



Province of Alberta
Order in Council

O.C. 052/2022

FEB 25 2022

ORDER IN COUNCIL

Approved and ordered:

Lieutenant Governor
or
Administrator

The Lieutenant Governor in Council makes the Prompt Payment and Adjudication Regulation set out in the attached Appendix.

CHAIR

FILED UNDER

THE REGULATIONS ACT

as ALBERTA REGULATION 23/2022

ON February 25 2022

REGISTRAR OF REGULATIONS

For Information only

Recommended by: Minister of Service Alberta

Authority: Builders' Lien Act (section 70) as amended by
Builders' Lien (Prompt Payment) Amendment Act, 2020
(section 25)

APPENDIX

Prompt Payment and Construction Lien Act

PROMPT PAYMENT AND ADJUDICATION REGULATION

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Interpretation

1(1) In this Regulation,

- (a) “Act” means the *Prompt Payment and Construction Lien Act*;
- (b) “calendar day” means a day other than a Saturday or a holiday as defined in the *Interpretation Act*;
- (c) “certificate” means a certificate of qualification issued under section 7;
- (d) “code of conduct” means the code of conduct established by a Nominating Authority under section 10;
- (e) “issuing Nominating Authority”, with reference to an individual adjudicator, means the Nominating Authority that issued a certificate to that individual adjudicator.

(2) For the purposes of sections 33.6(5) and 33.61(1) of the Act, “written agreement” means an agreement made by the parties after the adjudicator makes a determination of the matter.

Part 1 Lien, Prompt Payment and Right to Information

Conditions for payment of amount retained

2(1) For the purpose of section 24.1(2)(a) of the Act, an annual payment must be made if the contract between the parties does not specify a phased payment.

(2) For the purpose of section 24.1(2)(b) of the Act, the prescribed amount of the contract price is \$10 000 000.

Time for proper invoice

3 Subject to the 31-day limitation required under section 32.1(6) of the Act, the owner and the contractor may agree to specify terms as to when proper invoices may be delivered.

Rate of interest on late payments

4 For the purpose of section 32.6 of the Act, the rate of interest on any amounts included in a proper invoice that are unpaid and due shall be

- (a) the rate specified in the contract, or
- (b) if no rate is specified in the contract, the current rate provided in the *Judgment Interest Regulation* (AR 215/2011).

Statement of accounts

5 For the purpose of section 33(3)(d) of the Act, a statement of the state of accounts must contain the following information:

- (a) whether all or any portion of the amount has been paid with respect to
 - (i) a proper invoice or any other invoice, or
 - (ii) proper invoices or other invoices;
- (b) the percentage of amounts paid under one or more proper invoices or other invoices;
- (c) the date on which the amount due under a proper invoice or any other invoice was paid, if any amount was paid.

Part 2
Nominating Authority and
Administration

Designation of Nominating Authority

6 To be designated as a Nominating Authority under section 33.2(1) of the Act, an entity must submit an application to the Minister in the time and manner specified by the Minister.

Certificate of qualification

7(1) A Nominating Authority may issue a certificate of qualification to adjudicate to an individual who is eligible under

subsection (2) and who applies to the Nominating Authority in accordance with its procedures.

(2) An individual is eligible to hold a certificate who meets the following requirements and qualifications:

- (a) the individual has at least 10 years of relevant work experience in the construction sector in the opinion of the Nominating Authority;
- (b) the individual has been evaluated and considered by the Nominating Authority to have sufficient knowledge and experience in the following areas:
 - (i) dispute resolution;
 - (ii) contract law;
 - (iii) legislative interpretation;
 - (iv) determination writing;
 - (v) ethics;
 - (vi) jurisdiction;
 - (vii) adjudication process;
- (c) the individual is not an undischarged bankrupt;
- (d) the individual has not been convicted of an indictable offence in Canada or of a comparable offence outside Canada;
- (e) the individual pays to the Nominating Authority the required fees, costs or charges for training and qualification as an adjudicator;
- (f) the individual agrees in writing to abide by the code of conduct.

(3) Subject to subsection (4), a certificate issued under this section is valid for the period specified in it to a maximum of 3 years and may be renewed for one or more further periods not exceeding 3 years on each renewal, if the adjudicator holding the certificate continues to be eligible under subsection (2).

(4) Certificates issued by a Nominating Authority shall cease to be valid if

- (a) the designation of the Nominating Authority is terminated,
or
- (b) the Nominating Authority ceases to operate.

Responsibilities of adjudicators

8 Every adjudicator holding a certificate must

- (a) successfully complete all training programs required by the issuing Nominating Authority under section 33.2(2)(d) of the Act and section 11,
- (b) comply with the code of conduct of the issuing Nominating Authority, and
- (c) pay to the issuing Nominating Authority the required fees, costs or charges for the training and qualifications necessary to act as an adjudicator.

Suspension and cancellation of certificate

9(1) An issuing Nominating Authority may suspend or cancel a certificate if the issuing Nominating Authority is satisfied, on reasonable grounds, that

- (a) the adjudicator holding the certificate
 - (i) is no longer eligible under section 7(2) to hold the certificate, or
 - (ii) does not meet one of the responsibilities under section 8,
- (b) the adjudicator holding the certificate is incompetent or otherwise unqualified to conduct adjudications, or
- (c) the certificate was issued or renewed on the basis of a false or misleading representation or declaration.

(2) An adjudicator whose certificate is suspended or cancelled must not conduct or continue to conduct any adjudication for the duration of the suspension or cancellation.

(3) The issuing Nominating Authority may terminate the suspension of a certificate if the issuing Nominating Authority is

satisfied on reasonable grounds that the circumstances giving rise to the suspension no longer exist and the adjudicator whose certificate was suspended is eligible to hold the certificate.

(4) The issuing Nominating Authority may re-issue a cancelled certificate if the issuing Nominating Authority is satisfied on reasonable grounds that the circumstances giving rise to the cancellation no longer exist and the adjudicator whose certificate was cancelled is eligible to hold the certificate.

Code of conduct

10(1) A Nominating Authority shall establish and maintain a code of conduct for adjudicators and shall make the code of conduct publicly available on its website.

(2) A code of conduct shall address, at a minimum, the following matters:

- (a) conflicts of interest and related procedural matters;
- (b) principles of procedural fairness and proportionality in the conduct of an adjudication and the need to avoid excess expense;
- (c) principles of civility, competence, integrity and impartiality of an adjudicator in the conduct of an adjudication;
- (d) the confidentiality of information disclosed in relation to an adjudication.

(3) A Nominating Authority shall maintain an archive of all previous versions of its code of conduct, except typographical changes, indicating the period during which each version applied, and shall ensure that all versions are publicly accessible.

(4) The code of conduct of a Nominating Authority shall not restrict an adjudicator from holding a certificate from another Nominating Authority.

Training programs

11 For the purposes of section 33.2(2)(d) of the Act, a Nominating Authority shall ensure that

- (a) foundational training in the areas referred to in section 7(2)(b) is available to individuals who apply or intend to apply for a certificate, and
- (b) continuous training is available to adjudicators holding a certificate for maintaining their certification.

Adjudicator registry

12(1) For the purpose of section 33.2(2)(e) of the Act, a Nominating Authority shall ensure that the registry of adjudicators includes the name of every adjudicator certified by the Nominating Authority and any other information as directed by the Minister.

(2) A Nominating Authority shall ensure that information is posted on its website

- (a) with respect to an adjudicator whose certificate is cancelled, for one year from the date of the cancellation of the certificate,
- (b) with respect to an adjudicator whose certificate is suspended, for one year from the date of the suspension of the certificate, and
- (c) with respect to an adjudicator whose certificate has expired, for one year from the date of the expiry.

Fee schedule for adjudication

13(1) A Nominating Authority shall set out and maintain a schedule of fees publicly available on its website, listing the fees, costs or other charges related to adjudication according to the policies and procedures established by the Nominating Authority.

(2) The relevant parties shall pay the adjudicator who hears a dispute regarding an adjudication matter under section 19 a fee in accordance with the schedule of fees set out under subsection (1) unless the parties and the adjudicator agree to pay a different fee.

(3) Any costs and other charges related to an adjudication shall be equally divided among the parties to the adjudication unless the adjudicator, subject to the policies and procedures of the Nominating Authority, directs otherwise.

(4) All costs and other charges related to adjudication shall be paid to and collected by the Nominating Authority according to the policies and procedures of the Nominating Authority.

(5) The Nominating Authority must notify the Minister of any changes to the schedule of fees set out under subsection (1) no less than 3 months before the changes take effect.

Complaints against adjudicators

14 A Nominating Authority shall establish a complaints process for accepting and addressing complaints against adjudicators from persons involved in adjudications and shall make the complaints process publicly available on its website.

Adjudicator expertise

15 A Nominating Authority shall develop procedures and take other reasonable steps to ensure that the aggregate expertise and work experience of adjudicators holding certificates is sufficient to account for the industry sectors in which parties in dispute refer matters to adjudication and the nature of the matters in dispute.

Educational materials

16 A Nominating Authority shall develop and make publicly available on its website educational materials respecting the adjudication process.

Record keeping

17(1) A Nominating Authority shall keep and maintain a record of determination of all adjudications made within the last 3 years by the adjudicators appointed by that Nominating Authority.

(2) A Nominating Authority must submit copies of any record kept under subsection (1) to the Minister in a manner as directed by the Minister if

- (a) the Minister requires the Nominating Authority to do so,
- (b) the designation of the Nominating Authority is terminated,
or
- (c) the Nominating Authority ceases to operate.

Annual report

18(1) A Nominating Authority shall issue and make publicly available on its website, no later than 90 days after the end of each fiscal year, an annual report for the fiscal year containing

- (a) aggregated information respecting adjudication, and
- (b) any other information as the Minister may direct.

(2) The fiscal year of a Nominating Authority is April 1 to the following March 31.

Part 3 Dispute Adjudication

Adjudication matters

19 A party to a contract or subcontract may refer to adjudication a dispute with the other party to the contract or subcontract, as the case may be, respecting any of the following matters:

- (a) the valuation of services or materials provided under the contract or subcontract, including in respect of a written change order, whether approved or not, or a proposed change order, as the case may be;
- (b) payment under the contract or subcontract, including in respect of a written change order, whether approved or not, or a proposed change order;
- (c) disputes that are the subject of a notice of non-payment under Part 3 of the Act;
- (d) 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, as the case may be;
- (e) any other matter in relation to the contract or subcontract, as the 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.

Notice of adjudication

20(1) A party to a contract or subcontract who wishes to refer a dispute to adjudication under section 33.4(1) of the Act shall give to the other party a written notice of adjudication that must include

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

(2) The party giving the notice of adjudication under subsection (1) shall, on the same day, provide a copy of the notice to the relevant Nominating Authority.

(3) 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.

Parties may designate Nominating Authority

21(1) Subject to subsection (2), the parties to a contract may designate in the contract a Nominating Authority to which a notice of adjudication must be submitted in the event any party to the contract wishes to refer a dispute to adjudication under section 33.4(1) of the Act.

(2) The parties to a contract may agree on a Nominating Authority other than the one designated in the contract and shall provide a copy of the notice under section 20(2) to the Nominating Authority the parties agree on.

Nominating Authority to appoint adjudicator

22(1) After the notice is given to the other party and the relevant Nominating Authority under section 20, the parties may, within 4 calendar days, inform the Nominating Authority if the parties agree on a specific adjudicator to adjudicate the matter in dispute and the Nominating Authority must, within 7 calendar days, appoint the adjudicator the parties agree on.

(2) If the parties do not provide any name of a preferred adjudicator to the relevant Nominating Authority under subsection (1), the Nominating Authority must, within 7 calendar days after the expiry of the 4 calendar days referred to in subsection (1),

assess the nature of the matter in dispute for adjudication and appoint a qualified adjudicator to adjudicate the matter in dispute.

(3) After appointing an adjudicator under subsection (1) or (2), as the case may be, the relevant Nominating Authority must, on the same day, notify all parties in dispute of the contact information of the adjudicator.

Copy of notice

23 Once an adjudicator is appointed under section 22(1) or (2), the party who gave notice of adjudication shall, within 5 days of the appointment of the adjudicator,

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

Response

24(1) A party responding to a notice of adjudication given under section 20(1) shall provide copies of the response

- (a) to the adjudicator appointed under section 22(1) or (2), as the case may be,
- (b) to the party who gave the notice of adjudication, and
- (c) to all other parties, if applicable.

(2) The response in subsection (1) shall be provided to the adjudicator and every other party to the dispute within 12 calendar days of receiving the documents under section 23(b), unless the adjudicator directs to provide the response earlier.

Adjudication process

25(1) An adjudicator may exercise the following powers in conducting an adjudication:

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

(2) The adjudicator shall notify the parties to the adjudication when the adjudicator has in their possession all documents and information required to make a determination of the matter.

(3) The adjudicator may extend, one or more times, any deadline in the adjudication process to a maximum of 10 calendar days if

- (a) the adjudicator considers it necessary, or
- (b) the parties to the adjudication agree and the adjudicator consents.

Determination of matters

26(1) For the purpose of section 33.6 of the Act, an adjudicator hearing a dispute regarding any matter under section 19 shall make a determination of the matter by issuing an order within 30 days of receiving the documents under section 23(a) or within the time extended under section 25(3).

(2) The adjudicator may make an order directing a party to make a payment due to the other party or parties in the dispute within a time specified in the order and allowing the other party or parties to stop providing services or materials under the contract or subcontract, as the case may be, if the time for payment specified in the order expires.

(3) A copy of the adjudicator's order must be certified by the relevant Nominating Authority and provided to the parties to the adjudication within 7 days after the determination is made under subsection (1) or (2).

(4) Any typographical error in an adjudicator's order made under this section may be corrected within 4 days after the determination is

made, and an electronic copy of the updated order must be sent to the parties to the adjudication on the same day the correction is made followed by a certified copy sent within 3 days after the correction is made.

Parties may terminate adjudication

27 At any time after the notice of adjudication is given under section 20 and before the adjudicator makes a determination under section 26(1) or (2), as the case may be, the parties to an adjudication may agree to terminate the adjudication on notice to the adjudicator and subject to the payment of all applicable fees, costs and other charges payable under section 13.

Resignation of adjudicator

28(1) An adjudicator may at any time resign from an adjudication if the adjudicator determines that

- (a) the matter is not eligible for adjudication under section 19,
- (b) the adjudicator is not competent or qualified to conduct the adjudication, or
- (c) the adjudicator is otherwise unable to continue the adjudication in compliance with the Act and this Regulation.

(2) The adjudicator shall promptly give written notice of the resignation to all parties to the adjudication and the Nominating Authority that appointed the adjudicator.

(3) An adjudicator must resign

- (a) if the designation of the issuing Nominating Authority is terminated by the Minister,
- (b) if the issuing Nominating Authority ceases to operate under the Act or this Regulation, or
- (c) when the adjudication being conducted by the adjudicator is consolidated and another adjudicator is appointed under section 30(3).

Failure of adjudicator to conclude adjudication

29(1) If an adjudicator fails to conclude an adjudication according to the Act and this Regulation, or if an adjudicator's certificate is

suspended or cancelled under section 9(2) while an adjudication is in progress, any party to the adjudication may give to the other party a new notice of adjudication under section 20(1).

(2) If a new notice is given under subsection (1), the requesting party must provide a copy of the new notice and copies of any documents that were given to the adjudicator who failed to conclude the adjudication to

- (a) the same Nominating Authority to which the first notice of adjudication was provided under section 20(2), or
- (b) the Nominating Authority designated or agreed on by the parties under section 21,

and sections 22 and 24 shall apply with necessary modifications.

(3) Parties to the adjudication and the adjudicator who failed to conclude the adjudication under this section shall provide to the relevant Nominating Authority, on its request, any information in their possession relating to the adjudication to assist the Nominating Authority in appointing a new adjudicator.

Consolidation of adjudications

30(1) Subject to subsection (4), a party involved in more than one adjudication may request the adjudicator conducting the first adjudication for consolidation of all adjudications in progress into one adjudication.

(2) After receiving a request under subsection (1), the adjudicator shall, if satisfied that all adjudications in progress are sufficiently related and appropriate for consolidation, notify the relevant Nominating Authority that the adjudications should be consolidated.

(3) After receiving a notification under subsection (2), the Nominating Authority shall

- (a) consolidate all adjudications in progress into one adjudication,
- (b) appoint either the notifying adjudicator under subsection (2) or a new adjudicator to adjudicate the consolidated adjudication, and
- (c) notify the affected parties and adjudicators.

(4) No consolidation of adjudications is allowed under this section if more than 5 calendar days have passed since any of the adjudicators has provided notice under section 25(2) that they have received all documents and information required to make a determination.

(5) Sections 22 and 24 to 26 shall apply with necessary modifications with respect to a consolidated adjudication under this section.

Part 4 Miscellaneous

Service of notice of non-payment

31 Unless the contract between the parties specifies the manner of service, all notices of dispute or non-payment referred to in Part 3 of the Act shall be delivered to the relevant party by service at the relevant party's regular place of business.

Form of notification

32 Unless the relevant adjudicator directs otherwise, all notices and other documents referred to in or used for the purposes of Part 5 of the Act and this Regulation shall be sent electronically.

Action under section 33.6(6) of Act

33 Any party to an adjudication may commence an action in court within 2 years after the notice of adjudication is sent under section 20, other than an application for judicial review under section 33.7 of the Act.

Grounds for judicial review

34 For the purpose of section 33.7 of the Act, the determination of an adjudicator may be set aside on an application for judicial review if the applicant party establishes one or more of the following grounds:

- (a) the applicant party participated in the adjudication while under a legal incapacity;
- (b) the contract or subcontract is invalid or has ceased to exist;
- (c) the determination was of a matter that may not be the subject of adjudication under section 19 or of a matter entirely unrelated to the subject of the adjudication;

- (d) the adjudication was conducted by someone who did not, at the time, meet the requirements and qualifications under section 7(2);
- (e) 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;
- (f) there is a reasonable apprehension of bias on the part of the adjudicator;
- (g) the determination of the adjudication was made as a result of fraud.

Professionals acting in consultative capacity

35 For the purpose of section 70(a)(i) of the Act, the Act applies to the following persons contracted to act in a consultative capacity in respect of an improvement:

- (a) a regulated professional engineer;
- (b) a regulated professional architect.

Exception for concrete

36(1) In this section, “ready-mix concrete” means ready-mix concrete referred to in the North American Industry Classification System (NAICS), as amended from time to time.

(2) For the purpose of section 70(a)(iii) of the Act, the 90-day lien period under the Act does not apply to entities that install or use ready-mix concrete.

Transitional

37 For the purpose of section 74(3) of the Act, any contracts entered into prior to the coming into force of the *Builders’ Lien (Prompt Payment) Amendment Act, 2020* and scheduled to remain in effect for longer than 2 years after the coming into force of that Act shall be given 2 years from that date to be amended so that their terms are in compliance with the new provisions and this Regulation.

Coming into force

38 This Regulation comes into force on the coming into force of the *Builders' Lien (Prompt Payment) Amendment Act, 2020*.