

The Law Society
of British Columbia



Special Fund Fees, Trust Administration Fees and Low Income Clients

A Consultation Paper

February 20, 2007

Introduction

The purpose of this consultation paper is to provide the legal profession and others with the opportunity to assist the Benchers in considering whether the Special Fund and Trust Administration fees affect the ability of the legal profession in British Columbia to provide service to low-income clients.

Background

In July of 2006, Dugald Christie submitted a member resolution, seconded by Bruce Fraser, QC, for consideration at the Annual General Meeting of the Law Society. The resolution stated:

WHEREAS the Law Society's Special Compensation Fund Fee of \$600 on every practising lawyer and the \$10 Trust Administration Fee for every trust account opened by a lawyer cause undue hardship for lawyers who have little or no trust account activity which lawyers tend to be the ones that deal most with low income clients;

BE IT RESOLVED THAT all lawyers who deposit less than \$100,000 per annum to their trust accounts be exempt from the Law Society's Special Compensation Fund Fee;

BE IT RESOLVED THAT lawyers who deposit more than \$100,000 per annum to their trust accounts will be subject to a trust administration assessment of 0.05% of the amount by which such net annual deposits to the trust account exceeds \$100,000. Such assessment will be payable at the lawyer's year end.

BE IT FURTHER RESOLVED THAT the above percentage for the assessment may be varied by the Executive if funds coming in from the assessment either exceed or are less than estimated.

Prior to the Annual General Meeting, the resolution was withdrawn and the Benchers agreed to examine the issues raised by the resolution. As part of the Law Society's continuing commitment to enhancing access to justice for all, the Benchers agreed to consider the impact of the Special Compensation Fund fee and Trust Administration Fee on the service that lawyers provide to low income clients.

Low Income Citizens

Access to legal services is a crucial aspect of any free and democratic society. Unless citizens are able to understand and assert their rights, the rule of law as an underpinning of our society is compromised. This is particularly true for low income citizens who often have significant legal needs but whose ability to access legal services is impaired because of their financial circumstances. The Law Society recognizes the serious issue of access to justice for low income citizens and has undertaken a number of initiatives to identify and address these issues.

Since the early '90s, the Law Society has consistently maintained that the government has an obligation to adequately fund the Legal Services Society to ensure that low income

citizens have access to adequate legal advice when confronted with serious legal issues. In particular, the Law Society has always advocated for allocation of the full amount of the provincial sales tax on legal services to support legal aid.

The Law Society's Access to Justice Committee has been instrumental in developing responses to changes in legal aid and the legal system that impact on low-income citizens. In 2000, the Committee presented a report on the impact of the cutbacks in government funding for legal aid. The report observed, "*There is a very wide gap between the new financial cut-off levels and the income required to afford to hire a lawyer; eligibility is now restricted almost entirely to people receiving social assistance, or single parents with a very low earned income.*" Since that time, the Access to Justice Committee has continued to focus on ways to ensure that low-income citizens have adequate access to legal advice.

The Law Society has been a leader in advocating for pro bono legal services. In 2002, a joint committee of the Law Society and the Canadian Bar Association (BC Branch) issued *Pro Bono Publico – lawyers serving the public good in British Columbia*, a report that described the extent to which lawyers in British Columbia provide pro bono legal services and which advocated for creation of a society devoted to encouraging and facilitating the delivery of pro bono legal services. Following on the recommendations of this report, the Law Society was a founding partner in Pro Bono Law of BC, a registered charity, which facilitates the provision of high-quality pro bono legal services to individuals and non-profit organizations by supporting potential and existing pro bono legal service providers in British Columbia. The Law Society has also provided financial support to the Western Society to Access Justice that provides legal advice and services through numerous clinics throughout British Columbia.

In early 2005 the Benchers created the Unbundling Legal Services Task Force with a mandate to clarify the concept of "unbundling" and determine which forms and ways of offering unbundled legal services serve the public interest by increasing the public's access to justice. The Task Force has undertaken an extensive consultation on how lawyers in BC might best address the needs of low income citizens by offering necessary legal advice and services as part of a limited retainer.

The Law Society recognizes the importance of looking for further ways to enable better access to legal services for low-income citizens while not compromising the quality of those legal services or the standards of those who deliver them.

The Special Compensation Fund Fee

The Special Compensation Fund was introduced in 1948 as part of the public interest mandate of the Law Society in conjunction with the Law Society's obligation to ensure an honourable legal profession. Since then, all lawyers have contributed annually to the Special Fund as one of the means by which the reputation of the entire legal profession is preserved and enhanced.

In May 2002, the Law Society learned that Martin Wirick had been failing to comply with a large number of undertakings about the use of funds intended to discharge mortgages and other encumbrances. In December 2002, Mr. Wirick admitted at a discipline hearing that he breached an undertaking to pay out encumbrances and that the breach of his undertaking was professional misconduct. Mr. Wirick consented to disbarment. Overall, it is likely that Mr. Wirick assisted his clients to the tune of tens of millions of dollars misappropriated from individuals and financial institutions.

In response to the unprecedented magnitude of Mr. Wirick's misappropriations, the Benchers agreed to remove the limit of \$17.5 million on the Special Compensation Fund Committee's authority to pay claims. In order to pay for the anticipated amount of the claims that were likely to be presented, the Benchers increased the Special Fund fee from \$350 to \$600, starting in 2003. The Benchers recognized at the time that the increase might press some lawyers. However, the Benchers thought that it was important to do the right thing to ensure that the victims of Mr. Wirick were properly compensated and that all practising lawyers should contribute.

For 2007, the Benchers approved a reduction in the Special Fund fee from \$600 to \$500, which is expected to remain at this level until 2010 at which time the Wirick claims should have been paid in full. .

The Trust Administration Fee

The Law Society learned from Mr. Wirick that we needed to be much more effective in the way we review and regulate lawyer trust account activities. As a result, the Benchers initiated a review of our trust compliance activities resulting in an improved trust assurance program, better custodianship management and increased forensic audits where required.

In order to fund this improved program, the Benchers considered several options. One such option was to increase practice fees generally. Yet the Benchers did not want BC lawyers to face the prospect of higher Special Compensation Fund assessments (to pay for the Wirick claims) along with increased fees to prevent new claims. Moreover, simply raising the fees of all lawyers to cover the cost of better trust compliance did not seem equitable. The Benchers believed that, because the risk of misappropriation arises in the course of trust transactions, it was fair to ask lawyers who actually handle trust funds to take greater responsibility for the cost of this program.

After much consideration, the Benchers agreed that a Trust Administration Fee (TAF) made sense because it is directly connected to the operation of trust accounts. In brief, it allows the cost of trust administration to be apportioned in relation to the risk. This relieves lawyers who do few or no trust transactions — such as members of the criminal bar — from most of the burden.

Request for Consultation

The resolution that Mr. Christie presented for consideration at the 2006 Annual General Meeting proposed that the Special Fund Fee and the Trust Administration Fee cause undue hardship for lawyers who have little or no trust account activity and that these lawyers tend to be the ones that deal most with low income clients.

What the Benchers would like to know is whether these fees are causing undue hardship for lawyers and whether these lawyers are representing primarily low income clients. In order to gather information about the extent and scope of the issue that Mr. Christie raised, the Task Force has developed a short questionnaire. We hope that you will take a few minutes to complete the questionnaire online at <http://alt.lawsociety.bc.ca/survey/lowincome.cfm>.

The Benchers also invite submissions from any interested party. Submissions should be made before **April 30, 2007** and sent to:

Law Society Fee and Low Income Client Task Force
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