

Viewpoint*

*Pro Bono Publico: For the Public Good***

MARY EBERTS

Eberts Symes Street and Corbett, Barristers and Solicitors, Toronto

My Latin teacher at St. Thomas Collegiate, Mr. Brown, used to exhort us to study our Latin because it would be of immeasurable value to us in our future careers, whether we planned to be doctors or insurance agents. He didn't identify the particular challenges posed by legal Latin, but as I struggled to come to grips with the troublesome phrase, "pro bono" legal services, I wished he had turned his mind to this area.

Pro bono publico: For the public good. A well-known Latin phrase that has come to mean legal services delivered by the private bar for nothing or at least not for full rates. It embraces a range of activities.

So, I asked the shade of Mr. Brown, how did the donation or discounting of legal services come to have its own shorthand Latin description, a phrase with almost mythic power, when no such honour is paid to donated accounting services, dental services, plumbing or housebuilding?

What is it about no- or low-cost legal services that imparts this character of "public good" and which seems to attach in this way to no other profession?

And what is it about the legal profession and the character of *pro bono* legal services that seems to expose lawyers – of all the professions and callings – to the idea that they should donate their services in order to address profound social challenges?¹

There is no doubt that the expectation is there.

In a 1994 address to an ethics conference at the University of Calgary,² Justice John Major of the Supreme Court of Canada stated quite frankly that "a portion of lawyers' time is owed to making the system accessible to all", observing that "the privilege of practising law carries with it a duty to act in the public interest". He predicted that "unless lawyers act quickly to ensure that these

*"Viewpoint" and "Counterpoint" provide forums for informed discussion of issues of wide interest to the voluntary sector. The opinions expressed are those of the authors.

**This article was developed from a presentation to "Fit to be Tithed", a conference held under the auspices of the Continuing Education Committee of the Law Society of Upper Canada on November 26, 1998 in Toronto.

requirements are met, their position as members of a self-regulated profession with a virtual monopoly is in serious danger of becoming something else” and, in passing, took that now-familiar, almost obligatory, swipe at lawyers’ billing practices. He noted the disappearance of the Robin Hood billing tradition of billing what the client is able to pay so that the well-to-do clients no longer subsidize the less well off. In the area of costs, too, the shadow of coercion lay behind the exhortations to the profession. If the lawyers don’t act to solve the problem of the high cost of legal services, then perhaps the services will have to be provided elsewhere.

I ask myself, as doubtless will many readers, what is the civic faith that drives lawyers to make, and to entertain, such exhortations for a form of voluntary tithing?

Members of other professions and callings do no- or low-rate work from many motivations: kindness, the charitable impulse, even a form of “noblesse oblige”. Many lawyers doubtless do *pro bono* work for the same reasons.

And yet – unless I am missing something – plumbers and information technology specialists, gardeners, cooks, and accountants are not pressed in systemic ways to answer the call of philanthropy.

In some of these calls we see invoked a sort of privilege calculus: do this work as payback for the statutory monopoly of lawyers, or the privilege of self-government.

Yet, with respect, this does not really work as a rationale for *pro bono* legal work.

In fact, we lawyers no longer have a monopoly in a real sense over much that we do. We face competition at the high end from other professions like accountants and consultants, at the low end from agents, paralegals and conveyancers, and at both ends from ADR practitioners who can often be retired judges and attorneys-general, or neophyte social workers. We also face the absorption of what used to be our legal work into an array of bureaucratic settings, like the bank and insurance company activity on residential real estate transactions.

In many cases, our “monopoly” has been eroded at the initiative of those very governments who tell us we should do *pro bono* work in order to protect it: the recently introduced mandatory mediation program in Ontario welcomed non-lawyers as mediators and legislation has long permitted agents to appear in Provincial Court or before administrative tribunals. In others, erosion of the lawyers’ monopoly is proceeding apace because governments do not give a priority to stopping it: witness the long history of immigration consultants, some of whose practices have given rise to substantial ethical concerns.

It is, therefore, unconvincing when we are told we must do *pro bono* work or we may lose our monopoly, especially when those same governments are highly interested in just how large the legal aid budget needs to be.

Similarly, with the privilege of self-government. This is not to deny that self-government is a privilege. It is not, however, a privilege that is reserved only for lawyers or other traditional professions. Rather, in an era of government downsizing and offloading, the privilege of self-government is also a great convenience for the state because it lifts the burden of regulating professions and trades. Small wonder that self-government is being extended to many callings.

Even before downsizing diminished the cachet attached to self-regulation, there were other reasons for self-regulation by lawyers than that they were being rewarded for giving free legal services. The social impulse behind lawyers' self-regulation is not to recognize services rendered but rather to protect an extremely valuable democratic resource.

In *Pearlman v. Manitoba Law Society*,³ Iacobucci J. addresses the particular importance to a free and democratic society of an autonomous legal profession. He cites the earlier remarks of Estey, J.:

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. (emphasis in original)⁴

Society values self-regulation of the legal profession because the independence of the Bar is a crucial safeguard for democracy. For the same reason, it values broad access to legal services, which are essential to the maintenance and furthering of the rule of law.

In the *Manitoba Language Rights Reference*⁵ the Supreme Court of Canada identifies two fundamental elements of the rule of law. The first is that the law is supreme over officials of the government as well as private individuals and thereby preclusive of the influence of arbitrary power.

Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. "The rule of law in this sense implies ... simply the existence of public order".

The rule of law is referred to, implicitly or explicitly, in the preambles to both the 1867 and 1992 *Constitution Acts*, and the Court finds that the principle is also implicit in the very nature of a constitution:

... The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by the rule of law.⁶

Recently, in the *Secession Reference*,⁷ the Supreme Court has identified the rule of law as one of the foundations of our democracy:

The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution.⁸

Citing *Roncarelli and Duplessis*,⁹ the Court observes that the rule of law is a fundamental postulate of our constitutional structure. The rule of law conveys “a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.”¹⁰

In the *Manitoba Language Rights Reference*, the Court observes:

At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.¹¹

It also identifies yet a third principle of the rule of law: that the exercise of all public power must find its ultimate source in a legal rule.¹²

The Supreme Court’s understanding of the rule of law is a comprehensive one.

Here, then, is why the services of lawyers are so vital in the kind of representative constitutional democracy that we cherish and must constantly strive to uphold. Lawyers’ services need to be widely available for such a law-based democracy to work, to continue to renew its legitimacy, and to maintain its ability to elicit the consent of the governed. Availability must apply, not just to lawyers’ services aimed at curbing excesses of governments’ power in their dealings with the people, but also lawyers’ services aimed at assisting individuals to participate in the legal order not just through criminal law services and famous constitutional cases, but more “routine” applications of law for the

resolution of disputes in family, commercial, employment and other areas open to litigation.

This is why access to legal services means access to justice. This is where our ethic of service comes from. We, as lawyers, are serving not just the individuals, because we are moved by compassion or kindness or a form of *noblesse oblige*, we are serving our legal system and our democracy.

This is democracy work ... and this is the true meaning of the “public good”. We work for the public good, and not just for the goodwill of members of the public.

But if the need to uphold and to renew the rule of law is the reason why access to legal services and access to justice are so crucial, why do so many say that lawyers *must* provide their services for nothing? If these services are so prized for the maintenance of democracy, why must lawyers donate them when plumbers’ services, so prized for the maintenance of hygiene, are nowhere subject to such exhortations? What is the role of the state in upholding access to justice and how do we balance the roles of the legal profession and the state?

The Ontario Legal Aid Review, in its *Report*, “A Blueprint for Publicly Funded Legal Services” states, “... we suggest that the underlying normative foundation for the state’s obligation to provide some form of legal aid is to be found in Canadians’ shared commitment to the Rule of Law as an essential feature of the Canadian political system.”¹³

The key phrase here, of course, is “some form”.¹⁴

We face a dilemma. Everyone seems to recognize the value of legal services in upholding the ideals of the rule of law, and yet nowhere in our legal system do we find positive obligations to provide such services at no- or low-cost to individuals who need them. This is true both with respect to governments and also with respect to the profession.

Whether we look to *The International Covenant on Civil and Political Rights* or the *Canadian Charter of Rights and Freedoms*, we do not find any fixed general obligation on governments to provide funded legal services. In the area of criminal law, there are qualified and discretionary obligations and the Supreme Court has acknowledged that to force the state to fund provision of 24-hour legal advice to those who are arrested would interfere with the government’s allocation of scarce resources.¹⁵ There is at present no legal obligation in Canada to provide legal aid in civil matters.

Just as the courts have refrained from holding governments to a general duty to provide funded counsel while recognizing the virtues of such provision, Canadian rules of professional conduct for lawyers reflect an appreciation of the virtues of *pro bono* work but do not actually require it. Lawyers are required to act when assigned as counsel by a court, which does not happen all that often,

but are generally permitted to decline a particular piece of legal work, be it paid or *pro bono*. The decision whether to participate in the provision of legal aid services is left to the individual lawyer.¹⁶

Where does all of that leave us? Surely, the extent of the state's obligation to provide access to justice remains a matter of controversy. What do lawyers do if they have a commitment to the Rule of Law and to access to justice and are dismayed at the level of support these values receive from elected governments?

Some lawyers, doubtless acting *pro bono*, will challenge those limits, making an issue of the state's contribution. Others donate services. Still others donate services and take up in many ways the challenge of broadening the state's commitment.

The contribution of Ontario lawyers to *pro bono* services is not, as some would say, invisible. The Court of Appeal has initiated a project to provide *pro bono* duty counsel to unrepresented criminal litigants. At the other end of the spectrum, there is a program of duty counsel for lawyers appearing before the discipline tribunals of the Law Society. Many legal advice clinics operate in conjunction with legal aid local offices, organized by the Bar to provide summary advice and assistance. The thousands of lawyers who have paid a fee to join the Law Society's Lawyer Referral Service agree to offer a half hour of free consultation to each caller referred through the service. Many charitable organizations receive the volunteer services of lawyers and lawyer-mediators, either for party-to-party dispute resolution, or for high profile rights cases. In centres all over the province, lawyers reduce fees, eliminate them, or continue with files long after the clients' resources to pay have been exhausted. Some of the *pro bono* service is involuntary, as when a duty counsel appearing in court in the morning may be "buttonholed" by the judge to come back in the afternoon or to linger at the end of the day to do "just one more case".

In statistics prepared by the Law Society of Upper Canada on the basis of lawyers' annual member-information forms, it was reported that in the last three years, an average of almost 600,000 *pro bono* hours per year had been performed.¹⁷ At even a modest \$100 per hour, this is \$6 million annually in *pro bono* legal services.

This contribution of *pro bono* services is in addition to the volunteer time the profession has contributed to committees of the Legal Aid Plan and Clinic Boards and committees or to supervise *pro bono* students on placements. It is also in addition to time volunteered by practitioners doing low rate work for the Legal Aid Plan, the Children's Lawyer or other government marshallers of counsel services.

The problem, I would suggest, is not that the Bar lacks the charitable impulse or fails to understand the significance of legal services to the maintenance of

the Rule of Law. It is, rather, that the appetite for free or low-rate legal work is virtually limitless.

The challenge for us as lawyers is, I believe, clear. Our own deep commitment to access to justice and the Rule of Law will impel many of us to continue offering *pro bono* legal services, of many kinds. We will want to get the most effective return on our, and the profession's, *pro bono* hours so as to give the most benefit to the people and the causes we select. We will be identified with those people and those causes in ways that will enrich our lives, refresh our spirits and, possibly, limit or drastically change our careers. In short, we shall find this work both infinitely frustrating and infinitely fulfilling.

At the same time, we will worry about the effects of this unchecked and unbalanced commitment to *pro bono* work. Not all the members of the profession have this commitment and now that the legal aid levy has been abolished, the profession as a whole is, in effect, free of the requirement to support *pro bono* work in some organized way. Also the job of keeping alive the ideals of access to justice and the Rule of Law may fall disproportionately on only some members of the bar.

For these, imbued with the ethic of service and understanding how what they do maintains fragile democracy for all of us, it is gravely troubling that our *pro bono* labours may have the effect of letting governments off the hook, of readjusting in a negative way that moving boundary between what is expected of the state and what is expected of the profession. In recent years, governments at both levels have expected lawyers to do more with less. They have privatized, for these citizen lawyers and their often vulnerable citizen clients, the arduous job of restraining arbitrary conduct and maintaining the orderly arrangement of the private relations and the public/private relations involved in keeping society on an even keel. While neither the state nor the lawyer has a fixed general obligation to provide legal services in aid of access to justice, we should ask ourselves who is easier to push into doing so – the individual lawyer or the government?

Meanwhile, *pro bono* work is becoming a sort of legal food bank.¹⁸ Like food banks, *pro bono* service alleviates hunger for some on a daily or monthly basis but absorbs the energy of the alleviators so that they have little left for changing the underlying conditions that create the hunger in the first place.

Our challenge, as members of a *pro bono* bar, as the regulators of those professionals, and as partners of the governments that share with them the disputed terrain of *pro bono* work, is both to feed the “hunger” in the fairest and most effective way we can *and* to address the necessary issues of systemic change.

This is not just our legal work.

It is democracy work.

FOOTNOTES

1. In his *Report of the Court of Appeal for Ontario Upon the Opening of the Courts of Ontario for 1999*, (January 6, 1999), the Honourable R. Roy McMurtry, Chief Justice of Ontario, stated his belief that “the major challenge facing the justice system in the next millennium will be the absence of adequate legal advice and legal representation to our society’s increasing numbers of disadvantaged”.
2. Mr. Justice J.C. Major, “Lawyers’ Obligation to Provide Legal Services” (1995), 33 *Alberta Law Review* 719.
3. [1991] 2 S.C.R. 869.
4. The remarks cited, at 888, are those of Estey, J. from *Attorney-General of Canada v. Attorney-General of British Columbia.*, [1982] 2 S.C.R. 307.
5. [1985] 1 S.C.R. 721, at 748–749.
6. *Ibid.*, at 750–751.
7. Heard February 16–19, 1998, judgment rendered August 20, 1998. Dossier 25506.
8. *Ibid.*, paragraph 69.
9. [1959] 2 S.C.R. 121.
10. *Supra*, footnote 7 at paragraph 70.
11. *Ibid.*
12. *Ibid.*, at paragraph 71.
13. Page 68.
14. It is evident from the Review’s *Report* that how one conceptualizes the Rule of Law will have a significant impact on one’s concept of the proper role of the state in providing legal services. The Review emphasizes the “publicity” condition of the Rule of Law, which speaks to the need for law to be visible and comprehensible. Its point about the Rule of Law is a modest one. At page 69 it states:

In a democratic society committed to the Rule of Law, a publicity condition is inherent in the use of law by the state, and the complexity of that law may, in turn, impose an obligation on the state to facilitate access to the effective use of that law in some fashion. The more complex the law in question, and the greater its impact on individuals who lack the means to acquire help in understanding it, the more intense will be the burdens imposed on the state by the publicity condition. The individual’s interest in or entitlement to access to the law thus appears to be inherent in a decision by the state to utilize law to accomplish a particular social or political object.

This approach to the Rule of Law is, arguably, much narrower than the one embraced by the Supreme Court of Canada. It addresses only the use by the state of positive law and not the issue of law as a limit on arbitrary state action. Moreover, it focuses on legal information rather than the effective use of the law and it is therefore not surprising to read in the *Report* that such a requirement might also be satisfied by providing legal information in other ways, or by writing the laws in a less complicated way. The debate about the state’s proper role in furthering access to justice is, at its heart, a debate about what we mean by the “Rule of Law”.

15. See Article 14(3)(d) of *The International Covenant on Civil and Political Rights*, and sections 10(b) and 11(d) of the *Canadian Charter of Rights and Freedoms*. See also *R. v. Brydges*, [1990] 1 S.C.R. 190, *R. v. Prosper*, [1994] 3 S.C.R. 236, *R. v. Rain*, [1997] 2 W.W.R. 38 (Alta. Q.B.) and *R. v. Rowbotham* (1998), 41 C.C.C. (3d) 1 (Ont. C.A.).
16. Gavin MacKenzie, "Lawyers and Ethics: Professional Responsibility and Discipline", (Carswell, 1993) Part II, *Access to Justice*.
17. Law Society of Upper Canada, Pro Bono Activity as reported in *Membership Information Form*, 1996–1998. Statistics for 1998 are incomplete.
18. My thanks to Andy Orkin for this telling comparison.