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1. Introduction

1.1 Background

LAO's senior counsel serve the most vulnerable, hard-to-serve clients in the criminal justice system —people who would otherwise be unrepresented and either unable to retain counsel from the private bar, or ineligible for certificate services but eligible for duty counsel services. These clients include:

- people with mental and physical health issues
- Aboriginal clients
- the elderly
- youthful first offenders

- people who would experience significant secondary consequences, such as job loss
- members of other disadvantaged groups.

In the absence of senior counsel services, clients whose matters are complex and hard to serve as described above would face significant barriers to access to justice, such as procedural delays, more time incarcerated unnecessarily, and proceeding with *Amicus* (a lawyer appointed by the court for its assistance) or by way of self-representation.

Clients who receive the services of senior counsel have been previously advised of all options for representation, including a retainer with a member of the private bar. They voluntarily choose to be represented by senior counsel.

1.2 Staff

LAO engaged a total of 17 criminal trial counsel to work across the province, including:

- 12 senior counsel—at least one in each of LAO's districts
- three criminal counsel in its Criminal Litigation Services department (formerly known as Major Case Management Office) at its provincial office
- two trial counsel in the Brampton Criminal Law Services office

Beyond their practices as trial counsel, **senior counsel** are mentors, advisors, leaders and educators. They are a source of criminal law expertise for duty counsel in each of the districts. They also act as a resource to less experienced private bar lawyers through informal and formal mentoring. In addition, senior counsel act as co-counsel to senior and junior members of the bar.

The **senior counsel program lead** is responsible for oversight and management of the program and the application of criminal law by the program and its lawyers.

The **senior legal advisor** provides case-specific legal, procedural and tactical advice, guidance, mentorship, and direction to senior counsel and LAO's other criminal staff lawyers, where appropriate. This advice has generally been on highly complex matters, such as included admissibility of expert evidence on murder, jury closing on murder, a strategy for raising the defence of "not criminally responsible" for the first time on an appeal, and severance of counts and co-accused.

The **senior counsel program lead** and **senior legal advisor** monitor and respond to emerging criminal practice issues, develop and conduct training programs, consult on ethical issues and provide criminal law expertise and advice to the program and LAO.

2. Highlights of 2015/16

2.1 Mentoring and educational successes

2.1.1 Private bar partnerships and mentorship

Senior counsel meet the program's central objective of representing Ontario's hardest-to-serve clients—they mentor junior staff lawyers who express an interest in conducting broader litigation work by assisting in trial preparation or partnering with them so they can take matters to trial.

Partnerships between senior counsel and the private bar were also successful in 2015/16 and remain an area of projected growth in 2016/17. The program arranged at least 20 partnership opportunities between LAO's senior counsel and the private bar across the province. Staff counsel acted as co-counsel or lead counsel for murder cases and dangerous offender matters and appeals. In some cases, senior counsel provided mentorship to support less experienced members of the bar.

2.1.2 Advanced criminal advocacy training

In Fall 2015, the senior counsel program lead, senior legal advisor and LAO's human resources department developed and delivered a six-day advanced trial training program. Participants included 25 junior lawyers (primarily duty counsel) from across the province and one private bar lawyer. Several senior counsel acted as mentors and evaluators alongside Crown attorneys and members of the private bar. Part of the training included a mock trial before judges of the Ontario and Superior Courts. Feedback from the judges on the performance of the participants was very positive.

Participants expressed appreciation for this thorough training from senior mentors as well as for the opportunity to try a case before a judge. They also indicated that the training increased their effectiveness in serving highly vulnerable clients.

This training will be repeated in 2016/17.

2.1.3 Education day on criminal law practice essentials

On May 27, 2015, senior and other LAO counsel, private bar lawyers, judges and Crown counsel provided approximately 100 LAO staff lawyers, as well as students and several per diem duty counsel, with a range of presentations. These included talks on professional responsibility, search and seizure, administration of justice charges, effective submissions, guilty pleas, pretrial and disclosure review.

Senior counsel also participated in many other educational sessions for LAO's staff lawyers including on mental health, bail and bail reviews.

2.1.4 Innocence Canada conference

The senior legal advisor gave a well-received presentation on an advocate's role in preventing wrongful convictions, as part of the Innocence Canada (formerly the Association in Defence of the Wrongly Convicted) December 2015 "Getting too Zealous: Trial Preparation" conference for the private bar.

2.2 Client service successes

This is a high-level summary of the most rewarding, complex, or legally significant cases senior counsel handled in 2015/16:

- Acted on numerous appeals in the Superior Court and the Ontario Court of Appeal. One example: the Court of Appeal found the appellant's guilty plea to assault causing bodily harm equivocal and invalid. The Court ordered a new trial.
- Acted for an LGBTQ client who had experienced repeated harassment, leading to an incident causing bodily harm; was instrumental in helping a client, who had experienced considerable trauma navigate the legal system.
- In the Superior Court, successfully quashed an Order under s. 672.11 for an assessment of the mental condition of an accused.
- Successfully excluded a mentally ill client's statement under the Charter, where police lost the audiotape of an interview and the Crown wished to tender the statement through the police officer.
- Conducted a defence of not criminally responsible and a hearing at the Ontario Review Board, resulting in immediate community access for the client.
- Represented a client on a first-degree murder charge where the client received a conviction for manslaughter; the facts of the case—the discharge of a weapon during an altercation, which killed the defendant's partner—represented a highly successful result and the best possible outcome for the client.
- Provided multiple, ongoing co-counsel support on first- and second-degree murder trials, and in some cases assistance with the appeal; outcomes have included full acquittal.
- Conducted a multiple-day sexual assault and forcible confinement trial with co-accused, resulting in acquittal for senior counsel's client.
- Cross-examined a single witness at a second-degree murder preliminary inquiry, and successfully defended a client who is now planning a human rights complaint.
- Successfully cross-examined a psychiatric expert witness who found the client unfit to stand trial and had been recommended for permanent institutionalization; the result was mental health diversion and withdrawal of all charges.

3. Support for senior counsel

3.1 Administrative support

Throughout 2015/16, the following initiatives have provided timely, effective support to help senior counsel in their criminal law practices, expand the program's capacity for peer development, and improve communications within the program.

3.1.1 Email connection

Senior counsel has access to a shared email distribution list to help the program's lawyers discuss issues among themselves, circulate materials, receive updates from the senior counsel program lead/senior legal advisor, and request support where appropriate.

3.1.2 Retainer agreements and plea comprehension inquiry

LAO has developed and senior counsel uses:

- **a standardized client retainer agreement template** that can accommodate the particularities of a given case and be adapted to the needs of the case at the lawyer's' discretion.
- **a formalized plea comprehension inquiry form** for senior counsel and duty counsel, developed with input from the private bar and judges and consistent with LSUC's Rules of Professional Conduct and recent appellate decisions. It ensures that clients fully appreciate that they are giving up their right to a trial, and are aware of the consequences and potential consequences of pleading guilty. The form serves to minimize applications to strike guilty pleas and appeals.

3.2 Educational development

3.2.1 National Criminal Law Program (NCLP)

Seven of LAO's senior counsel attended the NCLP, held in Edmonton in 2015 and in Charlottetown in 2016. Presenters included highly respected and knowledgeable members of the criminal bar, Crown Attorneys, and members of the judiciary throughout Canada.

Senior counsel attendees appreciated the program's comprehensiveness in all areas of criminal law, from new offences, evidence, and sentencing, to trends in policy and best practices. They also said that the conference's high-quality materials were a significant and valuable resource for their own practices and their mentorship activities.

3.2.2 Ongoing learning and training

LAO hosts two day-long, in-house community of practice sessions for all senior counsel program lawyers to discuss issues that affect their law practices, receive updates on case law and program development, and solidify a cohesive, team-based approach to client services.

A monthly teleconference provides the opportunity for senior counsel to discuss current issues and best practices together.

4. Activity trends

4.1 Work load

Senior counsel represent clients at all levels of Ontario's courts. At any given time, they are assisting

approximately 450 clients. Each senior counsel's baseline caseload is 25-35 open files per lawyer, but varies depending on file complexity.

LAO considers workload to consist of any matter where a staff lawyer or co-counsel lead or carry a file. On average, Ontario Court of Justice files account for approximately 93 per cent of senior counsel's monthly workload, and Superior Court of Justice files account for approximately seven per cent.

In addition, senior counsel may have files before the appeal courts.

4.2 Referrals and intake

Senior counsel receive the majority of referrals for their services from duty counsel; community agencies, the courts and members of the private bar also provide some referrals. In general, referrals to senior counsel are vulnerable clients who:

- do not meet LAO's financial or legal eligibility threshold for a certificate but are within the threshold for duty counsel
- or
- are eligible for a certificate, but may be experiencing challenges in connecting to their counsel. These challenges can include the client's mental health issues, conflict of interest, difficulty maintaining the relationship with their counsel, and others.

The relationship with senior counsel is voluntary, and choice of counsel is respected. Clients are made aware of other options available to them.

Between March 2015 and January 2016, senior counsel (15 lawyers) received a total of 782 client referrals. This represents approximately six referrals every month.

4.3 Hours mentoring

Between March 2015 and January 2016, senior counsel engaged in 3,785 hours of mentorship—the equivalent of 522 working days of mentorship, where one working day equals 7.25 hours.

5. Conclusions

In 2015/16, the Senior Counsel Program provided high-quality defence services to highly vulnerable, hard-to-serve criminal defendants who required full defence services but would not or could not otherwise obtain representation. These clients frequently experienced mental health issues and/ or other significant vulnerabilities.

The program extended the services LAO could provide low-income clients through its duty counsel and

certificate system, filled an important gap in the criminal justice system, and ensured access to justice to a highly marginalized clientele.

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