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LSS Tariff Review — Phase 2 Report

November 2004

I. EXECUTIVE SUMMARY

This report is an interim report on progress during Phase 2 of the Legal Services Society (LSS) Tariff Review, which involved research and consultation between June and October, 2004. As Phase 2 consultation and research activities are ongoing, and will not be completed before the first quarter of 2005, the main findings and recommendations will be deferred to the Final Report due in June 2005.

- 1. Recommendation:** It is recommended that in the short term LSS make a significant improvement to tariff rates in order to address longstanding frustration among tariff lawyers. This will allow LSS more time to assess results-based compensation and build support among lawyers for changes designed to reward good results.
- 2. Quick Fixes:** In Phase 1, tariff lawyers informed LSS about a variety of operational issues that could be addressed without significant cost or further assessment in the Tariff Review. In Phase 2, LSS staff have already implemented changes to address some of these suggestions, and are continuing work on the remaining items.
- 3. Consultation:** In Phase 2, LSS expanded the scope of consultation beyond tariff lawyers to obtain different perspectives on the impact of the tariffs on low income people and the justice system. LSS staff have organized meetings with representatives of the Supreme Court and Provincial Court judiciary, the Canadian Bar Association (CBA), the Law Society, branches of the provincial and federal government involved in the criminal and family justice systems, the Law Foundation of B.C., legal education organizations, and community advocates.
- 4. Research:** Ongoing research in Phase 2 is focusing on tariff compensation and structure and lawyer attrition. LSS is conducting surveys of former tariff lawyers and young lawyers, as well as staff, and collecting comparative data on legal aid compensation in other jurisdictions as well as lawyer compensation in B.C..
- 5. Results-based compensation:** LSS staff are continuing research on compensation methods to promote better results for clients and greater efficiency in the justice system. LSS staff have collected information on performance-related pay outside the legal aid context, and conducted internal discussions to identify a range of options reflecting varying degrees of structural change, cost, and administrative complexity. LSS will retain a compensation consultant to assist in the evaluation of the tariffs and development of recommendations for the Final Report.

II. BACKGROUND

In December 2003, the LSS Board of Directors directed LSS staff to proceed with a comprehensive review of the legal aid tariffs beginning in January 2004, with a Final Report due in June, 2005. The LSS Board set the following objectives for the Tariff Review:

- 1. To establish and maintain tariffs that attract private bar lawyers who will provide quality services to meet the legal needs of LSS clients.*
- 2. To establish and maintain a tariff that promotes efficiency and effectiveness within the legal aid system and the larger justice system.*
- 3. To establish methods and criteria for regular evaluation of the tariff as an integral part of LSS administration to ensure the legal aid system is sustainable and responsive to changing needs.*

In June 2004, LSS staff delivered an interim report to the Board on Phase 1 of the Tariff Review, which consisted of consultation meetings with tariff lawyers conducted between January and May, 2004.

The current report covers Phase 2 of the Tariff Review, which has focused on consultation with justice system participants and research conducted between June and October 2004. The purpose of this report is to update the Board on progress in Phase 2 and outline the work remaining. This report is not intended as an evaluation of the results of the research and consultation process, since those activities will continue into 2005. It is expected that the findings and recommendations of the Tariff Review will be included in the Final Report, which will be delivered to the Board prior to its June, 2005 retreat. This will enable LSS staff to complete the consultation and research activities, analyze the results, and develop recommendations, including a plan for implementation. This will also enable LSS to take into account any recommendations from the family and criminal law working groups established under the Justice Review Task Force.

III. RECOMMENDATION

The tariff bar is very frustrated, and the tariff review itself may have raised expectations that there will be significant improvements in tariff compensation. There is a risk that too small a step, such as a one or two percent reduction in holdbacks, will be seen as inadequate, and perhaps even insulting. The recommended course is to make a significant improvement in tariff rates, and then introduce changes geared to promoting better results after the conclusion of Phase 3. This approach will allow more time for evaluation and design of results-based compensation. At the same time, LSS can notify the tariff bar of its intention to make structural changes in the tariffs to link compensation more directly to the achievement of good results for clients.

IV. PROGRESS UPDATE

The bulk of the work for Phase 2 revolves around two tasks: consultation with justice system participants, and research on compensation and related issues. This section outlines the work completed and identifies the work remaining for the balance of the fiscal year.

A. “Quick Fixes”

Using the lawyer feedback from Phase 1, LSS compiled a list of suggested changes that could be addressed in the short term without further assessment within the Tariff Review. These are largely operational issues that do not represent a significant cost to the Society. LSS staff have reviewed the list and made appropriate changes as part of the semi-annual tariff revision. In many cases, the proposed changes concerned issues that LSS staff were already addressing as part of tariff operations and the Quality Assurance initiative. The fact that some lawyers were unaware of the Society’s ongoing efforts to address their concerns, despite publication in the Legal Aid Fax and other notices, has highlighted the need to improve communication with the tariff bar.

Some examples of LSS efforts to respond to lawyer suggestions include:

1. Expert database

Based on tariff lawyer feedback, LSS is creating a searchable database of expert witnesses who are willing to assist legal aid clients. The database will provide tariff lawyers with a centralized, easy-to-access list of experts, thus reducing the administrative time required to research areas of expertise, locations and rates. In June 2004, LSS sent letters to 76 expert witnesses who have previously worked on legal aid matters to request updated information and obtain their consent to listing in the database. Once the list is compiled, LSS will make the database available to lawyers in the secure e-billing section of the LSS website. The target completion date is December, 2004.

2. List of community resources

Lawyers suggested that LSS circulate a list of community resources that they could use to refer clients to other agencies for non-legal problems. To date, LSS has added a link on the LSS website to the on-line version of the Red Book, a list of community resources in the Lower Mainland. LSS will continue to add more resources to the LSS website as they become available.

3. Continuing legal education (CLE) courses specific to legal aid

Some lawyers requested that LSS organize CLE courses tailored to the specific requirements of legal aid cases. This year, LSS has already convened a conference for Family Duty Counsel, and is currently organizing a conference with the Continuing Legal

Education Society (CLESBC) and the Ministry of Children and Family Development for lawyers who practice in the child protection area.

4. Legal resources

Lawyers suggested that LSS could enhance access to different types of case law and other resources. So far, LSS has arranged for expanded access to the CLESBC electronic case digests, so lawyers can utilize the on-line archives, and developed a sample retainer letter for family lawyers, which will be posted on the LSS website in the near future.

As Phase 2 proceeds, LSS staff will continue to review, and respond to, the operational issues tariff lawyers raised in Phase 1.

B. Consultation

While Phase 1 involved consultation with the tariff bar through focus groups in the various Regional Centres, the focus in Phase 2 has shifted to legal aid stakeholders, other justice system participants, and community organizations familiar with legal aid clients. The goal is to obtain information about justice system trends, the impact of the tariffs on clients, the legal aid system, and the justice system, and to elicit suggestions about the types of changes that may be required. In keeping with lawyer feedback from Phase 1, LSS is not seeking direct input on the appropriate level of lawyer compensation, but is focusing instead on systemic problems and options for improvement. In addition to these community consultations, LSS will conduct further consultations with the private bar in 2005, by attending meetings of local subsections of the Canadian Bar Association (CBA).

LSS staff did preparatory work in the summer, but it proved difficult to schedule meetings during this period and most consultations were scheduled for the fall months.

To date, LSS staff have obtained input from the following:

- Chief Justice of B.C. Supreme Court
- Management Committee of the B.C. Provincial Court (administrative judges)
- Executive of the CBA (B.C. Branch)
- Access to Justice Committee of the Law Society of B.C.
- Family Justice Services Liaison Group
- Provincial Training Conference for Legal Advocates
- Community Legal Assistance Society
- Native Courtworkers and Counselling Association of B.C.

- West Coast Prison Justice Society
- Department of Justice (Federal Prosecution Service)
- Ministry of Children and Family Development

In the remainder of Phase 2, LSS staff plan to meet with the following:

- Legal Educators (including representatives from the Faculties of Law at the University of B.C. and the University of Victoria; the Professional Legal Training Course; and the Continuing Legal Education Society of B.C.)
- Law Foundation Governors
- Criminal Justice Branch – Ministry of Attorney General
- Court Services – Judicial Case Managers
- Canadian Bar Association – Local Subsections

C. Research

The Tariff Review is continuing with its research on a range of issues related to tariff compensation and structure and lawyer attrition. This research involves collecting surveys and statistics on lawyer compensation; court statistics on family and criminal cases; information on compensation and benefits for provincial and federal court judges; and information on the tariff rate, structure, and coverage for legal aid plans in other provinces and Commonwealth jurisdictions.

1. Surveys

LSS has developed several surveys to help evaluate the tariff system and to investigate the underlying causes of lawyer attrition, drawing in part on survey questions used in the Legal Aid Ontario Tariff Review to frame its approach. Also, earlier in 2004, LSS conducted a Lawyer Satisfaction Survey independent of the Tariff Review to develop Board performance measures and help guide tariff operations in future years, and the Tariff Review will build on that research. To date, LSS has proceeded with surveys in three areas:

1.1 Former Tariff Lawyers

LSS is soliciting feedback from lawyers who have reduced the amount of tariff work performed in the past five years. The purpose of this survey is to gather data that indicates why the number of lawyers actively accepting cases has decreased.

LSS has generated a list of lawyers who have significantly reduced the number of referrals accepted since 1999. Of the 375 lawyers on this list, 82 are no longer in private practice, have retired or are deceased. LSS published the on-line survey in October and distributed emails to the target lawyers inviting them to respond. LSS has also conducted in-person and telephone interviews with a random sample of these lawyers to obtain qualitative feedback that will supplement the online survey results. The survey is scheduled to end on October 31st, but may be extended to gather information from a sample large enough to adequately represent the bar.

1.2 New Lawyers

LSS is surveying the opinions of new lawyers (those called to the B.C. Bar within the past five years) who have obtained vendor numbers but accepted few referrals. The purpose of this survey is to identify their reasons for refusing legal aid work, the regional and demographic factors affecting their decisions, the impact on service quality, and the measures that would persuade them to accept cases. LSS recently posted the on-line survey on the internet and sent out emails to about 100 new lawyers with links to the survey. The B.C. Branch of the CBA is also assisting with distribution of the survey.

1.3 LSS Staff

LSS is also conducting a staff survey to solicit internal input on the tariff system from staff members who work with clients and the tariff bar. The survey involves in-person or telephone interviews with local agents and managing lawyers around the province, and covers such topics as lawyer attrition, attracting new lawyers, client needs and profiles, and options for changes.

2. Research on lawyer compensation

LSS staff continue to collect a range of information that will enable the Tariff Review to complete a sound analysis of tariff compensation. The information includes the following:

2.1 Legal aid compensation schemes in other jurisdictions

LSS has collected information on the current legal aid rates and compensation mechanisms in other Canadian jurisdictions to update the data reported in the Legal Aid Ontario tariff review. It is also collecting similar information regarding lawyer compensation in other Commonwealth jurisdictions (England and Wales; Scotland; Australia; New Zealand).

2.2 Tariff reviews in other jurisdictions

LSS has obtained copies of reports from other legal aid authorities that have conducted inquiries into compensation for private bar lawyers providing legal aid services, including a 1997 report by the New Zealand Legal Services Board on lawyer remuneration, a 2002

national survey of family law practitioners conducted by National Legal Aid in Australia, and a Tariff Review by the Saskatchewan Legal Aid Commission in 2004.

2.3 Compensation rates for other government-funded lawyers

LSS has compiled information regarding the rates paid by government, or government agencies, to private lawyers including ad hoc Crown (both federal and provincial), the Ministry of Children and Family Development (for Director's counsel), the Legal Services Branch of the Ministry of Attorney General, and the Insurance Corporation of B.C.. LSS has also obtained information on salary and benefits for Crown counsel employed by the provincial and federal governments.

2.4 Surveys and statistics regarding lawyer compensation

Surveys and statistics on lawyer compensation collected to date include information obtained from *Canadian Lawyer* magazine's annual "Going Rate" survey; the B.C. Branch of the CBA.; the Law Society of British Columbia; and Statistics Canada. LSS is currently investigating other avenues to obtain current data specific to B.C., for example, purchasing income tax data from the Canada Revenue Agency or survey data from other private firms.

2.5 Internal LSS research on tariff lawyer compensation

LSS is currently reviewing its Case Management System and other data to analyze historical rates of tariff compensation for lawyers and other professionals adjusted for inflation; the earnings and demographic profiles of tariff lawyers; and the adequacy of the hourly allotments.

2.6 Judicial compensation

LSS has gathered data on salaries and benefits for both federally and provincially appointed judges.

2.7 Court statistics

LSS is collecting court data from provincial government sources regarding the processing of criminal and family cases. This data will be useful in evaluating how the current tariffs relate to larger justice system trends.

2.8 Tariff Lawyer Compensation survey

The existing data described above will be useful in establishing the broad parameters for lawyer compensation in B.C., but may not provide sufficient detail about the market conditions and economic profiles specific to current tariff lawyers. Accordingly, LSS

expects to proceed with a targeted survey of tariff lawyers to solicit more specific details about such matters as:

- Comparable private rates in different communities for selected tariff services
- Proportion of income from legal aid
- Overhead costs
- Expected income levels
- The relationship between legal aid and private market rates

2.9 Research on Results-Based Compensation

In Phase 1, tariff lawyers criticized the current tariffs for the low rate of compensation but also for the failure to reward lawyers for good results. Thus, a key focus in Phase 2 is to investigate options for reforming the tariffs to promote better results for LSS clients and greater efficiency in the justice system. In this respect, the evaluation of tariff compensation is closely linked to LSS initiatives in quality assurance.

To date, LSS staff have collected research materials on results-based compensation, performance pay and related topics. Performance pay is a well-established feature of compensation programs in the private sector, and it is becoming more common among larger private law firms. In the public sector, there is a substantial, and growing, body of literature on performance-related pay in fields such as health care and education, particularly in the United States. The health care models are of particular note, as the relationship between doctor, patient and third party funder (whether government, union, or insurance company) parallels the relationship between LSS, lawyer and client. In both health care and education, the performance-based pay systems tend to be administratively complex, involving development of performance measures, collection and analysis of performance data, and distribution of rewards.

The literature surveyed to date identifies some key principles for developing a results-based compensation system:

- Implementing results-based compensation may require a fundamental shift in the work culture of an organization.
- Ideally, the compensation system should support and direct the efforts of service providers towards realization of an organization's strategic objectives.
- Rewards must be salient. To promote desired behaviours, an organization must clearly and consistently communicate the specific behaviours that will be rewarded.
- An effective results-based system will offer meaningful rewards, that is, rewards that are substantial enough to make a difference to service providers.
- The rewards, and the process used to allocate them, must be fair and transparent. People may accept the principle of pay for performance but will object to inequities in its implementation, and a performance pay system will fail if participants perceive it as unfair.

- Rewards must be contingent on the performance of desired behaviours, but not on factors that are outside the service providers control.
- Implementing results-based compensation requires participation of those affected from an early stage, in design, implementation, and ongoing improvement.

LSS staff have conducted several brainstorming sessions to begin to identify options for implementing the principles of results-based compensation in the tariff system. The options reflect a range of solutions, some building on existing LSS practices and others involving administratively complex and far-reaching changes. Some examples include:

- Expanding the existing extra fees process to allow lawyers to request additional compensation where their efforts produced good results that the tariffs failed to properly reward.
- Increasing preparation hours to encourage lawyers to put more time into front-end assessment of the case and promote early resolution where appropriate.
- Incorporating elements of performance pay into tariff compensation. This might entail development of performance measures at different scales (e.g. individual cases, individual caseloads, or each tariff as a whole) and across different dimensions of service (e.g. client management, case management, resource management, and case outcomes). LSS would establish benchmarks for those performance measures based on the current tariffs, and then reward lawyers, individually or collectively, for improvements over time.

As research to date has not identified any performance pay models that are readily transferable to the LSS context, LSS staff will require the time remaining in Phase 2 to continue evaluating results-based compensation. It should be noted that results-based compensation only partially addresses the concerns of the tariff bar. At this stage, lawyers' principal concern remains the low level of compensation. Tariff lawyers are more likely to support a shift towards a more results-oriented compensation system if it is accompanied by significant increases in compensation rates. Also, during Phase 1, tariff lawyers identified administrative barriers to participation, and recommended that LSS reduce bureaucracy and streamline its administration. Whatever options are ultimately recommended, implementing results-based compensation may well place additional administrative burdens on tariff lawyers, and require additional staff time and resources. In this sense, there is a tension between implementing a results-based system and satisfying other concerns of the tariff bar. In determining whether, or to what extent, it should adopt a more results-based system, LSS will need to reconcile these competing objectives and ensure that any changes enjoy the support of the tariff bar.

3. Financial analyst and compensation consultant

As outlined in the Phase 1 report, the Phase 2 plan anticipated that LSS would retain an independent financial analyst or actuarial to review the statistics, survey results, and other data collected and develop a reasoned analysis to support recommendations for changes in the tariff rate. LSS will also retain a compensation consultant with expertise in the

design, implementation and evaluation of compensation systems to assist with evaluation of the tariffs and development of recommendations for the Final Report.

V. CONCLUSION

The Tariff Review is proceeding on schedule in most respects. LSS staff set an ambitious schedule for consultations, and it will take somewhat longer than expected to complete this process due to scheduling challenges. The evaluation of results-based compensation as it applies to the tariff system has proved more complex than anticipated, and will require more time for research and analysis. By spring 2005, LSS staff should complete the consultations and data collection, and will then focus on analyzing this material and preparing the Final Report. The Final Report will include recommendations for changes to the tariffs and a plan for implementation and evaluation.