

2023/24

ARCANA ALBERTA ANNUAL REPORT



ARCANA
Alberta
**Construction
Adjudication**

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Introduction

ARCANA (AB) is pleased to present its first annual report to the Government of Alberta, covering the period from its appointment in 2023 to March 31st, 2024.

ARCANA (AB) was appointed by the Minister of Service Alberta and Red Tape Reduction as a Nominating Authority (NA) for the delivery of construction adjudication services on April 19th, 2023. Prior to this appointment, made pursuant to the Prompt Payment and Construction Lien Act (PPCLA) and Regulation, ARCANA (AB) was given Ministerial authority to adjudicate a small number of early applications included in this report.

ARCANA (AB)'s first year can only be considered a success, but it was not a year without challenges. Construction adjudication, and legislation regarding the requirement for prompt payment, are relatively new in Canada, although well established in several other countries. The availability of accessible and affordable construction adjudication services in Alberta helps ensure that construction projects can advance to completion, that contractors get paid, that small businesses thrive, and that the Courts are relieved of a significant burden.

ARCANA (AB) structure

ARCANA (AB) represents a partnership between the ADR Institutes of Alberta & Canada (ADRIA & ADRIC), and the Royal Institution of Chartered Surveyors (RICS). RICS has over 25 years of experience in the delivery of construction adjudication services around the world, and brings invaluable expertise and experience to the NA. ADRIA and RICS have partnered to deliver an exceptional 40-hour training program for construction adjudicators. ADRIA & RICS administer and deliver NA services in Alberta and provide ongoing support and professional development to ARCANA (AB)'s roster of independent adjudicators. Albertans and the Province's construction sector benefit from having access to an Alberta-based NA that draws upon world-class expertise in construction dispute resolution.

ARCANA (AB) adjudicators are independent contractors, trained and certified by the NA, and appointed to individual files by ARCANA (AB) pursuant to the PPCLA and Regulation. Adjudicators are bound to a Code of Conduct and professional development requirements to ensure that their work as adjudicators is compliant with the legislation, that their conduct is above reproach, and that they stay abreast of developments in the sector.

The partners

The ARCANA (AB) Partnership is comprised of three well established entities:

The Royal Institution of Chartered Surveyors (RICS) is a global leader in the provision of adjudication services to the construction industry and has nominated qualified professionals for over 20,000 adjudications over the past 25+ years pursuant to statutory and contractual regimes in the UK, Australia, New Zealand, Southern Africa and the Republic of Ireland. The RICS training, accreditation and performance monitoring programs for construction adjudicators are regarded as the gold standard by industry professionals and users of adjudication globally.

The ADR Institute of Canada (ADRIC) is Canada's leading ADR professional organization and presides as the national body of the seven regional affiliate bodies of the ADR Institutes in Canada. It has established benchmarks for best practice for ADR professionals across Canada and offers highly respected and sought-after professional designations. ADRIC members include Canada's top dispute resolution professionals, many of whom are skilled and experienced in construction industry law and practice. ADRIC and RICS have partnered to respond to the Federal Government's Prompt Payment Adjudication legislation and are working with individual Affiliates across Canada to support Provincial Construction Adjudication initiatives.

The ADR Institute of Alberta (ADRIA) is well known to the Provincial Government as Alberta's professional association of mediators, arbitrators, adjudicators and other ADR practitioners, and the source of ADR expertise in Alberta. ADRIA functions as an independent Regional Affiliate of ADRIC in the delivery of highly qualified and credentialed ADR professionals in all sectors of Alberta's economic and civil life. For over 20 years ADRIA has administered the Canadian Motor Vehicle Arbitration Plan (CAMVAP) in Western Canada, in partnership with the CAMVAP national body. ADRIA has represented the new ARCANA (AB) partnership throughout Service Alberta's consultation process and the drafting of prompt payment adjudication legislation and directives.

ADRIA is the primary point of contact between the Government of Alberta / Service Alberta and ARCANA (AB) as an Alberta Nominating Authority (NA).

The Act and Regulation

The Prompt Payment and Construction Lien Act (PPCLA) and Regulation represent an important step forward for Alberta's construction sector. The Act took effect on August

28th, 2022, following many years of stakeholder engagement during which ADRIA played an active role. ARCANA (AB) was appointed as Alberta's first NA by the Minister of Service Alberta and Red Tape Reduction on April 18th, 2023. The PPCLA legislation expands Alberta's construction dispute resolution options to ensure that payment disputes do not disrupt the completion of projects, or the viability of contractors and firms that rely on this sector for their livelihood.

Consumers are similarly protected, and the Courts are relieved of a significant burden. Alberta is one of only four provinces that currently provides adjudication options within the construction sector and has demonstrated leadership in introducing this legislation. Ongoing engagement sessions with stakeholders, and feedback from the NA to Service Alberta, suggests that this legislation will soon be amended to address areas of concern, and expanded to include Public Works.

Adjudication explained

Adjudication is a form of expedited dispute resolution favored to resolve construction disputes quickly and cost effectively. An independent adjudicator is appointed by a Nominating Authority (NA) and the adjudicator will make a determination in accordance with the Act and Regulation. Adjudication is designed to be accessible, affordable and quick - the legislation sets out a strict timetable which the adjudicator and the parties must follow. This ensures that disputes are determined promptly - usually within a month of the adjudicator receiving submission documents from both parties.

Adjudication is intended to be a straightforward process without the need to involve lawyers, though parties are always encouraged to seek professional advice if they are involved in adjudication in order to familiarize themselves with their rights and remedies under the Act and Regulation, and other remedies available to them. Adjudication orders can be filed with the court and enforced as court orders. Adjudication orders, however, are considered to be interim and binding, in that they are subject to Judicial Review if either party to the dispute makes an application within 30 days of receipt.

Accessing adjudication

Accessing ARCANA (AB)'s adjudication services requires no more than completion of a Notice of Adjudication as laid out in the Act and Regulation. ARCANA (AB) offers a simple template and guidance on its website to facilitate this initiating step. ARCANA (AB) has observed that completing this single action, at no cost to the applicant, has been enough to encourage outreach by the respondent, if not a payment. Quick

resolutions such as this, potentially with no NA involvement, has been one of the goals of the Government's prompt payment initiative since first initiated.

Within a week of serving a Notice of Adjudication, NA fees are payable, and the formal appointment process begins. ARCANA (AB)'s fee schedule serves to encourage early dialogue between the parties and offers a discounted appointment fee if the parties can reach agreement on the adjudicator to be appointed. Once appointed, the adjudication begins in earnest, in strict compliance with the timelines laid out in the legislation. A comprehensive user guide is available on the ARCANA (AB) website outlining the adjudication process from start to finish.

ARCANA (AB)'s fee structure offers a tiered approach to ensure that adjudication services remain accessible to all. In addition, the ARCANA (AB) website offers information regarding alternatives to adjudication that are often attractive to those pursuing claims under \$15,000.

The Nominating Authority (NA)

ARCANA (AB) is currently the only NA in Alberta and, as such, is the only authority for the appointment of construction adjudicators pursuant to the Act. The PPCLA is unique in Canada as it allows for the appointment of additional NAs, although to date no other NA has been appointed.

The legislation allows construction contracts to specify ARCANA (AB) as their preferred Nominating Authority (NA), but not any specific adjudicator. NAs are responsible for the delivery of professional construction adjudication services upon application, as defined by the Act and Regulation, including the training, assessment and appointment of qualified adjudicators. NAs are also required to make publicly available an online roster of adjudicators, a code of professional conduct, a fee schedule, and a public complaint process.

As an Alberta-based NA that has worked closely with the construction sector, ARCANA (AB) is confident that it is well situated, in fact best situated, to support the growing demand for construction adjudication services within the Province. ARCANA (AB) provides ready access to highly trained adjudicators that offer expertise covering the full spectrum of construction disputes.

Roster of independent construction adjudicators

In its first year ARCANA (AB) hosted a roster of nine independent adjudicators and completed the training of a second cadre to join the roster in 2024. Construction

contracts cannot specify an adjudicator but can specify ARCANA (AB) as their preferred Nominating Authority (NA).

All ARCANA (AB) adjudicators hold professional insurance, function independently of the NA, and are subject to both a professional code of conduct and ethics, and a public complaint process. The ARCANA (AB) roster of adjudicators is expected to double in number this year in anticipation of increased demand, and all adjudicator profiles can be viewed online.

Adjudicator training, credentials & professional development

ARCANA (AB) adjudicators possess a minimum of 10 years experience in the construction sector. Before joining the ARCANA (AB) adjudication roster, candidates complete over 40 hours of training, and successfully pass a written evaluation. ARCANA (AB) adjudicators must also face a review panel of three, where they are examined by experienced and well-respected experts in the field.

Roster members must hold a membership in the ADR Institutes of Alberta and Canada (ADRIA/ADRIC) and hold ADRIC's national designation of Qualified Adjudicator (Construction). The Q.Adj (Const) designation must be maintained annually through a program of Continuing Education & Engagement (CEE).

The quality of the ARCANA (AB) roster adjudicators received judicial praise in the recent Alberta case of *Welcome Homes Construction Inc v Atlas Granite Inc, 2024 ABKB 301* where Judge W.S. Schlosser stated:

Adjudication in Practice

[14] Adjudicators are picked by a nominating authority after satisfying an impressive list of qualifications. They are governed by a Code of Conduct.

ARCANA (AB) fee structure

ARCANA (AB) fees are structured within five tiers and posted online to ensure that adjudication services are affordable for construction projects of any size. Applicants normally pay the prescribed appointment fee, which is reduced by 50% if the parties can agree on an adjudicator within four days of filing the Notice of Adjudication. Lower tier adjudication fees are capped and, once appointed, adjudicators will issue detailed instructions and collect appropriate retainers. While it is always preferable for the retainer to be divided and paid equally by both parties, it is often the Applicant that

initially covers the full cost. These fees are accounted for in the determination, and the full cost of the adjudication may be divided equally or unequally by the adjudicator in the accompanying order.

First-year challenges and Government liaison

ARCANA (AB) has appreciated the continued engagement process maintained by Service Alberta and has availed itself of every opportunity to provide constructive feedback as the Alberta Government considers updates and improvements to the legislation. As with any new and progressive legislation, implementation has not been without its challenges. Both the NA and its adjudicators have faced a steady stream of jurisdictional challenges arising from differing interpretations and minor inconsistencies within the Act.

ARCANA (AB)'s observations and suggestions to Government are detailed in the letters that accompany this report and focus on areas that will improve the adjudication experience for all parties, including the NA and its adjudicators. Paramount amongst these are amendments that will clarify jurisdictional issues such as “contract completion” and reduce the negative impact of court interventions by the parties that frustrate the intent of the legislation.

ARCANA (AB) has been encouraged by the Government's receptivity to its suggestions, and by the Government's intention to incorporate Public Works into the PPPCLA. ARCANA (AB)'s suggested amendments, if adopted and passed, will greatly ease the adjudication process and further reduce the burden placed on our Courts.

Jurisprudence

The intent of the PPCLA and Regulation is to provide accessible and affordable out-of-court resolution options for disputes that disrupt projects and/or threaten the livelihood of construction service providers. Nonetheless, some adjudication decisions have already faced court challenges. Construction adjudication is still quite new in Canada, so while there has been jurisprudence regarding the Ontario legislation, there has been only one court case concluded in Alberta (*Welcome Homes Construction Inc. v. Atlas Granite Inc.*, 2024 ABKB 301). In that decision the Alberta court held that adjudicator determinations are “final and binding, unless ...”, whereas determinations in Ontario are deemed to be “interim and binding, until...” due to the differing language used in their respective legislation. While this choice of language may be a “distinction without a difference”, it remains to be seen what impact (if any) this case, and others yet to be

argued, will have on subsequent adjudications and/or legislative amendments in Alberta.

Construction Sector Advisory Council

ARCANA (AB) has collaborated with the construction sector and encouraged the establishment of an independent Construction Sector Advisory Council (CSAC). The CSAC has been afforded access to ARCANA (AB) reports and statistics and will serve to inform the NA of sector concerns and suggested remedies. The CSAC's initial feedback on the PPCLA legislation and NA performance is attached to this report.

Adjudication statistics, fiscal year 2023-2024

Since standing up in 2023, ARCANA (AB) has received 23 formal Notices of Adjudication (Note 1).

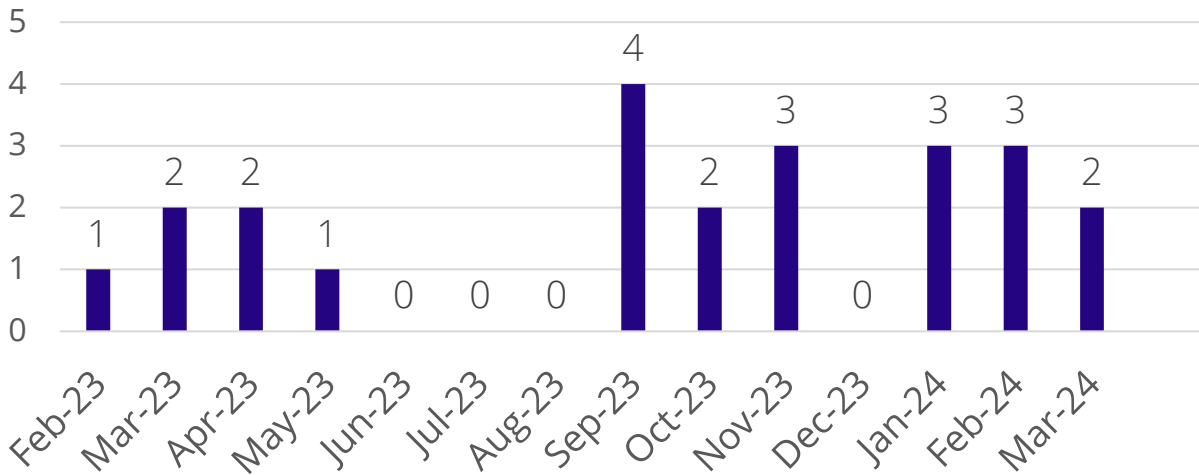
- Of the 23 Notices formally received:
 - 14 were Commercial, 7 were Residential, and 2 were Industrial
 - 11 were in the Calgary area, 7 in or near Edmonton, and 5 were North of Edmonton
 - Claims ranged from \$2.5K to \$335K. With reference to the ARCANA (AB) Fee schedule:
 - 10 Tier 1 (Under \$15K)
 - 11 Tier 2 (\$15-100K)
 - 2 Tier 3 (\$100-500K)
 - 0 Tier 4 (\$500K to \$5M)
 - 0 Tier 5 (Over \$5M)
 - 4 Notices were not accepted as the contract pre-dated the PPCLA.
- Of the 19 compliant Notices:
 - 1 file was consolidated with another into a single appointment.
 - 19 Appointment Fees were remitted to the NA totalling \$13,050.50 (Average \$686.87)
- Of the 18 files requiring NA appointment:
 - 18 Adjudicator appointments were issued (to 6 of the 9 roster adjudicators).
 - 16 Adjudication fees were paid to 6 Adjudicators totalling \$67,487.36 (Average \$4,217.98). A portion is remitted to the NA (see below).

- 8 files were granted extensions by the Adjudicator (for various reasons and varied lengths)
- 3 files were known to have later gone to Judicial Review after being certified
 - 1 of these 3 was also the subject of an Application for Judicial Review before the Determination was written
 - Only 1 of the 3 known Applications has been settled by the Court (jurisprudence)
- 3 files in which no Determination was issued, as
 - 1 file was referred to arbitration to satisfy a clause in their contract; and
 - 2 files had settled on their own.
 - In one of these 2 instances, the Adjudicator was never paid (hence retainers are now standard)
- Of the 15 Determinations written,
 - 1 determination did not include an order, as there was no financial consequence for either party.
 - In at least one file, the amount claimed was significantly reduced before a Determination was rendered
 - 15 Remits were paid to the NA by 6 Adjudicators totalling \$10,025.40 (Average \$668.36)
- Of the 14 written Determinations that included an Order,
 - 14 were certified by the NA
 - 13 were in favour of the Applicant
 - Payments ordered ranged from roughly \$2K to \$35K
 - Orders often included an allocation or re-allocation of the costs incurred to adjudicate
 - Adjudicator fees ranged from \$1000 to \$7500 (not including the NA Appointment fee)

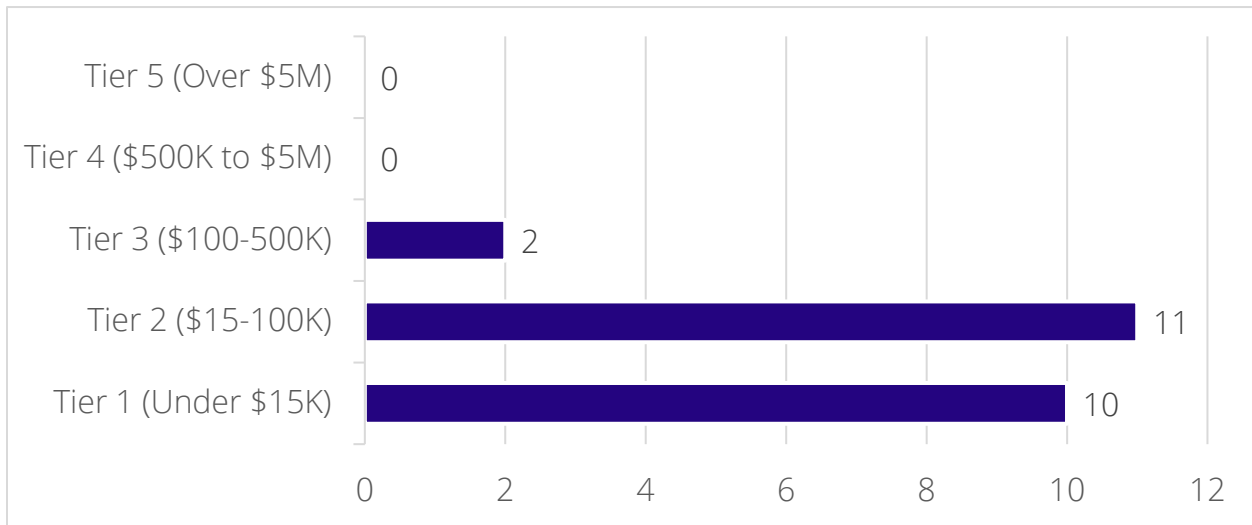
Note: that the NA also received over a hundred telephone enquiries, and an untold number of website visits seeking information. Many enquiries were quickly determined (by the NA or by the parties' own research) to pre-date the legislation, or to be of such small value that other dispute resolution options were more attractive. These other options are included on the ARCANA (AB) website to ensure that small claimants were making informed decisions. The website also includes information on how an

adjudication order can be enforced. ARCANA (AB) has received many positive comments on the website, and there will be new material added over time in response to the feedback received.

Notices received by month since approval as a Nominating Authority

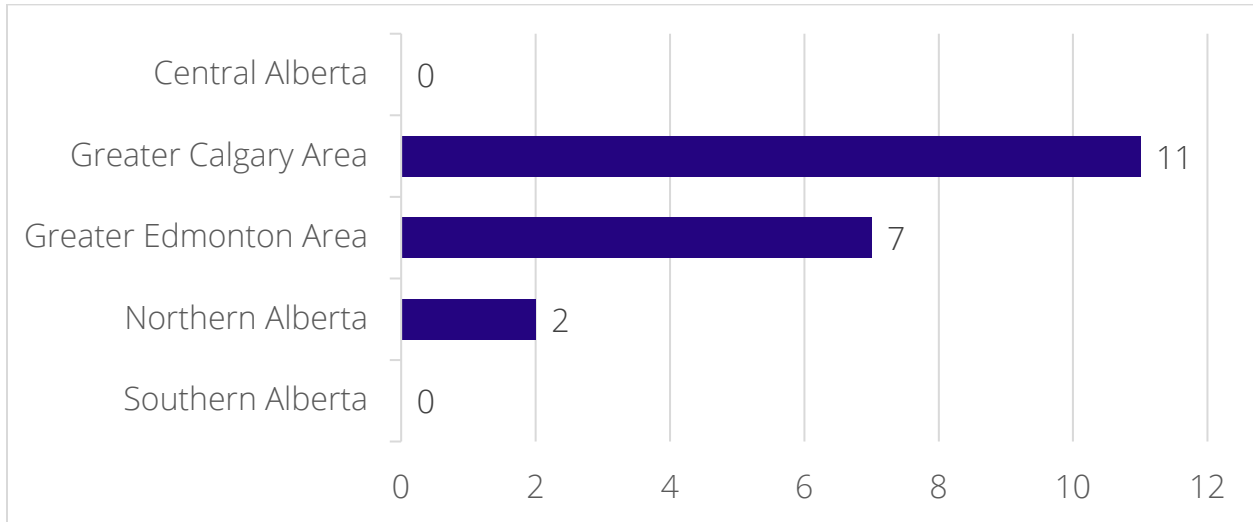


Claim values of notices received

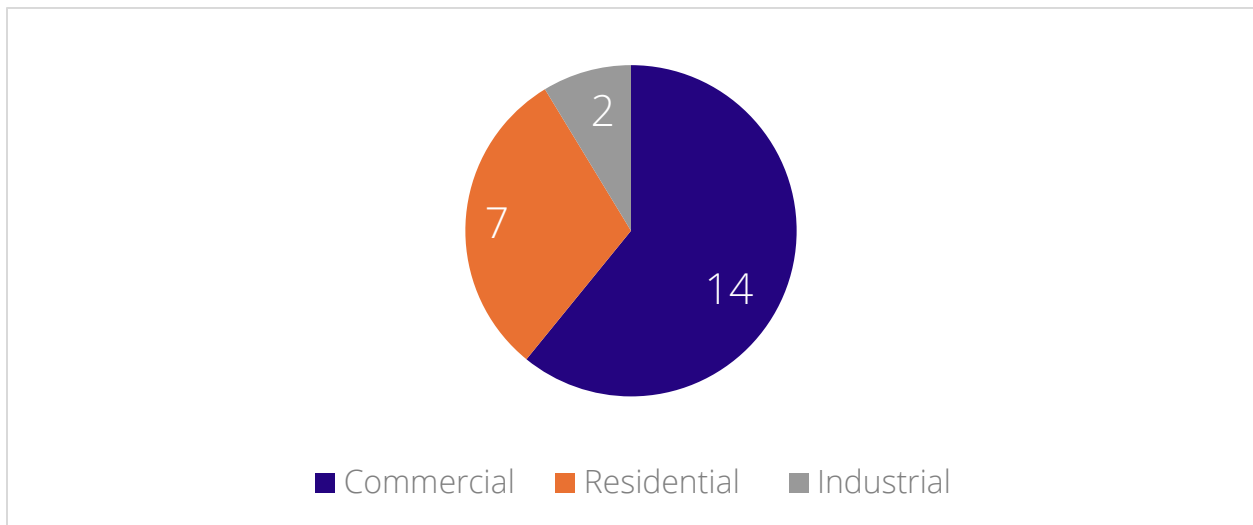


NOTE: Claims ranged from \$2.5K to \$335K. With reference to the ARCANA (AB) Fee schedule. 4 Notices were not accepted as the contract pre-dated the PPCLA.

Geographical distribution of notices received across Alberta



Types of notices for the adjudications received



ARCANA (AB) website & publications

ARCANA (AB) hosts a [comprehensive website](#) and continues to add new resources as they become available. The website serves to meet legislative requirements and provide users with full details of the adjudication process. Feedback from those accessing the website has been extremely positive, and ARCANA (AB) is committed to a process of continuous improvement.

Notably, ARCANA plans to move to and optimize a stand-alone website, including a dedicated online directory of professional construction adjudicators, as soon as resources permit.

Outreach and Public Education

In April 2023 ARCANA hosted a highly successful and well-attended Construction Adjudication Prompt Payment Symposium in Calgary. The conference featured representation from all three partners: ADRIA, ADRIC and RICS. There was strong participation from the legal and construction sectors, as well as provincial and municipal governments. A second symposium is envisioned once the Government passes amendments to the Act.

In addition to a process of continuous improvement to the website, ARCANA (AB) has reached out and made itself available to a wide array of public and professional forums. Webinars, panels and in-person presentations by the NA have served to inform and guide those most likely to access adjudication services and address any misconceptions regarding service delivery. In addition, quite independent of the NA, a number of law and construction-related firms have been regularly delivering bulletins, newsletters, webinars and presentations on the subject of Alberta's PPCLA. ARCANA (AB)'s outreach and public education efforts over the first year are detailed in an attachment to this report and continue unabated.

Conclusion

ARCANA (AB) is proud of its first-year accomplishments, and the opportunity to provide Albertans and the construction sector with alternatives to litigation. While challenges abound, ARCANA (AB) is confident that the Government of Alberta is receptive to legislative changes and an expansion of the prompt payment construction adjudication regime.

Contact information

ARCANA (AB) is responsive to questions and feedback from all sectors, public and private. Responses are assured within 2 business days. ARCANA (AB) can best be reached by:

Email: arcana@adralberta.com ;

Phone: 780-433-4881 ext 111 ; or

Mail: 3438 78th Ave NW, Edmonton, AB T6B 2X9

Appendices

1. Letters- ARCANA (AB) to Service Alberta
2. CSAC commentary on the PPCLA and Nominating Authority performance
3. ARCANA (AB) outreach and public education efforts

Appendix 1: Letters - ARCANA (AB) to Service Alberta



ARCANA
Alberta

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Edmonton, AB T6B 2X9
arcana@adralberta.com
arcana@rics.org
www.adralberta.com
Phone: (780) 433-4881

November 23, 2023

Sent via email to: Curtis.Wollard@gov.ab.ca

Service Alberta
Prompt Payment Project Team
10365 97 Street
Edmonton AB T5J 3W7

Attention: Mr. Curtis Woolard, Registrar of Land Titles, Director of Program Policy and Analytics

Re: ARCANA (AB) Recommended Amendments to the PPCLA and Regulation

Dear Curtis,

Thank you for permitting ARCANA (AB) representatives to attend the recent series of stakeholder engagement sessions (Evaluation of PPCLA) . We found the remarks of the participants to be highly informative and of great assistance to ARCANA (AB) in evaluating its own policies and procedures. We hope that our own remarks will be helpful to Service Alberta Red Tape Reduction going forward in this evaluation process and, most important, considering and ultimately enacting amendments to the existing Prompt Payment and Construction Lien Act (the “PPCLA”) and the Prompt Payment and Adjudication Regulation (the “Regulation”).

As promised by our representatives in the recent sessions, ARCANA (AB) is setting out below a series of recommended amendments. The genesis for these amendments flows from a variety of sources including construction industry representatives, ARCANA (AB) adjudicators, key representatives of ADRIC, ADRIA, and RICS (the ARCANA (AB) partnership), and various members of the legal profession.

Indeed, we believe very strongly that these amendments will be well received by all stakeholders. The suggested changes will be highly effective in clearing up the uncertainties currently experienced by those that interact with the PPCLA and Regulation, and will further promote the use of construction adjudication in Alberta. We are available, at your convenience, to discuss these amendments and provide any clarifications or background.

Please note that, while we have not detailed the suggested wording of any proposed amendment, we would be pleased to assist in this regard. Indeed, we are currently discussing such language within our organization. While we believe that these suggested amendments are key, and will greatly enhance the PPCLA and Regulation, we are continuing discussions within our organization and with various construction sector stakeholders regarding other possible enhancements to the delivery of construction adjudication services in Alberta.

Finally, we are also examining a series of recommendations which have been made to the Government of Ontario respecting possible amendments to its own Prompt Payment legislation. Some of these recommendations may be applicable to the Alberta experience, and we would be pleased to provide feedback in this regard as well. If you are not already in possession of these recommendations, please advise and the same will be forwarded to you.

Proposed Amendments:

*1. **Public Works Act Projects** – As our representatives clearly expressed during the recent round of stakeholder engagement sessions, we support this initiative - for the same reasons voiced by the various other participants in these sessions. Amending the legislation to permit adjudication and require prompt payment regarding public projects would signal to industry that the Government of Alberta is fully supportive of these provisions and recognizes their tremendous worth in improving the payment and dispute resolution processes in Alberta’s construction sector. Streamlining consistency of the applicable legislation across all building sectors would render the administration less complicated for stakeholders and users.*

We are sure that your counterparts in Quebec and Ontario, where prompt payment and construction adjudication have been in place respecting public projects for several years, would tell you that such legislation has been highly effective. We are confident that there would be a similar experience in Alberta.

*2. **S.33.4(2) of the PPCLA** - This provision currently prevents the commencement of adjudication “after the date the contract or subcontract is **completed** unless the parties to the adjudication agree” (**emphasis added**). This provision has been a source of much controversy as to its meaning and interpretation, e.g. “Is a contract completed if the work is complete, but payment has not yet been made?” , “Is a contract completed if one party unilaterally terminates the contract, or even if the parties agree to terminate the contract, prior to the completion of the contract work, but a payment or payments are still outstanding” .*

In this regard there is an application currently before the Court of King’s Bench in Alberta where the question of whether termination of a contract prior to completion of the work constitutes “completion” will presumably be decided. In our view this controversy is caused entirely by the unnecessary inclusion of this provision in the PPCLA. We are unaware of any policy reason why parties to a contract cannot have a dispute adjudicated even after the contract is completed. This is particularly important to small contractors, where only a single invoice might be sent once the job is finished. We understand that the legislation in the UK permits

adjudication to take place even once the contract in question has been completed. We see no reason why the legislation in Alberta should not be similarly permissive.

3. S.33.4(1) of the PPCLA - *This provision precludes adjudication once a party "... has commenced an action in court with respect to a dispute...". Once again, we see no policy reason why parties to a dispute which is already before the courts (although, in all likelihood, many months if not years away from trial) from using construction adjudication to attempt a resolution of the dispute prior to their court date. Indeed, we believe that construction adjudication is as well-suited to pre-trial settlement processes as any other ADR process. Notably, mediation and judicial dispute resolution conferences are currently well utilized under the mandatory Alternative Dispute Resolution (ADR) Alberta Rules of Court. If necessary, Rule 4.16 of the Rules could be amended to specifically permit construction adjudication. A further amendment, permitting the parties to agree to non-binding construction adjudication, could also be considered.*

4. S.33.61(1)(b) of the PPCLA - *This provision creates an automatic stay to the effect of an adjudicator's order if an application for judicial review is filed following the delivery of the adjudicator's determination and order. We believe that the party aggrieved by an adjudicator's determination and order should be required to apply to court for a stay of the order (as is the case in Ontario) where an application for judicial review has been filed. The inclusion of such an amendment would help to discourage the use of applications for judicial review as simply a stall tactic. We believe that the current wording of S.33.61(1)(b) discourages the use of construction adjudication where such an easy stall mechanism is available.*

5. Adjudicator Payment - *While our adjudicators do have powers under the Regulation to grant extensions of the process or even resign in the event of non-compliance with the adjudicator's directions regarding payment of a fee or retainer amount, such actions generally favour the non-paying party. ARCANA (AB) believes that the inclusion of a provision in the Regulation, permitting the Nominating Authority to pause or terminate an adjudication in the event of non-payment of either the appointment or adjudication fees, would be helpful in terms of ensuring the economic viability of the adjudication system.*

6. "Days" and "Calendar Days" - *The term "days" is used in SS. 33.61(a) and 33.8 of the PPCLA and SS. 23 and 26 of the Regulation and "Calendar days" is used in SS.22(1), 24, 25, and 30(4) of the Regulation. We are unsure of the policy reason(s) behind the use of these different terms and would like to discuss whether there is a need for such differing terminology.*

7. SS. 33.6(5)(c) and 33.61(1)(c) of the PPCLA - *These provisions have been interpreted by some as either precluding construction adjudication altogether, or causing the determination and order to be unenforceable, where a mandatory arbitration provision exists in the contract out of which a dispute arises. We are confident that this was not the legislature's intention behind the language in these sections.*

We believe that the legislature's intent, with which we agree, is that, only once the parties have actually appointed their arbitrator under an arbitration provision (which is rarely, if ever, done by way of the arbitration clause in the contract) does the adjudicator's determination and order become unenforceable. Indeed, the interpretation that a mandatory arbitration clause precludes construction adjudication altogether would clearly offend S.5 of the PPCLA which deems "contrary to public policy and void" any agreement "that this Act does not apply or that the remedies provided by it are not to be available". That said, some clarifying language added to SS. 33.6(5)(c) and 33.61(1)(c) would be helpful.

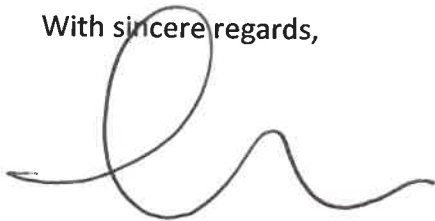
8. S. 19(c) of the Regulation - *This section currently permits an adjudicator to adjudicate "disputes that are subject of a notice of non-payment under Part 3 of the Act". Given that the Prompt Payment and Construction Lien Forms Regulation includes several prescribed forms of "notice of non-payment" for use by the contractor in its dealings with its sub trades or by a subcontractor in its dealings with its sub subs, one might conclude that S.19(c) is not intended to cover disputes between an owner and its contractor. The mechanism for an owner to notify a contractor that the owner will not be paying its contractor in accordance with the prompt payment provisions of Part 3 of the Act is by way of an "Owner's Notice of Dispute". We doubt that the legislature intended to limit S.19(c) to prompt payment disputes between contractors and subcontractors or between subcontractors and their subs. Clarifying language to this provision would also be helpful.*

9. S.26(4) of the Regulation - *This provision restricts revisions in an adjudicator's order to "typographical errors". We feel that the type of errors contemplated by this section could be broadened by way of the adoption of language similar to Rule 9.12, known as the "slip rule", in the Alberta Rules of Court. This Rule provides as follows:*

On application, the Court may correct a mistake or error in a judgement or order arising from an accident, slip, or omission.

We thank you for considering these possible amendments and reiterate that we are available to discuss them further and to provide suggested language regarding any such amendments. If there are any other amendments which we feel would improve the PPCLA and the Regulation, we will provide these to you in a timely manner.

With sincere regards,



Paul Conway, ADRIA/ARCANA (AB)
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28 March, 2024

Sent via email to: Curtis.Wollard@gov.ab.ca

Service Alberta
Prompt Payment Project Team
10365 97 Street
Edmonton AB T5J 3W7

Attention: Mr. Curtis Woollard,
Registrar of Land Titles, Director of Program Policy and Analytics

Ref: Our Nov 23, 2023 letter;
ARCANA (AB) Recommended Amendments to the PPCLA and Regulation

Dear Curtis,

As a follow-up to our November 2023 letter, ARCANA (AB) offers additional information as detailed below. It is hoped that these observations will be useful in your ongoing efforts to expand and improve the PPCLA and Regulation.

As discussed with Service Alberta previously, S. 33.4(2) of the PPCLA (“contract complete”) has emerged as the most problematic clause of the Act, and the subject of the most jurisdictional challenges. It is quite possible that literal interpretations of this clause will preclude any future adjudications in which the work is complete, but for which payment was not made. Different adjudicators will draw different conclusions in this regard, further undermining the credibility of the legislation. Decisions that preclude adjudication would appear to be contrary to the spirit and intent of the Act. **Any immediate legislative or regulatory clarification to S.33.4(2) would be greatly beneficial to the public and the construction sector as interest in adjudication grows.** Similar recommendations for change in Ontario support this conclusion.

There appear to be a few additional disconnections between the language of S.33.6(4) of the Act and S.26(1) of the Regulation, as detailed below:

(a) S.33.6(4) of the Act refers to a “written **notice of determination**” (emphasis added) whereas S.26(1) of the Regulation refers simply to a “determination”. We are unaware

of any reason why differing language is used. In our view “notice of” in S.33.6(4) is likely unnecessary and should be deleted.

(b) S.33.6(4) of the Act also distinguishes between the “notice of determination” and the “order” by use of the words “...accompanied by the adjudicator’s order, if any ...” . S.26(1) of the Regulation appears to equate the two by use of the language “... an adjudicator ... shall make a determination **by issuing an order ...**” (emphasis added).

These two issues can be dealt with by revising S.33.6(4) of the Act by deleting “notice of” as recommended above or, **alternatively**, by amending S.26(1) of the Regulation as follows:

*For the purposes of S.33.6(4) of the Act, an adjudicator hearing a dispute regarding any matter under section 19 shall make a determination of the matter by issuing a **notice of determination and order (if any)** within 30 days of receiving the documents under section 23(a) or within the time extended under section 25(3).*

Currently S.33.61 of the Act permits the successful party in an adjudication to register the “adjudicator’s order” with the clerk of the court and makes no reference to the certification process. Presumably, the Clerk’s Office would prefer to see a certified order. And, while the successful party cannot register the adjudicator’s order until 30 days following receipt of the order (S.33.61(a) of the Act) and, accordingly, the certified order will have been received by then, it might be helpful to the Clerk’s Office to have specific legislative guidance on this point. Some proposed language for the opening words of S.33.61(1) (in **bold**) is as follows:

*If a party meets all of the following requirements, the clerk of the court shall register an adjudicator’s order referred to in section 33.6(4), **certified in accordance with the Nominating Authority in accordance with the regulations**, as an order of the court.*

S.33.61(1)(a) could be further clarified to read: “*the order is submitted to the clerk of the court not less than 30 days after the parties have received the **certified order**;*”

S.34 of the Regulation, which sets out the grounds for judicial review, states that “... the determination of an adjudication may be set aside ...”. There is no reference to an order which may accompany the determination and, indeed, this order is likely to be the prime target of the application for judicial review. This regulation could be clarified through use of the following language (in **bold**):

*For the purpose of section 33.7 of the Act, the determination of an adjudicator, **and the adjudicator’s order, if any**, may be set aside on an application “.*

We would also like to provide some further support for our earlier recommendation that S.33.4 be amended by way of deleting S.33.4(2). We have done a review of other sections of the Act and believe that a court will likely find, on a judicial review at some future time, that “contract or subcontract is completed” likely means that the “work” under that contract is completed - whether or not that work has been paid for. Since many smaller contractors may not issue an invoice until their work is complete, it seems patently unfair to those contractors that the adjudication remedy should be foreclosed to them.

The sections in the Act which support this interpretation are:

S.18(1) Irrespective of whether a contract provides for instalment payments or **payments on completion of the contract ...**. S.18(1.1) contains similar language. In these sections the legislature here appears to distinguish between “completion of the contract” and “payment” under the contract.

S.23(6) If a contractor or subcontractor defaults **in completing the contractor’s or subcontractor’s contract ...** Here the legislature appears to be referring to the “work” under the contract or subcontract as the case may be.

S.24.1(2)(a)(i) reads, in part, ... for a **completion schedule that is longer than one year and for the payment of accrued amounts ...** Here, again, “completion schedule” can only refer to the “work”. The section also distinguishes between payment and the completion schedule.

We can likely refer to other sections in the Act, and some case law, which support this interpretation.

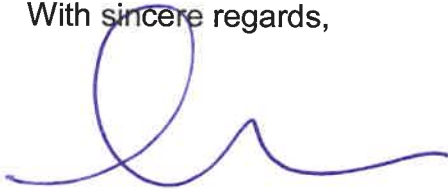
Accordingly we stand by our recommended amendment of S.33.4(2) of the Act, namely, that S.33.4(2) be repealed. However, while this would be the preferred course of action, the problem might also be addressed by including a 90-day deadline following completion of the work for the commencement of an adjudication.

While not recommending specific language, the Act & Regulation could be improved by clarifying that the NA can appoint a new adjudicator without requiring the Applicant to issue a new Notice of Adjudication in circumstances where the adjudicator originally appointed is required to withdraw or become incapacitated. The existing legislation and regulation precludes the appointment of a new adjudicator if a court action was commenced after the original Notice of Adjudication was issued. Again, this seems inconsistent with the intent of the legislation, when a NA should be able to substitute a new adjudicator in such circumstances.

The Act & Regulation could also provide further clarification regarding contracts that specify arbitration as the parties' agreed dispute resolution mechanism, and to what extent the parties would be able to (or be required to) access the PPCLA adjudication process, and to have any resultant order enforced.

Finally, as always, we would welcome any opportunity to speak with Service Alberta and its legal counsel to discuss our recommended amendments to the Act and Regulation, and possible wording to bring future amendments into effect.

With sincere regards,



Paul Conway, ADRIA/ARCANA (AB)
NA Program & Government Liaison
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27 June, 2024

Sent via email to: Curtis.Wollard@gov.ab.ca

Service Alberta
Prompt Payment Project Team
10365 97 Street
Edmonton AB T5J 3W7

Attention: Mr. Curtis Woollard,
Registrar of Land Titles, Director of Program Policy and Analytics

**Ref: Our November 23rd, 2023 and March 28th, 2024 letters;
ARCANA (AB) Recommended Amendments to the PPCLA and Regulation**

Dear Curtis,

In advance of submitting our Annual Report, ARCANA (AB) would like to update Service Alberta on continuing challenges, and correct some previous NA recommendations. “Contract completion” remains our greatest source of jurisdictional challenges, while the de-facto stay provision, whereby orders cannot be enforced if an application for Judicial Review has been filed, further frustrates the intent of the legislation. Also, added clarity regarding the intended impact (if any) of contract arbitration clauses on the adjudication process would reduce the frequency of jurisdictional challenges related to this point.

Further to our previous letters at reference, ARCANA (AB) has reconsidered one of the recommendations made in our first letter and wishes to correct a typographical error in the second. Accordingly please consider the points below as Service Alberta continues its deliberations regarding progressive amendments to the PPCLA and Regulation:

Paragraph 8 in the letter of November 23rd, recommends a revision of the Forms Regulation. This recommendation was founded upon the erroneous understanding at the time that the PPCLA and Regulation contemplate a “cascading” set of proper invoice requirements down the construction chain. We now understand that it is only the general contractor (ie. the “contractor” in the PPCLA) that issues a proper invoice to

trigger the prompt payment mechanisms down the construction ladder. Accordingly, we see no need to revise the Forms Regulation as suggested in our letter.

The adoption of a “cascading” set of proper invoice requirements may well be something the government wishes to look at. However, we are not in a position to make such a recommendation at this time.

On the second page of the letter of March 28th (4th paragraph from the bottom) the statement in **bold print** “... certified in accordance with the Nominating Authority in accordance with the regulations...” should read “... certified **by** the Nominating Authority in accordance with the regulations...”.

ARCANA (AB) apologizes for any confusion created by the errors detailed above, and appreciates the active consideration that Service Alberta has given to all these NA recommendations. ARCANA (AB) looks forward to further assisting the government with its legislative amendments, should such opportunities arise.

We also look forward to submitting our 2023/2024 Annual Report this week. Please contact us if you have any questions or wish to discuss further.

With sincere regards,



Paul Conway, ADRIA/ARCANA (AB)
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Appendix 2: CSAC commentary on the PPCLA and Nominating Authority performance

**CONSTRUCTION SECTOR ADVISORY COUNCIL
REVIEW**

For submission to

ARCANA – NOMINATING AUTHORITY ANNUAL REPORT

INTRODUCTION

The Construction Sector Advisory Council (CSAC) has been invited by ARCANA to review and comment on the Nominating Authority’s (NA) first year of operations. CSAC is an independent, impartial council established by the Alberta Trade Contractors Council in collaboration with ARCANA. The CSAC is comprised of representatives with extensive backgrounds in various sectors of the construction industry, each having played a significant role in the development of prompt payment legislation, regulations, and the Nominating Authority service agreement issued by Service Alberta.

This review involved analyzing data from ARCANA’s first year of operations and conducting interviews with its principal operators, staff, and adjudicators. The report presented here reflects the opinion of CSAC, highlighting areas of concern, recommendations, and potential future opportunities for improvement. This report has not been edited by ARCANA, and its recommendations are not binding on ARCANA.

PRELIMINARY OVERVIEW

ARCANA is a subsidiary of and is managed by the Alternative Dispute Resolution Institute of Alberta (ADRIA), whose primary focus is to promote the use of arbitration and mediation as a means of dispute resolution on behalf of its membership. CSAC has concerns that construction industry clients seeking information specifically on adjudication processes through the ADRIA based website are being influenced to choose between adjudication, mediation and arbitration. CSAC makes recommendations throughout this review that may remedy this issue.

While CSAC has not confirmed the appropriateness of the current advice and guidance being provided by ARCANA staff it is crucial that information about adjudication remains clear and does not inadvertently include details about other ADRIA services offered. CSAC recommends establishing clear guidelines to ensure that clients seeking adjudication information are not directed to these other services.

FINANCIAL AND OPERATIONS

Due to initial start-up costs and anticipated low utilization of the nominating authority’s services, the first year of operations were financially challenging. This was as expected. While the ARCANA principals are currently seeing signs that the volume of adjudications and the value of the disputes will both increase in the coming year, CSAC anticipates there will be pressure to review the funding model and the fees charged.

With the low volume of registered disputes and the relatively low value of the disputes registered for adjudication, it is difficult to ascertain the correlation between fees, the fee structure and utilization. CSAC is of the opinion that registration fees may be a barrier to utilization and recommends that fees for these lower value disputes remain the same for the coming year. The implementation of a user evaluation form may provide important insight for this recommendation.

To achieve economic viability, with a sustainable funding model, ARCANA must consider the balance between fees charged to clients, fees charged by adjudicators and the various costs required to operate a highly visible and secure public organization. The overarching principle of the PPCLA has always been to deliver relatively fast and economical dispute resolution. While CSAC is not opposed to increasing fees or changing fee structures, we recommend that the NA consult with industry prior to implementing significant changes. Increasing entry fees may create a barrier to registering disputes. A more sustainable funding model may be to claw back a percentage of the adjudicator fees charged.

CSAC recognizes that a significant amount of correspondence during an adjudication exists and given the remote and multi country communication locations for ADRIA staff and adjudicators, CSAC recommends that Service Alberta audit the tools and security protocols used for transmitting and storing confidential information to ensure that client privacy rules are being maintained in accordance with provincial and federal privacy laws.

The uptake of adjudication services may have been influenced by some of the weaknesses of the current legislation, however CSAC is concerned the lack of a clear stand-alone website may be adversely affected those seeking assistance. The current website, located within ADRIA's broader website, does little to differentiate the between the adjudication, mediation and arbitration services being offered through ADRAI/ARCANA. CSAC recommends that ARCANA be required to launch an independent website that has the sole purpose of promoting and supporting the use of adjudication services. References to ADRIA and other services offered by should be limited or removed entirely to facilitate a clearer understanding of adjudication.

MARKETING

As the startup processes for program implementation, training and assigning adjudicators, etc. are refined and become more entrenched, CSAC recommends that ARCANA turn its focus to marketing its services to the construction industry.

Industry associations have been reluctant to push their membership to use the PPCLA until after the government passes amendments to address a 'No Stay' provision. Once the government has acted, industry associations will be more inclined to partner with ARCANA to promote using prompt payment legislation and provide education on the use of the various tools and processes required. CSAC recommends that ARCANA utilize industry association partnerships to expand its outreach to the contractor community.

CSAC recognizes that financial constraints are such that there is limited opportunity for more outreach but recommends that as budgets improve, a marketing strategy be implemented to raise the profile of ARCANA and the services it provides. CSAC recommends this include a stand-alone website and a social media presence.

CLIENT INTERFACE

Currently, ARCANA's primary interface with clients is limited to web pages contained within ADRIA's existing website. Other client interfaces include volunteer attendance at a small number of industry events and direct client contact to the ADRIA offices through phone calls and email.

CSAC strongly recommends that ARCANA prioritizes improvement to the website content to ensure that users have easy access to well formatted forms needed and relevant information. As time and money permits improvement to the website, CSAC recommends that required forms be made in an executable PDF format rather than a simple copy taken directly from legislation.

We understand that a large number of calls were managed by ARCANA. CSAC recommends that the current FAQs tab on the ADRIA website be populated with questions received to date.

Attendance by ARCANA resource people at industry events are important and CSAC recommends ARCANA volunteers continue with this practice.

CSAC also recommends training for personnel responsible for email and phone communications to ensure consistent messaging sends clients to the right locations to find the information they require. We are not saying this is a current problem, but over time, as processes and personnel change, upgrading messages delivered by frontline contacts will be important.

ADJUDICATOR TRAINING

While CSAC did not review the training provided to Adjudicators, through interviews with adjudicators registered with ARCANA, they identified the need for more focus on training the elements of natural justice as the rules of natural justice are considerably different than those that apply to mediation and arbitration.

CSAC also recommends that ARCANA provide commentary and sample documents that provide guidance to adjudicators, plaintiffs and respondents in their preparation for adjudication. Initially, Adjudicators it may require some latitude around the rules of evidence, but strict adherence to protocols for rebuttals, requests for further clarifications, etc. is warranted.

Additionally, CSAC recommends that the future recruitment of adjudicators include professionals from the construction industry to provide plaintiffs with a broader range of skills.

APPOINTMENT OF ADJUDICATORS

While there does not appear to be a formal documented policy or procedure on how ARCANA is appointing adjudicators, CSAC does support the appointment of adjudicators based on connecting the adjudicator's experience with the type of dispute described. As the number of disputes increases and the number of adjudicators increases, the appointment processes may need to be refined. A rotation may be required to ensure that more adjudicators are being utilized while maintaining the link to expertise.

With the small number of adjudications during the first year of operations, appointing adjudicators was closely scrutinized by the ARCANA governing board. Going forward it is our understanding that adjudicator appointments would be the responsibility of RICS staff located in Texas and the UK and would be based entirely on matching a resume to a dispute. CSAC strongly recommends that local to Alberta oversight be maintained in adjudicator appointments and that this oversight would preferably have a strong connection to the construction industry. CSAC also recommends a formal policy be created to ensure the appointment process is fair, transparent, and consistent.

CSAC recommends that a survey of users become an annual process, specifically asking about the advice and guidance given by ARCANA regarding the appointment of the adjudicators.

ADDITIONAL DATA REQUEST

During the CSAC interview with the ARCANA Board there were requests for data that had not been collected. While ARCANA may or may not have an obligation to collect these data sets, CSAC believes they would provide value to the industry and will make a recommendation for ARCANA to collect this information in the future.

CSAC recommends that ARCANA require adjudicators to provide a post decision evaluation with a number of pertinent questions to be answered. Questions could include:

Type of dispute: ie: contractual, change order, quality of work, etc.

Value of the settlement, % assignment of fees to each party.

In cases where the original plaintiff was successful and awarded a settlement, did the adjudicator authorize the right to suspend work should payment not be made within the assigned period.

How many days were required from the appointment of the adjudicator to a decision being rendered?

What was the average time the adjudicator provided the losing party to pay the awarded amounts?

How many adjudications involved owners?

Did the plaintiff and respondents choose to use legal representation?

CSAC recommends a similar post determination evaluation for each of the plaintiff and respondents. It is understood these results may be tainted by the decision rendered, albeit there may be useful information to be gained.

CSAC did not receive, or review information related to complaints received or handled. CSAC has concerns regarding how future complaints regarding an adjudicator's performance may be managed by a remote workforce and recommends the ARCANA complaints protocols be reviewed in this context.

ARCANA INPUT TO LEGISLATION REVIEW

During the past year ARCANA/ADRI submitted letters to Service Alberta with recommendations for changes to the PPCLA legislation and regulations. CSAC has reviewed the recommendations and strongly supports:

The re-introduction of the "No Stay" provision with a recommendation to us the more robust model used by Ontario.

A stronger definition and more clarity for the term Contract Completion is required in the training of the adjudicator.

Changes to Adjudicator Payment. While CSAC supports changes that make it easier for an adjudicator to be paid, the requirement to pay must only be placed on the plaintiff. It is acceptable that the Adjudicator has the authority to determine a division of fees at the conclusion of an adjudication.

SUMMARY

With a solid understanding of the challenges ARCANA has faced through the launch of a new entity into a relatively unknown market, CSAC is pleased with the overall progress made. It was a daunting task, and the efforts required to build and deliver this program should not be underestimated. Thank you for this opportunity to provide an honest review. We look forward to the anticipated growth being forecast and the positive impact this will have on the construction industry.

Sincerely



Terry Milot
Chair, Construction Sector Advisory Council

Appendix 3: ARCANA (AB) outreach and public education efforts

Presentations on the PPCLA adjudication process have been delivered by ARCANA (AB) staff and roster members over the past year to the following:

- i) ARCANA (AB)'s Construction Adjudication Prompt Payment Symposium in Calgary (April 2023)
- ii) ARCANA (AB)'s open registration online webinar (October 2023)
- iii) Spring Home & Garden Shows in Calgary & Edmonton
- iv) Spring Home Renovation Show in Edmonton
- v) Canadian Bar Association (North & South) Construction Sectors
- vi) Society of Construction Law of North America
- vii) Medicine Hat Construction Association
- viii) Electrical Contractors Association of Alberta
- ix) Canadian Western Bank
- x) Alberta Construction Safety Association
- xi) Canadian Institute of Quantity Surveyors (Prairie Region)
- xii) Canadian Institute of Quantity Surveyors Annual Congress
- xiii) The University of Calgary; Canadian Institute of Resources Law

Discussions are underway to deliver presentations in 2024 to the following organizations:

- i) The Consulting Architects of Alberta
- ii) The Calgary Construction Association
- iii) The Edmonton Construction Association
- iv) The Lethbridge Construction Association
- v) BILD Housing Organization – Calgary Chapter
- vi) Alberta Water & Wastewater Operators Association
- vii) Alberta Wall & Ceiling Association
- viii) Mechanical Contractors Association of Alberta
- ix) Association of Professional Engineers and Geoscientists of Alberta
- x) Fall Home, Garden and Renovation Shows in Edmonton & Calgary