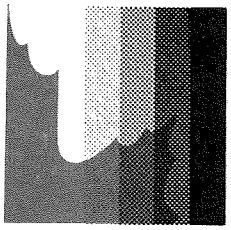
62

RECOMMENDATIONS FOR IMPROVEMENT

TO THE CLINICAL FUNDING REGULATION

Brief to the
Grange Commission



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prepared on behalf of

THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

by

Grace Patterson

SUBMISSIONS TO THE HONOURABLE MR. JUSTICE GRANGE ON THE OPERATION OF THE CLINICAL FUNDING REGULATION

1. RECOMMENDATION FOR IMPROVEMENT TO THE CLINICAL FUNDING REGULATION AND ITS ADMINISTRATION

The clinical funding regulation sets up the following decision-making process regarding the allocation of funds to clinical delivery systems (clinics):

(i) Recommendations relating to funding and the terms and conditions attached to that funding are made by the Clinical Funding Committee to Convocation.

(ii) If Convocation approves these recommendations, the Director may issue a certificate authorizing the operation of a clinic for a period of not more than one year. The certificate sets out the terms of approval and funding.

Within this structure it is only at the first stage that clinics may make representations as to what services they propose to provide and the amount of money they require. The applications submitted by clinics are received by government employees who handle the day to day work of the Clinical Funding Committee. These employees then make recommendations to the Clinical Funding Committee.

(a) APPEAL PROCEDURE:

We would recommend that only one major structural change be made in the clinical funding regulation. This change would involve the establishment of a new appeal body which would review any dispute

between the Clinical Funding Committee and the clinic to which the decision made by the Clinical Funding Committee relates.

The new appeal body should be composed of at least 3 members. Our suggestion for the composition of this body is as follows: one represenative elected by the clinics, one representative elected by members of the Law Society, and one representative appointed by the Attorney-General of Ontario.

Following this basic framework, we submit that the approval structure, including appeal procedures, should function as follows:

(i) The Clinical Funding Committee staff ("staff") would receive a clinic's initial written application for funding.

(ii) Recommendations from the Staff to the Clinical Funding Committee, and the Clinical Funding Committee's decision should be made available in writing to clinics.

Notice of this decision should be given by the Clinical Funding Committee along with notice of the time at which the Clinical Funding Committee will hear further submissions. The clinic should then be entitled to make representations to the Clinical Funding Committee in order that the Committee might consider changes to the proposal it will approve and forward to Convocation.

(iii) When the Clinical Funding Committee has finalized its decision, notice should again be given to the clinic. If the particular clinic wishes to appeal the decision before it is submitted to Convocation for approval, the Clinic should give notice to the appeal body that it wishes to make representations disputing the decision of the Clinical Funding Committee. These representations might deal with the amount of funding proposed to be allocated, the areas of service which are proposed to be funded, or other terms and conditions to which the clinic will be subject under its agreement with the legal aid plan.

(iv) When Convocation has given its approval, the matter would be forwarded to the Director for the issuance of a certificate.

(b) DISBURSEMENTS AND OTHER COSTS:

In many cases the provision of legal services is not adequate to ensure that low income clients receive the same treatment under the law as clients with a higher income. Disbursements such as travel, transcripts, and printing and photocopying costs in lengthy and complicated cases can in themselves amount to thousands of dollars. Also, in cases involving complex technical matters before courts, boards and tribunals, the client cannot be represented adequately without the assistance of technical experts to assist in preparing for hearings and also to appear and give evidence at hearings. These experts are expensive and if several are required for proper presentation of the case the expense is soon out of the reach of even a group of people. Such expenses should be considered as a legitimate part of the provision of legal services.

It is therefore recommended that the same review procedure as that described above should apply in any subsequent applications to the Clinical Funding Committee for extra amounts of money on account of:

1. Disbursements which a client or client group cannot afford to pay;
2. Costs which the client or client group would be unable to pay in the event that costs were awarded against them;
3. The expense of hiring part-time experts, such as scientists, medical practitioners and planners for specific cases.

We would submit that such applications for funding should be considered on a case by case basis, and that a rigid means test not be employed. In cases where the public interest, rather than a purely private right, is involved the decision should be based not only on the financial capability of the client or client group but also on a review on the merits of the particular application.

(c) COMPOSITION OF CLINICAL FUNDING COMMITTEE:

The Clinical Funding Committee is at present composed of two members appointed by convocation from the Legal Aid Committee of the Law Society, and one member appointed by the Attorney General. There is no representation from the clinics that are directly affected by the recommendations of the Clinical Funding Committee. It is submitted that such representation should exist, and specifically that two members be added to the Clinical Funding Committee, making a total of five members. We recommend only two additional members, because we consider that a large body would be cumbersome and inefficient.

The two additional members to be appointed to the Clinical Funding Committee should be either currently employed by a clinic or have previously played an active role in the operation of a clinic. They should be elected by a vote of all clinics in the province, with each clinic having one vote.

(d) EXTENDED DEFINITION OF "COMMUNITY - BASED":

Section 147 of the present clinical funding regulation describes clincs as "....independant community-based clinical delivery systems". We submit that it should be recognized in the definition contained in the new clinical funding regulation that community may mean not only a geographical community but also a community of interest. This would facilitate the recognition that a clinic specializing in a particular field of law could operate on a much wider geographical basis but for the general benefit of the citizens of Ontario. The community board of such a clinic would consist of interested and expert people in the specific area of law in which the clinic specializes.

2. GUIDELINES TO GOVERN A WORKING RELATIONSHIP BETWEEN CLINICS AND THE CLINICAL FUNDING COMMITTEE.

(a) GUIDELINES ON ELIGIBILITY

In order to avoid uncertainty on the part of clinics, it is submitted that the regulation should include broad general guidelines for the issuance of clinical certificates. These guidelines should be arrived at after the Cabinet has made clear its priorities as to the services it is willing to fund, and clinics have had an opportunity to make representations on what activities should be considered acceptable for funding by the Clinical Funding Committee.

We would suggest however that the following services be considered as a minimum guideline to what the Clinical Funding Committee would have the authority to recommend for clinical certificates:

(i) Case by case advocacy on behalf of individuals and/or groups;

(ii) Legal advice prior to taking steps having legal consequences;

(iii) Summary advice and assistance;

(iv) Community legal education and preventive law programs based on educational activities such as the production of legal educational materials and oral presentations before groups;

(v) Law reform based on test cases, input into redrafting of statutes and regulations, and research;

(vi) Advocacy on behalf of persons or groups litigating matters in the public interest.

In addition to the provision of the aforementioned services it is also submitted that "Clinical delivery systems" should continue to be defined as including "...educational and training programs calculated to reduce the cost of delivering legal services...". This recognizes a need for the training of community legal workers who will be able to perform many of the functions that lawyers would otherwise perform, thus lessening the cost in terms of salaries to the legal aid plan.

(b) STANDARDS OF SERVICE, ACCOUNTABILITY, AND CLIENT CONFIDENTIALITY:

We accept the need for accountability for the expenditure of public funds and the need to deliver a high standard of service to the public. However, this must not be used as a justification for unnecessary interference by the Ontario Legal Aid Plan in the solicitor-client relationship or infringement of client confidentiality.

It should be recognized that in those clinics where files are under the supervision of a lawyer, the lawyer owes a duty of confidentiality to the client and is subject to safeguards on his or her delivery of legal services imposed by the Law Society of Upper Canada.

(c) NEED FOR ADEQUATE SUPPORT STAFF:

It should also be recognized in the guidelines that when a clinic's application for funding is accepted, that funding should be adequate to pay a sufficient number of support staff to provide a support function equivalent to that provided to members of the private bar. This support staff would include an adequate number of secretaries and community legal workers, as well as bookkeepers and office managers if required.

It has been a recognized problem within the clinics that the abilities of staff members are often not maximized because of inefficiencies within the office. This results in a wasteful allocation of resources and is not, we submit, the best use of the funds made available to a clinic.

(d) SALARY RANGES:

Clinics have traditionally had difficulty firstly in attracting experienced lawyers because they have not been able to afford to pay them salaries equivalent to those of the private bar, and secondly in keeping legal staff on a long term basis. This latter problem is seen to be caused by low salaries and poor working conditions, for example, the lack of support staff. This has a detrimental effect on the continuity and competence of the clinic, with the result that the services provided lower income people are often inferior to those provided other income groups. With this in mind, we submit that salaries paid to both lawyers and support staff be commensurate with those paid in the private sector of the particular geographic area in which the clinic operates. Guidelines, including a base salary level for each category should be set by the Clinical Funding Committee, and money should be allocated according to those guidelines.

(e) GLOBAL FUNDING:

Although we recommend that funds be allocated on the basis of reasonable salary levels, we would also recommend that a particular clinic's Board of Directors be allowed to set salaries and operating budgets for the clinic. This would allow some degree of flexibility within the total amount of funding approved. Accountability to the Clinical Funding Committee in relation to the salaries actually paid would be maintained through the regular accounting reporting procedures.

(f) ACCOUNTING PROCEDURES:

The only change that we would recommend to the present accounting requirements is that reporting should be semi-annually or annually, rather than quarterly as presently required. We do, however, recognize that it may be necessary to have more frequent reports from newly established clinics. After one year these clinics should also be required to make only semi-annual or annual reports.