

THE RISE OF CANADIAN PRO BONO: IMPLICATIONS FOR HUMAN RIGHTS IN CANADA AND BEYOND

INTRODUCTION

Within the past two decades, volunteer “pro bono” legal service has received increased attention within the American legal profession as a mechanism for improving access to justice domestically and internationally. Pro bono work among lawyers has recently become “centralized and streamlined, distributed through an elaborate organizational structure embedded in and cutting across professional associations, law firms, state-sponsored legal services programs, and nonprofit public interest groups” (Cummings 2004). This growing interest in pro bono is reflected in the creation of new professional roles such as pro bono partners or managers who coordinate the pro bono initiatives of the firm and the activities of lawyers (Cummings 2004) as well as a growing number of law firms that allow lawyers to credit a small proportion of their volunteer legal work to their billable hour requirements (Rhode 2005). Additionally, the majority of American law schools now require some pro bono service among its students. While the pro bono movement in the US has gained vigor, pro bono legal service has been increasingly internationally. This proposal outlines research plans for investigating the developments and impact of pro bono in Canada, especially with regard to human rights and legal reform.

BACKGROUND ON PRO BONO IN THE US AND CANADA

In the US, voluntary pro bono work has become one of the central avenues in legal reform efforts to provide access to justice for people who are unable to afford legal services. In an effort to understand the evolving role of pro bono in the legal profession, I organized a national conference in 2008 at the Baldy Center for Law and Social Policy at the University of Buffalo. A book from this conference, forthcoming with Oxford University Press as *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession* (Granfield and Mather 2009), combines empirical research, historical analysis, and critical inquiry to explore the history, organization, strategies, and structure of pro bono lawyering. This book raises critical questions about the legal profession’s obligation to serve the public good at a time when publicly subsidized legal aid for the poor has been decreasing. This book follows up on my on-going research on pro bono (Granfield 2006; 2007a; 2007b) as well as my work on legal education and legal professionalism more generally (Granfield 1992; Granfield and Koenig 1992; 1998).

Although there has been growing attention to pro bono legal services among US attorneys, pro bono, as a humanitarian movement, has been also gaining momentum internationally in locations such as Britain, Australia, and Canada. Recently, Canada has witnessed the expansion of pro bono practice among private attorneys, especially those in large law firms in Toronto, Ottawa, and Montreal. While pro bono work within the Canadian legal profession has been slow in developing, it recently has been gaining substantial attention as a policy for increasing access to justice for the poor and middle classes as well as for under-represented minorities and indigenous people.

The precursor to legal aid in Ontario was a service developed by the Law Society of Upper Canada ("Law Society") in 1951. As Sossin (2008) points out the Law Society matched those facing criminal prosecution and unable to afford legal representation with available lawyers willing to take their case. However, the sense of voluntarism by the bar was

unable to meet the legal needs of the poor. Responding to this, the provincial government and the Law Society collaborated on the creation of the Ontario Legal Aid Plan in 1967 (Sossin 2008). By the 1990s, legal aid had come to be seen more as a responsibility of government than of the legal profession thereby reducing the sense of obligation among lawyers to provide pro bono. Perhaps not unlike the US context, it is no coincidence that the rejuvenation of pro bono as an element of legal professionalism coincides with the contraction of support for state subsidized legal aid that occurred in the past decade.

Much like the US case, the legal aid system in Canada arose in the 1960s and 1970s, primarily as a reaction to the failure of traditional philanthropic efforts to meet growing access to justice demands. However, unlike the US case, state subsidized legal aid remains the primary avenue for the access to justice among the poor in Canada. Also, while there is extensive coordination between private pro bono attorneys working in various sized law firms and state subsidized legal aid in the US, little coordination exists in Canada. The recent development of organizations such as Pro Bono Law Ontario (PBLO) in 2002 for the purposes of promoting the growth of pro bono work throughout Ontario's legal profession, developing the pro bono capacity of the private bar, addressing regulatory barriers to participation, and developing pro bono projects that address unmet legal needs in both urban and rural areas across Ontario as well as Pro Bono Students of Canada has been a step toward increased coordination between public and private legal services.

The evolving role of pro bono in countries such as Canada raises important questions about legal professionalism as well as issues related to access to justice, human rights, legal reform, and achieving social justice through law both domestically and internationally. Indeed, there are a number of examples around the world in which pro bono lawyers have become involved in access to justice, human rights, legal reform, and social justice. For instance, Lawyers without Borders, an organization begun in 2000 provides pro bono legal services in areas including immigration, refugee services, and violence against women. Private law firms in several countries are becoming increasingly involved in global pro bono efforts that promote legal reforms. As Steinitz (2009) notes, “mega law firms, as well as other sections of the Anglo-American private law sector, are increasingly undertaking ambitious and cutting-edge pro bono legal representations in post-conflict situations, emerging democracies and emerging markets.”

In Canada, pro bono efforts have been directed at a number of human rights and law reform issues. Data from the PBLO indicates that pro bono has increased significantly over the past few years (PBLO 2007). PBLO has coordinated pro bono efforts in a number of areas related to Canadian social policy including educational rights for special needs youth, health care access, immigration and refugee issues, tenants rights, and Aboriginal rights. Canadian lawyers are also working with organizations such as Lawyers Without Borders to provide pro bono legal assistance internationally.

In order to better understand the emergence of pro bono legal services among private attorneys Canada, I co-organized, with Lorne Sossin, a professor of law at the University of Toronto, a cross-border panel on pro bono at the recent Regional Socio-Legal Conference held at the Baldy Center for Law and Social Policy at University at Buffalo. This conference, *Pro Bono, Lawyers, and the State: Cross-Border Perspectives*, brought together scholars and practitioners from Ontario (David Scott, Chair of PBLO and Co-chairperson of Borden Ladner Gervais, LLP in Ottawa, Lorne Sossin, Vice Chair of PBLO and Professor of Law at the University of Toronto, and Mark Edelstein of Pro Bono Students of Canada) and from the

Buffalo/Niagara region to explore questions regarding pro bono, access to justice, human rights, and legal reform in Canada, the US, and beyond. The conference explored questions such as; how have changes in state support for legal services shaped the evolution of contemporary pro bono activities?, what kinds of infrastructures exist in Canada and the US for linking private attorneys with public interest/legal aid attorneys?, what kinds of resources should fund pro bono efforts (state, market, philanthropy etc)?, what are the politics of pro bono in Canada and the US, i.e. contested meanings over the definition of “the public good”?, how does the context of legal practice affect the provision of pro bono services in Canada and the US?, to what extent are issues related to pro bono integrated into the law school experience and would this enhance the law school experience?, are there best practices for encouraging pro bono within legal professions?, what implications might there be for the growing international pro bono humanitarian movement in areas such as human rights, asylum seekers, refugees, or access to medical care, education, and decent housing?

RESEARCH METHODOLOGY

I plan to investigate the following issues in my research. 1) The current rise in Canadian pro bono has not occurred without tension. Pro bono has received somewhat of a frosty reception from legal aid attorneys who view the rise of pro bono as presaging the erosion of state-supported legal aid. PBLO seems to recognize this potential tension in its public declaration that it exist to complement legal aid, not duplicate its service (see <http://www.pblo.org/about/>). To what extent is there tension between the private and public legal practitioners in Canada over the provision of legal services to poor and under-represented populations and what is the nature of this tension? What are the different narratives of “doing good” through law offered by private attorneys and their state-subsidized counterparts in legal aid? 2) While pro bono among private lawyers in Canada is increasing, a transformation of the culture of Canadian law firms towards a more “bottom-line” emphasis is also occurring. Given this, what are the facilitators and barriers to performing pro bono in Canada, what are the mechanisms currently in place to recruit Canadian lawyers into pro bono service, and to what extent do Canadian lawyers in private practice subscribe to an ethic of professionalism that includes an obligation for pro bono? Are there market or professional development incentives for “doing good” in Canadian law firms that are compatible for performing pro bono work? 3) A number of Canadian pro bono efforts have been in the areas of domestic and international human rights and legal reform. What are the examples of these efforts, how do lawyers get linked up with human rights causes domestically and internationally, what are the challenges of doing this work, and what have been the outcomes?

The research I wish to conduct as a Fulbright Scholar relates to these three general areas and would be conducted over the course of four (4) months. Through my contacts in Ottawa and Toronto, I would first develop a list of 50 private attorneys involved in pro bono work in Canada and internationally as well as legal aid attorneys. Following the construction of this list, I would contact each individual for the purpose of conducting in-depth interviews that explore the above general questions. I anticipate that most interviewees would reside in the cities of Ottawa, Toronto, and Montreal. I would also interview members of board of PBLO regarding their views of pro bono and the emerging infrastructure for linking private attorneys with pro bono projects.

I will use my contacts in the Canadian Bar Association and the Universities of Toronto and Ottawa to help acquire my interviews. These personal references will encourage research

subjects to participate in the interview. Conducting this research is only possible through the use of the kind of references I have already established. I have a great deal of experience conducting interviews with lawyers, law students, and other populations and I have found that working with influential intermediaries helps gain access to research subjects, especially those who have busy work schedules. With the input of colleagues at the University of Ottawa (Professor Adam Dodek-Law School; David Scott-Chair of PBLO, and Professor Lucie Lamarche-Law School and Director of the Human Rights and Education Centre) as well as from the University of Toronto (Lorne Sossin-Law School; Ronit Dinovitzer-Sociology; Ron Levi - Criminology), I will develop an interview protocol that poses questions related to the above research themes. Each of these individuals will also help identify research subjects and schedule interviews. Upon contacting each potential research subject, I will inform him/her that they were recommended to me from one of my contacts and I will explain the nature of the research to them and acquire their informed consent. I plan to conduct all interviews face-to-face as this provides the optimal opportunity to probe subjects for greater clarification. With the permission of each research subject, I will tape-record the interview and transcribe it immediately. All interviews will be coded and carefully analyzed. The analysis of the data will follow standard qualitative techniques including framing and forming hypotheses out of the emerging inductive data, manual coding and re-coding of data in order to categorize and compile an organized data base, brief memos and elaborations of emerging themes, patterns and theoretical insights, and, diagramming the association between emergent variables and creating analytical typologies. I plan to collaborate with my contacts at the University of Ottawa and the University of Toronto during the data analysis and writing up my research results in order to draw upon their insights on Canadian legal culture.

LOCATION, SIGNIFICANCE OF STUDY and DISSEMINATION PLANS

The program in legal studies at the Human Rights Research and Education Centre at the University of Ottawa is an ideal setting to conduct this research. The program's emphasis on human rights, legal reform, and the development of institutions and infrastructures in Canada and abroad to advance social justice is uniquely suited to sponsor my proposed research. Along with the program's emphasis in areas related to my research, the city of Ottawa, because it is the national capital, provides close proximity and access to private and legal aid attorneys that are needed for interviews. Finally, the University of Ottawa's Human Rights and Education Centre would place me in close proximity to other cities (Toronto and Montreal) for possible interviews as well as to the contacts I have established. While I have developed this proposal with the University of Ottawa in mind, the legal studies award at McGill University would also be an appropriate location to conduct this research.

The emergence of pro bono in Canada offers an opportunity for a very interesting and significant case study. It is well known that no single model of legal service delivery, whether state-subsidized legal services, the private market, philanthropy through pro bono, or self-help, is capable of providing for the legal needs of the poor and under-represented populations (Abel 2009). While the US funding for legal aid has been cut dramatically over the years, Canada's funding for legal aid remains substantial. The combination of pro bono legal services by private attorneys and state-subsidized legal could lead to an enhancement of legal services for large numbers of Canadians. However, such a combined model of legal services depends, in part, on whether pro bono can be expanded without causing a contraction in support for legal aid. If, as Abel (2009) has suggested, a rise in pro bono often leads to a

decline in support for state legal aid, then the expansion of the former may have deleterious consequences for the totality of legal service delivery in a country. But, if pro bono can expand, as PBLO suggests, to complement legal aid, then the delivery of legal services within a country could be greatly enhanced. Undertaking an investigation of these issues has important public policy ramifications for Canada and beyond as well as having scholarly theoretical and practice-based implications.

I would disseminate the findings from my research through a number of different venues. I will offer a colloquium at the University of Ottawa on the results from my investigations open to faculty, visiting scholars, and students. I have already been invited to present a public lecture on my research at the law school and have been asked to present preliminary results from my research at the 2010 Meeting of the Canadian Legal Ethics Teachers in Ottawa. I also plan to collaborate on research articles with scholars in Ottawa and Toronto and plan to design a follow-up collaborative project to conduct a national survey of pro bono among Canadian lawyers. I also eventually hope to publish a book that examines the global pro bono movement with a chapter that focuses exclusively on Canada. Finally, I plan to develop a course to be offered through the Canadian-American Studies Program at the University at Buffalo in comparative legal profession that explores issues related to my Fulbright experience and will seek to establish a working relationship and exchange between the University at Buffalo and the University of Ottawa.

I believe that I am uniquely suited to participate in the Fulbright Program in legal studies at the University of Ottawa. I am an established scholar of the legal profession having produced numerous books, articles, reports, and conference papers. I am a sociologist by training with expertise in both qualitative and quantitative methods, but conduct my research from an interdisciplinary perspective. I am an active member of the Law and Society Association, a robust interdisciplinary association of scholars. I am also an advisory board member of the Baldy Center for Law and Social Policy at the University at Buffalo, a center that attracts legal scholars from various disciplines. In addition, I currently am Chair of Sociology Department at the University at Buffalo (UB), a university that very much prides itself on being a “border university” with deep interests in our northern neighbors. Examples of this include the Baldy Center which frequently collaborates on conferences with York University, the University of Toronto, Brock University and other Canadian universities as well as the Canadian-American Studies Program at UB which coordinates, promotes, sponsors, and carries out research, instructional and service activities that are related to Canada. The Canadian-American Studies Program at UB, of which I am an affiliated faculty member, fosters a broad and diverse menu of courses, experiences and opportunities that stimulate scholarly inquiry and develop awareness of Canada among faculty and students across the entire university. Also, I have traveled to and spent time in several countries including Guinea, Senegal, Mexico, Guatemala, Sweden, Switzerland, the UK, Ireland, Scotland, France, Austria, Germany, Italy, Belgium, The Netherlands, and most recently to Singapore to develop an undergraduate sociology program at the Singapore Institute of Management. I have also traveled to various parts of Canada for professional and recreational purposes. I would undoubtedly find that my participation in the Fulbright Program at the University of Ottawa would be a professionally productive and personal enriching experience.

