

From Clause to Cost: Tariffs Risk in Canadian Construction Contracts

March 4, 2025

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In the current state of uncertainty surrounding the impact of tariffs imposed and threatened to be imposed by American and Canadian governments it is imperative that industry members consider the mechanisms, or lack thereof, for adjustment in contractors' compensation contained in various standard form contracts used frequently throughout Canada on construction projects ranging significantly in size, complexity and sector.

Understanding the entitlement of contractors to an increase in compensation under commonly used standard form construction contracts is complicated by the fact that in most cases, these contracts do not refer expressly to the concept of *tariffs*. Various standard form contracts do however refer to the concept of "taxes" and "duties".

For example, the standard language contained at GC 10.1 of the CCDC 2-2020 – Stipulated Price Contract provides the following:

GC 10.1 Taxes and Duties

10.1.1 The *Contract Price* shall include all taxes and customs duties in effect at the time of bid closing except for *Value Added Taxes* payable by the *Owner* to the *Contractor* as stipulated in Article A-4 of the Agreement – CONTRACT PRICE.

10.1.2 Any increase or decrease in costs to the *Contractor* due to changes in taxes and duties after the time of the bid closing shall increase or decrease the *Contract Price* accordingly.

It is our understanding that tariffs and duties are not technically the same concepts.^[1] Rather, tariffs are systems which *impose* duties. For example, if a 25% tariff is placed on steel, it will be the case that duties are placed on the steel too. That is because the tariff is a system of duties which are applied to the good in question. It is not the case that a tariff alone is applied to the steel.^[2] It seems therefore that a tariff must impose a duty or duties.^[3]

Similarly, the Ontario Provincial Standard Specifications Municipal-Oriented General Conditions of Contract, November 2019 ("OPSS") is silent as to the Contractor's entitlement in the event that tariffs are introduced after contract signing; however, the standard OPSS language does provide the following:

GC 8.02.08 Taxes

.01 Where a change in Canadian Federal or Provincial taxes occurs after the date of tender closing for this Contract, and this change could not have been anticipated at the time of Tender, the Owner shall increase or decrease Contract payments to account for the exact amount of tax change involved.

It is our understanding that tariffs are a form of tax primarily used to control trade policy and protect domestic industries from foreign competition by making imported goods more expensive. Further, *Customs Tariff* legislation imposes duties and taxes on imported goods, and these must be paid upon importation as per the *Customs Act*.^[4]

Although it is unclear whether tariffs are intended to be included within the meaning of the term “taxes” included in GC 8.02.08 reproduced above, it seems as though there is an argument to be made that a contractor would be entitled to an increase in the *Contract Price* on the basis that a tariff is a specific type of tax imposed on goods as they cross national borders.^[5]

Other types of standard form contracts provide less clear avenues for argument that contractors are entitled to an increase in compensation as a result of tariffs imposed after bid closing in certain circumstances.

For example, under the standard CCDC 5B – 2010 Construction Management Contract for Services and Construction, the Construction Manager is entitled to compensation for “taxes, other than Value Added Taxes, and duties relating to the Work for which the Construction Manager is liable” pursuant to Article A-7. Based on the reasoning provided above, it may therefore be argued that in the normal course, the Construction Manager is entitled to compensation for the total amount of applicable tariffs as these form part of the Cost of the Work. This discussion is complicated however in situations where parties have agreed to the exercise of a Guaranteed Maximum Price (“GMP”) Option provided for under Article 8 – OPTIONS of the CCDC 5B, as this standard form of contract does not provide for adjustment to the GMP in instances where it is exceeded as a result of tariffs that subsequently come into effect.

We note that tariff’s imposed by the American government are an *indirect* result of the increase in price for materials coming into Canada from the United States. What actually causes the increase in price is the imposition of retaliatory tariffs by the Canadian government on products imported from the United States. As of right now, we do not know the extent of these retaliatory tariffs or what goods and products will be affected. It is therefore very difficult at this time to predict the actual impact such tariffs will have on individual projects.

Therefore, it is important that parties consider the entitlement provided for in their current contracts related to each party’s obligations and entitlements with respect to tariffs and consider including clear and specific language to this effect in contracts for projects moving forward.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

^[1] The *Oxford English Dictionary*, 6th ed (Oxford: Oxford University Press, 2007) [**Oxford Dictionary**] defines a “tariff” as “a tax or duty to be paid on a particular class of imports or exports,” and a “duty” as “a payment levied on the import, export, manufacture, or sale of goods.”. *Black’s Law Dictionary*, 11th ed (St. Paul, MN: Thomson Reuters, 2019) [**Black’s Law Dictionary**] defines a “tariff” as “a schedule or system of duties imposed by a government on imported or exported goods,” while a “duty” is defined as “a tax imposed on a commodity or transaction, especially imports.”

^[2] Note for example that the [Customs Tariff](#), RSC 1985, c. 1 (2nd Supp). (“CT”) legislation includes the following subheading: “An Act respecting the imposition of **duties** of customs and other charges, to give effect to the International Convention on the Harmonized Commodity Description and Coding System, to provide relief against the imposition of certain duties of customs or other charges, to provide for other related matters and to amend or repeal certain Acts in consequence thereof” [emphasis added].

[3] Notably, the BCCA has described the CT as follows in a dispute involving the import of computers at para 6 of [R. v. Paragon Computer Group Ltd.](#) 1985 CarswellBC 865: “The *Customs Tariff*, R.S.C. 1970, c. C-41 provides for the levying and collection of rates of **duties** of customs. The charging section is s. 3(1), and it refers to Schedule A to the Act, which enumerates goods by reference to various tariff items and specifies the rate of duties payable for each tariff item.” [emphasis added] The CT covers all types of goods/commodities, including those that are relevant to the construction industry, e.g. cement, plaster, stone, glass, wood, etc. See the table of contents for the following [link](#).

[4] [Excise Tax Act \(GST/HST Portions\) | R.S.C. 1985, c. E-15, s. 214](#) and [CED Customs and Excise § 116. Generally](#)][3], ([CED Federal and Provincial Taxation § 11. Customs Duties](#). Note also that the Excise Tax Act also seems to treat certain taxes on imported goods similarly to customs duties under the Customs Tariff. Note in particular the [Excise Tax Act \(GST/HST Portions\) | R.S.C. 1985, c. E-15, s. 214](#), the [Excise Tax Act \(Non-GST/HST Portions\) | R.S.C. 1985, c. E-15, s. 103](#) and [Customs Tariff | S.C. 1997, c. 36, s. 152](#).

[5] Recall the Oxford definition for tariff: a **tax** or duty to be paid on a particular class of imports or exports. [emphasis added] Recall as well the Black’s definition for duty: A **tax** imposed on a commodity or transaction, especially imports. [emphasis added] See also that the **Oxford Dictionary** defines tax as: A compulsory contribution to state revenue, levied by the government on personal income and business profits or added to the cost of some goods, services, and transactions. Further, **Black’s Law Dictionary** defines tax as: Most broadly, the term embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people and includes duties, imposts and excises.

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