

**3rd National Pro Bono Conference
September 15-17, 2010
Calgary, Alberta**

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A. Introduction

The purpose of this paper is to focus on the difficult problem of future funding of access to justice services such as those offered by pro bono organizations across the country, in particular services designed to coordinate the identification and delivery of pro bono assistance in civil, non-family, law matters. While this paper is intended to explore the situation in Ontario, there are undoubtedly parallel conditions in other jurisdictions and thus this might best be regarded as a case study of conditions experienced by some, if not all, similar agencies in Canada.

While current funding difficulties may be regarded as transitory and associated merely with the economic downturn, there is a strong argument that they represent a relatively permanent challenge to the survival of what are important social programs. Law Foundations appear to be turning in the direction of favouring “project” – as opposed to “core” – funding. Furthermore, as access challenges expand exponentially, as is the case presently, services are inevitably bound to extend in their reach, exacerbating funding problems. Finding a permanent solution to the funding crisis appears to be necessary, and on an urgent basis.

PBLO is exploring a variety of alternatives, including solicitation of the profession, accessing cy pres resources and other non-traditional ways of securing support. Notwithstanding these efforts, the juxtaposition of the statutory access responsibilities of the provincial law societies and traditional service in this area by the practising Bar leads logically and practically to a consideration of whether the burden of these responsibilities might not be shouldered by the profession by funding through their governing bodies. Thus the purpose of this paper. Is this a reasonable idea and is it achievable?

B. Funding Difficulties in the Delivery of Pro Bono Services; Critical Services at Risk, the Ontario Case Examined

In 2010, PBLO’s funding agencies have made it clear that economic exigencies will result in significant reduction in financial support in the future. As a result of cutbacks in support from the Law Foundation of Ontario (LFO) and Legal Aid Ontario (LAO), PBLO’s budget will be reduced from \$1,150,000 to \$950,000, and to \$850,000 in 2012. Its highly successful Family Legal Health Project at Sick Kids Hospital in Toronto will be closed at year-end and unless resources are found, its Law Help Centre in Ottawa will lose its outsourced funding in 2012. In spite of a 30 percent increase in number of clients served in the first six months of 2010, PBLO’s support from LFO is at risk as a result of the current economic climate. In addition, there is a degree of uncertainty as to precisely where PBLO sits in the LFO’s list of priorities. We have been given a clear warning that we must explore alternative sources of funding for the future. As will be seen, none of this belt-tightening in funding agencies is accompanied by any criticism whatsoever of our programs or their effectiveness. Indeed, PBLO is entitled to feel considerable pride about its achievements over the decade since it was founded.

In the course of a spirited dialogue with our principal funding agencies, it was urged that we petition the Government of the Province of Ontario for future support. With respect, as has recently been acknowledged, this is entirely impractical. Within the last 24 months, PBLO has

been advised by the AG directly that there is no money in the budget for pro bono services. In view of the Government's elimination, in the Province of Ontario, of civil non-family legal aid, this official reaction is hardly surprising.

In the simplest of terms, PBLO must find alternative sources of fiscal support if its programs are to be sustained and continue to grow in the interest of continued access to justice for low income Ontarians.

C. The Current Scope of Pro Bono Services: A Decade of Development

The Province of Ontario is not unique insofar as the delivery of a range of pro bono services is concerned; nonetheless, it is useful to consider the catalogue of Ontario services, most of which are to be found, in one form or another, in the home states and provinces of delegates to this conference.

In terms of direct pro bono service, PBLO offers its Law Help Centres in Toronto and Ottawa, serving low and middle income citizens who do not have the benefit of legal advice or are representing themselves. Online self-representation resources are available in these facilities as well as consultative services of pro bono counsel. Similar services are offered in PBLO's Small Claims Court facilities, as well as pro bono assistance in the conduct of appeals. In terms of clients served in 2010, litigation service has increased by 27 percent.

In addition, PBLO has continued its Child Advocacy Projects, including its innovative Family Legal Health Project at Sick Kids Hospital in Toronto. PBLO is committed to continuing to maintain comprehensive document assembly resources. In 2010, it received the American Lawyer Magazine's Law & Technology News Award for best use of technology in a pro bono program. It has continued to offer Volunteer Lawyer Services for eligible charitable and non-profit organizations. Finally, PBLO, as part of a major enterprise, which it has undertaken since its founding, continues to broker pro bono partnerships in law firms, law associations and legal departments. Of particular significance is the commitment to pro bono activities of lawyers in business enterprises, of which the activities of the Royal Bank of Canada with McCarthy Tetrault are but one example. In all, a total of 100 law firms large and small, representing approximately 700 lawyers on roster projects, are engaged in pro bono enterprises in 2010 in Ontario. Additional numbers of lawyers are scheduled independently by law firms with pro bono policies.

The purpose of providing this outline is not so much to reflect on our successes for their own sake, but to make it clear to the organized Bar and its regulators that a broad range of services for low and middle income Ontarians are being provided through the agency of PBLO, all of which, in one form or another, are contributing to access to justice. These and similar services across the country could not have been made available without the proactive intervention of pro bono organizations of which PBLO is only one example.

D. An Evaluation of Current Programs: An Independent Review

Having catalogued the activities of one pro bono organization, a critic might ask, particularly in the light of funding difficulties, what has been done to validate the enterprise and its activities so that prospective supporters can be reasonably confident that ongoing activities are worthy of support.

Fortuitously, PBLO has recently been subjected to two assessments. In November 2009, the Resource for Great Programs Inc. issued a Report commissioned by the Law Foundation pursuant to its directive that Law Help Ontario be "vigorously examined" at the end of its first

year of operation. After extensive research consisting of dialogue with stakeholders, including judges, court staff, pro bono lawyers and law firms, and an assessment of Law Help methodology, the author of the report, Dr. Ken Smith, concluded in unequivocal terms that “the Law Help Centre is working. Major stakeholders agree it is delivering valuable results.” In his remarks to the Board of PBLO, in presenting his Report, Dr. Smith described Law Help Ontario as a pro bono service offering “unique in North America.” The Report is a detailed and helpful study of what the Law Help Centres do and what they have achieved.

In June 2010, Cathexis Consulting issued its final Evaluation Report commissioned by PBLO’s principal funding agencies, the Law Foundation and Legal Aid Ontario. The consultant’s mandate included a program evaluation which is a major part of its Report. It acknowledged Dr. Smith’s earlier Report and thus it focuses on the balance of PBLO’s pro bono programs.

In concluding that PBLO has achieved a tremendous amount on a relatively small budget, the Report records, amongst others, the following specific findings.

That PBLO:

- created opportunities and made it easier for lawyers to do pro bono work;
- contributed to a more positive attitude to doing pro bono work;
- increased the number of opportunities for lawyers to do pro bono work;
- and (significantly, it is submitted) increased the number of clients being served through pro bono services with a substantial proportion coming from low income households.

I would submit that, at a minimum, these two Reports should provide comfort to PBLO’s critics that the enterprise, and others like it across the country, are worthy of significant and sustained financial support in the future where meaningful access to justice for low income Canadians is the objective.

E. The Growth in Demand for Pro Bono Services: A Developing Need

In July of this year, the Report of the Ontario Civil Legal Needs Project, an enterprise sponsored jointly by the Law Society, Pro Bono Law Ontario, the Law Foundation of Ontario and Legal Aid Ontario, was released. The principal researcher associated with the program was Professor, now Dean, Lorne Sossin of Osgoode Hall Law School, a tireless worker promoting pro bono initiatives across the country. The findings of this study are telling in the evidence which they provide concerning the legal needs of low income citizens in our communities.

The Report discloses that in 2009, the study period, 3 in 10 Ontarians received pro bono legal services. These were low income citizens. Of the total number of citizens with legal problems who did not seek legal advice, 42 percent did not because they felt that they could not afford a lawyer.

The incidence of self-representation is escalating. In family law, some suggest that in certain proceedings it is as high as 50 to 60 percent. In civil non-family matters, anecdotally, it is said to

be as high as 20 percent. Self-representation will be a major contributor to escalating need for pro bono services such as those available through Law Help Centres. 84 percent of low and middle income earners have access to the Internet and a significant percentage of these citizens are comfortable with pro bono assisted self-representation. Fully 35 percent of low and middle income earners with legal problems chose to solve the problems themselves with some legal advice meaning, in practical terms, pro bono legal advice. Self-representation is a right, but requires pro bono service for those entitled to it if effective access is to be achieved.

It is noteworthy that the Report points out as well most legal needs amongst the poor are, by their nature, disruptive and cascade when unmet, a situation that is much less common amongst those who are relatively well off.

The self-represented litigant secures his or her legal assistance typically in a Law Help Centre. The escalation in use of these facilities is extraordinary. PBLO's Children's and Law Help Ontario projects served 5271 clients in the first 6 months of 2010, or an increase of 30 percent over the same period last year. Similar rates of expansion have been experienced in virtually all of PBLO's programs. The Small Claims Duty Counsel Project in Toronto has expanded from 4 to 5 days a week and increased its client load by 65 percent. 12 new law firms have been recruited for staffing purposes. The problems encountered for low income pro bono clients typically include child custody disputes, wrongful dismissal, landlord and tenant, personal injury, consumer debt, financial problems, social assistance, workers' compensation, disability, immigration and refugee matters and discrimination and human rights.

An examination of all of PBLO's programs show a steep incline in access, a condition which undoubtedly applies in equal measure in other jurisdictions.

F. Access to Justice: The Responsibility of the Governing Bodies and the Profession

It is generally acknowledged that lawyers have a professional responsibility to contribute to effective access to justice for low income citizens. The obligation is cultural, associated with the unique positions which lawyers have occupied in the administration of justice. Occupying the field, and controlling the delivery of services as we do, we have traditionally recognized a responsibility to serve the public within reason, regardless of ability to pay. Thus the derivation of the expression "pro bono publico," encapsulating the idea of service for the good of the community and its citizens out of a sense of societal and professional obligation rather than personal reward.

In regulatory and policy terms, the landscape with respect to mandated access to justice initiatives is somewhat uneven across the provinces. Insofar as pro bono services are concerned, Rule 4 of Alberta's *Code of Professional Conduct* is expressed in positive terms and requires that lawyers contribute to the profession's effort to make legal services available to all, regardless of ability to pay. Ontario's pro bono rule is expressed in somewhat more hopeful terms, identifying the provision of pro bono services as part of "the best traditions of the legal profession." Saskatchewan's rule is similar in tone. The provision of the BC and Quebec *Codes of Professional Conduct* on the subject are more abstract and wistful. Notwithstanding, all Provinces, as is well known, have embraced, in a variety of forms, the notion of broad-based access to justice through pro bono service.

In terms of statutory obligations, Ontario's *Law Society Act*, in section 4(1), speaks directly to the subject of access to justice, fixing the Society with a positive duty to "facilitate access to justice for the people of Ontario." Obviously, this is a mandatory requirement expressed with

legislative force. It has given rise, in Ontario, to a focus on the part of the Law Society upon several access to justice initiatives. While much is included under the rubric “access to justice,” in the Law Society of Upper Canada’s catalogue of programs and services, practical access initiatives have been relatively modest. A word about these to test the waters. The two principal programs in Ontario are the Lawyer Referral Service as part of the Client Service Centre, and the Compensation Fund. The remaining programs, including equity initiatives, the Certified Specialist Program and the Archives Department, are largely informational as opposed to service-driven.

The Lawyer Referral Service, which is replicated in other Provinces, is a telephone hotline by which the Law Society provides access to lawyers who will provide 30 minutes of free advice upon inquiries from the general public. The Society charges a fee of \$282.50 to include the practitioner’s name on the referral list. The Lawyer Referral Service has been, in terms of service to the public, a very effective tool. In 2009, over 48,000 calls were received seeking access to the service. Studies undertaken in the Ontario Civil Legal Needs Project demonstrate that 20 percent of lower income Ontarians with civil problems access the Lawyer Referral Service. This is a quite remarkable statistic. The Client Service Centre, which includes additional programs as above-described, has a budget of \$7 million, of which the Lawyer Referral Service is part.

The Compensation Fund, which is also a highly regarded enterprise undertaken by the Law Society, compensates clients, under prescribed conditions, who have suffered losses due to the defalcation or unprofessional behaviour of members of the Bar.

As noted above, the remaining Law Society-sponsored services in Ontario which are included amongst its Access to Justice programs are largely informational and would not qualify as service centres for members of the public requiring legal advice such as Pro Bono Law Ontario provides in the Province.

G. Funding by the Organized Bar: How Might It Work?

As pointed out earlier, PBLO’s major funding institution, the Law Foundation of Ontario, has signalled its intention to reduce the core funding which it has provided to PBLO since its inception. It has urged the leadership of the agency to explore funding prospects elsewhere. Suggestions include canvassing the profession at large. While PBLO is currently engaged in a study of the prospects in this direction, it is unlikely that sustained core funding can be developed by annual fundraising efforts with private law firms. Furthermore, only large law firms would be able to make meaningful contributions to such a program which, if undertaken, would result in an imbalance in financial support where universality ought to be the rule. As pointed out earlier, resort to Government is an impractical consideration at the present time. And, in addition, Government funding for the program might raise concerns about PBLO preserving its independence in the delivery of service, a consideration which is of significance in attracting pro bono lawyers from the private Bar.

Using Ontario as a case study, what are the prospects of securing core funding from the profession through the vehicle of the Law Society? By way of example, in Ontario, the Compensation Fund is supported by an annual levy of \$257 per lawyer and \$183 per paralegal per annum. This financial arrangement has enabled the Compensation Fund in Ontario to make compensation payments, in excess of \$1 million per annum, to clients who qualify. In British Columbia, its Special Compensation Fund paid out almost \$2 million in 2009. Thus, the utilization of a levy has enabled the profession to maintain a robust client compensation

arrangement in the public interest, which is both a credit to the practicing Bar and an important underpinning in its need to maintain independence in public service.

In the Province of Ontario there are 34,000 full fee-paying lawyers. If a PBLO access to justice levy was shouldered by the profession in Ontario, the current grant from the Law Foundation of Ontario could be replaced at a cost of approximately \$20 per lawyer per annum.

At the present time, the Law Society of Upper Canada is a full partner with PBLO in the design and delivery of pro bono services in Ontario. While its financial support has been limited to the sum of \$50,000 annually, its support for the program includes the provision of the services of the CEO of the Law Society, Malcolm Heins, who is a member of the Board of PBLO and serves as its Treasurer. In addition, the Society has partnered with PBLO in the delivery of the recently published Ontario Civil Legal Needs Report and has entertained, sympathetically and practically, petitions for policy change to advance PBLO initiatives, including changes to the Conflict Rules to accommodate service in the Law Help Centres. It is currently engaged in a joint effort with PBLO by way of a pilot project designed to develop protocols for delivery of service to the public in the “unbundling” or “limited service” model. A similar synergistic relationship exists in other provinces which have developed pro bono programs.

By way of a note of caution, if funding from the profession is sought in Ontario, there will be a heavy burden on PBLO to broaden its reach in the delivery of service across the Province. Presently, it operates Law Help Ontario Centres in Toronto and Ottawa and of course provides internet access to its inventory of process information to the entire population. Outreach to a broader constituency would unquestionably be welcomed by PBLO. Furthermore, its programs are easily adaptable and readily transferable in order to provide more complete and comprehensive service.

H. The Case for Funding: The Place of the Profession in Society

Why should the profession undertake to offer financial support for an organization like PBLO? It is submitted that there are several compelling reasons. In the first place, there is a growing need for pro bono services, particularly since legal aid in civil, non-family, matters no longer exists in my Province. Statistics emanating from the Needs Survey, the Law Help Centres and from the empirical evidence of self-representation make it obvious that there is a real need for the provision of service to low income citizens, a need which is escalating on a remarkably steep curve. The unique position of the practising Bar in its control of the delivery of legal services to the general public carries with it a responsibility to facilitate access to justice to those who are unable to meet the current cost. Clearly, access will be denied to an increasing number of citizens in the Province, as the Needs Survey shows, in the absence of a commitment by the profession. Pro bono services are ineffective without facilitative organizations like PBLO. Since the service is necessary, the need for meaningful contribution by the profession is, it would seem, self-evident.

In addition, the profession’s self-interest in undertaking the provision of financial support for pro bono organizations is clear. Maintaining exclusivity in the delivery of services in the public interest is at the core of the legal profession’s existence. Accordingly, ensuring that service is available to all our fellow citizens is in the interests of the profession itself. Without it, the case for the current professional model weakens significantly. Society’s reaction to the high cost of legal services is impossible to predict. We should presume that future reactive models of service provision might well be disastrous for the profession.

In addition, and as a complimentary benefit, undertaking the commitment suggested is bound to contribute to continued independence through self-governance, a requirement which the profession counts as critical to its position in society. We are best able to defend our position in society when our collective sense of responsibility is notable, effective and transparent.

Lastly, of course, in Ontario there is the statutory requirement. By law, the Society has a duty to act to facilitate access to justice for the people of Ontario. The Government having abandoned its role in providing support for access in civil matters, it is submitted that it can no longer be said that the Law Society has executed its statutory responsibility if it allows effective service providers such as PBLO to falter in the face of economic difficulties.

As we ponder these difficult problems, we might find inspiration in the words (contemporized and Canadianized) of a member of President John F. Kenney's Cabinet:

May 2011 be a year when the great majority of Canadians who are secure and busy think clearly of the minority who are not.