

# THE ELLIS ARCHIVES—1972 TO 1981: AN EARLY VIEW FROM THE PARKDALE TRENCHES<sup>©</sup>

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The author was intimately involved with PCLS from 1972 to 1981. Significant extracts from a recently uncovered, personal horde of archival materials—framed by the author's description and explication of the materials' original context—provide old perspectives on a wide range of surprisingly current issues—perspectives which the author believes readers will find still useful. The subject matter includes: the private bar's role in the ultimate success of PCLS and the clinic system; legal aid services; the bar's role in the legal aid system; the need for customized legal services in low-income communities; the role and operation of community based legal clinics; a closely considered analysis of a law school's fundamental goals; and, finally, clinical education. The archival materials also provide unique windows on various facets of the PCLS program during its first decade.

L'auteur a été intimement lié à *Parkdale Community Legal Services* de 1972 à 1981. Des extraits significatifs d'une foule d'archives personnelles découvertes récemment—que l'auteur accompagne d'une description ainsi que d'une explication du contexte original du matériel—fournissent des perspectives d'une autre époque sur un large éventail de questions d'actualité—perspectives que, de l'avis de l'auteur, les lecteurs jugeront toujours utiles. Cet article aborde entre les sujets suivants: le rôle par certain avocats dans le succès du PCLS et du système des cliniques juridiques; les services d'aide juridique ; le rôle des avocats dans les systèmes d'aide juridique ; la nécessité de services juridiques sur mesure dans les communautés défavorisées économiquement ; le rôle et le fonctionnement des cliniques juridiques communautaires ; les objectifs fondamentaux d'une faculté de droit ; et, finalement, l'éducation relative au travail dans une clinique juridique. Le matériel d'archives constitue une fenêtre unique sur les différentes facettes du programme de PCLS pendant sa première décennie d'existence.

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## I. INTRODUCTION

From 1972 to 1981, the writer was intimately connected with various aspects of Osgoode's Parkdale Community Legal Services program (PCLS). For five of those years he was the director or co-director of the clinic. His connections with Parkdale ended in 1981, when he left the faculty to become the director of the Law Society of Upper Canada's bar admission course.

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My leaving Osgoode was not well organized from a logistics point of view. Through a combination of circumstances, the contents of my Osgoode office, accumulated since my appointment as PCLS director in 1975, had to be packed in my absence. The files and books and accumulated papers were put in cardboard boxes and placed in storage. There was no opportunity to cull the files and papers—or to leave any of them behind—or to know what had been put in any particular box.

The number of stored boxes and the minimum labelling, coupled with my preoccupation in the intervening sixteen years with a number of busy activities, meant that during those years the material in these boxes remained effectively inaccessible.

Then, in 1997, a series of unrelated events conspired to open the boxes. My term as chair of the Ontario Workers' Compensation Appeals Tribunal ended in June. For the first time since leaving law school I found myself temporarily with no storage space. The boxes, I decided, had to go. However, the allure of their unknown contents prevented me from pitching them unopened, and the process of sifting paper I had not seen for sixteen years, therefore, began.

In the course of that process I eventually came upon a set of documents related to my years of involvement with Parkdale Community Legal Services. The bulk of these were papers or letters I had written when I was the clinic director and which it appeared I had pulled together in one collection for the purpose of supporting my 1977 tenure application. In the same boxes, I discovered copies of various other PCLS-related documents which I had kept, it would appear, from some sense of their intrinsic interest.

As often happens in such housecleaning activities, while leafing through this material in the process of throwing it out, I found myself increasingly intrigued with what I was reading.

The boxes contained operational, rather than academic, writing: letters, memos, and papers written, as it were, on the run, not for publication but addressed to the various players in the clinic world of the 1970s for the purpose of influencing events as they were happening.

The documents triggered memories of the most intense experience of my career and, of course, nostalgia ran rampant. But to my eye, the writing and analysis, some of it twenty years old, also stood up well to the changes in perspective that inevitably accompanies the passage of so much time, and furthermore, seemed to resonate with issues I knew to be still, or newly, current.

In due course, I shared the experience I was having with these boxes of material with my good friend Professor Mary Jane Mossman, herself a figure from Parkdale's past<sup>1</sup> and still a member of Osgoode's faculty. She was aware that the Osgoode Hall Law Journal was planning to devote a full issue to the PCLS program (by way of commemorating its twenty-fifth anniversary), and she brought the existence of my boxes to

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<sup>1</sup> Professor Mossman was Parkdale's first articling student, 1971-72; Osgoode representative on the board of governors, 1977-78; acting director of the clinic, 1978; and Clinic Funding Manager for the Ontario Legal Aid Plan, 1979-82.

the attention of the journal's editors. Mitchell Flagg, a student editor, visited the boxes and took away a selection of documents for examination by the journal's editorial board. They found the material of interest in terms of PCLS's history but they and Professor Mossman also saw the resonance with current issues.

The idea for this article emerged from those discussions. The article consists of a selection of documents, or extracts from documents, framed by an elaboration or explication of the context in which they originally appeared and of their significance at the time. It presents views from a 1972-1981 perspective on a number of legal-clinic, legal-aid, legal-services, and legal-education issues that are still alive—or which have come to life again—in late 1997. The article has been written in the belief that these views are still relevant and may still be useful.

## II. THE PARKDALE FOCUS ON LEGAL-SERVICES REFORM

Shortly after I arrived as Parkdale's director—on 1 January 1975—the clinic had occasion to make an emergency interim funding application to the Ontario Law Foundation. The application in fact was not successful. However, the application documents emerged from my boxes and have proven to be a rich source of information about the clinic and its environment, circa 1975.

The PCLS concept was always unique in the numbers of fronts for reform and development it offered. Looking back, it seems clear that a particular source of the intense dynamics of the office in my day—and I do not doubt it is the same today—was the fact that, while everyone connected to the clinic was passionately committed to the concept, the various groups within the clinic and amongst its outside supporters prioritized the concept's multiple reform potentials differently.

One of the reform potentials in which I was always particularly interested was the reform of legal services. This included the broadening of the idea of professional legal services to encompass a realistic understanding of the legal services needs of the poor; the discovery or development of strategies, tactics, and techniques for meeting those needs appropriately and effectively; and the education of a generation of new lawyers in respect of those needs, strategies, tactics, and techniques.

A list of Parkdale's then current "Office Objectives" was included with the Law Foundation application. The list makes the legal-

services and legal-profession reform goals, as understood in 1975, particularly clear:

1. To operate in Parkdale a community law office where low-income Parkdale residents and local community organizations will have ready access to first-class, legal advice and assistance in a receptive and comfortable environment.
2. To ensure that clients of the office receive such legal services as they may reasonably require, either from the office itself or through the Legal Aid Plan or other sources as may be appropriate.
3. To assist clients of the office in obtaining such other social services as may be available and of which they may have need.
4. To educate and train law students both in general terms and more particularly, in respect of poverty law and the delivery of community legal services. The office endeavours in the context of clinical training to create a more meaningful educational experience for the law student by juxtaposing the pragmatics of the daily practice of the law with the intellectual perception of the law normally associated with the law school. The process particularly takes place through the use of seminars and focuses on both procedural and substantive legal issues as well as particularly on matters of professional responsibility and ethics.
5. To research methods of making legal advice and assistance readily accessible and of delivering viable, legal services with a view to developing effective and economical methods, including the creative use of paralegal personnel, that adequately and sensitively reflect the special needs of a community law office clientele.
6. To explore the nature of the Parkdale community's needs for legal services and to develop new methods and remedies particularly adapted to those needs.
7. To establish or foster, particularly in the Parkdale community but also in the Metropolitan community at large, a varied educational program of activities, enterprises and projects designed to increase in the low-income community the level of awareness of the legal rights, benefits, remedies, techniques and resources that are available and which may be of assistance in dealing with problems encountered by low-income citizens.
8. To conduct on-going practical research into the relative effectiveness of the various educational activities, enterprises and projects established or fostered by the office.
9. To apply the experience, information and insights gained by the office in its day-to-day operation to the development and reform of the law and the law's various institutions with a view to making the law and those institutions more responsive to and more cognizant of the special needs and problems of people with low incomes by,
  - (a) Litigation of legal issues of particular significance to low-income citizens;
  - (b) Education and influencing of Government officials and legislators through representations and briefs;
  - (c) Legal writing by office staff lawyers and students; and
  - (d) Education of the media and public.

10. To contribute to the development and organization of a dynamic and sophisticated body of poverty law encompassing the statutes, case law, legal principles and precepts of special relevance to persons with low incomes and their communities, through an active litigation program and through encouragement of academic enterprises and legal writing on the part of the office's students and staff lawyers based again on the experience, information and insight acquired through the office's day-to-day operation as a community law office.

11. To contribute to the development of a poverty law bar of lawyers with specialized knowledge of poverty law, and experience in providing advice and assistance and delivering legal services in respect of all areas of law to people with low incomes.

12. To contribute to improving generally the quality of the legal services provided by the practicing profession to low-income clients and to raising the level of consciousness about the special problems inherent in the delivery of legal services to low income communities, through involving private practitioners in the activities of the office and by lending the office's experience, specialized knowledge and background in the area to educational and academic activities and programs focused on the profession at large.<sup>2</sup>

These are not, of course, the only expression of the clinic goals that will be found. There are, for example, the goals of the clinic as viewed from the law school's special perspective. I will make particular reference to the latter goals in Part VII, below.

### III. THE LEGAL PROFESSION AND LEGAL AID ENVIRONMENT—1971 TO 1977

Much is made of the conflict that PCLS experienced with the legal profession and with the Law Society in these years. And, indeed, that conflict is a major element in the history of the development of the clinic and of the clinic movement generally. However, the clinic was not without its support from within the legal profession, including from many of the so-called Bay Street firms. Indeed, a case can be made for the proposition that it was the positive and progressive elements of the private-bar, legal-aid environment of the time that ultimately ensured the clinic's survival. I well appreciate that many might see this proposition as perverse, but it is one for which there is nonetheless considerable evidence.

Professor Fred Zemans, Parkdale's first director, was recruited from private practice in Toronto<sup>3</sup>—a point of some significance itself. In his first semester, it became clear to him that if the idea of a large

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<sup>2</sup> See Parkdale Community Services, *Application to the Law Foundation of Ontario for Funding Assistance* (20 January 1975) [unpublished] at 14ff. [hereinafter *Application*].

<sup>3</sup> Professor Zemans was an associate lawyer with the Toronto law firm Goodman & Goodman from 1966 to 1971.

number of law students providing actual legal services to real clients was to be viable from a legal services perspective the amount of experienced, professional supervision that would be needed far exceeded what the clinic's funding base could sustain. Faced with that shortfall, he found it natural to turn for help to former colleagues in the private bar. Confident that he could find within the Toronto profession numbers of lawyers prepared to volunteer their assistance, he invented the idea of the "downtown supervisor."

Professor Zemans recruited me to the Parkdale cause as one of his downtown supervisors in, I believe, the winter of 1972. My responsibility in that role was to meet weekly with two designated PCLS students to review their client files with a view to ensuring that each client's interests and needs were being looked after appropriately.

At the time, I had recently made partner at the downtown Toronto law firm Osler, Hoskin & Harcourt (Oslers) and was enjoying a mixed barrister and solicitor practice with a principal emphasis on management labour law. I had articled there in 1962-63 and upon my call to the bar in 1964 had joined the firm as an associate.

As was the case for many of my contemporaries, my interest in legal aid had been active since my articling days. At that time, the Ontario Legal Aid Plan (OLAP) as we know it today did not exist, but the Law Society had a legal aid office through which volunteer legal services from members of the private bar were coordinated. No fees were paid, but funds were available for the payment of expert witnesses and other litigation expenses.

Because no fees were available, the "downtown" firms were a major source of these volunteer legal aid services. They could afford the unpaid time. Junior lawyers, as well as many experienced lawyers with those firms, would place their names on the Law Society's legal-aid roster and the coordinating office would assign them cases. The primary emphasis was on providing defence counsel in criminal cases, but other legal services needs were addressed as well.

The downtown firms' motives in allowing a high level of participation by their lawyers in this volunteer activity were mixed. In my perception, however, most important was their acknowledgment of the firm's professional responsibility to contribute to the profession's traditional role in ensuring that persons with a serious need for legal services did not go without such services because they were unable to pay legal fees. The firms, I am sure, also valued the advocacy experience their young lawyers could pick up in legal aid cases that could not be had, as early in one's career, in files of paying clients.

In 1968, the new legal aid certificate system—the Ontario Legal Aid Plan—became operational. For the first time, fees were available for private-bar legal-aid services. With this development, the role of the downtown firms in the legal aid system immediately began to fade. They had been prepared to volunteer their resources in response to what they perceived to be their professional responsibility; they were not prepared or equipped to *compete* for Legal Aid Plan *business*.

Thus, by 1971, when Professor Zemans turned up with his request for volunteer professional assistance he found a receptive audience. By that time, many lawyers within these firms were beginning to feel a sense of professional loss as a result of their increasing isolation from the legal aid world. They were looking for some other vehicle through which their commitment to a lawyer's professional responsibility for what was now beginning to be called *pro bono* legal services could find some expression.

I am, of course, particularly familiar with the profession's interest in *pro bono* work as that interest manifested itself at Oslers. Fortunately, some record of that interest may now be found in Professor Curtis Cole's history of the firm.<sup>4</sup>

In August 1971, Oslers gave Brian Bellmore, then a "young associate" in the litigation department, permission to participate in the Parkdale clinic. He served one full day a week over a period of about a year. (Bellmore's involvement with Parkdale and the clinic movement continued for many years. After the formal secondment from Oslers ended, he continued to serve as a downtown supervisor, was co-chair of the Parkdale Board of Governors [as it then was] during my and Archie Campbell's terms as director, and then served for a number of years as the "clinic" member on Ontario's clinic funding committee.)

Oslers also approved a subsequent request from Professor Zemans for "a few more lawyers who could volunteer to spend some time at the clinic"—a request taken to the firm's executive committee by one of its members, Purdy Crawford.

Crawford was a young but senior member of the Oslers firm. In due time, he was to become the chief executive officer of Imasco. Before that, however, his interest in legal services for low-income communities would lead to his serving as a member of the PCLS board, circa 1978. On this occasion, he persuaded Oslers' executive committee to approve Professor Zemans' request and at this time the firm authorized any members of the firm who were interested in doing so to

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<sup>4</sup> C. Cole, *Osler, Hoskin & Harcourt: Portrait of a Partnership* (Toronto: McGraw-Hill Ryerson, 1995) c. 7, especially at 169-74 (on the history of *pro bono* services at Oslers in the early 1970s).

spend “half a day a week at the clinic.” “Shortly thereafter,” Cole reports, “Peter Dey and Ron Ellis joined Brian Bellmore as Parkdale volunteers.”

The Zemans overtures to the Oslers firm (only one of many firms that responded favourably to his search for supervisory assistance) coincided with that firm’s own internal consideration of a structured means of expanding the opportunities for the firm to meet what many of its lawyers considered to be its responsibility for the provision of *pro bono* legal services—referred to in the firm at that time as “community law.”

Cole reports that in October 1972 the executive committee approved the establishment of a community law committee to study the question of “whether the firm should formally engage in community or public interest law and, if so, the manner in which it should do so.” This was a committee chaired by Ed Huycke and, in addition to myself (by then a partner), Brian Bellmore and Peter Dey, its members included Jack Ground (then a partner and now the Honourable Mr. Justice Ground), the late George Julian (a partner from the firm’s litigation department), Don Pattison (partner), and the late Stuart Thom (a partner who was also a bencher and was later to serve a term as treasurer of the Law Society.)

Professor Cole’s account of the work of this committee and the ultimate fate of its report captures the competing themes to be found within the downtown Toronto private-bar environment at the time, with respect to *pro bono* legal services. It portrays much of the positive and negative aspects of what Professor Zemans and PCLS were working with as they interfaced with that bar. It is, I believe, worth quoting *in extensa*

A number of large American firms had opened up their own community law departments in neighbourhood storefronts, much like the Parkdale clinic. The primary purpose of these firm-sponsored clinics was to serve the *pro bono* tradition, but they also offered an internal marketing advantage. The large American firms (like their Canadian counterparts a few years later) were becoming very competitive about recruiting the top graduates of the best law schools. In an age of increased social activism and awareness among young people, a firm which could boast a storefront community legal clinic would have something more to offer potential recruits.

This notion held some currency for Canadian firms like Oslers . . . .

In March [1973], . . . Huycke made a very significant report to the Executive Committee. It seemed that there was a possible conflict of interest between the activities of the firm’s volunteers at the Parkdale clinic and one of the firm’s major clients.

Although the minutes do not name the client or provide any detail about the nature of the conflict, this situation highlighted a fundamental problem with the community law idea. To a large degree, the social activist movement of the early 1970s, of which the storefront law clinic was a part, was basically inimical to the capitalist system. At a time

when President Richard Nixon was calling on his supposed “silent majority” to support his battles with campus peace demonstrators, it was difficult to see it as anything but an “us versus them” scenario. To a large corporate law firm, whose clients included many of the largest multinational companies, it was hard to see how they could side with both.

In May, Ed Huycke submitted his committee’s report. It recommended that the firm establish a community law department which would satisfy the firm’s *pro bono* professional obligations by providing low-cost or free legal services in the public interest and/or poverty law areas. This could be accomplished either with a department housed within the firm’s regular officers, *or by a separate storefront office*.<sup>5</sup> On May 29, the Executive Committee held a special meeting to discuss the report.

At the meeting it was obvious that there were some different views among the Executive Committee members. In the end, however, the Executive Committee rejected the recommendation. In ratifying this decision, the partners agreed to acknowledge the firm’s commitment to the *pro bono* tradition, but in an unstructured way. They decided to maintain community law as a heading for non-chargeable time docketing, but there would be no public interest department, and no Osler, Hoskin & Harcourt storefront clinic. ...<sup>6</sup>

From 1972, my own connection with the Parkdale clinic grew apace. It culminated as far as the volunteer role was concerned when I was appointed one of the private bar representatives and became the first chair of the new Parkdale board of governors. This occurred in 1973. During that time, Osler’s support for the involvement of myself and others with the clinic never wavered. And in 1974, when the then dean, Harry Arthurs, persuaded me to accept appointment as Professor Zemans’ successor in the director’s position, Osler had no difficulty in granting me a non-paid leave of absence. It soon became apparent, however, that looming conflicts between PCLS’s various law reform projects and Osler’s clients and potential clients made the continuation of that relationship problematic. In May, 1975, on my initiative, my formal relationship with the firm ended.

The Osler firm’s support for PCLS has continued through the years and I was thrilled to discover when I attended the clinic’s twenty-fifth anniversary functions in 1996 that the current co-chair of the PCLS board of governors was Ruth Wahl, a partner at Osler, Hoskin & Harcourt.

In addition to the strong connection that developed between Parkdale and Osler, Professor Zemans’ search for supervisory backup

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<sup>5</sup> *Ibid.* at 172-73 [emphasis added]. Given the context, it was a remarkable recommendation, and, as I recall, the report was unanimous. The fact that such a recommendation would emerge from a committee with so broadly based a membership is a significant indication of the progressive thinking on legal aid matters that was to be found within the downtown bar at the time.

<sup>6</sup> *Ibid.* at 172-73 [footnotes omitted].

was equally successful with many firms and the overall success of that initiative was documented in the Law Foundation application:

Support of Parkdale by the Law Foundation would also be a natural extension of the support and co-operation already being provided Parkdale by the practicing profession. We have all been aware of the stresses between Parkdale and the practicing profession and Law Society, particularly in the early days of the experiment. Given the nature of the project these stresses were inevitable. The surprising thing perhaps is that they were not more serious than they turned out to be. ... Over Parkdale's three and a half years existence to date, some 40 lawyers from a representative cross-section of "downtown" firms have been closely involved in the office's work through providing part-time supervision of students on a weekly basis, and in assisting the office with free legal services as well as participating in its administration and management. The contribution that the Honourable Mr. Justice S.G.M. Grange made to the success of the Board of Governors' experiment during his term as member of that Board prior to his appointment to the Court of Appeal exemplifies that support.<sup>7</sup>

As this submission makes clear, by 1975 Professor Zemans' inspired strategy of recruiting volunteer supervisory support from the downtown firms had borne substantial fruit. Indeed, a number of distinguished private-bar practitioners had made important contributions to the success not only of the Parkdale clinic but of the clinic movement generally.

The above reference to Mr. Justice Grange merits some elaboration. Grange had accepted appointment as one of the first two private-bar representatives on the new PCLS board, and he served in that capacity for about a year before his appointment to the bench intervened. However, his contribution to the clinic during that year was significant:

[Grange's] impact on the Board and his influence on the office's development cannot be measured by the arguments won or lost at the Board meetings. In the eyes of many of the Board members and of many of the office staff and students, Sam came to the Board as a representative of the "conservative" establishment bar and the "reactionary" Law Society. That he was urbane, persuasive and witty was not unexpected. That he was also a likeable human being, open-minded and fair, and as tough and innovative as any in confronting an injustice, was to many somewhat disconcerting. In the writer's opinion, when up close the benchers turned out to be Sam Grange, the office's perception of its own role *vis-à-vis* the established bar and the Law Society experienced an insensible but significant shift. At that point of time it became for the first time possible for the office to begin to contemplate at least the possibility of a working relationship with the Bar and the Law Society based on something more than simply the legal accountability imposed by statute. ...<sup>8</sup>

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<sup>7</sup> *Application, supra* note 2 at 4-5.

<sup>8</sup> See S.R. Ellis, "Parkdale Community Legal Services" (1976) 10 L. Soc. Gaz. 30 at 33-34.

Later, Mr. Justice Grange accepted appointment as the chair of the Ontario Commission on Clinical Funding. His report provided the essential foundation for the permanent community clinic system,<sup>9</sup> and in the history of the clinic movement he will be remembered particularly for that work. However, his involvement at Parkdale in 1973/74 was also, in my view, of seminal importance.

But Grange was not the most important of the contributors from the private bar. Chief Justice Roy McMurtry (as he now is) was the most important. McMurtry was elected for the first time to the Ontario Legislature in September 1975 and forthwith became the attorney general. He brought to that office perspectives shaped during a long and successful private-bar career as a tough and respected litigator. And there is no doubt that it was principally his influence as attorney general, in the Davis government and with the Law Society, that in 1975-76 caused the provincial government and the Law Society to agree to bring the clinics within the Legal Aid Plan's funding structure, and thus saved the PCLS project, and the clinic movement generally, from an early demise.

That this was no small feat may be seen from the implications of a letter written in 1971 by a previous Ontario attorney general to the federal minister of justice, complaining of the federal government's funding of the Parkdale clinic:

ONTARIO MINISTER of JUSTICE

AND ATTORNEY GENERAL

Parliament Buildings,  
TORONTO 182, Ontario.

May 7th, 1971.

Re: Store Front Law Offices

Dear Mr. Turner:

I recently read an article in the Toronto *Globe and Mail* dated April 2nd, 1971 that a grant of \$47,500.00 had been given to the Osgoode Hall Law School by the federal Department of Health and Welfare to operate a store front law office in Toronto which would be operated by law students under the general supervision of a member of the law faculty. I am enclosing a copy of that particular article in the event it may have escaped your attention. I am also taking the liberty of enclosing a consolidation of The Ontario *Legal Aid Act* and the Regulations made under that act so that your attention might be directed particularly to page 21 where Regulation 74 and the following regulations deal specifically with the matter of student legal aid societies.

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<sup>9</sup> See Ontario, Commission on Clinical Funding, *Report of the Commission on Clinical Funding* (Toronto: The Commission, 1978) (Commissioner: Hon. S.G.M. Grange).

I am taking the liberty of writing to you because this concept of the so-called "store front lawyers" causes me grave concern.

The whole concept of student participation in legal aid has been exhaustively reviewed by this government and by the Law Society of Upper Canada which administers the Ontario Legal Aid Plan. One of the most significant principles in our entire scheme, and to which we have devoted substantial resources, is that any citizen of this province should be entitled to assistance for legal advice if his circumstances so require it. It is generally repugnant to our concept of assistance that any citizen should have to depend upon advice from a student rather than obtaining that advice from a qualified member of the Bar. It was in this context that we amended our legislation and introduced these regulations so as to permit student participation in a manner that is consistent with the whole concept of legal aid in Ontario while, at the same time, consistent with the full assurance that the citizen will get qualified legal advice. It is most important that we engender in the student population an interest in the Legal Aid Plan while, at the same time, ensuring that this participation will, in no way, prejudice the rights of the individual.

You will see from the Regulation itself that we have gone to great lengths to ensure that very strict supervision will be given to the students participating in the authorized programmes and, indeed, you will note that in Regulation 77 the function of the student is really to assist the qualified lawyers who are participating in the plan. The essence of the whole arrangement is that the students will be operating as assistants to the lawyers who must bear the ultimate professional responsibility to the clients.

The concept as interpreted in the newspaper report, of a group of law students under a law teacher providing some type of legal advice independent of the Ontario Legal Aid Plan is likely to incur not only professional problems but, much more seriously, the possibility of prejudice to the rights of an individual who obtains advice from an unsupervised law student.

I am not aware as to whether your department may have been consulted by the Department of National Health and Welfare in the development of this programme, but I do know that my department was not consulted in the implementation as it now appears to me from the press. The question is one which bothers me and, I know, you will share my concern as to the interference with and prejudice that might arise to the Ontario Legal Aid Plan and to the people who are served by it. I gather from the article in the newspaper that the matter is being dealt with on the basis of a trial for one year and I frankly suggest to you that if federal assistance is going to be provided for legal aid to the citizens of Canada then it ought properly to be provided through those plans that have been undertaken by the provinces with, what I feel, is a very real success in my own province particularly. We are already involved to an extent of over \$10,000,000.00 in the provision of this service to the people in Ontario and we are also fully aware that our financial commitments will become even greater in the future. This financial resource is but one factor that should not overshadow the tremendous contribution that is being made by the legal profession within Ontario and by many other agencies that are associated with the plan and through which a substantial contribution is made, such as the Ontario Department of Social and Family Services, which review the individual's needs. I would point out that the expense provided by Ontario through this latter service is not even reflected in the stated cost of the Ontario Legal Aid Plan.

I regret having to take so much of your time to review this situation but I would not do so if I did not consider it so important to the whole concept of legal aid.

As a result of this experience, I would earnestly suggest that any future assistance for the provision of legal assistance to the people of Ontario should be directed through the

Ontario Legal Aid Plan and the government programs devoted to that area in order that everyone's best interests may be developed, particularly in accordance with the responsibilities which the province has assumed in this area.

Yours very truly

Allan F. Lawrence,

Minister of Justice and Attorney General.<sup>10</sup>

It is apparent that the provincial government had not been amused by what it saw as a gratuitous federal foray into the province's backyard.

I can personally recall that the transfer of the clinic funding from the initial federal seed money over to permanent provincial funding was thought to be especially problematic because of the province's resentment of this federal meddling in the province's legal aid business.

I also vividly recall the moment when the federal core funding had finally, really come to an end and all emergency, interim funding arrangements had been exhausted. We were in the office—director, staff and students—with letters to each of the clinic's clients, written, stuffed in envelopes, and poised for mailing, announcing that our funding had expired, that the clinic was closing, and advising the clients what would happen to their files.

The phone rang. It was Dermot McCourt, Legal Aid Plan financial director (and, I might say, a person with great empathy for the clinics), advising me that he had a cheque (in the amount, in my recollection, of \$250,000). Where would I would like it sent? That that call would not have been made—*could* not have been made—without Roy McMurtry's strong commitment to the community legal clinic concept is clear.

McMurtry's message to the Law Society with respect to clinics was made publicly explicit in his speech at the Ontario Legal Aid Plan's tenth anniversary seminar in Toronto, on 26 May 1977. The speech was published in the Law Society *Gazette* and turned up in my boxes.<sup>11</sup> In it one finds a strong statement of the case to be made for legal aid in general, and for the role of the Law Society in managing it in particular. However, after giving the Law Society-run Legal Aid Plan its due, McMurtry went on to give the Law Society this public warning: "A few

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<sup>10</sup> Letter of A.F. Lawrence (Attorney General of Ontario) to the Hon. J.N. Turner (Minister of Justice and Attorney General of Canada) (7 May 1971).

<sup>11</sup> See R.R. McMurtry, "The 10th Anniversary of the Ontario Legal Aid Plan" (1977) 11 L. Soc. Gaz. 137. In the current legal aid environment, in which the basic principles governing those same issues are again, apparently, up for debate, it is a speech that would reward a revisit.

moments ago I spoke of the commitment to the role of the Law Society. It must be clearly understood that this goes hand in hand with an equally deep commitment to the concept of community law and to the further development of community clinics.”<sup>12</sup>

It is evident, however, that McMurtry could not have carried the day alone. In my view, it was the essential support from McMurtry, combined with the voices of reason within the profession itself, exemplified by Sam Grange, that combined to allow PCLS and the concept of a *community* legal services clinic to survive and ultimately to prosper.

In addition to Grange, McMurtry, and the other individuals previously mentioned, other members of the private bar whose significant contributions I remember include:

Jim Chadwick, then a litigator from Ottawa and a bencher, and now the Honourable Mr. Justice Chadwick. He served as the chair of the Law Society’s first clinical funding committee—which turned out (to many people’s surprise) to be prepared to give emerging ideas about community-based legal services clinics their heed, and which, in the interest of not stifling experimentation in this new field, authorized funding for some legal services concepts that were unique indeed.

The other two original members of that committee were Archie Campbell, then senior Crown counsel and director of policy development in the Ministry of the Attorney General (now the Honourable Mr. Justice Campbell), and Lee Ferrier, then a principal in the well-known firm of McDonald, Ferrier, subsequently treasurer of the Law Society and now the Honourable Mr. Justice Ferrier.

Ferrier’s initial contact with the community clinic concept was as one of the private bar representative members on the PCLS board.

Campbell, of course, also served a one-year stint as the Parkdale Director—1977/78—before returning to the public sector and eventual appointment as the deputy attorney general. It is well known that he was McMurtry’s principal lieutenant in the development of the government’s community legal services clinic policy.

Peter Tobias, a lawyer from Huntsville, and a bencher of the Law Society (now the Honourable Mr. Justice Tobias), served for a number of years as chair of the post-Grange clinic funding committee, and in that role proved to be a strong supporter of innovative clinic funding initiatives.

Mary Cornish, a student at Parkdale in 1972, and a member, at the time, of the firm Cornish, King and Sachs, was a PCLS downtown

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<sup>12</sup> *Ibid.* at 140.

supervisor for a number of years, a member of other clinic boards of directors, and for several years, along with Bellmore and Tobias, a member of the clinic funding committee. (The other two members of that committee were a lay bencher, Noel Ogilvie, and Michael Fitzpatrick, a lawyer with the Ministry of the Attorney General.)

Tom McDonnell, a tax partner with Oslers at the time, served as volunteer chair of the governing board of the People and Law clinic—a clinic with an especially radical concept of low-income legal services—until its funding was discontinued by the clinical funding committee in, I think, 1976. (This event precipitated a crisis of confidence with respect to the funding arrangements for the clinics and led ultimately to the appointment of the Grange Commission on Clinical Funding.)

Ian Outerbridge—at the time the senior partner of the well-known personal injury litigation firm Thomson, Rogers—backed the 1972 initiative of two junior lawyers<sup>13</sup> and caused that firm to open its own storefront poverty law office designed to give poor people in the Kensington community access to the Thomson Rogers legal skills. The experiment was unsuccessful for a number of reasons, but the openness it evidenced on the part of a highly regarded mainstream litigation firm to radical experimentation in the delivery of legal services to disadvantaged communities is a significant indicator of the extent of the support for progressive reform that was to be found within the downtown bar.

Under the leadership of Ian Scott (who became Ontario's attorney general in the 1980s), the well-known firm of Cameron, Brewin and Scott had also opened a storefront poverty law office. It was located in the east end of Toronto, on Gerrard Street, east of the Don River, and was called the Riverdale Clinic. I am not familiar with the history of that clinic, although I know that it did not prove to be sustainable. Scott also served subsequently as the counsel to the Osler task force, the report of which strongly supported the community clinic concept and provided McMurtry with the formal back-up he needed to install provincial funding for clinics.

And then, of course, there were the forty or more mainstream practitioners referred to in the Law Foundation application who volunteered as downtown supervisors in this new, radical PCLS clinic, some for several years, and their senior partners and colleagues who supported that involvement. I am also sure that there are numerous

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<sup>13</sup> One of these was Bill Phibbs, the current moderator of the United Church of Canada.

other private-bar contributors whose roles have slipped from my memory over the years.

It would be wrong, however, to overstate the support to be found within the private bar for experimentation with reform in legal services concepts. The PCLS submissions to the Grange Commission speaks to another reality about the private bar, circa 1978.

(c) The Reaction of the Local Bar

32. Clinics now find reasonable acceptance amongst private lawyers in Toronto but there recently have been a series of bad experiences with local county bar associations as the effort to push the clinic concept beyond the Metro Toronto area has gotten underway. These experiences are well known within the clinic community and account for a resurgence in the level of distrust of the motives of the legal profession generally. It is a fact that cannot be ignored in considering the appropriate composition of the Clinical Funding Committee ... .

33. We hesitate to make specific allegations in this connection because our information is necessarily second or third hand but we would urge the Commission to investigate through the Clinical Funding Committee this aspect of the recent history of clinic development. The cities whose local bar organizations achieved notoriety within the clinic community for their negative reaction to clinic organization attempts - whether well-earned or not - are Halton Hills, Oshawa, Thunder Bay, Kenora and Sault Ste. Marie. Hamilton appears to be the only place outside of Metro Toronto with clinic activity where the attitude of the local bar has been positive and constructive.<sup>14</sup>

In the late fall of 1976, I had occasion to draft a letter to the managing partner of my old firm, in which I explored again the possibility of Oslers creating a *pro bono* law department.

My boxes contain only a draft of the letter, and I cannot now remember whether it was in fact ever sent. In any event, by then, times had moved on, and a big-firm *pro bono* law department had in truth become a quixotic idea. However, in that draft I spoke to a concern about the long term impact on the independence of the bar of the failure of the downtown firms to remain connected to the profession's efforts to deliver legal services to the disadvantaged. Reading that draft now, I hear the distant voice of a Cassandra on the walls of Troy. I take the liberty of sharing that concern—a concern even more cogent now than then—in the words penned more than twenty years ago.

Dear Allan:

As you know, it has long been a concern of mine, now confirmed by my experience at Parkdale, that the Downtown Bar's increasing detachment from the profession's struggle to meet the growing demands and needs for free or subsidized legal services and from the

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<sup>14</sup> See Parkdale Community Legal Services, *Submissions to the Ontario Commission on Clinical Funding* (14 September 1978) [unpublished] at 11-12.

profession's efforts to discharge its professional obligations to the non-commercial or non-affluent parts of society, has serious long-term implications for the future status of the profession. ...

The Bar, including the downtown portion of it, relies ultimately for its independence and professional standing on the support, or at least the forbearance, of the general public. That support or forbearance is in turn ultimately dependent on continued public confidence in the Bar as a helping and relevant institution. ...

I include in the concept of the Downtown Bar all lawyers practicing in firms, whether they be in Toronto, Ottawa, Hamilton, Windsor, London or wherever, which by reason of their geographic location and the special talents, interests and income expectations of their members and associates, are for all practical purposes largely or wholly committed to the provisions of legal services to the business world. The Downtown Bar in Ontario is the repository of a large part of the profession's economic strength, employs a disproportionate share of the profession's talent and energy, is the source of a significant part of the profession's political influence and, in my experience, is a part of the Bar strongly committed to professionalism in the practice of law.

Ironically, it is also the part of the Bar with the least influence on the nature of the profession's response to the current legal services crisis. It has surrendered its role in that regard to the criminal bar, to the legal aid bar and to the general practitioners. On these historic issues that arguably may ultimately determine the fate of the legal profession as we now know it, the Downtown Bar has put itself in the position of having nothing to say.

Thomson, Rogers' unfortunate experience with its Kensington clinic, Cameron Brewin & Scott's unsuccessful attempt to establish a Riverdale office and Osler, Hoskin & Harcourt's commitment in 1973 to an informal community interest law program, are the only instances of which I am aware, where the Downtown Bar has taken positive steps to confront its growing detachment from the traditional, people-oriented concerns of the legal profession. ...

If the profession is to answer the charge that it is unresponsive to the public interest and is to endure as a meaningful social institution, the downtown part of it must begin to play again an active role in coping with the full spectrum of the profession's obligations. ...<sup>15</sup>

I remain convinced that the failure of the downtown firms to maintain any connection to the delivery of legal aid services will prove to have been a mistake of the highest significance for the profession and for the legal system generally. At that point, the downtown firms' abandoned legal aid services to those in the profession who could use the business.

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<sup>15</sup> Letter of S.R. Ellis to A.L. Beattie (Osler, Hoskin & Harcourt) (9 November 1976), found in the archives in draft form only.

#### IV. THE JUDICARE SYSTEM AND THE LAW SOCIETY: A CLINIC PERSPECTIVE

Two hot issues in the 1970s were whether the so-called judicare certificate system of legal aid should continue or should be replaced by a combination of the community clinics and a public defender system, and whether the Law Society should continue to be responsible for OLAP. They were both addressed by the *Osler Report*<sup>16</sup> on legal aid.

The report recommended the retention and expansion of the certificate system in conjunction with a strong clinic system, but called for the transfer of responsibility for those systems from the Law Society to “Legal Aid Ontario,” an independent corporation.

On these two issues, amongst others, I found myself at odds with a number of Parkdale’s staff lawyers, lay advocates and some students, and, ten months into my term as director, my leadership on these and a number of other issues was directly challenged.

My response to this challenge took the form of a long paper entitled *The Director’s View* in which I described what I understood the issues to be and defended my views respecting those issues.

In that paper, I addressed, among other things, the issues concerning whether the judicare system of legal aid should continue or be replaced by a combination of community legal clinics and a public defender system, and whether the administration of legal aid should be removed from the Law Society. The relevant passages are as follows:

The Osler Task Force Report was published several months ago and since that time I have done a number of things which have caused you concern. These are, as I understand it, as follows:

1. I have questioned whether it is really wise to transfer the control and administration of Legal Aid from the Law Society to Legal Aid Ontario as defined by the Osler Report.
2. I have expressed enthusiastic agreement with the Osler Task Force’s main recommendation of an expanded role for private law firms in the legal aid system in combination with a strong network of clinics. ...

My initial concern about relieving the Law Society of any further responsibility for legal aid in Ontario focused on the fairly esoteric question as to what would be the long-term impact on the nature of the profession if it no longer had any professional responsibility for the delivery of legal services to people in need. I had a strongly felt, intuitive sense that we were somehow tinkering with the profession’s “soul”, as it were, with unforeseen, potentially dire consequences for the existence of the so-called independent bar over the long term.

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<sup>16</sup> See Ontario, Task Force on Legal Aid, *Report of the Task Force on Legal Aid* (Toronto: Ministry of the Attorney General, 1974-75) (Chairman: J.H. Osler) [hereinafter *Osler Report*].

I know the concept of an independent bar tends to be the subject of ridicule in the eyes of so called radical lawyers of today but in my view it remains, as corny [sic] as it may seem to say so, one of the corner stones of individual freedom in this society. However, that is not a debate that we need to get into here. ... I was ultimately persuaded, however, by the force of the argument in the Task Force Report to the effect that an effective, full scale, legal aid scheme could never be mounted under the auspices of the Law Society. ... With its inherent conflict of interest, [the Law Society] could never pursue the expansion of the legal aid scheme as effectively as it had to be pursued because of the suspicion that the government and the public would always have about any proposal emanating from the Law Society that the motives of the Law Society were at least in part to further line the pockets of their members.

And in May of 1975 I came to the conclusion that, on balance, the Osler recommendation for the transfer of the responsibility for legal aid to Legal Aid Ontario ought to be supported. ...

After coming to that conclusion, however, I had a further opportunity to study the Osler recommendations and I became more and more concerned about the wisdom of transferring this power to Legal Aid Ontario as that organization was defined and structured by the Osler Report, not this time on any question of principle but on the basis of a practical concern that the organization Osler recommended was likely to be at least as traditionalist and reactionary in its outlook on the expansion of new modes of delivering legal services as the Law Society, or more so.

Osler recommends a new organization consisting essentially of a twenty-person board of governors. Ten are to be appointed by the Law Society and ten appointed by the Government. When one considers that the setting up of that organization will follow a decision, that will obviously be made over the Law Society's dead body, to remove the responsibility for legal aid from the Law Society, one can reasonably suspect that the Law Society's appointments to the new board of governors are apt to be people who come to the board with the defense of the remaining prerogatives of the profession as one of their concerns. The Government, on the other hand, having indicated that it has no interest in spending any more money in the legal aid field than it is now spending, is unlikely to appoint any significant number of people to that board with real enthusiasm for the expansion of innovative methods of delivering legal aid services.

Looking at the thing in those terms, I came to the conclusion that it is at least an even chance that the organization one ends up with if one accepts the Osler Report's recommendation ... is an organization that is potentially less flexible, less expansion-minded and less innovative in its approach than the Law Society. ...

As far as my enthusiasm for the "mixed" system of legal aid recommended by the Osler Task Force is concerned, I am under the impression that this is a recommendation with which the office is generally now in agreement. I can recall a discussion at a meeting in the office and I believe it was at a meeting of the Board of Governors soon after the Osler Report was tabled, where it was generally conceded that no one was seriously opposed to the concept of the private firms continuing to have a role in conjunction with the clinic system. Certainly, there is no doubt that I have been strongly in favour of the mixed approach from the beginning and it was the clinic-only aspect of Parkdale's submission to the Task Force with which I disagreed. I never made that disagreement known in any public way nor did I take a stand contrary to the office's position on that issue until after the Task Force Report had been published. Since that time, as I say, I have had no sense that my position on this issue was any different in principle from

others in the office. There is no doubt, however, that I view the mixed system with more enthusiasm than some and I think it is useful to examine the reasons.

First of all, it makes no sense whatever to me that we should be using any resources allocated for clinics to do things that the private law firms do well.

Secondly, the universal problem with clinics, as experienced in the United States and is now being experienced in Quebec, is that they inevitably choke on the caseload that they develop. Successful clinics attract increasing caseload all the time and can cope with that caseload only by persuading the government to give them additional allocations of funds to hire more lawyers etc. Government allocations being what they are, the funds never catch up with the requirements and so you end up with a clinic that is perpetually overburdened and understaffed.

The judicare system on the other hand doesn't suffer from that problem. The money available to service the demand for legal services automatically increases with the demand. The only way the government can control the total financial commitment to legal aid under a judicare scheme is *by making a public decision to reduce the scope of the coverage of the Plan*. The mixed system therefore provides the best of both schemes. It provides, on the one hand, a clinic of salaried lawyers and paraprofessionals and students capable of doing the kinds of things that are necessary to make the law accessible to low income communities and, on the other hand, through the capacity of referring the bulk of the caseload generated by that activity through to the private bar under the judicare system, it maintains a capacity for handling the work generated without overburdening the clinic or having to seek additional funding.

Thirdly, the mixed system has the effect of expanding the exposure of the legal profession to the predicament of the poor and thus facilitating the law reform process to which I have already referred. In my view, an important part of the clinics' function is the enlistment of the resources and services of the legal profession in the interests of the poor in the same way that they are now enlisted in the interests of the business world. An enlarged role for the private bar in the legal aid scheme together with a strong network of clinics will make a large contribution to the achievement of that objective. A legal aid scheme based solely on clinics would have had the effect of further isolating the low income communities from the legal profession and thus depriving those communities of a potentially important ally in the fight for effective reforms.

Fourthly, I believe it would be wrong to create a situation where a resident of a low income community who needed legal services had no alternative but to go to the local clinic. Even a clinic that was being well run and providing good services would inevitably alienate some portion of the community ...

It seems self-evident to me that if the low-income citizen is to receive the same quality of legal services that the rich person receives, an essential element of such service is an effective choice between law offices. ...

[T]here is no hope in my view that clinics will in the long run provide the environment for the support and development of a politically radical segment of the legal profession. This is, of course, precisely what the present debate [in the office] is all about, and it is naturally possible that my perceptions of the limitations of the clinics in the political sphere will prove to be all wrong. However, I don't believe so.

Apart from anything else, I find it inconceivable that anyone could believe that the public and the government would provide the amount of funds that will be necessary to establish a viable clinic system (in the Parkdale office we are already looking at a total annual

budget of about a quarter of a million dollars) and allow those clinics to become a network of radical political organizations: it will be a full-time fight to maintain an effective capacity for professional activism. The expanded judicare system, however, seems to me to solve the problem without creating any difficulties.

The point I am making here is simply that when and if the Osler recommendations that legal aid certificates be made available for tribunal work such as unemployment insurance and workmen's compensation and the like, and that a system of summary advice and assistance paid for by the Legal Aid Plan be set up, are implemented, it will then, for the first time, become possible in economic terms to open a private law firm in a low income community devoted exclusively to providing legal services to poor people.

Within the limits imposed by considerations of legal ethics and the like, the lawyer operating an office of that nature would be free to practice law in as political a way as he saw fit. The diversity and dynamism of a sizable poverty law bar developed on that basis and working in tandem with a system of clinics committed to professional activism, would provide a prospect of progress and reform much more interesting in my opinion than any system of government clinics working alone could possibly hope to achieve. In my view, the radicals amongst us are turning their backs on that part of the Osler recommendations that offers them the only real hope for an opportunity to do their own thing in their own way and apparently opting instead for life in a government-funded and, in the long run, government-dominated, clinic.<sup>17</sup>

Readers in touch with the current legal aid environment will be forgiven a sardonic smile at the claim in the above passages that open-ended funding is an intrinsic feature of a judicare system of legal aid. At the time, I meant to say that under the judicare system a government could only control the spending on legal aid certificates by legislating a reduction in the coverage definition in the *Legal Aid Act*

There is reason now, of course, to believe that that was a significantly naive view of the real world. However, despite the apparent evidence to the contrary that has accumulated in recent years, I remain of the opinion that in a democratic system of government the downsizing of legislated rights by means of a cabinet-ordered reduction in funding support is neither appropriate (*i.e.*, ethical) nor, one might venture to think, legal.

The first break with the tradition of open-ended funding in the legal aid certificate system occurred in fact only six months after I had written the *Director's View* paper. And, surprisingly—to me at least—far from resisting the move, the Law Society—trustee, as it were, of the rights to legal services defined by the *Legal Aid Act*—volunteered to be the government's handmaiden. The benchers approved the capping of the funding and thereby, in my view, became co-conspirators in the unauthorized rationing of rights under the *Act*.

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<sup>17</sup> S.R. Ellis, *The Director's View* (30 October 1975) [unpublished] at 6-14 [emphasis added].

Given the clinics' dependence in an integrated system on the availability of legal aid certificates for their clients, this was a matter that had to be addressed, and I find in my boxes a copy of my letter addressed to the benchers of the Law Society, much of which remains relevant to today's legal aid debate.

Gentlemen:

The Government's decision to terminate the open-ended nature of legal aid funding and to impose a fixed budget limit for 1976-77 at a level 4.5 million dollars below what the Law Society believes it needs is, in the writer's view, an inappropriate use of the Government's executive fiscal power.

This decision constitutes an historic challenge to the legal profession's administration of legal aid services and its capacity to meet its responsibilities to the public for the delivery of needed services to people who cannot pay legal fees. The nature of the profession's response to this challenge is not only critical for the future of legal aid services in Ontario but fraught with serious implications for the future independence of the bar itself.

Presumably, the legal aid services now being provided are thought by the bar and the Benchers to be essential services. A legal profession that cannot or will not defend legal aid services it deems essential, and for which it is responsible, against the arbitrary exercise of government executive power is not a profession in whose future one can have much confidence. ...

If the present posture of accepting the role of the Attorney General's right arm in the imposition of restrictions on legal aid services is persisted in, it will, in the writer's opinion, effectively destroy the profession's claim to any significant role in the future management and control of legal aid services.

In my respectful view, the profession must say to the Government that there is no justification for any reduction in the legal aid budget; that the services now being provided are essential services; that indeed an expansion of legal aid services of various kinds as recommended by the profession in 1971 and again by the Osler Task Force in 1975 is necessary and long overdue; that, furthermore, the present services are provided pursuant to the legislated mandate in the Legal Aid Act which fixes the Law Society with the obligation to administer that mandate—efficiently and with the least possible abuse—in accordance with its terms in the interest not of the Government but of legal aid applicants; that the Government is responsible under the Act for providing funds to cover the reasonable costs of providing the services so mandated; and that it is inappropriate and contrary to the free traditions and principles of government in this society for the Government to attempt to restrict access to the mandated legal services by an executive decision to restrict the funds required. ...

Either the Benchers believe that the present legal aid services are essential, in which case their failure to fight for them is a betrayal of principle, or they are committing the profession to a position based on a decision about the merits of the present scope of legal aid services that is grounded on nothing more substantial than their own personal impressions, and which they are not entitled to take at this time, in any event. ...<sup>18</sup>

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<sup>18</sup> Letter of S.R. Ellis to the Benchers of the Law Society of Upper Canada, Toronto (22 April 1976).

## V. THE DEFINING FEATURES OF COMMUNITY-BASED LEGAL SERVICES CLINICS

Parkdale, and the other community-based legal clinics that emerged in Ontario in the 1970s, were a new thing in legal aid services as far as this province was concerned. The clinic movement had first appeared in the United States, and, at the outset, the American experience had been very influential in Ontario. However, Ontario clinics were operating with one substantial advantage not generally available to American clinics—the parallel, *judicare* legal aid system which, during these years, was well-equipped to handle the traditional legal aid services, such as defence advocacy in criminal cases, family-law litigation, and so on. With certificate services generally available to low-income clients through the private bar, the clinics were free to address other, unmet needs for legal services. There was, therefore, much exploration and considerable debate concerning the roles that Ontario's community based clinics should play.

In the summer of 1977, OLAP administrators had developed a regionalization proposal which included a scheme for the incorporation of clinical functions as an integral, direct activity of OLAP.

The proposal recommended that, in smaller centres, the legal services that were being provided in Toronto through caseload activity of community clinics should be provided by paralegals employed and trained by the plan—and located in legal aid offices. The paralegals' work was to be supervised by local lawyers on a duty-counsel basis and by the regional director of OLAP on a telephone-access basis.

The legal services which these "legal aid clinics" were to offer were claimed to be the same as the services being provided by Toronto's "community based clinics," and it was possible, if one were slightly paranoid, to see the proposal as a strategy of the Law Society's legal aid committee for forestalling the migration of the community based clinic concept into Ontario's regional centres.

The proposed legal aid clinics did not, however, come close to addressing the true legal services needs of low-income communities. In resisting this new initiative, it became necessary, therefore, to articulate exactly what it was that made community-based clinics unique.

In August 1977, I wrote to the chairman of the legal aid committee, opposing the legal aid clinic idea, and contrasting the features of that proposal with what we now knew of the community based clinic concept. That letter attempted a comprehensive description of the defining features of community-based clinics as we had come to

understand those features through the experience with Parkdale and other clinics in the preceding seven years:

Appreciation of the essential features of the community legal services clinic concept requires an understanding of the concept's objectives. Obviously, these include solving the problems of physical access, financial access and the availability of relevant lawyering skills and experience—the three problems with which the legal aid clinic concept is also concerned. They also include, however, a number of other objectives that are at least as valid and important.

Perhaps most important is overcoming the social and cultural barriers between low-income clients and lawyers. The significance of these barriers has been generally recognized in connection with the delivery of legal services to native people. What tends to be overlooked, however, is the fact that the cultural and social differences between lawyers and a third generation welfare recipient in an area like Parkdale may well be as fundamental in their nature, if perhaps different in kind, as those that exist between lawyers and native people. And, of course, the significance of the cultural and social differences between the average lawyer and low-income residents of immigrant communities such as Portuguese or East Indian needs no elaboration.

That these cultural and social differences are an important consideration in fashioning a more effective legal services delivery scheme should be, in the writer's respectful submission, self-evident: they discourage initial recourse to the service by potential clients intimidated or put off by its "foreign" or "unfamiliar" aspect; they inhibit, if they do not prevent, the development of a viable solicitor-client relationship and thereby reduce to potentially unacceptable levels both the quality of the actual services rendered and the client's level of satisfaction with the service; and they undermine a lawyer's actual ability to give relevant and valid advice and services by making it impossible for him to realistically project himself into the client's situation. ...

But the significance of these cultural and social differences has also been discounted, instinctively if not overtly, by reason of the legal profession's traditional view that the quality of a lawyer's personal relationships with his clients is not important. It is, after all, the professional relationship that counts and conventional wisdom in the profession has it that a professional relationship is possible with anyone. The nature or quality of the personal relationship with a client should not, the profession believes, affect the quality of services that a lawyer provides. ...

The role of a clinic is akin to that of a "family" solicitor. It involves an ongoing relationship covering information, general advice, referrals, education, preventative advice and assistance, as well as crisis-intervention as required. The relationship is quite different from the counsel-client model with which the certificate system is primarily concerned and, in the writer's view, it cannot be doubted that it is wholly dependent for its effectiveness on some significant measure of personal affinity between client and lawyer.

That this is true should be self-evident when one considers the highly personal and intimate nature of the relationship itself, but there is no lack of objective evidence. One needs only to contemplate the universal experience as to the extent to which fee-paying clients are attracted to solicitors with compatible ethnic and cultural backgrounds, or the general experience of the profession in acting for fee-paying clients in matters affecting the client's vital interests.

Where their vital interests are at stake, fee-paying clients are not at all satisfied with a purely professional relationship. They want from their lawyers some degree of personal commitment to those interests as well. Witness union clients who will not tolerate lawyers who are prepared to act for employers in labour matters; management clients who regard lawyers willing to act for unions or employees in labour matters as untrustworthy; and lawyers with major developer and landlord clients who feel they cannot afford to be seen acting for ratepayers or tenants associations. It should come as no surprise that the poor, too, need legal counselors, whether they be lawyers or paralegals, to whom they can relate on some personal basis and whom they feel are personally committed to their vital interests as they see them. ...

A related problem is the low-income community's instinctive rejection of lawyers and legal services as a *relevant* resource. With the exception of major litigation problems such as criminal charges, motor vehicle accidents, divorces, and the like, experience has demonstrated that the poor do not think of lawyers and the law as having anything to do with them (except when they are the objects of lawyers' activities on behalf of landlords or finance companies, etc.). They do not perceive their disputes with landlords, with unemployment insurance or welfare officials, with children's aid societies, with local merchants, with school authorities, etc., as legal problems, and cannot conceive of a *law* office being interested in, or, indeed, able to help with such matters.

Any significant reform of our legal services delivery system must be deeply concerned with raising the level of consciousness amongst the poor not only as to the availability of legal services but also as to their relevancy.

A further fundamental objective of the community legal services clinic concept is to engage the legal profession in law reform and law development activities in the interests of the poor in the same way that it is now engaged in such activities in the interests of fee-paying clients. The continuous law reform activity of lawyers in all its many facets is an essential element of our legal system. That element is presently entirely missing in respect of the law as it applies to the interests of low-income citizens and it is a legitimate and important part of any modern legal aid policy to ensure that the legal profession's role in law reform is extended to cover those interests. ...

Finally, one of the community legal service clinics' important objectives must be the development of modes and techniques of practice and kinds of legal services that are responsive to the unique needs and characteristics of its low-income client constituency. The reference here is particularly to the non-criminal side of its services.

The nature of the civil law services that lawyers traditionally provide and the way in which law offices traditionally deal with civil law clients is the product of years of service in the interest of fee-paying clients. Fee-paying, civil law clients are typically, well-educated people with substantial incomes, living in a stable and secure environment. They are generally confident and articulate and their transactions with other people normally proceed on a footing of relative equality and independence. Fee-paying clients are usually competent to cope themselves with the bulk of life's exigencies and need a lawyer's advice and assistance only in the rare situations they encounter where some specialized knowledge of the law is required.

How, as a simple example, should a law clinic cope in its daily business, with clients who cannot be reached by telephone, have mail arrangements that are dependent on a landlord's good faith and reliability, move frequently and eschew forwarding addresses? How should it deal with clients who may be literally incapable of accepting responsibility for keeping appointments? On the other hand, what can be done with a legal system prone to its own unexpected delays and adjournments, when the consequences for the

clinic's client and his witnesses of yet another day off work may well be economically intolerable, and the prospect of yet another appearance and more delay psychologically insupportable? What can or should a clinic do for an inarticulate, alcoholic, ex-con, welfare recipient client who wants and needs the protection of the legal system, given that success in that system is realistically predicated on standards of credibility and respectability that he has no hope of satisfying? How can clients who scream or pass out in the waiting room be managed? What is a clinic's proper role where a client is being outrageously and illegally abused by his landlord, has come for help but is simply "afraid" to do anything and cannot afford to move? What is its obligation or role where a tenant and his family, locked out of their apartment on a Saturday morning, have come to the clinic for help, have no means of obtaining alternative accommodation, no idea of what to do, and the landlord says, "sue me"? What is the community clinic's obligation when it appears that if an important witness complies with the clinic's subpoena, she will lose the job she has just found after eight months of unemployment?

Without belaboring the point, it is apparent that if we are to provide access to *effective relevant and constructive* legal services for the poor, there must be a commitment of resources to the imaginative development and provision of services and techniques of delivering services that adequately reflect the special needs and characteristics of the client constituency being served. The criticism often heard within the profession that clinics provide social services, not legal services, not only reflects ignorance of what actually happens in clinics but is premised on the unjustified assumption that the appropriate professional role for lawyers in civil matters is validly defined for all purposes by what has been found to be appropriate for fee-paying clients. ...<sup>19</sup>

The letter went on to point out in some detail why the clinic concept envisaged by the regionalization proposal could not serve these needs. One point, it is important to emphasize, is that it is an *essential* feature of any viable low-income community legal service that it *not* be dependent on private-bar lawyers:

Another difficulty with the plan to make the clinics dependent for their lawyering services on the local Bar which may not have received sufficient attention, is the problem of conflict. It has been the writer's personal experience, and one he has heard reported upon by others as well, that in trying to find in Toronto practicing lawyers to act on a *pro bono* (free) basis for ratepayers associations, tenants associations, native Indian groups and the like, or to act as counsel under legal aid certificates in significant litigation on behalf of individual clients involving contentious employment issues or landlord and tenant issues or environmental issues, etc., it is common to encounter amongst lawyers who in principle make themselves available for such work, an inability to act in particular cases in the face of what they or their firms consider to be potential "problems" with existing clients. (The word most often used in these discussions is "conflicts" but "problems" is more accurate since it is not actual "conflicts-of-interest" that usually cause the difficulty).

Thus, firms with major oil industry clients are reluctant to act for native Indian groups (and the native Indian groups are reluctant to have them), firms with major developer or landlord clients are rarely willing to act for tenants or tenant groups, and law firms with

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<sup>19</sup> Letter of S.R. Ellis to J.D. Bowlby, Q.C., (Chairman, Legal Aid Committee, OLAP) (23 August 1977).

major industrial clients do not feel comfortable acting for complainants in significant environmental cases.

Whatever one may think of the validity of such reservations in principle, the Toronto experience has demonstrated that they are very real practical concerns amongst practicing lawyers. And in proposing a clinic model that relies on the local private Bar for its lawyering skills, must not the Plan anticipate the same kind of problem and perhaps, in smaller centres, in even an exaggerated form? How, for example, is a legal aid clinic to cope with a contentious case against a prominent local landlord involving the assertion of novel tenant rights on behalf of a “known” deadbeat, when the clinic depends for its lawyering skills on members of the local Bar, all of whom have private practices that are in turn dependent in some significant measure on the goodwill of local landlords and the business community? ...<sup>20</sup>

History records that the “legal aid clinic” idea was eventually dropped from the regionalization proposal, and that the migration of the community-based legal services clinics into the regional centres continued apace.

Provincial funding for clinics was formalized in late 1975 or early 1976 when the cabinet approved a new Clinical Funding Regulation under the *Legal Aid Act*<sup>21</sup> authorizing a clinical funding committee to approve clinic funding applications. It was at this time that one of the most contentious issues concerning the definition of the services the new clinics would be allowed to deliver was finally directly confronted.

The issue was whether the new clinics, now operating with full government funding, should be allowed to engage in law reform activities. The question, in a nutshell, was, how could the government justify paying public funds in support of reform activities directed against its own laws on behalf of the interests of a particular segment of the population?

At this time, the existing community clinics who were to receive this new funding, were acting in concert in pursuit of the clinics’ common interests through a loosely arranged umbrella organization called “Action on Legal Aid” (ALA). This collaboration had been ongoing since 1975 and, as the Parkdale director, I was a regular participant.

From their inception, clinics had seen law reform as one of their principal goals. The clinical funding committee was now questioning whether, under the new regime of provincial government funding, such activities could be continued. Having survived the withdrawal of federal funding and achieved permanent provincial funding, we now appeared

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<sup>20</sup> *Ibid.* at 9.

<sup>21</sup> O. Reg. 160/76, s. 147.

to be in danger of losing one of the pillars of the community clinic concept.

ALA mounted a full-court press. At the heart of that campaign was a reasoned case in support of law reform as an essential component of a clinic's services. This case was made in the form of an ALA brief submitted to the clinical funding committee:

We are unanimous in the conviction that the application of caseload experience to law reform activities directed to the correction of problems exposed by such experience is an inseparable and crucial aspect of the legal or para-legal services delivered to the public by any community legal clinic.

Should the Committee consider that the concept of legal services outlined in the attached brief is not one to which they are able to subscribe, we would ask that the issue be referred to the Law Society and the Attorney-General and that we and other interested parties be given the opportunity to participate fully in the determination of this vital policy question.

Yours very truly,

PARKDALE COMMUNITY LEGAL SERVICES,

S.R. Ellis, Director <sup>22</sup>

ACTION ON LEGAL AID: THE MEANING OF LEGAL SERVICES IN A COMMUNITY LEGAL CLINIC CONTEXT ...

The legal services traditionally supplied to persons with means and which are necessary for full participation in the benefits, rights, protections and privileges of our system are listed in the Action on Legal Aid Brief to the Ontario Government in Response to the Osler Task Force Report on Legal Aid as follows:

(a) case by case advocacy; (b) legal advice prior to taking steps having legal consequences; (c) client education about law and its process; (d) law reform based on test cases, research, lobbying and organizing; (e) summary advice and assistance; (f) training of legal workers; (g) timeliness of response; and (h) psychological and geographical accessibility.

If clinics are to meet the legitimate demands of their clientele for legal services, then all of these services must be readily available; either directly through the clinic itself or in appropriate cases through the private bar. This most particularly includes law reform—the one category of these services the legitimacy of which may not yet be generally acknowledged.

The necessity for law reform initiatives by lawyers, and in a clinical setting by paraprofessionals as well, arises for a number of reasons. First, if the law is to be an effective and constructive influence in society, it must be a dynamic influence, sensitive and responsive to needs for change. ...

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<sup>22</sup> Letter of S.R. Ellis to J.B. Allen, Q.C., (Clinical Funding Committee, Ontario Legal Aid Plan) (4 May 1976), with enclosures.

Second, the design of our legal system and the nature of our law is such that the multi-faceted process of law reform is in almost all of its facets dependent on the active involvement of lawyers with direct experience in the application of the law to the business or interests of their clients.

Third, law reform activity in the areas of law in which they work must be regarded as an obligation of lawyers. They have the direct experience of the need for change coupled with the training and experience to recognize opportunities for reform and to identify likely avenues of reform, the skills to pursue those avenues and the incentive to act. They are parties to a system of law that requires a constant reform input which in large measure only they can supply.

The law reform activities of the private bar in respect of the commercial, business and property law with which its practice is largely concerned is extensive. Adventuresome litigation designed to expand legislative concepts or to clarify ambiguities is common-place—extensive legal research of litigation possibilities with the same object in mind, even more so. Fully researched and persuasively argued briefs in respect of proposals for change or advocating a particular interpretation of existing law go out from the private bar to government officials and responsible ministers in a constant stream; meetings for the same purpose at all levels of government are a regular feature of a successful practice; legal writing in learned publications on law reform issues is an acknowledged mark of distinction; lobbying of colleagues and associates and of government officials and politicians on law reform issues an honourable tradition; and the organizing of professional groups and of client groups to work together on law reform issues a common experience.

All of this is an integral aspect of a successful private practitioner's practice. Part of it, of course, will be done simply as another piece of professional business directly for a particular client at his expense; much of it is motivated in part at least by considerations of personal professional reputation and standing; and a significant proportion arises because of the sense of professional obligation felt by lawyers when they encounter a serious error or injustice in the law with which they are concerned. ...

The silence on the other side of the tracks, on the other hand, is complete. One could safely hazard a guess that in Toronto in the decade prior to 1971 there was not a single, practicing lawyer's, law-reform initiative in the interests of low-income citizens in respect of any of unemployment insurance law, workmen's compensation law, welfare law, consumer law, landlord and tenant law, or family law. Any exception that could be turned up would serve only to prove the essential truth of the proposition. The law as it relates to the particular interests of low-income communities has no dynamic aspect. It is dead law. Changes and innovations occur only after it has become so archaic and inappropriate and has inflicted its errors and omissions, irrelevancies and incongruities on so many victims that it becomes a political issue which ultimately compels legislative initiative.

The absence of any continuous, dynamic process of change and adaptation in respect of the law as it applies to low-income communities has not received much attention in the legal aid debate to date, but it is arguably the single most significant consequence of the failure to provide low-income communities with access to legal services. ...

The advent of clinics means that for the first time ever, there will be professional people—lawyers and paraprofessionals—with the experience and ability to recognize law reform needs and possibilities and the skills to pursue them who will have direct experience of the application of the law as it affects low-income citizens. The responsible

application of that experience to law reform initiatives must be recognized as a professional obligation and accepted as an integral part of any clinic's function.<sup>23</sup>

It is now known that this ALA brief was an important factor in persuading the clinical funding committee and, in due course, the Law Society and the government, as to both the propriety and the necessity of allowing community legal services clinics to engage in professional law reform activities.

Another controversy about the extent of a community clinic's legitimate activities concerned a clinic's right to act as the lawyer for an organized group, such as the Parkdale Tenants' Association (PTA). The activities of such groups would often take on a very political hue, including, in the PTA's case, the public support of particular candidates for public office and it was difficult for the community—and sometimes for the clinic—to distinguish between the clinic's appropriate role as *a lawyer* for a group and what most conceded was an inappropriate role as *a member* of that group.

The issue came to a head for Parkdale in March 1976, when one of the aldermen from the area—Tony O'Donohue—wrote to the clinic, complaining about the PTA's use of the PCLS office address as their return address. The PTA was supporting O'Donohue's opponent in forthcoming municipal elections.

The letter prompted some considerable soul searching in the clinic and amongst the members of the board of governors, and on 29 June 1976, I was authorized to write the following response:

Dear Tony:

The question you raised in your March 17th letter about the appropriateness of the Parkdale Tenants' Association using our address as their return address, is a question with important implications for legal services clinics generally.

No one would suggest that public moneys should be used for partisan political purposes. To cite an obvious example, it would be quite wrong for clinics to publicly endorse and support particular candidates for public office. But it is equally apparent that clinical legal services to a low-income client constituency must include providing law-office services to groups and organizations. And groups and organizations who utilize the clinic's services will often have objectives that conflict in some way or another with the interests of other elements of the local community in which the clinic is located. Where that occurs, the activities of such groups or organizations will naturally be perceived by those other elements as political activities and in those circumstances *any* assistance the clinic gives to such groups or organizations will tend to be characterized by some parts of the community as political activity.

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<sup>23</sup> Action on Legal Aid, *Brief on Clinic Law Reform Activities* (Toronto: 3 May 1976).

From the clinic's point of view, however, such assistance to groups and organizations is an inescapable, integral part of its function. In principle, such assistance is not an expression of the clinic's endorsement or acceptance of the client-group's objectives. The clinic's role vis-à-vis such groups is that of a professional consultant or service rather than that of a partner, associate or ally. It is a "professional" relationship rather than a "partisan" relationship. Unfortunately, however, this is not a distinction that is likely to receive general recognition. ...

This partisan identification of the clinic with the groups it serves is obviously a regrettable aspect of a clinic's relationship with its community. To the extent to which the clinic is seen by the community to have a partisan relationship with particular groups or organizations, individuals who do not agree with the objectives of such organizations or groups will tend to regard the clinic with hostility and suspicion and those attitudes will create obstacles to the accessibility of the clinic for such individuals in respect of personal legal problems and also in respect of their sense of access to legal services for groups or organizations in whose objectives they might be interested. It is a problem, however, that we believe to be an inescapable aspect of the clinic concept, as the restrictions that would be required to ensure that a clinic was regarded as apolitical by all segments of the community in which it was located would destroy the clinic's effectiveness as a legal service.

There are, of course, as I mentioned at the outset, obvious limits to what is appropriate activities for clinics, and clinics must be generally sensitive to this problem and avoid actions and activities that are unnecessarily provocative in that respect. They must also be scrupulous in their willingness to provide the resources of the service to any low-income group without regard for whether or not the individuals employed in the clinic approve of the group's objectives, subject only to considerations of conflict of interest and to ensuring that the clinic not appear to act for groups or interests which are so antagonistic to the general interests of its low-income client constituency as to jeopardize the clinic's general acceptability within that constituency.

The foregoing general views are, I believe, essential background to a consideration of your particular question.

Your question raises the narrow issue as to whether or not it is appropriate for a clinic to lend its street address to a community group or organization. I appreciate that the distribution of the letter in question by the Parkdale Tenants Association in envelopes showing 1267 Queen Street West as the return address was found to be particularly offensive because the letter contained a reference to preparations for the upcoming aldermanic election campaign. However, I don't believe that happenstance to be an essential aspect of the question. Any mail distribution by a community organization like the Tenants Association is likely to contain something that could be construed as apolitical, in the sense that it would be designed to promote objectives that would be seen by other elements in the community to be contrary to their interests. The real question is whether the clinic's address ought to be utilized at all by outside groups and organizations.

The office's answer to that question is, yes, that is an appropriate service for a clinic to provide. In the first place, it is a service that private law firms provide corporate clients as a matter of course, particularly in the early stages of a corporation's development. That private firms do it is not, of course, itself a reason why clinics ought to. But the reason it is appropriate for clinics is the same as the reason it has been found appropriate and convenient for law firms. In the course of developing an organization, it becomes at an early stage necessary to have a permanent address and this need very often arises

before it is convenient in terms of the organization's development in other respects for it to have its own permanent address. The practice is particularly appropriate with respect to low-income community groups since the problem of a permanent address for groups emerging from low-income communities is inevitably more serious in terms of financing and in terms of practical alternatives than would be the case with commercial corporations.

I should also mention that the service of providing a convenient address has been extended by the clinic in the course of its existence to date to a number of organizations in addition to the Parkdale Tenants Association.<sup>24</sup>

Acting for a group or organization is one thing; publicly endorsing that group's or organization's political agenda, was to me a very different thing. I strongly opposed the office engaging in such public endorsements and the detailed reasons for that will be seen later, but in the course of responding to the arguments in favour of such endorsements I had occasion to explain my understanding of the office's nature:

In my view, in terms of how and why the Office originated, what it purports to be, how it is organized, the basis on which it is funded, and what it does, the Office is not a *political* organization but rather a radical *professional* organization—a law office devoted to attempting to make the legal system really work for residents of low income communities.

It is easy to confuse radical professional activities with political activities. Certainly, the reactionary elements in the legal profession will not perceive any noteworthy distinction between the two. But the distinction is a real one and if the Office is to realize its full potential, it is a distinction that must be faithfully maintained. Taking public positions on political issues is to destroy the distinction.

As a professional organization we bring to the service of low-income communities certain unique advantages that we jeopardize when we allow that distinction to be blurred. In that role, we can command support and assistance from an established legal profession historically committed to the principle that the profession has an obligation to ensure access to legal services for anyone in need regardless of ability to pay and can ensure funding from a society now committed to the same objective. In that role, we have the benefit of society's acceptance and tolerance of the lawyer's traditional role and can fight fiercely and fearlessly for clients—be they groups or individuals—without endangering our effectiveness for other clients on other issues. In that role, we speak to Government and politicians from an established and accepted position habitually perceived as one of some objectivity and credibility. In that role—performed with competence and honesty—we are a recognized part of the established power structure and give the low income communities a voice and leverage within that structure which did not previously exist. And finally, we can, as a professional organization, enlist the services of lawyers and others committed on a professional basis to making the legal system work for low-income citizens, without concern as to their political orientation, and can make those services available to low-income clients unimpeded by the client barriers implicit in the concept of a political law firm.

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<sup>24</sup> Letter of S.R. Ellis to Tony O'Donohue (Alderman, City of Toronto) (29 June 1976), reproduced as Appendix A in Parkdale Community Legal Services, *Annual Report 1975-76* (Toronto: PCLS, 1976).

The importance of these advantages are hard to demonstrate convincingly at this stage. And it may be that political law firms comprised of individuals with a common political orientation and common political objectives and committed to the practice of law as a political activity will ultimately bring something to the battle for justice for the poor that Parkdale does not bring. But it is too early to be sure that the unique advantages that a professional organization like Parkdale brings to the battle are not important. Until Parkdale came along the concept had never been tried and, in my view, the results of this experiment so far are not such as to warrant the conclusion at this stage that the advantages of a professional organization are of such doubtful merit as to justify putting them at risk in order merely that the Office can be seen to add its voice in public support of some organization's position on a political issue.

The possible gain in the endorsement and sponsorship proposal as compared to the risk and potential losses is so disproportionate that the decision to indulge ourselves in the development of Office "viewpoints" on political issues is to me simply incomprehensible.<sup>25</sup>

The final aspect of the defining features of community-based legal services clinics to which my archival boxes speak is the "community-based" feature. Clinic funding authorized by the new Clinic Funding Regulation was limited to the funding of "community-based" clinics and the idea of community control as an essential feature of this concept had been central to the clinic movement in Ontario from the beginning. It will be remembered, for instance, that the attorney general's enjoiner to the Law Society concerning the society's embracing clinics as a condition of its continued control of legal aid, specified a commitment to the concept of *community* law and to the further development of *community* clinics.<sup>26</sup>

The question as to what could be seen as constituting a "community base" for these purposes eventually, of course, became an issue. And, in my archives, I find what I think is a rare attempt at actually describing a clinic's community base.

The occasion for this description was the dispute that sprang up in the summer and fall of 1978 between the Osgoode faculty and the PCLS office staff and Parkdale community concerning the appointment of a new director. In the midst of this dispute there was a "community" meeting at Parkdale at which the law school was asked to be represented.

As the chair of the clinical training committee and a recently appointed Osgoode representative on the Parkdale board, as well as a former Parkdale director, I was asked by the dean to represent the school at this meeting. The meeting was held at the PCLS offices on

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<sup>25</sup> S.R. Ellis, *The Endorsement Issue* (4 April 1975) [unpublished] at 16-18.

<sup>26</sup> See McMurtry, *supra* note 11. See also Hon. R.R. McMurtry, "Celebrating a Quarter Century of Community Legal Clinics in Ontario" (1997) 35 Osgoode Hall L.J. 425.

Queen Street, and was attended by about seventy people, including a number of Parkdale staff members and students.

Subsequently, I had reason to make a comprehensive report of this dispute and its outcome to the faculty council. I was aware as I was writing that report that there was a question in the minds of some members of the faculty as to the accuracy of characterizing the above mentioned meeting as a “community” meeting:

It is, of course, important to consider the extent to which the people who attended this meeting may be fairly said to represent the clinic’s “community base”, as there is a natural suspicion that since the meeting was organized by the staff, it might well be expected to have been dominated by, as it were, the staff’s friends and relatives.

In order to address that question, there must first be some understanding of what is meant by *community base* when one talks about a community-based clinic. When PCLS was opened in the Parkdale community in the Fall of 1971, one of the major objectives was that it become a *community* legal services clinic, *not* an Osgoode Hall Law School clinic. The very name reflects that commitment. The reasons for that commitment to what was thought of then in terms primarily of “community control” were in part a recognition that for a legal office to be truly accessible to residents of a low-income community, the clinic must be of that community—not just in it—and in part an acceptance of the view that people in low-income communities are entitled to control the services they require and it is not acceptable that they be simply the objects of such services.

In the early days of the clinic, the commitment to community involvement found its major expression in the fact that the office was managed through the device of an unstructured “town-hall” type of meeting—of community people and students—held once a week on Thursday evenings. ...

I think it is right to say that less importance is now attached to the control aspect of community involvement than was the case originally. ... However, the first part of the idea—that a clinic must be of the community, not just in it—remains of first importance.

...

A clinic’s community base is the people and organizations in the community who care about it. I cannot think how better to express the concept. They are the people and organizations who participate in the clinic’s public seminars, attend its training programs, share with it in the organizing of the street festival, turn to it for help and legal resources when the need arises, who come to the public election meetings to make sure the board doesn’t fall into the wrong hands, who stand for election to the board and who turn up in support of the clinic when the Law Society or the funding authorities are giving it a hard time. ...

A clinic cannot have a community-base without its staff continually interacting with that base and the clinic and its operations cannot help but be insensibly molded to a very significant degree by that relationship, and that, of course, without taking into account the direct involvement in policy development of the particular people that the base elects to the clinic’s board, or the influence of the staff hired from the base. And, finally, a strong base is essential to a clinic’s independence, giving it a constituency of support that both permits and requires its staff to maintain an arm’s length relationship with the funding authorities and providing it with the wherewithal to stand up to the influential

opposition from other parts of the community that the work of any effective clinic is bound to generate.

Judged in these terms, I am satisfied that the meeting on Tuesday night, whatever one may think of the propriety of the way in which it was called and the fact that it was organized by the staff, did in fact attract a representative section of the clinic's community base. The staff of the local library, who are closely involved in Parkdale community activities of all kinds and make the library available as a resource for those activities, were there, so too were two or three "community cops" from Division 14. The crowd included numbers of local residents, in particular one of the strong supporters of the office from its earliest days—the lady who was featured in the first Week End article on Parkdale for the strawberry tarts she brought to the office to thank Zemans and his students for saving some local park space from the grasp of developers at that time. Representatives of various tenants groups were present, as was Dr. Jannish Duksza, MPP for the riding. It is true that there were also a number of people from clinics in other parts of Toronto who came because they were interested in the issue (and, not insignificantly, perhaps also because they had always questioned the nature of Osgoode's commitment to community control and community base and, one suspects, were interested in seeing the commitment being put to the test).

It has been suggested to me that the Tuesday night meeting is not a valid factor because by no stretch of the imagination can it be said to have been fairly representative of the office's clients. And, after all, they are the people who really count. It is true that of the approximately 800 active clients, there would have been a very tiny percentage present at that meeting. Some reasonable percentage of the people there would, however, have been clients of the office at one time or another, and a significant percentage would be potential clients. But even so, no one could say that the meeting fairly represented the clinic's client constituency. The difficulty, however, is that the client constituency is so diverse a group and such a large proportion of it is too preoccupied with their own problems to have any capacity for anything else, that it is realistically impossible to conceive of any means of getting a truly representative participation by the client constituency. And to insist on that as the test of legitimacy for community input is in fact to deny the possibility of such input.<sup>27</sup>

## VI. SEMINAL DECISIONS ON OPERATIONAL ISSUES

### A. *Introduction*

During my term as Parkdale director, the office made a number of seminal decisions in the development of the clinic's professional character. The concept of a community-based clinic delivering professional legal services is an inherently radical idea. On the one hand, such a clinic must accept the professional and ethical responsibilities of a law firm as well as the inherent limitations attendant on the fact of public funding. On the other hand, it must rely for much

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<sup>27</sup> Memorandum of S.R. Ellis to Faculty Council (Osgoode Hall Law School) (24 October 1978) at 5-7 [hereinafter *October Memorandum*].

of its nurture and support on community activists intent on fundamental reform of the systemic shortcomings with which they live shoulder to shoulder every day, who, naturally, have little time or patience for fine distinctions in battle strategies—distinctions such as those between professional activities and political activities.

PCLS had the added complication of being dependent for its day-to-day delivery of services on the commitment and energy of sixteen to twenty law students with disconcertingly high ideals but often with little experience—a potent mixture in an environment as volatile as a community legal services clinic.

It was not surprising, therefore, that in the drawing of the lines between what its supporters wanted the clinic to be able to do (or not to do) and what it could appropriately do—and, yes, safely do—the clinic lived in a state of constant tension.

It was in the natural order of things—at least at that time—that the director was at the centre of the conflicts that arose from that tension. This had been true during Professor Zemans' time—the stories of the struggle between the then student-dominated office and Zemans are legendary—and, as recorded earlier in these pages, continued to be true during my tenure. Archie Campbell, my successor, was the subject of a formal staff impeachment motion based on some public statement of his, that was only defeated at a special meeting of the board.

In the working out of the necessary compromises between the office's conservative needs and its radical needs, the director's responsibilities and more general perspective ensured that the in-house defence of the office's conservative needs would fall principally on the director's shoulders.

By 1975/76, the centre of political power within the office itself had shifted from the constantly changing student population to the newly arrived but permanent, full-time community legal workers (CLWS)—or “lay advocates”<sup>28</sup>—and the now full-time staff lawyers. The CLWS were generally recruited from amongst the activists within the community base, and the lawyers, of course, tended to be on the more radical side of the profession, self-selected in that direction by their choice of employment.

The natural tensions between office staff and students and the director around the limits to the office's activities were exacerbated during my terms by the fact that I had come to the director's position from a private-bar, large-firm practice as a *management* labour lawyer.

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<sup>28</sup> “Lay advocate” was the earlier term. “Community legal worker” or “CLW” became the more modern reference.

From the staff's perspective, that background made my motives implicitly suspect. The situation was made even more interesting because the usual leader on these issues from the staff side was a highly respected and very talented CLW, the late Nelson Clarke, who had in his time been a prominent member of the Communist Party of Canada.

The pattern that developed around these seminal issues was that I would do or say something, and the staff would criticize, and I would respond, very often in writing. Or the staff would propose some course of action to which I felt I had to take some exception, and they would respond. A debate would ensue in the forum provided by the regular office meeting, where I was prone to lose. The matter would then be referred for a further, full discussion and a final decision to the board of governors, where my success rate was somewhat better.

It is important to record that rarely if ever did the board's voting on these issues split between the professional side—Osgoode and the private bar—and the community and staff side. When my arguments failed to persuade the board, I inevitably found one or more members of the private bar or Osgoode representatives siding with the staff position, and, often, some of the community members voting in favour of my position.

In my archival boxes, I am embarrassed to say, I find copies only of the arguments advanced by me. These arguments do serve to define the major issues and make clear the policy implications of the decisions that were in contemplation.

In my *October Memorandum*<sup>29</sup> (concerning the dispute over the appointment of the successor to Archie Campbell), I was concerned at one point to dispel a belief—which appeared to be taking on the status of conventional wisdom within the faculty—that this dispute over the selection of a new director was just one in a long list of disputes between the community and the school in which the school had always given way. In the course of doing so, I thought it necessary to trace the voting patterns at the board with respect to contentious “seminal” decisions the board had faced in my first term as Parkdale director. The list of such decisions present to my mind in that context—in 1978—seems an appropriate list for inclusion here. My report of those voting patterns will also add some flavour to the reader's sense of the dynamics at work at the clinic in those years. Those passages from the report read as follows:

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<sup>29</sup> *Supra* note 27.

[T]he Board's role in all of this has never, up to this moment, reflected a Community vs. Osgoode alignment. There has *never* been a decision at the Board where the lines were drawn even substantially between Osgoode on the one hand and the community on the other hand.

Let me offer some examples. The landlord issue—*i.e.*, do we refuse to act for landlords—was decided on a vote that saw some members of the community join with one of the private bar representatives in voting “no”, against an alignment of other community members and Osgoode representatives who decided “yes”.

On the so-called endorsement issue—that is, should we publicly endorse other organizations—which I felt very strongly about because of the shadow such endorsements would cast on the professional character of the office, my view was rejected by the Board. All of the community members voted for endorsement, but so did at least one of the Osgoode representatives and one of the private-bar representatives.

The selection of clients—*i.e.*, should we refuse to act for union busters—was another example. The view that we should not refuse prevailed with the assistance of at least two of the community members.

The participation in the [Ontario Federation of Labour's] 1975, Queen's Park demonstration against cutbacks [by means of the clinic staff and students marching with signs saying that PCLS opposes cutbacks] is a decision that really upset me, as it endangered, in my view, the office's non-partisan reputation. The Board decided against my view but again with votes that included those of community, Osgoode and private-bar members.

On the latter three issues, the staff was strongly opposed to my views and active in opposing them, but so were the Osgoode students. Furthermore, at no time has the Board ever been involved in any obstruction of Osgoode's legal training needs in the operation of the office.

I reject any suggestions that what has happened is the final evidence needed that the partnership hasn't worked. It is, rather, the first time that the quality of the partnership has been fairly tested. Furthermore, I cannot agree that the *community* can be said to have acted in this matter unreasonably or without regard for the [s]chool's interests. ...<sup>30</sup>

## B. *Decisions About Representation*

The decision that the clinic would not act for indigent landlords (of which there were undoubtedly a number in the Parkdale community) is the first of a trilogy of decisions from this period that addressed the definition of categories of potential clients for whom the clinic would not provide legal services. These decisions were of seminal importance to the evolving understanding of the clinic's essential nature. Two of these decisions are mentioned in the above passage.

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<sup>30</sup> *October Memorandum supra* note 27 at 19-20.

The landlord decision was the first of this trilogy. It was a policy decision made in the first instance, I believe, at the outset of the clinic's operations in 1971, but one that was formally reviewed by the board of governors after the board was established, and during my term as director. The policy—that the clinic would not act for indigent landlords in landlord and tenant disputes—was a policy on which I and the staff were of the same view, albeit not always for the same reasons.

In the summer of 1975, the Toronto City Council took public exception to this policy. It made a \$10,000 grant to Parkdale explicitly conditional on Parkdale reversing its policy of not acting for indigent landlords in landlord and tenant matters. My response, written to the council's executive committee, on instructions of the board, provides a full defence of the policy.<sup>31</sup>

The second decision respecting the exclusion of certain categories of potential clients from access to the clinic's services was made, to the best of my recollection, in 1977 or 1978, when I had left the director's position and taken up lecturing at the law school. It was not, therefore, a decision in which I had any involvement. It was also a decision, however, with which I agreed. I refer to the decision that the clinic would not act as defence counsel for men charged with assaulting women—typically, in the clinic context, men charged with assaulting their spouses. The justification for this decision ran parallel to the justification for the exclusion of landlords in landlord and tenant matters, and I found that justification equally persuasive regarding the exclusion of battering husbands in assault cases.<sup>32</sup>

It is an interesting comment on the lack of an adequate publication strategy in the clinic movement—and the absence in most law schools of any focus on legal service issues in a low-income context—that this self-same policy became a *cause célèbre* in Ottawa almost ten years later. When the Ottawa defence bar finally twigged to the fact that a local clinic was refusing to act for men charged with assaults on women, it descended on the clinic waiving the banner of the defence bar's sacred responsibility to act for anyone. The bar had apparently learned nothing in ten years about the needs of low-income communities for customized legal services policies.

The third decision in the trilogy, was a decision that *rejected* a proposed exclusion of a category of potential clients—workers seeking

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<sup>31</sup> See Parkdale Community Legal Services, Board of Directors, "PCLS Clinic Manual 6.18—Policy On Landlords" (1997) 35 Osgoode Hall L.J. 681.

<sup>32</sup> See Parkdale Community Legal Services, Board of Directors, "PCLS Clinic Manual 6.17—Policy on Spousal Assault" (1997) 35 Osgoode Hall L.J. 777.

legal assistance in *opposing* union certification. This was an exclusion proposed by the office staff, to which I was strongly opposed. The staff position was approved by the office committee, but subsequently rejected by the board. Portions of my paper in defence of the clinic's responsibility to accept such clients is set out below. It is a dissertation on the limitations and dangers of any exclusionary decision and may, I think, be of general interest to anyone interested in understanding a community clinic's operational environment.

At the Office Committee meeting on March 11, 1977, the question was raised as to whether or not the office should be prepared to act for an employee or group of employees in assisting them to exercise their rights under the Labour Relations Act in opposing a union application for certification.<sup>33</sup> ...

The argument in favour of providing access to legal services for a client or clients who meet our criteria and wish to exercise their right to oppose a union certification application or to seek decertification of a union is straightforward. The right is a substantial one requiring legal services to enforce; the client meets our criteria and a legal aid certificate is not available.

It has long been an accepted principle of office policy that in such circumstances we do not ask ourselves whether it is fair, or reasonable or socially constructive that the right be enforced. The importance of low-income citizens having ready access to a legal service that will act in their interests on their instructions in a non-judgmental way (vexation or frivolous proceedings excepted) has always been seen to override other considerations. Thus in tenant-landlord matters we have refused to be influenced by the probability in a particular case that we are acting for an obnoxious or destructive tenant who "deserves" to be evicted (making life intolerable for his impoverished widowed landlady). Neither have we been swayed by bitter complaints of long-suffering, low-income, tenant neighbours of a tenant client appalled at PCLS defending the client against eviction proceedings when they have been striving for months to persuade the landlord to take those proceedings.

In pursuit of our commitment to the provision of non-judgmental, client-directed legal services, we even refuse to be influenced by subjective concerns that a client's instructions are dangerous to himself so long as the client is competent, and firm in those instructions. This aspect of the policy is most dramatically evidenced when we act for patients in psychiatric facilities.

That we should be obdurate in insisting on performing our professional duty to provide client-directed, non-judgmental legal services without regard for possible consequences in cases where the potential "victims" of that policy are defenseless children, indigent widowed landlords, other low-income citizens, ... and clients of doubtful mental health, but be prepared to abandon that policy where to pursue it might jeopardize a union's application for certification, is a proposition with which I have considerable difficulty.<sup>34</sup>  
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<sup>33</sup> S.R. Ellis, *Position Paper on the Subject of Access to Legal Services for Employees Opposed to Union Certification* (21 March 1977) [unpublished] at 1.

<sup>34</sup> *Ibid.* at 4-5.

[There] is the concern that in acting for employees opposed to union certification, the office would alienate the union movement and jeopardize its support of this office and presumably of community legal clinics generally. ... The suggestion that the union movement would be so affronted by the prospect of individual employees being given access to legal services for the purpose of exercising their legal right to resist a union's application for certification, that it would withdraw its support of community legal services, is a suggestion that I would hope might be as upsetting to the union movement as it is to me. ... We have consistently pursued a determined policy of being willing in pursuit of the interest of clients to spit in the eye of government, of administrators, of funding sources, of local politicians, and even of segments of our own client constituency, without regard for consequences. In pursuit of the same policy we have been and are prepared to take serious risks with our credibility with the courts and the legal profession. The proposition that there is any group or organization whom we are not prepared to risk affronting in pursuance of a legitimate interest is to me simply intolerable. ...

Consideration of the possible consequences should the March 11th resolution be adopted as office policy must also receive careful attention.

The decision in my opinion would establish and would be seen by the world at large to establish that Parkdale Community Legal Services is prepared to modify its legal services policies and withhold its legal services in the interests of patrons and allies and in pursuance of its own non- legal-services objectives. Our funding sources and others will be entitled now to know who else is on our protected list and what other objectives in addition to the encouragement of collective bargaining do we consider more important than access to legal services. It is, indeed, a question we would have to ask ourselves. Does our protected list include fellow legal clinics? Tenants' Associations? Residents' Associations? The NDP party? Any individual politicians? And what are other objectives with which we will not let our general commitment to accessible legal services interfere?

Also, having now identified one thing which we will not be a party to because the union movement would not approve, we will need to consider what other of our activities fall within the same category. Can we act for a client who wants to sue a union for negligence or for unfair representation? Are we entitled to submit briefs on legislative amendments that do not adhere to the labour movement's policies? How do we distinguish between what is permissible and what is not? ...

As a final bit of relevant information it should be noted that our acting for clients against labour unions is not new. Before I became Director, PCLS had a major case before the Ontario Labour Relations Board in which it brought unfair labour charges against a union for breach of the union's duty of fair representation. A second major case before the Canada Labour Relations Board involving claims of union discrimination in hiring hall practices was started in this office and subsequently pursued by a private firm of Solicitors. Subsequent to that, we have in a few cases acted for employees in compelling unions to represent the employee in grievance procedures (none of these reaching the litigation stage), and we are presently contemplating a suit against a union trust fund based on discrimination in benefits against non-member employees of a bargaining unit.<sup>35</sup>

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<sup>35</sup> *Ibid.* at 6-10.

### C. *The Endorsement Policy*

During my term as director, PCLS approved a policy whereby the office would be open to publicly endorsing the political campaigns of other organizations. As mentioned previously, it was my view that such a policy was incompatible with the clinic's role as a professional legal service, not to mention its role as a clinical education program.

At the time the endorsement policy was under consideration—in April 1975—I had written a long paper detailing the arguments against such a policy. A few months later—in October—I had occasion to summarize those arguments in the paper entitled *The Director's View*

The third general area in which we appear to have a problem is that you believe and I strongly dispute that the office should be actively and publicly endorsing and promoting political positions on a variety of issues in which you believe this office ought to be interested had it a proper political commitment. You believe the office has a duty to use its resources and reputation for that purpose and some of you may believe that my resistance to that kind of activity by the office which I justify on considerations having to do with the impact of such activities on the effectiveness of this office as a law office, really only reflects a personal disapproval of the positions advocated, based on my own political perspective.

The issues that have actually arisen in this regard are as follows:

- (a) my resistance to the office being one of the sponsors of the International Woman's Day in Toronto last spring;
- (b) my resistance to the office criticizing the policy part of the Green Paper on Immigration as a racist document;
- (c) my resistance to the office, as such, endorsing the California grape boycott; and
- (d) my belief that we should lend our expertise in landlord-tenant matters and our organizing resources to the Federation of Metro Tenants for the purpose of assisting the Federation with the holding of a conference on rent control, but should not appear as a co-sponsor of that conference.

The reasons for my position on this issue I have already canvassed at some length in my paper on the endorsement issue. However, I think it would be as well to at least list them here. They are as follows:

1. This kind of activity distracts the office and its resources from its main objective of providing the low income Parkdale community with meaningful access to the law and the legal system, with only marginal potential advantages to show for it.
2. It presupposes an office with a homogeneous political outlook which by definition it is not and will not be until we adopt a policy of requiring every student entering the program and every lawyer and lay advocate entering the office to present acceptable political credentials.
3. Since the office is not homogeneous in outlook, any decision about an office policy on an issue of major importance will involve a large commitment of the office's time and

energy in what is bound to be internally a divisive process. On important fundamental issues, people who disagree with the majority on the issue may well feel compelled to resign.

4. This type of activity must result in the creation of a public political character for the office. And, given the very diverse nature of the community the office is designed to serve, and by and large the relatively conservative nature of the residents in that community, it will build up psychological barriers to access to the office by the community based on political factors. Since the main thrust of the office's efforts is directed to tearing down the already existing psychological and cultural barriers, this type of activity is seriously subversive of the very thing the office was established to accomplish.

5. The creation of an office identity as a political organization with a definite political character is destructive of the office's capacity for effective law reform work. The office loses its capacity to influence government and the bureaucracy on a professional basis when it is seen to be politically motivated and partisan in its essential character.

6. It threatens the office's community legal education function because education carried on by an acknowledged political organization will inevitably be characterized as propaganda.

7. It is incompatible with the office's function as a clinical training program.

8. These are activities entirely incompatible with the hard fact that if the office is to continue in existence it must do so in reliance on substantial public funding. ...

We have already in Parkdale felt political pressure on our funding sources based on a segment of the community's perception that we were using the funds for political rather than professional purposes ... . Mr. Stan Namak, the defeated Liberal candidate in the Parkdale riding, told us here in the office that if he were elected and the Liberal government in power, he would do whatever he could to see that our funding was reduced by at least a third and perhaps a half. His reasons for that view were in effect that he believed a substantial portion of the money was being used for political purposes within the community.

Obviously, Mr. Namak's views of the distinction between a professional activity of a legal clinic and a political activity of that same clinic will be very different from mine and as I said I am prepared to fight to establish the legitimacy of certain activities that may not traditionally have been viewed as legal services but which in the context of providing the equivalent range of legal services to a low income community that are available to the business world etc. must be seen to be legal services nonetheless. But a plaque in our storefront window to the effect that Parkdale Community Legal Services supports the California grape boycott, as simple a thing as that, is by itself substantial evidence that the office is not prepared to confine its activities to legal services, however broadly they may be defined. It gives the office a serious credibility problem when it does seek to support some kind of novel activity as a legitimate extension of the office's professional legal services concerns.

You could not get funding from the public for this kind of activity and in the long run you will be prevented from utilizing for that activity funds attained for another purpose. ...<sup>36</sup>

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<sup>36</sup> *Supra* note 17 at 23-29.

Fortunately, once the endorsement policy was on the books, the office proved not to be energetic in seeking occasions on which to exercise it, and during the balance of my term as director the policy remained virtually dormant.

## VII. PARKDALE AS A CLINICAL EDUCATION PROGRAM: ISSUES FROM THE SCHOOL'S PERSPECTIVE

### A. *Introduction*

At the beginning of this article, I made particular mention of Parkdale's goals as they related to the reform of legal services and of the legal profession, and I have subsequently dealt with the material in my archives that was primarily concerned with the clinic's role as a provider of legal services to a low-income community. But from Osgoode's point of view the clinic is, of course, most importantly a clinical education facility and I now turn my attention briefly to that aspect of its multiple roles.

### B. *The Education Policy Context for Clinical Legal Education Programs in the 1970s*

In the spring of 1980, Osgoode's clinical training committee delivered to faculty council its *Clinical Education Report*<sup>37</sup> in which it reported on its assessment of the school's post-1974 experience with its various clinical education programs. This assessment had been commissioned by Dean Stanley Beck in 1978 in order to provide a basis for a faculty council review of Osgoode's clinical education policy. Of course it included most particularly an assessment of the PCLS program.

The committee's mandate required it to judge Osgoode's various clinical education programs in terms of the contribution they were making to "advancing the proper ambitions and serving the goals of the school itself."<sup>38</sup> And to do that required an understanding of those ambitions and goals at a level of detail useful for the purpose.

The resulting full analysis of the school's proper ambitions and goals was, I believe, novel at the time and, to my way of thinking,

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<sup>37</sup> See Osgoode Hall Law School, Clinical Training Committee, *Clinical Education Report* (Toronto: Osgoode Hall Law School, 1980) (Chairman: S.R. Ellis) [hereinafter *1980 Report*].

<sup>38</sup> *Ibid.* at 1.

remains valid today. Since it also provides the educational policy context in which the Parkdale program operated in the 1970s, I have taken the liberty of including the core of that analysis here.

I will begin with the report's introduction, which describes its connection with its antecedents—the 1974 study of Osgoode's academic policy, including the role of clinical education programs in that policy—and continue with the analysis:

In the spring of 1974 Faculty Council adopted the report of the Long Range Academic Policy Study Group (the Hogg Report) in which the basic philosophy of legal education and the academic goals of Osgoode Hall Law School were examined. The report recommended policies for the implementation of the goals and considered in that context the potential of clinical education. The Study Group concluded that clinical education was still in its experimental stage and recommended the introduction of new clinical programs "on a modest and incremental basis." It recognized that the School needed experience and time before it would be able to make a responsible and informed decision "whether or not to shift emphasis more decisively in the clinical direction."<sup>39</sup> ...

The Hogg Report's definition of clinical education is: "Any experience with the following two features: one, the performance by the students of a legal task; and two, the use of the students' experience as the basis for organized analysis and study."

This definition excluded "observational field work"—the basis of the present intensive programs—but included the performance of legal tasks in a simulated setting.<sup>40</sup> The report did not disapprove of observational field work as a valid learning experience but indicated that it did not contain the essential elements of a clinical education experience, the heart of which it saw to be the tensions associated with adaptation [by students] to a professional role. ...

The Hogg Report identified three basic Osgoode Hall Law School "goals". They were: 1) leadership; 2) legal education; and 3) research and public service. These, however, are clearly means, not ends, and they are, therefore, not helpful in judging the appropriateness or usefulness of any particular law school program. Leadership, legal education, research and public service, yes, but to what purpose? ...

The Committee ... has concluded that Osgoode's ultimate purpose cannot be expressed in terms of the education of law students, or the training of lawyers, or legal scholarship, or law reform, or public service at large, or any combination of these. These are all means, not ends. The business in which this institution is primarily engaged may be defined most usefully, in the Committee's view, as follows:

*The optimum application of finite academic resources to the nurturing of **an**lightened and progressive legal system.*

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<sup>39</sup> *Ibid.* at I, citing Osgoode Hall Law School, Long Range Academic Policy Committee, *Report of the Long Range Academic Policy Study Group* (Chairman: P.W. Hogg) (Toronto: Osgoode Hall Law School, 1974) at 55 [hereinafter *Hogg Report*].

<sup>40</sup> *Hogg Report* *supra* note 39 at 45-46.

This conception of the law school's *raison d'être* has been the Committee's touchstone in the development of this report. ...<sup>41</sup>

#### Objectives of the Education Activity

It is the Committee's view that on grounds of both principle and practicality, professional competence *per se* cannot be a major education objective for law schools. As far as principle is concerned, obviously the Committee's view of the school's ultimate purpose requires that the determination of which subjects and skills to teach be made on grounds which will include concerns about a graduate's future professional competence but which must be much broader than simply the training of lawyers to be competent at what lawyers do. And from a purely practical perspective, it is impossible, in the Committee's view, not to recognize that as a basis for curriculum design the proposition that law schools must educate students to be competent lawyers is simply not workable. ...

These considerations have led the Committee to finally define the aim of the school's education activities in the following terms:

The development of graduates who have the knowledge, understanding, critical perspective and skills that are the essential prerequisites, so far as education can provide them, for the individual's ultimate development (with experience and subsequent specific practical training) as a lawyer who is competent and committed to excellence in what he or she does and who is a constructive influence in the enlightened operation and progressive development of the legal system.

Put more concisely: the development of the nucleus of an enlightened and progressive lawyer. ...<sup>42</sup>

The nucleal concept contemplates, of course, post-law-school vocational training in the particular work that individual lawyers find themselves called upon to do.<sup>43</sup> ...

#### Objectives of the Research Activity

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<sup>41</sup> 1980 Report, *supra* note 37 at 2. Note in particular, at 2-4, the statement of "The School's Means." It was meant to describe the school's "primary activities" for "nurturing an enlightened and progressive legal system on which the law school traditionally relies": education of law students; research; leadership in the reform and development of the law; planning; and "strategic intervention," which was described in a footnote, at 3:

"Strategic intervention" is a label the Committee has adopted to cover instances of law school activities of an activist nature, which are not solely student-education or research oriented and which, while motivated to provide leadership, are rather more substantial and participatory in nature than the type of activity usually subsumed under the leadership label. Examples that come quickly to mind are the development in the summer of 1979 of Professor Watson's trial practice seminar for practising lawyers, the creation of Professor Brooks' Tax Journal, and the school's participation in the creation of the Institute for the Administration of Justice. The opening of the Parkdale clinic was in part a strategic intervention in the delivery of legal services to the poor.

<sup>42</sup> By "lawyer" the committee intends reference here to the complete range of possible legal system roles which a law school graduate might appropriately fill during his or her career at the law, including that of legal scholar.

<sup>43</sup> 1980 Report, *supra* note 37 at 1-9.

The research function which, as previously indicated, includes both pure science and applied science activities, must encompass research on the subjects which are also the focus of the school's education activities (and, as well, of its leadership and strategic intervention activities), viz.:

a) the law; b) the role of law in society; c) the law development system; d) the delivery system; e) the lawyer's role, and f) professional responsibility.

There is, it may be noted, no role for the nuclear concept in respect of the research function. Indeed, the opposite is true. Thus, for example, while the nuclear concept of education identifies the teaching of *basic* law as one of its objectives, the research function is implicitly concerned with the problems of the law at large. ...

#### The Planning Activity from the Clinical Education Perspective

The advent of a significant clinical education program at Osgoode is particularly interesting from the point of view of the school's planning activity because it presents the school, perhaps for the first time, with the need to make fundamental choices in the allocation of academic resources. ...

Because clinical programs are primarily focussed on serving the school's education, research and leadership objectives with respect to (1) the role of law in society, (2) the delivery system, (3) the lawyer's role and (4) professional responsibility, whereas traditional programs are primarily focussed on (1) the law, (2) the role of law in society, and (3) the law development, it is apparent that the integration of clinical programs with the traditional curriculum presents the school's planning process with the problem of allocating scarce resources between sets of objectives which are in some essential respects different. ...<sup>44</sup>

### *C. The Parkdale Program from the Law School's Perspective*

Then, as now, Osgoode law students who successfully completed the Parkdale program received one semester's full academic credit. Since the bulk of a student's time in the PCLS clinic is devoted to the delivery of legal services to clients, there has always been a concern as to whether the program justified a full semester's academic credit. In my time, that concern found its most common expression in faculty questions about the appropriate level of student caseload that could be seen to be compatible with an academic program, about the nature and dimensions of the student academic writing assignments that would be necessary to make the program a legitimate academic experience, and about whether student participation in clinic, community legal education programs counted from a student education point of view.

The *1980 Reports* conclusion concerning the viability of the PCLS program from the school's perspective reads as follows:

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<sup>44</sup> *Ibid.* at 12-14.

[T]he Parkdale program ... is a valid and important educational undertaking. The question as to the appropriate size of the caseload remains contentious. A minority of the Committee believe that artificial restriction of the caseload below the operational level should be instituted. When that fact [that the Committee sees the program to be a valid and important educational undertaking] is coupled with the program's substantial contribution to the school's goals in other respects, it is apparent that Parkdale is a type of program which not only deserves to be continued but which merits a high place in the school's overall priorities.<sup>45</sup>

The reference to the minority view in favour of an artificial restriction of the caseload "below the operational level" reflects a debate that had emerged in the latter part of my term at Osgoode. At that time (and during the period when the clinical training committee was conducting its assessment of the clinical education programs) two quite different visions of the Parkdale program competed for acceptance.

One of these visions became known as the Bellow model—named after the Harvard professor who ran the clinical programs at Harvard.<sup>46</sup> At Osgoode, the Bellow model was a variation of the Harvard model, and its principal proponent at the time of the clinical training committee assessment was Professor Zemans. The primary feature of this model was that it premised a planned and controlled clinical experience designed to provide one-on-one teaching opportunities of particular excellence. It was referred to in the *1980 Report* as the "planned" model.

The second vision of the program—the other model, if you will—reflected the Parkdale program as it had in point of fact existed from its origins in 1971 through 1980 (and which I understand continued to exist until the 1985 *Hathaway Report's* recommendation in favour of the Bellow model was accepted by faculty council<sup>47</sup>). It was premised primarily on student exposure to a total, clinic operational experience in the role of principal provider of the clinic's legal services. This model placed considerable stress on the importance of self-directed education, and expected the one-on-one teaching transactions to occur—on the run, as it were—as an unstructured adjunct to the student's operational experience with his or her cases.<sup>48</sup> The *1980 Report* refers to this model

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<sup>45</sup> *1980 Report* supra note 37 at 72.

<sup>46</sup> See, for example, G. Bellow & B. Moulton, *The Lawyering Process: Materials for Clinical Instruction in Advocacy* (Mineola, N.Y.: Foundation Press, 1978).

<sup>47</sup> See J.C. Hathaway, *A Structured Approach to Clinical Legal Education* (Toronto: Osgoode Hall Law School, 1985) [hereinafter *Hathaway Report*].

<sup>48</sup> Both models included scheduled group seminars that built on the students' clinic experience. See the *1980 Report* supra note 37, App. C., for a description of the seminar component and reference to sample seminar agendas in 1974, 1976, and 1977.

as the “operational” model. The report ultimately recommended continued commitment to the operational model.<sup>49</sup>

Among the written material relied on by the committee<sup>50</sup> will be found a full analysis of the Parkdale program written by me in 1978 which was referred to in the *1980 Report* as the “Ellis analysis.” This analysis had also formed the basis for the 1979 survey of graduates [of the PCLS program].

In that analysis, I had developed a list of what, in 1978, I saw to be the program’s objectives as viewed from the law school’s perspective. The *1980 Report* records the general agreement of all past and present directors with this list, as well as a positive reaction from the PCLS graduates participating in the survey, and concludes that the list presents “a realistic set of objectives for programs like PCLS.”

The objectives are set out below in the order of importance assigned to them by the graduates’ responses to the graduate survey.

1. Educating law students about legal services in a low-income community and potentially contributing to the development of poverty-law lawyers (short reference: “poverty-focused law and systems education”).
2. Educating law students concerning the professional performance of the lawyering roles of counsellor, champion and custodian and about the issues of professional responsibility encountered in such activities (short reference: “education about professional responsibility”).
3. Contributing to the development of the lawyer’s special problem solving skills - the so-called legal mind—and of an aptitude for the creative application of the law (short reference: “development of problem-solving skills”).
4. Educating law students concerning the special skills required in the role of counsellor and champion over and above the traditional trial practice and advocacy skills (short reference: “education concerning lawyering skills”).
5. Providing law students with an appreciation of the implications of professional character and a realistic opportunity for beginning the considered development of their own professional character (short reference: “development of professional character”).
6. Providing an indispensable vehicle for the School’s leadership role in the development and reform of the law and its institutions as they affect, in particular, the low-income segment of society (short reference: “provision of a leadership vehicle concerning poverty-related issues”).
7. Educating law students in the skills of trial practice and advocacy (short reference: “trial practice education”).

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<sup>49</sup> *Ibid.* at 54.

<sup>50</sup> For a full description of the materials with which the committee was working, see *ibid.* at 16.

8. Educating law students concerning the legal system and related systems and institutions. (short reference: “education concerning the law delivery system.”)
9. Expanding generally the focus of the School's scholarship towards a greater emphasis on the means by which the law works in society (short reference: “expansion of the school's scholarship focus”).
10. Teaching law students substantive law (including its procedural aspects) (short reference: “substantive law education”).
11. Providing the School with opportunities for scholarly study of the roles of counsellor champion and custodian and about the issues of professional responsibility encountered in such activities (short reference: “scholarly study of the role of counsellor, champion and custodian”).<sup>51</sup>

The *1980 Report* also addressed specifically the program's contribution to the school's non-education goals.

In the Committee's view, the listed objectives also match the School's overall purpose exceptionally well, and identify a program which contributes uniquely to the performance of some key aspects of the School's mandate. For example, education about the moral and ethical implications of a lawyer's function in the legal system is routinely considered in most classroom programs and analyzed specifically in the Legal Profession option. However, the direct, first-hand exposure of both students and professors to the practice of law in the moral and ethical hot-bed of a poverty-law clinic ... is a particularly valuable source of knowledge, understanding, insights and sensitivity concerning professional responsibility issues which are not otherwise readily available to the School. ...

Moreover, PCLS has a potentially critical role as a goad to continued concern in the law school for important professional responsibility issues, legal system issues, lawyering issues and poverty law issues, which the law school confronts through the program and which have not traditionally figured prominently in either the School's education or research activities. A law school's day-to-day experience in a client-service clinic is a spur to interest and a source of data in respect of such issues in the same way that the case reports are a spur to interest and a data source for substantive law and legal policy issues. Thus, over and above the educational values derived by students enrolled in the program, PCLS-style programs are also important for the School's educational and research activities because of their unique potential for enriching the School's experience and broadening its knowledge and interest. They are not only educational programs, they are also a School resource of considerable significance.

It is also apparent that PCLS is an important vehicle for the School's leadership role and constitutes a strategic intervention by the School in the area of legal services for the poor which has proven to be of major significance. It does not appear to be overstating the case to suggest that through its partnership with the Parkdale community in PCLS, Osgoode has made a very significant contribution to the emergence of a network of independent community-based legal clinics as an integral part of the Ontario Legal Aid Plan. Moreover, through PCLS, Osgoode has been influential in the reform of tenant law, in the development of more viable low-income family law and family law procedures and

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<sup>51</sup> *Ibid.* at 20-21.

of more appropriate low-income family law lawyering techniques. It has also played a role in the development of fairer immigration procedures.<sup>52</sup>

The law school was always concerned as to whether the program provided a legal education sufficient to warrant a full-semester academic credit. Did the students' caseload leave time for academic reflection and analysis? That was a constant question.

Accordingly, any appreciation of the PCLS program in the 1970s must begin with a full understanding of the students' workload. In the operational model, students assumed the "responsibilities of poverty law lawyers servicing real clients." "As a matter of economic necessity," the report acknowledges, "the students were the heart of the clinic's service capacity." They were not observers or assistants; they were "the front-line legal workers ... responsible for the files and for the clinic's relationships with the clients from initial interview through to final reporting letter."<sup>53</sup>

Professor Jack Johnson, who had served as the program's co-director<sup>54</sup> from 1978 to 1980, had been asked by the committee to report on his experience with the program and his report included a detailed description of the student workload as he had observed it. The committee accepted his description as accurately reflecting the student workload at Parkdale "at any time since about 1973." It reads as follows:

The Student Workload:

The first problem with the "caseload problem" is an unfortunate absence of precision which can lead to simplistic solutions. The following observations may help to define the problem, if any:

- (a) Each student averages at any given time 25-35 open files but, as Professor Ellis points out in his study of Parkdale, "file" is not a meaningful term due to the infinite variations in the demands of each and the timing of those demands.
- (b) A new student upon arrival at Parkdale immediately assumes responsibility for 25-35 on-going files. The pressure of work which this entails is obvious; perhaps less obvious but no less real is the psychological pressure entailed. Until each file can be gone through and "mastered", each constitutes a potential land-mine to the student. This state

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<sup>52</sup> *Ibid.* at 22-24.

<sup>53</sup> *Ibid.* at 18.

<sup>54</sup> In 1978, the Clinic-director structure had changed from a single, faculty member Clinic Director, to two "Co-directors," one of whom was to have principal responsibility for the management of the clinic and its legal services, and the other—a faculty member—principal responsibility for the legal education program. Both worked full-time in the clinic. Mary Hogan (now the Madam Justice Hogan) was the first co-director on the clinic side and Prof. Johnson was the first co-director on the education side.

of affairs lasts perhaps 3 weeks but in those same weeks there is the need to pick up advocacy skills, to learn office routines, etc.

(c) The terms “caseload” and “case-work” are misleading because they imply only the servicing of one’s files and clients and tend to obscure the full significance of “intake.” Every student is responsible for three 4 1/2 hour periods per week on intake duty which simply means interviewing any members of the public who walk into the clinic during that period seeking advice. These can be periods of intense pressure—from sheer volume, from the emotional states of the visitors, from the variety of unknown situations presented and for which solutions are demanded, etc. Some of these interviews form the beginning of new files but many more result in summary advice.

(d) The nature of the office clientele is such that many “drop in” without warning (many have no telephones and also cannot cope with written communications), ... so breaking up non-intake time of the student as to render sustained thought and work during office hours extremely difficult.

(e) Apart from the casework described above and the requirement to be in the office in normal working hours, available to one’s clients, the demands on student time include: group seminar 5-7 p.m. Monday; academic seminar 6-7 p.m. Tuesdays; academic seminar 9:15-12 Thursdays; occasional intake duty 5-7:30 p.m. Mondays & Thursdays and 10 a.m.-2 p.m. on a Saturday; being on call on a rotational basis overnight and weekends for emergency calls received by our telephone answering service; court and tribunal appearances over the timing of which there is little control; and working on community education activities ... .

(f) This student activity takes place in what can charitably be called inadequate overcrowded working conditions—on a Thursday afternoon, it resembles an ant hill!

(g) In simple terms of hours, students work steadily during a long day and also put in a significant number of evening and weekend hours, especially before court and tribunal appearances.<sup>55</sup>

The contrast between this account of the Parkdale program and the following description of the Bellow model provided to the committee by Professor Zemans following a visit he had made to Harvard was, as the committee said, “interesting.”<sup>56</sup>

1. Harvard does not operate any clinics or law offices where its students are placed but insists upon the choice of staff lawyers who supervise their students in case-handling programmes.

2. Harvard has 6-8 staff lawyers who are employed, in effect, as adjunct professors to supervise 6-8 students per semester<sup>57</sup> in various poverty law settings. These supervisors are paid either entirely or partially by the law school for their teaching responsibilities while working as staff lawyers in clinics. The supervisors are themselves under the

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<sup>55</sup> 1980 Report *supra* note 37 at 24-26.

<sup>56</sup> *Ibid.* at 26.

<sup>57</sup> By comparison, PCLS’s supervisor-to-student ratio—in 1977 for example—was 21 students to three staff lawyers, an articling student, and the director. As well, each student had ready access to a downtown supervisor, and to the clinic’s experienced CLWS.

direction and supervision of a full-time faculty member and the Dean of the clinical programs who requires the supervisor to attend a weekly seminar for supervisors only, where they are trained in clinical teaching skills, supervision, the use of video-tape equipment in teaching lawyering skills and to discuss the programme.

3. Students in the programme handle no more than 4-6 cases at any given time and may not commence their case-work until they have completed a three-week intensive trial practice orientation similar to Garry Watson's trial practice seminar and designed at Harvard by Keaton.

*Zemans Footnote:* It is important to notice in comparing pre-program training that in Massachusetts, student practice rules permit student appearances in higher levels of court than is the case in Ontario. The ability of Parkdale to refer more serious cases to the private bar under the Ontario Legal Aid Plan certificate system is also a factor in this respect.<sup>58</sup>

In approving the continuation of the "operational model" and finding in that model more than sufficient justification for a full-semester academic credit, the committee relied principally on the opinions of the faculty members who had been the PCLS program directors up to that time: Zemans, Ellis, Campbell, Mossman, and Johnson, and on the results of the 1979 graduate survey.

The directors had been embroiled in the clinic on a full-time basis for extended periods of time. Mossman and Johnson had substantial traditional law teaching experience before going to Parkdale, and Zemans and Ellis followed their Parkdale assignments with traditional teaching roles. These four were, therefore, well placed to compare the PCLS program with traditional programs. Campbell came to the program from senior Crown prosecuting responsibilities at the Ministry of the Attorney General and returned to the Ministry after a one-year stint at Parkdale.

The *1980 Report* described the directors' views in the following passages:

Professor Zemans believes that the program's validity as a law school education activity is questionable as things now stand without a significant reduction in the student workload and/or a substantial change in the amount and the nature of the supervision of the student's work.

The other four of the directors will acknowledge that supervision is a perennial problem and that steps to strengthen it would be desirable. They will also agree that it is important to improve the preparation of students for their Parkdale responsibilities and that full advantage of the education potential of Parkdale will not be realized until we develop better ways of linking the Parkdale experience with the school's traditional program. But they clearly do not consider the work load described by Johnson as inappropriate—indeed they see it as a necessary aspect of the model—and they believe strongly that what they saw going on around them on a daily basis throughout their

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<sup>58</sup> *1980 Report*, *supra* note 37 at 26-27.

tenure as directors at Parkdale, in circumstances not fundamentally different from what Johnson is currently experiencing, was more dynamic and vital a learning process than any of them had previously or have subsequently experienced in the legal education field.

Professor Mossman, who is familiar with clinical education programs at other schools, both here and in Australia, and who in 1971 was Parkdale's first articling student, has stated that the environment she experienced at Parkdale during the summer and fall of 1978—a period when the program experienced an unprecedented turnover in staff lawyers and during which Osgoode and the clinic staff and Board of Governors were having their confrontation over the selection of a new director—was the most dynamic and valuable learning environment for students that she has seen.

Ellis' enthusiasm for the learning process he saw at work from January 1975 to August 1977 verges, he will admit, on zealotry.<sup>59</sup>

Professor Johnson, who wrote his first report in the midst of his second semester, is more restrained, but is clearly in the same camp. ... [His] conclusion concerning the program's academic merit is that while there are significant problems to be addressed, he has no doubt that the values inherent in the program and the extent to which they are presently being realized, amply justify the full-time semester academic credit. ... In his second report, which was submitted after his resignation, and which is focused principally on the program's future potential as a vehicle for the School's role in law reform about which he has serious reservations, Professor Johnson reaffirms his confidence in the program as an education vehicle.<sup>60</sup>

The 1979 graduate survey consisted of sending the Ellis analysis and an eleven-page questionnaire to 105 graduates (selected at random—seven from each of fifteen semesters from the fall of 1971 to the fall of 1978). Fifty-one questionnaires were completed. The report provides a quite detailed analysis of the survey. However, it is sufficient for the limited purposes of this article to note that the reaction of the 82 per cent of the respondents who remembered the program as a significant or positive part of their legal education was “uniformly enthusiastic,”<sup>61</sup> and that the survey-solicited comparison of the educational values of the PCLS program with those of the traditional Osgoode programs significantly favoured the PCLS program.<sup>62</sup>

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<sup>59</sup> *Ibid.* at 28-29.

<sup>60</sup> *Ibid.* at 31.

<sup>61</sup> *Ibid.* at 36.

<sup>62</sup> *Ibid.* at 41 and App. B.

## VIII. CONCLUSION

That brings me to the end of the archival material for which space could reasonably be made. I hope the reader will have found the material presented both interesting and useful.

The PCLS program in the 1970s and early 1980s may be seen in retrospect to have been an audacious pioneering venture, breaking new, and often contentious ground in many areas. It presented fundamental challenges to conventional thinking about the legal system, the legal profession, legal services, legal aid, law school goals, and legal education. And it was during those inaugural years of the program that the issues arising from those challenges were first confronted.

The first responses to those issues—responses that developed in the environment of high commitment and partisan exuberance that characterizes any pioneering project and which in those days absolutely enveloped the Parkdale clinic—are surely of intrinsic, continuing interest.

I hope that the article has managed to convey in some measure the special, personal excitement and challenge experienced by all who were privileged to participate in the work of the clinic during those years. It was for me the high adventure of my career and I will always be indebted to Professors Zemans and Arthurs for their respective roles in recruiting me to the program.

I have been conscious in all of this of my distance from the present-day operation of the clinic. I am, I appreciate, in some danger of being seen by my preoccupation with the first decade of this, now twenty five-year old, program as suggesting some discounting of the contribution of those who came to the program later or who are responsible for its current operation. I have, of course, no such intention. The achievement involved in sustaining this program over these many years has been formidable at every step along the way and one can have nothing but admiration for all of those who have participated in that achievement—in the second decade as well as the first, and now in the third. They will have experienced and will be experiencing challenges no less difficult, desperate, and exciting than those I and my colleagues encountered and they will have made and will be making their own unique contributions to what, in truth, has become an amazing success story.

For those currently in the program or responsible for the program, it is my hope, as I have said, that some of the first decade thinking outlined in these archival documents may prove of some

practical use in the modern context as well as being, hopefully, of some special historic interest.