

An Overview Of Alberta's Prompt Payment And Construction Lien Act



Overview

On August 29, 2022, the changes to the Alberta *Builders' Lien Act* will take effect, making Alberta the third province in Canada to implement prompt payment and adjudication in its lien legislation. The new act will be called the *Prompt Payment and Construction Lien Act* (the PPCLA or the Act). The PPCLA introduces a number of key changes, including:

- prompt payment timelines and requirements, triggered by the receipt of a “proper invoice” by the owner, which must be followed unless required notices are delivered by the stipulated deadlines;
- a new dispute adjudication process, under which adjudicators may hear disputes and render decisions, which may be binding in certain circumstances;
- the general deadline to register a lien for materials or the performance of services, not provided with respect to an oil or gas well or well site, will be extended to 60 days from the last day the materials were furnished or the services were provided, or the contract was abandoned;
- a new lien period of 90 days will be created for work or materials provided with respect to improvements primarily related to the furnishing of concrete; and,
- the introduction of a progressive release of the statutory holdback for projects and contracts that meet the required conditions.

The new regulations will also take effect August 29, 2022. The regulations include the form of notices of dispute and notices of non-payment to be used by the parties.

Transition

Any contract entered into on or after the coming into force date of the new Act (August 29, 2022) must conform to the new provisions.

Generally, the old provisions will govern contracts entered into before the coming into force of the new Act. However, any contract that was entered into before August 29, 2022, **and that is scheduled to remain in effect for longer than two years after the coming into force of the new Act**, must be amended

within two years (by August 29, 2024) so that it complies with the new provisions.

For contracts entered into before August 29, 2022, and which are scheduled to be complete less than two years after the coming into force of the PPCLA, the parties can, by agreement, amend their contract to conform with the new provisions at any time after the coming into force date and in so doing the new provisions will apply.

Prompt Payment Timeline

The PPCLA sets out prompt payment timelines that owners, contractors and subcontractors will be required to follow, which include:

- an owner must pay a contractor within 28 days of receiving a “proper invoice”;
- if the owner disputes any of the amount in the invoice, the owner must issue a notice of dispute within 14 days of receiving the proper invoice;
- the owner must still pay any undisputed amount within 28 days after receipt of the proper invoice;
- subject to giving a notice of non-payment, if a contractor is paid in full by the owner, the contractor must pay its subcontractors within seven days;
- Subject to giving a notice of non-payment, if a contractor receives partial payment from the owner, the contractor must within seven days pay its subcontractors the amounts owing that were paid by the owner for the work performed or materials furnished;
- if the contractor does not deliver a notice of non-payment to its subcontractors within seven days, the contractor must pay its subcontractors in full within 35 days of issuing the “proper invoice” to the owner, even if it did not receive full or partial payment from the owner;
- subject to giving a notice of non-payment, if a subcontractor is paid in full by the contractor, the subcontractor must pay its sub-subcontractors within seven days;
- subject to giving a notice of non-payment, if a subcontractor receives partial payment from the contractor, the subcontractor must pay its sub-subcontractors the amounts owing that were paid by the contractor for the work performed or materials furnished; and,
- if the subcontractor does not deliver a notice of non-payment to its sub-subcontractors, the subcontractor must pay its sub-subcontractors in full within 42 days from when the “proper invoice” was delivered to the owner.

What is a Proper Invoice’

The PPCLA sets out the minimum requirements of a “proper invoice” as follows:

1. Written bill or other request for payment for the work done or materials furnished in respect of an improvement under a contract.
2. Must be given to an owner at least every 31 days unless the contract provides for the testing and commissioning of the improvement or work done and the testing or commissioning has not been done.
3. The contractor’s name and business address.
4. The date of the proper invoice and the period during which the work was done or materials were furnished.

5. Information identifying the authority, whether in the contract or otherwise, under which the work was done or materials were furnished.
6. A description of the work done or materials furnished.
7. The amount requested for payment and the corresponding payment terms broken down for the work done or materials furnished.
8. The name, title and contact information of the person to whom payment is to be sent.
9. A statement indicating that the invoice provided is intended to constitute a proper invoice.
10. Any other information that may be prescribed.
11. The invoice meets any other requirements as specified in the contract.

Disputing a “Proper Invoice”

The receipt of a “proper invoice” by an owner from a contractor triggers the prompt payment regime in Alberta. The PPCLA sets the minimum requirements for what constitutes a “proper invoice” and additional requirements can be set out in the contract. If the owner determines the payment application received does not constitute a “proper invoice” or if it disputes the validity of the invoice, the owner must deliver a notice of dispute to the contractor within 14 days, which must be in the prescribed form set out in the regulations. The notice of dispute must specify if the owner is disputing all or a portion of the invoice and it must detail the reasons for non-payment. The undisputed portion of the invoice must be paid to the contractor within 28 days after receiving the “proper invoice”.

With respect to a contractor who disputes the entitlement of a subcontractor to payment, the contractor must provide the subcontractor a notice of non-payment in the form set out in the regulations. The notice of non-payment must be provided within seven days after the contractor receives a notice of dispute from the owner or, if no notice of dispute was given by the owner, within 35 days of giving a proper invoice to the owner. The notice of non-payment must specify the amount that is not being paid and it must detail the reasons for non-payment. The process for a subcontractor disputing its subcontractors’ invoices is nearly identical, but the deadlines are within seven days of receiving a notice of non-payment from the contractor or, if no notice of non-payment is given, within 42 days of the proper invoice being given to the owner.

Adjudication

Adjudication is a form of streamlined dispute resolution process outside of court. An adjudicator, appointed by a Nominating Authority, presides over an adjudication. Parties can contractually designate a Nominating Authority, but cannot agree to appoint a particular adjudicator. Decisions made by the adjudicator may be binding in certain circumstances.

An adjudication process is not available after contract completion, unless agreed by the parties. When an unpaid contractor sends a notice of non-payment to a subcontractor based on non-payment by the owner, the contractor must also undertake to commence adjudication against the owner for non-payment of its invoice no later than 21 days after giving notice.

An adjudication must be conducted in accordance with the procedures in the regulations or established by the Nominating Authority. Adjudication procedures

can also be contemplated in the contract to the extent they do not conflict with the regulations or the Nominating Authority.

Types of disputes that can be adjudicated are set out in the regulations, which include valuation of services or materials, change orders, non-payment, and major or minor lien fund amounts owed at the end of a contract or subcontract, or any other matters that the parties agree to adjudicate.

Parties may terminate an adjudication after the notice of adjudication is given, but before the determination is issued. The adjudicator may also resign or be terminated in accordance with the regulations.

Prompt Payment Checklist

Are you ready for Alberta's prompt payment and adjudication? Things to consider preparing in advance:

- updated contracts – consulting agreements, construction contracts, subcontracts and purchase orders;
- updated forms of invoices that contain the required information for “proper invoices”;
- template notices of dispute;
- template notices of non-payment;
- reminder systems to track the date of delivery or receipt of a “proper invoice”, deadlines for payments and notices;
- accounting protocols to satisfy the mandated payment timelines; and,
- project filing systems to organize documents to support or defend adjudication claims.

Contractual Updates and Considerations

The PPCLA brings a number of changes that will require participants in the Alberta construction industry to update their contracts beyond updating references from the “*Builders’ Lien Act*” to the PPCLA.

- **Transition:** The PPCLA will apply to all new construction contracts entered on or after August 29, 2022. Parties to a contract entered into before the coming into force date can, by agreement, amend their contract to conform to the new provisions at any time after the coming into force of the new Act. Any contracts entered into before August 29, 2022 that are scheduled to remain in effect past August 29, 2024 must be amended to comply with the Act by that date.
- **Application:** The PPCLA applies to the vast majority of construction contracts in Alberta, with the exception of:
 1. “public works” as defined in the *Public Works Act*;
 2. agreements to finance and undertake an improvement with the provincial Crown or its agents; or
 3. projects on lands administered by the federal government.
- **Proper Invoices:** There are minimum requirements for a “proper invoice” under the PPCLA, but parties are free to specify **additional** requirements for a “proper invoice” in their contracts (for example, by requiring a “proper invoice” to include a certificate of insurance, statutory declaration or WCB certificate).
- **Payment Timelines:** The PPCLA requires contractors to issue a “proper

invoice” to an owner at least every 31 days. An owner is required to pay a contractor within 28 days of receiving a “proper invoice” (unless the owner issues a notice of dispute within 14 days of receipt). Contractors are required to pay subcontractors within seven days of receiving full payment from an owner (unless the contractor issues a notice of non-payment) and so on and so forth down the construction chain. The only exception to the payment timelines set out in the Act is where payment is contingent on testing and commissioning an improvement.

- **Pay-When-Paid Clauses:** Although pay-when-paid clauses were expressly prohibited in earlier versions of the PPCLA, the prohibition was removed in the version of the legislation that received royal assent. In essence, the PPCLA’s prompt payment framework inserts a statutory paid-when-paid clause into every construction contract, with significant differences. Under a traditional paid-when-paid clause, the timing for payment is triggered when an owner pays the contractor. Under the PPCLA, the paid-when-paid mechanism is only activated if a contractor delivers the required notice of non-payment to its subcontractors by the statutory deadline, regardless of whether it has received payment from the owner. In addition, it will not be possible to use a contractual paid-when-paid clause or payment terms to extend payment deadlines, as the PPCLA prohibits any contracting out of the requirements of the PPCLA.
- **Lien Registration Deadlines:** The PPCLA extends the general deadline for registering a lien to 60 days (or 90 days for concrete work). However, the Act does not change the 90-day deadline for registering a lien against oil and gas wells or sites.
- **Progressive Holdbacks:** Under the PPCLA, parties may agree to release holdback funds on pre-determined dates or construction milestones. For projects with a completion schedule of more than one year and a contract price over \$10M, the Act requires that holdback funds be released annually or on some other phased basis if specified in the contract.
- **Dispute Resolution:** The PPCLA creates an adjudication process to resolve certain types of disputes as set out in the regulations, which include valuation of services or materials, change orders, non-payment, and major or minor lien fund amounts owed at the end of a contract or subcontract, or any other matters that the parties agree to adjudicate. Adjudication becomes mandatory if one of the parties issues a notice of adjudication to the other. An adjudicator’s decision is binding on the parties unless:
 1. a court order is made in respect of the dispute;
 2. a party applies for a judicial review of the decision;
 3. the parties agree in writing to resolve the dispute; or,
 4. the parties have entered into a written agreement to appoint an arbitrator under the *Alberta Arbitration Act*.
- However, nothing in the PPCLA restricts parties from participating in mediation, arbitration, or court proceedings.
- **Statutory Forms:** The PPCLA prescribes a number of statutory forms that can be found in the *Builders’ Lien Forms Amendment Regulation*.

The PPCLA will introduce a number of significant changes to the Alberta construction industry that will require participants to carefully review their contracts and internal processes to ensure they comply with the Act.

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