

# Conference Wrap Up and Summation

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The Honourable Mr. Justice Robert J. SHARPE\*

Je félicite l'Institut d'avoir organisé cette conférence. C'est un honneur d'avoir le dernier mot, mais ça présente un défi considérable. Il ne sera ni possible ni utile de faire un précis de toutes les présentations. Dans les prochaines dix ou quinze minutes, je vais essayer d'identifier les thèmes principaux de cette conférence et de mentionner quelques problèmes ainsi que quelques solutions qui ont été suggérés.

I have organized my remarks around the three points of the Conference : the "public", "perceptions" and "the administration of justice".

If you look at the title of this conference it is interesting to note qu'en français, le titre commence par "la justice". This, perhaps, is a message to us undisciplined, unprincipled common lawyers who rely on empiricism. The civilian mind is a much more principled and ordered mind. It starts with what is important, "justice". I am afraid I cannot escape the limits of my own orientation. I am going to proceed in the order in which the title appears in English, so I will start with "the public".

It seems to me that one of the most significant things we heard — Robert Fulford put it very well — was the fragmentation of the public interest. Justice Baudouin returned to this theme this morning. Both speakers mentioned the challenge that the fragmentation of the public interest presents to the fundamental ideal that underlies law, namely, that there are certain universal principles that apply equally to everyone. This fundamental issue was presented at the very beginning of the conference with Patricia Williams' analysis of the O.J. Simpson trial, the racial divide in the United States, and the way in which both the accused and the victim are portrayed not as individuals but as members of a racial group.

We heard Ovide Mercredi's very powerful and very moving remarks about the aboriginal point of view and his quite startling statement of tribal memory. I first encountered this perspective when I sat down with aboriginal students at the University of Toronto. Those of us who have grown up in the western, liberal-democratic tradition and taught to believe that judges, the law and the police are sources of justice find it very difficult to accept that there are members of our society who see things quite differently. Their tradition and their experience teach that the institutions many of us cherish are sources of oppression rather than sources of justice.

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Mary Crnkovitch added an element of complexity to this. Her remarks indicated there is not "one" aboriginal point of view. She pointed out the diversity of opinion within the aboriginal community, and particularly focused on the perspective of aboriginal women, many of whom do look to the courts for the protection of their rights and integrity.

From a very different angle, Priscilla deVilliers offered us a very moving account of the plight of victims in our system — the perception of being forgotten, ignored and even insulted.

I take from all this a powerful message that our society and the public we serve is not monolithic but divided. Somehow, we have to find ways to accommodate that diversity within and under the umbrella of the rule of law if we are to achieve the ideal of an ordered and respected legal system.

There may well be nothing new in that message. Perhaps what is new is that we are now hearing voices confident about expressing a different point of view and about insisting that different perspectives be taken into account by the justice system.

In any event, I suggest this was the most significant thing we heard about "the public". To ask "who is the public?" is to ask a complex question. We are a diverse public with very different points of view.

Accommodating those differences poses problems at various levels. Some of these differing perspectives present what I would describe as process issues. The claims and complaints asserted by victims' rights groups fall into this category. There, the legal system has to decide what it is going to do in response to the claim of exclusion. The question is essentially whether and to what extent our legal process ought to afford this interest a say. It is a question of deciding the extent and manner of accommodating that interest within the framework of the existing legal process. These issues are relatively easy to resolve. Process issues are familiar to lawyers and judges and we have experience upon which we can draw. In this regard, we were provided an historical analysis of the situation of victims in the criminal process by Professor Louise Viau and we were given a comparative law perspective by Justice Kelly.

More troubling and in some ways more threatening to the very foundation of our legal order are the issues posed by aboriginal perspective and by the issues of race. As Robert Fulford and Justice Baudouin suggested, this aspect of the fragmentation of the public presents a much more fundamental substantive challenge to the notion of universality of law.

I move from the "public" to "perceptions". A number of points struck me. First was the almost exclusive focus on criminal justice. The public perception, it would seem, is preoccupied by the criminal process. At least in part, that was explained by Patricia Williams' keynote address when she described the symbolic power of the criminal trial. As the modern day passion play, the criminal trial shapes public perceptions about the law, the legal process and some of the most fundamental values of our society. And as Professor Williams argued from the experience of the O.J. Simpson affair, the criminal trial may well distort public attitudes. This undeniable symbolic aspect of the criminal trial

underlies the depth of feeling that was evident in so many of the remarks made at this conference about the criminal justice system. My own impression is that what we saw was a disproportionate element of concern about criminal justice, but it is there and I think it is explained largely because of the symbolic power of the criminal trial.

The second striking aspect of "perception" is that it is evident from what we heard that there is a gap between what the public wants or thinks it wants and what the justice system actually delivers. Link Byfield described public rage and Priscilla deVilliers described public passion. However one describes it, there is a clear difference between what the public wants and what the public perceives the criminal justice system as actually delivering.

We were told by many speakers that this gap is, in part at least, due to misunderstanding and misinformation. Anthony Doob and H el ene Dumont as researchers and scholars, Allan Rock as a politician and minister of Justice, Judge Sirois as a judge involved with juvenile justice, John Gormley as a member of the parole board — all of those people from various studies and experiences were telling us that the public perception is not always founded on the facts and that truth and reality do not support the current level of public apprehension.

How do we explain this and what do we do to rectify it? Some fault rests with the media. Some journalists seem careless with the facts when the facts do not suit their purposes. But I suggest that we cannot put all the blame on the media and that actors within the justice system have to assume some responsibility for the woeful state of public knowledge. Many lawyers and most judges seem to have an instinctive distrust of the media and a tendency to reject out of hand that they should work cooperatively with the media representatives. In my view, it was very significant that all the journalists who spoke at this conference told us that they are frustrated by the attitude of the legal profession and judiciary and that our lack of cooperation feeds public misunderstanding. I hardly need to add that these were not yellow journalists. Robert Fulford, Michael Enright and Len Grant are respected leaders of their profession and they were pleading with us for more openness and more information. Robert Fulford offered us his "secrecy breeds conspiracy theory" as one explanation for the level of public misapprehension. I could see his theory at work when we talked about the parole system. Those of us who know little about parole ask "what on earth is going on there?" That is exactly what is happening with the public with respect to the justice system as a whole. There is, I think, a desperate need for more and better information. May I remind you that it was not only journalists who were giving us that message. Chief Justice Michaud said he felt it was the duty of Judges to be more open, as did Judge Martinson. We were also warned about some of the dangers of openness. David Lepofsky very effectively warned about the dangers of television, but it seems to me the overwhelming message we received was the need for more openness and better public information.

In one sense, judges do explain things every day. Every time a judge decides, reasons are given. A message I took from Andrew Sims' presentation is that the public perception is shaped by little things and not just by "Donahue" and the O.J. Simpson trial. It is shaped by actual experience. An important aspect of the message to those of us who work as judges is that we need to be very careful about the way we explain things. We

need to indicate that we have thought about the situation of the victim or that we have at least tried to take account of the perception of an oppressed minority. Even, or perhaps especially, when we are not giving litigants the result they want, at least they ought to know that we have considered their perspective. We must avoid the temptation of shielding behind the mystique of the law. That can only imperil the legal system because in the end, the rule of law depends upon public confidence in the justice system. We were told time and time again that when the problems confronting the justice system are accurately explained to the public, the public understands and accepts what is going on. There is an important message here — there is a duty to be more open and a duty to explain.

Let me move to the third and perhaps most important theme, "justice" and the "administration of justice". When one turned to the system of justice, I noted a tension. I have mentioned the symbolic power of the criminal trial. It is clear that courts are kind of a lightning rod attracting public attention and public scrutiny. At the same time, however, we were told repeatedly that the courts are just one little piece of a much more complex puzzle. Patricia Williams suggested that dramatic events within the criminal justice system like the O.J. Simpson trial serve to divert attention from the real problems, the real sources of injustice in our society. Ovide Mercredi did not blame the courts for the plight of aboriginal people. He sees the courts as part of the problem but he clearly identified the broader economic and social questions confronting aboriginal people in Canada as being of paramount importance. The criminal law scholars and experts — Anthony Doob, Hélène Dumont, Allan Rock, Justice Vickers — all referred to the need to confront the underlying causes of crime. There is only so much courts can do. Courts only get involved when everything else has fallen apart and failed. The result, I suggest, is that we have to deal with this tension. On the one hand, courts are going to attract a lot of attention. On the other hand, courts are at best the tip of the iceberg and perhaps even at the periphery of the real problems and certainly not in a position to grapple with those problems. Even within the administration of justice itself, we were told that while there is considerable public concern about what goes on in courts there is probably even more concern about corrections policy, that is the manner in which those convicted of crimes are dealt with after the courts have disposed of their cases. This suggests that those of us who work within the courts have to see ourselves as part of a much more complex structure, both within the context of the overall administration of criminal justice as well as the broader social structure.

Let me conclude by mentioning some issues identified during the conference that are bound to confront those of us who work within the courts. I picked out three or four themes. Our discussions here lead me to think they are going to be with us for some time to come.

First is the very basic question that will probably always be with us : what are we trying to do with the criminal law, sentencing in particular, and how do we resolve the tension between what we try to do in the name of individual justice and what the public seems to want us to do in the name of social protection and retribution?

The second theme that we are all too familiar with is the problem of delay, access and cost. Gil Remillard spoke of those issues from the perspective of a Justice Minister, as

did Justice Latham as a judge, John McCamus as a law reformer and Andrew Sims as an administrative law expert.

Third, I have already mentioned the issues of openness and the need to take active steps to ensure that the public is provided with full and accurate information regarding the operation of the justice system.

Finally, how does our justice system respond to the concerns of some of the specific interests we heard from? How do we define the role of victims? How do we accommodate within the rule of law respect for the perspective of others who have different understandings of justice?

I am afraid that a final message is that our discussions suggest that it will be easier to identify the problems than to find solutions. Ce sont des problèmes qui vont certainement nous préoccuper dans les années à venir. Je suis confiant que cet institut va jouer un rôle important dans la recherche des solutions.

