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A Seamless Approach to Service Delivery in Legal Aid: Fulfilling a Promise or Maintaining a Myth?

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Department of Justice Canada

The views expressed in this report are those of the author and do not necessarily reflect the views of the Department of Justice Canada.

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1.0 Introduction

Restructuring and privatization have now characterized State action in Canada and the industrialized world for close to three decades, as government continuously (and in recent years, dramatically) reduces its role, cutting back on social spending and increasingly promoting private self reliance and charity as a response to poverty and inequality. Those policies, and the cuts mandated by them have had dramatic consequences, from a sharp increase in the gap between rich and poor, "haves" and "have nots", to unprecedented levels of homelessness, child poverty, and declining health for those "left behind". They have also contributed to extraordinary levels of corporate profit, private wealth and the first government budgetary surpluses in decades.[1] In the face of those surpluses, and the troubling reality of poverty in the midst of wealth, attention is now returning to social issues.

It has long been recognized that poverty not only generates very particular legal and social problems but that poor people suffer in many ways from their restricted access to justice, from reduced health to increased social conflict. Thus the provision of legal services to those who cannot afford to purchase them is clearly one of the social services which merits reconsideration in the aftermath of restructuring and recession. That reconsideration should not simply attempt to make the case for restoring funding levels however. Although most cuts and freezes were driven in part at least by budgetary concerns, and it is obvious that adequate funding is a prerequisite for any effective program, it is important to remember that serious questions about the efficacy of legal aid generally have been posed, and not just by neo-liberals justifying the guiding hand of the free market.[2] Indeed, that reconsideration must begin by recalling the ideas and ideals that shaped a system that disappointed both progressives and conservatives alike (albeit for different reasons).

Social policy thinking thirty and forty years ago was marked by a reformist spirit that was both radical and (perhaps naively) optimistic. In the USA the "War on Poverty", and, in Canada, the "Just Society" encouraged initiatives intended to eliminate, not just alleviate poverty. Legal services were seen to be part of the solution to a poverty that could be transformed[3] an ideal which in turn transformed legal aid and legal education.[4] The essential insight, was that traditional approaches to legal practice were not appropriate for all people. That is, traditional approaches to practice had been designed by and for those with money and power, in part at least to preserve their power and wealth. Poor and marginalized people who were left without any meaningful access to legal services at all, thus required assistance to achieve full participation and equality. That recognition in turn led to the development of enhanced legal aid in general, community legal clinics in particular, and to the development of the specialty of "poverty law" (primarily social assistance, housing, employment and immigration law). The model was intended to take a different approach to the legal problems of the poor. Rather than the "case by case" approach still used for many family law and most criminal cases, the community clinic model incorporated community education and development, law reform, and locally elected boards of directors and non lawyer "community legal workers" into a lawyer-based practice.

The model was most successful when it was implemented as intended. Which in practice means when it has actually been multi-disciplinary and community based — as it was in Canada in the law school based approach exemplified by clinics like Osgoode Hall's Parkdale Community Legal Services programme in Poverty law.[5] "Parkdale" actually was able to incorporate legal case work with community education, organizing and development, and law reform, in part because of the commitment of the law school to progressive lawyering, in part because of a strong community board, and in part because of the resource of 20 full time law student case workers per semester. However this integrated, multi-faceted style of practice, (which in many respects is what really good legal services always includes) has rarely existed outside of a law school setting except in theory. In the United States the "neighbourhood law office" system was hamstrung by limits on work of a "political" nature such as community organizing almost before these offices were established.[6] In Canada, few community legal clinics have been able to achieve this level of service, even when it is theoretically encouraged, as it is in Ontario.[7] Most legal aid clinics do not have the "luxury" that the work of 20 full time law students represents. Moreover, all clinics, including those based in law schools, are plagued by two seemingly irremediable problems: (1) The case load of individual legal problems overwhelms all other approaches as problems are "legalized" (and connections and linkages to other resources are never made) and clinic lawyers are faced with an at times overwhelming volume of work;[8] and (2) Legal aid has become bureaucratized, encouraging routine, efficient operations, not innovation and transformation.[9] As "poverty law" evolved into a specialty (like "social work"), it sustained itself in the sense that it became self referential and not devoted to eliminating itself. In the result, very limited progress has been made in

addressing the root causes of the issues being "legalized".

These, and other failings and problems have not gone unnoticed.[10] However, along with the critique some suggestions for improvement have been generated, such as the intriguing suggestion by Douglas Ewart to redesign legal aid to make it an integral part of the justice system,[11] to a renewal of the principles that inspired (civil) legal aid when there was a clinic "movement" (as compared with a "system"), such as more community education,[12] and selecting cases and clients in a more politically informed and targeted fashion,[13] (ideas which have always been central to the Parkdale approach).[14] However no consensus like the one that created modern legal aid has emerged about how to achieve the "Just Society" promised so long ago, nor what role, if any, law and legal aid might play. It may be that there is no "one" way, or that all that is required is that the original vision actually get implemented.[15] What is clear is that in the face of the perceived "failure" of legal aid to achieve it initial promise, new or rejuvenated models face an obligation to demonstrate their efficacy at improving the circumstances of poor and marginalized women, men and children.

This paper attempts that reconsideration by examining legal aid from a social justice perspective, considering the history, structure, and approach of the community legal clinic as a vehicle for delivering civil (as in non-criminal) services in a way that improves the life chances and circumstances of its clients, and setting out some suggestions as to how that model might measure its successes. Some of the extensive literature is reviewed in Chapter 2.0, and in Chapter 3.0, the integrated, "seamless" approach exemplified by Parkdale Community Legal Services is described and a case study of its application set out. Chapter 4.0 offers suggestions for how to reconsider the delivery of legal services to low income communities, in particular, the *federal* role in that delivery.[16] The focus is on the delivery of civil legal aid; that is, legal services for matters other than criminal law, although people's legal problems do not neatly fit within constitutional compartments.[17] Finally, the need to measure the effectiveness of the model and to ensure that it keeps the promises made is considered. How to ensure that providing legal services to low income people actually improves their lives and life chances is an enduring challenge, and a very basic measure — population health and its enhancement — is suggested as an appropriate, minimum, basis for that task.

2.0 A Literature Review

2.1 The Beginning: United States

The War on Poverty: A Civilian Perspective by Edgar and Jean Cahn[18] is widely recognized as providing the seminal thesis in the development of models for delivering civil legal aid to low income people. Inspired by President Johnson's avowed War on Poverty, it was a major contributing factor in the establishment of the Neighbourhood Legal Services Program under the Office of Economic Opportunity which funded most of the neighbourhood clinics in the United States.

The authors begin with a critique of the approach inherent in a "war" on poverty by describing the rationale behind a comprehensive social services program in New Haven, Connecticut, administered by a private, non-profit organization called Community Progress Incorporated (CPI). This program involved the rendering of services, goods, and service programs by professionals to individuals in poor communities, through a local community office based in the low income neighbourhoods where the clientele lived. Each neighbourhood office was intended to supply legal services, health services, social workers, housing inspectors, homemaking advisors, etc… assisted by a community worker who is known and respected in the neighbourhood to serve as a "bridge between residents and service agencies".[19]

A fundamental criticism to this approach was that CPI retained a "service orientation" and thus did not alter the basic relationship between the community agency and the client (that of donor-donee). This professional service orientation approach does not promote the building of self-respect and dignity by community members, develop potential leadership or encourage community protest. Hence, the Cahns argued, it neglects to provide for or instil the "civilian perspective" and actually is subversive of that perspective, particularly by fostering dependency. The administrators of the community offices do what is "good for the client" and have the authority to determine eligibility for assistance and termination of the assistance. Limitations of and problems with such a community-wide social service organization are described by comparing the organization to a monopoly on all the opportunity and assistance available to the urban poor.

They argued that a "war on poverty" must be imbued with a 'civilian' perspective:

> The ultimate test, then, of whether the war on poverty had incorporated the 'civilian perspective' is whether or not the citizenry has been given the effective power to criticize, to dissent and where need be, to compel responsiveness.[20]

The Cahns posited two fundamental reasons why social service agencies must foster dissent within the communities themselves:

1) poor people must perceive that they have effective censorial power over all initiatives that are intended to affect the fundamental conditions of their life, and
2) protest and criticism from the community will offer wisdom and corrective insights, when previously "token approval, acquiescence and resignation have been eagerly equated with meaningful citizen participation".[21]

In Section II the concept of the civilian perspective is teased out and described in detail. Section III then demonstrates the vision that was so influential to the ways that the neighbourhood law firm could foster the civilian perspective in a community and provide meaningful representation and education.

The Cahn's neighbourhood law firm is university affiliated and includes a staff of lawyers, research assistants, community organizers and investigators who would represent individuals as well as community interests. Four different styles of legal advocacy and legal analysis which may prove useful in implementing the civilian perspective are described:

1) Traditional legal assistance in establishing or asserting clearly defined rights;
2) Legal analysis and representation directed toward reform where the law is vague or destructively complex;
3) Legal representation where the law appears contrary to the interest of the slum community; and,
4) Legal representation in contexts which appear to be non-legal and where no judicially cognizable right can be asserted.[22]

Several problems faced by the neighbourhood law office are outlined — taking on test cases for their "symbolic character", selecting cases in favour of certain clients and hence choosing who will be the community's leaders, the difficult line for the neighbourhood attorney between representing and leading, obeying and teaching. Furthermore, the neighbourhood firm can only come close to fulfilling its ideal conception if it has both the liberty and the resources necessary to proceed. The Bar's approval and cooperation as well as independence from the government which funds the

operation of the firm are both necessary and difficult to maintain.

Finally, the Cahns describe the manpower, skills and perspective needed for many of the tasks of the neighbourhood law office, which could be supplied through a connection with law schools and students. Case work assistance as well as the development of research projects and seminars would be a part of the law student's contribution to the office. In addition to benefiting the office, the clinical training element would create a group of young lawyers knowledgeable in poverty law issues. Both the university and the neighbourhood office could join in providing opportunities for the recruitment and training of leaders indigenous to the target community.

This was an enormously influential piece of writing, and in a later section, dealing with the "Parkdale Model" it will be seen as very enduring, in one setting at least. However, two years later, the Cahns are disillusioned. In *What Price Justice: The Civilian Perspective Revisited*[23] they conclude that neighbourhood legal services can have limited effectiveness in combatting injustice and helping the poor; fundamental changes in the conception and the administration of justice are first required. In this piece they ultimately argue that to effectively serve the needs of the poor, the Neighbourhood Law Office must be supplemented by some form of decentralized and community controlled Neighbourhood Court System. However, their cogent and vivid description of the pattern of overwhelming case loads, loss of community involvement or non-legal strategies, and inadequate resources is prescient and will also be reflected, decades later, in a Canadian context.

The reasons for their concern are somewhat sustained in a comprehensive look at the Neighbourhood Law Office concept, and in its implementation, done in 1967 by the Harvard Law Review: "Neighborhood Law Offices: The New Wave in Legal Services for the Poor".[24] This wide ranging article sets out the historical development and failings of legal aid in the United States, and the development of the "neighborhood law office". The authors elaborate on the benefits of the neighbourhood concept (also termed the "New Wave" of legal services). A decentralized location is easier and less costly for clients to reach, longer hours accommodate clients who cannot afford to lose a day's pay, and psychological barriers are broken down when a law office is placed directly in the community that it serves. The model contemplates what is described as a "service function", that is, the type of legal case work that will be done and a "non-service function", that is, law reform, community action, community education. From the inception of these offices, the problem of balancing between the "service" and "non-service" functions, such as a high volume of cases and limited resources, was understood and the student authours include ways that some neighborhood programs have attempted to solve them. A similar analysis touches on client participation as crucial to the provision of meaningful legal services to the poor and provides some ways in which some neighborhood programs have attempted to meet the participation requirement. The balance of the piece covers the institutional, ethical, and financial conflicts that were already being layered over the Cahn's groundbreaking concept in a careful but not particularly critical way.

That is not true of one of the other "foundation" articles, Stephen Wexler's oft quoted piece *Practicing Law for Poor People*.[25] Wexler, a staff attorney with the National Welfare Rights Organization when he wrote the article, put practical clothes on the framework erected by the Cahns, and did so from a critical perspective. His first proposition is that lawyers for poor people must understand the relationship of poor people and the law, and of poor people and a rich society, before 'practicing' on them; that is, poor people are not just rich people without money, and poverty lawyers must understand that.[26] His second key proposition is probably the most important — and the most difficult to put into practice. Wexler was one of the first to insist that a poverty practice had to put political organizing before case work, and therefore had to have a way to limit the cases accepted in a more principled fashion than "first come — first served".[27] His third was that "the lawyer does not do anything for his clients that they cannot do or be taught to do for themselves" and he sets out four mechanisms to achieve that goal: informing clients and communities of their rights; writing manuals and other materials; training lay advocates; and educating groups for confrontation.[28] Each of these have been and continue to be important today in clinics like Parkdale Community Legal Services.[29] Indeed, the Cahn-Wexler vision flourished in Canada, although not without difficulty and now more frequently in the breach than in the observance.

2.2 The Beginning: Canada

The history of legal aid in Canada is similar to that in the United States, although it was regularized beyond charity status later, and developed some unique delivery models. However the first step was to ensure representation to accused in serious criminal and civil matters. John Honsberger sets out this history in the

context of Ontario[30] describing the structure and operation of the new (1967) "judicare" plan in detail: the administration and direction of the plan by the Law Society, the rules for determining what services legal aid certificates will be granted, determination of financial eligibility by a welfare officer, client control over choosing their own lawyer, the Law Society's role, and how many lawyers were registered as accepting legal aid certificates (approximately _ the lawyers in Ontario, were either the civil or criminal legal aid panels, or both).

He evaluates the success of the Plan at just under two years of operation and identifies problems cited which will endure into the present: whether the poor person's right to choose their own lawyer is a meaningful and appropriate one, the problems associated with predicted rising costs of the Plan, and the tension between the Law Society and the government in determining how the Plan will evolve.

The final section, Legal Aid and the Chronic Poor, details how the need for legal services of the "chronic poor" is not being satisfied. The failure of Legal Aid Plans to help the chronic poor is attributed to a large extent on poor individuals' reluctance to see the law as a helpful force in their lives and a pessimistic "what's the use" attitude. The author concludes, "To encourage those who continue to be exploited to assert their legal rights, it may be necessary to take legal aid to the poor and not to expect the poor to ask for it. A local legal centre staffed by Duty Counsel could, for example, be taken, at no great expense, to the poorest and most depressed areas".[31]

That is, of course, what happened under the impetus of law students inspired by the American experiments and the goals of the "Just Society". In a brief, but prescient article in the 1973 Canadian Bar Review, Larry Taman and Fred Zemans predict "The Future of Legal Services in Canada".[32] They set out the evolution of legal services to the poor and working class in Canada and then set the stage for the emergence of a community legal clinic. They describe how the Ontario programme was at first hailed as the Canadian model, and other provinces were encouraged to follow it. However, as the other provinces began to make more substantial financial commitment to and recognize the need for legal services, the Ontario format and approach failed to dominate. A debate took place in which some, particularly in Quebec, propounded the superiority of a neighbourhood law office system: full-time salaried lawyers and a strong community base, modelled on the American neighbourhood law office model funded by the American Office for Economic Opportunity.

Other provinces systems and experimentations are then described. Nova Scotia — full-time, salaried lawyers work out of offices in the community, Manitoba had a plan which replicated Ontario's but which contained one large experimental neighbourhood law office in Winnipeg's north end and Manitoba rejected that the Law Society should be an administrator of the plan. The most ambitious departure from the model developed in Ontario was in Quebec. A large group of specially trained "laymen" along with lawyers were to serve the unmet legal needs in the province. The Regional Boards which administered the local legal service offices were to have not less than 1/3 and as much as 2/3 community representation. The authors submitted that beyond the radical departure in the amount of community representation in the administration of the legal services program, the most surprising development was the failure of the Quebec legal profession to gain control of the central coordination and policy-making body. As the authors note, "Quebec thus became the first province to operationalize with some vigour the view that more than legal expertise is needed to administer and develop a programme which, while law-oriented, is also a programme of social service and social change".[33]

They predict for the future that more community-centred legal service offices will be the basis of an expanded programme in which more and more lawyers are publicly employed in an effort to service legal needs. The general direction will move away from the fee-for-service model of the current Legal Aid system and towards the integration of this with the community-controlled clinics with staff attorneys and commitment to change. From trends at the time of this article, the authors conclude that "…it is likely that many such centres will offer an integration of legal, health and social services"[34] and predict that the ultimate control over legal aid service programmes will not remain with the law societies.

That trend, of course, had already begun, with Taman, in 1971, the first chair of the Community and Legal Aid Services Programme (CLASP)[35] at Osgoode Hall Law School (the volunteer student services clinic that operates today), and Zemans, the first director of Parkdale Community Legal Services. In less than ten years, Parkdale had secured permanent funding from the Ontario Legal Aid Plan and developed an approach to community development that included and expanded on most of the elements urged by Wexler and the Cahns.[36]

2.3 Unkept Promises

Although the Cahns and a few others very soon expressed doubts about the potential of the new community/neighbourhood based legal aid offices to dispense (civil) legal aid in a way that had transformative potential. Given the strict limits imposed on "political" work by neighbourhood law offices in the Nixon era, this pessimism was warranted. When the cuts to legal aid began with Reagan in the 1980s, the die was cast.[37] However, the most consistent and widespread criticisms don't emerge until the 1980s. In addition to the severe systemic limitations they suffered under the idealism of the 1960s and 1970s, fueled by the hubris of a generation who "won" the civil rights battle and "stopped" a war in Vietnam, was replaced with materialism on the one hand and a sort of weary pragmatism on the other. What had become clear was that laws, lawyers and legal clinics had neither ended poverty, nor even significantly diminished it. At best, some individual clients had been assisted in significant ways, and a new breed of judges, who had been students and lawyers at the height of the "just society" were about to start sitting.[38] However, interest in reform had not disappeared, it was merely reshaping itself.

In 1982, Richard (Dick) Gathercole, in *Legal Services and the Poor*,[39] argues that the positions of the poor have not been improved by legal aid programs because the leaders of the legal aid movement in Canada, as elsewhere, did not and perhaps could not, fully understand the problems of the poor.

> Contrary to their expectations, the fundamental problems of the poor are not susceptible to traditional legal solutions. They are not the traditional middle class legal problems that lawyers are familiar with. Most legal aid programs, even if not so designed originally, have tended to develop according to the interests and priorities of lawyers providing the services rather than those of their clients… Lawyers cannot accept the fact that the problems of the poor can only be solved through a fundamental restructuring of traditional institutions, not by suing someone in a court of law.[40]

However, the problem was not merely one of poor understanding. "[G]overnments have consistently underfunded legal services, partly because the poor are not a powerful political constituency, but also because government departments and agencies are prime targets of legal aid lawyers."[41]

Gathercole provides a brief history of the development of legal aid in the United States, Canada and Britain — emphasizing the differences, benefits and problems with the two major models of legal service delivery to the poor — judicare and legal services. Proponents of the two models have debated their respective merits, with the traditional bar and most politicians supporting the development of Judicare, which gave the law society and government professional administrative control and limited law reform and lobbying activities by legal aid lawyers. The legal service lawyers criticized Judicare for its failures to deal with the "real" problems of the poor. Gathercole maintains that, "…it became apparent that neither approach had all the answers and both had important strengths and weaknesses. As a result, most jurisdictions have developed mixed civil legal aid systems, albeit with the emphasis on one of the two models".[42]

In Section III, Gathercole elaborates on the inadequacies of legal aid. He cites the minimal level of funding by governments generally, citing the decision of the Saskatchewan government in June 1978 to require the Legal Service Offices (community legal clinics with salaried lawyers) to cease their practice of referring criminal cases to private lawyers and concentrate on civil legal aid cases (such as housing and welfare). The government, motivated primarily through financial concerns but also through a desire to "clip the wings" of Legal Service Offices, decided that staff lawyers should do the criminal work themselves due to the higher cost of having private lawyers do the criminal cases. This effectively meant that lawyers at the Legal Service Offices would spend all their time on criminal matters and would have to neglect what they viewed as more important civil cases.

However, even with adequate funding, Gathercole argues that there are inherent weaknesses in the existing legal aid programs which result in inadequate access to legal services for the poor. He identifies the approach that Wexler and Fox warned against decades earlier — that of emphasizing individual case service. The "case by case" operation is, in effect, a "band aid approach" rather than a preventative attack on legal problems, and cannot be transformative, almost by definition. This problem is inherent in Judicare models, while in the legal services offices, Gathercole argues, they have been forced to emphasize and stress individual cases by funding agencies. The evaluation of a legal services office is often based on its caseload and case victories as volumes are easier to measure than more amorphous factors such as acceptance in the community, long term interests of clients, and law reform.

Gathercole lists the other well known inadequacies of Judicare: the assumption that all that the poor need is formal access to justice which ignores the real legal and social problems; the fact that most law offices are physically and psychologically inaccessible to the poor; the lack of trust in lawyers; the private bar's lack of expertise in the legal problems of the poor; and the drawbacks inherent in the method of payment which limits coverage (legal aid is not going to be awarded to recover what is considered a small amount in unpaid welfare benefits, for example).

The reforms he proposes are not presented as transformative, just necessary to ensure decent service through: staffing legal clinics and multi-purpose advice and assistance clinics, with full-time salaried lawyers; utilizing non-lawyers to provide many of the services presently considered to fall with the exclusive domain of lawyers; subsidizing the private bar to provide certain basic services; educating people working in traditional service agencies to recognize and deal with routine legal problems. He concludes that until it is accepted that fundamental changes are required in the restructuring of the provision of legal services to the poor, legal assistance to the poor will remain inadequate. "[G]reater emphasis has to be placed on long term law reform and political organizing… legislatures rather than the courts should be the focus of these efforts."[43]

Laureen Snider in *Legal Aid, Reform and the Welfare State*[44] is even more critical. She argues that legal aid has failed as a "reform", defined as "a change leading to an improvement in the life style or life chances of the disadvantaged versus the advantaged".[45] She notes that the bottom 30 per cent of society do not use the legal system to alleviate their problems but rather see it primarily in defensive terms — a system that has offered them few advantages and one to be avoided. Yet many proponents for social reform have argued and continue to that poor people need lawyers more than other groups in society because their lack of options and political power force them to endure many illegal and correctable inequities (unpaid wages, faulty consumer goods, fraudulent landlord-tenant contracts and mistreatment by landlords as examples). "The initiative to supply legal aid to the poor was premised, then, on the belief that it could provide substantive as well as formal justice."[46]

Snider remarks, "This liberal notional became a motherhood issue, and the arguments in the literature developed over how this could be achieved and how expensive it would be, not over whether it was desirable…Legal aid was fought for and evaluated by its success or failure in promoting both of these types of justice".[47]

She then develops a trenchant critique of the new legal aid programs.[48] The established legal profession was thought to be one cause, as these lawyers were "…uninterested in serving the poor, ignorant of their problems and unsympathetic to their point of view".[49] Hence efforts were made to change the attitudes of the new generation of lawyers by offering courses in poverty law and an opening up of community legal clinics that provided a broad range of services, including lobbying for law reform to educating the community about their rights. Snider asserts that these projects were unsuccessful (clinics were overcrowded, little law reform work was actually done, community control was often lost, and morale was low). Also by the mid to late 70s, the cost of the judicare models had skyrocketed, resulting in more stringent eligibility requirements and a declining number of lawyers willing to take subsidized clients. Austerity measures and "law and order" policies were pushed by those with capital power and influence and the substantive justice aims of the provision of legal services were buried.

Snider next offers an alternate theoretical perspective, where she argues that several theoretical assumptions that were originally behind the legal aid schemes were erroneous, not adequately debated and actually worked against providing access to the legal system and justice for the poor. These assumptions in point form are:

- that the political structure (elected and appointed officials at all levels of government) are responsive to pressure applied by activists, scholars, and lawyers who could then reveal and document the problems for the poor to ensure that resources are equally allocated in a just fashion.
- law in its present form preserves and extends the rights and privileges of the advantaged at the expense of the disadvantaged because of accidental, historical reasons *rather than deep-seated structural ones*.

She attributes the fact that legal aid programs have *not* altered the basic position of the poor to these false premises: "The pluralist model based on consensus theory cannot explain these failures and can only call for more money (when the reality is less money), more political pressure and yet more studies. Clearly, the problems are more deeply rooted, more structurally based, than has been recognized."[50]

Keeping in mind that legal aid was initiated to provide both substantive and formal justice, Snider lists and

describes the major failures of legal aid. In the area of criminal law, legal aid has failed to materially alter the position of the defendant. It has not produced substantive justice in the criminal system for the poor. Legal aid has not altered the conviction rate, the class composition of the defendants or increased the bargaining power of the defendant.

Snider maintains that legal reformers were attempting to change the rules of the state to the advantage of the underclass, yet the upper, ruling class(es) had a vested interest in keeping the poor under control "…in the most efficient way possible" so as not to disturb the economic order. Snider views that the state's goal in controlling two types of underclass populations: the "social junk", those who are outside the productive process, such as welfare mothers, prostitutes, alcoholics and the "social dynamite", those who may threaten the system but are potentially useful (often non-disabled males), differs accordingly when substantive justice in the criminal sphere is sought (where the "social dynamite" is controlled) from the way in which legal aid reform was organized in the civil legal aid sphere where those redundant to the social process (the "social junk") are dealt with.[51]

She astutely notes: "At the first level, in all advanced welfare states, there is bound to be a vast untapped market in areas such as the illegalities of state bureaucracies. Most employers prove to be totally unfamiliar with the enabling legislation under which they work; there has been no need since they were used to dealing with people too cowed and powerless to challenge the standard working procedures. Being invisible to outsiders, these procedures have often become considerably more repressive/coercive than the legislation — framed in public forums with legitimacy needs paramount — allows".[52] Snider argues that at this level, gaining individual victories for poor people pitted against civil servants, government officials or boards of education resulted in legal victories, and more difficulty for the bureaucracy but few gains in the actual lives and lifestyles of the poor. Furthermore, this individual gain does not change the structure of the system itself, nor underlying attitudes towards the poor and powerless groups and allows the government to claim that the underclass is now being treated in a fair manner, while cutting back on legal service funding, or reversing practices that were previously found to be illegal. While Snider acknowledges that there were some limited victories, change that would truly affect the lives of the poor were doomed to failure because this involved challenges to the very structural system of our society (our regime of private property rights for example).

Snider's critique is in some ways too broad and too instrumental (although she struggled to avoid simple Marxist instrumentality), but she accurately identified two fundamental and ongoing issues. First, a well funded and 'staffed' criminal legal aid system, in Ontario for example (the best funded) has *not* changed the criminal justice system in ways that either reduce crime or reduce the targeting of poor and marginal youth. Indeed, initiatives such as the movement for restorative justice, which arose *outside* of the traditional criminal justice system have the most potential in that regard. Second, the transformative potential claimed for civil legal aid in the 1960s and 1970s has not been realized either, as clinics struggle with huge case loads and in the main are able to pay mere lip service to the ideal of law reform and community development. Even the law school based programs suffered. The groundbreaking clinic at Dalhousie was defunded in the early 1990s and others failed (only Parkdale survived essentially intact).

These issues are also addressed by Mary Jane Mossman at about the same time in *Legal Services and Community Development: Competing or Compatible Activities.*[53] She frames the question in order to explore why community legal clinics in Ontario have directed a greater amount of time, energy and resources to the "legal and paralegal services" part of their section 148(2) mandate under the Regulations of the *Legal Aid Act*, compared to the "promoting the community's welfare" component of their mandate.[54] She gives two reasons:

1) Misunderstanding on the part of lawyers and others about legal services and community development, and a tendency to think that they are totally separate; and,
2) Difficulties inherent in the community clinic context in fulfilling the legal service mandate of community development.

She then outlines three reasons why the legal service mandate of community development has been difficult to fulfill, namely — the failure of clinics to appreciate their historical roots and a perception of their own role in access to justice for the poor in Ontario, the failure to recognize and take into account the legal and political context in which the community clinic model of legal aid services exists, and the structural and human resource challenges faced by the community legal clinic. These issues are complex and responses to them need to be better incorporated into an overarching strategy, so that the clinic lawyers and Community Legal Workers work for the integrated mandate of providing *both* individual case assistance *and* community work. Mossman also argues that clinic Boards of

Directors should be strengthened in order for them to both be able and be seen as accountable for clinic activities including community development. As community development becomes more successful [and more noticeable] the Board must also be capable of withstanding potential criticism from a variety of sources: the Law Society, the provincial government and segments of their own geographical community. She concludes that community legal clinics can fulfill their mandate of providing legal services while devoting a more balanced amount of time to "promoting the legal welfare of the community" (as is their defined mandate under the *Legal Aid Act Regulations*). But to do so, it is crucial that they understand the context surrounding such efforts so that their initiatives in promoting community development are truly effective.

In the same period, in a US context, Rand Rosenblatt wrote a case study of the strategy to "legalize" welfare benefits that continues to have considerable value to the current project of revitalizing legal aid.[55] He begins by noting (as others have) that the lawyers and law students who entered the profession in the 1960s (and indeed the 1970s) were both radical and optimistic (they believed that law could and should alter unequal power relations — that it could be transformative). He then uses critical legal theory to examine the legalization strategy and its weaknesses, particularly in the ways that it changed the relationship of recipients to the welfare bureaucracy, and failed to address fundamental issues about work and the isolation of the poorest from other social classes. He then sets out the reasoning and the context for a strategy to transform welfare into a right bounded by the rule of law and both substantive and formal equality. His analysis of the history of approaches to welfare (as charity) and a jurisprudence that drew sharp distinctions between the small "public" or "political" sphere, which was subject to rule of law (and concepts like equality), and the large "private" or "social" sphere which sustained "natural" distinctions based on gender, class and race and thus was "free" from judicial regulation is both instructive and prophetic.[56] It is clear why then (and now once again) a strategy to cloak welfare with legalized safeguards was an attractive strategy.

However, Rosenblatt, while recognizing the short-term benefits of a legalization strategy, offers a powerful critique of its limitations, setting out four substantial ways by which legalization operates to undermine the interests of welfare recipients. First, because welfare is unpopular, welfare rights case victories generate (and in the contemporary context, serve) a political backlash against both recipients and "overly generous" benefits.[57] Second, reforms associated with legalization, such as restrictions on caseworker discretion, have "routinized" and undermined caseworker-client relationships in ways that make alliances between them (arguably essential to substantive reform) increasingly unlikely.[58] Rosenblatt's third point is particularly powerful. He points out that achieving the forms of procedural due process is a hollow victory as most adverse decisions are never appealed and even when they are appealed, they have little or no impact on the day to day practices of welfare bureaucracies.[59] Finally, he returns to one of his starting premises, that no legal victory can address the failure to implement a full employment policy or change the decision to ensure that welfare is harsh enough to serve as an incentive to low-wage work.[60]

Rosenblatt's important case study provides an important counter-point to another avenue of criticism and response that emerged around this time, and that is a movement toward 'specialty' legal aid offices and services. In Ontario, for example, race and culture specific clinics opened as well as offices devoted to subject areas. Diana Pearce's 1985 article *Welfare is not for Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty*,[61] exemplifies an analytical approach that (finally) recognizes that "the poor" are not a monolith and that "poverty law" as a generality cannot possibly be effective in response to the very specific issues facing women, youth, and cultural minorities. She argues that, "the trend toward the "feminization of poverty" has profoundly altered the needs, legal and otherwise, of today's poor, as well as the nature of advocacy required to meet these needs".[62]

She organizes her study into three topics:

1) The nature of and trend toward the feminization of poverty;
2) A contrast of the nature of women's poverty with the nature of U.S. anti-poverty programs, with emphasis on the ways in which the fundamental assumptions behind welfare are "at best inappropriate and at worst institutionalize women's poverty";[63] and,
3) An outline of the advocacy needs of women in poverty with suggestions for a model of how to meet those needs.

Her first point, that women's poverty is fundamentally different from that experienced by men and that women are subject to programs designed for poor men, is a key insight that has significance for all legal aid programs. "Poor women find that these programs are not only inadequate and inappropriate, but also lock them into a life of poverty."[64]

Pearce describes the distinction in welfare programmes between the needs of the "deserving poor" and the "undeserving poor".[65] Women and minorities are found disproportionately in the second grouping. Concerning these programmes, which are based on the "Male Pauper" model, she contends that:

> "[t]his model operates on a simple set of principles: most of the poor are poor because they do not work, and most of the poor are able-bodied and could work, therefore, the solution to poverty according to the male Pauper model is to "put 'em to work". Unlike unemployment compensation [an example of the primary sector of welfare entitlement for the "deserving poor"', there is little concern for the quality of the job, even its monetary return, or for matching worker skills to jobs with appropriate requirements. Rather, any job will do. When applied to women…the result is less than positive. First… having a job is, ipso facto, a less certain route out of poverty for women than for men. Second, income from earnings only partially alleviates her poverty. A woman's responsibility for children and/or other dependents results in economic and emotional burdens requiring additional income and fringe benefits for child care and health insurance and flexible or part-time work arrangements that are not available with most jobs."[66]

She continues; "[t]he dual welfare system in not only inherently discriminatory against women, but also operates to reinforce her disadvantaged status in the labour market".[67]

Section V sets out the case on the role that legal services have played in helping, or more usually, failing to help, to combat women's poverty. The example of the multi-faceted problems poor women face in relation to their housing illustrates that traditional legal representation (i.e., contesting an eviction notice) is a very limited tool for tackling the many aspects of women's poverty, such as isolation, responsibility for child care, and reduced opportunities for well paid work.

In section VI, she outlines the kind of advocacy model that should be developed to deal with women's poverty. The approach would draw on the lessons of the civil rights movement, and the fight for anti-discrimination policies and programs, because such movements understood that these problems are systemic, institutionalized and pervasive. "Like the civil rights aspect of the War on Poverty, a war on women's poverty must have as its underlying premise that gender discrimination is at the core of women's poverty."[68]

She lays down some basic principles, drawn from the material reality of women's lives. Lawyers working with poor women must understand how the structure of various government programs is not only ill-suited to alleviate women's poverty but are actually discriminatory against women (example of workfare/job training programs without adequate day care). Advocates must develop a comprehensive understanding of the dynamics of women's poverty, and Pearce warns that "[i]t cannot be assumed that advocates for women will adequately represent the needs of poor women, nor that advocates for the poor will adequately represent the needs for poor women".[69] In order to develop an agenda with this underlying premise in mind and at the same time empower the poor to organize around women's issues, this movement must develop specific and achievable goals and attempt to achieve these goals by collective, usually political action.

2.4 Legal Aid Today: The 'Old' is 'New' Again

There has been a resurgence of scholarship about legal aid and its potential in recent years, as government spending has resumed in small ways at least and a sense of concern about the social devastation left by restructuring is being felt in policy setting circles. In Ontario, for example, Osgoode Hall Law Professor John McCamus conducted a significant review which generated considerable research,[70] a pattern repeated in most provinces[71] at the federal level,[72] and in the United States.[73] However, Doug Ewart's piece for the McCamus review,[74] "Hard Caps; Hard Choices: A Systemic Model For Legal Aid" is one of the most important.

Ewart, writing in the context of budget cuts, constraint, and neo-liberal politics, suggests that framing the issues facing legal aid as the debate over what model is most cost effective: staff lawyer versus judicare versus *pro bono* models, is long over. Instead, he suggests that in a time of budgetary restraint,[75] legal aid needs to be redesigned "from the ground up" and offers five principles (at least two of which have real transformative potential) as guidance:

The first principle is that legal aid be funded and understood to be an integral part of the whole justice system: This suggested principle is the most radical of the five, and has real potential for bringing about progressive change. In criminal legal aid, for example, the cost of defence would be a line in a global budget that included investigations, prosecution and corrections. Savings in one area would be of use in others.[76] There are potentially other, even more significant, implications for such an approach. The cost, for example, of a

wrongful conviction would be borne by all of the participants in the prosecution process — and not just the hapless defendant. The use of the most costly sanction — imprisonment — would have to be justified against the overall budget. The police practice of overcharging in order to increase the number of paid overtime days in court would be exposed and managed more effectively. The potential is obvious. Ewart's vison for civil and administrative services are limited to reforming the ways that civil disputes are resolved so that they become more "user friendly" and attentive to access to justice issues.[77] However, much more could be done, for example, by global budgeting adequate access to justice services into the costs of health, education and social services.

Principles two and three (a "deep appreciation of systemic bias", and, a "systemic approach to the choice of cases"[78]) set out what is in effect a revitalized statement of the need for a politically based case selection criterion, what Paul Tremblay and others refer to as "triage".[79]

The fourth principle refines the first three, by arguing that legal aid as a whole should represent a "systemic approach to delivering services" so that savings in the criminal field because bail is dealt with more effectively and economically can translate into strategic choices in regard to family law matters, for example.[80]

Finally, the fifth principle ("making the most effective use of skills") argues persuasively for an integrated, or "seamless" approach to the provision of services, utilizing a team approach which might include interpreters, social workers, health careworkers, community organizers as well as lawyers and legal workers.[81] Once again, Ewart uses criminal legal aid as his example, but the experience of clinics like Parkdale demonstrate how effective an integrated approach is in civil and administrative legal aid matters. Indeed, but for the idea of including the cost of access to justice as part of the cost of the legal and social justice apparatus generally, Ewart is setting out a model of a community legal clinic that is very like the ideal Parkdale has set for itself from its inception.

3.0 The Neighbourhood Law Office in Practice: Parkdale Community Legal Services

The literature describes and promotes competing visions for the delivery of civil legal services to low income individuals and communities. Most write from the perspective of how those services should be provided and paid for, and range from those that decry the role of law and lawyers and envision a revolution of the poor, to those that frame the debate inside law, as one between staff lawyers and fee for service, to positions that combine both to varying degrees. The picture shifts somewhat, however, if one simply asks what people using legal aid services want. Paradoxically, the most "radical" position, the influential analysis offered by Edgar and Jean Cahn,[82] is essentially the most conservative, from a prospective client's point of view. It is also a perspective very much rooted in the American experience. The Cahn's proposal for the use of neighbourhood courts and poor centred practices is actually static rather than transformative from an individual client's perspective, and is premised on the presence of an enduring underclass, joined in mutual self interest by their poverty and social location. However, poor people do not want to stay poor, do not want to identify as poor and most importantly, are not a monolith, particularly in Canada. For example, immigrants may be poor when they arrive, but they have immigrated to improve themselves. They want to assimilate to a more affluent position and move out of their poor "neighbourhood", not stay behind to revolutionize it. In contrast, the bleak critique offered by Laureen Snider,[83] although not entirely successful, its general damnation of legal aid offers a more transformative vision, if not of society, then for the poor themselves. For example, it is transformative, for the next generation at least, to acquire better health, housing and education. That means ensuring that the techniques that secure better health, housing and education are developed and applied, and that the sense that it is possible to hold the State accountable, and to move 'out' of poverty is nourished.

It is this optimistic vision that animates the "neighbourhood" law office model, and has been functioning and indeed flourishing at Parkdale Community Legal Services. This vision offers a means to hold legal services accountable and to measure outcomes in a way that might encourage government to replicate the Parkdale "model" across the country. In essence, this is the model that Doug Ewart envisions as a way to accommodate both budget restraint and *effective* (as contrasted with token, and simply legitimating) legal aid services.

3.1 Parkdale: The Community and the Clinic

The Toronto community of Parkdale became home to a unique project of Osgoode Hall, Law School of York University and the Ontario Legal Aid Plan — Parkdale Community Legal Services (the "Clinic") in 1971. The description of the community provided in a funding application to the federal Department of Health and Welfare in 1972 is remarkably applicable almost 30 years later, a testament to the tenacity of poverty:

The community law office's catchment area is defined as Bloor Street on the north, Lake Ontario on the south, Dufferin Street on the east and High Park on the west. Parkdale was a well-to-do neighbourhood during the 1920s. The large three storey detached houses south of Queen Street were then well-maintained single family homes. But time, the Gardiner Expressway and land speculation have changed the appearance and composition of the community.

Today, the majority of large homes are rooming houses with often as many as fourteen unrelated people living under one roof. The two movie theatres have long been empty and the only businesses still doing well are the three major beer parlours. Parkdale has remained a predominantly English speaking community being the major receiving area for Maritimers arriving in Toronto. There is a scattering of middle European groups including immigrants from Germany, Ukraine, Czechoslovakia and Poland. In the area of Dufferin and Dundas Street and to the east are a number of Italians and Portuguese. The Atlantic Centre, situated also on Queen Street West, offering social assistance to the Maritimers, estimates that about 15% of the Parkdale population is made up of East coast migrants. In the high rise apartment of Jameson Avenue, there is a concentration of West Indians. However, most of the Parkdale community can be described as white, English speaking and poor.

Parkdale is unstable in the sense that many transients move about, but apparently they move within the boundaries of Parkdale and not out of the area completely. Welfare workers tend to trade files within the area and seldom transfer cases to a new district. The seven welfare workers average approximately 150 cases each. This total of course does not include those residents receiving unemployment, Worker's Compensation or Family Benefits.

The Ontario Housing Corporation is beginning to make its presence felt in Parkdale. It is presently erecting a 348 family unit approximately one block from the community law office. We have also been informed that several other Ontario Housing Corporation buildings are planned for the immediate vicinity. Additional institutional housing in Parkdale includes approximately fifteen half-way houses, for individuals recently-released from mental institutions or prisons. There are also several nursing homes and an emergency housing unit.

Despite its name, Parkdale is a community without parks. There are virtually no recreational facilities for teenagers. The rate of glue-sniffing and drug use among the young of Parkdale is very high as are the crime and prostitution rates. It is estimated that 70% of the homes in the community are divided into rooming houses or flats with considerable sub-standard housing. The presence of municipal housing inspectors in the area is too little or to no avail. Parkdale itself provides little employment which makes it primarily a dormitory community. The lack of any casual employment in the area tends to evidence itself in the number of people who appear to be “hanging around” on the street and other public places.[84]

There have been considerable changes in the population of Parkdale since 1971. It is no longer predominantly English speaking for example, as Parkdale has become a first stop for refugees from all over the world — Vietnamese, Chinese, Tamil and African, Somali and other East Africans followed Central and South Americans. However, even though Parkdale has become more ethnically heterogenous, little else has changed. The average income is significantly lower than that of Metropolitan Toronto as a whole. Much of the housing stock is low income and in poor repair. The largest mental hospital in the Province is located in Parkdale, as is the highest concentration of group homes and rooming houses in the city [85] as a core population, identified by their status as psychiatric survivors, substance abuse and conflict with the law continue to call Parkdale home.

All these folks want “up and out” of poverty. Many succeed and it is important to replicate and support the reasons for their success. Many do not and the reasons must be found. All have different experiences of law, the legal system and of poverty. Gender, age, race, culture, mental health and history with the criminal justice system generate very different relationships with law, lawyers, poverty and the state. A poverty law model that fails to account for these differences is wrong. A poverty law model that assumes lack of mobility is wrong. One that assumes “the poor are not like you and I” is wrong. One that patronizes the poor is wrong. And finally, one that assumes or claims that law is the engine of social change is wrong. It is transformative to protect rights, to defend gains, to build alliances and to allow people to move on to make their own political choices. Ultimately it is transformative to be humble and to remember what it might be like if no one spoke on behalf of those who would otherwise have no voice at all.

The “Clinic” that was ultimately established in Parkdale attempts to be that voice, to offer those options. It is mandated by its joint funders, the Ontario Legal Aid Plan and Osgoode Hall Law School to address the legal needs of the low income residents of this community and required by its statement of Goals and Objectives to:

1) Establish, maintain and operate a community legal clinic within and for the benefit of the Parkdale community in Toronto, Ontario, and in connection with this and subject to the applicable laws of Ontario from time to time, to provide advice, assistance, representation, education and research to both individuals and groups, and to organize, carry on and participate in such other activities as may from time to time seem expedient for the benefit of the Parkdale community.
2) In the course of providing services as aforesaid, to participate with a university school of law in the education and training of students of law.[86]

This mandate has given the Clinic the opportunity to provide innovative, community controlled legal services to Parkdale residents for almost 30 years; service with an equal focus on law reform, organizing, and case work. Originally very much a product of the “Just Society” movement of the 1970s (and the American “War on Poverty”) the Clinic has been committed to grass roots organizing, coalition building, and law reform since its inception.[87] The Parkdale “model” combines case work, community education and development, legal education and lobbying, and law reform in a resilient and enduring whole. The Clinic concentrates this focus in four subject area “groups” jointly directed by a team composed of a lawyer and at least one community legal worker and “staffed” by five law students (who spend at least an entire law school semester and often one or even two summers working full time at the Clinic). Those subject areas, “Family and Welfare”; “Housing”; “Workers Rights”; and “Immigration and Refugee” law also cover a range of subsidiary issues such as police misconduct; psychiatric survivor rights, witness assistance for

victims of wife abuse; and anti-racism initiatives, to name a few. The Clinic also trains two articling students per year and employs a range of cultural interpreters on a part time basis along with the usual support staff. It is managed and directed by co-directors (one, the "academic director" is a member of the faculty of Osgoode Hall Law School) who report to a Board of Directors comprised of community members (a majority) and representatives of the Law School, the Clinic staff, the students and the legal community. Unlike the pattern at almost all other community clinics (in Ontario at least) the community legal workers (originally known as "lay advocates") do *not* do individual case work, but rather devote their time to community development and education and to training the law students in those skills. The law students in fact do the bulk of the case work, but are also required to participate in at least one community project and to write a significant research paper on an issue of importance to the Clinic in order to complete the academic requirements of their semester.

3.2 The Immigration and Refugee Law Division: A Case Study

Parkdale has always assisted immigrants and refugees but only created a division devoted solely to Immigration and Refugee issues in 1989. From its inception, the "Immigration Group" made good use of the "Parkdale Model" and developed what they called an "integrated approach" to immigration issues, combining case work, community development and coalition building into highly effective whole.[88] Along with very effective community development initiatives, the group does some of the most sophisticated litigation in the Clinic; for example, representing interveners at the Supreme Court of Canada.[89]

A current issue demonstrates the approach. Restructuring is an amalgam of neo-liberal and neo-conservative practices and beliefs which have combined to legitimate particularly harsh measures against certain marginalized groups — welfare mom's, undocumented workers, refugees.[90] None are as cruel (or shortsighted) as the initiative which started in California and spread to other states with a perceived problem with illegal aliens, as the denial of health and welfare assistance to both undocumented workers *and* their US born children.[91] The factually false but politically seductive claim is made that "illegal aliens" are "abusing the system" and costing hard pressed taxpayer's money with their profligate abuse of health and social services. The "solution" is to deny those services not only to the adults without documentation, but also their children who should have birthright citizenship.[92] This troubling idea has come to Canada — and to Parkdale. Canadian-born children are being denied health coverage in Ontario because of their parents' (irregular/undocumented) immigration status. The children, citizens by birthright, have been denied OHIP coverage with the sometimes tragic result that the children fail to receive necessary health services.

The Clinic's response provides an excellent "case study" of the way that the "Parkdale model" works in regard to a concrete issue.[93] As these cases began to come in to the Clinic, as a first step, a student undertook to research the issue as part of his academic obligations. That research formed the basis for the legal work being done on this, and the related issue resolved earlier, concerning school admission for these children.[94] The next step, being directed by the community legal worker, is to pursue the issue through organizing education and lobbying (examples of the posters and flyers are in the attached Appendices). A campaign of public legal education aimed first at the professional and expert community of health care practitioners, and organized immigrant assistance associations through a series of workshops designed to identify issues and develop joint strategies comes first. More focused roundtable discussions are planned to follow which may be videotaped and shared broadly. Subsequent steps are designed to reach out to the affected families. This work requires more innovative techniques given the vulnerable position and legitimate fears these families experience. Colourful posters, translated into the languages of Parkdale, street theatre presentations, and dramatized case studies are planned.

Test case and political lobbying may follow, if the issue does not resolve. It is important to note, however, that a test case, or *Charter* challenge is not the *first* step. This kind of litigation is difficult to win and very costly on many levels.[95] Most importantly, however, it has little chance of success without a scrupulously documented factual foundation.[96] That foundation can only be constructed with the active cooperation of the families and the professionals affected.

This approach includes all of the elements advocated by Doug Ewart,[97] except that neither the health care system, the child welfare system, nor the immigration and refugee regime have incorporated solutions, or mechanisms to find solutions, to the issue at any of its levels. However, the literature is full of the long term *failure* of "legalization" strategies.[98] The long term success of community based strategies has also been

questioned.[99] How then can one assess the efficacy of this approach in improving people's life chances? How does one measure its impact?

3.3 'Seamless' Services and Measured Outcomes

First, this, or any other, approach must be "self conscious" and accountable to an internal set of standards of expectations derived from theory and experience. This type of accountability would assess a particular initiative against goals and standards established in advance. Second, one would look for an external measure, a way to answer Snider's challenge for a successful reform — have lives and life chances been improved?[100]

The health of populations — individuals, their families and communities — reflects a host of subtly interacting variables — social, political, economic, legal, cultural and historical, as well as biomedical. Of these poverty, and as a function of poverty, access to justice, has long been recognized by Health Canada and others as one of the most important. The stubborn persistence of a significant "health gap" between those living in poverty and those better off economically despite the existence of public health insurance has been well documented and continues to the present time (National Council on Welfare).[101] The inverse is also true. That is, *health*, provides a useful measure of the impact and value of the way that justice is accessed. Indeed, the predecessor to Health Canada, the Department of Health and Welfare, provided the initial funding for Parkdale Community Legal Services in recognition of that relationship.[102]

Health is an aspect of the human condition that we have learned to measure. Although one would never utilize a blind study or other similar measure with the lives of children at stake, comparisons and comparative data are readily available. What, for example, are the costs to individuals and to society when the health of some is sacrificed? That answer is well known — we all suffer.[103] The "health" approach is an obvious one when it is health benefits that are at issue. However assessing the effectiveness of other strategies — from housing to consumer rights to social assistance in terms of the short and long term impacts on health has much to commend it. In any event, at a minimum one would look for the following standards for "seamless" services:

Projects must:

1) locate and identify the relevant partners (both clients and agencies);
2) set goals and a timetable;
3) make regular progress reports and have points when strategy revision (internally and externally) is considered and decided;
4) train and incorporate new students into the project each semester.

Each initiative needs to include:

1) a strategy for building bridges and alliances with more influential groups — identifying who and how to reach them;
2) a media strategy;
3) a lobbying strategy;
4) a litigation strategy — which needs to have an eye to the solicitor work, the initial litigation, and an appeal strategy including interveners.

Each strategy should include a role for academics and those who will "keep a record"; clients; other community partners as well as students, Community Legal Workers and lawyers (both solicitors and barristers). And, finally, each strategy would be held to the standard of whether or not it improved the life and life chances, and thus the health, of the individual, family and community in question.

4.0 Conclusion

The "seamless" approach to the delivery of legal services assumes that the object of the exercise is problem solving and life enhancement for individuals and communities. That approach assumes that poor people should have access to skilled, competent lawyers who can solve their problems. However, it also understands that many problems arise from particular locations and instances of oppression, inequity and injustice and that solutions will be difficult and ephemeral. Because that is so, a seamless approach includes coalition building, consciousness raising and education and personal support along with and frequently instead of litigation or advocacy. Parkdale Community Legal Services has been practising in this way for thirty years, often without any funding at all allocated to community work. It can do so because of free student labour. Thus, a final question for any pilot project would be to determine the role the students play, who or what might fill that role in Clinics without students, and at what cost. Finally, the need for a director of community development position alongside the director of legal services that every Clinic now has should be explored. The administration of complex, long term, transparent and effective community projects is every bit as demanding as administering the delivery of legal services. It may well be time to recognize that fact administratively.

Endnotes

[1] Daniel Drache & Andrew Ranachan, eds., *Warm Heart, Cold Country: Fiscal and Social Policy Reform in Canada* (Ottawa: Co-published by the Caledon Institute of Social Policy, Ottawa and the Robarts Centre for Canadian Studies, York University, 1995); Jacqueline S. Ismael & Yves Vaillancourt, eds., *Privatization and provincial social services in Canada: policy, administration and service delivery* (Edmonton, University of Alberta Press, 1988); H. McKenzie & V. Shalla, *Poverty in Canada* (Parliamentary research Branch, 1988, revised 1994).

[2] The most trenchant criticisms have come from critical scholars. See: D. Laureen Snider, "Legal Aid, Reform, and the Welfare State", *The Social Basis of Law: Critical Readings in the Sociology of Law*, Toronto, Garamond Press, 1986, and Rand E. Rosenblatt, "Legal Entitlement and Welfare Benefits," in D. Kairys, ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon, 1982) 262.

[3] That the "War on Poverty" was the "source" is a matter of common understanding amongst legal aid and poverty law activists, critics and scholars. For example, see: Ruth Margaret Buchanan, "Context, Continuity, And Difference in Poverty Law Scholarship", 48 *University of Miami Law Review 999–1061* (1994); Ingrid V. Eagly, "Community Education: Creating a New Vision of Legal Services Practice" 4 *Clinical Law Review* 433–484 (1998); Marc Feldman, "Political Lessons: Legal Services For The Poor" 83 *Georgetown Law Journal* 1529–1632 (1995); Allen Redlich, "A New Legal Services Agenda" 57 *Albany Law Review* 169–86 (1993); Paul R. Tremblay, "Acting "A Very Moral Type of God": Triage Among Poor Clients", 67 *Fordham Law Review* 2475–2532 (1999).

[4] In Canada projects like Osgoode Hall Law School's Intensive Programme on Poverty Law led to the formation of community based legal clinics such has Parkdale Community Legal Services. The history, and approach to poverty and poverty law developed by Parkdale Community Legal Services is set out in Part III *Infra*. Much of it may be found in a 1997 *Osgoode Hall Law Journal* Special edition: "Parkdale Community Legal Services: Twenty-Five Years of Poverty Law". In particular, see: Shelley A.M. Gavigan, "Twenty-Five Years of Dynamic Tension: The Parkdale Community Legal Services Experience", (1997) 35 *Osgoode Hall Law Journal* 443–474; Frederick H. Zemans, "The Dream is Still Alive: Twenty-five Years of Parkdale Community Legal Services and the Osgoode Hall Law School Intensive Program in Poverty Law"(1997) 35 *Osgoode Hall Law Journal* 499–534.

[5] Two other law school based clinics were funded by the Department of Health and the Ford Foundation with Parkdale in 1971, at Dalhousie (where the Clinic still operates although on a reduced basis) and at the University of Saskatchewan (where the Clinic ceased to operate more than ten years ago), Zemans, "The Dream", *Ibid.* Note 4 at Note 15 and text.

[6] For an excellent description of the way these limits effected legal services see Eagley, "Community Education" and Buchanan "Context", *Supra* Note 3.

[7] The challenge and the conflicts are both captured well in Michael Blazer, "The Community Legal Clinic Movement in Ontario: Practice and Theory, Means and Ends" (1990) 7 *Journal of Law and Social Policy* 49–72.

[8] This is the issue that plagues the "case selection criterion" or "triage" debate. See Tremblay "Triage" *Supra* Note 3; but see: Justine A. Dunlap, "I Don't Want to Play God — a Response to Professor Tremblay" 67 *Fordham Law Review* 2601–2616 (1999).

[9] Many have noted this tendency in one way or another. None have documented it so thoroughly as Richard Abel in his massive study of legal aid throughout the industrialized world: Richard L. Abel, "Law Without Politics: Legal Aid Under Advanced Capitalism" 32 *UCLA Law Review* 474–621(1985) at 575–576; and *Supra* Note 3.

[10] Both in Canada and throughout the industrial world, the failures and the challenges facing legal aid have been attracting substantial interests from scholars, activists, and policy makers alike. For example see *Supra* Note 3, and, Mary Jane Mossman, "From Crisis to Reform: Legal Aid Policy-making in The 1990's", (1998) 16 *Windsor Yearbook of Access to Justice* 261–270; Mitchell A. Kamin, "Review: *Rebellious Lawyering: One Chicano's Vision of Progressive Legal Practice*. Gerald P. Lopez. Boulder: Westview Press, 1992" 28 *Harvard Civil Rights-Civil Liberties Law Review* 237–243 (1993); Erhard Blankenburg, "Private Insurance And The Historical "Waves" of Legal Aid", (1993) 13 *Windsor Yearbook of Access to Justice* — 185–201; Albert Klijn, "Dutch Legal Services Quality Incentives: The Allegedly "Perverse" Effects of the 1994 Legal Aid Act" (2000) 33 *University of British Columbia Law Review* 433–446; David J. McQuoid-Mason, "The Delivery of Civil Legal Aid Services in South Africa", 24 *Fordham International Law Journal* 111–142 (2000); Anne Opie and Dave Smith, "Needs Assessments: Knowing Disadvantaged Communities in Aotearoa/New Zealand" (2000) 33 *University of British Columbia Law Review* 405–431; Roger Smith, "Clinics in a Cold Climate: Community Law Centres in England and Wales" (1997) 35 *Osgoode Hall Law Journal*. However, the most trenchant criticisms have come from critical scholars. See: Snider, "Legal Aid" *Supra* Note 2; Abel, "Law Without Politics" *Supra* Note 9; and Marc Feldman, "Political Lessons"*Supra* Note 3.

[11] Douglas J. Ewart, "Hard Caps; Hard Choices: A Systemic Model For Legal Aid" *A New Legal Aid Plan for Ontario* (Toronto: Queen's Park Printer, 1997).

[12] Eagly, "Community Education: *Supra* Note 3.

[13] The ideal of a politically informed case selection criterion is best promoted by Paul Tremblay who refers to it as "triage": Tremblay, "Triage" *Supra* Note 3; but see: Dunlap, "a Response" *Supra* Note 8. The concept has been evolving to encompass both a "community as client" analysis : Robin S. Golden, "Toward a Model of Community Representation For Legal Assistance Lawyering: Examining The Role of Legal Assistance Agencies in Drug-related Evictions From Public Housing" 17 *Yale Law and Policy Review* 527–561 (1998), to the development of specialized skills and approaches: Peter Margulies, "Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence For The Impact Litigation/client Service Debate" 3 *Michigan Journal of Gender & Law* 493–514 (1996), and Jessica A. Rose, "Rebellious or Regnant: Police Brutality Lawyering in New York City" 28 *Fordham Urban Law Journal* 619–665 (2000). Parkdale has been targeting these issues for many years; see: Dianne L. Martin, "Organizing for Change: A Community Law Response to Police Misconduct", *Hastings Women's Law Journal*, 4 (1993): 131–74; Dianne L. Martin & Janet Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-criminalization of Wife Assault", *Canadian Journal of Women and the Law*, 8 (1995): 8–44; and Dianne L. Martin & Ray Kuszelewski, "The Perils of Poverty: Prostitutes Rights, Police Misconduct and Poverty Law, *Osgoode Hall Law Journal*, 35 (1997): 835–63.

[14] See Chapter 3.0, *Infra*, for a full description of the Parkdale Model.

[15] This is, in effect, the position of Alan W. Houseman, who responded critically to Feldman's call for an entirely "new" (and to him more "radical") approach: Feldman, "Political Lessons" *Supra* Note 3. Alan W. Houseman "Political Lessons: Legal Services For The Poor — a Commentary", 83 *Georgetown Law Journal* 1669–1709 (1995).

[16] Therefore Chapter 4.0 of the paper will consider legal issues affecting immigrant and refugee families, and in particular, children, as a topic worthy of federal concern and federal resources.

[17] Mary Jane Mossman noted the absurdity of limiting the federal share of civil legal aid to matters within federal competency in: Mary Jane Mossman, *Civil Legal Aid Services in Canada: Policy Options* (Ottawa: Department of Justice of Canada, 1990).

[18] Cahn & Cahn, "War on Poverty" *Supra* Note 3.

[19] Cahn & Cahn, *Ibid.*, p. 1320.

[20] *Ibid.*, p. 1329.

[21] *Ibid.*, p. 1330.

[22] *Ibid.*, pp. 1336–1344.

[23] Edgar S. Cahn & Jean C. Cahn, "What Price Justice: The Civilian Perspective Revisited," *Notre Dame Lawyer*, Vol. 41: 927 (1965–66). A similar, although less politically explicit view was offered by Kenneth A. Pye in "The Role of Legal Services in the Anti poverty Program," *Law & Contemporary Problems*, Vol. 31: 211 (1966). Pye concludes that traditional legal services overwhelms political organizing, but is less concerned about it.

[24] Harvard Law Review. "Neighborhood Law Offices: The New Wave in Legal Services for the Poor" Vol. 80: 805 (1967).

[25] Stephen Wexler, "Practicing Law for Poor People" *The Yale Law Journal* 79 (1970) 1049–1067.

[26] Wexler, "Practicing Law" pp. 1049–1053.

[27] *Ibid.*, pp. 1054–1055; and see Tremblay, "Triage" *Supra* Note 8.

[28] Wexler, *Ibid.*, pp. 1055–1056.

[29] The proposition that the purpose of practicing law for poor people is to end poverty, rather than simply provide services to poor clients was developed into ten "rules" by Michael Fox in "Some Rules for Community Lawyers," (1980) *Clearinghouse Review* 1. This is, in effect, what Doug Ewart argued recently, *Supra* Note 11.

[30] John D, Honsberger. "The Ontario Legal Aid Plan" *McGill Law Journal*, Vol. 15, No. 3: 436.

[31] *Ibid.*, p. 440.

[32] Larry Taman & Frederick H. Zemans, "The Future of Legal Services in Canada," *Canadian Bar Review*, Vol. 53: 32 (1973).

[33] *Ibid.*, pp. 33–34.

[34] *Ibid.*, 34.

[35] National Council of Welfare (by Larry Taman), *The Legal Services Controversy: An Examination of the Evidence* (Ottawa, September, 1971).

[36] Parkdale Community Legal Services, "Brief to the Task Force on Legal Aid," April 26, 1974 (in *Community Legal Services in Perspective*); Parkdale Community Legal Services, "A Report from Parkdale Community Legal Services," *Canadian Community Law Journal*, Vol. 3 (1979).

[37] For an excellent description of this process see Eagley, "Community Education" and Buchanan "Context", *Supra* Note 3.

[38] In Canada, just in time for an entrenched *Charter of Rights and Freedoms*, in the United States, in response to the new conservatism.

[39] R. J. Gathercole, "Legal Services and the Poor," in Robert G. Evans & Michael J. Trebilcock, eds., *Lawyers and the Consumer Interest: Regulating the Market for Legal Services.* (Toronto: Butterworths, 1982).

[40] Gathercole "Legal Services" pp. 408–409.

[41] *Ibid.*, p. 409.

[42] *Ibid.*, pp. 410–411.

[43] *Ibid.*, p. 426.

[44] Snider, "Legal Aid", *Supra* Note 2.

[45] *Ibid.*, p. 169.

[46] Formal justice is achieved after each party has had an equal opportunity to tell their story to a judge and be heard in accordance with the legal norms of due process. Substantive justice, however, rests on the idea that the legal system is inequitable, structurally biased against the poor and the powerless. Legal reform to achieve substantive justice would aid in changing discriminatory laws which maintain these inequitable conditions. *Ibid.*, p. 170.

[47] *Ibid.*, p. 171.

[48] She sets out the history which led to the development of the neighbourhood legal clinic considered by reformers as the best vehicle to accomplish substantive justice and thus the dominant model to deliver in civil law in the United States (and frequently criminal law as well), while a judicare model (private lawyers chosen by the client and paid by the state) became predominant in several Canadian provinces, and usually covered both criminal and civil matters, in the traditional legal sense.

[49] Snider *Ibid.*, p. 171.

[50] *Ibid.,* p. 174.

[51] *Ibid.*, p. 181–182.

[52] *Ibid.*, p. 184.

[53] Mary Jane Mossman, "Legal Services and Community Development: Competing or Compatible Activities," (1984) (in vol. 2 Martin PCLS 1990–91 material).

[54] This is essentially the case-work, individualized, formal justice aspect of the clinic versus the law reform, community action, substantive justice aspect of the provision of legal services for the community. This tension was identified in the early theory and literature regarding the community legal clinic model and the apportionment of time and resources towards each has since become a balancing act and debate of community legal clinics in practice.

[55] Rosenblatt, "Legal Entitlement" *Supra* Note 2.

[56] The sharp parallels with the arguments of neo-liberals promoting welfare 'reform' are a reminder that there are very few new ideas. Rosenblatt, "Legal Entitlement" *Ibid.*, pp. 265–267.

[57] *Ibid.*, p. 273.

[58] *Ibid.*

[59] *Ibid.*, pp. 273–274.

[60] *Ibid.*, pp. 274, 263.

[61] Diana Pearce, "Welfare is not *for* Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty," (1985) *Clearinghouse Review* 412.

[62] Pearce was one of the first to write about the phenomenon that gender has become a determinant of poverty and that this feature is escalating it has become the "feminization" of poverty. She

analyzes the circumstance of single-person heads of household who are women, and points out that it is not the lack of two adults that is associated with higher rates of poverty but the fact that it is a woman alone, attempting to run a family on her own, that is so highly correlated with poverty. Pearce "Welfare" p. 412.

[63] *Ibid.*, p. 412.

[64] That is because although many women are poor for some of the same reasons that men are poor, much of women's poverty is due to two causes that are essentially unique to females: women most often are required to provide all or most of the support for their children and they are disadvantaged in the labour market. *Ibid.*, p. 413. Similarly sharp distinctions can and should be drawn in other cases — in regard to youth, recent immigrants, racialized peoples, etc.

[65] Although her examples are American, the same distinction is drawn in Canada: See Dianne L. Martin, "Passing the Buck: Prosecution of Welfare Fraud, Preservation of Stereotypes", *Windsor Yearbook of Access to Justice*, 12 (1992): 52–97, a study of welfare fraud prosecutions based in part on Parkdale cases.

[66] Pearce, *Supra* Note 61, p. 415.

[67] *Ibid.*

[68] *Ibid.*, p. 417.

[69] Her crucial insight, applicable to others as well, is that advocacy on behalf of poor women must proceed from the understanding that gender discrimination is a key element behind the feminization of poverty. At the same time, it cannot be assumed that all policies designed to combat gender discrimination will be effective for (all) poor women. *Ibid.*, p. 418.

[70] John McCamus, *A New Legal Aid Plan for Ontario* (Toronto: Queen's Park Printer, 1997).

[71] For example, see: Patricia Hughes, "New Brunswick's Domestic Legal Aid System: New Brunswick (Minister of Health And Community Services V. J.G." 16 *Windsor Yearbook of Access to Justice* 240–251 (1998); and D.A. Rollie Thompson, "Legal Aid Without Conflict: Nova Scotia" (1998) 16 *Windsor Yearbook of Access to Justice* 306–324.

[72] Albert Currie, "Legal Aid Delivery Models in Canada: Past Experience and Future Developments" (2000) 33 *University of British Columbia Law Review* 285–317.

[73] See the references *Supra* Note 3 and Note 10. And see: Ann Southworth, "Lawyers And The "Myth of Rights" in Civil Rights And Poverty Practice", 8 *Boston University Public Interest Law Journal* 469–511 (1999).

[74] Ewart, "Hard Caps" *Supra* Note 11.

[75] Of course legal aid has *always* been subjected to significant budget limitations, particularly in the case of civil legal aid. It is a fallacy advanced by neo-liberal politicians that concern with the cost of social programmes is something new that they have brought to the fore. It is, however, a fallacy of considerable purchase in contemporary policy debates.

[76] Ewart, "Hard Caps" *Supra* Note 11 at pp. 11–12.

[77] Ewart *Ibid.*, pp. 12–13.

[78] *Ibid.*, pp. 13–18.

[79] *Supra* Tremblay et al., Note 8.

[80] Ewart, "Hard Caps" *Supra* Note 11 pp. 20–21.

[81] *Ibid.*, pp. 21–26.

[82] Cahn & Cahn, *Supra* Note 3.

[83] Snider, *Supra* Note 2.

[84] Parkdale Community Legal Services, Report to Department of Health and Welfare (February 1972) from Zemans, "The Dream" *Supra* Note 4 at note 22.

[85] Dianne L. Martin, ed., *Intensive Programme in Poverty Law at Parkdale Community Legal Services, Cases and Materials*, Volume I. Toronto: Osgoode Hall Law School, 1991, p. 3.

[86] Martin, "Intensive Programme" *Supra* note 9, p. 6. Twenty law students per semester work under the joint supervision of a community legal worker and a staff lawyer.

[87] For a discussion of this "movement" (and its evolution into a "system") comparing Canada with the United States, see Gathercole, "Legal Services" *Supra* Note 39.

[88] Jacqui Greatbatch, "The Immigration Group: An Integrated Approach to Casework, Law Reform and Community Development", (Toronto, Parkdale Community Legal Services, 1989) Appendix A.

[89] Ron Schacter, the lawyer head of the Immigration and refugee Law division at the time (1993 and 1995) describes the interventions, as the Clinic represented the Canadian Council for Refugees, in "The Cases of Ward and Chan", *Osgoode Hall Law Journal*, 35 (1997): 723–735.

[90] An extensive literature has documented the phenomenon. For example see Drache, Ismael, Mckenzie, *Supra* Note 1.

[91] The practice has been fairly well examined, and almost universally decried in the literature, Jenifer M. Bosco "Undocumented Immigrants, Economic Justice, and Welfare Reform in California", 8 *Georgetown Immigration. Law Journal* 71–94 (1994) and Liza Cristol-Deman & Richard Edwards, "Closing The Door on The Immigrant Poor", 9 *Stanford Law and Policy Review*, 141–155 (1998).

[92] There are efforts in the US to deny citizenship to US born children of "illegal aliens" (and a debate about how best to counter-act them), a move successfully implemented in Britain. See: Michael Robert W. Houston, "Birthright Citizenship in the United Kingdom and the United States: a Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants", 33 V*anderbilt Journal of Transnational Law*, 693–738 (2000). That is not the law in Canada.

[93] Another is found in the accounts of the Clinic's taking up of the issues of police misconduct, and of the plight of street prostitutes. The scope and history of the Clinic's response to policing issues is in Martin, "Organizing for Change" *Supra* Note 13, and in a shorter version, along with the story of the Clinic's involvement in Prostitutes Rights, in Dianne L. Martin & Ray Kuszelewski, "The Perils of Poverty: Prostitutes Rights, Police Misconduct and Poverty Law, *Osgoode Hall Law Journal*, 35 (1997): 835–863.

[94] John Dent, "Mom is Here Illegal" The Denial of OHIP to Canadian Children Based on Parental Immigration Status: A Violation of International Human Rights?" Unpublished paper submitted in compliance with the requirements of the Intensive Programme in Poverty Law, Osgoode Hall Law School, York University, Toronto, 2000. Abstract attached in Appendix B. This is not unusual. Student papers have been instrumental in a wide range of cases and initiatives: see: Martin & Kuszelewski, *Ibid.*, and Gavigan, "Twenty-five Years" *Supra* Note 4.

[95] There is a lively debate about the role and efficacy of what the Clinic calls "test case litigation" and what is known as "impact litigation" in the US literature. The practice at the Clinic is that a decision to launch a test case strategy is made by the Board who are very mindful of this debate. See for example: Amy Bartholomew & Alan Hunt, "What's wrong with rights?" *University of Minnesota Law School Journal* 9 (3) 1–58, (1991); Stephen Brickey & Elizabeth Comack, "The role of law in social transformation: Is a jurisprudence of insurgency possible?", *Canadian Journal of Law and Society* 2, 97–119 (1987); Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women: One Step forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989); Board of Directors, Parkdale Community Legal Services, "Poverty Law and Community Legal Clinics: A View From Parkdale Community Legal Services" (1997) 35 *Osgoode Hall Law Journal* 595–601.

[96] The importance of skill and energy addressed to gathering the facts is too often ignored by those seeking change, but it is absolutely crucial to both litigation and to lobbying and other strategies. For an illuminating discussion of the importance of facts in this type of litigation see: Mary Eberts, "New Facts for Old: Observations on the Judicial Process", in Richard Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991), 467.

[97] Ewart, *Supra* Note 11.

[98] Rosenblatt's case study of the "legalization" of welfare entitlements represents the most thorough and thoughtful, Rosenblatt, *Supra* Note 55.

[99] In the context of police reform, An M.A. thesis studies a citizen police reform group, details its initial effectiveness but suggests the members were ultimately co-opted into the "policing discourse", and that the process is almost inevitable with "extra-governmental" reform groups. Maeve W. McMahon, "CIRPA: A Case Study of the Reform Process and the Police Institution". A Dissertation submitted in conformity with the requirements for the degree of Master of Arts in the University of Toronto, 1983. Much of her data also appears in: M.W. McMahon and R.V. Ericson *Policing Reform: A Study of the Reform Process and Police Institutions in Toronto*, Centre for Criminology, University of Toronto, Toronto, 1984. See Martin (1992) *Supra* Note 13 for a response.

[100] Snider, *Supra* Note 2 and discussion at Notes 44–52 inclusive.

[101] The significance of broader determinants of health to the health status of populations is now widely recognized (see e.g., National Forum on Health and accompanying background papers). A number of Canadian writers, feminists in particular, have begun to examine privatization and its effects on women both generally and with specific reference to social assistance and health care. See, for example: Patricia and Hugh Armstrong, *Wasting Away: The Undermining of Canadian Health Care* (Toronto, Oxford U. Press, 1996); Issa Bakker, *Rethinking Restructuring: Gender and Change in Canada* (Toronto, U. Toronto Press, 1996); J. Brodie (ed) *Women and Canadian Public Policy* (Harcourt Brace, 1996, Toronto).

[102] Zemans, "The Dream" *Supra* Note 4 at Notes 12–17 and accompanying text.

[103] This material is available from any public heath department and was effectively utilized in: Shari B. Fallek, "Health Care for Illegal Aliens: Why It Is a Necessity", 19 *Houston Journal of International Law,* 951–981 (1997) from the perspective of the public health costs associated with these measures.

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Appendix A:

The Immigration Group: An Integrated Approach to Casework, Law Reform and Community Development

The Immigration Group targeted a number of important areas for law reform in the last year. They include: refugee protection; family reunification; discrimination against immigrant women; sponsorship breakdown; rights of domestic workers.

The case of the S** family illustrates our integrated approach to casework, law reform and community development. The issue is one of family reunification and Canada's treatment of immigrants with disabilities. The S** family were wrongly denied the opportunity to apply for landed immigrant status under the Administrative Review Program of 1986, on the basis that, because young M. S** has Down Syndrome, the family would be found inadmissible, and thus there was no point processing the application.

The Immigration Act states that people with disabilities and their families will be denied landed immigrant status if two doctors (neither of whom examine the disabled person) decide the person could cause "excessive demand" on "health or social services". This provision applies despite the fact that the family meets all other requirements.

The only alternatives a family which finds itself in this situation has are

1) abandon their efforts to be come landed;
2) abandon the disabled family member.

Parkdale represents the S** family in a challenge to the law. We are going to Federal Court to argue that the refusal in the S** case is wrong, and that the provision of the Immigration Act violates s. 15 of the Charter of Rights because it discriminates against people on the basis of their disability.

Alongside the court challenge, the Immigration Group is building support for the reform of this discriminatory law among immigrant and disabled peoples' community groups, and we have formed a group for immigrant parents whose disabled children are subjected to this discrimination. The group is important for information sharing and for mutual support, so that families do not feel isolated and alone. It will shortly begin a public campaign to press for the law to be changed.

The integrated approach to law reform — both legal and political advocacy on behalf of our clients along with support services they need, is a strategy for fighting discrimination and injustice which makes the most of Parkdale's resources and fulfills our mandate to work for social change.

Jacqui Greatbatch
Staff Lawyer
Immigration Law Group

Appendix B:

"Mom is Here Illegal"

The Denial of OHIP to Canadian Children Based on Parental Immigration Status: A Violation of International Human Rights?

John Dent*

In Ontario, Canadian-born children are denied health coverage on the basis of their parents' immigration status. Parkdale Community Legal Services has many clients whose children, citizens by birthright, have been denied OHIP coverage solely because the parents have not normalized their immigration status. In many cases, the tragic result is that the children fail to receive necessary health services.

The policy of denying health coverage to Canadian children solely on the basis of their parent's immigration status is arguably contrary to the Ontario *Health Insurance Act* and regulations, the *Charter of Rights and Freedoms*, and to Canada's obligations under international law. This paper focuses on the latter issue: Does the denial of health coverage to such children violate our obligations under international law, specifically the U.N. Convention on the Rights of the Child?

In order to arrive at an answer to this question, the paper first reviews the current practice concerning the granting of OHIP to children of immigrants, the relevant provincial law, and regulations. International law is introduced as a potential remedy through a discussion of the relevant sources of international law, the utility of international law in domestic litigation, and the value of international oversight of Canada's human rights performance. An analysis of the compatibility of the Ontario practice with Canada's obligations under the relevant international law is then undertaken, with specific emphasis on the right to non-discrimination and the substantive right to health guaranteed in the Convention on the Rights of the Child.

Throughout the paper, the case of Florencia and Anna is used to illustrate the impact and legality of the OHIP eligibility rules for Canadian children whose parents are without legal status in Canada. Florencia arrived in Canada four years ago from Colombia with her husband, who made a refugee claim. While the claim was in process, the family was covered by the Interim Federal Health Plan. The claim was denied, but Florencia and her family were afraid to return to Colombia. Meanwhile, Florencia's husband, Enrique, had found work, and Anna was born. They hope to remain in Canada, and plan to file an application for landing on humanitarian and compassionate grounds as soon as their English is better and they have saved the money for the processing and Right of Landing Fees (totalling approximately $3000). When Florencia applied for OHIP coverage for Anna, she was turned down by the worker in the OHIP office. The worker said that since Florencia was not a permanent resident or a citizen herself, her daughter was ineligible for OHIP. On the eligibility form she wrote "mom is here illegal." Florencia was told it did not matter that Anna was a Canadian citizen. She was afraid to argue, since she thought the OHIP worker might report her to Immigration Canada. She is very frightened, because Anna has developed a heart condition, and may need surgery. It would be very expensive, and she could never afford to pay that much money herself. She came to Parkdale, hoping there was something we could do for her.

Through careful analysis of the provisions of the relevant international law, as interpreted by academic commentators and by U.N. treaty monitoring bodies, the policy of denying OHIP coverage to Anna and other children in her situation is found to violate the substantive right to health under the U.N. Convention on the Rights of the Child (CRC) and the U.N. International Covenant on Economic, Social, and Cultural Rights (ICESCR). This policy is also found to violate the right to non-discrimination guaranteed by the CRC, the ICESCR, and the U.N. International Covenant on Civil and Political Rights (ICCPR).

Specifically, the minimum core content of the right to health in international law may be said to preclude the denial to children for financial reasons of their right to access necessary health care. The gaps in the health services available to uninsured people in Ontario mean that, in some cases, this minimum core content will not be met. The case of Florencia and Anna illustrates the potentially harmful consequences that may arise from the denial of preventative health services.

Fulfilling the right to health requires States Parties to do more than meet the minimum core content. Rather, the CRC specifically requires States Parties to implement the right to health to the maximum extent of their available resources. This contingent standard places the highest obligation on wealthy countries such as Canada. The denial of OHIP coverage to a vulnerable segment of the population in the absence of any pressing shortage of resources renders such a retrogressive policy contrary to the obligations under the CRC.

The singling out of Canadian children of immigrants without status for exclusion from provincial health coverage constitutes a violation of the principle of non-discrimination, both when considered from a theoretical perspective, and from the more pragmatic perspective employed by the monitoring committees of the U.N. human rights treaties.

With respect to the theoretical approach, the denial of OHIP to Canadian children on the basis of their parents' immigration status constitutes discrimination as it is unrelated to the children's capabilities or potentialities. The approach to non-discrimination by U.N. treaty-monitoring bodies has been criticized as lacking in theoretical rigour, but their emphasis on the "reasonableness" of the differentiation does provide the advantage of allowing for inclusion in the analysis of a broader range of factors. Accordingly, the arguments presented in favour of a finding of discrimination include consideration of the legitimacy of the object of the legislative changes that restricted OHIP eligibility, the proportionality and rationality of the means used to achieve these objectives, the harm wreaked on the children effected, and the incompatibility of this policy with the obligation under the CRC to always give primary consideration to the 'best interests of the child.'

The Committee on the Rights of the Child will be issuing its second report on Canada's performance under the CRC in the upcoming year. This paper argues that the government will have much to answer for in its treatment of Canadian children whose parents are without status. That a province as wealthy as Ontario has chosen to pursue a policy which violates our international commitment to ensure without discrimination the right to health to all children, constitutes a profound embarrassment and serves to undermine Canada's stature in human rights on the global stage.

Appendix C:

Children's Right to OHIP in Canada

The Issue

In Ontario, Canadian born children are routinely denied health coverage on the basis of their parent's immigration status. It is our position that the denial of health coverage solely on the basis of the immigration status of the parents of Canadian born children is contrary to the *Ontario Health Insurance Act*, the *Charter of Rights and Freedoms*, and to Canada's obligations under international law.

Public Legal Education:

Preliminary Work
The community legal worker and students have been working in partnership with several community groups such as the Women's Health Centre at St. Joseph's Hospital and Access Alliance to identify and address legal issues facing clients and strategize on how to best meet community needs. One approach has been the use of informational workshops to address this issue. While these workshops have been highly successful and we will continue offering these types of sessions, they can only reach a limited audience. The production and distribution of pamphlets ensures exposure to a much larger audience and encourages self-help, thereby, reducing the need for direct representation by lawyers. Our assessment of community needs has made us realize that translation of the pamphlets, and other materials into other languages further ensures that this information is communicated directly to other language groups that make up our client population.

Stage One

What we've done so far:
The first pamphlet has already been printed in English (please see attached copy), and Spanish and Portugese translations are in progress. In addition, we have produced a series of colour transparencies that can be used as a visual aid during public legal education seminars on the topic of OHIP coverage for Canadian children of parents without status.

We have forwarded copies of the first pamphlet to a number of community legal clinics and community health centres. In addition the pamphlet was distributed at a workshop held for service providers at the Toronto Hostels Training Centre and at a Health Fair organized by the St. Joseph's Health Centre, held at the Dufferin Mall, in which over 55 health care providers participated. We continue to distribute the pamphlet throughout the different communities we work with.

Next Step:
Based on our understanding of the community needs we are initially working on getting the pamphlet translated into Spanish and Portugese. We are in the process of having the draft translations proofread by community members. We hope to expand the translation project to later include Vietnamese and would like to print additional copies in English.

We are also in the process of expanding the colour transparencies into a kit which will contain buttons, posters, the transparencies in booklet form and registration forms for our workshop. This kit could then be passed out to community health centres, ESL classes, etc. to raise awareness of the issue and promote discussion in the community.

Again we plan to translate all these materials into various languages based on community needs.

Stage Two

We would like to continue our public legal education work by creating videos on the issue. The first video we would produce would be a roundtable discussion by experts on the issue. This would include lawyers and other community workers with expertise in this field. The second video we would produce would be a case study of a particular family who agreed to tell their story in this format. The personal story would be intercut with an explanation of the legal issues involved.

Stage Three

The third stage we envision for the public legal education part of the OHIP project is a community theatre project. This project would directly involve immigrant communities in the writing and performing of various skits on this issue. Such skits could be used as a lead-in to an educational session with community groups, ESL classes, etc.

Appendix D:

All Children Have a Right to Education and Health Care

Over the last several years, Parkdale Community Legal Services has helped many parents who are not Canadian citizens or landed immigrants with issues surrounding their children's right to education and health care.

According to the *Education Act* (Ontario), a school board may not refuse admission of any child under the age of eighteen to an elementary or high school. Moreover, it is illegal for a child between the ages of six and sixteen not to be in school, according to Section 21(1)(a) of the *Act*.

In addition, a school board may not refuse admittance of a child under the age of eighteen to an elementary or secondary school based on the child's immigration status or the immigration status of the child's parent or guardian.

A person who is otherwise entitled to be admitted to a school and who is less than eighteen years of age shall not be refused admission because the person or the person's parent or guardian is unlawfully in Canada. (S. 49.1 of the *Education Act*).

Yet, many parents who attempt to enroll their children into school are asked for papers proving their children's status in Canada. Given the clear directions in the *Act*, why are schools requesting authorization?

The problem is the federal *Immigration Act*, which requires all children who are not landed immigrants or Canadian citizens to have a "student authorization" document, issued by Canada Immigration, before they can attend school. Under the Constitution, education is the exclusive jurisdiction of the province. This means the *Education Act* should take precedence. However, many school boards are advised otherwise by the Immigration Department. As a result, parents who are legal immigrants often have to wait months for student authorizations, and parents who are undocumented immigrants are afraid to send their children to school.

The innocent victims in all of these situations are the children themselves, whose lives are often irreparably damaged by being kept out of school.

At Parkdale, we work on many levels to assist parents with this problem. On an individual basis, we will provide letters for parents to take to school, explaining the law to school principals and requesting that they admit the child. Most of the time, particularly in Toronto, this is sufficient. However, we are also working to change the law by lobbying the Minister of Immigration, Elinor Caplan, and by working with our federal and provincial representatives, community organizations and the media to raise awareness of this issue.

Health

Many children in Ontario are denied health coverage under OHIP. Canadian-born children who are Canadian citizens by birth right, but whose parents do not have permanent resident status, are routinely denied OHIP coverage because of the status of their parents. Yet this policy is contrary to OHIP regulations, which prescribe that children's eligibility for OHIP be determined by their parents' intent to reside in the province. Many parents without permanent resident status fully intend to reside in the province, and many in fact have immigration applications in process to regularize their status. But their children are still being denied OHIP coverage. Parkdale Community Legal Services has many clients whose Canadian citizen children have been denied OHIP due to their parents' immigration status in Canada.

Sometimes children in these situations are able to obtain OHIP coverage if their parents appeal the original negative decision. But most parents are not even aware of their right to appeal, which requires that the negative eligibility assessment from the OHIP office be given in writing. Furthermore, parents who are undocumented are afraid to appeal their cases so if they are told by the OHIP officials that their child does not qualify for OHIP, they do not pursue the matter further. This can result in tragedies for children who do not get adequate medical care because the services they need are only available if they have OHIP.

In any case, *ad hoc* solutions for individual children are not adequate to resolve the problem. Parkdale Community Legal Services is involved in educating parents on their children's right to OHIP, and in lobbying the government of Ontario to ensure that no Canadian child who lives in the province is denied their right to health coverage under OHIP. Denial to these children of health care under OHIP is not only inconsistent with the Ministry of Health's own regulations, but is also inconsistent with Canada's obligations under international conventions such as the Convention on the Rights of the Child.

Conclusion

The right of all children to education and health care is recognized under the United Nations Convention on the Rights of the Child, as well as under the International Covenant on Economic, Social, and Cultural Rights. Canada has ratified both of these conventions and should be living up to its international commitments. Having children who are healthy, educated, and accepted in Canadian society is good for everyone.

If you are a parent and need assistance helping your children get into school or obtain an OHIP card, please call us at 531-2411, ext. 262. We may be able to help. Your confidentiality is assured.

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