The Public Perception of Sentencing — The Role of the Media

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First, I want to express my thanks to Bill Vancise and the organizers of this symposium for having invited me to address you. It is for me a great pleasure to be here and to voice some thoughts, opinions and concerns on what could be a very controversial topic. The very title of this segment "The Public Perception of Sentencing — The Role of the Media" makes it such that I will be saying very little about the content or pausing to analyze *Bill C-41* to any degree whatsoever as many of the speakers did yesterday. My role and the role of the others, I presume, on this panel will be more in dealing with matters of communicating and perceptions, rather fluid topics with which judges often are not too comfortable. However, at this late hour on a Friday afternoon, for those of you who are left, it is probably just as well that I won't be talking about the legal analysis of *Bill C-41* while I struggle to keep you awake.

Somewhat akin to Marshall McLuan's famous adage "the medium is the message", in the matter of sentencing, as with the criminal legal process in its entirety, for the general public perception is reality. It has often been repeated that in order to function effectively, the criminal legal process must have the confidence and respect of the public, in no aspect more so than as regards the culmination of that process when there is a verdict establishing guilt, that is, the sentence.

Both prior to *Bill C-41* as well as within the context of that law, the basic principle underlying the sentencing process was, and in my opinion remains, the protection of society. For that element in *Bill C-41*, one need only glance at section 717(1) where the terms protection of society are there as such and also the opening paragraph of section 718 which speaks of a safe society, into which I read that same element of protecting society. Generally, *Bill C-41* is seen to be a tentative step towards restorative justice and away from the traditional form of retributive justice. The major question, however, would appear to me to be : Is the Canadian general public ready for it?

I mentioned the protection of society and the persons who compose that society, the public, are thus entitled to be adequately and accurately informed of the functioning of the sentencing process. Our American neighbours call it the public's right to know. The media are the eyes and ears of the public in that regard. The media therefore have a duty, that is, the responsibility which is the flip side of the constitutional right called freedom of the press. That duty is to report honestly, fairly and accurately.

I digress for a few moments in regard to that legal concept called "freedom of the press". Many people, even attorneys and journalists, especially the younger ones,

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mistakenly believe that in Canada, among other rights and freedoms, the legal concept of freedom of the press is a creature of the *Canadian Charter of the Rights and Freedoms* of 1982. While it is true that the Charter has entrenched that right in the nation's constitution, it has existed in the Common Law for many decades, in fact, for almost two centuries.

Insofar as Quebec, after its cession by France to the United Kingdom, in virtue of the Treaty of Paris of February, 1763, the legal notion of freedom of the press was transported into Quebec Public Law by virtue of the Common Law continuing to prevail here in public law matters. That same legal notion also became and remained part of the public law of the common law provinces and territories.

As to the notion of a "free press", it existed and was largely respected in the United Kingdom since at least early in the 19th century. The concept of a free press then, prior to the advent of radio, telegraph, telephone, telex, cinema, television and now the fax, computer and the Internet, applied only to the printed word, newspapers, magazines, etc. Since the evolution of those other technologies, the concept applies both to the print and the electronic media. Section 2(b) of the Charter makes it clear when it refers to "freedom of the press and other media of communication".

By the late 19th century, the existence and functioning of a free press was generally considered to be an indispensable cornerstone of a free and democratic society. That legal principle was recognized throughout the common law world, that is to say, the U.K., its dominions and colonies, now the members of the British Commonwealth and the U.S.A., as well as the European democracies. In fact, when a dictator, whether an individual or group, wished to enforce his or its control over the machinery of government of a state, among the first steps taken would be, immediately after gaining control of the military, the muzzling and control over the press and the suppression of the independence of the judiciary and the bar. We saw this in the countries of the axis powers during the second world war.

In the *Constitution Act*, *1867* the preamble declared in part "whereas the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one dominion under the crown of the United Kingdom of Great Britain and Ireland, *with a constitution similar in principle to that of the United Kingdom*". The practical effects of that affirmation in the last phrase of the portion which I just read were amply demonstrated in the 1938 judgment in the Supreme Court of Canada in what has come to be known as the *Alberta Free Press* case, [1938] S.C.R. 100, at pages 132-135, 142-147 for those of you who might feel inclined to have a look at it.

Basing itself in large part on that last phrase of that first paragraph of the preamble to the *1867 B.N.A. Act*, the Supreme Court of Canada struck down a series of Bills enacted by the Social Credit Government of Alberta, including the *Press Bill No. 9*, which purported to give to a government body or agency the authority to control the press, to have articles submitted in advance for approval, etc. Hence, in that affirmation in the preamble to the *B.N.A. Act*, you have the Canadian constitutional origin of a free press.

Thus, the media are a powerful instrument in modern society. They mould and shape public opinion and public perception. Correspondingly, they have the duty of

restraint, impartiality, accuracy and fairness when covering, in particular, the criminal legal process and, especially, sentencing. In the light of that concept of freedom of the press, it is not without some trepidation that I venture onto the terrain of suggesting to the media how they should perform their function in that connection.

On the issue of accuracy, one would reasonably expect that the journalists assigned to cover the courts would have a modicum of understanding and knowledge about the legal process. Here in Quebec, the question of two languages is a further complicating factor. The English language media, frequently assign to cover a French language trial, persons who are not adequately bilingual. The same occurs in reverse. It is a practice which I decry.

One example, and a good case in point, is the case of *R*. v. *Bergeron* which is more frequently known by the name of the victim in that case, one Richard Barnabé, frequently called the Barnabé case. It was extensively covered by the media. I will refer later to some aspects of that coverage. It was a case of police brutality where a man who was arrested was subdued or restrained, or beaten as the press reported and I say that *entre guillemets* for the moment, so that he lapsed into a coma after a cardiac arrest and remained in a coma until he died 2 1/2 years later, last summer. This attracted an awful lot of media attention. It was not long after the Rodney King incident in California and this was a hot topic for the media to deal with.

Now, Mr. Picard gets up and on behalf of Pierre Bergeron, he puts himself in the skin and shoes of his client and says, as follows "My name is Pierre Bergeron, I am married, my wife's name is Lise, I have three teenage children". He stated their names, ages and grade of school attended. He went on to say that "I have been a police officer for 17 years, I have a perfectly clean record and I did not do what the prosecution imputes here that I did". He concluded that segment of his summation by saying "Je ne suis pas un Rambo". The next morning, *The Gazette*, which had a daily article on this case, on the first page — the headline — "Defense calls Barnabé a Rambo". What did this do, and this was a flagrant misunderstanding when he said "Je ne suis pas un Rambo". This was an accused saying about himself, through his lawyer, I am not a Rambo and to the reporter, this meant that the defense was calling the victim a Rambo. I asked myself how this affected the public's perception, because not only would the police have beaten this man nearly to death, but at the trial they call him names and they malign him, adding insult to injury. This paved the way for what happened when the sentences were eventually rendered. I will get to that a little later. I could give numerous such examples.

Another example, not restricted to that case, but to murder cases in general. We all know that any person convicted of murder in an adult court, whether that person was an adult when he committed the crime or someone who was a minor between the ages of 16 and 18 when he committed the crime, but has been deferred to the adult court, that the sentence is automatic and imposed by the law — every murder conviction carries a life sentence. What remains where one is dealing with an adult found guilty of second degree murder is for the judge to exercise his or her discretion in the domain of the period of ineligibility for parole. In second degree murder, as you all know, that period will range from 10 years to 25 years, after a recommendation by the jury which the judge must consider but is not obliged to follow.

Until the Supreme Court recently changed its earlier position, which severely limited a judge's discretion, and opened up a wider discretion for judges to go beyond the 10 years, attempts by judges, myself included, to go beyond the 10 years in a second degree murder conviction were usually slapped down by the appeal courts because of a particular position adopted by the Supreme Court of Canada. They have now generally widened that discretion but before that, most second degree murder convictions were disposed of with a 10 year period of parole ineligibility.

The media, in Quebec, and I can't speak for the rest of the country, would frequently report this as follows : Joe Bleau, convicted of second degree murder, sentenced to 10 years. And then someone would say to me, where it was not my case because they wouldn't normally approach me to say anything to me about one of mine but rather one of another colleague : How is that possible, such a brutal murder and the person is sentenced to only 10 years? That means he will be out in 3. What kind of a justice system is this? If the media would take the trouble to say, "sentence : life in prison, not eligible for parole before 10 years," so that the person who reads that knows that, oh well, that man is going to spend at least 10 years in jail, then you wouldn't get this kind of negative reaction in the public.

Yet, almost routinely in Quebec, murder sentences are reported as 10 years, 12 years, 15 years, whatever may be the period of parole ineligibility. How difficult would it be for the people who report in the press on court cases in general and murders in particular, to learn that it is life imprisonment and to say so. Then, you won't have the resulting discredit on the system which is brought about when a person reads that someone committed this brutal murder — they read the facts or heard about the facts of the case during the evidence stage when itt was reported — and the person gets only 10 years. It is also well known that you get out after serving one third of your time, which means that in 3 years he will be on the street.

Most members of the general public are hard liners when it comes to crime. This has been confirmed, even more than what I believed to have been the case when I wrote and prepared this text a few days ago, by what I have heard here. Professeur Brodeur yesterday spoke about a poll wherein, when asked ?what measure do you think would most enhance the protection of society", 27% of the people replied, stiffer sentences. And you had Professor Julian Roberts speak this morning about a poll conducted by him and his associates in the 1980's and again recently, which showed that then, as now, approximately 80% of the persons polled felt that sentences in general are too lenient. It is clear that the reasonably well-informed general public are hard liners when it comes to sentences. Very surprisingly a poll conducted under the auspices of the Quebec Department of Justice only a few weeks ago among young people, people around the age of 20, when interviewed about the justice system and sentencing, as surprising as you may find it, the vast majority of those young people, whom you might not expect to be so hard line on crime, urged the return of the death penalty and that the system come down heavily on criminals.

Hence, it is clear that the general public feels that sentences are insufficient, are overly lenient. When they read an inaccurately reported or incompletely reported sentence in a murder case which makes them believe that someone who has committed a murder of one or sometimes two people non-premeditated, not within a sequestration or within

a situation of sexual assault, where it is a spur of the moment and location event but could be very brutal, could be very degrading, and when they read of this person going to jail for 10 years and believe he will be out in 3, it does not have a good result or a good effect on the public's perception of the justice system. This is something which can be very easily corrected. So the press, in such an instance when it erroneously understates a specific sentence or misstates it, tends to discredit the criminal legal process in the minds of the public.

The same occurs when the sentence provided for by the *Criminal Code* is erroneously understated. On the matter of the sentence provided by the Code for murder, an example of which is a case presently being presided overy by my colleague Justice Fraser Martin, who will be here chairing a panel tomorrow but who is, today, at the courthouse, I believe preparing his directives in that case which will probably be taking place on Monday. The trial has been ongoing now for two months. In the pre-jury selection stage, here is what a reporter wrote, [...] *and this is an accused who at present, unless and until the appeal court changes it, is being tried as an adult because the youth court held a hearing to determine whether this person was or was not of the age of majority at the time of his crime, or the crime he is alleged to have committed. Was he 17 or was he 18?*

He came from an island in the Caribbean where he had been found, as an infant, on the doorstep of a church. No one knew exactly what his age was. He had been adopted, came to Canada later and because of problems while a youth, there had been an effort to establish his age early on, when he was 10 or 11, and doctors who were experts in the field came and testified about the bone density at that time which would lead to a conclusion that he was then 11 rather than the age of 10 that his birth certificate showed. The youth court ruled that he was 17 at the time of the crime but deferred him to the adult court and that decision is still before the Court of Appeal.

I am assuming that the Court of Appeal will maintain that decision. That is an assumption for the purpose of discussion only, I have no inside knowledge. Therefore under section 745.1(b) it is clear that if he committed the crime at a time when, at the very least, he would have been 17, his sentence would be life imprisonment and ineligibility for parole for a period of 10 years. Here is what the reporter writes : "As a minor, the maximum time he would serve is 10 years. As an adult he would have to spend at least 25 years behind bars. He is accused of first degree murder". Though he got it right on the adult part, the 25 years is the time a person would have to serve, saving of course always section 745 and a possible revision after 15 years. But insofar as this person is concerned, who is presently undergoing trial here in Montreal, it is not the maximum time that he would have to serve — which is 10 years — it is the minimum time.

Of course, the error could be a typo, a clerical error or a simple slip. Was it? I believe not because the same reporter, after selection of the jury — that article, by the way, was on February 25, 1997— wrote, on March 11, 1997, the following : "If Bromby is found guilty of the charge, he faces a maximum of 10 years behind bars". Well here is a situation where a person reading this says to himself : "well, this person is alleged to have come into the home of this teenager, Miss Manning, brutally sexually assaulted her and stabbed her 48 times, or something to that effect, and the inference is that the most he

will serve is 10 years if found guilty. What is the least he will serve"? So this, again, could have a tendency to discredit the justice system in the eyes of the public in general.

Now as to Barnabé, Dr. Mark Angle, who is a neurologist at the Montreal Neurological Institute, to which the victim was taken the day after the incident, gave his evidence and showed coloured slides from the CAT scans he had conducted the day of admission and 2 weeks later. He showed a part of the brain at the centre which was darker, a dark gray in colour, and which he said was a result of the fact that, although there was no evidence of external blows to the head, the injury to the brain was physiological in nature, this is the Crown witness. The sudden cardiac arrest and the positional asphyxiation which he underwent because of being forcibly restrained, rather than beaten, which is what the evidence showed although the press continues to call it a beating, meant that the brain was deprived of oxygen, in his case for 28 minutes. It was therefore a miracle that he remained alive at all and then he remained in a coma, because after 6 to 7 minutes brain cells start to die and when brain cells die, said Dr. Angle, they tend to liquefy, the brain cells that die liquefy. This dark patch that you see there are the liquefied dead brain cells.

You can see it coming, I am sure. The next day in the Montreal Gazette, banner headline in bold type over an inch high. I had kept that paper and hoped to be able to show it to you but I couldn't lay my hands on it when I had my secretary search the day before last. It was impressive, across the masthead on the front page : "BARNABÉ CASE : BEATING LIQUIFIES BRAIN". You can imagine the image that was conjured up in the minds of the people who read it. It was like the Rodney King case all over again, but worse. Here you would have had six policemen with their truncheons or whatever, who would have hammered this man's skull into mush and liquefied his brain. No such thing ever happened.

Now it happens that an article which appeared in the winter 1996 issue of the McGill News, which is a quarterly magazine which goes out to all McGill alumni, featured an article on 5 judges, all former McGill students, myself included. We were asked to include a summary of two cases that we thought to be of note and I included the *Oka* case, the case of two individuals known by their surname known as "Lasagna" and "Norriega", which case I presided up in St. Jérôme some 5 years ago, and the case of Barnabé. This is what the magazine said on my comment on the Barnabé case "[...] in submitting this case to the McGill News, Judge Greenberg commented, most people felt the sentences were lenient but they don't know the facts of the case. There was no evidence of external blows. He feels that the media misreported the case".

Now, four of the five accused were found guilty. They had been charged with aggravated assault and were found guilty of the lesser offence of assault causing bodily harm. The maximum penalty was 10 years. They had applied in the restraining of Barnabé a method which had been taught to them at the police college and which continued to be taught until 1992. The Barnabé incident occurred in late 1993. That method has since proven to be extremely dangerous. When a person is restrained on his stomach, ventrally, and that person is highly agitated or hallucinating, or in a state of psychosis and where that person is handcuffed to the rear, as Barnabé was, and where that person has some broken ribs, as Barnabé did, breathing becomes more laboured and difficult as the person resists.

There is a greater demand for oxygen than is being furnished by the lungs and this spirals down into cardiac arrest, or can do so very easily.

In 1992, the Health and Medical Section of Corrections Canada distributed a warning to all the penitentiaries and personnel across the country : do not, in these kinds of circumstances, restrain a person on his stomach. He may die on you. Get him up onto a chair or erect. Since 1992, as a result of this, the college at Nicolet has taught Quebec police recruits new and less dangerous methods of restraining violent persons who resist vigorously and who happen to be, as Barnabé was, delusional, hallucinating and in a state of delirium.

You might ask, what about the 10,000 or so police officers in Quebec, that would be the S.Q., Montreal and the others, who received their training before 1992. Surely they are being brought back systematically to update them on this technique. Oh no, budgets do not allow it. Only those who come back to the college for some other reason, such as a fingerprinting course, etc. are updated. But all of the policemen out there who got their training before 1992, and the man who did the teaching testified at the trial that this is what he taught these 5 people, as well as 15,000 others, and the accused here did it by the book. As I put it in my Sentence which I intended to read here in part, but I haven't enough time, I did not feel that it was fair to put all of the burden on the policemen who only applied what they had been taught.

I sentenced the four individuals, one who involved himself the least, Vadeboncoeur, who arrived late as he and his partner, the lady police person who was eventually acquitted, stayed in Laval to see to the removal of the victim's automobile. They arrived at the police station in the last minutes of the incident in the cell. Therefore, Vadeboncoeur's participation having been much less, and notwithstanding that there were cries and demands in the press and in the public for exemplary sentences, I sentenced him to 180 hours of community service within a year in the context of a 3-year probation order. I sentenced the others, two of them (those that had initiated the incident) to 90 days by way of 45 weekends in prison, and Lapointe, the other one who came in response to their call for assistance, to 60 days by 30 weekends.

The press universally and unanimously lambasted me. My sentence ran, in terms of its reasons, to 59 pages and I venture to say that not one of them took the time or trouble, between the rendering of the sentence and the article the next morning, to read it. Moreover, because of this perception in the minds of the public, created by the media, and I would call it a misperception, I received hate mail for almost 3 months after the sentence. I have a thick file of letters from members of the public who saw fit to write to me with all kinds of expletives expressing their horror at these inadequate and insufficient sentences.

Now, I suggest that where a judge deposits his reasons for sentence after reading them out, and notwithstanding the immediacy of deadlines, that reporters who want to report on that sentence should take the time to read it, even though it is 59 pages. You can easily get through it in an hour and half if you attended the trial and know what it is about. Moreover, reporters will often consult experts as to their opinion of the sentence and, of course, these experts, whose knowledge is limited to what they saw and read in the newspapers, give an opinion again based on the same misperceptions. I therefore suggest

humbly and respectfully that reporters should not solicit an expert's opinion on a sentence without assuring him or herself that that expert has read the sentence. It is something as elementary and fundamental as that.

I cannot close my remarks without a word about the electronic media in the courtroom. If and when that occurs in Canada, and I hope it is not while I remain a judge, the media's role in moulding the public's perception of the trial and sentencing process would be greatly accentuated. We have as the best recent example the Simpson "trial", if you feel you could dignify what happened there with the term trial, or call that spectacle a trial. Many feel it was more like a circus. Here is what the lead prosecutor in that case, Marcia Clarke, had to say when she was in Montreal in February, 1997 to give an address in a series of addresses at the Place des Arts by prominent women who have succeeded in their various fields of endeavor. She, who lived that case said that "cameras do not belong in the courtroom", adding that "they make lawyers pander to the camera and judges take too long to make decisions. The effect it has is not an effect toward justice, the case becomes a cartoon and not a dispensation of justice". This is the opinion of a person who lived through the Simpson trial, if you would persist in calling it a "trial".

In conclusion, the public's perception or misperception of the sentencing process, as of the trial process in its entirety, is wholly fashioned and moulded by the media and, for the public that perception or misperception is reality. Therefore, the media, in recognition of the fact that the freedom of the press has the flip-side, which is the responsibility that goes along with the right, must recognize that fact and must fulfil their function accordingly by reporting accurately, truthfully and fairly.