

## WHEN LAWYERS ARE ONLY FOR THE RICH: SPECIAL REPORT: Legal fees are soaring, and thousands are being left behind

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The Ontario Court of Justice, housed in a grey building with small slitted windows, could leave any visitor feeling like a tiny speck before the mighty judicial system. For Antoinette Augustine it was especially true. A single mother, she filed a lawsuit against her ex seeking child support and sole custody of their two kids. He hired a lawyer; she was on her own. "I don't make a lot of money," says the Toronto child-care worker. "But I make too much to get legal aid, and not enough to pay a lawyer." Augustine was left with little choice but to represent herself.

Do-it-yourself legal work, she soon learned, isn't for the faint of heart. "It's back and forth, speak to the clerks, get it served, get it filed," says Augustine, who used up all her vacation and sick days in a gruelling odyssey to sort out her family life. The stress took a toll: she broke down crying in front of court clerks, and was often overwhelmed at work. "I'd be online all night, or calling friends," says Augustine, 36. Despite her best efforts, over a year later, the case had gone nowhere.

Augustine's experience was harrowing, but it's far from unique. As the cost of hiring a lawyer soars out of reach, unrepresented litigants are flooding the courts in unprecedented numbers. While no definitive figures exist, some judges, especially in family law, say it's over 60 per cent in their courtrooms. Chances are, those numbers are going to rise, as the legal profession is now paving the way for even more people to appear without a lawyer. Self-help centres have sprung up in several provinces, and lawyers are offering limited services to entice clients who otherwise couldn't afford them. Critics say it's a cynical way to deal with the problem. Being your own lawyer is "like doing your own dental work or heart surgery," says Judith McCormack, executive director of Downtown Legal Services, a law clinic for the poor, run by the University of Toronto's law faculty. "It's a desperate response."

It's no secret what lies at the root of that desperation. "Let's face facts, the cost of lawyers has escalated dramatically," says David Scott, an Ottawa lawyer and chair of Pro Bono Law Ontario. A civil trial of two days costs \$25,220 in lawyers' fees, according to Canadian Lawyer's 2008 survey. That works out to almost half the annual median family income in Canada, and represents a rise of 21 per cent in just three years. An uncontested divorce now typically costs \$1,620, up a staggering 72 per cent in three years. Hourly rates are soaring, too. In 2005, lawyers called to the bar that year charged \$130 an hour, on average. Last year, it was \$220.

Lawyers say this escalation simply reflects the

realities of supply and demand: more people are resolving disputes in the courts, and cases are increasingly complex, so they're charging more for their time and expertise. "The market dictates lawyers' fees," says Winnipeg lawyer Guy Joubert, president of the Canadian Bar Association. "I don't think access to justice is in crisis. It's in a constant state of movement. The system is never perfect." If there is a problem, the government should funnel more money into legal aid programs, Joubert says.

But that attitude is at odds with mounting outrage over the price of justice, as even voices within the legal community are starting to demand change. Many people "find themselves unable, mainly for financial reasons, to access the Canadian justice system," Beverley McLachlin, the chief justice of Canada, said in a recent speech. "Hard hit are average middle-class Canadians." The rich can get a lawyer, and the very poor (in Ontario, typically those who make \$15,000 a year or less) can get legal aid. But the vast group in-between are stuck. David Scott feels the law society (the lawyers' self-regulating body) should study the phenomenon to see if regulatory initiatives could improve access. "The middle class cannot afford this," he says.

Despite the stereotype, self-represented litigants aren't just Law & Order fans with a briefcase. Today, they come from all walks of life. But as Augustine can attest, our courts simply weren't designed to accommodate them. "We have an adversarial system of justice. It is based on having two represented litigants presenting their case to the judge," says Alice Woolley, an assistant professor with the University of Calgary's faculty of law. "If one is unrepresented, how can the judge decide that case fairly, and with justice?" Lawyerless litigants bog down the courts, adding expense, confusion, and delay. "It reduces [the trial] to the lowest common denominator," says Ontario Chief Justice Warren Winkler.

Not to mention the life-changing impact it could have for an inexperienced litigant, who might end up with a criminal record or lose custody of their kids, simply because they lack the experience and understanding to properly present the case. Even the term "self-representation" is controversial among critics, who underline that litigants without a lawyer have no representation at all. They worry that, instead of being a solution to the access to justice crisis, encouraging the trend only aggravates the problem -- and it's the legal profession itself that's driving it.

At the Superior Court of Justice in Toronto, clerks are increasingly sending the unrepresented to Law

Help Ontario, a two-year pilot project launched in late 2007 to help people represent themselves in court. People can get help filling out documents and free legal advice from volunteer lawyers, who sometimes appear in court on a litigant's behalf. In the first nine months of last year, the centre helped about 2,500 people. The province is about to embark on its first-ever civil legal needs assessment, says Lynn Burns, executive director of Pro Bono Law Ontario, which runs the centre. "Starting a centre like this, you realize how many people were falling through the cracks," she says.

Loreto Gonzalez is one of them. After representing herself for almost three months in a lawsuit against her former lawyer, she turned to Law Help Ontario. The centre gave her the confidence, she says, to stand alone before a judge. "The legal system is a clique," says Gonzalez, 41. "If you're not a member of the clique, it's hard to represent yourself."

The first legal self-help centre opened in Vancouver in 2005. Alberta now has three such centres, with more to come. A recent report on P.E.I.'s unrepresented litigants recommended setting up a centre there, too. Diana Lowe is executive director of the Canadian Forum on Civil Justice, whose report on the trend was instrumental in designing Alberta's self-help centres. "If someone doesn't have a lawyer retained in the traditional sense, at least they have access to someone who can give advice," she says.

Meanwhile, a growing number of private practice lawyers are also helping the unrepresented -- for a fee. They're offering services à la carte: as a cheaper alternative to full representation, lawyers might be hired just to help complete a document, or coach a client before he goes to court. Already popular in the U.S., "unbundled" legal services are now taking off here. Law societies in B.C. and Alberta have promoted them as an access to justice initiative, but lawyers stand to benefit, too. Sue Talia, a California-based expert on unbundled legal services, has addressed Canadian lawyers on the subject. "I tell them, 'If you want to learn how to tap into a completely new pool of clients, listen up,'" she says.

Even the courts themselves are having to change the way they operate to deal with the influx of lawyerless litigants. Nova Scotia and Ontario recently announced changes aimed at streamlining the civil justice system; though Ontario's reforms weren't driven by the needs of the unrepresented, "they will help the unrepresented, because it will make the system work more quickly, and at a lower cost," says Coulter Osborne, former associate chief justice of Ontario, whose report was the basis for reforms. Next year, Ontario's small claims court (where lawyers aren't generally necessary) will start accepting cases of up to \$25,000, up from \$10,000.

All this has got people in the legal community doing some serious soul-searching. In June, Jordan Furlong, editor-in-chief of the CBA's National magazine, wrote an editorial raising the possibility that we're headed toward a "post-lawyer justice system."

To Alice Woolley, that's a sad state of affairs, one

that strikes a blow against one of the most fundamental rights in any democracy: access to effective justice. "People need lawyers," Woolley says. "People may do without them, but they do so at a cost." Parachuting in a lawyer for a short-term appearance is hardly a solution, adds Frank Addario, president of the Criminal Lawyers' Association. "A trial is a complex, dynamic event," he says. "Lawyers can pick up and exploit any nuances. You don't get that with piecemeal."

As Ontario's chief justice, Warren Winkler has dealt with unrepresented litigants countless times. "Anything that makes it easier for people to access the system, I say is good," he says. However, making self-representation easier "is a band-aid approach," he says. "It's loaded with compromises." In fact, Winkler sees it as the red flag of a much bigger problem. "I think our goal should be to turn the trend around: to make lawyers, and the justice system in its traditional sense, more accessible," he says. "Then, the problem would go away."

As for Augustine, her own legal problems did eventually go away -- once she found a lawyer. After over a year of representing herself and getting nowhere, she heard about Downtown Legal Services, which provides a service akin to full representation. There, law students, under the guidance of a lawyer, worked closely with her on the file. When it was time to go to court, the supervising lawyer represented her. "She encouraged my ex's lawyer to back down," Augustine says. "It was a level playing field."

A level playing field might strike most people as a basic right. Today, though, it seems increasingly reserved for the lucky, and the rich.

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This is the first in a five-part series of stories on the crisis in Canada's legal system.

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