THE LAY MIND IN THE LAW

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Lay judges and magistrates — that is, persons without formal training in the law — have always played a major part in the administration of criminal justice. This is not surprising. Laws are usually drafted by trained lawyers, but they are or should be made for ordinary people, for the protection of ordinary people, the control of ordinary people, the peace and welfare of communities made up almost entirely of ordinary people. It follows that good laws are or should be comprehensible to ordinary people.

British Columbia has had a long history of lay judges and magistrates. The first magistrate in the colony of Vancouver Island was probably J. S. Helmcken, a medical doctor appointed to preside at Fort Rupert in 1850; he resigned a month or two later, to be reappointed in 1853. Among the first justices of the peace was also a layman, Donald Cameron, who soon after became the first Supreme Court judge and finally the first Chief Justice of Vancouver Island and British Columbia. Cameron seems to have been a great success in that even his opponents and critics agreed that he dispensed justice "not only with rigidness and exactness, but with despatch" and his judgments "exhibited prudence, firmness and candour." His greatest weakness was exactly where one would expect to find it: "in rulings during the course of a trial — rulings which must be made quickly and which require legal training and experience." Not too surprisingly, Cameron retired in 1865, after 12 years in office, and was replaced by a legally trained Chief Justice.

In the lower courts of the colony, things went differently. In 1859, soon after Judge Begbie arrived, five lay magistrates were appointed for the mainland. These men were paid respectable salaries and appear to have had extensive criminal jurisdiction. Four of the five were later appointed County Court judges and served, some with considerable distinction, until 1881.

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As time went on and the province was settled, a great many magistrates were appointed. Nearly all were laymen and in the rural areas were still known as Stipendiary Magistrates, though the appointments carried no salaries and any financial return was limited to that provided for in the provincial and federal tables of costs. Jurisdiction was limited to summary conviction matters and the "absolute jurisdiction" section of the Criminal Code, with a strange consent area which provided that certain indictable offences could be dealt with by the magistrate after a preliminary inquiry, provided the accused consented *and* entered a guilty plea. In the larger centres there were "police magistrates" with criminal jurisdiction approximating that of today's provincial judges. These were usually lawyers, whose salaries were paid by the municipalities.

Rural and small-town magistrates and justices of the peace were appointed in the 1920's and 1930's and even later with what seems to have been almost reckless abandon. I have personally known of magistrates parked away on islands or in obscure bays and inlets who never heard a trial from the day of their appointment to the day of their death. Such appointments seem to have been made for the convenience of local citizens who needed papers signed and perhaps as a minor compliment to the appointee, as well as for the assistance of police who might want a search warrant in a hurry. I have myself recommended the appointment of justices of the peace on no more compelling grounds, though always after fairly thorough inquiries.

Once appointed, a magistrate was sent a bare-bones copy of the Criminal Code and a fairly recent edition of selected provincial statutes. After taking the oath of office, he was in business. If he was wise, he probably talked with an experienced magistrate in a nearby community, though accepting advice *with caution*. If he was curious, he soon learned that other more instructive books were available and acquired these — perhaps Snow's Criminal Code, Popple on Evidence and Popple on Procedure. If he studied these after the shock of paying for them, he rather soon realized that he knew more criminal law than a good proportion of the lawyers who appeared before him; they tended, on the whole, to be rather elderly gentlemen, more versed in wills and conveyances than in assaults and thefts. When, as occasionally happened, able and experienced criminal lawyers appeared, they were invariably considerate and helpful. The magistrate found himself eased gently over the rough spots and learning far more rapidly than books could teach.

No doubt, appointments in the thirty years since my own have been more carefully checked. Certainly many able, well-informed laymen have been appointed in British Columbia, men who have served with consistent success and sometimes distinction. But so far as I know, no effort was ever made to inform them better, to provide even minimal law libraries (apart from a subscription to the Criminal Law Quarterly and, more recently, a copy of the Magistrate's Manual) or even to suggest useful purchases. Court facilities have varied from dismal to non-existent through the 1950's and 1960's, though a few municipalities, including my own, have provided excellent physical plant and resources within the last two or three years.

The salaries of lay magistrates were always nominal, bearing little or no relationship to the services performed; any change called for degrading negotiations, usually futile. It was explained that the work was a "service to the community" and that much of the reward was the "prestige of the office": it is difficult to imagine any reward more illusory or more unwanted. I think most of us did feel that we were performing an essential and often distasteful service and for the most part, doing it rather well. Perhaps this, too, was an illusory concept, but it kept us in operation.

In 1955, with the coming into force of the revised Criminal Code, a number of us were "specially authorized to exercise jurisdiction under Part XVI" which added very considerably to the responsibilities of the job. Later this jurisdiction was extended to all magistrates in the province. I firmly believe that this was an error scarcely short of irresponsibility. Part XVI matters arise so seldom in the more remote areas and other trials are so few that magistrates sitting there cannot possibly be expected to develop the experience necessary to perform satisfactorily with so much at stake. Sentencing, particularly, requires a sense of proportion and understanding of the possibilities that can only come with experience and careful consideration of recent precedents. I am well aware that a summary conviction trial can present difficulties as great as those of a Part XVI trial, but I am convinced that the limited "stipendiary" jurisdiction was of great value and that its removal has been the source of most of the recent criticisms of the lower courts.

I believe, very strongly, in the principle of the lay mind in the law. So, unless I misinterpret, does the great preponderance of western jurisprudence, at least in respect of the criminal law. In the most serious criminal matters, a judge alone has never been enough: he is the guiding influence in the trial and the interpreter of the

law, but the jury is the judge of fact. A jury is made up of ordinary men; if the law seems unjust or unduly harsh or incomprehensible, a jury is unlikely to convict. In time, this will have its effect and the law will be changed. Juries can, it is true, be prejudiced, capricious, insensitive or perverse. With respect, the same is true of judges, and the chances of such disabilities are greater in one man than in twelve — or so the theory goes.

There are no juries in the lower courts, but the jury principle is nevertheless there. A judge must instruct himself on the law in relation to the facts as he would instruct a jury, and having done so he becomes the jury — the judge of facts. This in itself may be an argument in favour of lay judges, albeit a tenuous one. But there is a far more important one. If the law is too difficult for the intelligent lay mind to administer, then it is altogether too difficult for most of the people upon whom it bears. If it is surrendered entirely to the triangle of lawyer judge, lawyer prosecutor and lawyer defence counsel, it is in danger of becoming far too remote from the ordinary citizen. If legislators, too many of whom are lawyers, can depend on this, then the law is likely to become increasingly difficult and incomprehensible.

It is practically a truism that eighty or ninety per cent of the cases decided in the lower courts are decided on the facts. They require relatively little learning in the law, but call for a balanced coherent mind and the ability to listen with analytical intelligence. Case law can, of course, be helpful and some leading cases are constant guiding lights. But only rarely does a case fit exactly the case one is trying and in the end it comes down to: What do I believe and why? What do I disbelieve and for what reasons? I have often thought that the criminal statutes are far more comprehensible than some of the cases which purport to clarify them.

The lower courts — that is, the provincial courts — deal with all criminal and quasi-criminal matters and carry about ninety per cent of them to completion. They deal, at present, with all juvenile and a substantial proportion of family matters. They deal also with small claims matters between citizens. They are the courts of first resort, and they operate day in, day out, in every community. They are the citizens' courts in a very active sense. It follows that they should be as simple, straightforward and comprehensible as possible, that they should be prompt in giving judgment and that their reasons for judgment should be clear and concise, uncluttered by legal obscurities or learned dissertations. This is not to say that legal precedents, much less the law itself, should ever be slighted, only that these should not be allowed to obtrude or obscure; where they are essential to the judgment, their application should be plainly shown. This is counsel of perfection and perhaps rarely attainable. But at lower court levels it should be as readily attainable by articulate layman as by lawyers.

It may be asked: "How can a layman know the special applications of the law to the case before him?" A great judge once rebuked a young lawyer arguing before him in words not unlike these: "Young man, you are not to assume that I know the law. It is your duty to explain to me what you believe to be the law." Since a judge goes into court knowing nothing of the evidence to be presented by either party nor any of the issues beyond the wording of the charge itself, it is obvious that the parties involved are better informed than he is and should have a better knowledge of the applicable law. The judge must listen and decide. Only rarely should it be necessary for a lower court judge to go beyond the authorities quoted to him into broader knowledge and understanding of his own; and when it is, it simply extends the cooperation that should exist between judge and lawyers in order to arrive at accurate interpretation.

I do not think that people who are constantly dealing with the law often realize how formidable and forbidding even the simplest court of law can seem to most of those who appear before it, whether as accused or as witnesses. The whole procedure is restrictive and inhibiting, almost entirely foreign to day-to-day living and communication. Certainly a court needs its own protections. The judge must be able to see over the court room, legal courtesies and formalities should be observed, proper procedure must be followed, laws of evidence adhered to. But apart from these essentials the lower courts should seek to be as informal and reassuring as possible. The objective is to get at the truth by means within the limits of the safeguards that the law provides, nothing more than this. Black robes are not necessary, a stern clerk, loud-voiced and formal, is not necessary. A prisoner's box is not necessary. Most witnesses are more at ease when seated. Apart from the necessity of a court room open to the public and large enough to accommodate spectators, most of the matters that come into court could as well be solved by people seated around a table. I believe that a judge who belongs to the community in which he sits can contribute something to general reassurance, and so to the search for truth.

Sentencing is difficult for all judges, laymen or lawyers, in the lower courts and in the high courts. If it is not, the judge should

not often arise at this level and are never settled there. When a significant point of law does arise, the appeal courts are readily available should either party feel aggrieved by the lower court decision. A certain input of lay minds can be of advantage in this as in all stages of lower court performance. The law is much too important to be left solely to lawyers.