

**Agency, Section 802.1 of the Criminal Code of Canada, & Its Applicability to the Native  
Court Workers of British Columbia**  
*A Position Paper*

## **1. Introduction**

Recent changes in the *Criminal Code of Canada* have placed the role of agents in Criminal Courts at issue. On July 23, 2003 the following provision was added to the *Criminal Code*.

802.1 Despite subsections 800(2) and 802(2)<sup>1</sup>, a defendant may not appear or examine or cross-examine witnesses by agent if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless the defendant is a corporation, or the agent is authorized to do so under a program approved by the lieutenant governor in council of the province.

The Native Court Worker Association of British Columbia has requested a brief position paper as to whether the organization should be recognized by regulation as exempt from the general prohibition of section 802.1, and as such, authorized under a program approved by the provincial government Cabinet to appear as agent in a criminal Court. The answer to this question is clearly

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<sup>1</sup> Section 800(2) states:

800(2) A defendant may appear personally or by counsel or agent, but the summary conviction Court may require the defendant to appear personally and may, if it thinks fit, issue a warrant in Form 7 for the arrest of the defendant and adjourn the trial to await his appearance pursuant thereto.

Section 802(2) states: the prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel or agent.

in the affirmative. This paper will illustrate this point by first outlining the mandate of the Native Court Worker Association, illustrating that they are clearly making representations on the part of the accused. The paper will then conduct a review of legislation pertaining to agents in British Columbia and the *Criminal Code*, as well as the applicable case law in relation to these sections, and determine whether Native Courtworkers are “agents” as envisioned under this legislative scheme. The paper will next outline some of the concerns of Law Societies across Canada regarding the growth of agency in Criminal Courts and illustrate that most of these arguments do not apply to the work of the Native Court Workers. The paper will conclude with a recommendation to apply for recognition under section 802.1, followed by some further steps to accomplish this goal.

## **2. Native Court Workers Mandate: What Do They Do?**

The Native Court Workers Association was created to serve the needs of Aboriginal Peoples caught up in the Canadian judicial system in a holistic and comprehensive manner. It was designed to provide a culturally relevant and sympathetic support system for Aboriginal peoples, helping guide them through a technical, impersonal and, at times, intimidating legal system. Not only do Native Court Workers help Aboriginal peoples in their initial or preliminary type Court appearances, but Native Court Workers also served an important gateway function referring the overwhelming majority of clients to the private practicing Bar through legal aid, and where appropriate, the UBC First Nations Legal Clinic, or other non-profit legal service programs. This has resulted in a very close and amicable relationship between Native Court Workers, the private Bar, and the Courts. Native Court Workers also provide Aboriginal peoples

with far more holistic approaches and options in dealing with the root problems that normally lead to criminal behavior in the first place. Native Court Workers aid offenders, Crown and sentencing judges by providing references to Aboriginal specific organizations that offer help in the way of: alcohol and drug counseling; victim support groups dealing with physical, sexual and mental abuse, anger management; life support skills; and financial and income supplementary resources. The Native Court Workers also provide internal counseling services in many of the before mentioned areas, including drug and alcohol rehabilitation and victim support services. Consequently Native Court Workers are an important component in any successful endeavor on the part of the Canadian Judicial system to embrace the principles of restorative justice. This paper is however specifically concerned with the role played by Native Court Workers within the Court system, specifically within a Court of law.

Native Court Workers operate at the provincial Court level across British Columbia. Their focus is primarily on Aboriginal peoples in the Criminal justice system, facing both summary conviction and indictable offences. The typical day for a Native Court Worker is to scour the daily Court lists published by the Courts for the general public, identify Aboriginal peoples with Court appearances, and proactively seek out those individuals on the day in question. As an organization with serious credibility in the Aboriginal community, Aboriginal peoples also actively seek this organization out. Contact is normally made at the very initial stages of the Criminal Justice process. Normally when individuals have their initial appearances or an individual is being remanded, a Native Court Worker will attend the hearing and, **if the individual is without representation**, the Native Court Worker may make representations, not as counsel of the accused, but as a “friend of the Court”. Initial appearance and remand

representations are generally limited to making an undertaking to the Court that they will provide guidance and aid in ensuring that the offender gets legal representation through legal aid and the private Bar. The Native Court Worker will also adjourn the matter over to another date, so that the accused can appear with their newly obtained legal counsel to proceed with the matter. In short, the Native Court Workers act as a culturally supportive referral agency and facilitator of the effective and efficient functioning of the Court process in their normal Court appearances. Hence it is clear that in their day-to-day operations in Court, Native Court Workers play a limited but crucial role for Aboriginal peoples and the proper functioning of the Court.

Native Court Workers in unusual circumstances, and only under the request of counsel, will make preliminary representations on the part of counsel where counsel cannot attend. These representations are both limited and preliminary in nature. Native Court Workers have in the past, adjourned matters over for the UBC First Nation Legal Clinic, and confirmed, under the direction of this organization, that counsel is ready to proceed for trial at a trial confirmation hearing. These actions are clearly limited to only procedural housekeeping matters and will never involve actual substantive legal arguments or hearings, which are clearly outside of the Native Court Worker's mandate. Native Court Workers will never be involved in a trial. The organization will normally not be involved in sentencing either, however, there may need to be some room for the Court workers to operate here. In an emergency situation, where counsel or duty counsel has been rejected by the accused, Native Court Workers should be able to make representations as "a friend of the Court" **with leave granted by the sitting judge**. This latter approach would be extremely rare, however there are circumstances where offenders, at an initial or remand appearance, have rejected their right of counsel, pled guilty, and proceeded directly to

sentencing. In such a situation, a Native Court Worker should be able to speak to the circumstances of Aboriginal offenders and the obligation on the judiciary, as directed by the Supreme Court of Canada in *R. v. Gladue*<sup>2</sup> that Courts must pay special attention to the circumstances of Aboriginal offenders and consider all other options besides prison before sentencing a Aboriginal offender. At sentencing, Native Court Workers can also speak to community organizations, which Crown and the Court may not be aware of, that may be appropriate for the offender to access as a condition of his or her probation. Any direction surrounding this level of appearance would need to be clearly “fleshed out” in regulation.

In order to appear in Court on these ordinary as well as exceptional matters, the Native Court Workers are making representations on behalf of Aboriginal offenders. On its face, it would appear that Courtworkers are agents as conceived under English common law, however in order to confirm this conclusion from a legal perspective, a review of both British Columbian and Federal legislation on this matter is necessary.

### **3. Legislative Review**

#### ***A) Native Court Workers and the Treatment of Agents in British Columbian Legislation***

In British Columbia the *Legal Professions Act* governs who can and cannot engage in the “practice of law” within the province. According to the Act “the practice of law” includes a number of areas in which Court agents such as BC Native Court Workers presently have ongoing experience. This includes:

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<sup>2</sup> *R. v. Gladue* (1999) 133 C.C.C. (3d) 385.

- (a) appearing as counsel or **advocate**,
- (b) agreeing to place at the disposal of another person the services of a barrister or solicitor, (*Referrals*)
- (c) the making of an offer to do anything referred to in paragraphs (a) or (b), and
- (d) the making of a representation by a person that the person is qualified or entitled to do anything referred to in paragraphs (a) or (b).<sup>3</sup>

The “practice of law” does not include any of the before mentioned acts “if it is not done for or in the expectation of a fee, a gain or reward, direct or indirect, from the person for whom the acts are performed”.<sup>4</sup> It is important to note here that Native Court Workers do not work with Aboriginal clients in the Court system for an expectation of a fee, gain or reward. There is no direct or indirect fee-for-service or retainer arrangement between the client and the Native Court Worker. The funding of the Native Court Workers by governments is not based on the volume of clients served. A point in fact is that while Aboriginal peoples are disproportionately represented in the justice system, and those numbers are steadily increasing, the 2004-2005 provincial budget for Native Court Workers has been drastically cut by some 40%. Therefore on its face, Native Court Workers, though heavily involved in the justice system as agents, do not participate in “the practice of law”.

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<sup>3</sup> *Legal Profession Act*, S.B.C. 1998, c. 9, s.1.

<sup>4</sup> *Ibid.*

Section 15 of *Legal Professions Act* states, “No person, other than a practicing lawyer, is permitted to engage in the practice of law”. There are a number of exceptions to this section, however, including:

1. Persons permitted to practice under the *Court Agent Act*.<sup>5</sup>
2. Persons permitted to practice under section 12 of the *Legal Services Society Act*<sup>6</sup>
3. Persons permitted to practice under the *Offence Act*.<sup>7</sup>
4. Articled students, where permitted by the rules of the Law Society.
5. A person who is employed by a practicing lawyer, a law firm, a law corporation or the government and who acts under the supervision of a practicing lawyer.
6. Lawyers from other provinces by special permission granted in particular cases.
7. Public officers preparing documents in the course of their duties.
8. Notaries public engaged in their lawful practice.

Native Court Workers, although partaking in a number of areas arguably constituting “the practice of law”, clearly can and do fall under a host of these exceptions. They may fall under those persons permitted to practice under the *Court Agent Act*, however given the stringent

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<sup>5</sup> Section 1 of the *Court Agent Act* reads: *Despite any other law, a person whose name is on the Provincial list of voters for the electoral district in which the Court is held is entitled to appear in the Supreme Court or in the Provincial Court or before a justice as the attorney and advocate of any party to any proceedings in that Court, even though the person is not a practicing lawyer.*

<sup>6</sup> Although this section is not applicable to the Native Court Workers, it is interesting to note that agents may only act under section 12 of the *Legal Services Society Act* **with leave of the Court**.

Section 12 of the *Legal Services Society Act* reads: *Despite the Legal Profession Act, the society or a funded agency may employ, with or without remuneration, an individual who is not a lawyer or an articled student to provide services that would ordinarily be provided by a lawyer so long as the individual is supervised by a lawyer, but the individual may not appear as counsel in a Court except with leave of the Court.*

<sup>7</sup> Section 57 (2) of the *Offence Act* reads: *A defendant may appear personally or by counsel or agent, but the justice may require the defendant to appear personally, and may, if the justice thinks fit, issue a warrant, in Form 5, for the arrest of the defendant and adjourn the trial to await his or her appearance under the warrant. Section 65 (1) The prosecutor or defendant may examine and cross examine witnesses personally or by counsel or agent.*

prerequisites to qualify to act as agent under this legislation it is highly unlikely that a Native Court Worker would qualify as agent anywhere in the Vancouver lower mainland, or in most other areas of the province for that matter.<sup>8</sup> Depending on whether the Native Court Workers have access to a supervising practicing lawyer, as employees (or as contractors) of government, they may be legislatively entitled to act in a Court of law. If the Native Court Workers were to employ articling students as staff, these students would be able to act in a Court of law. Under these exceptions, not only would Native Court Workers be permitted to act as agent for a client in a Court of law, but they would be able to charge a fee for their efforts. In addition, Native Court Workers can appear as an agent for a client involved in a proceeding under the *Offence Act*. *Offence Act* proceedings normally involve quasi-criminal matters dealt with by way of ticketable offences and punitive fines. However in *Law Society of British Columbia v. Lawrie*<sup>9</sup> the British Columbia Court of Appeal held that the *Legal Professions Act* takes precedence over the *Offences Act*, and therefore “agent” in the *Offence Act* must be interpreted as a person who does not charge a fee for representation. Consequently, where an agent in BC is actually permitted to represent an individual under the *Offences Act*, it must be on a non-profit basis. Finally, as persons who provides legal services without fees or any expectation of gain and reward, Native Court Workers are currently well within their right to act as agents in a Court of law, as they are technically not providing legal services. While it is clear that under British Columbian legislation, Native Court Workers may appear as agents in a Court of law, one must also inquire as to their status and treatment in such a situation.

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<sup>8</sup> Section 3 of the *Court Agent Act* states: *This Act has no application (a) within the limits of any municipality in which 2 or more members of the Law Society of British Columbia are in actual practice of the profession of a barrister or solicitor, or (b) to any Court where there are 2 or more members of the Law Society of British Columbia in actual practice of the profession of a barrister or solicitor whose places of business are within 8 km of the place where the Court sits.*

<sup>9</sup> *Law Society of British Columbia v. Lawrie* (1991), 59 B.C.L.R. (2d) 1 (C.A.).

According to the *Court Agents Act*, the Supreme Court, the Provincial Court or a justice of British Columbia may refuse audience to an agent in that Court or before that justice if, in the opinion of the Court or justice, the person is guilty of any gross misconduct. In addition the *Court Agent Act* states that the Supreme Court, the Provincial Court or a justice of British Columbia has the same control over an agent practicing in the Court or before the justice as the Court or justice would have over a qualified practitioner practicing in the Court. The Ontario Court of Appeal decision in *R. v. Romanowicz*<sup>10</sup> is an often-quoted decision by British Columbia's Courts in relation to a provincial Court's treatment of agents. In that decision some of the Court's comments where as follows:

- (1) A trial judge has an obligation to determine whether or not the accused has made an “informed choice” to proceed by representation by agent but has no right to inquire as to the competence of that agent.<sup>11</sup>
- (2) A Court has a general discretion to control its own process and to maintain the integrity of that process.<sup>12</sup>
- (3) That although the Court retains this discretion, there is no inherent jurisdiction in the Provincial Court to choose who will appear before it as counsel or agent.<sup>13</sup>
- (4) The Provincial Court can prohibit representation by agents who are “lacking the ability to competently represent the accused which endangers all aspects of the proper administration of justice, particularly the accused's right to a fair trial.”<sup>14</sup>

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<sup>10</sup> *R. v. Romanowicz C.C.C (3d) 225 (Ont. C.A).*

<sup>11</sup> *Ibid.*, Para 41-52.

<sup>12</sup> *Ibid.*, Para 58.

<sup>13</sup> *Ibid.*, Para 67-71.

<sup>14</sup> *Ibid.*, Para 74.

In *R v. Dick*<sup>15</sup>, the BC Court of Appeal adopted a similar position holding that it lies within a Court's discretion to permit or not permit a person who is not a lawyer, to represent a litigant in Court. Each Court has the responsibility to ensure that persons appearing before it are properly represented and (in the case of criminal law) defended, and to maintain the rule of law and the integrity of the Court generally. It also concluded that an appeal Court is clearly a different Court statutorily, constitutionally and historically from a summary conviction Court, which precluded the use of agents in the former circumstance. In *Law Society of British Columbia v. Mangat*<sup>16</sup>, the Supreme Court of Canada concluded that non-lawyers provide a very useful service to people who are subject to immigration proceedings, particularly where the agent is fluent in other languages and familiar with cultural differences. This latter observation is directly applicable to the work undertaken by Native Court Workers in relation to the Aboriginal peoples within the criminal justice system.

### ***B) Native Court Workers and the Treatment of Agents in the Canadian Criminal Code***

The Federal *Criminal Code* of Canada clearly allows for the use of agents in summary conviction matters in the Canadian criminal judicial system. Although "agent" is never defined in the *Criminal Code*, there are numerous provisions that speak to the use of agents including:

1. Sections 556(1), 800(3) and 620 allow agents to appear on behalf of a corporation or enter a plea on behalf of a corporation, not only for summary, but also indictable conviction matters.

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<sup>15</sup> *R v. Dick* [2002] B.C.J. No 59 (BCCA).

<sup>16</sup> *Law Society of British Columbia v. Mangat* [2001] 3 S.C.R. 113 (S.C.C.).

2. Part XXVII deals with summary conviction matters and under 800(2), a defendant may appear personally or by counsel **or agent**, but the summary conviction Court may require the defendant to appear personally and may, if it thinks fit, issue a warrant for the arrest of the defendant and adjourn the trial to await his appearance.
3. Section 802 (2) of the Criminal Code states that the prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel **or agent**.

On July 23, 2003 Parliament introduced into law the following provision to the *Criminal Code* of Canada:

802.1 Despite subsections 800(2) and 802(2), a defendant may not appear or examine or cross-examine witnesses by agents if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless the defendant is a corporation, or the agent is authorized to do so under a program approved by the lieutenant governor in council of the province.

This new provision added to the *Criminal Code* was designed to restrict the number of matters in which an agent could represent a defendant in a criminal Court. This governmental response was to alleviate concerns of Law Societies across Canada of the alarming trend of an increase in summary conviction and hybrid offence matters, with an accompanying increase in unregulated paralegal organizations providing legal services for a fee. The practical ramifications of this new law is to bar agents from appearing on all hybrid offence until an election is made by Crown to proceed summarily. If the election is delayed, the accused person who wants to be represented by

an agent will be placed in a difficult situation. There has been an argument made in other provincial jurisdictions that hybrid offences retain their indictable nature despite a Crown election of trial by summary conviction.<sup>17</sup> This latter interpretation would forbid agents to work on hybrid offences altogether. In addition, it bars agents from appearing on many different summary conviction matters in which the Criminal Code or other legislation explicitly allows for a sentence greater than six months. Summary conviction offences that are silent as to sentencing length still allow agent representation, as such provisions carry, unless otherwise stated, a maximum penalty of 6 months of imprisonment and/or \$2000 fine.

While it is clear that 802.1 of the *Criminal Code* greatly limits the work of agents in a criminal Court, it is unclear, due to lack of definition, what “agent” constitutes exactly. Would it for instance regulate Native Court Workers who do not provide their service on a fee-for-service or retainer basis?

### ***C) Does the 802.1 of the Criminal Code Regulate Non-Profit Agents?***

What is important to note here is that the *Criminal Code* does not make explicit whether an agent must be a paid representative. Therefore would a non-profit representative who is not a lawyer be considered an agent under the *Criminal Code*? The answer to this matter is largely dependent on the interplay of Federal and provincial legislation in this area. A 1997 Ontario Court of Justice decision in *R. v. Lemonides*<sup>18</sup> is instructive here. In this case, the Ontario

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<sup>17</sup> *R. v. Stone* (1997), 33 W.C.B. (2d) 87.

<sup>18</sup> *R. v. Lemonides* [1997] 35 O.R. (3d) 611.

Criminal Lawyer's Association argued that ss. 800 and 802 of the Criminal Code were *ultra vires* the federal government insofar as they purport to authorize the practice of law by non-lawyers. Madame Justice Wein found the provisions were constitutional as pertaining to criminal procedure and accordingly valid federal legislation. Section 91(27) of the *Constitution Act, 1867* gives the federal government jurisdiction over the Criminal Law, including the procedure in criminal matters. However although the Court determined that agents may appear in criminal Courts, the Court also established that it is ultimately the provincial government who determines *whom may appear as an agent*. Section 92(14) gives the provincial government jurisdiction over the administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction. Consequently it is provincial government's role to prescribe rules for the qualifications and admissions of practitioners and is therefore ultimately up to the provinces to determine who can actually engage in the practice of law before the criminal Courts.

In B.C. this of course brings us full circle to the *Legal Professions Act*, which, as stated beforehand, allows non-lawyers, in a limited number of circumstances, to engage in "the practice of law". However, "the practice of law" must include legal services for a nominal fee or expectation of gain or reward. Because the Native Court Workers do not directly or indirectly apply a fee for their services, they would not be considered agents in these circumstances. However, BC case law has also suggested that agents are not only limited to paid paralegals. In *Law Society of British Columbia v. Lawrie*<sup>19</sup> the British Columbia Court of Appeal held that because the *Legal Professions Act* must take precedence over the *Offences Act*, that an "agent" in the *Offence Act* must be interpreted as a person who does not charge a fee for representation.

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<sup>19</sup> *Law Society of British Columbia v. Lawrie* (1991), 59 B.C.L.R. (2d) 1 (C.A.).

Consequently, in British Columbia, agents can include non-profit organizations engaged in “the practice of law”. Given the inclusion of both paid and unpaid representatives as agents in British Columbian jurisprudence, section 802.1 of the Criminal Code effectively prohibits Native Court Workers from appearing as agent in a number of summary conviction and hybrid matters previously handled by the organization. It also prohibits Native Court Workers from appearing as agent at any point in the proceedings, including remand, initial appearances, bail hearings and trial confirmation hearings.

This means that in order for Native Court Workers to effectively continue meeting their ongoing expectations and achieving their existing mandate, the organization must, irregardless of sentencing maximums, be authorized to act as agent in summary conviction matters by the lieutenant governor in council of the province.

#### **4. Concerns Regarding Agency & their Applicability to Native Court Workers**

There are three major obstacles that Native Court Workers are likely to face from the Bar Society regarding an application for agency. The first are concerns about the evaluation and training of Native Court Workers and their competency as agents in criminal matters. A client hiring a lawyer can be confident that the lawyer has met certain standards for training and competence by the province’s Law Society. Where agents are unregulated, there are no such guarantees. In British Columbia agents and paralegals are not regulated. As a result, the quality and competency of agents can vary substantially. Judges may in unique circumstances prohibit or prevent an agent from appearing in his or her Courtroom due to actions on behalf of the agent

that bring the reputation of the legal system into disrepute thus frustrating an individual's right to a fair trial. However, since such acts are not recorded and reported, the agent is free to appear on another matter in another Court therein after. As such, the BC Law Societies is extremely sensitive to the spread of agents in the province's Court system and may have concerns about Native Court Workers being formally recognized by the Provincial government as agents of the Court in criminal matters.

What is important to note from this perspective is that Native Court Workers have been acting as agents in the past and recognition of this fact by the provincial government would simply allow for a practice that has always existed to continue. The granting of such status by the provincial government through regulation would not result in an influx of additional Native Court Worker activity in the criminal Court system. Rather it would ensure that the existing operational mandate of Native Court Workers is in line with what is required under 802.1 of the *Criminal Code*, shielding this organization from any accusations that it is in non-compliance with the law. More importantly, it would also shield the provincial government, who has contracted this organization to undertake the activities before mentioned, from any accusations that one of their organizations is acting outside of its legal mandate.

Perhaps more importantly, it would actually facilitate what Law Societies across Canada have been seeking, namely clarification of the role of agents in Criminal matters. The regulation in question would be crafted in a manner that delineates the crucial but limited role of the Native Court Workers before a Court. If lawyers could look to a piece of legislation that actually sets out the responsibilities of Native Court Workers and the areas in which they are confined to

make submissions in a Court of law, the Law Society would see how limited such areas actually are, and that they are only a preliminary step towards referring the client to actual legal counsel. The legislation could also set out the requirements and training necessary to certify a Native Court Worker to act as agent.

Finally, Native Court Worker's clearly have the competence to act as agents in a Court of law. The organization's hiring policies and training policies are rigorous. Persons hired to attend Court are either university or college graduates. These worker's schooling is normally in criminology, where there is significant exposure to the criminal Court system, its jurisprudence and procedure. It could be very well argued that given the limited type of appearances undertaken by Native Court Workers, most individuals are actually over-qualified for such work. In addition, there is presently being developed a national curriculum by the Nation Court Workers Directors and the Federal Department of Justice with the intention of eventually leading to Aboriginal Court worker accreditation. These standards are expected to be set by the provinces/ territories and Federal Department of Justice. The organization continues to deliver in-house criminal Court training. In addition, periodic evaluations occur as is required and as may occur in response to information received from external sources such as judges, defence lawyers, prosecutors or clients. Finally, the Native Court Workers Association in the Greater Vancouver Area has a close informal affinity with the UBC First Nations Clinic. The organization shares an office with the clinic and as such regularly seeks the advice and guidance of the Clinics in-house counsel in obtaining information that may be used to better represent clients and ensure competency.

The other area of concern by bar societies across Canada regarding the allowance of agents in the Canadian Court system is financial in nature. Fees, which are closely regulated in the legal profession, are not regulated in relation to agents. Monies paid in advance to a lawyer must be placed in trust until the client is billed for work already done and is subject to strict controls. If the client subsequently terminates the relationship with his lawyer, any surplus must be returned to the client. Agents are not subject to such regulation. In addition, lawyers fees are subject to assessment, whereas if a client finds that they have been overcharged by an agent there is little recourse beside further legal action. Finally, lawyers have a pecuniary interest in ensuring that the Court system is monopolized by members of the Bar. For example, the introduction of businesses in which agents are solely employed, such as the POINTS traffic corporation in Ontario, have had an effect on the level of work done by lawyers in this area.

These arguments should not prevent Native Court Workers for appearing as agents in the Criminal Process. Native Court Workers are not paid on a fee for service basis. The organization has a set contract with the Provincial and Federal government that does not reflect the volume of clients Native Court Workers work with in the legal system. Therefore, Native Court Workers do not charge fees to the clients they serve and as such are incapable of using the clients funds inappropriately or overcharging. In addition, the organization does not pose a threat to the pecuniary interests of lawyers, rather quite the opposite. As participants in the initial stages of criminal law system, Native Court Workers encourage that accused obtain legal counsel before making any future legal decisions. This is facilitated by adjourning the matter over and then aiding the individual with his application to legal aid or referring the accused to a member of the private Bar. Consequently, Native Court Workers act as a referral service for counsel, thereby

furthering counsel's pecuniary interests. Without the guidance of Native Court Workers, accused may not act in their best interest by rejecting assistance of counsel in order to speed up the slow-moving Court processes. Such decisions normally result in detriment to the accused and the loss of a potential client for members of the Bar.

The final area of concern on the part of the BC Law Society is that legal safeguards and protections available to an accused that has obtained the services of counsel, may not be available in an agency relationship. For one, lawyers are required to carry liability insurance. A client who has suffered loss due to a lawyer's negligence can be compensated if loss and negligence is proven. No such requirement exists with respect to agents. In addition, ineffective representation is grounds for appeal. Where an appellant Court can be persuaded that council did not effectively represent a client, the client will be entitled to a new trial. It is unclear whether a similar right applies in relation to agents, especially where it can be said that the accused has waived his right of council by retaining an agent.<sup>20</sup> Final unlike the counsel/client relationship, communications between a client and agent has not been recognized as privileged. As such, clients are taking a significant risk when making potentially incriminating statement to agents.

Again these arguments against the use of agents generally in a Court of law should fail when applied specifically to the Native Court Workers of British Columbia. Given the types of "housekeeping" procedural activities that Court workers are involved in within a Court, namely the adjournment of matters and acting under the direction of council to verify readiness for trial, it is inconceivable how, under such limited arrangements, a Court worker could ineffectively represent a client. It is also very difficult to argue that a client could suffer any loss directly

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<sup>20</sup> *R. v. Lemonides* [1997] 35 O.R. (3d) 611.

related to such preliminary matters. If Native Court Workers were, in extreme circumstances, speaking to sentencing of an Aboriginal offender, it would need to be clear that they are not acting on the client's behalf but as a friend of the Court. Finally, it would be difficult to contemplate why an accused would confide incriminating evidence to a Native Court Worker in the limited circumstances outlined earlier. However if this latter point is a problem it can be addressed through legislation. Manitoba has statutorily recognized that communication between an agent and client is privileged. Perhaps this could be addressed in the final regulations authorizing agency on the part of the Native Court Workers.

Consequently, it is clear that although most of the arguments against agency are certainly valid from a general standpoint, when applied specifically to the case of Native Court Workers of British Columbia they are simply not applicable.

## **5. Conclusion: Recommendation to the BC Native Court Workers**

This paper has recommended that the BC Native Court Workers must be authorized to act as agent pursuant to a program approved by the Lieutenant Governor of the Province of British Columbia, in order to ensure compliance with the law. It has outlined the mandate of the Native Court Workers and illustrated that this clearly requires representation in Court on behalf of Aboriginal accused for a narrowly defined set out of circumstances, including adjournments, remand hearings and trial confirmation hearings. It next looked at the legislative arrangements in Federal and provincial statutes and related case law to illustrate that Native Court Workers are clearly "agents" as conceived by this scheme, despite they charge no fees directly to their clients.

Finally the paper looked at potential concerns from the legal community concerning agency, and provided arguments why such concerns do not apply to Native Court Workers. Section 802.1 is drafted in a very specific and intentional manner: to ensure that unskilled agents are not representing individuals where there is the potential for a significant loss of liberty, but allowing exceptions on a case by case basis where agents are clearly competent and are necessary. This paper has argued that this exception is certainly the case here. Some potential next steps to making this position a reality are:

1. Beginning a dialogue with the BC Bar Society and Provincial Government to have Native Court Worker program approved by lieutenant governor in council to act as agent in summary conviction matters, irregardless of sentencing maximums.
2. Develop draft regulations pursuant to this end.
3. Consult with BC Bar Society in the development and approval of these regulations.
4. Have draft regulations completed for Fall 2004 for Attorney General's Legislative Council.
5. Introduce regulation Winter 2005 cabinet session for Order in Council.

If governments and the legal community are serious about responding to the plight of Aboriginal peoples in the legal system and not merely paying "lip-service" to this injustice, all stakeholders should welcome the participation of the Native Court Workers as agents in the Courts and work towards ensuring that this participation is recognized in law.

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