

# *Prompt Payment and Construction Lien Act* - Stays of Enforcement

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Discussion Session  
June 7, 2022



# Agenda

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- 1. Introduction** Welcome attendees and introduce all
  - 2. Overview** Current Status
  - 3. Reflection** Judicial Review / Considerations
  - 4. Implementation** Evaluation period to assess and determine needed changes
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# Current Status

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- Act comes into force on August 29, 2022
- Under the *Prompt Payment and Construction Lien Act* disputes that are covered by the Act may be referred to interim and binding adjudication between the parties.
- While the adjudication process is binding on the parties, it is considered an interim process per Section 33.6 (5)

# Current Status - continued

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- An application for judicial review may be made under section 33.7 under the *Prompt Payment and Construction Lien Act* on limited grounds in the Regulation.
- While the adjudication process is binding on the parties, it is nevertheless an interim process. Section 33.6(5)(b) sets out that
  - The determination of a matter by the adjudicator is binding on the parties to the adjudication, except where a party applies for a judicial review of the decision under section 33.7,
- In practical terms, this means that an application for judicial review essentially acts as a stay of enforcement on the adjudicators decision.

# Judicial Review

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- Judicial Review is not an opportunity to litigate the dispute and is limited by Regulations:
  - the applicant party participated in the adjudication while under a legal incapacity;
  - the contract or subcontract is invalid or has ceased to exist;
  - 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;
  - the adjudication was conducted by someone who did not, at the time, meet the requirements and qualifications under section 7(2);
  - 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 is a reasonable apprehension of bias on the part of the adjudicator;
  - the determination of the adjudication was made as a result of fraud.

# Considerations

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- The limitations imposed by regulation in Alberta substantially reduce the availability of Judicial Review and make it risky to invoke unnecessarily.
  - potentially involving cost penalties and professional reprimand for lawyers who abuse the process.
- Establishing a balance for ‘interim and binding’ adjudication was based on input from stakeholder consultations.
  - In the initial version of Bill 37, adjudication was ‘final and binding’. The majority of stakeholders initially supported this position, but upon more consultations, felt this would foreclose on recourse to the Courts and so the provision was seen as too strong.

# Considerations

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- The concepts of ‘interim’ and ‘binding’ provide balance for strengthening an adjudicator’s decision for it to be followed by the parties, but still allow flexibility to proceed to Court if one party was seriously dissatisfied. It also tries to balance the interests of diverse parties.
  - Consultations with stakeholders emphasized that the adjudicator’s decision should carry weight and the force of law, but also that a path to the Courthouse should always be readily available.
  - Proceeding to Court to have a Judicial Review is possible:
    - if the adjudication has not already commenced;
    - if there is a serious procedural unfairness by an adjudicator; and/or
    - if the contract is already complete and the project finished, it would be necessary to proceed through the Courts.

# Evaluation Period

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- August 29, 2022 – *Prompt Payment and Construction Lien Act* and *Regulations* are proclaimed and in effect.
  - 6 to 9 months after proclamation, a review by Service Alberta will be completed with industry stakeholders and NA's.
  - This includes review of adjudication process abuse experiences, and other potential process issues.
  - Act amendments, if needed, will be scheduled into an upcoming legislative calendar.



# Discussion and Questions?

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