# Transitioning from Alberta's Builders' Lien Act to the PPCLA

**March 03, 2022**

***Prompt payment and adjudication take effect August 29, 2022***

In BLG's October 23, 2020, November 4, 2020, November 11, 2020 , May 3, 2021, June 2021, and February 2, 2022 articles, we discussed upcoming changes to Alberta's *Builders' Lien Act*.

On February 25, 2022, the Government of Alberta issued an Order in Council proclaiming that Bill: 37 *The Builders' Lien (Prompt Payment) Amendment Act* will come into force on August 29, 2022 (the PPCLA). This will make Alberta the third province to introduce prompt payment into its lien legislation. Ontario's *Construction Act* added prompt payment in October 2019 and Saskatchewan's changes came into effect on March 1, 2022.

Also on February 25, 2022, the Government of Alberta issued Orders in Council releasing the long awaited regulations to the PPCLA:

1. the Prompt Payment and Adjudication Regulation; and
2. the Builders' Lien Forms Amendment Regulation (the Regulations).

For the most part, the Regulations are similar to the regulations in Ontario.

Participants in the construction industry will now need to make the required adjustments to contracts and contract administration processes to prepare for the August 2022 transition.

A summary of the key provisions of the Regulations is set out below:

## Release of holdback:

While the Builders' Lien Act contained provisions that governed the early release of holdback for subcontractors who had substantively completed work, the PPCLA introduces further requirements regarding the early release of these funds on large projects. The Regulations confirm that the threshold value for contracts with an early

release of holdback is $10 million and that a payment must be made if (i) the project completion schedule is longer than one year and the contract provides for payment on an annual basis; or (ii) a phased payment is provided for in the contract.

## Time for a proper invoice:

As discussed in our previous articles, the PPCLA contains detailed requirements for what constitutes a “proper invoice” to trigger the mandatory payment timelines. The Regulations provide additional guidance on when a proper invoice may be issued. The PPCLA requires that a contractor issue an invoice to the owner every 31 days. Subject to the 31-day requirement, the Regulations allow parties to agree to when proper invoices must be delivered. This can assist with the administration of payments.

## Nominating authority:

The PPCLA provides that the Services Minister of Alberta may designate one or more entities to act as a Nominating Authority to administer the adjudication process. The Regulations set out the process for Nominating Authorities to be designated and introduce requirements to ensure the Nominating Authority will establish procedures and actively manage the adjudication process.

Similar to the approach taken by Ontario, the Government of Alberta has taken a market-driven approach that focuses on creating demand for a self-regulating body capable of producing competent and experienced adjudicators to preside over adjudications. The Regulations vest Nominating Authorities with latitude to certify adjudicators, develop educational tools, and govern how much training to provide to adjudicators.

## Adjudicators:

Under the Regulations, adjudicators will preside over disputes between parties. The training, experience, and powers of adjudicators are outlined in the Regulations and may differ significantly from judges or arbitrators.

The Regulations also set out the requirements for who can serve as an adjudicator, which include: the individual must have at least 10 years of relevant work experience in the construction sector and have sufficient knowledge and experience in dispute resolution, contract law, legislative interpretation, determination writing, ethics, jurisdiction and adjudication process.

In addition, the Regulations require that every adjudicator completes all training programs required by the Nominating Authority, complies with the code of conduct of the Nominating Authority and pays the Nominating Authority dues and fees.

## Adjudication:

As outlined in our previous articles, Adjudication under the PPCLA is an expedited dispute resolution process that places an emphasis on reaching a decision relatively

quickly. The Regulations provide more information and guidance on the types of disputes the parties can take to adjudication. The parties may adjudicate:

- the valuation of services or materials provided under the contract or subcontract;
- payment under the contract or subcontract;
- disputes that are the subject of a notice of non-payment;
- payment or non-payment of an amount retained as a major lien fund or minor lien fund and owed to a party during or at the end of a contract or subcontract; and
- any other matters that the parties agree to adjudicate.

# Overview of the adjudication process:

Based on section 33.4 of the PPCLA, unless the parties agree, the parties cannot commence an adjudication after the date the contract (or subcontract) is completed or the dispute has been referred to the Court. However, in all other contexts, including situations where a project is ongoing, the Regulations set out the procedure for how to commence an adjudication. The Regulations dictate that if one party to a contract wishes to commence an adjudication, it shall give the other party a written notice that includes:

- the names and addresses of the parties in dispute;
- the nature and a brief description of the dispute, including details respecting how and when it arose;
- the nature of the redress sought;
- the name of the Nominating Authority to whom the party serving notice intends to submit the notice; and
- the name of the adjudicator requested to conduct the adjudication, if any.

The commencing party also has to provide a copy of the notice to the relevant Nominating Authority on the same day it provides the notice to the other party. The Nominating Authority has the power to nominate the adjudicator. A provision in a contract that purports to name a person to act as an adjudicator in the event of an adjudication is of no force or effect. However, if the parties agree on a specific adjudicator within four days after giving the notice of adjudication, the Nominating Authority must, within seven days, appoint the adjudicator the parties agreed on and notify the parties on the same day. If the parties cannot agree on the adjudicator, the Nominating Authority must within 12 calendar days, appoint an adjudicator and notify the parties on the same day.

Once the adjudicator is appointed, within five days, the commencing party must:

- provide the adjudicator with
  - a copy of the notice;
  - a copy of the contract or subcontract, as the case may be; and
  - copies of any documents the party intends to rely on during the adjudication,
- provide all parties in dispute with copies of any documents the party intends to rely on during the adjudication.

The responding party must, within 12 calendar days of receiving the documents from the commencing party, provide copies of its response to the adjudicator, the commencing party, and all other relevant parties.

The Regulations specify that an adjudicator must issue a determination within 30 days after receiving the documents from the commencing party, or extend deadlines in the adjudication process, as needed. The Regulations dictate that the determination of an adjudicator must be certified by the Nominating Authority within seven days of the determination being issued. The Regulations also make it clear that the adjudicator's order may include making payments, and directing parties to stop providing services or materials if payments are not made within the deadlines.

Further, the Regulations empower an adjudicator to:

- issue directions to the parties involved in the adjudication;
- obtain information through independent research;
- conduct on-site inspections of subjects that the adjudicator considers necessary; and
- obtain assistance from construction industry professionals.

Under the Regulations, the parties may combine all adjudications if a party is involved in more than one adjudication or terminate the adjudication process at any time after the notice of adjudication is given. Typically, the costs related to an adjudication are to be equally divided among the parties to the adjudication and are paid to the Nominating Authority.

# Judicial review grounds:

The Regulations address grounds for judicial review and outline a number of grounds where the determination of an adjudicator may be set aside. They include:

- one of the parties participated in the adjudication while under a legal incapacity;
- the contract or subcontract between the parties is invalid or has ceased to exist;
- lack of jurisdiction to adjudicate a matter;
- the adjudication was conducted by someone who, at the time, did not meet the requirements to hold a certificate of qualification to serve as an adjudicator;
- reasonable apprehension of bias; and
- the determination of the adjudication was the result of fraud.

# Transitional rules:

The Regulations impose a new transitional rule that will govern the change over from the *Builders' Lien Act* to the PPCLA. Unlike Ontario's "grandfathered" transitionary rule, the Alberta transitional rule now contains a hard cut off date. Under the PPCLA, the new rules automatically apply to all contracts entered into after the changes come into force on August 29, 2022. In addition, contracts that were executed before August 29, 2022, must be amended to comply with the PPCLA within two years, if they are still in progress at that time. Any agreement that attempts to say the PPCLA does not apply is considered to be against public policy and is void.

Therefore, beginning August 29, 2022, new contracts will need to comply with the PPCLA and, for at least the next two years, construction industry stakeholders will be required to juggle two different processes while they complete work under the old *Builders' Lien Act* and take on new work that will automatically be subject to the PPCLA.

## Preparing for transition:

Construction industry participants should begin taking steps to get ready for the transition to the PPCLA on August 29, 2022. These steps could include:

- revising contracts to ensure that they are ready to comply with the PPCLA and the Regulations by August 29, 2022;
- updating internal contract administration systems to comply with payment and notice obligations under the PPCLA;
- preparing template notices of dispute and notices of non-payment, with consideration of the forms included in the Builders' Lien Forms Amendment Regulation; and
- developing systems to organize project documentation to ensure that it is easily accessible for participation in an expedited adjudication process.

We will continue to monitor the progress of the PPCLA and any changes to the Regulations and provide further updates. BLG's construction lawyers have written extensively on the upcoming changes to the BLA. Reach out to any of our construction lawyers below should you have any questions on how the upcoming changes to the BLA or new regulations could affect your business.

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