

Alberta's Prompt Payment and Construction Lien Act

Amendments

- Alberta's *Builders' Lien Act* has been amended and renamed the *Prompt Payment and Construction Lien Act* (the “**Act**”)
- Three main amendments:
 - prompt payment provisions
 - holdback period/lien registration date changes
 - new non-judicial dispute resolution process

Amendments in force August 29, 2022

- The amended and renamed Act, which comes into force on August 29, 2022, will apply to:
 - all contracts and subcontracts entered on or after August 29, 2022
 - parties have until August 29, 2024, to amend existing contracts to comply with the Act
- All other existing contracts and subcontracts will continue to be governed by the provisions of the former *Builders' Lien Act* until expired, terminated or amended in order to conform with the new Act

Application of the Act

- The amended and renamed Act provides additional clarity with respect to its application
- The Act does not apply to:
 - public works under the *Public Works Act* (Alberta)
 - agreements to finance and undertake an improvement where the Alberta Crown or a provincial corporation that is an agent of the Alberta Crown is a party
- The Act does apply to:
 - professional engineers and architects contracted to act in a consultative capacity in respect of an improvement

Certificates of Substantial Performance

- Where permitted by the applicable contract, the Act allows certificates of substantial performance to be posted electronically, rather than on the job site, provided that all persons providing labour or materials have a reasonable opportunity of seeing the electronic certificate

Prompt payment – proper invoice requirements for contractors

- Key role of a “proper invoice” to payment triggers
- To be a proper invoice, an invoice must include all of the below:
 - contractor’s name and business address
 - the date of the proper invoice and the period during which the work was done or materials were furnished
 - information identifying the authority, whether in a written or verbal contract or otherwise, under which the work was done or materials were furnished
 - a description of the work done or materials furnished
 - the amount requested for payment and the corresponding payment terms broken down for the work done or materials furnished
 - the name, title and contact information of the person to whom the payment is to be sent
 - a statement indicating that the invoice provided is intended to constitute a proper invoice

Proper invoice and monthly invoicing by contractor to owner

- A provision in a contract that makes the giving of a proper invoice conditional on the prior certification of a person (like a payment certifier) or prior approval of the owner is of no force or effect, unless the provision provides for the *testing and commissioning* of the improvement or work done/materials furnished under the contract
- Proper invoices must be given to an owner by a contractor at least every 31 days (unless the contract includes a provision for the testing and commissioning of the improvement or of the work done or materials furnished under the contract and the conditions of testing and commissioning are not met)
 - an owner and contractor may agree when proper invoices are to be delivered, but can not exceed 31 days

Interest on unpaid amounts

- Interest will accrue at the rate set out in the applicable contract on any amounts included in a proper invoice that are not paid when due
- If no rate is specified in the contract, interest will accrue on unpaid amounts at the rate set out in the *Judgement Interest Regulation* (currently 0.2% per year)

Access to information

- Access to information provisions expanded beyond lienholders to include contractors and subcontractors who do not have a lien, along with beneficiaries of trusts
- A demand for information under the Act may be:
 - a) of the owner or the owner's agent, for the contract with the contractor,
 - b) of the contractor, for
 - i. the contract with the owner, or
 - ii. the contract with the subcontractor through whom the applicable person's claim is derived,
 - c) of the subcontractor, for the contract with the contractor through whom the applicable person's claim is derived,
 - d) for a statement of the state of accounts between the owner and contractor or between contractor and subcontractor, as the case may be, containing all information prescribed,
 - e) of a mortgagee or the mortgagee's agent or unpaid vendor or the unpaid vendor's agent, for
 - i. the terms of any mortgage on the land or any agreement for sale of the land in respect of which the work is or is to be done or in respect of which materials are or are to be furnished, and
 - ii. a statement showing the amount advanced and the amount currently due and owing on the mortgage or the amount owing on the agreement, as the case may be

Statement of Accounts

- When a demand for Statement of Accounts is made, the response must include:
 - Whether all or any portion of the amount has been paid with respect to a proper invoice or any other invoice
 - The percentage of amounts paid under one or more proper invoices or other invoices
 - The date on which the amount due under a proper invoice or any other invoice was paid, if any amount was paid

Payment by owner to contractor

- **28 Day Payment Rule (subject to exception below):** an owner who owes money under a proper invoice must pay the contractor the amount payable under a proper invoice no later than 28 days after receiving the proper invoice from the contractor
- **Exception - Notice of Dispute Issued by Owner:** an owner who disputes a proper invoice may refuse to pay all or any portion of the amount payable under the proper invoice within the 28 day period if no later than 14 days after receiving the proper invoice, the owner issues the contractor an *Owner's Notice of Dispute (Form 1)* specifying the amount of the proper invoice that is not being paid and detailing all the reasons for non-payment
- If an owner disputes only part of a contractor's proper invoice, the owner must pay the undisputed amount to contractor within the 28 day period

Payment by contractor to subcontractors

- **7 Day Payment Rule and Full Payment by Owner to Contractor (subject to exception):** if the payment received by the contractor from the owner (within the 28 day period) is for the full amount payable under a proper invoice:
 - the contractor must, no later than 7 days after receiving payment, pay each subcontractor the amount payable to the subcontractor for the work done or materials furnished under a subcontract with the contractor that were included in the proper invoice
- **7 Day Payment Rule and Less than Full Payment by Owner to Contractor (subject to exception):** if the payment received by the contractor from the owner is only for a portion of the amount payable under a proper invoice:
 - the contractor must, no later than 7 days after receiving payment, pay each subcontractor the amount paid by the owner for the work done or materials furnished under a subcontract with the contractor that were included in the proper invoice

Payment by contractor to subcontractors (cont'd)

- **Exception to 7 Day Payment Rule – Contractor Provides Notice of Non-Payment to Subcontractor:** a contractor who disputes (in whole or in part) the entitlement of a subcontractor to payment of an amount under the subcontract may refuse to pay all/any portion of the amount within the 7 day period, if the contractor issues the subcontractor a *Contractor's Notice of Non-Payment Dispute (Form 3)* specifying (a) the amount that is not being paid and (b) detailing all the reasons for non-payment by no later than:
 - (i) 7 days after receiving a notice of dispute from the owner, or
 - (ii) if no notice of dispute was given by the owner, before the expiry of the 35 day period after the contractor gave the proper invoice to the owner

Payment by contractor to subcontractors (cont'd)

- **Owner Non-Payment to Contractor - 35 Day Payment Rule for Contractor to Pay Subcontractors (subject to exception):** if the owner does not pay a contractor some or all of the amount payable under a proper invoice within the 28 day time period:
 - the contractor must, no later than 35 days after giving the proper invoice to the owner, pay each subcontractor the amount payable to the subcontractor for the work done or materials furnished under a subcontract with the contractor that were included in the proper invoice to the extent that the contractor was not paid in full
- **Exception to 35 Day Payment Rule:** a contractor does not have to comply with the 35 day payment rule if the contractor provides to the subcontractor the following:
 - a) a *Contractor's Notice of Non-Payment (Form 2)*:
 - i. stating that some or all of the amount payable to the subcontractor is not being paid within the 35 day time period *due to non-payment by the owner*, and
 - ii. specifying the amount not being paid;
 - b) an undertaking to refer the matter to adjudication no later than 21 days after giving the notice to the subcontractor; and
 - c) a copy of any notice of dispute given by the owner

Payment by subcontractor to sub-subcontractors

- **7 Day Payment Rule and Full Payment by Contractor to Subcontractor (subject to exception):** if the payment received by the subcontractor from the contractor (within the 7 day period) is for the full amount payable under a proper invoice:
 - the subcontractor must, no later than 7 days after receiving payment, pay each sub-subcontractor the amount payable to the sub-subcontractor for the work done or materials furnished under the subcontract between them that were included in the proper invoice
- **7 Day Payment Rule and Less than Full Payment by Contractor to Subcontractor (subject to exception):** if the payment received by the subcontractor from the contractor is only for a portion of the amount payable under a proper invoice:
 - the subcontractor must, no later than 7 days after receiving payment, pay each sub-subcontractor the amount paid by the contractor for the work done or materials furnished under the subcontract between them that were included in the proper invoice

Payment by subcontractor to sub-subcontractors (cont'd)

- **Exception to 7 Day Payment Rule – Subcontractor Provides Notice of Non-Payment to Sub-Subcontractor:** a subcontractor who disputes (in whole or in part) the entitlement of a sub-subcontractor to payment of an amount under a subcontract may refuse to pay all/any portion of the amount within the 7 day period, if the subcontractor gives to the sub-subcontractor a *Subcontractor's Notice of Non-Payment Dispute (Form 5)* specifying (a) the amount that is not being paid and (b) detailing all the reasons for non-payment by no later than:
 - (i) 7 days after receiving a notice of non-payment from the contractor, or
 - (ii) if no notice of non-payment was given by the contractor, before the expiry of the 42 day period after the contractor gave the proper invoice to the owner

Payment by subcontractor to sub-subcontractors (cont'd)

- **Contractor Non-Payment to Subcontractor - 42 Day Payment Rule for Subcontractors to Pay Sub-Subcontractors (subject to exception):** if the contractor does not pay a subcontractor some or all of the amount payable under a proper invoice within the 7 day of receiving payment from the owner:
 - the subcontractor must, no later than 42 days after the contractor gave the proper invoice to the owner, pay each sub-subcontractor the amount payable to each sub-subcontractor for the work done or materials furnished under a subcontract with that sub-subcontractor that were included in the proper invoice to the extent that the sub-subcontractor was not paid in full
- **Exception to 42 Day Payment Rule:** a subcontractor does not have to comply with the 42 day payment rule if the subcontractor provides to the sub-subcontractor the following:
 - a) *Notice of Non-Payment Where Contractor Does Not Pay (Form 4):*
 - i. stating that some or all of the amount payable to the sub-subcontractor is not being paid within the 42 day time period *due to non-payment by the contractor*, and
 - ii. specifying the amount not being paid;
 - b) unless the failure of the contractor to pay is as a result of non-payment by the owner, an undertaking to refer the matter to adjudication no later than 21 days after giving the notice to the sub-subcontractor; and
 - c) a copy of any notices of dispute or non-payment, as the case may be, received by the subcontractor in relation to the proper invoice

Holdback and lien registration periods

- Statutory holdback / lien registration periods for:
 - Improvements “primarily related to the furnishing of concrete as a material or work done in relation to concrete”: **90 days** (new)
 - **Exception:** the extended 90 day lien period for work done in relation to concrete does not apply to entities that install or use ready-mix concrete—though the *Prompt Payment and Construction Lien Forms Regulation* suggests that the extension does apply with respect to the manufacture and supply of ready-mix concrete
 - Improvements to an oil or gas well or to an oil or gas well site : **90 days** (no change)
 - All other improvements: **60 days** (currently 45 days)

Annual or phased release of holdback for certain contracts

- The Act requires a release of the holdback on an annual or phased basis specified in the contract when 1) the contract has a completion schedule longer than one year; and 2) the value of the contract is worth at least CAD\$10 million
- Holdback amounts may only be released if, as of the payment date:
 - i. there are no liens filed in respect of the contract, or
 - ii. all liens filed in respect of the contract have been satisfied, discharged or otherwise provided for under this Act

Adjudication

- **Nominating Authority:** the Minister may designate one or more entities to act as a Nominating Authority, who will be responsible for training and accrediting adjudicators
- **Adjudication:** provided that no party has commenced an action in court with respect to a dispute, a party to a contract or subcontract may refer to adjudication a dispute with the other party to the contract or subcontract
 - An adjudication may not be commenced if the notice of adjudication is given after the date the contract or subcontract is completed, unless the parties to the adjudication agree otherwise
- **Conflict:** adjudication procedures set out in a contract or subcontract apply only to the extent that they do not conflict with the procedures set out by the regulations or established by the responsible Nominating Authority

Matters subject to adjudication

- A party to a contract or subcontract may submit any of the following matters for adjudication:
 - the valuation of services or materials provided under a contract or subcontract
 - payment under a contract or subcontract
 - disputes that are the subject of a notice of non-payment under the Act
 - 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
 - any other matter in relation to a contract or subcontract that the parties in dispute agree to, regardless of whether or not a proper invoice was issued or the claim is lienable

Adjudication timelines

- The adjudication timelines are highly condensed:
 - Once a party has given notice of their intention to have a matter adjudicated, the parties have **4 days** to agree on an adjudicator
 - Failing agreement by the parties, the Nominating Authority will appoint an adjudicator for the parties within **7 days**
 - Once an adjudicator has been appointed, the initiating party has **5 days** to send copies of all the documents they intend to rely on to the adjudicator and other parties
 - Once the initiating party has provided its documents, the respondents have **12 days** to provide their responding documents
 - Once both sides have exchanged documents, the adjudicator has **30 days** to issue a decision
- An adjudicator may extend, one or more times, any deadline in the adjudication process to a *maximum* of 10 calendar days if the adjudicator considers it necessary or the parties agree and the adjudicator consents

Adjudication (cont'd)

- **Binding:** the determination of a matter by an adjudicator is binding on the parties to the adjudication, except where:
 - a court order is made in respect of the matter
 - a party applies for judicial review
 - the parties have entered into a written agreement to appoint an arbitrator under the *Arbitration Act*
 - the parties have entered into a written agreement that resolves the matter
- A written agreement to resolve the matter or appoint an arbitrator must be made by the parties *after* the adjudicator has made his or her determination

Judicial review

- **Judicial Review:** an application for judicial review of the determination of an adjudicator must be filed with the court and served no later than 30 days from the date of the notice of determination
- An adjudicator's determination may only be set aside by the courts on the following narrow grounds:
 - the applicant party did not have legal capacity
 - the contract or subcontract was invalid or ceased to exist
 - the determination was of a matter that may not be the subject of adjudication under the Act or of a matter entirely unrelated to the subject of the adjudication
 - the adjudication was conducted by someone who was not a duly qualified adjudicator

Judicial review (cont'd)

- An adjudicator's determination may only be set aside by the courts on the following narrow grounds (cont'd):
 - the procedures followed in the adjudication did not accord with the procedures to which the adjudication was subject and the failure to accord prejudiced the applicant party's right to a fair adjudication
 - there was a reasonable apprehension of bias on the part of the adjudicator
 - the determination of the adjudication was made as a result of fraud

Thank you

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