NOVEMBER 2020
SPECIAL EDITION

GLAHOLT BOWLES
CONSTRUCTION LAWYERS

# BUILDING INSIGHT

GLAHOLT BOWLES LLP

Adjudication: One Year in Review

IN THIS ISSUE



## Ontario Dispute Adjudication for Construction Contracts ("ODACC") Annual Report in Review

**Introduction**

On October 1, 2020, Ontario Dispute Adjudication for Construction Contracts ("**ODACC**") released its first annual report (the "**Report**"). The Report provides key statistics on the adjudications conducted in ODACC's first year and demographics on the adjudicator roster. It also provides a summary of the services available through ODACC's custom online portal, as well as an overview of the adjudication process.

The Report mirrors our firm's experience: adjudication is in its early stages, has not been widely adopted by the industry at this time, and like all construction disputes, adjudicated disputes are frequently settled before a formal determination. What follows is a summary of the Report and our firm's observations on adjudication over its first year.

**Overview of the Cases**

The ODACC fiscal year ended on July 31, 2020 and as of that date, 32 notices of adjudication had been submitted.

At the time of the Report, seven adjudications remained open.

The total number of adjudications in the first year averaged out to less than three notices per month. For now, it appears most construction disputes continue to be resolved outside of a formal dispute resolution process, or in the courts. Adjudication volume is expected to increase exponentially as more parties become familiar with the process and an increasing number of projects are governed by construction contracts, including procurement processes, post - October 2019.

As expected, there were more adjudications involving the residential sector as compared to the commercial, industrial, public buildings, or transportation and infrastructure sectors. There were 22 residential, five commercial, two public buildings, and three transportation and infrastructure notices of adjudications issued in ODACC's first year.

As commercial, public, and infrastructure projects often have lengthy procurement processes, many major projects in Ontario are still not subject to adjudication due to the *Construction Act*'s transition provisions. Even if a contract was signed after October 1, 2019, if the procurement process began prior to that date, subsection 87.3 (4)(2) of the *Construction Act* states that the adjudication provisions do not apply.

Therefore, it should not come as a surprise that residential projects are more frequently adjudicated as compared to commercial projects. Residential projects are less likely to have procurement processes lasting many months prior to the signing of a contract. Determining the threshold for adjudication eligibility is relatively straightforward as long as the contract is signed after October 1, 2019.

## Adjudication Determination and Amounts Paid

Of the 32 notices of adjudication in the Report, only three resulted in a determination by the adjudicator.

All three were in the residential sector and none centered on prompt payment or payment of holdback. Two of the three matters were disputes over the valuation of services or materials provided under the subject contracts and one dispute focused on payment under the contract.

The total amount ordered to be paid under all three residential adjudications was $35,459.40, an average of $11,819.80 per dispute. The average amount claimed in the residential sector was $22,148.87. It would appear that there is an average recovery of 53% of the amounts claimed. However, one important caveat is that no "median" amount was provided by ODACC. Without knowing the exact numbers in each case, it is possible these figures are skewed by a single matter where recovery was a large sum. It is important to treat these early numbers with a high degree of caution.

No commercial, public, or infrastructure disputes were determined by an adjudicator. As expected, the amounts in dispute in these non-residential projects were far higher: the average claim amount was for $361,349.37. Once again, no median amount was provided in the Report. Given the low number of commercial disputes, and the fact that none resulted in a determination, the lack of a reported median amount makes it difficult to detect whether this average has been skewed by an outlier case.

## Termination of Adjudication and Settlement

Most adjudications were terminated voluntarily by the parties to the dispute. There were 21 terminated adjudications in ODACC's first fiscal year: 14 were settled, three reached the determination stage where payment was ordered, three were terminated because the date of the construction contract pre-dated October 1, 2019, and one was terminated for an unknown reason.

The predominance of settlement reflects our firm's experience in traditional litigation: most disputes are settled before heading to a hearing. The primary difference is that the short timelines of adjudications lead to shortened timelines for achieving a settlement. This reality underscores the usefulness of adjudications as leverage for early settlement discussions. As long as adjudication is applicable to a project, and a claimant is prepared to commit to the process, the strict deadlines may encourage parties to resolve disputes faster than they might otherwise in traditional litigation.

## Adjudicator Statistics

The balance of the Report covers the demographics of adjudicators.

To be qualified, the Report notes that those interested in becoming adjudicators must attend a two-day program as a prerequisite for applying to ODACC for certification. As part of the certification process, candidates must answer a series of evaluation questions and, among other things, draft a sample determination for a case. At a minimum, a candidate must have at least 10 years of relevant working experience in the construction industry.

Flat rate fees paid to the selected adjudicator are provided in the Report and range from $800.00 to $3,000.00, depending on the adjudication process selected. For large-quantum or more complex disputes, adjudicator hourly fees can range from $250.00 to $750.00, but the majority is somewhere between $250.00 and $500.00 per hour.

At the time of the Report, ODACC's roster was made up of 65 adjudicators, some of which are licensed in more than one profession: 28 engineers, 26 project managers, 22 lawyers, 10 quantity surveyors, 9 arbitrators, 2 architects, and 1 accountant. These statistics raise interesting questions about why certain professions appear

more likely to either apply or be certified as adjudicators. Further analysis may consider how the professional background of adjudicators impact decision making and the perception of claimants in selecting an adjudicator.

**Conclusion**

Overall, the Report provides an important window into adjudication's early adoption across Ontario. As contractors, trades, and owners get more familiar with adjudication, the uptake can be expected to accelerate in coming years. With the current economic uncertainty and disputes within the construction industry generated as a result of COVID-19 impacts, adjudication may start playing a significant role in resolution much sooner than we anticipate.

The decisions from adjudications are not public record and little guidance is expected from ODACC on the factors leading claimants to success. For now, individuals and organizations across the construction industry need to know whether a particular project is subject to adjudication, know their obligations under the *Construction Act*, and prepare to respond to adjudications in a short timeframe should the situation arise.

AUTHOR:


# One Year in Review: A First-Hand Look at an Adjudication under the *Construction Act*

**Introduction**

In June 2020, Glaholt Bowles LLP completed one of the first adjudications under the new *Construction Act*, R.S.O. 1990, c. C.30 (the "***Act***").

The adjudication provisions under Part II.1 of the *Act* came into force on October 1, 2019 and were developed to ensure continuity of work on jobsites and cash flow through the construction pyramid.

Adjudication is available where both the procurement process (if any) is started, and the contract is executed, after October 1, 2019. It is unavailable in situations where the contract may have been executed after October 1, 2019 but the procurement process was commenced prior to that date. In other words, *both* the procurement process (if any) must have com-menced and the contract must be formalized after October 1, 2019 for adjudication to be an option.

This article discusses a first-hand experience of legal advocacy in an adjudication and provides insight into whether this new form of dispute resolution serves to meet the legislative goal of efficient resolution of contract disputes on construction sites.

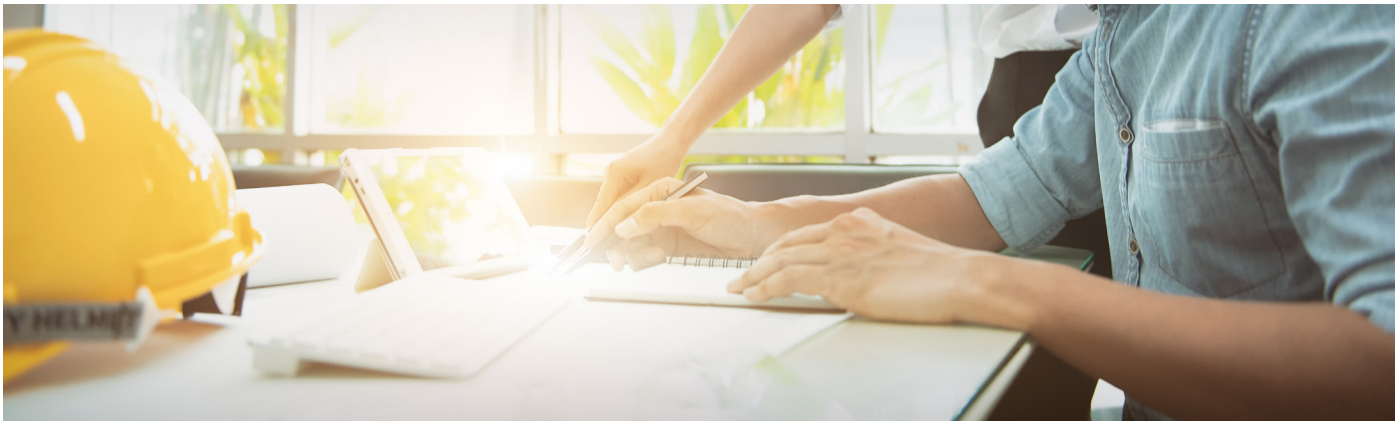
**The Decision to Adjudicate**

The decision to pursue adjudication on behalf of a subcontractor client (the "**Claimant**") was based on several factors including availability of adjudication, the nature of the dispute and client cost considerations.

Our firm saw an opportunity to explore a quick form of resolution which had the potential to meet the needs of our client. The claim centered on a residential project dispute between two private individuals and involved no procurement process. Section 87.3 (4) of the *Act*, the transition provision, makes it clear that in determining the availability of adjudication, the contract governs.

Here, the contract between the contractor and owner of the residence had been formalized after October 1, 2019. The subcontractor's agreement was also formalized after October 1, 2019. It is important to note that had the contract been effective prior to October 1, 2019, it would not have mattered that the Claimant, as subcontractor, entered into the agree-ment after that date. Adjudication would not have been available in those circumstances.

We grappled with a few anomalies in deciding whether to pursue adjudication. First, there was no written agreement but only an oral agreement along with payment records and various communications (emails, texts) related to the subcontract. Second, section 13.5(3) of the *Act* explicitly states that adjudication is not available when a contract or subcontract is complete, unless the parties agree otherwise.



In our case, if section 13.5(3) had been raised, we were prepared to take the position that the "completion" of a contact was not the same as an effective termination of the contract (as in our case) and therefore the adjudication period had not expired for the Claimant. To reiterate, adjudication is meant to be a "real time" resolution vehicle for active projects which is why it is unavailable in contracts that are completed.

The types of disputes that may be referred for adjudication are listed under section 13.5(1) of the *Act*. We determined, based on the facts, that the Claimant's dispute fell into the category of "payment under the contract".

We continued our analysis of whether to pursue adjudication by taking stock of the scope of the claim. The claim was relatively small (less than $100,000) and the issue fairly discrete and straightforward (non-payment). Section 13.5(4) of the *Act* explicitly states that unless the parties agree otherwise, adjudication should only address a single matter. We were confident that the facts of the claim met this requirement.

Finally, we were conscious of the Claimant's costs and business needs. As the operator of a sole proprietorship, the Claimant's priority was to recoup funds as quickly as possible. Adjudications can be completed in writing and written materials have strict page limits and submission deadlines. Importantly, a determination must be made by the adjudicator within 30 days (s.13.13(1)) unless an extension of time is approved with written consent of the parties (s.13.13(2)). An attractive feature of adjudication is the ability to avoid expansive hearings and protracted pleadings, which are typical of traditional lien actions.

Following our review of the Claimant's dispute, we decided adjudication was appropriate in the circumstances. We issued a Notice of Adjudication to opposing counsel as required under section 13.7(1) of the *Act*.

## Ontario Dispute Adjudication For Construction Contracts (ODACC)

On July 18, 2019, the Province of Ontario announced the appointment of ADR Chambers as the Authorized Nominating Authority under section 13.2(1) of the *Act*.[1]

ADR Chambers, for the purposes of carrying out its mandate, operates under the title Ontario Dispute Adjudication for Construction Contracts ("**ODACC**"). ODACC oversees the appointment of adjudicators and each adjudication proceeding.

ODACC's website is a critical tool in the adjudication process. It acts as both a source of information and, if so desired, the administrative centerpoint of the proceeding via the online portal.

In our case, we used the online portal and found it user-friendly. After registering an account, we were able to create a file online for the new claim. We completed and electronically submitted the online form for the Notice of Arbitration.

Each party (or their counsel) must register for an ODACC account to use the online portal. The online portal can be used to send and receive all materials pertaining to the claim. The adjudicator and the parties can also use it for direct communication. All conversation histories are saved to the system. When a message is sent or received, it is viewed by all parties along with an ODACC administrative coordinator.

Using the online portal is more efficient than email or hardcopy correspondence. The portal keeps the adjudication organized, with all information and required next steps clearly displayed on the user "dashboard". The portal is truly a "one-stop shop" for carrying out an adjudication proceeding under the *Act*.

1. https://adrchambers.com/wp-content/uploads/2019/07/announcement.pdf

Notifications are sent to the user's email whenever materials are uploaded to the online portal or a new message is available. We experienced some technical glitches where notifications were significantly delayed, but ODACC quickly resolved that issue and has since made instant notification a reliable feature for users.

It is not required that parties register and use the online portal as part of the adjudication. Given that adjudications will likely be in writing in most cases, the option remains to circulate documents and other correspondence via email, fax or mail. However, the online portal is recommended based on our experience.

Even if a party does decide to use the online portal, the regulations under the *Act* still require that any documents (including the Notice of Adjudication) be "given" to the opposing side under the rules of court (s.13.7(1)). In other words, despite using the online portal to submit all documents, we still formally served the materials on opposing counsel.[2]

**The Adjudication Process**

**Notice of Adjudication**

The Notice of Adjudication is an important document for the Claimant because it must concisely describe the dispute in 250 words or less. In addition, it must include: (1) the Claimant's suggested adjudicator; and (2) the suggested procedure for conducting the adjudication.

*I. Selecting an Adjudicator*

In selecting a proposed adjudicator, we had two options. The first option was to review the ODACC registry of adjudicators and select from the extensive list of certified adjudicators. The registry provides background details of each adjudicator including their profession, years of experience, professional memberships, languages spoken and fee range. The second option is choosing a certified adjudicator based on recommendations from colleagues or other networks. In our case, our proposed adjudicator was based on a short list of recommendations from other practicing construction lawyers.

It is not required that an individual be a licensed lawyer in Ontario to be certified as an adjudicator. Many are accountants, project managers, architects, quantity surveyors or engineers. Depending on the nature of the dispute, some parties may not want a lawyer as an adjudicator. Instead, the parties may decide that an adjudicator with training and depth of experience in a highly technical profession (e.g. structural engineering) is better suited to make a determination.

Still, any adjudicator has the ability to request the participation of an independent "assistant" under section 13.12(5) of the *Act*.

If the parties cannot agree to an adjudicator, one will be assigned by ODACC.

*II. Selecting an Adjudication Procedure*

ODACC's website provides four (4) "pre-designed" options for conducting an adjudication. The first three options are strictly in writing, where the parties exchange written materials of varying lengths. The fourth option involves a 30-minute oral presentation by each party.

If none of the four pre-designed procedures fit the needs of the parties, a fifth option is for the parties, with input from the adjudicator, to develop a customized process. A customized process may involve, for instance, a site visit or the appointment of an assistant. An assistant is an experienced professional such as an architect, engineer, or actuary who carries out the role of an expert in helping the adjudicator determine facts in question prior to reaching a determination.

Each type of procedure has its own cost implications. Adjudicator fees can range from a flat fee of $800 all the way to hourly rates of $750 per hour depending on both the amount of money in dispute and the complexity of the issue. In our case, the adjudicator's fee was due 10 days after the adjudicator agreed to hear the matter.

The Claimant and Respondent each pay 50% of the adjudicator's fee and are expected to cover their own legal costs unless the adjudicator determines otherwise.

In our case, we initially selected the pre-designed process #1, which allows for a maximum of 2 pages of written submissions from both parties. However, based on the adjudicator's recommendation, all parties agreed to pre-designed process #2, which allows the Claimant a total of 5 pages of submissions and a one-page reply. The Respondent is also allowed a total of 5 pages.

The adjudicator must approve the selected procedure for conducting the adjudication. It was helpful to have the adjudicator's input in selecting the procedure because we had initially underestimated the length of written submissions we would need to effect-ively advocate our client's position.

A more difficult decision is determin-ing whether written submissions will suffice or if your client would benefit from the comparatively more costly and time-consuming options of oral submissions or site visits. The need to ensure your client is positioned for the best possible outcome is paramount and that may mean that the truncated

2. Section 16.1(1), O. Reg. 306/18: Adjudications under Part II.1 of the *Act*.

pre-design procedures are not suitable given the substantive issue in dispute.

Supporting Documents

After we submitted our notice of adjudication and received confirmation of the adjudicator's approval to hear the matter, we had five (5) days to submit our supporting documents.

Akin to a statement of claim, our supporting documents consisted of a 4-page, written advocacy piece of the issue and why the Claimant was entitled to recovery. The Respondent was given 7 days to submit a 5-page response. The Claimant was then given 3 days to issue a 1-page reply.

Attached documents such as contracts and invoices are not counted in the page limit. However, it is good practice to clarify what limits, if any, might be placed on the number of attachments allowed in the adjudication. In some cases, the need for additional documents (emails, text, etc.) may be necessary to establish key facts. Communication between parties and with the adjudicator is essential to setting the parameters of what is acceptable. Section 13.12(1) gives the adjudicator significant flexibility in overseeing the conduct of the adjudication.

Determination

The adjudicator is required to render a determination within 30 days of receiving all documents (s. 13.13(1)). In our case, we received a determination in 13 days.

We were satisfied with the quick turnaround but recognize that this may not occur in other cases. External factors that impact scheduling may arise or the complexity of the issues may require a longer period of analysis and review of materials by the adjudicator.

ODACC uploaded the final determination with written reasons to the online portal. Seven (7) days later, a certified copy of the determination was also uploaded to the online portal.

As soon as we received the certified copy of the determination, we filed it with the court per section 13.20 of the *Act*, thus making it enforceable as any other court order. In accordance with section 13.20(3), we contacted opposing counsel and provided notice that the determination had been filed with the court.

## Parallel Proceedings

Notwithstanding the decision to pursue adjudication, an important practice tip is to ensure that any claim for lien is properly preserved and perfected under the *Act*.

In our case, the Claimant pursued both the adjudication and a standard lien claim. During the adjudication period, we continued to serve pleadings and communicate with opposing counsel concerning the lien action. It is prudent to protect a client's lien rights in the event the lien remains the only viable method of enforcement.

The determination of an adjudicator is the equivalent of an interim order. Per section 13.15, it is binding on the parties until a later determination by a court or arbitrator or until the parties enter into a written agreement respecting the adjudicator's decision.

If the parties accept the determination and thereafter forgo the lien action, another key practice tip is to seek an order on a without costs basis when discontinuing the lien action. If this is not done, there remains an opportunity for the defendant to make a motion within 30 days of the discontinuance to seek such costs under Rule 23.05(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Secondly, parties should strongly consider executing a mutual "full and final" release to avoid the resurgence of future claims related to the matter already addressed in the adjudication.

If a party disagrees with the adjudicator's determination, the option remains for them to seek the court's final disposition in the lien action. However, under section 13.15(2), the court or an arbitrator may consider the merits of a matter decided by the adjudicator. In other words, seeking a final determination in a separate forum will not necessarily lead to a different result from the adjudication.

A party that disagrees with the outcome of an adjudication has the option of seeking judicial review of the decision, with leave of the Divisional Court, as prescribed in section 13.18(1) of the *Act*.

The lien action was discontinued in our case and judicial review was not sought by any of the parties. Still, anyone participating in an adjudication should be attuned to the reality of parallel proceedings, especially those involving lien actions and should be prepared to protect their client's interests.

## Conclusion

As one of the first completed adjudications in Ontario, our experience confirms what the legislators hoped would be the impact of adjudication. We found the process to be quick and relatively inexpensive as compared to a lien action or other legal proceeding which can seriously hamper the progress of a construction project.

We were impressed by the thoroughness of the analysis and extensive written reasons of the adjudicator. There were no concerns that the adjudicator was engaging in what some have suggested may be a form of "quick and dirty" or "rough" justice.

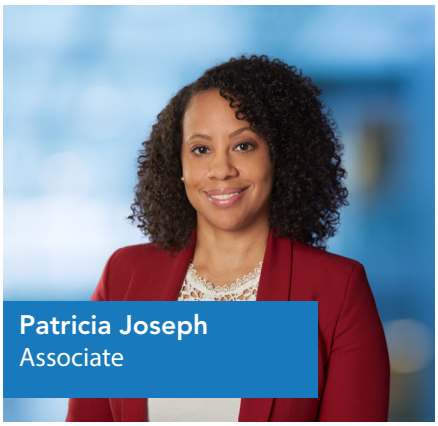
On the contrary, the adjudicator was actively involved in the process and provided direction to ensure the proceedings ran smoothly and all parties would have a fair opportunity to present their case.

Administratively, the ease of use of ODACC's online portal, along with the pre-designed forms of adjudication made participation seamless. In our case, the fast turnaround in receiving a determination removed any doubt that adjudication can be the "real time" dispute resolution tool that it is intended to be.

If adjudication is going to have the long-term impact of maintaining continuity of work on construction projects and cashflow, then industry stakeholders and their counsel will need to utilize adjudication where appropriate. An interesting study would be the short and long-term effects of these new provisions in the *Act*. However, such a study cannot take place until there is a sufficient number of adjudications.

Adjudication has the potential to save costs and maintain the focus on bringing projects to completion. With these priorities in mind, we are hopeful that adjudication can serve the construction industry well in this expanded era of alternative dispute resolution.

AUTHOR:



**Patricia Joseph**
Associate

# Adjudication in Ontario and Beyond: The Role of the Construction Adjudicator

**Introduction**

It has been a year since adjudication and prompt payment came into effect in Ontario under the *Construction Act*, R.S.O. 1990, c. C.30 (the "***Act***").[1] Despite this, as of September 21, 2020, only eight Determinations had been made and eight adjudications were in progress.[2] The seemingly slow adoption of adjudication in Ontario is partly due to the fact that the old *Construction Lien Act* continues to apply where a contract for an improvement was entered into before July 1, 2018 or a "procurement process" for the improvement was commenced before July 1, 2018 by the owner.[3] In addition, the impact of COVID-19 and the associated government-ordered construction site shutdowns slowed construction in some respects. (Interestingly, some projects have been able to finish ahead of schedule due to COVID-19 related reductions in road traffic.[4])

Statutory adjudication is one process by which the prompt payment obligations under the *Act* are enforced. The changes to the *Act*, including the introduction of prompt payment and adjudication, were designed, in part, to bring construction projects to completion faster and with fewer payment delays. In the construction context, adjudication is the determination of a dispute arising under a contract by an adjudicator who is a qualified person – not a judge – appointed to conduct an investigation and make a quick decision, which is called a determination. The types of disputes that can be referred to adjudication are the valuation of services or materials, payments under a contract, including in respect of a change order, those related to notices of non-payment or holdbacks and any other matter that the parties to

1. *Construction Act*, R.S.O. 1990, c. C.30. The changes came into effect on October 1, 2019.

2. Email from Carina Reider, Project Manager, ODACC, September 21, 2020.

3. *Construction Lien Act*, R.S.O 1990, c. C.30.

4. https://canada.constructconnect.com/dcn/news/infrastructure/2020/09/city-of-toronto-accelerates-construction-projects-during-pandemic

the adjudication agree to or that may be prescribed.[5]

What advantages does adjudication have over other dispute resolution processes? For starters, adjudication is quick; determinations are made in 39 to 46 days (unless the parties agree to an extension).[6] It also tends to be less expensive than traditional litigation or arbitration. Adjudication allows the parties and the adjudicator to tailor the process, rules and timeline for the adjudication based on the complexity of the dispute and the dollar amounts involved (while still complying with the *Act*), which helps to ensure proportionality. The Authorized Nominating Authority ("**ANA**") for adjudication under the *Act* is Ontario Dispute Adjudication for Construction Contracts ("**ODACC**"). ODACC offers four Pre-Designed Adjudication Processes, each providing for an increasing level of procedural complexity (and corresponding increase in suggested fees). In addition, adjudication is confidential, unlike traditional litigation (at least in theory). As discussed in my colleague Ivan Merrow's article "ODACC Annual Report in Review", ODACC has provided information about adjudications in its Annual Report, with identifying features about the parties involved removed. However, if adjudicators' determinations and reasons are being filed with the court, this presumably would waive confidentiality and create a body of case law. How this will play out in practice is yet to be seen.

Why would a party choose adjudication, rather than pursue a lien claim? The lien remedy is particularly useful if payment is not made at the end of a party's work on a project. It can be a good option if a project is in a later stage or if there are concerns about the solvency of the paying party. Conversely, a party may choose adjudication if a payor is not meeting its prompt payment obligations while a project is still in the early or middle stages. Adjudication is often strategically the way to go during a project to ensure payment continues to flow 'down the chain' and work can continue. It is worth noting that a claimant who commences an adjudication can still commence lien proceedings and/or litigation, although contractors, subcontractors and suppliers may have to incur significant legal expense to pursue these avenues to recover the money that is owed to them. As discussed in my colleague Patricia Joseph's article "One Year in Review: A First-Hand Look at an Adjudication Under the Construction Act", it is prudent to pursue both avenues for potential recovery.

## Adjudication in Ontario

ODACC is solely responsible for administering construction-related adjudications and for training and qualifying adjudicators. ODACC derives its powers from the *Act* and O. Reg. 306/18.[7] In Ontario, all adjudications that are commenced under the *Act* must proceed through ODACC and only adjudicators listed in ODACC's Adjudicator Registry are permitted to conduct adjudications and make determinations.[8] To qualify as an adjudicator in Ontario, a person must have at least ten years of relevant working experience in the construction industry, have successfully completed ODACC's training program, not be an undischarged bankrupt, not have been convicted of an indictable offence in Canada (or a comparable offence outside of Canada), pay ODACC the required fees, costs or charges for training and qualification as an adjudicator and agree in writing to abide by the requirements for holders of a certificate of qualification to adjudicate.[9]

ODACC's adjudicator training program is called the "Construction Adjudication and ODACC Orientation Program". There is both an online and in-person component to the training, which takes about three days to complete. The program is mandatory for everyone who wishes to become an adjudicator, regardless of previous training and experience. One benefit of having a single ANA is that adjudicators are trained uniformly, which may help to eliminate concerns about real or perceived procedural fairness. This is in contrast to the United Kingdom ("**UK**"), which has more than a dozen ANAs (it is worth noting here that the

5. *Construction Act*, R.S.O. 1990, c. C.30., s. 13.5.

6. *Construction Act*, R.S.O. 1990, c. C.30., s. 13.13.

7. Ontario Regulation 306/18: Adjudications Under Part II.1 of the *Act*.

8. https://odacc.ca/en/adjudicator-registry/.

9. *Construction Act*, R.S.O. 1990, c. C.30, s. 3(2).

population of the UK is much larger than that of Ontario). Under section 2 of O. Reg. 306/18, the Minister has the right to designate other ANAs, giving Ontario the flexibility to allow for more ANAs in the future.[10] As demand for adjudication increases, we may see more ANAs in Ontario.

The majority of the adjudicators do not have legal backgrounds. As noted in *Carillion Construction Ltd v. Devonport Royal Dockyard Ltd.*, a decision of the UK Court of Appeal, adjudicators are not selected for their legal expertise, as their "skills are likely (if not more likely) to lie in other disciplines."[11] This technical proficiency enables adjudicators to make knowledgeable decisions on highly specified matters within the time constraints of adjudication.[12] The province's decision not to limit the pool of people who can become adjudicators to lawyers and ADR professionals has both strengths and challenges. One of the main strengths is the wealth of experience and knowledge that individuals from varied backgrounds bring to adjudications. Someone with many years of project management experience may bring a different perspective to an adjudication than a career civil litigator with little experience in construction matters, for example. The challenge for adjudicators will be remembering that they are operating under a limited, but important, mandate. Adjudicators are not operating as judges or arbitrators. At the same time, they have expansive powers which they must use to identify the issues, understand and apply the *Act*, ascertain facts and law and assess the credibility of evidence, including witnesses. They must keep due process and natural justice in mind.

Lord Justice Chadwick summarizes the role of the adjudicator as follows:[13]

> the task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to recognise that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due.

While this is true for the most part, many disputes are properly dealt with through adjudication, without the necessity of litigation or arbitration after the fact, thus rendering the adjudicator's decision final, rather than interim.

Parties seeking to appoint an adjudicator can search the Registry by name, keyword, geographical area, profession, minimum years of experience, language used, maximum hourly rate and/or flat fee rates. For each adjudicator, the Registry lists:

- Contact information;
- Geographical areas where the adjudicator agrees to travel to without travel time or disbursement charges;
- Education
- Professions(s);
- Professional bodies that the adjudicator is a member in good standing of;
- Years of experience;
- Language(s) spoken;
- The hourly rate at which the adjudicator will conduct ODACC adjudications;
- The fixed fee rates for which the adjudicator is willing to conduct ODACC adjudications;
- A biography detailing areas of expertise in the construction industry; and
- The period of validity of the adjudicator's certificate.

Along with the factors set out above, when selecting an adjudicator, the parties should consider the adjudicator's background and experience and whether they are applicable to the dispute and/or the type of project. The adjudicator's hourly rate should also be considered in relation to the amount in dispute, the volume of documents the adjudicator may need to review and the necessity of a site visit by the adjudicator. As ODACC has the capacity to conduct adjudications virtually and parties will likely choose this option for the duration of the pandemic, the adjudicator's location may be less important than his or her experience and area of expertise.

Once a claimant serves a Notice of Adjudication on a respondent and sends ODACC an electronic copy of the notice, the parties have four days to select an adjudicator and obtain the adjudicator's consent to act in the adjudication. An adjudicator will not be appointed without his or her

10. Ontario Regulation 306/18: Adjudications Under Part II.1 of the *Act*.

11. *Carillion Construction Ltd v. Devonport Royal Dockyard Ltd.*, [2005] EWA Civ 1358 at para. 86.

12. https://www.cba.org/Sections/Construction-Law/Resources/Resources/2019/Winner-of-the-2019-Atrium-law-student-essay-contes

13. *Carillion Construction Ltd. v. Devonport Royal Dockyard Ltd.*, [2005] EWA Civ 1358 at para. 86.

consent.[14] When determining whether to consent to conducting an adjudication, adjudicators should consider their experience and whether they are qualified to accept the appointment, their hourly rate as it relates to the amount in dispute, whether they will be able to meet the timelines for making a determination and, most importantly, whether a conflict of interest exists which may prevent them from acting. Due to the nature of the construction industry and the limited pool of adjudicators available, repeat appointments are likely.

Ontario permits parties to appoint an adjudicator only after a dispute has begun, whereas the UK permits adjudicator appointments prior to a dispute arising. In the UK, parties to an agreement may name an adjudicator in their contract, although this practice is uncommon. Ontario's system helps to avoid a situation where an adjudicator is appointed who turns out not to be suited to determine the dispute. On the other hand, by the time a Notice of Adjudication is issued, the dispute between the parties has typically crystallized and the parties may not agree on an adjudicator. In such an event, the parties can send an adjudicator appointment request to ODACC and an adjudicator will be appointed within seven days. Adjudicators are appointed by ODACC on a rotating basis. If appointing an adjudicator, ODACC will aim to appoint an adjudicator who is prepared to adjudicate at a fee that is proportionate to the amount claimed, and will consider, if possible and if travel is required, appointing an adjudicator who is wiling to travel to the location where construction is occurring.[15] Adjudicators are not necessarily appointed based on whether their expertise is suited to the dispute. Therefore, while all the adjudicators in the Registry are well-qualified and have completed ODACC's training process, ideally the selection of an adjudicator should not be left to ODACC.

Under 'normal' circumstances, adjudicator training sessions take place in the Greater Toronto Area and Ottawa. During the COVID-19 pandemic, training is taking place virtually. It remains to be seen whether there will be a shortage of adjudicators who work in or are willing to travel to more rural or remote areas in Ontario for site visits. This will be less of an issue if, as in the UK, most adjudications are conducted through paper only. It is now possible for an adjudication, including an "in-person" hearing, to take place completely online using ODACC's Custom System, which allows parties to present witnesses and documents online.

### Adjudicators' Code of Conduct

ODACC has a Code of Conduct for adjudicators, which is designed to "to maintain and ensure public trust and confidence in ODACC and the Adjudicator's Determinations for construction disputes".[16] The stated purpose of the Code of Conduct is to:

1. Establish rules to govern the professional and ethical responsibilities of adjudicators;
2. Maintain the principles of civility, procedural fairness, competence, proportionality, and integrity in the conduct of adjudications; and
3. Promote public confidence in the adjudication process.

Notably, the Code specifies that an adjudicator shall "listen carefully and with respect to, and read carefully the views and submissions expressed by, the Parties and their representatives", "make determinations on the merits of the case, based on justice, the law then in effect, and the evidence" and "write determinations in accordance with the ODACC Determination Guidelines." Adjudicators shall not delegate to any other person any duty to decide, unless permitted to do so by the parties or applicable law. The consequences for failing to adhere to the adjudicators' Code of Conduct include suspension or cancellation of the adjudicator's Certificate and/or a requirement to complete additional training or education, as deemed appropriate by ODACC. Anyone who has reasonable grounds to believe that an adjudicator may have contravened the Code may proceed with a complaint pursuant to the complaints procedure set out on the ODACC website.

### Determinations

An adjudicator's decision is called a determination. Like most dispute resolution processes, the purpose of an adjudication is for the parties to present their dispute to an independent third party for a decision, in this case the adjudicator. Unlike most decision-makers, adjudicators work under very tight timelines and must make a determination within thirty days from the day on which the claimant submitted its documents.[17] That deadline can be extended at any time before its expiry, either on the adjudicator's request and with the written consent of the parties, for a period of no more than 14 days, or upon the written agreement of the parties and with the adjudicator's consent, for the period specified in the

14. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.9(6).

15. https://odacc.ca/en/claimants/selecting-an-adjudication/

16. https://odacc.ca/en/adjudicators/code-of-conduct/

17. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.13(1).

underlying contract.[18] A determination made after that date is of no force or effect.[19] Extension requests are handled through ODACC's Custom System. After a request is submitted, the parties and the adjudicator will receive an email asking them to respond to the request. If everyone agrees, the due date will be extended by the number of days that was indicated in the request. If the request is rejected, another may be submitted.

In conducting an adjudication and arriving at a determination, adjudicators have extensive powers, including an inquisitorial function, which they can use to quickly resolve disputes.[20] Prior to an adjudication, the adjudicator receives a copy of the Notice of Adjudication, which defines the dispute and sets out the nature of the relief sought and whom it is sought against, and a copy of the parties' contract or subcontract, as well as any documents the claimant intends to rely upon during the adjudication.[21] The adjudicator must use those documents to become as well-versed as possible on the issues in dispute as quickly as possible.

An adjudication may only address a single matter, unless the parties and the adjudicator agree otherwise.[22] Complex three-party disputes will require creative solutions, including filing and then consolidating multiple adjudications.[23] Unless provided for in the contract between the parties to the adjudication, there is no "pre-trial" before an adjudication.[24] Decisions are to be made only on the basis of law and the facts presented to the adjudicator.[25]

18. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.13(1) and (2).

19. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.13(5).

20. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.12(1) and (2).

21. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.11.

22. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.5(4).

23. https://ontarioconstructionreport.com/ontarios-construction-industry-to-be-reshaped-with-a-new-culture-as-prompt-payment-and-adjudication-rules-go-into-effect-today/; *Construction Act*, R.S.O. 1990, c. C.30, s. 13.8.

24. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.6.

25. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.12(1).

Accordingly, it is important for adjudicators to "dial out the noise", including their own opinions, emotions and potential biases, when making a determination. In some cases, the parties to an adjudication will have a long-standing working relationship, which can make it difficult to separate the dispute from other sources of tension. During an adjudication, adjudicators must ensure that their own focus, and that of the parties, remains on the dispute that is the subject of the adjudication.

In making a determination, focus is key. Adjudicators should think a lot, say little and write even less. Clear, concise writing is essential. Adjudicators should also possess case management skills which allow them to steer the adjudication through the very tight timelines mandated by the *Act*.[26] Given the tight timelines, it is likely that most adjudications will be decided on a document-only basis. Although not mandated by the *Act*, Notices of Adjudication may be followed by some other document in which a party will make detailed written submissions, akin to a factum or statement of case. The *Act* does not prescribe what types of documents are to be submitted to the adjudicator, but the scope of production ought to be informed by the type of dispute. If the adjudication is conducted by way of an in-person (or virtual) hearing, it will be important for the adjudicator to clearly identify the issues to be addressed by the parties, in order to ensure that the parties focus the limited time available on those issues and avoid distractions.[27] The adjudicator may also obtain "the assistance of a merchant, accountant,

26. James Pickavance, *A Practical Guide to Construction Adjudication* (Chichester: WileyBlackwell, 2016) at 165-6.

27. James Pickavance, *A Practical Guide to Construction Adjudication* (Chichester: WileyBlackwell, 2016) at 492.

actuary, building contractor, architect, engineer or other person in such a way as the adjudicator considers fit, as is reasonably necessary to enable him or her to determine better any matter of fact in question."[28]

Determinations must be made in writing and must include reasons.[29] The reasons should be communicated clearly and concisely, keeping in mind that they may be relied upon as evidence in subsequent proceedings. ODACC has a template form for determinations, which is provided to certificated adjudicators. Determinations are interim binding and remain binding unless set aside on judicial review or overturned by a judgment or an arbitration award, or until the parties execute a written agreement determining the matter. Once a determination is filed with the court, "any related requirement" to make payment to a subcontractor is deferred until final determination of the matter and work on the project in question may be suspended.[30]

28. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.12(1).

29. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.13(6).

30. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.20(4).

## After a Determination is Made: Enforcement and Other Considerations

Determinations may be enforced in court and can be used as evidence in subsequent proceedings. However, an adjudicator cannot be compelled to give evidence in any action or other proceeding in respect of a matter that was the subject of an adjudication that he or she conducted. It remains to be seen whether judicial guidelines will develop through caselaw on how judges and other decision makers should weigh an adjudicator's decision as evidence. In addition, while not contemplated by the *Act*, an adjudicator's decision presumably can be used as evidence in other contractually ordered dispute resolution processes.

Adjudicators must provide ODACC with a draft determination within 25 days of the claimant providing all documentation to the adjudicator upon which the claimant intends to rely. ODACC will certify the determination within seven days of the determination being sent to the parties and will provide a certified determination to the parties through ODACC's Custom System.[31] The parties will receive an email once it is available.

31. Ontario Regulation 306/18: Adjudications Under Part II.1 of the *Act*; *Construction Act*, R.S.O. 1990, c. C.30, s. 22(1)(b).

The fee for certifying the determination is $0 where the amount claimed in the Notice of Adjudication is less than $50,000 and $100 (plus HST) where the amount claimed in the Notice of Adjudication is $50,000 or greater. Only one certification fee is payable for each determination and the parties will split it equally, unless the adjudicator orders otherwise. Every party will receive a certified copy of the determination. Either party may file the determination with the court and it can then be enforced as if it were a court Order, including by way of a writ of execution and garnishment.[32] This step must be taken within two years of the communication of the determination (or in cases where a determination is subject to judicial review, two years from the dismissal or final determination of that application). The filing party must provide notice to the other party of the filing within ten days. The party who is required to pay an amount must pay the amount no later than ten days after the determination has been communicated to the parties, less any holdback.[33]

Even if a claimant receives a favourable determination, there is no guarantee that they will be paid, particularly if the

32. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.20(1).

33. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.19.

respondent does not have the funds to pay. In the event a party fails to make the payment ordered by the adjudicator, the unpaid party is entitled to suspend its work on the project.[34] The party in default is then not only responsible to pay the amounts ordered by the adjudicator, plus interest, but they are also responsible to pay the costs of the suspension and any remobilization costs.[35] This option will likely not be preferred by contractors, who want to continue working and earning money and ensuring that their subs and suppliers are being paid. There is still some uncertainty as to how enforcement will happen in practice.

It may be tempting for the "losing" party in an adjudication to defend itself against the "winner's" enforcement proceedings by arguing that the adjudicator made an error in his or her determination. Even if the "losing" party truly believes that the adjudicator made an error, it is important to remember that adjudicators' determinations are interim binding. Until a matter is finally determined, the "losing" party must live with the determination and pay what it has been ordered to pay, or else it may face enforcement proceedings and additional costs. This is sometimes referred to as the "pay now, argue later" principle, under which some argue a quick answer is more valuable than the right answer. Some industry players have expressed concerns about "rough justice" or the "quick and dirty" determinations of disputes, and there will almost certainly be instances where an adjudicator gets it "wrong". However, this can be remedied in the form of a final determination of the matter by a court or arbitrator. In the mean time, work continues and cash continues to flow on the project.

Adjudicators can make changes to a determination to correct typographical (or similar) errors. Such corrections must be made no later than seven days following the making of a determination. This may seem insignificant, but an error, however minor, could have unforeseen consequences if later used as evidence in court. If a party would like to suggest a correction to the adjudicator, that party can message the adjudicator through ODACC's Custom System. If a determination is corrected, the corrected version will be made available in ODACC's Custom System and ODACC will provide a free copy of the corrected determination to the parties within five days of the changes being made. However, such a situation is potentially embarrassing to the adjudicator and should be avoided as much as possible.

## Challenging A Determination

A determination cannot be appealed in the traditional sense of the word. A determination can only be set aside on an application for judicial review if the applicant establishes one or more of the grounds set out in section 13.18 of the *Act*.[36] An application to set aside a determination will rarely succeed, as the test set out in section 13.18 is very strict.[37] Subject to section 13.18, nothing in the *Act* restricts the authority of a court or of an arbitrator acting under the *Arbitration Act, 1991* to consider the merits of a matter determined by an adjudicator.[38]

In the UK, the most commonly cited reasons for non-compliance with an adjudicator's determination are:

1. The unsuccessful party does not have the means to pay;
2. The unsuccessful party wants to stall for time, while preparing to launch some sort of belated counter-offensive, e.g., another adjudication or action; and
3. The unsuccessful party disagrees with the determination and wants to challenge the decision (i.e., by judicial review).[39]

While a party is engaged in enforcement proceedings, s. 13.20(4) of the *Act* operates to defer certain payment obligations. As with an order of the court, the *Rules of Civil Procedure* apply. Under r. 60.02, an order for the payment or recovery of money can be enforced in the following ways:

- Writ of Seizure and Sale (r. 60.07);
- Garnishment (r. 60.08);
- Writ of Sequestration (r. 60.09); and
- Writ of Possession (r. 60.10).

A judgment creditor can also conduct a debtor examination to identify exigible assets (r. 60.18). These remedies are significant and are different than what many construction industry participants are used to. It is important to seek legal advice throughout the adjudication process, including when determining which enforcement avenues to pursue.

## Other Jurisdictions

While other jurisdictions have enacted construction adjudication legislation, such as the UK, Singapore and Australia, Ontario is unique in that adjudication

34. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.9(5).

35. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.19.

36. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.18.

37. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.18.

38. *Construction Act*, R.S.O. 1990, c. C.30, s. 13.15(2); *Arbitration Act, 1991*, S.O. 1991, c. 17.

39. https://www.singleton.com/2020/01/when-you-win-enforcing-the-adjudicators-decision/

is aligned with prompt payment in its lien statute, meaning it is difficult to draw direct comparisons with other jurisdictions. However, trends in other jurisdictions may help to predict the future of adjudication in Ontario.

The UK has had a system of mandatory adjudication in place since 1998. It was introduced through the *Housing Grants, Construction and Regeneration Act 1996* (the "***UK Act***") and enabled through The Scheme(s) for Construction Contracts[40] and their respective Exclusion Orders.[41] In the UK, an average of 1,500 disputes are referred to adjudication each year.[42] Overall, adjudication in the UK has been positively received by the country's construction industry and has reduced construction litigation in the courts. It has generally achieved the goals of resolving disputes quickly and effectively, while allowing cash to continue to flow "down the chain". It has also allowed parties to resolve payment disputes at a significantly lower cost than litigation or arbitration.[43] The most common pairing of parties to refer disputes to adjudication in the UK are general contractor and subcontractor, with the client/owner and general contractor combination also accounting for a significant number.[44] There have been issues in the UK with claimants repeatedly referring the same, or substantially the same, issue to adjudication, and we may see this in Ontario as well.[45]

Over time, the disputes being resolved by adjudication in the UK changed from being simple payment issues, wherein the payment regime as set out in the *UK Act* was not being followed, to disputes which are concerned with large sums of money and which involve complex legal questions.[46] Generally, courts in the UK refuse to correct errors of fact or law in adjudication matters. If the adjudicator has addressed the proper issue in the wrong way, the court will not intervene in the adjudicator's decision; decisions are only set aside if the adjudicator answered the wrong issue.[47]

## Relationship with Construction Workload

During the "settling-in period" of adjudication in the UK, which lasted until around 2006, there were various legal challenges, many of which were the result of more powerful parties seeking to increase the barriers to the use of adjudication and dissuade others from adjudicating.[48] These challenges occurred during a time of relatively stable workload in the UK construction industry.

Data from the Adjudication Reporting Centre at Glasgow Caledonian University demonstrated that from year 1 to 3 after adjudication began in the UK, there was a dramatic increase in the use of adjudication. From years 3 to 5, the number of referrals to adjudication remained steady, which mirrored the UK workload over this period. However, as the UK construction workload increased from years 5 to 7, the number of adjudication referrals started to decrease. From years 8 to 9, the UK workload decreased slightly and then started to increase, while the number of referrals did the opposite. From years 11 to 12, the UK construction workload started to declined sharply, as did the number of adjudication referrals. When there was an increase in the UK construction workload, followed by a slight decrease, the number of adjudication referrals continued to increase.

However, when the UK construction workload dropped more dramatically in 2010, the number of adjudication referrals also dropped noticeably.[49] The last three years in the data series are when the downturn in the UK construction workload began to take effect and when a downturn in the economy

40. The Scheme for Construction Contracts (Scotland) Regulations 1998 and The Scheme for Construction Contracts (England & Wales) Regulations 1998.

41. The Construction Contracts (Scotland) Exclusion Order 1998 and The Construction Contracts (England and Wales) Exclusion Order 1998.

42. https://www.on-sitemag.com/features/mandatory-adjudication-what-ontario-can-expect-based-on-the-u-k-experience/

43. Peter Rosher, "Adjudication in Construction Contracts" (2016) 5 Intl Business L J, at page 497, para. 13.

44. https://www.gcu.ac.uk/media/gcalwebv2/ebe/content/COBRA%20Conference%20Paper%202010.pdf

45. Rudiger Tscherning, "Construction Disputes in Major Infrastructure Deliveries: Lessons from the United Kingdom for the Introduction of Statutory Dispute Adjudication in Canada" (2018) 18 Asper Rev of Intl Business & Trade L, at page 91.

46. https://www.gcu.ac.uk/media/gcalwebv2/ebe/content/COBRA%20Conference%20Paper%202010.pdf

47. https://www.cba.org/Sections/Construction-Law/Resources/Resources/2019/Winner-of-the-2019-Atrium-law-student-essay-contes; *Bouygues UK Ltd v. Dahl-Jensen UK Ltd* (2000), GBR [2001] C.L.C. 927, [2000] 7 WLUK 948, [Bouygues].

48. *Bridgeway Construction Ltd v. Tolent Construction Ltd* (2000) CILL1662, also see *Yuanda (UK) Co Ltd v. WW Gear Construction Ltd* [2010] EWHC 720 (TCC); https://www.gcu.ac.uk/media/gcalwebv2/ebe/content/COBRA%20Conference%20Paper%202010.pdf

49. gcu.ac.uk/media/gcalwebv2/ebe/content/COBRA%20Conference%20Paper%202010.pdf

was occurring and access to funding had become more problematic. In the immediate aftermath of a downturn in workload, adjudications rose, but one year later the ongoing reductions in workload were followed by a reduction in referrals.[50]

Disputes may manifest themselves a year or more after the contract commenced and when it would have been included as part of the workload statistics. As such, the time lag must be taken into account. The motivation to pursue an adjudication may be influenced by the immediate requirements of cash flow and continuity of work on a project.[51] Parties may be motivated to pursue adjudications during periods where workload is declining slightly because there are fewer opportunities for tender, a greater need for cash flow and more time on their hands to go through with an adjudication. However, where workload has declined sharply, adjudications will likely decrease as parties do not have the resources to follow through and do not want to be passed over for opportunities for later work.

**Conclusion**

We are still very much in the "settling-in" period of adjudication in Ontario and the construction world and the world at large is currently being impacted by a worldwide pandemic. Adjudication trends in the UK and other jurisdictions will no doubt be of interest to adjudicators in Ontario. However, much remains to be seen about the future of adjudication in Ontario and it will likely be some time before enough adjudications occur to create a pool of data which can be used to meaningfully analyze and predict trends.

50. https://www.gcu.ac.uk/media/gcalwebv2/ebe/content/COBRA%20Conference%20Paper%202010.pdf. Experts confirmed that adjudication was still highly regarded.

51. https://www.gcu.ac.uk/media/gcalwebv2/ebe/content/COBRA%20Conference%20Paper%202010.pdf

AUTHOR:

**Jackie van Leeuwen**
Associate

# Avoiding Bias and Remaining Impartial: A (Preliminary) Guide for Construction Adjudicators

Despite the adjudication provisions under the *Construction Act*, R.S.O. 1990, c. C.30 (the "***Act***") having been in force for over a year now, the Divisional Court has yet to release a decision considering an application for judicial review made under Section 13.18(1) of the *Act*. This is unsurprising, given the disruptive effect that the current pandemic has had on our judicial system. Nevertheless, while setting aside a determination will almost certainly be the exception and not the rule, we may start seeing in the coming years some decisions from the Divisional Court that consider the limits to the broad and flexible powers granted to adjudicators under the *Act*.

Section 13.18(5) enumerates seven grounds upon which an adjudicator's determination may be set aside, including:[1]

1. The applicant participated in the adjudication while under a legal incapacity;
2. The contract or subcontract is invalid or has ceased to exist;
3. The determination was of a matter that may not be the subject of adjudication under [the *Act*'s adjudication provisions], or of a matter entirely unrelated to the subject of the adjudication;

1. *Construction Act*, R.S.O. 1990, c. C.30 , s. 13.18(5).

4. The adjudication was conducted by someone other than an adjudicator;

5. The procedures followed in the adjudication did not accord with the procedures to which the adjudication was subject under [the *Act*'s adjudication provisions], and the failure to accord prejudiced the applicant's right to a fair adjudication;

6. There is a reasonable apprehension of bias on the part of the adjudicator; and

7. The determination was made as a result of fraud.

One ground that may have an interesting application in the construction adjudication context, and thus worth some discussion, is "a reasonable apprehension of bias on the part of the adjudicator." This is not to say that the other grounds do not raise important questions. For example, at what point does an adjudicator seeking assistance amount to the adjudication no longer being conducted by the adjudicator at all?[2] However, it is a reasonable apprehension of bias that adjudicators must be especially careful of, in light of their broad and flexible powers under the *Act* (and the *Act*'s encouragement of adjudicators to make use of them),[3] as well as the intimate nature of the construction industry and the construction law bar.

So what is "a reasonable apprehension of bias" and how will it be interpreted under the Act? On its surface, there is an inextricable connection between "a reasonable apprehension of bias" (also known as "disqualifying bias") and conflicts of interest,[4] and there are a number of great resources from, for example, the arbitration context that adjudicators may turn to for guidance.[5] However, as will be discussed below, this guidance will ultimately have its limitations, as adjudicators have a unique function that distinguishes them from judges, arbitrators and other decision makers exercising statutory powers of decision. This unique function may result in a unique interpretation of "a reasonable apprehension of bias" within the construction adjudication context.

Moreover, conflicts of interest are only one piece (albeit a big piece) of the reasonable apprehension of bias puzzle. For a more in depth understanding, adjudicators may turn to existing case law for guidance, with the same aforesaid caveat, as "a reasonable apprehension of bias" has a long tradition of interpretation in the wider legal context, with origins in English common law.[6]

In the Canadian context, an early example of its interpretation comes from the 1895 Ontario Court of Appeal decision of *R. v. Steele*,[7] which quashed a conviction made by a decision maker whose father was the complainant. On appeal, the defendant argued that his conviction should be quashed because the nature of the relationship between the decision maker and the complainant gave rise to disqualifying bias. That is, by the very nature of the relationship, the decision maker likely had an interest in the result of the decision.

The Court of Appeal agreed with the defendant and importantly held that a party need not prove that the decision maker was actually biased in order to be disqualified. Rather, it is sufficient for the party to establish that it is more likely than not the decision maker would be biased in favour of one of the parties:[8]

> 27 The principle to be deduced from these cases is, I think, that if a state of things

2. It should be noted that Section 13.12(1) of the *Act* expressly allows the adjudicator to obtain assistance that is [emphasis added] "reasonably necessary to enable him or her to determine better any matter of fact in question."

3. For example, Section 13.12(1) of the *Act* allows the adjudicator to [emphasis added] "tak[e] the initiative in ascertaining the relevant facts and law."

4. The ODACC Adjudicators' Code of Conduct, which can be found here, defines conflicts of interest as: "…a situation where an Adjudicator has a real or perceived interest, pecuniary or non-pecuniary, direct or indirect, sufficient to appear to influence the objective exercise of the Adjudicator's duties. Conflicts of Interest include prior or current connections to the parties, perceived or actual, and prior or current involvement in the matter. A real or perceived interest of an Adjudicator's spouse, child, parent, or other close relative or person who is closely connected with the Adjudicator is considered the equivalent of an Adjudicator's interest for the purpose of this definition". This definition addresses some of the broad categories of disqualifying bias discussed below.

5. See, for example, the International Bar Association's "Guidelines on Conflicts of Interest in International Arbitration", which can be found here. Particular attention should be given to Part II: "Practical Application of the General Standards", which provides a useful colour-coded categorization of different types of conflicts that addresses some of the broad categories of disqualifying bias discussed below.

6. See, for example, *The Queen v. Gaisford (1892)*, 1 Q.B. 381; *The Queen v. Henley (1892)*, 1 Q.B. 504; *The Queen v. Huggins (1895)*, 1 Q.B. 563.

7. 1895 CarswellOnt 52.

8. *R. v. Steele*, 1895 CarswellOnt 52, at paras. 27 and 28.

> exists, whether arising from relationship to the parties to the litigation or from other causes, which is likely to create a bias, even though it be an unconscious one, in the magistrate, in favour of one of the parties, or, as put by Mr. Justice Wills in the Huggins case, which causes a "reasonable apprehension of bias" — that is sufficient to prevent his adjudication upon the matters in controversy being upheld, if it be impeached by a party who either had no knowledge of the existence of that state of things, or, knowing of it, objected to the magistrate acting; and in dealing with this question, which is one of fact, regard must be had to the principle upon which the rule is founded, that it is of the highest importance, in the general interests of justice, to keep its administration by magistrates clear from all suspicion of unfairness. I paraphrase here the language of Mr. Justice Wills, which is, if I may be permitted to say so, a clear and satisfactory exposition of the rule in question, and of the principle which underlies it.
>
> 28 In reaching this conclusion, I do not overlook the fact that it is not sufficient that there be a mere possibility of bias, as was said in several of the cases to which I have referred. That is quite true; and, on the other hand, it is not necessary that there should be real bias proved — it is sufficient if there be a likelihood of real bias or a reasonable apprehension of bias.

The question of a reasonable apprehension of bias is accordingly a question of perception that is ancillary to the question of a decision maker's impartiality.[9] What *R v. Steele* exemplifies is that public confidence in the administration of justice can only be maintained if our judicial system both is, and is perceived to be, just, fair and neutral. The current "general test" established by the Supreme Court of Canada for whether there is a reasonable apprehension of bias on the part of a decision maker maintains this element of perception:[10]

> what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would [they] think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.

While *R v. Steele* may provide an obvious example of a reasonable apprehension of bias (i.e. one may not be the judge of a family member's case),[11] whether there is a reasonable apprehension of bias on the part of a decision maker is not always an easy question to answer.

In applying the "general test", case law finding a reasonable apprehension of bias tend to fall into four categories:[12]

1. Cases where there is an association between one of the parties and the decision-maker;
2. Cases where the decision maker showed antagonism during the hearing towards one of the parties (or his or her counsel or witnesses);
3. Cases where the decision maker was involved in a preliminary stage of the decision; and
4. Cases where the adjudicator possessed a prior attitude towards the outcome.

*R v. Steele* is a clear example of a case involving an association between one of the parties and the decision maker. However, this first category is not limited to cases involving kin relationships and may extend to cases involving past professional relationships and personal relationships as well. Courts have generally found that a past professional relationship between a decision maker and a party does not in and of itself rebut the presumption of impartiality on the part of the decision maker. That said, it must be shown that the past professional relationship related to the subject matter of the dispute.[13] Moreover, while a personal relationship between a decision maker and a party also does not in and of itself raise the issue of disqualifying bias, courts will scrutinize allegations of a

9. Note that Section 13.12(5) of the *Act* expressly requires an adjudicator to conduct an adjudication in an impartial manner.

10. *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at para. 40.

11. This principle is an extension of the "principle of natural justice" that one may not be the judge of his or her own case: *nemo debet esse judex in propriâ suâ causâ*.

12. Gus Van Harten et al, *Administrative Law Cases, Text, and Materials*, 7th ed (Toronto, ON: Emond, 2015), p. 444; *Turner v. Northview Apartment Reit*, 2019 ONSC 2204 (Div. Ct.), at para. 16.

13. See, for example, *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, where a reasonable apprehension of bias was found on the part of the chairman of the subject board, who in considering competing applications relating to the proposed development of a pipeline, had previously been a member of a corporation that participated in a study with one of the applicants relating to the construction and operation of the proposed development.

decision maker's familiarity or friendliness with one of the parties during the hearing.[14] The takeaway for the adjudicator is that construction law is a niche and specialized area involving a relatively small group of professionals and as such, he or she should consider, prior to appointment: (1) whether he or she has an association with one of the parties; and (2) whether the nature of this association could lead to a reasonable apprehension of bias on their part.

The second category of cases may seem like a no-brainer, especially in cases where a decision maker is, for example, raising their voice or yelling at one of the parties. However, it should be noted that cases that fall into this category may be decided on subtleties and nuances. That said, a decision maker's mere "[inappropriate] tone or demeanour" may be sufficient to raise disqualifying bias.[15] As such, while an adjudicator should always be mindful of what they say they should also be mindful of how they say it.

The third category of cases may have relatively less application in the construction adjudication context, as these cases tend to involve decision makers who were overly active during the subject dispute resolution process. That said, while in most contexts, decision makers are required to play a passive role in the dispute resolution process and thus may not be involved in investigating the matter that is before him or her, the *Act*, in contrast, provides for an inquisitorial adjudication process whereby the adjudicator may play an active and investigative role.[16] Notwithstanding, this third category also includes cases where the decision maker was involved in a previous stage of the dispute resolution process. As such, an adjudicator should be mindful of a reasonable apprehension of bias on their part when he or she was involved in the dispute prior to his or her appointment – perhaps as a mediator or as a member of the subject project's dispute resolution board.

The final category of cases, known as "attitudinal bias",[17] considers allegations of a decision maker coming to the dispute with a prior attitude towards the dispute's outcome. In these cases, courts may scrutinize, among other things, a decision maker's past statements or publications. Consider, for example, an adjudication involving a specific kind of payment dispute between a subcontractor and contractor where the adjudicator decides in favour of the subcontractor. If the contractor subsequently discovers that the adjudicator had previously published articles or appeared on podcast episodes showing unequivocal support for subcontractors in similar payment disputes, the contractor may be successful in raising disqualifying bias.

The general takeaway for adjudicators is that until the Divisional Court interprets "a reasonable apprehension of bias" within the context of the *Act*'s adjudication provisions, the adjudicator must look to its interpretation in the wider legal context for guidance. However, this guidance will ultimately have its limitations for, as discussed above, the powers bestowed on adjudicators under the *Act* are unique and as such, the interpretation of a "reasonable apprehension of bias" under the *Act* may reflect this uniqueness. Stay tuned.

AUTHOR:


14. See, for example, *United Enterprises Ltd. v. Saskatchewan (Liquor & Gaming Licensing Commission)*, [1996] S.J. No. 798 (Sask. Q.B.), where the Queen's Bench quashed a decision of the subject tribunal after inter alia the chair of the tribunal invited one of the parties' lawyers to a dinner party at the end of the hearing.

15. *Muhwati v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 1121, at para. 11.

16. Once again, see for example, Section 13.12(1) of the *Act*, which allows the adjudicator to "tak[e] the initiative in ascertaining the relevant facts and law."

17. Gus Van Harten et al, *Administrative Law Cases, Text, and Materials*, 7th ed (Toronto, ON: Emond, 2015), p. 452.

GLAHOLT BOWLES
CONSTRUCTION LAWYERS

# Building Insight Podcasts

## Episode 18: Force Majeures
**March 2020**

Madalina Sontrop and Jackie van Leeuwen, associates, discuss force majeure events and clauses in the context of the global COVID-19 pandemic.

glaholt.com/linktopodcast18

## Episode 19: COVID-19, Ontario's Essential Workplaces and the Suspension of Limitation Periods and Procedural Time Periods
**April 2020**

John Paul Ventrella and Jacob McClelland, associates, discuss the effect of Ontario's regulations under the *Emergency Management and Civil Protection Act*, the list of essential workplaces and the suspension of limitation and procedural time periods on the construction industry.

glaholt.com/linktopodcast19

## Episode 20: Updates to Ontario's Essential Construction Workplaces and Court Notices to the Profession
**May 2020**

Pavle Levkovic and Derrick Dodgson, associates, discuss construction-related updates to the Government of Ontario's List of Essential Workplaces and the Ontario Superior Court of Justice's Notices to the Profession.

glaholt.com/linktopodcast20

## Episode 21: Technology in the Practice of Law
**July 2020**

Keith Bannon, managing partner, and Myles Rosenthal, associate, discuss the use of technology in the practice of law and specific practice tips for navigating working from home.

glaholt.com/linktopodcast21

## Episode 22: Our First Adjudication under the New *Construction Act*
**August 2020**

Patricia Joseph, associate, and Matthew DiBerardino, summer student, discuss Glaholt Bowles' first adjudication experience.

glaholt.com/linktopodcast22

## Episode 23: Remote Hearings
**October 2020**

Partners Lena Wang, Charles Powell, and Michael Valo discuss their recent experiences conducting a three week online arbitration, along with tips for other practitioners getting ready for their first virtual arbitrations.

glaholt.com/linktopodcast23

**For a complete list of our podcasts and to listen, visit www.glaholt.com, Apple Podcasts, Spotify, Google Play, or wherever you get your podcasts.**