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IOLTA Feature

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Thinking Nationally: What Canadian Interest on Lawyers' Trust Accounts (IOLTA) Programs are Doing to Raise Revenues and Coordinate Grant-Making

Delivery

IOLTA

By Barbara Palace

Canadian Trends in IOLTA

There's strength in numbers.

From the Chair

This familiar phrase illustrates a recent trend among the Canadian IOLTA programs, which have begun to take a national approach to increasing revenues and creating effective grant-making processes. By working together, the Canadian programs have found new opportunities to maximize the effectiveness of our work within the justice community. These efforts have become increasingly important in this time of historically low IOLTA revenues.

Grantee Spotlight

News and Notes

The Canadian Landscape

There are many similarities between Canadian and U.S. IOLTA programs, the most important of which is the source of our revenue (IOLTA) and our commitment to funding legal services. There are also some interesting differences:

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The first difference is a matter of numbers; as there are far fewer provinces in Canada than there are states in the United States, there are also fewer IOLTA programs. There are 13 active members of the Association of Canadian Law Foundations (ACLF), the national association which serves as our hub for communication. Through our annual in-person meeting, periodic conference calls and participation in our list service, the ACLF has become a critical vehicle for sharing information and cooperation.

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In addition, Canadian IOLTA programs are, by their design, mandatory programs. Each law foundation is created by statute, and the statutes require lawyers to maintain pooled trust accounts and to have the interest earned on those accounts remitted to the law foundation in their jurisdiction. The Canadian programs have not had to pursue rules changes to "go mandatory" like so many of our American colleagues.

A third difference is in the type of grants made with IOLTA funds. The Canadian IOLTA programs focus not only on funding legal services, but equally on funding a wide range of other initiatives including legal research, law libraries, and legal education. Depending upon the jurisdiction, "legal education" has a broad meaning, which can range from providing grants for law schools for the formal education of lawyers, to funding community-based agencies which help members of the public learn about the law through public legal education.

A final difference between Canadian and U.S. IOLTA programs is in the number and size of the financial institutions from whom they receive IOLTA revenue. In Canada, banks come under federal government jurisdiction and as such are governed by federal legislation, rather than by provincial statute. Because of that, banks operate on a national basis, and there are 5 major banks from which all of the law foundations receive the vast majority of their revenue. Smaller, regional banks and credit unions play important roles in different parts of the country, but do not displace the central role of the "big 5." This stands in stark contrast to U.S. IOLTA programs, some of which deal with over 200 banks in a single state. This contrast may be short-lived, as there has been a movement over the past several years towards consolidation in the U.S. banking industry, such that regional and national banks play an increasingly dominant role.

Money In

Each Canadian IOLTA program negotiates interest rate arrangements in their jurisdiction with each of the financial institutions where lawyers keep trust accounts. Traditionally, these interest rate arrangements have been based on the prevailing Prime Rate of interest offered by that financial institution, and are expressed as a formula of the Prime Rate minus a negotiated percentage point. At times of a higher Prime Rate, these formulae have worked extremely well, and have allowed revenues to flourish. Because the Prime Rate is at its lowest point in history, revenues in this fiscal year are also hitting historic lows across the country. Minimum interest rates (frequently approximately 0.25%) have been applied in situations where operation of the formula results in a zero interest calculation, but this is not universal.

The Canadian programs have shared information through the ACLF about their respective interest rate arrangements with each of the financial institutions for many years. Having this information has been particularly useful in negotiating with the major banks over the years, and the banks are well aware that the law foundations share this information. In the current revenue crisis, this shared information has become even more critical, as law foundations can develop their own negotiation strategies based upon it.

Until relatively recently, each IOLTA program dealt with contacts from each of the banks in their own jurisdiction. In some cases, regional contacts were

developed. Over the past several years, however, an increasing trend for the banks to centralize their decision-making processes has led to a decrease in local or regional authority in negotiating interest rate arrangements for IOLTA funds. The big banks are beginning to take a national approach in their interest policy decisions, and these decisions and their communication are increasingly coming out of Toronto, where the majority of the large banks are headquartered. To address this issue, ACLF members have been working together more closely than ever on banking issues, and will be discussing the potential for national negotiation strategies at their next annual meeting.

Money Out

Because Canadian IOLTA programs offer grants for legal research and legal education projects, they frequently receive applications for projects which have national scope or applicability. Grant applications often propose national conferences about the law and legal research projects which cross jurisdictional boundaries. Until recently, applicants for such projects have had to complete an application form for each of the law foundations to which they wished to apply for funds, resulting in some applicants having to complete five or more application forms.

In order to streamline the process for these applicants, the law foundations have developed a common application form. Each IOLTA program's grant application form was reviewed and a draft was created which captured all of the substantive information required by each program. This draft was discussed and adopted in principle at the 2007 ACLF annual meeting. Each program's board of directors was asked to consider adopting this form for national applications, and to date, most programs' boards have adopted that draft. Applicants for national projects may now complete one form and submit copies of that document to each foundation for a decision. Further work on a common assessment process is planned for the upcoming ACLF annual meeting.

In addition, a recent and exciting court judgment in Ontario has created a fund that can be used for national access to justice. The parameters for use of the fund are still in development. The case was a class action award regarding unauthorized charges levied by the bank on foreign currency transactions carried out with VISA cards issued by the bank.¹ As it was determined by the court and the parties to be impracticable to identify more than a small percentage of potential claimants, the court stated in its July decision that a fund be created with a *cy pres* award of \$14.2 million to be administered by the Law Foundation of Ontario "*for the purpose of advancing public access to justice in Canada.*"

The trustees of the Law Foundation of Ontario will be developing a strategic direction for the fund, and will seek input from other law foundations and stakeholders. Informal consultations have begun among the law foundations about how this fund may be best used to achieve the greatest impact across

the country, and this topic will be a central item of discussion at the ACLF annual meeting. This fund, the first for a law foundation, provides another opportunity for developing a national approach to grant making.

Looking Forward

IOLTA programs are unique in their ability to provide significant funding to local legal services and justice-based organizations. Because of our connection to local communities, we are able to communicate with those doing grassroots work and effectively assess where the needs exist. IOLTA programs are also unique in that they come together to form an expansive but close knit network across both Canada and the United States. We have found that collaboration and information sharing through this network dramatically increases the success of our individual efforts as well as our joint efforts towards improving access to justice in Canada.

¹ Cassano v. The Toronto-Dominion Bank, 2007 ONCA 781.

Barbara Palace is an attorney and has been the Executive Director of the Manitoba Law Foundation since 2000. She will complete her term as Canadian representative to the National Association of IOLTA Programs (NAIP) in October, 2009.