



Robert Bales
Adjudicate.ca

THE ROLE AND FUNCTION OF THE ADJUDICATION NOMINATING AUTHORITY

At the core of the construction adjudication process will be the adjudicator, a person with 10 years' construction experience and the capability to manage a dispute from the first submission of documents through to a decision within 30 days, despite its complexity and the size of the claim. Adjudicators will be drawn from experienced engineers, architects, quantity surveyors, lawyers and project managers, and others with a full range of construction backgrounds and experience, language capabilities and geographic locations (generally, construction professionals).

It is the task of the Authorized Nominating Authority (ANA) under Part II.1 of the Ontario *Construction Act* and O. Reg. 306/18 (the Ontario Act or Regs) and, when it comes into effect, the Adjudicator Authority (AA) for construction projects on federal property under the *Federal Prompt Payment for Construction Work Act* (the Federal Act), to develop and manage the required adjudication process. In brief, the ANA and (generally) the AA must:

1. source, train, qualify and certify adjudicators for inclusion on the Adjudicator Registry from which all adjudicators must be selected;
2. where the parties themselves have not agreed on a qualified adjudicator, appoint adjudicators with the qualifications and the necessary skills, including language skills, that are appropriate to the particular dispute being referred to adjudication; and

3. develop, maintain and make public a code of conduct, complaints process, fee schedule, educational materials and an annual report, and ensure that adjudicators with the necessary breadth of expertise, language capabilities and work experience are available province-wide.

As always, the devil is in the details — the Designation Agreement that was to be negotiated by the successful ANA applicant, ADR Chambers, is not yet available (as of the date of this writing). These remarks are thus speculative regarding the details of the Ontario ANA's roles and responsibilities, and also for the federal process, where only a Draft Statement of Work for the Adjudicator Authority was released. The focus of this article is on the Ontario ANA, with comments on the federal process as appropriate.

Designated Provinces

The Federal Act allows for the designation of a province with legislation similar to the Federal Act, whereupon the Federal Act does not apply to any sub-contractor that is to perform construction work on a federal construction project. The intent is to leave the Prime Contractor-Federal Government relationship under the Federal Act, while the relationship between the contractor and its sub-contractors, and between sub-contractors, will fall under the designated Provincial Act. At this time, it appears there will be two Adjudicator Registries, administered by the AA and the ANA respectively; however, under the Federal Act, authorities may adapt the Act to address any inconsistencies with the law of the designated province.

Federal authorities have also made clear that negotiating such provincial designations are their preferred pathway; quite a challenge given the variety of approaches by the provinces at this time. Foremost will be federal concern that, for example, two disputing sub-contractors under a designated province's system may agree to extend timelines beyond the prescribed milestones: the federal project

could be held hostage to such a protracted adjudication under the provincial adjudication system.

There is a model for disputes between a Prime Contractor and a large Government body: The Referee Process between the Ontario Ministry of Transportation (MTO) and the Ontario Road Builders Association (ORBA). The MTO-ORBA Referee Process, a contract adjudication, is described in an excellent article by Harvey Kirsh in the *Construction Law Letter*, Volume 35, No. 4 (March/April 2019), “References and Construction Claims”.

The Adjudication Process and the ANA through the Lens of the Parties to the Dispute

The parties want an adjudicator with the expertise and working experience, preferably within the sector germane to the dispute, to hear their respective stories, make such enquiries and seek clarification regarding the information provided and the relevant parts of the contract, then make a timely decision at reasonable cost.

Appointment of an Adjudicator

Following delivery of the Notice of Adjudication with a copy to the ANA, the parties have four days to agree on the appointment of a qualified adjudicator from the Adjudicator Registry.

Although contentious, they would be wise to agree, as the ANA monitors the process but has little involvement afterwards. The adjudicator must provide the ANA with the determination and information as to the claim amount, the amount awarded and compliance with timelines for the ANA’s reporting purposes.

Failing agreement, the party that gave the Notice (Ontario) or either party (federal) may request the ANA to appoint a qualified adjudicator. The ANA must do so expeditiously and in any event within seven days, without favouritism or the appearance of self-interest, and must identify adjudicators who

are suitably qualified and whose skills, including language skills, are appropriate to the particular dispute being referred to adjudication.

An appointment made by the ANA is thus dispute-specific, requiring the ANA, prior to the appointment, to consider the skill and expertise of the adjudicator in the context only of the Notice of Adjudication filed by the claimant that provides just a brief description of the dispute. The ANA must also ensure that the adjudicator has disclosed and addressed any conflicts of interest as required by the Code of Conduct developed and published by the ANA.

Adjudicator Registry, Fees and Charges

Both the ANA and the AA must establish Adjudicator Registries for their respective jurisdictions, including the necessary details for the parties to agree on their selection, and for the parties to inform themselves of the credentials, qualifications, skills and experience of the adjudicator.

Immediate availability of the adjudicator is critical at the outset. Where an adjudicator is selected by the parties, his or her availability and fee must be negotiated by the adjudicator and the two parties. The ANA has no involvement as to the adjudicator’s fees but it appears that the ANA may levy fees, costs or other charges for the administration of adjudication, or specify their amounts or the method for determining the amounts, including for that appointment.

Where the parties do not agree on the fee sought by the adjudicator selected by them, the adjudicator may request the ANA to determine his or her fee. In that event, the ANA may levy its fees, costs or other charges as above, and the ANA shall determine the amount or rate with respect to the fee payable to an adjudicator. The Regulations are unclear where the parties do not agree on the appointment and the ANA is requested to do so. One must assume that a request for appointment of an

adjudicator entails a request also to determine his or her fee, as above.

The ANA shall, subject to the approval of the Minister, establish, maintain and publish a Fee Schedule which includes fees, cost or other charges payable to it for each adjudication including the appointment of adjudicators. Further, where the parties and the adjudicator do not agree on the adjudicator's fees (or, as above, where the ANA appoints the adjudicator), the Fee Schedule shall set out the amounts or rates determined by the ANA regarding the adjudicator's fees.

Adjudication Procedure and the Determination

The credibility of the ANA and of its Adjudicator Registry rests on the Certificate of Qualification to Adjudicate, issued by the ANA. This certificate, a necessary requirement for every adjudicator, is founded on a quality assurance system that the ANA must establish and maintain, a system that must ensure all adjudicators have been trained, meet the minimum requirements and qualifications for that certificate, and have the necessary skills and knowledge to write a clear and thorough determination. All adjudicators must be monitored by the ANA on an ongoing basis for compliance with the certificate including continuing education.

In addition to the certificate, the ANA must establish, maintain and publish an Adjudicator's Code of Conduct, a complaints process for complaints against adjudicators from persons involved in adjudications and for complaints against the ANA. The Code of Conduct includes principles of proportionality and the need to avoid excess expense; conflicts of interest; principles of civility, procedural fairness, competence and integrity in the conduct of an adjudication; confidentiality of information; and procedures for ensuring the accuracy and completeness of information in the Adjudicator Registry. Recourse for an adjudicator's breach of the Code of Conduct is suspension

or cancellation by the ANA of the adjudicator's Certificate of Qualification to Adjudicate.

Although not called out in the Regulations, an adjudicator who engages a third party, for example a construction claims consultant or a lawyer for assistance with the adjudication, without disclosing that engagement to the parties, risks a challenge either to his or her determination, or under the Code of Conduct, of suspension or cancellation of the Certificate of Qualification. Such an improper delegation may be difficult for the ANA to identify, but clearly flies in the face of the duties of the ANA to ensure a fair adjudication process.

The Adjudication Process and the ANA through the Lens of the Adjudicator

All of the above clearly are of interest to the adjudicator but, first, a construction professional must obtain a Certificate of Qualification to Adjudicate.

Sourcing, Training and Qualifying Adjudicators

Suffice it to say that the ANA must source adjudicators with experience drawn from the full range of industry sectors, sufficient to provide adjudicator services to remote regions and in both official languages, to aboriginal communities and for disputes in every construction field and under consumer contracts governed by the province.

To draw construction professionals into this new field of alternative dispute resolution, sufficient information should be provided by the ANA to evaluate the economic costs and professional opportunities that a new adjudicator may anticipate. In effect, a business case is necessary from the ANA to outline cost and duration of training and continuing education; anticipated yearly file volume; acceptable hourly fee; duration of claim in hours; expectation of the depth and detail of the decision that the adjudicator must provide; degree of sophistication of the submissions, and so on.

For adjudicator candidates who are presently construction professionals in active practices, the ANA should be proactive and provide those candidates with realistic examples of the duration and intensity that some adjudication claims will impose on them over 30 days. Adjudication may not be a good fit for them.

Data, Performance Metrics and Feedback from the Adjudicator

There is no data available at present for construction adjudication in Canada, and international data is sparse and difficult to translate into construction industry means and methods here, particularly with differences in legislation between those international jurisdictions and our federal and provincial legislation.

The federal adjudication process requires more data collection from the AA than does Ontario, but neither system requires the development of performance metrics by which the data can be properly analysed.

There is no provision for feedback from the adjudicators themselves. Feedback from the adjudicators and

the parties to the ANA would provide a means of evaluating and improving the operations of the adjudication system, but would also allow adjudicators to better participate and contribute to that system.

What is Success?

Superficially, the success of the construction adjudication system may be measured as the number of adjudication claims that do not proceed to litigation or arbitration after the adjudication determination. The value of construction adjudication may better be determined by a full analysis of the adjudication claim, response, determination and stated experiences drawn from all those who participated in it. Together with the final outcome of the claim, success may best be measured by the statements of satisfaction by each party that, win or lose, the adjudication was fair, timely, inexpensive and satisfactory as conducted by a skilled and experienced construction professional.

Properly analysed, this new field of alternative dispute resolution may serve as a model, not just for the parties to the claim, but for the justice system as a whole.

The U.K. experience:

“The response in England is draconian. Most construction disputes that arise from projects within the geographical reach of Parliament must now, by statute, be heard and resolved within 28-42 days by an ‘adjudicator’ who will be appointed if the parties cannot select one by agreement. The adjudicator’s decision is immediately binding but not final since the dispute is subject to de novo rehearing in subsequent arbitration or litigation. It is doubtful that this process can do justice to a significant or complex dispute. And anyway it is open to either party to go on with an unacceptably long and expensive arbitration or litigation. What adjudication has really achieved is rough justice on an interim basis”.

—Jesse B. Barry Grove III