

COMMUNITY LEGAL CLINICS AND CLINICAL EDUCATION IN THE COVID ERA: RESILIENCE, INNOVATION, AND GAPS

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In Canada and throughout the commonwealth countries, access to justice depends upon free legal clinics to fill gaps. While provinces vary in the amount they invest in Legal Aid Services for lower income citizens, it is generally recognized that the majority of lower-middle-class people simply cannot afford to pay the retainer fee for a private lawyer.¹ Legal clinics provide, at bare minimum, summary advice to self-represented litigants, and in some cases full carriage of the file including representation in court.² In Canada, almost all university law faculties have legal clinics as part of their curriculum, or are partnered with independent legal clinics that offer students clinical experience.³ This creates a win-win situation: students receive an invaluable opportunity to do hands-on work under the supervision of clinic lawyers, and clients who cannot afford to hire a lawyer receive legal support.

The University of New Brunswick Faculty of Law (UNB Law) is no exception. In partnership with the Fredericton Legal Advice Clinic (FLAC), volunteer UNB Law students have had the opportunity to do client intake interviews since FLAC's inception in 2009. Since January 2017, UNB Law has enhanced its

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¹ See generally Julie MacFarlane, *National Self-Represented Litigants*, online: <representingyourselfcanada.com>. The idea of “unbundled services,” championed by Dr. Julie MacFarlane, is the practice of offering specific legal assistance to otherwise self-represented litigants without the lawyer retaining full carriage of the file. This practice is largely unknown in New Brunswick, so most often litigants must come up with a retainer fee of several thousand dollars before a private bar lawyer will take their case.

² Community Legal Services at the University of Western Ontario offers arguably the gold bar standard of legal clinics, with 125-150 students taking part in 800-1,000 files per year, with three separate clinical courses covering 11 areas of law supervised by five full-time staff lawyers and numerous junior lawyers. See Douglas F Ferguson, “Supervision in the Clinical Setting: What we Really Want Students to Learn” (2019) 26:1 Intl J Clinical Leg Education 158.

³ Douglas F Ferguson et al, “Ensuring the Competency of “Whole” Legal Professionals: Maximizing Experiential Learning Opportunities for Law Students” (paper delivered at CALT/ACCLE Conference, University of Victoria, Victoria, 2017) online (pdf): <communitylegalcentre.ca/wp-content/uploads/2018/08/CALT-CBA-Experiential-Learning-Guide-Workshop-June-2017.pdf>. See also Gemma Smyth, “Clinical and Experiential Legal Education in Law Schools: Current Perspectives” (2019) 95:1 Can Bar Rev 151.

experiential learning for law students by offering the Community Clinic Course (Law 5210) in its course selection.

COVID restrictions have impacted clinics and legal education across Canada. This paper will outline the “old normal” – pre-COVID practices for FLAC and the Community Clinic Course – and then discuss both innovation and ongoing gaps that have been a response to COVID restrictions. Finally, this paper looks forward to a “new normal” that is more responsive to both student learning and access to justice in New Brunswick.

The “Old Normal” – Pre-COVID

Fredericton Legal Advice Clinic (FLAC)

In 2008, NB Pro Bono Inc. was incorporated under the New Brunswick *Companies Act*, RSNB 1973, c C-13. Their purpose was “to promote access to justice in New Brunswick by creating and promoting opportunities for lawyers to provide *pro bono* legal services to persons who lack the means to hire a lawyer.” Under the direction of four local lawyers, NB Pro Bono’s first project was to re-create the Wilmot (United Church) Legal Advice Clinic.⁴ As a response, the Fredericton Legal Advice Clinic (FLAC) was incorporated with the following mandate:

To establish a free, open and accessible venue to provide legal advice, advocacy and representation to the broadest range of people in Fredericton and outlying areas who would otherwise be unable to find or afford these services.

Since its incorporation, FLAC has offered Fredericton Southside clinics twice a month at Wilmot United Church, a monthly Fredericton Northside clinic at the John Howard Society building, and a monthly clinic at St. Mary’s First Nation.

FLAC clinics have provided valuable clinical experience to the volunteer UNB Law students that attend each week. Volunteers each year have exceeded the number of volunteer time-slots available each September. Some students have received articling positions in part because of the clinical experience they received through their volunteerism with FLAC. The FLAC Board of Directors has a place for a student representative who coordinates the student volunteer schedule.

Student volunteer training includes training in intake interviews, professional ethics, confidentiality, and conflicts. Because there is a fairly high representation of First Nations people in the client demographic, who in some instances have legal issues specific to their First Nations status, students receive indigenous cultural training by an elder from St. Mary’s First Nation as well as a professional from the

⁴ The Wilmot (United Church) Legal Advice Clinic operated for approximately 15 years prior to FLAC.

off-reserve urban indigenous community. Students also interact with a regular flow of newcomer clients, particularly refugees, who have unique challenges navigating the justice system. To this end, volunteer law students are given cultural training from the Fredericton Multicultural Association (MCAF). In addition, volunteer training includes sensitivity training around LGBTQIA2S+ issues by members of that community.

The existence of FLAC benefits three distinct groups: clients, students and lawyers:

- i. Clients are helped to discern legal from non-legal issues.
- ii. Clients are guided to the correct procedures if they are pursuing self-represented legal remedies.
- iii. Clients are encouraged to hire lawyers when their issue cannot be adequately addressed through self-representation.
 - They are given clear and comprehensive explanations that help them understand why professional advocacy would be best in their situation.
- iv. Clients are pointed toward a network of other community services
 - If their problems are of a non-legal nature.
 - If they could benefit from community services on top of legal remedies.
- v. UNB Law students have the opportunity to engage with real clients:
 - Student volunteers perform the initial intake interview, giving them first contact with the client.
 - Students develop skills in compassionate critical thinking.
 - Students develop skills in discerning legal issues from other problems.
 - Students learn to control and direct the conversation without disregarding the client's need to tell his or her story in detail.
 - Students learn to interact with a wide cross-section of society, including people with special needs, mental health issues, language and literacy barriers.
 - After the intake interview, the student must brief the lawyer on what he or she believe to be the legal issues.
 - a. Students must think on their feet.
 - b. Students learn to distill and articulate the legal issues from what may have been a long and convoluted client narrative.
 - Students listen while the lawyer interviews the client.
 - a. Students get exposed to a variety of different lawyers who have different styles and approaches to client interviews and legal problem solving.
 - b. Students learn about a range of legal issues within real-life fact scenarios.
 - c. Students may be invited by the lawyer to offer input, which permits them to apply legal theories they have learned in the classroom
 - Students debrief on-site with the lawyer afterwards.

- a. All students benefit from hearing about the different legal issues that clients brought to that clinic session.
 - b. Students can engage in further discussion with the lawyer regarding other legal matters.
- vi. Lawyers have opportunity to give back to the community, to learn from one another and to teach students through the de-briefing process.

FLAC students have often expressed that they particularly value the ability to practice providing legal information and distinguishing it from legal advice. Traditional classroom learning does not provide students with a chance to exercise this distinction. When working on hypotheticals, students are expected to demonstrate the application of the law to specific fact scenarios. In the real world, providing legal information means walking away from the temptation of giving the “best answer” to the facts of the client in front of you. Learning this skill early in law school is an invaluable way to develop habits that will be helpful even as a new lawyer, when one may be too eager to help a friend or family member with advice even though not retained, and potentially open oneself up to liability.

Community Clinic Course (Law 5210)

While invaluable, the volunteer student experience at FLAC is limited compared to what students can learn in a for-credit clinical context. In 2017, UNB sought to address the need for clinical education by developing the Community Clinic Course (Law 5210).

Clinical legal education creates a learning environment that is different from both academic law courses and from articling. While the articling position provides the student-at-law an experiential learning environment, it is not generally bolstered with the same type of learning processes that occur in a clinical course. Articling students exist primarily for the value their work brings to the firm and their principal, where, in a clinical setting, the law student’s personal and professional development is the primary value. Being afforded the opportunity to work with real clients under a supervisor who prioritizes the student’s learning experience is unique to the law school clinic environment.

Clinical legal education includes a classroom component which prepares the student to get the most out of their learning experience. Students are given exercises and assignments that assist them in developing reflection; students are also given cultural sensitivity training through guest speakers and exercises that help them learn to recognize their own bias and privilege. Students are required to use critical thinking skills to unpack experiences within their externship placements as observers and participants in the administration of justice. As such, they have opportunity to intentionally develop the type of professional identity that is going to be tailored to the style of lawyering they wish to emulate, in an environment where the real-world stakes are low. The reflective practice skills they learn through a clinical environment equip

them to enter their articling positions with the ability to observe and analyze dynamics in the work environment. Intentional learning paves the way for a practice where new lawyers not only learn from their mistakes, but are equipped to unpack the emotions that come with mistakes.

The first term of the course focuses on classroom learning around professional identity, reflective practice, learning processes, access to justice, local community network services, and cultural sensitivity training by local community experts.⁵ As with the volunteer FLAC students, guest speakers include members of the Fredericton Multicultural Association and members of St. Mary's First Nation. In addition, students in the course hear from an expert in trauma and violence informed approach from Sexual Violence N.B., political activists from the LGBTQIA2S+trans community, and executive directors of the public organizations where students will be placed for their clinical externship. Each year students in this course have been invited to participate in a traditional sweat lodge ceremony led by a Wolastoqiyik elder of St. Mary's First Nation. A physically and mentally challenging experience, it has been one of the highlights for students each year.

Traditional legal education lacks a trauma and violence informed approach to the practice of law. Recently, with podcasts like "The Trauma Informed Lawyer" on CBC, and changes to *The Divorce Act*, the legal profession is beginning to recognize the impact of trauma on survivors in domestic and other contexts. Sexual Violence NB brings to the Community Clinic Course an opportunity to understand the basic neurology of how trauma impacts memory and cognitive thinking, and the implications this can have for clients in both family law and criminal law settings. It is also a lens that permits students to better learn about the inter-generational impact of trauma for indigenous clients.

Student placements occur approximately six weeks into the first term. Externships include the New Brunswick Legal Aid Services Commission, the New Brunswick Office of the Child, Youth and Elder Advocate, Public Legal Information and Education Services, FLAC, the Youth A2J Clinic and Outreach Program, and the Elizabeth Fry Society. Placements continue into the Winter Term, at which time classroom meetings are limited to a monthly basis to do case-rounds. Case rounds provide students the opportunity to reflect, share, and receive feedback on their placement experience. Clinical legal education enhances self-review, peer-review, and the setting of personal and professional goals through reflective practice. Students learn to reflect not only on their internal experience, but on the larger framework of clients and lawyers in the justice system. They have an opportunity to assess the strengths and weakness of the administration of justice in Canada.

⁵ Course materials include Sarah Buhler, Sarah Marsden & Gemma Smyth, *Clinical Law: Practice, Theory, and Social Justice Advocacy*, 1st ed (Toronto: Emond-Montgomery, 2016); Jennifer Moon, *A Handbook of Reflective and Experiential Learning: Theory and Practice*, (London: Routledge, 2005) [Moon]; Leah Wortham et al, *Learning from Practice: A Text for Experiential Legal Education*, 3rd ed (St. Paul: West Academic Publishing, 2016).

Reflective practice is relatively new to the law school environment. While educators in medicine, nursing, social work, and teaching have employed reflective practice as part of the curriculum, it is only in the last decade that reflective practice has been used more consistently at law schools, and most often in a clinical context. In the Community Clinic Course, course materials include Jennifer Moon's *A Handbook of Reflective and Experiential Learning: Theory and Practice*.⁶ A theoretical understanding of how one learns is essential to engage students with being pro-active in their own learning process after they are placed in their externships. Students are not asked to write reflections prior to having exposure to learning theory, which helps them to recognize the process by which information is received, organized, and formulated into meaningful narratives.

When reflective exercises are included in a course that does not take into consideration the necessary building blocks of understanding how intentional learning occurs, it is frequently experienced by the student as an artificial requirement that exists only to satisfy the instructor. Reflective exercises – essays and journaling – run the risk of being highly artificial. Particularly in a profession where students are encouraged to look at facts and legal principles, being asked to reflect on themselves, their professional environment, and their clients is occasionally met with resistance. For reflective exercises to be useful, students must be educated in the learning process and the need to take responsibility for their own learning. When students are equipped to analyze their own learning processes, they learn to step back and see themselves within the larger professional context, freeing them to make observations without judgement. To assist students to engage critically with their own reflections, students are asked to mark samples of reflective writing. They follow the same rubric that the instructor will use in marking their work, and learn to identify the important qualities that make strong reflective writing. Strong reflective writing is ultimately transformative: it takes the individual from a subjective place of participating in a professional context where they are unaware of their own biases, assumptions, fears and blinders, to a place of freedom where it is safe to make fearless self-observations that transform their prior experience. This is a journey that requires intentionality and commitment, and cannot be achieved if the student is only interested in satisfying a course requirement. Genuine reflection that results in transformation cannot be “faked.”

The reflective essays of students in the Community Clinic Course demonstrate transformation when the walls between “self” and “other” dissolve in remarkable ways. The student comes to realize that he or she has imported expectations of what it means to be a law student, a lawyer, and a client predicated on normative biases. Lawyers who do not engage in reflective practice too often carry their biases throughout their careers. The nature of the legal profession is such that

⁶ Moon, *supra* note 5. While there are a growing number of resources available in this field of study, for the purposes of the Community Clinic Course this book strikes a helpful balance between theory and praxis. Chapters 6–7 provide an overview of the theory of learning, focusing on depth learning through reflection. Chapters 8–9 define the academic conversation around experiential learning, and integrate the idea of depth learning in a placement context.

“success” is often measured through signifiers of status (income, appearance, prestige) that easily permit ego to control the lawyer’s professional identity. When this happens, the client is inevitably “othered” to some extent, which is different from maintaining appropriate professional boundaries necessary for objective quality services. Law students in the Community Clinic Course have the chance to develop a professional identity that is not built on ego-maintenance, but on respect and understanding of the client in his or her particular circumstances.

Transformation of self-awareness has frequently been most evident in white, male, cis-gendered students. Through reflective training, combined with experiential placements, male students have come to terms with the biases that are often otherwise reinforced by their law school experience.⁷ This transformation is only possible if the classroom ethos is supportive and non-judging. To date, the Community Clinic Course has had a diversity of students who have been willing to support one another’s process without shutting down students who hold outlier views. This attitude is modelled by the instructor, who is intentional about engaging each students’ contributions to discussion with enthusiasm and positive regard. When a student expresses views that may demonstrate a lack of awareness around important issues of privilege, the instructor makes sure that they are not made to feel “wrong.” Picking up on this lead, classmates have engaged in lively dialogue around difficult topics that do not require a strident policing of what is considered “politically correct.” Learning is only possible in environments where the learner feels safe. When students feel they cannot express points of view that go counter to what they perceive as acceptable, the classroom dynamic polarizes and genuine communication stops. Without communication, learning is not possible. When the instructor models an openness to hear students, actively listening for the values inherent in their position and/or experience, and is willing to be challenged, the student is freed to hear other points of view.

The Community Clinic Course’s training in indigenous culture, immigration and refugee clients, and sex and gender minorities educates students on the ways in which they import normative biases. This training is not academic: it can only be successfully accomplished by inviting into the classroom the voices of those from within those marginalized communities. Guest speaker Jeremias Tecu of the MCAF brings insight into his personal experience as an indigenous Guatemalan, his survival of a genocide that took most of his family, and his eventual immigration to Canada as a refugee. He also shares with the students the challenges of being a brown-skinned person in Fredericton, who speaks with a strong South American accent. The students learn first-hand the experience of micro-aggressions and inequities that he faces on a

⁷ Anecdotally, female law students through their reflective essays and journals have expressed a greater degree of self-doubt around professional image than their male counterparts. In classroom presentations, female students more often speak about challenges regarding professional dress, make-up and appearance, than do their male counterparts. They are also more likely to dress professionally than the majority of male students in the course. Community Clinic Course students who are from vulnerable minority groups have consistently shared anecdotes where they have experienced some form of marginalization from peers at law school based on race, gender, or sexual orientation.

regular basis. With his work at MCAF, he also is able to share the challenges of other refugees and immigrants including youth who are often criminalized in contexts where they do not understand their rights and obligations. His stories and his presence allow for a learning experience that goes beyond anything that could be learned through texts or class discussion.

Lapskahasit Cihkonage (Chris Brooks) is an elder from St. Mary's First Nation who has taught the class about Wolastoqiyik spirituality and the challenges faced by indigenous people within the settler justice system. Like Jeremias Tecu, his presence in the classroom brings a teaching style that reflects indigenous values and cannot be replicated by a non-indigenous educator. Even more than his teaching, the sweat lodge the students participate in under his leadership provides a transformative learning opportunity. The sweat lodge is built on his property and students are invited to enter his home to change into the clothing they wish to wear in the lodge. Women are encouraged to wear long skirts, as per the gender norms of the Wolastoqiyik traditional culture, providing an interesting intersection between issues of culture and gender. The sweat lodge takes place in four rounds: the introduction round, the women's round, the men's round, and the gratitude round (closing). Inside the sweat lodge, all light is blocked out other than that which comes from the pit in the centre. Large rocks called "grandfathers" and "grandmothers" are carried in carefully on boards and placed in the centre after having been heated red-hot in a large open bonfire outside the lodge. Everyone crawls in on hands and knees and sits in a circle around the pit; if anyone gets too hot or needs to leave they may do so, saying "all my relations" as they exit.⁸ In each round everyone has an opportunity, though they are not obligated to do so, to share something personal that they bring with them to the sweat lodge. This is the type of learning opportunity that takes what is inside the emotional core of each student and brings it to consciousness. The result has been transformative for many of them, and in some instances, it has impacted the whole class in ways that can only be described as bonding. Some students have expressed in their reflections that the sweat lodge was the most important lesson of their law school experience. By participating in something very foreign, they are challenged to let go of what they consider "normal" and to be led to re-evaluate how settler culture has impacted First Nations in Canada.

Speakers from the transgender community have also played an invaluable role in helping students recognize and identify implicit bias around gender and sexuality. Fearless advocates for trans rights, the speakers who have participated have engaged students with humour and personal transparency. As such, they lead by making themselves vulnerable, demonstrating that difficult topics can be broached when individuals are self-confident and willing to make themselves available to educate others. Students also learn that it is not up to minority voices to shift social narrative: those who benefit from fitting into "mainstream" society have a

⁸ Not limited to what settlers would consider "relations" – family or extended family – this phrase includes the individual's connection with and obligation toward all "creatures" including water, air and land.

responsibility to become educated allies by pro-actively learning about specific challenges faced by minority groups.

Clinical legal education is also a group experience. Students learn from one another through case-rounds, and are often their own best educators. This educational process, of course, includes the voices of students who themselves are part of racialized groups or sexual/ gender minorities. As such, the instructor must be able to hold safe space for students who are living the experience of marginalization, while maintaining a safe educational atmosphere for those students who have never had to question their own acceptability because they participate in social privilege.

Ultimately, the goal of the pedagogical component of the course is to best equip students for the learning that they will do on their own in their externship placements. While traditional classrooms can include lively discussion, the discussion that centers around experience with real clients is invaluable. The diversity of student placements allows students to hear about more areas of law than those practiced at their particular placement. Students can slow-down the learning process to observe the power imbalances that arise in legal contexts regarding gender, race, class, and ability. By becoming aware of their own biases, privilege, and assumptions around normalcy, clinical law students are better equipped to serve both the public and be an asset to the profession.

Youth Access to Justice Clinic and Outreach Program – A Niche Gap

In 2017, FLAC partnered with the New Brunswick Office of the Child and Youth Advocate and received funding from the Law Foundation of Ontario for a two-year pilot Youth Access to Justice Clinic and Outreach Program (Youth A2J Clinic). The Youth A2J Clinic has been operational since November 2017. In September 2017, six UNB Law students from the Community Clinic Course were placed with the Project for the purpose of being trained to participate as Youth Outreach Coordinators within the Fredericton area.⁹

The New Brunswick Office of the Child, Youth, and Elder Advocate has long been engaged in progressive initiatives for change that will improve outcomes for youth under the *YCJA*.¹⁰ The *YCJA* outlines principles which ought to inform any decisions being made regarding youth in the justice system:

⁹ The purpose of the Project is to identify youth who are at risk of becoming involved in the criminal justice system, youth who are being diverted, and youth who have criminal charges, with the goal of providing legal information and support at the earliest possible stage. While extra-judicial sanctions have been increasingly used in the New Brunswick criminal court system, there are still many missed opportunities to employ extra-judicial measures, including diversion, sentencing circles, and restorative justice measures under the *Youth Criminal Justice Act*, SC 2002, c 1.

¹⁰ See Office of the Child and Youth Advocate, “More Care Less Court: Keeping Youth out of the Criminal Justice System” (July 2015), online (pdf): *Government of New Brunswick* <www.gnb.ca/legis/business/pastsessions/58/58-1/LegDoc/Eng/July58-1/MoreCareLessCourt.pdf>.

- (a) The youth criminal justice system is intended to protect the public by:
 - (i) Holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
 - (ii) Promoting the rehabilitation and reintegration of young persons who have committed offences, and
 - (iii) Supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behavior;

- (b) The criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
 - (i) Rehabilitation and reintegration
 - (ii) Fair and proportionate accountability that is consistent with the greater dependence of young person and their reduced level of maturity
 - (iii) Enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
 - (iv) Timely intervention that reinforces the link between the offending behavior and its consequences, and
 - (v) The promptness and speed with which persons responsible for enforcing this act must act, given young persons' perception of time;

- (c) Within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should:
 - (i) Reinforce respect for societal values,
 - (ii) Encourage the repair of harm done to victims and the community,
 - (iii) Be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and
 - (iv) Respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements.

While youth open custody sentences have decreased, many accused youths are still remanded prior to trial in New Brunswick, and too many youth are still not offered

alternative measures in lieu of being charged through the court system.¹¹ While the *YCJA* unequivocally mandates that the incarceration of youth be a last measure, and this principle has been upheld by the New Brunswick Court of Appeal,¹² nonetheless many youth are given onerous conditions that, if breached, almost always result in incarceration. Under the *YCJA*, youth have the right to have a lawyer and parent/guardian present any time they are questioned by police or legal authorities. The *YCJA* requires that youth explicitly waive this right, and that the authority interviewing them make certain that they understand the right before waiving it. Despite this requirement, many youth speak to police without having a lawyer present.

The New Brunswick Legal Aid Services Commission makes a lawyer available to any youth charged with an offence, but they cannot apply for a lawyer until after their first court appearance. Many youths do not realize that they can apply for a lawyer even then, or lack the initiative to follow-through with the application process. Duty counsel is available for both youth and adults,¹³ but the time constraints on the duty counsel lawyer are intense. Youth and adults arrive at the courthouse less than a half an hour prior to the commencement of court, and the duty counsel lawyer is available to meet with each person who does not have representation for a few minutes prior to their court appearance. Adults are not fully prepared by such brief summary advice, but much less so youth who do not have the life experience to understand the rapid-pace court process. While some jurisdictions in Canada have government-funded Youth Court Worker Programs that can prepare youth prior to court and be available to the youth throughout, New Brunswick does not. The time required to ensure each youth fully understands their rights, the court process, and the implications of entering a plea is not possible in the few minutes meeting afforded by duty counsel.

The Youth A2J Clinic was created to address these many gaps in the youth justice system. Law students were specifically educated about the *Youth Criminal*

¹¹ Alternative measures divert youth from the court system either pre-charge by the City Police or RCMP, or post-charge on consent by the Crown Prosecutor. If post-charge, the youth is often required to attend court for an initial appearance and an appearance at the successful conclusion of the alternative measures.

¹² See e.g. *LRP v R*, 2004 NBCA 76, where Drapeau CJ (as he then was) states: “Section 3(1)(a) provides that the youth criminal justice system is intended to: (1) prevent crime by addressing the circumstances underlying the offending behaviour, (2) rehabilitate offenders and, where necessary, reintegrate them into society, and (3) ensure the offence entails meaningful consequences for its perpetrator. Section 3(1)(b) specifies that the criminal justice system for young persons must emphasize rehabilitation and reintegration as well as “fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity”. Section 3(1)(c) goes on to state that measures taken against young persons who commit offences should, *inter alia*, “reinforce respect for societal values”, “encourage the repair of harm done to victims and the community” and “be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person’s rehabilitation and reintegration”. Section 3 is not a collection of pious wishes: s. 38(2) requires that any youth sentence be determined in accordance with those general principles.”

¹³ Duty counsel lawyers are lawyers paid by the New Brunswick Legal Aid Services Commission to provide summary advice to accused persons just prior to their court appearance.

Justice Act, the UN Commission on Human Rights and the Convention of the Child, and international instruments interpreting the above.¹⁴ Cultural sensitivity training regarding youth needs includes discussion by Indigenous elders, training regarding immigrant and refugee youth, trauma-informed approaches to dealing with youth, and training regarding LGBTQIA2S+ youth. Students were then provided hands-on training by shadowing duty counsel, as well as the opportunity to work on individual youth files through Legal Aid.

Since September 2018, UNB Law students have met youth at the courthouse as Youth Court Workers, meeting youth at the entry to the courthouse and directing them to duty counsel, and then coordinating with them after court to debrief and, if desired, attend with them at the New Brunswick Legal Aid Service Commission office. Students also accompanied youth who were being diverted to alternative measures post-charge to their mandatory court appearances.¹⁵ In one instance, the law students were able to act as a liaison for the Crown and duty counsel when the youth did not arrive due to the youth's mother's failure to facilitate attendance. Their role made a significant difference between the youth being permitted to continue with diversion and being potentially charged with a breach.

To proactively address the gap in youth understanding of their legal rights and obligations, UNB Law students have provided legal presentations to middle and high schools in the Fredericton area. Students employ an age-appropriate presentation style to educate youth on the *YCJA* and have also presented on other areas of law as requested by high school teachers.¹⁶ UNB Law students also did presentations with community stake-holders, including the MCAF, Under One Sky Aboriginal Head-Start, and Youth Engagement Services (a program aimed at youth who cannot live at home and are in the care of the Minister of Social Development).

The Art Justice Project is one of the innovative approaches to educating youth on their rights under the *YCJA* and human rights law. With the support of classroom teachers at various high schools and middle schools in Fredericton, FLAC provided art supplies (canvas and paint) and students provided presentations inviting youth to create works of art that captured what "access to justice" meant for them.¹⁷

¹⁴ Materials included the *Convention on the Rights of the Child*, 7 March 1990, 1577 UNTS 3 (entered into force 2 September 1990); Brock Jones, Emma Rhodes & Mary Birdsell, *Prosecuting and Defending Youth Criminal Justice Cases*, 2nd ed (Toronto: Emond Publishing, 2019).

¹⁵ Diversion or alternative measures can occur pre-charge based on a police recommendation, or post-charge after the Crown has already approved the charge. In the latter case, the offending youth has to appear in court and appear at the end of the diversion process. Sometimes there are multiple court appearances, and in some instances the youth is deemed to have failed at diversion if they do not complete the required conditions in an acceptable length of time.

¹⁶ Presentations have included information on tax law, minority human rights, cannabis law, assault and consent.

¹⁷ In 2018 four St. Thomas University B.S.W. students who were placed with FLAC for the public social agency intensive of their program implemented by the Art Justice Project after training in the *YCJA* and the

Significantly, there was a great deal of uptake from newcomer youth through their ESL classes at the local Fredericton high schools.¹⁸ Art created by youth reflected a diversity of images, including racialized trauma, political trauma from their countries of origin, drug and alcohol concerns, and (for many) the desire for peace and inclusiveness. For the students facilitating this project with youth, it required finesse communicating legal information and the invitation for artistic expression to a range of age groups and English language abilities. The art they created was auctioned at a community event, organized by the law students, which featured a key note speaker and guests from interested community partners. The response was overwhelmingly positive, and it became an annual highlight of the Youth A2J Clinic year.

Under section 18 and 19 of the *Youth Criminal Justice Act*, the Attorney General is empowered to designate Youth Justice Committees. In New Brunswick, Youth Justice Committees began in 2015, tasked with creating optimal service outcome for criminalized youth who are being diverted from the court system. Youth Justice Committees are comprised of a network of community stakeholders who identify issues in the individual youth's life that contribute to instability and the potential for further criminal behavior.¹⁹

Law students have attended RCMP Youth Diversion Team Committee Meetings since October 2018. Students were tasked with working directly with youth and their families to complete their diversion requirements, including the attendance at court and follow-up with the required tasks. Law students have contributed meaningfully to discussion of various challenging situations for youth, including the problem of the over-criminalization of youth living in group homes.²⁰

The “New Normal” – Pandemic Protocols and Innovation

Community Clinic Partners 2020-2021

In 2020 the annual Community Clinic sweat lodge ceremony was scheduled for a Friday in mid-March. During a break between one of the four circle rounds of the

UNCRC. In 2019 the Art Justice Project Team was comprised of three UNB Law students and one Arts 4000 student.

¹⁸ The Fredericton Multicultural Association has been a key partner in this initiative, and has invited student-led presentations for both youth and newcomer adults on areas of law relevant to their clientele.

¹⁹ The committees are made up of a consistent team of social workers, ISD workers, RCMP or City Police, mental health workers, and those offering specialized services to the particular youth client.

²⁰ Youths in group homes are particularly vulnerable to criminalization. Acting-out or aggressive behavior which would normally be dealt with by parenting sanctions are not given the same latitude. Police are frequently involved, which invariably results in the youth being charged notwithstanding the discretion of the police to de-escalate the situation without charging the youth. As a result, the most vulnerable youth – those who are in the system due to a break-down of their home situation, mental health and/or behavioral issues, and LGBTQIA2S+ youth (particularly trans youth) – are faced with the least accommodating rules governing their behavior and a high likelihood of criminalization.

sweat lodge ceremony, one student discovered that UNB would be shifting to virtual classes the following Monday. For the 3L students in the Community Clinic Course 2019-2020, the sweat lodge ceremony was their final in-person UNB Law school experience. Student placements ended at that point for that term, and the Community Clinic Course 2020-2021 transferred to its virtual format.

All the community partners that have provided externship placements for students in the course in the past continued to make themselves available under COVID protocols. Some placements, such as the NB Legal Aid Services Commission and FLAC, permitted students to attend in person with masks, sanitizer and social distancing. Other placements, such as the NB Office of the Child, Youth and Elder Advocate, Public Legal Education and Information Services (PLEIS NB), and the NB E. Frye Society offered placements virtually. Where possible, students who were located in other cities across Canada were placed in organizations in those cities.²¹

The classroom component of the course is typically an opportunity for students to begin to get to know one another, to share more reflectively, and to engage with the course materials in student-led discussion. The virtual classroom presents learning challenges no matter what the course material. For a course that is largely discussion-led, the virtual classroom requires students to take greater risks in speaking up when the usual signals of body language and visual clues are lacking. The Community Clinic students rose to the challenge, and the classroom component of the course remained a learning-rich experience.

The virtual classroom had an advantage in that it allowed for multiple speakers on some occasions. Instead of one speaker from the transgender community, the course had two on-line speakers simultaneously. The speakers each shared their own stories and experiences in advocating for transgender human rights, and were able to add a rich layer of dialogue to the students' questions. Lapskahasit Cihkonagc was joined by Benson Barnaby, student at law, in sharing his experiences as a former police officer who worked at Listiguj First Nation for fourteen years prior to attending law school at Dalhousie University. Jeremais Tecu was joined by Joanne Ouwor, social worker at MCAF, who spoke to the African women immigrant's experience in Canada. The flexibility of having more than one guest speaker in the virtual classroom will translate into opportunities to have more speakers in the physical classroom post-Covid.

There is no question students placed in virtual externships would have preferred an in-person placement. There is so much benefit for a student to attend a professional organization and to be able to observe the lay-out, the décor, the interplay between administration and lawyers, and of course the in-person engagement with clients. The temptation with a virtual placement is to experience it as just another academic requirement. With support, however, students who were in virtual

²¹ Placements included E. Fry Legal Counsel Halifax; Newfoundland and Labrador Legal Aid Commission; Saint John Immigration and Refugee Newcomer's Project.

placements demonstrated resilience by shifting their expectations, and recognizing that even though they were working from their living rooms, they were working for real clients with a real-life investment in the research they were providing.

COVID protocols shifted as the Province of New Brunswick continued to balance public health safety with practical consideration for providing essential services. From April – June 2020 FLAC ceased operating. Clinics resumed when New Brunswick entered the “orange” phase: it was clear that many clients found the closure of FLAC to have created a hardship. FLAC needed to be innovative to continue to provide services while maximizing public health safety. Instead of offering a walk-in clinic on a first-come first-serve basis, clients were required to book appointments by phone in advance. Clients were asked to remain in the parking lot outside the clinic building, and were contacted by phone to come in at the appointed time. Not only did this change create a greater convenience for clients (not having to wait upwards of two hours to meet with a lawyer) it allowed FLAC administration to anticipate the number of clients who would attend and the areas of law for which they sought advice. While most of the volunteer lawyers practice in family law, if known in advance it has been possible to bring in lawyers engaged in other areas of law such as civil litigation, insurance law, or employment law. When New Brunswick entered the “yellow” phase of COVID, FLAC decided to continue the practice of phone-in scheduled appointments on a permanent basis. That is FLAC’s “new normal.”

Throughout the summer of 2020 volunteer UNB students attended FLAC clinics, and in the fall of 2021 new students in the Community Clinic Course had opportunity to begin to take on client files providing a service beyond summary advice. With additional precautions – masks, sanitizer, COVID screening questions, social distancing and the use of a thermometer – FLAC has been able to offer a full service to a small number of clients based on their need, the availability of lawyer supervision, and student capability. Should we go into the “red” phase again, FLAC is prepared to provide a phone-service linking students and lawyers through conference calls that will still allow clients to receive timely summary legal advice.²²

“No Normal” AND “New Normal” – Gaps and Innovation in Youth Access to Justice During COVID-19

While FLAC has adapted its procedures to ensure health protocols, the Youth A2J Clinic has not fared as well. School closures in the spring of 2020 meant that the Youth A2J Clinic was unable to send law students to schools to do legal presentations. Likewise, the Art Justice Project was cancelled because it was not possible to provide youth with art supplies or to host a community event. Students placed in the Youth A2J Clinic in the Community Clinic Course 2020-2021 have had some, but little,

²² During the pandemic, we have had an increased number of “phone in” clients at our clinics. While this is effective for some legal issues, if the viewing of disclosure or other court documents is required, in-person service is preferable.

uptake by school administrators regarding legal information presentations.²³ High schools, while functioning in most of New Brunswick, are rotating students on a day-on/day-off basis, adding increased challenges for teachers and administrators. Because of their dependency on adults, what was already a challenging situation for youth to get independent legal advice has become untenable during COVID.²⁴

Furthermore, the Youth Court Worker initiative is also on hiatus. In an effort to limit public numbers to protect public health, any unnecessary court attendance is discouraged. The Provincial Court in Fredericton requires anyone having business at the court to sign up in advance. While students may still attend with specific youth if it is known in advance,²⁵ attending youth court and engaging with the youth who are on the docket was not sustainable in the interest of public safety due to crowded conditions at the courthouse. It is clear that new initiatives will be needed to meaningfully engage youth who are less accessible than formerly due to COVID restrictions.

Notwithstanding the above challenges, a student-led innovation promises to offer a significant resource for NB youth going forward. The UNB Restorative Justice Society commenced in 2019 under the leadership of three (then) 1L law students, two of whom had significant personal experience with restorative justice circles. Currently placed in the Youth A2J Clinic and Outreach Program through the Community Clinic Course, these students have made remarkable gains in advancing Restorative Justice (RJ) in New Brunswick. They have incorporated as a not-for-profit, and as such anticipate that they will continue to spear-head RJ in the Province of New Brunswick post-graduation.

RJ initiatives in New Brunswick have waxed and waned over the last four decades. RJ circles were facilitated in schools throughout New Brunswick in the 90s and early 2000s as a highly successful program, seeing little to no recidivism in youth offenders who participated in them. Unfortunately, it was not adequately funded and eventually those who had been trained lost their qualifications²⁶ and RJ ceased to be

²³ During Fall 2020 and Winter 2021, UNB Law students contacted some teachers in Fredericton middle and high schools, though unfortunately the legal information presentations did not proceed as planned. The lack of buy-in by the schools was due to COVID related administrative and teaching complications.

²⁴ One of the most difficult components of the Youth A2J Clinic was having youth attend the clinic in person for legal advice. Efforts were made to re-locate the clinic to the different high and middle schools at specified times during the week, but this proposal was rejected by the New Brunswick Anglophone District West legal team. Unlike FLAC clinics, which are located through in-kind service at the Wilmot United Church, Kolopehtuwan-mip (Turning Leaf Foundation), and the Fredericton John Howard Society, finding a location for a youth clinic that would feel safe and approachable remains a challenge. There is ongoing interest in creating a youth drop-in center in Fredericton, which would be an ideal location to house a youth legal clinic, but to date this initiative has not materialized.

²⁵ Specific youth are most likely to be referred to the Youth A2J Clinic through the Youth Diversion Team Meetings, or through referrals from other partner agencies in Fredericton.

²⁶ To facilitate an Restorative Justice circle, it is necessary for the facilitator to facilitate or co-facilitate 3-5 circles over a 12 month period.

an option for youth in the province.²⁷ The goal of the Restorative Justice Society, through ongoing participation of UNB Law students, is a sustainable presence through diversion and alternative measures which will become a permanent part of the “new normal” for youth in conflict with the law.

RJ is extremely effective in satisfying the principles of the *YCJA*. RJ works by engaging the offending youth in a face-to-face structured dialogue, with all individuals impacted by the youth’s offending behavior, as well as a network of family and community support members, to help craft an appropriate plan to permit the youth to take responsibility for harm done. While it can still take longer than ideal to organize a restorative justice circle, there is no question that it creates the most meaningful outcome for youth in regard to timely rehabilitation and reintegration. Youth who have gone through this process not only have a deepened understanding of the consequences of their actions, but those impacted see the youth’s complexity and the humanity behind the offending behavior. It is inherently healing on an interpersonal and communal level, and affords the best outcomes from an access to justice point of view.

Despite the fact that all of the Section 19 Youth Diversion Team Meetings have shifted from an in-person to a teleconference format due to COVID, the students who have spearheaded the Restorative Justice Society have not only been engaged participants in these meetings, but have contributed a new tool set through to the Youth Diversion Team.²⁸ They held their first RJ circle in February 2021, a file received through the Oromocto RCMP Youth Diversion Team in February 2021, and completed another two circles by the end of May. While COVID has brought some challenges with in-person meetings, it is expected the Restorative Justice Society will move forward with increasing RJ as a viable option for youth in New Brunswick.²⁹

Conclusion

Clinical legal education in New Brunswick has met the challenges in the COVID era with resilience and innovation. The Community Clinic Course itself has continued through a virtual classroom, and while this format is inhibiting of the type of transparency and reflection that typifies class discussion, students have worked hard to cooperate with the limitations by keeping their cameras on, offering input, and

²⁷ RJ is based on Indigenous cultural practices which hold the offender accountable to the complainant and the community by listening to one another in a structured circle of sharing and sentencing. This has been implemented through the Wellness Court at Elsipogtog First Nation since 2010, but uptake on sentencing circles has been slow to gain traction generally, see Office of the Child and Youth Advocate, *supra* note 10 at 10, 66.

²⁸ While the RCMP Youth Diversion Team was aware of the option of RJ circles, it was little implemented prior to the UNB Law students’ availability in 2020–2021 to run the circles.

²⁹ While less than ideal, the Restorative Justice Society has been practicing mock online Restorative Justice Circles. For youth, however, in-person accountability is a key factor to ensure proper facilitation and best outcomes.

maintaining full attendance. Guest speakers' presentations have been received by the students with engagement and curiosity. Student placements have continued as a mix of in-person and virtual externships: in-person placements have expanded to include lawyers and public interest organizations in other cities, allowing for round-table discussion around differing practices in jurisdictions throughout Canada, while virtual placements have challenged students to recognize the value of their work for a real-life client, notwithstanding the lack of in-person contact. The COVID experience has created innovation around partnering with organizations outside the province, enhancing student engagement, and a "new normal" of resilience when met with institutional barriers.

FLAC has adapted its approach to accommodate COVID protocols and to continue to offer free legal clinics to the Fredericton area. Students have taken on extensive work on select files, and by implementing COVID protocols this aspect of FLAC's services has not been impeded. FLAC has begun scheduling interviews via phone beforehand so to insure the availability of lawyers specialized in the area of law required by the client, to avoid long waits for clients, and to manage the number of clients that attend the clinic on a given evening. These are better practices for FLAC, and will continue to be the "new normal."

The Youth A2J Clinic has had the most set-backs with COVID. The Art Justice Project and the Youth Court Worker initiative currently have "no normal," and are awaiting safer days when it is possible for more people to freely engage with one another. The UNB Restorative Justice Society, however, has brought its initiative forward to the Youth Justice Committee diversion team, with the result that Restorative Justice is now being offered in New Brunswick for youth. Under the *YCJA*, this is the best practice for holding youth accountable and insuring they appreciate the consequences of their behavior, and at the same time providing for youth a wrap-around service that will see and recognize their particular needs. This is an immensely hopeful "new normal" for youth justice in New Brunswick