



THE CANADIAN
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“Tension at the Border”: Pro Bono and Legal Aid

A Consultation Document prepared by the Canadian Bar Association’s
Standing Committee on Access to Justice

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Table of Contents

A. Introduction.....	1
B. Defining Pro Bono.....	2
C. Context for Pro Bono	3
D. Pro Bono as a Professional Responsibility	7
E. Potential and Limits of Pro Bono	11
F. Continuum of Service	13
G. Improving the Partnership.....	15
H. Conclusion	17
Discussion Questions	18

Note: This consultation document has been produced by the Canadian Bar Association’s Standing Committee on Access to Justice for consultation only. It has not been approved by the CBA, and does not represent an official statement of CBA policy. It is intended to foster discussion. That discussion will be considered by the Committee in making its Final Report and recommendations to the CBA at the Canadian Legal Conference in August 2013.

A. Introduction

This paper will consider the “tension at the border”¹ between publicly funded legal services, or legal aid, and services offered by the legal profession without charge, or pro bono legal services. This phrase is intended to capture several important issues surrounding the relationship between pro bono and legal aid.

For lawyers in private practice, there is often not a “bright line” between legal aid and pro bono work. Work on a legal aid file routinely involves a pro bono contribution, either because lawyers work for hourly rates that are significantly lower than what they normally charge, or continue work on a file after the legal aid plan stops paying for their work. It is also not uncommon for lawyers in private practice to prefer taking occasional pro bono files rather than dealing with the administrative requirements and constraints required by legal aid plans.

The primary focus of the paper will be the situation in Canada, but other jurisdictions are mentioned for comparison purposes. There is an increasing and widespread acknowledgement among justice system participants that the problem of unmet legal needs in Canada is serious and growing, and significant effort is being dedicated to finding creative new approaches to solve the problem. Certainly, both pro bono and legal aid are aspects of that discussion, and the legal profession is an important participant. One unfortunate response has been to point the blame and responsibility elsewhere – lawyers at governments, demanding new money for legal aid, or judges and governments at lawyers, demanding an undefined and seemingly unlimited amount of pro bono work. Underlying the finger pointing are uncertainty and confusion regarding key issues that require further discussion and analysis.

Many lawyers have responded to shortfalls in access to justice by volunteering legal services, either as individuals, by large law firms, or through pro bono organizations. While the legal profession is “stepping up” in significant ways, it cannot meet the huge demand alone. Nor, arguably, should it.

To what extent can the public’s current unmet legal needs reasonably be addressed by pro bono work? If lawyers have a public duty to engage in pro bono work, either because of professional obligations or their monopoly on providing legal services, how much of that work can reasonably be demanded of volunteers? And, how sustainable is a social program that is increasingly reliant on the charity of a particular profession?

¹ This phrase is borrowed from the report on a roundtable in Victoria, Australia, discussed in *Moving Forward on Legal Aid*, by Melina Buckley (Ottawa: CBA, 2010). “The roundtable discussion noted that there is “tension at the border of legal aid and pro bono.” The private legal profession has effectively subsidized and supported the legal aid system for many years through acting for reduced fees and doing extra unpaid work in legal aid cases. Anecdotal information suggests that in Victoria lawyers are becoming increasingly frustrated with the legal aid system, preferring on occasion to provide services at reduced fee or on a pro bono basis. Given the links between legal aid and pro bono services there is a need for a sounder working relationship between the two” (at 112). It should be noted that the profession also contributes to pro bono work in very deliberate ways, in addition to this type of pro bono that might be seen as incidental to legal aid work.

The questions don't stop there. If we know that legal services, including representation, are essential in some situations for a just result, then how can we justify some people not having that essential help when critical interests are at stake? While the profession has a role in meeting the public's unmet legal needs, who but governments can ensure those essential services are consistently available through adequately funded legal aid programs?

We propose a new conversation and partnership between justice system participants, particularly legal service providers and governments. A principled discussion of what are truly essential legal services and who should be eligible for those services is required, with legal aid plans adequately funded to provide those services to the most vulnerable, low income populations. Pro bono work cannot and should not fill the entire void produced by government cuts to legal aid services. However, pro bono work and the many creative new approaches to deliver legal services now being explored can supplement government programs, to ensure that essential services to those not eligible for legal aid are available, and that options to enhance access to justice for the working poor and middle class are provided. As a genuine partnership between the Bar providing a predictable pro bono contribution, and governments adequately funding legal aid programs, equal justice could be a more realistic goal than it is currently.

B. Defining Pro Bono

Pro bono comes from the Latin term, *pro bono publico*, meaning "for the public good and for the welfare of the whole".² Over time, the phrase has become associated with the law, and specifically, the unpaid work that lawyers do. However, there are many different definitions of what actually constitutes pro bono work, and so the scope of the term is unclear.

Pro bono work is perhaps most often thought of as the efforts of a lawyer in providing free legal services to a client, just as that lawyer would provide services on a file for a paying client. The same obligations under lawyers' rules of professional conduct apply. Members of the profession may also supervise law students or others on a pro bono basis to provide legal services in alternative ways.

It is also commonly considered pro bono work when lawyers volunteer their work to advance the concerns of whole communities in an effort to achieve systemic improvements to the law and advance social justice. For example, in 2005 the CBA launched a constitutional challenge to the federal and B.C. governments, and the legal aid plan in B.C., for failing to adequately provide access to justice for low income people in that province. These efforts over a four year period were owed to the volunteer efforts of the CBA's test case counsel team, led by JJ Camp, Q.C. of Vancouver.³

According to the CBA's 1998 resolution, *Promoting a Pro Bono Culture in the Legal Profession*, lawyers work pro bono when they "voluntarily contribute part of their time without charge or at substantially reduced rates, to establish or preserve the rights of disadvantaged individuals; and to provide legal services to assist organizations who represent the interests of, or who work on behalf of, members of the community of limited means or other public interest organizations, or for the improvement of laws or the legal system."⁴

² *Black's Law Dictionary*, 4th ed., s.v. "pro bono publico".

³ Other volunteer members of the CBA's test case counsel team were Sharon Matthews, Dr. Melina Buckley and Dr. Gwen Brodsky.

⁴ CBA Resolution 98-01-A. See, Standing Committee on Pro Bono; <http://www.cba.org/CBA/groups/probono/>

This more expansive definition would include other types of volunteer work done by lawyers, such as sitting on the Board of a legal aid provider or pro bono organization. It would also include “low bono” services where lawyers work for reduced pay, such as the amount they would earn if providing legal aid, or perhaps on a sliding scale for middle income clients. Finally, it might involve a financial contribution in lieu of pro bono service.

It could also include work further removed from providing services to low income people, such as volunteering with the law society, law foundation or a professional association. Some sources suggest the scope of pro bono might go so far as to include any unpaid work or services provided by a lawyer, even if totally unrelated to the law (such as a lawyer coaching a hockey team).⁵

While lawyers’ involvement in their profession or their communities is without doubt commendable, to be most meaningful in the context of the proposals outlined later in this paper, pro bono work should be limited to the delivery of legal services to those who can’t otherwise afford them, and have a direct connection to filling unmet legal needs.

C. Context for Pro Bono

Historically, lawyers have provided free legal help on occasion, in some circumstances. “Pro bono service can be traced to practices in the early Roman tribunals, medieval ecclesiastical courts, and to Scottish and English legal proceedings.”⁶ Bishops in the 12th century were required by scripture to assist indigent people with legal problems,⁷ and subsequently required lawyers to provide services for spiritual, rather than monetary compensation.⁸ English law required lawyers to represent the poor in the 15th century.⁹

Throughout the 20th century, lawyers have often provided free services, particularly for individuals who are members of their family, religious institution or community. A 1970s survey that found that two thirds of pro bono work lawyers were doing was for friends and relatives.¹⁰ In addition, committed lawyers concerned about social justice have taken on test cases with the intention of achieving systemic change or asserting the rights or protections under the law of a certain group of people. For example, the Women’s Legal Education and Action Fund (LEAF) has intervened in over 150 cases, using pro bono lawyers, to assert women’s equality rights.¹¹

Melina Buckley notes that “the legal profession has a long tradition of contributing its services to the community at no or reduced fees. The pro bono work of the profession pre-dates the rise of the

⁵ See, Deborah L. Rhode, *Pro Bono in Principle and in Practice* (California: Stanford University Press, 2005) at 4, or Scott L. Cummings, “The Politics of Pro Bono” (2004) 52 UCLA L. Rev. 1 at 4.

⁶ Raj Anand with Steven Nicoletta, “Fostering Pro Bono Service in the Legal Profession: Challenges Facing the Pro Bono Ethic”, paper prepared for the Chief Justice of Ontario’s Advisory Committee on Professionalism, Ninth Colloquium on the Legal Profession, Toronto 2007.

⁷ Zino I Macaluso, “That’s O.K., This One’s on Me: A Discussion of the Responsibilities and Duties Owed by the Profession to do Pro Bono Publico Work” (1992) 26 U.B.C. L. Rev. at 6.

⁸ Lorne Sossin, “The Public Interest, Professionalism, and the Pro Bono Publico” (2008) 46 Osgoode Hall L.J. 131 at 135.

⁹ *Supra*, note 5 at 21.

¹⁰ Barbara A. Curran and Francis O. Spalding, *The Legal Needs of the Public: preliminary report of a national survey by the Special Committee to Survey Legal Needs* (Chicago: ABA, 1974).

¹¹ <http://leaf.ca/legal-issues-cases-and-law-reform/>

modern, government-funded, organized legal aid system.”¹² Before the creation of publicly funded and operated legal aid plans in the 1960s and 1970s, some provinces offered a type of “legal aid” by organizing what we would now call a pro bono referral service for people who could not pay for legal counsel.¹³ The profession was called upon to volunteer to be matched with those in need as an element of their professional responsibility.¹⁴ In Canada, the first civil “legal aid” program was developed in Manitoba in 1937. The “Law Society of Manitoba set up a program through which poor clients could apply to a special committee for a certificate appointing a lawyer free of charge” and also use a “Poor Man’s Lawyers Centre” staffed by volunteer lawyers”.¹⁵ A criminal version was established by the Law Society a decade later, again the first of its kind in Canada.¹⁶ However, the problem in Manitoba and elsewhere where similar programs were subsequently established, was that fairly small numbers of lawyers volunteered and were soon overwhelmed by client demands, in addition to the organizations themselves being underfunded and often run by volunteers. These somewhat makeshift pro bono programs eventually proved to be unsustainable.¹⁷

Although there is clearly some overlap between legal aid and pro bono, they have developed out of somewhat different traditions. “Early pro bono work by private lawyers was largely based on two principles: charity and professionalism. The rise of legal aid, on the other hand, was based on a concept of rights – that is, people are entitled to legal information and assistance. Public funding is an essential part of a government legal aid scheme as, in theory, it removes the need to rely on the “charity” of the profession and it gives the system public accountability. However, a reliance on public funding means that the legal aid budget is limited, particularly in a climate of reduced government spending on services in general...”.¹⁸

According to Ab Currie at the Research and Statistics Division of Justice Canada:

Legal aid grew out of a pro bono system that prevailed in most provinces up to the mid-1960’s. As an expression of professional responsibility, lawyers would take on a few cases per year at no charge for indigent people. Organized legal aid began in some provinces in the mid-1960’s. By the early 1970’s there were legal aid plans in every province and territory, and a federal program for sharing the cost of criminal legal aid with provinces and territories was in place. In the early 1970’s federal funding became available for civil legal aid under the Canada Assistance Plan.¹⁹

By the 1990s, addressing the unmet legal needs of the poor was accepted as more of a government responsibility than a professional obligation.²⁰ As a public social service, legal aid provided help in a

¹² Melina Buckley’s 2009 original working draft, *Moving Forward on Legal Aid* (unpublished, available through CBA National Office) at 314.

¹³ Sossin, *supra*, note 8 at 135.

¹⁴ For example, the work of the Salvation Army in British Columbia, Needy litigants Committee in Alberta, a Law Society of Upper Canada project founded in 1951, and the Poor Man’s Lawyers Centre in Manitoba.

¹⁵ See, Ron Perozzo, Q.C. (Chair), *A Review of Legal Aid in Manitoba* (Winnipeg: 2004) at 8. <http://www.gov.mb.ca/justice/publications/pdf/le.galaidreviewfinal.pdf>

¹⁶ *Ibid.*

¹⁷ Sossin, *supra*, note 8 at 8.

¹⁸ Melina Buckley, *Moving Forward on Legal Aid* (Ottawa: CBA, 2010) at 121.

¹⁹ Federal funding for civil legal is now said to be in a global transfer called the Canada Social Transfer (CST), though provincial governments have at times disputed that claim. See also, Ab Currie, “Some Aspects of Access to Justice in Canada”, http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/op00_2-po00_2/b3.html

²⁰ Sossin, *supra*, note 8 at 8.

more systematic, equitable and efficient manner than the earlier pro bono efforts had achieved. People were eligible based on demonstrated financial need and a legal situation sufficiently serious to justify the public expenditure, as defined by provincial and territorial legal aid plans.

According to Professors Zemans and Monahan, in *From Crisis to Reform: A New Legal Aid Plan for Ontario*, a:

kind of open-ended, demand-driven program was not uncommon in the 1960s and 1970s, when government revenues and budgets were constantly expanding. But in the more fiscally conscious 1990s, governments of all political stripes in Canada have come to assume that the vast majority of government programs must be operated on a fixed budget, and that those funding the service must have the ability to control their overall costs.²¹

Legal aid providers, offering legal representation through specialty clinics, certificates offered to private lawyers or by paying staff lawyers, have had to determine increasingly limited priority areas of coverage for increasingly impoverished clients, to meet limited budgets.

There has been a significant issue of disparity in coverage across Canada. This was exacerbated as a result of a change to federal support for civil legal aid in the mid-1990s, so that federal funding for civil legal aid was no longer linked to the amount a jurisdiction actually spent on those services, but rather included as part of a global transfer given to each province for several priority areas, initially including health and post-secondary education. In addition, a declining federal contribution through cost sharing agreements for criminal legal aid, and a general shift in economic climate, has meant that legal aid plans have been forced to make deep cuts since the mid-1990s. Most plans have decreased financial eligibility levels to access services to approximately social assistance levels, so people working a full time job at minimum wage would not qualify. In addition, they have narrowed the range of services that are provided, and in parts of the country, even services that would provide some representation by counsel in cases involving fundamental interests, such as to prevent homelessness, to maintain government benefits, or to fight for custody of children, are not provided. Some plans have also required client contributions or repayment.

With this added fiscal restraint, plans have come to rely heavily on lawyers to contribute time and money to the operations of the legal aid system, though that contribution may not always be called “pro bono” work as some payment is often involved. For example, certain plans have at times instituted “holdbacks”, where the legal aid plan would keep a percentage of the amount owed to a lawyer on a legal aid file, and only pay it as the fiscal year ended if sufficient funds remained. Others cap paid hours for a legal matter below those often required, relying on lawyers to ask for more time, or complete the remaining hours on the file pro bono. All pay hourly rates for lawyers’ time significantly lower than what the lawyers would normally charge, and sometimes at levels insufficient even to cover normal office overhead.²²

There have been important changes and innovation in the services provided by legal aid plans in recent years. There is a marked trend away from providing legal representation and toward providing legal information, summary advice and self-help materials. This allows legal services to benefit more people, but may abandon the most vulnerable and marginalized populations who may not be capable of taking full advantage of those options and require actual representation.

²¹ (Toronto: York University Centre for Public Law and Public Policy, 1997) at 1.

²² In New Brunswick, for example, lawyers on legal aid certificates are paid between \$58.00/hour and \$70.00/hour, depending on the type of legal matter and year of call.

Recent years have also brought about a significant expansion of organized pro bono. Pro Bono Students Canada was formed in 1996 and now operates out of 21 law schools across the country. In the last decade, formal pro bono organizations have been established in several provinces, providing an infrastructure and paid staff. Formal organizations now exist in 5 provinces; Ontario (Pro Bono Law Ontario),²³ B.C. (Access Pro Bono),²⁴ Alberta (Pro Bono Law Alberta),²⁵ Saskatchewan (Pro Bono Law Saskatchewan)²⁶ and Quebec (Pro Bono Quebec).²⁷

These organizations generate and facilitate opportunities for lawyers and law students to provide pro bono legal services and increase awareness of the opportunities. The organizations supply administrative support, an intake and screening process to ensure that clients meet established financial criteria and need the type of assistance offered by the organization, and a roster of volunteer lawyers to be called upon as needed, or who regularly attend at a designated location. Once a client and lawyer are matched, the file might proceed as any other regular paying client file would proceed, or the lawyer or organization might offer assistance with only certain aspects of the file, or provide referrals, legal information or self-help materials.

In recent years, there has also been significant growth in pro bono departments within larger law firms in Canada, again providing support and structure to facilitate pro bono work supported by the firm. Some large firms second junior associates or articling students to legal aid offices or other projects.

These initiatives can be expected to build on those explored in other countries. In Australia, “law firms are building multi-tiered relationships with pro bono partners in the community, particularly with Community Legal Clinics (CLCs). These relationships rely on the following forms of legal support:

- Providing legal advice and representation to clients referred by CLCs;
- Providing legal advice to CLCs on particular matters that require specialized assistance;
- Researching and drafting law reform submissions, and undertaking general legal research;
- Seconding to CLCs full and part time law firm staff on a sessional or short-term basis;
- Preparing and updating Public Legal Education and Information materials;
- Advising about internal management issues (e.g. taxes, incorporation);
- Providing training and mentoring to community organizations and CLC lawyers;
- Supporting co-counsel arrangements; and
- Working with organizations towards particular law reform proposals.”²⁸

Many pro bono organizations are able to allow for more flexibility as to who qualifies for help than that allowed by legal aid programs. Gillian Marriot, Q.C., the Executive Director of Pro Bono Law Alberta (PBLA) says that in her province, as a result of reduced funding, legal aid is intended for the

²³ <http://www.pblo.org/>

²⁴ <http://www.accessprobono.ca/>. Access Pro Bono was created in 2010 when the Western Canada Society to Access Justice and Pro Bono Law of British Columbia merged.

²⁵ <http://www.pbla.ca/>

²⁶ http://www.pblsask.ca/pr_obonoprograms.shtml

²⁷ <http://www.probonoquebec.ca/en/>

²⁸ See Buckley, *supra* note 12 at 292.

poorest residents, limited services are provided, and users are expected to reimburse the Plan. Pro bono clinics have more lenient financial eligibility criteria, and broader and different areas of coverage, with significant discretion as to which cases will be accepted. This extends to the Volunteer Lawyer Service, a roster program operated by PBLA with capacity for conducting test case litigation using volunteer lawyers. Three kinds of clinics offer pro bono in the province. One is a model that incorporates staff lawyers who then rely on pro bono assistance from other lawyers, and those clinics are funded and sustainable as independent clinics. Second, PBLA organizes one day or limited engagement events, engaging members of the private bar to provide free direct service. The third is a duty counsel project staffed by volunteer lawyers that operates in the provincial court, Civil Claims Division.

D. Pro Bono as a Professional Responsibility

Various explanations are offered as to why lawyers should do pro bono work. These explanations include that lawyers have a professional duty to ensure access to justice and must respond to a clear and growing public need for legal help. A lawyer's contribution to pro bono is also said to balance the privilege of self-regulation and act as a counterpart to the monopoly lawyers enjoy on providing legal services.

In an address to the 2010 Pro Bono Conference of Canada, David Scott, Q.C., a founding member of Law Help Ontario, said:

it is generally acknowledged that lawyers have a professional responsibility to contribute to effective access to justice for low income citizens. The obligation is cultural, associated with the unique positions which lawyers have occupied in the administration of justice. Occupying the field, and controlling the delivery of services as we do, we have traditionally recognized a responsibility to serve the public within reason, regardless of ability to pay.²⁹

Some recognition of the important role of pro bono services is also found in provincial and territorial *Codes of Professional Conduct*. In 2010, Scott provided this summary:

Rule 4 of Alberta's *Code of Professional Conduct* expresses the duty in positive terms, requiring that lawyers contribute to the profession's effort to make legal services available to all, regardless of ability to pay.³⁰ Ontario's pro bono rule is expressed in somewhat more hopeful terms, identifying the provision of pro bono services as part of "the best traditions of the legal profession." Saskatchewan's rule is similar in tone. The B.C. and Quebec *Codes of Professional Conduct* on the subject are more abstract than in Saskatchewan or Ontario.³¹ All provinces have "embraced, in a variety of forms, the notion of broad-based access to justice through pro bono service."

In terms of statutory obligations, *Ontario's Law Society Act*, in section 4(1), speaks directly to the subject of access to justice, fixing the Society with a positive duty to "facilitate access to

²⁹ Address at 3rd Annual Pro Bono Conference, September 15-17, 2010, Calgary, Alberta.

³⁰ *Ibid.* Note that since the time of Scott's article, the Alberta *Code* was amended. Rule 1.01 now refers to lawyers' duty to "uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions." The commentary to that Rule says lawyers are encouraged to address the Rule "by participating in legal aid and community legal services programs or providing legal services on a pro bono basis."

³¹ Note that some other provinces are silent with respect to a duty to provide pro bono services.

justice for the people of Ontario.” Obviously, this is a mandatory requirement expressed with legislative force.”³²

In terms of the amount of pro bono hours that should be expected, both the ABA and the CBA have suggested that 50 hours per year is an appropriate amount of pro bono work per lawyer.³³ Pro bono work is included in Rule 6.1 of the ABA *Model Rules of Professional Conduct*, originally enacted in 1983, and revised in 1993 and 2002. It has now been adopted by several states in their rules of professional conduct. The Model Rule says:

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono public legal services per year. In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and (b) provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; (2) delivery of legal services at a substantially reduced fee to persons of limited means; or (3) participation in activities for improving the law, the legal system or the legal profession. In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.³⁴

The CBA's 1998 resolution says:

It is inherent in the professional responsibility of a legal practitioner to voluntarily contribute an identifiable part of time without charge or at substantially reduced rates:

- to establish or preserve the rights of disadvantaged individuals;
- to provide legal services to assist organizations who represent the interests of, or who work on behalf of, members of the community of limited means or other public interest organizations; or
- for the improvement of laws or the legal system.

Each member of the legal profession should strive to contribute 50 hours or 3% of billings per year on a pro bono basis.

(The Canadian Bar Association should) take steps to encourage and promote this level of pro bono activity and to recognize pro bono efforts undertaken by members of the legal profession in Canada.³⁵

³² Scott, *supra*, note 29.

³³ See, ABA Model Rule 6.1
http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html
and CBA Resolution 98-01-A; <http://www.cba.org/CBA/groups/pdf//98-01-A.pdf>

³⁴ *Ibid.*

³⁵ *Ibid.*

Canada's formal pro bono organizations commonly stress two important principles, that they are assisting the profession in meeting a professional responsibility to provide pro bono services, and that they are not intended to replace an adequately funded public legal aid system.

For example, the Executive Director of Access Pro Bono in B.C., Jamie Maclaren says:

Each pro bono organization — young or old — pursues the same basic mission: to increase access to justice through the provision of pro bono services to individuals of limited means. Each pro bono organization also operates according to the core principle that pro bono services should complement rather than substitute for a properly funded legal aid system.³⁶

Likewise, Pro bono Law Saskatchewan's website says:

- pro bono services are meant to complement, not replace, an adequately funded legal aid system;
- pro bono service should be endorsed and encouraged within the profession as a professional responsibility shared by all in the profession.³⁷

Lorne Sossin argues that the current arguments for pro bono in the public interest are confusing and lack coherence, and that the debate is “adrift” and “rudderless”. He offers an alternate argument for pro bono, noting that public interest in pro bono is based on a framework of rule of law, access to justice and social justice arguments. Lawyers are the guardians of the rule of law and have a clear interest in ensuring that all have access to justice, but they are also dedicated to serving their own clients and making a living. If advancing the public interest is the goal, lawyers would need to consider whether providing service on a particular pro bono file will do that, before providing the client with pro bono legal representation or assistance.³⁸

Pro bono work is frequently promoted by the profession for such reasons as that it is good for marketing, reputation and status in a firm, which Sossin notes run contrary to public service aspirations as essentially based on self-interest. While lawyers and pro bono organizations are certainly motivated by the desire to give back to their communities and help individuals in need, they also routinely offer reasons for the profession to engage in pro bono work based on self-interest. These include that engaging in pro bono can:

- change the public perception of the profession
- enhance the reputation of a firm
- expose lawyers to a broader range of clients and social justice issues
- help lawyers develop new marketable skills
- provide lawyers with a feeling of personal satisfaction in contributing to the social good
- improve retention and performance for law firms
- give young lawyers learning opportunities, and more legal skills
- allow law firms to recruit the best young lawyers.

³⁶ Jamie Maclaren, “Integrating pro bono and legal aid” (October 30, 2009) *The Lawyers Weekly*.

³⁷ <http://www.pblsask.ca/about.shtml>

³⁸ Sossin, *supra*, note 8 at 147-158.

David Scott similarly makes a “business case” to the profession as to why pro bono is in the self-interest of the profession. His argument is based on four points, firms need to meet their regulatory requirements for professional compliance, promote the best interests of their firm, meet their clients’ needs, and elevate their firms’ presence in the community.³⁹

Scott L. Cummings suggests that rather than being an age old tradition, the concept of pro bono as a professional responsibility is actually relatively new. He notes that it was only first referred to in the ABA Model Rules of Professional Conduct as a “professional duty” in the 1980s.⁴⁰ Similarly, as discussed above, it was in 1998 that the CBA first referred to pro bono as a professional duty, as part of the implementation of recommendations from its Systems of Civil Justice Task Force Report.⁴¹

In addition, it has often been observed that an increased reliance on, and demand for organized pro bono services, along with recognition of pro bono work as a responsibility within lawyers’ codes of professional conduct, has coincided with the erosion of public funds for legal aid programs. For example:

- Lorne Sossin says that “It is perhaps no coincidence that the rejuvenation of pro bono as an element of legal professionalism coincides with the demise of the profession’s stewardship over legal aid”, and “(i)ronically, the failure of legal aid schemes to meet the still growing needs of the poor may be seen as a catalyst for the rise of pro bono programs and organizations in the later 90 and early 2000s.”⁴² He also notes that pro bono has been particularly relevant when legal aid is unavailable, and that efforts for more developed and organized pro bono may undercut legal aid.⁴³
- Jamie Maclaren says that “[t]he increasing vitality of Canada’s pro bono organizations should, on the one hand, inspire considerable pride among Canadian lawyers, since it reflects a pervasive spirit of benevolence and a healthy respect for the rule of law. On the other hand, it should raise considerable concern over the inability or unwillingness of governments and the profession to make our justice system more accessible, more equitable and more efficient. The growing complexity of our judicial processes calls for substantial reform, but it is no coincidence that the current decline in access to justice parallels the gradual dismantling of legal aid in most provinces.”⁴⁴
- And, Melina Buckley says that “(c)utbacks in government support for legal aid programs have led to a substantial increase in pro bono activities in many countries and a move toward greater organization and integration of pro bono programs within legal aid programs and/or the court system itself”.⁴⁵

³⁹ David Scott, Q.C., “Pro Bono Services by the Practicing Bar: The Business Case” (Address to Law Firm Managers, Petroleum Club, Calgary, Alberta, May 29, 2008).

⁴⁰ Rhode, *supra*, note 5 at 4.

⁴¹ http://www.cba.org/cba/pubs/pdf/systemscivil_tfireport.pdf

⁴² Sossin, *supra*, note 8 at 136.

⁴³ *Ibid.*

⁴⁴ Maclaren, *supra*, note 36.

⁴⁵ Buckley, *supra*, note 12 at 111.

E. Potential and Limits of Pro Bono

Regardless of the impetus for pro bono, the legal profession has embraced pro bono work as its contribution to assist with providing access to justice, and that contribution is steadily growing. Formal and informal pro bono organizations now exist across Canada, and assist thousands of clients each year.

In 2011, Pro Bono Law Alberta, in addition to the CBA-Alberta Branch, and Legal Aid Alberta, provided a coordinated response from the legal community to assist residents with the aftermath of wildfires at Slave Lake. Access Pro Bono in B.C. receives over 25,000 requests for assistance each year, and provides a Court of Appeal Roster program, among several other programs, providing free legal counsel to litigants in civil, criminal and family law appellate cases. Pro Bono Law Saskatchewan offers free legal clinics in locations across the province to those who qualify financially, and matters can be referred on to a Panel Program for legal representation if there is a match between the case and the expertise, capacity and geographic location of a volunteer lawyer. The CBA and Pro Bono Law Ontario have partnered to make legal counsel available for litigants seeking leave to take their cases to the Supreme Court of Canada. Pro Bono Law Ontario assisted 13,758 clients last year.⁴⁶ And, Pro Bono Quebec receives commitments of pro bono hours from law firms in the province, and puts them in a virtual “bank”. As it receives a request for legal services, it chooses a firm to match the request, and dips into its bank for the required hours.

In the United States, pro bono has a much longer history than in Canada, and is “an integrated part of the American justice system. In fact, the ABA includes as among its stated goals, “to integrate pro bono representation into the system for delivering legal aid services to the poor.”⁴⁷

Melina Buckley notes that “pro bono efforts in the United States continue to expand and engage more private attorneys, providing greater levels of service. The federal funder, the Legal Services Commission (LSC) requires that each LSC-funded provider expend 12.5 percent of its LSC funding for private attorney involvement. There are also substantial efforts by both the ABA and state and local bar associations to increase pro bono activity among all segments of the practicing bar, including government attorneys and corporate counsel.”⁴⁸ The judiciary plays a central and important part in encouraging and establishing pro bono efforts in the United States. A 2004 ABA survey found that 2/3 of respondents provided pro bono services, and 46% said that they met the ABA target of at least 50 hours of pro bono services per year.⁴⁹

While pro bono legal services certainly have the potential to enhance access to justice for clients, there are inherent limits to the capacity of pro bono work to address the unmet legal needs that currently exist in Canada.

First, pro bono programs may link lawyers who specialize in one area of law with a client requiring services in a completely different area, either with or without additional training. This can be inspiring and exciting for lawyers whose practices routinely involve little contact with clients, or with clients living in poverty. Law students are also used to provide legal assistance to clients needing pro

⁴⁶ <http://www.pblo.org/news/article.421092>

⁴⁷ Andrea Long and Anne Beveridge, *Delivering Poverty Law Services: Lessons from B.C. and Abroad* (Vancouver: SPARK B.C., 2004) at 59-60, cited in Buckley, *supra* note 8, at 305.

⁴⁸ Buckley, *ibid.*

⁴⁹ ABA Standing Committee on Pro Bono and Public Service, *Supporting Justice II: A Report on the Pro Bono Work of America’s Lawyers* (Chicago: ABA, 2005) <http://apps.americanbar.org/legalservices/probono/report2.pdf>

bono services, generally though with qualified lawyers as supervisors. Law firms may assign junior associates to a pro bono file, at least partially because that junior will gain legal experience and knowledge while engaged in the work. Offering lawyers or students who are not knowledgeable in the area of law involved may well impact the quality of legal help offered. One response is that the underlying rationale of pro bono is that the good should not be the enemy of the best, in other words, that some legal help is better than none at all.⁵⁰

Second, pro bono organizations may be limited in the populations they can assist, and as a private endeavour, there is less expectation that services will be available equally across a province, or for all those in similar circumstances with particular legal needs. For example, Law Help Ontario provides some actual legal representation, but only in two places in Ontario - Toronto and Ottawa - and not for litigants who need help with family law matters, which is the greatest area of need for civil legal assistance in the province.⁵¹

Third, as noted by Melina Buckley in *Moving Forward on Legal Aid*, there are ambiguities as to where legal aid should end and pro bono work begin. She reviews a study in Australia that divided legal work into three categories; publicly funded legal aid cases (mainly family and criminal law), legal aid “overflow” cases (those that should be funded but are not, like poverty law matters), and public interest or public benefit cases.⁵² By far the biggest focus of pro bono efforts has been on the second, legal aid “overflow” cases. The study commented on continued disagreement about whether these cases should be dealt with on a pro bono basis, due to concern that as the private profession picks up these cases, it essentially lets governments “off the hook” of fulfilling their responsibilities to the public. Whether private lawyers should be filling the gap left by the reduction in legal aid was questioned, and some felt that doing so is counter-productive in that it may reduce the likelihood that more money will be injected into the system by government.

The discussants recognized that pro bono work plays an important role in the justice system and stressed that the profession has a commitment to doing work pro bono regardless of what is happening with legal aid. They also noted that many clients ineligible for legal aid will also not be able to get someone to take their case on a pro bono basis. They noted a significant area of unmet need for legal services that cannot be filled by pro bono efforts.⁵³

Jamie Maclaren says that it is the uneasy “relationship between legal aid and pro bono that causes a regular conundrum for pro bono organizations. Wherever and whenever legal aid cuts are made, pro bono organizations are compelled to fill the resulting vacuum by deploying pro bono services of an inherently less dependable nature than their forerunners. Though this strategy invariably succeeds in increasing access to justice by serving otherwise unmet legal needs in the short-term, it alleviates some political pressure on governments to maintain or increase legal aid funding, and it arguably weakens the legal service delivery system in the long-term.”⁵⁴

⁵⁰ See discussion in Rob Atkinson, “A Social Democratic Critique of Pro Bono Publico Representation of the Poor: the Good as the Enemy of the Best” (2001) 9.1 *Journal of Gender, Social Policy and the Law* 142.

⁵¹ <http://www.lawhelpontario.org/> See, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Legal Needs Project Steering Committee, 2010).

⁵² Buckley, *supra*, note 12 at 112.

⁵³ *Ibid.*

⁵⁴ Maclaren, *supra*, note 36.

Considering both the potential and the inherent limits of pro bono, there are important distinctions as to what legal aid and pro bono work generally offer to the public. They can be complementary, but are often not interchangeable:

1. Legal aid responds to public demand for a certain kind of service. Pro bono is generally supply driven – how many lawyers in the area are available to help that day.
2. Legal aid plans, while particular to each province and territory, will ideally prioritize the most critical legal matters. Some pro bono organizations, again noting that there are significant differences across the country, decline the same cases, for example, family law, criminal law or domestic violence cases. Both deal with an unmanageable amount of unmet need, so also must determine what part of that need they can address. For example, Pro Bono Law Ontario’s website states:

We CANNOT help you at the centre with: family law matters, criminal cases, human rights, landlord and tenant matters, etc. Please refer to our online resources for information that might be available in these areas.⁵⁵
3. Legal aid plans have consistent and detailed criteria for assessing financial eligibility and which cases will be accepted. Pro bono may be available to a greater number of people, based on more flexible criteria in terms of both income and type of case.
4. Legal aid plans will refer eligible clients to a roster of lawyers specializing in the relevant area of law for that client, to a specialty clinic or to staff lawyers with practices limited to the relevant area of law. Pro bono organizations may refer clients to a lawyer or student without previous experience in the area of law at issue, sometimes offering training to that lawyer or student.
5. Although not without challenges, legal aid plans will attempt to provide coverage somewhat equitably throughout a province or territory. Pro bono organizations and large law firms may offer help depending on a readily available supply of lawyers, or resources to set up administrative support.
6. Legal aid plans determine public interest priorities in keeping with the public funding they receive and constitutionally mandated coverage areas. Pro bono organizations may determine public interest priorities based on input from the profession and/or those who fund or administer the necessary infrastructure for pro bono as to the services the profession can most efficiently offer.

F. Continuum of Service

Given the current economic and political climate, it is unrealistic to anticipate significant improvements to legal aid funding in the near future. Instead, the focus for public funding to increase access to justice seems likely to continue to be on providing services that can assist many people, like web-based public legal information and self-help materials, and away from providing actual legal representation to those most desperate for assistance. Even essential legal needs will likely continue to be addressed inconsistently across the country. In the event that there was a renewed commitment to do more to adequately fund legal aid in Canada, certainly not all important legal services would likely be included and there would still be a gap between who is financially eligible for legal aid and who can afford to pay for their own lawyers for essential legal services.

⁵⁵ *Supra*, note 23.

To have greater clarity and certainty as to who is responsible for providing essential legal services, an initial important question is what services do we, as a society, consider “essential.” If some services are considered essential, then it can be argued that they must be fairly awarded to all those who need them and qualify financially, and only governments can ensure that is what consistently happens.

The CBA’s 1993 *Charter of Public Legal Services* dealt with the essential legal services as follows:

- (a) **family law**, including child welfare matters where the state is involved as a party, custody and access, independent representation for children who have an interest apparently separate from the parents or guardian, proceedings to prevent or relieve domestic violence, maintenance proceedings, divorce and nullity proceedings, division of matrimonial property (subject to financial eligibility), paternity and adoption;
- (b) **criminal law**, including all indictable offences, all summary conviction offences in which conviction is likely to lead to imprisonment or loss of means of earning a livelihood and other summary conviction cases where special circumstances exist which require counsel to ensure the fairness of the adversarial process; and all Crown appeals therefrom and conviction and sentence appeals by an Accused where there is apparent merit or a miscarriage of justice;
- (c) **immigration matters**;
- (d) **administrative law matters** which present real jeopardy to liberty, livelihood, health, safety, sustenance or shelter, including Workers' Compensation, Welfare, Unemployment, Insurance, housing, pension, education, and human rights cases;
- (e) **other civil matters** presenting real jeopardy to liberty, livelihood, health, safety, sustenance or shelter, such as foreclosures, residential tenant evictions, uninsured motorists, Charter proceedings and other proceedings where a person is unable to retain counsel and the matter is not capable of being fairly resolved by other means.

It is also essential that public legal education and advice is available for all members of society in order for them to know, respect and exercise their legal responsibilities and rights, to prevent legal problems, and to help themselves to resolve legal problems without or with limited need for lawyers and courts.⁵⁶

The issue of defining essential legal services is currently again being considered through the CBA’s *Envisioning Equal Justice* project, under the heading of National Standards for Legal Aid. Reference to the results of research on that aspect of the project will inform this discussion in the coming months.

As noted above, there is a certain lack of predictability as to what the public can expect of a pro bono organization, as it is often supply driven and the services provided vary significantly. Rather than looking to pro bono to replace all that should be provided through public funding, given the interests at stake and the vulnerability of the people who need help, narrowing the services and population to be served through pro bono would make the profession’s contribution more targeted and achievable. For services that fall outside of the ambit of what and who can be publicly funded, the profession has shown that it can play an important role in filling the access to justice gap.

We see essential legal matters as falling on a continuum. Governments must be responsible for essential legal needs of the most impoverished, vulnerable and marginalized members of society.

⁵⁶ Resolution 93-11-A.

Essential legal needs for the most well off, on the other hand, can be addressed through the private market for legal services. Pro bono services can fill an important gap between the two extremes.

We suggest that for the justice system to operate as a coherent whole system, a structured and principled approach that clearly defines what are “essential” legal services is required. Providing those services to the poorest among us must be for governments to accomplish. Lawyers’ fees are within the reach of those on the other end of the economic spectrum for their essential legal needs. Helping the working poor and middle class in the middle range with access to essential legal services, perhaps in new and innovative ways, would provide reasonable parameters for the profession's contribution.

Innovations include changes to law society restrictions to allow for limited scope representation or “unbundled” services. Changing the mindset where the only options are “full service” or “no service” creates new possibilities for collaboration, including public-private programming that is adaptable to urban, suburban, semi-rural and rural areas.⁵⁷ “It provides a potential referral outlet for legal aid overflow in the form of pro bono lawyers willing to carry on where legal aid lawyers have reached their mandatory limits. A legal aid lawyer, a pro bono lawyer and their common client could also work together to craft an efficient and neatly spliced series of unbundled tasks that takes advantage of their various proficiencies and capacities.”⁵⁸

G. Improving the Partnership

In *Moving Forward on Legal Aid*, Melina Buckley identifies two important trends in the area of pro bono work. These are:

- Greater integration between legal aid providers and pro bono schemes and individual law firms and the formation of multi-tiered ongoing partnerships between these entities; and
- A move toward quantifying the amount of pro bono work carried out including more American states making it mandatory for attorneys to report on pro bono activities.⁵⁹

Jamie Maclaren asks:

How then are pro bono organizations supposed to breathe life into the fundamental principle that pro bono services should complement rather than substitute for a properly funded legal aid system? The answer is likely implied by the principle itself: greater and closer integration of legal aid and pro bono. In most provinces, pro bono organizations operate in relative isolation from their legal aid counterparts. The pro bono organizations are much newer to the legal service field, and the potential fit of pro bono services within the greater and more established legal aid system is rarely obvious. Pro bono services are too often viewed as lesser substitutes for legal aid services, and hardly ever as vehicles for added value.

Thankfully, new opportunities for greater integration between pro bono and legal aid are beginning to emerge.⁶⁰

⁵⁷ Maclaren, *supra*, note 36.

⁵⁸ *Ibid.*

⁵⁹ Buckley, *supra*, note 12 at 111.

⁶⁰ Maclaren, *supra*, note 36.

Maclaren suggests that law schools and Bar training courses could assist by educating students about areas of law that are relevant to both legal aid and pro bono practice. Such instruction would increase the capacity for young lawyers to provide pro bono services in support of legal aid, and lend credibility to the notion that pro bono service is a professional responsibility. It would provide low income clients with a broader, more flexible range of services. And, it would “benefit the profession by increasing the overall cost-efficiency of serving clients and by providing solid moral ground for the argument that governments should increase legal aid funding. The profession would then speak less from a position of self-interest, and more from a position of knowledge and investment.”⁶¹

If an objective is to encourage a clearer division of responsibility, or a new partnership, between governments and the profession to address prioritized legal needs, the profession’s contribution needs to be more capable of measurement and more predictable – less ad hoc and imprecisely defined – than at present. To add certainty about the profession’s contribution, lawyers might routinely report their pro bono hours, with what constitutes pro bono being precisely defined. Voluntary reporting to lawyers’ regulatory bodies is already common. But the information it yields may be less reliable and helpful than it might be, given different definitions of pro bono, subjective interpretations of what constitutes pro bono versus other charitable offerings, and inaccurate record keeping of time spent on pro bono files. On the other hand, a new partnership would also require that government contributions be subject to satisfactory national standards and stable designated funding.

In the US, some attention has been given to mandatory reporting of pro bono work. Seven states now have mandatory reporting, and 16 others have voluntary reporting. The ABA website provides a comprehensive list of arguments for and against mandatory reporting, and contrasts it with voluntary reporting.⁶²

Even members of the profession who argue that providing pro bono is all lawyers’ professional duty seem to generally prefer voluntary pro bono reporting to mandatory reporting. One major point of resistance is that mandatory reporting will eventually lead to mandatory pro bono requirements. However, David Scott has proposed consideration of mandatory pro bono service as a move that would simultaneously help law firms’ bottom lines, and improve access to justice.⁶³ Richard Devlin has criticized the profession for not embracing its professional duty to provide pro bono services in a non-optional way. He suggests that in response to alarming cuts to legal aid, the legal profession should adopt a mandatory pro bono system, seeing pro bono not as a charitable donation, but as a professional obligation.⁶⁴ The profession, in partnership with government could treat legal aid as a social investment rather than a welfare benefit, given that it enables citizens to be less vulnerable and dependent, and more productive. This partnership would have the profession offering mandatory pro bono in return for the government’s re-investment in legal aid.⁶⁵

Lorne Sossin also says that the fact that “lawyers’ engagement in pro bono activities is entirely discretionary, and any activity in which a lawyer seeks to engage for no compensation is treated similarly, is inconsistent both with a needs approach and a public duty approach.” If the public interest is in a case, linking it to core principles of rule of law, access to justice, or social justice, then any scrutiny regarding income thresholds is misplaced. Public interest should be recognized through

⁶¹ *Ibid.*

⁶² http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html

⁶³ Scott, *supra*, note 39.

⁶⁴ Richard Devlin, “Breach of Contract?: The New Economy and the Ethical Obligations of the Legal Profession” (2002) 25 *Dalhousie Law Journal* 335 at 375.

⁶⁵ *Ibid.*

the regulatory process: public reporting requirements; rules of professional conduct; or other obligations.⁶⁶ Regulatory involvement could lead to a more refined sense of the contribution pro bono can make to advancing the public interest, and act as a catalyst for further pro bono efforts.

H. Conclusion

The extent of the public's unmet legal needs is now well recognized in Canada. Because public legal services are not constitutionally required of governments (except in certain limited types of cases), and the public has not generally demanded that access to justice be an integral part of Canada's social safety net, governments have been able to cut legal aid funding without significant political risk. The question as to how and who will fill the gap left by those cuts could be called the "elephant in the room", and something that governments and justice system participants are struggling to figure out. Much attention is being given to providing services useable for the general public, such as how to prevent legal disputes or foster early dispute resolution, information to the public about their legal options and rights to allow for more informed decision making, and "self help" materials for those who decide to pursue their cases through the court system. A triage approach to quickly identify the appropriate level of service in each case, and a team mentality to delivering legal services that brings in both lawyers and non-lawyers, are other important ideas.

The contribution of the legal profession is certainly part of any new comprehensive solutions, but cannot be the only answer. There needs to be more precision in terms of expectations, and reasonable limits to what is expected. An enhanced, more defined commitment by the profession must be accompanied by a corresponding firm commitment from public funders. Together, these contributions could create a more optimistic future for access to justice.

⁶⁶ Sossin, *supra*, note 8.

Discussion Questions

To assist the CBA Access to Justice Committee in developing recommendations in this area, we are seeking your feedback on the following questions:

- 1. Is it appropriate to limit the definition of pro bono work to ensure a direct link to providing legal services and representation to the low and lower middle income populations?**
- 2. Are you in favour of more precise ways of measuring the profession's contribution to ensure that contribution can be a predictable part of a comprehensive solution? Why or why not?**
- 3. What are the truly essential legal services that should be provided through public funding for the lowest economic groups?**
- 4. What role should the profession play in assisting other low to middle economic groups?**
- 5. In what ways will proposing national standards for legal aid services and financial eligibility levels assist to resolve the "tension at the border"?**
- 6. What are the essential elements of a partnership between governments and the legal profession to achieve a sensible distribution of responsibility for providing necessary legal services?**
- 7. Do you support the goal of ensuring that the widest possible range of legal needs are addressed, including legal representation when required for a just outcome, and that public resources should be dedicated first to the most vulnerable populations?**

Please send your written responses by January 31, 2013 to the attention of Access to Justice Project Director, Gaylene Schellenberg, at CBA National Office (gaylenes@cba.org; 1 800 267 8860 ext 139).