

**THE CANADIAN BAR ASSOCIATION/FRASER INSTITUTE
CORPORATE COUNSEL SURVEY**

Dear Sir or Madam:

Thank you for taking time from your busy day to complete this survey.

The Canadian Bar Association and the Fraser Institute are jointly conducting this survey of members of the Canadian Corporate Counsel Association. The purpose of the survey is to obtain the views of corporate counsel regarding cost and delay factors in the resolution of civil justice disputes. It also seeks to understand the main causes of cost and delay.

All individual questionnaires will be treated as *strictly personal and confidential*. The results will form part of a presentation to the Canadian Bar Association's *Task Force on Systems of Justice* national conference to be held in February, 1996.

The first section will ask you questions about your overall case load during the last five years.

The second section will ask you to choose a single representative case and to answer specific questions about it.

Thank you again for your cooperation in this first-ever survey of its kind in Canada.

WE WOULD APPRECIATE IT IF YOU COULD COMPLETE THE SURVEY BY NOVEMBER 30TH, 1995, AND MAIL IT (C/O OWEN LIPPERT AT THE FRASER INSTITUTE) IN THE STAMPED, SELF-ADDRESSED ENVELOPE WHICH IS ATTACHED. YOU MAY ALSO FAX IT TO OWEN LIPPERT AT (604) 688-8539.

PART ONE: GENERAL CASE LOAD QUESTIONS

1) Over the past five years, how many civil actions, regardless of disposition, have been undertaken by your corporation?

a) EITHER: give an exact number of cases average =291
OR: MARK ONE OF THE FOLLOWING RANGE:

b) 0-49	<input type="checkbox"/>
c) 50-99	<input type="checkbox"/>
d) 100-199	<input type="checkbox"/>
e) 200-500	<input type="checkbox"/>
f) 500-999	<input type="checkbox"/>
g) 1000 +	<input type="checkbox"/>

2) Please indicate the percentage of cases over the last five years that were in the following areas.

a) Product liability	8%	h) Tax	5%
b) Contract	38%	i) Intellectual property (patent, copyright, trademark)	2%
c) Consumer protection	0+ %	j) Stockholders	1%
d) Environmental	4%	k) Human rights	3%
e) Trade law	1%	l) Personal injury	11%
f) Employment/labour	14%	m) Competition law	1%
g) Other (specify)		n) Other (specify)	14%

3) Please indicate as a percentage who were the other parties in your cases.

a) Federal Government	3%
b) Provincial Government	3%
c) Municipal or Local Government	2%
d) Public or Regulatory Agency	2%
e) Other Company	46%
f) A Union	3%
g) An Individual	41%

4) What percentage of your cases were (or would have been) heard at what level of court? *N.B. Include each case in only one category. For example, an action that was tried in a Provincial Superior Trial Court but was later argued on appeal should be included as part of the Provincial Appeal Court percentage.*

a) Supreme Court of Canada	3%
b) Federal Court of Appeal	0%
c) Federal Court of Canada-Trial Division	1%
d) Tax Court of Canada	2%
e) Provincial Appeal Court	6%
f) Provincial Superior Trial Court	63%
g) Provincial Court	12%
h) Administrative Tribunal (Federal)	3%
i) Administrative Tribunal (Provincial)	6%
j) Other	5%

5) Identify the historical disposition of your civil cases over the last five years. *N.B. Alternate dispute resolution is here defined as one or more of the following: arbitration; mediation; mini trial; conciliation; other third party involvement; settlement conference with judicial officer; and other ADR.*

a) Percentage resolved by pre-trial conferences	12%
b) Percentage resolved by trial	15%
c) Percentage resolved by ADR (other than arbitration)	3%
d) Percentage settled without going to court or using ADR	54%
e) Percentage resolved by combination of trial and ADR	0%
f) Percentage resolved by arbitration	4%
g) Percentage resolved by withdrawal or abandonment	11%

6) Indicate your satisfaction with the number of cases settled at each of the following stages. Mark one box for each category, if applicable.

	1	2	3	4	5	6
	Very Satisfied	Satisfied	Neutral	Dissatisfied	Very Dissatisfied	Average
a) Cases resolved by pre-trial conferences						2.84
b) Cases resolved by trial						2.82
c) Cases resolved by ADR (other than arbitration)						2.6
d) Cases settled without going to court or using ADR						2.14
e) Cases resolved by trial and ADR						2.8
f) Cases resolved by arbitration						2.81
g) Cases resolved by withdrawal or abandonment						2.57

7) For cases settled at an unsatisfactory level, please indicate the major reasons for their disposition at that level. *Circle one number for each category.*

	Highly Significant(1)	Significant(2)	Insignificant(3)
	AVERAGE		
a) The potential judgment or award costs were too high for you or the other party not to pursue			
	2.8		
b) The potential judgment or award costs were too low for you or the other party to pursue			
	2.1		
c) Court management scheduling and supervision			
	2.0		
d) Court rules of procedure			
	2.32		
e) The length of time to reach a satisfactory conclusion was too long			
	1.5		
f) The transactional costs, e.g. the legal fees and expenses of reaching a satisfactory conclusion, were too high to justify proceeding			
	1.46		
g) Opportunity costs--the resources to pursue the action could be put to other uses of more value to the company			
	1.85		
h) Complexity of legal and statutory issues involved in the cases, i.e. complexity of relevant laws did not easily permit predictability of outcome			
	2.23		
i) Actions or failure to act by your lawyers			
	2.67		
j) Actions or failure to act by other parties and their lawyers			
	2.1		
k) Actions or failure to act by your organization			
	2.67		
l) Factual complexity/ difficulties			
	2.5		
m) Evidentiary complexity/ difficulties			
	2.2		
n) The action led to hurting your relationship with the other party			
	2.57		

If you have further comments regarding other possible causes of an unsatisfactory case disposition, please use the space below to indicate them. (Attach a separate sheet if necessary)

o).....

THANK YOU FOR COMPLETING PART ONE OF OUR SURVEY

PART TWO: SPECIFIC CASE QUESTIONS

8) From the following list, select ONE case from the last five years that represents as closely as possible the typical litigation you conduct for your corporation. *Mark the box that applies.*

a) Product liability	12%	h) Tax	5%
b) Contract	40%	i) Intellectual property (patent, copyright, trademark)	0%
c) Consumer protection	0%	j) Stockholders	0%
d) Environmental	0%	k) Human rights	2%
e) Trade law	0%	l) Personal injury	10%
f) Employment/labour	19%	m) Competition law	0%
g) Other (specify)	2%	n) Other (specify)	10%

Please answer the rest of the survey on the basis of this basis of

9) In what court was this case heard? *Mark one box. N.B. Indicate Supreme Court of Canada or Appeal Court only if an appeal to such Court was actually heard or set down for hearing.*

a) Supreme Court of Canada	0%
b) Federal Court of Appeal	0%
c) Federal Court of Canada-Trial Division	0%
d) Tax Court of Canada	3%
e) Provincial Appeal Court	11%
f) Provincial Superior Trial Court	78%
g) Provincial Court	8%
h) Administrative Tribunal (Federal)	0%
i) Administrative Tribunal (Provincial)	0%
j) Other (specify)	0%

10) Please indicate the other party(ies) to the dispute. *Mark one box.*

a) Federal Government	3%
b) Provincial Government	0%
c) Municipal or Local Government	0%
d) Public or Regulatory Agency	0%
e) Other Company	43%
f) Union	0%
g) Individual	54%

11) What was your status in this action? *Mark one box.*

a) You originated the action	29%
b) You were a defendant/respondent	71%
c) You joined/were joined as a third party	0%
d) You had intervenor status	0%

12) Please indicate the approximate dates for the following events..

a) Date the dispute started	YR	MO 1
b) Date you began work on this case	YR	MO 10
c) Date of trial (if applicable)	YR	MO 47
d) Date the trial or other disposition ended	YR	MO 39
e) Date the appeal commenced (if any)	YR	MO --
f) Date the appeal concluded	YR	MO --

13) Please indicate the way in which this case was resolved. *Mark one box.*

a) By pre-trial conference	8%
b) By trial	49%
c) By ADR (other than by arbitration)	3%
d) Without court or ADR	31%
e) By combination of trial and ADR	0%
f) By arbitration	5%
g) By abandonment or withdrawal	5%

LAWYER WORKLOAD AND BILLING

17) Please estimate your own hours and costs and/or the hours and costs incurred by other corporate counsel in your organization.

a) Your Hours 223	c) Your Costs \$22,814
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b) Other in-house Counsel Hours 52	d) Other in-house Counsel Costs \$7,313
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18) Please estimate the fees and disbursements paid to outside counsel, if any, hired by your corporation, excluding G.S.T.

a) Fees \$101,860	b) Disbursements \$9,258
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19) Please estimate the fees and disbursements paid to outside experts, if any, hired by your corporation, excluding G.S.T.

a) Fees \$8,978	b) Disbursements \$569
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20) Please estimate the disbursements for transcripts and court fees, if any, paid for by your corporation, excluding G.S.T.

a) Disbursements \$3,770

21) Please estimate the hours and costs to the management and staff of your corporation.

a) Total Hours 225	b) Costs \$17,714
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22) Please estimate the total hours and costs to your corporation of all of the above.

a) Total Hours 387	b) Total Costs (fees and disbursements) \$106,170
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23) If possible, give more detailed information about the total hours and costs spent and incurred by you and in-house counsel, and by outside counsel, for this case.

	In-house counsel		Outside Counsel	
	1) hours	2) cost	3) hours	4) cost
a) Preparation and consultation				
b) Preparation and consultation with experts				
c) ADR such as arbitration or mediation after filing (include preparation time)				
d) Motions				
e) Pre-trial conferences				
f) Oral discovery (preparation for, conduct of and follow-up)				
g) Documentary discovery/production				
h) Trial preparation (including witness preparation)				
i) Time spent by counsel at or involved with case management meetings, rules and directives				
j) Trial				
k) Post trial analysis and consideration of appeal				
l) Initiation of appeal, if any				
m) Preparation for appeal				
n) Argument of appeal				
o) Other (specify).....				

COMPLEXITY OF THE CASE

24) How would you describe the overall degree of complexity in this case? *Mark one box.*

a) Very Complex	23%
b) Complex	45%
c) Not very complex	32%

25) Please rank the significance of the following factors in contributing to the complexity of of the case. *Please circle a number for each factor.*

	Highly Significant (1)	Significant (2)	Insignificant (3)
	AVERAGE		
a) Factual complexity			1.9
b) Number of parties			2.7
c) Number of witnesses			2.4
d) Number and complexity of legal issues, including evidentiary issues ³			2.0
e) Procedural complexity			2.6
f) Number of expert witnesses/consultants			2.5
g) Complexity of technical evidence			2.2
h) Other (specify)			3.0

LENGTH OF LITIGATION IN THIS CASE

26) How would you describe the amount of time it took from the start of the case to its resolution? *Mark one box.*

a) Too long	33%
b) Long	24%
c) Reasonable	20%
d) Short	2%
e) Too short	0%

IF YOU ANSWERED A OR B, PLEASE GO TO QUESTION 27. IF YOU ANSWERED C, D, OR E, PLEASE GO TO QUESTION 28.

27) If the time taken was "far too long" or "too long," what caused the delay?
 Circle one number for each of the following.

	Highly Significant(1) Significant (2) Insignificant (3)
	AVERAGE
a) Too many civil cases; backlog of civil cases in the court	1.7
b) Nature or complexity of the issues in the case (factual and legal)	2.2
c) Actions or failure to act by your lawyers	2.8
d) Actions or failure to act by other parties and their lawyers	1.6
e) Actions or failure to act by your organization	2.7
f) Court management-scheduling/supervision	2.2
g) Court rules of procedure	2.6
h) Length and complexity of oral discoveries	2.2
i) Number and length of pre-trial motions	2.4
j) Expert witnesses/ consultants	2.4
k) Volume and complexity of documents (production, discovery, trial)	2.3
l) Time spent at or concerning case management meetings, rules and directives	2.6
m) Too many criminal cases; demands of the court's criminal caseload	2.5

COURT SCHEDULING

28) Were you satisfied with the time to availability of trial court dates? *Mark one box.*

a) Very satisfied	6%
b) Somewhat satisfied	21%
c) Neutral	36%
d) Somewhat dissatisfied	24%
e) Very dissatisfied	12%

29) In terms of the time to availability of trial court dates, how would you rank the significance of the following factors. *Please circle a number for each category.*

Highly Significant (1) Significant (2) Insignificant (3)

AVERAGE

a) Scheduling did not take into account the needs of the parties for either a quicker or slower resolution	2.1
b) Scheduling favored certain kinds of cases over others	2.4
c) Scheduling appeared to favor certain parties on the basis of size of dispute, reputation of clients and counsel, or media profile	2.6
d) Scheduling led to excessive intervals between appearances	2.4
e) Scheduling led to excessive length of the proceedings	2.2

30) Were you satisfied with the time to availability of appeal court dates? *Mark one box.*

a) Very satisfied	29%
b) Somewhat satisfied	0%
c) Neutral	43%
d) Somewhat dissatisfied	14%
e) Very dissatisfied	14%

31) In terms of the time to availability of appeal court dates, how would you rank the significance of the following factors. *Please circle a number for each category.*

Highly Significant (1) Significant (2) Insignificant (3)

AVERAGE

a) Scheduling did not take into account the needs of the parties for either a quicker or slower resolution	1.8
b) Scheduling favored certain kinds of cases over others	2.4
c) Scheduling appeared to favor certain parties on the basis of size of dispute, reputation of clients and counsel, or media profile	2.7
d) Scheduling led to excessive intervals between appearances	2.4
e) Scheduling led to excessive length of the proceedings	2.6

32) Were you satisfied with the time to availability of interlocutory matters? Mark one box.

a) Very satisfied	4%
b) Somewhat satisfied	26%
c) Neutral	51%
d) Somewhat dissatisfied	19%
e) Very dissatisfied	0%

33) In terms of the time to availability of interlocutory matters, how would you rank the significance of the following factors. Please circle a number for each category.

	Highly Significant (1)	Significant (2)	Insignificant (3)
AVERAGE			
a) Scheduling did not take into account the needs of the parties for either a quicker or slower resolution			2.3
b) Scheduling favored certain kinds of cases over others			2.6
c) Scheduling appeared to favor certain parties on the basis of size of dispute, reputation of clients and counsel, or media profile			2.7
d) Scheduling led to excessive intervals between appearances			2.5
e) Scheduling led to excessive length of the proceedings			2.6

ROLE OF OUTSIDE COUNSEL

34) In your experience with this case, how would you rate the outside counsel used by your firm? *If applicable, mark as many choices as apply.*

a) Efficient	20%	b) Inefficient	4%
c) Competent	27%	d) Incompetent	0%
e) Effective	24%	f) Ineffective	3%
g) Overpaid	13%	h) Paid reasonably	12%
i) Underpaid	0%		

COSTS OF LITIGATING THIS CASE

35) How would you describe the level of costs in this case. *Mark one box.*

a) Far too high	23%
b) Too high	18%
c) High	25%
d) About right	33%
e) Low	3%

36) If possible, please estimate as a percentage how much more this case cost your corporation than it should have. *Mark one box.*

a) 0%		g) 60%	
b) 10%		h) 70%	
c) 20%		i) 80%	
d) 30%		j) 90%	
e) 40%	40.2%	k) 100%	
f) 50%		l) Other %	

37) Which of the following do you think were significant causes of the costs incurred by your party? Please circle the significance of each of the following factors.

	Highly Significant (1)	Significant (2)	Insignificant(3)
AVERAGE			
a) Amount at stake in case too high to not pursue action			
			1.75
b) Nature or complexity of the factual and legal issues in the case			
			2.0
c) Legal fees			
			2.0
d) Expenses other than lawyer's fees			
			2.45
e) Opportunity costs: case would involve a redirection of company resources that could be put to more valuable uses			
			2.2
f) Actions or failure to act by your lawyers			
			2.9
g) Actions or failure to act by other parties and their lawyers			
			2.0
h) Actions or failure to act by your organization			
			2.8
i) Court management-scheduling/supervision			
			2.3
j) Delays caused by court backlog			
			2.3
k) Court rules of procedure			
			2.6
l) Length and complexity of oral discoveries			
			2.3
m) Number and length of pre-trial motions			
			2.6
n) Expert witnesses/consultants			
			2.4
o) Volume and complexity of documents (production, discovery, trial)			
			2.3
p) Time spent at or concerning case management meetings, rules and directives			
			2.8

CASE MANAGEMENT

Some civil cases are intensively managed by the judge through various means, e.g. detailed scheduling orders, frequent monitoring of discovery, and the requiring of substantial efforts to settle the case. Other cases are not managed as intensively by the judge. The pace and course of litigation is left to the lawyers, with court intervention only when requested.

38) How would you characterize the level of management by the judge in this case? Please mark one box.

a) Intensive	0%
b) High	3%
c) Low	26%
d) Minimal	44%
e) None	24%
f) Not sure	3%

39) Would a greater degree of case management by the judge have made a difference to the following factors? Please circle one number for each category.

Reduced a lot (1) Reduced a little (2) No impact (3) Increased (4)

AVERAGE

a) Costs (legal fees and expenses) to corporation	2.06
b) Time to disposition	1.76

ALTERNATIVE DISPUTE RESOLUTION

N. B. ADR is defined in this section as one or more of the following: arbitration; mediation; conciliation; mini trial; other third party involvement; settlement conference with judicial officer; other ADR.

40) If the case proceeded to trial or litigation, did your outside counsel explain to you any ADR options? Mark one box.

a) YES

30%

b) NO

70%

IF YOU ANSWERED "NO", ANSWER QUESTION 41, THEN GO TO QUESTION 45.

IF YOU ANSWERED "YES," ANSWER QUESTIONS 42, 43, 44 THEN QUESTION 45.

41) If "NO," could such an explanation have made a difference in your decision to proceed to trial or litigation?

a) YES

26%

b) NO

74%

42) If "YES," ADR options were explained to you, how would you characterize the explanation?

a) Adequate	100%
b) Inadequate	0%

43) IF "YES," How would you characterize the timing of the explanation?

a) Before litigation commenced	27%
b) As an alternative to litigation once commenced	55%
c) As an adjunct to litigation	18%

44) If "YES," could a more adequate and timely explanation have made a difference in your decision to proceed to trial or litigation?

a) YES

0%

b) NO

100%

45) Did you use any ADR mechanisms in this case?

a) YES

13%

b) NO

87%

IF NO ADR WAS USED, PLEASE GO TO QUESTION 49. IF ADR WAS USED ANSWER QUESTIONS 46, 47, AND 48, THEN PROCEED TO THE INFORMATION ON YOUR ORGANIZATION SECTION.

46) If "YES," was your decision to use ADR motivated by either the cost or the delay involved in proceeding with further litigation? *Mark two boxes.*

a) Yes, Cost was a factor	38%	c) No, Cost was not a factor	13%
b) Yes, Delay was a factor	38%	d) No, Delay was not a factor	13%

47) Please indicate what impact ADR had on the outcome of the case. *Circle a number for each form of ADR employed*

	Helped a lot (1)	Helped a little (2)	No impact (3)	Impeded (4)
AVERAGE				
a) Arbitration				3.0
b) Mini Trial				3.0
c) Mediation				2.5
d) Conciliation				3.0
e) Other Third Party Involvement				2.0
f) Settlement Conference with Judicial Officer				3.0

48) What impact did the use of ADR have on the following? *Please circle one number for each category.*

	Reduced a lot (1)	Reduced a little (2)	No impact (3)	Increased (4)
AVERAGE				
a) Costs (legal fees and expenses) to corporation				2.5
b) Time to disposition				1.5

49) What reasons best describe your choice NOT to use ADR? *Please circle the significance of each factor.*

	Highly Significant (1) Significant (2) Insignificant (3)
	AVERAGE
a) ADR would cost the same as proceeding formally with little likelihood of a different result	2.1
b) ADR would take as long as proceeding formally with little likelihood of a different result	2.1
c) Other party was in a different jurisdiction, making ADR difficult	2.9
d) Did not trust other party sufficiently	2.3
e) Wanted to compel witnesses to testify	2.4
f) Previous experience with ADR not encouraging	2.8
g) ADR would give other party an advantage	2.7
h) Nature or complexity of issues not amenable to ADR resolution	2.1

50) If ADR was not used, do you think ADR should have been used?

a) NO	66%
b) YES	33%

IF YOU ANSWERED "NO" TO QUESTION 50, PROCEED TO THE INFORMATION ON YOUR ORGANIZATION SECTION. IF YOU ANSWERED "YES", PLEASE PROCEED TO QUESTION 51.

51) If you think ADR should have been used, what kind would you have preferred to employ?

Results for this question left blank due to an insufficient number of responses.

a) Arbitration	
b) Mediation	
c) Conciliation	
d) Mini Trial	
e) Settlement Conference with Judicial Officer	
f) Other Third Party Involvement	
g) Other ADR	

52) If you would have used ADR, what impact do you think it might have had on the following factors? *Please circle one number for each category.*

Reduced a lot (1) Reduced a little (2) No impact (3) Increased (4)

	AVERAGE
a) Costs (legal fees and expenses) to corporation	1.6
b) Time to disposition	1.3

INFORMATION ON YOUR ORGANIZATION

53) In what province or territory is your corporation's headquarters located?

a) B.C.	7%	g) NEW BRUNSWICK	2%
b) ALBERTA	14%	h) NOVA SCOTIA	0%
c) SASKATCHEWAN	0%	i) P.E.I.	0%
d) MANITOBA	2%	j) NEWFOUNDLAND	2%
e) ONTARIO	64%	k) YUKON	0%
f) QUEBEC	7%	l) N.W.T.	0%

54) Please indicate the industrial classification of your corporation. *Mark one box.*

a) Manufacturing	12%	j) Transportation	0%
b) Financial-Other than Banking Institutions	2%	k) Forestry	0%
c) Financial-Banking Institutions	2%	l) Health	0%
d) Insurance	12%	m) Mining	5%
e) Service	2%	n) Oil and Gas Development	14%
f) Federal Government	0%	o) Utility	5%
g) Provincial Government	0%	p) Agriculture	0%
h) Municipal or Local Government	5%	q) Engineering	5%
i) Accounting and Managerial Services	0%	r) Other (specify)	36%

55) Please estimate your corporations sales' volume.

\$ 1.36 billion

56) Please estimate the total number of employees in your corporation.

3,862

57) Please indicate the number of lawyers in your corporation.

6

58) Please indicate the number of outside counsel retained by your corporation.

32, includes firms as well as lawyers

59) Do you have any specific recommendations on how to reduce cost and delay in the civil justice system in your province or nation-wide? (Please attach a separate sheet if necessary.)

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THANK YOU FOR YOUR PARTICIPATION IN THIS SURVEY. FOR A COPY OF THE SURVEY RESULTS, PLEASE CONTACT OWEN LIPPERT AT THE FRASER INSTITUTE, 626 BUTE STREET VANCOUVER B.C., V6E 3M1, (604) 688-0221. FAX: (604) 688-8539; E-MAIL: 72271.3700@compuserve.com