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Richard Devlin*

**Breach of Contract?: The New Economy,
Access to Justice and the Ethical
Responsibilities of the Legal Profession**

In the last several years, there has been a growing awareness within the legal profession that access to justice, that is, to legal advice and representation, is becoming increasingly difficult. Nowhere is this more obvious than in the cuts to legal aid programmes. The author argues that the response of the legal profession is inadequate because it remains trapped in a welfarist paradigm of legal aid that is insensitive to the impact of the new economy and the newly emergent social investment state. The author explores the possibility of an alternative response — the adoption of a mandatory pro bono system — and suggests that both ethically and politically, given the realities of the social investment state, it is the most justifiable strategy.

Ces dernières années, les praticiens de la profession juridique sont devenus conscients que l'accès à la justice devient de plus en plus difficile. Ayant subi d'importantes compressions, les programmes d'aide juridique illustrent bien l'acuité du problème. L'auteur soutient que la profession a été trop longue à la détente. Dans sa forme actuelle, l'aide juridique procède d'une vision étriquée de l'assistance sociale qui ne tient pas compte de l'impact de la nouvelle économie et des nouvelles orientations de l'État en matière d'intervention sociale. L'auteur explore une formule alternative notamment l'adoption d'un régime de services bénévoles obligatoires. Il argue que, tant le plan éthique que sur le plan politique, cette stratégie répond mieux aux impératifs de la nouvelle politique d'investissement social de l'État.

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Introduction

"I ... believe 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."

— Roy McMurtry C.J.O.¹

"The legal system is grossly inequitable and inefficient. There is far too much law for those who can afford it and far too little for those who cannot."

— Derek Bok²

"Membership in the bar is a privilege burdened with conditions ... [a member becomes] an officer of the court ... an instrument or agency to advance the ends of justice."

— Benjamin Cardozo³

Horror stories abound about the many Canadians who do not have access to the legal profession and therefore cannot protect their rights, not only in the criminal sphere but also the civil sphere.⁴ Although the Canadian legal profession has expressed significant concern, in general its response has been inadequate, as evidenced by the tardy release of a disappointing report by the CBA's Pro Bono Working Group.⁵ I will argue that this failure can be traced to the fact that the Canadian legal profession is part of a

1. As quoted in Justice Casey Hill, *The Self Represented Litigant in Criminal Cases* (2002) [unpublished, on file with author] at 1.

2. As quoted in Roger C. Cramton, "Delivery of Legal Services to Ordinary Americans" (1994) 44 Case W. Res. L. Rev. 531 at 533-534 [Cramton, "Ordinary Americans"]; The Marrero Report reiterates the same point, "...the poor paradoxically live in circumstances in which they need legal services more but can obtain them less." See "Final Report of the Committee to Improve the Availability of Legal Services" (1991) 19 Hofstra L. Rev. 755 at 771. See also President Jimmy Carter, "No resources of talent and training in our own society, even including the [*sic*] medical care, is more wastefully or unfairly distributed than legal skills. Ninety per cent of our lawyers serve 10 per cent of our people. We are overlawyered and under-represented" (as quoted in Roger C. Cramton, "Mandatory Pro Bono" (1991) 19 Hofstra L. Rev. 1113 at 1118-1119 [Cramton, "Mandatory Pro Bono"]).

3. *People ex rel Karlin v. Culkin*, 162 N.E. 487 (N.Y. 1928) at 489-90.

4. The Canadian Bar Association has established Legal Aid Watch. This is an e-mail network of legal aid lawyers who gather "horror stories" about how the legal aid system impacts the lives of real people. The network aims to focus attention on governmental responsibility to improve access to justice, improve the legal aid programme, raise the profile and portray the needs of clients and the work of legal aid lawyers in a more sympathetic manner, and demonstrate the CBA's commitment to access to justice and to establish a clearinghouse for information. The website contains a number of "legal aid horror stories" and accounts of the actions the CBA is taking with regard to legal aid. See online: Legal Aid Watch <<http://www.cba.org/CBA/LAW/Main/>>.

5. Canadian Bar Association Pro Bono Working Group, *Pro Bono Working Group: Mid-Winter 2003 Report* (Ottawa: Canadian Bar Association, 2003), online: Pro Bono Working Group <<http://www.cba.org/CBA/pdf/03-04-M-Background.pdf>>. For further discussion see below at Part III.2.

larger economic, political, social and cultural formative context that is sometimes called the new economy, and that the profession has not fully considered the impact of this context.

In particular, I want to challenge one possible, indeed predictable, response to the current dilemma. One could argue that little can be done to remedy the problem of access to justice in the age of the new economy. The legal profession is a business, and given the current pre-eminence of market forces and the retreat by governments, there is no solution. I reject this argument on two grounds. First, the “new economy” is not as fatalistically predetermining as some analysts claim. Second, the legal profession, as a profession, is a special case that takes particular benefits from aspects of the new economy, benefits that accrue in part because of the privileged role that the state accords to it. I will argue that these benefits engender reciprocal burdens and that the Canadian legal profession should consider the adoption of a mandatory pro bono obligation. The problem of access to justice then is not one of economic necessity, but of political and normative will.

My argument will unfold in four stages. Part I outlines the nature of the new economy, highlighting the key characteristics of a new state form — “the social investment state” — and discussing the impact of these developments on the legal profession. Part II discusses the rise and relative demise of legal aid in Canada. Part III analyses some recent responses by the Canadian legal profession to the crisis in access to justice and canvasses the arguments for and against mandatory pro bono. Part IV argues that we need a new strategy for the new economy, and locates the proposal for mandatory pro bono in the larger political context of the social investment state. In short, my claim is that pro bono is not a charitable donation but a professional obligation.⁶

I. *The New Economy, The Social Investment State And The Legal Profession*

The phrase “new economy” is amorphous, ideologically loaded and highly contested. For some it is simply a way of describing a new configuration of economic forces in contemporary society.⁷ For others it holds the promise

6. This paper focuses on the legal profession’s obligations to *individuals* in need of legal assistance. The other dimension to the pro bono argument is the provision of legal assistance to institutions, such as charitable organizations. As I will argue later, pro bono for charitable organizations is fraught with analytical and practical difficulties; hence, my focus is on the provision of legal services to disadvantaged persons.

7. See generally “The New Economy” (2002) 3:1 *Isuma*: Canadian Journal of Policy Research.

of increased wealth, progress and even peace on a world wide scale.⁸ Yet others see it as just another version of capitalism that will increase rather than decrease inequality, on both national and global levels.⁹

For the purposes of this paper, I will characterize the new economy as a constellation of economic, political, social and cultural practices that are reconfiguring wealth, knowledge and power in modern society. Although I will restrict my focus to Canada because my particular subject matter is the Canadian legal profession, I will attempt to analyse the contemporary Canadian context in the light of the larger global forces that drive the new economy.

The **economic** dimensions of the new economy are familiar to most. They include: technological innovations which have the capacity to compress time and space;¹⁰ globalization, with a particular emphasis on the internationalization of trade;¹¹ the emergence of knowledge as a key source of production and dynamo of economic wealth;¹² and a commitment to the discourses of the market: competition, efficiency, rationalization, privatization, deregulation and team production.¹³

For the purposes of this paper, however, it is important to emphasize that the new economy is not just economic in nature; it is also inherently **political**. By this I mean that the new economy inevitably has an impact on, and is a consequence of, the distribution of wealth and power in society. Two points can be noted in this regard. First, there can be little doubt that power and wealth are being increasingly concentrated in the hands of transnational corporations. This enables them to exercise inordinate influence, not only in small countries but also in relatively large countries such

8. See generally Alberto Bernabe-Riefkohl, "Tomorrow's Law Schools: Globalization and Legal Education" (1995) 32 San Diego L. Rev. 137 at 151; Jonathan Story, "The Emerging World Financial Order and Different Forms of Capitalism" in Richard Stubbs & Geoffrey R.D. Underhill, eds., 2nd ed., *Political Economy and the Changing Global Order* (Toronto: Oxford University Press, 2000) 129 at 138.

9. See generally Stephen Gill, "Knowledge, Politics and the Neo-Liberal Political Economy" in Stubbs & Underhill, *ibid.* 48 at 54-57 and Gary Teeple, *Globalization and the Decline of Social Reform* (Toronto: Garamond Press, 1995).

10. Stephen McBride, *Paradigm Shift: Globalization and the Canadian State* (Halifax: Fernwood Press, 2001) at 21; James H. Mittelman, "The Dynamics of Globalization", in *Globalization: Critical Reflections*, ed., James H. Mittelman (Boulder, Col.: Lynne Rienner, 1996) 1 at 3; Robert W. Cox, "Political Economy and World Order: Problems of Power and Knowledge at the Turn of the Millennium" in Stubbs & Underhill, *supra* note 8 at 25-26; Teeple, *supra* note 9.

11. McBride, *ibid.* at 13, 17; Claire Turenne Sjolander, "The Rhetoric of Globalization: What's in a Wor[l]d?" (1996) 51 International Journal 603 at 606-607; W.H. Arthurs, "Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields" (1997) 12 C.J.L.S. 219 at 221 [Arthurs, "Globalization"]; Mike Burke, Colin Mooers, & John Shields, eds., *Restructuring and Resistance: Canadian Public Policy in an Age of Global Capitalism* (Halifax: Fernwood, 2000) at 20.

12. Sjolander, *ibid.* at 607.

13. Burke, Mooers & Shields, *supra* note 11 at 12; Mitchell Bernard, "Post Fordism and Global Restructuring" in Stubbs & Underhill, *supra* note 8 at 152 at 158.

as Canada. Second, although there is unanimity among commentators that the new economy has serious consequences for the nation state, there is widespread disagreement as to what those consequences will be. My own view is to agree with those commentators who suggest that new economy signals the end of the Keynesian welfare state with its emphasis on economic stability and social security,¹⁴ and a renewed faith in the capacity of the market. But I do not go as far as to suggest that this means the end of the state and a total slide into untrammelled neoliberal non-interventionism.¹⁵

Rather, following Dobrowolsky and Saint-Martin, I would suggest that Canada is currently emerging as a “social investment state,” a form of government which emphasizes the pursuit of competitiveness, employability and prosperity.¹⁶ There are several political characteristics central to this social investment state. First, the market and politics are not contrasting principles of social organization. The market has no pre-ordained natural essence independent of political processes; rather, the market is a dynamic social phenomenon constructed by varying social forces. Markets can and do vary over space and time to respond and give effect to the prevailing powers at any particular moment in history.¹⁷ As Mittelman has noted, “the question is not whether the state should intervene in the economy but what type of state and what interventions are most appropriate in a specific context?”¹⁸ For example, contemporary governments are becoming increasingly responsive to non-citizens such as transnational corporations, foreign currency traders and international banks.¹⁹ Second, the state might shrink, it may retreat from some of its previous functions, and in some dimensions it may be hollowed out,²⁰ but the Canadian state is neither withering away nor becoming obsolete; rather it is in a process of metamorphosis. The role of the state is now conceptualized as “enabling ... facilitative and directive”²¹ so that “policies are

14. Burke, Mooers & Shields, *ibid.* at 10; McBride, *supra* note 10 at 79, 90.

15. Teeple, *supra* note 9.

16. Alexandra Dobrowolsky & Denis Saint-Martin, “Agency, Actors and Change in a Child Focused Future: Problematizing Path Dependency’s Post and Statist Parameters” [forthcoming] at 2. They build on an idea first articulated by Anthony Giddens in *The Third Way: Renewal of Democracy* (Cambridge: Polity Press, 1998).

17. Geoffrey R.D. Underhill, “Conceptualizing the Changing Global Order” in Stubbs & Underhill, *supra* note 8 at 3-4.

18. Mittelman, *supra* note 10 at 16; Arthurs, “Globalization”, *supra* note 11 at 221.

19. Marjorie Griffin Cohen, “From the Welfare State to Vampire Capitalism” in Patricia M. Evans & Gerda R. Wekerle, eds., *Women and the Canadian Welfare State: Challenges and Change* (Toronto: University of Toronto Press, 1997) 28 at 41-42; Mittelman, *supra* note 10 at 9.

20. Bob Jessop, “Towards a Schumpeterian Workfare State? Preliminary Remarks on a Post-Fordist Political Economy” (1993) 40 *Studies in Political Economy* 7 at 9.

21. Alexandra Dobrowolsky, “Rhetoric Versus Reality: The Figure of the Child and New Labour’s Strategic ‘Social Investment State’” (2002) 69 *Studies in Political Economy* 43.

developed in ways that project future outcomes in light of their productive potential: the choices being made now bank on benefits to be reaped later on."²² Consequently, the social investment state, though fiscally responsible, is active; the state engages in spending, but the spending is calculated to be strategic, sound and costed investments in education, training and knowledge.²³ The state will seek to foster "adaptability and flexibility in order to enable its citizens to compete effectively in a global marketplace"²⁴ and it is willing to invest in "the improvement of the stock of human capital...[if it will give it] a comparative advantage for the economy."²⁵ Third, and importantly, as Dobrowolsky and St. Martin state:

The social investment state also promotes public-private relationships. It does not simply revert to laissez fairism and a belief in the market. Rather ...the state engages in both neo-statist, and neo-corporatist behaviour, as there is a continuing role for the state, but it also relies on ... an array of complex 'partnerships' that include the voluntary sector.²⁶

As a result, the social investment state does leave some space for the participation of civil society, especially through public/private partnerships and the "third sector" where there can be active agency and proactive engagement and even contestation.²⁷

Beyond the foregoing economic and political dimensions, the new economy also has significant **social** characteristics. As a result of the changing economic and political environment, the social fabric of Canadian society is also undergoing significant transformation. Most importantly, because of governments' commitment to deficit reduction, financial stringency, balancing the budget, restructuring, retrenchment, deregulation, decentralization and downloading, there has been a significant retreat from the Keynesian social safety net. As a result, governmental support for access to justice has diminished significantly. As we shall see later, because legal aid has little direct impact on the ideology of investment, it has suffered disproportionately from government cutbacks. Moreover, factors such as the downsizing of government, privatization, contracting out, reorganization of the unemployment benefits system, shifts in the tax structure, the deregulation of labour markets and the creation of the Canada Health and Social Transfer (C.H.S.T.) have radically increased income

22. Dobrowolsky & Saint-Martin, *supra* note 16 at 6.

23. *Ibid.* at 7; Dobrowolsky, *supra* note 21 at 44, 50.

24. McBride, *supra* note 10 at 23.

25. Burke, Mooers & Shields, *supra* note 11 at 18.

26. Dobrowolsky & Saint-Martin, *supra* note 16 at 8.

27. *Ibid.* at 16, 23; Dobrowolsky, *supra* note 21 at 58.

inequality in Canada.²⁸ One report indicates that 60% of families experienced an after tax real income decline in the 1990s.²⁹ Another indicates that 57% of female headed households live in poverty, and that 21% of children under the age of eighteen live in poverty, up from 15% in 1980.³⁰

Finally, the **cultural** aspects of the new economy may not be quite as obvious as some of its other dimensions. Several commentators have pointed out that there may be an important cultural tension at play.³¹ On the one hand, there is a tendency towards homogenization and uniformity, exemplified by the diffusion of fungible consumer goods or product/format standardization. On the other hand, globalization leads to greater interaction among different cultures and cultural pluralism. In the Canadian context, the interaction manifests itself in the increasing diversity of the Canadian population. Given low birth rates, Canada has had to recruit immigrants, many from the “Third World,” in order to sustain a productive and competitive workforce.³² However, visible minorities and Aboriginal peoples tend to earn less than other Canadians.³³ Consequently, diversity intersects with economic inequality and poverty is racialized.³⁴ Finally, some commentators suggest that the polarizations generated by the new economy are likely to intensify social conflict locally, nationally, regionally and internationally.³⁵

Each of these dimensions of the new economy — the economic, political, social and cultural — has a direct impact upon the Canadian legal profession. Indeed, several commentators have argued that we are experiencing a change in the “mode of production of law.”³⁶

Economically, lawyers have spearheaded the development of the new

28. McBride, *supra* note 10 at 79-101.

29. *Ibid.* at 93.

30. Ellen M. Gee, “Demographic Change in Canadian Society - Looking to 2020” in W.A. Bogart, ed., *Access to Affordable and Appropriate Law Related Services in 2020* (Report of a Roundtable sponsored by the Department of Justice, the Law Commission of Canada, the Canadian Bar Association and the Faculty of Law, University of Windsor) (Ottawa: CBA, January 1999) 31 at 37 [Access], online: CBA Reports <http://www.cba.org/cba/cba_reports/main/> .

31. Mittelman, *supra* note 10 at 2, 8; Sjolander, *supra* note 11 at 604, 609.

32. Gee, *supra* note 30 at 31-34.

33. *Ibid.* at 35.

34. The UN Special Session on Children, *Putting Promises into Action: A Report on a Decade of Child and Family Poverty in Canada* (Toronto: Campaign 2000, 2003) at 10, online: Campaign 2000 <<http://www.campaign2000.ca/rc/unsscMAY02/MAY02statusreport.pdf>> .

35. Mittelman, *supra* note 10 at 18; Sjolander, *supra* note 11 at 609.

36. David M. Trubek *et al.*, “Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas” (1994) 44 Case W. Res. L. Rev. 407 at 419; Harry W. Arthurs & Robert Kreklewich, “Law, Legal Institutions and the Legal Profession in the New Economy” (1996) 34 Osgoode Hall L.J. 1 at 16; Harry W. Arthurs, “Poor Canadian Legal Education: So Near to Wall Street, So Far from God” (2000) 38 Osgoode Hall L.J. 381 at 386 [Arthurs, “Legal Education”].

economy.³⁷ As Keith Clark, Chairman [*sic*] of Clifford Chance — the world's second biggest law firm — has said “[w]here businessmen [*sic*] and bankers go, lawyers are not far behind and often get there first.”³⁸ For several decades now lawyers have been engaged in the project of developing “the new property,” with a heavy emphasis on intellectual property rights. Moreover, intellectual property is widely perceived to be one of the most important growth areas for legal practice, for it requires the “creation of a new category of juridical technicians”.³⁹ For example, scientific developments must be commodified to be exploited, and commodification requires the conversion of abstract ideas, processes and systems into private property rights. Intellectual property rights are now being used to protect a company's proprietary interests in the human genome, the biological components of traditional natural remedies, and other developments on the new frontiers of intellectual property law.

Similarly, lawyers have played a central role in the globalization of the economy. Whether we are discussing the emergence of global capital markets or globalized firms, lawyers have been key actors in constructing such regimes and assisting their clients in participating in such fora.⁴⁰ Arthurs and Kreklewich suggest that we are witnessing the emergence of a new *lex mercatoria*, in which “law experts are central to the production of . . . non-state regimes.”⁴¹

37. Richard G. Stock & Lori Brazier, “Corporate Counsel and the Corridors of Power” *Lexpert: The Business Magazine for Lawyers* (April 2002) 64; Michael Lewis, “Surviving the Tech Wreck” *Canadian Lawyer* 26:10 (October 2002) 10 at 10.

38. Keith Clark, “Introduction” in Basil Markesinis, ed., *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (Oxford: Hart, 2000) 1 at 4. Clark pointed out that Clifford Chance believes, “In this new world, respect for different legal cultures . . . will be key” (*ibid.* at 7). However, he also states, “We seek to use the best forms of practice in each legal system, and combine them on a daily basis . . .” (*ibid.* at 3). Clark's paper illustrates the tensions between a commercial imperative that believes that “the standardisation of such transactions drives down their costs” (*ibid.* at 5) and the global political imperative that clings to cultural differences in law.

Harry Arthurs, analysing the same phenomenon, but through a very different ideological lens, noted that:

It is not surprising to find that some law students, lawyers, law firms, and law faculties are attempting to position themselves to take best advantage of continentalism and globalization. This takes several forms: the acquisition of capacities and credentials which will be negotiable in an integrated continental legal community; the development of reputations which will have transborder currency; and the forging of transnational alliances and partnerships which will enable Canadians to survive and flourish in the new continental dispensation. In the short term, moreover, legal actors are staking out their claims as managers of continental integration, as stalwarts of the resistance movement or as honest brokers between the two.

(Arthurs, “Legal Education”, *supra* note 36 at 387.)

39. Arthurs & Kreklewich, *supra* note 36 at 16.

40. “Low Dollar, IT help fuel export of legal services” *Lawyers Weekly* 22:14 (16 August 2002) 22.

41. Arthurs & Kreklewich, *supra* note 36 at 38; see also Arthurs, “Globalization”, *supra* note 11 at 221, 237; Arthurs, “Legal Education”, *supra* note 36 at 403-404.

Legal knowledge is a highly valuable form of knowledge in the new economy. First year lawyers in some of the elite Bay Street firms begin their careers earning nearly \$100,000 a year.⁴² In response to globalized market forces, law schools are under increasing pressure to provide students with the type of education that will enable them to contribute to the marketplace. My own law school, Dalhousie University, has recently created a Law and Technology Institute.⁴³

Similarly, commentators argue that as a result of globalization the practice of international law will expand greatly, especially in the realm of international contracts, foreign investment, international banking, antitrust, arbitration, tax planning and commercial trade.⁴⁴ Further, as globalized players seek to determine which legal regimes are most hospitable for investment and encourage the cross-fertilization, standardization and convergence of different legal systems,⁴⁵ the area of comparative law will expand.

Finally, governments contract out legal work to the private bar. Although it has been difficult to obtain solid information on the exact dollar figures of legal services that are being contracted out,⁴⁶ one source indicates that spending on services by the federal government has increased from approximately \$38 million in 1994-1995 to \$46 million in 1999-2000 and \$57 million in 2001-2002.⁴⁷ Another source indicates that the federal spending increased from approximately \$42 million in 1998-1999 to \$51 million in 1999-2000, \$55 million in 2000-2001, \$63 million in 2001-2002 and \$65 million in 2002-2003.⁴⁸ Of the \$65 million spent in 2002-2003,

42. See online: ZSA <<http://www.zsa.ca/En/Infor/showInfo.php?file=/En/Info/Pages/ontario.inc>>.

43. See online: Dalhousie University Law and Technology Institute <<http://as01.ucis.dal.ca/law/lati/>>.

44. Bernabe-Riefkohl, *supra* note 8 at 139.

45. *Ibid.* at 149, 155; Clark, *supra* note 38 at 4-5; Trubek *et al.*, *supra* note 36 at 428, 475, 497-498.

46. At the federal level, figures were available through the Department of Justice and the Department of Finance. However, at the provincial level, most of the departments would not provide the information services because of provincial privacy laws. As well, most of the provincial CBA and Law Society offices did not maintain statistics on contracting out. Nevertheless, information about contracting out is available in Nova Scotia. It has been suggested that in Nova Scotia there has been a decline in contracting out in recent years. In 2001-2002 it is estimated that \$5.3 million was spent on legal services, but that this will be reduced to less than \$4 million in 2002-2003 (data provided by the Nova Scotia Department of Justice on 25 November 2002). One proffered explanation for contracting out is that in-house legal counsel lack expertise in specialized areas of the law. As I discussed earlier, the new economy has resulted in the shrinking or hollowing out of the state. This has implications for the role of in-house governmental lawyers whose capacities may be reduced because of structural pressure on organisations. The perceived benefits of competition with external lawyers and the provision of legal advice that may be regarded as more independent and less susceptible to agency capture than that provided by in-house governmental lawyers may also contribute to the hollowing out of institutional capacity.

47. Data provided by the Federal Department of Justice, Ottawa (Correspondence with the Federal Department of Justice, 9 January 2003).

48. Cristin Schmitz, "Federal Crown Agents billings reached a record \$65 million" *Lawyers Weekly* 23:6 (6 June 2003) 1.

\$24 million was for non-criminal matters and \$22.5 million for the war on drugs.⁴⁹

Politically, lawyers have also played a leadership role. As a result of the closer relationship between states and transnational corporations, some lawyers — particularly commercial lawyers, but also constitutional lawyers — are playing an important role as intermediaries between governments, banks and businesses. They communicate business' wants to governments as governments develop policies.⁵⁰ NAFTA, for example, has been described as a “product of the trade bar.”⁵¹ Indeed, some have argued that “powerful supranational corporations are relatively free to produce their own law, their own normative systems, and to impose them on customers, suppliers, workers — even on governments.”⁵²

Finally, **socially** and **culturally** the new economy has had an impact upon the legal profession. For example, I have suggested that law firms have benefited from government policies of contracting out legal services, which have enabled these private firms to profit from taxpayers' money. Moreover, while the state may have less need for certain legal skills, other types of legal expertise are in greater demand. It has been argued that the “juridification of welfare, refugee admissions, and prison administration ... have all resulted in the expansion of the cadre of law experts employed by the state or by advocacy groups ...”⁵³ Examples of some of these groups include the Women's Legal Education and Action Fund (LEAF), the African Canadian Legal Clinic, and the Refugee Law Office.

None of this is to argue that the new economy has been unqualifiedly good for the legal profession.⁵⁴ As Katzmann has summarized, in recent years the profession has become increasingly strained on several levels: the growth of larger firms, the rise in costs with its impetus towards intensifying the need to log an ever-increasing number of billable hours, the fickle loyalties of clients — and lawyers — to firms; the erosion of collegiality, and the specialization and commercialization of lawyers.⁵⁵ Some of this is due, in part, to the nature of the new economy. More specifically, there has been an increase in stratification within the Canadian legal profession, with the elite large firms getting bigger and doing increasingly well, middle sized firms struggling to maintain market share, and smaller

49. *Ibid.*; Cristin Schmitz “Lumber War, aboriginal suit triggers big Crown agent tabs” *Lawyers Weekly* 23:8 (20 June 2003) 1.

50. Clark, *supra* note 38.

51. Trubek *et al.*, *supra* note 36 at 469.

52. Arthurs & Kreklewich, *supra* note 36 at 22.

53. *Ibid.* at 37.

54. See Arthurs, “Legal Education”, *supra* note 36 at 397-401.

55. See Robert A. Katzmann, “Themes in Context” in Robert A. Katzmann, ed., *The Law Firm and the Public Good* (Washington DC: Brookings Institution, 1995) 1 at 4-5.

firms facing hard times.⁵⁶ The number of lawyers employed by government also has been cut as a result of governmental downsizing.⁵⁷ Moreover, although the legal profession itself is becoming more diversified, there are suggestions of a correlation between gender and race on the one hand and economic status on the other.⁵⁸

In the next section, I will demonstrate how these developments are affecting access to justice in Canada through provision of legal aid services. This will lay the foundation for an assessment of the legal profession's response to what is widely perceived to be a "crisis" in access to justice.

II. *Access To Justice And Legal Aid*

"Access to justice", like the "new economy", is a highly indeterminate idea and ideal.⁵⁹ Much depends upon whether one puts the emphasis on "access" or on "justice."⁶⁰ Clearly, however, it is a large idea that seeks to live up to the promises of a democratic society committed to both the rule of law and the principle of equality. There is little doubt that access to justice must mean more than access to a lawyer,⁶¹ but given the pervasiveness and complexity of both substantive and procedural law in contemporary Canadian society, it would seem that access to a lawyer is a necessary — though insufficient — element of access to justice.⁶² Lawyers, in other words, function as the gatekeepers of the justice system.⁶³

56. See generally Arthurs & Kreklewich, *supra* note 36 at 44-47; Arthurs, "Globalization" *supra* note 11 at 237-238, 244.

57. See Arthurs, "Legal Education", *supra* note 36 at 397.

58. See e.g. CBA Report of the Working Group on Racial Equality in the Legal Profession, *The Challenge of Racial Equality: Putting Principles into Practice* (CBA: Ottawa, 1999) at 18: "While lawyers from racialized communities may find employment, their careers may get stalled as they do not earn the same salaries or progress at the same rate or to the same levels as their white colleagues."

59. William E. Conklin, "Whither Justice: The Common Problematic of Five Models of Access to Justice" (2001) 19 Windsor Y.B. Access Just. 297.

60. See Roderick A. Macdonald, "Access to Justice and Law Reform # 2" (2001) 19 Windsor Y.B. Access Just. 317 at 323.

61. Indeed it can be argued that in some respects lawyers may be part of the problem. See e.g. Yedida Zalik, "Where There is No Lawyer: Developing Legal Services for Street Youth" (2000) 18 Windsor Y.B. Access Just. 153.

62. Although courts have not constitutionalized a right to legal representation, they have clearly recognized the importance of being able to access a lawyer in so far as they have acknowledged the inherent jurisdiction of a court to order the government to provide legal representation in certain situations. See e.g. *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.); *New Brunswick (Minister of Health and Community Services) v. G.(J.)* (1999) 26 C.R. (5th) 203 (S.C.C.). See also *B.(G.D.) v. The Queen*, [2000] 1 S.C.R. 520, where the Supreme Court of Canada has recognized that the right to effective assistance of counsel is a principle of justice (*ibid.* at paras. 24-25).

63. See David Harris, "Meet Legal Needs of the Poor Through Organization, Not Mandatory Pro Bono" (2001) 163 New Jersey Law Journal 23, online: Lowenstein Sandler: Attorneys at Law <http://www.lowenstein.com/new/meet_legal.html> [Harris, "Organization"].

Proponents of the Keynesian welfare state recognized the importance of being able to access a lawyer through the creation of legal aid programmes as a key component of access to justice.⁶⁴ The CBA, in a recent publication, has articulated the following, explicitly welfarist, “statement of principle”:

The objective of an effective and fair legal aid system is to provide and encourage equal access for all Canadians to the full range of essential legal services, of a consistently high quality through a plan adequately funded by federal and provincial governments and assured of independence in promoting the legal welfare of individuals who are unable to afford legal counsel.⁶⁵

Such a principle is reflective of a broader public consciousness which has emerged over the last fifty years. Legal aid has come to epitomize the institutional and financial embodiment of access to justice.⁶⁶ Consequently, for the purposes of this paper, I will focus on legal aid to reflect upon the impact of the new economy and its significance for the ethical obligations of the legal profession.

Legal aid was first introduced in the United Kingdom in 1949 as part of the newly emerging welfare state. Ontario became the first Canadian province to legislate a legal aid plan in 1967, with the other provinces and territories following suit over the next fifteen years. From the beginning, advocates of legal aid recognized that inequality can manifest itself in both the public and private sphere.⁶⁷ Consequently, legal aid was available not only for criminal law matters, but also for civil law matters such as family law, divorce, separation, maintenance, custody, access and child protection, and (in some jurisdictions) welfare, refugee, and mental health issues.

Because Canada is a federal system, legal aid was unevenly structured and distributed among the provinces. In every jurisdiction, the federal government provided targeted funding for civil and criminal legal aid under

64. See e.g. Rebecca Johnstone & Jennifer Thomas, “Legal Aid in Canada: 1996-1997” (1998) 18:10 *Juristat: Canadian Centre for Justice Statistics* 1.

65. As quoted in Melina Buckley, *The Legal Aid Crisis: Time For Action* (Background paper prepared for the CBA, 2000) at 2; Daphne Dumont, “A Commitment to Win Access to Justice for All: The CBA’s Efforts to Improve Civil Legal Aid Services in Canada” in *The Civil Legal Aid Conference* (Toronto: LEAF, 2002) 1 at 2 [LEAF].

66. National Council of Welfare, *Legal Aid for the Poor* (Minister of Human Resources Development Canada, 1995), online: National Council of Welfare <<http://www.ncwcnbes.net/html/document/reportlegalaid/reportlegalaid.htm>> [*Legal Aid for the Poor*].

67. See generally *ibid.* and Legal Aid Ontario, *Legal Civil Tariff Reform: Business Case* (November 2001) at 6-9, online: Legal Aid Ontario <http://www.legalaid.on.ca/en/info/pdf/Tariff_Business_Case_full_document.pdf> [*Legal Aid Tariff Reform*].

the Canada Assistance Plan (C.A.P.). The provinces also contributed. For example, in Ontario, the federal government funded approximately 20% of the programme and the province the rest.⁶⁸ The programmes were designed and administered by the provinces and territories. The result was a checker-board system where geographical location determined the scope of coverage.⁶⁹ Despite the obvious inequities of such a system, the basic pattern across the country between the 1960s and the early 1990s was one of continuous growth.⁷⁰

Two constituencies benefited from such programmes: low income Canadians who were recipients of legal advice, and the legal profession itself.⁷¹ For example, it has been estimated that of the \$465.1 million spent on direct legal services in 1996-97, 68% was paid to private lawyers.⁷² The authors of the study also note that, in the same year, of the 67,038 registered practicing lawyers in Canada approximately 24% provided legal aid assistance.⁷³

All this began to change in the mid 1990s with the retrenchment of the state from welfare driven programmes.⁷⁴ In 1991-1992, the federal government capped its criminal legal aid contribution at the 1989-1990 level of \$86 million. By 2001-2002, this amount had dropped to just under \$80 million. Currently, criminal legal aid is generally available only where an accused faces the possibility of incarceration.⁷⁵ On the civil side, the turning point was 1994-1995, when the C.A.P. was replaced by the C.H.S.T. and legal aid monies became part of an unconditional transfer to the provinces, with the federal government no longer directly contributing to civil legal

68. John D. McCamus, "The Reshaping of Legal Aid" in *Access*, *supra* note 30 at 43, where he states that the remainder of the funding for legal aid comes from a share of the interest on lawyers' trust funds administered by the Law Foundation of Ontario, contributions from members of the profession through a hold-back on legal aid fees, a levy imposed on the profession and client contributions. (The professional levy has since been abolished in Ontario).

69. See Buckley, *supra* note 65 at 33-34.

70. *Legal Aid for the Poor*, *supra* note 66 at 11: "When we adjust per capita expenditures on legal aid to eliminate the effect of inflation, we see that expenditures grew tremendously from the beginning of legal aid in the early 1970s until the end of that decade, then slowed down rising by only 30% between 1978-1979 and 1986-1987... Spending took off again in the following years, rising by 175% in actual dollars and doubling in uninflated dollars between 1980-1987 and 1992-1993."

71. *Ibid.* at 20-25.

72. Johnstone & Thomas, *supra* note 64.

73. *Ibid.*

74. Similar cutbacks have taken place in many other countries. See e.g. Don Fleming, "Australian Legal Aid under the First Howard Government" (2000) 33 U.B.C. L. Rev. 343; Roger Smith, "Clinics in a Cold Climate: Community Law Centres in England and Wales" (1997) 35 Osgoode Hall L.J. 895; Francis Regan, "Legal Aid Without the State: Assessing the Rise of Pro Bono Schemes" (2000) 33 U.B.C. L.Rev. 383.

75. See Buckley, *supra* note 65 at 13.

aid.⁷⁶ In other words, federal contributions went into the general revenues of the provinces and ceased to be targeted to legal aid. As the following table demonstrates, while justice spending for the coercive dimensions of the state *increased* in the late 1990s, legal aid was the only expenditure that clearly dropped:

	1994-95	1995-96	1996-97	1997-98	1998-99
\$ million					
Justice Spending ¹	9,944.0	9,966.0	9,996.0	9,011.0	10,704.0
Police ²	5,783.7	5,808.6	5,856.1	5,989.0	6,209.8
Courts	838.0	848.0	857.4	x	925.0
Prosecutions	257.0	261.0	264.6	x	278.0
Legal Aid	646.0	622.9	536.1	454.6	494.0
Youth Corrections ³	526.0	507.2	501.4	490.2	497.4
Adult Corrections	1,894.0	1,918.9	1,968.6	2,077.4	2,257.0

x Data not available, applicable or confidential.

1. In order to allow annual comparisons, court expenditures for 1993-1994, and 1995-1996 are estimated, based on the average between the reporting years immediately preceding and following the reference period. Prosecutions expenditures for 1995-1996 were estimated in similar manner. Note that these estimates are included the total. Prosecutions expenditures for 1992-1993 and 1993-1994 are not included in the total.

2. Most municipal police forces report on a calendar year, all other data represent fiscal year reporting.

3. Youth corrections costs are estimates. The figures likely underestimate total costs.

Source: Statistics Canada, Catalogue no. [85-002-XIE](#) Last modified: March 7, 2001

The extent of the down sizing may be illustrated by reference to Ontario and British Columbia. In Ontario, “the principal device for reducing expenditures was simply to eliminate service in various areas” so that certificates issued for legal aid dropped from 230,000 to 80,000 per year, with the most serious impact in the family law area.⁷⁷ The government also imposed a strict cap on legal aid funding for each fiscal year.⁷⁸ Because of frozen tariffs, in 2002 the private bar held a “job action” week and threatened a legal aid “strike”.⁷⁹

76. *Legal Aid and the Poor*, *supra* 66 at 9.

77. McCamus, *supra* note 68 at 44-45.

78. *Ibid.* at 43.

79. Cristin Schmitz, “Weeklong Protest in Ottawa Planned Over Legal Aid Tarriff”, *Lawyers Weekly* 21:42 (15 March 2002) 1 at 1.

In British Columbia, in 2002, the new Liberal government cut legal aid by almost 40% and announced the closure of twenty-four courthouses. The stated goal was to cut funding from \$88.3 million in 2001-2002 to \$54 million in 2004-2005. This led to an unprecedented chain of events: objections from the legal aid board and its ultimate firing by the Attorney General, a no confidence motion in the Attorney General being passed by an overwhelming majority of the British Columbia Law Society (by a vote of 754-325), a letter from the chief judge of the Provincial Court to the Attorney General indicating that the judiciary had lost confidence in him, and a suit by the Law Society seeking an injunction against the Attorney General.⁸⁰ The Attorney General defended himself in the familiar discourses of neo-liberal necessitarianism: although he “expressed regret” at the “real impact” of the cuts, “these are tough times” and he “had no choice”.⁸¹

The problem of there being less funding for legal aid is compounded by other cutbacks, restructuring and increased coercion by the state. Consequently, a greater number of people have found themselves worse off and, therefore, the demand for legal aid has increased. McCamus notes that in Ontario over a six-year period:

The welfare rolls in Ontario had increased by about 40%. The number of violent offence charges had risen about 16%. The number of family law cases had almost doubled over that period of time. Changes to existing law and prosecutorial policy no doubt had an impact. Due process requirements had made immigration and refugee law more complex. Criminal law cases appeared to have increasing complexity, principally as a result of the *Charter*. Minimum sentence and zero tolerance policies of various kinds made some types of cases harder to clear. Family law also enjoyed some growth in complexity. As well, government involvement in family law matters for example forcing single mothers to seek support as a condition of receiving welfare added to case volumes.⁸²

Johnstone and Thomas have summarized the national profile of legal aid as follows: applications for legal aid peaked in the early 1990s, but declined significantly thereafter because of application fees, pre-screening procedures, restrictions in coverage, tightened eligibility criteria and reduced government funding.⁸³

80. See Jean Sorensen, “Cutting B.C. Legal Aid System in Half” *Canadian Lawyer* (26:8) (August 2002) 17; Gary Oakes, “B.C. Attorney General, Judges Declare Ceasefire on Closures” *Lawyers Weekly* (22:1) (3 May 2002) 2; Michael Wilhelmson & Gary Oakes, “Law Society of B.C. Challenges Plans to Close 24 Courthouses” *Lawyers Weekly* (21:44) (29 March 2002) 1.

81. Gary Oakes, “Law Society of B.C., CBA Denounce Government’s Firing of Legal Aid Board” *Lawyers Weekly* (21:41) (8 March 2002) 1 at 2.

82. McCamus, *supra* note 68 at 43-44; *Legal Aid Tariff Reform*, *supra* note 67 at 9, 14-19.

83. Johnstone & Thomas, *supra* note 64.

The effects of such governmental cutbacks have an especially harsh impact upon those who may need legal services the most: the poor, women, members of “visible minority groups”, persons with disabilities, the homeless, and First Nations.⁸⁴ As the National Council for Welfare has observed, “poverty law” issues such as landlord/tenant relations, consumer fraud, social assistance, unemployment insurance, workers’ compensation, disability benefits and pension programmes can be especially problematic because of the complexity of the regulatory regimes and the nature of the bureaucracies involved.⁸⁵ A particularly interesting issue, in the light of globalization, is the issue of legal aid for immigration and refugee claimants. The Attorney General of Ontario has suggested that the federal government’s increased tightening of admission criteria has led to a significant increase in legal aid costs from \$14 million in 2001 to \$20 million in 2002 and estimates as high as \$43 million in 2003.⁸⁶

Finally, it is important to note that it is not just legal aid lawyers or left oriented advocates who have expressed concern about access to justice. Judges have also become increasingly alarmed in recent years with the large number of unrepresented or self-represented litigants appearing in court. Over the last several years, there have been a number of judicial conferences on how to respond to such litigants and attempts have been made to develop protocols and procedures.⁸⁷ In one court in Toronto 75% of the parties appearing in family law matters were not represented by a lawyer.⁸⁸ In short, as the British Columbia Coalition on Access to Justice has pointed out:

Legal aid underfunding has resulted in a tiered system of justice, with at least three types of people who need lawyers. First, there are those who can pay for lawyers privately. Second, there are those who receive Legal Aid from lawyers who receive unrealistically low remuneration for the work and time required to provide the high quality level of representation each client deserves. Third, there are those who are refused the services of a lawyer altogether, since they do not qualify financially or they have a legal issue which is not covered by the tariff.⁸⁹

84. See generally Buckley, *supra* note 65 at 3, 40-44; Hill, *supra* note 1 at 2, 41; LEAF, *supra* note 65; *Legal Aid Tariff Reform*, *supra* note 66 at 32; Zalik, *supra* note 61 at 164-165, 176; Sorenson, *supra* note 80 at 21.

85. *Legal Aid for the Poor*, *supra* 66 at 6, 23-24, 29.

86. John Jaffey, “Access System’s ‘Foremost Challenge’: A.G.” *Lawyers Weekly* (21:34) (18 January 2002) 3. See also Sorenson, *supra* note 80 at 21.

87. See e.g. *Beyond Accommodation to Equality in the Courtroom - Gatekeepers, Advocates or Referees? New Brunswick Court of Queen’s Bench and Court of Appeal Education Seminar Held June 26-27, 2002* [unpublished, copy on file with the author].

88. See Buckley, *supra* note 65 at 45.

89. *Ibid.* at 16.

Thus, to summarize my argument so far, it would seem that the effect of the new economy on the legal profession has been Janus-faced: because of its potential to expand the market for legal services it may tie the legal profession even more closely to those who are privileged; but for these very same reasons, it may actively disconnect increasing numbers of lawyers from those in society who might need their help the most.⁹⁰ The next section analyzes how the Canadian legal profession has responded to this dilemma, and then considers an alternative possibility, mandatory pro bono.

III. *The Ethical Obligations Of The Legal Profession*

1. *Caveat*

In the same way that there are analytical problems with the new economy and access to justice, there are also analytical problems with the phenomenon we call the legal profession. As Kent Roach has noted, “[i]t is misleading to talk of a legal profession which includes barristers and solicitors, local, national and international firms, boutique and generalist firms, sole practitioners and lawyer employees. The legal profession is fragmented and stratified.”⁹¹ More specifically, in the context of this paper, it is important to note that there are sharp divisions in the legal profession between those who have been doing increasingly well over the last decade (in part perhaps due to the new economy) and those who have been struggling. This is perhaps best personified in the priorities of the two past presidents of the CBA (Daphne Dumont, family lawyer from PEI, and Eric Rice, a general practice lawyer from Richmond B.C.), both of whom made legal aid an explicit priority, and the new president (Simon Potter, a corporate lawyer from Montreal) whose emphasis is on international trade law and globalization.⁹²

Clearly, some lawyers have been negatively affected by the cuts to legal aid.⁹³ Tariffs for legal aid work have been frozen for a decade, and there is little doubt that many lawyers who do legal aid work put in more time than they are paid for and carry an extremely high caseload.⁹⁴ Indeed, the CBA notes in passing that “[t]he caseload of Nova Scotia [legal aid] staff lawyers is similarly about four times that of the busiest lawyers in private practice in that province.”⁹⁵ Significant numbers of lawyers have

90. See Bernabe-Riefkohl, *supra* note 8 at 139.

91. K. Roach, “Restructuring of the Legal Profession” in *Access*, *supra* note 30 at 78.

92. Alex Dickson, “New CBA President, Simon V. Potter”, *Canadian Lawyer* (26:8) (August 2002) 27 at 27.

93. See e.g. *Legal Aid Tariff Reform*, *supra* note 67.

94. Buckley, *supra* note 65 at 55-68.

95. Buckley, *ibid* at 65.

withdrawn from providing legal aid services.⁹⁶ In Ontario, for example, it has been estimated that since “the legal aid cutbacks in 1996, about 24% of private lawyers have stopped doing legal aid cases”.⁹⁷

Despite this caveat, it is still possible to discern the contours of the overall response by the legal profession to the problem of access to justice.

2. *The Response of the Legal Profession*

The legal profession tends to make much of its contributions in facilitating access to justice. Official reports from the CBA highlight the following:

- direct contributions through financial levies;⁹⁸
- the amount of funding generated by interest on trust accounts;
- the extent to which bills for legal services are voluntarily discounted for compassionate reasons;
- *pro bono* contribution of legal services; and
- volunteer participation of members of the legal profession in governance and/or operation of the legal aid organization.⁹⁹

The CBA has lobbied to maintain and enhance legal aid budgets; it has launched Legal Aid Watch to collect “horror stories”; it has engaged in public education programmes; it has commissioned legal opinions in support of publicly funded legal representation in Canada¹⁰⁰ and it has proposed investigation of some alternative funding schemes (e.g., pre-paid legal services plans, contingency legal aid funds, contingency fees and tax deductions for legal expenses).¹⁰¹ Even more dramatically, some lawyers have engaged in “job actions” and legal aid boycotts,¹⁰² while others have

96. See especially *ibid.* at 38; Cristin Schmitz, “Week Long Protest in Ottawa Planned Over Legal Aid Tarriff” *Lawyers Weekly* (21:42) (15 March 2002) 1 at 22; donalee Moulton, “More N.S. Lawyers Seen Refusing Legal Aid Cases” *Lawyers Weekly* (21:46) (12 April 2002) 6.

97. Cristin Schmitz, “Private Bar Legal Aid ‘Strike’ Looms in Ontario Over Rates” *Lawyers Weekly* 22:11 (12 July 2002) 3.

98. But note that in 1996-1997 it is estimated that legal profession contributions equalled only 2% of revenue for legal aid assistance. See Johnstone & Thomas, *supra* note 64.

99. Buckley, *supra* note 65 at 50; G. Schellenberg, “Action on Legal Aid” *Voir Dire* (July 2000) 1.

100. Dumont, *supra* note 65; CBA, *Making the Case: The Right to Publicly Funded Legal Representation in Canada* (Ottawa: CBA, 2002), online: CBA Reports <http://www.cba.org/cba/cba_reports/main/>.

101. See Buckley, *supra* note 65 at 4, 82-87.

102. See generally Cristin Schmitz, “Week-long Protest in Ottawa Planned Over Legal Aid Tariff” *Lawyers Weekly* 21:42 (15 March 2002) 1; Cristin Schmitz, “Ontario A.G., Defence Bar Reach Legal Aid ‘Understanding’” *Lawyers Weekly* 22:25 (1 November 2002) 3; Dean Jobb, “Nova Scotia Lawyers Considering Boycott of Legal Aid Work” *Lawyers Weekly* 22:31 (13 December 2002) 3.

sought *Fisher* applications (i.e., requests by lawyers to judges for an order that the province must pay counsel their reasonable hourly fees).¹⁰³ Moreover, the CBA has decided to sue governments, claiming that it is unconstitutional to deny legal aid.¹⁰⁴

Much of this is praiseworthy. But it has also produced little in the way of results, as the CBA itself acknowledges.¹⁰⁵ Moreover, the CBA has identified some of the problems in arguing for better legal aid: the provinces manage the delivery of legal aid thereby making coordinated lobbying difficult; legal aid does not have a public profile; the public often misunderstands why people need legal aid; and people have misconceptions about why lawyers want improvements to the legal aid system.¹⁰⁶

It is clear from the foregoing that the primary thrust of the CBA's agenda has been to focus on the obligations of governments to provide for legal aid funding. But the likelihood of governments fully responding to the legal aid crisis in the new economy are extremely slim.¹⁰⁷ The legal profession needs to be more aware of the larger context of the retrenching new economy, and more importantly, move in tandem with the emerging discourses of the "social investment state." In particular, I want to suggest that the legal profession should consider the possibility of promoting a "third sector partnership" with governments to reconceptualize legal aid not as a welfare entitlement, but as a social investment that will "enhance efficiency" and "improve the human capital stock" of Canadian society. The key to the creation of this partnership will be an offer by the profession to engage in mandatory pro bono, with consideration from the government coming in the form of re-investment in legal aid.¹⁰⁸ The result will be enhanced (although undoubtedly still inadequate) access to justice.

There already exists in Canada the inchoate elements of such a project.

103. See generally Cristin Schmitz, "'Fisher King' Wins Two Key Legal Aid Funding Cases" *Lawyers Weekly* 22:23 (18 October 2002) 9; Cristin Schmitz, "Trial Judges Order Crown to Pay Premiums Above Current Legal Aid Rates" *Lawyers Weekly* 22:19 (20 September 2002) 1 at 18; Eric Dowd, "Ontario A.G. Angered by Judges' Actions on Legal Aid Fees" *Lawyers Weekly* 22:20 (27 September 2002) 3. The Government of Ontario pays legal aid lawyers \$88 per hour; the courts have been ordering the government to pay between \$125-140 per hour. See also, Jim Middlemiss, "Bar Playing with *Fisher* Fire" *Lawyers Weekly* 22:24 (25 October 2002) 5.

104. See Cristin Schmitz, "CBA to Launch Series of Test Cases to Challenge Funding of Legal Aid" *Lawyers Weekly* 22:15 (23 August 2002) 6.

105. See especially Dumont, *supra* note 65 at 6-7.

106. *Ibid.* at 8-10.

107. See also Rob Atkinson, "A Social Democratic Critique of the Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best" (2001) 9 *Am.U. J. Gender Soc. Pol'y & L.* 129 at 131.

108. Such a view may be beginning to emerge in British Columbia. See Gary Oakes "Now it's B.C. Government's Turn, Says Head of New Pro Bono Body" *Lawyers Weekly* 22:3 (13 December 2002) 6.

I suggest that now is an appropriate moment for the leadership of the legal profession to pull these various strands together and to make an offer to governments. Five disparate threads can be identified.

First, leaders of the profession have called for more voluntary pro bono¹⁰⁹ and in 1998 the CBA passed a resolution “committing the Association to the development of a policy which requires or encourages each member to contribute fifty hours or three percent of billings per year to *pro bono* work, aimed at assisting the disadvantaged.”¹¹⁰ Nothing came of this, and in 2001 a new working group was created to investigate further.¹¹¹

Second, in both Ontario and British Columbia new voluntary pro bono societies have been created. Their goal is to promote, coordinate and facilitate the provision of pro bono services.¹¹² In British Columbia, the

109. Jaffey, *supra* note 86.

110. Hill, *supra* note 1 quoting McMurtry C.J.O. at 1.

111. Canadian Bar Association, *CBA Resolution 01-15-A*, online: Resolutions 2001 < <http://www.cba.org/cba/resolutions/2001res/probono.asp>>.

112. See e.g. Law Society of British Columbia and CBA (B.C. Branch), *Pro Bono Publico Lawyers: Serving the Public Good in B.C.: Report of the Pro Bono Initiative Committee June 2002 [B.C. Report]*. The Report further spells out its objectives as follows:

As part of its community development work, the Society will:

- operate as a first point of contact for community organizations looking for *pro bono* assistance for their clients and for lawyers interested in *pro bono*;
- provide programme support to *pro bono* organizations and lawyers (it will not, however, provide direct delivery of *pro bono* legal services);
- direct agencies, lawyers and, in some cases, individual clients to a *pro bono* programme most appropriate to them;
- function as a centralized source of information and other useful *pro bono* resource materials;
- assist community organizations with developing *pro bono* delivery models and resource materials to ensure consistent and high quality *pro bono* legal services;
- assist community organizations with publicizing their *pro bono* opportunities;
- develop and maintain a directory of *pro bono* programmes available in the province; and
- coordinate the profession's *pro bono* programmes (*ibid.* at 17).

It is also worth noting, however, that the Report is quite explicit about what it describes as the “public and government relations implications” of the initiative:

The public and government relations benefits of the proposed *pro bono* framework should not be underestimated. Lawyers are often criticized for their apparent lack of commitment to assisting people who need help the most, irrespective of whether the criticism is warranted. Many lawyers are committed to public service and they demonstrate the commitment by giving their time and resources to a variety of charitable organizations and worth causes. Unfortunately, the public is not fully aware of the profession's philanthropic spirit. From a public relations perspective, the proposed framework for *pro bono* would accomplish the following objectives:

- demonstrate to the public that lawyers can and do perform charitable work;
- debunk the myth that lawyers do not currently provide or never have provided *pro bono* legal services;
- mobilize lawyers who are looking for new, meaningful ways to give back to the community; and
- generate positive media coverage about lawyers' humanitarian activities, thus improving the public image of lawyers (*ibid.* at 18).

primary vehicle will be the adaptation of a website called "Pro Bono Net" that will be "accessible to both lawyers seeking to do pro bono work and community groups looking for free legal assistance."¹¹³ In Ontario, the plan seems to be more inclusive, covering not only charities and community groups but also "needy people themselves."¹¹⁴ Moreover, there is the Western Canada Society to Access Justice, which operates thirty-two clinics from Manitoba to British Columbia where "[m]ore than 230 lawyers volunteer time once a month to help about 300 clients who can't afford professional legal advice or are unable to obtain legal aid."¹¹⁵ Similarly, in Nova Scotia nearly 150 lawyers volunteer with Reach, an organization that seeks to provide legal counselling for persons with disabilities.¹¹⁶

Third, a recent survey of British Columbia lawyers found that 78% claim to be delivering pro bono services.¹¹⁷ At first blush these initiatives

113. Michael Wilhelmson, "Go-ahead Given to Create B.C. Non-Profit Pro Bono Society" *Lawyers Weekly* 21:47 (19 April 2002) 7.

114. Bill Rogers, "Profile: Ronald Manes" *Lawyers Weekly* 21:35 (25 January 2002) 8. See generally, *Pro Bono News: Quarterly Newsletter of Pro Bono Law Ontario*.

115. Gary Oakes, "B.C.-based Organization Operates 32 Pro Bono Clinics" *Lawyers Weekly* 22:25 (1 November 2002) 2.

116. See donalee Moulton, "Reach Nova Scotia: Helping to Change Legal Landscape for Those with Disabilities" *Lawyers Weekly* 22:10 (5 July 2002) 1.

117. *B.C. Report*, *supra* note 112 at A-1. The *Pro Bono* Legal Services Survey was jointly conducted by the Law Society of British Columbia and the Canadian Bar Association. Surveys were sent to 10,330 members. The response rate for this survey was particularly poor with only 619 responses received (six percent response rate). If the respondents are a random sample of the legal population in British Columbia, the organisers state that the data should be reliable +/- 3.8%, nineteen times out of twenty. An evaluation of the responses by the organisers suggested a representative sample. However, I suggest that these results should be treated very cautiously as a reflection of the current involvement of practitioners in pro bono work. The survey can be usefully compared with the Pro Bono Survey conducted by the Victoria Law Foundation, Australia, online: Barrister Survey <http://www.victorialaw.org.au/Probono_-_Barrister_Survey_report.htm/>. The survey asked the pro bono question to Victorian barristers, a section of the legal population in Victoria. Surveys were sent to 1,380 barristers with a response rate of 16.4 percent. The survey used the Law Council of Australia's definition of pro bono, which states:

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

Ninety percent of the respondents claimed to have undertaken pro bono work in the two year period prior to the survey; on average the median monthly value of the work was \$AU 1500. Of the barristers who practice criminal or family law, 68% believed that cuts to legal aid funding have resulted in an increase in demand for pro bono services. However, the majority of all respondents stated that their reason for doing pro bono work was a sense of personal responsibility. Not surprisingly, criminal law was the most common area of the law in which pro bono work is provided.

appear promising and the contributions of those who participate must not be underestimated or undervalued. However, some caution is appropriate. It is to be noted that the definition of pro bono was “legal services for persons of limited means or not-for-profit organizations, without expectation of a fee.”¹¹⁸ An article reporting on this survey suggests that the beneficiaries are mostly “non-profit organizations and societies.”¹¹⁹ Moreover, lawyers might include within their definition of pro bono: volunteering for committee membership in legal organizations, continuing legal education, community legal education,¹²⁰ and unremunerated teaching as a sessional lecturer in law schools. Coombs raises the possibility of “mislabelling.”¹²¹ Cramton argues that in the United States “much [of the pro bono] time is directed toward activities that build relationships with other lawyers ...or work that is designed to attract clients.”¹²² Elsewhere, it has been suggested that what some lawyers characterize as pro bono is, in fact, one of the costs of “business-getting.”¹²³ Another commentator has suggested that in the United States one study found that one third of the work classified by lawyers as pro bono in fact involved friends or relatives.¹²⁴ It is also worth noting that another American study suggests that only 10% of American lawyers engage in voluntary pro bono,¹²⁵ while another claims that “[r]ecent estimates suggest that most attorneys do not perform significant pro bono work, and that only between ten and twenty percent of those who do are assisting low income clients. The average for the profession as a whole is less than half an hour per week.”¹²⁶ There is even some evidence to indicate that pro bono rates

118. *B.C. Report*, *supra* note 112 at 10.

119. Michael Wilhelmson, “Survey of B.C. Lawyers Shows Support for Pro Bono Initiative” *Lawyers Weekly* 21:36 (1 February 2002) 22.

120. Buckley, *supra* note 65 at 87.

121. Mary Coombs, “Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services” (1993) 3 *B.U. Pub. Int. L.J.* 215 at 229.

122. Cramton, “Mandatory Pro Bono”, *supra* note 2 at 1129; see also Cramton, “Ordinary Americans”, *supra* note 2 at 578; David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988) at 279 [Luban, *Lawyers*].

123. Barlow F. Christensen, “The Lawyer’s Pro Bono Publico Responsibility” (1981) 1 *American Bar Foundation Research Journal* 1 at 11.

124. See Zino I. Macaluso, “That’s O.K., this One’s on Me: a Discussion of the Responsibilities and Duties Owed by the Profession to Do *Pro Bono Publico* Work” (1992) 26 *U.B.C. L. Rev.* 65 at 70; see also Deborah L. Rhode, “Cultures of Commitment: Pro Bono for Lawyers and Law Students” (1999) 67 *Fordham L. Rev.* 2415 at 2423 [Rhode, “Cultures”].

125. See Steven Lubet & Cathryn Stewart, “A Public Assets Theory of Lawyers’ Pro Bono Obligations” (1997) 145 *U. Pa. L. Rev.* 1245 at 1257, n. 49.

126. Rhode, “Cultures,” *supra* note 124 at 2415.

have been declining in the United States.¹²⁷ It is beyond the scope of this paper to account for these manifest disparities, but they do raise the question of whether the highly positive response in British Columbia is accurate and, more generally, whether anyone truly knows the extent of pro bono in Canada.¹²⁸

Fourth, in the last several years there has emerged a national organization called Pro Bono Students Canada, which is a “network of law schools and community organizations that matches law students with public interest and non-governmental organizations, legal clinics, tribunals, agencies and lawyers who are doing pro bono work.”¹²⁹

Fifth, and finally, there are also elements of mandatory pro bono in Canada. For example, British Columbia has a dedicated tax of 7.5% on lawyers’ bills to help pay for legal aid. The Law Society of Upper Canada had a self imposed legal aid levy for 10 years, but, interestingly, it was eliminated in 1999. It ranged anywhere from \$185-292 per year per lawyer.¹³⁰

Although the foregoing pro bono initiatives are an important starting point, they are manifestly inadequate.¹³¹ In February 2003 the CBA released its long awaited report from its Pro Bono Working Group. Unfortunately, the report and a resolution supporting its recommendations did little to move the pro bono agenda forward. Assiduously avoiding any suggestion that the CBA might attempt to enforce the pro bono obligations it had passed in 1998, the report merely recommended that a new administrative structure be created to enable and assist lawyers to participate in pro bono work. But it did little to promote direct leadership to engage lawyers, law firms, law societies and governments in a commitment to pro bono. Rather than being at the vanguard in the struggle for access to justice, the report and resolution envision the CBA as little more than an administrative assistant providing lawyers and law firms with “how to

127. See Kellie Isbell & Sarah Sawle, “Pro Bono Publico: Voluntary Service and Mandatory Reporting” (2002) 15 *Geo. J. Legal Ethics* 845 at 853-854.

128. The A.B.A. has recently launched a commission to “study the effect of law school debt on students’ ability and willingness to take public interest jobs and to study the effect of billable hours and salaries on firms’ commitment to pro bono work.” See *ibid.* at 854.

129. *B.C. Report*, *supra* note 112 at 3-4.

130. Buckley, *supra* note 65 at 54-55.

131. See Coombs, *supra* note 121 at 231, n. 47.

guides” for pro bono work.¹³²

In the remainder of this article, I propose that these sputtering and inchoate initiatives to provide pro bono need to be consolidated into a larger,

132. Canadian Bar Association Pro Bono Working Group, *Mid-Winter 2003 Report* (Ottawa: Canadian Bar Association, 2003), online: CBA Mid-Winter 2003 Report <<http://www.cba.org/CBA/pdf/03-04-M-Background.pdf>>. The Working Group was required to report on three matters: the nature of the pro bono work being performed by members and how to recognize such work, the development of a business plan as to how the CBA should design, coordinate, facilitate and promote the pro bono contributions of its members, and methods of obtaining and sharing information about the pro bono initiative at the national and branch levels. In August 2002, the Working Group was also asked to consider whether the CBA should enter into a proposed programme to support pro bono clinics and develop specific goals and strategies to enable all Canadians who cannot afford a lawyer or obtain legal aid to obtain free legal advice. In February 2003, the Working Group finally presented its long awaited report to the CBA Council. The Working Group recommends that the CBA:

- develop template policies for law societies and their insurers;
- encourage each law society and its insurer to permit insurance coverage for pro bono work for lawyers who are otherwise exempt from insurance coverage, such as public sector lawyers, corporate counsel and non-practicing or retired lawyers, so that these persons can participate in the provision of pro bono services;
- develop model practices and checklists for law firm work;
- develop a clearinghouse to inform members of best practices for pro bono delivery on a sector basis and make this information available on the CBA website;
- explore the need for specialized pro bono services in particular areas of law;
- encourage all law firms to adopt a pro bono policy and to support and promote pro bono service by their lawyers
- encourage branches to support pro bono activities in their respective jurisdictions by urging each branch to explore the feasibility of developing an internet based pro bono delivery system
- undertake a regular survey of CBA members’ pro bono activity;
- promote a variety of delivery models to best meet local needs for pro bono services without endorsing a particular delivery model;
- not directly fund pro bono clinics;
- promote and recognize pro bono work to include issuing a pro bono challenge to law firms and peer recognition of pro bono activity through a regular feature in the CBA national magazine.

The Working Group concluded that promoting a pro bono culture within the legal profession is sufficiently important to be an ongoing CBA priority, with a specific group in the organization mandated to implement the recommendations in its report, raise funds for ongoing initiatives and oversee the work. This group should be permanently established within the CBA governance structure and must recognize that pro bono work complements, but does not replace, a properly funded legal aid programme. The CBA Council adopted these recommendations during its February 2003 meeting.

Any strategy to encourage lawyers to contribute their time to the provision of legal advice for needy Canadians must be commended. However, the Working Group’s recommendations are inadequate to ensure that more lawyers will undertake pro bono work and that that work will be directed to those *individuals who need it most*. It amounts to a *laissez-faire* position that requires the CBA to provide little direct leadership to engage lawyers, law firms, law societies, the community and governments in a commitment to pro bono work. The strategies propounded by the report are instrumentalist and address how to do pro bono work and ensure that pro bono work is done effectively and efficiently rather than why lawyers and firms should undertake pro bono work. It is unclear just how this proposal will in any measurable way increase lawyers’ or law firms’ commitment to undertake pro bono work. At an even more fundamental level, it fails to create a new modality to address access to justice issues for Canadian citizens by engaging governments, the profession and citizens into a discussion about a partnership for change.

more coherent ethical obligation. The existence of the obligation will allow the Canadian legal profession to put pressure on governments to ameliorate the legal aid crisis.¹³³ But to do so, it will be necessary to address the ethical arguments for and against mandatory pro bono.

3. *Arguments for mandatory pro bono*

Several different types of argument can be mobilized in favour of mandatory pro bono. As Deborah Rhode points out, both rights-based and utilitarian arguments can be developed in support of mandatory pro bono. The primary rights-based argument suggests that there is an unmet right to legal assistance and that, contractually, the legal profession is obliged to respond to that need because of its privileged monopoly situation. Utilitarian arguments depend more on the distributive benefits and instrumental consequences of mandatory pro bono.¹³⁴ I will address each of these in turn.

a. *The Rights Based Argument: Monopoly and the Juridical Contract.*¹³⁵ Building on Locke's social contract theory,¹³⁶ advocates of mandatory pro bono suggest that we need to be aware of three potential contracts. First, there is the contract whereby the citizenry agree among themselves to leave the state of nature in the pursuit of mutual self interest. Second, there is the contract between the citizens and the sovereign whereby the latter agrees to protect the rights of the citizens and to enforce the rule of law. In contrast to conventional Lockean theory, which had a relatively narrow and negative conception of rights and the rule of law, modern Canadian society has a broader conception of what these concepts mean. In several recent cases the Supreme Court of Canada has attempted to delineate what is encompassed by the rule of law.¹³⁷ Crucial to this exercise is the idea of equality before the law,¹³⁸ that "[t]here is, in short, one law for all."¹³⁹ In Canada, we have adopted an expansive definition of what equality means.

133. See also *B.C. Report*, *supra* note 112 at 19.

134. Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* (Toronto: Little Brown, 1994) at 26 [Rhode, *Professional Responsibility*].

135. This subsection is a somewhat modified and Canadianized version of that developed by Luban, *Lawyers*, *supra* note 122 at 241-289.

136. John Locke, *Two Treatises on Government*, ed. by Peter Laslett (Cambridge: Cambridge University Press, 1988).

137. See *Manitoba Language Rights Reference* [1985] 1 S.C.R. 721 at 747-752; *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at paras 71-73.

138. See *B.C. Report*, *supra* note 112 at 19; David Dyzenhaus "Normative Justifications for the Provision of Legal Aid" in Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*, vol. 2 (Ontario: Government of Ontario, 1997).

139. *Reference re Secession of Quebec*, *supra* note 137 at para. 71.

Section 15(1) of the Charter provides:

Every individual is equal before and under the law and as the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This approach to equality rights is much more encompassing than the American ideal of “equal justice under the law.”¹⁴⁰ For good or ill, lawyers are the gatekeepers to providing equal access to the law. The state has given the legal profession a nationalized monopoly in this regard: lawyers regulate admission to the profession, engage in legal practice to the exclusion of all others and self-regulate for misconduct.¹⁴¹ Thus we come to the third contract — the juridical contract — that in exchange for their monopoly, autonomy and independence there is a corresponding obligation on the legal profession to ensure that there is equal access to law for all members of the community.¹⁴² Indeed, lawyers swear to honour this obligation when they take their oath.¹⁴³ As David Luban has argued:

The lawyer’s lucrative monopoly would not exist without the community and its state; the monopoly and indeed the product it monopolizes is an artifact of the community. The community has shaped the lawyer’s retail product with her in mind; it has made the law to make the lawyer indispensable. The community, as a consequence, has the right to condition its handiwork on the recipients of the monopoly fulfilling the monopoly’s legitimate purpose.¹⁴⁴

140. Luban, *Lawyers*, *supra* note 122 at 252.

141. See generally Cramton, “Mandatory Pro Bono”, *supra* note 2 at 1126; Cramton, “Ordinary Americans” *supra* note 2 at 606-607; Christensen, *supra* note 123 at 14-18; Marrero Report, *supra* note 2 at 782-783.

142. Cramton, “Mandatory Pro Bono”, *ibid.* at 1134-1135. My conception of this entitlement is equal access to *basic* legal services, specifically criminal matters, housing issues, family issues, employment matters and consumer matters.

143. See by-law 11, section 6.(6)1 of the Law Society of Upper Canada, which states: “Barristers Oath: You are called to the Degree of Barrister-at-law to protect and defend the rights and interest of such citizens as may employ you. You shall conduct all cases faithfully and to the best of your ability. *You shall neglect no one’s interest* nor seek to destroy any one’s property. You shall not be guilty of champerty or maintenance. You shall not refuse causes of complaint reasonably founded, nor shall you promote suits upon frivolous pretences. You shall not pervert the law to favour or prejudice any one, but in all things shall conduct yourself truly and with integrity. In fine, the Queen’s interest and the interest of citizens *you shall uphold and maintain according to the constitution and law of this Province*. All this you do swear to observe and perform to the best of your knowledge and ability. So help you God.” [emphasis added]

144. Luban, *Lawyers*, *supra* note 122 at 286. Recently, Luban has recast his argument slightly, suggesting that if lawyers are not a monopoly they are an oligopoly, and that they are “trustees administering the actual distribution of law.” See David Luban, “Faculty Pro Bono and the Question of Identity” (1999) 49 J. Legal Educ. 58 at 63-66 [Luban, “Faculty”].

The idea of special status engendering special responsibilities¹⁴⁵ is given even more concrete, quasi-economic form in Lubet and Stewart's "public assets theory."¹⁴⁶ They argue that lawyers are essentially concessionaires, in that the state grants to them exclusive access to certain publically created commodities — including rights of confidentiality, loyalty, lawyer-client privilege, and conflict of interest rules — which they then sell for profit to clients. In other words, a significant portion of the legal profession's income is based upon these specially designated lawyer commodities, which should be compensated by way of a user fee or commission in the form of a contribution to the public good. This monopoly has directly translated into the fact that lawyers, as a group, tend to be extremely well paid relative to other members of the public.¹⁴⁷ Moreover, as I have indicated, a significant portion of many lawyers' salaries comes from the public purse, either as a consequence of contracting

145. Rhode, *Professional Responsibility*, *supra* note 134 at 545.

146. Lubet & Stewart, *supra* note 125.

147. It is always somewhat risky to generalize about incomes of a particular group, especially given the fragmented status of the legal profession. However, consider the following: Statistics Canada reported that the average lawyer earned \$75,200 per year (1996 Census data). Revenue Canada 1997 information shows the average Canadian lawyer's income to be \$96,962. This is the data for all age groups, however, for peak earners between the ages of 44 and 56 years old, the average salary was \$118,998 in 1997. And, as with most other professions, male lawyers earned more than female lawyers in the same positions covering the same caseloads. Males in the peak age group earned an average of \$109,200 per year, while females in the same group earned \$55,600 per year. At the entry level (age 25 to 29) the salary difference is much less, with an average of \$31,300 for men compared to \$28,400 for women [It should be mentioned that male lawyers put in more hours per year than female lawyers (2,300 hours for men and 1,950 hours for women).] See Monique Conrod, "Compensation Trends in the Legal Profession" *Canadian Lawyer* 26:5 (May 2002) 41 at 41.)

Rates differ among the various provinces in Canada. Lawyers' earnings in the peak age group differed depending on the geographical region in which the lawyer worked ranging from P.E.I., where peak age group lawyers earned an average of \$113,700 per year, to Ontario, where they earned an average of \$200,565 per year (1997). According to *Canadian Lawyer* magazine the median rate of pay for an associate was \$38,750 per year in 1997 while partners could earn up to \$450,000 in one year alone (Conrod, *ibid.* at 42).

As for billing hours across Canada, Canadian Lawyer's 2000 survey states that "annual billable hour targets for both partners and associates are moving to achievable levels;" see Casey Watson, "The 2000 Canadian Lawyer National Compensation Survey" *Canadian Lawyer* 24:6 (June 2000) 25 at 26. According to this survey, "For most solo practitioners and law firms, the targets for annual billable hours are quite reasonable. The average for partners this year is 1,400 and 1,300 for associates. Most respondents say there are few problems hitting those figures. As in previous years, though, it should be noted that partner incomes are larger in firms with higher targets - about \$50,000 - \$100,000 more" (*ibid.* at 25).

In-house counsel, although similar in many respects to private lawyers practice, differ in terms of remuneration and should be dealt with separately. Generally, salaries are higher among all groups, specifically the base salaries of associate counsel and junior lawyers. While salaries are slightly lower in some industries, the sky's the limit when it comes to salary maximums. With the exception of counsel working in natural resources, salaries for counsel range from \$90,000 to \$300,000. See Kirsten McMahon, "Corporate Dividends: 2002 In-House Counsel Compensation Survey" *Canadian Lawyer* 26:5 (May 2002) 12.

out or as recipients of legal aid disbursements.

Furthermore, the education of most Canadian lawyers has been subsidized by the state. Until recently, law school fees have been quite low, accounting for a fraction of the cost of the education provided. While it is true that there has been a significant increase in fees over the last few years, the vast majority of lawyers have been able to maximize their private wealth on the basis of a public investment in their professional training.

In short, the practice of law in Canada is not, and never has been, a private practice freely playing in the competitive marketplace; on the contrary, it is a state created and facilitated privilege and advantage. As Katzmann summarizes the argument:

The state grants... autonomy, an effective monopoly, in exchange for lawyers, as officers of the court, discharging their duty to further equality before the law... A lawyer's duty to serve those unable to pay is thus not an act of charity or benevolence, but rather one of professional responsibility, reinforced by the terms under which the state may grant to the profession effective control of the legal system.¹⁴⁸

A similar point has been made by Dickson J. [as he then was] when he argued: “[i]mplicit in the legislative grants of self government and monopoly is concern for the protection of the public interest. Monopoly is only a means to an end, and that end is service to the public.”¹⁴⁹

Despite this monopoly situation, there are no distinct rules of professional conduct which require lawyers to provide legal services to those of lesser means. Rather there are just aspirational propositions. As MacKenzie notes:

Canadian rules of professional conduct recognize that lawyers have a general duty to break down barriers to equal access to legal services, but fall short of prescribing such specific duties as acting for reduced or no fees to accomplish that objective. Thus, while lawyers are enjoined to ‘encourage respect for and try to improve the administration of justice’ (CBA Code, chapter XIII, rule; Ontario rule 11), to have ‘a basic commitment to the concept of equal justice for all’ (CBA Code, chapter XIII, commentary 1; Ontario rule 11, commentary 2), and to ‘make legal services available to the public in an efficient and convenient manner’ (CBA Code, chapter XIV, rule; Ontario rule 12(1)), the rules make it clear that lawyers have a general right to decline a particular employment’ (CBA Code, chapter XIV, commentary 6; Ontario rule 12, commentary 5), and that whether they wish to participate in legal aid plans and other

148. Katzmann, *supra* note 55 at 6-7.

149. Mr. Justice Brian Dickson, “The Public Responsibilities of Lawyers” (1983) 13 Man. L.J. 175.

programmes designed to provide legal representation or public education or advice, is entirely up to them (CBA Code, chapter XIV, commentary 5; Ontario rule 12, commentary 3).¹⁵⁰

Moreover, lawyers have not been passive recipients of such a monopoly but have proactively encouraged it. Lawyers have resented and resisted paralegals and other non-lawyer agents and this is reflected in legislation in many provinces.¹⁵¹ It might be possible to deregulate a significant number of legal services (wills, probate, real estate closing, uncontested divorces, title searches) so that they could be performed either by other professionals or even laypersons¹⁵² at significantly reduced costs, thereby increasing access to justice for at least some matters.¹⁵³ As one American commentator has suggested, lawyers cannot have it both ways:

they may accept their roles as public servants and shoulder the burden of bridging the gap between needs and services; or they may characterize themselves as business people and yield their monopoly of the legal services market, thus opening up to competition from non-lawyers and fostering a more available, more affordable market.¹⁵⁴

b. Utilitarian Arguments: Distributive and Instrumental Benefit

Deborah Rhode has succinctly summarized the possible distributive benefits of mandatory pro bono as follows:

promoting more just outcomes in legal disputes; enabling more individuals to enforce their entitlements to crucial benefits; enhancing the legitimacy of the legal system; increasing public regard for lawyers; and expanding attorneys' awareness of how the law functions, or fails to function, for subordinate groups.¹⁵⁵

150. Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1999) at 9-2.

151. See generally Madam Justice Marguerite Trussler, "A Judicial View on Self Represented Litigants" (Paper presented to New Brunswick Judges, June 2002) [unpublished, on file with author] at 9-13; Julius Melnitzner, "Paralegals: the Turf War Lawyers Can't Win" *Canadian Lawyer* 26:8 (August 2002) 39; "B.C. Law Society Goes After Workers Comp. Consultants" *Canadian Lawyer* 26:8 (August 2002) 7.

152. Cramton, "Mandatory Pro Bono", *supra* note 2 at 1136-1139; Cramton, "Ordinary Americans", *supra* note 2 at 609, 615.

153. Luban, *Lawyers*, *supra* note 122 at 247, 269-273.

154. Karen E. Kelleher, "The Availability Crisis in Legal Services: A Turning Point for the Profession" (1993) 6 *Geo. J. Legal Ethics* 953 at 976; see also Mr. Justice J.C. Major, "Lawyers' Obligation to Provide Legal Services" (1995) 33 *Alta. L. Rev.* 719 at 728.

155. Rhode, *Professional Responsibility*, *supra* note 134 at 26.

From a different perspective, several commentators have argued that there are a number of instrumental values for individuals and institutions to be gained from pro bono work. For example, the Brookings Institution in the United States has argued that pro bono can be in the self-interest of both lawyers and law firms.¹⁵⁶ For individual lawyers, the quality of their lives can be improved, their morale can be boosted, legal skills can be developed and enhanced, networks can be created, and social capital can be increased.¹⁵⁷ Moreover, it can be argued that pro bono is also beneficial for law firms because it enables them to recruit talented junior lawyers who aspire to something more than the treadmill of maximizing billable hours; intensify the productivity of a more experienced, mature, imaginative, responsible and talented staff; enhance employee satisfaction with, and loyalty to, the firm; and project a positive public image that can be a marketing asset in a competitive environment.¹⁵⁸ One English commentator has characterized such arguments as motivated by “enlightened self-interest.”¹⁵⁹

However, as I will discuss in the next section, not everyone is persuaded by such arguments.

156. Katzmann, *supra* note 55; see also *B.C. Report*, *supra* note 112 at 12; Rhode, “Cultures”, *supra* note 124 at 2420; Isbell & Sawle, *supra* note 127.

157. Macaluso, *supra* note 124; Nadine Strossen, “Pro Bono Legal Work: For the Good Not Only of the Public, But Also the Lawyer and the Legal Profession” (1993) 91 Mich. L. Rev. 2122; Harris quotes a Hindu poem in support of the “feel good” argument: “I slept, and I dreamed of joy, I awoke, and I did my duty, and therein I found joy,” in Harris, “Organization”, *supra* note 63.

158. There are some problems with definitively establishing these benefits as many of these claims are made on the basis of anecdotal evidence. Moreover, the analysis may be somewhat paternalistic and therefore is not being advanced or assumed or relied upon in this paper. See also Atkinson, *supra* note 107 at 140-141.

159. Smith notes that:

“[Allen and Overy’s] full-time co-ordinator provides a hard-headed rationale for [its] pro bono work, citing the following benefits, a nicely balanced statement of enlightened self-interest:

- Professional obligation;
- The work provides an interesting way to develop skills. It breaks the insularity of many elements of corporate practice and fosters a cross-fertilisation of knowledge, skills and client contact. The value is such that consideration of pro bono work is included within staff appraisal as a way of seeking to inculcate a culture;
- Marketing - the report is used at beauty parades and potential clients do sometimes ask about pro bono. The report also allows clients to be told of the firm’s commitment.
- Recruitment and retention - it does help to keep staff interested and engaged.
- Fostering of a sense of community with the firm. A very evident indication of this is shown in the weekly newsletter circulated around the firm where the coverage of pro bono work is content that is accessible to all.

Thus, the firm manages to combine an impressive commitment to the delivery of free services with a very clear-eyed view of the importance of those services to itself.”

Roger Smith, “Pro Bono Legal Services in England and Wales” (Paper presented to Legal Aid Roundtable at Osgoode Hall Law School, 1 November 2002) [unpublished, on file with author] at 9.

4. *Arguments Against Mandatory Pro Bono*

Opponents of mandatory pro bono have identified at least eight possible objections. While several raise legitimate concerns, others are premised upon mistaken assumptions. None, however, are fatal to the idea of mandatory pro bono, properly understood and flexibly institutionalized.

a. *Autonomy*

This rights-based argument is often advanced in response to the monopoly argument outlined previously. Lawyers have rights too; they should neither be conscripted to provide services without remuneration nor compelled to work for someone who is not of their choosing, for this infringes their right of self determination. It is inappropriate to put the burden of access to justice on lawyers alone: “[i]f society wishes to expand legal access, society as a whole should pay the cost.”¹⁶⁰

This is an important argument that requires careful consideration. Usually it is bolstered by analogies to doctors or cab drivers who are also said to be beneficiaries of state-created monopolies, but do not face any pro bono requirements.¹⁶¹ However, several counterarguments might be made. First, arguing that lawyers should not have to perform pro bono because doctors or cab drivers do not simply avoids the issue. Second, neither doctors nor cab drivers have the same “public assets” of confidentiality and privacy as lawyers.¹⁶² Third, and closely related, the legal profession’s power of self-regulation is distinct from other professions in that it is explicitly justified on the basis of the public interest.¹⁶³ Fourth, the analogy to doctors might backfire. Recently, in response to a shortage of doctors in emergency wards, Quebec introduced Bill 114 which empowers the government to force doctors to provide services in emergency rooms on the basis of social necessity.¹⁶⁴ Fifth, the argument relies on an impoverished conception of autonomy. Several relational theorists have rejected “the autonomy as freedom from” metaphor to demonstrate that autonomy is always relational and contextual and therefore embedded in obligations

160. Rhode, *Professional Responsibility*, *supra* note 134 at 27; Suzanne Bretz, “Why Mandatory Pro Bono is a Bad Idea” (1990) 3 *Geo. J. Legal Ethics* 623; Luban, *Lawyers*, *supra* note 122 at 285; Erika Martin-Doyle, “Massachusetts Rule of Professional Conduct 6.1: One Small, but Needed, Step for Lawyers, An Even Smaller Step for the Commonwealth’s Poor” (1994) 9 *B.U. Pub. Int. L.J.* 53 at 57. 161. Bretz, *ibid.* at 628, n. 152.

162. Lubet & Stewart, *supra* note 125.

163. Stephen Gillers, “Words Into Deeds: Counselor, Can You Spare a Buck?” (1990) 76: *Nov. A.B.A.J.* 80 at 81.

164. Bill 114, *An Act to ensure the continued provision of emergency medical services*, 2d Sess., 36th Leg., Quebec, 2001.

of interdependence and reciprocity.¹⁶⁵ Lawyers are never truly autonomous as they are only free to practice law in the context of the society in which they operate, a society which makes legal relations and lawyers' services not just possible but unavoidable.

Other opponents of mandatory pro bono have questioned the assumption of whether lawyers truly exercise a monopoly. To bolster this argument, they argue that litigants can be self-represented,¹⁶⁶ that the large number of lawyers in the marketplace makes for strong competition,¹⁶⁷ that there has been an easing of the restraints on internal competition, and that some other market players do provide legal services.¹⁶⁸ Such arguments are unpersuasive: the vast majority of self-represented litigants are clearly at a disadvantage, and while it may be true that there is some competition within the legal profession, this has not kept the cost of legal services down. Furthermore, these arguments ignore the reality that only lawyers can provide legal advice on the vast majority of legal issues. Indeed as one African-American lawyer has recently noted, "few, if any, attorneys will compete to represent indigent clients ...[and] no amount of competition will provide assistance to the truly indigent."¹⁶⁹

b. *Necessity*

It is often suggested that the economics of law practice make demands for pro bono unrealistic. Such an argument is usually made by way of assertion rather than through empirical proof. However, one cautious (and admittedly limited) study of large firms in the United States found that pro bono is "not incompatible with the flourishing of the large law firm."¹⁷⁰ Another commentator has argued that the real costs are greatly exaggerated and do not factor in the intangible benefits.¹⁷¹ Smaller firms are said

165. Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990); Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 *Rev. Const. Stud.* 1.

166. Bretz, *supra* note 160 at 628; Martin-Doyle, *supra* note 160 at 57; Omar J. Arcia, "Objections, Administrative Difficulties and Alternatives to Mandatory Pro Bono Legal Services in Florida" (1995) 22 *Fla. St. U. L. Rev.* 771 at 780-781.

167. Jonathan R. Macey, "Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?" (1992) 77 *Cornell L. Rev.* 1115 at 1121-1122; David L. Shapiro, "The Enigma of the Lawyer's Duty to Serve" (1980) 55 *N.Y.U. L. Rev.* 735 at 776-777; Timothy P. Terrell & James H. Wildman, "Re-thinking 'Professionalism'" (1992) 41 *Emory L.J.* 403 at 411-412, 421.

168. Cramton, "Mandatory Pro Bono", *supra* note 2 at 1135-1136.

169. Donald Patrick Harris, "Let's Make Lawyers Happy: Advocating Mandatory Pro Bono" (1999) 19 *N. Ill. U.L. Rev.* 287 at 306, 322, n. 233 [Harris, "Make Lawyers Happy"].

170. Marc Galanter & Thomas Palay, "Public Service Implications of Evolving Law Firm Size and Structure" in Katzmann, *supra* note 55 at 46.

171. Barrington W. Parker, Jr., "Monitoring Compliance with the ABA Law Firm Pro Bono Challenge" in Katzmann, *ibid.* at 158.

to face particularly high costs because of tighter profit margins, higher administrative costs and minimal flexibility. However, as I shall argue later, there may be ways of designing pro bono programmes that do not unduly burden small firm lawyers and may redistribute the cost of providing legal services for the disadvantaged to some of the deeper pockets within the legal profession. Indeed, my approach explicitly recognizes and values the contributions — both in kind and financial — of lawyers who work at the lower end of the stratified legal profession and, as such, will not add to their burdens.¹⁷²

c. *Unfairness*

There are two aspects to this argument. The first is connected to the necessity argument just analyzed. It is sometimes suggested that given the fragmentation and inequalities within the legal profession it is unfair to impose mandatory pro bono on all lawyers. It has been argued that it is easier for larger firms and wealthier lawyers to absorb the cost of pro bono than for smaller firms and less affluent lawyers.¹⁷³ Moreover, there is already a significant cadre of lawyers, particularly in the criminal, family and immigration fields, who are already helping the disadvantaged.¹⁷⁴ There is merit in this concern. However, it seems to me that if, as I suggest later, we can devise a flexible system of mandatory pro bono — for example, by prorating to salary/seniority, allowing for buy outs or pro bono credits — then this is not an absolute bar. Indeed, mandatory pro bono can be viewed as a way of redistributing the burden within the profession, from the lower echelons to the higher echelons, thereby marginally decreasing the inequalities. Coombs characterizes this as a form of “professional cross-subsidization”.¹⁷⁵

The second unfairness argument is that the costs of pro bono will not really be borne by lawyers but will be redistributed to paying clients. This consequence would be unfair not only because it would be an arbitrary and unprincipled imposition of a tax upon those who pay,¹⁷⁶ but also because this additional cost would make access to legal services unattainable for even more people.¹⁷⁷ This “robbing Peter to pay Paul” argument is a real

172. It has also been suggested that in the long run mandatory pro bono may create more paid work for larger firms on the theory that if the disadvantaged begin to litigate on the basis of pro bono, the defendants are likely to be landlords, creditors, etc., who will need to hire lawyers, and these will likely be from the larger firms. See Arcia, *supra* note 166 at 788.

173. Luban, *Lawyers*, *supra* note 122 at 278; Cramton, “Mandatory Pro Bono”, *supra* note 2 at 1137; Cramton, “Ordinary Americans”, *supra* note 2 at 585; Macey, *supra* note 167 at 1116, 1119-1121.

174. Coombs, *supra* note 121 at 217; Atkinson, *supra* note 107 at 148-149.

175. Coombs, *ibid.* at 221.

176. Shapiro, *supra* note 167 at 781; Atkinson, *supra* note 107 at 147-148.

177. Buckley, *supra* note 65 at 50; Cramton, “Mandatory Pro Bono”, *supra* note 2 at 1130; Macaluso, *supra* note 124 at 79; Shapiro, *ibid.* at 783.

danger, but on a redistributive justice basis it can be argued that this disadvantage will be offset by the benefits reaped from a mandatory pro bono scheme that also helps to redistribute some of the wealth generated by the new economy from the top of the social hierarchy to those further down.

d. *Competence*

Codes of ethics impose a responsibility on lawyers to engage only in practice where they are suitably competent.¹⁷⁸ As a result of specialization, it may be that some lawyers have little they can offer to the disadvantaged. Consequently, it is argued that it is inappropriate to foist low quality service on the disadvantaged.¹⁷⁹ It is probably true that a tax lawyer who specializes in international transactions can be of little assistance to a disabled person with an accessibility issue, and they are likely to be inefficient.¹⁸⁰ But there are three responses to the competency objection. First, competency is a comparative concept — would not limited competency be preferable to no legal representation at all?¹⁸¹ Despite specialization, many lawyers do have the general skills required by many of the disadvantaged.¹⁸² Second, many of the legal problems of the disadvantaged can be addressed if the lawyer is at all competent and is willing to invest some time in developing new skills and knowledge.¹⁸³ Such skills can probably be utilized with other similarly disadvantaged persons.¹⁸⁴ Third, as I will suggest later, pro bono need not be the actual provision of in-kind legal services, but could be based upon a tax on lawyers or buy out options.

e. *Inefficiency/Impractical*

Deborah Rhode nicely summarizes this objection as follows:

Pro bono obligations are not an efficient way of realizing the benefits of broadened access. Lawyers who lack expertise and motivation to serve under-represented groups will not provide cost-effective representation.

178. See e.g. Chapter 2, Nova Scotia Barristers Society, *Legal Ethics and Professional Conduct Handbook*, online: Nova Scotia Barristers Society <<http://www.n.s.b.s.NS.ca/handbook/chapter2>>.

179. Arcia, *supra* note 166 at 783.

180. Coombs, *supra* note 121 at 217; Luban, *Lawyers*, *supra* note 122 at 278; Rhode, *Professional Responsibility*, *supra* note 134 at 545; Cramton, “Ordinary Americans”, *supra* note 2 at 586.

181. Cramton, “Mandatory Pro Bono”, *supra* note 2 at 1127.

182. Sandra Day O’Connor, “Meeting the Demand for Pro Bono Services” (1992) 2 B.U. Pub. Int. L.J. 1 at 5-6; Lubet & Stewart, *supra* note 125 at 1298; Marrero Report, *supra* note 2 at 812.

183. Nancy Ritter, “In-house and Pro Bono? You Bet!” online: Corporate Pro Bono.Org <<http://www.cpbo.org/news/displaynews.cfm?newsID=1047>>; Bryan Rund, “The Time is Right for Transactional Counsel”, online: Corporate Pro Bono. Org. <<http://www.cpbo.org/news/displaynews.cfm?newsID=1008>>.

184. Lubet & Stewart, *supra* note 125 at 1299; Marrero Report, *supra* note 2 at 812-814.

Requiring lawyers to provide a minimal level of services of largely unverifiable quality cannot begin to meet [the] nation's massive problem of unmet legal need. Worse still, such token responses to distributional inequalities may deflect attention from the fundamental problems that remain and from more productive ways of addressing them. Preferable strategies might include simplification of legal procedures, expanded subsidies for poverty law programs, and elimination of the professional monopoly over routine legal services.¹⁸⁵

Moreover, it is suggested that it would be administratively impractical to coordinate the provision of pro bono services, monitor the quality of the service provided by a lawyer or to ensure there is compliance with any minimal requirements.¹⁸⁶ Unlike most of the previous arguments, these objections come from the left, from those who are skeptical of over-emphasizing the role of lawyers at the expense of a more profound re-organization of legal services. Again, these are legitimate concerns, but it seems to me that realistically large scale reorganization is highly unlikely in the current politico-economic environment. More specifically, some of the criticisms only apply if pro bono is assumed to be in kind. However, as I will argue in Part IV, pro bono can be more flexible than this.¹⁸⁷ Moreover, the coordination problem may be resolvable by building upon the Pro Bono Net initiatives already underway in British Columbia and Ontario.¹⁸⁸

f. *Inherently Contradictory*

Opponents of mandatory pro bono often suggest that the term is an oxymoron, as the essence of pro bono is its voluntary quality.¹⁸⁹ The coercive and conscriptive dimensions of a mandatory system undercut the moral ideals of personal growth and fulfillment. Two counterpoints can be made. First, pro bono has no necessary essence; it need not be conceived of as being about the interests of lawyers, but rather about the impact on recipients. Second, the evidence from the United States indicates that voluntary

185. Rhode, *Professional Responsibility*, *supra* note 134 at 27.

186. Bretz, *supra* note 160 at 633-634; Esther F. Lardent, "Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question" (1990) 49 Md. L. Rev. 78 at 99-100; Luban, *Lawyers*, *supra* note 122 at 278-279; Marrero Report, *supra* note 2 at 821; Cramton, "Mandatory Pro Bono", *supra* note 2 at 1128; Shapiro, *supra* note 167 at 785.

187. Coombs, *supra* note 121 at 232-238; Rhode, "Cultures", *supra* note 124 at 2425.

188. See Buckley, *supra* note 65; See also Martin-Doyle, *supra* note 160 at 62. The one jurisdiction in the United States that has mandatory pro bono, Florida's Orange County, seems to be having some success in overcoming these administrative problems. See also Isbell & Sawle, *supra* note 127 at 858-859 and their discussion of Florida's mandatory reporting system (*ibid.* at 860-863).

189. Cramton, "Mandatory Pro Bono", *supra* note 2 at 1132-1133; Coombs, *supra* note 121 at 217.

initiatives systematically fail.¹⁹⁰ In several American jurisdictions mandatory pro bono has been resisted and legal organizations have argued that voluntary initiatives can fill the gap. However, the pattern appears to be that while there is a spike in voluntary pro bono when mandatory pro bono is proposed, within a few years volunteer rates drop significantly.¹⁹¹ As the Marrero Report in New York commented:

... the ‘voluntarism’ so eloquently extolled and advocated by the organized Bar may well amount to little more than a rallying cry for the status quo. When all is said and done, only the same disappointingly small proportion of practicing attorneys who can contribute pro bono efforts to the poor would be counted upon to continue bearing the full load for the rest of the legal profession.¹⁹²

g. *Scope*

It may be argued that there are a significant number of lawyers who do not fit nicely with either the monopoly analysis or public assets theory. These might include in-house corporate counsel, government lawyers and law professors. Because they are not providing direct legal advice or selling privacy, they are outside the equation. In response, it can be suggested that these lawyers are still direct beneficiaries of the legal regime. In-house counsel and government lawyers still provide some legal advice or have skills that are directly related to their legal training; and law professors, to be blunt, are parasites whose professional existence is dependent upon the continued market demand for legal services.¹⁹³ As beneficiaries, they too must accept their burden.

h. *The Soup Kitchen Argument: Why Legal Services?*

The final argument against mandatory pro bono legal services is not an argument in principle against mandatory pro bono, but asks whether a lawyer’s pro bono contributions should necessarily be funneled into legal services. Why cannot other socially positive contributions — for example, helping in a soup kitchen — be adequate?¹⁹⁴

Again, several counterarguments might be suggested. First, there is

190. See Coombs, *ibid.* at 225, n. 28; Christensen, *supra* note 123 at 17-18; Lardent, *supra* note 186 at 88-92.

191. See Janet Stidman Eveleth, “The Great Pro Bono Debate” (2002) 35: Jun. Md. B. J. 46; Marrero Report, *supra* note 2 at 777, 822-829.

192. Marrero Report, *ibid.* at 828.

193. Luban, “Faculty”, *supra* note 144; Rhode, “Cultures”, *supra* note 124 at 1442-1444.

194. Martin-Doyle, *supra* note 160 at 59, n. 50.

nothing about mandatory pro bono legal services which precludes lawyers from engaging in other additional pro bono contributions. Second, because legal pro bono need not be in kind, lawyers can have sufficient opportunities to engage in other services, if they choose to do so. Third, lawyers have unique — indeed exclusive — skills and rights as officers of the court that other members of the public do not possess and which the disempowered need. Fourth, and finally, the assumption underlying this view is that pro bono legal services are a charitable donation, and therefore *morally* fungible with other charitable contributions.¹⁹⁵ However, in this paper I have assiduously avoided characterizing pro bono legal services as charitable in nature; rather, they are a duty that emerges from the special privileges that are given to lawyers.¹⁹⁶

IV. *A New Strategy For The New Economy: Mandatory Pro Bono And The Social Investment State*

The leadership of the profession has done a good job of identifying the “false savings” and “costs of inadequate legal aid”:

- the costs of those who are unfairly imprisoned or denied the ability to earn a living due to a criminal record that could have been avoided;
- the costs to the state of caring for children who are unnecessarily made wards of the state;
- the costs of safeguarding and caring for women who are unable to access legal protection from abusive spouses; and
- the costs of supporting single parents who are unable to reap the benefits of support provisions in the law.¹⁹⁷

These costs can be repackaged in the discourse of the “social investment state.” It is not just about saving money; it is about investing in a system — legal aid — that enables citizens to be less vulnerable, less dependent, more efficient, and more productive. However, as I have argued, the social investment state is not the welfare state; legal aid is seen

195. It may be worth noting that one commentator has traced this charitable conception of pro bono to Aquinas characterizing it as “a corporal work of mercy that is very personal.” See Macey, *supra* note 167 at 115, n. 4. This charitable assumption seems to persist in the *B.C. Report* (*supra* note 112 at 18) and among leaders of the legal profession. See Gregory D. Goulin, “Charitable Justice” *Lawyers Weekly* 22:18 (13 September 2002) 5.

196. See also Marrero Report, *supra* note 2 at 323; Rhode, “Cultures”, *supra* note 124 at 2421, 2432; Harris, “Make Lawyers Happy,” *supra* note 169 at 290.

197. Buckley, *supra* note 65 at 28-29.

as a soft policy option which does not garner much public support. But, as I emphasized in Part I, the social investment state is keen to engage in partnerships.¹⁹⁸ Thus, it is argued that as a complementary strategy, the legal profession should adopt a policy of mandatory pro bono in partnership with government funders.¹⁹⁹ If the legal profession can demonstrate a robust pro bono culture it can take advantage of this discursive policy opening to promote legal access policies that dovetail with the social investment state's rhetoric of partnership and contribution.²⁰⁰

For example, in recent years there have been suggestions from the CBA and members of the bar that the government might support pro bono work by giving lawyers a tax credit — a charitable donation credit — for work they do for legal aid,²⁰¹ establishing a contingency legal aid fund, and creating a disbursement fund for lawyers who do pro bono work.²⁰² These are proposals worthy of consideration, but even if they were successfully implemented, only a relatively small percentage of the legal profession would participate. If, however, the profession were to make a commitment for all lawyers to engage in pro bono work for the disadvantaged, then the partnership between government and the profession might have significantly greater impact.²⁰³

It may be, however, that not all lawyers are well-suited to providing in kind pro bono. Consequently, it is suggested that lawyers should be given a time-or-money option: they can buy themselves out of legal aid by contributing to a fund that the government commits to being used exclu-

198. See e.g. “The Canada We Want,” Speech From the Throne to Open the Second Session of the Thirty Seventh Parliament of Canada” (30 September 2002) at 2, 8-9, where a significant section is devoted to “A New Partnership between Government and Citizens”, online: Government of Canada <http://www.sft-ddt.gc.ca/hnv/hnav07_e.htm> [Throne Speech].

199. See more generally Kathy L. Brock & Keith G. Banting, eds., *The Nonprofit Sector and Government in a New Century* (Montreal & Kingston: McGill - Queen's University Press, 2001); Kathy L. Brock, ed., *Improving Connections Between Governments and Nonprofit and Voluntary Organizations: Public Policy and the Third Sector* (Montreal & Kingston: McGill - Queens University Press, 2002); Privy Council Office, *A Code of Good Practice on Policy Dialogue* (Ottawa: Privy Council Office, 2002).

200. For example, in Australia the Commonwealth Attorney General provided grants totalling \$100,000 to help develop pro bono programmes in Victoria and New South Wales. Regan comments that it is “ironic” that “while the government recently made substantial cuts to the state's legal aid scheme, it is prepared to fund the charitable work of the profession” (*supra* note 74 at para. 39). While this is true, the point remains that there is an opportunity to recast the discourse and the sense of obligation. Hints of such a partnership vision are also identifiable in England and Wales. See e.g. L. Smith, *supra* note 159 at 1.

201. Canadian Bar Association, *CBA Questionnaire on Legal Aid 2000*, online: CBA <<http://www.cba.org/CBA/Advocacy/legalAidAdvocacyResourcekit/CBAmemberviewsonlegalaid.asp>>.

202. Buckley, *supra* note 65 at 84.

203. Throne Speech, *supra* note 198.

sively for legal aid purposes.²⁰⁴ There are at least three alternative options available in such a monetary contribution system. First, all lawyers could contribute a percentage of their total billings. This was a suggestion of the Canadian Bar Association when it proposed “the development of a policy which requires or encourages each member to contribute 50 hours or 3% of billings per year to pro bono work, aimed at assisting the disadvantaged.”²⁰⁵ Second, all lawyers could be required to pay a standard percentage of their annual earnings into a fund for legal aid services. Or third, lawyers would be taxed differentially depending on their level of employment.²⁰⁶ Entry level lawyers would pay a lower percentage for the first five or ten years of practice as during these early years their earnings are relatively low, their expenses relatively high (e.g., purchase of a first car, first home) and most will be simultaneously paying off their student loans for a number of years. In return, experienced associates and partners would pay a higher percentage of their total earnings into this pool.²⁰⁷

It is beyond the scope of this paper to develop the details of such a scheme, but such practices have been in place in at least one province, British Columbia, and are clearly feasible.²⁰⁸

Conclusion

“Truth is, the legal profession has always been an alloy of lucre and magnanimity.”²⁰⁹

The new economy does not create a new problem for the legal profession in the context of access to justice. Rather, it rekindles, and perhaps intensifies, an old problem. The welfare state allowed the profession, as a profession, to engage in an exercise in confession and avoidance:

204. In British Columbia lawyers have been paying a 7.5% tax on their billings. However, recent governments have been putting this in the general revenue. See Owen Lippert, “The Unprecedented and the Useful” *Canadian Lawyer* 26:7 (July 2002) 62. An alternative idea is to develop a “coupon scheme.” See Luban, *Lawyers*, *supra* note 122 at 279-282. See also Atkinson, *supra* note 107 at 132, 170; Coombs, *supra* note 121; Marrero Report, *supra* note 2 at 799; Shapiro, *supra* note 167 at 781-782; Terrell & Wildman, *supra* note 167 at 431.

205. Justice Casey Hill, *supra* note 1 at 1.

206. This is also supported by an efficiency argument. Previously in this paper, in Section IV.4.d., it was suggested that in light of competency concerns lawyers might be entitled to buy out options. In a suggested prorated system those lawyers who might be the least “useful” to the disadvantaged might also be among the highest earning, hence their contributions would be that much greater. See Atkinson, *supra* note 107 at 142-143.

207. Coombs, *supra* note 121 at 226-228.

208. Buckley, *supra* note 65.

209. Frank M. Coffin, “Afterward” in Katzmann, *supra* note 55 at 172.

Yes, structural inequalities impede access to justice; but no, it is not the responsibility of the profession to try to remedy that problem. The state has the responsibility to ensure access to justice through the provision of adequate legal aid. If individual lawyers choose to engage in pro bono, that is laudable; however, pro bono is not of the essence to the legal profession, and those who do not engage in pro bono are not to be criticized.

Now, however, with the retreat of the welfare state, the legal profession can no longer claim moral or political innocence. The new economy, access to justice and ethical obligations are not just questions of economics or cultural norms, they are issues of politics. The new economy is about the redistribution of power and wealth in society. The Canadian legal profession cannot avoid or transcend these politics. The legal professions in other countries have recognized these challenges, and realizing that the politics of denunciation alone cannot fill the void, they have begun to experiment.²¹⁰ In this paper, I have argued that while the new economy paints a grim picture for access to justice, there is still space for the legal profession to mobilize within the discourses and practices of the social investment state. But political engagement will not be cost free.²¹¹ Nor will it fully resolve the problem of access to justice where there is clearly a vitally important role for the state to increase its contributions.²¹² Nevertheless, the Canadian legal profession can choose to be part of an attempt to minimize the injustices inflicted by the new economy ...or not.

210. Andrew Boon & Robert Abbey, "Moral Agendas?: *Pro Bono Publico* in Large Law Firms in the United Kingdom" (1997) 60 Mod. L. Rev. 630; Regan, *supra* note 74; Francis Regan, "How and Why Pro Bono is Flourishing: A Comparison of Recent Developments in Sweden and China" in Christopher Arup & Kathy Laster, eds., *For the Public Good: Pro Bono and the Legal Profession in Australia* (Annandale, Federation Press, 2001) 148; David Weisbrot, "Introduction to Report of the National Pro Bono Task Force and Recommended Action Plan," in Arup & Laster, *ibid.* at 214.

211. Nor is it risk free. There is a danger that my arguments could be interpreted as reinforcing new right calls for greater "charity," (see Lippert, *supra* note 204) or that governments will be delighted to have the legal profession pick up the slack by engaging in pro bono. Pro bono is not a substitute for an adequate legal aid system, it is a supplement to such a system.

212. Atkinson, *supra* note 107 at 146; Dyzenhaus, *supra* note 138 at 475.

