

**IN THE MATTER OF THE INQUIRY INTO PEDIATRIC FORENSIC  
PATHOLOGY IN ONTARIO**

**AND IN THE MATTER OF AN APPLICATION FOR  
STANDING AND FUNDING  
BY ABORIGINAL LEGAL SERVICES OF TORONTO  
AND NISHNAWBE-ASKI NATION**

**AFFIDAVIT OF DEREK CHUM**

I, DEREK CHUM of the City of Toronto, in the Province of Ontario, MAKE OATH  
AND SAY:

1. I am the President of the Board of Directors of Aboriginal Legal Services of Toronto ("ALST") and, as such, have knowledge of the information contained herein.
2. ALST has partnered with the Nishnawbe-Aski Nation (NAN) to seek standing at the Inquiry. As such, this Affidavit should be read in conjunction with the Affidavit of Deputy Grand Chief Alvin Fiddler.

**ABORIGINAL LEGAL SERVICES OF TORONTO ("ALST")**

3. ALST was established in February 1990 and presently encompasses two provincially incorporated, non-profit organizations. ALST is a multi-service legal agency that provides services to the Aboriginal community in Ontario.

ALST recently received, by way of a traditional naming ceremony, its Aboriginal name – “*ikina gwii waabamaa dawiwini*”, meaning “all those who seek the truth”. One of the main objects for which ALST was incorporated is to assist Aboriginal community members exercise control over the justice-related issues and factors that affect them.

Consistent with its mandate, ALST commences proceedings and, where warranted, seeks standing and participation in proceedings before courts and quasi-judicial and administrative tribunals where it is determined that those proceedings will have a significant effect on the Aboriginal community. ALST has worked diligently to protect the rights of the Aboriginal community by addressing laws, policies and practices that have a potential impact on the Aboriginal community.

6. ALST has reviewed the Order-in-Council establishing the Inquiry into Pediatric Forensic Pathology in Ontario, the Rules of Standing and Funding, and the Opening Comments of Commissioner Goudge in relation to the mandate of the Inquiry. After having reviewed the aforementioned documents, ALST is of the view that the systemic issues under review by the Inquiry are issues that impact the Aboriginal community. Recent studies have shown that Aboriginal people are over-represented in the criminal justice system, over-represented as persons accused of committing homicide, over-represented as victims of crime and that the rate of infant and preschooler deaths are 4 to 5 times higher than the average Canadian rate. This disturbing data illustrates why Aboriginal people have an interest in the Inquiry, and the event recommendations that may arise from the Inquiry.

## **ALST's PROGRAMS**

7. ALST is governed by a community-based Board of Directors and it operates the following five main programs: the Courtworker Program, the Gladue (Aboriginal Persons) Court Program, the Community Council Program, the Kaganoodamaagom Program (Victim Rights Program), and the Legal Representation Program.

### **Courtworker Program**

8. ALST's Courtworker Program consists of Aboriginal Criminal, Family and Youth Courtworkers. The Criminal and Youth Courtworkers assist Aboriginal people charged with criminal offences by explaining the court process, providing support and helping them obtain legal aid and legal representation. The Criminal Courtworkers serve approximately 1,200 clients per year. The Family Courtworker assists Aboriginal families involved in child welfare matters and family law issues such as divorce, custody, and support and access matters.

9. Through its Courtworker Program, ALST is well aware of the various systemic problems facing Aboriginal people who have contact with the criminal justice system, including contact with police, crown attorneys, child welfare agencies, legal aid and criminal defence lawyers. ALST's Criminal Courtworkers work with Aboriginal people that have been charged with offences, including manslaughter and murder.

### **The Gladue (Aboriginal Persons) Court Program**

10. The first Gladue (Aboriginal Persons) Court is located at the Old City Hall Courts in Toronto. The Court derives its name from the decision of the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688, in which the Supreme Court set out the parameters of section 718.2(e) of the *Criminal Code* regarding the sentencing of offenders and, in particular, Aboriginal offenders. ALST participated as an intervener before the Supreme Court in *R. v. Gladue* and was subsequently instrumental in the development of the Gladue (Aboriginal Persons) Court, which is the first court of its kind in Canada that deals exclusively with bail and sentencing hearings of Aboriginal people.

11. More recently, ALST assisted with the establishment of two additional Gladue (Aboriginal Persons) Courts, one located at 1000 Finch Court in Toronto, and the other at College Park Court in Toronto.

12. ALST employs three Gladue (Aboriginal Persons) Court Case Workers who prepare reports for Aboriginal persons who are being sentenced. The Case Workers work primarily with clients from the Toronto courts, and in the Hamilton/Brantford area. Reports however, are also prepared on request for any Aboriginal person before a court in Ontario. The Case Workers' reports are designed to provide information on the life circumstances of the offender and, in light of those circumstances, to make recommendations as to possible sentencing options that the court might wish to consider. The reports also provide assistance to the court in responding to the decision of the Supreme Court in *R. v. Gladue* by explaining how systemic factors may have

played a role in bringing the particular offender before the court. The reports can be requested either by defence counsel, by the crown, or by the sentencing judge.

13. Through its Gladue Program, ALST is made aware of the various systemic problems facing Aboriginal people who have contact with the criminal justice system, including contact with police, crown attorneys, judges, legal aid and criminal defence lawyers. The Gladue Case Workers work with Aboriginal people that have been charged with serious offences, including manslaughter.

### **Community Council**

14. The Community Council is a post-charge diversion program for Aboriginal people charged with criminal offences. This program takes Aboriginal adult and youth 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 the Aboriginal community. The focus of the Community Council is to develop a plan by consensus that will allow the offender to take responsibility for his/her actions, address the root causes of the problem and reintegrate him/her into the community in a positive manner.

15. Through the Community Council Program, ALST is aware of the systemic problems that exist in terms of the relationship between members of the Aboriginal community and the police, crown attorneys, defence lawyers and judges.

**Kaganoodamaagom Program -Victim Rights Program**

16. The Kaganoodamaagom Program works with Aboriginal victims of crime. Some of the matters that the Victim Rights Worker assists clients with include applying for criminal injuries compensation, advocating on behalf of victims with police, and crown attorneys, and assisting families that are involved with the Office of the Chief Coroner. The Victim Rights Advocate, along with the ALST lawyers, has assisted several families in making inquiries of the Office of the Chief Coroner in relation to post-mortem reports, toxicology reports and inquests. Through this work, ALST has become very familiar with how police, crown attorneys, and the Office of the Chief Coroner serves, or does not serve, the Aboriginal community. Through this work, ALST has also become familiar with serious systemic issues that exist within the Office of the Chief Coroner. For example, ALST has had more than one case where post-mortem reports contain very serious errors, or where the Coroner's office has refused to conduct post-mortem examinations or toxicology tests in matters that are believed to be suspicious in the view of the Aboriginal community.

**Legal Representation Program**

17. The Legal Representation Program is funded by Legal Aid Ontario and provides free legal advice and representation to low-income Aboriginal people. ALST serves clients in many areas of law including: housing and tenant rights, social assistance and disability benefits, human rights, employment insurance and pensions, police complaints, criminal injuries compensation, provincial offences, and *Indian Act* matters. The legal work of the program is informed by an awareness of Aboriginal traditions, culture, and law.

18. Consistent with ALST's mandate, the Legal Representation Program also participates in law reform activities, community organizing, public legal education and test-case litigation and interventions. ALST has a mandate to be involved in test-case litigation and interventions which are of importance to the Aboriginal community. As such, ALST has been involved in many cases affecting Aboriginal people before the Ontario Courts, the Federal Court of Canada and the Supreme Court of Canada. ALST also seeks standing and participation in proceedings before quasi-judicial and administrative tribunals such as coroner inquests and public inquiries where it is determined that those proceedings will have a significant effect on the Aboriginal community.

19. The Supreme Court of Canada has granted ALST intervener status in a number of cases, based on ALST's interest and particular expertise. ALST was granted intervener status and participated in the hearing of the following cases before the Supreme Court of Canada in which systemic issues affecting Aboriginal peoples were addressed, six of which dealt with systemic issues in the criminal justice system:

- i. *R. v. Williams*, [1998] 1 S.C.R. 1128;
- ii. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203;
- iii. *R. v. Gladue*, [1999] 1 S.C.R. 688;
- iv. *R. v. Wells*, [2000] 1 S.C.R. 207;
- v. *R. v. Golden*, [2001] 3 S.C.R. 679;
- vi. *Sauvé et al. v. Attorney General for Canada*, [2002] 3 S.C.R. 519;
- vii. *R. v. Powley*, [2003] 2 S.C.R. 207;
- viii. *R. v. B.W.P.*, [2006] 1 S.C.R. 941; and
- ix. *Hill v. Hamilton Wentworth Regional Police Services Board et al.*, court file #31227 (decision pending)

20. ALST also participated as an intervener, or as counsel to the accused, in the following cases before Ontario Courts in which the application of sentencing principles in responding to systemic issues, including the over-representation of Aboriginal peoples in the criminal justice system, were addressed:

- i. *R. v. Penasse*, [2002] O.J. No. 4346 (Ont. C.A.);
- ii. *R. v. Dorian*, [2003] O.J. No. 1415 (Ont. Ct. Jus.);
- iii. *R. v. Hamilton et al.*, [2004] 72 O.R. (3d) 1 (Ont. C.A.);
- iv. *R. v. Parenteau* [2007] O.J. No. 1290; 2007 ONCA 255 (Ont. C.A.); and
- v. *R. v. Wilde* [2007] O.J. No. 2342; 2007 ONCA 434 (Ont. C.A.).

21. ALST has also represented families or Aboriginal organizations at the following Ontario Coroner inquests:

- i. Coroner's Inquest into the death of James Jamieson ( held in St. Catherines);
- ii. Coroner's Inquest into the death of Benjamin Mitten (held in Brantford);
- iii. Coroner's Inquest into the death of William Kitchkeesic (held in Armstrong);
- iv. Coroner's Inquest into the death of Martin King (held in Cochenour);
- v. Coroner's Inquest into the death of Joseph Teigesser (held in Toronto);
- vi. Coroner's Inquest into the death of Martine Ladoucer (held in Thunder Bay);
- vii. Coroner's Inquest into the death of Kenneth Coaster (held in Geraldton);
- viii. Coroner's Inquest into the death of Geronimo Fobister (held in Kenora);
- ix. Coroner's Inquest into the death of Harvey Barkman (held in Sudbury);
- x. Coroner's Inquest into the death of Raymond Dubois (held in Thunder Bay);



22. Currently, ALST acts on behalf of nine different families, or organizations, that are dealing with the Office of the Chief Coroner in relation to the death of an Aboriginal person. These matters are being dealt with in various regions of Ontario, including Kenora, Hamilton, Toronto, Kingston, Kaschechewan, and Thunder Bay. As such, ALST has knowledge of the different regional coroner's offices, and police services.

23. ALST most recently participated as a party with standing and funding in both Part 1 and Part 2 of the Ipperwash Inquiry, an Ontario public inquiry that examined a number of systemic issues in responding to Aboriginal land claims and policing Aboriginal protests.

24. During the past 17 years, ALST has worked to convey Aboriginal perspectives in justice-related matters. ALST has conducted cross-cultural training for various audiences, including judges, crown attorneys, lawyers, students, police officers and the general public.

25. ALST has also participated in several consultations relating to the justice system. For example, ALST participated in the following consultations:

- i. Both consultations in relation to the review conducted by the Honourable George W. Adams of reforms to the Special Investigations Unit in Ontario;
- ii. Consultations in 1996 on the legal aid reform conducted by Professor John McCamus;
- iii. Consultations on amendments to the *Police Services Act, 1997*;
- iv. Ontario Human Rights Commission's recent inquiry into racial profiling;
- v. Consultation for Addressing Hate Crimes in Ontario;
- vi. Ombudsman of Ontario Review of the Criminal Injuries Compensation system, 2007;

- vii. Consultations on the *Independent Police Review Act, 2007*;
  - viii. Current consultations on legal aid in Ontario; and
  - ix. Current Ombudsman investigation of the Special Investigation Unit
26. ALST also sits on several advisory committees, for example, ALST participates on the following committees:
- i. Aboriginal Advisory Committee of Legal Aid Ontario;
  - ii. Prison Law Committee of Legal Aid Ontario;
  - iii. Criminal Law Committee of Legal Aid Ontario;
  - iv. Aboriginal Working Group of the Law Society of Upper Canada;
  - v. SIU Director's Resource Committee;
  - vi. Toronto Police Service's Saving Lives Implementation Working Group; and
  - vii. Toronto Police Services Board's Community Safety Advisory Committee.
27. ALST has been involved in the development of best practices and protocols. For example, ALST participated on the development of the following:
- i. Best practices and protocol in relation to the discovery of Aboriginal remains in Ontario;
  - ii. Notification protocol with the SIU regarding Incidents that involve an Aboriginal person or community; and
  - iii. Policy for the provincial correctional services manual on the use of traditional Aboriginal medicine and healers in correctional institutions.
28. ALST recently met with the Deputy Chief Coroner Dr. Porter, the Regional Coroner Dr. Legge, and representatives of NAN, to commence discussions on the possibility of developing protocols with the Office of the Chief Coroner in various areas of concern.

## Summary

29. Through its various programs, and as a result of its litigation, advocacy, law reform and community development initiatives, ALST has developed considerable expertise with respect to Aboriginal peoples and the justice system, including expertise with respect to the existence of systemic issues at all levels of the criminal justice system.

## ALST-NAN COALITION'S INTEREST

30. Given that Aboriginal people have had, and continue to have, contact with the criminal justice system, both as victims and as accused persons, the ALST-NAN Coalition has a broad interest in all of the identified areas of review as set out in the June 18, 2007 Opening Statement by Commissioner Goudge.

31. Without limiting the ALST-NAN Coalition's interest, the following areas identified in paragraph 18 of the Commissioner's June 18, 2007 Opening Statement are of particular concern to the Coalition:

### **a) The development of best practices for pediatric forensic pathology, including issues of training, protocols, and oversight**

32. Given that the Office of the Chief Coroner, police, crown attorneys, and defence lawyers have frequent contact with Aboriginal people, and some of the contact is in relation to matters of pediatric forensic pathology, the wrongful conviction of William Mullin-Johnson being such a case, it is important that an Aboriginal perspective be heard at the Inquiry. Without an Aboriginal perspective, recommendations in relation to best practices, protocols, training and oversight may be ineffective when working with cases that deal with Aboriginal accused,

victims, and communities. The ALST-NAN Coalition, given its experience and expertise, is ideally placed to provide such an Aboriginal perspective.

**b) The interaction between pediatric forensic pathologists, the police, the Coroner's Office, crown attorneys, and others**

33. The interaction and relationship between pathologists, police, the Coroner's office and crown attorneys is an issue of grave concern to the Aboriginal community. Numerous studies, inquiries and cases have found that systemic discrimination exists against Aboriginal people in the justice system. A thorough review of these interactions may assist in addressing what the Supreme Court of Canada has identified as a "crisis" in the criminal justice system, being the over-representation of Aboriginal people within it.

34. The ALST-NAN Coalition, given their individual and combined experience and expertise, are able to assist the Commission in reviewing these interactions, interactions that vary from region to region in Ontario. For example, investigating and prosecuting cases in remote northern Aboriginal communities is different than working in downtown Toronto. An examination of the above noted interactions would not be complete without a full understanding of these differences.

**c) Best practices to avoid tunnel vision during investigations and criminal proceedings involving pediatric forensic pathology**

35. Direct and systemic discrimination against Aboriginal people has led to stereotypes and prejudices against Aboriginal people that have resulted in the perception that Aboriginal people engage in criminal activity. This perception of Aboriginal people has contributed to the tainted

tunnel vision found during investigations and proceedings of and against Aboriginal accused persons. As a result, Aboriginal people, such as Wilson Nepoose and Donald Marshall Jr., have been wrongfully convicted. The *Commission of Inquiry into the Wrongful Conviction on Donald Marshall Jr., Prosecution* found:

Donald Marshall, Jr.'s status as a Native contributed to the miscarriage of justice that has plagued him since 1971. We believe that certain persons within the system would of have been more vigorous in their duties, more careful, or more conscious of fairness if Marshall had been white.

36. The ALST-NAN Coalition would assist the Commission in this regard by suggesting ways to address the “tunnel vision” that exists against Aboriginal people. “Avoiding tunnel vision” is perhaps a larger, more complicated exercise when dealing with Aboriginal accused people given the long imbedded history of systemic issues that exist in the justice system against Aboriginal people. Solutions in the non-Aboriginal community may not necessarily be adequate to address the issues that exist in the serving the Aboriginal community.

#### **d) Evolution of pediatric death investigation procedures**

37. The ALST-NAN Coalition would assist the Commission in reviewing the evolution of pediatric death investigation procedures in understanding that this evolution has not been responsive to the realities of investigations in remote Aboriginal communities, or with respect to Aboriginal deaths. It is important that any future change be responsive to the unique nature of Aboriginal people and communities, with specific regard to the challenges of remote, fly-in First Nation communities. Such change should not be implemented without meaningful input from the Aboriginal community.

**e) Different models of death investigation and reporting including coroner-based systems and medical examiner-based system, their strengths and weaknesses, and what we can learn from other jurisdictions**

38. The ALST-NAN Coalition would assist the Commission in its review of the different models of death investigation and reporting by ensuring that the Commission is mindful of the reality that one system may be appropriate for the non-Aboriginal community and inappropriate for the Aboriginal community. The ALST-NAN Coalition is abundantly aware that systemic changes do not necessarily address the systemic issues as they exist in relation to the Aboriginal community, unless Aboriginal people are involved in the identification of the issues, and in responding to the issues.

39. The ALST-NAN Coalition will also assist the Commission with its comparative review of jurisdictions, in particular, with reviewing jurisdictional responses in serving other Indigenous populations. For example, the ALST-NAN Coalition will assist the Commission in determining whether there are best practices that can be learned from jurisdictions that have similar systemic issues in serving an Aboriginal community, such as Australia, and New Zealand.

**f) How crown attorneys and defence counsel obtain and use forensic experts**

40. Participation by the ALST-NAN Coalition at the Inquiry will assist the Commission understand the difference in crown attorney and defence counsel practices across Ontario and in relation to serving Aboriginal victims and accused. The level of service can vary broadly from region to region. Northern fly-in courts present unique challenges for all parties to an

investigation and proceedings. Responding to these unique challenges may only be accomplished with Aboriginal input.

**g) The role of the legal aid system in ensuring that defence counsel has access to competent expertise in pediatric forensic pathology**

41. The ALST-NAN Coalition can assist the Commission in understanding the unique challenges that Aboriginal accused have in accessing legal services and accessing legal aid. The ALST-NAN Coalition has particular expertise in legal aid issues, having participated in Professor McCamus' former and current review of the legal aid system. The ALST-NAN Coalition has worked, and continues to work closely with one another, to address service delivery issues. The current legal aid system is failing the Aboriginal community in many respects, thus contributing to the on-going over-representation of our community members in the justice system.

**ALST-NAN COALITION'S PROPOSED CONTRIBUTION TO THE INQUIRY**

42. The ALST-NAN Coalition represents distinct ascertainable interests and perspectives with respect to the above areas and issues in light of its previous work and expertise concerning these issues. The ALST-NAN Coalition could greatly assist the work of the Commission in discharging its mandate. The ALST-NAN Coalition is not aware of any criminal justice public interest organization seeking standing at the Inquiry that is representative of the Aboriginal community, in consultation with the Aboriginal community, or purports to speak on behalf of the Aboriginal community.

43. The ALST-NAN Coalition's clients, members and constituents have an interest which is directly and substantially affected by the subject matter of the Inquiry. The issues that will be raised by the Inquiry's proceedings and the eventual recommendations of the Inquiry have the potential to impact directly and substantially on the ALST-NAN Coalition's clients, members and constituents.

44. The ALST-NAN Coalition proposes that it could assist the Commission proceedings by addressing systemic issues, consistent with its expertise as set out above, that are relevant to the overall proceedings. More particularly, the ALST-NAN Coalition could assist with evidence relevant to the key policy and systemic issues raised by the Inquiry through leading the evidence of, or cross-examining, particular witnesses with questions that relate to these issues.

45. The ALST-NAN Coalition also proposes that it could assist the Commission proceedings by:

- i. Working with the Director of Research in order to identify and address key subject matters for its research and policy work;
- ii. Making written and/or oral submissions throughout the Inquiry process;
- iii. Convening and/or participating in meetings or symposia to discuss issues raised by the Inquiry, particularly with members of the Aboriginal community;
- iv. Leading or assisting in the calling of evidence, including expert evidence, on matters relevant to the Inquiry; and
- v. Convening a roundtable of Aboriginal political leaders, the Office of the Chief Coroner and other parties to create protocols that will assist in eliminating barriers faced by Aboriginal people and communities in relation to responding to pediatric death investigations.



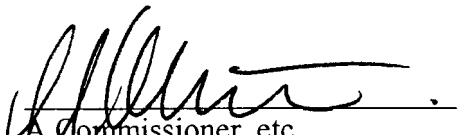
**FUNDING REQUEST**

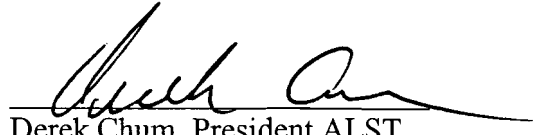
46. Currently ALST has three lawyers on staff, one of which is the Executive Director of the agency. ALST receives funding from Legal Aid Ontario to operate its legal representation services. ALST operates a busy practice. The last calendar year, ALST opened 265 new case files. Currently, the agency has 692 open legal files that the lawyers work directly on, or supervise non-lawyers to work on.

47. Due to its busy practice, ALST has insufficient staff resources to properly participate in the Inquiry without additional funding. The ALST-NAN Coalition thereby requests that should it be granted standing at the Inquiry, it be granted funding to cover disbursements and the cost of hiring outside counsel to assist on the Inquiry.

48. This affidavit is made in support of an order granting the ALST-NAN Coalition standing at the Inquiry into Pediatric Forensic Pathology in Ontario, and for no other or improper purpose.

SWORN before me at the City of Toronto, )  
in the Province of Ontario, this 13<sup>th</sup> day of )  
July, 2007 )  
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A Commissioner, etc.  
LSUC 47970T

  
Derek Chum, President ALST