

The Public Interest, Professionalism, and Pro Bono Publico

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There is a clear public interest benefit for lawyers to ensure access to the rule of law, especially on the part of the vulnerable. This article seeks to show that the seemingly simple relationship between the legal profession and the public interest is in fact more complicated than it looks. Pro bono may be viewed from two perspectives—that of the lawyer and that of the client. From the perspective of the lawyer, the important question is whether there is ethical motivation to engage in pro bono. If, however, the perspective of the client is paramount, then meeting the client's needs is the point of pro bono, irrespective of the lawyer's motivation. Our current approach to pro bono lacks coherence because we embrace both perspectives but seem unable to provide a satisfying account of the existing pro bono policies and programs under either view. Despite this complexity (or, perhaps, because of it), the public interest approach allows both lawyer and client perspectives to inform an understanding of pro bono publico. And, understood in a public interest paradigm, pro bono serves a vital and necessary role in the legal profession and the legal system.

L'intérêt public tire manifestement avantage du fait que les avocats assurent l'accès à l'état de droit, surtout en faveur des populations les plus vulnérables. Cet article cherche à montrer que la relation, apparemment simple, entre la profession juridique et l'intérêt public est en fait plus compliquée qu'il ne semble. Le *probono* peut être perçu de deux points de vue : celui de l'avocat et celui du client. Du point de vue de l'avocat, il s'agit de savoir s'il existe une motivation éthique à s'engager dans le *probono*. Cependant, si le point de vue du client est primordial, répondre aux besoins du client constitue le but du *probono*, quelle que soit la motivation de l'avocat. Notre approche actuelle du *probono* manque de

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cohérence, parce que nous adoptons les deux points de vue, mais nous semblons incapables d'offrir une justification satisfaisante des politiques et programmes *pro bono* existants, à partir de l'un ou l'autre de ces points de vue. En dépit de cette complexité (ou peut-être en raison de celle-ci), l'approche de l'intérêt public permet aux deux points de vue - celui de l'avocat et celui du client - d'influencer la compréhension du *pro bono publico*. Et si on le comprend dans le cadre d'un paradigme d'intérêt public, le *pro bono* remplit un rôle vital et nécessaire au sein de la profession juridique et du système juridique.

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THE RELATIONSHIP BETWEEN *pro bono publico*¹ and the public interest is at once simple and complex. It is simple in the sense that lawyers are the key guardians of the rule of law, which in a democracy is a cornerstone of the public interest. There is a clear public interest benefit for lawyers to ensure access to the rule of law, especially on the part of the vulnerable. It is complex because lawyers seek not only to ensure access to the rule of law, but also to serve their own clients and to run a business. For example, it is ethically permissible to turn away potential clients if they cannot pay their legal fees.² Thus, lawyers at once uphold the public interest and pursue their own interests (often through advancing the interests of their clients). These objectives, of course, are not always in alignment.

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1. There is no definition of "pro bono" with which everyone would agree. At its broadest, "pro bono publico" may be defined as legal work done without compensation for the public good. Many would define the term more narrowly, as non-compensated legal representation on behalf of the poor.
 2. The "cab rank rule" suggests that lawyers should simply take the next client in the queue, but it allows for an exception where the next client cannot afford to pay. See Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1998), c. 4 at 4-4. See also Earl A. Cherniak & Shelby Z.C. Austin, "Standing for Justice: The Lawyer's Role in Client Selection Process" (Paper prepared for the Seventh Colloquium of the Chief Justice of Ontario Advisory Committee on Professionalism, Law Society of Upper Canada, 20 October 2006) [unpublished], online: <http://www.lsuc.on.ca/media/seventh_colloquium_cherniak.pdf>.

In this article, I suggest that the current approach to the public interest dimension of pro bono is not coherent. Pro bono may be viewed from two perspectives—that of the lawyer and that of the client. From the perspective of the lawyer, the important question is whether there is ethical motivation to engage in pro bono. Some lawyers may seek out pro bono opportunities because they see this work as a public duty. Other lawyers, however, may work for partial or no compensation for self-interested reasons: to enhance their reputation, to market their services, as a loss leader for an important client, to impress someone more senior, or for other idiosyncratic motives. If the point of pro bono is to reflect the best public service traditions of the legal profession, some of these motivations seem antithetical to that goal. If, however, the perspective of the client is paramount, then meeting the client's needs is the point of pro bono, irrespective of the lawyer's motivation.

Would well-served litigants be concerned with the reason why their lawyers took their case pro bono? Conversely, should pro bono lawyers care about their clients' subjective motivations, which will not always advance the public interest? Pro bono services preventing an eviction or deportation may be more easily amenable to public interest arguments. However, advising a client launching dubious litigation against a neighbour or trying to escape a debt pose greater challenges to the public interest rationale for pro bono. Our current approach to pro bono lacks coherence because we embrace both perspectives but seem unable to provide a satisfying account of the existing pro bono policies and programs under either view.

Through an analysis of pro bono activities, this article seeks to show that the seemingly simple relationship between the legal profession and the public interest is in fact more complicated than it looks. Both the motivation of lawyer and the motivation of client matter, but neither on its own is able to provide a complete justification for pro bono in the public interest. Despite this complexity (or, perhaps, because of it), the public interest approach allows both lawyer and client perspectives to inform an understanding of pro bono publico. And, understood in a public interest paradigm, pro bono serves a vital and necessary role in the legal profession and the legal system.

The analysis below is organized into three parts. First, I examine the public interest justifications of pro bono activities. Second, I consider the relationship between pro bono and professionalism. Third, in light of the first two questions, I explore the distinctive setting of pro bono activities among public lawyers.

I. PRO BONO AND THE PUBLIC INTEREST

Typically, a discussion of pro bono activities begins with the idea (and the ideal) that pro bono activities reflect a public good—hence the full term, pro bono publico.³ It is unclear, however, why pro bono is assumed to be in the public interest. In most cases, pro bono simply entails a lawyer providing services free of charge to clients involved in the civil justice system.⁴

There is no doubt that persons in the low-income bracket have a wide range of legal needs, most of which are unmet by even the most generous legal aid system.⁵ There is also little doubt that this is an access to justice issue, and one in which, in some civil settings, the stakes are very high for the individuals involved (*i.e.*, custody dispute, housing, employment, *etc.*). Still, the connection between serving the *public* interest and volunteering to help someone sort out their *private* relationships, disputes, and legal entanglements is less obvious than, for example, the clear connection between the provision of legal aid and the public interest.

The origins of pro bono publico are contested. Some historians have linked the modern concept of pro bono to the medieval practice in Europe, where

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3. See Justice J.C. Major, “Lawyer’s Obligation to Provide Legal Services” (1995) 33 Alta. L. Rev. 719; Rob Atkinson, “A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best (Le mieux est l’ennemi du bon)” (2001) 9 Am. U. J. of Gender, Soc. Pol’y & L. 129; and Tanina Rostain, “Professional Commitments in a Changed World” (2002) 70 Fordham L. Rev. 1811 (Special issue entitled *Colloquium: What Does it Mean to Practice Law in the Interest of Justice in the Twenty-First Century*).
 4. In light of the provincial legal aid schemes which are required to provide legal assistance to those unable to afford a lawyer in criminal matters, pro bono has come to be associated in Canada primarily with the civil justice system.
 5. Data from the UK suggest that existing resources do not even scratch the surface of need. While over a third of those surveyed in 2004 had experienced a legal problem in the past year, only 13% of that group received any advice from a lawyer. See Pascoe Pleasance *et al.*, *Causes of Action: Civil Law and Social Justice* (Norwich: The Stationary Office TSO, 2006) at 81. A 2006 study of the Canadian Department of Justice presented at the Legal Aid Ontario/Osgoode Hall Law School Symposium, “Rethinking Civil Legal Needs,” suggests that a similar situation of unmet civil legal needs exists in Canada: see Ab Currie, “Justiciable Problems and Access to Justice in Canada” (Paper presented at the Osgoode Hall Law School Legal Aid Roundtable and Legal Aid Ontario Strategic Research, 5 November 2007). The Canadian Forum on Civil Justice is now undertaking an ambitious needs assessment in Alberta to determine both the incidence and the impact of unmet legal needs in that province. See Canadian Forum on Civil Justice, *Alberta Legal Services Mapping Project*, online: <<http://cfj-fcjc.org/research/mapping-en.php>>.

bishops had compelled lawyers to provide legal services for spiritual rather than worldly compensation.⁶ The full history of pro bono publico in Canada has yet to be written. Certainly, lawyers who came of age prior to the rise of legal aid plans internalized the expectation that taking on pro bono clients in need was a part of their professional responsibility, which was usually an ad hoc arrangement, mainly focused on the indigent accused facing criminal prosecution. Indeed, the precursor to legal aid in Ontario was a service developed by the Law Society of Upper Canada (“Law Society”) in 1951, matching those facing criminal prosecution and unable to afford legal representation with available lawyers willing to take their case.⁷ In the 1960s, the sense that voluntarism by the bar was unable to meet the legal needs of the poor led the provincial government and the Law Society to collaborate on the creation of the Ontario Legal Aid Plan in 1967. By the 1990s, legal aid had come to be seen more as a responsibility of government than of the legal profession. 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.

In Canada, at least since the 1970s, pro bono has been seen as relevant only where legal aid coverage is unavailable. Given the tremendous need and the scarce resources endemic to provincial legal aid schemes, access to justice advocates worry that pro bono efforts could undercut the efforts to attract more public funding to expand legal aid. Indeed, some legal aid lawyers point to the irony that, in their view, they contribute more pro bono services than any other sector since they are so rarely compensated for all of the work they undertake on a file.⁸

In Canada, legal aid and pro bono have tended to exist in tension with one another. Legal aid schemes arose in the 1960s and 1970s, primarily as a reaction to the failure of traditional pro bono practices to meet growing demands.⁹ Jack Major explains that the result of establishing legal aid schemes across Canada under such circumstances has been to create a false assumption

6. See James A. Brundage, “Legal Aid for the Poor and the Professionalization of Law in the Middle Ages” (1988) 9 J. Legal Hist. 169.

7. Ontario Legal Aid Review, *Report of the Ontario Legal Aid Plan: A Blueprint for Publicly Funded Legal Services* (Toronto: Ontario Legal Aid Review, 1997) at 10. The report is also known as the McCamus Review.

8. *Ibid.*

9. See Frederick H. Zemans & Patrick J. Monahan, *From Crisis to Reform: A New Legal Aid Plan for Ontario* (North York: York University Centre for Public Law and Public Policy, 1997).

that those schemes excuse lawyers, simply as members of the profession, from the responsibility of ensuring access to justice:

The present legal aid system grew out of the profession's acknowledged obligation to help the poor, but was in no way intended as a replacement for its overriding obligations, nor as a full and complete response by the profession. Legal aid as it exists today was the direct result of lawyers' attempts to fulfill their obligation to serve the needy.¹⁰

Ironically, 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 late 1990s and early 2000s.¹¹ Though legal aid and pro bono each have a distinctive ethos and different characteristics, both find their public interest rationale in a common set of principles—that law is a helping profession, and that rights-bearing individuals should be able to assert their rights to the full benefit of the law notwithstanding their lack of financial means.

While there is a live (and lively) debate in the United States as to whether pro bono or state-run legal aid is the preferred means of addressing the needs of the poor, there are no credible voices advocating pro bono as a substitute for, or as preferable to, legal aid in Canada (at least in the criminal law settings where legal aid is most active). Rather, legal aid remains the gold standard for those committed to principles such as the rule of law, access to justice, and social justice. Instead, inadequate state resources and the limited scope of legal aid coverage have been the assessment of pro bono. It is in civil justice settings, where legal aid coverage is scarce and inconsistent across the country, that the rise of pro bono programs has been most conspicuous and has had the most significant impact. Pro bono in Canada begins from the motto that “the good should not be the enemy of the best.” It should come as no surprise that pro bono organizations in Canada have looked to the legal aid system for sustenance, just as the legal aid community has cast a wary eye at the rise of pro bono.¹²

10. Major, *supra* note 3 at 724.

11. Supporters of legal aid have reacted to this recent rise in pro bono programs with skepticism. See *e.g.* Avvy Go, “Pro Bono can't replace legal aid” *Toronto Star* (13 May 2004) A24. The connection between cuts to legal aid schemes and the rise of pro bono is documented in peer jurisdictions outside of Canada: see *e.g.* F. Regan, “Legal Aid Without the State: Assessing the Rise of Pro Bono Schemes” (2000) 33 U.B.C. L. Rev. 383.

12. Legal Aid Ontario, for example, is one of the largest funders of PBLO.

If there is a public good being served by pro bono in the civil justice system, it arguably flows from one or more of three related principles: the rule of law, access to justice, and social justice.

A. THE RULE OF LAW

The first principle justifying pro bono on public interest grounds is the rule of law. Everyone should be subject to similar legal rules and have similar legal rights. It is unfair and unjust that some are unable to enforce legal rules and unable to assert legal rights simply because they lack the financial means to retain a qualified lawyer. By providing pro bono services, lawyers fill this gap and ensure that the rule of law governs. In its recent report, the Law Society of Upper Canada's Task Force on the Rule of Law and the Independence of the Bar noted the following:

It is when a person is most vulnerable, that his or her lawyer can make the difference between a just and an unjust outcome, or fair or unfair treatment. An independent Bar means that everyone is entitled to have their position presented fearlessly and zealously by an independent lawyer within the limits of the law; that no one should be denied the benefit of the law; and that no one may escape the consequences of the law. This commitment underscores the code of professional conduct that governs lawyers; it is also the essence of the lawyer's role in the administration of justice.¹³

However, in *British Columbia (Attorney General) v. Christie*,¹⁴ the Supreme Court held that, while no one should be denied the benefit of the law, the rule of law does not necessarily require access to legal representation:

The issue ... is whether *general* access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law. In our view, it is not. Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.¹⁵

13. See The Law Society of Upper Canada, *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Irwin Law, 2007) at 1. For a review of the report, see Janet Leiper, (2008) 46 Osgoode Hall L.J. 189.

14. [2007] 1 S.C.R. 873.

15. *Ibid.* at para. 21 [emphasis in original].

Thus, the rule of law as a principle underlying the public benefit of pro bono cuts both ways. On the one hand, the rule of law requires the independence of the bar but not access to it: in that regard, pro bono appears to be more of a personal choice than a public duty. However, if the rule of law is truly to provide equal benefit of the law, in the absence of constitutionally mandated legal aid, it will fall to pro bono activities and the leadership of the bar to realize this right.

B. ACCESS TO JUSTICE

The second public interest principle is related to the first, and it is that the courts should be open to all who have legal disputes that require judicial resolution. Access to justice, in other words, is a public good, and this explains why the public purse shoulders the cost of court administration and judicial salaries. The rationale for this expenditure is compelling on the criminal side of the justice system, where individuals are faced with a threat of losing their liberty. Access to civil justice is a more complex issue.

Some kinds of civil justice, such as family law or consumer protection law, provide as compelling a rationale for civil justice as criminal justice. But other areas of civil justice seem to be built on the idiosyncratic decision to litigate a claim, regardless of the burden on the litigant's financial means. For example, certain individuals may feel wronged by unfounded rumours assailing their reputation. Some parties may dispute whether an oral agreement amounted to a contract. Employees at any level may believe they were dismissed from their employment without good grounds. In all of these settings, the civil justice system may provide a remedy, but it is not clear that the same question of access arises in each. We may conclude that the unfair loss of employment is serious and that it would be a greater public harm if vulnerable employees had no access to a forum in which to assert their rights than would be the case of the adverse impact of an unfounded rumour on reputation. If one is committed to access to justice, however, is one also committed to respecting the choices that individuals make and, by corollary, to ensuring legal representation to advance individual interests on public interest grounds? This question is taken up in more detail below. For now, the point is that access to justice as a principle of public interest ought not to encompass *everyone's* access to *all* forms of civil justice.

It is appropriate to address the distinctive public interest access issues of administrative justice. Arguably, where the legal needs of the poor are most implicated is not in private litigation (with some notable exceptions such as

employment law, family law, and consumer protection law), but in public litigation in areas such as social welfare, health benefits, immigration and refugee protection, public housing, and so forth. Pro bono is less associated with these areas of law, in part, because some provincial legal aid schemes provide limited coverage in these areas, and thus unmet needs are more likely to be seen as deficits of legal aid than as opportunities for pro bono. This situation, however, may be changing.¹⁶

Access to administrative justice relates to myriad public agencies, boards, commissions, and tribunals which are established by statutes and have specific public interest functions, including but not limited to the adjudication of disputes. Some parties in administrative justice settings without means to retain lawyers will have access to state-run legal aid programs (for example, refugee claimants, tenants with claims before a rental housing board, welfare recipients, and university students defending against academic discipline) or other forms of legal assistance (for example, unionized employees accessing union counsel). Most parties to administrative justice will, however, be unrepresented. This does not necessarily suggest a failure in the system of administrative justice. One of the goals of administrative justice, after all, is to provide accessible forms of dispute resolution where public duties and obligations are at stake.¹⁷ Many of these tribunals were established with a mandate to provide accessible and expeditious dispute resolution procedures for which legal representation would not be necessary.

C. SOCIAL JUSTICE

A third public interest rationale for pro bono, related to the first two, is that pro bono may facilitate social justice by redressing the imbalance of power in the courtroom where one party is self-represented. Where parties cannot understand or meet the case against them and cannot give voice to their legal rights, this presents a critical challenge to the egalitarian values of a liberal

16. Pro Bono Students Canada, for example, has established a “Courts and Tribunals” initiative under which law students are providing public legal education and other services for administrative tribunals, including the Ontario Health Professions Appeal and Review Board, which lies outside the coverage of legal aid.

17. This point is developed further in Lorne Sossin, “Access to Administrative Justice” in Colleen Flood & Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery) [forthcoming in 2008].

democracy. This principle also suggests that the public interest in pro bono resides in those cases where the lawyer's role is one of empowerment.

There is another dimension to the social justice rationale for pro bono that relates to the legal profession's monopoly on the provision of legal representation. The legal profession, with the statutory authority granted to provincial law societies, is able to regulate membership in the profession and prohibit non-members from entering its market.¹⁸ As a result, the price of legal services is much higher than it would be in an unregulated market, and a significant swath of the population cannot afford legal services. Recognizing this situation, the legal profession has internalized the ethic of pro bono service as a kind of quid pro quo for the privileges enjoyed by its members.

This attitude may be rooted in *noblesse oblige*, but its tangible benefits seem to accrue to the lawyers. Lawyers gain a better understanding of the role of law in a democratic society through pro bono; they learn how to represent vulnerable individuals and gain a sense of fulfillment by making a positive contribution to justice. Further, these lawyers learn about the effects and implications of poverty. Rob Atkinson explains: "[O]nce one sees how badly off the needy really are, one will want to pitch in even more. If one does, presumably, one will then receive even more of the blessedness that is the giver's primary entitlement and reward."¹⁹

The social justice rationale thus includes the idea that, through pro bono activities, lawyers will establish meaningful connections to and insights about their communities. For this reason, a lawyer's pro bono obligations cannot be adequately addressed by cash donations to worthy causes (including public interest legal organizations).²⁰ This view advocates that it is through personal commitment, involvement, and individual relationships that social justice is pursued.

Alone or in combination, the principles of the rule of law, access to justice, and social justice explain the public interest in pro bono. The spectre of the unrepresented litigant poses a danger when looked at from any one of these perspectives. While there seems to be a general recognition that the problem of

18. In 2007, the regulation of paralegals in Ontario has now opened up a market for legal services to non-lawyers. The regulation of notaries in British Columbia and Quebec may also be seen to be a qualification to this assertion. The point remains, however, that lawyers are in a monopoly position with respect to most areas of legal representation.

19. Atkinson, *supra* note 3 at 140.

20. This issue is explored in Steven Lubet & Cathryn Stewart, "A 'Public Assets' Theory of Lawyers' Pro Bono Obligations" (1997) 145 U. Pa. L. Rev. 1245.

self-represented litigants in the civil justice system is a public problem, there is no consensus that the solution lies in the state and the public purse. This is presently the subject of a constitutional challenge launched by the Canadian Bar Association (CBA) in British Columbia. The CBA alleged that the exclusion of civil matters from legal aid coverage violates the Constitution.²¹ The CBA took this step as the culmination of a significant campaign to highlight access to justice in civil matters. The CBA described its efforts in the following terms:

3. The CBA has been fighting for more than a decade to expand civil legal aid services for those who do not have the means to access our legal system:

...

Unfortunately, our submissions have fallen on deaf ears. In fact, rather than increase, civil legal aid funding—particularly in this province—has been severely reduced.

4. The result is tragic. Every single day in British Columbia the rights of people who cannot afford legal services fall by the wayside. They cannot access the justice system. Often their shelter, health, safety, sustenance and livelihood are at stake.²²

The CBA's challenge was dismissed by the British Columbia Supreme Court on grounds that the CBA did not merit public interest standing. It should be litigants, the court reasoned, not lawyers, who challenge the lack of access to justice. The likelihood of legal aid making strides in the problem of the unrepresented litigant in non-criminal matters, in the short term, appears slim.

While the unmet legal needs of the poor and middle class increase dramatically, and legal aid budgets remain besieged, the focus of access initiatives has shifted to pro bono organizations. The creation of public interest organizations such as Pro Bono Students Canada (1996), Pro Bono Law Ontario (PBLO) (2002), Pro Bono Law British Columbia (2002), and Pro Bono Law Alberta (2007) has served as a catalyst for pro bono profile and activities throughout the

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21. See *The Canadian Bar Association. v. HMTQ et. al.* (2006), 59 B.C.L.R. (4th) 38 [CBA]. For a discussion of this litigation, see Lorne Sossin, "The Justice of Access: Who Should have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007) 40 U.B.C. L. Rev. 727. For the argument in support of a constitutional right to civil legal aid, see Patricia Hughes & Joseph Arvay, "A Constitutional Right to Civil Legal Aid" in Vicki Schmolka, *Making the Case: The Right to Publicly-Funded Legal Representation in Canada* (Ottawa: Canadian Bar Association, 2002) 331-65.
22. Canadian Bar Association, News Release, "CBA Launches Test Case to Challenge Constitutional Right to Civil Legal Aid: Statement by Susan McGrath, President of the Canadian Bar Association on the CBA Legal Aid Constitutional Challenge" (20 June 2005), online: <http://www.cba.org/CBA/News/2005_Releases/2005-06-20_remarks.aspx>.

country. This has also come, not coincidentally, at a time of increasing competition for legal talent and increasing disaffection on the part of younger lawyers with private legal practice. Can pro bono solve all of these problems?

That pro bono allows lawyers to discharge a public duty, thereby upholding the rule of law, providing access to justice, and promoting social justice, is an intuitively appealing claim. But does it withstand scrutiny? Why should we not see all charitable activity as public? Is activity undertaken in the context of religious institutions or private clubs and societies somehow different? I suggest that for pro bono to be properly characterized as serving the public interest, the subject matter or the circumstances of the litigation or the litigant must have a link to some public interest value. Thus, the case for pro bono as public activity is more convincing in a case of constitutional challenge on behalf of a marginalized group, and less convincing in a dispute between a small business owner and a supplier. The difference between a lawyer acting pro bono for a tenant or acting pro bono for a landlord matters in terms of advancing the public interest. While the impetus behind a lawyer's engagement in pro bono may be lauded notwithstanding the kind of client seeking his or her services, not all civil matters should be seen as equally advancing the public good. Indeed, a survey from the 1970s disclosed that many lawyers reported working on pro bono activities, but two-thirds of this work turned out to consist of free legal services for friends and relatives.²³ Once again, the lawyer's perspective and the client's perspective on pro bono may not be aligned.

A possible approach, adopted by the Law Council of Australia in 1992, defines the scope of pro bono publico in the following terms:

1. A lawyer, without fee or without expectation of a fee or at a reduced fee, advises and/or represents a client in cases where:
 - (i) a client has no other access to the courts and the legal system; and/or
 - (ii) the client's case raises a wider issue of public interest; or
2. The lawyer is involved in free community legal education and/or law reform; or
3. The lawyer is involved in the giving of free legal advice and/or representation to charitable and community organisations.²⁴

23. Joel F. Handler *et al.*, *Lawyers and the Pursuit of Legal Rights* (New York: Academic Press, 1978) at 100. See also Z. 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. 65.

24. National Pro Bono Resources Centre, *Information Paper: Government Lawyers and Pro Bono* (2004), online: <<http://www.nationalprobono.org.au/documents/NPBRCGovtlawyerspaper.doc>>.

If all civil matters can be transformed into a public good through pro bono representation, pro bono becomes difficult to distinguish from other access-related initiatives, such as contingency fees, under which a lawyer contracts with a client to receive a portion of a settlement or damages in lieu of fees. In contingency fee arrangements, lawyers only receive compensation when the client is successful, and clients who could not otherwise afford to litigate gain access to civil justice. Ontario, the last jurisdiction in Canada to ban contingency fees (outside of class actions), relented in 2004 and finally enacted legislation to permit these arrangements. Ontario did so explicitly on access to justice grounds.²⁵

Despite their access to justice rationale, contingency fees reflect an expressly market-based approach to the provision of legal services. For this reason, they are sometimes criticized as preying on litigants with strong cases but without the financial means to litigate. In these settings, meritorious litigants risk paying greater sums to their lawyer than they would have paid in fees based on docketed hours. At the same time, lawyers who shoulder the up-front costs for the litigation under contingency fee arrangements may be risk averse and eschew difficult or novel cases with less certain outcomes, thus leaving vulnerable litigants without any effective representation at all.

Unlike contingency fees, in which the rational self-interest of the lawyers is harnessed to serve access ends, pro bono is seen as a public good. The claim that pro bono is public interest work (because the lawyer undertaking the representation is discharging a public duty to provide access to justice) raises the issue of whether these lawyers should disclose the nature of this representation to the court, and whether the clients of these lawyers should be entitled to costs if successful.

Cost-shifting is intended to serve multiple rationales: deterring parties not to bring matters to court that ought not to be litigated, encouraging settlement between the parties, motivating parties to conduct their litigation expeditiously in the courts, and compensating the winning parties' expenses incurred in vindicating their positions. If costs are not available for pro bono representation, the rationales are negated where at least one party is represented pro bono; the losing party may benefit with an unwarranted discount of the costs award. By contrast, if costs are made available, they would be based on fictitious claims, since the winning party did not, in fact, expend legal fees for the litigation.

25. *Justice Statute Law Amendment Act, 2002*, S.O. 2002, c. 24.

The costs question also gives rise to a further dilemma for the pro bono lawyer. If a case is taken on pro bono, but with the expectation that a victory may bring a costs award, is it truly pro bono (*i.e.*, work done without compensation for the public good)? Or does it start to look like a cousin to contingency fee arrangements (*i.e.*, a lawyer expecting to be compensated if successful but willing to bear the financial risk of an unsuccessful outcome)? On the other hand, if pro bono is a public good, what is wrong with courts making costs available as an incentive to encourage more lawyers to take on such files? Providing costs incentives for a lawyer to undertake a case on a pro bono basis may not be necessary in the context of a large urban firm, but in smaller centres and rural areas, lawyers may find that taking on a significant case pro bono without the hope of recovering costs may prove prohibitive.

All of these issues were canvassed by the Ontario Court of Appeal in the *Cavalieri* case.²⁶ *Cavalieri* involved a corporate matter proceeding before the Court of Appeal in which the appellant was successful in setting aside a default judgment, and after which the appellant sought costs. The respondent objected on the grounds that the appellant's counsel was acting on a pro bono basis. Neither Rule 57 of the Ontario *Rules of Civil Procedure*²⁷ nor section 131 of the *Courts of Justice Act*,²⁸ two authorities governing the awarding of costs in civil matters in Ontario, address the pro bono issue.

The Court of Appeal conducted a separate hearing on the costs question, highlighting the fact that the case did not engage public law or *Charter* issues and was a purely private law dispute. Pro Bono Law Ontario, the Ontario Trial Lawyer's Association, and the Advocates' Society intervened to address this question. All the interveners agreed that costs in some circumstances should be available to parties represented by pro bono counsel.²⁹ PBLO also encouraged the court to consider that parties or their counsel may wish to donate costs awarded in pro bono cases to charitable organizations on a *cy pres* basis.³⁰

26. 1465778 *Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757 (C.A.) [*Cavalieri*].

27. R.R.O. 1990, Reg. 194, r. 57.

28. R.S.O. 1990, c. C.43, s. 131.

29. While the costs remain the entitlement of the parties, not of counsel, the court recognized that counsel would typically make arrangements with clients to recover any costs if available—otherwise, the clients who expended no funds on the litigation would receive an unjustified windfall. See *Cavalieri*, *supra* note 26 at para. 36.

30. The term *cy pres* is derived from the term "*cy près commé possible*," meaning "as near as

In its decision, the Court of Appeal accepted that costs should be available at least in some circumstances for parties represented by pro bono counsel and adopted “access to justice” as a newly recognized costs criterion in Ontario.³¹ The court openly accepted that allowing pro bono counsel to seek costs would enhance access to justice by attracting more counsel to take on such cases.

Although the court determined that the application of this criterion to particular contexts would be sorted out on a case-by-case basis, the court also added that it would be more likely to be available in public law or public interest cases, and that in those settings, it could be available even to a losing party if the circumstances were warranted.³² The court held that costs would be available in *Cavaliere*, which raised no public interest issue. The court’s analysis in *Cavaliere* nicely captures the ambivalence of the search for the public benefit in pro bono for civil matters.

An even starker tension emerges from the jurisprudence relating to advance costs. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*,³³ the Supreme Court recognized that interim costs could be available in advance of the determination of litigation if three conditions are met:

- 1) The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.

possible.” The concept allows for distribution of residual damage awards, particularly in class action litigation, where it is not possible to determine each plaintiff’s actual damages or when plaintiffs fail to collect their portion of the award. Under the *cy pres* doctrine, courts may order residual funds to be put to the “next best compensation use, for the aggregate, indirect, prospective benefit of the class (aggregate *cy pres* distribution).” See H.B. Newberg & A. Conte, *Newberg on Class Actions*, 3d ed. (New York: McGraw-Hill, 1992) at § 10.17. In April of 2007, PBLO itself was the recipient of a \$19,500 *cy pres* award where certain settlement funds from concluded litigation had not been claimed. See Law Society of Upper Canada, News Release, “Pro Bono Law Ontario receives Cy Pres Award for Access to Justice Programming” (13 April 2007), online: <http://www.lsuc.on.ca/media/apr1807_cy_pres_award.pdf>.

31. Access to justice thus has been added to the four other recognized criteria: indemnification, encouraging settlement, discouraging frivolous and vexatious litigation, and discouraging unnecessary steps in litigation.
32. *Cavaliere*, *supra* note 26 at paras. 20, 45.
33. [2003] 3 S.C.R. 371 [*Okanagan*].

2) The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

3) The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.³⁴

The Court held that these criteria were met in the litigation before it. The Aboriginal band seeking interim costs was impecunious and could not proceed to trial without an order for interim costs. The case was of sufficient merit that it should go forward. The issues sought to be raised at trial were considered by the Court to be of profound importance to the people of British Columbia, both Aboriginal and non-Aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-Aboriginal relationship in that province.

In *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*,³⁵ the Court had an opportunity to revisit the application of the *Okanagan* approach. The Court held there that only “rare and exceptional” cases are special enough to warrant advance costs awards.³⁶ To demonstrate that litigation could not proceed absent interim costs, it would be necessary to show that no lawyer would be willing to take on the case on a pro bono basis; otherwise, presumably the first *Okanagan* threshold would not be met. As the Court stated in *Little Sisters*:

The impecuniosity requirement from *Okanagan* means that it must be proven to be impossible to proceed otherwise before advance costs will be ordered. Advance costs should not be used as a smart litigation strategy; they are the last resort before an injustice results for a litigant, and for the public at large.³⁷

Thus, the Court’s desire to facilitate pro bono activities is rooted in a concern for injustice arising with the lack of representation, particularly where the nature of the litigation or the litigant engages rule of law, access to justice, and social justice considerations. The Court also expressed anxiety, however, that individual choices by lawyers may distort public interest priorities. It is to the lawyer’s perspective on pro bono as a public good that the analysis now turns.

34. *Ibid.* at para. 40.

35. [2007] 1. S.C.R. 38 [*Little Sisters*].

36. *Ibid.* at para. 38.

37. *Ibid.* at para. 71.

II. PRO BONO AND PROFESSIONALISM

The other aspect in which pro bono advances the public interest is through the development of a public-spirited ethos for the legal profession as a whole. From law societies, the courts, professional associations, and law schools, the legal community holds out pro bono activities as those which best fulfill the aspirations of the legal profession. Jack Major, then a justice of the Supreme Court of Canada, claimed that “[t]he concept of service pro bono publico is found at the very core of the profession. In fact, it distinguishes the practice of law as a profession.”³⁸ Gavin MacKenzie wrote that the first principle which ought to animate codes of professional conduct for lawyers “should be the reinforcement of the public service orientation of the practice of law.”³⁹ On a more personal level, former Ontario Chief Justice McMurtry observed, “I have come to believe that any lawyer’s career that does not include a significant component of public service could ultimately lead to a real degree of dissatisfaction.”⁴⁰

As indicated above, pro bono may be seen as part of a bargain that allows the legal profession to enjoy its self-regulating monopoly market, in return for committing itself to address the needs of those who have been priced out of the market. On this view, pro bono serves to transform lawyers from guns for hire to guardians of social justice.

David Tanovich, in his article, “Law’s Ambition and the Reconstruction of Role Morality in Canada,”⁴¹ argues that the legal profession in Canada is in the midst of a “role-morality” reconstruction, shifting from an ethic of zealous advocacy on behalf of the client to an ethic of pursuing justice. The rise of pro bono within the Canadian legal profession both reproduces and reflects this ethic. Even lawyers working in corporate settings devoted primarily to protecting and augmenting private wealth may give expression to a desire to serve the public interest through pro bono activities. Indeed, large corporate-oriented firms have in many cases led the way in developing pro bono policies and pioneering pro

38. Major, *supra* note 3 at 721.

39. Gavin MacKenzie, “The Valentine’s Day Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession” (1995) 33 *Alta. L. Rev.* 859 at 872.

40. R. Roy McMurtry, “The Legal Profession and Public Service” (Remarks delivered at the Third Colloquium of the Chief Justice of Ontario Advisory Committee on Professionalism, University of Ottawa, 2004) at 3, online: <http://www.lsuc.on.ca/media/third_colloquium_mcmurtry.pdf>.

41. David M. Tanovich, “Law’s Ambition and the Reconstruction of Role Morality in Canada” (2005) 28 *Dal. L.J.* 267.

bono initiatives.⁴² Whether lawyers practise on their own or in large firms, pro bono has been touted as the elixir for the spiritual crisis of the “lost lawyer.”⁴³

Here too, however, the relationship between pro bono and the public interest is anything but obvious. We should be wary of equating access to lawyers with access to justice.⁴⁴ It is clear that representation matters, and in some settings the presence or absence of counsel may be determinative of whether justice or injustice results. This is precisely why we see legal aid as a sphere of public interest and entitlement for the vulnerable. However, access to justice may also mean access to a qualified paralegal or access to the means to effective representation (*e.g.*, public legal information, self-help centres).

As Pascoe Pleasance’s studies in the United Kingdom have demonstrated, access to justice may also mean access to the means to solve problems, many of which have both a legal and a social dimension.⁴⁵ Advice bureaus, referral centres, and community centres with a legal advice-giving component are all more consistent with this approach than simple legal representation. Merely settling the legal issue while leaving the underlying social problems unaffected may be a superficial and temporary band-aid.

If a core public interest in pro bono is access to justice, and if access to justice includes as one of its components access to lawyers, then it is appropriate to look to the legal profession for leadership in advancing access to justice in this sense. Pro bono activity is not, however, required of lawyers in Canada. Also, provincial law societies do not require lawyers or firms to disclose the amount of hours or kinds of activities devoted to pro bono.⁴⁶ Allan

42. The Blakes firm, for example, is one of the first to designate a pro bono partner and to organize a pro bono division within the firm. See About Blakes Pro Bono, online: <<http://www.blakes.com/english/probono.html>>.

43. See Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Harvard University Press, 1995).

44. Rod MacDonald, “Access to Justice in 2003: Scope, Scale and Ambitions” (Paper prepared for the Symposium on Access to Justice, sponsored by the Ontario Law Foundation and organized by the Law Society of Upper Canada, May 2003), online: <http://www.lsrc.on.ca/media/convjune03_access.pdf>.

45. Pascoe Pleasance *et al.*, *Causes of Action: Civil Law and Social Action* (London: Legal Services Commission, 2004) at 1, online: <<http://www.lsrc.org.uk/publications/Causes%20of%20Action.pdf>>.

46. Mandatory pro bono has been debated in the US context, but has not been seriously considered

Hutchinson⁴⁷ has persuasively chronicled the ways in which the legal profession and law societies have failed to follow through on rhetorical commitment to providing equal access to justice:

If the profession is to have any real chance of matching its rhetoric of service to the reality of social need, lawyers must begin to take seriously the obligation to provide their service at reduced rates, to take legal aid clients, and to engage in pro bono work. It is not enough to heap praise on those lawyers who undertake such work. The obligation must be built into the basic ethical fabric of professional responsibility.⁴⁸

Perhaps most significantly, law societies have been reticent even to define the nature or scope of pro bono activity. In Ontario, for example, the Law Society's *Rules of Professional Conduct* refer to pro bono only in a commentary to the rules relating to "Reasonable Fees and Disbursements":

It is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee where there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. A lawyer should provide public interest legal services and should support organizations that provide services to persons of limited means.⁴⁹

The Canadian Bar Association's *Code of Professional Conduct* echoes a similar theme, although without mentioning pro bono activities per se:

Lawyers should make legal services available to the public in an efficient and convenient manner that will command respect and confidence, and by means that are compatible with the integrity, independence and effectiveness of the profession.⁵⁰

Unlike legal aid, which is driven by demand (as many people as those who qualify for legal aid certificates will receive them), pro bono is understood by the profession as being principally driven by supply (only as many people can be served as there are lawyers willing to volunteer to help them). For this reason, as suggested in the *Cavalieri* decision above, the concern has been to

in Canada: see *e.g.* Reed Elizabeth Loder, "Tending the Generous Heart: Mandatory Pro Bono and Moral Development" (2001) 14 *Geo. J. Legal Ethics* 459; Atkinson, *supra* note 3.

47. See Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999).

48. *Ibid.* at 85.

49. Law Society of Upper Canada, *Rules of Professional Conduct*, r. 2.08, online: <<http://www.lsuc.on.ca/regulation/a/profconduct/>>.

50. Canadian Bar Association, *Code of Professional Conduct* at 91, online: <<http://www.cba.org/CBA/activities/pdf/codeofconduct06.pdf>>.

encourage more lawyers to volunteer more of their time and expertise. The recent BC Civil Justice Reform Working Group Report made this observation:

We believe that, consistent with the altruistic reasons many lawyers had for deciding to enter law school, most lawyers want to volunteer and mandatory requirements are therefore not necessary at this time ... *it will be a matter of encouraging them to volunteer (at the firm and professional level) and rewarding them for doing so.*⁵¹

As in British Columbia, Ontario's most recent foray into civil justice reform has featured a more prominent role of pro bono representation in civil matters. In November 2007, Justice Coulter Osborne released an interim report as part of the government-commissioned Civil Justice Reform Project.⁵² Osborne recognized the ambivalence of the legal profession toward pro bono in the following terms:

I agree that pro bono services cannot adequately respond to all of the needs of unrepresented litigants. I do not think that imposing mandatory pro bono quotas or greater regulation of fees charged by lawyers is the solution. *Market forces and the lawyers' sense of public duty will drive the amount of pro bono services that any one lawyer can offer and the fees he or she may charge.* A recommendation to regulate these areas would have a chilling effect on the spirit of volunteerism that appears to be growing among the bar. I prefer to leave it to the Law Society of Upper Canada to examine these issues, should it see fit to do so. However, I encourage Ontario lawyers to continue to offer pro bono services and innovative billing options to enhance access to justice.⁵³

The courts have voiced their support for pro bono as well. The recently published *Statement of Principles on Self-represented Litigants and Accused Persons* by the Canadian Judicial Council states that members of the bar "are expected to participate in designing and delivering legal aid and pro bono representation to persons who would otherwise be self-represented."⁵⁴

51. British Columbia, BC Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (Vancouver: BC Justice Review Task Force, 2006) at 19 [emphasis added], online: <http://www.bcjustice-review.org/working_groups/civil_justice/cjrwg_report_11_06.pdf>.

52. Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ministry of the Attorney General, 2007), online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf>.

53. *Ibid.* at 47 [emphasis added].

54. Canadian Judicial Council, *Statement of Principles on Self-represented Litigants and Accused*

As Hutchinson observes, the legal profession is quick to laud pro bono but is equally quick to resist the notion that it is a professional requirement. The United States has witnessed a number of embryonic initiatives to regulate a minimum commitment to pro bono on the part of every lawyer. The American Bar Association's 1983 *Model Rules of Professional Conduct*, as amended, proclaim that "[a] lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year."⁵⁵ At a minimum, advocates seek to create reporting requirements on pro bono activities for all lawyers. Interestingly, the closer the possibility of regulation appears, the greater the desire becomes on the part of the profession to broaden the definition of pro bono itself.⁵⁶

In 2005, for example, the members of the New York State Bar Association voted to expand the scope of activities covered under the pro bono publico umbrella, as part of an effort to give lawyers credit for the wide range of public services they perform and to allow these activities to be recognized for regulatory purposes. Along with supporting a definition of pro bono that includes providing legal services to the poor, the New York Bar voted to include service to individuals, civic groups, or government agencies "seeking to secure or protect civil rights, civil liberties or public rights, or to meet the basic needs of individuals of limited means ... where payment of standard legal fees would significantly deplete the recipient's economic resources"; participation in "activities for improving the law or the legal system"; and financial contributions to "groups or organizations whose principal purpose is to address the legal needs of individuals of limited means, and of not-for-profit organizations."⁵⁷ When push comes to shove (or, more to the point, when indifference comes to push), lawyers would rather focus on the lawyers' perspective on pro bono's appeal than respond to the needs of clients priced out of legal services.

Persons (Ottawa: Canadian Judicial Council, 2006) at 9, online: <<http://www.cjc.gc.ca/cmslib/general/Final-Statement-of-Principles-SRL.pdf>>. See also Canadian Judicial Council, News Release, "Canadian Judicial Council Issues Statement of Principles on Self-Represented Litigants and Accused Persons" (12 December 2006), online: <<http://www.cjc-ccm.gc.ca/english/news.asp?selMenu=1061212>>.

55. American Bar Association, *Model Rules of Professional Conduct* (1983) "Rule 6.1: Voluntary Pro Bono Publico Service," online: <http://www.abanet.org/cpr/mrpc/rule_6_1.html>.

56. For a discussion of this debate, see Atkinson, *supra* note 3.

57. John Caher, "Bar Group Expands Pro Bono Definition" *New York Lawyer* (5 April 2005), online: <<http://www.nylawyer.com/display.php/file=/probono/news/05/040505a>>.

The sense that pro bono is defined by “doing good” and not necessarily by addressing the unmet legal needs of the poor is exemplified by the remarks of a sole-practitioner in New York who participated in the debate to expand the definition of pro bono, described above:

Michael Miller, a solo practitioner and past president of the New York County Lawyers’ Association, said, “there are many ways to do good” other than by providing direct services to the poor. He said the state bar and the Office of Court Administration should recognize the broad range of services lawyers can and do provide for the public good. Mr. Miller noted that he devoted six weeks to providing legal services after the Sept. 11, 2001, terror attacks and served as an elections observer in a war zone — and neither activity fit within the current pro bono structure.⁵⁸

Importantly, the spectre of regulatory involvement in pro bono in the United States has served as a catalyst for discussion (and dissension) as to the public commitment legal ethics will require of lawyers.

The profession’s ambivalence is also reflected in the approach of law firms. Some firms have opted to show their commitment to pro bono activities by allowing lawyers to bill the time they spend on such files. A recent story in the *Lawyers Weekly* explains the rationale for this approach:

Young lawyers like Ian Collins are very conscious of the cost of legal services, the plight of the impoverished and the importance of giving back to the community. Burns says, “New lawyers are looking for firms that value pro bono work and treat it as billable time. Firms are smart to pay attention to what young associates want. Some firms now use the fact that they do pro bono work to recruit students.”

Collins agrees. “Associates are looking for a connection to the public interest. They go into law because of that. Students want firms who live up to their advertising and do pro bono work. It creates good relations within the community, to know that we’re not just sitting in our tower.”

Collins goes on to say that Fasken Martineau has a policy of treating the first 50 hours of pro bono work as billable time, with the possibility of extending that number upon approval. Collins is enthusiastic about the expansion of the pro bono project to Superior Court, and anticipates that more experienced associates will want to become involved after they’ve worked with the small claims court program.⁵⁹

58. *Ibid.*

59. Valerie Mutton, “Provincial Pro Bono Initiatives Get A Helping Hand from Firms” (21 December 2007), online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=596>>.

As in the case of costs for pro bono counsel discussed above in the context of *Cavalieri*, the trend towards rewarding pro bono activities in order to demonstrate a firm's commitment to public service further blurs the distinction between lawyers undertaking pro bono as a public duty, and lawyers undertaking pro bono as a matter of individual choice or as a response to market incentives and pressures.

Not only is there murkiness on the question of benefit for the lawyer providing pro bono services, there is also anxiety with respect to the genuineness of client needs. Members of the bar have expressed a concern that pro bono legal services should not grow to such an extent that they actually take away paying clients from lawyers. In other words, these lawyers argue that where pro bono services are provided, they should be limited to those demonstrably in need and not provided to those with means who could otherwise afford to pay for legal services. For this reason, PBLO programs, such as the Small Claims Duty Counsel project or the new self-help oriented Law Help Centre in Toronto, are available only to those who meet a specified income threshold.⁶⁰

My perspective here is similar to that outlined above—the scrutiny regarding income thresholds is misplaced. Pro bono is distinct in its claim to advance the public interest. The public interest, as discussed, turns on the link between pro bono and core principles such as the rule of law, access to justice, and social justice. Where these links can be demonstrated, either because of the unmet needs at issue, and/or the public duty being discharged by the lawyer, pro bono ought to be expressly recognized through the regulatory process. Whether this occurs in the form of public reporting requirements, rules of professional conduct, or other means is an important question, but one that is beyond the scope of this article.

Regulatory involvement of any kind is likely to lead to the nature and scope of pro bono being contested—this, in my view, is a potentially good thing. It will lead to more refined and well-conceived accounts of the public interest in the approach a particular lawyer, firm, or organization takes to pro bono, and will serve as a catalyst for legal practice to increasingly include policies and programs that express a commitment to pro bono. The current regime, whereby a lawyer's engagement in pro bono activities is entirely

60. See online: Pro Bono Law Ontario <<http://www.pblo.org>>.

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.

III. PRO BONO IN PUBLIC SETTINGS

If there is one place where the public interest in pro bono ought to be self-evident, it should be in the pro bono activities undertaken by lawyers who work for the government or government bodies, whose client is the public. Paradoxically, government lawyers represent the setting that has generated the most anxiety with respect to pro bono activities. As former Ontario Chief Justice McMurtry observed:

When we speak of the legal profession and public service, it is important to note the large number of lawyers who have chosen to serve the public as government lawyers. ... The government lawyer ... has greater independence, more discretion in the exercise of their skills as a lawyer as well as a broader responsibility than the private lawyer.⁶¹

Government lawyers do not serve clients *per se*, but owe their loyalty ultimately to the Crown, and through the Crown, to the public interest. They have no profit incentive and, consequently, they seldom experience the tensions that arise in civil justice settings. However, as public servants, government lawyers also owe an additional duty of loyalty to the government of the day, in addition to their obligations to the profession.⁶² It is these multiple loyalties that complicate the ability of government lawyers to engage in pro bono activities. For example, government lawyers representing someone charged with an offence by the Crown or a public regulator may be in a direct conflict of interest.

In 2004, then Ontario Attorney General Michael Bryant established a task force to explore ways for government lawyers to engage in pro bono activities. The task force has been working for the past two years on innovative ways to give Ontario's 1,400 Crown lawyers the opportunity to work in the community.⁶³ A number of projects were initiated:

61. McMurtry, *supra* note 40 at 23.

62. Allan Hutchinson, "In the Public Interest': The Responsibilities and Rights of Government Lawyers" (2008) 46 Osgoode Hall L.J. 105

63. Ministry of the Attorney General, News Release, "New And Innovative Programs to Increase Access to Justice" (16 November 2006), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/news/2006/20061116-probono.asp>>.

- A partnership with Pro Bono Law Ontario and the Nishnawbe-Aski Legal Services Corporation to bring free legal support to remote First Nations communities across northwestern Ontario. The Telejustice Project is an interactive anonymous online question and answer service connecting legal workers in the North with government experts.
- Participation in the Adopt-a-School program, with the Ontario Justice Education Network and the Toronto District School Board. Lawyers act as a resource for secondary school civics and law teachers, make presentations, take part in panel discussions, coach students for mock trials, provide information about justice careers and act as the school's link to broader justice education resources.
- Developing a new advocacy training program, where government lawyers teach law students about providing legal services to low-income citizens.
- Offering pro bono mediation to eligible charitable and non-profit organizations in conjunction with the Volunteer Lawyers Service of Ontario.
- Creating a statement of principles to empower government lawyers to do pro bono work and provide guidance on activities consistent with the obligations of Crown lawyers as public servants.⁶⁴

At a pro bono conference in 2006, Bryant commented that, “[a]s members of the legal profession, we have the unique opportunity and the privilege to work for the betterment of society.”⁶⁵

What is notable about the pro bono efforts of the Ontario government is that none of these efforts involve government lawyers representing low-income clients in civil disputes. In 1996, then US President Bill Clinton issued an executive order encouraging the US Department of Justice lawyers to undertake pro bono activities.⁶⁶ As part of a series of civil justice reform initiatives, the executive order directed all federal agencies to “facilitate and encourage” pro bono programs to be performed by government attorneys on their own time. Clinton’s executive order followed on the heels of several state initiatives. For example, in 1993, the Texas Legislature passed legislation that authorizes pro bono participation by all district and county attorneys and their assistants,

64. *Ibid.*

65. Ministry of Attorney General, News Release, “Attorney General Applauds Ontario’s Growing Pro Bono Culture” (22 November 2006), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/news/2006/20061116-probono.asp>>.

66. US, Exec. Order no. 12988, 61 Fed. Reg. 4727 (5 February 1996), online: The National Archives <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1996_register&docid=fr07fe96-108.pdf>.

provided that those services do not interfere with their official duties.⁶⁷ To give another example, the King County Bar Association has worked with the Washington State Department of Labor & Industries to provide legal advice on wage claims through a day labourer's organization called Casa Latina. The Association also encourages local prosecutors to provide clinics during their lunch hour at homeless shelters and women's shelters.⁶⁸

Often, it will make sense for government lawyers to undertake pro bono activities as part of a network of lawyers and community groups. The Legal Services of North Florida, for example, has worked with government lawyers in a project for the homeless, a senior citizens advice clinic, and a telephone hotline. The telephone hotline is sponsored by agencies such as the Florida Attorney General's Office, the Florida Department of Transportation, the Florida Department of Community Affairs, and the City of Tallahassee Attorney's Office.

Pro bono activities by government lawyers are not without dangers. The role and loyalty of government lawyers may be complicated if they find themselves representing individuals against the Crown or other public boards, agencies, or tribunals. However, while there certainly will be settings where government lawyers would be in a position of conflict when engaging in pro bono activities, there are other situations where they would not. For example, where a government lawyer assists a low-income person in executing a will, it is difficult to see how the public interest could be compromised. The question as raised above, however, is whether such activity enhances the public interest. Government lawyers may be in a uniquely well-qualified position to make and defend these initiatives. More to the point, government lawyers can exercise leadership in the profession by doing so.

It is also important to explore the possibility that courts and tribunal staff could also engage in important pro bono activities. The law clerks for the Ontario Court of Appeal, for example, have prepared a manual to assist

67. National Pro Bono Resource Centre, "Government Lawyer and Pro Bono," Information Paper (October 2004), online: <<http://www.nationalprobono.org.au/documents/NPBRCGovtlawyerspaper.doc>>.

68. See American Bar Association Standing Committee on Pro Bono & Public Service, "Government Agencies and Pro Bono: Projects That Facilitate Pro Bono Participation by Government Attorneys," online: <http://www.abanet.org/legalservices/probono/government_attorneys.html>.

unrepresented litigants before the Court of Appeal.⁶⁹ There is some hand-wringing on the part of courts and tribunals that they not be directly involved in assisting advocacy for fear of undermining their impartiality. If pro bono is a matter of public interest and not just private advocacy, however, then it is entirely appropriate for courts and tribunals to be active partners in this endeavour.

A model for this kind of initiative may be the enthusiastic participation by judges, Crown prosecutors, and court administrators, among others, in the Ontario Justice Education Network (OJEN). Established in 2001 as a network bringing together the three Ontario Courts with school boards, law schools, and public interest legal organizations, OJEN coordinates and promotes educational opportunities for students to learn about the judicial system.⁷⁰ OJEN's "courtrooms and classrooms" program has seen thousands of high school students exposed to judges and the justice system, while "mock trials" have featured prosecutors working with at-risk youth to simulate criminal trials. These initiatives address a different kind of legal need in the community, a need which public sector lawyers and judges are uniquely well-suited to fill.

IV. CONCLUSION

As I have explored in this article, I believe that the provision of legal services to the poor is unquestionably a matter of public interest. I believe that lawyers ought to view pro bono activities as a public duty attached to their profession and that this ought to extend in distinctive ways to those lawyers in the public service.

I have also suggested why the relationship between pro bono activities and the public interest merits closer attention. First, I expressed the need for a conceptual framework capable of justifying the public interest principles advanced by pro bono activities, notably the rule of law, access to justice, and social justice principles. Second, I emphasized the lack of coherence between the lawyer-centred view and the client-centred view of pro bono. While pro bono is seen, by definition, as the delivery of legal services without compensation, the Ontario Court of Appeal in *Cavaliere* justified the

69. Pro Bono Law Ontario, *Court of Appeal Handbook: A guide to representing yourself at the Court of Appeal of Ontario* (Pro Bono Law Ontario, 2004), online: Law Help Ontario <<http://www.lawhelpontario.org/library/attachment.78441>>.

70. See online: Ontario Justice Education Network <<http://www.ojen.ca>>.

availability of costs for pro bono lawyers on the grounds that lawyers may need monetary incentives to take on pro bono cases. Third, I questioned the legal profession's aversion to regulating pro bono activities and the public sector lawyers' reticence to exercising leadership in undertaking pro bono in the public interest.

I have argued that without elaborating on the meaning of *publico*, pro bono is adrift and rudderless. Too often, pro bono has been invoked in Canada as a way of avoiding important and difficult debates about the public interest in access to civil justice. I believe, by contrast, that pro bono should be the catalyst for such debates. The result will be a culture and a system of pro bono capable of addressing both the unmet needs of the poor and the unfulfilled public duties of the legal profession.