

## **Protocol between the Law Society and the BC courts respecting concerns that arise in ongoing proceedings (1997)**

### **Background on the protocol**

Under the 1997 protocol concluded between the Law Society and all three levels of court in BC, a special panel is available to assist with problems that might occasionally arise between judges and lawyers in ongoing proceedings before the Provincial Court, Supreme Court of BC or the BC Court of Appeal.

The special panel can provide emergency assistance or advice to a lawyer in the course of a trial or other proceeding when such assistance is requested by a judge who has concerns about that lawyer's conduct or competence. The panel is also available to provide advice and assistance to lawyers who have complaints about judges. Members of the panel will act in accordance with the protocol approved by the Law Society, and their services are entirely optional — no judge or lawyer is obliged to participate.

This panel was recommended by a special Law Society Committee on Relations between the Law Society and the Judiciary, comprised of Leonard Doust, QC, as Chair, Bruce Fraser, QC, Marguerite Jackson, QC, Charles Maclean, QC, Karl Warner, QC and Karen Nordlinger, QC.

Under the protocol, when a judge has concerns that a litigant is receiving inadequate representation, the judge may adjourn the matter so the litigant can retain other counsel, or may alternatively attempt to control the process to ensure the case is decided fairly. As noted in 1997 by the Committee on Relations between the Law Society and the Judiciary, the urgency of an issue before the court may in some instances preclude a judge from adjourning the matter, or it may be difficult for the judge to control the process to ensure fairness.

In the Committee's view, it is not appropriate for the Law Society to take any action on a judge's complaint about a lawyer until the ongoing proceedings have been completed or adjourned, except in the most unusual circumstances. The concern was that there be no miscarriage of justice or appearance of unfairness to the lawyer about whom the complaint is made, or to the lawyer's client.

The Committee recommended that the services of an independent panel of senior and respected barristers should be available to judges in such circumstances to provide advice and assistance to the lawyer, in accordance with the protocol set out below. No judge or lawyer is bound to avail themselves of the services of the special panel — participation is voluntary.

The special panel is also available to give advice and assistance to a lawyer who feels that a judge's conduct has been inappropriate. The panel may advise on whether or not to proceed to a complaint and may canvass the options of making a complaint to the appropriate judicial council, raising as a legal issue in the trial whether the judge's actions manifest a bias against the lawyer's client or asking the Law Society to raise the matter informally with the appropriate Chief Justice or Chief Judge.

## Text of the Protocol

1. The judge who has concerns should seek advice from the Chief Justice or Associate Chief Justice or, in the case of the Provincial Court, with the Chief Judge or an Associate Chief Judge.
  2. No steps under this protocol will be taken if the judge, after receiving advice, concludes that the interests of the litigant can be adequately protected by the judge or that the matter can be adjourned.
  3. If the interests of the litigant cannot be adequately protected by the judge or the matter cannot be adjourned, the Chief Justice or Associate Chief Justice or, in the case of the Provincial Court, the Chief Judge or an Associate Chief Judge may approach the special panel for assistance.
  4. When the special panel receives a request for assistance, it will immediately contact the lawyer affected and attempt to provide assistance.
  5. Other than informing the judge who contacted the special panel of the fact that the lawyer has been contacted (and nothing further), the special panel will provide no information to anyone and, in particular, will not inform the Law Society of its activities with respect to any specific case.
  6. If the lawyer declines the assistance offered, no further steps will be taken by the special panel. The panel will not report to anyone on whether the assistance it offered has been declined or accepted by the lawyer.
  7. A judge will be free to report a lawyer's conduct to the Law Society at any time and have the complaint dealt with in accordance with the Society's normal procedures. However, where a complaint relates to a trial that is still proceeding, the Society will take no action on the complaint unless:
    - (a) the trial or interlocutory matter is completed or adjourned, (b) a mistrial is declared,
    - (c) counsel is no longer acting on the matter, or
    - (d) Law Society representatives are satisfied that the continued practice of the lawyer would be dangerous or harmful to the public or the lawyer's clients.
- Except in extraordinary circumstances, where a judge makes a complaint against a lawyer to the Law Society, the lawyer will receive notice of the complaint from the Law Society.
8. Where a judge hearing a case requests the assistance of the special panel directly, the panel will, nevertheless, respond to that judge's request in the same way as if the request had been made by an administrative judge.
  9. Where a judge approaches the Law Society, outside of the complaints process, to intervene in a matter, the Society should only do so when:
    - (a) Law Society representatives are satisfied that the continued practice of the lawyer would be dangerous or harmful to the public, the lawyer's client in the proceedings or other clients, and

(b) the judge making the approach is unwilling to follow the usual protocol, or the protocol has been followed but has not succeeded in resolving the matter.