

**ONTARIO COURT OF JUSTICE AND
MINISTRY OF THE ATTORNEY GENERAL
JOINT FLY-IN COURT WORKING GROUP**

**REPORT ON
FLY-IN COURT OPERATIONS
(AUGUST 2013)**

August 23, 2013

The Honourable Annemarie E. Bonkalo
Chief Justice
Ontario Court of Justice
One Queen Street East
Toronto, Ontario M5C 2W5

Lynne Wagner
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Toronto, Ontario M7A 2S9

Dear Chief Justice Bonkalo and Ms. Wagner:

Enclosed please find the report and recommendations of the Ontario Court of Justice and the Ministry of the Attorney General Joint Fly-In Court Working Group regarding the operations of the Ontario Court of Justice criminal and family fly-in courts held in First Nations communities in the Northwest and Northeast Regions of Ontario. The recommendations are summarized at Appendix A.

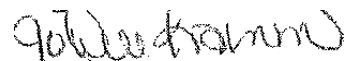
This report provides a general overview of the fly-in communities and courts, as well as a discussion of the issues and recommendations relating to the following ten categories:

1. Modernizing criminal proceedings	6. Transportation, scheduling and cancellations
2. Family and child protection proceedings	7. Base court realignment: Summer Beaver and Webequie
3. <i>Gladue</i> information	8. Band by-law prosecutions
4. Consent releases and bail hearings	9. Technology
5. Facilities, security and equipment	10. Savings

We look forward to the Ontario Court of Justice and the Ministry of the Attorney General, along with the First Nations fly-in communities and those who participate in the fly-in courts, working together to address these priority issues and recommendations.



Regional Senior Justice Marc Bode
Ontario Court of Justice
(Working Group Co-Chair)



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TABLE OF CONTENTS

	Page
A. ACRONYMS	1
B. INTRODUCTION	2
C. FLY-IN COURTS OVERVIEW	5
D. DISCUSSION AND RECOMMENDATIONS	6
1. Modernizing Criminal Proceedings	6
(a) Video conference advance days	6
(b) Designation of counsel	9
(c) Dedicated YCJA days	10
2. Family and Child Protection Proceedings	10
(a) Family mediation and information services	10
(b) Legal advice	11
(c) Court services and forms	11
(d) Video and telephone conferencing	13
(e) Child protection	14
3. Gladue Information	15
4. Consent Releases and Bail Hearings	18
5. Facilities, Security and Equipment	21
(a) Facilities	21
i. Kashechewan	23
(b) Security	23
(c) Equipment	24
i. Portable laptops and printers	24
ii. Portable privacy dividers and witness screens	25
6. Transportation, Scheduling and Cancellations	25
(a) Transportation	25
(b) Scheduling	26
(c) Cancellations	27
7. Base Court Realignment: Summer Beaver and Webequie	29
8. Band By-law Prosecutions	30
9. Technology	31
10. Savings	32
E. APPENDICES	33

A. ACRONYMS

CLA	Criminal Lawyers' Association
CSD	Court Services Division, Ministry of the Attorney General
CLD	Criminal Law Division, Ministry of the Attorney General
LAO	Legal Aid Ontario
MAG	Ministry of the Attorney General
MCSCS	Ministry of Community Safety and Correctional Services
NAN	Nishnawbe Aski Nation
NAN Legal	Nishnawbe Aski Nation Legal Services Corporation
NAPS	Nishnawbe Aski Police Services
OCJ	Ontario Court of Justice
OCL	Office of the Children's Lawyer
ONWA	Ontario Native Women's Association
OPP	Ontario Provincial Police
V/WAP	Victim/Witness Assistance Program, Ministry of the Attorney General

B. INTRODUCTION

When conducting a review of services similar to that which the OCJ and MAG Joint Fly-In Court Working Group (“the Working Group”) embarked upon, it is useful to first spend some time reflecting on the history of these services.

Forty-five years ago, there was no regular fly-in court system in Ontario. Connections between the fly-in communities with the rest of Ontario were much more tenuous than today. Most of these communities were much smaller. Most did not have landing strips and were accessible only by float or ski-plane. The present winter road system did not exist. There was no Internet or satellite television, and telephones were rare.

Some of the serious social and economic challenges that now affect some of the fly-in communities were not as prevalent 45 years ago, or had less of an impact on these communities. Some communities were dry, both notionally and actually. Drug addiction in these communities was virtually unknown. Unlike today, traditional harvesting pursuits such as fur trapping and commercial fishing provided meaningful economic activity for many families.

Forty-five years ago the provincial justice system played a very small role in these communities. Few had a regular police presence. Only the most serious cases attracted outside police attention. Less serious offences were resolved or forgiven at the community level without formal criminal charges. When someone was charged with a serious offence in the community, it was very likely that all aspects of the case would be dealt with in a different community hundreds of kilometers to the south.

As the police presence in the remote north expanded, more criminal charges were laid in fly-in communities. This in turn resulted in residents of remote communities having to make court appearances at court sittings in the larger centres to the south.

The current OCJ fly-in court system grew out of discussions between leaders of the First Nations communities, the Attorney General’s Office, the police and the judiciary. These leaders recognized that if residents of the remote northern communities were to

enjoy reasonable access to the provincial justice system, then the courts would have to come to the communities. They also recognized the importance of the justice system being sensitive to the realities of life in these communities and respecting the culture of the community.

It is fair to say that many First Nations leaders in the north saw the introduction of the fly-in courts as an experiment. Initially, there were relatively few communities where fly-in courts were held. Over a period of roughly 20 years, the number of communities where fly-in courts were held expanded. For approximately the last 25 years now, the OCJ has been sitting regularly in the 29 fly-in communities that were the subject of the Working Group's attention.

For a variety of reasons, different customs and practices have developed for the delivery of court services in each of these fly-in communities. For example, in some communities the role of elders in sentencing processes has been well developed for many years. In other communities the role of elders has waxed or waned depending on the community leadership at the time.

In the spring of 2012, the OCJ and MAG created this Working Group. The Working Group was charged with looking at how the OCJ court system functions in each of the fly-in court communities of the far north. The Working Group was asked to identify operational issues that need to be addressed, to identify best practices used in some communities that could be more broadly applied, and to generate ideas and recommendations that could, if implemented, improve the operation of these courts and the related justice service provided to these communities.

The mandate of the Working Group was established by its terms of reference. Those terms of reference were jointly drafted by the OCJ and CSD, and were adopted by the Working Group at its first meeting. The terms of reference are found at Appendix B to this report.

Initially, the Working Group had about 12 members. Within a few months its membership doubled in size: This increase in size enhanced rather than compromised

the Working Group's effectiveness. The Working Group's membership included the Deputy Grand Chief of NAN responsible for justice issues, representatives of NAN Legal, MAG officials, OCJ judiciary and staff, the defence and family bar, and the police services that work in these communities (NAPS and the OPP). The Working Group membership is set out in Appendix C.

Members of the Working Group also received input from several northern band councils, from representatives of ONWA and from other First Nations leaders. The Working Group shared its draft recommendations and a draft of this report with LAO, MCSCS and the OCL.

The Working Group held two full day in-person meetings and a number of teleconference meetings. Very early in its mandate the Working Group identified specific topic areas to focus on, and created eight sub-groups to study these topic areas. The membership of each sub-committee is set out in Appendix D.

As the mandate of the Working Group suggests, its work focused on the operation of the OCJ court system in fly-in remote communities. At the same time, the Working Group was very aware of the serious systemic problems that affect these First Nations communities. These systemic problems present broader policy issues for the justice system to grapple with as it tries to provide relevant and appropriate justice services for these communities. These broader policy issues were touched upon by the Honourable Frank Iacobucci in his *Report on First Nations Representation on Ontario Juries*. These broader policy issues will be the focus of a Justice Summit sponsored by NAN that will take place in November 2013. NAN has extended an invitation to the OCJ and MAG to participate in this justice summit.

The Working Group believes that all of the recommendations contained in this report can and should be implemented relatively quickly.

C. FLY-IN COURTS OVERVIEW

The OCJ presides over criminal and family court hearings in 29 First Nations fly-in communities. There are 24 fly-in courts in the Northwest Region and 5 in the Northeast Region. Appendix E1 lists the fly-in courts and Appendix E2 is a map prepared by MAG that shows the location of these courts. Appendix F is a chart prepared for the Working Group that summarizes information regarding the fly-in criminal court communities and courts, including the venue where court is held in each community, the number of court days, the police force serving that community, and flight costs. Appendix G sets out a disposition summary of all the adult and youth criminal cases heard in the fly-in courts in 2011 and 2012. (Very few family or child protection cases are heard in the fly-in courts.)

The OCJ has the statutory jurisdiction to schedule court sittings.¹ The regional senior judges for the Northwest and Northeast Regions are responsible for scheduling the fly-in courts. The OCJ presently sits between two and forty times per year in each fly-in court community.

On a typical fly-in court day, the “court party” (which includes the judge, the Crown prosecutor, defence or child protection counsel, family counsel, court staff, V/WAP staff, and the police) fly into the community in the morning and fly out at the end of the day. Additionally, NAN Legal employs community legal workers in several fly-in communities, who are available to assist the accused persons. For each fly-in court day, at least three chartered aircraft will fly into the community. There is a plane chartered by the Crown’s Office and NAN Legal to transport Crown and defence counsel, a police plane, and a plane charted by MAG for the judge and court staff.²

The same OCJ judge generally presides in all the courts held in a particular fly-in community. Often, there are also assigned Crown prosecutors and court staff. This permits the judiciary and MAG staff to develop a relationship with the First Nations band Chief and others in the community. In some fly-in courts, a band representative or elders may provide input during the court proceedings.

¹ Courts of Justice Act, R.S.O. 1990, c.C.43, s. 36.

² Transportation for OCL counsel is discussed at page 26.

D. DISCUSSION AND RECOMMENDATIONS

1. MODERNIZING CRIMINAL PROCEEDINGS

(a) Video conference advance days

The commitment of time, energy and resources by community leaders and residents, as well as all the justice system participants, that is required to hold court in a fly-in community is significant. Those who make these commitments have every right to expect that during a scheduled fly-in court session, the court will focus on those matters that require judicial intervention. To meet these expectations, it is important to maximize the time spent during each fly-in court sitting day on the core business of the court, which is handling trials, accepting guilty pleas, receiving sentencing submissions and making appropriate decisions.

To achieve this goal, the Criminal Court Modernization Sub-committee looked at alternative ways for a judge or the accused person to attend court when in-person appearances are not critical (e.g., set dates and adjournments), and to encourage counsel to speak with each other, as well as clients and witnesses, before the scheduled fly-in court date. These measures should ensure that court time on fly-in court days is devoted to proceeding with trials, guilty pleas and sentencings in a more timely fashion.

In most fly-in communities, advance days are held the day before the scheduled court date. On these advance days, counsel, accused persons, witnesses and the police should have discussions relating to their cases and deal with those aspects of their cases that do not require judicial participation. When both Crown and duty counsel³ attend in the community on an advance day, a great deal can be accomplished provided they consult regularly throughout the day. What is accomplished on the advance day can substantially reduce the amount of time that would otherwise be needed during the subsequent sitting day. Legal aid issues are addressed, accused persons retain defence counsel, diversion plans are developed, witness availability is ascertained, and the Crown and defence counsel can meet to discuss potential resolution of the charges.

³ LAO currently funds duty counsel and certificate counsel to attend advance days.

During advance day discussions, it often becomes clear that a remand will be necessary before the case can be dealt with in a concrete and final fashion.

The Working Group strongly endorses the continued use of advance days in fly-in communities. It goes further and recommends that, on a pilot basis, adjournments and the setting of trial dates should be dealt with on the advance day by video conference connection to a judge or justice of the peace in the base court location.⁴ This approach should maximize the meaningful use of the court sitting time on the actual fly-in court date.

The Criminal Court Modernization Sub-committee reviewed the possibility of video remands and set dates on advance days with Crown and defence counsel, NAN Legal, and the police. Defense counsel, NAN Legal, and the police indicated support for piloting the use of video for remands and set dates in a few locations. Crown counsel expressed significant concern that attending to video remands and set dates on advance days could (i) reduce the time available to the Crown to meet with witnesses (who are often vulnerable persons); and (ii) result in unnecessary or meaningless appearances. Crown counsel, however, agreed to test the proposal on a pilot basis, on the understanding that the pilot would be for one year and would be evaluated by all the affected parties at the end of the term to assess the effectiveness of video remands and set dates on advance days.

The Criminal Court Modernization Sub-committee identified Sandy Lake and Fort Hope as possible locations for a pilot in the Northwest Region. Consultation with these communities is required before any steps are taken. Discussion is also required with the Crown's Office, defence counsel and community leaders regarding a Northeast Region venue.

⁴ Section 669.1(2) of the *Criminal Code* states: Any court, judge or provincial court judge having jurisdiction to try an accused or a defendant, or any clerk or other proper officer of the court, or in the case of an offence punishable on summary conviction, any justice, may, at any time before or after the plea of the accused or defendant is taken, adjourn the proceedings.

The Criminal Court Modernization Sub-committee, and the Working Group, identified several logistical issues to be addressed when setting up the video advance day pilots:

- The video equipment should be located in a neutral venue in the community (e.g., band office, community centre) where Crown and defence counsel can not only jointly conduct the advance day video appearance to the base court, but can also hold private discussions with witnesses and clients, as well as each other, throughout the day.
- On the advance day, the necessary video technology must be available solely for the use of the court, the Crown and defence counsel. The use of this technology on advance days cannot be compromised by other community needs.
- There should be consultation with the parties about the best time to schedule the video proceeding into the base court. The Crown noted that 1 p.m. might work well in some communities and would fit into the base court schedules.
- The base court could be presided over by either a judge or a justice of the peace, who, wherever possible, would preside in the next day's fly-in court.
- Accused persons should be summoned to the advance day as a way to ensure that the advance day is used effectively. A bench warrant with discretion returnable the next day could be issued if the accused person does not appear on the advance day.
- The NAN Legal Community Legal Worker should assist on the advance day.
- A Crown should attend the advance day to ensure that these advance day discussions take place.
- Simple remands on advance days may also be dealt with by telephone to a base court clerk assigned to receive and record such remand calls. The Crown and defence counsel must both participate in such remand calls.

RECOMMENDATION:

The OCJ should pilot video conferencing on advance days to deal with routine court appearances. The pilot should be for one year and should be evaluated by those involved in it before any decision is made regarding continuation or expansion. Telephone remands may be used for simple remands on advance days.

The expectation is that both the Crown and duty counsel would be in the community on advance days, would identify the cases that can be appropriately dealt with by video conference appearance and then would link up by video conference with a judicial

officer sitting in a base court location who would deal with remands and set dates. Pilot locations, venues within the community to hold a video conferencing remand court and start times for that video conferencing remand court should be determined in consultation with the First Nations communities, the Crown and defence counsel, NAN Legal, and the police. To reduce delays, the pilot video conference technology should be supplemented by an audio conferencing back-up system.

LEAD: OCJ with CSD/CLD/NAN Legal/CLA

(b) Designation of counsel

Requiring an accused to appear in person at every scheduled appearance is unnecessary. For people who may be out of the community on a fly-in court date, it may also pose a serious logistical problem. First Nations people can be very mobile. They often need to leave their communities to attend school, to obtain basic services such as medical or dental care or to take care of relatives. The cost in both dollars and time for an accused person to return to the community for a non-critical court appearance can be very significant.

Section 650.01(1) of the *Criminal Code* should be used more often to reduce the number of court appearances that accused persons must make. This provision permits accused persons to “appoint counsel to represent the accused for any proceedings under this Act by filing a designation with the court.” The defence bar who appear in the fly-in courts do not always obtain and file designations of counsel. They should be encouraged to do so as much as possible. LAO and NAN Legal should identify this as a best practice to be used by members of their panels in most cases.

RECOMMENDATION:

In recognition of the difficulties for many accused persons to attend all court appearances and that an accused person’s personal attendance is often not necessary, in order to reduce the number of warrants issued for failing to appear, and to encourage base court appearances where appropriate, defence counsel should file a designation of counsel upon being retained whenever possible.

LEAD: NAN Legal/CLA

(c) Dedicated YCJA days

The limited sitting time available on most fly-in court days makes it very difficult to provide the separate youth proceedings mandated by section 3(1)(b) of the *Youth Criminal Justice Act*⁵. For the past year and a half, the court sitting in Fort Hope has addressed this problem by designating a number of sitting days per year as dedicated YCJA days. This has proven to be very effective and useful for everyone involved in youth cases.

The Working Group agrees that it would be worthwhile to test a designated youth court in another community, and that Pikangikum would be an ideal location in the Northwest Region. There are two youth intervention workers in Pikangikum who would be available to assist the court and the parties on a designated youth day. Appendix H contains statistics for youth cases for 2011 and 2012: The total number of youth case appearances in Pikangikum was 572 in 2011 and 405 in 2012, which is significantly higher than any other fly-in community.

RECOMMENDATION:

The OCJ should pilot YCJA dedicated days within existing court schedules in the Northwest Region, recognizing that urgent adult cases may be scheduled on these days, if required.

LEAD: OCJ with CSD/CLD/NAN Legal/CLA

2. FAMILY AND CHILD PROTECTION PROCEEDINGS

(a) Family mediation and information services

The OCJ has statutory authority to hear family cases relating to child custody and access, spousal and child support, and child protection. The family legislative framework is supplemented by non-judicial processes provided through MAG. In 2011, MAG expanded its family justice services to all base court locations that hear family law cases. These expanded services include family mediation, an information and referral coordinator to assist with community referrals, and a Mandatory Information Program that family law litigants are required to attend. MAG's service expansion, however, did

⁵ "... the criminal justice system for young persons must be separate from that of adults..."

not take account of the particular needs of fly-in communities. MAG acknowledges this gap, and recognizes that there is significant interest for alternative resolution processes for family law matters arising in fly-in communities.

RECOMMENDATION:

Provide MAG's mediation service and information services in family proceedings by telephone or video conferencing in fly-in court communities.

LEAD: MAG in consultation with fly-in communities

(b) Legal advice

LAO provides a telephone summary legal advice service in the areas of family law and child protection. Staff responding to these calls assess the caller's circumstances and determine what the most appropriate service for them is at that time, whether it be a referral to another service like a community legal clinic, telephone summary legal advice, referral to duty counsel in the courts or granting a certificate for them to retain a private lawyer. For residents of fly-in communities, however, speaking to legal counsel beyond getting summary legal advice remains problematic.

RECOMMENDATION:

LAO should develop a simplified process that permits residents of fly-in communities to speak to legal counsel about family law or child protection matters to obtain timely independent legal advice beyond summary advice where required, using available technology including the telephone.

LEAD: LAO with NAN Legal

(c) Court services and forms

Family law is a civil proceeding that requires complex paperwork. Parties must prepare the court documents, have them commissioned and then serve and file everything in order to start court proceedings or participate in them. MAG has family law self-help information and publications on its website and family court forms are available on-line. There is also a Forms Assistant program that provides on-line assistance for completing the family law court forms. However, not everyone living in the fly-in communities has access to a computer or the Internet, or possesses the requisite level of computer skills to use the forms program.

In some locations, court staff bring blank court forms to the fly-in court communities. Parties can then complete the forms, and the court staff return the completed forms to the base court for filing. This approach is not available in all communities. As well, community members require legal advice before completing this paperwork, and not all the lawyers who accompany the court party are able to provide advice in this area.

In addition to the practical barriers raised by the court forms, persons living in fly-in communities who want to access the family justice system may not be able to do so because of difficulties in obtaining information about the court processes or participating in the case management process.

RECOMMENDATION:

MAG should continue to take steps to permit people living in fly-in communities greater practical access to family law and child protection services. This includes the following:

- *Establish a simple method for persons without Internet access or ability to obtain court forms on a timely basis.*
- *Establish a simple method to allow persons in fly-in communities to file copies of all court documents (e.g., fax, scan, or other electronic means).*
- *Review with the Family Law Rules Committee how to address barriers imposed by personal service requirements on persons in fly-in communities, including permitting e-service.*
- *Ensure persons in fly-in communities are informed in a timely and consistent manner of their ability to participate meaningfully in family court processes that are scheduled to take place outside their home community in the base court.*
- *Ensure translation/interpretation services are available for individuals prior to a court process.*
- *Culturally relevant Mandatory Information Programs (MIPs) should be broadly and easily available for the participants, without requiring in-person participation.*
- *In accordance with judicial direction, court staff should be instructed to process cases for case management regardless of MIPs attendance, where MIPs are not easily available.*
- *Review alternative means to swear affidavits, where commissioners of oaths are not located in a remote community.*

LEAD: MAG/NAN Legal/OCJ

(d) Video and telephone conferencing

The main challenge in hearing family and child protection cases in the fly-in courts is that there is not enough time on the fly-in court schedule to address these cases. There are two main concerns resulting from this lack of court time to hear family law cases.

First, most pre-trial steps in child protection cases, which have very short statutory time lines, typically are dealt with in the base court, away from effective participation by the child's parents or others in the community. Second, access to justice for other family law cases, such as child custody and access or child support, can be much delayed.

Video and telephone conferencing can substantially improve the ability of residents of fly-in communities to participate in family and child protection motions and case management conferences. Giving fly-in community residents a real opportunity to participate using this technology will require judges to assign fixed times for these proceedings and for court staff to inform litigants that they can participate in this way. This is already occurring in much of the Northwest Region. The same approach should be piloted in Northeast Region.

Given the limited amount of fly-in court time available, where the parties have counsel and it is appropriate, counsel should schedule motions and case management conferences returnable before the case management judge in the base court, as opposed to a fly-in court sitting. And where a motion or case management conference has been scheduled for a fly-in court hearing date but is not reached, it should be immediately adjourned to a date before the case management judge in the base court. This will ensure that the matter is dealt with sooner than if the motion or conference must wait the next time the court is back in that fly-in community.

RECOMMENDATIONS:

- OCJ judges should assign fixed times for motions and conferences in the case management process to encourage residents of fly-in communities to participate by video or conference call. Court staff should ensure that residents of the remote community, as well as counsel, are informed that they can participate by telephone or video.

LEAD: OCJ and CSD

- *The OCJ should pilot scheduling video conferences at dedicated court times for family and child protection motions and case conferences from a fly-in community to a base court, with the possibility for counsel attending by video or conference call from counsel's own home community.*

LEAD: OCJ

- *Family counsel representing clients living in fly-in communities should be encouraged to make motions and case management conferences returnable before the OCJ case management judge sitting in the related base court location. Their clients should be permitted and encouraged to attend those hearings by telephone or videoconference. This should ensure that family law and child protection motions and conferences are held in a timely fashion. Trial coordinators should schedule these proceedings in the related base court if ordered by the court or if requested by counsel. Court staff should take steps prior to the scheduled court process to ensure that the litigants are able to participate appropriately from the remote location*

Lead: NAN Legal/CSD

- *Motions or case management conferences scheduled for a fly-in court hearing date but not reached, should be adjourned to a date before the OCJ case management judge in the base court that the counsel and litigants can attend by telephone or video.*

LEAD: OCJ/NAN Legal/OCJ/CSD

(e) Child protection

At the present time, most child protection matters in the Northeast Region fly-in communities⁶ are scheduled to proceed on the same day as criminal matters. Whenever there are time constraints, criminal matters, particularly if the accused person is in custody, tend to take priority over child protection matters. This can result in lengthy delay in the child protection proceedings, which often creates additional emotional, financial and other hardships for the child, the family, and the community while the child's status remains unresolved. To address this problem, the Working Group recommends that the OCJ pilot dedicated child protection case conference times where numbers warrant this in the Northeast Region to promote the expeditious resolution of child protection proceedings.

⁶ There are very few child protection proceedings in the Northwest Region. The child welfare agencies responsible for child protection in the Northwest Region fly-in communities use customary care agreements for most child protection matters rather than the court process.

RECOMMENDATION:

Where there are sufficient cases, the OCJ should pilot dedicated case conference times for child protection cases in the Northeast Region.

LEAD: OCJ/MAG/ with Payukotayno: James and Hudson Bay Family Services Family Services /NAN Legal and community band representatives

3. GLADUE INFORMATION

The 1999 Supreme Court of Canada's decision in *R. v. Gladue* emphasized the importance of sentencing judges having information relating to a First Nations accused person's community and individual circumstances as well as sentencing options other than incarceration. Since then, Ontario courts have recognized the importance of having *Gladue* information in bail as well as sentencing hearings involving First Nations accused persons.

Neither the *Gladue* case, nor the more recent appellate decisions commenting on that case, dictate how this *Gladue* information should be provided to the courts. Various ways of collecting and delivering this information to the court have developed.

The more formal “*Gladue report*”, as it has come to be known, is a lengthy and thorough review of the accused person’s circumstances, including systemic factors that may have resulted in the specific accused person being before the court, as well as sentencing options appropriate in light of the accused person’s First Nations heritage and non-custodial alternatives available in the community. These “*Gladue reports*” are prepared by writers whose connections with First Nations communities enable them to obtain the requisite *Gladue* information. There are a very small number of “*Gladue report*” writers in Ontario and almost all of the reports they create are prepared for First Nations accused persons whose cases are dealt with in a major metropolitan center. There are presently no “*Gladue report*” writers available to prepare reports for accused persons residing in any fly-in communities. (NAN Legal recommended that three *Gladue* workers be hired to write “*Gladue reports*” in the NAN territory.)

In the absence of this kind of formal “*Gladue report*”, the court may receive relevant *Gladue* information from defence counsel. LAO authorizes the payment of up to five hours spent to prepare appropriate *Gladue* submissions.

Probation officers also provide *Gladue* information in pre-sentence reports when they are asked to do so by a sentencing judge. These reports can be very valuable if the probation officers have the appropriate training and have relationships with the relevant First Nations communities that allow them to obtain reliable information about the community, the offender, and his or her community supports, as well as what non-custodial options may be available. (NAN Legal noted that it has community legal workers at every fly-in court who can speak to *Gladue* issues, and that probation officers should provide *Gladue* information to the court as a last resort. Additionally, NAN Legal suggested that its community legal workers be invited to any *Gladue* training the MCSCS provides to probation officers.)

Additionally, in appropriate cases, the relevant *Gladue* information can be provided to a judge sitting in a fly-in court community by community leaders, family members, community legal workers and others.

The Working Group agreed that in order to support First Nations justice values, promote restorative justice and foster community based options, *Gladue* information must be considered in all bail and sentencing cases involving First Nations accused persons. Regardless of who provides it, there is an obligation to provide *Gladue* information to the court, and the timely provision of an appropriate level of *Gladue* information needs to be a priority when decisions are made about whether a First Nations accused person from a remote community will remain in custody pending trial and in all sentencing hearings dealt with in the fly-in courts.

The Working Group recognized that accused persons and their communities sometimes have a competing interest in obtaining timely bail or sentencing decisions before the process of gathering all relevant *Gladue* information can be completed. Accused persons in fly-in courts often waive their right to have detailed *Gladue* information

collected and placed before the court because they are detained and do not want to prolong their incarceration by deferring their sentencing or bail hearing for this purpose.

The Working Group's recommendations below attempt to balance these competing needs by recognizing that the *Gladue* information required may vary from individual to individual. The amount of information, the kind of information and how the information is provided must be proportionate and meaningful to the specific circumstances of an individual First Nations accused person and the criminal charge.

Any discussion about applying *Gladue* principles in the fly-in communities would be incomplete without mention of the extremely limited after-care services presently available for First Nations accused persons in remote communities. Even if they have *Gladue* information about the accused person and the community, judges struggle to craft bail and sentencing decisions that reflect true *Gladue* principles where programming or treatment options are unavailable. Much work remains to be done to address the limited resources available in these communities.

RECOMMENDATIONS:

- (a) *The OCJ must be provided with Gladue information in a timely fashion in all bail and sentencing cases involving First Nations accused persons. This information allows judicial officers to apply the law properly, and also supports First Nations justice values, promotes restorative justice and fosters community-based options. Subject to any judicial order in a specific case, Gladue information may be provided to the court in a number of ways, including:*
 - (i) *Counsel, community members, and community legal workers may provide summary Gladue information verbally in appropriate cases (e.g., joint release or sentencing submissions, legislative minimum sentences).*
 - (ii) *Where release is in dispute or custody is a real possibility, a probation officer or community legal worker may provide more detailed or culturally appropriate Gladue information about the individual circumstances of a First Nations person*
 - (iii) *Detailed Gladue information similar to what is found in the more formal "Gladue report" must be available to the court whenever an accused person is at risk of being incarcerated for a lengthy period and in any other case where the presiding judge determines that it is warranted.*

- (b) *MAG, in consultation with the judiciary, First Nations groups and NAN Legal, MCSCS, LAO and the CLA, should review how the more summary Gladue information referred to above could be more effectively collected and provided to the court.*
- (c) *MCSCS should provide, and continue to provide, Gladue specific training to all probation workers who provide pre-sentence reports for First Nations offenders.*
- (d) *When an OCJ judge or justice of the peace determines that further Gladue information is required in a proceeding that arises in a fly-in court community, there must be resources available to ensure this information is provided in a timely fashion.*

LEAD: CLD with OCJ/NAN Legal/CLA/MCSCS

4. CONSENT RELEASES AND BAIL HEARINGS

Many accused persons living in fly-in communities are detained upon arrest and flown out of their communities for a bail hearing. Being detained far from home creates logistical difficulties for an accused person in terms of arranging for witnesses and sureties. This practice of removing a person pending a bail hearing also imposes significant transportation costs on the police (who must pay for the accused person's flight out of the community) and the Crown (who must pay for an accused person's flight back to the community if he or she is released).

The Consent Release and Bail Sub-committee initially focused on how to permit an accused person to have his or her bail proceeding dealt with in the fly-in community, rather than in a base court. The Sub-committee eventually concluded that this could not be achieved under the current legislation. Section 516 (1) of the *Criminal Code* is at the heart of this issue: It requires any remand before or during a bail hearing be “to custody in prison by warrant in Form 19 [emphasis added]”.

Practically, this means that an accused person must be flown out of his or her community if a bail hearing is not concluded on the first day. The Consent Release and Bail Sub-committee discussed the possibility of setting up pilot sites for an accused person to appear at least once by video from his or her community before a base court judicial officer. However, the Sub-committee was told that often those cases that can be resolved by consent releases are already being addressed in the community by

telephone. The remaining bail cases are contested, and so it is extremely unlikely that the parties would be able to proceed at the first bail appearance, or that the bail hearing would finish that day. Inevitably, these accused persons would have to be flown out of the community in any event as a result of the s. 516(1) requirements.

Having come to this conclusion, the Sub-committee agreed that it would be useful to focus on other ways to keep an accused person in the fly-in community pending trial. The police have the discretion to release an accused person on an undertaking where this is appropriate in all the circumstances. The Working Group agreed that this can be an effective option that should be encouraged in order to ensure that an accused person is not flown out unnecessarily for a bail hearing. Another option, which currently is in place in some fly-in communities, is for the police to consult with the Crown regarding release before any decision is made to fly an accused person out of the community for a bail hearing. The Working Group agreed that this bail consultation process serves the accused person and the administration of justice well by reducing unnecessary transportation from and to the fly-in community where the accused person eventually will be released at the base court on a consent release.

The Working Group agreed that where an accused person must be flown out for his or her bail hearing, the added burden of having to get sureties to the base court for a bail hearing imposes a significant hardship. Technology could assist in this regard if arrangements could be made for the surety to appear in front of a justice of the peace presiding in a base court location by video or telephone from the surety's home community.

The Working Group also agreed that the template surety affidavit form can be a barrier that prevents some potential sureties from coming forward. The template surety affidavit form is not mandatory. The Working Group was advised that it is often not used in bail matters for accused persons from fly-in communities in the Northwest Region, but is required in the Northeast Region. It would be helpful if there was judicial education about the various options relating to how surety information can be received.

Last, while the Working Group concluded that at the present time video technology would not assist in keeping accused persons in their community for their bail hearing (because contested fly-in court bail hearings invariably require at least one adjournment and s. 516(1) of the *Criminal Code* requires an accused person to be remanded to a “prison” when a bail hearing is adjourned), the Working Group also recognized that there are significant reasons to ask and answer the questions: (i) could accused persons be safely and appropriately detained temporarily in their home community pending a resolution of their bail hearing; and (ii) if not, what needs to be done, and by whom, to permit this to occur?

The Working Group was not constituted to conduct the appropriate analysis required to address these questions, or recommend or not recommend an amendment to s. 516(1). However, the inability to find a way to conduct bail hearings by video in the community because of s. 516(1) prompted the Working Group to recommend that MAG undertake the appropriate consideration and consultation regarding the possibility of recommending to the federal government an amendment to this legislative provision.

RECOMMENDATIONS:

- (a) *Where appropriate, northern police should exercise their discretion to release the accused person into the fly-in community. Police should consult with the Crown whenever detention is contemplated. northern police services and Crown Offices should review, and adopt if appropriate, a bail consultation process as a best practice to ensure that accused persons are not taken out of the community where the Crown will consent to release.*
- (b) *MAG, NAN Legal and NAPS should work together to develop a protocol for sureties to appear in front of a justice of the peace presiding in a base court location by video or telephone from their home community.*
- (c) *The OCJ should provide education to its judiciary regarding ss. 515(2.2) and (2.3) of the Criminal Code and the various options to receive surety information, which include, but are not limited to, the standard bail surety affidavit form.*
- (d) *MAG and the OCJ should consider the possibility of recommending to the federal government an amendment to s. 516(1) of the Criminal Code to permit an accused person, with his or her consent, to be remanded to somewhere other than “custody in prison” before or during a bail hearing. Such an amendment could potentially allow an accused person to remain in the community for his or her bail hearing. Analysis of this possible recommendation of an amendment would need to consider*

a number of factors, including the limited capacity in communities to hold accused persons in pre-trial custody, as well as the comments expressed in the case law that the investigative process incidental to arrest has terminated once an accused person is taken before a judicial officer.

LEAD: MAG (CLD)/NAN Legal/NAPS/OCJ

5. FACILITIES, SECURITY AND EQUIPMENT

(a) Facilities

Fly-in courts take place in venues provided by the band. MAG has formal facility agreements for fly-in court venues in only nine communities where fly-in courts are held (Armstrong, Attawapiskat, Bearskin Lake, Big Trout Lake, Fort Severn, Moosonee, North Spirit Lake, Peawanuk, and Wunnimun Lake). In the other communities, there are no formal arrangements regarding the venues used for fly-in court purposes. MAG pays communities on a *per diem* basis for use of facilities for court purposes upon receipt of an invoice. It has made such payments to six communities, and has not received invoices from the other communities.

The Working Group agrees that MAG's use of community facilities for court purposes should be subject to consistent and proper financial contractual arrangements with all of the fly-in communities. Regularizing these arrangements by contract would ensure the communities are properly compensated for use of their facilities, and would impose an obligation on the communities to ensure that suitable facilities are consistently available. MAG should take the lead in consulting and preparing the paperwork necessary to regularize these arrangements.

For the same reason, MAG should also look for alternatives to requiring the First Nations to submit an invoice for the use of a facility for fly-in court purposes. One suggestion is a fly-in court sign-off sheet, similar to the sheet that court interpreters sign for payment of their services. A court staff member who attends the fly-in court could have the fly-in court sheet signed, and bring the signed sheet back to the base court where it would provide the basis for payment for use of the fly-in court facility.

The proper administration of justice depends on court proceedings taking place in appropriate and safe facilities that promote decorum, respect and public confidence. The Working Group is well aware that there are limited facilities available for court use in many fly-in communities and that maintenance of the facilities is often a significant challenge. Insufficient heat in the winter, the lack of proper washrooms, and poor cleanliness are some of the concerns expressed by Working Group and Sub-committee members.

The Facilities Sub-committee prepared a report summarizing the current conditions of all the fly-in court venues (Appendix I). Having MAG start to regularly pay for use of these facilities should be of some assistance in terms of facility conditions and upkeep. Additionally, building on the work of the Facilities Sub-committee, CSD has developed a strategy to address the facilities issues in the fly-in courts, including piloting a maintenance and improvement facility plan in two locations to be determined. Attached as Appendix J is the MAG Fly-In Court Facilities Maintenance Strategy.

Of particular and immediate note is that in the fly-in communities serviced by NAPS, NAPS has committed to arrange for the persons who clean the NAPS detachment to clean the court venue prior to a scheduled fly-in court date. CSD will approach the OPP about providing a similar service in the fly-in communities they service.

The Facilities Sub-committee also developed the Fly-In Courts Facilities Considerations chart (Appendix K) as a tool that MAG could use to assess facilities for fly-in court use, as well as to monitor on-going maintenance. The factors listed on the chart were identified by those who work and participate in the fly-in courts as requiring priority attention.

RECOMMENDATION:

MAG should regularize, by contract or other similar arrangement, the use of all fly-in court facilities for advance and court days, and should also look for alternatives to requiring First Nations communities to submit an invoice for the use of a facility for fly-in court purposes. MAG should also take steps to ensure the on-going maintenance of fly-in court facilities.

LEAD: MAG

(i) *Kashechewan*

The Working Group is aware of the acute problems associated with the fly-in court venue in Kashechewan. While there are facility issues with the venues used for many of the fly-in courts, the unheated foyer of the hockey arena that is used in Kashechewan is acknowledged to be of significant concern. However, the reality is that there is no other suitable facility in the community at this time. MAG and the OCJ has looked previously into the possibility of using the health unit building for court sittings, but the restricted access and exit points are unsuitable for court use. The identification of a more suitable site to hold the court sittings in Kashechewan should remain a priority for MAG.

(b) Security

In addition to the physical considerations of the fly-in court venues, the police and MAG should give priority to the safety of those who attend fly-in court proceedings. Lack of minimum security plans and insecure court facilities can make justice system participants (including community members attending court, witnesses, judiciary, MAG staff, and counsel) feel that little has been done to address their basic safety and security needs. Facilities Sub-committee members also noted that people attending court (witnesses, victims, and residents generally) are sometimes not sure where to sit or find themselves seated beside the accused person in a matter in which they are a witness. Having a community resident available to direct people would be very helpful.

The Working Group noted that there have been fly-in court security discussions in some fly-in communities, and such discussions should continue to ensure that proper security plans are in place. By way of example, the OPP provided the Sioux Lookout Court Security Plan (Appendix L).

Transportation of counsel and court staff between the aircraft landing site and the fly-in court venue is another matter to be addressed in any safety planning undertaken in local communities. As part of the Security and Transportation Sub-committee's discussions, NAPS advised that it would provide transportation for the court party in those fly-in communities it serves where there are sufficient police officers in the community. This will be easier in the Northeast Region, where NAPS has more police

officers. The OPP has frequently provided similar transportation services in the fly-in communities it polices.

In most fly-in communities, there are no alternative means available to safely transport the court party to and from the court venue. NAPS and the OPP are not compensated for providing this transportation and there are occasions when police operational needs must take precedence over transporting the court party. CSD recently contacted the airlines to ask that pilots radio NAPS when they are approaching the fly-in community. In some locations, it will be useful to stagger the landing times for the court planes to spread the demand on police vehicles for transportation. In all cases, it would be helpful if NAPS or the OPP received timely notification of the arrivals of the court planes.

NAPS advised the Working Group that its Emergency Response Team officers in Thunder Bay could assist with fly-in court security in the Northwest Region. These officers do not work in the fly-in communities, and would not normally have a witness or investigating officer role to play in the fly-in court proceedings. With the OCJ's permission, these NAPS officers could escort the judiciary on the flight as well as provide court security during the fly-in court proceedings.

RECOMMENDATION:

Police should consult, develop and implement fly-in court security plans as appropriate for local communities (including safe transportation strategies for all participants to and from the court venues).

LEAD: NAPS and OPP

(c) Equipment

(i) Portable laptops and printers

Portable laptops and printers for the exclusive use of court clerks and reporters working in fly-in courts would be very helpful to permit the immediate generation of court documents in the community. MAG advised that there is such portable equipment in Hearst and Kapuskasing in the Northeast Region. (The Working Group recognizes that the power supply in certain fly-in communities may not be able to support additional electronic equipment.)

RECOMMENDATION:

MAG should procure and provide portable laptops and printers for use by court staff at all fly-in court locations.

LEAD: CSD

(ii) Portable privacy dividers and witness screens

As a result of discussions in the Facilities and the Safety and Security Sub-committees, MAG acquired the following for use at the fly-in courts:

- (a) forty-five portable stantions provided to NAPS and the OPP; and
- (b) 8 privacy dividers provided to V/WAP.

Additionally, V/WAP has vulnerable witness screens at its base court locations that are available for use at fly-in courts. The next step is to develop a protocol that addresses where this equipment will be stored, who will set it up, who will transport it, etc.

RECOMMENDATION:

MAG should develop a protocol that addresses where portable privacy dividers and vulnerable witness screens for use at fly-in courts will be stored, who will set it up, who will transport it, etc.

LEAD: CSD/V/WAP

6. TRANSPORTATION, SCHEDULING AND CANCELLATIONS

(a) Transportation

The Transportation Sub-committee reviewed the flight costs associated with all the fly-in courts. These estimated costs are set out in Appendix F. Transportation is the single most significant cost associated with scheduling fly-in court sittings. Shared transportation should become a matter of regular practice where appropriate.

For example, in the Northeast Region, OCL counsel travel to the fly-in courts on a separate plane. The OCL advised that it used to travel to child protection court proceedings in the Northwest and Northeast Regions on either the NAN Legal plane or the judicial and court staff plane. In recent years, OCL counsel have not gone into fly-in communities in the Northwest Region as the child protection agency in this region relies

extensively on customary care agreements rather than court proceedings. In the Northeast Region, the OCL began to charter its own planes a few years ago because it was advised that OCL counsel would no longer be permitted to travel on the NAN Legal plane or the judicial and court staff plane, and also because a change to the plane schedules required OCL counsel to stay extra nights and days in Moosonee in order to catch the plane.

The Working Group also agrees unanimously that police attending a fly-in court for security purposes and with no connection to any case on the court docket should be able to travel on the judicial plane. The OCJ should consult with the local community leaders about this issue before implementing this practice.

RECOMMENDATIONS:

(a) *MAG should increase the shared use of chartered planes where appropriate (e.g., OCL counsel flying on the NAN plane in the Northeast Region, instead of flying on a separate plane.)*

LEAD: CSD/CLD/OCL

(b) *The OCJ should consider whether additional personnel with a role to play in the fly-in court process can share the court plane (e.g., a NAPS officer brought in to provide court security only).*

LEAD: OCJ

(b) Scheduling

The Transportation Sub-committee reviewed the court activity at each fly-in court for the past year, with an eye to how to best meet the demands for court time in the various fly-in court communities. The Sub-committee reached the following preliminary conclusions regarding possible scheduling of court hearings in adjacent communities, and the frequency of certain court sittings:

- i) Combine the following fly-in court sittings in adjacent communities into morning and afternoon courts:
 - a) Bearskin Lake and Sachigo Lake (4 x per year)
 - b) Kasabonika Lake and Wapakeka (3 x per year)
 - c) Keewaywin and North Spirit Lake (4 x per year)
 - d) Kingfisher Lake and Wunnumim Lake (4 x per year)
 - e) Summer Beaver and Webequie (3 x per year)
 - f) Lansdowne House and Ogoki Post (4 x per year)

ii) Reduce fly-in court sittings as follows:

- a) Deer Lake (3 x per year)
- b) Fort Severn (2 x per year)
- c) Muskrat Dam (2 x per year)
- d) Poplar Hill (4 x per year)
- e) Peawanuk (2 x per year)

RECOMMENDATION:

Recognizing that scheduling is a judicial prerogative and the importance of developing efficient court schedules for fly-in communities, the OCJ should:

- *continue to consult with appropriate stakeholders (including the Crowns and NAN Legal);*
- *take into account the previous year's statistics;*
- *consider scheduling morning and afternoon courts in adjacent communities; and*
- *continue to explore telephone and video attendances where an appearance before a judicial officer is not required in person.*

LEAD: OCJ

(c) Cancellations

The Working Group discussed the importance of advance scheduling of fly-in courts. To paraphrase from the Working Group's discussion on this issue, it "creates havoc" and is "a disaster" for fly-in court participants if court dates are established or changed on short notice.

While court scheduling is clearly an exclusive judicial power, the capacity of all the participants in the fly-in court justice system to adjust to last-minute scheduling changes is very limited, and the financial and personal costs associated with last minute changes can be very significant. Fly-in communities provide community facilities for the court's use and need to know when the facility is required for court. Crown Attorneys staff the fly-in courts with trial Crowns and need to know in advance in what communities and when court will be held in order to do so. Defence counsel schedule their other court commitments based on their fly-in court commitments, and vice versa: Other accused persons suffer if their defence counsel cannot attend to them as planned because of a last-minute change in the fly-in court schedule.

There is also much concern regarding the frequency and ease with which court dates are cancelled, often at the very last minute and without sufficient or any notice to all the affected persons. Some cancellations are inevitable given the geography and weather conditions of the fly-in court communities. However, community leaders sometimes cancel court for reasons unrelated to weather or geography. For example, the court facility may be required for a community event, which can range from a kindergarten graduation to a funeral. Cancelling court can have a serious negative impact on accused persons, victims, witnesses and on the administration of justice in the community. The Working Group unanimously agreed that greater efforts are required to ensure the number of court cancellations is kept to a minimum.

The Working Group also agreed that there must be co-ordinated notification to everyone expected to attend court whenever there is a court cancellation. NAN Legal advised the Working Group that the NAN Legal LAO Coordinator could fulfill this role.

RECOMMENDATIONS:

- (a) *Once the OCJ court calendar is set, changes should only be made at the direction of the regional senior judge or the local administrative judge in consultation with the affected persons.*

LEAD: OCJ

- (b) *The OCJ in consultation with MAG, NAN, NAN Legal, the Criminal Lawyers' Association and Band Councils, should develop and adopt a court cancellation policy that respects a community's interest in having a facility available for critical community events, but also recognizes the importance to the community and its members of having scheduled court matters proceed.*

LEAD: OCJ

- (c) *CSD or NAN Legal should appoint a Fly-In Court Transportation Coordinator who is contacted when courts are cancelled and is responsible for notifying all parties of court cancellations.*

LEAD: CSD/NAN Legal

7. BASE COURT REALIGNMENT: SUMMER BEAVER AND WEBEQUIE

At the present time, judicial officers, CSD staff, Crowns and police officers flying into Summer Beaver and Webequie come from a base court location in the district of Kenora. Accused persons who come from Summer Beaver and Webequie and are detained prior to trial are typically housed in detention facilities in the district of Kenora.

The Matawa First Nations Council, which represents both the Summer Beaver and Webequie communities, met with Regional Senior Justice Bode and advised that these two communities have many more connections to Thunder Bay than to Kenora. Realigning the court services provided to these two communities with Thunder Bay as the base court would make it easier for accused persons and their families to organize bail sureties, which could reduce the number of pre-trial detentions. It is also easier for the accused persons from these communities to retain and instruct counsel from Thunder Bay. The Matawa First Nations Council also advised that accused persons from these two communities sometimes enter guilty pleas simply because it is too difficult to arrange for their witnesses to get to a trial in Kenora.

The Criminal Court Modernization Sub-committee reviewed the logistical impact of this proposed base court realignment with the organizations that would be affected. Corrections representatives from the Kenora and the Thunder Bay jails confirmed that they could accommodate this change. The Thunder Bay jail is prepared to house detained accused persons who are from these communities while they await a trial in Thunder Bay. The Kenora and Thunder Bay Crown Offices, as well as NAPS, similarly advised that their organizations could accommodate this change. NAN Legal advised that there are sufficient defence counsel in Thunder Bay to accommodate this change.

RECOMMENDATION:

The OCJ should realign court services for Summer Beaver and Webequie with Thunder Bay, rather than Kenora, beginning in 2014.

LEAD: OCJ: with CSD/CLD/NAN Legal/NAPS/Band Councils

8. BAND BY-LAW PROSECUTIONS

Sections 81 and 85.1 of the *Indian Act* provide that band councils may make by-laws relating to maintaining orderly conduct on a reserve and imposing a penalty for violation of any such by-law. The OCJ currently does not preside over any prosecutions relating to band by-laws in the Northwest Region, and has presided over a minute number of these prosecutions in two communities in the Northeast Region (Attawapiskat and Kashechewan). There have been no by-law prosecutions since 2011.

A few fly-in communities in the Northwest Region have expressed interest in addressing drug trafficking and boot-legging problems through band council by-laws that would initially be subject to a community enforcement and resolution process, but that could be prosecuted in the OCJ where the community resolution process was unsuccessful. The Windigo First Nations Council passed a resolution in July 2012 promoting the development of a process to enforce band by-laws and to seek funding for a prosecutor. The Working Group was advised that this past spring the Windigo First Nations Council received a grant to develop a band by-law enforcement process and hire a prosecutor for the Bearskin Lake First Nation.

The Criminal Court Modernization Sub-committee had several discussions regarding the possibility of dealing with band by-law prosecutions in the fly-in courts. Too many variables and unknowns exist at this time for the Working Group to comment on the viability of such prosecutions. Any proposal regarding band by-law prosecutions should specify who will enforce the band by-laws (i.e. who will lay the charges), and who will prosecute failures to comply (e.g., Crown's Office, police officer, band by- law prosecutor). The Crown's Office expressed strong concern that it currently has insufficient resources to take on this additional work, and that there is serious dispute about who should prosecute these cases and who should try them. Details about the community resolution process have not yet been developed. Thought needs to be given to when, and in what circumstances, matters would move from the local resolution process to a by-law prosecution. Additionally, any such proposal should take into account that band by-laws prosecuted in the OCJ will be subject to scrutiny under the *Canadian Charter of Rights and Freedoms*.

RECOMMENDATION:

Where a community has expressed an interest in passing and prosecuting by-laws, the community should initiate discussions with the Crown, police, and the OCJ to review the viability of by-laws being enforced through court prosecutions in those circumstances where the community based by-law enforcement process has been unsuccessful.

LEAD: NAN

9. TECHNOLOGY

Better and expanded use of technology such as Internet video conferencing and telephone access is critical to ensuring that residents of remote communities have more regular and productive access to the justice system. KNet, an Internet service provider owned and operated by the Keewaytinook Okimakanak Council, provides Internet services in all the fly-in communities. Currently however, MAG does not have an agreement that would allow MAG access to the KNet network to provide video conferencing services. The Working Group has been advised that MAG signed an agreement in June 2013 that provides MAG access to the KNet network. MAG

anticipates it will obtain access to the KNet network shortly in some communities, and eventually across all the fly-in court communities in Ontario.

Under the KNet agreement, KNet will provide the technology, the equipment (including video conferencing equipment and storage) as well as someone to operate the equipment in the fly-in communities. KNet will arrange for the video conference equipment to be available in a venue in the fly-in community that meets the needs of the court and the parties. For example, as mentioned above in relation to the video advance day pilot, the video conference equipment should be located in a place that accommodates Crown and defence counsel meeting with clients and witnesses, as well as meeting with each, and appearing by video in the base court location.

RECOMMENDATION:

MAG should enter into an agreement with KNet to provide residents in fly-in communities greater access to the justice system, through video and Internet services, and specifically to:

- *pilot video advance days in criminal proceedings (Recommendation 1(a));*

- *pilot dedicated/scheduled video appearances for family and child protection motions and case conferences from the fly-in community to a base court (Recommendation 2(d)); and*
- *permit sureties to appear in front of a justice of the peace presiding in a base court location by video or telephone from their home community (Recommendation 4(b)).*

LEAD: MAG/CSD

10. SAVINGS

From the outset, the Working Group was clear that its work was intended to improve access to justice for First Nations persons living in fly-in communities, and that this was not an effort to reduce justice services in these communities. To the extent there are monetary savings achieved by implementing any of these recommendations, the Working Group unanimously and strongly urges MAG to reinvest such moneys in Aboriginal community justice initiatives in fly-in communities. By way of example, enhancing the capacity of those who provide *Gladue* information to the court and supporting restorative justice programs are initiatives that could benefit from any redeployment of fly-in court savings. NAN Legal noted that it should be involved in the identification of any resulting monetary savings, and reinvestment initiatives.

RECOMMENDATION:

MAG should track the implementation of these recommendations to identify any monetary savings, which should be reinvested in enhancing community justice initiatives in fly-in court operations, particularly those that provide Gladue non-custodial sentencing options in fly-in communities.

LEAD: MAG

E. APPENDICES

- (A)** Recommendations
- (B)** Terms of Reference
- (C)** Working Group Membership
- (D)** Sub-committee Membership
- (E)**
 - 1. List of Fly-In Courts
 - 2. Map of Fly-In Courts
- (F)** Fly-In Courts, Communities and Facilities (June 2013)
- (G)** Fly-In Court Criminal Statistics (2011, 2012)
- (H)** Fly-In Youth Court Criminal Statistics (2011, 2012)
- (I)** Fly-In Court Facilities Report (March 2013)
- (J)** MAG Fly-In Court Facilities Maintenance Strategy (July 2013)
- (K)** Fly-In Courts Facilities Considerations (March 2013)
- (L)** Sioux Lookout Court Security Plan (Sept. 2012)

APPENDIX A:
ONTARIO COURT OF JUSTICE AND MINISTRY OF THE ATTORNEY GENERAL
JOINT FLY-IN COURT WORKING GROUP
RECOMMENDATIONS

1. Modernizing Criminal Proceedings

- (a) *Video conference advance days:* The OCJ should pilot video conferencing on advance days to deal with routine court appearances. The pilot should be for one-year and should be evaluated by those involved in it before any decision is made regarding continuation or expansion. Telephone remands may be used for simple remands on advance days.

The expectation is that both the Crown and duty counsel would be in the community on advance days, would identify the cases that can be appropriately dealt with by video conference appearance and then would link up by video conference with a judicial officer sitting in a base court location who would deal with remands and set dates. Pilot locations, venues within the community to hold a video conferencing remand court and start times for that video conferencing remand court should be determined in consultation with the First Nations communities, the Crown and defense counsel, NAN legal, and the police. To reduce delays, the pilot video conference technology should be supplemented by an audio conferencing back-up system.

LEAD: OCJ with CSD/CLD/NAN Legal/CLA

- (b) *Designation of counsel:* In recognition of the difficulties for many accused persons to attend all court appearances and that an accused's personal attendance is often not necessary, in order to reduce the number of warrants issued for failing to appear, and to encourage base court appearances where appropriate, defence counsel should adopt as a best practice the filing of designation of counsel whenever possible.

LEAD: NAN Legal/CLA

- (c) *Dedicated YCJA days:* The OCJ should pilot YCJA dedicated days within existing court schedules in the Northwest Region, recognizing that urgent adult cases may be scheduled on these days if required.

LEAD: OCJ with CSD/CLD/NAN Legal/CLA

2. Family and Child Protection Proceedings

- (a) *Family mediation and information services:* Provide MAG's mediation service and information services in family proceedings by telephone or video conferencing in fly-in court communities.

LEAD: MAG in consultation with fly-in communities

(b) *Legal advice*: LAO should develop a simplified process that permits residents of fly-in communities to speak to legal counsel about family law or child protection matters to obtain timely independent legal advice beyond summary advice where required, using available technology including the telephone.

LEAD: LAO with NAN Legal

(c) *Court services and forms*: MAG should continue to take steps to permit people living in fly-in communities greater practical access to family law and child protection services. This includes the following.

- Establish a simple method for persons without Internet access or ability to obtain court forms on a timely basis.
- Establish a simple method to allow persons in fly-in communities to file copies of all court documents (e.g., fax, scan, or other electronic means).
- Review with the Family Law Rules Committee how to address barriers imposed by personal service requirements on persons in fly-in communities, including permitting e-service.
- Ensure persons in fly-in communities are informed in a timely and consistent manner of their ability to participate meaningfully in family court processes that are scheduled to take place outside their home community in the base court.
- Ensure translation/interpretation services are available for individuals prior to a court process.
- Culturally relevant Mandatory Information Programs (MIPs) should be broadly and easily available for the participants, without requiring in-person participation.
- In accordance with judicial direction, court staff should be instructed to process cases for case management regardless of MIPs attendance, where MIPs are not easily available.
- Review alternative means to swear affidavits, where commissioners of oaths are not located in a remote community.

LEAD: MAG/NAN Legal/OCJ

(d) *Video and telephone conferencing*:

- OCJ judges should assign fixed times for motions and conferences in the case management process to encourage residents of fly-in communities to participate by video or conference call. Court staff should ensure that residents of the remote community, as well as counsel, are informed that they can participate by telephone or video.

LEAD: OCJ and CSD

- The OCJ should pilot scheduling video conferences at dedicated court times for family and child protection motions and case conferences from a fly-in community to a base court, with the possibility for counsel attending by video or conference call from counsel's own home community.

LEAD: OCJ

- Family counsel representing clients living in fly-in communities should be encouraged to make motions and case management conferences returnable before the OCJ case management judge sitting in the related base court location.

Their clients should be permitted and encouraged to attend those hearings by telephone or videoconference. This should ensure that family law and child protection motions and conferences are held in a timely fashion. Trial coordinators should schedule these proceedings in the related base court if ordered by the court or if requested by counsel. Court staff should take steps prior to the scheduled court process to ensure that the litigants are able to participate appropriately from the remote location.

Lead: NAN Legal/CSD

- Motions or case management conferences scheduled for a fly-in court hearing date but not reached, should be adjourned to a date before the OCJ case management judge in the base court that the counsel and litigants can attend by telephone or video.

LEAD: OCJ/NAN Legal/OCJ/CSD

(e) *Child protection:* Where there are sufficient cases, the OCJ should pilot dedicated case conference times for child protection cases in the Northeast Region.

LEAD: OCJ/MAG/ with Payukotayno: James and Hudson Bay Family Services Family Services /NAN Legal and community band representatives

3. *Gladue* Information

- (a) The OCJ must be provided with *Gladue* information in a timely fashion in all bail and sentencing cases involving First Nations accused persons. This information allows judicial officers to apply the law properly, and also supports First Nations justice values, promotes restorative justice and fosters community-based options. Subject to any judicial order in a specific case, this information can be provided in a number of ways, including the following:
 - (i) Counsel, community members, and community legal workers may provide summary *Gladue* information verbally to the Court in appropriate cases (e.g., joint release or sentencing submissions, legislative minimum sentences).
 - (ii) Where release is in dispute or custody is a real possibility, a probation officer or community legal worker may provide more detailed *Gladue* information as required by individual circumstances.¹
 - (iii) Detailed *Gladue* information similar to what is found in a full “*Gladue* report” must be available to the court whenever a First Nations accused person is at risk of being incarcerated for a lengthy period, and in any other case where the presiding judge determines that it is warranted.
- (b) MAG, in consultation with the judiciary, First Nations groups and NAN Legal, MCSCS, LAO and the CLA, should review how the more summary *Gladue* information referred to above could be more effectively collected and provided to the court.

¹ NAN Legal noted that it has community legal workers at every fly-in court who can speak to *Gladue* issues, and that probation officers should provide *Gladue* information to the court as a last resort.

(c) MCSCS should provide, and continue to provide, *Gladue* specific training to all probation workers who provide pre-sentence reports for First Nations offenders.²

(d) When a judge or justice of the peace determines that further *Gladue* information is required in a proceeding that arises in a fly-in court community there must be resources available to ensure this information is provided in a timely fashion.

LEAD: CLD with OCJ/NAN Legal/CLA/MCSCS

4. Consent Releases and Bail Hearings

(a) Where appropriate, northern police should exercise their discretion to release the accused person into the fly-in community. Police should consult with the Crown whenever detention is contemplated. Northern police services and Crown Offices should review, and adopt if appropriate, a bail consultation process as a best practice to ensure that accused persons are not taken out of the community where the Crown will consent to release.

(b) MAG, NAN Legal and NAPS should work together to develop a protocol for sureties to appear in front of a justice of the peace presiding in a base court location by video or telephone from their home community.

(c) The OCJ should provide education to its judiciary regarding ss. 515(2.2) and (2.3) of the *Criminal Code* and the various options to receive surety information, which include, but not limited to, the standard bail surety affidavit form.

(d) MAG and the OCJ should consider the possibility of recommending to the federal government an amendment to s. 516(1) of the *Criminal Code* to permit an accused person, with his or her consent, to be remanded to somewhere other than “custody in prison” before or during a bail hearing. Such an amendment could potentially allow an accused person to remain in the community for his or her bail hearing. Analysis of this possible recommendation of an amendment would need to consider a number of factors including the limited capacity in communities to hold accused persons in pre-trial custody, and the comments expressed in the case law that the investigative process incidental to arrest has terminated once an accused person is taken before a judicial officer.

LEAD: MAG (CLD)/NAN Legal/NAPS/OCJ

5. Facilities, Security and Equipment

(a) *Facilities:* MAG should regularize by contract or other similar arrangement the use of all fly-in court facilities for advance and court days, and should also look for alternatives to requiring First Nations communities to submit an invoice for the use of

² NAN Legal suggested that its community legal workers be invited to any *Gladue* training the MCSCS provides to probation officers.

a facility for fly-in court purposes. MAG should also take steps to ensure the on-going maintenance of fly-in court facilities.

LEAD: MAG

- (b) *Security:* Police should consult, develop and implement fly-in court security plans as appropriate for local communities (including safe transportation strategies for all participants to and from the court venues).

LEAD: NAPS and OPP

- (c) *Equipment:*

- MAG should also develop a protocol that addresses where portable privacy dividers and vulnerable witness screens for use at fly-in courts will be stored, who will set it up, who will transport it, etc.

LEAD: CSD/V/WAP

- MAG should procure and provide portable laptops and printers for use by court staff at all fly-in court locations.

LEAD: CSD

6. Transportation, Scheduling and Cancellations

- (a) *Air transport:*

- MAG should increase the shared use of chartered planes where appropriate (e.g., the OCL flying on the NAN plane in the Northeast Region, instead of flying on a separate plane.)

LEAD: CSD/CLD/OCL

- The OCJ should consider whether additional personnel with a role to play in the fly-in court process can share the court plane (e.g., a NAPS officer brought in to provide court security only).

LEAD: OCJ

- (b) *Scheduling:*

Recognizing that scheduling is a judicial prerogative and the importance of developing efficient court schedules for fly-in communities, the OCJ should:

- continue to consult appropriate stakeholders (including the Crowns and NAN Legal);
- take into account the previous year's statistics;
- consider scheduling morning and afternoon courts in adjacent communities; and
- continue to explore telephone and video attendances where an appearance before a judicial officer is not required in person.

LEAD: OCJ

- (c) *Cancellations:*

- Once the OCJ court calendar is set, changes should only be made at the direction of the regional senior judge or the local administrative judge in consultation with the affected persons.

LEAD: OCJ

- The OCJ in consultation with MAG, NAN, NAN Legal, the Criminal Lawyers' Association and Band Councils, should develop and adopt a court cancellation policy that respects a community's interest in having a facility available for critical community events, but also recognizes the importance to the community and its members of having scheduled court matters proceed.
LEAD: OCJ
- CSD or NAN Legal should appoint a Fly-In Court Transportation Coordinator who is contacted when courts are cancelled and is responsible for notifying all parties of court cancellations.
LEAD: CSD/NAN Legal

7. Base Court Realignment: Summer Beaver and Webequie

The OCJ should realign court services for Summer Beaver and Webequie with Thunder Bay, rather than Kenora, beginning in 2014.

LEAD: OCJ: with CSD/CLD/NAN Legal/NAPS/Band Councils

8. Band By-law Prosecutions

Where a community has expressed an interest in passing and prosecuting by-laws, the community should initiate discussions with the Crown, police, and the OCJ to review the viability of by-laws being enforced through court prosecutions in those circumstances where the community based by-law enforcement process has been unsuccessful.

LEAD: NAN

9. Technology

MAG should enter into an agreement with KNet to provide residents in fly-in communities greater access to the justice system, through video and internet services, and to specifically:

- pilot video advance days in criminal proceedings (Recommendation 1(a));
- pilot dedicated/scheduled video appearances for family and child protection motions and case conferences from the fly-in community to a base court (Recommendation 2(d)); and
- permit sureties to appear in front of a justice of the peace presiding in a base court location by video or telephone from their home community (Recommendation 4(b)).

LEAD: MAG/CSD

10. Savings

MAG should track the implementation of these recommendations to identify any monetary savings, which should be reinvested in enhancing community justice initiatives in fly-in court operations, particularly those that provide *Gladue* non-custodial sentencing options in fly-in communities.

LEAD: MAG