Alberta Builders' Lien Act Update – Red Tape Reduction Implementation Act (Bill 62)

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Background

In BLG's October 23, 2020 and November 4, 2020 articles, we discussed Bill 37, the *Builders' Lien (Prompt Payment) Amendment Act*, 2020 and its proposed amendments to the *Alberta Builders' Lien Act* (the Prompt Payment Amendment). In addition to changing the name of the *Alberta Builders' Lien Act* to the *Prompt Payment and Construction Lien Act* (the PPCLA), the *Prompt Payment Amendment* also contains new rules and adjudication procedures that will have a transformative impact on the construction industry in Alberta. The PPCLA is anticipated to come into force on July 21, 2021, although the regulations have not yet been released.

On April 8, 2021, Bill 62, the *Red Tape Reduction Implementation Act* (Bill 62) received its first reading in the Alberta legislature. Bill 62 contains important information and guidance on the adjudication provisions in the Prompt Payment Amendment, a key feature of the PPCLA. Most critically, Bill 62:

- outlines the application and scope of the PPCLA; and
- provides further definition to the adjudication provisions in the PPCLA.

Scope of the PPCLA

Bill 62 excludes construction projects involving the provincial government from the PPCLA, including projects involving crown corporations. Bill 62 also references other entities and agreements to be excluded from the PPCLA's scope. While Bill 62 states that the PPCLA will apply to "a prescribed class of professionals acting in a consultative capacity", the Government of Alberta has not yet published guidance or regulations about which professions would fall within this "prescribed class".

Adjudication

More importantly, Bill 62 makes significant changes to the adjudication provisions in the PPCLA (the Adjudication Process). Bill 62 stipulates that parties cannot use the Adjudication Process where a court action has been commenced or where the contract

is complete. As such, the Adjudication Process appears to be exclusively intended for disputes occurring during the execution of a project.

Completed projects

While these changes highlight the primary goal of the adjudication provisions of the PPCLA (the faster resolution of disputes during a construction project), they also create uncertainty and potential for delay and inconsistent results. When a project is "complete" is often a point of contention between parties in a construction dispute. Uncertainty stemming from whether a project is complete may result in more court applications, which could result in fewer disputes being subject to the Adjudication Process and create further delays. Notably, as drafted, warranty or remedial work that is usually completed close to or after project completion, may be excluded from the Adjudication Process altogether.

Court actions

Carving out construction disputes that are the subject of a court action may generate unintended consequences. For example, parties may be incentivized to commence court actions to avoid the Adjudication Process altogether in an attempt to ensure they are able to select the forum for the dispute. Further, there could be instances where a broad court action touches on the subject matter and potentially the same parties involved in an Adjudication Process. This raises the possibility of inconsistent results. Without more guidance from the Government of Alberta, the incentive to race to the courthouse and the potential for inconsistent results between courts and adjunction panels adds to the uncertainty that the adjudication provisions of the PPCLA will create.

Adjudication orders and judicial review

Prior to Bill 62, the PPCLA attempted to make adjudication decisions final by making judicial review the only way to challenge an adjudicator's decision. To further reinforce the PPCLA's adjudication provisions against delays associated with court involvement, the PPCLA makes adjudication decisions enforceable despite the filing of a judicial review application. Bill 62 walks back the limits on the court's ability to become involved in a dispute that is subject to the Adjudication Process. Specifically, the order of an adjudicator stemming from a dispute will not be binding where:

- The Court makes an order in respect of the dispute;
- An application for judicial review of the determination is made by one of the parties;
- The parties proceed to arbitration by entering into a written agreement; or
- The parties settle the dispute by written agreement.

(The Exemptions)

In addition to raising serious questions about the strength of any order stemming from an Adjudication Process, the Exemptions also act as a bar to the registration (and enforcement) of an adjudication order. The Exemptions create significant uncertainty about how arbitration/meditation clauses, commonly found in construction contracts, will apply to the Adjudication Process. If a party commences an arbitration, are they barred

from using the adjudication provisions? If during the course of an Adjudication Process, one party seeks to activate the arbitration clause of their agreement, does this trigger one of the Exemptions? Moreover, do the Exemptions mean that, at any time, a party can make an application to the court in respect of a dispute? As drafted, the Exemptions may provide parties an avenue to engage the court even if they have failed to win the race to the courthouse.

Procedural guidance

Finally, Bill 62 includes mechanical and procedural provisions required to enforce an order stemming from the Adjudication Process. A party must register an adjudicator's order with the Clerk of the Court of Queen's Bench of Alberta (the Clerk of the Court) and provide a written notice to the other party within 10 days from the date that the Clerk of the Court registers the adjudicator's order. Once the Clerk of the Court registers the adjudicator's order it has the same effect as a court order. Bill 62 also includes two important limitations dates that stipulate that an adjudicator's order cannot be registered:

- Two years after the order is issued; or
- Two years after the court has rendered a decision on an application for judicial review.

Conclusion

Bill 62 raises further uncertainty about the applicability of the PPCLA. As a result, we expect that additional changes in the form of further amendments or publication of draft regulations will be required to better frame the purpose and scope of the PPCLA.

We will continue to monitor the progress of Bill 37 and Bill 62 as both pieces of legislation receive further consideration by the Alberta legislature and provide updates as they become available. It remains clear that construction industry players, of all sizes, will need to take proactive steps to prepare for and mitigate against the uncertainty and new risks created by these reforms to the Alberta *Builders' Lien Act*.

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