

**Legal Services and Community Development:
Competing or Compatible Activities**

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Introduction:

Most community legal clinics in Ontario would agree that their mandate includes both delivering legal services and fostering community development. Moreover, the mandate is unmistakably defined in the Regulations under the Legal Aid Act, which authorize the funding of community legal clinics. Section 148(2) provides that clinics are to provide “legal or paralegal services”, including:

“activities reasonably designed to encourage access to such services or to further such services and services designed solely to promote the legal welfare of a community”.

A reasonable interpretation of this section of the Regulations is that it includes “traditional” case-by-case legal services in areas of poverty law (tenant housing, welfare, unemployment matters), which are usually regarded as “legal or paralegal services”. In addition, however, it seems that the section also mandates more broadly-based activities which encourage access to legal services or make legal services more effective, as well as group services designed to promote a community’s legal welfare: law reform and community development.

Yet, despite the mandate of section 148(2), it seems that community clinics in Ontario direct proportionately much greater amounts of time, energy, and resources to “legal and paralegal services” (traditional case-by-case to individuals), than they do to “promoting a community’s welfare” (law reform and community development). I want to explore the reasons why this has happened.

I think there are two reasons:

1. A misunderstanding about legal services and community development, and a tendency to think that they are totally separate and incompatible: and
2. Difficulties inherent in the community clinic context in fulfilling the legal services mandate of community.

1. Misunderstanding about Legal Services and Community Development

In many community legal clinics, Board members and staff think about legal services and community development as if they were two separate activities. Often, this polarization in people’s minds is translated into personnel decisions, with lawyers primarily handling the traditional case-by-case services for individual clients, and community legal workers primarily attending community meetings and working with community groups. All too often, the lawyers and community legal workers don’t even talk to each other – or to the Board – about their separate activities, what goals they are trying to achieve, and whether any progress has been achieved. So Boards can seldom, if ever, assess the work of the staff as a whole, measured against overall objectives, and reassign priorities to achieve a greater impact. Obviously, these problems seriously

impede a community legal clinic's ability to become the "driving force" on behalf of the disadvantaged community in any geographical area, and across the province as a whole.

The first problem is one of definition. I think that the polarization which has occurred between "legal services" and "community development" is a critical problem, and that it is important, even essential, to re-orient our way of thinking about these activities. If there is one thing about Ontario's community clinics which makes them unique in Canada, and probably in the western world, it is that they have a mandate for broadly-based legal services, including community development which "promotes the legal welfare of a community". Moreover, because almost all other legal aid services focus primarily on case-by-case services to individuals, the clinic system has an obligation to fulfill its unique mandate, even though this may mean that the number of case-by-case services to individuals is reduced.

But aside from the fact that a unique opportunity has been given to Ontario's community legal clinics, I think that it is crucial to understand legal services as a concept which includes, and is not separate from, community development. In some ways, I think that the failure to achieve much in our community development objectives has occurred because of the separation of these activities, both in the way we think about them and in the way we do them.

Ideally, the individual cases coming through clinic doors should be regarded, not as ends in themselves, but as the tips of icebergs which get in the way of decent lives for poor people. For example, every single client who seeks legal assistance to enforce a support order should be regarded not as someone for whom a "show cause" hearing will do anything effective, but as the tip of the iceberg out there which is the wholesale lack of financial security for dependent wives and children in our society. In the first place, "show cause" hearings seldom do very little to alleviate financial hardship for dependents in the long term; and in addition, the legal process exacerbates the client's feelings of dependence and helplessness when the lawyer "takes over the case". What this means is that part of the "legal service" offered by a community legal clinic must be law reform and client organizing. Yet, it cannot happen effectively where lawyers' roles are to provide individual case-by-case services and CLW's roles are to promote community development, because the clients' problems cannot be so neatly divided. There must be a meshing of the two activities and of personnel for clinic services to be really effective.

In fact, the need to integrate case-by-case services to individuals with community development activities of a clinic is not a new idea. People have been saying that it is needed for years. However, it hasn't happened. So I want to explore more fully why we have failed to achieve this stated objective. At this point, however, I want to underline my view that it is a misunderstanding of "legal services" and "community development" to view them as separate activities; in my view, the legal services mandate of Ontario's community legal clinics includes promoting "the legal welfare of a community" as an integral part of its scope. Indeed, in the absence of community development, Ontario's clinic system will have failed completely to fulfill its unique legal service mandate.

2. Difficulties In Fulfilling The Legal Service mandate of Community Development

a. The Impact of History

Of all the difficulties which prevent clinics from being effective at community development, the failure to appreciate our historical roots, in terms of the present mandate, may be the most serious. In Ontario, the earliest legal aid programs were very ad hoc; individual lawyers or lawyer-associations provided free services or services at reduced fees to indigent clients on a voluntary basis. In effect, lawyers provided charity to such clients. While many lawyers may have performed such services, they probably did so relatively infrequently, and so the total number of clients helped was not large. In addition, it is likely that lawyers usually provided such free services to clients in rather serious trouble, eg. To those charged with criminal offences, etc. It is unlikely that lawyers often provided free service to groups of clients seeking recognition of positive rights, particularly where law reform we needed, simply because the cost to the lawyer to provide such services would have been too great on a charitable basis. And it is important to recognize that it was in this context that the legal aid pattern was established – a lawyer providing service to one client in one case. And it is equally important to recognize that this rather narrow pattern of legal aid service was established, even though lawyers might be involved at the same time in lobbying and law reform on behalf of paying clients.

In 1966 when Ontario passed the Legal aid Act, the nature of legal aid changed fundamentally, because the government accepted responsibility for funding such services (although legal aid lawyers agreed to accept 75% of the tariff amount specified for services provided, so that legal aid lawyers still provide charity to their clients by foregoing 25% of their fee). More importantly, the Legal Aid Act reinforced the earlier pattern of legal aid services by adopting the concept of “fee-for-service” for individual client cases. Thus, in the minds of both lawyers and their clients, as well as the public, legal aid services were understood to mean “case-by-case” individual client services.

The conception of legal aid services was not, however, the only one possible. Both prior to and after the Legal Aid Act was passed, some people expressed the idea that legal aid services must be patterned on the needs of legal aid clients, and that such needs might require a wholly different form of services in contrast to case-by-case services to individual clients. The fact that legal services have not been traditionally available to the poor meant, of course, that it was difficult to define their legal needs, at least at the outset. But gradually it has become apparent that the legal system often betrays the poor by failing to provide remedies for their problems which are fair and just. And it is for this reason that legal aid services must go beyond the traditional concept of individual clients’ cases and encompass active efforts at law reform and community organizing – designed to provide remedies which are fair and just for clients and for the client community. And the clinic system in Ontario was established for exactly this purpose.

The problem is that many people in clinics, Board members as well as staff, have been influenced by the prevailing ideas about legal aid services as case-by-case services to

individual clients. All too often, people think that clinics and fee-for-service lawyers differ only in the types of cases they handle or the way they are funded. While these differences, of course, exist, the fundamental difference is the scope of service they are intended to provide. The Regulations give to clinics, and not to fee-for-service lawyers, the mandate to promote “the legal welfare of a community”. If clinics do not fulfill this mandate, no one else will.

So, the first difficulty to be overcome in order to fulfill the mandate for clinic legal services, which means community development as an integral activity, is our perception of our role. Lawyers and CLWs, as well as Board members, must understand the historical role of clinics, which includes community development as an essential component of legal services which respond to the needs of the low-income community.

b) The Impact of the Clinic Context

The community clinic model of legal aid services must also take account of the legal and political context in which it operates. This context includes:

- (i) the legal parameters imposed on legal services by the Law Society;
- (ii) the financial and political limits inherent in services provided by public funds; and
- (iii) the limits of “community” consensus, especially on controversial issues.

(i) Legal parameters

Lawyers in Ontario offer legal services to paying clients in accordance with rules and guidelines, many of which are established by the governing body of the legal profession, the Law Society of Upper Canada. Understandably, many of the Law Society’s guidelines were developed in the context of paying clients, and as a result, some of them seem inappropriate for clinic legal services. For example, restrictions on advertising, or contact with the media, which may be wholly desirable where lawyers act for paying clients, may have no relevance in the clinic context and may even impede the work of the clinic.

The obvious solution seems to be to define the differences between the objectives of clinics and those of lawyers in private practice and to request exemption for clinics from Law Society rules – and this course of action has been taken successfully on a few occasions in the past, eg the advertising rules. However, the Law Society has an inherent interest in having its rules apply to clinics: because the Law Society is ultimately responsible for all legal aid services, including those provided by clinics, it is understandably loath to appear to relax the rules for clinics when they are being applied fully to private practice lawyers. At best, this argument is one of “appearance” rather than substance, although it is important to appreciate that “appearances” matter, particularly when clinics are increasing in size and number while the legal aid tariff for private practice lawyers remains static.

Aside from this argument of “appearances”, however, it is still possible to argue that most of the Law Society’s rules are designed to ensure quality legal services. Since clinics share this interest in providing quality legal services, it seems reasonable for such rules to apply to them, as well as to private practice lawyers. This difficulty, however, lies in the fact that rules designed to achieve quality legal services in the private context may not fit well where a broader mandate of legal services, including community development, is intended.

Yet, while the Law Society’s rules define the parameters of legal services, they do not prevent clinics from offering a broad scope of legal services, including community development. The rules do, for example, require lawyers to supervise the work of community legal workers, but this requirement per se does not prevent clinics from doing community development work. It does require lawyers and community legal workers to work closely together, but as suggested above, this result is actually desirable in terms of overall objectives, not a problem.

The history of clinics and the law Society has not been altogether cordial. Even so, clinics have been successful in persuading the Law Society to broaden the mandate for legal aid services in the years since 1966 when the Legal Aid Act was first enacted. The scope of services offered by clinics was unmistakably accepted in the recommendations of the Grange Report in 1978 and subsequently in the 1979 Regulations under the Act. To the extent that problems remain, it is necessary for clinics to continue to accept their educational role within the legal services context; indeed, perhaps it is time for another Commission of Inquiry on the scope of legal aid services in Ontario.

(ii) Financial and political limits

The scope of clinic legal services is also affected, to some extent at least, by the financial and political limits inherent in publicly-funded activities. The funding of legal aid services also reflects the historical focus on case-by-case services. In the cost-sharing agreements between the federal government and each province, the calculation of the federal contribution may be related to the number of criminal legal aid cases handled because of the federal government’s constitutional responsibility for criminal law. This focus on numbers of individual criminal cases is disadvantageous for clinics’ legal aid work because it emphasizes that legal aid services are usually case-by-case services; in addition, it reinforces the historical notion of legal aid as an entitlement for someone charged with an offence, rather than the idea of more broadly-based group action to enforce positive rights. Moreover, because the province has constitutional jurisdiction for civil legal aid, the province cannot seek a federal contribution for the funding of most of the work done by community legal clinics. To an extent, the fact that the province bears almost sole financial responsibility for the legal aid work done in community clinics, places clinics in jeopardy of inappropriate political interference with the community development aspects of their legal services.

The potential for interference with the community development work of clinics through their funding is always present, particularly if the work is successful in making demands on behalf of the low-income community. It may often be very subtle. Especially, in the context in which the Law Society seems to view clinics with disfavour, the extensive support for community clinics from the government funder, financially and politically, is very comforting. Yet one must ask whether the governmental support is based on the potential services clinics can provide if they fulfill their statutory mandate, or whether it derives from a more traditional notion of (inexpensive) legal services for poor people using the case-by-case approach. Notwithstanding the wholehearted and much-needed support for clinic activities which has been offered by the provincial government, it is realistic to recognize that by fulfilling the mandate to “promote the legal welfare of a community”, a clinic might encounter some pressure from government, however subtle.*

(iii) Limits on community consensus?

The allocation of clinic resources to community issues generally means a significant amount of time, energy, and human resources; without clinics resources, some issues would not be raised so effectively. For this reason, the decision to use clinic resources for a particular issue of community development is a very political one within the clinic context – it requires a process for making such decisions which is accountable to the “community” served by the clinic. Clearly, such decisions are more difficult in practice than decisions about providing case-by-case services for individual clients.

In this way, the relative difficulty of making appropriate service delivery decisions in community development itself may operate to discourage clinics from fulfilling their broad service mandate. Moreover, there is no doubt that identifying the clinic’s target “community” is an ongoing process, and sometimes the lack of consensus within the “community” will further inhibit the clinic’s community development work. However, these same features of community development work may also act to revitalize the clinic and to redefine its objectives. Certainly, although often complex, community development work is not beyond the scope of most clinics.

*I have argued elsewhere that the structure of the CFC and its process for making decisions on funding and on defunding of clinics offers substantial protection from such interference by government; however, the integrity of the structure and its process depend on their being respected by the constituent parties; the Law Society, the provincial government and the clinics. See Mossman, “Community Legal Clinic in Ontario” (1983) 3 Windsor Yearb. Access Just 375.

3. The Impact of Clinic Structure and People

In addition to clinics' history, and to the legal and political context in which they operate, their capacity for community development work is also shaped by their structure and human resources.

One of the chief challenges for clinics in attempting to fulfill their broad service mandate is the need to educate clinic lawyers about the broad service mandate of the clinic (in contrast to the services of private practice lawyers) and the need to educate community legal workers about the community development process in the legal clinic context (in contrast to other contexts in which community development may occur). Far too often, clinic workers are highly committed people, but are without any defined sense of the unique role of clinics, or the special nature of the roles of lawyers and CLWs in clinics. Moreover, clinic workers quite often will have had little or no experience at all in working with other types of "experts" before they come to a community clinic. For example, the university clinics have provided only minimal opportunities to law students to work closely with CLWs or to assist in community development projects; much more frequently, law students are confined to case-by-case services to individuals, and the learning of traditional lawyering skills. On the other hand, many CLWs are hired for their community activism/organizing experiences/expertise, but there have been very little systematic effort by clinics to explore the nature of the clinics. In effect, clinic lawyers and CLWs have become more separate and less effective in their separate worlds. Inevitably, job satisfaction has suffered for clinic workers as individuals. Moreover, no one experiences the satisfaction of achieving the mandate unique to community clinics, a tragedy for the clinic system as a whole.

At the same time, new efforts are needed to provide clinic Board with the means of directing community development efforts. In part, it is also a need for a more thorough grounding in the special role of Ontario's community clinics, the choices which Boards must make (many of them not easy ones), and the need for processes appropriate to the Board's tasks. And the task of strengthening Boards is one which must go hand in hand with efforts to fulfill the community development mandate. The bottom line is that Boards must be able to, and be seen to, be accountable for clinic activities which "promote the welfare of a community". Inevitably, more and more successful community development by clinics will make them vulnerable to criticism from the Law Society, the provincial government, and segments of their own geographical community. If clinics are to survive such criticism, it will be only because they have representative and accountable community Boards. On this basis, to undertake efforts to fulfill the community development mandate of clinics without simultaneously addressing the issue of viable clinic Boards is short-sighted indeed. Effective community development and viable Boards of Directors must go together.

Conclusion

Nothing in this analysis precludes Ontario community legal clinics from fulfilling their service mandate as set out in the Regulations; in particular, nothing in this analysis

prevents a clinic from undertaking efforts to “promote the legal welfare of a community.” Yet it is important to understand the context within which such efforts must be made, both in order that they will be acceptable but more importantly, in order that they will be truly effective. The clients of community clinics surely deserve no less.