renew it before the end of each calendar year in order to continue to practise engineering in that province.

In order to obtain further information about the licensing of foreign architects or engineers in Canada the following organisations may be contacted:

- Canadian Architectural Certification Board ([www.cacb.ca](http://www.cacb.ca)); and
- Engineers Canada ([www.engineerscanada.ca](http://www.engineerscanada.ca)).

The licensing of contractors is also a provincial matter. In Quebec, all contractors must be licensed, including foreign contractors seeking work. Quebec's provincial licensing body requires that contractors satisfy various qualifications or competency, financial and bond requirements to obtain such a licence. A contractor that performs construction work without a licence is subject to sanctions. In addition, in Quebec, pursuant to the Act Respecting Contracting By Public Bodies, contractors and service providers must obtain prior authorisation from the financial markets authority (AMF) to bid and contract for public projects with a value in excess of C\$5 million and to enter into service contracts and subcontracts with a value in excess of C\$1 million. This monetary threshold is subject to periodical review and has certain specific exceptions for certain municipal contracts.

The other provinces generally do not require general contractors to be licensed, although residential builders in British Columbia do have to be licensed and residential builders in Ontario must be registered with Tarion Warranty Corporation (Ontario's new home warranty provider).

## Competition

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

According to Canadian common law, any local preference must be disclosed at the time of tendering. Some tender-calling authorities utilise a disclosed preference for local contractors, mainly in municipal contracts. In federal and provincial government procurement, the general rule

under the Agreement on Internal Trade (AIT, a federal-provincial agreement applicable to public bodies) and the North American Free Trade Agreement (NAFTA) is that no preference may be given to domestic suppliers, subject to limited exceptions set out in the AIT and NAFTA.

### Bribery

#### 4 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?

Depending on the circumstances of the case, the contract may not be enforceable by the contractor if illegal behaviour, such as a bribe, was the cause of its being awarded the contract. The contract may be avoided if it was induced by fraudulent misrepresentation, duress, undue influence or unconscionability.

A contractor engaging in this type of behaviour may face other consequences as well. For example, section 121 of the federal Criminal Code makes it an offence to bribe a public official to obtain a public contract, and section 426 makes it an offence to pay or receive secret commissions. Both offences are indictable and punishable by up to five years in prison, and therefore any party who participates in a bribe or secret commission may be prosecuted in the criminal courts.

In Quebec, the Building Act addresses tax evasion and bid rigging, and imposes licensing restrictions where a contractor is charged with any such offences. Quebec's licensing body is charged with the enforcement of these licensing measures. It should be noted that, when a construction company's licence is restricted, the company must halt all ongoing construction projects until such time as it obtains permission to complete the work from the Treasury Board. Moreover, the Act respecting contracting by public bodies (see question 2) will also come into play where bribery charges are involved. The contractor will also be barred from responding to any public call for tenders for a period of five years. The prohibition will extend to the activities of all other corporate entities for whom the individual members of the contractor play an administrative role (as a director, shareholder or lender). The Act respecting contracting by public bodies requires persons or corporations seeking to contract with public bodies or municipalities to obtain pre-authorization from the AMF, the purpose of which is to assess the applicant's probity. The AMF will examine an applicant's probity by considering various factors related to corruption, fiscal and regulatory issues (eg, whether the enterprise has been found guilty of particular criminal offences within the preceding five years). The Act also confers on the AMF the authority to revoke authorisation if 'public confidence in the enterprise concerned is undermined on account of lack of integrity on the part of the enterprise, any of its partners, directors or officers or another enterprise that has direct or indirect legal or de facto control over the enterprise'. The Act ensures the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts and provides for a regime allowing public bodies who have been defrauded to seek recovery. The Act creates a number of legal presumptions which facilitate such legal recourse.

The Corruption of Foreign Public Officials Act (CFPOA) is a federal statute that governs the prevention of bribery of foreign public officials inside Canada and was signed by Canada to implement its obligations under the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Co-operation and Development (OECD). The CFPOA makes it a crime for any person to bribe, attempt to bribe, aid someone in bribing or counsel someone to bribe a foreign official. In 2013, the jurisdictional reach of the CFPOA was expanded. Now, the actions of Canadian citizens, permanent residents, corporations, societies, firms, or partnerships are deemed on a worldwide basis to be acts within Canada for the purposes of the Act. This means that Canadian citizens and companies are now subject to worldwide regulation by Canadian authorities under the CFPOA.

### Reporting bribery

#### 5 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?

There are no laws requiring reporting of suspicion or knowledge of bribery in general, nor are there mandatory reporting provisions in the CFPOA.

The Federal Extractive Sector Transparency Measures Act (ESTMA) requires mandatory annual public reporting of payments made by larger entities 'engaged in commercial development of oil, gas or minerals' to government entities. Construction contractors, suppliers and service providers working in the extractive industry are not currently captured by the ESTMA's scope.

In Quebec, there is no obligation to report bribery of public or government employees, however, the Anti-Corruption Act (CQLR c L-6.1) provides a number of measures to protect any 'whistle-blowers' against reprisals that may be either threatened or taken against any such individual.

### Political contributions

#### 6 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 are no laws that restrict an individual from working for a public agency if he or she has supported a political candidate or party on an individual basis. There are general rules that address political contributions by corporations, organisations or unions found in the Federal Accountability Act, which was enacted in 2006. The purpose of the Act is to increase transparency and reduce the opportunity for large corporations, organisations or unions to exert influence by making politically motivated contributions. Any gifts to political candidates over C\$500 will be made public.

### Other international legal considerations

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

Some federal contracts (eg, contracts involving projects for the Department of National Defence) can only be awarded to companies whose officers and facilities meet certain security requirements that, in some cases, may be difficult for foreign contractors or their personnel to meet. Information in relation to these security requirements can be found on the website of Public Works and Government Services Canada.

Canada's environmental regulatory system may present challenges and delays for projects.

In addition, contractors from civil law countries should understand that, in the event of litigation, they will be subject to the rules of court relating to the extensive requirements for disclosure of documents (including electronic documents) in Canada's common law provinces.

### Construction contracts

#### 8 What standard form contracts 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?

In Quebec, all contracts with a public organisation must be written in French, under the Charter of the French Language. Contracts signed between private parties, however, can be in a language chosen by the parties. In the other provinces of Canada, a contract in any language will be enforceable, although standard form contracts are usually in English.

In Canada, standard forms are published by the Canadian Construction Documents Committee (CCDC, a national committee that has developed standard form construction documents), which includes members from the Canadian Construction Association, the Association of Consulting Engineering Companies-Canada (ACEC), Construction Specifications Canada and the Royal Architectural Institute of Canada (RAIC). In addition, the federal government, various provincial governments, regional governments (within some provinces) and large municipalities have their own standard form documents. P3 Projects use template documents developed by the provincial government entity in each province.

The ACEC and the RAIC have standard form consulting contracts for engineers and architects respectively, and some provincial engineering and architectural associations have also developed standard form contracts.

Choice of law and venue for dispute resolution can be specified by contracting parties in their contract. A Canadian court will respect the law selected by the contracting parties as long as it is bona fide, legal, and there is no public policy reason preventing the selection.

In respect of arbitration, it is common for parties to use international institutional arbitration bodies or Canadian arbitration bodies. Whatever body is chosen should be made clear in the contract. If no body or rule system is provided for in the contract, the province's arbitration legislation will be imposed, for example, Ontario's Arbitration Act, 1991.

### Payment methods

#### 9 How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

Parties select a preferred payment method and include this method as a term of the contract and, depending on the size and nature of the project, are paid generally by electronic transfer or cheque.

Construction contracts usually contain provisions related to the frequency of payments. Parties may agree to advance payments, payments after completion of the project, periodic instalments, payments at specified times or a combination of any of these methods. Contracts of a longer duration generally provide for periodic payments.

### Contractual matrix of international projects

#### 10 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?

In a typical contractual structure in Canada, the owner contracts directly with an architect and an engineer for the design of the project and with a general contractor for its construction. The general contractor is typically responsible for obtaining permits and approvals, scheduling and coordinating the work of subcontractors, calling and holding project meetings and establishing and carrying out a health and safety plan. The general contractor will contract out most of the labour to various subcontractors with specific knowledge of individual trades.

The contractual matrix, however, varies according to the industry, the size and cost of a project and the risk that the owner is willing to assume. Canadian provincial governments and the federal government are increasingly using the PPP model and design-build financing frameworks for infrastructure projects. In a design-build contract, the owner enters into a single contract with a designer-builder who performs both the design and the construction of the building. The designer-builder may employ architects or engineers (either on the designer-builder's staff or from outside firms), but such design professionals are directly responsible to the designer-builder, not the owner. To maintain some form of oversight on the project, the owner usually hires a consultant to inspect and monitor the development of the construction work.

There are both advantages and pitfalls to design-build contracts. Advantages of such a model include the following:

- the fact that the project can usually be fast-tracked because the owner only has one party to deal with regarding the construction, as opposed to an architect, general contractor and several subcontractors under the typical contractual framework;
- the fact that the design-builder has complete responsibility for the project and cannot blame other parties for any problems; and
- the fact that the design-build contract stipulates the exact price of the project without any risk of escalating cost to the owner.

The disadvantages of design-build contracts mirror those of stipulated price contracts, for example, there is little opportunity for the owner to scrutinise the design-builder's incentive to be too judicious in its use of resources and there is usually an increase in cost associated with removing aspects of the project from competitive bidding processes, as would be the case for any work that the design-builder would perform itself rather than contracting out to a subcontractor.

### PPP and PFI

#### 11 Is there a formal statutory and regulatory framework for PPP and PFI contracts?

In Canada, PPP and PFI models have been adopted and the federal and various provincial governments have developed agencies that encourage the use of such procurement models. The statutory and regulatory framework varies between provinces and between the provincial and federal levels of government.

The province of British Columbia established Partnerships British Columbia to bring together ministries, agencies and the private sector to

develop projects through public-private partnerships (PPPs). Partnerships BC is wholly owned by British Columbia and reports to its sole shareholder, the Minister of Finance. British Columbia regulates PPPs for highways through the Transportation Investment Act.

In Quebec, the Act Respecting Contracting by Public Bodies establishes conditions governing all contracts between public bodies and private contractors and includes a chapter setting out certain requirements for the tendering process in a PPP contract. The Quebec government has also enacted the Public Infrastructure Act which requires the government to deposit on a yearly basis a 10-year plan for public infrastructure investments. A Directive has been implemented which sets out policies regarding the prioritisation of the public body's infrastructure projects, rules concerning the governance of the portfolio management etc. The Quebec Infrastructure Agency has also been created to advise and assist the government and public bodies on procurement and project delivery concerns for infrastructure projects. The Agency also functions as a knowledge and expertise centre to identify the appropriate project delivery method for a given project, including PPPs. Departments are obligated to consult the Agency in respect of their PPP projects according to conditions established by the provincial government.

The province of Ontario has established Infrastructure Ontario (IO), a Crown corporation, which bears responsibility for delivering public infrastructure improvements for the province. For larger projects (ie, C\$50 million or more), IO is mandated to set project criteria, bring together public and private sector organisations and conduct a procurement process to select private sector consortia for projects such as public hospitals, courthouses, prisons, roads, bridges, border crossings, water systems and other public buildings. IO refers to such financing models as alternative financing and procurement. The Ontario Ministry of Infrastructure has legislative responsibility for IO. In 2011, IO expanded its Ontario Loan Program to include loans for community and health social service hubs, aboriginal healthcare access centres and non-profit sports and recreation organisations in Ontario.

The province of Alberta created Alberta Infrastructure, which is responsible for infrastructure planning and building and managing government-owned infrastructure in Alberta. Alberta has used the PPP model for road projects, schools, and water and wastewater treatment facilities.

In 2012, the province of Saskatchewan established SaskBuilds, a crown corporation, to address the infrastructure priorities of the province. At present, the focus of SaskBuilds is to help plan and manage pressing, large-scale infrastructure demands typically involving projects of C\$100 million or more. SaskBuilds is using the PPP model for various large-scale projects, including the Regina Stadium.

PPP projects have been completed in other Canadian provinces, including the New Brunswick Fredericton-Moncton Highway Project and the Confederation Bridge on Prince Edward Island. The Province of Nova Scotia signed a memorandum of understanding with Partnerships British Columbia in 2008 to consult on the use of the PPP model for large infrastructure projects, and has employed the PPP model to award contracts to build 39 schools in addition to other public infrastructure. Nunavut is using the PPP model in respect of the Iqaluit Airport expansion.

At the federal level, the Canada Strategic Infrastructure Fund Act, introduced in 2002, aims, where appropriate, to promote the use of partnerships between public and private sector bodies by creating a programme pursuant to which eligible recipients are provided with contributions for the carrying out of large-scale strategic infrastructure projects that contribute to economic growth or quality of life in Canada or that advance Canada's objectives in respect of infrastructure. The Act does not establish a regulatory framework for PPP projects. In September 2009, PPP Canada, a Crown corporation, was created to manage and invest the government of Canada's C\$1.25 billion P3 Canada Fund, an infrastructure programme designed to invest in PPP using a range of financing arrangements, advise the federal government on the execution of PPP projects, and assess PPP options for major projects seeking funding from federal infrastructure programmes. In 2013, the federal government announced the renewal of the P3 Canada Fund, committing C\$1.25 billion over the following five years.

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

In the common law provinces of Canada, members of a consortia joint venture may allocate liability and responsibility among individual venturers through their joint venture agreement. In this way, the consortia can decide which members will bear the risk of liability and to what extent.

It is important for members of the consortia to take steps that demonstrate their intention to contract as joint venturers because if the members are found to be in a partnership and not a joint venture, the members will be co-partners and therefore will be jointly liable, pursuant to the Partnership Act of each province.

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**Tort claims and indemnity**
**13 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?**

There is no specific legislative prohibition on structuring a contractual arrangement such that the contracting party is entitled to be indemnified against all acts, errors and omissions arising from the work of a subcontractor, even if the contracting party is negligent. However, such an arrangement would be unusual and would have to be expressed clearly in the contract documents. There are legislative provisions in certain provinces that address apportionment in the context of contributory negligence.

In Quebec, although the design professionals, contractors and subcontractors are, pursuant to article 2,118 of the Quebec Civil Code, jointly liable towards the owner for the loss of a building that occurs within five years of the end of the work, they may be able to seek relief from any liability between themselves by proving the fault of the other party (article 2,119). The contractor may be relieved from liability by proving that the defects result from an erroneous or faulty expert opinion or plan of the architect or engineer selected by the client. The subcontractor can be relieved from liability by proving that the defects resulted from decisions made by the contractor or from expert opinions or plans furnished by the architect or engineer. Liability may also be relieved by proving that the defects resulted from decisions imposed by the client in selecting the land, materials or methods used.

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**Liability to third parties**
**14 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?**

A contractor may be liable to the third party in tort. For example, a general contractor responsible for the construction of a building may be held liable in tort for negligence to a subsequent purchaser of the building for the cost of repairing certain types of defects in the building arising out of negligence in its construction.

In Quebec civil law pursuant to article 2,118, the contractors, architects and engineers who direct or supervise the work, as well as the subcontractor, are solidarily liable (which is essentially the same as joint and several liability) to the owner for damages (due to defects or deficiencies) within five years of its completion, whether the damage results from the faulty design, construction or production of the work, or unfavourable soil. Article 2,118 of the Civil Code is of public order and cannot be contracted out of. The law presumes that consortia are jointly and severally liable, unless the architect or engineer can prove that the defects in the work do not result from any erroneous or faulty expert opinion submitted, or from any failure to supervise the work.

In Quebec civil law, the contractor is liable to the owner even in the absence of a contractual relationship between the contractor and the subsequent owner, provided the other elements of article 2,118 of the Civil Code are met.

Unless they can be relieved from liability, the contractor, architect and engineer who, as the case may be, directed or supervised the work, and the subcontractor in respect of work performed by him or her, are solidarily liable for the loss of the work occurring within five years after the work was completed, whether the loss results from faulty design, construction or production of the work, or the unfavourable nature of the ground.

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**Insurance**
**15 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?**
**Property damage**

Commercial general liability (CGL) is an insurance product that generally covers claims made against the insured by third parties who have suffered loss or damage as a result of an event for which the insured is responsible. This insurance covers damages arising from bodily injury or property damage.

**Injury to workers or third parties**

Employers, including contractors and subcontractors, must comply with provincial workers' compensation plans. These plans insure workers against losses that result from on-site injury. In Ontario, workers are compensated through the Workplace Safety and Insurance Board, and in Quebec, through the Occupational Health and Safety Commission.

**Delay damages**

Delayed completion and delay in start-up insurance may be obtained under a builder's risk policy. Standard form insurance policies do not contain insurance for liquidated damages, and any liquidated damage coverage is difficult to place though may be covered under subcontractor or contractor default.

**Damages due to environmental hazards**

Pollution liability insurance can be purchased to protect contractors from damages caused to the environment. Such insurance is important given that CGL policies often include pollution exclusion clauses.

Local laws do not otherwise limit a contractor's liability for damages.

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**Labour requirements**
**16 Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?**

Generally, in Canada, there are no laws that expressly require a minimum amount of local labour to be employed on a particular construction project (although some requests for proposals are graded, in part, based on 'local content'). In Quebec, however, virtually all workers in the construction trades must hold a required Quebec competency certificate, as described in question 2. The government of Ontario has, at times, restricted the number of construction workers from Quebec who are permitted to work in Ontario. The Fairness is a Two-Way Street Act (Construction Labour Mobility) 1999 came into effect in 2002, mostly in response to restrictions in Quebec that barred many Ontario construction workers from obtaining licences to work in Quebec.

This Act was repealed in 2006. Since that time, Ontario and Quebec have an agreement to improve labour mobility between them in the construction industry called the Agreement on Labour Mobility and Recognition of Qualifications, Skills and Work Experience in the Construction Industry (2006) between the government of Ontario and the government of Quebec. As a practical matter, Canadian federal immigration law requires all foreign workers to apply for and obtain work permits before they work in Canada.

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**Local labour law**
**17 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?**

Each province and territory has enacted statutes that govern labour, employment and health and safety standards within that jurisdiction. These are laws of general application to many sectors of the economy, including the construction industry. Employment standards legislation establishes the minimum working standards and conditions for all employees covered by the legislation, including such matters as overtime pay, restrictions on the hours of work, minimum wage, holiday leave and holiday pay, rest periods, statutory holidays, certain types of leaves of absence,

and notice of termination or pay requirements in the event of termination of employment.

At the end of a project, all contractors, foreign and local, must provide notice or pay in lieu of notice to all non-unionised employees whose employment will be terminated. Under certain special circumstances, an employer may be obligated to provide severance pay to its employees in addition to notice. For unionised employees, specific entitlement to termination payments is governed by the applicable collective agreement. Generally, there is no requirement to provide termination payments if appropriate notice is provided. All employers must comply with at least the minimum standards established by the legislation.

In Quebec, the Act Respecting Labour Relations, Vocational Training and Workforce Management in the Construction Industry governs labour relations in the construction industry (the Labour Code and the Act Respecting Collective Agreement Decrees do not apply to that industry unless there is an express provision to the contrary). The legislation provides for four sector-based collective agreements with various common elements (namely union representation, grievance settlement procedures, disciplinary measures, arbitration, etc). Union membership is compulsory. There is a vocational training and qualification system for workers. Contractors, as employers, must belong to the Quebec Association of Construction Contractors, which is one of the statutorily mandated employer associations for collective agreement purposes.

Each province and territory also has workers' compensation legislation. Employers are required to register with and make payments to a compensation fund. Employees are then prevented from suing their employer or fellow employees for workplace injuries, and instead receive compensation from the fund.

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### Labour and human rights

#### 18 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?

In addition to the protection of local labour laws of general application, foreign construction workers who enter Canada to work under the Temporary Foreign Worker Program or International Mobility Program receive additional protections. Employers are required to ensure that temporary foreign workers' employment is in the same occupation, at substantially the same, but not less favourable, wages and working conditions (including hours of work) as outlined in the foreign worker's offer of employment. Employers must pay temporary foreign workers at the prevailing wage for the same job in the same location. Employers must also make reasonable efforts to provide a workplace that is free from all forms of abuse, including psychological and financial.

Employers may be subject to routine compliance reviews or directed reviews, for which they are required to submit documents for a period of up to six years prior to the receipt of authorisation to employ a temporary foreign worker. Employment and Social Development Canada officers have fairly broad powers to conduct inspections and collect evidence.

Penalties for violations include ban periods of one to 10 years in length, during which the employer may not hire temporary foreign workers, and cumulative administrative monetary penalties that can be as high as C\$100,000 for a single violation, and up to C\$1 million for a single final determination or within a one-year period. They are determined by the type of violation and a points system whereby points are assigned for an employer's previous history of compliance and the severity of the violation. For administrative monetary penalties, the size of the business being penalised will be taken into account. A small business with fewer than 100 employees or less than C\$5 million in annual gross revenue at the time the relevant labour market impact assessment application was made or the offer of employment was submitted will receive a smaller monetary penalty than a large business (any business that does not qualify as a small business).

Employers who employ a foreign national not authorised to work in Canada, who make misrepresentations or who counsel others to make misrepresentations, or who are found guilty of human trafficking can face imprisonment and additional fines.

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### Close of operations

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

There are no legal obstacles to closing up and leaving. If the foreign contractor formed a Canadian subsidiary, it would either have to go through the statutory procedure to wind up that subsidiary (which includes obtaining a tax clearance) or continue to make corporate filings and file tax returns.

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### Payment rights

#### 20 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?

The common law jurisdictions in Canada (that is, all provinces and territories except Quebec) have lien legislation that allows contractors to place a lien on the property where the construction project is situated in order to partially secure payment for services or materials provided to the project.

A lien is, in effect, an extra-contractual, unilateral charge against the lands of an owner. Generally, any supplier of services or materials to an improvement, whether or not it has a direct contract with the owner, has a lien against the property (that is, the right to subject the property to a charge to secure payment for the services or materials, or both, supplied). Colloquially, a lien is said to arise when the first shovel hits the ground and to continue until it either expires through the lapse of time or is asserted (usually through registration against the property) and satisfied. In other words, the lien is an inchoate statutory security, the effect of which is to secure an owner's holdback obligations owed to subcontractors and suppliers that do not have a contract with the owner of the property (see Reynolds, R B (1996) 'A Canadian Approach to the Minimisation of Construction Insolvencies', *Contemporary Issues in Construction Law*, p. 124).

Liens are enforced by way of a civil action in the provincial or territorial superior court. Frequently, the court will remove the lien from the title at the outset of litigation by accepting alternative collateral posted by the owner or contractor, in the form of either a certified cheque or letter of credit in favour of the court or a bond issued by a surety. This security stands in place of the property, and partially (and possibly fully) secures the owner's payment of a judgment in the event the claimant is successful in its lawsuit.

In Quebec, design professionals, contractors, subcontractors and suppliers benefit from a legal hypothec against the immovable upon which they carried out their work or supplied their materials. The legal hypothec covers the increase in value given to the property by the work or materials, or both.

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### Contracting with government entities

#### 21 Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

Canadian courts do not allow government agencies to raise sovereign immunity as a defence against the breach of a commercial contract.

On occasion, however, government agencies have successfully invoked the rule of sovereign immunity to contest commercial claims against them when the agency is sued in a foreign court. The plaintiff can then bring an action in the appropriate Canadian jurisdiction.

In cases where a foreign state is sued in Canada, the doctrine of 'qualified' or 'restrictive' immunity protects a foreign government from a suit only if the act or omission giving rise to the claim occurred when the defendant was acting in its sovereign capacity (an act *jure imperii*) as opposed to in a private (eg, commercial) capacity (an act *jure gestionis*).

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### Statutory payment protection

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

Construction liens are described in question 20. In addition, and if the interruption or cancellation is attributable to the contractor's insolvency or bankruptcy, and if the owner and contractor so agree, an act of bankruptcy or insolvency by the contractor can be identified in the contract as a ground for termination. For example, the CCDC2-stipulated price contract provides that if the contractor is adjudged bankrupt, or makes a general assignment for the benefit of creditors because of the contractor's

insolvency, or if a receiver is appointed because of the contractor's insolvency, the owner may, without prejudice to any other right or remedy the owner may have, terminate the contractor's right to continue with the work, by giving the contractor or receiver or trustee in bankruptcy notice in writing to that effect.

As noted above, lien rights, and rights of 'legal hypothecs' in Quebec, are addressed in question 20. However, if restructuring proceedings are brought under the federal Bankruptcy and Insolvency Act or Companies' Creditors Arrangement Act, rights of termination will normally be suspended and proceedings brought against the insolvent entity will normally be stayed, and, in certain circumstances, lien rights may be affected as well.

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### Force majeure and acts of God

#### 23 Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

The common law doctrine of frustration may excuse parties from performing their contractual obligations where intervening events have prevented their ability to do so. Most provinces have enacted frustrated contracts legislation that provides for the adjustment of the rights and liabilities of the parties to a frustrated contract. For example, in Ontario, the Frustrated Contracts Act provides that sums paid under a frustrated contract are recoverable, and sums payable cease to be payable.

Despite the existence of the common law doctrine of frustration, contracting parties will usually include a force majeure clause in their agreement, because such a clause allows the parties to clearly identify the kinds of events that will excuse non-performance. The standard form agreements in use in Canada generally contain such clauses.

In Quebec, article 1,470 of the Code defines the notion of 'force majeure' as an unforeseeable and irresistible event and provides that a person is not liable for damages if he or she proves that they result from force majeure, unless he or she has agreed to be liable for such damages.

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### Courts and tribunals

#### 24 Are there any specialised tribunals that are dedicated to resolving construction disputes?

No. Lawsuits arising out of construction disputes are heard in the superior courts of the various provinces and territories, but in some jurisdictions, such as Ontario, subordinate judicial officers (known as masters) may preside over construction lien trials by way of reference from a Superior Court judge. In Ontario, it is also possible for a Superior Court judge to refer a construction lien matter to a private individual for resolution.

In Quebec, disputes governing construction-related labour disputes or challenges are disposed of, in the first instance, by a construction industry commissioner.

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### Dispute review boards

#### 25 Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

DRBs are not common in Canada. Bid challenges in respect of federal government contracts can be reviewed by an administrative tribunal, the Canadian International Trade Tribunal (CITT), but although the CITT has had this bid challenge mandate for more than 10 years, the number of cases it receives in one year – generally between 60 and 90, not including appeals – is a small fraction of the number of annual procurements conducted. The CITT is perceived as an open, fair and timely means of adjudicating bid challenges. The decisions of the CITT are mandatory and final but nonetheless are subject to judicial review.

Provincial and municipal government procurement protests are either subject to specific provincial resolution mechanisms (which vary in effectiveness) or are heard in the province's superior court. Those procurement protests not involving government entities are heard in the superior court of the province in question.

A DRB can serve as a cost-effective and quick means of resolving a dispute without the need to resort to litigation. The DRB will hear arguments from both parties and will deliver a recommendation. This recommendation is not binding.

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### Mediation

#### 26 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?

Yes, mediation is increasingly used and accepted as an effective mode of dispute resolution in Canada. The number of mediators and arbitrators with good training and experience has increased. The rosters of available mediators include many who are familiar with construction disputes, including former judges and practising senior construction litigation counsel.

There is also a trend in favour of mandatory consideration of or participation in mediation. For instance, the Rules of Civil Procedure in Ontario establish mandatory mediation for civil actions commenced in certain cities after 1 January 2010.

In Quebec, the court rules permit that, where the parties to a dispute consent, a dispute may be submitted to a court-mandated mediation.

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### Confidentiality in mediation

#### 27 Are statements made in mediation confidential?

Statements made during mediation, both oral and written, are privileged and confidential. These statements are inadmissible as evidence should the matter proceed to trial. The parties to a mediation generally enter into an agreement prior to the commencement of mediation that contains a confidentiality provision.

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### Arbitration of private disputes

#### 28 What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

To avoid extensive legal expenses, lengthy court battles and damaging future business relations, and in an attempt to preserve some degree of confidentiality, parties involved in a construction dispute often look to arbitration as a means to resolve disputes and include arbitration clauses in their contracts. Arbitration is used by private parties and both federal and provincial government agencies can, and often do, agree to arbitrate disputes privately.

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### Governing law and arbitration providers

#### 29 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?

The International Chamber of Commerce Court of Arbitration (ICC) is the world's leading body for the resolution of international disputes by arbitration. The ICC is generally preferred over providers such as the American Arbitration Association because of its international membership and composition and the clarity and broad enforceability of the ICC rules. There is no clear preference or resistance to hearings being held in particular jurisdictions, although Canadian venues are preferred for Canadian projects, based upon considerations of convenience, followed by well-established venues such as London, New York, etc. As for the national law applicable, the general preference is for Canadian law. Some legislation (for example, health and safety legislation and construction legislation) may apply, despite the parties' choice of law.

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### Dispute resolution with government entities

#### 30 May government agencies participate in private arbitration and be bound by the arbitrators' award?

Federal government agencies or 'crown corporations' can participate in private commercial arbitration subject to the Commercial Arbitration Code, which is based on the Model Law on International Commercial Arbitration, and they are bound to an arbitrator's award. Legislation in each of the provinces also confirms that provincial government agencies can participate in arbitration and are also bound to the arbitrator's award. For example, in Quebec, articles 948 to 951.2 of the Code of Civil Procedure, and in Ontario, section 51 of the Arbitration Act 1991 and section 12 of the International Commercial Arbitration Act, govern arbitration awards.

**Arbitral award****31 Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?**

The grounds upon which an arbitral award can be rejected by the courts are limited. The provinces and territories have enacted international commercial arbitration statutes to provide for the enforcement of foreign arbitral awards. These statutes append and incorporate the terms of the UNCITRAL Model Law on International Commercial Arbitration. For example, in Ontario the Model Law is a schedule to the International Commercial Arbitration Act. Article 36 of the Model Law sets out the eight grounds upon which a court may refuse to recognise and enforce a foreign arbitral award, as follows:

- incapacity of the party;
- invalidity of the arbitration agreement;
- lack of proper notice of the arbitration;
- the arbitrator exceeded his or her jurisdiction;
- the arbitral panel was improperly constituted;
- the award has not yet been enforced or has been set aside by the domestic court in the country where the arbitration took place;
- the subject matter of the dispute is not capable of settlement by arbitration in Canada; or
- recognition or enforcement would be contrary to Canadian public policy.

In Quebec, articles 948 to 951.2 of the Code of Civil Procedure govern the recognition and execution of foreign arbitration awards. The six grounds on which enforcement of a foreign award may be refused are essentially the same as those provided for under the Model Law.

**Limitation periods****32 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 provinces have enacted general limitations legislation that sets out the limitation periods for suit. In addition, the construction lien legislation of the common law provinces sets out strict timelines within which liens must be registered and actions commenced.

**International environmental law****33 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?**

Canada, Mexico and the US are parties to the North American Free Trade Agreement, which has as a side treaty the North American Agreement for Environmental Cooperation (NAAEC). In the preamble to the NAAEC, the parties reaffirm their commitment to the Stockholm Declaration of 1972. Canada has also reaffirmed its commitment to the Declaration in various bilateral agreements.

**Update and trends****Construction Lien Act review**

One of the most significant developments is the consideration of lien legislation in various jurisdictions. In Ontario, in 2015, the government launched an expert review of the Construction Lien Act, which includes an examination of payment issues within the construction sector. The review was created in response to stakeholder concerns related to prompt payment and effective dispute resolution in Ontario's construction industry, such as encouraging timely payment for services and materials, and making sure payment risk is distributed fairly. The report of the review is complete.

**Good faith in contracting**

The highest court in Canada issued a landmark decision that dramatically impacts the obligations of all parties to commercial contracts in Canada. The law in Canada now recognises that good faith contractual performance is a general organising principle. As a result, there is a duty that applies to contracting parties to act honestly in the performance of contractual obligations.

Under the Canadian Constitution, environmental protection is a matter that falls under both federal and provincial jurisdiction. At the federal level, Parliament has enacted the Canadian Environmental Protection Act 1999. The provinces and territories have also enacted specific legislation for environmental protection and wildlife preservation, for example, Ontario's Environmental Protection Act 1990 and Endangered Species Act 2007. In Quebec, pursuant to the Environment Quality Act, all large infrastructure projects likely to have a major impact on the environment must undergo a public consultation process carried out by the Public Hearings Office for the Environment.

**Local environmental responsibility****34 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?**

Environmental regulation exists at both a federal and a provincial and territorial level. Therefore, there is a range of environmental regulatory regimes across the provinces and territories. In most cases, the main regulator of environmental matters will be the provincial or territorial government in which a construction project is located. Generally, provincial and territorial environmental legislation addresses the release of contaminants and contains provisions imposing stringent clean-up liability.

According to the common law, developers and contractors may be liable to neighbouring landowners at a construction site if they have been found responsible for acts that degrade or impair the land. Generally, a duty of care is owed to neighbouring landowners, and negligence cases are a frequent cause of action in respect of land. Landowners are strictly liable if they bring a potentially dangerous substance or material on to their land and allow it to escape.

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**International treaties**

- 35 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 to a number of bilateral and regional investment treaties, although none focuses specifically on the protection of a foreign entity in construction and infrastructure projects.

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**Tax treaties**

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

Canada has entered into more than 90 tax treaties with the tax authorities of other countries and continues to work on expanding this tax treaty network. These treaties generally follow the OECD Model Convention in respect of taxes on income and on capital. One of the predominant purposes of these tax treaties is to ensure that taxpayers, including contractors, are not subject to income tax in multiple jurisdictions on their business income. Another increasingly important goal of Canada's efforts to expand its tax treaty network is to improve tax information exchanges to prevent tax avoidance and to facilitate the resolution of international tax disputes. Generally tax treaties determine how much each country can tax income in respect of pensions, wages, salaries and interest.

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**Currency controls**

- 37 Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?**

No.

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**Removal of revenues, profits and investment**

- 38 Are there any controls or laws that restrict removal of revenues, profits and investments from your jurisdiction?**

If the foreign company creates a Canadian subsidiary, there are withholding taxes in the amount of 25 per cent on corporate distributions, dividends and other inter-company payments. The tax on these distributions and payments are, in certain cases, reduced by treaty. There are also corporate law restrictions on distributions where the subsidiary would fail to meet certain solvency requirements. Where the foreign company is carrying on business in Canada directly, there is a branch tax in lieu of the withholding tax.

The Federal Income Tax Act exempts some forms of interest payments from the withholding tax. This affects some forms of payments made by a payer resident in Canada to a non-resident recipient with whom the payer deals at arm's length. The exemption does not affect interest payments that are, in effect, a distribution of profits.

## Getting the Deal Through

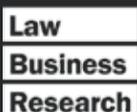
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