

Walsh LLP

*Prompt Payment and Construction Lien Act:
Coming to Alberta on August 29, 2022*



Prompt Payment and Construction Lien Act

OVERVIEW

The Government of Alberta has now confirmed that the *Prompt Payment and Construction Lien Act* (“PPCLA”), which replaces the current *Builders’ Lien Act* (“BLA”), will come into force on August 29, 2022. On February 25, 2022, the Alberta Government also released the long awaited *Prompt Payment and Adjudication Regulations* (“PPAR”), which provides further clarity regarding the PPCLA. The PPCLA and PPAR provide a framework that establishes strict timelines and rules for payments, creates a new adjudication process for payment disputes and revises some key aspects of the existing lien legislation. A summary of the major amendments include:

- An extension of the lien period;
- Improved access to payment information for subcontractors
- A change to the release of holdback requirements;
- Updated invoicing and billing practices; and
- Adjudication.

THE CHANGES

The Lien Period

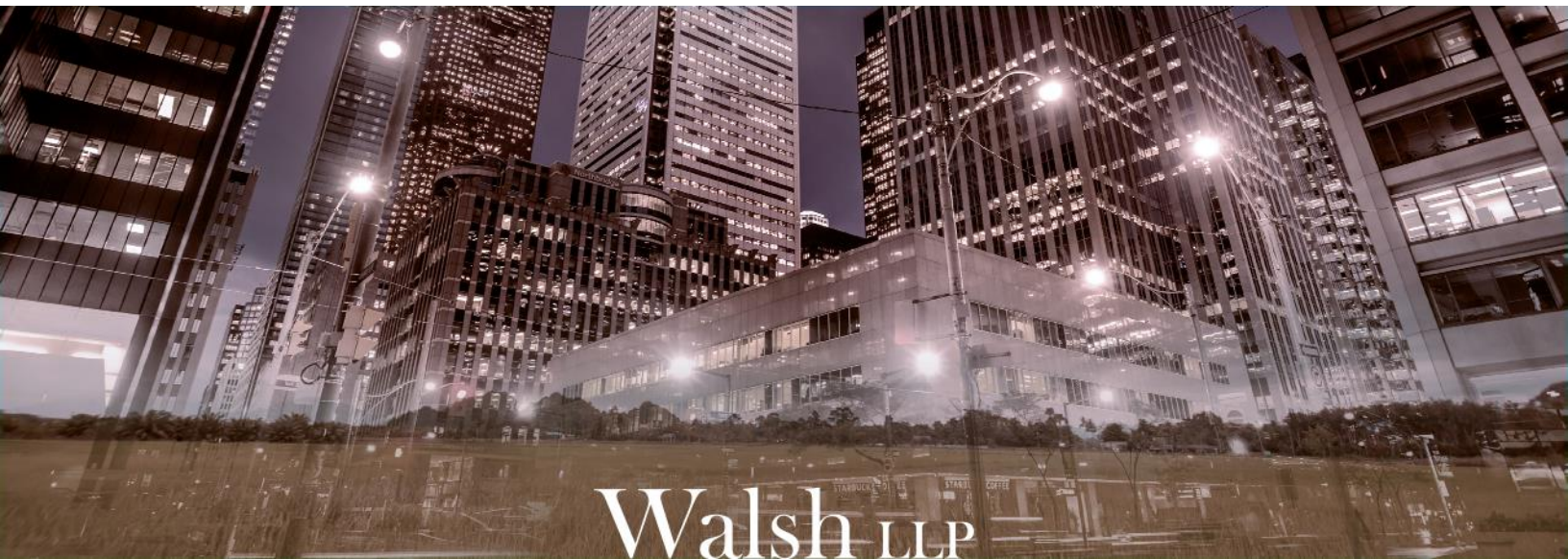
Under the new changes, the lien period for the construction industry will be extended from the current 45 days to 60 days. The oil and gas industry’s lien period for oil and gas well sites will remain unchanged at 90 days. The PPCLA also carves out an exception for contracts for the supply of work and services in relation to concrete by extending the lien period to 90 days. The PPAR, however, creates an exception for ready-mix concrete, namely that the 90-day lien period does not apply to entities that install or use of ready-mix concrete.

There will also be an increase from \$300 to \$700 for the required minimum amount owing in order to register a lien.

Improved Access to Payment Information for Subcontractors

As it currently reads, section 33 of the BLA, allows a lienholder to request a copy of contracts and statements of accounts for the relevant project between the contractor and the owner. The PPCLA expands who may request this information to include a lienholder, beneficiary of a trust or a contractor or subcontractor currently working under a contract on the project, by notice in writing, at any reasonable time to demand the production of the contract and statement of the accounts from an owner.

The six (6) day time period and the ability to claim for losses sustained if the requested information is not provided will remain unchanged, along with the ability to apply to the Court for an order to produce the information.



Holdback

Due to the extended lien period, holdbacks related to concrete contracts will be retained for 90 days and general construction contract holdbacks will be extended to 60 days. Furthermore, section 24 of the PPCLA, mandates the progressive release of holdbacks on an annual basis if the value of the contract exceeds \$10,000,000.00 and if the contract has a completion schedule that is longer than one year or the contract provides for phased release of holdback.

Prompt Payment

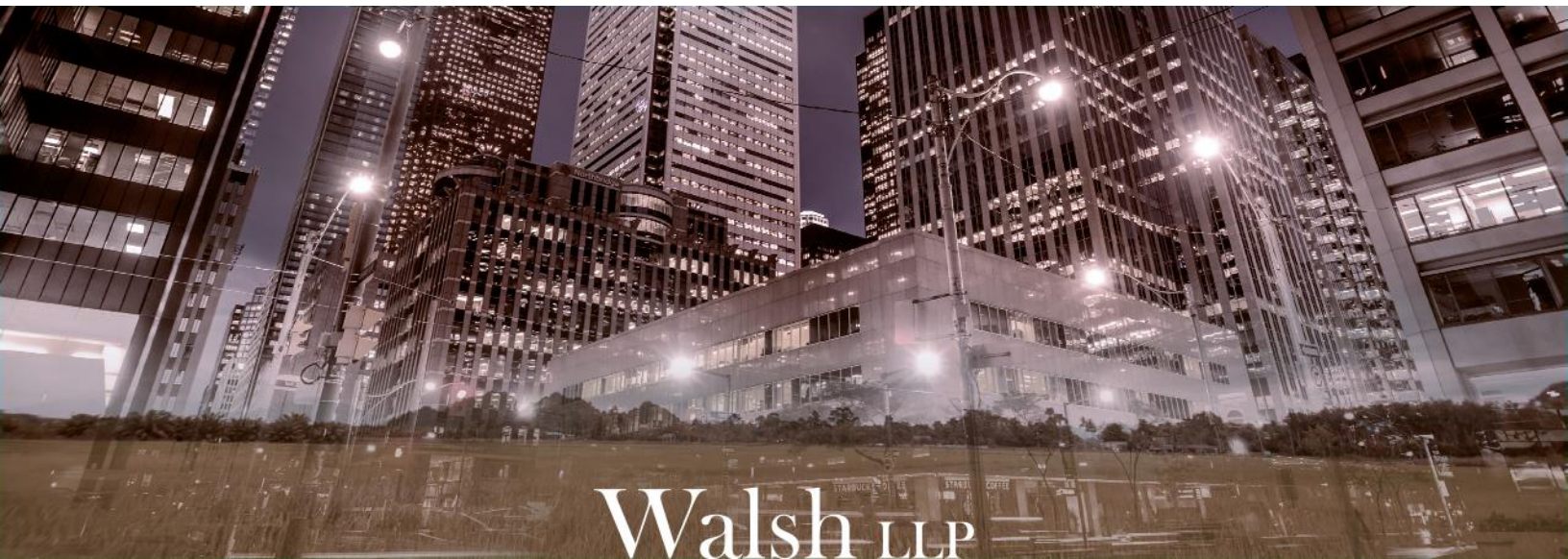
Part 3 of the PPCLA has the most significant changes. Most importantly, it will mandate a time period and payment deadline for payment in an effort to streamline payment terms across the industry. Key changes to note include:

- a statutory definition of what constitutes a “proper invoice”;
- a prohibition on contractual terms that impose prior certification from a consultant or approval of the owner as a condition precedent to the issuance of a proper invoice;
- an invoice may only be revised if there’s agreement between the parties; and
- a proper invoice must be given to the owner at least every 31 days. There will be an exception where the contract includes a provision for testing and commission of the improvement and conditions are not met.

Proper Invoice

Under the PPCLA, a “proper invoice” must include:

- the 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; and
- any other information that may be prescribed in the PPAR.



Payment Deadlines

The PPCLA mandates timelines for payments down the construction pyramid that are triggered by receipt of a “proper invoice” given by a contractor to an owner. Upon receipt of a “proper invoice” by the owner, there are different timelines for payments:

- The owner must pay the contractor within 28 days after receipt of a proper invoice;
- The contractor must pay its subcontractors within 7 days of receipt of payment from the owner;
- The subcontractor must pay its subcontractors within 7 days of receipt of payment from the contractor.

Unless provided for below, a contractor must pay its subcontractors within 35 days of giving the proper invoice to the owner, even if the contractor has not been paid in full.

Disputed Invoices

If the proper invoice is disputed by the owner, the owner must provide the contractor with a Notice of Dispute no later than 14 days after receipt of the proper invoice. Notice must be in a proscribed form and manner pursuant to the PPAR, it must specify the amount not being paid and the reasons for the non-payment.

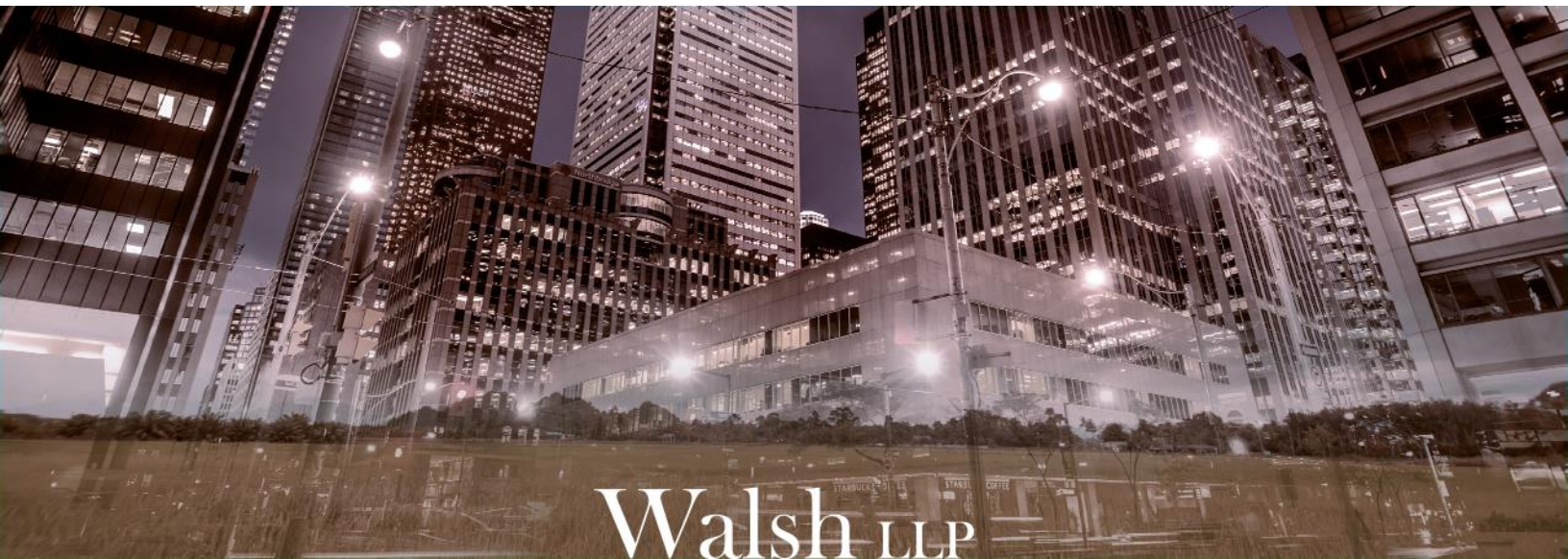
If a contractor receives a Notice of Dispute, they are still required to remit payment in full to their subcontractors not affected by the Notice. However, if the Notice calls for an overall reduction of payment, the contractor is only obligated to pay its subs on a proportionate basis.

Notice of Non-Payment

If a contractor receives a Notice of Dispute from an owner, the contractor must give a Notice of Non-Payment to their subcontractor within 7 days. The Notice of Non-Payment must state the amount not being paid is due to the non-payment by the owner. It also must provide an undertaking by the contractor to refer the matter to adjudication within 21 days and attach a copy of the Notice of Dispute.

If a contractor disputes its subcontractor’s invoice and the owner has not issued a Notice of Dispute, the contractor has 35 days after submitting its proper invoice to issue a Notice of Non-Payment to the subcontractor. The subcontractor is then required to advise its subcontractors and suppliers accordingly on whether payment will be affected or if payment will be received on a proportionate basis.

A subcontractor must pay its subcontractors within 42 days (from the date the proper invoice submitted by the contractor to the owner) even if the contractor has not fully paid the subcontractor. If a subcontractor disputes its subs’ invoice, and the contractor has not issued a Notice of Dispute, the subcontractor has 42 days after the contractor submitting its proper invoice to issue a Notice of Non-Payment to its subs.



A subcontractor must give Notice of Non-Payment to its subs in a proscribed form and manner and include the following information:

- disclose if the amount not being paid is due to non-payment by contractor;
- an undertaking to refer the matter to adjudication within 21 days of giving notice of non-payment to subcontractor; and
- copies of any Notices of Dispute or Non-Payment relevant to the subcontractor

Adjudication

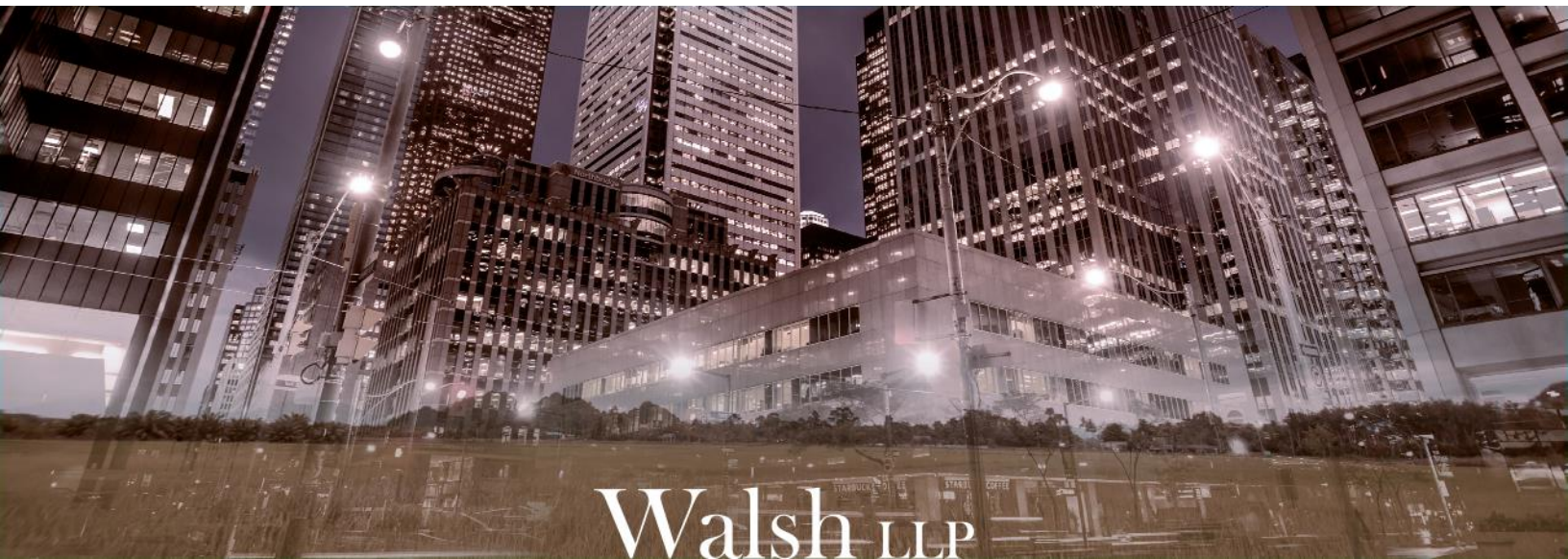
Disputes regarding any matter under the PPCLA may be referred to adjudication for determination. The PPCLA provides for an optional dispute adjudication process that either party to a contract or subcontract may initiate. Adjudication is intended to bolster the prompt payment scheme, providing for faster and less costly resolutions of payment disputes than a court proceeding.

The PPCLA provides that a Nominating Authority will qualify and appoint adjudicators to hear dispute under the PPCLA. The PPAR mandates that an adjudicator must obtain a certificate of qualification from a Nominating Authority which requires the adjudicator to successfully complete all training programs required by the Nominating Authority, comply with the Nominating Authority's code of conduct, have at least 10 years of relevant work experience in the contraction sector, and have sufficient knowledge in the areas of dispute resolution, contract law, legislative interpretation, determination writing, ethics, jurisdiction and adjudication process.

To refer a dispute to adjudication, one of the parties to the contract may issue a written notice of adjudication. There are two circumstances in which a party is unable to refer a dispute to adjudication: when an action in court is commenced on or before the date that the notice of adjudication is delivered and after the contract or subcontract is completed (unless the parties agree otherwise).

Once a written notice of adjudication has been delivered, the adjudication process will proceed as follows:

- the parties have 4 days to agree on an adjudicator failing which, within 7 days, the Nominating Authority will select an adjudicator for the parties;
- once an adjudicator is appointed, the initiating party has 5 days to provide the other party ad the adjudicator with the notice of adjudication, the contract and other documents they intend to rely on;
- The responding party has 12 days to provide a response to the adjudicator and the other party, unless the adjudicator requires an earlier response;
- The adjudicator must issue a decision within 30 days of receiving the documentation from the initiating party; and
- The adjudicator may extend any of the deadlines above by a maximum of 10 calendar days.



The adjudicator may refer a dispute to court if they do not have jurisdiction or are of the opinion the Court is more appropriate. The adjudicator's decision is binding on the parties subject to certain exceptions:

- 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;
or
- The parties have entered into a written agreement that resolves the matter.

The written agreements to resolve the matter or appoint an arbitrator must be made by the parties after the adjudicator has made a determination. A contract that provides for mandatory arbitration as a mechanism for dispute resolution will not be effective to prevent the enforcement of an adjudicator's determination as it is agreed prior to the adjudicator's determination.

The determination of an adjudicator may be set aside by judicial review on certain limited grounds, including a reasonable apprehension of bias on the part of the adjudicator, a failure to follow the appropriate procedures, determination was made as a result of fraud, and the invalidity of ceasing to exist of the underlying contract or subcontract. A judicial review application prevents the registration and enforcement of an adjudicator's order and must be commenced no later than 30 days after the date of the notice of determination is issued by the adjudicator.

Transition

Contracts or subcontracts entered into on or after the PPCLA comes into force shall be governed by the PPCLA. Consequently, contracts or subcontracts entered into prior to the PPCLA will be governed by the BLA until the contract expires, is terminated or is amended.

More guidance and clarification is required for situations where the contract between the owner and contractor fall under the BLA but the contract between the contractor and the sub-contractor fall under the PPCLA.

Questions

If you have any questions, please do not hesitate to contact the litigation team at Walsh LLP at (403) 267-8400.

