CONSTRUCTION PROJECTS IN QUEBEC

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Plus ça change, plus c’est la même chose. Planning for a construction project in Quebec appears daunting because of the French culture, language and civil law traditions that make Quebec so unique. Yet Quebec projects share much in common with North American construction practices.

1 As Owner/Developer

Companies interested in the construction of a place of business, distribution centre, plant or other facility must comply with procedures common to those in other Canadian provinces. They may incorporate locally under federal or provincial law as a subsidiary. Or they may operate as a branch of a company headquartered outside of Quebec. Companies doing business in Quebec must register with the provincial government (immatriculation). Registration introduces a company to the Quebec and federal administrative apparatus that will prompt the Company for business and sales tax numbers, income and sales tax returns, contributions to pension plans and social service programs.

No special rules apply to companies interested in commercial, industrial or civil engineering projects. Residential construction merits special planning should the developer intend to sell residences to buyers following their construction. Where new residential units are being sold to purchasers, the entity selling the units must be the same as the entity which owns the land. The same entity must be licensed by the Régie du bâtiment du Québec (mentioned later) as an owner-builder, even if the actual construction is performed by others. The same entity also must enter into a regulated warranty program for new residential construction, save in the case of high-rise condominium or cooperative projects.

2 As Contractor

Companies wishing to act as contractors in Quebec must be licensed by the Régie du bâtiment du Québec, an important pre-requisite for numerous reasons. Quebec is the only province in Canada requiring contractors to be licensed, although a multitude of states in the United States and many other countries have similar licensing requirements. The lofty ideal is to assure the public of competency in the workforce.
An unarticulated objective of licensing is the elimination of black market contractors. Licensing is a one-time annoyance for those wishing to act as contractors. The yearly renewal process is quite automatic, as long as the annual financial statements of the contractor meet fairly low solvency and working capital requirements.

The licensing system introduces contractors to regulatory agencies governing the construction industry, namely the Commission de la construction du Québec (C.C.Q., the Quebec Construction Commission) and generally to the Commission de la santé et sécurité du travail (C.S.S.T., being the equivalent of a workmen’s compensation board). During a project, benefits and contributions on behalf of workers are paid to these regulatory agencies.

Unlicensed contractors usually are disqualified as bidders in a call for tenders; contracts awarded to them may be cancelled and an owner may strike a construction hypothec (lien) registered by an unlicensed contractor. Pure suppliers not providing significant installation services need not be licensed.

Subcontractors and suppliers of materials or equipment (whether the supplier is resident inside or outside Quebec) who do not deal directly with an owner must notify an owner that they have been awarded a subcontract for work or for a supply of materials or equipment so that, if unpaid, they may claim the protection of a construction hypothec (lien). Upon receiving this notice, an owner is forewarned to take the necessary steps to ensure that announced subcontractors and suppliers are paid. A number of other American jurisdictions have similar notice requirements, most do not. This critical practice of sending a notice to an owner in advance of the performance of any subcontract work or the supply of materials can come as a surprise to those unfamiliar with the procedure. Since the law protecting construction participants in Quebec is very simple, without complicated statutory holdback procedures or convoluted construction trusts, the plain and inexpensive device of notifying an owner of a subcontractor’s or supplier’s involvement in a project is sufficient to afford the latter the protection of a construction hypothec (lien) if unpaid and to allow an owner to demand evidence from a contractor that the owner’s payments are flowing to those subcontractors and suppliers who have notified the owner of their subcontracts.

3 Construction Laws

Quebec is a civil law jurisdiction like Scotland, South Africa, continental Europe and elsewhere. Codes of law set out the rules governing society. The principal code is the Civil Code of Quebec, promulgated originally in 1866 and reformed in 1994. Included in the Civil Code of Quebec are the rules governing contracts of enterprise and for services (namely construction contracts and contracts with the professionals such as architects and engineers), rules particular to the construction industry and to the entitlement of certain construction participants to a construction hypothec (lien) to protect their claims for payment, provided requisite formalities are observed.
Quebec also has adopted a number of statutes that are specific to the construction industry, the most important of which is the Building Act. Among other matters, it establishes the principal regulatory body in the construction industry, the Régie du bâtiment du Québec (RBQ), as well as the rules governing the licensing of contractors in Quebec, warranty plans for new residential construction, inspection of construction sites, a Building Code setting construction standards, a Safety Code, etc.

4 Contracts

Contract law in Quebec is essentially the same as that found in other North American jurisdictions. The rules governing contracts are set out in the Civil Code of Quebec.

In the public domain, contracts are drafted in French. In the private domain, contracts are drafted in French but, where the parties jointly agree, also in English. Contract forms proposed by the Canadian Construction Documents Committee (CCDC) and Canadian Construction Association (CCA) are used frequently. These national forms contain alternate provisions allowing them to be adapted to the civil law of Quebec. The adaptations often fall short of the mark. For example, final payment mechanics and the determination of lien rights revolve around the notion of “substantial performance of the work”, a concept delineated in the legislation of other Canadian provinces but absent in Quebec. Our practice is to add supplementary conditions so that such contracts are effective when used in Quebec.

5 Tendering

The rules governing tendering in the Province of Quebec are similar to those in the rest of Canada and the United States. The principles found in recent classic decisions of the Supreme Court of Canada in the Ron Engineering case, [1981] 1 S.C.R. 111, and in MJB Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619 apply in Quebec, so that in most situations the lowest compliant bid must be accepted by the party calling for tenders.

6 Bid Depository

Unlike most other Canadian provinces where utilization of bid depositories in the private domain is voluntary, use of the bid depository is obligatory in Quebec both in the public and private domains in specific areas of specialization. The Quebec Bid Depository System is commonly referred to as the BSDQ (Bureau des soumissions déposées du Québec). Tenders for mechanical and electrical work, and activities related to them, are subject to the mandatory jurisdiction of the BSDQ. Where competitive bids are sought in specialties where the BSDQ has jurisdiction, all bids must
be submitted through the BSDQ and – this being unique to Quebec – the lowest conforming bid must be accepted, without the possibility of renegotiation. To ensure competency, only licensed contractors may submit bids through the BSDQ. To ensure solvency in bids exceeding $50,000, only bidders providing bonding may bid.

7 Construction Insurance and Bonding

Construction insurance is similar to elsewhere in North America. Workman compensation insurance is not necessary as all Quebec workers are covered by no fault, non-recourse workman’s compensation administered by the CSST. Construction bonding in Quebec is the same as in other provinces in Canada (typically 50% bonding), although different from the United States (typically 100% bonding), where progressive payments are involved.

8 Claims, Liens and Recourses

The Quebec equivalent of builders’ and mechanic’s liens in other North American jurisdictions is the “legal hypothec in favour of persons having taken part in the construction or renovation of an immovable”, more simply known as legal hypothecs or construction hypothecs. Since there are three other categories of legal hypothecs, the term “construction hypothecs” is preferred.

A construction hypothec is restricted to architects and engineers licensed in Quebec, contractors and subcontractors holding a construction license, manual workers and suppliers of materials (including equipment). It is not available to the supplier of a supplier nor, unlike elsewhere, to a supplier of rental equipment.

The construction hypothec attaches to immovables (real property), from buildings to windmills, that have been improved by construction or major renovation. The charge encumbers both the structure and the subjacent land. A construction hypothec covers claims for contract balances, approved extras and variations, a limited amount of interest, interest indemnity and value added taxes (GST, PST). It does not necessarily cover other claims which have not added value to the immovable, such as claims for loss of profit, a performance bonus and the like.

The construction hypothec is a powerful weapon. It outranks the claims of all holders of conventional security (akin to mortgagees). Apart principally from realty taxes owing to municipalities and school boards and the rights of an unpaid vendor with security against the immovable, it ranks first to the extent of the additional value which the construction added to the immovable, but not on any value pre-existing the construction work. Thus, from a practical standpoint, holders of a construction hypothec essentially rank before anyone else. As a result, owners and financiers should ensure that progress and final payments are directed to those entitled to claim a construction
hypothec. Payments ought not be made unless an accounting and corresponding release is granted by the recipient or recipients of the payments.

A construction hypothec is created without the need for registration. However, the right to a construction hypothec must be conserved by observing a number of essential formalities.

Holders of a valid construction hypothec are entitled to the same four recourses that are available to all hypothecary creditors, including those holding conventional security (such as a mortgagee). By far the recourse construction creditors most commonly utilize is the public sale under judicial authority of the charged property. Holders of a construction hypothec are paid out of the sale proceeds.

A weakness in an otherwise enviable Quebec system for liens is the difficulty in determining when the delay expires for the registration of a construction hypothec. It must be registered within thirty days following the "end of the work". This enigmatic term is difficult to define. Essentially, the end of the work is reached when all items of work called for in the original plans and specifications have been completed, even if completed deficiently. No means exists to objectively determine when this date arrives. Regrettably, Quebec law has no procedure that is similar to the system of publishing or posting of a notice of substantial completion of the work as exists in many other North American jurisdictions, whereby the delay for the release of holdbacks and for the expiry of the right to register liens can be determined objectively.

9 Construction Labour

In a sense, Quebec is the only jurisdiction in North America which is entirely a “closed shop”. That is, all construction workers in Quebec must hold competency cards issued by construction unions. In turn, all workers, owners, and contractors in Quebec are bound by collective agreements that are negotiated by four unions representing all construction workers and by specified associations representing contractors and owners. Collective agreements are negotiated every five years or so, covering four construction sectors: commercial and institutional, residential, industrial and commercial, civil engineering and road works. They establish minimum wage rates and work standards. This unique arrangement, forged decades ago from the need to achieve labour peace in a once-turbulent construction industry, has been validated by the Supreme Court of Canada (R. v. Advance Cutting & Coring Ltd. [2001] 3 S.C.R. 209). The Quebec system is unique in that these collective agreements are centrally negotiated, they apply Province-wide and are enforced not through a grievance procedure controlled by unions but through a public body, the Commission de la construction. As a result, Quebec has enjoyed labour peace and stability in the construction industry for a long while.