

CONSTRUCTION ADJUDICATION



DEVELOPING A BUSINESS CASE TO BECOME A CONSTRUCTION ADJUDICATOR

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Construction adjudication, the newest form of ADR in Ontario, became effective on October 1, 2019. The Ontario Dispute Adjudication for Construction Contracts (ODACC) is the new Authorized Nominating Authority (ANA) for Ontario.¹

For those considering a future as a construction adjudicator, start with reading Part I.1 Prompt Payment and Part II.1 Construction Dispute Interim Adjudication, in the Construction Act, R.S.O. 1990, Chap. C.30, and O.Reg. 306/18, Adjudications under Part II.1 of the Act, accessible through the links on the ODACC site.

Before committing to reading statutes and regulations, what is the business case for becoming a construction adjudicator, and how will that role compare to the vocation you have right now?

As with any other business analysis, you need to know: What are the necessary qualifications? What experience is required? What training is required: when and where can you do the training? What is its duration and what does it cost? Is there a continuing education requirement and, if so, what is it and what is the cost? What insurance coverage must you have and who provides it? What is the application process? And...After fulfilling all the requirements, are you guaranteed to become a construction adjudicator?

Most of the answers are readily available on the ODACC website, but the critical answers are that you must have at least ten years construction experience and fulfill all

the requirements before your application will be considered. ODACC will then compile all the completed applications, determine how many adjudicators are needed and make final decisions about who is given an adjudication certificate.

The preceding, however, are the easy questions. Far more difficult are the following:

- ✓ What is the estimate of the number of files to be adjudicated in a year?
- ✓ What is the anticipated breakdown of those files into sectors?
- ✓ How many files should an adjudicator expect to get in a year?
- ✓ What is the adjudicator selection protocol?
- ✓ What is the anticipated range of billable hours for the adjudication?
- ✓ What is the anticipated range of adjudicator fees?
- ✓ Are there administration fees, costs and charges and, if so, how much?

Although some information is available from other countries with construction adjudication systems, notably the United Kingdom, New Zealand and Australia, their legislation and construction environments are different, making their data much more difficult to analyse. The absence of accurate construction adjudication data inhibits the development of data analytics and metrics to improve the adjudication process and reduce claims, and lead toward better contract management. On a positive note, after 23 years of United Kingdom experience

¹ODACC.ca

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with construction adjudication, most disputes are finally resolved as a result of the construction adjudication process.

Ontario has a construction adjudication system in its standard-form contract for highways. Termed a Referee Process and administered by ADR Institute of Ontario (ADRIO) for the Ontario Ministry of Transportation (MTO) and the Ontario Road Builders Association (ORBA), it has been operating for three years. Harvey Kirsh, in *ADR Perspectives*², provides a short but excellent description of this process.

The following is anecdotal information on the MTO-ORBA system, with the caution that the disputes being determined range from claims from tens of thousands to millions of dollars, with some contract values going up to very high amounts; it is a form of contract that is extremely complex, and involves very sophisticated parties within a somewhat limited field. For claim amounts greater than \$750,000, a three-person panel decides the claim, making the process more complex as the panel must communicate among themselves to reach a decision. There is also a mandatory Referee Meeting as part of the process where lawyers may attend but not participate.

The approximate hourly fee range for MTO-ORBA is \$350 to \$700, and billable hours range from about 30 to 75 hours or more - this is within the range of UK adjudications. The Referee process has an extended timeline compared to the new Ontario requirements: once the Referee(s) has been selected, the Claimant and the Respondent take two months to exchange their documents. The Referee Meeting occurs just two weeks later, for which the Referee(s) must be well prepared as the Referee Decision must then be delivered about three weeks after the Meeting.

A rough breakdown of the time for each part of the Referee process:

- ✓ Negotiations and discussions before the Referee Agreement is executed: approximately 5 to 10 hours (not billable);
- ✓ Delivery of the Contract documents and first review of the Claimant submission and documents: approximately 10 to 20 hours;

- ✓ Delivery of and first review of the Respondent submission and documents: approximately 10 to 20 hours;
- ✓ Preparation for the Referee Meeting: approximately 10 to 15 hours;
- ✓ Review of the submissions, documents and Referee Meeting notes, discussions among the panel members where applicable, drafting of the Decision, review and issuance: approximately 10 to 30 hours.

Failure by the Referee(s) to issue the Decision within the prescribed time terminates the process, sending the parties back to the beginning, and may result in forfeiture of the Referee(s) fees.

Should you become a qualified adjudicator under ODACC, does your schedule in your existing business allow you immediately to focus on an adjudication file and negotiate your fee and your appointment within four days?

As soon as the documents have been received, can you commit as many as 60 hours or more to this one adjudication file over the next 25 days?

If you are typically booked for weeks or months in advance, be careful walking away from an existing and successful business. Otherwise, the construction adjudication field shows great opportunity to those who qualify as adjudicators.

²Kirsh, Harvey: "References and Construction Claims", *ADR Perspectives*, 10 September 2019 <http://adric.ca/adri-perspectives/references-and-construction-claims>

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Robert Bales, P.Eng, LLB, has practised as an adjudicator, arbitrator, lawyer, engineer and project manager with wide experience in construction arbitration. His technical experience ranges from roads and bridges, building envelope failures, home construction and renovation through geotechnical problems, and his arbitrations have addressed a range of procedural matters, complex issues and expert testimony. He is also the Co-Chair of ADRIO's Construction Adjudication Special Interest Section.