Alberta Builders' Lien Act update: It's time to get your house in order

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In BLG's October 23, 2020, November 4, 2020, November 11, 2020 , May 3, 2021 and June 2021 articles, we discussed upcoming changes to the Alberta Builders' Lien Act. These changes occurred through:

- Bill 37: the Builders' Lien (Prompt Payment) Amendment Act, 2020, including changing the name to the Prompt Payment and Construction Lien Act (the PPCLA); and
- Bill 62: the Red Tape Reduction Implementation Act, which amended important provisions of the PPCLA.

While both bills have received royal assent, they have not yet come into force. Previously, the Government of Alberta announced that the PPCLA was to come into force in July 2021; however, it appears that the PPCLA will now come into force by July 2022.

Recently, the Government of Alberta completed its consultation with construction industry stakeholders. This consultation was meant to assist the government in its drafting of the regulations that will govern important aspects of the PPCLA, like the new adjudication process. While the Alberta government has not yet published the regulations, it expects to do so in February 2022. We expect that these regulations will be similar to those in Ontario's Construction Act and will include:

- specifics on convening nominating authorities;
- requirements to serve as an adjudicator;
- an adjudicator code of conduct;
- further guidance on the adjudication process; and
- parameters for transitioning from the legal framework created by the Builders' Lien Act to the new prompt payment and adjudication framework set out in the PPCLA.

Drawing from the experiences of other jurisdictions like the United Kingdom, even with the release of the regulations, uncertainty may be a pressing issue for some time.

Based on our review of the United Kingdom's and Ontario's updates to comparable construction legislation, we anticipate that the forthcoming PPCLA regulations will focus on generating streamlined adjudication procedures that are designed to resolve disputes quickly. Like Ontario and the U.K., we expect that the PPCLA regulations will prioritize speed to create an Albertan version of an expedited dispute resolution process with significant consequences. This form of "rough justice" may come at the expense of procedural steps that are common in traditional litigation proceedings and arbitrations. However, drawing from U.K. jurisprudence, the desire for speed may make adjudication a little too rough, leading to further delay, increased court-involvement and, ultimately, more uncertainty.

In the U.K., there have been challenges of adjudicators' decisions based on the grounds of procedural fairness and natural justice. For example, in Victory House General Partner Ltd v. RGB P&C Ltd [2018] EWHC 102, an adjudicator's decision was challenged on the basis that the adjudicator arrived at a decision that neither party had argued for or supported. In addition, in Aecom Design Build Ltd v. Staptina Engineering Services Ltd [2017] EWHC 723 (TCC), the decision of an adjudicator was challenged because the claimant alleged that it was not afforded the opportunity to respond to a claim raised against it in a series of adjudications.

It is not yet known how the new regulations will attempt to balance expediency against procedural fairness and Canadian principles of fundamental justice. However, the U.K. examples above suggest that there will be some growing pains as adjudicators, owners, contractors, counsel and the court begin to work through the uncertainty that the PPCLA's new adjudication regime will generate.

We expect that lingering questions about the adjudication process, and other changes being implemented through the PPCLA, will continue after the Government of Alberta releases the regulations. The spectre of persistent uncertainty with respect to key aspects of the PPCLA reinforces the need for all construction industry players to take proactive steps to prepare for and mitigate against risks generated by these legislative changes, which will soon be one step closer to becoming law.

We will continue to monitor the progress of the PPCLA and the forthcoming regulations and will provide further updates as they become available.

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