

**Special Fund Fees,  
Trust Administration Fees  
and Low Income Clients**

**Final Report  
September, 2007**

## **Introduction**

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Prior to the annual general meeting, the resolution was withdrawn and the Benchers agreed to examine the issues raised by the proposed resolution. The Benchers created this task force with a mandate to consider the premises and the implications of the resolution and make recommendations to the Benchers.

## **Consultation**

Earlier this year, the task force published a consultation paper and invited members to respond and comment via an online survey. The results of that survey have been presented to the Benchers and published to the membership. In reporting on the responses and comments, the task force was reluctant to extrapolate from the survey results to a majority of lawyers in the province due to the relatively low number of responses and the potential for response bias. However, it was clear to the task force that some lawyers are of the view that the fees associated with trust activity should not apply in the limited circumstances defined in the resolutions.

## **Law Society fees**

The Law Society regulates the legal profession and the delivery of legal services in British Columbia in the public interest. The principal source of funding for this activity is the fees the Law Society charges its members. And while all members generally pay the

same amount regardless of their circumstances, there is some recognition of differences in what is required from each member.

For example, at the request of the Women in the Legal Profession Subcommittee in the early nineties, the Law Society allowed lawyers providing legal services to the public for less than 25 hours per week on average to pay a reduced insurance assessment. The expectation was that this would benefit female lawyers looking to balance personal and work demands by reducing the cost of working less than full time. Subsequent experience has shown that a disproportionate number of women take advantage of the part-time insurance discount. However, the single largest group of beneficiaries of the part-time insurance discount is males over age 50. Thus, while the part-time insurance discount may achieve the objective for which it was created, the collateral affects are not inconsequential.

The question the task force has had to consider is whether the circumstances identified in the recital and resolutions are sufficient to justify differential treatment of lawyers in those circumstances.

## **Special Compensation Fund fee**

In May 2004, the Benchers approved a new insurance scheme provided by the Lawyers Insurance Fund for protection of the public from defalcation or misappropriations by members of the Law Society. The task force is mindful that the implementation of this new scheme likely means that the amount of the Special Compensation Fund fee in the near future will be small or nil. Nevertheless, the task force still thought it appropriate to consider the question of the Special Compensation Fund fee as a matter of principle.

As noted in the consultation paper, 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.

The task force concluded that, on the face of the recital and the resolutions, two justifications were advanced by the movers for eliminating the Special Compensation Fund fee for certain lawyers. The first was that lawyers with little or no trust activity depositing less than \$100,000 in total to their trust accounts each year do not or are less likely to misappropriate client funds. Since their clients would not need to avail themselves of the Special Compensation Fund, these lawyers should not have to contribute. The second was that lawyers with little or no trust activity depositing less than \$100,000 in total to their trust accounts each year tend to be the ones dealing with low income clients.

While the merits of the first justification could be tested empirically against the claims paid by the Special Compensation Fund, the task force is of the view that the Special Compensation Fund fee is not based on the risk posed by the individual lawyer. The task force noted that in any given year almost no one in the profession engages in defalcation

or misappropriates client funds. If risk were the determining factor, the Special Compensation Fund fee for most lawyers would be zero. Instead, the Special Compensation Fund fee is levied and paid by all practising lawyers to ensure the honour and reputation of the profession.

It seemed to the task force that the second justification overstates the premise upon which it rests. While lawyers representing low-income clients may have low levels of trust activity, not all lawyers with little or no trust activity represent low-income clients. The task force notes that Crown counsel, lawyers in government service, in-house counsel and other lawyers not engaged in the provision of legal advice to the public do not have trust accounts and yet must pay the Special Compensation Fund fee as part of their annual fees. To accept the resolution on its face might benefit those lawyers providing services to low-income clients but would also eliminate the Special Compensation Fund fee for more than 20 per cent of practising lawyers.

The task force also noted that the proposed resolution was directed at members but that trust accounts are generally maintained by firms. For about a one-third of the profession, this may be a distinction without a difference. However, where the firm consists of more than one lawyer, implementation of the resolution, at least on its face, would raise questions about whether some lawyers would be exempt because they did not deposit more than \$100,000 to the firm trust account.

## **The Trust Administration fee**

In 2004, the Benchers approved the creation of the Trust Administration Fee for the purpose of funding the trust assurance activities of the Law Society. Rather than charge each member of the Law Society a flat sum, the Benchers implemented a transaction fee based on trust transactions. The view of the Benchers was that Trust Administration Fee made sense because it is directly connected to the operation of trust accounts. It allows the cost of trust administration to be apportioned in relation to the activity and thus relieves lawyers who do few or no trust transactions — such as members of the criminal Bar — from funding trust assurance activities.

The proposed resolution would eliminate the Trust Administration Fee and implement an assessment under which lawyers depositing less than \$100,000 a year to their trust accounts would pay nothing and those depositing more would pay a percentage assessment based on the total amount deposited to trust. The proposal retains some elements of the Trust Administration Fee in that it is proportionate to trust activity as measured by the total amount deposited. It also would reduce or eliminate any assessment for lawyers with limited trust activity. However, in the view of the task force, it would trade one method of matching funding to activity for another less satisfactory one.

The current Trust Administration Fee scheme involves a flat charge of \$10 on most trust transactions, regardless of their size. Thus a \$150,000 deposit for a residential conveyance incurs the same fee as a \$300 million deposit for the closing of a business transaction. In one sense, this may seem unfair, as the \$10 charge is proportionately greater to the amount deposited in the first transaction than the second (although it is a

very small proportion in either case). However, in the task force's view, the flat charge is more appropriate if we take into account the purpose of the fee which is to fund trust assurance activities. The degree of trust assurance activity is no greater in the case of the \$300 million deposit than the \$150,000 deposit. Both require compliance with the same trust accounting rules and both involve the same amount of review and auditing. To charge some lawyers less because their practice involves many smaller trust transactions while charging other lawyers more because their practice involves a few large transactions does not seem commensurate with the purpose of the trust assurance scheme.

The task force also notes that the proposed resolution would also generate the same issues arising from lawyers and firms as noted above in relation to the Special Compensation Fund fee proposal.

## **Conclusion and recommendations**

Throughout its consideration of the issues raised by the proposed resolutions, the task force has been mindful that the objective of the resolutions was to assist those lawyers providing services to low-income clients. The movers of the resolutions were not seeking to avoid their fair participation in the funding of the Law Society except to the extent that the benefit could be passed on to their low-income clients. The task force believes the goal of improving legal service to low-income clients is a worthy one and one which the Law Society should support and encourage. In this regard, the task force would encourage the Access to Justice Committee to look at direct ways of assisting low-income clients seeking legal services. However, based on the results of the consultation and the considerations noted above, the task force finds itself unable to agree that the fees in question represent an "undue hardship" keeping in mind the benefits that flow to the public from the Special Compensation Fund and the trust assurance program. While some members of our profession would benefit from implementation of the proposed resolutions, the circumstances identified in the recital and resolutions are not sufficient to justify differential treatment as proposed.

The task force therefore recommends to the Benchers that they:

1. Not implement the change to the Special Compensation Fund fee and the Trust Administration Fee proposed in the resolutions; and
2. Refer to the Access to Justice Committee the issue of what other steps the Law Society might pursue to assist low-income clients and the lawyers serving them.