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A Journalist's      Perspective

Courts, Media and the Law

by Robert Enright

Before I begin I'd like to thank the Canadian Institute for the Administration of Justice for the opportunity to be a part of this significant and timely seminar. I should point out to you that I have a prior legal life in that I took two years of pre-law courses at the University of Saskatchewan in the late 60's, but that's as far as I got. I fell in love - with life and with literature and after that the only bar whose siren call I attended was the kind with the slogan in vino veritas. I think too that the Dean of Law at the time was a veritable youngster named Otto Lang and it occurred to me that legal O.K. Corral wasn't big enough for two cowboys under 25 years of age. In a metaphoric way I headed out of town and, as it turned out, so did the Dean. I notice that the profession of law has survived my abdication, but my father always wanted me to be a lawyer and he would be pleased to interpret my proximity with judges and lawyers today as a minor fulfillment of the vocational wish he had for me. Being Irish, he would recognize my apostasy as a species of guilt by association.

Any of you in the audience who know me as a journalist will recognize that the majority of my activity since I joined 24 Hours five years ago has been as a cultural journalist. I remember the surprise registered on the faces of some lawyers who knew my work when I routinely began to turn up for the hearings on the Betty Osborne Case in September of 1988. But I think its important for me

to stress that from the moment the Osborne murder was first discussed at a morning meeting over three years ago, it struck me as a story that was cultural to its very core. You understand that I'm using the word cultural in a broad sense - as a pattern of reflecting and establishing the values we live by as a society - and while much of my work as a journalist has assumed a narrower, more aesthetic definition of the term, I want to insist upon its broader application in this context. There was something about this incident, about the community in which it occurred, about the attitudes towards the law, towards women, even about what community itself means, which, as the happy cliché goes, spoke volumes about what it was like to be a Canadian in the last 20 years of this waning century.

And of course what the Osborne story was most dramatically about - a fact that recent events at Oka and Chateauguay have made abundantly and distressingly clear - was the sorry relationship that exists between white and native people in Canada. And it will come as no surprise to anyone in this room that any change in that relationship has been - and will continue to be - an area where the law will play a significant role.

Even as I write it, I'm uneasy about the word "dramatically" because despite the horror of the murder and the undeniable reluctance to come forward on the part of a number of townspeople who had information which might have helped solve the crime - despite these circumstances the conclusions I've come to about the Osborne murder are not dramatic and sensational. Rather they are subtle, perhaps even banal; the errors and actions of people who are

neither demonic nor heroic. While it may be little consolation to any of us who lean towards a Rousseauesque view of humanity, the people involved in the Osborne case were "just plain folks," a number more cowardly than we'd like people to be, and some more malicious and cruel than we think we're capable of being. For the most part the face humanity put forward for scrutiny in this tragic case was not its most shining countenance. Pound for pound and action for inaction, these were pretty ordinary people who became part of a rather extraordinary process.

The extraordinary process I'm referring to is, of course, the Aboriginal Justice Inquiry, an inquiry which took place over a year; which racked up a total of thousands of pages of testimony; and which generated a level and degree of public response unprecedented in my journalistic experience.

I want to concentrate today on the "publicness" of the AJI. Any budding historians of language will encourage my own inquiry into the application of a related word - publicity - when I talk about the Osborne case. Much of the debate about the nature of the media coverage - in both print and broadcast - focussed on ideas like publicity and sensational rather than on ideas like public interest and responsible. In a characteristically Canadian way, the real story we covered as journalists may be somewhere in the spaces between these opposing concepts. Canada is a country defined by interstices, by reading between the lines and, if the pun is forgivable, by reading between the lies as well.

I mentioned earlier the non-dramatic sense I now have of the Osborne case and the community in which it occurred. I admit it was

a question of having to put the slow cart before the once excitable horse. As I first heard the sketchy details about the Osborne murder and as the trial unravelled a skein of brutality and indifference, my reactions to the case were anything other than disinterested. To be blunt, I was furious and ashamed and went into the process like a moral paratrooper armed with a stealth-gun of self-righteousness. Now three years later and thanks in no small measure to the proceedings of the AJI I'm less arrogant. In fact, I'm doubtful about a too-easy insistence on moral superiority. The Inquiry has done a number of things; it has humanized the community; it has made the audience more compassionate; while at the same time it has in no way diminished my conviction about how the individuals in the town of The Pas should have acted, even taking into account the circumstances of fear, community tolerance, frontier standards and any cluster of moral relativisms you may want to throw up. The Aboriginal Justice Inquiry argued - in some instances directly and in others indirectly - the appropriate behaviour while it had the compassion to understand the inappropriate behaviour as well.

All knowledge for me is gain. As reporters and analysts we were afforded an unusual amount of information as the AJI progressed, material which otherwise would not have been forthcoming. It's no secret that police organizations are reluctant to give out information and that for the most part, the relationship between the police and the media could best be described as tolerably competitive. I should point out that the two individual cases considered by the Inquiry assumed a very different character with respect to the police forces involved. While occasionally

strained, the relationship in the Osborne case between the media and the RCMP was respectful and satisfying; whereas the relationship between the media and the City of Winnipeg Police Department over the J.J. Harper case was abominable. These bad relations reached a low point on a 24 Hours documentary about journalistic practice when Police Chief Herb Stephen accused Free Press columnist Gordon Sinclair of a "vendetta" against the police department. Sinclair's opinion about Stephen was that "he wasn't the right man for the job of Police Chief"; he went on to characterize himself with an equally small degree of humour and modesty as "Public Enemy Number One" in the eyes of the police.

But the adversarial role between the police and the media is as it should be; journalists are skeptical by inclination and training. We assume we're not being told the whole truth and see our function to inform the public as accurately, as fully and as soon as possible. Police officers will say there are good reasons for the controlled disclosure of information and journalists will respond there are also very bad reasons for those same inhibitions. I'm inclined to think most of the reasons are bad - short of national security issues and not wanting to damage an investigation or violate pre-existing laws, I can think of few justifications for the parsimonious release of information.

That was what made the AJI such a gold mine for the members of the media. It was curious to see the compelling effect the legal force of the AJI had on the individuals who appeared before it. There were instances where people I had talked to in researching my book had told me one thing in our informal interviews and then said

something totally different - and oftentimes contradictory - when testifying before the Commissioners. They were under no legal compulsion to tell me the truth in our conversations but when they responded to questions from the Inquiry there was a noticeable increase in memory and accuracy. The cynical side of my character says its interesting to notice what the threat of perjury and fear will do to improve the memory; the more ritualistic side recognizes that the formality of the proceedings - with their attendant dignity - may well have been a determining factor in the quality of information the witnesses were able - and willing - to supply.

Among the dilemmas journalists face in supplying their public with good coverage are a deficiency of information and a difficulty in understanding and in translating specialized languages. The language of law, like any professional discourse, is to some extent a private language. How many of us can recall the furrowed, vaguely neanderthal brow of Dr. Ben Casey as he offered his diagnosis of a patient in the 60's television show? Any diagnosis he gave always sounded like a fatal prognosis and I remember thinking to myself that the language of the program was a deliberate con, a way of mystifying medicine and not incidentally of maintaining power.

What happened during the AJI was that the privacy of legal language and process was, for the most part, abandoned. Part of that was a function of time; the lines of questioning were often thorough and lengthy and what you didn't get at the beginning you often got later on; part of it was because the lawyers for the Inquiry, other lawyers with standing, as well as the Commissioners themselves, were often in the nerve-wracking position of being obliged to ask

questions they didn't already know the answers to. And the final reason why the proceedings for the Inquiry were more comprehensible was that all parties were concerned to ask questions that the witnesses were able to understand and respond to. It became apparent fairly early on, for example, that Betty Osborne's mother was completely unfamiliar with legal process and had no idea what a prosecutor was, yet alone why it had taken so long for the murder of her daughter to go unpunished.

The AJI ended up being about, both by design and by serendipity, the democratization of information. It shifted the power away from the court system to the arena of public perception. And it's precisely in the area of public perception that the AJI did its most radical and its most perplexing work. To understand what effect the Inquiry had it's necessary an outline the Betty Osborne story: in 1971 the beaten body of an 18 year old native girl was found 56 kilometres outside of The Pas. The body was nude except for a pair of boots and it had been stabbed over 50 times with a screwdriver. Within a relatively short period of time a number of people in the community had a fairly good hunch as to who was involved in the murder. Four white men were suspected by the RCMP and as the months passed, the conviction that Messrs. Johnston, Colgan, Houghton and Manger were the men involved became commonly accepted. But it took 17 years before any of the four were brought to trial; both Mr. Johnstone and Mr. Houghton were charged with first degree murder; by the time the trial was over Houghton had been acquitted and Johnston had been convicted. Mr. Colgan was granted immunity for his testimony and Mr. Manger was never charged.

But the case didn't stop there. The Pas Indian Band, the media and a portion of the public - both within The Pas and outside of it - were not convinced that justice had been done. Then three months later J.J. Harper, a native leader, was shot in an encounter with a Winnipeg policeman. The officer, Robert Cross, was rather quickly cleared of any wrongdoing. The cry for a public Inquiry into native justice became widespread. The province's Attorney General at the time, Roland Penner, established the AJI into the Administration of Justice for Native People with an ambitious mandate to deal with the general administration of justice and then, as a second and no less significant responsibility, to consider the separate cases of Helen Betty Osborne and J.J. Harper. By the time the Inquiry completed its proceedings, it had ruffled the feathers of members of the legal community, its mandate and procedures were questioned, and it had raised to an unprecedented and sometimes, uncomfortable level the awareness of white and native cultural interaction. What it also did was to make apparent the discrepancy between what the public felt to be just and what the law could actually deliver. While the letter of the law was adhered to, its spirit was left in tatters. I remember talking to people in The Pas and in Winnipeg after the trial and noting a general feeling that something had gone wrong. All four men were involved, why weren't they all punished? Something of the same attitude existed after the hearings, although I wouldn't go so far as to say it prevailed. The powers given the AJI were wide-ranging; the Commissioners could subpoena the four men involved and, to various degrees of satisfaction, all four did say something to the Inquiry, even, if in the case of Mr. Johnston, it was to say that he



wasn't about to say anything. On the day Mr. Johnston refused to be sworn in there was a palpable air of disappointment in The Pas; there was a feeling that of all four men involved, he could go the furthest in clearing things up. His refusal to do anything - mourn, accuse, attack - left the door open for his former friend - Jim Houghton - to suffer a convenient and total memory loss about the Osborne incident when he came to testify in Winnipeg some weeks later. Houghton's testimony was carried on Newsworld, the twenty-four hour news service the C.B.C. had begun transmitting only a month before. As a result the entire country had excellent seats for Mr. Houghton's testimony. For those of you who didn't see it, it was a remarkable performance. Mr. Houghton, now a married man with two children of his own, was unable to remember anything of the night 18 years earlier when Betty Osborne was murdered, and his refrain, "I don't say it never happened, I just don't remember," became a kind of black prayer, a liturgy of amnesia. It was at the end of his testimony, after all appeals to his sense of decency, to his care for the spirit of Betty Osborne, to the integrity of his relationship to his own children had been exhausted, that Justice Sinclair delivered his astonishing summary:

"Before you step down Mr. Houghton I just want to say that we have been quite taken by your lack of recall for the day... And when you leave here today I don't want you to walk away for one moment thinking that we believe you, because, quite frankly, we don't. You have managed to escape being incarcerated by not lying to us about the events... You're either a very, very stupid man or else you're a liar. And frankly, we think you're very intelligent."

In the entire duration of the hearings I had never heard a more dramatic pronouncement from the Commissioners. I would hazard

that Sinclair's judgement coincided with the perception of the vast majority of people watching Houghton's testimony across the country. What he did was to judge a man who already had been acquitted of murder by a jury and declare him guilty of some involvement, some knowing complicity, in the death of Betty Osborne. Jim Houghton may have stepped down from the witness stand a free man, but he also stepped down a disgraced and guilty one.

As I said, this made for incredibly dramatic television. It was enough simply to see the individuals involved; there wasn't any reason to have additional "catchy" pictures. (There were a number of times throughout the Inquiry when I thought of the intensity of the Watergate Hearings in Washington; nothing could add to the real drama of that history-making confrontation between corruption and justice anymore than we as broadcasters could up the ante on our own history in the making.)

As the commissioners travelled across the province they were told compelling stories, stories which addressed the larger question of the justice system and how it affected the lives of Manitoba's aboriginal people. And whenever it was possible, the media was there. It's worth noting that all of the testimony - thousands of hours of it - was recorded by a Video company hired by the Inquiry, which meant that everything said was ultimately available to the media. But it often came from isolated communities and unless the tapes were flown into Winnipeg, the material didn't make the 6:00 news deadline. And old news is no news.

Radio and print journalists were able to more effectively cover the nuts and bolts of the Inquiry's activity because they were

able to file their stories more easily. Television is a cumbersome, costly business and its language is pictures. I realize its sometimes difficult for people who watch television but who don't know its demands to understand all the fuss television people make about pictures. But as viewers we have come to accept a standard level and quality from our news programs. I mentioned the language of legal discourse earlier; well, television has a language too, with a visual syntax no less demanding than the one we hear in courtrooms and read in judgements. The pictures that news programs were getting from the Inquiry sometimes weren't varied enough for editing and, as a result, a good deal of testimony wasn't covered. The amount of coverage the AJI received was a tricky issue throughout the hearing process. Our talkback lines were often sprinkled with callers who had become sick and tired of the "whining" Indians and of the "police-bashing" which we were engaged in. These callers represented one side of the debate which attends all controversial issues: the other side said we weren't covering enough of the hearings, that we were sensationalist in our concentration on the Harper and Osborne cases. I may be out on a limb here, but I sensed that the Commissioners themselves felt the media spent too much time on the splashy cases and not enough on the real work they were doing in providing a forum for native people to air their grievances. It's an issue we addressed as journalists on numerous occasions; each time we scrutinized our approach, our budget, our manpower resources and our judgement about the delicate balance between what we wanted to give the audience and what the audience wanted to get.

In a number of instances money was the determining factor and that made the decision easier. Where it got more problematic was in the area of journalistic ethics and practice. The AJI heard from a number of witnesses who were not obliged to testify under oath and they said some fairly startling things. I can think of one case where 24 Hours and I, personally, got wrecked on the rocky shore of hearsay evidence. A young native prisoner in The Pas testified that he had been beaten by the RCMP while he was on the phone and he obliged the Inquiry he bending his head toward the camera to reveal a rather ugly pair of wounds - complete with suture marks. We broadcast segments of his testimony, including the parts where he accused the RCMP of brutality. Six months later the same young man, this time under oath and as part of a regular trial, was convicted on two charges of assaulting a police officer and was sentenced to 18 months. In pointing out this error I only want to underline that Public Inquiries can be tricky; our role is to report events as they happen but implicit in that activity is the responsibility to get things right. Given the restraints of time, access to information, and the obvious fact that we are not judges, it was impossible to check Eric Redhead's story. Clearly, we were fooled on this one and we probably were fooled on dozens more. But it strikes me that these problems come with the public inquiry territory and that we aim to present the information in such a way that viewers can judge for themselves whether an individual is telling the truth or not. If television viewers are passive to the message of the medium, its not entirely the fault of television.

Television may contribute to bad and lazy audiences but I'm not entirely convinced it creates them.

The incident that most severely tested our ethics was the suicide of Inspector Ken Dowson. Dowson was supposed to appear before the AJI to explain his role in the Harper case; instead he waited until his family had left for the day and, with his television set turned to the Inquiry, he shot himself with his service revolver. He left two suicide notes and the contents of one of them became public at the inquest into his death. Our news program, like all media outlets, had to decide whether or not to broadcast the contents; it was a letter full of apology, anger at the AJI and contempt for the media "whose antics were a circus". The letter had been read at the inquest by Dowson's friend who had broken down; when the staff announcer read the letter on our program he tended to dramatize it somewhat, as a conscious mimic of its original presentation. The Executive Producer of 24 Hours admitted later that she felt we had over-stepped the boundary in the dramatization, but not in presenting the letter in the first place. Suicides are generally off-limits at C.B.C. but this was a special case - a player in the legal process blaming the media and the Inquiry itself for conducting a witch hunt. But it was the Dowson suicide that turned public opinion away from the AJI and while I have no scientific evidence for this I would say that people became highly critical of the Inquiry after this sad event. The Police Chief and the Mayor said the AJI had gone too far, a statement that seemed, even given the intense sentiment at the time, a most inappropriate conclusion. What was forgotten in all the moral hand-

wringing and flagellation surrounding the suicide was that the AJI didn't kill Ken Dowson (another local television station conducted a telephone poll asking, "who do you blame for the death of Inspector Dowson: the media or the Aboriginal Justice Inquiry?"). At the risk of sounding disingenuous, it was Ken Dowson who killed Ken Dowson. He was the most extreme example of the Police Department's reaction to the intense public scrutiny of the Inquiry. The police were not used to and clearly were psychologically unprepared for what was called "life inside the AJI fishbowl." Inspector Dowson's action was tragic, it was a measuring stick of the pressure the police were under; it was the act of a sick man; it was also - and no one had the guts to say so in the aftermath of the suicide - an irresponsible and cowardly act.

But in a way, the suicide was a red herring; in that it took the public's attention away from the central issue: the legitimate activities of the AJI itself. I remain convinced that the Inquiry process, for all of its difficulties, was a positive and socially significant process. What I tried to keep in mind as I covered it was that it was a public inquiry, that it was a way of getting at truth being conducted for the public's education and to restore the public's confidence in the law. This latter intention - or perhaps it was a wish - was the most subtle generator of all: the AJI revealed a number of things about law, that it is a complicated mechanism - and sometimes a limited one - that lawyers tend to stick together when the going gets tough and potentially damaging to the profession, that it is best understood when its processes are laid bare. What the AJI accomplished - and I'm sure there are a number of

you in the audience who will squirm at this - was to detail the discrepancy between what the public felt was just and what little the law could do about it - and then to compensate for that deficiency, to close the gap in the public's mind. Watching the four suspects in the Osborne murder may have had no legal effect but it had an undeniable cathartic effect. Society saw four men still refusing to break the code of silence they had informally taken 18 years ago in a northern community. The persistence of their silence, their willed amnesia, was one of the revelations of the AJI. The Inquiry became a window on - and a window for - the human heart. In its public forum, it afforded us the insight to make conclusions for ourselves. That may not have been a legal accomplishment, but it was a liberatingly personal one.