



# The Development of Legal Aid Ontario's Aboriginal Strategy

Approved by the Board of Directors on June 20, 2008

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# TABLE OF CONTENTS

<b>1. Executive Summary .....</b>	<b>1</b>
<b>2. Explanation and background for initiating LAO’s Aboriginal Strategy .....</b>	<b>2</b>
(a) The Reasons for developing an Aboriginal Strategy.....	2
(b) The Need for a Strategic Approach .....	2
(c) Initiating the Development of the Aboriginal Strategy .....	3
<b>3. The process that LAO is currently using to guide the development of the Aboriginal Strategy .....</b>	<b>3</b>
(a) Methodology .....	3
(b) Input and Participation .....	4
(i) Outreach and Networking .....	4
(ii) People and Places Visited .....	4
(iii) Questions Asked to Participants.....	4
(c) Correlation to the Federal and Provincial Aboriginal Justice Strategies .....	5
<b>4. Information on LAO’s general services and services for Aboriginal people ...</b>	<b>6</b>
(a) Mandate and Objects of LAO .....	6
(b) Services in General .....	7
(c) Unique LAO Services and Projects for Aboriginal People .....	8
(i) The Aboriginal Issues Advisory Committee to the Board of LAO .....	8
(ii) A Summary of services LAO provides to Aboriginal people .....	8
(iii) Improving Services: Local Aboriginal Planning Meetings .....	9
(iv) Supporting Innovation .....	9
<b>5. What LAO has heard from participants; identified service issues, ideas and recommendations that have been put forward .....</b>	<b>10</b>
A. Barriers to Accessing Justice .....	11
(i) Administrative and Operational Issues .....	11
➤ Geographical and logistical Barriers .....	11
➤ In-take and application process .....	12
➤ Language barriers .....	13
(ii) Cultural Competency Training of LAO staff and legal aid lawyers .....	14
➤ Awareness and knowledge of Aboriginal peoples’ legal issues, rights, protections and their cultures, customs, practices .....	14
➤ Cultural sensitivity based on competently understanding the historic and systematic injustice Aboriginal people have experienced .....	15

(iii)	Public Legal Education and accessible information for Aboriginal people, Aboriginal service agencies and other service providers .....	16
(iv)	Active Outreach to Aboriginal communities and service agencies to build partnerships and networks .....	16
B.	Lack of Aboriginal representation within LAO and LAO's Advisory Systems .....	17
(i)	Senior position to direct and supervise implementation of the Aboriginal Strategy and an Aboriginal Department .....	17
(ii)	Inclusion at all levels and positions within LAO of Aboriginal people .....	17
(iii)	Active Recruitment of Aboriginal Staff .....	18
(iv)	Aboriginal Representation at the Board level .....	18
(v)	Increase in the representation of various Aboriginal peoples in the composition of the Aboriginal Issues Advisory Committee .....	18
(vi)	Models and mechanisms for continued advisory participation from Aboriginal people .....	19
C.	Lack of Aboriginal Legal Representation or Legal Representation that is appropriately informed on the Unique Needs of Aboriginal clients .....	20
(i)	Aboriginal Legal Representation- Development and Recruitment .....	20
(ii)	Aboriginal Articling Students and Law Students .....	20
(iii)	Development of all LAO Legal Representatives providing services to Aboriginal people.....	21
D.	Improving service on Aboriginal specific legal issues and addressing the role of LAO in participating or supporting Aboriginal specific or driven processes .....	21
(i)	Aboriginal Legal Issues .....	21
(ii)	Aboriginal Legal Services Corporations .....	22
(iii)	Aboriginal Community Justice Programs in partnership with the Canadian legal system AND Aboriginal Justice Initiatives as an alternative to Canadian legal system or as front line approach .....	24
<b>6.</b>	<b>The 12 Immediate Initiatives for 2008 /09.....</b>	<b>25</b>
(1)	Hiring an Aboriginal Policy Counsel.....	25
(2)	Hiring an Aboriginal Project Manager.....	25
(3)	Providing Cultural Competency Training for LAO Staff and Lawyers .....	25
(4)	Reviewing and improving legal resources for LAO service providers.....	26
(5)	Providing extension of legal aid certificate coverage for Gladue submission preparation .....	26
(6)	Ability to identify Aboriginal Clients.....	26
(7)	Increased accessibility of LAO information (pamphlets, brochures).....	27
(8)	Creating policy defining Aboriginal Services as a priority.....	27

(9) Increasing composition and capacity of the Aboriginal Issues Advisory Committee.....	27
(10) Develop minimum panel standard regarding Aboriginal specific legal issues.....	27
(11) Develop a recruitment policy aimed at hiring Aboriginal people.....	28
(12) Refining the 3 to 5 year strategic plan with Aboriginal participation and input.....	28
<b>7. Sample Analysis: The Application of Gladue Principles .....</b>	<b>28</b>
<b>8. Acceptance of General Feedback or Written Response .....</b>	<b>34</b>



### LIST OF APPENDIXES

Appendix “A” The Story the Numbers Tell
Appendix “B” Methodology of LAO’s Aboriginal Strategy
Appendix “C” Places Visited
Appendix “D” Consultation Summary
Appendix-“E” Questions Asked to Participants
Appendix “F” Information on General Services Provided
Appendix “G” Excerpts from LAO Duty Counsel’s Manual, April 2007
Appendix “H” LAO Services and Projects for Aboriginal People
Appendix “I” Past and Present Aboriginal Issues Advisory Committee Members



## 1. EXECUTIVE SUMMARY:

The purpose of Legal Aid Ontario's ("LAO") Aboriginal Justice Strategy is to improve legal aid services to Aboriginal people<sup>1</sup> including First Nation people, Métis people and Inuit people, regardless of whether they live on or off-reserve, are status or non-status or live in rural or urban contexts<sup>2</sup>.

This paper presents:

- ◆ Important background information and current LAO services;
- ◆ Highlights the most commonly identified service issues and recommendations as provided by participants;
- ◆ Outlines the 12 immediate initiatives for 2008/09, detailing service improvements that LAO will immediately undertake;
- ◆ Provides a sample analysis of one pressing legal issue for Aboriginal people;
- ◆ Addresses future development of the three to five year strategic plan;

As a result of meeting with and hearing the concern of participants<sup>3</sup>, LAO is immediately going to start providing service initiatives specific to Aboriginal clients. LAO will be seeking further input and feedback regarding how to prioritise and implement future service initiatives, and seek further input on developing the three to five year strategic plan.

Part of the objective of creating the Aboriginal Strategy is to provide immediate resolve to the identified service issues to enhance and improve these areas. General feedback has indicated that LAO needs to act quickly on some of the most pressing legal aid service issues.

As part of the continued commitment LAO has to low-income Aboriginal individuals and communities, LAO will immediately begin to initiate 12 action items to help improve services for Aboriginal clients, which will include:

- (1) Hiring an Aboriginal Policy Counsel;
- (2) Hiring an Aboriginal Project Manager ;
- (3) Providing Cultural Competency Training for LAO Staff and Lawyers;
- (4) Reviewing and improving legal resources for LAO service providers;
- (5) Providing extension of legal aid certificate coverage for Gladue submission preparation;
- (6) Ability to identify Aboriginal Clients;
- (7) Increased accessibility of LAO information (pamphlets, brochures)'
- (8) Creating policy defining Aboriginal Services as a priority;
- (9) Increasing composition and capacity of the Aboriginal Issues Advisory Committee;
- (10) Develop minimum panel standards regarding Aboriginal specific legal issues;
- (11) Develop a recruitment policy aimed at hiring Aboriginal people;
- (12) Refining the 3 to 5 year strategic plans with Aboriginal participation and input.

\*To find out more about these initiatives see pages 25 to 28.

## **2. EXPLANATION AND BACKGROUND FOR INITIATING LAO'S ABORIGINAL STRATEGY**

### **(a) THE REASONS FOR DEVELOPING AN ABORIGINAL STRATEGY?**

Aboriginal legal issues and service issues are complex and require multiple approaches in finding solutions. Without even discussing numbers or statistical information, there is awareness that Aboriginal people in Ontario are not receiving optimal justice within the Canadian legal system due to historical and systemic injustice and current ignorance of the socio-economic circumstance and issues facing Aboriginal people daily within this province.

Given the extreme over-representation of Aboriginal people in the criminal justice system, and those before the courts in child protection and family matters, along with many other forms of systemic oppression and discrimination faced by Aboriginal people, LAO is committed to providing better legal aid services to Aboriginal people.

LAO's Board has directed the staff to develop a three to five year plan to achieve measurable improvements in LAO's services to Aboriginal people. It is intended that the plan will include specific options and recommendations for changes and/or enhancements to legal aid services.

### **(b) THE NEED FOR STRATEGIC APPROACH**

Developing an Aboriginal Strategy is grounded in LAO's mandate and the *Legal Aid Services Act* (LASA). In order to actively improve any legal services or promote access to justice, a plan must be crafted that speaks to the needs and concerns of Aboriginal people that will also fit into the mandate of LAO. It must contain concrete initiatives and services with proposals for change and improvement that must be feasible and affordable. The ultimate goal will be to obtain approval from the LAO Board to implement an Aboriginal Strategy that commits LAO to achieving between five and ten high-level objectives or milestones for improving legal aid services to Aboriginal people over the next three to five years.

The Strategy will build upon successful work that LAO has already undertaken in delivery of legal services for Aboriginal people and broaden such success consistently across the province. LAO recognises that an emphasis on building relationships and partnerships with Aboriginal people, agencies and organizations as well as government agencies is essential to providing practical and positive change.

The need to make information about Aboriginal legal aid services and legal issues more readily available and accessible is apparent. Creating a plan to deliver such information is important to enhancing legal services to and for Aboriginal people.



Finally LAO acknowledges that more input and feedback on Aboriginal specific legal issues and considerations are required in order to develop appropriate strategic plans to expand and positively effect change in conjunction with enhancing current services.

### **(c) INITIATING THE DEVELOPMENT OF THE STRATEGY**

Based on advice from the Aboriginal Issues Advisory Committee to the Board of LAO, and experience from previous initiatives<sup>4</sup>, during the spring 2006 meeting of the Aboriginal Issues Advisory Committee to the Board of LAO, the Board committed to developing an Aboriginal Strategy. The Treasury Board approved LAO spending \$50,000 of new government funding from the 2007-2008 Provincial budget to support the development of a LAO Aboriginal Strategy.

## **3. THE PROCESS THAT LAO IS CURRENTLY USING TO GUIDE THE DEVELOPMENT OF THE ABORIGINAL STRATEGY**

### **(a) METHODOLGY**

The goals of the on-going discussion process with participants are threefold. First, meeting with Aboriginal people, agencies and political organizations provides an important opportunity to inform Aboriginal agencies across the province of the special services for Aboriginal people and general services that LAO currently provides. Secondly, there is an opportunity to create sustainable relationships between Aboriginal agencies and local and provincial LAO personnel. Thirdly, and perhaps most vitally, engaging Aboriginal participation ensures that the development of the Aboriginal Strategy is guided and informed by the knowledge of Aboriginal people.

Quantitative research has formed part of the approach that LAO is taking to developing the Aboriginal Strategy—but has not been the sole approach, in fact a greater emphasis has been put onto a qualitative research approach.

To see the type of quantitative or statistical research that is one of the driving forces behind LAO's commitment to enhance and improve services to Aboriginal people see Appendix "A"- "The Story the Numbers Tell". It is noted that LAO does not have any in-house statistical record of services provided to Aboriginal clients in Ontario. Unfortunately the only information or statistics that LAO currently records with respect of Aboriginal clients is to ask legal aid certificate applicants: "Do you, or have you lived on reserve in the last year?"

Qualitative research is being used to seek specifics and detail about the kinds of problems that Aboriginal clients or communities face. LAO is relying on stakeholders to identify issues that may be characterised as legal problems. LAO seeks the voice of the client community. This involves understanding the legal nature of the problem, the impact on the client or community, barriers to resolution, and how the LAO can most effectively address the service issues. To find out more background on the methodology, see Appendix "B".

## **(b) INPUT AND PARTICIPATION ON DEVELOPING THE STRATEGY**

### **(i) Outreach and Networking**

The initial approach to reach out and network included the three following starting points:

- Recommendations from members of the Aboriginal Issues Advisory Committee (discussed in more detail below);
- Meetings/ teleconferences with Area Directors and Executive Directors and staff of LAO Offices and Clinics to identify Aboriginal communities within the geographical proximity to legal aid service providers and to gauge how many Aboriginal clients or issues were arising in each area;
- An independent survey of former or rejected Aboriginal legal aid clients on what their legal aid needs were and whether their needs were met. For more information see Appendix “D” Consultation Summary on the “Report on Consultation Meetings with Legal Aid Ontario Aboriginal Clients and Applicants for Legal Aid” prepared by Campbell Research Associates.

Once it was determined what some of the areas of greatest need were, plans to travel to various communities and urban centres were established. Various Aboriginal service agencies and organizations were invited to participate in meetings to provide their input and feedback. The process of making connections and building networks with Aboriginal participants is on going.

### **(ii) People and Places visited**

Two of LAO’s Policy Counsel, Wayne van der Meide and Christa Big Canoe, travelled to and conducted a number of meetings throughout Ontario. For a more detailed list of the locations travelled to, see Appendix “C”-“Places Visited”. More than 250 individuals met with or spoke with Policy Counsel regarding the Aboriginal Strategy.

### **(iii) Questions asked to participants**

The service needs must be identified before they can be measured. Only qualitative research which incorporates open-ended questions will allow the community to raise its own issues will allow for the identification any need. See Appendix “E” to find out what questions were asked.

### **(c) CORRELATION TO THE FEDERAL AND PROVINCIAL ABORIGINAL JUSTICE STRATEGIES**

The federal and provincial governments have primary responsibility for the justice system and how that system impacts Aboriginal people and their rights. The federal government established its Aboriginal justice strategy in 1996 and the Ontario government is now in the process of developing an Aboriginal justice strategy. Given its mandate, it is appropriate for LAO to participate in federal and/or provincial justice initiatives to the extent that they affect legal aid services and the delivery of legal aid services.

The federal Aboriginal Justice Strategy, established in 1996 with a five-year mandate, was part of the federal response to the recommendations of the *Report of the Royal Commission on Aboriginal Peoples*. The federal Aboriginal Justice Strategy consists of community-based programs that are cost-shared with provincial and territorial governments and self-government negotiations in the administration of justice. The objectives of the federal Aboriginal Justice Strategy are:

- To support Aboriginal communities as they take greater responsibility for the administration of justice;
- To help reduce crime and incarceration rates in the communities that administer justice programs; and
- To improve Canada's justice system to make it more responsive to the justice needs and aspirations of Aboriginal people.

The federal Aboriginal Justice Strategy is administered by regional co-ordinators in the Aboriginal Justice Directorate of the Department of Justice.

Ontario is developing an Aboriginal Justice Strategy ("AJS") as part of its "New Approach to Aboriginal Affairs" through the Ministry of the Attorney General ("MAG"), Policy Division. Ontario's AJS is intended to be a comprehensive justice sector strategy. One key objective of Ontario's AJS is to reduce overrepresentation.

LAO supports Ontario's developing AJS and their vision statement as currently set out; therefore LAO has and continues to participate in MAG's consultation process. Ontario's AJS is intended to be a comprehensive justice sector strategy.

LAO is aware that our Aboriginal Strategy should be designed to complement MAG's Aboriginal Justice Strategy in so far as ensuring that legal aid service needs should support, where feasible and affordable any MAG initiatives that develop in their strategy. LAO is willing to work with Ontario to explore and support opportunities to partner in justice initiatives such as legal educational opportunities, as well as other areas that will benefit enhanced service to Aboriginal clients.

LAO is also mindful of any potential conflicts that may develop between these two developing strategies and attempts to avoid any such conflict. LAO's Aboriginal Strategy should dovetail with the Ontario and federal Aboriginal Justice Strategies, where

appropriate. These are key partnerships for LAO particularly with regards to the areas that involve the delivery of legal aid services, such as overrepresentation, access to justice services and promoting justice sector knowledge.

#### **4. INFORMATION ON LAO'S GENERAL SERVICES AND SERVICES FOR ABORIGINAL PEOPLE**

##### **(a) MANDATE AND OBJECTIVES OF LAO - THE *LEGAL AID SERVICES ACT (LASA)*:**

LAO's mandate is defined in *LASA*<sup>5</sup>

1. The purpose of this Act is to promote access to justice throughout Ontario for low-income individuals by means of,  
**(b) encouraging and facilitating flexibility and innovation in the provision of legal aid services**, while recognizing the private bar as the foundation for the provision of legal aid services in the areas of criminal law and family law and clinics as the foundation for the provision of legal aid services in the area of clinic law;

The objects of LAO are set out in **s.4** of the *LASA*:

- (a)** to establish and administer a cost-effective and efficient system for providing high quality legal aid services to low-income individuals in Ontario;
- (b)** to establish policies and priorities for the provision of legal aid services based on its financial resources;
- (c)** to facilitate co-ordination among the different methods by which legal aid services are provided;
- (d)** to monitor and supervise legal aid services provided by clinics and other entities funded by the Corporation;
- (e)** to co-ordinate services with other aspects of the justice system and with community services;
- (f)** to advise the Attorney General on all aspects of legal aid services in Ontario, including any features of the justice system that affect or may affect the demand for or quality of legal aid services.

Other provisions of *LASA* that are relevant to developing an Aboriginal Strategy include:

- 14. (1)** Subject to subsections (2) and (3), the Corporation shall provide legal aid services by any method that it considers appropriate, having regard to the needs of low-income individuals and of disadvantaged communities, the need to achieve an effective balance among the different methods of providing legal aid services, the costs of providing such services and the Corporation's financial resources, including,

(f) the funding of Aboriginal legal services corporations to provide legal aid services to Aboriginal individuals and communities;

(j) the authorization of alternative dispute resolution services.

Foundation for criminal and family law services

(2) The Corporation shall provide legal aid services in the areas of criminal and family law having regard to the fact that the private bar is the foundation for the provision of legal aid services in those areas. 1998, c. 26, s. 14 (2).

## **(b) SERVICES IN GENERAL**

Legal Aid Ontario (“LAO”) is an independent agency with its own Board of Directors and is accountable to the government of Ontario for the expenditure of public funds<sup>6</sup>. LAO provides legal aid services throughout Ontario to low-income people. The bulk of the legal aid services that LAO provides fall into three main categories. These include:

- (1) Legal Aid Certificates- LAO provides certificates to people so that they can hire a lawyer of their choice. A certificate is a promise that LAO will pay a lawyer for certain legal services provided to a client.
- (2) Duty Counsel-LAO provides Duty Counsel in every court in Ontario, including fly-in courts in remote communities. Generally, Duty Counsel provide services to persons required to be in court on the day of their appearance help people who come to court without their own lawyer; advice lawyers provide advice and assistance to people not scheduled to be in court that day
- (3) Monitor, supervise and provide funding for Legal Aid Clinics and Entities that provide legal aid services – LAO does so for 80 community legal clinics and 6 law student clinics that provide legal aid services directly to people using staff lawyers, community legal workers and law students.

\*For more detail regarding these three areas, see Appendix “G”- “Information on General Services Provided” and see Appendix “H” “Excerpts from Legal Aid Ontario’s Duty Counsel Manual, April 2007”

Legal Aid Ontario (LAO) currently accepts on-site applications in nine Ontario courthouses. Under the province's new Justice on Target strategy, Ontario is setting targets to reduce court delays and appearances by 30 per cent over the next four years. To help meet its target, the province will work with LAO to place legal aid application offices in an additional 17 criminal court locations in Ontario in the coming months. Once open, on-site legal aid offices will be operating in 26 courthouses serving almost 80 per cent of criminal legal aid clients in the province.

Additionally Ontario’s AJS is exploring ways to provide access to justice services for Aboriginal people living in remote communities. LAO is committed to working with the

Justice Sector to ensure any tools and enhancements in services through the Justice Sector are developed in a co-ordinated way.

**(c) UNIQUE LAO SERVICES AND PROJECTS FOR ABORIGINAL PEOPLE**

\*For more a more detailed description of LAO services and projects for Aboriginal people see Appendix “I”.

**(i) The Aboriginal Issues Advisory Committee to the Board of LAO**

**Mandate and Membership**

- Is one of eight advisory committees to the LAO Board of Directors;
- Provides expertise and advice regarding service priorities, policy issues, and program improvements, in order to ensure that LAO’s services are effective and are meeting the needs of Aboriginal clients in Ontario;
- Committee has been comprised of various members who are appointed for two-year renewable terms. See Appendix “J” for “Past and Present Aboriginal Issues Advisory Committee Members.”

**Some of the issues raised and discussed by the Committee**

- Sentencing in light of the *Gladue* decision;
- Native Courtworkers and LAO;
- Aboriginal Community Justice programs;
- Diversity and equity issues;
- Providing service to Aboriginal communities in southern Ontario;
- Provide training to area directors on Aboriginal issues;
- Consider opening more Aboriginal legal services corporations;
- Creation of an Aboriginal Issues Department at LAO and/or hire an Aboriginal person in a senior position;

**(ii) A Summary of services LAO provides to Aboriginal people.**

**Nishnawbe-Aski Legal Services Corporation (NALSC)**

Core funding of Nishnawbe-Aski Legal Services Corporation to provide a comprehensive range of legal aid services to members of NAN.

NALSC is a multi-service agency that was incorporated in 1990 through the collaborative efforts of the Ontario Legal Aid Plan (now LAO), the MAG, the Department of Justice (“DOJ”) and the Nishnawbe-Aski Nation (“NAN”). Although both Ontario and Canada provide the NALSC with programmatic funding, LAO provides core funding in the amount of approximately \$1.6 million annually. A Board of Directors appointed by the NAN governs the NALSC however a Memorandum of Understanding with LAO also determines its scope of activities.

LAO also shares its proportionate cost of charter planes used by defence counsel, Crowns, community legal workers and parole officials to get to remote fly in courts.

- The NAN is comprised of 48 small and remote First Nation communities that cover approximately 2/3 of Ontario. With a head office in Thunder Bay, the NALSC is both an area office and direct service staff office.

### **Aboriginal Legal Services of Toronto (ALST)**

LAO provides core funding for the Aboriginal Legal Services of Toronto Clinic. The speciality clinic's services include summary advice, public legal education, community organising and representation.

ALST is a Legal Clinic and additionally provides non-clinic services through a separate non-profit corporation, Aboriginal Legal Services Inc.<sup>7</sup>, that has functioned largely as one entity in harmony with the clinic.<sup>8</sup> ALST services Aboriginal people primarily in the Toronto area. As part of the core funding, LAO funds three lawyers, a Community Legal Worker and an executive assistant. ALST currently has 32 employees and receives program specific funding from the federal government, DOJ, MAG, and MCYS. ALST also supports its services through fundraising efforts.

### **Other Community Legal Clinics**

Keewatinok Native Legal Services in Moosonee, Kinn-aweya Legal Clinic in Thunder Bay and the Manitoulin Legal Clinic on the Kaning First Nation provide coverage for legal matters that are uniquely Aboriginal, for example Indian Status applications. In general, community legal clinics do not have expertise nor do they practice in these areas.

#### **(iii) Improving Services: Local Aboriginal Planning Meetings**

LAO has also sponsored two Aboriginal Local Services Planning initiatives. The first such initiative was in North Bay/Nipissing First Nation (July 2004) and the second was in Sarnia (January 2006). The meetings were attended by LAO's CEO, the VP of Client Legal Services, several local Chiefs, as well as representatives from the local Friendship Centres and other agencies that serve Aboriginal clients.

The purpose of the meetings was to explore how legal aid services can be improved to better respond to the unique needs of Aboriginal people and build stronger relationships between local legal aid staff and Aboriginal community leaders.

#### **(iv) Supporting Innovation**

In 1999 the LAO Board established a fund to be used to improve legal aid or related services to Aboriginal clients. More recently some of the funded projects between 2004, until April 2008 include:

- (a) An OFIFC administered "Aboriginal Community Justice Project"

- (b) An ALST administered “Gladue Caseworker Pilot”
- (c) An NALSC project called “Talking Together”
- (d) ALST- Fetal Alcohol Spectrum Disorder Information Distribution

## **5. WHAT LAO HAS HEARD FROM PARTICIPANTS; IDENTIFIED SERVICE ISSUES, IDEAS AND RECOMMENDATIONS THAT HAVE BEEN PUT FORWARD**

This section of the paper will address the following:

- A. Barriers to Accessing Justice;
  - (i) Administrative and Operational Issues
    - Geographical and logistical Barriers
    - In-take and application process
    - Language barriers
  - (ii) Cultural Competency Training of LAO staff and legal aid lawyers
    - Awareness and knowledge of Aboriginal peoples legal issues, rights, protections and their cultures, customs, practices
    - Cultural sensitivity based on competently understanding the historic and systematic injustice Aboriginal people have experienced
  - (iii) Public Legal Education and accessible information for Aboriginal people, Aboriginal service agencies and other service providers
  - (iv) Active Outreach to Aboriginal communities and service agencies to build partnerships and networks
- B. Lack of Aboriginal Representation within LAO and LAO’s Advisory Systems:
  - (i) Senior position to direct and supervise implementation of the Aboriginal Strategy and an Aboriginal Department;
  - (ii) Inclusion at all levels and positions within LAO of Aboriginal people
  - (iii) Active Recruitment of Aboriginal Staff
  - (iv) Aboriginal Representation at the Board level
  - (v) Increase in the representation of various Aboriginal peoples in the composition of the Aboriginal Issues Advisory Committee
  - (vi) Models and mechanisms for continued advisory participation from Aboriginal people
- C. Lack of Aboriginal legal representation or legal representation that is appropriately informed on the unique needs of Aboriginal clients:
  - (i) Aboriginal Legal Representation- Development and Recruitment
  - (ii) Aboriginal Articling Students and Law Students
  - (iii) Development of all LAO Legal Representatives providing services to Aboriginal people
- D. Improving service on Aboriginal specific legal issues and addressing the role of LAO in participating or supporting Aboriginal specific or driven processes:
  - (i) Aboriginal Legal Issues
  - (ii) Aboriginal Legal Services Corporations
  - (iii) Aboriginal Community Justice Programs in partnership with the Canadian legal system;
  - (iv) Aboriginal Justice Initiatives as an alternative to Canadian legal system or as front line approach;



The discussion below details what LAO has heard from participants. This portion of the paper organises what service issues have been identified and ideas and recommendations to improve services in four general areas. These do not cover all comments and responses of each and every participant but rather are organised based on the most commonly heard comments and services issues identified<sup>9</sup>.

## **A. BARRIERS TO ACCESSING JUSTICE**

### **(i) Administrative and Operational Issues**

#### **➤ Geographical and logistical Barriers**

##### Background Information/Considerations:

Aboriginal communities are diverse and geographically spread across the province. For example 48 Aboriginal communities of Nishnawbe-Aski Nation (NAN) are located in remote northern Ontario and most are accessible only by air.

In the 48 NAN communities, courts sit, on average, 359 times a year, including criminal court and advance days, provincial offences court and family court. There are frequent cancellations due to weather or community crises.

Community Legal Workers and Native Courtworkers (discussed above) in Ontario play a significant role in assisting the Court, Crown, Defense counsel, and LAO Duty Counsel in delivery the of services to Aboriginal people but they cannot be expected, nor should it be their role to address all service issues.

##### Service Issues Identified:

- The logistics of getting to a legal aid office or legal aid service provider from an Aboriginal community is difficult. People who live any distance away from such resources who do not have a vehicle, gas money, flight money or means of transportation are not likely to go to a legal aid office or service provider. This is true whether an individual lives in a remote fly-in community or is 20 kilometres away.
- In northern and southern urban centres public transit either does not exist or where it does exist—it does not extend to First Nation communities or rural Aboriginal communities
- The same problem with physically accessing legal services holds true for attending court. Most of the courts in Ontario are located in cities and towns and not on reserves or in Métis homelands.
- Not being able to attend Courts easily results in a higher amount of criminal charges for administrative breaches on release documents or failure to appear charges by Aboriginal people.

- There are individuals in Aboriginal communities that do not have telephones or computer access.
- Even where there is computer access, Internet access is not always consistently available---particularly true in remote Aboriginal communities.
- In remote communities and even in communities that are not that geographically far from urban centres, there is a lack of LAO presence on a regular or consistent basis.

Ideas and Recommendations made:

- Legal information booklets and resources written in an accessible manner (see language barriers below) would be beneficial.
- Post all toll free LAO resources and Post telephone numbers of offices that accept collect calls in every Aboriginal community<sup>10</sup>. Advertising or posting information should have far reaching delivery to a variety of locations within any one Aboriginal community.
- Having more access to LAO services through telephone and Internet, for those who have telephones and computer access would allow those individuals to communicate with their legal counsel, legal aid offices and resources.
- Further LAO support of Community Legal Workers and Native Courtworkers—whether it is financially or through programs as long as it provides these frontline workers with information and resource tools to assist people in the community.

➤ **In-take and application process**

Background Information/Considerations:

As discussed above, there currently is no means to collect information or identify all Ontario Aboriginal people who access or apply for LAO legal aid services.

A few examples of what is working well in respect to in-take and application processes in certain regions or areas of the province include:

- Where in-take or applications for legal aid certificates occur in the Aboriginal community by a central in-take position or through a satellite office located in the community<sup>11</sup>;
- Area offices that accept collect calls from certificate applicants;
- Area offices that approve advice counsel located in Aboriginal communities, so that lawyers receive remuneration for providing services directly to Aboriginal people on an advise basis—this allows clients to become informed about their legal options and connected to legal aid services.
- Having an Aboriginal Application Assessment Officer in legal aid offices that are close to many Aboriginal individuals or communities—Generally, Aboriginal staff members understand Aboriginal clients. They are more approachable and aware of the general and daily circumstance of Aboriginal people. They also ask questions and explain services in a manner that is more culturally appropriate.

### Service Issues Identified:

- Little awareness by the Aboriginal client of what services are available or where to access them.
- LAO staff having a lack of cultural sensitivity during the application or in-take process.
- Some participants were never asked whether they were Aboriginal, nor were they directed to any Aboriginal specific services---in these instances some attributed that to their “non-native” appearance.
- Some participants said they were never asked if they lived on-reserve.
- Some of the questions that were asked during in-take or application processes were not explained well, even when the individual asked for particulars.

### Ideas and Recommendations made:

- Means of identifying Aboriginal clients as part of the in-take process at Clinics, as part of the application process for certificates, and by Duty Counsel services.
- Statistics should be maintained on Aboriginal applicants and clients of LAO .
- Pamphlets and information regarding what services and where such services can be accessed should be available for Aboriginal clients at all LAO offices and clinics, court houses and Aboriginal service agencies.
- Information could be designed to appeal to Aboriginal people.
- Awareness by in-take and application assessment officers that many Aboriginal people have a non-native appearance, or non-Aboriginal last names.

#### ➤ **Language barriers**

The following story highlights services issues where language barriers exist.

An LAO lawyer gave an Aboriginal client a piece of paper explaining the law and the court process in Cree syllabic. The client was an Anishinabemowin (Ojibway) speaker and not a Cree person. The client never told his lawyer that he could not understand the information sheet because he appreciated that the lawyer was trying to be helpful.

Despite the good intentions of the lawyer, arising issues include: (1) there is clearly a communication barrier (2) The lawyer does not know his client's first language and/or the fact that there are many Aboriginal languages. (3) The client is never provided an understanding of the legal issues or court process in a meaningful way—therefore this client is never fully informed of potential rights or issues.

### Service Issues Identified:

- The Canadian criminal justice system and court systems are particularly intimidating for people who do not speak English or French as a first language <sup>12</sup>

- Language barriers still exist between Duty Counsel, certificate lawyers and many Indigenous speaking Aboriginal clients.
- Translators are often needed when counsel meets with clients prior to court and during court.<sup>13</sup> This in and of itself is a language barrier.
- Questions of privilege arise when court interpreters or translators are used when lawyers are interviewing or advising their clients.
- When translators are from the same community as the client, even when the translator is well respected and will keep confidentiality, individuals hesitate to fully explain their situation or facts with their lawyers because they do not want to disclose information to the translator.
- Public Legal Education materials and Public information is not readily available in Aboriginal languages, specific to Aboriginal communities.<sup>14</sup>

Ideas and Recommendations made:

- Conduct assessments on what public legal education and information material should be translated into Aboriginal languages.
- Produce information and descriptions of the range of LAO services available and how to access them in Aboriginal languages and provide them to the appropriate and corresponding Aboriginal groups and service providers.
- Dedicate Internet resources to information provided in a number of Aboriginal languages.
- Provide a listing of translator services or keep a comprehensive listing of translators for clients when they need them.

**(ii) Cultural Competency Training of LAO staff and legal aid lawyers**

- **Awareness and knowledge of Aboriginal peoples' legal issues, rights, protections and their cultures, customs, practices**

Service Issues Identified:

- Lack of knowledge of specific Aboriginal legal issues, such as:
  - Awareness of the plurality of laws in Canada, including Aboriginal and customary laws;
  - Knowledge of the diversity of Aboriginal people;
  - Traditional Aboriginal concepts of law and justice;
  - Constitutional rights of Aboriginal people in Canada<sup>15</sup>;
  - History of Treaty making process and resulting Treaty rights;
  - Territorial land claims, depletion of resources and the economic and environmental effect on Aboriginal people;
  - Unique hunting, fishing and harvesting rights;
  - Jurisdictional differences of First Nations people living on-reserve as by virtue of the *Indian Act*;
  - Legal differences based on the *Indian Act*;
  - Indian Status and Métis registration issues;

- Historical injustice of legislative means used in an attempt to assimilate and regulate Aboriginal people.

Ideas and Recommendations made:

- Aboriginal Perceptions or Competency Training—beyond awareness or cultural sensitivity training, presenting more comprehensive historical perceptions.
  - Training on Specific Aboriginal Legal Issues—such as the differences in landlord and tenant, and break down of marriage and child protection issues for First Nation people living on-reserves OR why Métis people have specific hunting and harvesting rights.
  - Information resources for LAO staff and lawyers who provide legal aid services—such as computer resources, information bulletins, pamphlets, updates on relevant law, that specifically address these unique legal issues and needs.
- **Cultural sensitivity based on competently understanding the historic and systematic injustice Aboriginal people have experienced**

Service Issues Identified:

- Lack of cultural awareness or circumstances of living conditions and treatment of Aboriginal people historically and currently.
- Cultural insensitivity or poor treatment by some service providers.
- Lack of knowledge of the historical injustices—such as residential schools, the 60s scoop, treatment in the criminal justice system, child protection and welfare issues, and the effect these injustices have had on Aboriginal societies
- Common misconceptions—based on the inaccurate history and portrayal of Aboriginal people by mainstream—beyond tipis and beadwork. Aboriginal culture, customs, spirituality and history is much deeper than many of us learned in school.

Ideas and Recommendations made:

- Aboriginal Perceptions or Competency Training—with a focus on history of discrimination and treatment of Aboriginal people.
- Make consistent policy requiring tolerance or zero tolerance towards cultural insensitivity.
- Make policy that requires LAO staff to have awareness and knowledge of Aboriginal issues within work place policies and job descriptions.

(iii) **Public Legal Education and Accessible Information for Aboriginal people  
Aboriginal service agencies and other service providers**

Identified service issues discussed above and below under other headings

Ideas and Recommendations made:

- Pamphlets and information regarding what services and where such services can be accessed available for Aboriginal clients at all LAO offices and clinics, court houses and Aboriginal service agencies.
- Produce information in Aboriginal languages in areas where clients first language is Indigenous.
- Be innovative and creative in producing Internet resources and information booklets, pamphlets or posters. Have Aboriginal people design them so that they are Aboriginal user-friendly or attractive to Aboriginal populations.

(iv) **Active Outreach to Aboriginal communities and service agencies to build  
partnerships and networks**

Service Issues Identified:

- There is not enough liaising between Aboriginal service agencies and LAO service providers.
- Not all LAO offices and service providers are aware of the available Aboriginal specific services in their area.
- Not all Aboriginal service agencies, political organizations, or communities are aware of the range of LAO services or how to access them.

Ideas and Recommendations made:

- LAO staff and service providers should actively communicate with Aboriginal communities.
- They could host an agency “get-together” where local Aboriginal community and agencies are invited to hear about LAO services and take part in an information exchange by explaining their services.
- All LAO Area Offices should keep a listing of all Aboriginal communities, service agencies and resources for use and access by other legal aid service providers.
- Having Aboriginal service agency’s brochures and pamphlets available in LAO offices for Aboriginal clients and those refused services would be helpful.

**B. LACK OF ABORIGINAL REPRESENTATION WITHIN LAO AND LAO'S ADVISORY SYSTEMS**

**(i) Senior position to direct and supervise implementation of the Aboriginal Strategy and an Aboriginal Department;**

Service Issues Identified:

- There currently is no Aboriginal person in senior position.
- There currently is no Aboriginal person in a senior position designated specifically to addressing Aboriginal Policy or Issues.
- There is no Aboriginal Policy or Issues Department within LAO.
- An Aboriginal Issues Advisory Committee is not enough to properly advise and analysis legal aid service issues.

Ideas and Recommendations made:

- An Aboriginal person should be hired into a senior position at minimum to oversee the implementation of LAO's Aboriginal Strategy. There needs to be an Aboriginal person to direct and supervise the implementation and provide a check and balance that LAO's mandate is being met as well as the interests and needs of low-income Aboriginal people and communities.
- An Aboriginal Policy and/or Issues Department should be established.
- The Aboriginal Issues Advisory Committee should inform and complement an Aboriginal Policy and/or Issues Department or an Aboriginal senior staff position and not be the primary advisory mechanism.

**(ii) Inclusion at all levels and positions within LAO of Aboriginal people**

Service Issues Identified:

- There needs to visibly be more Aboriginal people working within LAO.
- There needs to be more frontline LAO staff that is Aboriginal, particularly in areas where there is a larger Aboriginal population.

Ideas and Recommendations made:

- Preferences or equity policies should be considered when positions are created or come up where there are high numbers of Aboriginal clients.
- Job postings should include external posting---it is hard to increase hiring of Aboriginal people if the pool of potential staff first being considered (internal postings) does not include many Aboriginal individuals.
- Recognition that Aboriginal knowledge and traditional knowledge of Aboriginal issues as an asset or as "value plus" service.

- Consider and place appropriate weight on Aboriginal peoples' skills beyond formal education and take into account experience and traditional Aboriginal forms of knowledge—equivalencies should be considered.
- Job descriptions and postings could have an Aboriginal language requirement where surrounding Aboriginal communities speak their indigenous language. Preference should be given to a speaker of that language.

**(iii) Active Recruitment of Aboriginal Staff**

Service Issues Identified:

- There does not appear to be an active recruitment of Aboriginal staff for LAO.
- LAO does not post jobs regularly in the Aboriginal media sources.
- There rarely seems to be any posting in any of the Aboriginal employment agencies, or communities.

Ideas and Recommendations made:

- All external postings should go to Aboriginal employment agencies and local Aboriginal communities near where the position is coming up.
- Policy should be developed to require extending job postings to Aboriginal communities and agencies.
- Milestones or benchmarks should be set to actively recruit and hire Aboriginal people.

**(iv) Aboriginal Representation at the Board level**

Service Issues Identified:

- Although in the past, there has been Aboriginal people on LAO's Board of Directors there currently is no Aboriginal representation on the Board.
- There has not consistently been Aboriginal representation on the Board

Ideas and Recommendations made:

- There should be Aboriginal representation on LAO's Board of Directors.
- Actively recruit Aboriginal members from the business sector or Aboriginal lawyers.

**(v) Increase in the representation of various Aboriginal peoples in the composition of the Aboriginal Issues Advisory Committee**

Service Issues Identified:

- There are not enough members on the Aboriginal Issues Advisory Committee to capture all of the Aboriginal perspectives or groups in Ontario.



- There are some nations or Aboriginal groups lacking representation on the Committee.

Ideas and Recommendations made:

- Aboriginal Issues identified and presented to the LAO Board of Directors by an Advisory Committee should speak to universal Aboriginal legal and service issues, but also should also speak specifically to
  - First Nation Specific Issues;
  - Métis Specific Issues;
  - Inuit Specific Issues;
 That means having representation on the Advisory Committee from the each of the above-mentioned groups of Aboriginal peoples.
- The Committee should have an awareness of the different service needs and legal issues for the different circumstances of Aboriginal people. For example in addition to having the various Aboriginal groups represented as committee members, it would be beneficial to have representation of both on-reserve and off-reserve members, both urban and rural members, both status and non-status member, and northern and southern members.

(vi) **Models and mechanisms for continued advisory participation from Aboriginal people**

Service Issues Identified:

- More advisory participation is required than just an Advisory Committee or pilot projects.
- Involving Aboriginal community participation on programming and services more regularly would be preferable.
- There is no Aboriginal Department in LAO to voice concerns or raise issues.

Ideas and Recommendations made:

- Aboriginal forums could be held every few years or rotating to various locations annually to seek input and update on service enhancements and improvements.
- Client surveys on LAO programs and services—could be done regionally by area offices or electronically.
- Aboriginal service agencies surveys—given to service providers to see how often their clients seek information or referral to LAO services.
- A means to capture comment/recommendations via Internet or electronic resources available for clients to provide feedback, good or bad, on LAO services.

**C. LACK OF ABORIGINAL LEGAL REPRESENTATION OR LEGAL REPRESENTATION THAT IS APPROPRIATELY INFORMED ON THE UNIQUE NEEDS OF ABORIGINAL CLIENTS**

**(i) Aboriginal Legal Representation- Development and Recruitment**

Service Issues Identified:

- There are few Aboriginal lawyers available to accept legal aid certificates<sup>16</sup>.
- There are few Aboriginal Duty Counsel, where there are a high number of Aboriginal people before the Court.
- There are a limited number of Aboriginal people hired as staff lawyers at legal Clinics.

Ideas and Recommendations made:

- Ensure job postings for staff lawyers and Duty Counsel are made externally in Aboriginal communities and through Aboriginal legal resources such as LSUC, the Indigenous Bar Association (“IBA”), OBA-Aboriginal Division and Aboriginal media sources.
- Provide Associate Grants to law firms to entice associating Aboriginal talent. Ensure that the firm has a senior partner or lawyer who can provide mentoring on the areas of law that the associate will be practising in when providing legal aid services. Ensure that any grant structure allows for autonomy of the firm while committing the associate to provide a certain amount of LAO services.
- Business or Start-up Grants for Aboriginal sole practitioners who meet panel requirements, who will agree to provide a certain amount of legal aid services specifically to Aboriginal clients.
- Mentoring Program—establish a mentoring program in which senior Aboriginal lawyers mentor younger lawyers and law students with legal aid service objectives and focus.

**(ii) Aboriginal Articling Students and Law Students**

Service Issues Identified:

- No outreach or specific recruitment of Aboriginal students when LAO presentations are done at Law Schools.
- Courses that are offered do not have much Aboriginal specific content and those that do often only cover Constitutional, Treaty, land and resource issues and not areas most commonly practised by legal aid service providers.

Ideas and Recommendations made:

- Provide an Articling grant for Aboriginal lawyers or law firms to take on Aboriginal students-at-law, ensure that someone in the firm can act in a supervisory capacity and that the student-at-law can commit to a certain number of legal aid hours in the course of the firm’s practice.

- Create more Articling positions in LAO Clinics<sup>17</sup> and with Duty Counsel services for Aboriginal Students.
- Post any positions broadly and within Aboriginal resources and media sources.
- Provide programs and training to Aboriginal students at Law Student Clinics that are specific to Aboriginal issues and legal needs.

(iii) **Development of all LAO Legal Representatives providing services to Aboriginal people**

Service Issues Identified:

- Lack of awareness of Aboriginal specific legal issues---knowing the differences in law and jurisdiction.
- Legal issue specific training (discussed above)
- There are no panel standards in certain areas of law that would be beneficial to improving services to Aboriginal people.

Ideas and Recommendations made:

- Cultural Prospective or Competency training (discussed above)
- Training material, and resources dedicated to informing lawyers on Aboriginal legal issues, such as material available on LAO LAW
- Setting panel requirements in certain areas, i.e. a demonstrated knowledge or reading requirements for Gladue principles on the criminal panel.

**D. IMPROVING SERVICE ON ABORIGINAL SPECIFIC LEGAL ISSUES AND ADDRESSING THE ROLE OF LAO IN PARTICIPATING OR SUPPORTING ABORIGINAL SPECIFIC OR DRIVEN PROCESSES**

(i) **Aboriginal Legal Issues**

Service Issues Identified:

- It is unclear what role LAO can play or services that can be provided in the following areas:
  - Constitutional Rights and Cases
  - Aboriginal and Treaty Rights
  - *Indian Act* issues
  - Legal issues particular to Métis
- It is difficult to obtain test case funding on specific Aboriginal legal issues such as Aboriginal and Treaty Right litigation.
- LAO could do more sentence appeals for Aboriginal people

### Ideas and Recommendations made:

- Further explore these areas, and have continual input from stakeholders where services can be designed where they fit into LAO's mandate.
- Ensure that knowledge of these issues is shared with LAO legal service providers.
- Set aside test case funding separate from the current test case funding and application process specifically for Aboriginal legal issues with its own application and review process.
- Also LAO should consider putting into place a separate committee or advisory body comprised of Aboriginal Lawyers and Professors to make recommendations or review applications so that the applications are vetted to people who have awareness and knowledge of the legal and Aboriginal issues. Funding of test case litigation or the case itself should be vetted with a lens that understands the need to not put any other Aboriginal interests or peoples Constitutional rights at stake.
- Training for lawyers providing opinion on appeals and for Area Committees who approve appeal certificates should be undertaken that is specific to Aboriginal peoples' applications. Training should focus on the particular needs and considerations of sentence appeals for Aboriginal people.

### **(ii) Aboriginal Legal Services Corporations**

#### Background Information/Considerations:

The only Aboriginal legal services corporation that is connected to LAO is Nishnawbe-Aski Legal Services Corporation (NALSC). NALSC is a Service Corporation whereas Aboriginal Legal Services Toronto is a clinic. Legal services corporations are similar to legal clinics but their business structures are set up different than a clinic. There are pros and cons to having a business set up as a service corporation as opposed to a legal clinic. Some people see legal service corporations as being able to provide for a "one stop shop" or having fewer limitations in terms of what services they can provide.

The *LASA* provides that:

14. (1) Subject to subsections (2) and (3), the Corporation shall provide legal aid services by any method that it considers appropriate, having regard to the needs of low-income individuals and of disadvantaged communities, the need to achieve an effective balance among the different methods of providing legal aid services, the costs of providing such services and the Corporation's financial resources, including,

(f) the funding of Aboriginal legal services corporations to provide legal aid services to Aboriginal individuals and communities;

The *LASA* does not define “Aboriginal legal services corporations.” The paper “*Legal Aid Needs of Aboriginal People in Urban Areas and on Southern Reserves*,” by Jonathan Rudin<sup>18</sup> includes the following recommendation and explanation of these corporations or centres:

It is therefore recommended that one-stop Aboriginal legal services centres, comprised of Courtworkers, a legal clinic providing poverty-law services, and criminal and family staff lawyer, be established in all Ontario urban centres with significant Aboriginal populations. Since these centres will likely act as the source for the development of alternative justice projects, the province should increase the funds available for such projects.

Service issues identified:

- Having more Aboriginal legal services corporations may improve services to Aboriginal people.
- ALST offers many services and does so well, but they are not a “one-stop shop” and they do not have staff lawyers who provide criminal or family court representation services. It can be argued that this is primarily because they are a clinic and a separate Corporation and not an Aboriginal legal services corporation.

Ideas and Recommendations made:

- Aboriginal legal services corporations’ Boards can be comprised entirely of Aboriginal people—who are best informed in Aboriginal issues and would ensure Aboriginal representation.
- There is strength in a corporate Board of Directors structure to ensure legal services are being delivered within a mandate and to the client base that needs such services—Allowing Aboriginal specific Board to address Aboriginal specific legal services issues is a good option for improving services.
- A legal service corporation would have the capacity to be more adaptable to the Aboriginal issues that arise and flexible to change as service needs require them to change. Examples include residential school settlement or any legislation that may result in regards to matrimonial real property on reserves. If service needs in those areas increase or change a corporation will have more flexibility than a Clinic to meet those needs.
- Generally speaking Aboriginal legal services corporations are funded at a higher level than Clinics because their role is more expansive than performing “clinic law” matters.

(iii) **Aboriginal Community Justice Programs in partnership with the Canadian legal system AND Aboriginal Justice Initiatives as an alternative to Canadian legal system or as front line approach;**

General Discussion:

For clarity, LAO considers NALSC's Restorative Justice or Aboriginal Justice Program, "talking together"<sup>19</sup> and OFIFC's Aboriginal Community Justice Project<sup>20</sup> to be Aboriginal Community Justice Programs.

LAO considers Aboriginal Justice Initiatives, as those programs and/or processes that work independently from the Canadian legal system or courts to address justice issues within Aboriginal law. An example of a process is one that the Anishinbek Nation's (Union of Ontario Indians) is currently developing, known as the Appeals and Redress Process<sup>21</sup>. This process deals with issues at a First Nation or Anishinabek National level by members and people from those communities and seeks to address issues prior to involvement of or outside of the Canadian legal system.

This area of discussion is not broken into service issues identified and ideas and recommendations because it has been more generally discussed and needs further input to establish what type of service issues and recommendations can be made. Here is the input on Aboriginal Community Justice Programs and Aboriginal Justice Initiatives that LAO heard:

- There needs to be recognition of the plurality of law in Canada, which includes Aboriginal laws and Aboriginal people's ability to practice and follow such laws.
- There needs to be more financial support for Aboriginal Community Justice programs.
- There needs to be further development of Aboriginal Justice Initiatives and discussion on what if any role LAO services or support has in this area.
- Programs are not used often enough as an alternative to the criminal justice system or in child protection proceedings.
- Sometimes this type of programming is viewed as only a "diversion" program—which means that the mainstream Canadian legal system or the actors within that system may not view it as wholly or independently legitimate.
- These programs need to be able to develop beyond just diversion mechanism and be legitimised as appropriate forums to deal with legal matters
- There is precedence in Canada, where Aboriginal Community Justice systems and programs work hand in hand with the Criminal justice system and have a much larger role than simply a diversion aspect. Examples of such include the Provincial Court in T'suu T'ina, Alberta and the Provincial Court at Siksika in Alberta.
- There needs to be a greater awareness of Aboriginal justice initiatives and what role they can play in alleviating the over representation of Aboriginal people in courts and Canadian justice systems.

- LAO should commit to doing research on whether there would be any cost savings or benefits for legal aid services when Aboriginal Justice initiatives and Aboriginal Community Justice Programs are used as an alternative.

## **6. THE 12 IMMEDIATE INITIATIVES FOR 2008/09**

LAO is immediately going to start providing service initiatives specific to Aboriginal clients. LAO will be seeking further input and feedback regarding how to prioritise and implement future service initiatives, and seek further input on developing the three to five year strategic plan.

Part of the objective of creating the Aboriginal Strategy is to provide immediate resolve to the identified service issues to enhance and improve these areas. General feedback has indicated that LAO needs to act quickly on some of the most pressing legal aid service issues.

### **(1) Hiring an Aboriginal Policy Counsel;**

- ◆ Will increase the capacity to respond to Aboriginal specific issues by hiring dedicated Aboriginal Policy Counsel.
- ◆ Will provide Aboriginal perspective and knowledge to issues that concern Aboriginal clients.
- ◆ Hiring an Aboriginal Policy Counsel acknowledges that they Aboriginal specific skill set and experience provides value plus services beyond skills attained in Law School and the Canadian legal system.
- ◆ They can develop a recruitment policy targeted at Aboriginal people.
- ◆ They can research and provide opinion on what minimum panel standards need to be addressed

### **(2) Hiring an Aboriginal Project Manager ;**

- ◆ Will ensure that there is a staff member dedicated to ensuring key initiatives are being implemented and responsible to ensure deliverables and commitments are being met.
- ◆ Ensures that future initiatives and continued Aboriginal participation and input is actively sought.
- ◆ Will enable an Aboriginal person to liaise with Aboriginal service agencies and legal aid service providers.

### **(3) Providing Cultural Competency Training for LAO Staff and Lawyers;**

- ◆ Will have positive implications under each of the four major areas and most of the sub-topics fall under each area.

- ◆ LAO is willing to commit resources and set a goal of training approximately 200 staff and lawyers in 2008/09.
- ◆ Heighten awareness of Aboriginal issues generally and provide historical background and injustices, including legislative history of assimilation and elimination policy.
- ◆ Discuss current issues of poverty, substance abuse, FASD, and other socio-economic problems but also focus on positive aspects and beliefs of Aboriginal culture.
- ◆ Address cultural insensitivity and establish that it has no place in LAO working environment

**(4) Reviewing and improving legal resources for LAO service providers;**

- ◆ This will involve enhancements to LAO LAW and other electronic resources that lawyers and LAO staff access as resource tools in assisting them to remain up on the law and any legal developments. These types of resources are essential to assisting legal professional provide quality service and knowledge—ramping up any such resources will be beneficial to clients.
- ◆ More specifically, an in-depth review of current Aboriginal resources will be done which will identify what areas of law need to be improved. Then a plan to begin enhancements will be crafted so that more case law, best practice guides, procedural tips, information resources and links to other resources on areas of law that are specific to Aboriginal legal issues can be added. This type of support ensures that all lawyers providing legal services have proper resources and tools to be better legal representatives for Aboriginal people.

**(5) Providing extension of legal aid certificate coverage for Gladue submission preparation;**

- ◆ Will enable lawyers providing legal aid services on a criminal certificate for an Aboriginal client to have an extension on their preparation time. I
- ◆ This recognises the importance of making Gladue submissions on behalf of Aboriginal clients. Further it recognises that to properly apply Gladue principles additional preparation time is required.

**(6) Ability to identify Aboriginal Clients;**

- ◆ By creating a process to identify Aboriginal clients we will expand the ability to measure the services provided to Aboriginal clients and have quantitative knowledge of what the service issues are.
- ◆ Identifying Aboriginal clients allows us to provide better and more specific services
- ◆ LAO staff can direct Aboriginal people to specific and unique Aboriginal programming.



- ◆ We can take into consideration the differing needs of various and distinct Aboriginal peoples.
- ◆ LAO can re-direct, refer or provide information to Aboriginal people to other service providers.

**(7) Increased accessibility of LAO information (pamphlets, brochures)**

- ◆ Increase the accessibility of all external communications such LAO Pamphlets and information brochures in a format that appeals to Aboriginal clients, in some cases translated into Aboriginal languages with an aim to have 2-3 created and delivered to Aboriginal clients by the end of 2008/09.

**(8) Creating policy defining Aboriginal services as a priority;**

- ◆ Creating such policy will demonstrate LAO commitment and validate that the 12 Immediate Initiatives and the 3 to 5 year strategic plan.
- ◆ Ensuring that CEO and Executive team have clearly defined deliverables within performance contracts will ensure accountability.

**(9) Increasing composition and capacity of the Aboriginal Issues Advisory Committee;**

- ◆ Expanding the Terms of Reference of the current Aboriginal Issues Advisory Committee to broaden community representation or capacity to be aware of all Aboriginal issues will result in broader advisory participation, thus casting the net further to be inclusive of various Aboriginal peoples.
- ◆ Creation of a process that allows Aboriginal groups and organizations input or advice on Committee membership selection. Another idea is to allow such organizations to vet potential members for the Committee. This will ensure that external and Aboriginal knowledge are contributing to determining the make up of the Committee and thus reflect the diversity and capacity of knowledge of Aboriginal people and issues in Ontario.

**(10) Develop minimum panel standards regarding Aboriginal specific legal issues;**

- ◆ Minimum standards on panels would identify and be in regards to Aboriginal specific legal issues. For example--Criminal panel having minimum standards on the Gladue principles, and the Family panel having minimum standards regarding the Aboriginal specific provisions in the *CFSA* and how the *Indian Act* effects the law and legal services.

**(11) Develop a recruitment policy aimed at hiring Aboriginal people;**

- ◆ Would address concerns about there not being enough Aboriginal staff within LAO.
- ◆ That could determine what the best places and outlets to advertise or seek Aboriginal staff are.
- ◆ Would be culturally aimed and appealing,
- ◆ Designed to take into account Aboriginal knowledge as valuable skill, and address equivalency and set job description standards that actively seeks Aboriginal experience and knowledge

**(12) Refining the 3 to 5 year strategic plan with Aboriginal participation and input.**

- ◆ Designing a plan that addresses future initiatives and service delivery that are feasible and affordable.
- ◆ Setting that plan into action so that initiatives and services begin improving immediately as well as being implemented within the three to five year period.
- ◆ Seeking and receiving continued Aboriginal participation and input through various forums and means.

**7. SAMPLE ANALYSIS: ONE ABORIGINAL SPECIFIC ISSUE AND HOW TO REMEDY SOME OF EXISTING LEGAL AID SERVICE ISSUES:**

To provide insight on how feedback in relation to the development of the Aboriginal Strategy can take one Aboriginal legal issue and the identified problems of legal services surrounding that issue and begin to translate that input into enhancement and improvement in LAO services, the below analysis is given:

**THE APPLICATION OF *GLADUE*<sup>22</sup> PRINCIPLES AND USE OF *GLADUE* REPORTS:**

**What is section 718.2(e) of the *Criminal Code*? And why is important to Aboriginal people?**

Section 718.2(e) of the *Criminal Code* states:

A court that imposes a sentence shall also take into account the following principles:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

This section of the *Criminal Code* is important to Aboriginal people because when it came into effect, it was part of a reformatory change that was made to sentencing principles in the *Criminal Code*. The Supreme Court of Canada stated in *R. v. Gladue* that the new sentencing amendments represented “a watershed, marking

the first codification and significant reform of sentencing principles in the history of Canadian criminal law”<sup>23</sup>.

Section 718.2 (e) addresses a crucial issue to Aboriginal people in Canada—the overrepresentation of Aboriginal people being incarcerated under Canadian law. Recognition of the overrepresentation of Aboriginal people in the penal system and the need to consider additional factors when sentencing an Aboriginal offender, actually written in Canadian law is significant.

More than ten years has passed since sentencing reform was enacted in the *Criminal Code*. There has been Supreme Court of Canada interpretation and direction on use and application of the section. There has been further development in the common law in respect to this section yet Gladue submissions are not being made every time an Aboriginal person has the probability of receiving custody as part of their sentence. Gladue principles should be applied in every case where the principles have not been waived.<sup>24</sup>

This limited application of Gladue principles being used in sentencing Aboriginal offenders is problematic and legal services in respect to this problem need to be improved.

Alarming statistics demonstrate that despite the findings in Gladue and the heightened responsibility of lawyers and the Court to address Gladue principles, there is an ever-increasing over-representation of Aboriginal people incarcerated. In 2004/2005 Aboriginal people accounted for 17% of admission to federal custody and 22% of admissions to all provincial correctional facilities.<sup>25</sup>

### **What are Gladue Principles?**

In the 1999 Supreme Court of Canada decision *R. v. Gladue* the Court decided that section 718.2 (e) of the Criminal Code applies to all Aboriginal people whether they lived on or off reserve. The Supreme Court of Canada found as follows with respect to the over-incarceration of Aboriginal people:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada – First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural – in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.<sup>26</sup> [Emphasis Added]

The Gladue decision underscored the need for judges to consider the personal history leading up to an Aboriginal person’s crime within the context of the systemic oppression faced by Aboriginal people generally:

...[S]entencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders. The fact that the reference to aboriginal offenders is contained in s. 718.2(e), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.<sup>27</sup>

The Principles and factors that a judge should consider when sentencing an Aboriginal offender include “the unique background and systemic factors which may have played a part in bringing the particular offender before the courts.”<sup>28</sup> More specifically, when sentencing Aboriginal people judges are to consider such systematic factors<sup>29</sup> as:

- low incomes;
- high unemployment;
- lack of opportunities and options;
- lack or irrelevance of education;
- substance abuse;
- loneliness;
- community fragmentation;
- racism and impacts of colonialism.

Subsequent to the Gladue decision, the Ontario Court of Appeal, on August 22, 2006 decided *R. v. Kakekagamick*<sup>30</sup>. This case highlighted<sup>31</sup> that the failure to address Gladue principles when sentencing an Aboriginal Offender is an error of law.<sup>32</sup> Where the defence counsel or Crown fails to address the *Gladue* factors, the judge must launch such an inquiry<sup>33</sup>. As a result of this case the bar is raised in terms of what all parties involved in the sentencing process are required to do when an Aboriginal offender is being sentenced.<sup>34</sup>

### **Current Programming/Projects that Legal Aid Ontario Funds:**

In response to the Gladue decision, in October 2001 the judges at Old City Hall with the support and approval of senior judges established the Gladue (Aboriginal Peoples) Court. The Gladue Courts at 1000 Finch and at the College Park were developed in the same manner as the first Court. The Old City Hall Court sits two full days a week, the 1000 Finch Court sits one afternoon a week and the College Park Court sits one full day a week. At the time it was established the Court was unique in that it only dealt with Aboriginal people. Another distinctive feature is that the judges, Crowns and Duty Counsel were specifically trained on Aboriginal issues. In the beginning, at Old City Hall, Miziwe Biik funded a Caseworker and about six months after the Court was established in April 2002, MAG also funded ALST to hire, train and supervise a Gladue Caseworker.

Gladue Caseworkers gather information about the person who was convicted and write a report for the court. The Gladue Report presents a comprehensive picture of the life circumstances of the Aboriginal person within the context of his/her community, thereby enabling the judge to comply with section 718.2 (e) of the

*Criminal Code*. These reports are significantly more detailed, well-researched and sensitive to the particular challenges faced by the Aboriginal person being sentenced than a standard pre-sentence report could provide. For cases where a full report may not be needed, for example where the Crown is not seeking more than four months of custody, Gladue Caseworkers can write reports that consist primarily of release plans.

- In 2004 LAO began funding ALST to retain two more Gladue Caseworkers. One worker provides services to courts in the Greater Toronto Area (“GTA”) other than Old City Hall i.e. Scarborough, College Park, North York and Etobicoke. The other worker provides services to courts with a high percentage of Aboriginal accused people in the Hamilton and Brantford area and when possible the Caseworker extends her reach to London.
- More recently, LAO recognised the importance of continue legal education to private bar members on legal aid panels in regards to Aboriginal Criminal Justice issues. Therefore LAO provided panel members that attended Osgoode Hall Professional Development Institute’s “National Conference on Aboriginal Criminal Justice Post-Gladue” compensation for 50% of the learning hours spent in the educational session at their applicable legal aid rate.

#### **INPUT FROM PARTICIPANTS:**

One of the most consistently raised issues throughout LAO’s meetings with various Aboriginal participants, LAO staff, and lawyers were the issues surrounding Gladue principles. The issues that arise regarding the application of *Gladue* at bail hearings<sup>35</sup> and during sentencing of Aboriginal individuals was by far one of the major areas of feedback LAO received in the development of the Aboriginal Strategy to date. Participants from every region and in every area raised the issues surrounding use and application of *Gladue* principles. A number of concerns were raised and many contributed ideas to improve services to Aboriginal people.

#### **Service Issues Identified:**

- There are no Gladue Courts currently in operation outside of Toronto, nor are there any courts specifically designated for Aboriginal Youth or women offenders.
- a general lack of knowledge regarding Gladue principles and knowledge about the circumstance of Aboriginal offenders and accused people —by all parties and participants in the Criminal justice system;
- Minimal application or sentencing submissions presented by legal aid panelled and private defence bar lawyers;
- Few public information booklets, pamphlets, or public on-line resources regarding s.718(2)(e) and Gladue Principles;

- Few or no submissions of Gladue principles at bail hearings;
- Lack of bail programs or available sureties resulting in Aboriginal accused being remanded in custody;
- Long waits for Gladue reports where one has been requested and/or ordered by the court prior to sentencing<sup>36</sup>; The average wait for a Gladue Report is about 4 to 5 weeks – the same time period as it takes to write a pre-sentence report. Where a client is in custody, it generally does not make sense to write a full report unless the Crown is looking at a four-month sentence or more.
- The three prior issues have a combined effect that results in disadvantage to the Aboriginal person who is accused of an offence. By not applying Gladue principles during bail submissions or having Aboriginal specific bail programs in place, accused parties remain in custody until after trial and/or sentencing. This means that some Aboriginal people will potentially be remanded in custody for periods that may be longer than what they would receive in sentencing;
- General feeling of cultural insensitivity by lawyers, legal aid offices and courts towards Aboriginal people who are accused or found guilty of offences;
- Approach of interviewing or advising Aboriginal clients lacks cultural appropriateness or sensitivity to issues that may contribute to why the individual is before the courts.

### **How the 12 Immediate Initiatives will address the identified service issues**

Based on the feedback received to date, LAO will be making improvements and enhancing current services to specifically addressing the application of Gladue principles. Based on the four major areas for improvement discussed above, here are the ways that the 12 immediate initiatives will address the service issues:

#### **A. Barriers to Accessing Justice**

- Cultural Competency training will include sections on Gladue principles, the background on the over-representation and treatment of Aboriginal people in Canadian criminal law context. The very nature of the training should inform participants on the circumstances of Aboriginal people. It should also assist in heightening an awareness of the systematic injustice Aboriginal people face.
- Creating a process that will give LAO the ability to identify Aboriginal clients—this in turn will assist Aboriginal clients. When lawyers have identifiable Aboriginal clients they can then take into consideration the special and unique legal needs that applying Gladue principles requires. They can also provide information to Aboriginal clients on legal aid services and supports.
- Increasing the accessibility of LAO information will result in public legal information materials being produced and widely distributed, particularly at courts, LAO offices and Clinics and also in Aboriginal service agencies and governmental service agencies.

- As part of refining the 3 to 5 year strategic plan with Aboriginal participation and input LAO will continue to work in partnership with Aboriginal and government agencies to identify and address issues in this area.

**B. Lack of Aboriginal representation within LAO and LAO's Advisory Systems:**

- An Aboriginal Issue Advisory Committee with increased composition and capacity of the knowledge areas will represent various perspectives, will be equipped to provide more advise on the application of Gladue principles. They can also provide on-going recommendations in this area on a regular basis.
- Having an Aboriginal Project Manager and an Aboriginal person hired in a Policy Counsel will help inform and provide Aboriginal experience and knowledge in increasing Aboriginal staff and advisory mechanism.

**C. Lack of Aboriginal legal representation or legal representation that is appropriately informed on the unique needs of Aboriginal clients:**

- LAO will be providing an extension on certificate coverage specifically for preparation time of Gladue submissions. Where a lawyer representing an Aboriginal accused person who is faced with the probability of receiving incarceration they should be able to access extra preparation time, whether a Gladue report has been ordered or not;
- LAO will be reviewing their LAO LAW and other electronic resources and adding more research and support material, including procedural guidelines on making Gladue submission at bail hearings and sentencing. This type of support should ensure that all lawyers providing legal services have proper resources and tools to be better legal representatives for Aboriginal people.
- Developing minimum panel standards regarding the application of Gladue principles will result in ensuring high quality and knowledgeable legal representation. This point specifically addresses ensuring all legal aid lawyers have the required knowledge and tools to provide the best service for Aboriginal clients.

**D. Improving service on Aboriginal specific legal issues and addressing the role of LAO in participating or supporting Aboriginal specific or driven processes:**

- Providing Cultural Competency Training to staff and lawyers is the starting point to broadly spreading knowledge of issues. Future incentives could include an extension of the training to lawyers who are providing opinion on sentence appeals and for Area Committees who approve appeal certificates of Aboriginal applicants as well as external service providers.

## 8. ACCEPTANCE OF GENERAL FEEDBACK OR WRITTEN RESPONSE

LAO welcomes any verbal or written responses regarding this paper and the Aboriginal Justice Strategy from individuals, agencies or organizations.

Please direct your comments, feedback or written response to:

Christa Big Canoe, Policy Counsel  
Legal Aid Ontario, Provincial Office  
Atrium on Bay  
40 Dundas Street West, Suite 200  
Toronto, ON - M5G 2C2  
Email: [aboriginalstrategy@lao.on.ca](mailto:aboriginalstrategy@lao.on.ca)

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### END NOTES:

<sup>1</sup>The use and term Aboriginal people is intended to capture the Constitutional definition of “Aboriginal people” which includes First Nation people, Métis people and Inuit people, as per s.35(2) *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

<sup>2</sup> Although such factors as living off- or on-reserve being status or non-status or living in urban or rural areas will be considered in the context or form part of the understanding why various Aboriginal groups of people have differing or unique legal issues and rights. The point is that no Aboriginal individual will be discriminated against in receiving legal aid services based on any one of those factors even if those factors must be considered or assessed in addressing ways to improve legal services.

<sup>3</sup>Participants have included Aboriginal people, service agencies, political organizations, and LAO area office and clinic staff, private bar layers who accept legal aid work, federal and provincial government ministries and departments. A range of Aboriginal service organizations has included Health, Welfare, Justice, Police services, Education, Native Court workers, Community Legal Workers. Policy counsel has also met with Elders, some community Leaders, or department staff from some Aboriginal community governments. They have also met with Aboriginal Lawyers and law students as well as some members of the judiciary.

<sup>4</sup> See Appendix “H”- LAO services and projects for Aboriginal people

<sup>5</sup> To access the *LASA* visit CanLII at <http://www.canlii.org/on/laws/sta/1998c.26/20080515/whole.html>

<sup>6</sup> LAO does not receive any dedicated funding for services targeted for Aboriginal people. However, both Aboriginal Legal Services of Toronto (“ALST”) and Nishnawbe-Aski Legal Services Corporation (“NALSC”) — organizations discussed below — do receive some programmatic funding from other sources, including the Department of Justice Canada (“DOJ”) and the Ministry of the Attorney General (“MAG”).

<sup>7</sup> Aboriginal Legal Services Inc. is a corporation with charitable status.

<sup>8</sup> Jonathan Rudin, “Legal Needs of Aboriginal People in Urban Areas and Southern Reserves”, a background Paper for Legal Aid Ontario, John D McCamus et al., *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*, vol.2, (Ontario, August 1997) page 454.

<sup>9</sup> There were issues that were identified by a number of participants and therefore issues are prioritised under each area based on what LAO has heard.

<sup>10</sup> Regard should be paid to the fact that some individuals may not want to access such information from their local government or administrative offices, such as at Band Council offices or political organizations. Advertising or posting information should have far reaching delivery to a variety of locations within any one Aboriginal community.

<sup>11</sup> Positive feedback was received where this person is Aboriginal or a part of the community—some commented that having a local person assist with the application made the process more comfortable.



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<sup>12</sup> As stated in the Legal Aid Ontario, Duty Counsel Manual, April 2007: “To a person from a remote fly-in community whose first language is Ojibway or Cree, being in custody can be a frightening and bewildering experience.”

<sup>13</sup> Also the amount of time in which Duty Counsel spends in remote fly-in communities is limited.

<sup>14</sup> Yedida Zalik, “Aboriginal Peoples and Access to Information” Executive Summary, Community Legal Education Ontario (CLEO), May 2006--- discusses the importance of providing public legal education but also discusses that the need for translation into indigenous languages is (quantitatively) unknown, undetermined.

<sup>15</sup> Specifically, section 35 of the *Constitution Act, 1982*

<sup>16</sup> In the north but also throughout other parts of Ontario that have remote or isolated Aboriginal communities, very few lawyers in general (not just Aboriginal lawyers) that take family law cases because of difficulties such as serving documents, enforcing orders and a low tariff rate. New time limits with the law present difficulties for the children and parents involved in child welfare cases. The issue of availability of lawyers is also is apparent in the criminal law context.

<sup>17</sup> Making Articling grants available to Clinics would allow Clinics to consider hiring Aboriginal students. Additionally separate funding or projects could be established and set aside for Clinics to apply for hiring Aboriginal students.

<sup>18</sup> included in the “Report of the Ontario Legal Aid Review.: A Blueprint for Publicly Funded Legal Services,” vol. 2, 1997, pp. 441- 474

<sup>19</sup> For further information on these programs see <http://www.nanlegal.on.ca>

<sup>20</sup> For further information on this program see <http://www.ofifc.org/ofifchome/page/index.htm>

<sup>21</sup> to find out more information on this process see the Legal department’s contact information [http://www.anishinabek.ca/index.php?option=com\\_content&task=view&id=21&Itemid=3](http://www.anishinabek.ca/index.php?option=com_content&task=view&id=21&Itemid=3)

<sup>22</sup> [1999] 1 S.C.R. 688

<sup>23</sup> *R. v. Gladue* [1999] 1 S.C.R. 688, para 39.

<sup>24</sup> The exception is where the Aboriginal offender waives application of such sentencing principles as per *Gladue*.

<sup>25</sup> Adult Correctional Services in Canada 2004-2005 (2006) Juristat Vol 26 No.5 at 15-16.

<sup>26</sup> *Gladue* para 62

<sup>27</sup> *Ibid*, para 37.

<sup>28</sup> *R. v. Gladue*, para 69:

...the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts. In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

<sup>29</sup> *Ibid.* , para 67

<sup>30</sup> *R. v. Kakekagamick*, August 22, 2006, Ont. C.A. Docket C43843.

<sup>31</sup> *R.v. Brizard* [2006] O.J. no. 729 had already determined “that the failure to give adequate weight to an offender’s Aboriginal status in accordance with s. 718.2(e) of the *Criminal Code* and *Gladue* amounts to an error of law”

<sup>32</sup> Jonathan Rudin, “Aboriginal Over-Representation and *R.v. Gladue*: Where We Were, Where We Are and Where We Might Be Going”, *Supreme Court Law Review*, Vol.40 (LexisNexis Canada, 2008) reproduced in Aboriginal Criminal Justice Post-*Gladue* Conference materials at page 21.

<sup>33</sup> *R. v. Kakekagamick*, LaForme, J.A. states:

Section 718.2(e) imposes an affirmative duty on the sentencing judge to take into account the surrounding circumstances of the offender, including the nature of the offence, the victims and the community (*Wells*, para. 41). Where the sentencing judge narrows the choice of sentence to one involving imprisonment, the judge is obliged to consider the unique systemic or background

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circumstances which may have played a part in bringing the particular Aboriginal offender before the courts. The judge must also consider the types of practicable procedures and sanctions that would be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage (*Wells*, para. 30). [Empahsis added]

<sup>34</sup> Ruden, "Aboriginal Over-Representation and *R.v. Gladue: Where We Were, Where We Are and Where We Might Be Going*" at page 21.

<sup>35</sup> *R. v. Bain* stands for the proposition that Gladue principles should be applied to Aboriginal accused people at the bail hearing level.

<sup>36</sup> This is partial due to the fact that it takes time to appropriately interview the offender, other sources, research and prepare the report as well as there being a limited number of Gladue writers to take on the demand.

## **LIST OF APPENDIXES**

- Appendix “A”**      The Story the Numbers Tell
- Appendix “B”**      Methodology of LAO’s Aboriginal Strategy
- Appendix “C”**      Places Visited
- Appendix “D”**      Consultation Summary
- Appendix-“E”**      Questions Asked to Participants
- Appendix “F”**      Information on General Services Provided
- Appendix “G”**      Excerpts from LAO Duty Counsel’s Manual, April 2007
- Appendix “H”**      LAO Services and Projects for Aboriginal People
- Appendix “I”**      Past and Present Aboriginal Issues Advisory Committee Members



## APPENDIX “A” THE STORY THE NUMBERS TELL

Reviewing the statistics regarding the daily circumstances of Aboriginal people in Canada and Ontario should immediately indicate the need for change and improvement of legal aid services. The fact that the below numbers exist should alarm us that in relation to non-Aboriginal people in Ontario and Canada, Aboriginal people face barriers that need to be addressed. The story that the numbers tell is that there is disparity in living circumstances, education, employment and over-representation in the criminal justice system as well as other areas of Canadian and Ontario law for Aboriginal people.

### ABORIGINAL PEOPLE IN CANADA

The below statistics are from *Juristat Canadian Centre for Justice Statistics*, Statistic Canada – Catalogue no. 85-002-XIE, Vol. 26, no. 3 (Released June 6, 2006):

- 21% experience physical or sexual spousal violence;
- Are relatively younger---for example in 2001, Aboriginal people have a median age of 24.7 years as compared to 37.7 years for non-Aboriginal people;
- Are less likely to complete high school;
- Are 10 times more likely to be accused of homicide;
- 23% of people accused of homicide are Aboriginal;
- On-reserve crime rates are three times higher than the rest of Canada;
- One in five are unemployed compared to one in ten for non-Aboriginal people;
- Represent 2.6% of Canadian adults — make up 21% of adults in jail, 19% of people given a conditional sentence, and 16% of those on probation<sup>i</sup>
- Approximately three-quarters (74%) of Aboriginal adults involved in correctional services had not completed their secondary school education, compared to one-third (33%) of non-Aboriginal adults.
- The proportion of Aboriginal people in custody **is increasing**

From: Trocmé, N., Knoke, D. & Blackstock, C. (2004). “Pathways to overrepresentation of aboriginal children in Canada’s child welfare system.” *Social Services Review*, 78 (4), 577–601:

- Approximately 5% of all children in Canada are Aboriginal, but an estimated 40% of children and youth placed in out-of home care in Canada are Aboriginal. Between 1995 and 2001, there was a 71.5% increase in the number of First Nations children from reserves being placed into care.

### ABORIGINAL PEOPLE IN ONTARIO

According to the 2006 Census, 2.0% of Ontario’s population self-identified as being an Aboriginal person. There are 242, 495 Aboriginal people in Ontario in total with 158, 400 identifying themselves as First Nation people, 73, 610 identifying themselves as Métis

and 2, 035 identifying as themselves as Inuit. It is noted that these statistics only include individuals who participated in the Census and does not address any who were not enumerated as part of the 2006 Census process.

#### NO LAO SPECIFIC STATISTICS ON ABORIGINAL CLIENT BASE

Unfortunately the only information or statistic that LAO currently records with respect of Aboriginal clients is to ask legal aid certificate applicants:

“Do you, or have you lived on reserve in the last year?”

On this information, it is not possible to determine the extent to which Aboriginal people qualify for certificate services such as criminal, family and child protection services. The above question does not provide information on how many Aboriginal people use Duty Counsel services or legal clinics. More importantly, the question itself does not enable LAO to capture the Constitutional definition of an Aboriginal person, as a result Métis, Inuit and non-status clients are not identifiable nor can such clients be directed to any Aboriginal specific or beneficial services.

What LAO does know based on the information gathered in the certificate application context is that in 2007-2008 4,983 people applying for legal aid certificates were Status Indians living on-reserve. Of the 4,983 applicants, 3999 qualified.

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## **APPENDIX “B” METHODOLOGY OF LAO’S ABORIGINAL STRATEGY**

LAO undertook an approach to seek input and feedback that uses an Action Research / participatory model. The process thus far has involved participation of Aboriginal people, Aboriginal service agencies, political organizations, LAO area office and clinic staff, private bar lawyers who accept legal aid work, federal and provincial governments. There was a multi-cultural<sup>i</sup> as well as a multi-disciplinary approach taken which included soliciting the views of those both within and outside of any LAO staff or advisory mechanisms. Contacts were made with various Aboriginal communities, and networks were established to contribute to the next phase of addressing appropriate responses to the problems that have been uncovered.

This model of approach looks beyond simply issuing a report of recommendations, it also focuses on laying groundwork for the development of future needs assessment and relationship making to improve services for Aboriginal people. Rather than a one-time information gathering process, it is LAO’s goal to put into place systems, connections and relationships that will generate information and an advisory mechanism on an ongoing basis—specific to the service needs of Aboriginal people and communities.

### **Quantitative Research**

Often quantitative research, such as statistics, is the driving force behind assessing what issues exist and what course of action should be taken based on the available quantitative research. This type of research has formed part of the approach that LAO is taking to developing the Aboriginal Strategy—but it is not the sole approach, in fact a greater emphasis has been put onto a qualitative research approach.

### **Qualitative Research**

In an attempt to seek specifics and the detail about the kinds of problems faced by an Aboriginal client or community, LAO in developing a Strategy canvasses to a number of stakeholders to identify issues that may be characterised as legal problems. The objective of including multiple participants is to find possible legal remedies. This type of research seeks to understand the barriers that may exist between those communities and LAO services whether they are physical, linguistic, or cultural barriers. It asks open-ended questions, allowing for the unexpected, and looks for patterns. It does not set out a hypothesis to be confirmed or rejected. It seeks the voice of the client community.

If the objective is to understand legal needs in order to develop innovative solutions, the discussion process needs to look beyond numbers. This involves understanding the legal nature of the problem, the impact on the client or community, barriers to resolution, and how the LAO can most effectively address the service issues.

LAO is taking an approach that involves qualitative research because it has a legal obligation to “determine the legal needs of low income individuals and disadvantaged communities in Ontario”<sup>ii</sup>. LAO also has an obligation to deliver legal aid services according to those needs.

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<sup>i</sup> The use of the word “multi-cultural” here also includes reference to the multiple and differing Aboriginal cultures as there are many Nations of Aboriginal people within Ontario.

<sup>ii</sup> s. 12 (2) (a) of the *Legal Aid Services Act* itself points in the direction of the community based model by imposing an obligation on the corporation to “determine the legal needs of low-income individuals and of disadvantaged communities in Ontario.” Furthermore, the statutory composition of the LAO Board of directors is also an indication of this approach, with the requirement to ensure the Board has knowledge of both “the special legal needs of and the provision of legal services to low-income individuals and disadvantaged communities” and “the social and economic circumstances” associated with those legal needs. (*LASA* s. 5 (4)&( 5))



**APPENDIX "C"**  
**PLACES VISITED**

◆ **18 CITIES OR TOWNS, INCLUDING:**

Belleville  
Brantford  
Cornwall  
Hamilton  
Kapuskasling  
Kenora,  
Kirkland Lake  
Kingston  
London  
Moosonee  
North Bay  
Ottawa  
Pickle Lake  
Sarnia  
Sioux Lookout  
Sudbury  
Thunder Bay  
Timmins

\*And numerous meetings in Toronto

◆ **12 ABORIGINAL COMMUNITIES, INCLUDING:**

Aamjiwnaang First Nation  
Akwesasne First Nation  
Aroland First Nation  
Manitoulin Island,  
Moose Cree First Nation,  
Mohawks of the Bay of Quinte (Tyendinaga)  
Nippissing First Nation  
Rama Mnjikaning First Nation  
Stoney & Kettle Point First Nation,  
Six Nations First Nation,  
Walpole Island First Nation

\*Please note, that travel to any First Nation or any Aboriginal Community does not indicate that LAO met with the government bodies of the above communities. LAO has met various service providers, individuals and in some circumstances the governmental bodies or representatives of these communities.



## **APPENDIX “D” CONSULTATION SUMMARY**

“REPORT ON CONSULTATION MEETINGS WITH LEGAL AID ONTARIO  
ABORIGINAL CLIENTS AND APPLICANTS FOR LEGAL AID”  
Prepared by: CAMPBELL RESEARCH ASSOCIATES

### **CONSULTATION SUMMARY**

The results of the consultation meetings and interviews point to a number of areas which LAO may want to consider for improvement or changes. The following sections have organized these under the general topics covered in the consultations.

#### **4.1 Increasing Awareness of Legal Aid**

Most Aboriginal LAO clients and applicants were aware of the possibility of obtaining legal assistance from LAO due to the experience of friends and family who had previous involvement with the justice system. Some had been directed to legal aid by duty counsel, a private lawyer, Aboriginal courtworkers or a community legal worker. Specific findings and suggestions offered were:

- Advertise in a prominent location (i.e. a billboard) with the phone number of the legal aid office and a toll-free number for legal advice;
- There is a lack of awareness of Legal Aid in the Aboriginal community.

#### **4.2 Education about Legal Aid**

Although participants in the consultations had “heard” about legal aid from family and friends or were advised by persons working in the justice system about applying for legal aid, they had very little understanding of what legal aid could do for them. They were unaware of the criteria for eligibility, the process for obtaining a lawyer, what to do if denied legal aid, the availability of other resources and the process of the justice system in general. As a result, some suggestions were put forward:

- Provide more information about what legal aid is, how to get it, the eligibility criteria, what it can and cannot do, etc.;
- Provide additional information through pamphlets, fliers placed in service agencies in the First Nation communities regarding not only legal aid but other local legal resources available.
- Have more information readily available and widely distributed regarding other potential legal resources.
- provide more information about how Legal Aid works, what it can do for people;

- need to explain to younger people how the whole process works - Legal Aid and the courts - need a school program that explains this is what you do, this is where you go for help;
- people in the community are confused about their rights, the legal process, what happens when they are arrested etc. - need more information about what Legal Aid is and what it does at the community level. Also need this to be culturally appropriate to be better understood.
- Legal terminology, especially in court, makes the justice and legal system difficult for many Aboriginal people to understand.

### 4.3 Service Counter Supports

Most of the individuals consulted reported a positive experience with the process of applying for legal aid and receiving a response to their application. Generally this was due to the attitude of and assistance provided by the legal aid staff or community legal worker who was the first “face” of legal aid they encountered. However, in some cases, this “face” was not seen to be very welcoming and, in other cases, additional information and communication would have been very helpful. The following were mentioned by participants as ways in which the legal aid office could facilitate the process.

- Make it possible to fax the necessary information documents to the legal aid office in order to save time and money;
- Provide more information regarding lawyers to approach who will take the kind of case presented by the individual.
- Establish an appointment system for being seen at the legal aid office to make an application. To protect people’s privacy perhaps have applicants for criminal cases come in the morning and for family cases in the afternoon.
- Provide an on-line application system.
- Have legal aid staff provide more explanation about why an individual has been denied a legal aid certificate.
- provide more information in the community about what Legal Aid does and who it provides services to;
- improve communications with person who is applying for legal aid, don't leave them feeling "up-in-the-air";
- speed up the approval process;
- speed up the approval process - it can take more than three weeks;
- make it possible to apply for Legal Aid on a website, especially for remote communities;
- fully explain what the financial criteria are for receiving Legal Aid;
- There was little if no familiarity with the existence of and services offered by the local community legal clinic.
- Issue of lost identification and obtaining official identification (particular issue of spelling of names) compounds legal problems for some Aboriginal people.
- Make it clear that the person has to repay the full amount in a co-pay arrangement.

- Legal Aid asks for household income, yet the income of a spouse, common-law partner, girlfriend/boyfriend living in the same house, it was felt was their business and confidential. Why is this information needed? How is this information used to determine whether the applicant can afford to pay for a lawyer?
- change the notification of denial letter around so that the reason for denial is stated up front.
- people in the remote communities think that their lawyer doesn't show up for court for them when it is only a remand. When a lawyer is not sent for those court dates due to cost, it should be communicated to the client.

#### **4.4 Supports for Aboriginal Clients and Applicants**

Aboriginal legal aid clients and applicants identified some specific ways in which LAO could better address the needs of Aboriginal people.

- Have an office or, at least, office hours in First Nation and Aboriginal communities so that people do not have to travel to urban centres (apparently this had been tried before in some locations but was not always successful);
- translate Legal Aid application forms into First Nation languages;
- translate Legal Aid information and educational materials into First Nation languages;
- employ someone at the Legal Aid office who is Aboriginal and speaks First Nation languages (both for translation and cultural context purposes).
- people in the community are confused about their rights, the legal process, what happens when they are arrested etc. - need more information about what Legal Aid is and what it does at the community level. Also need this to be culturally appropriate to be better understood.
- Issue of lost identification and obtaining official identification (particular issue of spelling of names) compounds legal problems for some Aboriginal people.
- 

#### **4.5 Other Issues Raised**

A variety of other issues were raised by the focus group participants and interview respondents. Many of these require more far-reaching changes on the part of LAO and some require additional funds. There are also some suggestions with respect to areas outside of LAO's direct control, i.e., with respect to the conduct of lawyers.

- Raise the fees so that people can obtain a higher quality of representation.
- offer Legal Aid support of some kind to those whose charges will not likely result in them facing time in jail, but still need some legal assistance;
- recognize that Aboriginal family income often supports large extended families and that total dollar expenditures cannot always be documented;
- accept people who have minor charges, or first time charge over people who have a lot of charges.

- Two persons (both denied legal aid) said that duty counsel “gave me five minutes” to explain their situation and was not very friendly or helpful. Duty counsel sent one individual to apply for legal aid but counsel “should have known” that the person would not be eligible due to not looking at jail time.
- Lawyers in London will not accept cases being heard in another jurisdiction due to the fact that LAO will not reimburse their travel costs. Individuals residing in the First Nation outside London often go to other nearby First Nations and may incur charges outside of their home community.
- Legal aid doesn’t cover cases involving child support.
- sometimes people only need a little bit of assistance, should be something for them too.
- make the lawyers work for the clients;

#### **4.6 Summary**

Findings from the focus group consultations indicate that there is a fair level of awareness of Legal Aid Ontario services among the Aboriginal population consulted. At the same time, it is also clear that there is considerable misinformation about the range of services, application criteria (acceptance and denial of applications), processing timeframes and communications with clients once their application is approved. It appears that once potential clients find their way to Legal Aid Ontario (or NALSC in its’ area of jurisdiction) the application-to-acceptance/denial process generally moves smoothly. Area office and clinic staff play crucial roles in assisting clients with general questions and information, with the application process and with legal system/process information. Nearly everyone consulted through the focus group process was satisfied, and in a great many cases highly satisfied, with LAO throughout the process with the service they received from LAO/clinic staff. For those clients who were accepted/ approved for certificates, the most significant complaints were with respect to their relationship with the specific lawyers who had been retained although many respondents also reported receiving very good help from the lawyers assisting them.

## **APPENDIX “E” QUESTIONS ASKED TO PARTICIPANTS**

The policy counsel who travelled and conducted the meetings were flexible to hearing, discussing and recording via note taking any other questions raised by participants or any concerns that were not captured in the questions below.

- Are there specific areas of law or types of legal aid services not currently offered by LAO that should be offered?
- How can LAO make legal aid services more accessible for Aboriginal people?
- How can LAO co-ordinate legal aid services to improve these services for Aboriginal people?
- How should LAO work with governments and with Aboriginal people and organizations?
- Are Aboriginal restorative or alternative justice programs “legal aid services?” What role should LAO play in promoting and supporting Aboriginal restorative justice programs?
- What role can and should LAO play in the development and/or support of traditional justice systems?
- Should LAO support and fund Aboriginal legal aid services corporations to provide a range of legal aid services to Aboriginal people? Which types of legal aid should be provided by Aboriginal legal aid services corporations? How should these corporations be governed, and by whom?
- What are the regional differences in the needs of Aboriginal people? What are the regional differences in the ways in which these needs can be met?
- How should LAO evaluate the outcomes of an Aboriginal strategy?

Additional Questions asked to Aboriginal lawyers, judges and law students included:

- Why are there so few Aboriginal Lawyers accepting certificates for Aboriginal clients?
- What needs to be done to entice more Aboriginal Lawyers to accept certificates, or include LAO services as part of there practice?
- What can LAO do to encourage Law Students to consider practice in this area?





## APPENDIX “F” INFORMATION ON GENERAL SERVICES PROVIDED

Legal Aid Ontario (“LAO”) is an independent agency with its own Board of Directors and is accountable to the government of Ontario for the expenditure of public funds. LAO provides legal aid services throughout Ontario to low-income people. The bulk of the legal aid services that LAO provides fall into three main categories.

LAO provides certificates to people so that they can hire a lawyer of their choice. A certificate is a promise that LAO will pay a lawyer for certain legal services provided to a client. Most clients do not have to pay anything to get legal aid but there are some that are asked to make monthly payments or contributions to LAO towards the cost of their legal aid services. There are 51 offices in Ontario where a person can apply for a certificate. Some legal aid offices will also accept applications for a certificate by fax or phone. In 2006/07 LAO spent \$169 million on certificates, including:

- Certificates for people charged with serious criminal matters
- Certificates for people involved in a family dispute such as custody and access to children and/or spousal and child support
- Certificates for women trying to escape a situation of domestic abuse
- Certificates for parents whose children are the subject of child protection proceedings
- Certificates for immigrants and refugees trying to get status in Canada

The second main type of service that LAO provides is duty counsel in every court in Ontario, including fly-in courts in remote communities. Duty counsel are lawyers who work out of court and help people who come to court without their own lawyer. In 2006/07 LAO spent \$34 million on duty counsel services.

Finally, LAO transfers about \$61 million yearly to 80 community legal clinics and 6 law student clinics that provide legal aid services directly to people using staff lawyers, community legal workers and law students. These clinics provide a wide range of legal aid services depending upon local community needs. Most clinics provide services to the people who live in a particular area, but there are also some clinics whose mandate is to serve a larger group of people, such as people with disabilities. For the most part, the types of legal matters that community clinics help people with include:

- Disputes about people's entitlement to disability support or social assistance
- Assisting tenants to enforce their rights
- Assisting people with claims for compensation from the Criminal Injuries Compensation Board
- Assisting people injured at work with worker's compensation claims
- Assisting people to enforce their human rights under the ***Human Rights Code***
- Assisting people claiming Canada Pension Plan benefits based on a disability



**APPENDIX “G”**  
**EXCERPTS FROM LEGAL AID ONTARIO**  
**DUTY COUNSEL’S MANUAL, APRIL 2007**

**Services for Aboriginal People**  
**General**

When working with Aboriginal people, duty counsel should have an understanding of family and criminal legislation that specifically relates to Aboriginal people. Duty counsel must recognise that the unique languages, cultural and social backgrounds of their Aboriginal clients can have great relevance to the outcome and to the clients’ understanding of the court proceeding. Finally, it is important that duty counsel are familiar with services to assist Aboriginal people that are available in local courts and communities.

The demeanour of the Aboriginal individual in court is culturally unique in that it is considered rude to look people in the eye. The accused may laugh at inappropriate times because of nervousness. However, this is not considered disrespectful. Often the accused may feel that pleading “not guilty” is a lie. Victims and accused are not assertive.

Clients in remote fly-in communities face challenges in obtaining lawyers, child representation and long delays in proceedings. An adjournment may be as long as three months. Duty counsel must deal with long dockets and the failure of clients to attend at court because they are out of the community, frequently for medical purposes or traditional hunting days.

The [Indian Act](#) empowers Aboriginal communities to pass by-laws on such issues as possession and consumption of alcohol. Duty counsel should be aware of the relevant legislation that deals with matters such as interim release and sentencing options on Band By-Law offences ([Provincial Offences Act](#)).

Particularly in northern Ontario courts, duty counsel must have knowledge of specialised offences relating to Aboriginal law such as Band By-law breaches and the *Gladue* (see discussion below) and *Corbiere* decisions. Duty counsel must also be familiar with firearms and FAC legislation and hunting, game and fish regulations. Duty counsel must be sensitive to the fact that many Aboriginal people rely on hunting, trapping and fishing for their livelihood or survival. In firearms cases, if rifles are seized or prohibited, the accused loses his whole livelihood and food source. Duty counsel must recognise the severe impact that a firearms prohibition may have on an Aboriginal client.

To many Aboriginal people, the Canadian justice system is an alien process, operated by strangers in a fashion quite unlike the traditional Aboriginal concepts of justice and

healing. To a person from a remote fly-in community whose first language is Ojibway or Cree, being in custody can be a frightening and bewildering experience.

Conversely, an Aboriginal person from an urban centre may have built up deep resentment toward our justice system, and may feel it has put his or her life in a “revolving door” pattern of being constantly in and out of custody. In either situation, duty counsel must be familiar with the agencies and services that can assist them and their clients in effectively managing their case.

One of the most important services duty counsel should be aware of is the availability of court interpreters. Particularly in the North, many Aboriginal persons speak little or no English or French. Duty counsel must be satisfied that the client can communicate with them in private and can understand English or French well enough to follow an often confusing court proceeding, where various strangers will be speaking, often in rapid succession. If in doubt, duty counsel should have the court interpreter available, and should ensure the client comprehends at all steps of the proceeding.

Many communities across Ontario have a branch of the Ontario Federation of Indian Fellowship Centres that provides a wide range of services to Aboriginal people in the court system. Depending on the demand, some Fellowship Centres employ Aboriginal court workers. They are important liaisons between lawyers and clients, their families and communities. The Centres may also provide addiction and mental health counsellors who attend at jails and where they may, unlike in some correctional facilities, provide counselling for persons on remand. They can also be important resources for accessing counselling and treatment facilities for persons on release.

Most Aboriginal communities take an active interest in assisting band members who are going through the court process. Many have developed justice tribunals and have implemented restorative justice techniques to try to divert many criminal charges back to the community level. It is important that duty counsel know which communities offer these programs, and the relevant contacts. Further, many courts in Ontario place heavy emphasis on input from Aboriginal communities on such issues as sentencing and interim release. Duty counsel should, where appropriate, work with Chief and Council or community legal workers to obtain this kind of input.

## **The Gladue Court**

On April 23, 1999, the Supreme Court of Canada released its decision in *R v. Gladue* [1999] 1 S.C.R. 688. The decision provided the Supreme Court’s first interpretation of s. 718.2 (e) of the [Criminal Code](#). The section, which was part of a comprehensive series of amendments made in 1996 to the sentencing law in Canada, says:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

The court stated that these amendments represented a change in the way judges should approach the sentencing process (para. 33). The court noted that Canada, compared to other countries, showed an over- reliance on incarceration as a response to criminal activity. This was particularly the case with respect to Aboriginal people.

If over- reliance upon incarceration is a problem in the general population, it is of much greater concern in the sentencing of Aboriginal people. After canvassing numerous studies, commissions and reports on Aboriginal people and the criminal justice system, the court concluded:

These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of Aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out Aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process. (para 64).

In response to these concerns a group of judges, academics and community agencies met for a year to discuss how to meaningfully develop a response to the *Gladue* decision at the Old City Hall Courts in Toronto. The result was the creation of the *Gladue* (Aboriginal Persons) Court. The objective of the court is:

To establish this criminal trial court's response to *Gladue* and s.718.2 (e) of the [Criminal Code](#) and the consideration of the unique circumstances of Aboriginal accused and Aboriginal offenders.

The court is available to all Aboriginal persons - Indian (status and non-status), Métis and Inuit who wish to identify themselves as such. While the court is open to all accused Aboriginal persons, no person is required to have his or her charges heard by the court. Aboriginal individuals are free to have their matters dealt with in any court. However once a matter is heard in the *Gladue* (Aboriginal Persons) Court, it will normally continue in that court until it is resolved. The court sits Tuesday and Friday.

The *Gladue* (Aboriginal Persons) Court performs no different activities than any other court at Old City Hall, although it offers all of them in one court: bail hearings, bail variations (with consent of the Crown attorney), remands, diversions and sentencing.

What distinguishes the court is that those working in it have a particular understanding and expertise of the range of programs and services available to Aboriginal people in Toronto. This range of expertise allows the court to craft decisions in keeping with the directive of the Supreme Court in *Gladue* because the information required to develop such responses is put before the court.

The *Gladue* (Aboriginal Persons) Court redistributes existing resources. The court has dedicated judges, crowns, duty counsel, and court clerks. Aboriginal Legal Services of Toronto (ALST) provides an Aboriginal court worker who works closely with the court. A new position created in response to the development of the court is the Aboriginal Caseworker - an employee of ALST who is available to defence counsel to assist in the preparation of sentencing reports to the court. In addition, a new position of Aboriginal After-care Worker has been added. In order to assist all who are involved with the court, ALST has agreed to co-ordinate training and education sessions on relevant issues. These sessions are also available to members of the defence bar.

The Supreme Court of Canada decision in *R v. Gladue* stands as an important reminder for duty counsel to constantly be considering the sentencing provisions of the [Criminal Code](#) relating to Aboriginal offenders as described at s. 718.2(e). The disproportionate number of Aboriginal persons in correctional facilities has forced the courts to consider the broad range of factors that bring many Aboriginal people before the courts, and to respond with more creative sentencing options. Due to the success of the Aboriginal Court at Old City Hall, Gladue Courts have been established at College Park Court in Toronto and North York Court at 1000 Finch. For more information on the *Gladue* (Aboriginal Persons) Court please contact Jonathan Rudin, Program Director, Aboriginal Legal Services of Toronto - 416-408-3967 ext. 226.

### **Duty counsel in the far north**

Nishnawbe-Aski Legal Services Corporation (NALSC) serves 48 Aboriginal communities of Nishnawbe-Aski Nation (NAN). These communities are located in remote northern Ontario and most are accessible only by air. Chartered aircraft transport duty counsel, often with the crown and (rarely) with the judge. There are frequent cancellations due to weather or community crises.

In the 48 NAN communities, courts sit, on average, 359 times a year, including criminal court and advance days, provincial offences court and family court. Very few lawyers take family law cases because of difficulties such as serving documents, enforcing orders and a low tariff rate. New time limits present difficulties for the children and parents involved in child welfare cases.

Some communities have a minimum of three courts per year and some as many as two courts per month. Fly-in courts are held on average of three to four times a year. Duty counsel are often the first and only lawyer contacts for NAN members.

Advance days permit duty counsel to be present in the community for a full day prior to the court day to meet with clients, review crown disclosure and confer with the crown. Duty counsel often stay overnight in the community and see clients in the evening.

Duty counsel depend on community legal workers for translation, communicating with clients and understanding community dynamics. Duty counsel need to explain basic legal rights and procedures because of the low level of understanding of the judicial system in these remote communities compared to urban areas.

Cross-cultural training is provided by NALSC to assist duty counsel to be culturally sensitive (e.g.: impact of residential school, importance of elders, etc.). Duty counsel must be knowledgeable and informed of emerging Aboriginal justice systems such as restorative justice and community accountability conferencing.

Advice lawyers attend clinic days and public legal education sessions to educate NAN members on legal issues and to provide the opportunity of one-on-one consultation to clients.

Duty counsel face unique issues relating to the availability of police, peacekeepers, relationships within the community amongst families, band council, chief and regular band members.





**APPENDIX “H”**  
**LAO SERVICES AND PROJECTS FOR ABORIGINAL PEOPLE**

**Nishnawbe-Aski Legal Services Corporation (NALSC)**

Core funding of Nishnawbe-Aski Legal Services Corporation to provide a comprehensive range of legal aid services to members of NAN.

NALSC is a multi-service agency that was incorporated in 1990 through the collaborative efforts of the Ontario Legal Aid Plan (now LAO), the MAG, the DOJ and the Nishnawbe-Aski Nation (“NAN”). Although both Ontario and Canada provide the NALSC with programmatic funding, LAO provides core funding in the amount of approximately \$1.6 million annually. A Board of Directors appointed by the NAN governs the NALSC however a Memorandum of Understanding with LAO also determines its scope of activities.

LAO also shares its proportionate cost of charter planes used by defence counsel, Crowns, community legal workers and parole officials to get to remote fly in courts.

The NAN is comprised of 48 small and remote First Nation communities that cover approximately 2/3 of Ontario. With a head office in Thunder Bay, the NALSC is both an area office and direct service staff office. The area office is responsible for processing applications for certificate legal aid services from members of the NAN and also for administering a comprehensive Duty Counsel program for fly-in court communities. The area office has a part-time area director and three staff members that focus on area office related work. The staff office, which has an Executive Director, offers a range of direct services, including:

- A community legal worker program that employs 10 paralegals who assist members of remote fly in communities to prepare for fly-in court dates, advise them of their rights and assists them to complete applications for legal aid.
- A restorative justice or Aboriginal justice program that employs a co-ordinator lawyer and three paralegal workers to divert Aboriginal criminal accused from the mainstream justice system to a more traditional form of Aboriginal justice system (i.e. healing circle).
- A public legal education program
- The Talking Together pilot project, which employs a co-ordinator lawyer and five paralegals. The Ministry of Children and Youth Services (“MCYS”) as taken over funding as a program.

## **Aboriginal Legal Services of Toronto (ALST)**

LAO provides core funding for of the Aboriginal Legal Services Toronto Clinic. The speciality clinic's services include summary advice, public legal education, community organising and representation.

ALST is a Legal Clinic and additionally provides non-clinic services through a separate non-profit corporation, Aboriginal Legal Services Inc.<sup>i</sup>, that has functioned largely as one entity in harmony with the clinic.<sup>ii</sup> ALST services Aboriginal people primarily in the Toronto area. As part of the core funding, LAO funds three lawyers, a Community Legal Worker and an executive assistant. ALST currently has 32 employees and receives program specific funding from the federal government, Department of Justice ("DOJ"), Minister of the Attorney General ("MAG"), and the Ministry of Child and youth Services ("MCYS"). ALST also supports it services through fundraising efforts.

In terms of direct legal services to individuals ALST serves Aboriginal people in Toronto<sup>iii</sup> in a variety of areas including:

- Housing problems and tenant rights
- Ontario Works and Ontario Disability Support Plan
- *Indian Act* matters- status recognition under the Indian Act.
- Canada Pension Disability applications
- Employment Insurance and Employment Standards
- Police Complaints
- Criminal Injuries Compensation
- Provincial Offences under *LLA*
- Human Rights
- Referrals to lawyers on other matters including criminal and family law

In addition to these areas of practice, ALST also operates a number of programs designed to meet the unique legal needs of Aboriginal people, including:

- The Aboriginal Courtworker Program, which is a provincial program funded by MAG. Aboriginal Courtworkers explain legal rights and obligations to their clients. They assist in securing legal counsel, finding interpreters if they are needed, assist with pre-sentence reports, bail hearings, and referrals. ALST administers the Aboriginal Courtworkers in the Toronto area courts.
- The Gladue Caseworker Program. This program is currently co-funded by MAG and LAO. ALST have three Gladue Caseworkers - who write reports, commonly referred to as "Gladue Reports" at the request of defence counsel, the Crown Attorney or the judge, on the life circumstances of an Aboriginal offender. These reports also contain recommendations that the court can consider in sentencing in light of the circumstances of the offender. Gladue Reports can be done for Aboriginal offenders in any court in Toronto as well as for Aboriginal offenders in the Hamilton and Brantford area. ASLT also has two Gladue Aftercare Workers, one is funded by LAO and the other is funded by MAG. Additionally there is a Gladue Liaison position funded by Miziwe Biik.

- ALST currently conducts sentencing appeals on cases where the Gladue principles have not been applied. These appeals are heard at the Ontario Court of Appeal. In each case that ALST has acted on, the court has reduced the sentence of the offender after having proper Gladue submissions provided. A number of the sentencing appeals that ALST has conducted are referrals from northern Ontario.
- Through funding from the DOJ and MAG, the Criminal Community Council offers diversion programs for Aboriginal individuals, adult and youth - who live in Toronto. The project takes Aboriginal offenders out of the criminal justice system and brings them before members of the Aboriginal community. The members of the Council are men and women who represent a cross-section of Toronto's Aboriginal community. The focus of the Community Council is to develop a plan by consensus that will allow individuals to take responsibility for his/her actions, address the root causes of the problem, and reintegrate him/her into the community in a positive way.
- There is also a Family Community Council, which is funded by MCYS. This process deals with child welfare matters through a pre-apprehension and post-apprehension process.
- ALST has made it a priority to have their Clinic lawyers initiate or intervene in important cases involving the rights and interests of Aboriginal people. ALST has intervened in cases before the Supreme Court of Canada, the Federal Court of Canada, the Ontario Court of Appeal, and the British Columbia Court of Appeal. The issues and facts raised in these cases are often of provincial or national relevance. Some of the important cases ALST has been involved in include:
  - *Corbiere v. The Queen*                      -                      *R v. B.W.P.*
  - *R v. Gladue:*                                      -                      *R v. Powley*
  - *R v. Sauve*    -                      *R v. Williams*
  - *R. v. Golden*
- LAO funded ALST Clinic lawyers represent the families of the deceased or any groups with an interest in the outcome of the issues in question at inquests. As with test cases, the issues and facts at issue in these inquests are not limited to Toronto. Inquests with ALST participation have included:
  - *Fobister Inquest.*                                      -                      *Kitchkeesic Inquest.*
  - *Jamieson Inquest.*                                      -                      *King Inquest.*
  - *Ladouceur Inquest.*                                      -                      *Mitten Inquest.*
  - *Teigesser Inquest:*
- In addition to Coroners Inquests, ALST has been a party at three Public Inquiries: The Ipperwash Inquiry, Inquiry Into Paediatric Forensic Pathology (Goudge Inquiry) and the Frank Paul Inquiry in British Columbia.

## **Improving Services: Local Aboriginal Planning Meetings**

LAO has also sponsored two Aboriginal Local Services Planning initiatives. The first such initiative was in North Bay/Nipissing First Nation (July 2004) and the second was in Sarnia (January 2006). The Nipissing First Nation Meeting in July 2004 was attended by LAO's CEO, the VP of Client Legal Services, several local Chiefs, as well as representatives from the local Friendship Centres and other agencies that serve Aboriginal clients.

The purpose of the meetings was to explore how legal aid services can be improved to better respond to the unique needs of Aboriginal people and build stronger relationships between local legal aid staff and Aboriginal community leaders.

The goals of these initiatives included promoting increased awareness among local Aboriginal people of legal aid and complementary services. The desired outcomes included more referrals and co-ordination between agencies, leading to improved, more seamless service to Aboriginal clients and a greater awareness among service providers of the issues facing this group of clients.

The centrepiece of both initiatives was a meeting attended by local social service agencies, Aboriginal community groups and leaders, local area directors, staff Duty Counsel and senior management of LAO. Some of the issues raised at these meetings included:

- A demand for representation to defend against hunting and fishing charges brought against Aboriginal people that are allegedly a breach of their treaty and constitutional rights
- The need for more outreach and public legal education for Aboriginal communities
- The need for legal aid staff to come out to reserve and remote communities to take applications for legal aid, or to accept applications over the phone
- The need to liaise more closely with band staff
- Cultural sensitivity training for legal aid staff
- Not enough lawyers to represent people in child protection matters, particularly on an emergency basis

Some of the actions that were taken by LAO as a result of these meetings include:

- Area directors, clinic lawyers and Duty Counsel going out to remote reserve communities to provide public education sessions on legal aid coverage and legal rights
- Increased availability and awareness among clients of the option to submit applications over the phone (collect calls)
- Increased communication between LAO and Aboriginal agencies
- Cultural sensitivity training for legal aid staff
- In-take for legal aid certificate applications in the First Nation Communities as a result of the Sarnia Meetings

## **Supporting Innovation**

In 1999 the LAO Board established a fund to be used to improve legal aid or related services to Aboriginal clients. More recently some of the funded projects between 2004, until April 2008 include:

- (a) An OFIFC administered “Aboriginal Community Justice Project”
- (b) An ALST administered “Gladue Caseworker Pilot”
- (c) An NALSC project called “Talking Together”
- (d) ALST- Fetal Alcohol Spectrum Disorder Information Distribution

### **(a) OFIFC – Aboriginal Community Justice Program**

Highlights:

- The program facilitates diversion of Aboriginal adult and youth offenders from the mainstream criminal justice system into community-based sentencing circles.
- Between November 1999 and March 2002 the funders provided funding to support assessments being conducted in 19 communities to determine the need for and capacity to deliver community based criminal diversion programs.
- Beginning in March 2003 the program moved from research to development and implementation of criminal diversion projects. In January 2002 the former CEO of LAO committed to continue to fund the program for implementation for three years (i.e. from April 2003 to March 2005).
- In March of 2005 LAO renewed it's commitment to the program support this program by providing it with “seed money” so that it could prove itself over a three-year period.
- The program seeks to divert Aboriginal people from the criminal justice system to a more traditional form of Aboriginal justice system (i.e. healing circle). This program also receives funding from MAG and the federal DOJ.
- On February 13, 2006, the LAO Project Funding Committee committed to funding the program for the 2006/07iv.
- Funding from LAO, MAG and DOJ was provided in 2007/2008 to the OFIFC for this project.

#### **The Success of the OFIFC Program**

The program is in its fourth year of implementation. It has faced significant challenges including high staff turnover, the need to build capacity within the communities it serves, and difficulty persuading Crowns to divert matters. However, over the past two years, the program's performance has significantly improved. In 2004/2005 there were 92 diversions. The number of diversions increased significantly to 177 in 2005/06. In the period between April 2005 and August 2006, the program diverted 271 people. In the 2007/2008 167 people were diverted. Additionally:

- The programs successfully promote access to justice for Aboriginal people in a way that services tied to the mainstream justice system arguably cannot.
- Considering the potential cost avoidance — in the form of certificates saved, as a result of diversion — it is worth investing time and energy into further supporting such programs.
- The issue of whether a criminal diversion program can and should be a core legal aid service can be considered as part of the strategic planning process.

**(b) ALST -Gladue Caseworker Program**

The goal of this program is to promote recognition by judges and Crowns of the unique life circumstances of Aboriginal offenders, the historic and systemic oppression they have faced, and to recommend sentencing options.

As discussed above, LAO contributes to the funding of the Gladue Caseworker Program. In October 2001, the Gladue (Aboriginal Peoples) Court opened at the Old City Hall Court in Toronto. Gladue Courts were subsequently established at Toronto's 1000 Finch and College Park Courts. Gladue courts were created to provide more rehabilitative and restorative aspects of sentencing. Aboriginal individuals are free to have their matters dealt with in any court.

The Gladue Courts offer a range of programs and services available specifically to Aboriginal people. These Courts accept guilty pleas, sentence offenders and conduct bail hearings.

In 2004 LAO began funding ALST to retain two more *Gladue* Caseworkers. One worker provides services to courts in the GTA other than Old City Hall i.e. Scarborough, College Park, North York and Etobicoke. The other worker provides services in the Hamilton and Brantford area. When possible the Brantford worker also extends her reach to London.

Discussion and co-operation between ALST, MAG and LAO is on-going to establish continuing funding and operation of this pilot.

**(c) Nishnawbe-Aski Legal Services Corporation -“Talking Together”**

“Talking Together” uses Aboriginal healing circles to prevent the removal of Aboriginal children from their communities by child protection agencies by attempting to find solutions to the underlying problems that have led to the children being at risk. From 2004-2007 LAO provided the “Talking Together” pilot project “seed” money. As a result of the pilot’s success, funding has been taken over completely by MCYS.

**(d) ALST- Fetal Alcohol Spectrum Disorder Information Distribution**

In the 2006/2007 fiscal year LAO funded distribution of over 2,200 copies of a CD-ROM about Fetal Alcohol Spectrum Disorder, through ALST on behalf of the FASD Ontario Justice Committee, to lawyers who provide criminal defence services to legal aid clients.

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<sup>i</sup> Aboriginal Legal Services Inc. is a corporation with charitable status.

<sup>ii</sup> Jonathan Rudin, "Legal Needs of Aboriginal People in Urban Areas and Southern Reserves", a background Paper for Legal Aid Ontario, John D McCamus et al., *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*, vol.2, (Ontario, August 1997) page 454.

<sup>iii</sup> For more information and details on services provided by ALST visit their website at <http://www.aboriginallegal.ca/>

<sup>iv</sup> Commitment was for a maximum of \$197,866 for the fiscal year (the same amount as was committed in 2005/06).





**APPENDIX “I”  
PAST AND PRESENT ABORIGINAL ISSUES  
ADVISORY COMMITTEE MEMBERS**

**Membership, 2002-2004**

- Sylvia Maracle, Chair and LAO Board member, Toronto
- Kimberley Murray, lawyer, Executive Director, Aboriginal Legal Services of Toronto
- Jeffrey Hewitt, lawyer, Toronto
- Chief Phil Maness, Chippewas of Sarnia, leader of community justice project
- Joseph Morrison, Justice of the Peace, active in public legal education, Kenora
- Debra Houston, Native Courtworker, North Bay Indian Friendship Centre, North Bay
- Chester Langille, Alternative Justice Program Developer, Ontario Federation of Indian Friendship Centres, Toronto
- Brian David, Director of Justice Services, Mohawk Council of Akwesasne, St. Regis; or Louise Thompson, Justice Coordinator
- Cliff Summers, Executive Director, Odawa Native Friendship Centre, Ottawa
- Elder Vern Harper, former Counsellor, Aboriginal Legal Services of Toronto, Toronto
- Frank McKay, Executive Director, Nishnawbe-Aski Legal Services Corporation, Thunder Bay

**Membership, 2004-2006**

- Sylvia Maracle, Chair and LAO Board member, Toronto
- Kimberley Murray, lawyer, Executive Director, Aboriginal Legal Services of Toronto
- Debra Houston, Native Courtworker, North Bay Indian Friendship Centre, North Bay
- Brian David, Director of Justice Services, Mohawk Council of Akwesasne, St. Regis
- Jeffrey Hewitt, lawyer, General Counsel, Rama Mnjikaning First Nation, IBA President
- Evelyn Baxter Robinson, Executive Director, Nishnawbe-Aski Legal Services, Thunder Bay
- Brenda Small, Dean, Negahneewin College of Indigenous Studies, Confederation College, Thunder Bay
- Sherry Lewis, Executive Director, Native Women’s Association of Canada, Ottawa

## **Membership, 2006-2008**

- Sylvia Maracle, Chair and LAO Board member, Toronto
- Kimberley Murray, lawyer, Executive Director, Aboriginal Legal Services of Toronto
- Brian David, Director of Justice Services, Mohawk Council of Akwesasne, St. Regis
- Evelyn Baxter, Executive Director, Nishnawbe-Aski Legal Services, Thunder Bay
- Brenda Small, Dean, Negahneewin College of Indigenous Studies, Confederation College, Thunder Bay
- Sherry Lewis, Executive Director, Native Women's Association of Canada, Ottawa
- Catherine Mathias McDonald, lawyer, North Bay
- Michael McGuire, President, Ontario Métis Aboriginal Association, Sault Ste. Marie
- Loretta Loon, York University student, Toronto. Former LAO Application Assessment Officer and former Office Manager of Keewaytinok Native Legal Service Clinic in Moosonee