Agents in Criminal Courts 1997

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Working Group On Agents in Criminal Courts

This paper was prepared after consultation with the members of the Working Group which included representatives from the Department of Justice, Saskatchewan Justice, Alberta Attorney General's Department, Ontario Ministry of the Attorney General and the Criminal Lawyers' Association.

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INTRODUCTION

In 1995 and 1996 there was a significant increase in the number of non-lawyers appearing as paid advocates in Ontario criminal courts. The judiciary, prosecutors and defence counsel expressed concerns about the quality of representation being provided as well as the ethical and professional responsibilities of agents. Agents who had criminal records for offences involving interferences with the administration of justice were appearing, not advising the court they were agents, leading accused to believe they were lawyers and appearing on indictable matters (see Appendices A & B). Summary conviction appeals commenced in which the accused was seeking a new trial because of the belief, at the trial, that he/she was represented by a lawyer when the agent appeared, or were otherwise misled by agents. Cases are also being appealed by the accused persons who claimed they received incompetent representation by his/her agent.

As a result of these incidents in Ontario, as well as reports of difficulties with agents in Alberta, a resolution was presented by the Ontario Criminal Lawyers' Association (through their President, being a member of the Ontario delegation to the Uniform Law Conference) to the Criminal Law Section meeting in Ottawa in August of 1996. The resolution proposed an amendment to the Criminal Code which would have defined the term 'agent' and specified the type of activity which agents could undertake. In brief, it called for unsupervised agents to be permitted to handle only pure summary offences. Agents who were supervised by counsel who were responsible for the conduct of the agent to the court and public would be permitted to appear on hybrid offences where the maximum penalty was six months. All eighteen month maximum summary offences would require the appearance of counsel.

When the resolution was presented, several provinces spoke in favour of assisting the

Provinces where the problems existed but were opposed to opening up their courts to agents for any offences since non-lawyers could not appear for any offences in their province. These provinces included Quebec, British Columbia and Saskatchewan. When the proposal was amended to delete the term 'agent' from the Criminal Code, Manitoba noted that a Native

Canadian program was about to be set up which contemplated the use of agents/paralegals in that province which might
be jeopardized by the amendment. Following the discussion, the resolution was amended to state:

That the question of the appropriateness and scope of agents acting in criminal matters be examined by a working group of the Criminal Law Section in liaison with the Executive of the Conference.

The resolution as amended was passed. In the result a Working Group was established to examine the issue and report back to the 1997 Uniform Law Conference.

This paper examines the following issues:

1. the legal authority upon which agents can appear in criminal courts;
2. judicial application of provincial legislation concerning the practice of law; and
3. the problems which result when agents appear.

Possible options are discussed to deal with these issues and recommendations of the Working Group are presented for consideration.

THE LEGAL BASIS FOR AGENTS IN CRIMINAL COURTS

Before the actual legislation is considered, it should be noted that the problems stemming from representation by agents occur most frequently with paid agents, as opposed to an accused having a relative or friend appear to represent and assist him/her. As such, the focus of this paper and the deliberations of the Working Group have been on "paid agents".[1] For the purposes of this paper (until the section dealing with possible inquiries to be made before trial) it should be assumed that all references are to paid agents.

Federal legislation deals with agents in the sense of private individuals unsupervised by lawyers who provide representation in criminal courts. In addition to the sections discussed below, most provincial statutes have exceptions for articling students and other persons acting under the supervision of a lawyer, and some provinces have exceptions for certain types of government employees or persons employed by quasi-public organizations (see for instance Ontario's Crown Attorneys Act[2] and British Columbia's Legal Services Society Act[3]),

FEDERAL LEGISLATION

The Criminal Code of Canada[4] mentions agents in the following sections:

Part XIX: Trial Without A Jury

556 (1) An accused corporation shall appear by counsel or agent.

Part XX: Jury Trials

620 Every corporation against which an indictment is found shall appear and plead by counsel or agent.

Part XXVII: Summary Convictions

800 (1) Where the prosecutor and defendant appear for the trial, the summary conviction court shall proceed to hold the trial.
(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.
(3) Where the defendant is a corporation, it shall appear by counsel or agent, and if it does not appear, the summary conviction court may, on proof of service of the summons, proceed ex parte to hold the trial.

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

"Counsel" is defined in s. 2 as "a barrister or solicitor, in respect of the matters or things that barristers and solicitors, respectively, are authorized by the law of a province to do or perform in relation to legal proceedings." "Agent", as used in the above sections, is not defined.

Sections 800 and 802 originated in the following sections of The Criminal Code, 1892:[5]

850 (1) The person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witness examined and cross-examined by counsel or attorney on his behalf.
(2) Every complainant or informant in any such case shall be at liberty to conduct the complaint or information, and to have the witnesses examined and cross-examined, by counsel or attorney on his behalf.

855 If both parties appear either personally or by their respective counsel or attorneys, before the justice who is to hear and determine the complaint or information such justice shall proceed to hear and determine the same.

There is no discussion of these sections in The Debates of the House of Commons. In 1906, the statutes of Canada underwent a revision. Following the enactment of the Revised Statutes of 1906, the following sections appeared in the Criminal Code:[6]

715 (1) The person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel, solicitor or agent on his behalf. [emphasis added]
(2) Every complainant or informant, in any case shall be at liberty to conduct the complaint or information, and to have the witnesses examined and cross-examined, by counsel or attorney on his behalf

720 If both parties appear, either personally or by their respective counsel, solicitors or agents, before the justice who is to hear and determine the complaint or information such justice shall proceed to hear and determine the same. [emphasis added]

It should be noted that the addition of the word 'agent' to sections 715 and 720 were not the result of any specific Act of Parliament amending the Criminal Code. The change simply occurred as a result of the revision process of federal legislation. Nevertheless, this brings about a substantive change to the law contrary to the provisions of Revised Statutes of Canada, 1906, Act section 7 [7] Moreover, there is no discussion of these amendments in The Debates of the House of Commons.

It is important to note that there were significantly fewer offences triable by summary conviction in the Code of 1906 than in the present statute. In fact, the following is a list of all the hybrid offences contained in the Code in 1906:

82 Inciting or assisting desertion from the armed forces
169 Obstruction of peace officer
208(1) Presenting immoral performance
291 Common assault
409 Personation of examinee
430 Offences with respect to wrecks
435 Possession or sale of public stores
438 Receiving items belonging to His Majesty from soldiers
439 Receiving necessaries from seamen or marines
440 Receiving seaman's property
499(1) Breaking contracts under certain circumstances
501 Intimidation [8]
502 Specific forms of intimidation

With the exception of obstruction of a peace officer and common assault, this list contains none of the offences that now dominate the provincial courts cases. The number of offences for which an agent could provide representation, if that was indeed what was contemplated by the amendments, was therefore sharply limited compared to the present.

PROVINCIAL LEGISLATION

The following provinces do not have unsupervised agents appearing in criminal courts: British Columbia, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan, the Yukon and Northwest Territories. As noted above, in Alberta and Ontario, agents appear in criminal courts and it would appear that Newfoundland's provincial legislation permits such appearances.

A survey of the provinces' legislation regulating the practice of law is set out in Appendix C. The "no agent" provinces have provincial legislation which prohibits non-lawyers practising law for a fee. As will be noted in the judgments discussed below there appears to be consistency in finding that agents appearing in criminal court are acting as barristers and practising law.

The provinces where agents appear have provincial legislation which contemplates court appearances by non-lawyers. Alberta's legislation exempts "a person permitted by statute to appear as the agent ... before a justice of the peace, the Provincial Court or a provincial judge ..." (s.103 (2) (1)).

Newfoundland's legislation provides for exemption if "authorized to do so under an Act of Parliament of Canada or the Legislature" (s.85 (g)). Ontario's legislation provides no person shall act as a barrister "unless otherwise authorized by law" (s.50 (1)).

The legislation in Saskatchewan specifically permits members of a police force to appear for the Crown before a judge of the Provincial Court or justice of the peace and an employee of the provincial government to prosecute summary conviction cases under provincial or federal legislation (s.31 (c),(d)).

In 1990 Manitoba passed legislation that formally recognized agents.[9] The legislation stipulated that agents cannot be disbarred lawyers or anyone convicted of an indictable offence and restricted their practice to certain Highway Traffic Act matters (s.57.1 (4)).

INTERPRETATION OF PROVINCIAL LEGISLATION

Ontario

The Ontario Legislation was considered in the seminal case of R. v. Lawrie and Pointts Ltd.[10] Ontario's Provincial Offences Act[11] permits defendants to appear and act by counsel or agent. The issue before the court was whether a non-lawyer was permitted to act for

payment in provincial offences court. The Ontario Court of Appeal found that the provisions of the Provincial Offences Act met the requirements of "where otherwise provided by law" in the Law Society Act. The Court rejected the argument that the Provincial Offences Act did not contemplate agents acting for payment. After a review of the history of the statutes, it further found that s.1 of the Solicitors Act must be read in light of the "where otherwise provided by law" exception in the Law Society Act, and only acts to impose penalties additional to those found in the Law Society Act.

British Columbia

In Law Society of British Columbia v. Lawrie,[12] the British Columbia Court of Appeal considered a section of the Offence Act [13] which allows defendants to appear by agent. It concluded that the Legal Profession Act takes precedence and that "agent" in the Offence Act must be interpreted as a person who does not charge a fee for representation.

INTERPRETATION OF FEDERAL LEGISLATION

Despite its existence since 1906, the presence of the word "agent" in the Code has been subject to little judicial interpretation. It has been noted in such cases as R. v. Lawrie and Pointts Ltd.[14] and R. v. Duggan,[15] but only incidentally.

One of the few cases to consider it in any detail is Law Society of Newfoundland v. Nixon,[16] in which a majority of the Newfoundland Court of Appeal (O'Neill J.A. dissenting) found that under the Code and Newfoundland's statutes, a non-lawyer could represent an accused in provincial court for a fee. The majority found that since "counsel" is defined in the Code and "agent" is not, "agent" must refer to a person who is not a barrister or solicitor.

In Law Society of Manitoba v. Lawrie,[17] a different result was arrived at by the Manitoba Queen's Bench. The issue in that case was whether agents could appear under provincial statutes that incorporated the summary conviction procedures of the Criminal Code.[18] Kennedy J. discussed ss. 800 and 802 as follows:[19]

- In close but obvious scrutiny of ss. 800 and 802 of the Criminal Code there appears to be little doubt that the sections purport to govern the procedural aspect of a prosecution ... and provides procedural guarantees that a defendant under s. 802(1), is entitled to make full answer and defence, while s. 802(2) grants a defendant the right to examine or cross-examine witnesses by counsel or agents.
- Section 800, on the other hand, also provides certain authority to appear by "agent but when the complete context of s. 800 is read it is clear that the Code is primarily requiring someone to be in attendance. ... Section 800 is aimed, not at obligating or authorizing someone to act for the defendant, but obligating someone to be there on behalf of the defendant ...
- Section 802 of the Criminal Code does not, in my view, purport to give authority to an agent to act as a barrister and solicitor. Instead, it limits the conduct of an agent to the examination and cross-examination of witnesses. Counsel has always acted in that capacity on behalf of an accused, but the section extends that limited right to an

agent ... There is no suggestion in the section that that same agent would be entitled to act as an advocate or a spokesman, or to present a submission in law, unless he were a barrister and solicitor.

- I do not find that the wording of the Criminal Code, where it refers to "agent" (s. 802(2)), was intended to permit "commercial agency" on behalf of persons charged with summary conviction offences. But it certainly permits and authorizes next friends, friends, members of family (the list is not exhaustive) to assist a defendant in the examination or cross-examination of witnesses.
- The court should not read into 802(2) of the Criminal Code authority that is not expressly set out in view of the clear restrictions contained in the Law Society Act. To do so would be to permit, in an implied way, the complete frustration of the clear and express purposes of the Law Society Act of this province. [emphasis is original]

Very recently, in May, 1997, a summary conviction appeal case was argued before the Ontario Court of Justice (General Division): R. v. Lemonides. In this case, the appellant is alleging that he received ineffective representation from his agent, and further that he never understood that the person representing him was not a lawyer. The Ontario Criminal Lawyers' Association was granted permission to intervene in this appeal. It argued that ss. 800 and 802 of the Code are ultra vires the federal government insofar as they purport to authorize the practice of law by non-lawyers. Wein, J. reserved her judgement and it has not been given at the time of this writing.

There are several potential interpretations of these sections of the Code. The first is that s. 800 and s. 802 are meant to deal only with the court's jurisdiction over the accused based on his/her presence or absence in the courtroom. In other words, as long as someone is present on behalf of the accused, including his/her counsel or some "agent" (a person appearing for the accused who is not the accused's lawyer), the court maintains its jurisdiction over him or her. This is supported by the wording of s. 800(2), and by the fact that ss. 556 and 620 mention agents without suggesting that they will engage in advocacy in the superior courts. Under this interpretation, the agent is merely a placeholder for the accused. The problem with this interpretation is that it is not entirely consistent with s.802(2), which seems clearly to contemplate that the agent will examine witnesses, something normally done by the accused's counsel, although it does not mention other aspects of advocacy such as legal argument.

A second interpretation is that the sections permit but do not authorize non-lawyers to represent accused persons. The use of the word "agent" is intended to allow provinces, should they see fit, to define a class of non-lawyers who may appear in provincial court on criminal matters. This parallels the treatment of counsel: the Code permits representation by counsel but leaves it to the provinces to qualify counsel. Similarly, s. 626 leaves the responsibility of setting qualifications for jurors to the provinces.

A third interpretation is that the use of the word "agent" in the Code is intended to authorize non-lawyers to represent accused in summary conviction matters. Under this interpretation, the absence of a definition of "agent" in the Code would indicate that anyone may act in this capacity.

In determining the appropriate interpretation to give to these sections, we must consider the division of powers issues. Section 91(27) of the Constitution Act 1867 gives the federal government jurisdiction over "[t]he Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters. Parliament is specifically precluded from regulating "the constitution of the courts of criminal jurisdiction". Section 92(14) gives the provincial governments jurisdiction over "[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction".

The case of A.G. Canada v. A.G. Ontario[20] states that it is the provincial governments' role to "prescribe rules for the qualification and admission of practitioners". The first and second interpretations set out above are consistent with the position that Parliament, in enacting ss.800 and 802 of the Code was not authorizing a form of legal practice in the criminal courts, but was simply dealing with a matter of criminal procedure. It is ultimately up to the provinces to determine who can actually engage in the practice of law before the criminal courts, which, it is submitted, involves assisting the accused in the representation of his/her defence for a fee. The third interpretation arguably engages a form of ultra vires legislation by Parliament, namely providing lawful authorization for non-lawyers to represent accused persons for a fee in a criminal proceeding.

CONCERNS FOR THE PROPER ADMINISTRATION OF JUSTICE RAISED BY THE APPEARANCE OF AGENTS

The presence of agents in criminal courts raises a number of difficulties for the proper administration of justice. Some of the key differences between representation by counsel and agents are listed below. Some, but far from all, would be diminished if there was provincial regulation of agents. [21]

Lawyers are subject to screening for competence

- A client hiring a lawyer can be confident that the lawyer has met certain standards for training and competence set by the province's Law Society. Where agents are unregulated, there is no such guarantee. The problem is made more serious by the difficulty a lay person will have in assessing his or her advocate's performance.
- As more and more criminal offences become hybrid, this problem will only escalate. When such crimes as moderately serious sexual assaults can be prosecuted by summary conviction, it is to be expected that complex legal issues will arise more frequently in summary conviction trials.
- There is no way of judging the general competence of the agents currently in practice; any evidence is anecdotal. As an example, in the cross-examination of the agent in R. v. Lemonides before the Summary Conviction Appeal Court in relation to his competence, it came out that the agent did not know how to introduce photographs into evidence over the objections of the Crown.
- There is information about cases in Ontario where agents have appeared on pleas of guilty where the facts revealed viable defences or did not appear to support the charges.

Lawyers are subject to screening for good character

- A client hiring a lawyer can be assured that the lawyer has not, for instance, been convicted of any serious crimes. There is no such assurance for agents. One agent in practice in Ontario, Maverick A. Maveric, has been convicted of fraud and uttering a forged document. This criminal record has been the cause of at least one provincial court judge refusing to permit him to appear as agent on the ground that the court could not place its trust in him as an advocate.[22]

Lawyers are subject to the Rules of Professional Conduct and to complaints and discipline procedures.

There is no obligation on agents to follow the Rules of Professional Conduct of the applicable Law Society. There is no way for a client to lodge a complaint against an agent. There is no body with the power to discipline an agent.

Apart from the obvious public interest in advocates following a code of conduct, many of the Rules of Professional Conduct directly protect the clients. Examples include the obligation to keep the client fully informed, to zealously guard the confidentiality of the solicitor-client relationship, and to avoid any conflicts of interest and to immediately inform the client if any should arise.

One example of a practice that can arise when advocates are unregulated by a code of conduct, a document, titled "Rules of Engagement With This Firm", which is presented to clients by an entity operating in Ontario called GTA Legal Services & Associates Ltd. Often provided to young offenders, the document, which is intended to be signed by the firm's clients, includes the following clauses:

"The client will follow the guidance of advocate without question.

The client will not act in a manner detrimental to the pursual of the client particular matter by:

- communicating with the opposing side without prior notice to advocate
- pursuing a course of action not advised by the advocate during the advocate's assistance with whatever matter.

The client will understand that there is a time element of consideration toward the ultimate disposition of any matter, and the client will maintain patience during the pursual of their matter.

The client fully comprehends that the advocate is well trained in the law and able to assist the client to their full success concerning whatever matter the client may be engaged with, as so long as the client follows the directions of the advocate without hesitation and or confrontational dialogue. [sic]"

Clearly it would be grossly unethical for a lawyer to suggest that a client agree to such conditions.

In R. v. Goddard,[23] a non-lawyer was charged with obstruction of justice for failing to inform the court of the whereabouts of police witnesses against his client. The Supreme Court of Canada, in restoring the acquittal, commented that the conduct was "ethically inexcusable" and would have been subject to discipline if the accused had been a lawyer.

In addition, agents are not officers of the court, owing no ethical, legal or moral duty to the court. In one unreported provincial court judgment in Ontario, the court held there was no remedy for the court for an agent who failed to appear on a trial date, since they owe no duty to the court to appear.

Lawyers' finances are regulated

The most important aspect of such regulation is that any money paid in advance to a lawyer must be placed in trust until the client is billed for work already done. Lawyers' trust accounting is subject to strict controls. If a client terminates a relationship with a lawyer, any surplus trust funds must be returned to the client.

Agents are not subject to such regulation. If a client pays an agent in advance and no services are actually performed, the client may be forced to rely on civil action to recover the funds. [24]

Lawyers' fees are subject to assessment

Agents' fees cannot be assessed. A client who finds that he or she has been overcharged has little recourse.

While there is no way to measure the average fees of agents as compared to those of lawyers, there is evidence[25] that accused persons are paying agents amounts equivalent to or even greater than typical lawyers' fees. This suggests that far from providing legal services to those who genuinely cannot afford lawyers, some agents are exploiting public misconceptions concerning lawyers' fees and are not charging significantly less than lawyers.

Lawyers must carry liability insurance

A client who has suffered loss due to a lawyers' negligence can be largely confident of recovery if such loss and negligence are proven. No such assurance exists with respect to agents.

A client's communications with a lawyer are privileged

Except where created by statute (e.g. in Manitoba) there is no guarantee of privilege for agent-client communications. There has not yet been a case of the Crown attempting to

compel an agent to testify against a client. Until such a case arises and the legal issues are resolved, clients are taking a significant risk when making potentially incriminating statements to agents.

Ineffective representation by counsel is a ground of appeal

If an accused person can persuade an appellate court that he or she was not effectively represented by counsel, he or she may be entitled to a new trial. It is not presently clear that there is a remedy for ineffective representation by an agent; the issue is to be addressed in R. v. Lemonides, supra. If a client who retains an agent can be said to have waived the right to counsel, then there very well may be no remedy.

The Accused's Knowledge

The right to counsel is a critical component of the protections available to an accused person. It may be waived, but such waiver must be an informed one. The various obligations placed on police officers by s. 10(b) of the Canadian Charter of Rights and Freedoms exist in part to ensure that an accused person does not waive the right to counsel out of ignorance.

It is uncertain what the legal effect is of a decision to be represented by an agent rather than by counsel. Is it equivalent to a complete waiver of a right to counsel, or does it occupy some intermediate position such as an acceptance of a lower standard of representation? Depending on the answer to that question, there may be a requirement that the accused be fully informed of the consequences of the decision. This is one of the issues argued in R. v. Lemonides, supra.

Clearly the accused must be informed that the person representing him or her is an agent. This is complicated by the fact that a lay person may not appreciate that there is a distinction between agents and lawyers. Simply being informed that one's advocate is an agent may not be enough. Lawyers tend to refer to themselves by a number of titles: lawyer, barrister, solicitor, attorney, counsel. Indeed, at least in Ontario, it is common practice for a lawyer appearing without the client under s. 800 of the Code to refer to himself or herself as "acting as agent". An accused person who has attended to set a trial date and heard lawyers referring to themselves as agents may be forgiven for not understanding that there is a distinction.

Even if the accused person is made to understand that there is a distinction between lawyers ad agents, this may not be enough. The accused will likely deduce that an agent is not as highly trained as a lawyer, although he or she may well not be aware that there are no qualifications required at all for a person to be an agent. As the list of differences between lawyers and agents given above illustrates, a client who chooses to be represented by an agent rather than by a lawyer gives up a large number of protections. It would be patently unrealistic to expect a lay person to be aware of most of them. Given the written

representations of some agents, many clients are misled into believing they have counsel, particularly those whose first language is not English. (See Appendices A and B.)

It therefore remains to be determined by the courts what information an accused person must have before the waiver of right to counsel in favour of representation by an agent becomes constitutionally valid. If it is decided that the Charter requires a minimum level of information, then a number of practical issues arise:

- Who is required to verify the validity of the waiver?
- At what stage of the proceedings?

It is unsatisfactory, impractical and inefficient to wait until the beginning of trial, but it may well be that an agent will not be retained until the eve of trial in many cases.

It is clear that the responsibility for informing the client cannot be left with the agents themselves. While there are some agents who are conscientious about explaining their status to their clients, there are, unfortunately, too many cases where agents have appeared for trial without informing even the court that they are not lawyers.[26]

Hybrid Offences

Under the Interpretation Act,[27] hybrid offences are deemed to be indictable until the Crown elects trial by summary conviction. This obviously imposes some practical difficulties, as an agent is not legally permitted to act until the election is made. If the election is delayed, the accused person who wants to be represented by an agent will be placed in a difficult situation.

At least one provincial court judge in Ontario has held that under the wording of the Interpretation Act, hybrid offences retain their indictable nature despite a Crown election of trial by summary conviction, and therefore agents are not permitted to appear on hybrid matters even after Crown election. [28]

Uncertainty of Representation

As a result of many of the above problems, it is not uncommon in Ontario for judges to refuse to permit representation by agents. This results in situations where an accused shows up for trial with an agent only to be informed that the agent cannot represent him or her. This results either in prejudice to the accused, or in considerable inconvenience for all concerned and further strain on court scheduling.

OPTIONS

1. Eliminate all reference to agents in the Criminal Code

If it is accepted that only the provinces can regulate who appears in criminal courts the easiest solution would be to remove the references in sections 800 and 802 in the Code and

leave the issue to the provinces. At present no province specifically authorizes agents in criminal court without reference to federal legislation. However, if the issue of who can appear is viewed as criminal procedure then there must be reference in federal legislation.

The problem with this option is that, although it would solve the problem of representation of accused persons by paid agents, it has further impact on the ability of unpaid agents (relatives, friends) and also, for some provinces, representation on behalf of the prosecution by non-lawyers. This is, perhaps, too drastic an approach to take to solve the problem.

2. Delineate Federal and Provincial Jurisdiction

It may be that a position suggested in argument by the Court in Lemonides is persuasive on this option. There it was suggested that the federal government could say who could appear on summary and indictable matters (counsel or paid agents) but who would qualify in each province as counsel or agent is a matter within the exclusive jurisdiction of the province.

3. Define agent in the Criminal Code

Assuming the current references to agent remain in the Code, a definition of what agents are specifically permitted to do, as a matter of criminal procedure, would clarify some of the current confusion.

The first area of concern is the scope of authority conferred by s.800(2). If the section only refers to the ability of a court in maintaining jurisdiction over the accused by having a person appear on behalf of an accused person or corporation the following amendment would clarify the situation:

- for the purposes of section 800(2) the authority of an agent appearing with or without fee is limited to appearances on pre-trial appearances for the purposes of maintaining jurisdiction.

However, the current s.802(2), by referring to the prosecutor or defendant examining or cross-examining witnesses, goes beyond appearances for jurisdictional purposes. Therefore, any solution along this line of thinking should attempt to take into consideration jurisdictions who have supervised agents appearing on summary conviction matters pursuant to provincial legislation (such as Saskatchewan as noted above).

The following definitions attempt to address the current situations and place the criteria for agents within the provincial jurisdiction:

- *agent* - a defendant may appear by agent for the purpose of maintaining jurisdiction subject to the court's authority to require personal attendance. Where a defendant or private complainant in a prosecution in which the Attorney General does not intervene is represented by an agent for any purpose other than for the purpose of maintaining jurisdiction, no fee shall be payable to the agent or the agent's company unless provincial legislation specifically authorized agents appearing for fees in Criminal Code summary conviction matters.
- *Crown agent* - the Crown may appear by agent for all summary conviction matters.
- *Corporate defendant agents* - a corporate defendant may appear by agent for all summary conviction matters.

If agent is to be defined in the Criminal Code is it preferable/constitutional that only agents who are supervised pursuant to provincial regulation be permitted to appear?

In terms of provincial legislation, Manitoba has the most comprehensive scheme. Manitoba has defined who can be an agent - no disbarred lawyers and no one convicted of an indictable offence. Manitoba agents can only appear in Highway Traffic offences where the penalty for the offence does not include imprisonment other than in default of payment of a fine and if there is no report of bodily harm arising out of the incident. The legislation provides for the creation of a privilege, an advisory committee and provides a "justice of the provincial court" may bar a person from appearing as agent who is found to be incompetent or does not understand or comply with the duties and responsibilities of agents.

Define the types of offences upon which agents may appear

As noted above when the term "agent" appeared in the Criminal Code in 1906, there were few summary offences, trials were conducted by lay magistrates and there was no Charter. It is arguable that criminal trials for any offence in 1997 require the prosecution and defence to be conducted by counsel.[29] However, as a matter of provincial policy, some provincial governments rely on the use of non-lawyers in the courts.

If agents are to appear, concerns arise regarding the sentences available for summary offences. Last year's resolution restricted unsupervised agents-for-fee to pure summary offences. Supervised agents could prosecute and defend hybrid offences provided the maximum penalty did not exceed six months. With increased hybridization of offences some provincial court trials will become more complex. Indeed, with the expansion of hybrid offences, O'Connor applications and Charter motions will arguably become more frequent in summary matters formerly prosecuted by indictment. The concerns magnify if a current proposal for a two year maximum for proceeding summarily in the case of a certain class of hybrid offences is implemented.

The issue is further complicated by the constitutional division of powers between the provincial and federal governments. Currently the federal government specifies in the Criminal Code that only counsel may appear on indictable offences. Should the Code provide for a further distinction between the types of summary offences? If the issue is regarded as not procedural it can be argued that it is for the provinces to specify if agents are to appear on all or only some summary offences. There is a concern that, in this age of fiscal restraint, the solution to this very important issue will be based on purely fiscal considerations.

The alternatives, whether in provincial or federal legislation are:
a) permit agents to appear on all summary matters
b) permit agents to appear on all summary matters punishable by a maximum of six months imprisonment
c) permit agents to appear on summary matters with a six month maximum sentence only if supervised by counsel who is responsible to the court and the public for the conduct of the

agent

Should there be an inquiry?

The provincial government response to the issues raised in the Lemonides appeal was to argue that sections 800 and 802 were valid legislation and suggest that an inquiry be conducted on the trial date to obtain an informed waiver of counsel by the accused.

The inquiry could focus on two areas: first, the defendant's waiver of the right to counsel, and second, the competency of the agent. At present some justices of the peace in assignment courts and some provincial division judges in Ontario conduct inquiries to determine if the accused is aware that the agent:

- is not a lawyer,
- is not subject to any disciplinary authority,
- is not subject to solicitor-client privilege,
- has no legal training.

Some judges ask if the agent is going to present legal argument and if they receive a positive response, rule that they cannot appear. Some justices of the peace set trial dates advising the accused that if a judge is presiding who does not let agents appear, he or she must proceed unrepresented.

The difficulties with the inquiry approach are: inconsistency, uncertainty and wasted court time. Permitting each judge to determine what the law is, leads to inconsistent rulings within the same jurisdiction and uncertainty for accused persons. If the inquiry is to occur at the time the trial date is set, many assignments courts are so crowded that time would not permit a proper inquiry. Currently, some agents send the accused to set a trial date unrepresented and first appear on the trial date. If the inquiry is held on the trial date, court time has been set aside and witnesses required to attend if the agent is precluded from appearing and the court unwilling to force an accused on for trial unrepresented, the witness' attendance and court time are for nought.

If there is to be an inquiry, under what head of authority would this come: criminal procedure or regulating the practice of law? If this is a matter of criminal procedure then it should be included in the Criminal Code. If the issue is within the provincial jurisdiction it should be included in enabling provincial legislation. Arguably, since the inquiry is to determine whether or not the accused truly wishes to waive his/her right to counsel and be represented by a non-lawyer, it comes within the proper area of criminal procedure.

If there is to be an inquiry, the scope of the inquiry should also be determined. Should it address only the issue of informed waiver of counsel or should it examine the competence of the agent as well? It would appear that this inquiry should be held regardless of whether the agent is receiving a fee. Having regard to the fact that a court must have the authority to control its own process, the competency of the agent must be addressed. A provision

similar to the Manitoba provincial legislation might address this issue. That legislation provides the Court with the authority to bar agents if the Court concludes that the person is not competent to properly represent or to advise the defendant or does not understand or comply with the duties and responsibilities of an agent. (See Appendix D).

Some of the possible questions for the inquiry are:

Questions for the accused (assuming no provincial supervisory legislation)

- are you aware that the agent is not a lawyer?
- are you aware that the agent has no law degree?
- are you aware that the instructions and information you provide to the agent are not subject to any privilege?
- are you aware that the agent is not supervised by or accountable to any body including the Court?
- are you aware that if the representation you receive from the agent is deficient you may well have no appeal based on deficient representation?

Questions for the agent

- what qualifications do you have which permit you to represent this accused?
- what are the elements of the offence charged?
- have you been permitted to appear in other courts defending this charge?
- do you have a criminal record

CONCLUSIONS

1. The Criminal Code, as federal legislation dealing with criminal procedure can specify that agents can appear on summary conviction matters. However, each province must legislate who may appear as agent and for which summary offences before agents-for- fee are permitted to appear.

2. Defendants charged with summary conviction offences who wish to be represented by a relative, neighbour or friend appearing without fee should be permitted to do so subject to the inherent jurisdiction of the court to insure that the defendant receives a fair trial. It is the view of the Working Group that the defendant would have waived his/her right to counsel. The Court would proceed as if the defendant was unrepresented.

3. Corporate defendants charged with summary conviction offences are required to appear by agent and are not liable to custodial sentences.

4. Appearances to maintain jurisdiction on behalf of the Crown, defendants and corporate defendants should be permitted by agents appearing with or without fee subject to the Court's authority to require the personal attendance of a defendant. These appearances are matters of criminal procedure and appropriately included in federal legislation.

5. Agents appearing for fees on summary conviction matters other than to maintain jurisdiction are practising law. Who is allowed to practise law is a matter within the exclusive jurisdiction of the provinces and authority to practise law cannot be derived from federal legislation.

6. In the absence of specific provincial legislation authorizing agents to appear for fees in summary conviction matters under the Criminal Code, no agents should be permitted to appear except for appearances to maintain jurisdiction.

7. It is the view of the Working Group that agents appearing for fees should be regulated as to competence and training. Acknowledging that this is an area within the exclusive jurisdiction of the provinces, it is recommended that agents appearing for a fee should be regulated and accountable to a supervisory body.

8. Provided provincial legislation is enacted with regulations for competence, training and accountability, the inquiry at the commencement of the trial as to the competence of the agent appearing for a fee would not be required in every case. The Court would maintain its inherent jurisdiction to prevent an abuse of process or unfair trial.

9. Similarly, with the recommended provincial legislation enacted, the inquiry at the commencement of trial to obtain an informed waiver of counsel may not be necessary if the legislation provides for complete disclosure to the defendant regarding the agent's status, a method by which the Court is advised of the agent's appearance and a means of obtaining the waiver.

10. It is the view of the majority of the Working Group that the nature of Crown agents' appointments provide sufficient safeguards to permit Crown agents to appear for all aspect of summary conviction proceedings. Crown agents are supervised and the Crown responsible to the Court and public for their conduct. The minority position would advocate specific provincial legislation authorizing appearances by Crown agents including police officers who appear as Crown agents in the course of their police duties.

11. It is the view of the majority of the Working Group that any determination of which categories of summary conviction offences agents may appear upon is a matter within the exclusive jurisdiction of the provinces. It is only the provinces who determine who may appear as an agent-for-fee and only the provinces who may determine if such agents can appear on pure summary, hybrid - 6 month maximum, or hybrid - 18 month maximum offences. The minority position would advocate a Criminal Code restriction on the type of summary offences upon which agents-for-fee may appear. The Code already provides the requirements of counsel for indictable offences. Given the nature of summary trials in the 1990's including the Charter and available sentences agents should have a very restricted jurisdiction.

12. Noting that many provincial statutes adopt the summary conviction procedures in the

Criminal Code to provincial laws, any changes to part XXVII of the Code should be accompanies by sufficient notice to the provinces to permit provincial amendments.

RECOMMENDATION PRESENTED BY THE WORKING GROUP

1. That sections 800(2) and 802(2) of the Criminal Code be repealed.

2. That agents-for-fee be permitted to appear on behalf of the defendant or a private prosecution in which the Crown has not intervened for the purpose of maintaining jurisdiction, subject to the Court's authority to require personal attendance.

3. That agents appearing without fee for defendants be permitted to appear on all summary conviction proceedings subject to the Court's authority to require personal attendance.

4. That agents appearing for corporate defendants be permitted to appear on all summary conviction proceedings.

5. That where an agent-for-fee appears on behalf of a defendant or on behalf of the prosecutor in a private prosecution other than for the purpose of maintaining jurisdiction no fees shall be payable to the agent or agent's company unless provincial legislation specifically authorizes agents appearing for fees in Criminal Code summary conviction matters.

6. That agents appearing for the Crown be permitted to appear for all summary conviction matters.

RESULTS OF ULC DELIBERATIONS

The following principles were adopted and endorsed in relation to appearances by agents in Provincial Courts:

- THAT agents-for-fee be permitted to appear on behalf of the defendant or a private prosecutor in a case in which the Crown has not intervened for the purpose of maintaining jurisdiction, subject to the Court's authority to require personal attendance.
- THAT agents appearing without fee for defendants be permitted to appear on all summary conviction proceedings subject to the Court's authority to require personal attendance.
- THAT agents appearing for corporate defendants be permitted to appear on all summary conviction proceedings where the agent is an employee of the corporate defendant and has authority to act on behalf of the corporate defendant
- THAT where agents-for-fee appear on behalf of a defendant or on behalf of the prosecutor in a private prosecution other than for the purpose of maintaining jurisdiction no fees shall be payable to the agents or agent's company unless provincial legislation specifically authorizes agents appearing for fees in Criminal Code summary conviction proceedings. In recognition of jurisdictions where court workers appear on behalf of defendants the Lieutenant Governor-in- Council or the

Law Society may authorize such appearances where no fees are paid to the agent by the defendant.

- THAT agents appearing for fees should be regulated as to competence and training. While acknowledging that this is an area within the exclusive jurisdiction of the provinces, it is recommended that agents appearing for a fee should be regulated and accountable to a supervisory body.
- THAT agents currently appearing for the Crown be permitted to continue to appear on all summary conviction matters.

Noting that many provincial statutes adopt the summary conviction procedure in the Criminal Code to provincial laws, any changes to part XXVII of the Code should be accompanied by sufficient notice to the provinces to permit provincial amendments.

It was determined that the above-noted principles should be provided to the Federal-Provincial Working Group, the Department of Justice, the Attorneys General and the Law Societies.

As a result of the discussions on the issue there appears to be two options for implementing the proposals. First, amend the Criminal Code by deleting sections 785, 800(2) and 802(2) which refer to agents and provide new Code sections to implement the principles expressed above. It was the view of some that this approach would protect the rights of those who wished to be represented by an agent who was appearing without fee, ie: a parent or neighbour. It would also provide a clear definition in the Code which would be common to all provinces. Others felt that the detailed definitions encroached upon provincial jurisdiction.

The second approach would add a definition of 'agent' to section 2 of the Code to parallel the current definition of 'counsel' in that section - "a barrister or solicitor, in respect of the matters or things that barristers and solicitors, respectively, are authorized by the law of a province to do or perform in relation to legal proceedings." This option places the issue squarely in the hands of the provinces who already have jurisdiction to determine who qualifies as 'counsel'. A difficulty with this approach lies in a province where no legislation is enacted. In such a province a parent or friend would be precluded from appearing without fee. It could also lead to inconsistent practice from one province to another.

REGINA v. LEMONIDES JUDGMENT

On September 4, 1997, Madam Justice Wein released her judgment in the summary conviction appeal referred to earlier in the paper. Her Honour found sections 800(2) and 802(2) were constitutional as pertaining to criminal procedure and accordingly valid federal legislation. While agents may appear, who may appear as an agent is a matter within provincial jurisdiction.

The judgement notes the Provincial Court should control its own processes and has the responsibility through the trial to ensure the process is fair to unrepresented litigants. The

Charter right of the accused is to have competent counsel and public policy may well clearly favour the argument that legal representation be by those trained in law and qualified as to standards set by a governing body such as the Law Society. The judgment notes that while the Provincial Court may not have the time, resources or inclination to embark on a lengthy inquiry as to the agent's competence, the Court has the jurisdiction and responsibility to do so. The appropriateness of an agent appearing should be done on a case-by-case basis. The Court recommends it as "better practice at a minimum" to enquire into details of the defendant's understanding of the status and limitation of agents, the role of agents, the availability of legal aid, if the agent is working under the supervision of counsel, ethical obligations that require the person to act as an officer of the Court, whether the agent ought to be barred for any reason (i.e. record for dishonesty), legal issues which might require counsel, limited legal abilities of agents and lack of privilege.

Her Honour found a duty on courts to protect the public against persons who, for their own gain, set themselves up as competent to perform services that imperatively require the training and learning of a solicitor, although such persons are without learning or experience to quality them.

The material regarding the activities of agents filed by the Criminal Lawyers' Association as intervenors presented a "detailed picture of the magnitude and scope of the problem". "The picture painted ... is one that fairly suggests that the administration of justice could well be brought into disrepute by the continuing lack of legislative control in this area."

There was no further appeal since Her Honour ordered a new trial, rejecting the agent's evidence that he told Lemonides he was not a lawyer. The position adopted by the Court was that advanced by the Crown and the CLA as intervenors had no right of appeal.

APPENDIX C

Alberta

The basic prohibition is found in ss.103 and 104 of the Legal Profession Act[30] . There are several exceptions including s.103(2)(1), "a person permitted by statute to appear as the agent of another person before a justice of the peace, the Provincial Court or a provincial judge in respect of services provided as an agent".

British Columbia

Section 26 of the Legal Profession Act[31] says that no non-lawyer "shall engage in the practice of law" subject to a number of exceptions. One of these in the Court Agent Act[32], which provides as follows:

- Any 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 County Court or in a Provincial Court

or before a justice as the attorney and advocate of any party to any proceedings in that court, notwithstanding that he has not been admitted to practise ...

- A County Court, a Provincial Court or a justice has the right to refuse audience to a person practising in that court or before that justice under the authority of this Act if the person is, in the opinion of the court of justice, guilty of any gross misconduct, and shall generally have the same control over an unprofessional person practising in the court or before the justice as the court or justice would have over a qualified practitioner practising in their court.
- This Act has no application within the limits of any municipality in which 2 or more members of the Law Society of British Columbia are in actual practice ... or to any court where there are 2 or more members of the Law Society of British Columbia in actual practice ... whose places of business are within 8 km. Of the place where the court sits.

Manitoba

In 1990, Manitoba proclaimed the Law Society Amendment Act [33], which formally recognized agents. It specifies who may be an agent (anyone other than a disbarred lawyer or someone convicted of an indictable offence) and where they may practice (in Provincial Court on certain Highway Traffic Act matters). It also creates privilege for agents equivalent to solicitor-client privilege. Other sections allow the enactment of regulations concerning such matters as bonding and insurance. These sections were enacted following the decision in Law Society of Manitoba v. Lawrie.[34]

Ontario

The basic prohibition is found in s.50(1)(a) of the Law Society Act[35] :
50(1) Except where otherwise provided by law,

(a) no person other than a member whose rights and privileges are not suspended, shall act as a barrister or solicitor or hold themselves out as or represent themselves to be a barrister or solicitor or practise as a barrister or solicitor; ...

In addition, s.1 of the Solicitors Act[36] has some application:

If a person, unless a party to a proceeding, commences, prosecutes or defends in his own name, or that of any person, any action or proceeding without having been admitted and enrolled as a solicitor, he or she is incapable of recovering any fee, reward or disbursements on account thereof, and is guilty of a contempt of the court in which such proceeding was commenced, carried on or defended, and is punishable accordingly.

Quebec

Sections 128 and 132 of An Act Respecting the Barreau du Quebec[37] prohibits the practice of the profession of advocate without being entered on the Roll. The only exception applicable to agents in found in s.129(b), which preserves "the rights specifically defined

and granted to any person by an public or private law".

New Brunswick

Section 33 of the Law Society Act[38] prohibits non-lawyers from practicing law. There are no exceptions applicable to agents.

Nova Scotia

Section 5 of the Barristers and Solicitors Act[39] prohibits non-lawyers from carrying on "the practice or profession of a barrister". There are no exceptions applicable to agents.

Newfoundland

Section 84 of the Law Society Act [40] prohibits the practice of law by non-lawyers. Section 85(g), however, says that s.84 "does not prohibit a person from appearing as an agent for another person before a Provincial Court judge or justice of the peace when authorized to do so under an Act of the Parliament of Canada or of the Legislature" [emphasis added]. Unlike equivalent sections in the Ontario and Alberta statutes, therefore, the Newfoundland statute specifically refers to federal legislation.

Prince Edward Island

Section 20 of the Legal Profession Act[41] prohibits the practice of law by non-lawyers. There are no exceptions applicable to agents.

Saskatchewan

The basic prohibition is found in ss.30 to 32 of the Legal Professions Act[42] . There are no exceptions applicable to agents.

The Northwest Territories

Section 68 of the Legal Profession Act[43] contains the same prohibition and exemption as s.102 of the equivalent Yukon Territory statute.

Yukon Territory

Section 102 of the Legal Profession Act[44] prohibits the practice of law by non-lawyers. Section 102(2)(d) exempts those "appearing as an agent without reward for another person before a justice of the peace or judge of any court or other tribunal".

Footnotes

Footnote: 1 It would be undesirable, impractical and arguably unconstitutional to prohibit an accused person from being represented by someone other than a lawyer.

Footnote: 2 R.S.O. 1990, c. C.49.

Footnote: 3 R.S.B.C. 1996, c. 256.

Footnote: 4 R.S.C. 1985, c. C-46.

Footnote: 5 S.C. 1892, c. 29.

Footnote: 6 R.S.C. 1906, c. 146.

Footnote: 7 R.S.C. 1906, 6-7, Edward VII

Footnote: 8 This section gave the election to the accused rather than the Crown.

Footnote: 9 Law Society Amendment Act (1989-90) S.M., c.35.

Footnote: 10 (1987), 59 O.R. (2d) 161 (Ont. C.A.).

Footnote: 11 R.S.O. 1990, c. P.33.

Footnote: 12 (1991), 67 C.C.C. (3d) 461 (B.C.C.A.).

Footnote: 13 R.S.B.C. 1996, c. 338.

Footnote: 14 (1987), 59 O.R. (2d) 161 (Ont. C.A.).

Footnote: 15 (1976), 31 C.C.C. (2d) 167 (Ont. C.A.)

Footnote: 16 (1992), 94 D.L.R. (4th) 464.

Footnote: 17 (1989, 61 D.L.R. (4th) 259 (Man. Q.B.).

Footnote: 18 Note that the case occurred before the 1990 amendments to provincial law.

Footnote: 19 at 265 to 266

Footnote: 20 [1898] A.C. 247 (P.C.)

Footnote: 21 In 1990 the Report of the Task Force On Paralegals (1990, Queen's Printer for

Ontario), commissioned by the Government of Ontario, was released. It recommended that paralegals be subject to regulation. No action has been taken by Ontario on these recommendations.

Footnote: 22 R. v. Deane (1997), Unreported (Ont. Ct. (Prov. Div.)), Bentley Prov. Ct. J.

Footnote: 23 [1995] 1 S.C.R.. 854

Footnote: 24 The Ontario Criminal Lawyers Association has obtained transcripts of court proceedings where accused persons have complained of being unable to recover money from agents.

Footnote: 25 The Ontario Criminal Lawyers' Association has obtained transcripts where accused persons have provided this information to the court.

Footnote: 26 Indeed, the Ontario Criminal Lawyers' Association has information about cases where agents have explicitly told clients that they are lawyers, or otherwise use misleading language (e.g. "legal counselor").

Footnote: 27 R.S.C. 1985, c.I-21.

Footnote: 28 Regina v. Stone (1997), 33 W.C.B. (2d) 87.

Footnote: 29 This is, in fact, the position of the Ontario Criminal Lawyers' Association.

Footnote: 30 S.A. 1990, c. L-9.1.

Footnote: 31 R.S.B.C. 1996, c. 255.

Footnote: 32 R.S.B.C. 1996, c. 76.

Footnote: 33 S.M. 1989-90, c. 35.

Footnote: 34 (1989), 61 D.L.R. (4th) 259 (Man. Q.B.).

Footnote: 35 R.S.O. 1990, c. L.8.

Footnote: 36 R.S.O. 1990, c. S.15

Footnote: 37 R.S.Q. 1977, c. B-1.

Footnote: 38 S.N.B. 1973, c.80.

Footnote: 39 R.S.N.S. 1989, c.30.

Footnote: 40 R.S.N. 1990, c.L-9.

Footnote: 41 S.P.E.I. 1992, c.39.

Footnote: 42 S.S. 1990-91, c.L-10.1.

Footnote: 43S.N.W.T. 1988, c.L-2.

Footnote: 44 S.Y., c.100.