



# Pro Bono Practices and Opportunities in Canada<sup>1</sup>

## INTRODUCTION

Canada has a rich tradition of promoting access to justice through, among other things, legal aid and pro bono legal assistance. In recent years there has been increased support for the active coordination of pro bono opportunities and, particularly as a result of the efforts of professional bodies such as the Canadian Bar Association, various initiatives have been undertaken to promote, simplify and encourage pro bono participation across Canada. While pro bono legal services and legal aid are generally available across Canada, several factors affect the availability of such services, including underfunding, insurance requirements, uneven coverage, fragmented approaches, discretionary eligibility criteria and a lack of information to potential clients/applicants. Notwithstanding these factors, lawyers and law students across Canada increasingly continue to provide pro bono services.

## OVERVIEW OF THE LEGAL SYSTEM

### The Justice System

#### Constitution and Governing Laws

The Constitution of Canada (the “**Constitution**”), which includes the Constitution Act 1867 and the Constitution Act 1982, sets out the basic principles of a democratic government and defines the powers of the three branches of government: the executive, the legislative, and the judiciary.<sup>2</sup> Canada is a federation with jurisdiction over governance divided between the federal government that governs matters of a national interest and ten provincial and three territorial governments that are responsible for matters of a more local nature.<sup>3</sup> Although common law is applied throughout the Canadian legal system, within the province of Quebec, a civil law system is applied for all matters of a private law nature.<sup>4</sup>

#### The Courts

Canada’s system of courts is complex. Generally speaking, Canada’s court system is based on a tiered hierarchy and is divided into federal and provincial/territorial courts organized by levels of superiority.<sup>5</sup> While each province/territory has jurisdiction over the administration of justice within their jurisdiction, the federal government maintains exclusive legislative authority over criminal law in order to ensure fair and consistent treatment of criminal law nationally.

Within each province/territory there are generally three or four levels of courts, which can be divided between trial-level courts and appeal courts. Among trial-level courts there are provincial/territorial courts and superior trial courts. The former are staffed with judges appointed by the province/territory and handle certain family law and criminal law matters. The superior trial courts have the power to review the

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<sup>1</sup> This chapter was drafted with the support of Shane C. D’Souza and Diego Beltran of McCarthy Tétrault LLP, Jamie Telfer of Hewlett Packard Enterprise Canada, and a contribution from the Canadian Bar Association.

<sup>2</sup> The Canadian Constitution, Department of Justice, available at <http://www.justice.gc.ca/eng/csj-sjc/just/05.html> (last visited on September 4, 2015).

<sup>3</sup> The Constitutional Distribution of Legislative Powers, available at <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=federal&doc=legis-eng.htm> (last visited on September 4, 2015). Note however that Canada’s three territories have less extensive legislative powers than the provinces, see Difference between Canadian Provinces and Territories, available at <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=provterr&doc=difference-eng.htm> (last visited on September 4, 2015).

<sup>4</sup> Where Our Legal System Comes From, Department of Justice, available at <http://www.justice.gc.ca/eng/csj-sjc/just/03.html> (last visited on September 4, 2015).

<sup>5</sup> For more details, see Department of Justice, Canada’s Court System, available at <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/index.html> (last visited on September 4, 2015).



decisions of the provincial/territorial courts and to deal with more serious criminal cases and civil and family law cases, including divorces. The superior appeal courts hear appeals from the superior trial courts. Notwithstanding that the provinces/territories administer the superior courts in their jurisdiction, the federal government appoints judges based on an application and assessment process. Although there are permanent court houses and judicial centers in each province/territory, courts also travel “on circuit” to small or isolated areas.<sup>6</sup> Outside of the courts, certain matters, such as labor relations and employment discrimination, are adjudicated by specialized administrative tribunals which may be subject to judicial review by the courts.

Federal courts hear matters that are under exclusive federal control. The Federal Court may sit anywhere in Canada and conducts hearings across Canada. Decisions of the Federal Court may be appealed to the Federal Court of Appeal which hears cases in 18 cities across Canada. Federal judges are appointed by the Minister of Justice through an application and assessment process.

The Supreme Court of Canada serves as the final court of appeal and answers important questions of national importance. The Supreme Court of Canada sits in Ottawa<sup>7</sup> and consists of a Chief Justice and eight other justices appointed by the federal government.

## The Practice of Law

### Education

There are twenty-three law schools in Canada. Of these, seventeen offer a degree in common law, six offer a degree in civil law, and five offer degrees in both common and civil law. Canada’s law societies have agreed on a national requirement that graduates of Canada’s common law programs must meet in order to enter into a law society admission program. While pro bono is not included as part of these national requirements, some law schools have included such a requirement. For example, Osgoode Hall Law School demands that students complete at least 40 hours of unpaid public interest law related work as a requirement for graduation.<sup>8</sup>

### Licensure

#### **The Role of Solicitors and Barristers**

In Canada, the professions of solicitors and barristers are fused and Canadian lawyers can call themselves barristers or solicitors. Generally, a barrister is a litigator. Their work is associated with the court process, including alternative dispute resolution and administrative tribunals. Solicitors’ work, on the other hand, involves assisting clients with all other legal matters including drafting contracts or wills, handling real estate transactions and incorporating and maintaining companies.

Law societies established at the provincial/territorial level set the standards for admission to the profession and the conduct of its members.<sup>9</sup> The Federation of Law Societies of Canada (the “**Federation**”), which is the national coordinating body for Canada’s 14 provincial and territorial law societies, has undertaken a major initiative on behalf of the law societies to develop national standards for admission to ensure that admission standards are consistent across the country. Generally speaking, admission to a provincial/territorial law society requires an applicant to have

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<sup>6</sup> For more details, see Department of Justice, How the Courts are Organised, available at <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/page3.html> (last visited on September 4, 2015).

<sup>7</sup> Teleconferencing facilities to locations across the country are available, see Supreme Court of Canada, The Canadian Judicial System, available at <http://www.scc-csc.gc.ca/court-cour/sys-eng.aspx> (last visited on September 4, 2015).

<sup>8</sup> Osgoode Hall Law School, Osgoode Public Interest Requirement, available at <https://www.osgoode.yorku.ca/programs/jd-program/osgoode-public-interest-requirement/> (last visited on September 4, 2015).

<sup>9</sup> Federation of Law Societies of Canada, Our Members: Canada’s Law Societies, available at <http://flsc.ca/about-us/our-members-canadas-law-societies/> (last visited on September 4, 2015).



attended an approved law school in Canada,<sup>10</sup> passed the relevant provincial/territorial bar admission course and completed a period of articling, which is a training period with a firm. The bar admission course and specific articling requirements vary between provinces/territories.

### **The Role of Foreign Lawyers**

Foreign-qualified lawyers cannot practice law in Canada without being licensed to practice. To obtain a license to practice in a province/territory, foreign-qualified lawyers are required to complete the necessary accreditation licensing process and complete articling.

### **Demographics**

In 2013, there were approximately 117,000 lawyers registered with the law societies of Canada, with the majority of them working as either sole practitioners or in small firms of up to ten lawyers.<sup>11</sup>

### **Legal Regulation of Lawyers**

The function of Canadian law societies is to regulate the legal profession in the public interest of that jurisdiction. The Federation leads the development of high national standards for the legal profession and undertakes initiatives to introduce common standards in, among others, admissions,<sup>12</sup> money laundering,<sup>13</sup> codes of conduct<sup>14</sup> and complaints and discipline across all provinces/territories.<sup>15</sup>

To practice in Canada, each lawyer is required to be a member of a law society and be governed by its rules. Each of the provincial/territorial law societies is established by provincial/territorial law and is principally responsible for regulating the conduct of Canadian lawyers. These provincial/territorial law societies are, in light of guidance from the Federation, responsible for writing the codes of conduct, investigating and adjudicating complaints of misconduct and imposing sanctions on their members. While there is some limited non-lawyer oversight in certain provinces,<sup>16</sup> in general the profession is largely self-regulating.

## **LEGAL RESOURCES FOR INDIGENT PERSONS AND ENTITIES**

### **The Right to Legal Assistance**

While it is acknowledged that access to legal services is fundamentally important in any free and democratic society, it is generally accepted that the Constitution does not provide an automatic right to

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<sup>10</sup> Attendees to foreign law schools may apply for their education to be approved by the National Committee on Accreditation (or, in the case of Quebec, directly by the Barreau du Québec or the Chambre des notaires du Québec which each have their own evaluation procedures) who will determine what, if any, further coursework or examinations must be completed. For more details, see Federation of Law Societies of Canada, National Committee on Accreditation, available at <http://flsc.ca/national-committee-on-accreditation-nca/> (last visited on September 4, 2015).

<sup>11</sup> 2013 Statistical Report, Federation of Law Societies of Canada, available at <http://docs.flsc.ca/STATS2013ReportFINAL.pdf> (last visited on November 4, 2015).

<sup>12</sup> National Admission Standards, available at <http://flsc.ca/national-initiatives/national-admission-standards/> (last visited on September 4, 2015).

<sup>13</sup> Model Rules to Fight Money Laundering and Terrorist Financing, available at <http://flsc.ca/national-initiatives/model-rules-to-fight-money-laundering-and-terrorist-financing/> (last visited on September 4, 2015).

<sup>14</sup> Model Code of Professional Conduct, available at <http://flsc.ca/national-initiatives/model-code-of-professional-conduct/> (last visited on September 4, 2015).

<sup>15</sup> National Discipline Standards, available at <http://flsc.ca/national-initiatives/national-discipline-standards/> (last visited on September 4, 2015).

<sup>16</sup> The Law Society of British Columbia, for example, is subject to review by an independent Ombudsperson, available at <https://www.bcombudsperson.ca/complaints/what-we-investigate> (last visited on September 4, 2015).



state-funded counsel in all proceedings.<sup>17</sup> Notwithstanding this, Canadian courts have recognised that an individual's right to publically funded counsel exists in certain circumstances, such as ensuring that a criminal accused receives a fair trial<sup>18</sup> and in civil cases involving a government-initiated challenge to child custody.<sup>19</sup>

## State-Subsidized Legal Aid

The administration of legal aid services in Canada falls mainly within the responsibility of the provincial/territorial governments. Contribution funding is provided to the provinces and territories for the delivery of legal aid services to economically disadvantaged persons through the Legal Aid Program. In the absence of national coordination, each province/territory has established its own legal aid plan,<sup>20</sup> utilising different delivery mechanisms, employing varying eligibility criteria and coverage provisions and in some cases requiring client contribution and repayment.<sup>21</sup> For instance, some provinces/territories provide numerous services such as telephone hotlines, community clinics, mediation services, subject-specific services and representation while others provide much more limited services.

The financial eligibility criteria for applicants vary by province/territory and are generally based on income levels, with varying rules regarding the rate of client contributions towards the fees.

Applicants may seek legal aid if their matter is taking place in a different province/territory than where they reside. Generally, if an applicant and their legal matter are eligible for legal aid in their province/territory of residence then a referral will be sent to the legal aid plan in the province/territory where the matter is taking place. The discretionary decision to cover the legal matter is, however, up to the legal aid plan of the province/territory where the matter is taking place.

Legal aid is also limited to certain types of matters. For criminal matters, legal representation is generally provided for indictable offences and for certain summary offences if there is a likelihood of imprisonment or, for some schemes, loss of livelihood, if convicted. For civil matters, most plans provide legal representation for disputes involving child protection/welfare matters, while some also cover matters such as child custody and immigration/refugee issues.

## Mandatory assignments to Legal Aid Matters

Legal aid programs generally compensate lawyers for their time, subject to the particulars of the retainer. Generally, legal aid programs pay hourly rates to lawyers at much lower rates than a lawyer would charge a paying client. Other legal aid programs cap the hours they are willing to pay on a matter, even if the hours spent by the lawyer exceeds the cap.

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<sup>17</sup> See *Christie v. British Columbia* [2007] 1 S.C.R. 873.

<sup>18</sup> In making this determination, the court must consider various factors, including, the seriousness of the charges, the length and complexity of proceedings, and the accused's ability to participate effectively and defend their case at trial. The accused must also establish that they have exhausted all avenues for receiving legal aid and be unable to retain counsel on their own, see *Attorney General of Quebec v. R.C.* [2003] R.J.Q. 2027 at para 130 and *R v Rushlow* [2009] ONCA 461 at paras 19 and 20.

<sup>19</sup> For a general discussion on the right to publically funded counsel in Canada, see, Erika Heinrich, *Canadian Jurisprudence Regarding the Right to Legal Aid*, Lawyers' Rights Watch Canada (September 2013), available at <http://www.lrwc.org/ws/wp-content/uploads/2013/09/Canadian-Right-to-Legal-Aid-E.Heinrich.pdf> (last visited on September 4, 2015) and Vicki Schmolka, *Making the Case: The Right to Publicly-Funded Legal Representation in Canada*, Canadian Bar Association (Feb. 2002), available at [http://www.cba.org/cba/pdf/2002-02-15\\_case.pdf](http://www.cba.org/cba/pdf/2002-02-15_case.pdf) (last visited on September 4, 2015).

<sup>20</sup> *Provincial and Territorial Legal Aid Plans*, Canadian Bar Association, available at <http://www.cba.org/Cba/advocacy/legalaid/resources.aspx> (last visited on September 4, 2015).

<sup>21</sup> For a general discussion of the provincial legal aid plans, *Legal Aid Eligibility and Coverage in Canada*, Department of Justice Canada (Oct. 2002), available at [http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03\\_la5-rr03\\_aj5/rr03\\_la5.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_la5-rr03_aj5/rr03_la5.pdf) (last visited on September 4, 2015).



Other than in very limited instances where the court may insist on a lawyer being appointed where fairness is at stake in the trial process, lawyers accept legal aid on a voluntary basis. In other words, a lawyer who has no ongoing involvement with the litigant cannot be directed to accept a client and legal aid rates as compensation.

## Unmet Needs and Access Analysis

There are many disparities, inconsistencies and shortcomings of legal aid across Canada. Certain professional bodies, such as the Canadian Bar Association (the “CBA”), have taken an active role in trying to initiate change in the legal aid system, calling for national standards of legal aid coverage and eligibility, increased public funding, a revitalised commitment from the federal government and even (unsuccessfully) attempting to establish a constitutional right to legal aid in British Columbia through the courts.<sup>22</sup> Additionally, in response to some of these concerns, the Department of Justice has established a Deputy Minister Advisory Panel to investigate ways to maximize the federal investment in legal aid through innovations, best practices and efficiencies.<sup>23</sup>

The CBA has identified four facets to the current legal aid crisis: underfunding, disparities in coverage, fragmentation and disproportionate impact. Recent statistics show that the federal government now contributes less than 20% of the costs associated with the legal aid plans.<sup>24</sup> Cuts in criminal legal aid funding, together with other factors, such as the increasing complexity and costs of cases,<sup>25</sup> have hindered the ability of the provincial/territorial legal aid programs to respond to demand.<sup>26</sup> Along with this, the decision to incorporate civil legal aid funding within a general, unallocated transfer of funds to the provinces, has been associated with recent shortcomings of certain legal aid programs.<sup>27</sup>

Additionally, as eligibility levels are generally set lower than the low-income levels measured by Statistics Canada Low Income Cut-Off, many low-income individuals, who may not be able to retain a lawyer, may fail to qualify for legal aid services.<sup>28</sup> Or, alternatively, they may only qualify for legal assistance that covers one part of their legal problem. This denial of legal representation or only partial assistance to low-income individuals may result in self-represented individuals including those who are vulnerable or

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<sup>22</sup> See, e.g., Legal Aid in Canada, available at <http://www.cba.org/cba/advocacy/legalaid/default.aspx> (last visited on September 4, 2015) and Reaching Equal Justice Report: An Invitation to Envision and Act, The Canadian Bar Association (November 2013) available at [http://www.cba.org/CBA/equaljustice/secure\\_pdf/EqualJusticeFinalReport-eng.pdf](http://www.cba.org/CBA/equaljustice/secure_pdf/EqualJusticeFinalReport-eng.pdf) (last visited on September 4, 2015).

<sup>23</sup> Report of the Deputy Minister Advisory Panel on Criminal Legal Aid, Legal Aid Directorate, Department of Justice (2014), available at [http://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/rr14/DMAP\\_Report.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/rr14/DMAP_Report.pdf) (last visited on September 4, 2015).

<sup>24</sup> Statistics Canada, Legal aid in Canada, 2013/2014, available at <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14159-eng.htm> (last visited on September 4, 2015).

<sup>25</sup> Legal Aid Program Evaluation Final Report, Office of Strategic Planning and Performance Management, Evaluation Division, Department of Justice (January 2012), available at [http://publications.gc.ca/collections/collection\\_2013/jus/J22-16-2012-eng.pdf](http://publications.gc.ca/collections/collection_2013/jus/J22-16-2012-eng.pdf) (last visited on September 4, 2015).

<sup>26</sup> Maximising the Federal Investment in Criminal Legal Aid, Prairie Research Associates (PRA Inc.) (2014).

<sup>27</sup> See, e.g., Leonard T. Doust, QC, Foundation for Change, Report of the Public Commission on Legal Aid in British Columbia (Mar. 2011), available at [http://www.publiccommission.org/media/pdf/pcla\\_report\\_03\\_08\\_11.pdf](http://www.publiccommission.org/media/pdf/pcla_report_03_08_11.pdf) (last visited on September 4, 2015).

<sup>28</sup> Ibid. See also, Certificate Program for Legal Aid Ontario, available at <http://www.legalaid.on.ca/en/getting/certificateprogram.asp> (last visited on September 4, 2015); the maximum gross income amount to qualify for free legal aid services in Ontario for a family of one is \$12,135, contrasted with a low income cut-off of approximately \$20,000, see Low income cut-offs (1992 base) before tax, Statistics Canada, available at <http://www.statcan.gc.ca/pub/75f0002m/2014003/tbl/tbl02-eng.htm> (last visited on September 4, 2015).



disadvantage, including as to education and literacy.<sup>29</sup> These factors may also discourage some people from applying for legal aid because of how they perceive their request will be evaluated.<sup>30</sup>

## PRO BONO ASSISTANCE

### Pro Bono Opportunities

There are a wide variety of volunteer opportunities available to legal professionals across Canada to address the unmet needs of low-income and/or disadvantaged individuals and non-profit organizations,<sup>31</sup> with many lawyers already participating in such pro bono activities.<sup>32</sup>

#### Private Attorneys

Although there is no requirement for Canadian lawyers to provide pro bono legal services, lawyers are encouraged by their regulatory bodies and professional associations to provide pro bono representation to persons who would otherwise be self-represented.<sup>33</sup> The CBA's Pro Bono Committee suggests that all members of the legal profession aim to contribute 50 hours or 3% of billings per year on a pro bono basis.<sup>34</sup> Additionally, the Federation's Model Code of Professional Conduct encourages lawyers to enhance the profession's standard and reputation by providing pro bono legal services.

#### Law Firm Pro Bono Programs

In recent years, various law firms have reviewed their pro bono policies and have committed additional resources to pro bono initiatives in order to provide support and structure to facilitate pro bono work.<sup>35</sup> Some larger law firms also second junior associates or articling students to legal aid offices or other projects. Some law firms, such as McCarthy Tétrault LLP, encourage pro bono initiatives by treating hours spent on pro bono matters as the equivalent of billable hours, up to a threshold, for the purposes of internal measurement and recognition.

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<sup>29</sup> See, e.g., Melina Buckley, Moving Forward on Legal Aid (Jun. 2010), available at <http://www.cba.org/CBA/Advocacy/PDF/CBA%20Legal%20Aid%20Renewal%20Paper.pdf> (last visited on September 4, 2015).

<sup>30</sup> See Legal Aid in Canada, available at <https://www.cba.org/cba/Advocacy/legalAid/> (last visited on September 4, 2015).

<sup>31</sup> See, e.g., the volunteer opportunities offered by Pro Bono Alberta, available at <http://www.pbla.ca/volunteer/> (last visited on September 4, 2015) and Access Pro Bono (BC), available at <http://accessprobono.ca/information-lawyers> (last visited on September 4, 2015), and Pro Bono in Nova Scotia: Current practice and future opportunities, available at: <https://nsbs.org/sites/default/files/ftp/NovaScotiaProBonoStudy.pdf> (last visited on September 4, 2015), for an illustration of the opportunities available in Nova Scotia (which does not currently benefit from a provincial pro bono organisation).

<sup>32</sup> For example, in Nova Scotia, 77% of lawyers provided some form of pro bono service in 2009, *ibid.* at 6.

<sup>33</sup> Canadian Judicial Council, Statement of Principles on Self-Represented Litigants and Accused Persons, (September 2006), available at [http://www.cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_other\\_PrinciplesStatement\\_2006\\_en.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf) (last visited on September 4, 2015).

<sup>34</sup> Canadian Bar Association, Resolution 98-01-A, Promoting a Pro Bono Culture in the Canadian Legal Profession, available at <http://www.cba.org/CBA/groups/pdf/98-01-A.pdf> (last visited on September 4, 2015).

<sup>35</sup> See, e.g., McCarthy Tétrault, Making a Difference Together, available at [http://www.mccarthy.ca/community\\_and\\_pro\\_bono\\_work.aspx](http://www.mccarthy.ca/community_and_pro_bono_work.aspx) (last visited on September 4, 2015), Borden Ladner Gervais, Pro Bono Services, available at <http://www.blg.com/en/aboutblg/probonoservices> (last visited on September 4, 2015), Blakes, Pro Bono, available at <http://www.blakes.com/English/WhoWeAre/SocialResponsibility/Pages/ProBono.aspx> (last visited on September 4, 2015) and Gowlings, Pro Bono & Community Service, available at <http://www.gowlings.com/Firm/communityService.asp> (last visited on September 4, 2015).



## Legal Department Pro Bono Programs

Legal departments have teamed up with law firms, NGOs and bar associations to receive training and on-going support and provide pro bono services. Provincial bar associations also work to broker pro bono projects with law firms and community organizations. For example, Federal Department of Justice lawyers have provided services advising low-income clients on landlord and tenant matters. Lawyers from the Royal Bank of Canada have teamed up with lawyers from McCarthy Tétrault LLP to represent unaccompanied children who arrive in Canada on immigration matters. In certain jurisdictions, legal department lawyers must work with NGOs (as that term is described below) for insurance coverage purposes in order to provide pro bono legal services.<sup>36</sup> Some legal departments create their own program and then take it to the NGO for approval, such as the Hewlett Packard Enterprise /HP Inc. seminar for middle school students on legal implications of online behaviour, which required the cooperation of the local school board and Pro Bono Law Ontario.

## Non-Governmental Organizations (NGOs)

Several province-wide pro bono organizations have been established (i.e., Pro Bono Law Ontario, Pro Bono Law Alberta, Pro Bono Law Saskatchewan, Pro Bono Quebec and Access Pro Bono - British Columbia)<sup>37</sup> to increase access to justice by creating and facilitating opportunities for lawyers to provide pro bono legal services particularly through referral programs that match the needs of individuals and nonprofit organizations with the expertise and availability of volunteer lawyers. These organizations also provide information and resources on other volunteer opportunities and on issues such as insurance coverage and have played an influential role in increasing awareness of pro bono opportunities and services.

For example, Pro Bono Law Ontario (“**PBLO**”) is a non-profit charity founded in 2001 that connects lawyers with Ontarians who cannot afford legal services and are not eligible for legal aid.<sup>38</sup> In Ontario, PBLO is the legal profession’s only organized volunteer response. PBLO serves over 14,000 clients per year with demand increasing each year. PBLO creates and manages volunteer programs and connects lawyers either directly to clients or to opportunities in partnership with charitable organizations. PBLO also offers pro bono legal services through LawHelp Ontario.<sup>39</sup> These services are provided for both individuals and charitable organizations and include representation, free legal advice by phone and free legal advice at walk-in centers.

Aside from provincial pro bono organizations, there are many NGOs in Canada that provide pro bono legal services. For example, the Volunteer Lawyers Service (“**VLS**”) is sponsored by United Way, the Canadian Bar Association, Alberta Branch, the Law Society of Alberta and the Association of General Counsel of Alberta. VLS matches eligible non-partisan charitable organizations with volunteer lawyers who provide a range of pro bono legal services including incorporation, charitable registration, board governance, contracts or trademark registration.

## Bar Association Pro Bono Programs

The CBA has a dedicated pro bono committee that is mandated to recognize and support the efforts of pro bono lawyers, share information about pro bono across the country, and provides resources to

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<sup>36</sup> Rules of the Law Society of Alberta, Rule 148 (2.1); Law Society of Upper Canada By-Law 6, Section 9(2); BC Lawyers’ Compulsory Professional Liability Insurance Policy Number LPL 12-01-01(definition of “Sanctioned Services”).

<sup>37</sup> Pro Bono Law Alberta, available at <http://www.pbla.ca/> (last visited on September 4, 2015), Access Pro Bono British Columbia, available at <http://accessprobono.ca/> (last visited on September 4, 2015), Pro Bono Law Ontario, available at <http://www.pblo.org/> (last visited on September 4, 2015), Pro Bono Quebec, available at <http://www.probonoquebec.ca/en/> (last visited on September 4, 2015) and Pro Bono Law Saskatchewan, available at <http://www.pblsask.ca/> (last visited on September 4, 2015).

<sup>38</sup> See <https://www.pblo.org> (last visited on September 4, 2015).

<sup>39</sup> See <https://www.lawhelpontario.org> (last visited on September 4, 2015).



lawyers in private practice, the public sector and the corporate sector. The CBA lists numerous pro bono opportunities on its website.<sup>40</sup>

### University Legal Clinics and Law Students

Canadian law schools have shown a strong commitment to social justice. Many law schools run legal clinics allowing law students to gain experience and exposure in the law while providing services to the public. Furthermore, a significant contribution to pro bono legal services is provided by law students through the Pro Bono Students Canada (“**PBSC**”) initiative, which relies on volunteer lawyers supervising its various projects.<sup>41</sup> PBSC has a chapter in 21 law schools across Canada, with over 1,600 law students volunteering approximately 130,000 hours of free legal services to 400-500 public interest groups, community organizations, courts and tribunals across the country.<sup>42</sup>

## Historic Development and Current State of Pro Bono

### Historic Development of Pro Bono

Lawyers in Canada have long considered the representation of those unable to afford legal representation to be part of their professional responsibility and the provision of pro bono legal services has existed in Canada in various forms for many years.<sup>43</sup> However, early pro bono programs proved to be unsustainable, principally as a result of small numbers of volunteers, overwhelming client demands and underfunding. This inability to adequately meet the legal needs of the poor led to the development of the current legal aid system from the modest pro bono arrangements that prevailed up to the mid-1960s.<sup>44</sup> By the 1990s, the provision of legal services to address the unmet legal needs of the poor had come to be seen more as the responsibility of government than of the legal profession.<sup>45</sup>

### Current State of Pro Bono including Barriers and Other Considerations

More recently, pro bono legal services are increasingly seen as a significant component of access to justice.<sup>46</sup> Over the last 15-20 years there has been a concerted effort in the legal profession to coordinate and encourage active participation in pro bono activities, principally through the establishment and consolidation of the centralised referral organizations described above and as a result of the recent failings of legal aid plans to meet the growing needs of the poor.<sup>47</sup> While legal aid programs are generally only intended for the poorest residents and only provide limited services, pro bono programs typically

<sup>40</sup> See <http://www.cba.org> (last visited on September 4, 2015).

<sup>41</sup> Pro Bono Students Canada, available at <http://www.probonostudents.ca/> (last visited on September 4, 2015).

<sup>42</sup> Pro Bono Students Canada, History, available at <http://www.probonostudents.ca/about-pbsc/history> (last visited on September 4, 2015).

<sup>43</sup> See, e.g., Lorne Sossin, The Public Interest, Professionalism, and the Pro Bono Publico, 46 Osgoode Hall Law Journal 131 (2008), available at <http://ssrn.com/abstract=1205162> (last visited on September 4, 2015) and The Canadian Bar Association, “Tension at the Border”: Pro Bono and Legal Aid, A Consultation Document prepared by the CBA’s Standing Committee on Access to Justice (October 2012), available at [https://www.cba.org/cba/groups/PDF/ProBonoPaper\\_Eng.pdf](https://www.cba.org/cba/groups/PDF/ProBonoPaper_Eng.pdf) (last visited on September 4, 2015).

<sup>44</sup> Ab Currie, Expanding Horizons: Rethinking Access to Justice in Canada, Department of Justice Canada (Feb. 2000), available at [http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00\\_2-po00\\_2/op00\\_2.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_2-po00_2/op00_2.pdf) (last visited on September 4, 2015).

<sup>45</sup> Lorne Sossin, The Public Interest, Professionalism, and the Pro Bono Publico, 46 Osgoode Hall Law Journal 131 (2008), available at <http://ssrn.com/abstract=1205162> (last visited on September 4, 2015).

<sup>46</sup> Lorne Sossin, The Public Interest, Professionalism, and the Pro Bono Publico, 46 Osgoode Hall Law Journal 131 (2008), available at <http://ssrn.com/abstract=1205162> (last visited on September 4, 2015) and Ab Currie, Expanding Horizons: Rethinking Access to Justice in Canada, Department of Justice Canada (Feb. 2000), available at [http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00\\_2-po00\\_2/op00\\_2.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_2-po00_2/op00_2.pdf) (last visited on September 4, 2015).

<sup>47</sup> Ibid.





serve a greater number of individuals as well as charitable organizations as a result of more lenient financial eligibility criteria, broader areas of coverage and more discretion on accepting cases.

## Laws and Regulations Impacting Pro Bono

### “Loser Pays” Statute

In Canada, judges have a wide discretion in deciding whether to award costs. Recently, courts in certain provinces have permitted lawyers representing clients on a pro bono basis to seek cost awards from the losing party.<sup>48</sup> Allowing lawyers to seek cost awards, promotes access to justice and encourages lawyers to volunteer in deserving cases.

### Concerns About Pro Bono Eroding Public Legal Aid Funding

Legal aid and pro bono in Canada have historically existed in what may be perceived to be tension with one another, with formal legal aid schemes coming into existence primarily as a result of traditional pro bono practices failing to meet growing demands and then failings of legal aid schemes being viewed as a catalyst for the recent rise of pro bono programs.<sup>49</sup> This has led to concerns that, while the pro bono strategy succeeds in increasing access to justice by serving otherwise unmet legal needs in the short-term, it alleviates political pressure on governments to maintain and/or increase legal aid funding, and arguably weakens the legal service delivery system in the long-term.<sup>50</sup>

## Regulations Imposing Practice Limitations on In-House Counsel and Government Lawyers

Additional concerns apply to in-house lawyers who want to provide pro bono services. These include exposure to legal claims, the risk of conflicts of interest, insurance requirements and the availability of opportunities. Recent initiatives of the Canadian Corporate Counsel Association have been aimed at easing these concerns so that in-house lawyers can more easily participate in pro bono. Additionally, some law societies in Canada have adopted professional conduct rules to facilitate in-house counsel providing pro bono services. For example, in Alberta, insurance coverage has been extended to governmental and in-house lawyers when they provide services through a non-profit services provider.

Crown counsel, who previously were restricted from providing pro bono due to issues with insurance coverage and potential conflicts of interest due to the large scope of cases handled by the federal government, have set up a new program that allows Crown counsel to provide pro bono services outside their regular hours at three clinics in Canada on specific areas of law that the government has screened to minimize conflicts.

## Availability of Professional Indemnity Legal Insurance Covering Pro Bono Activities by Attorneys

In order to practice in Canada, lawyers must typically maintain adequate insurance.<sup>51</sup> Although private practice lawyers in Canada are required to maintain insurance in order to provide legal services, some

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<sup>48</sup> See <http://www.montanaprobono.net/geo/search/item.120537> (last visited on September 4, 2015).

<sup>49</sup> Lorne Sossin, The Public Interest, Professionalism, and the Pro Bono Publico, 46 Osgoode Hall Law Journal 131 (2008), available at <http://ssrn.com/abstract=1205162> (last visited on September 4, 2015).

<sup>50</sup> See, e.g., Jamie Maclaren, Integrating pro bono and legal aid (October 30, 2009), The Lawyers Weekly, available at <http://www.oregonadvocates.org/geo/search/item.286718> (last visited on September 4, 2015) and The Canadian Bar Association, “Tension at the Border”: Pro Bono and Legal Aid, A Consultation Document prepared by the CBA’s Standing Committee on Access to Justice (October 2012), available at [https://www.cba.org/cba/groups/PDF/ProBonoPaper\\_Eng.pdf](https://www.cba.org/cba/groups/PDF/ProBonoPaper_Eng.pdf) (last visited on September 4, 2015).

<sup>51</sup> With the exception of certain interprovincial initiatives regarding mobility of lawyers mentioned previously.



provinces provide an exemption from maintaining insurance for certain groups of lawyers, such as in-house, government/public, non-practicing and retired.<sup>52</sup> Although such exempt lawyers still maintain indemnity insurance, some do not, therefore rendering them unable to provide pro bono legal services.

While some provincial/territorial law societies and insurance providers have made arrangements for such uninsured members to benefit from extended indemnity insurance coverage when providing pro bono services, this is not currently available in all provinces/territories and, where it is available, is generally subject to limitations, such as only extending protection for certain “approved” services and programs.<sup>53</sup> In the provinces of Alberta, British Columbia, Ontario and Saskatchewan, the law societies also provide insurance coverage for a nominal annual fee to retired or non-practicing lawyers with a status of “active for pro bono only.” Given that insurance coverage remains a major barrier to participation in pro bono, the CBA passed a resolution urging all law societies to arrange for an extension of insurance coverage in order to facilitate the participation of all lawyers in pro bono.<sup>54</sup> Please see the websites of the provincial pro bono organizations for more information on insurance.

## Other Barriers to Pro Bono

Even in circumstances where a lawyer provides pro bono services, the disbursements related to a legal matter may prevent the recipient from accessing justice. In order to address this concern, some provincial pro bono organizations have been successful in setting up disbursement funds to assist with the costs incurred in relation to pro bono matters.<sup>55</sup> However, this is a not common practice across Canada.

Although each province/territory benefits from an established organization providing legal education and information to its residents,<sup>56</sup> the absence of a coordinated pro bono referral organizations in every province/territory can make it more difficult and onerous to locate and identify pro bono opportunities and information.

## Pro Bono Resources

### Provincial/Territorial Pro Bono Organizations

- Pro Bono Law Alberta: <http://www.pbla.ca/> (last visited on September 4, 2015)
- Access Pro Bono British Columbia: <http://accessprobono.ca/> (last visited on September 4, 2015)
- Pro Bono Law Ontario: <http://www.pblo.org/> (last visited on September 4, 2015)
- Pro Bono Quebec: <http://www.probonoquebec.ca/en/> (last visited on September 4, 2015)
- Pro Bono Law Saskatchewan: <http://www.pblsask.ca/> (last visited on September 4, 2015)

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<sup>52</sup> See e.g., the insurance provisions of Alberta, available at <http://www.lawsociety.ab.ca/membership/status/insurance/exemption.aspx> (last visited on September 4, 2015), British Columbia, available at <http://www.lawsociety.bc.ca/page.cfm?cid=203&t=Exemptions and Ontario> (last visited on September 4, 2015), available at [http://www.lawpro.ca/Insurance/Practice\\_Type/Practice\\_Type.asp](http://www.lawpro.ca/Insurance/Practice_Type/Practice_Type.asp) (last visited on September 4, 2015).

<sup>53</sup> See, e.g., the insurance extension provisions for Ontario, available at [http://www.lawpro.ca/insurance/Practice\\_type/Probono\\_exempt.asp](http://www.lawpro.ca/insurance/Practice_type/Probono_exempt.asp) (last visited on September 4, 2015), British Columbia, available at <https://www.lawsociety.bc.ca/page.cfm?cid=209&t=Coverage-for-pro-bono-legal-services> (last visited on September 4, 2015) and Alberta, available at [http://www.lawsociety.ab.ca/advisory\\_2010/advisory\\_volume\\_8\\_issue\\_5\\_dec2010/news/pro\\_bono\\_insurance.aspx](http://www.lawsociety.ab.ca/advisory_2010/advisory_volume_8_issue_5_dec2010/news/pro_bono_insurance.aspx) (last visited on September 4, 2015).

<sup>54</sup> Insurance Coverage for Pro Bono Legal Services, available at <http://www.cba.org/CBA/groups/pdf/07-04-A.pdf> (last visited on September 4, 2015).

<sup>55</sup> See, e.g., Access Pro Bono, Disbursement Coverage, available at <http://accessprobono.ca/disbursement-coverage> (last visited on September 4, 2015) and Pro Bono Quebec, Mandate(s) for Lawyers, available at <http://www.probonoquebec.ca/en/lawyers-and-law-students> (last visited on September 4, 2015).

<sup>56</sup> Supreme Court of Canada, Public Legal Information and Education Sites, available at <http://www.scc-csc.gc.ca/res/unrep-nonrep/plie-opij-eng.aspx> (last visited on September 4, 2015).



- Canadian Bar Association: <http://www.cba.org/CBA/groups/probono/resources.aspx> (last visited on September 4, 2015)
- Pro Bono Students Canada: <http://www.probonostudents.ca/> (last visited on September 4, 2015)
- Calgary Legal Guidance: <http://clg.ab.ca/> (last visited on September 4, 2015)
- Edmonton Centre for Equal Justice: <http://ecej.ca/> (last visited on September 4, 2015)
- Lawyers Without Borders: <http://www.asfquebec.com/en> (last visited on September 4, 2015)
- Canadian Lawyers Abroad: <http://cla-ace.ca/> (last visited on September 4, 2015)
- Pro Bono Canada: <http://probonocanada.org/> (last visited on September 4, 2015)

## CONCLUSION

Canada has a long history of encouraging access to justice through both legal aid programs and pro bono assistance. At present, with funding concerns and policy issues reshaping the legal aid landscape, the Canadian legal profession continues to provide pro bono assistance and, through important contributions by regulatory bodies and professional organizations, there is a growing recognition that pro bono legal services form a significant component of access to justice. The legal profession's increased emphasis on the importance of contributing to pro bono initiatives and the establishment of provincial pro bono organizations have significantly increased the awareness of and access to pro bono opportunities, however the absence of coordinated pro bono organizations in some provinces/territories has resulted in all disparate pro bono opportunities across Canada.

September 2015

Pro Bono Practices and Opportunities in Canada

This memorandum was prepared by **Latham & Watkins LLP** for the **Pro Bono Institute**. This memorandum and the information it contains is not legal advice and does not create an attorney-client relationship. While great care was taken to provide current and accurate information, the Pro Bono Institute and Latham & Watkins LLP are not responsible for inaccuracies in the text.