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THE CRITICAL CHARACTERISTICS OF COMMUNITY LEGAL AID CLINICS IN ONTARIO

LENNY ABRAMOWICZ

RÉSUMÉ

Cet article examine le système de cliniques juridiques communautaires en Ontario en cette année de son 30^e anniversaire, et se penche tout spécialement sur les raisons de son succès remarquable. Il souligne le fait qu'alors que, dans d'autres juridictions, les services d'aide juridique ont rétréci, le système de cliniques communautaires en Ontario a en fait grandi, et est maintenant universellement reconnu pour la solidité des services juridiques qu'il offre aux collectivités à faible revenus. L'article déclare que les cliniques communautaires possèdent TROIS « caractéristiques essentielles » et que ce sont ces caractéristiques qui expliquent leur succès. Ces caractéristiques essentielles sont : gouvernance par la collectivité locale; concentration sur des prestations de services juridiques pour les personnes et les collectivités défavorisées; et, offre d'une gamme variée de services pour satisfaire aux besoins de leurs collectivités. Dans des périodes d'évolution des besoins et de contraintes financières, il est parfois tentant pour certaines personnes d'essayer de changer des programmes qui marchent très bien, ou d'essayer de les utiliser à des fins pour lesquelles ils n'avaient pas été créés. C'est particulièrement en ces temps de grande pression qu'il faut se rappeler des raisons qui avaient motivé la création des cliniques communautaires, et comment leurs caractéristiques uniques furent façonnées pour répondre à un ensemble bien particulier de besoins juridiques.

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Legal aid, and, in particular, community law, is perhaps the single most important mechanism we have to make the equal rights dream a reality (Ontario's Chief Justice, the Honourable R. Roy McMurtry).¹

INTRODUCTION

Community Legal Aid Clinics have been in existence in Ontario for 30 years. Ontario's clinic system has been applauded by international observers of the legal aid landscape. Administrators of legal aid programs from around the world regularly come to Ontario to study the clinic system. At a time when legal aid services in most jurisdictions have been contracted, Ontario's clinic system is in the midst of expansion.

How to account for this success? What are the unique characteristics of community legal clinics in Ontario that made them so successful and have led Ontario's chief justice, the Honourable R. Roy McMurtry, to state in 1997, regarding the clinics, "The last twenty-five years have shown how the power of an idea – when matched with energy, determination, and community support – can make a crucial and enduring difference."²

To understand clinics it is necessary to briefly examine the origins of legal aid in Ontario.

Legal aid in this province originated in the mid 1960s. It began through the vehicle of a "judicare program". Judicare is a form of service in which an individual, who is poor enough, is given a "certificate" by the legal aid administrators to bring to a private lawyer. This private lawyer, if he or she is willing to work for legal aid's tariff rate, would then represent the individual and be paid by legal aid in accordance with the certificate granted.

This judicare service was an important step forward from a legal landscape that had, until then, provided assistance to low-income individuals purely through *pro bono* (or charitable) services. The judicare legal model was based on the prevailing liberal notion of equality at the time, that the best way of assisting the poor was to treat them exactly as one would treat those with funds.³ The certificate was the tool to do this, allowing a poor person to seek out and hire the same private lawyer a person of means would hire.

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1. These comments were made by Chief Justice McMurtry in a speech he gave to the Community Law Conference on 13 November 1976, at the Ontario Institute on Studies in Education, Toronto. At the time he was the province's attorney general, and this was his first address to the nascent community clinic movement in Ontario.
 2. These comments were made almost 20 years later, on 14 November 1996, in a speech the chief justice gave in Toronto on the 25th anniversary of Parkdale Community Legal Services.
 3. Mary Jane Mossman, "Community Legal Clinics in Ontario" (1983) 3 Windsor Yearbook of Access to Justice, 379.

Within a few years, however, it became apparent that although the judicare legal aid system was a critical tool in providing low-income individuals with some access to justice, it was not sufficient in of itself. Stephen Wexler, a staff lawyer with the National Welfare Rights Organization in the United States, in 1970, wrote regarding the legal problems of the poor, "Poor people are not just like rich people without money ..."⁴

Poor people, community groups and agencies that supported them, and legal academics all began to note that a different model was necessary to meet the particular legal needs of the poor. A number of reasons were put forward for it:

- Private lawyers tended to practise in areas of law in which they could cultivate a fee-paying clientele. Therefore, areas of law that were particular to – and of critical importance to – poor individuals and communities primarily (*i.e.* welfare rights, tenancy rights, basic workers' rights, etc.) were neglected by the private bar and often not even recognized as "legitimate" spheres of legal practice.
- Poor people were often entirely unaware of the fact that they had legal rights. For them to be truly provided with legal services, they first had to be informed of the existence of these rights through proactive outreach and education.
- Whereas the legal issues of those individuals with means tended to be discrete (*i.e.* a will, a divorce, the purchase of a home, or the incorporation of a business), poor peoples' lives were enveloped by a complex legal regulatory regime (*i.e.* income maintenance programs, public housing, etc.). So, whereas an individual case-by-case approach might work in some areas of law, the response to the fundamental legal problems of the poor had to be more systemic, in response to the systemic nature of their legal problems.
- It was particularly critical that poor people and communities, traditionally disenfranchised on many levels, be involved in fashioning the responses to their legal problems, in a way that was not possible in the traditional model of one lawyer, one client.

These ideas were more in keeping with the new theories of equality that were taking root at the time. Rather than believing that equality came from treating a disenfranchised group in the same way as the rest of society (the underlying ethos of the judicare program), it was felt that it was critical to develop special programs that recognized the special circumstances of the group.

Therefore, it quickly became apparent that, although critical, the judicare model of legal aid services was insufficient in responding to the legal needs of low-income individuals and communities. In fact, in Ontario, a number of community agencies began providing legal services to low-income individuals and groups, outside of the established legal aid scheme.

4. Stephen Wexler, "Practicing Law For Poor People" (1970) 79 *Yale L.J.* 1049.

Eventually a task force was established, in 1974, to examine legal aid in Ontario. The resulting Osler Report recommended a mixture of delivery systems for legal aid services, including the staffed neighbourhood legal aid clinic.⁵ A Regulation was proclaimed under the *Legal Aid Act* in 1976, allowing for the funding of community legal aid clinics.⁶ Many of the community groups that had been providing legal services to low-income communities were given funding and enveloped within the legal aid scheme. Since the inception of Ontario's community legal clinic system, subsequent reviews have further praised the model and recommended its expansion.⁷

From those initial days the clinic system has grown, so that at the time of writing, there are 79 community legal aid clinics in this province. Every geographic community in Ontario is now served by a clinic, and in addition, there are 19 "specialty clinics" that do not provide services to a geographically defined community, but rather to a low-income community of interests otherwise defined (*i.e.* the disabled community, seniors, the youth, injured workers, etc.).

It is not just the clinic system that has expanded over the years; rather, all of Ontario's legal aid program has grown and changed significantly. Legal Aid Ontario, the statutory body created by the *Legal Aid Services Act*⁸ and given the responsibility of running legal aid in this province in 1998, now operates a legal aid system that includes certificates for private lawyers, advice lawyers, duty counsel services, staff law offices, student legal aid societies, and community legal aid clinics.

But despite all of these changes, community clinics remain a unique and successful response to the particular legal needs of the poor. Although there are many things that distinguish community clinics from these other services, the three most fundamental defining characteristics are:

- Local community governance
- Practice in the areas of poverty law
- Legal response provided through a broad array of services

Let's turn to each of these characteristics in turn.

LOCAL COMMUNITY GOVERNANCE

Why did Ontario succeed when no other jurisdiction on this continent has been able to build a structure dedicated exclusively to the particular legal needs of the

5. Ontario, *Report of the Task Force on Legal Aid* (Toronto: Queen's Printer, 1974). (Chair: J.H. Osler).

6. O. Reg. 160/76.

7. Ontario, *Report of the Commission on Clinical Funding* (Toronto: Queen's Printer, 1978) (Chair: S.G.M. Grange); Ontario, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Toronto: Queen's Printer, 1997) (Chair: John D. McCamus).

8. *Legal Aid Services Act, 1998*, S.O. 1998, c. 26.

most disadvantaged? I have already noted the importance of the community to the early funding and growth of clinics ...

(Ontario's Chief Justice, the Honourable R. Roy McMurtry).⁹

The bulk of funding for legal aid in Ontario comes from the provincial government. These funds are transferred to Legal Aid Ontario [LAO], a statutory corporation, independent from government, that has the responsibility of administering the province's legal aid services. LAO provides funding to community clinics to provide "clinic law services".¹⁰

Community legal aid clinics in Ontario are governed by community elected boards of directors. The board of directors is responsible for the management and administration of the clinic. Boards must comprise members of the communities to be served by the clinic.¹¹ The board is responsible for determining the needs of the community and providing the services that meet those needs.¹²

The McCamus Review Panel examined the issue of community governance of clinics. The Report stated,

The issue of community governance is of fundamental importance to the mandate and operations of the community clinic system and the delivery of "poverty law" services ...

Community-elected boards have historically been important in ensuring independence from both the (Legal Aid) Plan and the provincial government; in assisting the clinic in identifying and prioritizing community needs; in ensuring accountability to their communities for the nature and quality of services provided; and, through their board members, in providing vital linkages to other community services.¹³

So the community board has a number of interrelated characteristics that are critical to the provision of legal services to low-income communities:

1. *Independence from the government.* The fact that a clinic is governed by a local board of directors ensures that it is independent from the government. Independence in legal decision-making and legal representation is one of the hallmarks of the rule of law. More specifically, independence from the government is crucial because, in a large percentage of the legal matters involving poor people, the "other side" is the government, or a government agency.

9. *Supra* note 1.

10. *Supra* note 8.

11. The fundamental rules governing community legal aid clinics can be found in the Memorandum of Understanding that is signed by every clinic and by Legal Aid Ontario. Section 10(a) of this Memorandum of Understanding sets out the characteristics of the community board of directors.

12. *Supra* note 8 at s. 39(2).

13. McCamus Report, *supra* note 7 at 193-94.

2. *Accountability to the community.* Having a clinic governed by a locally elected board of directors is an important factor in ensuring that the clinic is accountable to the people it is serving. Clinic board members are usually from the community served and are often past and potential future users of the service. This linkage helps to ensure that the services provided are the services the community most needs. This is particularly critical in light of the reality that there are never enough resources to meet all demands in the area of poverty law. Hard decisions about what services should be prioritized are legitimized by the fact that they are made locally by the community itself.
3. *Flexibility and responsiveness.* As a corollary to the concept of accountability, local community governance ensures that the services provided are the ones needed by this particular community. Local governance means that there is the flexibility for each clinic to meet the needs of its community (whether it is geographically or otherwise defined). The local board takes the lead in identifying and prioritizing the community needs. And because the decisions are made locally, they can be made quickly, to respond to rapidly changing needs. Therefore, each community gets the poverty law services that are most critical to it, and at the time that they are needed. Again, in a world where there are never enough resources to meet all demands, this is a fundamental strength of the clinic model.

Despite the strengths of the model of local community governance, there are some challenges. First, it must be recognized that operating a community legal aid clinic is a difficult task. Even with on-site management, it is often daunting for a volunteer board of community representatives to successfully navigate fiscal, personnel, and administrative issues, while focusing on ensuring the development and delivery of top-quality legal services. As recommended by the McCamus review, it is vital that boards be given the training and support they need to carry out this fundamental role of local governance.¹⁴

The other main challenge facing community boards of directors is the inherent tension that exists between the board of a local clinic and the central funding body. This is a significant issue because there is always the danger that a central funder will place such stringent administrative or reporting conditions on a local clinic, as a condition of funding, that local governance and autonomy becomes illusory. If this happens, the accountability to the community and responsiveness to its needs that are the hallmarks of local governance, could easily disappear. However, Legal Aid Ontario and community legal clinics in Ontario have gone a long way in dealing with this issue by identifying each other as “partners” in the task of providing services to low-income communities, and by codifying that partnership through a mutually respectful Memorandum of Understanding, which recognizes the primary role the local board plays in determining and delivering the services.¹⁵

14. *Ibid.* at 194–95.

15. Memorandum of Understanding, *supra* note 11.

PRACTICE IN THE AREAS OF POVERTY LAW¹⁶

Although the term “poverty law” is sometimes used to describe the method of providing legal services through a community based clinic, for the purposes of this discussion, I am referring to the actual fields or areas of law that are practised at a community clinic.

The *Legal Aid Services Act*, section 2, defines “clinic law” as:

The areas of law which particularly affect low-income individuals or disadvantaged communities, including legal matters related to,

- (a) housing and shelter, income maintenance, social assistance, and other similar government programs, and
- (b) human rights, health, employment and education;

I would suggest that although this definition contains some useful elements, overall it is not too helpful in describing the area of poverty law. Particularly, attempting to define poverty law by listing a number of areas of legal practice is unfortunate because it does not recognize the reality that the specific areas of practice that make up poverty law can change (and has changed) over time, and certainly differ from community to community. For example, whereas a downtown urban clinic may do a lot of tenant advocacy work, a rural clinic may not do much (or any), and the clinic that represents injured workers will do none at all.

In place of this static definition, I would propose a more flexible two-part definition for poverty law:

1. The areas of law that disproportionately affect low-income individuals or disadvantaged communities
2. The areas of law around which a low-income community of interests can easily coalesce

The first leg of this definition is reasonably straightforward. To qualify as poverty law, the area of law must have a disproportionate impact on the poor. This is simple enough to quantify objectively. For example, it can be statistically shown that tenants and injured workers are disproportionately lower-income individuals, and that certain ethnic or racial communities have a disproportionate number of lower-income people in need of legal services.

The second leg of the definition is less straightforward, but still critical. The concept of “community of interests” is one that is unknown to any type of legal services, except the community legal clinic. Whereas most legal services are predicated on the needs of the single client, in a clinic these needs must be viewed within the context of the

16. Although traditionally the practice of community based clinics was referred to as “poverty law”, Ontario’s *Legal Aid Services Act* refers to it, in an example of “definition by tautology”, as “clinic law”. However, except when making reference to the *Legal Aid Services Act* definition, in this paper I will continue to refer to the more descriptive phrase, “poverty law”.

needs of the larger community. For example, it is clear that there is a community of interests that can easily form around issues such as income maintenance, or tenancy or employment rights. The clients of the clinic will be recipients of benefits, or tenants, or employees, and the other side will always be the government bureaucracy, the landlord, or the employer. The community board will be able to coalesce around issues in these areas, providing casework, community development, and other services to the low-income community served by the clinic.

On the other hand, this definition makes it clear why some areas of law are less well suited to clinic practice. They are areas of law that have a significant impact on not just the poor, but on individuals with means as well (and therefore there is likely to be an established private bar to provide representation). Or, even more significantly, they are areas of law where the low-income community served by the clinic could be found on either side of the issue. This would make a community-based response not only difficult, but potentially destructive to the clinic and community itself.

For example, some aspects of family law are generally not seen as an appropriate fit for a clinic practice. Although there are undoubtedly low-income individuals in need of legal assistance, there are just as many persons of means with these needs (thus explaining the existence of a large private family law bar). Moreover, not only could both members of a low-income family seek out representation by a clinic in a separation, divorce, or custody dispute, but either or both sides of the dispute could conceivably be sitting on the clinic's board of directors. The same analysis could be applied to many criminal law matters, where, for example, not only could the alleged drug dealer be a part of the clinic's community, but likely, so would the tenants in the housing complex where the trafficking is alleged to be occurring. Having a community clinic become involved in these types of cases not only raises issues of conflict of interest, but those issues have the real potential of tearing apart the community and destroying the clinic.

This does not mean that low-income individuals with these family or criminal law legal problems should not receive legal assistance; rather, this assistance should come from the more traditional forms of legal aid services, where a community-based response is not necessary, such as the *judicare* program, staff law offices, or duty counsel.

Moreover, there are aspects of family or criminal law that could meet the two-step poverty law test. In fact, many clinics offer legal services to women who are victims of domestic violence, or who are battling the state for custody of their children, because these are areas of law around which a community of interests could easily coalesce. In doing so, the community board makes a clear policy decision that it will offer services only to the victim of domestic violence, rather than the alleged perpetrator, regardless of whether he qualifies financially for legal aid services. The "other side", if he qualifies financially, is referred to other, more traditional, legal aid services for his legal assistance. Similarly, a clinic may engage in the area of criminal law to deal with a matter

such as the unjust police harassment or targeting of a particular community, or the discriminatory use of trespass laws against the poor and homeless.

This two-part definition is certainly more in keeping with the *raison d'être* of a community clinic system. Community clinics were created because of the insufficiency and inherent inability of the traditional methods of legal aid services to reply to the specific needs of low-income individuals and communities.

A few observations flow from the two-part definition above:

- Although there are many areas of law that have a disproportionate impact on the poor, there are a much more limited number of legal issues that also lend themselves to a community of interests. It is this “community of interests” test that primarily separates community clinics from other legal services. Whereas in other forms of legal service the response is based purely on the needs of the individual client, in a community clinic the needs of an individual client are matched with the broader needs of the community that the client comes from.
- The easiest test to determine whether an area of law is a good fit for a community legal clinic is to see whether representatives of both sides of the dispute could sit on the community board of directors of the clinic. If so, then it's likely not an area of poverty law.
- As opposed to other forms of legal practice, which are determined solely by the needs of the client who walks in the door, the areas of clinic law truly involve identifying a “side” to an issue and limiting the clinic's representation to that “side” only.

This focus on poverty law has helped to make Ontario's legal aid system unique in Canada in responding to the poverty law needs of its low-income population. Not only has this focus on poverty law allowed clinics to meet the legal needs of low-income Ontarians, but this focus has also been instrumental in actually preserving the service in this province. In other jurisdictions, where legal aid offices provide criminal and family law services, poverty law is either ignored or neglected.¹⁷

Mary Jane Mossman, in comparing Ontario's clinic system to those in other provinces, points out,

By contrast, the Ontario clinics have an inherent capacity to focus on the specialized legal problems of the poor and to advocate purposefully on their behalf; the Ontario clinic system is an affirmative action program directed to achieving equal justice and capable of performing as a driving force on behalf of the poor. And Ontario clinics feel freer to specialize in the legal problems of the poor, knowing that other legal problems, for which traditional advocacy solutions are more appropriate, can be

17. *Supra* note 3 at 387. Until recently, British Columbia was the only other jurisdiction in Canada to have community based legal clinics with a focus on “poverty law”. However, in 2002, the provincial Liberal government cut back the provincial legal aid plan and eliminated the community clinic system entirely in BC.

provided by the judicare program and by personnel who are appropriately trained to do so.¹⁸

BROAD ARRAY OF SERVICES

The third critical characteristic of community based legal aid clinics is their use of a broad array of services in meeting the needs of their communities.

This is perhaps the most visible unique characteristic of clinics. Whereas virtually all other legal aid resources are focused on individual casework representation, clinic practice is far more varied. For example, the 2000–2001 clinic system statistics show:¹⁹

- 16,607 case files opened
- 59,408 referrals made
- 124,519 legal advice/brief services
- 498 law reform files opened
- 846 community development files opened
- 1,700,830 public legal education materials published

Although many of the services referred to above exist in some form in many jurisdictions, what is remarkable about the clinic system in Ontario is that all these services are provided under one roof, as part of a coordinated, holistic response to the legal needs of the poor in a particular community.

This variety in practice is expressly recognized in clinic mandates. The Memorandum of Understanding each clinic enters into with Legal Aid Ontario states, “Clinic law services means legal and other services provided under the Act, in clinic law areas, and includes legal representation and advice, community development and organizing, law reform, and public legal education.”²⁰

It is primarily to meet these responsibilities that most clinics employ staff other than lawyers to assist in meeting their community’s needs. Clinics in Ontario employ a wide range of non-lawyer service providers, including intake workers, community legal workers, policy analysts, social workers, and agronomists.

This focus on non-traditional forms of service is fully in keeping with the reality that community legal clinics were created to respond to the broader systemic needs of a community, rather than solely to the individual needs of a particular client. As Stephen Wexler noted, “Poor people are always bumping into sharp legal things...”, and therefore a traditional case-by-case response is insufficient.²¹ It is only through test

18. *Ibid.*

19. Legal Aid Ontario Annual Report 2002.

20. Memorandum of Understanding, s. 3(f).

21. *Supra* note 4 at 1049–50.

cases, public legal education, community development and organizing, and law reform initiatives that there is any hope in attacking the systemic nature of the problems confronting the poor.

That being said, it is certainly an ongoing challenge for clinics to find time to engage in the non-traditional legal services. Demand for individual casework representation is usually high in the areas of poverty law and often outstrips available resources. It can become very tempting to allow casework pressures to overwhelm the other proactive and systemic forms of legal service.

A clinic could easily engage all its resources in doing casework, but this would be an abdication of its mandate and underlying *raison d'être*. It would be somewhat akin to using a hockey stick to play golf: possible to do, but not the correct use of the instrument.

For this reason, clinic boards use various techniques to ensure that casework pressures do not overwhelm all other forms of service provision. Some do it by employing non-lawyers, others make use of strict case criteria and case limits, and still others expressly mandate in their annual plans of work that the clinic should perform a certain percentage of non-casework activities. Each clinic develops techniques that make sense for their local community at a particular place and time.

CONCLUSION

This paper was not an attempt to critically analyze the strengths and weaknesses of Ontario's community legal aid clinic system. This has been done many times in the past, and the conclusion has always been that the community clinic model is the best method for providing poverty law services. Or, as it was stated in the McCamus Report,

It is widely acknowledged that community legal clinics are best suited to deliver "poverty law" services. This conclusion has been confirmed by numerous independent studies on this subject, including the 1974 Osler Report; the 1978 Grange Report; the 1987 Canadian Bar Association report, *Legal Aid Delivery Models: A Discussion Paper*; the 1992 Review of Legal Aid Services in British Columbia; and the 1997 report by Osgoode Hall Law School Professors Frederick Zemans and Patrick Monahan, *From Crisis to Reform: A New Legal Aid Plan for Ontario*.²²

Rather, this paper was an attempt to examine those unique characteristics of the community clinic model in Ontario that have led to its success and differentiate it from other types of legal services.

It is the combination of local community governance, a focus in the area of poverty law, and the utilization of a broad array of services that have made the Ontario community clinic both unique and successful.

22. McCamus Report, *supra* note 7 at 192.

In times of expanding need and fiscal restraint, it is sometimes tempting for people to consider turning to successful models such as community legal clinics to plug holes and fill gaps. It is particularly at these times of pressure that it is important to remember the reasons community legal clinics were created, how their unique characteristics were fashioned to respond to a particular set of unique legal needs. Forgetting this, the temptation to use “the hockey stick on the golf course” could become overwhelming.