



### **CRISIS IN THE COURTS: IS ADR THE ANSWER?<sup>1</sup>**

“Our system of court is archaic and our procedure behind the times. Uncertainty, delay and expense...and the backwardness of our procedure, have created a deep-seated desire to keep out of court...”

“As in most other common law jurisdictions, civil litigation...is being suffocated by its expense. The majority of members of the public cannot afford to fund litigation themselves.... The problem of cost is the most serious problem besetting our litigation.

“Do we have adequate access to justice? It seems to me that the answer is no. We have wonderful justice for corporations and for the wealthy. But, the middle-class and the poor may not be able to access our justice system.”

The need for justice reform and the public dissatisfaction with the administration of justice has been a topic of discussion for over one hundred years. These quotes were made by leaders in the legal community, from three different countries, addressing problems in their legal system. One address was delivered over one hundred years ago in 1906; another is more recent from 2011. It is interesting to note that each leader expressed similar concerns and further, that the year or country in which these comments were made cannot be distinguished.

In the past twenty years, there have been numerous task forces, working groups and other programs commissioned in Canada and BC to examine justice reform. The increasing cost of litigation is a recurring theme in the reports. In October 2013, the Action Committee on Access to Justice in Civil and Family Matters released its report, “Access to Civil & Family Justice: A Roadmap for Change”<sup>2</sup> (Action Committee Report). The Action Committee Report is intended to address ongoing issues in access to justice in both civil and family matters across Canada. The report states, “There is a serious access to justice problem in Canada. The civil and family

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<sup>1</sup> This is a summary of a paper, Crisis in the Courts:Is ADR the Answer?, prepared by Carol W. Hickman, Q.C., of Quay Law Centre and West Coast ADR Law Group, as part of her LL.M. (ADR) thesis in 2014.

<sup>2</sup> Action Committee to Justice in Civil and Family Matters, “Access to Civil & Family Justice: A Roadmap for Change” (October 2013). (electronic copy available at [http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)).



justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportionate to the problems...”<sup>3</sup>

The Action Committee Report concludes that “access to justice is at a critical stage in Canada and change is urgently needed.”<sup>4</sup> To date, the author is not aware of any significant changes which have been made or are underway.

On December 17, 2013 the CBA’s Access to Justice Committee released the “Reaching Equal Justice Report: an invitation to envision and act”<sup>5</sup> (CBA Equal Justice Report). The CBA Equal Justice Report identifies that “public confidence in the justice system is declining.”<sup>6</sup>

The CBA Equal Justice Report also makes reference to the fact that “tinkering is insufficient”

The civil justice system is too badly broken for a quick fix. People fall between the cracks at an unacceptable cost. Injustice is too deeply woven into the system’s very structure for piecemeal reforms to make a dent. It is unclear whether the myriad of ad hoc access to justice interventions currently proliferating outside the overarching strategic framework are actually helping. Individual interventions may work at cross-proposes and risk hindering progress by fostering complacency and diminishing support for more substantive reform. An excess willingness to compromise makes achieving the equal justice vision impossible.<sup>7</sup>

The goal of the CBA Equal Justice Report is to “invite and inspire action”<sup>8</sup> to make significant changes to the Canadian Justice System. It recommends various “action steps” that should be undertaken to reach this goal. The ultimate question is, will someone or some group follow these recommendations and “just (ice) do it.”<sup>9</sup>

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<sup>3</sup> Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil and Family Justice: A Roadmap for Change” (October 2013).

<sup>4</sup> Ibid.

<sup>5</sup> Canadian Bar Association Access to Justice Committee, “Reaching Equal Justice Report: an invitation to envision and act,” (December 2013). (electronic copy available at <http://www.cba.org/cba/equaljustice/pdf/EqualJusticeReport.pdf>).

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.



The hope is that from these reports a national action plan will evolve to address the ongoing crisis in our court system. It may be cliché to say that “actions speak louder than words”; however, it is time for action. Much has been written about the problem but not enough has been or is being done. To date only minor adjustments, or tinkering (the words of the JRTF), have been made to the justice system. The adjustments have not resulted in any significant or measurable improvements and the problems continue to exist – our justice system is too slow, too expensive and too complex for most members of the public. In family matters, the problems cause significant delays for families, and more important, for children. It is no longer time for “tinkering”; something substantial must be done to our justice system or the “crisis” will continue. This paper will compare the average cost of a family trial to the average cost of other ADR options.

### **Costs of Family Trial**

In 2011, the Canadian Forum on Civil Justice (CFCJ) launched a 5 year project whose purpose is to “define the economic and social costs of justice.”<sup>10</sup> The CFCJ website states, “there is mounting evidence that the public cannot afford to resolve their legal problems through formal litigation processes because the cost of legal advice and representation required is beyond the means of low and middle income Canadians.”<sup>11</sup>

A recent study conducted by the writer confirms the average cost of a family trial in BC is:

LENGTH OF TRIAL	AVERAGE COST
One day trial	\$7,750.00
Three day trial	\$23,045.00
Five day trial	\$39,772.00
Ten day trial	\$84,545.00

<sup>12</sup>

<sup>10</sup> Canadian Forum on Civil Justice website, supra note 10.

<sup>11</sup> Ibid.

<sup>12</sup> The author sent out a survey to over 50 family litigation lawyers; unfortunately, only 15 lawyers responded. These results are based on the responses received and relate only to the cost of preparation and attendance at trial. They do not include the costs of commencing the action, examinations for discovery, document disclosure or any interlocutory applications prior to the trial. (Survey results on file with the author.)



The cost estimates relate only to the cost of preparation for and attendance at the trial itself. They do not include the costs of commencing an action, attending the JCC, examinations for discovery, document disclosure or any interlocutory applications prior to trial. Nor do they include the cost of disbursements (including expert witnesses) or taxes, which in and of themselves can be significant. The estimate of court fees does not include other related costs, including time off work or costs to other systems (like health and policing).

Anecdotal evidence suggests that between 95% and 98% of all disputes before the court settle prior to trial. The Cost of Litigation Survey conducted by the author confirms the accuracy of this evidence in the context of family disputes. The lawyers who responded to the survey estimated that on average, 96% of their matters settle and only 4% go to trial.<sup>13</sup> In the author’s experience, settlement often occurs on the eve of trial and even literally on the “courthouse steps.”<sup>14</sup> When that takes place, the parties have spent an enormous amount of money preparing for a trial that does not happen. That is money “thrown away” and that otherwise could have been used to support the family and children.

**A. Average Cost of One Day Family Mediation**

<b>AVERAGE COST OF A ONE DAY FAMILY MEDIATION (Mediator’s fees only)</b>	<b>\$3,676.50</b>
<b>TOTAL AVERAGE COST OF A ONE DAY FAMILY MEDIATION (WITHOUT COUNSEL) Cost per party (assuming the mediator’s costs are divided equally)</b>	<b>\$1,838.25</b>
<b>AVERAGE COST FOR COUNSEL TO PREPARE FOR AND ATTEND A ONE DAY MEDIATION (Cost per party for each counsel)</b>	<b>\$5,562.50</b>
<b>TOTAL AVERAGE COST OF A ONE DAY MEDIATION (WITH COUNSEL) Cost per party (assuming the mediator’s costs are divided equally)</b>	<b>\$7,400.75</b>

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<sup>13</sup> Survey sent to over 50 family litigation lawyers, supra note 47.

<sup>14</sup> The author has conducted hundreds of family court matters over the past 25 years.

<sup>15</sup> The author sent out a survey to over 30 family mediators (lawyers and non-lawyers) and received 20 responses. These results are based on the responses received. (Survey results on file with the author.)



The mediator's fees varied depending on the mediator's level of experience, practice location and other factors. The hourly rates of the mediators ranged from \$200.00 to \$500.00 per hour and the average cost per day varied from a low of \$1,600.00 to a high of \$5,000.00. It is important to note that the mediators who recorded the daily rate at the higher end of the spectrum included the pre-hearing screening interviews, as well as a draft separation agreement or minutes of understanding. The results of the survey disclose that the total average cost of a one day mediation, per party, is very similar to the costs of a one day court hearing. In most circumstances, more can be accomplished in a one day mediation than a one day hearing. It is hoped that numbers such as those may be used to encourage parties to attend mediation early in the proceedings as a way to try to resolve some, or all, of their dispute.

## **B. Average Cost of Med-Arb Process**

To date, the number of med-arb files conducted in BC is negligible. Accordingly, the information relating to med-arb was collected by the author primarily from practitioners in Ontario, including Toronto and the surrounding area (Med-Arb Survey). The participants in the Med-Arb Study were asked to provide the average cost of reaching a resolution of a family dispute using the med-arb process. Again, in considering the numbers, it is important to note that in most circumstances, the total costs of the med-arb process are shared equally between the parties.

The average cost of the entire med/arb process to reach a resolution:

- Less than \$5,000.00 – 10%;
- Between \$5,000.00 and \$10,000.00 – 24%;
- Between \$10,000.00 and \$20,000.00 – 45%;
- More than \$20,000.00 – 21%.

Sixty-nine percent of respondents estimated that the average cost of resolving a family dispute, using med-arb, ranged between \$5,000.00 and \$20,000.00. Assuming the cost is divided equally, the average cost to the parties for the med-arbitrator is between \$2,500.00 and \$10,000.00, if they attend without counsel. If the parties attend with counsel and the average cost for counsel to attend a one day mediation (from above - \$5,500.00) is added to this



expense; the average cost for reaching a resolution of a dispute using the med-arb process is between \$8,000.00 and \$15,500.00 per party, which is significantly less than the costs of trial referenced above.

### **C. Costs of Collaborative Family Law**

The author also conducted a survey of several experienced collaborative family law lawyers in the Lower Mainland.<sup>16</sup> Each lawyer provided an estimate of the total costs of resolving a family law dispute using the Collaborative Process. Most respondents provided their responses based on an average of five to ten files. One lawyer provided her response, based on her experience with her last 25 files, with a range between \$6,100.00 and \$61,000.00.<sup>17</sup> The lawyer explained that the files at the upper end of the range “involved either extremely high conflict families or families who had complicated asset structures”<sup>18</sup> worth several million. Even considering those extreme situations, that respondent confirmed that the average cost per collaborative file was approximately \$15,000.00, well within the range of other respondents.<sup>19</sup> Another respondent, at the higher end of the range was \$14,500 based on 10 files. However, it is important to note that this included the cost of a separation agreement and divorce.<sup>20</sup>

Based on the responses from all respondents, the author found the range of fees in collaborative files was from \$3,500.00 to \$61,000.00 (including the extremely complex matter referred to above).<sup>21</sup> The average cost to resolve a family dispute using the collaborative process is \$11,466.00.<sup>22</sup> This amount is per party.

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<sup>16</sup> The author sent out a survey to over 35 collaborative family lawyers and, unfortunately, only received responses from only 12 lawyers. However, each lawyer’s response was based on a minimum of 5 files and one lawyer provided her response based on 25 collaborative files. In total, the numbers are based on a total of 91 files. The results are based on the responses received. (Survey results on file with the author.)

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.



## Summary

### Average Cost of ADR Process (Cost per party)

<b>AVERAGE COST OF A ONE DAY FAMILY MEDIATION (WITHOUT COUNSEL)</b>	<b>\$1,838.25</b>
<b>AVERAGE COST OF A ONE DAY FAMILY MEDIATION (WITH COUNSEL)</b>	<b>\$7,400.75</b>
<b>AVERAGE COST OF THE MED—ARB PROCESS (WITHOUT COUNSEL)</b>	<b>\$6,250.00</b>
<b>AVERAGE COST OF THE MED-ARB PROCESS (WITH COUNSEL)</b>	<b>\$11,750.00</b>
<b>AVERAGE COST OF THE COLLABORATIVE PROCESS (WITH COUNSEL)</b>	<b>\$11,466.00</b>

## Conclusion

There will always be some family disputes that must be litigated and require the court system.

Those situations include:

- Situations involving significant legal principles that cannot be negotiated;
- Intractable disputes that require a trier of fact to make a determination;
- Disputes involving difficult or unreasonable parties who are unwilling or refuse to compromise and who require a Judge to make a decision;
- Disputes involving individuals with mental health problems who are incapable of making compromises;
- Situations where one party fails to disclose documents, will not follow court procedures and requires the courts powers of enforcement and contempt;
- Families with a history of extreme family violence and power imbalance that cannot be managed in another ADR process.

These matters represent less than 5% of family disputes. For the other 95% of the population, who simply want a resolution of their family dispute, there must be “cheaper, faster and simpler” alternatives. That may include participation in an ADR process, outside the court system. That requires educating the public about ADR and requires government funding so ADR options can be made available to people who cannot afford them.