CONSTRUCTION LAW LETTER

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ADJUDICATION OF CONSTRUCTION CLAIMS

"(T)*he recent amendments to the newly renamed* Construction Act *focused on three major reforms: modernization of lien provisions, introduction of prompt payment, and a new interim binding dispute resolution mechanism known as adjudication. On October 1, 2019, prompt payment and adjudication under the* Construction Act *will come into force and all eyes are on Ontario as it will be the first jurisdiction to have legislation that combines prompt payment and adjudication alongside traditional lien legislation. While the construction industry in Ontario will be grappling with the inevitable growing pains of new legislation, a number of other jurisdictions in Canada, including the federal government, have followed Ontario's lead in introducing a prompt payment and adjudication regime to alleviate delayed payments to contractors and subcontractors down the construction pyramid*".

—Richard Wong, Andrew Wong, Jagriti Singh, "*Ontario Prompt Payment and Adjudication: The Final Countdown*", (Osler Resource Bulletin) July 10, 2019

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CONSTRUCTION ADJUDICATION: AN OVERVIEW

After years of consultation, anticipation and preparation, construction adjudication in the Province of Ontario has finally arrived. Subject to the application of the new *Construction Act*'s transition provisions, which will be addressed elsewhere in the next article of this issue, Ontario will be the first North American jurisdiction to experience statutory adjudication of construction disputes, beginning on October 1, 2019. Prognostications run the gamut. The optimistic among us envision a future with faster, efficient dispute resolution that will allow all parties to devote more of their time and resources to what they do best — building projects. The cynical foresee simply another layer of expensive disputes that will co-exist alongside construction liens and traditional litigation and arbitration. The reality is that there is probably no system or set of rules that could possibly be the panacea for the prevalence of construction disputes. However, if used properly, the sweeping changes we are about to embark upon should go a long way to ensure early and efficient dispute resolution of discrete issues as they arise and a reduction in the pervasiveness of costly and protracted litigation and arbitration. At the same time, the complexity and high stakes of some disputes on today's large and complex projects will likely mean that certain matters will continue to require the full checks and balances of a formal arbitration or litigation process.

A Quick Refresher: A Framework for Change

By now, many industry observers will be well aware of the two groups of change that have been introduced in Ontario through the *Construction Act*.

First, the construction lien modernization provisions were introduced as of July 1, 2018. Although a discussion of these changes is outside the scope of this article, they have broad implications. These amendments impact virtually all facets of construction liens and more. Significant updates have been implemented for everything from construction lien deadlines to holdback rights and obligations to project accounting requirements to bonds. For projects that meet the applicable transition test, the industry has been experiencing these changes for over a year now. However, it is nonetheless still early in the process and there are many projects that are still operating under the legislation as it existed prior to July 1, 2018. Accordingly, "the jury is still out" on the impact the lien modernization provisions will have on construction dispute resolution.

The second, sweeping group of changes can broadly be described as "prompt payment and adjudication". As noted above, projects that meet the applicable transition test will be governed by these changes effective October 1, 2019. While the priority of this article is construction adjudication, prompt payment and adjudication are so tightly integrated that it is almost impossible to discuss adjudication without discussing prompt payment.

Prompt Payment from a Thousand Feet

The prompt payment scheme was introduced to ensure payment continuously flows down the construction pyramid by providing statutory deadlines for payment on construction projects. These deadlines are built around the submission of a "proper invoice" from the contractor to the owner. The *Construction Act* dictates what must be included in a proper invoice but allows the parties to agree upon any further information they would like to include. The *Construction Act* additionally allows parties to agree on a proper invoice submission schedule; however, the prescribed default under the *Construction Act* is a monthly submission schedule if the parties did not otherwise establish a schedule in their contract.

The owner has 28 days from the date of receipt of a proper invoice to remit payment to the contractor. The contractor then has seven days after receiving payment to remit payment to its subcontractors, with subcontractors then having seven days to pay their sub-subcontractors. In other words, prompt payment applies to each tier of the construction pyramid.

Parties to a contract or subcontract will not have the ability to contract out of the payment deadlines set by the *Construction Act* once a proper invoice has been delivered. This means that, subject to the delivery of a notice of non-payment (described below), payments must be made within the prescribed deadlines. Contract provisions imposing payment restrictions that rely on the receipt of payment certification or prior approval from the owner are prohibited by the *Construction Act*.

Where a party decides it is going to refuse to make a payment, certain obligations arise. First, the party refusing payment is obliged to deliver a notice of non-payment within the prescribed deadline. For example, for an owner who has decided not to pay a proper invoice, it must deliver its notice of non-payment within 14 days of receipt of the proper invoice. Second, if the non-paying party is a contractor or subcontractor (as opposed to an owner) who is refusing to pay on the basis that they have not received payment, then the non-paying party is also obliged to initiate an adjudication process. In the case of a contractor who receives a notice of a non-payment from an owner, the Act provides that the contractor must: (i) deliver a notice of non-payment to its subcontractor within seven days of receipt of the notice of non-payment from the owner; and (ii) undertake to refer its dispute with the owner to adjudication within 21 days of giving its notice of non-payment.

The prompt payment requirements also apply to the release of holdback. If no construction liens are preserved within the prescribed deadlines, or preserved liens are discharged, satisfied, or otherwise provided for in accordance with the *Construction Act*, it is now obligatory for each payer on a contract or subcontract to release holdback. The exception to this obligation for an owner is the publication of a notice of non-payment of holdback within 40 days of a holdback release trigger date (detailed in the *Construction Act*). Contractors and subcontractors may then also refuse to release holdback provided that, among other things, they refer the matter to adjudication.

In sum, using the role of a contractor to illustrate the point, a contractor is required to submit a dispute to adjudication in two scenarios: (1) if the basis for a contractor choosing not to pay its subcontractor is the contractor's receipt of a notice of non-payment from the owner; and (2) if the basis for the contractor refusing to release holdback to the subcontractor is the receipt of a notice of non-payment of holdback from the owner. Similar obligations apply to subcontractors.

In addition, a party failing to abide by the prompt payment deadlines will encounter the consequences of the *Construction Act*'s statutory remedies, which include the requirement to pay a prescribed rate of interest and the potential referral of the dispute to adjudication.

What is Adjudication?

Adjudication is a binding, interim dispute resolution process where an appointed adjudicator presides over a dispute resolution process and ultimately issues a decision in the form of a "determination". There are some important observations to make about adjudication from the outset: First, the adjudicator has a great deal of discretion in setting the process, subject to requirements that may have already been established by the parties. As a result, some adjudications will likely be carried out exclusively in writing, whereas others will involve a more traditional hearing. Second, the process will be fast — much faster than what is now customary in the Ontario construction industry. Subject to extensions made on the consent of all parties, a determination will be issued within 46 days of the date that the process is initiated. Third, the adjudication process does not replace construction liens, litigation or arbitration. Parties are free to arbitrate or litigate any issue submitted to adjudication at a later time if they so choose. As a practical matter, however, the goal of the *Construction Act* is to reduce the occurrence of litigation or arbitration. Fourth, while the discussion above identifies circumstances in which adjudication will be mandatory, adjudication will not be limited to prompt payment disputes.

Adjudication can indeed be said to give "teeth" to the prompt payment regime. However, adjudication is also an available route for dispute resolution with respect to: the valuation of services or materials; payment under the contract, including with respect to change orders; amounts retained under s. 12 (set-off by trustee) or under s. 17(3) (lien set-off); payment of holdback on an annual or phased basis; non-payment of holdback under s. 27.1; and any other matter that the parties to the adjudication agree to, or that may be prescribed.

Notably, the selection of an adjudicator will be regulated. Adjudicators will be listed on a roster established by a body called the Authorized Nominating Authority (ANA). Following a competitive tender process, the Government of Ontario has recently designated ADR Chambers Inc. to fulfill that role. The ANA will also be responsible for training and qualifying adjudicators and administering the adjudication process generally. A full description of the ANA's role and obligations is prescribed by provincial regulation.

While parties are entitled to agree upon their adjudicator from the established roster, it should be noted that it is not permissible to name an adjudi-

cator in a construction contract; with the exception of Public Private Partnership (P3) projects, this step must be taken when the adjudication is being initiated.

The adjudication process begins on the issuance of a notice of adjudication, which must contain the name of a proposed adjudicator. If the proposed adjudicator does not accept the appointment within four days of the notice of adjudication, the party issuing the notice shall request the ANA to appoint one. The ANA will then have seven days to designate an adjudicator, subject to the adjudicator's consent. Within five days of the adjudicator's appointment, the party initiating adjudication must submit the contract at issue, together with all documents it is relying upon, to the adjudicator and the opposing party. The adjudicator must then render his or her determination within 30 days of receiving the documents, unless the deadline was otherwise extended on written consent of the parties and the adjudicator. The adjudicator's determination will then be binding on the parties unless and until it is re-litigated at a later date. The determination of an adjudicator may be enforced in court.

A party who has been ordered to pay pursuant to the determination must do so within 10 days of the determination, failing which interest will be payable and the successful party will be entitled to suspend their work with compensation for expenses incurred in so doing.

There are circumstances in which an adjudicator's determination can be set aside on an application for judicial review. However, those circumstances will be very limited and will likely be rare. A party seeking to have an adjudication set aside may bring a motion to do so within 30 days of its receipt.

The inevitable summary nature of the adjudication process has made it susceptible to criticism from some industry stakeholders. In particular, concern has been expressed that the outcomes will constitute "rough justice" and that the process facilitates "litigation by ambush", where contractors can spend months building up a claim, only to give the other side very limited time to respond before a determination is rendered. However, the objective of the legislation is to provide parties with expeditious and fair resolutions to deal with problems as they arise. Accordingly, the response to these criticisms is that the process by design eliminates all of the procedural and evidentiary requirements of lengthy and expensive litigation or arbitration proceedings, which are themselves seen as unpredictable despite their checks and balances. In addition, it is important to remember that parties who disagree with the determination have further avenues for dispute resolution, namely advancing a construction lien claim, or having the matter heard at a later date through litigation or arbitration.

Several jurisdictions around the world have already experienced construction adjudication as a staple of their local industry — for as long as 20 years. While some have observed a decline in traditional forms of construction dispute resolution processes in those regions, the Ontario regime is unique to this jurisdiction. For example, Ontario will be the only jurisdiction with adjudication to have a parallel, robust construction lien process. Accordingly, only experience will tell us to what extent these traditional avenues will be reduced in Ontario. The only certainty lies in the importance for industry stakeholders to prepare themselves for these impending changes. Interested parties will therefore without a doubt be anxious to see the results as the Ontario process takes hold.

"*It remains to be seen in what direction adjudication goes and, like any other new procedure, it will take time for adjudication to find its feet in the construction industry. At first, it will no doubt be used in the first instance at the end of contracts by those whose business relationship has deteriorated to a level where future goodwill or partnering is unlikely to be a consideration. Later, however, if seen to be operating in a fair manner, there is every possibility that over time the ambit of adjudication, or even the threat of adjudication, may expand to become a means whereby any disputes arising are quickly resolved as the work proceeds, so that payments are evened out, costs are reduced, and the industry as a whole becomes more competitive. There lies the way ahead*".

—Richard N.M. Anderson, *A Practical Guide to Adjudication in Construction Matters*, at p. 944

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STATUTORY ADJUDICATION UNDER THE *CONSTRUCTION ACT*: WHEN IS IT AVAILABLE AND WHEN IS IT NOT?

On July 1, 2018, the *Construction Act* became the governing regime for Ontario's construction industry. The Act represents the most significant development in the province's construction legislation since at least 1983, particularly in terms of modernization and dispute resolution. Part II.1 of the Act, Ontario's statutory adjudication provision, came into force on October 1, 2019 and cements Ontario, for the time being, as the only jurisdiction in Canada with both construction lien and adjudication legislation.

Part II.1 of the Act, "Construction Dispute Interim Adjudication", grants parties to Ontario construction contracts, subject to the transition provisions, the right to refer certain enumerated disputes to adjudication. Interim dispute adjudication will hopefully see to the timely resolution of disputes during the course of construction projects thereby preventing delays and work stoppages, facilitating the flow of cash down the construction pyramid and, ultimately, helping to avoid the complex and costly litigation involved in resolving construction disputes. Though the benefits of statutory adjudication are clear, for parties to reap these benefits they must identify whether adjudication is an available remedy under a specific contract or not. Section 87.3 of the Act provides this answer.

Section 87.3 of Act: The Adjudication Transition Provisions

Section 87.3 of the Act outlines the rules for Ontario's transition from the predecessor *Construction Lien Act* (CLA) to the new Act. The transition provisions under this section provide an important guide for construction industry stakeholders to identify which projects are governed by the CLA versus those that are governed by the Act. The correct interpretation of s. 87.3 is therefore critical with respect to forecasting risk on a construction project, project planning and legal strategy.

While Ontario's current transition from the CLA to the Act is gradual in order to provide the construction industry time to adjust, the adjudication provisions (Part II.1 of the Act) come into force the day subs. 11(1) of the *Construction Lien Amendment Act, 2017* come into force.

October 1, 2019 — The Day Subsection 11(1) of The *Construction Lien Amendment Act, 2017* Comes into Force

With respect to adjudication, October 1, 2019 is an important date under the Act for two reasons: first, Part II.1 of the Act, "Construction Dispute Interim Adjudication", came into force on this date; and, second, this date determines whether or not statutory adjudication is an available remedy for parties to a construction contract. See subs. 87.3(4):

> **Non-application of Parts I.1 and II.1**
>
> (4) Parts I.1 and II.1 do not apply with respect to the following contracts and subcontracts:
>
> 1. A contract entered into before the day subsection 11 (1) of the *Construction Lien Amendment Act, 2017* came into force.
>
> 2. A contract entered into on or after the day subsection 11 (1) of the *Construction Lien Amendment Act, 2017* came into force, if a procurement process for the improvement that is the subject of the contract was commenced before that day by the owner of the premises.
>
> 3. A subcontract made under a contract referred to in paragraph 1 or 2.

As outlined in subs. 87.3(4) of the Act above, interim dispute adjudication under Part II.1 of the Act is available and applies to contracts and subcontracts if: (1) the contract is entered into after October 1, 2019, *and* (2) the contract's procurement process for the improvement that is the subject of the contract was commenced after October 1, 2019.

Therefore, when a contract is entered into *and* when a contract's procurement process commences are two determinant periods in the life of a construction contract which together dictate whether interim adjudication is an available remedy under a particular contract.

Interpreting "Entered into"

Although there is currently no caselaw that interprets the exact meaning of the phrase "entered into", it is best practice to rely on the fundamental rules of contract law formation, namely the elements of offer, acceptance and consideration, to determine the point in time when a contract is entered into for the purposes of the Act.

The court in *Global Experience v. 855983 Ontario Ltd*., [1998] O.J. No. 581 (Gen. Div.) held that, in common law jurisdictions, "a contract comes into existence when an offer (e.g. an offer to purchase) is made, that offer is accepted and notification of that acceptance is received by the offeror". To the extent there was ever an issue as to whether adjudication applies based on the date a contract was "entered into", it is likely these principles would govern.

When the Procurement Process Commences

With respect to the procurement process, s. 1(4) of the Act helpfully outlines certain events that determine when this process was commenced:

> **Commencement of a procurement process**
>
> (4) For the purposes of this Act, a procurement process is commenced on the earliest of the making of,
>
> (a) a request for qualifications;
>
> (b) a request for quotation;
>
> (c) a request for proposals; or
>
> (d) a call for tenders.

Interim Adjudication Going Forward

The implications for when interim adjudication is an available remedy under the Act are clear. The ability to compel adjudication to resolve an Ontario construction dispute will only be implemented gradually. No current projects, even those which were at the procurement stage prior to October 1,

2019, will be automatically subject to the new adjudication regime, although there is nothing to stop parties from voluntarily adopting adjudication as a dispute resolution procedure in their contracts if they are willing to do so.

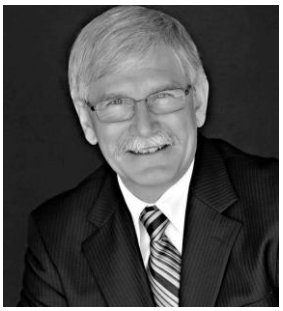
In terms of the universal imposition of adjudication through the Act, especially given that large commercial construction projects and infrastructure developments can take years from the procurement process to completion, it is likely that we will only witness disputes that are "ripe" for adjudication gradually begin to appear, and even then, only on work that was bid after October 1, 2019. We will not witness the opening of the floodgates of adjudication in the months immediately following the coming into force of statutory adjudication in Ontario. Indeed, those expecting to begin adjudicating on October 2, 2019 may well become impatient with the pace of adjudication's implementation. Others may take comfort from a gradual imposition of adjudication since any significant, systemic change takes time to properly implement. In any event, the transition provisions will allow all stakeholders in Ontario a significant period of adjustment to adjudication as a new, more abbreviated form of dispute resolution.

Conclusion

Significant change is typically exciting for some, and nerve-wracking for others, but it is important to understand that the transition to the new legislative reality is deliberately gradual. The good news in this slow roll-out is that it provides the construction industry and counsel significant time to adjust to this change, particularly while the Authorized Nominating Authority who will run the regime is getting on its feet and qualified individuals become licensed to adjudicate in Ontario. We can also expect, as a legal issue, that determining which new provisions of the Act apply to a given project will remain a challenge for the foreseeable future. Adjudication is no exception.

"*Adjudication is a swift and flexible mechanism of dispute resolution. While there are many variations of adjudication, the essential characteristics involve the determination of a dispute arising under a construction contract by an adjudicator who is a qualified person (not a judge) appointed to conduct an investigation and make a quick determination (in about 40 days, on average). The adjudicator's decision is binding on an interim basis and enforceable. In certain adjudication regimes, parties are free to specify in their contracts the mechanisms for adjudication, as long as those mechanisms comply with the minimum requirements set out in the legislation and/or regulations. If they do not comply, the minimum standards set out in the legislation or regulation will be implied into the contract.*"

—Report: "*Striking the Balance: Expert Review of Ontario's Construction Lien Act*", at p. 202



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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