

A Role for Law Students in the Administration of Justice in Quebec

Chris Nation*

Introduction

Much has been written over the past few years in praise of student legal aid clinics. Those concerned with making legal services more available to the poor have seen the student clinic as a means to that end. Others, concerned with the lack of practical content in today's law school curriculum, have seen the clinical experience as a counterweight to the academic programme. And more recently, those involved in the provincial legal aid schemes have sought to use the student clinic to fill the gaps and absorb some of the spillover from their larger plans.

In Quebec today, student clinics are operating at each of the province's five law schools. The clinics vary from school to school (particularly with respect to the degree of supervision of the students by lawyers) but generally much of the practice undertaken by students is unauthorized given a strict interpretation of the *Bar Act*.¹ A recent amendment to the *Bar Act*² and a provision of the *Legal Aid Act*³ have entrusted the Bar and the Legal Aid Commissioner with the responsibility of defining the capacity of students to practise law. To date, no regulations have been passed by either body, and from conversations which I had with various Bar officials, none appear to be on the horizon. Until such time as these regulations are made, our clinics will continue to operate with little legal authority behind them.

In the light of this situation, two questions present themselves: Firstly, what is the present capacity of students to practise law and secondly, what type of statutory formula could best provide for the needs of both the legal aid system and the law schools.

* Articling student with Jones, Branson, Emery & Cafra, Victoria, British Columbia.

¹ S.Q. 1966-67, c.77, s.128 as am. by S.Q. 1973, c.44, s.72.

² S.Q. 1973, c.44, s.8(d).

³ S.Q. 1972, c.14, s.80(f).

1. Statutory limitations on law students' ability to practise

Under section 128(1) of the *Bar Act*⁴ only the practising advocate or solicitor may give legal advice or prepare and draw up certain documents, such as a notice or motion, intended for use in a court case. The competence of a student (or any other non-lawyer) to act for a client on his own mandate is established and defined in subsection 2(a) of section 128 and section 129:

- s.128(2) The following acts, performed for others, shall be the exclusive prerogative of the advocate, and not of the solicitor:
- (a) to plead or act before any tribunal, except before:
 - (1) ...
 - (2) A conciliation officer or a council of arbitration; and
 - (3) An investigator ... or the Labour Court ...
 - (b) to prepare and draw up a will ...
 - (e) to make collections or make any claim with costs or to imply that judicial proceedings will be taken.
- s.129 None of the provisions of s.128 shall limit or restrict:
- ...
 - (b) the rights specifically defined and granted to any person by any public or private law.⁵

Section 128(2)(a) allows non-lawyers to act before the designated tribunals and section 129 would have the effect of authorizing student practice before those tribunals which specifically permitted appearances by non-lawyers.

(a) *Administrative tribunals*

The rules of procedure used in administrative tribunals are generally of a more flexible nature than those in force in the courts. The administrators or arbitrators take an active role in the conduct of the hearing and it is common practice for the parties to appear without counsel. Parties are also frequently represented by para-professionals or specialists in the subject matter of the particular tribunal and the lawyer will usually only be necessary when the case raises a fairly complicated legal issue. In the *Rapport du Groupe de Travail sur les Tribunaux Administratifs* one of the recommended uniform rules of procedure before the tribunals was that:

Toute partie touchée doit pouvoir se faire représenter par un conseil, c'est-à-dire une personne compétente, et pas nécessairement un membre du Barreau, et il pourrait être dans l'intérêt des justiciables de se faire représenter par un spécialiste non-juriste.⁶

⁴ S.Q. 1966-67, c.77 as am. by S.Q. 1972, c.44, s.72.

⁵ *Ibid.*

⁶ *Groupe de Travail sur les Tribunaux Administratifs, Rapport*, Québec: Ministère de la Justice (1971), 162.

Given the volume of cases heard by the various tribunals,⁷ representation for all parties by specialists and lawyers is undoubtedly beyond the present capacity of those groups. In certain cases, as well, a party may need representation but not necessarily the highly skilled representation which the lawyer or specialist would provide. In such circumstances, the law student could make a useful contribution by appearing on behalf of a party.

Although there are many tribunals which would theoretically fall within the exceptions of sections 128 and 129 of the *Bar Act*,⁸ I will consider below those in which student involvement would be both useful and practicable.

Subsection (2)(a)(2) of section 128 of the *Bar Act* refers to "a conciliation officer or a council of arbitration". Although the words "conciliation" or "arbitration" are not defined in the Act their meaning is clear: it is the procedure whereby two parties submit their grievances to a third who is entrusted to settle the dispute according to a certain set of agreed upon rules. The two foremost examples of this type of tribunal in Quebec are the Workmen's Compensation Board⁹ and the Rental Board, originally established under *An Act respecting the regulation of rentals*¹⁰ (now *An Act to prolong and amend the Act to Promote Conciliation Between Lessees and Property-Owners*).¹¹ Neither board has established procedures to be followed in their hearings, but it appears that a practice has developed before both boards of allowing parties to be represented by both lawyers and non-lawyers.¹²

Under section 129(b) of the *Bar Act*, law students would be permitted to represent parties who were claiming before an administrative tribunal which permitted parties to be represented by non-lawyers in their regulations. Statutory regulations are public laws within the meaning of the subsection and the right to choose to be represented by an agent is a right "specifically defined and granted to any person".

There are four tribunals in particular, two federal and two provincial, whose regulations should permit law students to appear

⁷ See *ibid.*, for figures.

⁸ *Supra*, note 4.

⁹ *Workmen's Compensation Act*, R.S.Q. 1964, c.159.

¹⁰ S.Q. 1950-51, c.20.

¹¹ S.Q. 1975, c.84.

¹² See J.P. Bergeron, "The Quebec Rentals Board", and M. Lacoste, "The Workmen's Compensation Commission" in W.C.J. Meredith Memorial Lectures, *Eleven Lectures on Administrative Boards and Commission* (1961) at pp. 60, 64.

on behalf of a client: the Unemployment Insurance Commission,¹³ the Immigration Appeal Board,¹⁴ the Quebec Pensions Appeal Board¹⁵ and its Review Commission.¹⁶

Under the federal *Unemployment Insurance Act*,¹⁷ a claimant may appeal a decision of the commission to a Board of Referees¹⁸ and then under certain circumstances appeal the Board's decision to an Umpire.¹⁹ The right of a claimant to be represented by a non-lawyer in his appeal is contained in rule 4(2) of the *Umpire Rules of Procedure*,²⁰ under the heading "Commencement of Appeal":

A Notice of Appeal shall contain:

...

- d) the name and address of the appellant's solicitor, if any; and
- e) the name and address of the appellant's agent, if any.

The federal *Immigration Act*²¹ allows a person to appeal a decision of the Special Inquiry Officer²² and be represented by counsel.²³ Under rule 2(b) of the *Immigration Appeal Board Rules*,²⁴ "counsel" is defined as:

[A]ny person authorized by the appellant or respondent to represent him before the Board, and is not restricted to barristers, solicitors or advocates.

¹³ *Unemployment Insurance Act*, R.S.C. 1970, c.U-2.

¹⁴ *Immigration Appeal Board Act*, R.S.C. 1970, c.I-3.

¹⁵ *Quebec Pension Plan*, S.Q. 1965, c.24.

¹⁶ *Ibid.*

¹⁷ R.S.C. 1970, c.U-2.

¹⁸ *Ibid.*, s.70.

¹⁹ *Ibid.*, s.30.

²⁰ *Umpire Rules of Procedure*, P.C. 1974-2333 of 22 Oct. 1974, S.O.R. 74-602, s.4(2)d, Can. Gaz., Part II, vol.108, no.21, 2826, 13 Nov. 1974. In practice claimants are quite frequently represented before the Board and Umpire by non-lawyer specialists in unemployment insurance law. One such group of specialists, the Mouvement d'Action-chômage, a Montreal charity-funded organization, takes on students from law and other faculties at the Université du Québec at Montreal to help them with their projects.

²¹ R.S.C. 1970, c.I-2.

²² *Ibid.*, s.31(1).

²³ *Ibid.*, s.26(2).

²⁴ *Immigration Appeals Board Rules*, P.C. 1967-2084 of 2 Nov. 1967, S.O.R. 67-559, s.2(B), Can. Gaz. Part II vol.101, no.22, 1743, 22 Nov. 1967. According to a spokesman at the Service d'Accueil aux Voyageurs et aux Immigrants, the petitioner will be represented by a lawyer in the majority of cases before the Appeal Board and by an immigration law specialist provided by the Service d'Accueil in a lesser number of cases. In hearings before the Special Inquiry Officer the situation is the reverse with the specialists appearing in the majority of cases where counsel is used, and lawyers appearing in only the occasional case.

Two separate administrative tribunals are established under the Quebec Pension Plan, the Pensions Appeal Board²⁵ and the Review Commission.²⁶ Both tribunals allow the appellant to be represented by an agent of his choice. In the "Schedule A-Form of Notice of Appeal" of the regulations of the Pension Appeal Board²⁷ it says:

At the end of the notice of appeal there should then be set out

- (a) Name and address of appellant's solicitor, if any,
- (b) Name and address of appellant's agent, if any, on whom documents may be served.

The *Rules of Procedure of Review Commissions (Benefits)*²⁸ contain a similar reference to a representative of the appellant who is not necessarily the lawyer.

(b) *Summary conviction offences*

The Summary Conviction Offences section of the *Criminal Code*,²⁹ provides another important exception to section 128 of the *Quebec Bar Act*.³⁰ Two sections, the meaning of which appears to be quite plain,³¹ allow appearance and cross-examination by an agent:

s.735(2) A defendant may appear personally or by counsel or agent... and

s.737(2) The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel or agent.

As both the words "counsel" and "agent" are used, the interpretative presumption against redundancy in statutes would indicate that the words were not intended to have the same meaning:

When two words or expressions are coupled together, one of which generally includes the other, it is obvious that the more general term is used in a meaning excluding the specific one.³²

"Counsel" is defined in the *Criminal Code* as a "barrister or solicitor" (advocate in Quebec) but "agent" is not. The word "agent" therefore must be given its normal meaning. For the purposes of the section

²⁵ S.Q. 1965, c.24.

²⁶ *Ibid.*

²⁷ Q.S.R. 2-235 (Aug. 1972).

²⁸ Q.S.R. 2-239 (Aug. 1972), s.4(c).

²⁹ R.S.C. 1970, c.C-34.

³⁰ S.Q. 1966-67, c.77.

³¹ See W.J. Parker, *An Observation on Appearances by Agents in Summary Conviction Matters* (1968-69) 11 Crim.L.Q. 393.

³² *Maxwell on Interpretation of Statutes* 11th ed. by R. Wilson and B. Galpin (1962), 320.

it would mean "a non-lawyer who is authorized by the accused to act on his behalf in court".³³

The law student therefore has the right to represent clients before these tribunals since they fall into the exceptions foreseen by sections 128(2)(a) and 129(b) of the *Quebec Bar Act*. One relatively minor point only remains to be determined.

The provisions of section 128(2)(a), the regulations of the administrative tribunals and sections 735(2) and 737(2) of the *Criminal Code* allow the non-lawyer to act and plead before the particular tribunal mentioned. Section 128(1)(a) and (b) and section 128(2)(e), however, say that non-lawyers generally may not perform the acts of giving legal advice, drawing up court proceedings and letters threatening to take action. The question is whether the student would be permitted to perform these acts for a client whose case was within the jurisdiction of one of the excepted tribunals. For example, if a student had a client who as a tenant wished to obtain a reduction of rent under the *Conciliation Act*,³⁴ would he be able to give the client advice as to his legal rights? Or could he write the landlord a letter threatening action before the Rental Board and draw up the legal proceedings required in the action?

Basic rules of interpretation would suggest that the student would be able to perform all the various acts which are necessarily incidental to the actual representation before the tribunal. The act of pleading before a tribunal is of far more importance in terms of the rights of the client than the acts of advising, preparing proceedings and writing letters. As the greater act it must be construed as including these lesser acts; it would be manifestly inconvenient

³³ Despite the apparent plain meaning of the *Criminal Code*, the judges of the Montreal Social Welfare Courts have, at the request of the Montreal Bar, refused to allow law students to act on behalf of clients who are brought before their courts. The reasons behind the Bar's decision are not known and, at this time, the Bar has not taken an official public position on the question. See "Résumé: Re L'étudiant à la Cour du Bien-Etre Social" in R. Cooper, *The Poor and Legal Facilities*, 1015-1018 (unpublished, McGill University Law Library).

Shortly after the incident described in the above paragraph, a report prepared by Robert Cooper of Community Legal Services Inc. titled *Memorandum of C.S.L. to the Bar of Quebec concerning the capacity of law students as agents in summary conviction matters* June 1971 was sent to the Bar for its consideration. Recently I was informed by the Bar that the issues raised in the Memorandum had been on the agenda of the Bar's Committee on Professional Training but had not been discussed due to lack of interest.

³⁴ *Supra*, note 11.

and unjust if a client were able to engage a student to plead his case but were forced to hire a lawyer to write his letters:

If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance (if not actually essential) to the proper and effectual performance of the work... which the statute has in contemplation the courts are at liberty to infer that the statute by implication empowers that detail to be carried out.³⁵

Section 128(1) and (2)(e) should therefore be qualified so as not to restrict or infringe upon the rights of persons who may plead before a tribunal.

2. The student assisting a lawyer

It is well recognized that the presence of practising lawyers is essential to the well-being of any student clinic. This is so, not only for supervisory purposes, but also in order that the clinic may provide a fairly comprehensive range of legal services to the community it serves. The question may arise then as to the rights of the student to assist the lawyer on a case which is beyond the competence of the student.

This issue was discussed in *Barreau de Montréal v. Singer*.³⁶ Singer, a lawyer from New Brunswick, was charged by the Bar with usurping the functions of an advocate. He had come to Montreal at the request of a litigant to help with the preparation of an important case. His activities included studying the pleadings and documents, drawing up procedural documents, interviewing witnesses, researching the authorities, giving advice to the client and the attorney of record, and preparing the case for trial. One of Singer's defenses was that he was merely performing the traditional tasks of articling students. Walsh J. distinguished his case from that of a student and in doing so acknowledged the rights of students to assist lawyers:

There is no doubt that a person learned in the law, though not qualified to practise under the Bar Act may render services to the attorney of record: students do this for their patrons ...³⁷

Generally then, when a law student is providing services under the authority and responsibility of a lawyer and is neither directly advising the client nor pleading or acting before a court there will be no conflict with the *Bar Act*.

³⁵ *Craies on Statute Law* 6th ed. by S.G.G. Edgar (1963), 111.

³⁶ (1934) 56 C.B.R. 394.

³⁷ *Ibid.*, 409.

3. The role of a student clinic within the Quebec Legal Aid Plan

Since the implementation of Quebec's Legal Aid Plan³⁸ practising lawyers provide free legal service for practically any legal matter. One would think that the Plan has deprived students of their traditional clientele. Certainly it is true that the Plan has brought a lawyer within reach of the poor. However, this does not necessarily preclude a useful role being played by student clinics.

First of all it should be borne in mind that part of the *raison d'être* for student clinics is the educational experience which they provide for law students. Involvement with clients, courts and real cases will not only teach the student how to practise law but will also stimulate his interest in the substantive law that forms his curriculum.

Secondly, it should not be assumed that the services provided by law students under the supervision of experienced lawyers will be in any way inferior to those provided by members of the Bar. Reports on the performance of students in other clinics indicate that the student generally handles the cases he is given with great conscientiousness and diligence. A report on the Dalhousie clinic found that:

Clinical students devote much research and preparation time to these matters, in many cases more than a practitioner would or could do. The result is that the clinic develops a considerable expertise in a variety of poverty law matters ...³⁹

Thirdly, there is the simple fact that the law student is willing to work for free. Whatever his motivation, a desire to help the underprivileged or the opportunity to gain some practical experience, the utilization of law students in the legal aid system will put no further burden on the public coffers and, in fact, could have the effect of relieving them to some extent.

Other provinces have attempted to deal with the question of student clinics and their experiences may be illuminating.

(a) Ontario

In Ontario, student legal aid clinics have been a firmly established branch of the legal profession for several years. According to a recent report⁴⁰ the combined case load of the six law school clinics is close to six thousand cases *per annum*. Despite this activity, and despite a considerable degree of *de facto* recognition of the students'

³⁸ *Legal Aid Act*, S.Q. 1972, c.14.

³⁹ H. Savage, *The Dalhousie Legal Aid Service* (1975) Dal.L.J. 505, 519.

⁴⁰ L.S. Fairbairn, *Student Legal Aid, The Search for Legitimacy* (1974) Osgoode Hall L.J. 627, 634.

status within the profession, *de jure* recognition of students remains marginal at best.

The *Regulations of the Legal Aid Act*⁴¹ govern the constitution and operation of the clinics. They provide for a scheme whereby the student clinics can render assistance to duty counsel and panel solicitors, and handle certain types of cases in which the client has been refused legal aid for other than financial reasons. These cases, enumerated in section 13 of the *Legal Aid Act*,⁴² include summary conviction proceedings, civil proceedings in a provincial court (family division), small claims court cases, proceedings before a quasi-judicial tribunal and proceedings in bankruptcy subsequent to a receiving order.

Although the regulations do allow the clinics to handle certain cases, they stop short of resolving the question of the student's status to practise law. Rule 78 merely provides that:

... a law student who has successfully completed two years of his law course and is a member of its legal aid society, may, with the approval of the dean, represent and appear on behalf of a person ... provided he is entitled in law so to appear.

As no special role for law students has been carved out of the general statutory prohibition against unauthorized practice,⁴³ Ontario students must be satisfied with practising law in those areas which have specifically permitted representation by non-lawyers.⁴⁴

(b) *Nova Scotia*

The Nova Scotia statute⁴⁵ does confer a certain status to practise law on a law student during the period he is participating in a legal aid or clinical law programme operated by the faculty or under the authority of an enactment. It defines the student's rights in terms of the tribunals and proceedings in which he is appearing. Before the "courts, masters, judges *et al.*", the student acting alone may present an uncontested motion or a motion for adjournment or to hear judgment. Before the provincial or stipendiary magistrate (basically a minor civil claims jurisdiction) the student may appear

⁴¹ R.R.O. 1970, Reg. 557, ss.74-78.

⁴² R.S.O. 1970, c.239.

⁴³ *The Law Society Act*, R.S.O. 1970, c.238, s.50; *The Solicitors Act*, R.S.O. 1970, c.441, s.1.

⁴⁴ It would appear from Fairbairn's article, *supra*, note 40, that in reality this is far from the case. Student clinics in Ontario on a regular basis take on cases which are outside of the "approved function" as defined in the Rules and engage in legal activities in violation of professional codes.

⁴⁵ *Barristers and Solicitors Act*, R.S.N.S. 1967, c.18, s.7 as am.by S.N.S. 1969, c.28, s.1; S.N.S. 1970-71, c.28, s.1.

on behalf of any client of the barrister, conduct a civil proceeding, try an offense punishable on summary conviction or, where the judge has absolute jurisdiction, try an indictable offense.

Although the range of activities permitted under the Act appears to be quite narrow, it does include the two areas crucial to any student clinic: small claims and summary conviction proceedings. A report on the clinic which has been operating under this regime⁴⁶ paints a glowing picture of dynamic growth, a broad and varied case load and a deep involvement in the community through a variety of paralegal projects. Certainly no complaint emerged from the report that the clinic was having difficulty functioning within the permissible jurisdiction.

On this point, the report raised something well worth keeping in mind for our present purposes: a university clinic must be structured in such a way that all acts performed by the students for the clients are done under the strict supervision of the resident lawyers. The point is made frequently by Fairbairn as well, regarding the Ontario clinics: the lesser the supervision of the students' activities, the greater the risk of overstepping jurisdictional bounds and the greater the danger of becoming tangled in problems of professional responsibility.

(c) *Manitoba*

Undoubtedly the recent Manitoba legislation⁴⁷ is the most comprehensive and well-defined formula enacted in Canada to this date concerning student practice. A student "who is acting under the... supervision... of a barrister or solicitor and who is... registered in an accredited clinical training program...", under section 48.1(1):

- (a) may engage in the work of a solicitor;
- (b) may appear as a junior with a barrister or solicitor in the conduct of any proceeding; and
- (c) may appear, either alone or as a junior with a barrister or solicitor
 - (i) in any interlocutory application or motion in any proceeding including, without restricting the generality of the foregoing, an application for bail and to examine for discovery,
 - (ii) to move an adjournment or hear judgment,
 - (iii) in any summary proceeding in a Provincial Judges' Court or before a Provincial Judge including, without restricting the generality of the foregoing, proceedings under The Highway Traffic Act, The Wives' and Children's Maintenance Act, The

⁴⁶ *Supra*, note 39.

⁴⁷ *An Act to Amend the Law Society Act (2)* S.M. 1974, c.51, s.3, amending *The Law Society Act*, S.M. 1956, c.39, ss.48.1(1) and (2).

- Child Welfare Act, the Juvenile Delinquent's Act and the Criminal Code,
- (iv) in any proceeding under Part IV of the Landlord and Tenant Act,
 - (v) in any proceeding heard under subsection 85(1) of The County Courts Act whether the hearing is before a Deputy County Court Clerk, County Court Clerk or County Court Judge,
 - (vi) in any proceeding in which the presiding Provincial Court Judge has absolute jurisdiction to try an indictable offence,
 - (vii) in any proceeding before an administrative or public tribunal or commission,
 - (viii) in any other proceeding specified in any regulation of the governing body.⁴⁸

The bulk of the cases to be expected at a student clinic are in the areas of family law, landlord and tenant, criminal law and employment law; the above regulations would therefore appear quite adequate to meet the needs of a busy clinic. The Manitoba legislation could serve as a model for similar initiatives on the part of the other provinces.

4. Recommendations

As mentioned above, the recent amendment to section 13(2)(a) of the Quebec *Bar Act*⁴⁹ enables the Bar to determine an area of competence for law students. Rather than itemizing the precise activities which the student should be allowed to perform, I will do no more than mention some of the considerations which should bear upon the decision. The regulations should be oriented towards the types of cases most commonly handled by a legal aid clinic. Experience has shown that the overwhelming majority of such cases are concerned with family law, lease law, criminal law (especially juvenile matters), small claims, welfare, unemployment and immigration. The right of the law student to appear before these latter administrative tribunals should be confirmed in the regulations and certain of the more routine court procedures in the area of family and lease law should be brought within the competence of the student. In family law, for example, a student might be allowed to deal with matters under "Proceedings concerning marriage and the alimentary obligation" in Title IV of Book Five of the Code of Civil Procedure.⁵⁰ In lease law a student would be able to handle the application for permission to withhold rent.⁵¹

⁴⁸ *Ibid.*

⁴⁹ S.Q. 1966-67, c.77 as am.by S.Q. 1973, c.44.

⁵⁰ S.Q. 1965, c.80.

⁵¹ Art.1612 C.C.

Secondly, the organizational framework of a clinic should be kept in mind. Student clinics are normally composed of a small nucleus of lawyers who advise and supervise a relatively large body of students. The student handles the case assigned to him independently and consults the lawyer only when the need arises. For this reason, the regulation ideally should attempt to single out those types of judicial activities which students could handle from beginning to end. This has been done in Nova Scotia and Manitoba by defining the student's area of competence in terms of particular tribunals which by law have particular jurisdictions. I would not recommend the wholesale application of the existing Quebec regulations on articulated students⁵² to law students simply because nearly half the specific activities listed in the regulations are subsidiary procedures to actions which a student clinic would probably never handle.

Conclusion

Quebec law students do possess certain rights to practise law as recognized by the statutes and the courts. These rights however are randomly located and often quite tenuously based. For the future well-being and development of our student clinics a comprehensive regime of the student's capacity to practise law is essential.

At a recent conference at Osgoode Hall Law School on "The Role of the Law Student in the Administration of Justice" (February 21-22, 1975), representatives from the legal aid clinics of Canadian law schools came together to compare and discuss their activities. The information exchange at the conference was of interest to Quebecers for several reasons:

First, it showed that the degree of student participation in the clinics of other provinces was significantly higher than in Quebec. Secondly, and more importantly, it showed a high level of cooperation between the clinics, the provincial law societies, the provincial legal aid organizations and the law schools. Student clinics in the other provinces are recognized as being capable of performing a useful service within the legal aid structure and have, by and large, received either official or unofficial authorization to pursue this goal. Surely the time is long overdue for such cooperation in Quebec.

⁵² *Regulations of the Bar of Quebec*, Q.S.R. 9-015-016, Division III, nos.27-28 (Aug. 1972).