



**Summary of Responses to “*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
(April 2013)**

Why the “Tension at the Border” Paper?

In the discussion paper “*Tension at the Border*”: Pro Bono and Legal Aid, prepared by the CBA’s Standing Committee on Access to Justice, the question is asked “why lawyers do pro bono work?” The answer that is often given is that “doing pro bono work is part of the professional duty or responsibility owed by lawyers to the community at large”. However, isn’t this really the “second question”; the first being “what do we mean by pro bono work? How do we define that work? Is it the overflow hours a lawyer puts in when the money provided by legal aid stops before the case is resolved? Is it simply free legal services offered to a client, or does it include “low bono” – work at reduced rates? Does it include volunteer work on behalf of an individual or community to achieve systemic improvements in the law? What about sitting on the board of a legal aid provider or pro bono organization: does that count?

As funding for legal aid programs is reduced in some jurisdictions, there is a growing need for pro bono services, but lawyers can’t simply fill the gap left by government’s withdrawal from funding legal aid, nor arguably should they. How can lawyers help with this problem, without letting governments off the hook from doing their part too?

The CBA’s Envisioning Equal Justice initiative is trying to answer that question and many more. “*Tension at the Border*”, which was presented at the recent Pro Bono Conference in Montreal, is the first of five discussion papers addressing issues the Committee has identified as needing more discussion and debate, such as the relationship between pro bono and legal aid. The consultation paper was forwarded to a variety of stakeholders and their responses to 7 questions, posed for discussion purposes were sought.

Who responded to the paper?

In response to this consultation paper, the Committee received submissions from members of the judiciary (provincial, superior and appellate courts), a law society, a local bar association, a pro bono organization, a Faculty of Law, lawyers (sole practitioner/consultant, associate, very senior counsel), a law commission, and two Justice Departments. Those who made submissions came from Quebec, Ontario, Saskatchewan, Alberta and British Columbia.

What did they say?

The following is a summary of these submissions, grouped by the discussion questions which were set out at the end of the consultation paper.

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?

Most respondents said “yes”, with some adding qualifiers:

- The CBA should adopt a broad definition of pro bono work that is very purposive and flexible.
- While it may be helpful to continue conversations that would clarify what constitutes pro bono services and which services provide the greatest value, creating a strict definition could be limiting and not helpful. One of the benefits of pro bono work done outside legal aid is that it is adaptable and flexible where by necessity legal aid programs must have defined parameters of eligibility.
- All of the activities falling within the CBA’s 1998 definition are very worthwhile.
- Is the purpose of limiting this definition to encourage the direct provision of legal services more than provision of the other types of services included in the broader definition?
- This definition should also include *pro bono* representation in test cases (to challenge interpretations of the law) in a range of areas, which might be undertaken regardless of economic status, when a client could not otherwise bring the case for financial reasons.
- The work done by university legal clinics is not sufficiently reflected in this definition, however. There both the work of the students and the supervision given by pro bono lawyers constitute a pro bono contribution.
- The definition should include not for profit entities which might have a large overall budget but would have to divert their resources from the charitable causes they undertake to pay for legal fees. That should cover most public interest litigation done for no fee.
- Yes, the legal profession has the most direct impact on supporting access to justice when devoting time to the actual practice of law and services to low or lower income people.
- It makes sense for low to middle income earners to be covered by pro bono lawyers whose fee structure is at the root of the problem.
- While we support low bono work, we do not support including such work in the definition of pro bono work, because it is not pro bono work.
- While lawyers who do Legal Aid work are providing an essential service in providing *access to justice* for low income people, they are not doing it pro bono, which has come to mean “free” in the context of the delivery of legal services.

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?

Most respondents said yes, though seemed less favourable if reporting became mandatory. Some also commented specifically on mandatory pro bono service, most of whom, but not all, being against the idea.

- It depends on how, for what purpose and for whom. If this was to be a tool for Law Society measurement of member participation, then perhaps this is okay as long as providing such services is not mandatory and the monitoring is for recognition purposes only.
- Reporting is self-congratulatory and does not advance access to justice.
- There is a concern by speaking to minimums; lawyers would revert to minimal required hours and effort. It may be preferable to continue with efforts to encourage voluntary pro bono work.... It will, however, be important to not discount this option entirely. As the profession and the justice system evolve with time it may become a preferred option.
- I favour a pro bono system and, subject to studying its practicality and implementation, a minimum number of hours as a licensing requirement.
- Yes, difficult though it may be. Measuring the profession's contribution helps to show how much of legal representation is based on "the kindness of strangers" (i.e. Not a right but based on charity.)
- The Access to Justice dialogue needs as much data as possible to arrive at reasoned solutions and the legal profession is very adept at documenting information.
- We are not in favour of measuring the profession's contribution. It is first and foremost the state's responsibility to ensure access to justice. Canada is a signatory to The International Covenant on Civil and Political Rights, article 14 of which assures the right of all to access to justice and in certain cases, legal aid.
- We need some metrics – perhaps not too many – so we are capable of demonstrating what we are doing and showing over time (if such is the case) that we are doing it better and would inform a more reasoned debate about what is required to fund a properly running legal system.
- The experience in BC is that collecting objective information about how much pro bono is done yields impressive and helpful data and indicates a significant voluntary contribution of pro bono legal services by a majority of the bar membership in this province. We commend the model used by the Law Society of BC as an effective measurement tool. During the data collection process, there should be no suggestion that undertaking such work is required, affects practice standards or that an individual answer would ever become public.
- Quebec's Code does not deal with *pro bono* at all, contrary to what may be implied by the paper. Perhaps the various law societies across the country should be invited to take a position as regards pro bono obligations

- I would be in favour of mandatory reporting...if the proper definitions were adopted; the results would be surprising in terms of the limited current commitment to genuine pro bono activities on the part of the profession.
- The Law Society of Alberta rejected a mandatory regulatory approach to pro bono legal services. Additionally, the Law Society articulated the position that pro bono legal services are meant to complement and not replace a properly funded legal aid system.
- Mandatory pro bono carries a real risk of destroying the personal drive to do pro bono and the very essence of “for the public good”; instead rendering it “because we are mandated to”.
- Mandatory pro bono service is not a good idea and would lead to significant difficulties in terms of the definition.
- Not all legal jobs lend themselves easily to providing pro bono services. Could Canada Revenue/Finance allow lawyers a charitable tax deduction for some element of pro bono work? This would allow for some measurement of work done and incentive for pro bono work to be taken on with minimal impact on federal revenue.
- While mandatory pro bono is no doubt an initiative which would extend the resource, it does nothing to address the problem that pro bono service depends for its efficacy on the service provider and the client intersecting effectively. Without pro bono service agencies, connecting the resource with the need is far from easy to achieve.
- Practical impediments to pro bono need also be addressed (costs awards, disbursement coverage, etc.)

3. What are the truly essential legal services that should be provided through public funding for the lowest economic groups?

The Committee received a varied range of responses to this question, from “there is no point to answering this question”, to attempts to list essential services, to suggestions to move away from categories:

- I favour this approach of defining the essential services legal aid is responsible for.
- The access to justice committee should spend time on broad access to justice issues, not spend energy prioritizing types of access to justice that are needed over those that are not.
- For me, this question is both impossible and impractical to answer. The categories in the report described as essential, if such a categorization is possible, are far too broad and overreaching. I think government would balk if this is a test for legal aid coverage.
- Aside from those legal services that are constitutionally mandated, the determination of what essential legal services should be funded by government is one that needs to be made by the public....the availability of funds and the corresponding ability to provide government funds for legal services will be

impacted by other priorities such as healthcare and education. Further education and advocacy about the importance of funding legal services for the lowest economic groups will be critical so that citizens and their elected representatives can make informed choices.

- We question whether truly essential legal services are capable of subject matter categorization or identification in a way which provides clarity, certainty and is neither under-inclusive nor susceptible to abuse. The best definition is probably the old Legal Services Act definition of what “a reasonable person in similar circumstances would pay” to obtain a legal remedy.
- It might also be possible to answer by thinking about other dimensions, such as how significant is the interest at stake for the individual? Is it possible for the person to represent themselves or obtain (as referred to in the last question) a “just result” without a lawyer?
- If subject matter categorization is necessary in taking incremental steps, we generally support the essential services set out in the CBA’s 1993 Charter of Public Legal Services, so long as they are approached with equality as a governing principle (e.g. Emphasis on ensuring that women and children do not get left behind in family law cases.)
- I think the CBA has done a good job of identifying the major essential services required. I echo the concern that depending on where you live in Canada, your ability to access essential legal services is very different.
- It would be useful to compare the services provided and the income cut-offs in Canada with those in other democratic and economically prosperous nations who do much better than does Canada in the area of access to justice. I suspect that access to legal aid and legal expense insurance is one of the reasons that 15 countries have better access to civil justice than does Canada.
- Essential legal services should be defined not by type of service but a human rights approach. Once an interest protected by civil, political, social economic or cultural rights is at risk, the person should have the ability to enforce their rights and have access to justice.
- Clearly, criminal legal aid and family legal aid are priorities. After this, some element of poverty law related to tenancies, access to benefit programs like OAS, etc. and refugee and immigration issues.
- My first cut at an answer:
 - Representation for: those charged with criminal offences (perhaps with some differentiation); those responding to Crown child custody applications, including interim and wardship; victims of domestic violence; those in family cases that will have a significant impact on future life: child custody/access, support, and others as relevant in the case, including for settlement, mediation; at social benefit tribunals and other similar administrative tribunals;

- Legal advice, assistance with understanding information, completing forms, mediation, preparation of arguments for civil cases that could have a significant impact on the life of either plaintiff, defendant or both;
 - Immigration/refugee cases; and
 - Discrimination cases, although here perhaps the interest affected might also be relevant.
- In Alberta, the survey data disclosed that the tipping point for those individuals experiencing the legal system differently (than those higher income levels), is \$50,000. Those making \$50,000 or less were more likely to have a variety of legal problems (except purchasing a house or making a will), less likely to have had a lawyer, more likely to think that the outcome to their problem was unfair and were likely to think that a lawyer could have helped them. Family law was one of the most likely areas of law encountered. It is interesting to note that there is a gap between this level of income and the eligibility requirements for Legal Aid.

4. What role should the profession play in assisting other low to middle economic groups?

Respondents tended to support some involvement by way of pro bono and/or low bono combined with innovative ways of delivering legal services, provided that expectations were realistic and the result was not poor quality legal help. Some were concerned, however, about the resulting move to a charitable model and away from the notion that accessible justice is a right.

- It is important to articulate expectations on the profession in this regard and to set realistic and reasonable limits.
- The profession already has an important role in providing services to the other low and middle income groups and there will be more opportunities for the profession to improve access to justice for these groups. This will need to come from better working relationships with service providers to minimize both overlaps and gaps in services. The profession's role should always be viewed from a social justice perspective. Firstly, a person's level of marginalization and ability to access legal services is not solely dependent on their income level. Secondly, test cases that have the promise to improve conditions for many disadvantaged people may be necessary to conduct pro bono because the individual, while not poor, cannot afford to carry the case. Both of these are good reasons for doing pro bono legal work.
- I also agree with those who believe that *pro bono* services are not really a sustainable way to provide legal services in the fullest sense. Whether viewed as an expression of lawyers' duty to engage in public service, a way to promote themselves or in some other way, *pro bono* services do treat the provision of services as a charity rather than a right ("*noblesse oblige*"). The question is: why should vulnerable populations receive services as a charity and not as a right?
- Lawyers should be able to assist the client in obtaining other help to deal with the many facets of a complex problem and ideally maintain contact with other

professionals, where possible to do so; there may be barriers to this, such as professional rules, or simply practical difficulties.

- Can we identify what types of cases are more suitable for legal aid and what type for pro bono? This would also help to focus training, resources etc. for pro bono more effectively.
- The access to justice committee should promote comprehensive legal aid.
- We support initiatives which will assist in making legal services more affordable to people who can afford some level of legal fees. At the same time, we must be mindful that these tools are not access to justice solutions for the very large portion of our society which cannot afford the first dollar of legal services. This may include unbundling. In addition, unbundling generally and expanding the jurisdiction of paralegals and articulated students to provide legal services supervised by a lawyer on less complex matters are part of the solution if properly supervised and regulated.
- Conversations should also continue about finding new alternatives to make legal service affordable such as the discussions already occurring with respect to unbundled services and insurance.
- Another initiative that may be of interest is the work of the Law Society of Alberta on the delivery of legal services in Alberta. In making recommendations on the delivery of legal services by non-lawyers, the Law Society pursued an evidenced based approach through several research methodologies including a general consumer survey, survey of the legal profession and social science based research methods. http://www.lawsociety.ab.ca/about_us/initiatives/initiatives_a2j.aspx
- I support the use of pro bono programs to try to reach out to other groups requiring legal assistance, both individuals and charitable organizations and including support to help resolve disputes through mediation, arbitration and collaborative processes.
- My greatest worry is regarding ineffective or harmful pro bono work by lawyers (or others) who do not have the necessary capacity in the area. The Quebec system with a bank of lawyers with specialization in certain areas is a good model to address this.
- Reluctantly, I have come around to unbundled legal services or limited retainers that could apply in many cases (although perhaps not all). However, I believe more work needs to be done around ensuring lawyers understand the challenges in limited retainers, that the “institutional” matters be clearly defined and that lawyers are sufficiently familiar with the area of the law to appreciate how their limited contribution fits into the whole picture.
- Unbundling or limited service representation (LSR) must be given more attention as it goes hand in hand with the burgeoning phenomenon of self-representation. At least in the court or tribunal context, LSR is particularly compatible with legally aided services. LSR controls the cost of the service from an economic standpoint and is thus a practice model which, as experience in certain states in the United States would show, can become commercially viable and attractive to service providers. For this reason, in an expanding LSR world, legally aided service is likely to be a more attractive option for government.

- The business of law has in many respects dwarfed the profession and the profession can assist low and middle income groups in many ways - by ensuring its services are affordable and reasonably priced, by reducing serial adversarialism, by (re)considering when lawyers are adding value, by revisiting the monopoly on all legal services ...
- The judiciary could do a lot more in Canada to encourage pro bono, as they do in the U.S.

5. In what ways will proposing national standards for legal aid services and financial eligibility levels assist to resolve the “tension at the border”?

Not all respondents answered this question and responses were mixed:

- While imposing minimum national standards for legal aid would promote consistency across Canada and put pressure on governments to achieve the standard, ultimately the decision what is publically funded in each jurisdiction must be made by the citizens of that jurisdiction.
- Minimum national standards set unilaterally by the federal government without meaningful federal monetary contribution to the justice system and legal aid in particular will be ignored, or worse, be an irritant, to provincial governments. However, the chances of achieving the necessary multi-lateral agreements on such standards are such that it must be considered whether seeking such standards is a good use of energy and resources of the CBA.
- National standards risk the adoption of a lowest common denominator approach. A human rights approach seems better to us, one dealing with real issues and the degree of marginalization and vulnerability than a financial eligibility standard.
- It is difficult to set national standards on eligibility given the different cost of living realities across jurisdictions and within jurisdictions – any standards need to be at a high level in terms of the principles that such eligibility levels should seek to address.
- Coverage and per capita spending standards have some utility, especially if the comparisons are between provinces with similar population and/or GDP. Our experience in lobbying government is that politicians are interested in such comparisons.
- Setting such standards also pre-supposes how the services should be provided. Innovative solutions that provide increased access to justice may not fit within the traditional definitions that such minimum standard would likely incorporate. For example, in Alberta, Family Law Information Offices perform an important role in providing Albertans with information and assistance related to family law matters but this program is not part of the “legal aid” program and is not income tested.

- Achieving this consistency of service would greatly clarify where and what pro bono services remain necessary.
- It won't unless there is "buy-in" on the part of funders. It would help the profession ensure however that it is not providing a substitute for a properly funded legal aid scheme.
- We invite the Committee to endorse an approach where pro bono organizations stay away from the subject area jurisdictions that the legal aid plan covers as a reflection of the ideals of public and private co-operation espoused in the consultation document.
- The access to justice committee should promote comprehensive legal aid.
- A broad outline of the sort of services legal aid should provide is more helpful than standards as each jurisdiction has developed their own service to meet their perceived needs.
- I have to say I'm not sure. Regardless of the "standard", there will be a gap between what legal aid can do and what needs to be done. Perhaps national standards will result in a single "border" for all provinces and territories rather than "resolve" it. At the same time, it is not realistic to think that all provinces can or will give the same level of legal aid services.
- For my part, I would say the elephant in the room is self-representation. Limited service representation (LSR) is at least one way of controlling the fallout from the phenomenon. Presiding officers need to be in a position to direct the self-represented litigant to engage counsel at critical points in the process and the availability of legal aid may become the instrument by which the court can reasonably do so, if only on a LSR basis.
- Is the dividing line between pro bono and legal aid services the essential character of the services (which is a very broad category), or, more properly, serving the low income on the one hand and the poorest of the poor on the other?

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?

Responses to this question were varied. Among the more common themes were: the importance of evidence-based and/or principled approaches, the need for consensus on key points, collaborative and complementary efforts, and opportunities presented by innovation in the provision of legal services, and government's ongoing responsibility to support legal aid for the most vulnerable:

- Governments and the legal profession need to continue having an open dialogue about these issues as both play fundamental roles in the justice system. There needs

to be a solid understanding of existing services and resources and further discussions on how the justice system should evolve. These conversations also need to engage other stakeholders (such as non-profit organizations who provide service to low income people) and the larger public.

- The legal profession and government must collaborate on defining the kinds of cases that require legal assistance, the kinds of cases that can be addressed with limited retainers, the way in which people who are not lawyers but who have legal training (students, paralegals) can provide specified services, either alone or under the supervision of a lawyer, as appropriate, how community workers can be trained and provided with appropriate resources and help in assisting people, and the extent to which *pro bono* services can be offered without substituting for understanding how all these different facets of providing services work together.
- Above all, Government, legal aid and *pro bono* need to recognize the need for a collaborative and complementary process for the best and most legal services to be available.
- While the more vulnerable clientèle should not be left behind, justice is a right for every citizen and governmental responsibility extends to all.
- A human rights framework provides a principled approach that will never be perfected, but can guide decision-making and correct power imbalances as governments fulfill their obligations. The Special Rapporteur on the Independence of Judges and Lawyers has some interesting commentary on access to justice and decision-making fueled by available research and is a good starting place.
- At its base, this partnership must be based on the recognition of access to justice as a fundamental right. It is unacceptable that there are gaps in service.
- *Pro Bono* should not replace Legal Aid but should complement it not only to offer more available services but also to foster a less "corporate" and more "social" view of the legal profession.
- Look at the differences between what is expected of the state in terms of legal aid and what services are needed by the public, on top of this, to facilitate access to justice and respect for the administration of justice, in which area private counsel can play a role. Clarity of role is important, so is some agreement on basic level of provision of service. Where does responsibility lie for holding each area to account for their role?
- The first element is developing some consensus on the resources available to respond to the need for legal services. This inventory of resources needs to look at legal aid funding, *pro bono* work and innovative ways to fund legal services. Within that sort of comprehensive framework of resources, some decisions could be made about the priorities for each type of service. I suggest, though, that the profession must also turn its attention urgently to developing innovative ways to offer legal services to the public in a more cost-effective manner.
- An evidence-based approach is a good starting point for developing common ground on which to proceed. Using an evidence-based approach, one could consider using the profession's *pro bono* contribution as a two-way incentive. For example, striking

a deal with the government to increase legal aid spending by a mutually agreed upon value assigned to pro bono work.

- The profession cannot be expected to solve this problem.
- Improve legal aid coverage and urge government to assume the overhead cost of pro bono delivery systems, viz. staffing, etc.
- One might also argue for a different model of providing legal services altogether, one more akin to the health care model. But this is a huge question not really part of this particular paper and would also require a different partnership between the legal profession and the government.
- Law schools and professional legal training courses are good places to instil the ethic and culture of pro bono. Further opportunities exist here that may involve partnership with government or demonstrate to government the professions' willingness to find new solutions to these old problems.
- Other areas of potential partnership may be on identifying areas that are amenable to pro bono and promoting them to the profession – if government sees the profession “covering” certain areas, they might be more inspired to provide matching resources to cover the areas that are not amenable to pro bono.
- Asking governments to match or top up the coverage provided by a pro bono referring agency for disbursements is a low cost way for governments to provide resources to access to justice.
- Opportunities for both clients and lawyers to participate in low bono work could be more structured through programs run as separate from, but adjunct to, the Legal Aid or Pro Bono systems.
- Governments are some of the largest employers of lawyers in Canada. They should be looking for ways that lawyers paid by tax payers can be part of the solution to access to justice issues. The Department of Justice Vancouver pilot project is an excellent start and model for partnerships in this regard.

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?

Many said “Yes!” Others said “Yes, but...”

- Yes, absolutely.
- Yes, subject to a concern that the expenditure of the resource must be proportionate in some way to the need and also that there are areas of priority for the addressing legal needs.
- Yes, public resources should be dedicated first to the most vulnerable populations in the context of legal aid. Addressing the widest possible range of legal needs will require a menu of dispute resolution and micro-justice options that correlate to people's actual needs.

- In terms of coverage we support a test which is based on the reasonable person standard and not limited by subject matter. Within that, the guiding principles must be fairness and equality.
- Yes, but the challenge is in defining the “vulnerable” population. Financial eligibility standards are way too low. On top of this, the degree of marginalization and vulnerability of a person does not depend solely on their income level.
- It’s hard to say no to this statement. But it isn’t only “the most vulnerable populations” who are suffering from the “legal aid crisis” or from the high cost of legal services. This goal does nothing for the low and even middle-middle class who cannot afford legal representation in many cases and are a long way from being eligible for legal aid.
- While appealing, this statement is an over-simplistic response to a tremendously complicated question. Access to legal services needs to be provided where it has the most potential to help achieve a positive outcome for the person or group concerned. Decisions about providing legal resources cannot ignore cost-benefit calculations respecting outcomes and sometimes legal representation can be overly focused on process when we need to be focused on outcomes.
- Financial means based tests must be part of a legal aid regime – it is not imaginable that there are enough resources to fairly design a regime otherwise.