



# Prompt Payment & Next Steps

## General Information and Q&A

### General Comments

The *Prompt Payment and Constructions Lien Act* comes into force on August 29, 2022 and will replace the current *Builders Lien Act*. The upcoming changes will impact business processes and timelines to pay invoices and file disputes for adjudication. The guide below is intended to summarize the upcoming changes and the impact it can have on residential construction owners, general contractors, subcontractors and suppliers.

**Please note this is BILD Alberta's interpretation of the legislation and regulation at this time and should not be considered legal advice.**

### Processing Prompt Payment Invoices

- Prompt payment legislation prescribes a proper invoice to be delivered every 31 days which will then initiate a 28-calendar day payment period to general contractors who will then have 7 calendar days to pay sub-contractors and so forth.
- The form to file notice of non-payment and notice of dispute are prescribed in the appendix of the regulation and method of delivery of these notices can be established in a contract.
- The regulation provides freedom of contract to ensure financial obligations are met to give more certainty for project planning and financing.
  - Example: Contract stipulates a proper invoice must be submitted on the 15<sup>th</sup> of every month which then initiates the 28-day payment cycle. If the invoice is provided after the 15<sup>th</sup>, the invoice will be processed the following month.
- Interest will begin to accumulate after the 28-day invoice period based on a rate that is agreed upon in the contracts. In the event there is no agreed interest rate, the standard is based on the *Judgement Interest Act* is applied.
- Prompt Payment comes into effect for all new projects as of August 29, 2022, but existing contracts and on-going projects will be grandfathered for a period of two years.
  - This provides a consistent framework for the transition of construction projects currently underway and provides industry with the time to adopt the new rules governing contracts and payment terms.

### What are Nominating Authorities

- A Nominating Authority (NA) is an appointed authority from the Minister of Service Alberta to carry out adjudication processes. Duties of a NA includes:
  - Hiring qualified adjudicators that meet the prescribed requirements.
  - Appoint adjudicators through certification.
  - Arrange for the hearing by adjudicators of prescribed matters for which that NA is responsible.
  - Develop and oversee programs for the training of persons as adjudicators.
  - Establish and maintain a publicly available registry of adjudicators

- Service Alberta is open to hiring multiple NA through a Pre-Qualifying Request approach which will last 3-5 years.
- Successful NA's will be required to educate and train a roster of adjudicators, in addition to establishing a code of conduct, standard operating procedures, maintaining a public website and publishing an annual report.
- In the event there are multiple nominating authorities, the first NA to be receive the dispute will initiate the request for adjudication unless a contract specifies a NA in advance. NA's also have the authority to decline the process of adjudication.
- Both parties are able to agree on an adjudicator but in the event, there is no agreement, the NA has the authority to appoint the appropriate adjudicator.
- Adjudicators require a minimum of 10 years of relevant working experience in the construction sector and have sufficient knowledge in the following areas:
  - Dispute resolution
  - Contract law
  - Legislative interpretation
  - Determination Writing
  - Ethics
  - Jurisdiction
  - Adjudication process
- A Nominating Authority must issue an annual report on their website no later than 90 days after the end of each fiscal year and will contain aggregated information respecting adjudications.

## Settling a Dispute via Adjudication

- Service Alberta is introducing a system of adjudication for construction disputes. This system is intended to create a dispute resolution process that moves away from the Courts, as was previously required under the *Builders' Lien Act*, to create a less formal, streamlined system of adjudication administered by an NA. By moving disputes away from the Courts, the Government of Alberta intends to create a more cost-efficient and timely system for resolving payment disputes in the construction industry.
- In the event a dispute is headed towards adjudication, the following information must be included for the notice of adjudication.
  - Name and address of parties involved.
  - Nature and brief description of the dispute, including details of how and when it arose.
  - Nature of redress sought.
- The party that initiates the adjudication must send an electronic copy of notice to the NA on the same day.
- Both parties can agree to an adjudicator within 4 days of initiation of the dispute.
- The NA assesses dispute and assigns a qualified adjudicator to the dispute within 7 days.

- Once the adjudicator is assigned the initiating party has 5 days to provide required documentation.
- The party responding to notice of adjudication has to provide response documentation to adjudicator, party initiating adjudication, other applicable parties within 12 days of required information from the initiating party.
- 30 days after notice that all required information has been gathered, the adjudicator must make a determination which includes reasons for determination.
- Any time prior to a determination, but after notice is given to the parties, a 10 day extension may be granted by the adjudicator.
- Certified determination must be provided to all parties within 7 days of the determination being made.
- Adjudicators can conduct on-site inspections of the improvement that is the subject of the contract/subcontract.
- The parties can agree to terminate an adjudication at any time between giving the notice of adjudication and the issuance of a determination.
- An adjudicator can resign from an adjudication if they deem the matter not eligible or if they are not competent or qualified.
- Decisions will be interim and binding, per the legislation. This means that it is possible for the parties to proceed to the Courts to litigate the issue if they are not satisfied. However, in the absence of pursuing litigation through the Courts, the decision is binding and enforceable on the parties with the same force as a Court order.
- The unsuccessful party has 30 days to bring forward a motion of judicial review.

## FAQ

### 1) **When does Prompt Payment come into effect?**

*Legislation supporting amendments to the Builders Lien Act received Royal Assent in November 2020. The Regulation and proclamation of the legislation comes into force on August 29, 2022.*

### 2) **What disputes are considered for adjudication?**

*The following matters may be referred to adjudication:*

- *The valuation of services or material provided under the contract or subcontract*
- *Payment under the contract or subcontract*
- *Disputes that are subject to 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.*
- *Any other matter in relation to the contract or subcontract, as they case may be, that the parties in dispute agree to, regardless of whether or not a proper invoice was issued or the claim is lienable.*

### 3) **What about existing contracts for on-going projects?**

*The Regulation allows a two-year grace period for transition to the new rules for construction projects underway. All contracts that are still in effect for longer than two years past the proclamation date, must amend their terms to be in alignment with the new legislation and regulations.*

- 4) What if there are multiple nominating authorities?**  
*The first nominating authority to receive the adjudication request from the disputing party will undertake the adjudication unless a NA is specified in the contract prior.*
- 5) How do I ensure the successful adjudicator is adequately trained?**  
*Nominating Authorities will establish the training criteria which is prescribed through Service Alberta to ensure all adjudicators are trained consistently across the province. The regulations prescribe the training requirements all adjudicators must meet and this includes relevant working experience.*
- 6) Who selects the adjudicator?**  
*Both parties can agree to selecting an adjudicator but in the event both parties cannot come to an agreement, the adjudicator is set by the nominating authority. It is the duty of the Nominating Authority to assign a qualified adjudicator based on the type of dispute*
- 7) What happens if there is a preference to choose a different Nominating Authority than what is currently stated in the contract?**  
*Both parties can agree to change the nominating authority identified in the contract. In the event there is no agreement, the nominating authority selected in the contract will proceed with adjudication.*
- 8) Who pays for adjudication?**  
*The adjudicator determines which party pays for the fees. It is expected the successful party will not pay any fees but they adjudicator has the authority to share the costs between both groups.*
- 9) What happens if I do not agree with the adjudicator's determination?**  
*In the event you do not agree with the adjudicator's determination, you have 30 days to appeal the decision to the courts for judicial review. However, the following conditions must be met:*
- *The party applying for judicial review must prove the following occurred during the adjudication:*
    - *The party was legally incapacitated during adjudication*
    - *The contract or sub-contract is not valid or does not exist.*
    - *The matter being adjudication did not fit within eligibility criteria.*
    - *The adjudication did not meet requirement or qualifications to be certified.*
    - *The adjudication process is deemed unfair.*
    - *There is belief the adjudicator was bias.*
    - *The determination was influenced by fraud.*
- 10) How common is adjudication?**  
*In 2021, in Ontario there were a total of 50 adjudications were issued and out of those only 10 were related to residential construction.*
- 11) Can I consolidate various complaints?**  
*Any party including the adjudicator can apply to consolidate without agreement from other parties. NA will determine if disputes can be consolidated. Consolidation may be initiated by the NA without input from the disputing parties. If notice has been given that all documentation has been received, a dispute cannot be consolidated.*

**12) How are notice of non-payment sent?**

*Terms for the notice of non-payment can be established in the contract including submission electronically or specified place of business.*

**13) What professions does Prompt Payment apply to?**

*Prompt payment applies to staff associated with construction projects including trades, suppliers, sub trades and professional consultants including engineers and architects.*

**14) What should I include in our contracts?**

*Contracts can prescribe the following information:*

- *Calendar date a proper invoice must be submitted*
- *Interest rate*
- *Selection of Nominating Authority*
- *Selecting an adjudicator*
- *Delivery method of notice of non payment (manner is specified)*

*If contracts do not establish particulars prior to project commencing, the Regulation will become the default. This can include invoices coming in throughout the month and each invoice initiating a 28 day payment period.*

**15) Where can I find the form to file a dispute or notice of non payment?**

*Service Alberta included a prescribed form in the appendix of the regulation, which can be found online or [clicking here](#).*

**16) Does prompt payment apply to change orders?**

*Yes, the regulation states written change orders, whether approved or not, or a proposed change order can be filed for adjudication.*