

Model Framework for Construction Adjudication across Canada

The ADR Institute of Canada and its affiliate organizations
throughout the Canadian Provinces and Territories supported by The
Royal Institution of Chartered Surveyors



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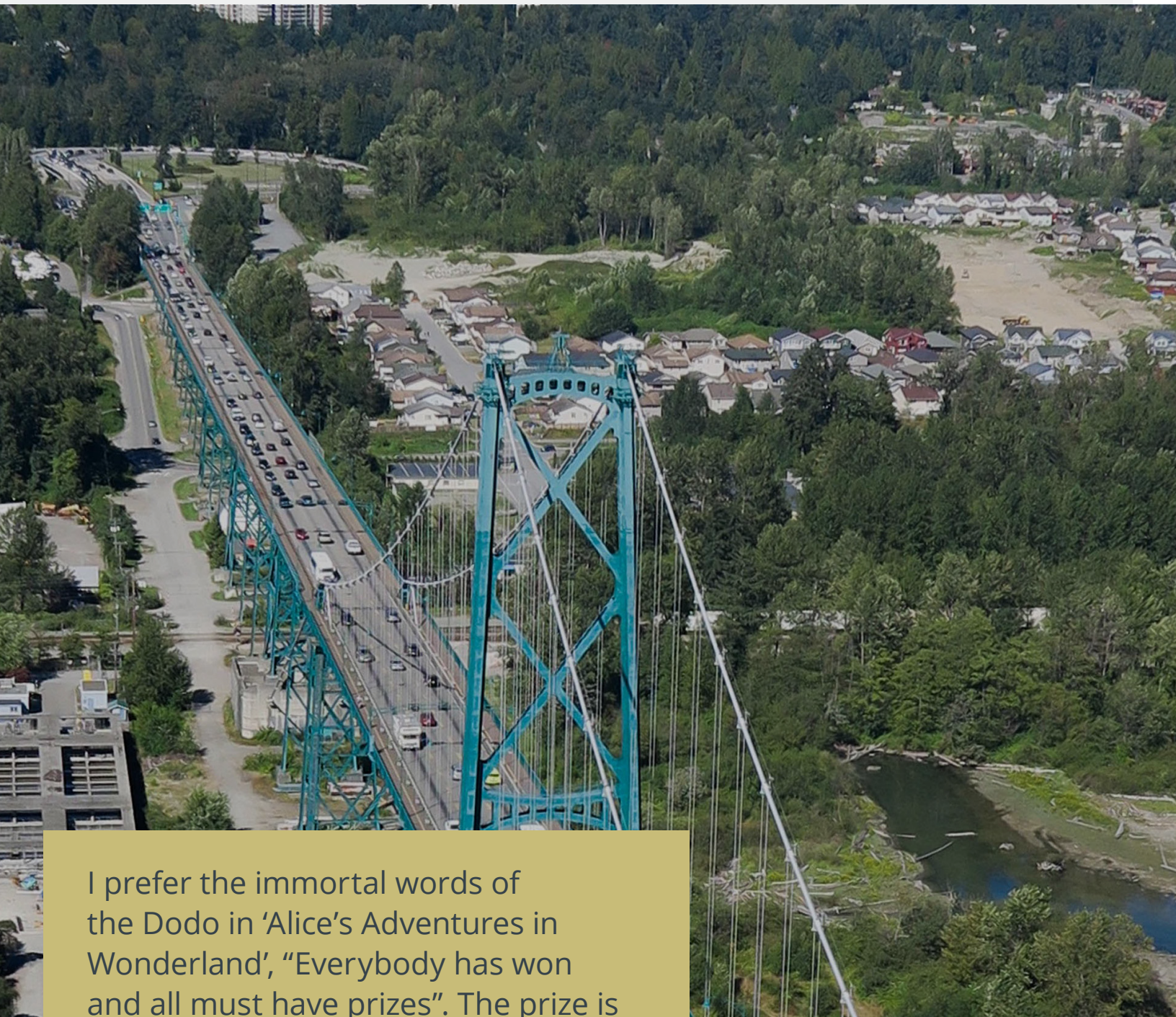
Introduction

As the Provinces and Territories each enact their own legislation, the risk arises that Canada will end up with a fragmented approach to construction adjudication. This would be to the detriment of the adjudication mechanism itself, the parties seeking relief via adjudication, and the construction industry.

To support the legislation and the growth of successful adjudication nationwide, ADRIC and its provincial affiliate organizations, supported by the Royal Institution of Chartered Surveyors, proposes the development of a comprehensive framework for construction adjudication based on:

- a consistent level of construction adjudicator training, and
- a consistent approach, within the parameters of provincial and federal legislation, to panel creation, appointments and quality assurance.





I prefer the immortal words of the Dodo in 'Alice's Adventures in Wonderland', "Everybody has won and all must have prizes". The prize is enhanced performance in a healthier atmosphere. It will involve deeper satisfaction for clients. It will lead to a brighter image and better rewards for a great industry.

Sir Michael Latham
CONSTRUCTING THE TEAM
Final Report July 1994

History

When the Construction Act came into force in the UK on 1 May 1998, there were around 30 organizations which initially offered nomination services. It became clear very quickly that the industry favoured a small number of professional organizations, all of which had well-established reputations as dispute resolution service providers and were focused on professional competence and customer service.

In 2020, there are now around six organizations in the UK that regularly nominate adjudicators. Three of these are the UK's leading professional bodies in the construction sector, Royal Institution of Chartered Surveyors (RICS), the Royal Institute of British Architects (RIBA) and the Institution of Civil Engineers (ICE).

In Canada, as the provincial and federal governments enact separate pieces of adjudication legislation, the risk arises that a fragmented approach to construction adjudication will ensue. This risks reducing confidence in the adjudication process among the parties to disputes and the construction industry generally.

ADRIC and its provincial affiliate organizations, supported by the Royal Institution of Chartered Surveyors, propose that these difficulties can be avoided by governments and the construction industry supporting the development of a comprehensive framework for construction adjudication based on:

- a consistent level of construction adjudicator training, and
- a consistent approach, within the parameters of provincial and federal legislation, to panel creation, appointments and quality assurance.

This would include the identification and vetting of prospective adjudicator candidates, training and continuous education programming, adjudication application processes, claim assessment and selection of an adjudicator appropriate to the dispute, claim administration and management including complaints; data collection, analysis and publication; and ongoing program performance review.



Our Credentials

The ADR Institute of Canada (ADRIC)

The ADR Institute of Canada is recognized as Canada's pre-eminent self-regulatory professional Dispute Resolution organization. ADRI is a "not for profit" organization with a membership of approximately 2500 dispute resolvers across Canada.

ADRIC sets the standard for best practices for ADR (alternative dispute resolution) in Canada and provides leadership, value and support to its individual and corporate members and clients.

ADRIC maintains ethical standards and professional competency via its Codes of Ethics and Conduct. It also provides education, course accreditation and a peer-review certification program leading to the national Qualified and Chartered designations for Arbitrators, Adjudicators and Mediators that meet the demanding criteria. Designated members are required to commit to continued learning to uphold best practices.

Access to Dispute Resolution processes such as those offered by ADRI members provides families, workplaces, businesses and communities with efficient and effective ways to resolve their disputes without recourse to the Courts and litigation. The demand for ADR is growing in the justice system, in personal and professional relationships, and in every sector of the Canadian economy.

ADRIC's Provincial affiliate organizations are:

- ADR Institute of British Columbia (ADRI) (also serving Yukon)
- ADR Institute of Alberta (ADRIA) (also serving NWT)
- ADR Institute of Saskatchewan Inc. (ADRSK)
- ADR Institute of Manitoba (ADRI)
- ADR Institute of Ontario (ADRIO) (also serving Anglophone Nunavut)
- Institut de médiation et d'arbitrage du Québec (IMAQ) (also serving Francophone Nunavut)
- ADR Atlantic Institute (ADRAI)/Institut de médiation et d'arbitrage de l'atlantique



The Royal Institution of Chartered Surveyors (RICS)

Founded in 1868 and with over 200,000 students, trainees and members in 140 countries worldwide, RICS is the oldest and largest professional organization for the international land, property, construction and related sectors.

RICS promotes and enforces the highest professional standards in the development and management of land, real estate, construction and infrastructure. Its Royal Charter requires RICS to “promote the usefulness of the profession for the public advantage” in the UK and around the world.

The RICS Dispute Resolution Service (DRS)

Founded nearly fifty years ago, DRS is an independently governed arm of RICS responsible for the training, appointment and quality assurance of the international RICS President’s Panel of Dispute Resolvers and Expert Witnesses.

DRS education programs include two university masters level Diplomas in Arbitration and Adjudication, the Accredited Expert Witness Program, Mediation Program and Independent Expert Determination Program, as well as bespoke training.

In the UK, DRS manages around 5000 appointments a year including over 70% of its construction adjudications, and is leading the UK construction industry in the development of effective conflict avoidance services.

All RICS Panel adjudicators undergo rigorous reassessment to ensure that they maintain the relevant knowledge, skills and experience at the highest level.

Panel members are normally reassessed during a face to face interview every five years. UK adjudicators are required to participate in a rolling program of competency training to accommodate the rapidly changing legal and industry framework in which they operate.





Our Approach to Adjudication

In the 1990s UK construction industry, poor payment practices and a deep-seated adversarial and claims-conscious attitude became so severe as to require statutory intervention. Reforms, which led to contracting parties having the right to refer disputes to adjudication, have their origin in Sir Michael Latham's report *Constructing the Team*, published in 1994. Latham's report described an industry rife with disputes.

Latham criticised litigation and arbitration, the costs of which often outweighed the sums in dispute. Latham called for statutory implementation of a quick and affordable means for resolving disputes by an independent adjudicator, whose decision was binding. The result was s.108 of the Housing Grants Construction & Regeneration Act 1996 (Construction Act).

RICS DRS was there at the start and was among the first adjudicator nominating bodies established in the UK.

In the first year, RICS made 23 appointments, 350 the following year and have since grown to be the UK's leading adjudicator nominating body, making over 70% of all appointments. The framework for recruiting, training, monitoring and nominating independent adjudicators, which RICS has established, has to a large extent, been followed across the industry.

Fundamental Principles

The service we propose is based on these fundamental principles:

Independence- The body empowered by Government to appoint adjudicators, the Authorized Nominating Authority (ANA), should be independent of the adjudicators themselves to avoid perceived conflicts of interest that otherwise may rapidly undermine public confidence in the system. This also ensures that parties have confidence in the skills and independence of their adjudicator.

Distinct Process - Adjudication is not 'arbitration light' or watered down litigation. It is a unique process, providing a sector specific, pragmatic, quick and cost-effective mechanism designed for and suited to the construction industry.

The Right People - Lawyers, arbitrators and retired judges do not necessarily make the best adjudicators. A panel of adjudicators ought to reflect a wide range of skills, and should include construction industry experts such as quantity surveyors (QS), claims consultants and project managers as well as construction lawyers, architects, engineers etc. They must all be properly trained to act as adjudicators. These people will:

- Focus on practical matters
- Speak the same industry language as parties
- Be less inclined to over-legalise

Active Matching of Adjudicators to Cases - Adjudicators should be carefully matched to the dispute in terms of its nature, value and geographic situation, and by their primary professional skills e.g. as a lawyer, QS, engineer or construction expert, as well as by their experience, geographic location, expected fee range, etc. Cab rank/next-in-line appointments do not serve the interests of the parties to a dispute nor those of the public. Although making next-in-line appointments is the least costly process for an ANA, every party deserves the best available adjudicator with skills that match the circumstances of the dispute.

Comprehensive Training and Assessment - Adjudicators must be trained in the law and practice of adjudication, and specifically on how to manage parties, submissions and evidence, and on how to produce a useful, coherent and binding decision. Adjudicators should be vetted and assessed very carefully before being appointed to a panel, both in terms of their knowledge and skills as an adjudicator, and their professional background, expertise and reputation. They must demonstrably be a fit and proper person to exercise a quasi-judicial role in the public interest. A rigorous assessment process is essential for this to happen, including the scrutiny of referees' reports from fellow professionals.



CPD and Reassessment - Adjudicators should be subject to an ongoing process of continued adjudication-specific professional competency development and reassessment in addition to the standard CPD required by their other professional bodies.

Rigorous Quality Assurance - Both the appointments process and the adjudicators themselves should be subject to a rigorous complaints and quality assurance procedure.

Established and Published Standards and Best Practice – ADRIC - RICS maintains a body of internationally recognized professional standards and practitioner guidance. The professional conduct of all adjudicators is measured against these as well as against the rules of conduct mandated by their individual professional bodies.

See for example:

RICS professional guidance, *Surveyors acting as adjudicators in the construction industry* 4th edition, January 2017

RICS professional guidance, *Conflicts of Interest for Members Acting as Dispute Resolvers*, 2nd edition, October 2020

Data Collection, Analysis and Publication - Subject to proper confidentiality constraints, information as to the quantum and nature of claims, process costs, duration of the adjudication process, outcomes, language and cultural availability, etc should be collected, analyzed and published in support of a program of continuing performance assessment. This will assist parties, industry and governments in evaluating the uptake and the efficiency of existing programs, and provide a knowledge base for future improvement.

Our Model for a Consistent and Comprehensive Service in Canada

A Consistent Level of Adjudicator Training

ADRIC - RICS provides high-quality construction environment-specific ADR training programs in Canada and around the world.

The ADRIC - RICS Canada Adjudicator Training Program

The ADRIC - RICS Canada Adjudicator Training Program covers core subject areas common to other methods of dispute resolution e.g. arbitration and expert determination. These include evaluating evidence, ethics and conflicts of interest, managing parties and writing reasoned decisions. The training also examines the fundamental differences between adjudication practice and procedure and those of arbitration. It teaches candidates how to manage the adjudication timetable and to deliver a fair and enforceable decision within the prescribed timetable.

The intense 40-hour program includes federal, provincial and international law components developed by leading Canadian construction lawyers.

The practical elements of the program will initially be delivered by leading, hugely experienced UK adjudicators, who are prominent members of the RICS President's Panel.

The program is usually delivered both face-to-face and via online tutorials and workshops, but will be entirely online for as long as the COVID situation continues.



Module 1 - Introduction to the Canadian Legal System and the Law of Obligations and Evidence

Sessions 1 and 2 - Legal System and Law of Contract

Course subject	Description
Legal System	How the law is made and applied under the Canadian civil and common-law systems
Contract Law	Contract formation, interpretation, breaches and remedies
Review Questions	Questions for discussion in groups followed by plenary session

Sessions 3 and 4 – Law of Tort and Evidence

Course subject	Description
Tort	Negligence and other torts – key components
Review Questions	Questions for discussion in groups followed by plenary session
Evidence	Statutory/regulatory regime - applicability of rules of evidence – burden and standard of proof - admissibility – evidence of fact and opinion – expert witnesses
Review Questions	Questions for discussion in groups followed by plenary session

Session 5

Assessment	Contract, torts and evidence exam	3-hour online examination
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Module 2 Legal Framework for Adjudication

Sessions 6 and 7 – Adjudication Law

Course subject	Description
Adjudication Law	The application of adjudication under provincial and federal legislation, and the key principles applying to the presentation of evidence
	The principles and specific legal requirements of federal and provincial adjudication provisions
	The key principles applying to the presentation of evidence and case management in adjudication
Case Law	Canadian courts' attitudes to non-litigation dispute resolution procedures + comparative/persuasive international case law

Sessions 8 and 9 - Practice and Procedure

Course subject	Description
The Process for Commencing Adjudication	<p>Appointment of an adjudicator by agreement of the parties</p> <p>Appointment of an adjudicator by an appointing/nominating body</p> <p>Matters an adjudicator must consider if appointed by agreement – e.g. qualifications, conflicts and involvements, subject matter expertise, timescales and availability.</p> <p>Qualifications for ADRIC - RICS Panel membership – disclosures, CPD requirements, duty of care, accepting an appointment, communications with parties, post-appointment actions and getting the process underway. Reporting obligations to the appointing body.</p>

Session 10

Assessment	Adjudication law, practice and procedure	3-hour online examination
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Module 3 Adjudication Drafting and Decision Writing

Sessions 11, 12 and 13

Course subject	Description
Production of a Final Reasoned and Enforceable Decision	<p>Critical analysis and competent application of law and best practice in drafting a reasoned and enforceable adjudication decision.</p> <p>Production of a formal document that is legally satisfactory, clear, cogent, comprehensive and concise.</p> <p>Evaluation of evidence, distilling issues from submissions and deciding issues by applying appropriate legal principles.</p> <p>Making appropriate orders as to interests and costs.</p>

Session 14

Assessment	Adjudication Drafting and Decision Writing	5-hour online examination
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A Consistent Approach to Panel Creation, Appointments and Quality Assurance

ADRIC - RICS is, itself, structured to serve as an Adjudicator Nominating Authority. Recognizing that Canada and each of its jurisdictions will be best served by a consistent and comprehensive system for the establishment, operation, management and continuing performance assessment of construction adjudication, ADRIC - RICS has developed and is distributing this framework to governments, the industry and the public.

In so doing, it is hoped that whichever body may become the Adjudicator Nominating Authority (ANA) in each of Canada's jurisdictions, every ANA will have the benefit of the depth of experience and knowledge developed by RICS and ADRIC over many decades.

Since 1998, RICS has nominated adjudicators from a panel of professionals, all of whom are trained, assessed and interviewed.

Panel Entry Assessment

Applicants for Panel membership are required to successfully complete a panel assessment interview. This is conducted by an interview panel of three persons, consisting of the Chair, a Professional (usually an experienced adjudicator or construction arbitrator) and an Independent member.

The interview is designed to test whether applicants can put their training and knowledge of adjudication into practical use. It is not uncommon for professionals to have acquired immense knowledge and understanding of the law and procedure of adjudication, yet not be able to apply themselves to the practicalities, and pressures, associated with discharging the role.

Applicants to the panel must complete an application form, which elicits information about the applicant's relevant professional qualifications, skills and experience.

Applicants must provide names and contact details of a minimum of two references, neither of whom must be a member of the applicant's own firm.

Applicants must also provide:

- Details of their relevant experience acting as a dispute resolver or party representative
- Information about training and qualifications in adjudication
- Information about any formal complaints and/or investigations that may have been undertaken by their professional body

A Model Appointments Mechanism

The applicant will complete an application form, which is available on the ANA web page. The application can be completed and submitted electronically.

The application form elicits information including copies of the pertinent notice of adjudication, a description of the dispute and the remedy sought; the location of the works, the identity of relevant parties and their representatives (if any) and names of any potential adjudicators who may have a conflict of interest.

The data in the application is captured and recorded on a computerized case management system, and then reviewed by a case officer.

The respondent is notified electronically that an application has been received and is invited to review the case details to check their accuracy. If any questions are raised by the respondent, the case manager will revert to the applicant for comments.

The information in the application is used by the case officer to match suitable adjudicators to the requirements of each case.

ADRIC - RICS does not nominate adjudicators on a next in line or cab-rank principle. Our priority is to meet the needs of the parties in each case, and to nominate the most suitable adjudicator, taking into account a range of factors including the nature of the dispute, specific qualifications and experience that may be required of the adjudicator to deal with the matter.

A locally based adjudicator who is not conflicted can keep party costs down. Thus, the proximity of the adjudicator's place of business in relation to the dispute and/or parties is often an important factor.

An adjudicator who is matched to a case is invited by electronic communication to put their name forward for nomination.





Invited panel members are required to confirm that they:

- a. are willing and available to accept the nomination
- b. have appropriate experience, expertise and knowledge of the subject matter in dispute
- c. can undertake the adjudication expeditiously and complete it within the timetable required under statute and/or contract
- d. are not conflicted and have had no involvements with the parties, related parties, or the subject matter in dispute that could give rise to a conflict of interest (the adjudicator is required to disclose any involvement, remote or historic, that may possibly affect the decision by the ANA as to whether to make the nomination).
- e. are appropriately insured
- f. are not precluded from taking the nomination for any other reason.

The case officer reviews the invited adjudicator's responses and will normally decide to:

- a. proceed with the nomination, or
- b. advise the adjudicator that the nomination will not proceed and seek an alternative adjudicator to nominate.

A decision not to proceed with the nomination of a particular adjudicator may be made where, e.g. the adjudicator's response gives rise to a concern that the adjudicator may have a conflict, or does not have the necessary skills or experience to deal with the issues in the dispute or cannot complete the matter within the required timescale.

Both the parties and the adjudicator are notified of the nomination via electronic communication.

Transparency of Fees for Adjudication

ANA Commission

To further the overriding public interest imperative on all ANAs, ADRIC - RICS proposes that adjudicator appointments be made subject to a balanced fee structure designed to provide value for money for the public, sufficient financial incentive for ANAs to function, and a reasonable remuneration for the adjudicators. Furthermore, ANAs should balance the source of their remuneration between a modest administration fee and the levying of a 20% commission on adjudicators' fees. This provides sufficient financial incentive for ANAs to function, without being seen to exploit the public or the members of their panels.

Levels of Service

ADRIC - RICS proposes four levels of service to accommodate the different needs across the construction sector:

1. On-line adjudication - For cases where the amount in dispute is less than \$30,000: a paper-only process with all documents exchanged electronically via the ANA; strict limits on the length of submissions and attachments; no site inspection or oral testimony hearing, and a decision delivered electronically. This is in line with the consumer/homeowner adjudication process which has been successfully run by RICS in the UK for many years.
2. Short form process - For cases where the amount in dispute is between \$30,000 and \$100,000: a predominantly paper process, with provision for limited site inspections and hearing only in exceptional circumstances; limited disclosure of documents and length limits to formal submissions. This process is based on the Low-cost Adjudication Rules drawn up by the UK Construction Industries Council which were promulgated in June 2020.
3. Standard process - For cases where the amount in dispute is between \$100,000 and \$1,000,000: this is adjudication following the normal procedures as defined in the UK under the UK 1996 Construction Act "Scheme for Construction Contracts" and employed in the vast bulk of large construction adjudications in the UK, and with minor variances to accommodate the various forms of adjudication provided for in Australia and New Zealand.

Specific Process - For cases where the amount in dispute is above \$1,000,000: a more bespoke approach with a greater degree of proactive involvement from the ANA in shaping a set of directions and a process best adapted to meet the specific needs for the parties in what tend to be more complex and multifaceted cases.

Table of ANA and Adjudicators' Fees

ADRIC - RICS proposes a table of fees for each form of adjudication determining the ANA's administration fee and the hourly rate to be charged by adjudicators as well as providing an anticipated total cost for the process. This is intended to strike a balance between providing a value-for-money service for parties and providing sufficient levels of remuneration for adjudicators to attract and retain competent practitioners to the panel. These figures are based on the average charges prevailing in the UK and Australia/New Zealand.

Level of Service	Claim worth \$	Adjudicator Fees \$	ANA Administration Fee \$
On-line adjudication	<30,000	4,000	250
Short-form process	30k – 100k	12,500	500
Standard process	100k – 1 million	24,000	750
Specific process	>1 million	32,500	750

These amounts can be modified to suit conditions in each jurisdiction.

Continuing Professional Education and Reassessment of Panel Adjudicators

Based on our experience in the UK and other jurisdictions, ADRIC - RICS have learned that once adjudication is introduced, the law and practice which underpins it quickly evolves as parties and courts test key elements.

Adjudicators on the Panel must remain up to date on the law and practice of adjudication. This is achieved by requiring all Panel adjudicators to submit to a rolling program of training and reassessment. Each Panel member must attend a total of 24 hours of assessed workshops/webinars within a period of three years. Each workshop/webinar focuses on a core competency required of an adjudicator, e.g. dealing with jurisdictional issues, contract law, conflicts of interest, managing parties and timetables, etc.

Assessments of Panel members who attend workshops is undertaken via a mix of online tests and written assignments.

Panel members will also be interviewed every five years and must attend an interview upon request, e.g. if there has been a complaint that gives rise to concerns about their ability to discharge the role to a high standard.

Complaints Handling and Quality Assurance

An adjudicator nominating body owes a duty of care to both parties in each adjudication to take all reasonable steps to ensure that the adjudicator is competent to take on the dispute before them, and is free from conflicts of interest.

It should provide a rigorous recruitment, training and assessment program to ensure that adjudicators who are placed on its panel are highly capable and meet high standards.

Beyond that, an ANA should also be engaged in ensuring that adjudicators on its panel remain competent and perform to a high level. Both the appointments process and the adjudicators' conduct should be subject to a rigorous complaints and quality assurance regime.





The Benefits of the ADRIC - RICS Model for Adjudicator Nominating Authorities

ADRIC - RICS is, itself, structured to serve as an Adjudicator Nominating Authority.

Nonetheless, whichever body may become the Adjudicator Nominating Authority in each of Canada's jurisdictions, every ANA will have the benefit of the depth of experience and knowledge developed by ADRIC - RICS over many decades.

Support with Implementing The ADRIC - RICS Model for Construction

Where the legislation provides for the appointment of a local ANA, ADRIC - RICS will make its Model available to:

- Provide ANAs with access to adjudicator training of an international standard, with its practical elements delivered by leading, highly experienced, international adjudicators.
- Reduce the risk for ANAs attached to expending costs and time involved in setting up an effective appointments service in the light of uncertainty as to how many applications will be received, and thus whether the investment will be worthwhile.
- Provide an experienced and thus well calibrated complaints system and disciplinary function.
- Provide ANAs, adjudication users and representatives with access to technical knowledge and experience on adjudication.
- Enable ANAs to adopt and to project to government and the industry, a body of published guidance, professional standards and best practice at an internationally recognised standard.
- Limit the scope for accusations of amateurism, cronyism and of ANAs placing financial interests ahead of their provision of essential services.

Qualifications and Designations

Upon successful completion of the ADRIC - RICS Canada Adjudicator Training Program, delegates will be awarded the **ADRIC - RICS Adjudicator Training Program Certificate**.

Upon successful completion of the panel assessment interview, they will be admitted to the ADRIC - RICS Canada Panel and become a member of the RICS Global Panel of Dispute Resolvers and Expert Witnesses, with the international status that accompanies this.

They will become entitled to use the following designations and logos:



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Contact Details

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Delivering confidence

We are RICS. Everything we do is designed to effect positive change in the built and natural environments. Through our respected global standards, leading professional progression and our trusted data and insight, we promote and enforce the highest professional standards in the development and management of land, real estate, construction and infrastructure. Our work with others provides a foundation for confident markets, pioneers better places to live and work and is a force for positive social impact.

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