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ACCESSING JUSTICE

MANY PEOPLE GO TO COURT AND
COME AWAY POOR AND FRUSTRATED.
ALTERNATIVE FORMS OF DISPUTE
RESOLUTION - AND THE INTERNET -
COULD CHANGE THAT

BY TK. DEMMINGS

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I T WAS NEARLY silent in the courtroom, just the hum of fluorescent lights and lawyers shuffling papers. I sat frozen on the wooden bench, straining to hear the judge's footsteps coming down the stairs from her chambers.

The day before the judge had ordered me out of her courtroom so that I couldn't report on an important child apprehension case. I wanted to know why. The clerk told me that the judge was too busy to deal with my application. But I persisted, and asked to speak to the judge in person.

The clerk raised an eyebrow. "If you dare," she said.

"Order in court!" the sheriff announced suddenly, as the door sprang open. My stomach somersaulted as I jumped obediently to my feet.

The judge glared at me. But before I got more than a sentence into my speech, she held up her hand. She demanded: "Where is your lawyer?"

Despite having reported on the courts for nearly three years, it was the first time I understood how people feel when they appear in court. Time and again I'd seen people who were confused and frustrated by the experience—which didn't seem terribly respectful to the citizens who pay for the courts or vote for the legislatures that create the laws in the first place. Weren't there other ways of doing things?

Brad Maclaren wishes there were. He's been to court with a lawyer and without, and both ways, says the 36-year-old Island Farms dairy worker, were painful.

When he first sought custody and visitation rights to his child a few years ago, Maclaren automatically turned to a lawyer. He was glad about his decision when he saw people trying to represent themselves in court. "I've seen people get thrown out," recalls Maclaren. "The judge gets angry and starts shouting at them to come back when they have all their papers. I'm sitting there thinking, 'Man, get a lawyer.'"

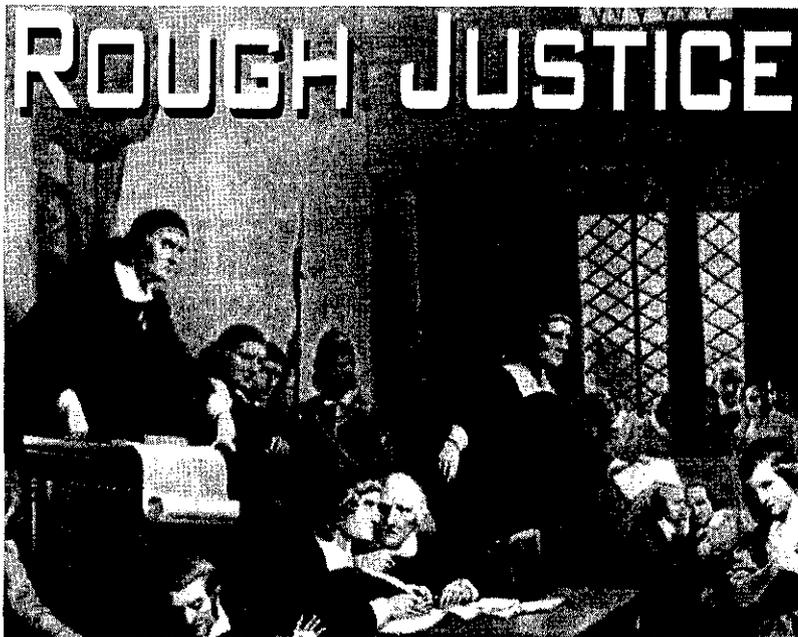
But after spending more than \$10,000 on lawyer's fees, Maclaren ended up going to Supreme Court himself. At least he had his lawyer's earlier documentation, and he'd spent time in court already so he had an idea of what to do. He was successful in getting the courts to enforce his rights, but he says representing himself still left much to be desired.

"It's intimidating and overwhelming," says Maclaren of the process. He ended up spending a month preparing documents, reading the *Family Relations Act*, and learning the proper legalese. ("I found the court has to be fed everything exactly as they want it or they just regurgitate it.") Looking back, Maclaren says he'd like to remove the lawyers from the process entirely and replace the court system with one that is less adversarial. "It's just too hard to do it yourself."

MANY LAWYERS, OF course, would argue that's the way things are supposed to be. "A man who acts as his own lawyer has a fool for a client," says an old maxim—one which is often cited by lawyers in defence of their profession. But not all of them feel the same way.

A self-proclaimed renegade who keeps an electric guitar in his office, Victoria lawyer Lloyd Duhaime advocates giving courts "back to the people"—by simplifying the courts, and making them less formal and easier to understand. He's dedicated much of his 34-year career to the

ROUGH JUSTICE



Though the public pays for it, the justice system is mystifying—even frightening—to many citizens. Could change be in the works?

By T.K. DEMMINGS

cause of accessible justice.

In 1987 Duhaime started Jurisfax, a company which faxed legal precedents to lawyers across the country, duplicating judge's decisions from law reports, removing what he considered copyrighted material (such as footnotes and summaries of the judgments) and sending the rest. Within days he was threatened with lawsuits from legal publishers. He folded Jurisfax rather than going to court, but he still argues that judges, not publishers, hold the copyright to their decisions—and that those decisions should be available to the public.

The B.C. government agrees with him (to a point, anyway) because our province is the only one in Canada to post on the internet all of its laws and regulations (see www.qp.gov.bc.ca) and the recent judgments of its courts (www.courts.gov.bc.ca). Attorney general Ujjal Dosanjh also took on legal publishers last year when they started requiring libraries to pay royalties for photocopying of court decisions; Dosanjh demanded that Ottawa include exemptions in the federal *Copyright Act* to allow the public unfettered access to such decisions.

Duhaime wants to see the electronic revolution carried even further, a case he makes on the website for his World Wide Legal Information Association (www.ilia.org). On the site, he offers a dictionary translating legalese into plain English and numerous quick and easy guides to everything from wills to consumer protection law. Duhaime wants to arm clients with information so they can discuss their cases intelligently with their lawyers—just as increasing numbers of patients are already doing with their doctors.

Duhaime also aims to shake up the practice of law as well. His latest venture, which he is discussing with various law associations, is to create a non-profit co-op law firm. Clients would buy annual memberships to pay the overhead, and then would be entitled to a non-profit hourly rate by the firm's lawyers, which would be far less than what local lawyers usually bill.

University of Victoria law professor Stephen Owen says lawyers like Duhaime are merely employing a marketing tactic, much like the one used by credit unions that say big, impersonal banks will never change. "It's a combination of self-interest and altruism," says Owen.

However, Owen admits the strategy also reflects a real push to "humanize" the legal system. The public sentiment is that the law is for judges and lawyers, Owen says. He doesn't deny that the law is still paternalistic and elitist.

The English legal system we've inherited evolved primarily from the ecclesiastical courts of the Roman Catholic church, and is rooted in the myth of the divine right of kings, the belief that the authority to make laws comes straight from God. But many things have changed since the 13th century, and they're changing still. From his own ivory tower, where he sits as the director of UVic's institute for dispute resolution, Owen has become an advocate of using processes outside the courts such as mediation, where judges help warring parties reach mutually-agreeable (and far less costly) decisions. "It makes for a more human process which is still dominated by lawyers, but less so."

Inside the courts, Owen has also observed a movement toward plain language and plain process. As a member of the Law Commission of Canada, Owen says the need for plain language is more pressing than ever as judgments are scrutinized by the media and the public. "If you write a controversial decision, you better make sure to write it plainly so it's not misunderstood, twisted or misconstrued."

Although the legal profession has been working on the plain language issue for decades, Owen says lawyers are not nearly as vigilant about it as they should be. Perhaps that's understandable: While the development of legalese, with its numer-

ous Latin phrases, is rooted in history, maintaining it is also partly a way for lawyers to create and protect their professional status. As one author has observed, complex legalese often seems "like the hieroglyphics of ancient Egypt devised by priests to keep knowledge of the rites of the temple from the people."

The bigger problem is that legalese is one more reason why lawyers often have difficulty maintaining the respect of the public. One 1997 study by the Attorney General's office revealed that three out of four people in B.C. believe respect for the law is declining; both Duhaime and Owen argue that respect for the law would increase if people felt they had a stake in it. The trick, Owen says, is to encourage respect without assuming artificial superiority. "If people feel part of the process they will respect the courts far more than if they are made to feel they *have* to respect the courts."

Another symbol of such superiority is the black robes worn by lawyers and judges in higher courts. "It makes us look important, but it intimidates the public," Duhaime says. His own tabs, the white necktie worn in court—similar in appearance to a priest's collar—hang from a hook on the back of his door. He dons them dutifully and refers to the judges as "M'Lord" and "M'Lady" and bows as he enters and leaves the courtroom. Technically lawyers are officers of the court, but Duhaime doesn't believe this gives them a more important relationship with the court than Joe Public.

There have been changes made to the courts themselves, however. Earlier this decade, B.C.'s small claims court was revamped, and its judges discarded their robes and literally came down off the bench to sit at the table with the litigants. In most cases, there is a compulsory settlement conference which brings the parties together to see if they can resolve their differences without a trial. Lawyers only appear on about 40 percent of cases. (No one even bothers to keep statistics on what percentage of cases lawyers appear on in the higher levels of courts.)

Plain language rules and simple forms have also been developed to help make the court easy to use. The Law Centre in Victoria offers six booklets which take people all the way through the system. One says this: "Small claims court is a court of law, but it's not designed for

lawyers. It's meant to be a 'do-it-yourself' kind of court where ordinary people can handle their own cases."

Why, asks Lloyd Duhaime, can't the same thing be done for the higher levels of court?

THERE ARE PLENTY of reasons why, says Fort Street lawyer Aaron Gordon. "I believe the inequalities in our society are far too great, but I don't believe tearing down institutions leads to equality," says Gordon, who describes himself as a life-long social democrat.

Society needs rituals which show respect for our institutions and culture, Gordon argues. If people are going to respect the laws and the rules, they need to feel the courts are special. "It's a very serious thing when it's a life or death struggle," he says. "It's not sitting around having a beer."

Gordon says the chaos of the O.J. Simpson trial in the United States convinced him that formality is essential in a court of law. "The informality of it made me appreciate our rituals and respect for each other." Discarding the robes, for instance, would only bring greater inequality to the courtroom. Without them, he asks, how would a young lawyer just out of law school in a Value Village suit feel standing beside a veteran lawyer

in a \$3,000 Armani?

Gordon says Duhaime's suggestion that the legal system should be completely revamped is simplistic. It's unrealistic to believe that anyone could try their own case simply by reading up on law on the internet, he says. The internet doesn't provide the foundation for understanding the context, nor does it provide the experience of having tried hundreds of similar cases. As an example, he refers to the rules prohibiting or allowing the use of hearsay evidence in court. (Duhaime, on the other hand,

A 1997 study revealed that three out of four people in B.C. believe respect for the law is declining. Some lawyers say that respect would return if people felt they had a stake in the process

says anyone who watches TV understands the problem with hearsay; his on-line dictionary defines it as "any evidence that is offered by a witness of which they do not have direct knowledge, but rather their testimony is based on what others have said to them.")

Gordon isn't the only lawyer concerned that people will try tackling the courts on their own. Roland Kuczma,

head of the Victoria Law Centre, which administers legal aid lawyers, says that while he believes people should be able to do as much as possible on their own, they should also get legal advice. "Lawyers are genuinely concerned with making sure people don't miss things."

It would also create headaches in criminal courts, says Victoria Crown counsel Geoffrey Gaul. Underrepresented accused put an additional burden on prosecutors and judges, who would have to take the time to explain all court procedures—and could even run the risk of making the process unfair. "A trial judge has to be careful not to cross the line of impartial arbitrator to advocate for the accused," says Gaul.

Critics argue that trials conducted by non-lawyers can go more quickly because non-lawyers do not know as many procedural tactics, but Mayland McKimm, president of the B.C. branch of the Canadian Bar Association, says that's ridiculous. "Lawyers get down to the issue, cut to the chase," says McKimm. "To say that lawyers slow down the process because they provide due process is to say lawyers provide justice." Court procedures haven't been put in place simply to complicate things, but developed over centuries to ensure fair trials.

The solution to increasing access to justice is not to

make it easier to go to court without a lawyer, but to provide the poor with free lawyers, says McKimm. As the head of the bar association's legal aid committee, he's leading the fight against the province for more legal aid funding.

About half the people who applied for legal aid in 1998 did not qualify. A single person facing a criminal charge needs an income of less than \$831 a month to qualify. It's the working poor who end up falling through the cracks—the people who aren't poor enough to qualify for legal aid, and yet are too poor to pay for a lawyer. No statistics are available from the attorney general's ministry about what happens to these people.

Kuczma believes that one solution is to improve the duty counsel system. Duty counsel, paid through legal aid, are available in provincial courts each day to provide those appearing in court with initial legal representation. The duty counsel's first responsibility is to see people who have been arrested and are in custody awaiting an appearance before the judge. In his 1998 report on backlogs and delays in B.C.'s provincial court system, chief judge Robert Metzger recommended the province provide enough funding so that duty counsel are made available at every step of the proceedings, and even at trial if necessary. Whether that suggestion will be followed remains to be seen.

OTHER PEOPLE HAVE their own ideas about how to guide people through the courts. Every day Harold Blenman sees people grappling with the byzantine judicial system, and the Salvation Army legal assistant offers them a moment of spiritual calm. "Sometimes people just need someone to sit and listen," he says.

A quiet black man who always finishes his conversations with "God bless", Blenman spends much of his time in the galleries of the courtrooms at 850 Burdett, sitting on the hard wooden benches in an impeccable navy blue uniform. "People can become quite confused," he says of a place where blue-collar workers in stained coveralls stand before judges on pedestals and draped in black



Lloyd Duhaime's betting the internet will help clients become their own lawyers; Harold Blenman counsels people who've been confused by the court system

robes. But in the six years Blenman has been working for the Sally Ann's correction and justice services division, he's found that his most important task is simply "allaying fears". "People just ask, 'Will you pray with me?'"

Sometimes, Blenman says, people underestimate the seriousness and the complexity of their circumstances—he's seen people plan to plead guilty, just to get the matter behind them. Blenman says he always encourages them to talk with a lawyer.

But that's not easy when lawyers cost \$125 per hour or more. So Blenman's office is setting up a *pro bono* legal clinic in its Johnson Street building this fall. Like 12 others the Salvation Army already operates in the province, the clinic will offer a half-hour of free legal advice to people who plan to represent themselves. The program is intended to help the working poor—those who have been turned down by legal aid because they make too much money, but who still can't afford a lawyer. And while the lawyers will provide a half-hour's advice on everything from writing a will to defending one's self on a criminal charge, they will not accompany anyone to court.

To critics of the system like Lloyd Duhaime, though,

that still leaves poor souls to contend with a legal system that's designed for lawyers and not the layperson. As far as he's concerned, *pro bono* programs, legal aid and duty counsel lawyers are a stop-gap purgatory.

The justice system, Duhaime says, often reminds him of the tale of the emperor's new clothes—those involved in it are afraid to say something's wrong because doing so would be disrespectful to the court. "Nobody involved in the justice system is putting forward a real concrete proposal for a substantial change," says Duhaime. "You don't want to criticize judges, especially if you are a lawyer or a litigant."

He doesn't buy the argument that the law only reflects the complexity of our society, and is best left up to professionals as is accounting or medicine. The complexity of the legal system is not an accident, Duhaime argues. "Law is based on human relations and common sense." Hundreds of years ago it may have made sense for illiterate people to hire those who could read and write to represent them, Duhaime says. "Now that we can all read, there shouldn't be any need for lawyers."

But Duhaime admits things are unlikely to change for two intertwined reasons: money and lack of political will. While hesitant to paint all lawyers with the same brush, he says many lawyers are like the Luddites—they resist modernization because the rituals, the complexity and the arcane language of the legal system serve to inflate the value of their services. "The more complicated the justice system is, the more money lawyers can make," he says.

The fear of losing business is not irrational. When B.C.'s small claims procedure was renovated and cases involving up to \$10,000 were moved into its courts, judge Metzger wrote in his 1998 report, the legal profession found itself "giving up the more comfortable and expensive procedures of pleadings, motions, discoveries and trials. This was a costly concession to access to justice principles."

Of course, one could argue that lawyers are hardly hard done by. A national survey of legal fees published in the September issue of *Canadian Lawyer* shows that B.C. lawyers charge \$190 per hour if they have 10 years of expe-

rience; \$165 an hour if they have five years, and \$125 if they have just been called to the bar. (As UVic's Owen observes, "most lawyers couldn't afford their own fees if they had a big case.")

But as much as lawyers are criticized for what they charge, McKimm says, they should also get credit for providing more free service than does any other profession, in effect subsidizing what should be government-funded legal aid. "Lawyers take great pride in the legal tradition of *pro bono* work, providing services at a greatly reduced rate for the poor and disenfranchised." For example, he notes, conducting an impaired driving trial would

each others' toes," says Duhaime. "The judicial system is to politicians like God is to the Pope."

IN FRANZ KAFKA'S *The Trial*, a priest relates a parable of a countryman who grows old awaiting admission to the Law, always being turned away by a doorkeeper who says he cannot admit him at the moment.

The Law, the man thinks, should be accessible to every man and at all times. And so he waits. And waits. And waits. And on his deathbed, the doorkeeper tells him that the door was always open—but since it was only accessible to the coun-

Lawyers have an interest in keeping the system complicated. As one judge pointed out, when B.C.'s small claims courts were simplified, the legal profession found itself "giving up the more comfortable and expensive procedures of pleadings, motions, discoveries and trials. This was a costly concession to access to justice principles."

normally earn a lawyer \$2,000 to \$3,500, but a lawyer paid through legal aid will only get \$400 for doing the same work.

That it is in lawyers' interest to provide free services rather than lose their monopoly on legal knowledge is not relevant, McKimm says. "There will always be a need for lawyers. It would be a perfect world if we never needed a lawyer."

On this point, Duhaime agrees. Lawyers, he says, have an inherent conflict of interest because simplifying the courts could have an impact on them financially. Therefore, the issue can only be dealt with politically. But he's skeptical that any party or government will take on the issue. Many politicians are former lawyers, and both the legislature and the judiciary are really only different branches of the same government. "They don't want to step on

tryman and no one else, the keeper will shut it when he dies.

The lesson of the parable, perhaps, is that law is always inaccessible, that its secrets are only revealed to those who know its rituals. Eventually the judge heard and approved my application to report upon that child custody case, but not before my newspaper's lawyer secured an injunction from the Supreme Court and argued my case before the family court judge. In fact, the decision set a precedent, requiring judges to stop trials and hear such applications when they announce that they intend to exclude reporters from their courtrooms. So my own experience with the law was not quite as frustrating as the countryman's—but then again, our legal system would be in serious trouble if it too often reminded us of a story by Kafka. **M**