Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

contempt of court

OFFENCES

Working Paper 20

Law Reform Commission
of Canada

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contempt of court

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Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Foreword

One measure of a society is the effectiveness of its system of justice. Consequently it is normal, indeed necessary, to try to protect the judicial system by classifying as criminal certain forms of conduct that challenge judicial institutions or endanger the fair and impartial administration of criminal and civil justice.

Canada is no exception. Our *Criminal Code* contains a series of specific offences, such as obstructing justice, perjury, corrupting judicial officials, etc., intended to protect the administration of justice. As well, courts have over the centuries, developed a separate and flexible concept to assure respect for the administration of justice: contempt of court.

From the standpoint of law reform, it is impossible to separate the statutory offences from the rules of contempt. Both are components of a larger whole: offences against the administration of justice.

Nevertheless, the two may be analyzed separately. In fact, separate treatment is desirable because it facilitates consultation. Moreover, the complexity of the rules of contempt require that they be examined separately. The present Working Paper is, therefore, the first part of a general study of offences against the administration of justice. A second Working Paper dealing with the *statutory offences* will follow. This second paper will contain a proposed legislative draft covering the whole area.

The purpose of this paper is to obtain a wide variety of views on general policy in the area of contempt, both from the legal profession and the general public. For this reason, the Commission hopes it will receive many comments on this Working Paper. We

have already obtained valuable advice and counsel on the paper from some 40 judges, lawyers and law professors throughout Canada, and we are most grateful for their help.

During these consultations, the following point frequently arose: change of any law involves social cost, a cost in disruption of known procedures and habits; a cost in making obsolete the wisdom and experience built in the law to be changed; a cost in that a change has an element of unknown. The onus is then on the person who proposes change to justify it.

The Commission accepts this challenge. Indeed in our publications we have very often criticized change for the sake of change. We do not feel that such is the case with contempt. *The law of contempt is unnecessarily complicated* and in great need of simplification. The enormous amount of case law has made it difficult to know exactly where the law stands in certain areas such as the *sub judice* rule. Moreover, there are some areas of redundancy between codified forms and common law forms of contempt. *The law of contempt lacks organizing principles.* Laws should not be viewed as self justifying, but should always be measured against the social values or institutions they are intended to protect. A critical reappraisal of the law of contempt on the basis of its utility and effectiveness is long overdue.

The continuing use of common law contempt offences is an unnecessary anomaly in the present context. A basic principle of our criminal law is that there must be a specific legislative enactment prohibiting a particular conduct before that conduct can become the subject of a criminal prosecution. This is viewed as a basic protection against arbitrary power. Section 8 of the *Criminal Code* stands alone in creating, by reference, a series of offences that cannot be found in the written law.

These are the principal reasons the Commission felt it necessary to consider to the reform of the law of contempt.

"La justice est un besoin de tous et de chaque instant; comme elle doit commander le respect, elle doit inspirer la confiance".

Mirabeau

"Richardson, Chief Justice of C.B., at the Assizes at Salisbury in the Summer of 1631, was assaulted by a prisoner condemned there for felony, who after his condemnation threw a brickbat at the said judge, which narrowly missed and for this an indictment was immediately drawn by Noy against the prisoner, and his right hand cut off and fixed to the gibbet upon which he was himself hanged in the presence of the Court."

Anon, (1631), Dyer 188b (n), 73 E.R. 416 n.

Introduction

Contempt of court in Canada is a legacy of the British common law, although its equivalent exists in one form or another in every country[1]. The doctrine was developed over the years by British royal courts of justice to meet two objectives: first, to ensure that court orders in both civil and criminal matters were obeyed; secondly, to promote respect for the courts and through them the administration of justice generally. The doctrine of contempt thus served to consolidate and strengthen judicial authority.

In Canada, two sources of contempt of court exist. One is statutory, found in the *Criminal Code* and other federal statutes containing express references to certain forms of contempt, notably obstructing justice, disobeying a court order and misbehaving in court and the offences covered by the sections beginning with 107 of the Code. The other source is case law which, by virtue of s. 8 of the *Criminal Code*, expressly retains the common law power. This is, by far, the richer source of the two. Thus, the traditional power to punish for contempt of court hammered out over the centuries by the English courts is incorporated into Canadian criminal law. Accordingly, the creative role of the British and Canadian courts remains important. Consequently, in Canada, contempt is a two-fold concept, comprising both statutory offences and the courts' inherent common law power. The law of contempt is only partially codified.

Development of the Canadian law of contempt has been influenced by our particular social and political context. In some Canadian provinces, frequent labour disputes coupled with organized resistance to injunctions, political opposition to the judicial

system during the October 1970 crisis, and the emergence of guerilla tactics against the courts, among other things, have produced a noticeable increase in contempt of court cases. Full media coverage has been given to these incidents, with the result that contempt of court has been highly dramatized in the eyes of the public.

As a result, the law of contempt has become a subject of sometimes heated debate both among lawyers and laymen. To some, contempt of court is an arbitrary power exercised without basic guarantees traditionally provided for other offences. To others it is seen as a power used to muzzle critics of the judicial system, thereby inhibiting reform. The media has sometimes helped to spread this negative image by contrasting, often wrongly, contempt of court with freedom of expression, and by dwelling on its most spectacular aspects. To the man on the street contempt of court conjures images of workers disobeying labour injunctions, or radicals confronting the judicial system, rather than individuals interfering with the court or obstructing justice.

Contempt of court therefore appears unjust.

Contempt for disobeying a court order has often been used improperly in labour disputes. When an injunction is sought to force employees back to work, the court is placed in a very difficult situation: on the one hand the judge must ensure compliance in order to maintain respect and credibility for the court. On the other hand the judge may suspect that those disobeying the order will probably not be punished if the parties ultimately reach a settlement. The threat of conviction for contempt looks more like a negotiating manœuvre than a serious legal proceeding. Not surprisingly, the public tends to see the courts as being biased in favour of the managerial class and as interfering with the normal functioning of collective bargaining.

Contempt of court therefore appears artificial.

Contempt for misbehaving in court and for interfering with the court process can easily be used by a group of radicals to politicize a judicial hearing. Any group can force a judge to use the contempt power to maintain order in the courtroom. They then complain that this is an intolerable example of political censorship by the establishment as represented by the judge. Finally, they criticize the contempt procedure as being anti-democratic and contrary to basic

rights by exaggerating the dangers of the summary procedure that applies to these forms of contempt.

These two forms of contempt have left many people with an essentially negative impression of contempt and its procedure, and consequently of the administration of justice generally. We are therefore faced with a disturbing paradox: contempt was developed mainly to enhance the image of the judicial system but its most publicized forms do just the opposite.

Contempt, therefore, creates a negative impression in certain situations.

The proliferation of situations where the judge is obliged to invoke the doctrine of contempt has given it a bad name. Contempt applies to a wide range of situations, of which the only common factor is some obstacle to the smooth functioning of the judicial process. These situations range from a simple instance of misbehaviour before a justice of the peace to a public challenge of an injunction handed down by a superior court. This diversity, coupled with the literal meaning of the term "contempt", gives the impression that courts are often "treated contemptuously" and therefore must constantly try to uphold their dignity and authority by means of contempt proceedings.

An impression is therefore created that contempt is overused.

Finally, the public often looks upon contempt as the creature of the courts: the court creates the offence, initiates the prosecution, prosecutes, and then determines the penalty. Understandably, the public is concerned about the impartiality of the process, especially when the summary procedure is used.

Contempt therefore gives the impression of being an arbitrary power.

Some lawyers agree with the general public on this point. They argue that contempt is not adapted to present day society. Some of these criticisms have resulted in change. For example, in 1972 s. 9 of the *Criminal Code* was amended to give the accused a right of appeal both from conviction and from sentence[2].

The judges often find themselves in a difficult position in this debate. For they do not wish to seem to be protecting their own

interests in defending the doctrine of contempt. To avoid becoming embroiled in an emotional and political discussion, they have usually kept silent.

In an open society, tolerant of dissent, and where many traditional values are being questioned, the doctrine of contempt of court may appear anachronistic. *This apparent anachronism stems from the fact that the doctrine is often misunderstood because it is viewed in the abstract, rather than in the context of practical situations of the day-to-day administration of justice.* In this paper we propose to examine this problem as objectively as possible and to suggest reform. In this endeavour we would appreciate receiving the views of the legal profession and the public at large.

Before examining the problems associated with contempt of court, three preliminary observations must be made.

First, "contempt of court" is not a single offence. The expression describes several very different types of offences: *misbehaving in court* (the witness who throws an egg at the judge in the courtroom), *obstructing justice* (bribing a witness), *disobeying a court order* (such as an injunction), *breaching the sub judice rule* (a newspaper publishing articles that try to influence the outcome of a trial), *scandalizing the court* (unfounded criticisms or accusations of bias directed against a judge or the court).

Secondly, the expression covers a complex reality. The common law permits superior courts to punish for contempt, independently of any statutory authority and regardless of their jurisdiction *ratione materiae.* The justification for this lies in the very nature of judicial power, in its authoritative position in society. If courts are to function effectively, they must be provided with the means of keeping order, of commanding respect and of protecting both the public and the litigants from abuse. The public claim to this protection derives fundamentally from its right to justice. The power to punish contempt, traditionally recognized in the superior courts, has often been called the "inherent power". Superior courts have a general power of contempt; courts of record other than superior courts are limited to the right to punish for contempt *in facie.* In the absence of statute, all other courts are restricted to the right to keep order in the courtroom. This is also the case for administrative bodies, commissions of inquiry or other quasi-judicial bodies that are not courts of record.

Third, a distinction is sometimes made between "*contempt-offence*" and "*contempt-power*", the former being the strictly penal and legislative content of contempt, the latter, the common law power to discipline. It has been argued that when a judge exercises his contempt powers, he is really exercising two different powers: a police or disciplinary power inherent in the judicial function, and a penal or punishing power relating to the commission of a specific offence. We do not accept this distinction. Contempt, whether spelled out in a statute or arising as a natural adjunct of the judicial function, is always an offence. It seems better, therefore, simply to contrast the two as aspects of the same matter: the "power aspect" and the "offence aspect".

The diversity of the forms of contempt make it very difficult to formulate general solutions in the field of contempt. We have, therefore, thought it best to study each type of contempt separately. Before making recommendations for reform, we must have a clearer idea of what needs to be reformed. Consequently, this paper is divided into two sections: the present state of the law, and proposals for reform.

I.

The Present State of the Law

In a Working Paper on the law of contempt, it is difficult to resist the temptation to undertake an exhaustive study of the existing law. The case law is controversial and sometimes contradictory. The end result is often a triumph of technicality over logic and clarity. The Commission has, however, already had a detailed study paper prepared[3] which proved very useful in the preparation of the present text. It is available for those who may wish to consult it.

Before examining each of the different types of contempt, two preliminary issues must be dealt with. One relates to the differences between criminal and civil contempt; the other, between contempt in the face of the court and contempt out of court (contempt *in facie* and *ex facie*).

A. The Dual Nature of Contempt

1. Criminal and civil contempt

Nature of the distinction

The common law traditionally distinguishes between civil and criminal contempt, although British jurists are now seriously questioning the usefulness of the distinction; some even suggest its

outright abolition[4]. Because of the constitutional problems that would arise, there seems little point in eliminating the distinction here in Canada.

Civil contempt at common law consists largely in disobeying a judgment or a court order. It includes disobeying an injunction, refusing to testify when ordered to do so, or failing to appear as a witness. The harm done by civil contempt is primarily of a *private character:* if an injunction is not respected, it is the party in whose favour it was granted who will suffer; if a witness refuses to appear, it is the party calling him who bears the loss.

Criminal contempt, on the other hand, results from words, acts or writings that constitute an obstruction or discredit to the administration of justice. Examples are bribing a witness or a juror, attempting to influence a judge, falsely accusing a judge of bias, or disobeying a court order in a criminal case. The harm in criminal contempt, therefore, is primarily of a general character: if the course of justice is tampered with, society as a whole suffers the consequences.

Civil contempt exists primarily for the benefit of individuals. Its justification is, above all, the protection of individual interests. Criminal contempt serves a broader social interest; it finds its justification in the desire to protect the rights of society generally.

Put in these terms, the distinction may appear clear. But it has become blurred in practice. For example, during a labour dispute a judge issues an injunction at the request of the employer against the union and the employees ordering them to respect their collective agreement and to return to work. Or again, home-owners in a residential area obtain an injunction to stop the construction of a commercial building that would infringe the zoning by-laws. Supposing that in both instances the enjoined parties refuse to obey, the resulting contempt is primarily of a civil nature because it affects the interests of the employer or the home-owners.

However, in both cases, the employees or the contractor are disobeying an explicit court order, thus defying judicial authority, and in this sense obstructing the normal course of justice by openly flouting the court's authority. Are they guilty only of civil contempt? Is there not also criminal contempt?

The Supreme Court of Canada examined this issue at length in the *Poje* case[5]. Strikers had publicly announced that they would

resist an injunction ordering them to disband a picket line. When the sheriff came and read out the order, they refused to obey. The dispute was later settled and the employer withdrew the civil charges of contempt. However, the British Columbia Supreme Court judge who had issued the injunction considered it a case of criminal contempt, apart from any civil contempt, and convicted the strike leader, one Poje. The Supreme Court of Canada upheld this decision. The decision is an important one. On the one hand, the judgment declares that an act that is basically civil contempt can also constitute criminal contempt when it has elements of a public challenge to the court's authority. On the other hand, the judgment recognizes that a court of first instance sitting in a provincial matter has jurisdiction to punish the perpetrator of a criminal contempt. A recent judgment of the Quebec Superior Court[6] had cast doubts on the latter point, but it has now been overruled by the Quebec Court of Appeal[7].

Thus it can be affirmed that under existing law a contempt that is initially purely civil can become criminally tainted if the act of disobedience also constitutes an open challenge to judicial authority.

Practical importance of the distinction

The distinction between the two types of contempt is not an academic exercise; it has practical importance at three different levels.

First *at the constitutional level,* the distinction can usually be used to indicate the division of powers between the federal and provincial authorities.

Secondly, the distinction has an important bearing on the *legal nature* of contempt. In purely civil matters, contempt has a primarily *coercive* dimension, in that it obliges one party to submit to a court order issued for the benefit of another. Very often, the order is enforced merely by hinting at the possibility of sanctions.

In criminal matters, on the other hand, contempt is essentially of a *punitive and deterrent character.* It is used to punish an action judged harmful to the dignity of the judicial process or to the administration of justice. Its object is to expose attacks on a fundamental institution and, ultimately, to prevent their repetition.

The philosophy underlying sanction in the two cases is therefore based on different considerations. As well, civil contempt is presently left to the initiative of the parties, or so it would appear from one line of cases. The parties are the masters of the proceedings. Civil cases being private litigation, the parties can in principle discontinue the proceedings if a settlement is reached. But with criminal contempt, the parties no longer control the procedure, as the *Poje* case shows.

A third distinction between the two types of contempt is based on the *essential elements* of the offence. Current case law indicates that for civil contempt the person charged must have knowledge of the court order he is required to obey (*mens rea* of intention). On the other hand, in cases of criminal contempt, absence of knowledge is not a valid defence in all situations. For example, an editor charged with contempt resulting from a publication containing offensive remarks about a current trial cannot always successfully invoke ignorance of the publication's content as a defence[8].

Finally, there are other, more technical, differences between the two types of contempt, such as the possibility of pardon for criminal contempt, or varying possibilities for immunity, that do not merit detailed examination here.

For purposes of law reform, it is important to clarify the legal relationship between civil and criminal contempt. For example, should the possibility that a single act might constitute the two kinds of contempt be retained? Should the mixed nature of contempt be recognized? These are only a few of the questions in need of specific examination.

Nevertheless, a preliminary observation can be made: the real problem is not to isolate each form of contempt and then to classify it as civil or criminal, but rather to decide what actions ought to be made criminal, whether or not a civil penalty also exists.

2. Contempt *in facie* and contempt *ex facie*

As we shall see later, the distinction between contempt in the face of the court (*in facie*) and out of court (*ex facie*) is extremely important in Canadian law in relation to the jurisdiction of the court.

Nature of the distinction

Contempt *in facie* generally corresponds to what might be called misbehaving in court. It is designed to control the conduct of individuals before the court or in the courtroom. It derives from the court's inherent power to maintain order to ensure tranquility, objectivity and the proper functioning of a hearing, thereby ensuring respect for judicial authority. Case law also classifies as contempt *in facie* the refusal to comply with certain orders given during the trial, for example where a spectator refuses to sit down, to keep quiet, to leave, to rise, etc. Sometimes this sort of behaviour also falls within certain offences spelled out in the *Criminal Code*: perjury (s. 120), contradictory testimony (s. 124), refusal to take an oath or to testify at a preliminary inquiry (s. 472). It is therefore technically possible for certain forms of perjury to be punishable either as contempt of court or as perjury.

Contempt out of court is different in that it is an act that interferes with the administration of justice but of which the judge does not have immediate, personal knowledge. The case law traditionally distinguishes three types of contempt *ex facie*: scandalizing the court, obstructing justice and attempting to influence the public during a trial (the *sub judice* rule).

Scandalizing the court consists of any damaging remark or attack on the court's impartiality made *outside* the presence of the person attacked. One example is a newspaper that publishes a defamatory comment about a judge in respect of a recent trial[9]; another is the individual who, in the absence of the judge, publicly states that the latter is crazy[10]. Victims of contempt can also be other persons (such as Crown prosecutors or jurors) who are officers of the court in a certain sense; for example, a Canadian newspaper described a death sentence in the following terms: "... *twelve people planned the legal murder of the accused*..."[11].

Obstructing justice is any act aimed at, or having the effect of upsetting the normal and peaceful functioning of the judicial process. Some examples are trying to influence a juror, and publicly challenging an injunction outside the courtroom. Others are bribing or threatening a witness to make him suppress or falsify testimony, taking revenge against a witness because of what he said, trying to prevent someone from instituting an action or getting him to hide evidence or to lie, interfering with court officials in the performance of their duties, etc...[12].

Most instances of common law contempt for obstructing justice are also covered by express offences in the *Criminal Code*. This probably explains why relatively few Canadian cases are brought under the heading of contempt of court. For this reason, it is open to question whether resort to contempt powers for these sorts of cases is really necessary.

Finally, the third form of *ex facie* contempt is contravening the *sub judice* rule. The courts have the responsibility of ensuring that hearings are fair, impartial and free from prejudice. Nothing is more harmful to the interests of the parties or to the administration of justice generally than creating a public bias against one of the parties before the case is heard.

The purpose of the *sub judice* rule is not to cloak the hearing in a veil of total silence. It is to avoid statements predicting the outcome of a case that might either unduly influence the final verdict, or at least give the impression that this can be done, or discredit the judgment in advance.

Anyone who publishes a report that endangers the impartiality or proper functioning of a trial is contravening the rule. The courts have reacted more strongly in cases of trial by jury, no doubt feeling that a judge is less likely to be swayed because of his legal experience and training.

Some cases hold that one commits contempt of court by publishing a newspaper article suggesting that the accused is either guilty or innocent, containing information damaging to the reputation of one of the parties, or listing previous convictions of the accused, etc... The same cases have also held that these are strict liability offences and therefore reject lack of *mens rea* as a defence. It is sometimes difficult to distinguish this type of offence from that of obstructing justice. One distinction may be that a violation of the *sub judice* rule usually takes the form of a public statement, while obstructing justice is more private or secretive.

Difficulties in the distinction

The distinction then between contempt *in facie* and contempt *ex facie* is far from clear. There are many borderline cases that are difficult to dispose of satisfactorily. For instance, is someone demonstrating on the steps of the courthouse against a trial going on

inside committing contempt *in facie* or *ex facie*? And what of the lawyer who fails to appear in court on the appointed day? True, the cases provide answers to these questions, but the important point for our purposes is that there is presently no simple, precise and clear rule.

In facie contempt presupposes, at least in theory, that the offender be in the presence of the court and that the court be in session. But what exactly is meant by "in the presence of"? Some courts extend this notion to include acts committed outside the courtroom but in the courthouse or even near it if the acts somehow disturb the administration of justice. Accordingly, the act need not be committed in the physical presence of the judge. Demonstrations on the courthouse steps, or absent lawyers, could fall into this category.

Another criterion requiring consideration is that of the direct and personal knowledge of the offending act by the court. A recent illustration can be found in the dissenting opinion of the Chief Justice of Canada in the *McKeown* case:

> Contempt in the face of the Court is, in my view, distinguished from contempt not in its face, on the footing that all the circumstances are in the personal knowledge of the Court. The presiding judge can then deal summarily with the matter without the embarrassment of having to be a witness to issues of fact which may be in dispute because of events occurring outside[13].

It follows, therefore, that contempt *in facie* applies only where the judge himself has personal and direct knowledge of all the relevant facts, whereas contempt *ex facie* applies where the judge only learns of the facts through witnesses or some other evidence.

There is yet another complicating factor. In practice, contempt *in facie* is often tried by the summary procedure. But, as we know, the general public has serious reservations about the fairness of this procedure. The question therefore arises as to the extent that these procedural considerations may not have had an influence on the criteria used by judges to differentiate between these two types of contempt.

Practical importance of the distinction

The distinction between contempt *in facie* and contempt *ex facie* is of considerable practical importance in Canadian law,

although one difference, concerning the right of appeal, has disappeared as a result of a 1972 amendment to s. 9 of the *Criminal Code*[14]: A right of appeal now exists for the two types of contempt, both from conviction and against sentence.

The distinction is now important in relation to questions of the courts' jurisdiction. At common law—which is preserved by s. 8 of the *Criminal Code*—only "superior courts" have jurisdiction over contempt out of court; the jurisdiction of inferior courts is limited to contempt *in facie*, and then only if they are "courts of record".

Thus, the basic scheme is as follows:

- Only "superior courts" have the power to sanction all types of contempt.
- Other courts have the inherent power to sanction contempt *in facie*, provided they can properly be classified as "courts of record".
- All other courts, that is courts that are neither "superior courts" nor "courts of records", have no contempt power, but only the right to maintain order, although they may be specifically granted contempt power by statute.
- Finally, a "superior court" has jurisdiction to hear and decide both cases of contempt *ex facie* committed against a court which is not a "superior court" in the traditional sense, and cases of contempt *in facie* committed against courts that are not courts of record.

It would probably require a book to summarize the law on these different points.

Generally speaking, superior courts have full jurisdiction over all types of contempt. In the Canadian context, this distinction is particularly important having regard to s. 96 of the *B.N.A. Act*. The Supreme Court of Canada, the Federal Court, the Courts of Appeal and the Superior (or Supreme) Court of each province are therefore "superior courts" and have inherent power and the whole range of contempt jurisdiction.

What constitutes a "court of record" is more difficult to determine. A study of this question has already been undertaken for the Commission[15]. The case law suggests certain criteria for determining whether a body is a court of record. These include: the power to fine or to imprison, the power to examine and to take judicial notice of its own records, the authentic nature of the records,

the existence of a registrar to maintain them, the power to perform certain delegated tasks, etc. Nowhere, however, is there a precise definition of the term, even though very often the statute creating a court declares, without further elaboration, that it is a court of record.

In reforming the law of contempt, the distinction between the power to punish contempt *in facie* and contempt *ex facie* will have to be borne in mind.

We have thus far briefly sketched the two major types of distinction used in dealing with contempt of court. This examination has underlined the great complexity of the subject, and will help identify problems requiring closer attention.

B. The Different Forms of Contempt

Contempt of court, as one readily finds in reading the cases, takes many and varying forms. Nevertheless, these can be classified under five main headings:

- Misbehaving in court,
- Disobeying a court order,
- Scandalizing the court,
- Obstructing justice,
- Attempting to influence the outcome of a trial (*sub judice* rule).

The next few pages give a brief description of these five classic forms of contempt, leaving aside for the moment whether they are criminal or civil, *in facie* or *ex facie*.

1. Misbehaving in Court

Any act, gesture or words that hinder or obstruct the normal, harmonious flow of courtroom proceedings can be characterized as misbehaving in court. Case law reveals many examples: someone throwing an egg at the presiding judge, a witness striking the defendant in the anti-chamber following a trial, a person insulting the presiding judge and thereby casting doubts on his impartiality,

litigants fist-fighting in the courtroom, an accused smoking in court or including insolent remarks in argument if he is not represented by a lawyer, an accused refusing to stand as the judge enters the courtroom, a lawyer, without giving reasons, asking a judge of the Supreme Court of Canada to disqualify himself, a lawyer being disrespectful to a judge during the trial, noisy demonstrators interrupting a hearing, etc. And to return to the case of the unexplained absence of a lawyer whose case is being heard, it would seem that this does in fact constitute contempt in the face of the court, in spite of the strong dissenting opinions of Laskin C. J. C. and Spence J. in the *McKeown* case[16].

Basis

As the above examples show, this type of contempt constitutes an attack on the *functioning* of the judicial system. The offence is a disciplinary measure designed to punish direct attacks on the court and is therefore directly linked to the exercise of judicial authority.

Referees, umpires and chairmen of meetings have analogous powers. If a referee was unable to reprimand or punish players for misbehaviour, or if a chairman could not maintain order during discussion, they would not really be fulfilling their respective roles. Similarly, a judge without power to maintain order in the courtroom cannot fulfill his judicial function.

But is punishment necessary to maintain order? Is the contempt procedure really necessary? Justice must not only be done, it must also be seen to be done; it must not only be fair, it must also be seen to be fair. A trial, after all, is a substitute for violence, a battle of words rather than weapons. If the contest is to be waged successfully, the discussion must be orderly, calm and unemotional; any attempt by the participants to intimidate each other must be excluded. This is particularly important in criminal trials, for they have the added function of dramatizing the social censure of the conduct of a few who threaten accepted values. It is vital to ensure that hearings proceed in a calm and deliberate manner. The parties themselves are too involved in the argument to ensure this; and it is impossible to think of a party (other than the judge) who might be able to do so. The task must fall on the judge because he is by definition an impartial arbitrator, with no vested interest in the case,

and because his very function gives him responsibility for controlling and supervising the proceedings.

Contempt for misbehaving in court fulfills two different, though complementary, functions.

First, that of *eliminating a "nuisance"* in the judicial process by restoring order and ensuring a smooth functioning of judicial hearings. This is its first function and is essentially *remedial.* It complements other measures a judge can, and indeed must take in certain circumstances, ranging from simple reprimands or expulsion from the courtroom to charges under the *Criminal Code* (for perjury, assault, disobeying an order, etc.).

Its second function is *repressive*, to punish the author of the offence in order to underline the reprehensible nature of his conduct. In the final analysis, however, this is not its primary purpose. If the act is not serious, a mere reprimand or warning will suffice. If, however, the act is serious, other charges such as scandalizing the court or obstructing justice may be instituted. Misbehaving in court, properly so called, lies somewhere between these two extremes.

Such, then, are the theoretical grounds of the offence of contempt by misbehaving in court. How can they be translated into law?

Legal policy considerations

At the outset, it must be underlined that contempt should be resorted to as little as possible to punish misbehaviour in court, and that it must always be used with restraint and caution. Indeed, it is not unlikely that the effectiveness of the sanction is in direct proportion to the restraint with which it is exercised.

The concept of misbehaving in court must not be used to turn harmless or careless acts of discourtesy by witnesses, parties or spectators into criminal offences. In such situations, the court is better advised to expel the person, to reprimand or warn him while reserving the right to apply more severe measures if, and only if, the act is repeated in a challenging or obstructive way. There is, therefore, a preventive aspect to this form of contempt, about which it seems difficult to legislate.

As well, the offence of misbehaving in court must not be used to vindicate the personal prejudices of the judge or to cater to his ego. It

is not intended to protect the judge personally but rather to protect citizens by ensuring them an independent judicial system, free from all attacks or undue influence. If the judge is attacked in his personal capacity, he has other civil or criminal remedies to protect himself, such as defamation. If he is attacked in his official capacity while exercising his functions, that is a different matter, and society is justified in coming to his aid through the laying of charges against the offender.

Nevertheless, it is sometimes difficult to separate certain forms of misbehaving in court from insulting a judge. For example, what happens when the accused starts shouting in the middle of a jury trial that he is "*fed up with the judicial system*" because of the judge's "*nauseating, biased and dishonest*" decision, and that the judge is "*just an executioner, a hypocrite, an ignoramus and an incompetent*"[17]? The judge is personally insulted and even defamed; through him, the administration of justice generally is put in disrepute by the accused. Finally, the peaceful atmosphere of the trial is affected by this outburst. But if these facts are to give rise to a charge of misbehaving in court, we feel that it must be *for the last reason only*. Other civil and criminal remedies can best deal with the first aspect, and a charge of contempt for scandalizing the court with the second.

In our opinion, it should not be assumed that any insult to a judge is, by definition, an insult to the judicial system he represents. To accuse a judge of corruption or dishonesty is to reach past him and attack the honesty and fairness of the judicial system as a whole. But to tell a judge that he is ugly is a personal attack, nothing more.

Accordingly, it is only to the extent that conduct disrupts order in the courtroom that it should be considered as misbehaving in court, in which case the authority of the court must be reaffirmed immediately and on the spot.

Finally, the offence of misbehaving in court must not be used as a substitute for other offences or proceedings. If, for example, a witness tries to hit a judge, the proper charge is one of assault, not misbehaving in court. Misbehaving in court should remain a means of controlling conduct for which there is no other remedy. It should be used only as a last resort, when all other means of restoring order (such as warnings or expulsions) have been exhausted.

If one accepts that the two purposes of the offence of misbehaving in court are to keep order and to punish misconduct, we must look for better techniques to meet these ends.

The offence of misbehaving in court is normally handled through summary procedure. The accused is cited for contempt on the spot and asked to give reasons why he ought not to be convicted. If he cannot give reasons, he is convicted immediately. There is no formal rule requiring that either the ordinary procedure or the summary procedure be used in such cases of contempt; nevertheless, cases of misbehaving in court are almost always handled through summary procedure, which, as everyone knows, has become a favourite target for the press, the public and sometimes lawyers. Some have even suggested that it be abolished completely. This is a serious criticism that must be examined in detail.

The first criticism of the summary procedure is that the judge is simultaneously judge, witness, prosecutor and plaintiff. This, some feel, interferes with the impartial character of the proceedings. This criticism is technically correct; but the conclusion drawn from it is not. Misbehaving in court must in fact be committed in the court's presence; since the court has an immediate and direct knowledge of the facts constituting the offence, it would not appear to serve any useful purpose to interrupt the hearing and refer the matter to another judge before whom the same facts would have to be proved. While this argument alone would not justify retaining summary procedure, there are two others that we find more persuasive. First, the judge must remain in full control of the hearing. If it is interrupted by misbehaviour in the courtroom, he must take steps to restore order as quickly and effectively as possible. The time factor is crucial: dragging out the contempt proceedings would mean a lengthy interruption to the main proceedings, thereby paralysing the court for a time, and indirectly impeding the speed and efficiency with which justice is administered.

Secondly, the judge's power to control the court proceedings would be weakened if contempt proceedings were heard by another court. The second court would have to hear evidence about the act, with the judge before whom the disruption had taken place as principal witness. And should the accused again misbehave in court, the contempt case itself would have to be referred to still another court, and so on. The administration of justice could be brought to a complete standstill.

Accordingly, to ensure the effective administration of justice, the presiding judge must remain in control of the proceedings. He must therefore be able to use the classical summary procedure for cases of misbehaving in court. However, because of widespread public concern about the use of summary proceedings, every effort should be made to forestall any possible abuse. There are several possibilities.

First, the summary procedure should be considered as *exceptional.* It should be resorted to only if absolutely necessary to restore order and calm to judicial hearings in a speedy and efficient manner. The ordinary procedure should, therefore, remain as an alternative remedy.

Next, when the summary procedure is used, there should be a right to appeal both from conviction and sentence, as is presently the case. This right of appeal is an important safeguard against possible abuses that may occasionally arise.

Finally, and more generally, the judge should, if possible, punish for misbehaving in court only after giving fair warning that he will do so. The purpose is to restore order immediately, with punishment being secondary. The judge should not go beyond a warning unless resistance is met. It is hoped that, if the above is followed, citations for misbehaving in court will be rare, thereby attenuating the public's negative attitude towards the summary procedure.

2. Disobeying a Court Order

Contempt for disobeying a court order takes several forms. It may be committed *in facie* (for example, the witness refusing to obey a judge's order during the hearing) or *ex facie* (the litigant refusing to obey an injunction). It may be civil or criminal depending both on the degree and nature of the act of disobedience and on the jurisdiction of the court issuing the order (since it appears from the cases that disobeying an order of a criminal court is always criminal contempt).

Criminal contempt for disobeying a court order in criminal matters is governed by s. 116 of the *Criminal Code.* In practice, however, this section is seldom used. Judges prefer to invoke their inherent power to punish for contempt as permitted by s. 8 of the

Code. In civil matters, a variety of federal and provincial statutory provisions govern the enforcement of judicial orders and set out penalties for violations.

Historically, contempt for disobeying a court order has always been considered as primarily a civil offence (*contempt in procedure*), and only secondarily as criminal. In Canadian law, the *Poje* case[18] established that this form of contempt can sometimes have a dual nature: in principle, disobeying a court order constitutes civil contempt, but it can become criminally tainted when the violation appears as a challenge to, or a confrontation with, judicial authority.

Basis

Under our judicial system, the courts are the supreme arbitrators of conflicts between litigants in civil cases. Their decisions put an end to disputes and determine the past and future rights of the parties; they "declare" the law by defining the legal standing of the parties. A judgment can order that a sum of money be paid. It can also order one party to perform an act for the benefit of another (to return an object, demolish a building, etc.) or order him to refrain from acts that would infringe on another person's rights (to halt work on a building, etc.).

Where payment of money is involved, coercive power (the means by which a judgment is enforced) can only be exercised against the property of the debtor, since imprisonment for debt has been abolished. If a debtor refuses to pay voluntarily, his goods are seized and sold at a judicial sale, and the creditor is paid out of the proceeds. Whether or not the debtor refuses to pay is immaterial, as a way has been found to circumvent his resistance. But the situation is different where the order is to do or to refrain from doing something. Coercive power is in principle exercised against a person, whether real or corporate, and not against property. Apart from the cases where substitute action by a third party would produce the identical result (for instance when the court orders performance by a third party at the expense of the debtor), the execution of the judgment depends on the will of the debtor, who can refuse to obey if he is prepared to face the consequences. This is where contempt of court enters the picture. The threat of a fine or imprisonment is usually enough to ensure compliance.

Nevertheless, as we know, experience in this area shows that it is all a question of nuance and degree. Sometimes the debtor is certain that a negotiated settlement will eventually be reached, and therefore perseveres in his non-compliance. Illustrations abound in labour conflicts, where the final agreement often contains a clause to the effect that any contempt proceedings for disobeying injunctions issued during the conflict are to be withdrawn.

The legal rationale for this type of contempt is clear: it serves to enforce judicial orders for the protection of private interests. Judicial authority in such cases serves the interests of the parties. It makes coercive power, in the form of the threat of contempt, available to those whose rights have been judicially recognized.

Disobeying a court order can also occur in totally different circumstances, such as in the course of a hearing. A court will sometimes issue orders to ensure that rules of procedure are obeyed in order that a hearing will run smoothly. For example, a witness may refuse to take the oath or to testify, or a person may refuse to produce an item for examination. In such cases, the purpose of the court order is to ensure a proper and fair hearing, rather than to protect private interests. It should be noted that the *Criminal Code* could apply in several of these situations (ss. 472, 533(1), 633, 636).

These examples of disobeying a court order are related to the notion of misbehaving in court and, in the final analysis, constitute obstructions to justice. Orders given in these situations ought not to be confused with final, interim or interlocutory orders designed to enforce private rights and obligations that have been judicially recognized.

Legal Policy Considerations

Frequently, where civil contempt arises from non-compliance with a court order in a non-criminal matter, the person in whose favour the order was granted later waives his right to enforce it by means of contempt proceedings. This raises a fundamental question: should the parties be permitted, as seems to be the case under existing law, to negotiate the consequences of their disobedience to a court order? There are two opposing views on the subject.

Some argue that since the order has been granted to protect purely private interests, it should be enforced only if, and to the extent, necessary to serve these interests. Moreover, in non-criminal matters, the parties control the procedure. It would be unwise for the State, through the instrumentality of the judge who issued the order, to intervene in the matter when the parties have, more often than not, already settled their dispute. Why reopen a case? Why throw fuel on the fire by trying to enforce an order that has lost practical significance? Why disturb the newly found peace between the parties?

Let us take two specific examples. A divorced husband disobeys an order from the court concerning the limitations imposed on his right to visit with his children. The wife asks for a contempt order but this in turn, brings both parties to reconsider the time and place of these visits. Should the court still condemn the man for contempt? Again, in a labour dispute, the workers go on strike and set up picket lines to prevent anyone from entering the plant. The company obtains an injunction ordering the workers to stop preventing supervisory personnel from entering the building. The injunction is not respected. However, the strike is settled; a new collective agreement is signed and industrial peace is restored. But an injunction was disobeyed. Should the judge who issued it reopen the case, summon the offenders and sentence them for contempt? Those who uphold the view that the order serves the private interests of the parties strongly argue that he should not, except in cases where the disobedience appears as a public challenge to the courts' authority. The latter situation may constitute criminal contempt not so much for disobeying a court order but for scandalizing the court.

This would be the situation where the party who refuses to comply with the order takes the opportunity to publicly challenge the judicial system and tries to discredit it. There, non-compliance with the order is only a pretext, one of several tactics in a broader confrontation. Therefore, the same facts give rise to two very different kinds of contempt: one civil, resulting from disobedience to an order protecting private interests; the other criminal, constituting a challenge to judicial authority and therefore, in a broad sense, an obstruction to the administration of justice.

Those who uphold the second point of view argue that, according to legal theory, any refusal to obey a court order is an

explicit challenge to its authority, a breach of public order. Disobeying an order that protects private interests is necessarily criminal because it constitutes an open challenge to the legal order. Permitting the parties to play the game we have described considerably undermines the authority of the courts, permits court orders to be ignored with impunity and makes them subject to negotiations. It makes contempt proceedings serve a purpose other than that for which they were designed.

Perhaps, it could be suggested, the courts ought to exercise their power of handing down orders with greater care and restraint. Perhaps they should do so only on rare occasions and when they are sure the order can be obeyed. Possibly Parliament should provide for two different kinds of injunctions—those affecting strictly private interests, and those involving an element of public interest or public order—and that only the latter ought to be criminally sanctioned. However, under existing law, at least as set out in the *Poje* case, when an order is granted, its execution transcends the interests of the parties; the issue becomes one of public order which the judge must pursue to its conclusion to protect and defend judicial authority independently of any private agreement between the parties.

These two positions are, or at least appear to be, irreconcilable. The first is based mainly on practical arguments of social peace, the second, on theoretical legal and political arguments. Since the arguments on either side are convincing, each in their own way, it is difficult to resolve the problem and to decide upon a basic legal policy.

At the level of principles, we must admit that those who uphold the second position are on legally sound ground. Allowing a court order to be compromised or to be the subject of negotiation between private parties can seriously undermine judicial authority. An order issued by a court pertains to public order. We believe, therefore, that from the standpoint of legal policy, any reform must clearly reaffirm this principle.

Once this principle is reaffirmed, however, it by no means follows that *any* contravention of a civil order is automatically a criminal act. There seems to us to be a certain confusion here. In theory, it may be true that *any* such disobedience *ipso facto* constitutes a public challenge to judicial authority. However, this is perhaps the wrong way to put the issue. In our view, one ought

rather to ask if the disobedience is such that the criminal law ought to intervene or, to put in another way, should the law not tolerate certain challenges, should it not refuse to punish certain behaviour? Society must balance the potential loss in public respect for the judicial system that such punishment might entail against any possible gain. After all, recourse to the courts should be a last resort, after private negotiations have failed. The law ought to favour negotiated settlements, even when they are reached after one party has breached a court order issued to protect the other party's rights.

In other words, the question does not turn so much on the components of the offence, but on whether prosecution is opportune. It must not, in any event, be forgotten that civil contempt is sanctioned through provincial legislation or through the rules of practice of the federal courts and that, in most cases, these sanctions differ only slightly from any criminal sanctions that might be imposed. The legal policy we recommend, therefore, would be to retain a general offence in the *Criminal Code* reaffirming the principle that any disobedience to a court order constitutes a criminal offence for which charges can be laid. However, the Crown should invoke the offence only for serious reasons. For example, where the infraction is deliberate, open, public and an evident challenge to the judicial system or an obstruction of justice, a charge would be laid. All other cases should be dealt with as civil contempt under the rules of practice of the courts or the rules of civil procedure.

As well, legislation should, at least in relation to sentence, deal separately with disobedience to orders given during trial (refusal to take the oath, or to testify, or to appear, etc.) because of their particular nature. These cases, which are akin to misbehaving in court, must be disposed of quickly so that the hearing can be proceeded with as quickly as possible.

Another general solution would be to reform the law of injunctions to create a procedure whereby the Attorney General could have a say, in his capacity as guardian of the public interest, in those conflicts that are essentially private but in which the public interest is also at stake. If an order were handed down, any disobedience would then automatically be treated as criminal. It is beyond the scope of this paper to expand upon this idea, however, since it relates more to the law of injunctions than to contempt.

3. Scandalizing the Court

This third type of contempt covers a wide range of situations. In many cases, it bears a close resemblance to misbehaving in court. This is so when it results from insulting language directed at the court or attacks on its impartiality during the course of the hearing. Therefore it includes, first of all, any insulting, abusive or slanderous remarks directed against a judge as well as those casting doubt upon his impartiality. In one Canadian case, a charge of contempt was laid against a person who shouted at the people inside the courthouse: "*Let's all stay here; let's celebrate Christmas with that lunatic, Judge X . . .*"[19].

Scandalizing the court also includes attacks made outside the courtroom, even when made outside the context of a particular case. For example, a newspaper reporter and the owners of the paper were found guilty of contempt for having written and published an article against capital punishment in terms that were scornful and abusive of both judge and jury[20]. Again, a campus newspaper unleashed a biting attack on the whole legal system, stating that the New Brunswick courts were "*tools of the corporate elite*"[21]. In a broad sense, therefore, contempt for scandalizing the court is contempt for insulting a judge in the exercise of his duties.

Basis

The legal basis of this type of contempt is very different from the first two: its purpose is to protect justice's reputation for honesty and impartiality, thereby promoting public confidence in judicial institutions. Nevertheless, two points which sometimes confuse the public must be clarified.

First, contempt is not designed to protect the personal sensitivity of judges but rather the respectable image enjoyed by the system of justice itself. To constitute contempt, therefore, the attack must be directed against a judge in the exercise of his duties, and be aimed at or have the effect of tarnishing the image of the judicial system through him, thereby diminishing or destroying it in the eyes of both litigants and the public.

Secondly, the existence of contempt for scandalizing the court is not intended to stifle all criticism of a judge's decision or of the

administration of justice as a whole. To constitute contempt, the criticism must be slanderous or made in bad faith. The law should not punish anyone for an offence of "difference of opinion" on judicial matters.

Curiously enough, contempt for scandalizing the court is rarely invoked in England, but it is still quite frequently used in Canada. Some might attribute this to a greater sensitivity on the part of Canadian courts or to greater feelings of insecurity in the face of criticism. It may be, as well, that the very existence of the offence has had a preventive effect in England, especially if the act is an example of *in facie* contempt. Although one cannot hope to assess the exact impact of its preventive effect, it cannot be ignored.

Legal policy considerations

This type of contempt conflicts with certain very important principles of Canadian society, notably the right freely to criticize the system of justice and judicial institutions. Is our system of justice so unsure of itself that it has to suppress attacks even if they are unfounded or malicious? Why give special protection to members of the judiciary when it is not given to other important members of society (politicians, administrators, public servants, etc.)? Why not simply let the public be the final judge of such criticism, without resorting to a seemingly self-serving process that seems to turn the judicial system into both judge and plaintiff? It is crucial to find adequate answers to these questions. For that reason, we propose to examine them in some detail.

Some do not hesitate to propose the outright abolition of this type of contempt of court. They make three basic arguments. The first is practical: most situations within the scope of contempt for scandalizing the court also fall within other offences. Accordingly, the argument continues, this particular form of contempt serves no purpose. An insult in the face of the court often interrupts the proceedings and can be punished as misbehaving in court. If it is made out of court and is serious, it can be punished as defamation or as obstructing justice in the broadest sense; if not serious, it should simply be ignored.

The second argument is of a social and philosophical nature. The right to criticize is a fundamental right recognized by all open

societies. There is no reason to create a special exception for the system of justice; its actions should be judged on their merits. It ought to be protected from abusive criticisms under the usual rules, and not by a procedure that appears dogmatic in the eyes of certain persons in that it implies that judicial institutions are infallible. Where criticism is excessive, abusive or defamatory, we then return to the preceding argument about the adequacy of ordinary civil and criminal remedies.

The final argument is psychological. Judges should not be too touchy or too sensitive to criticism; on the contrary, they should be more tolerant. Justice will not be enhanced by muzzling its critics, but rather by the exercise of tolerance and by establishing respect based on the value of the institutions rather than fear of criminal sanctions. In any event, it is argued, it is hardly likely that in 1977 the public is so naïve that it will lose confidence in the administration of justice as a result of insults or abuses heaped upon a judge.

In reply, it is urged that these other offences, especially defamation, are not as efficient, as easy to use, or as well-suited, as contempt of court. In principle, libel, at least criminal libel, applies only to written statements, and in this particular case it is the system of justice itself and not the judge that is the real victim of the libel.

Moreover, using the rules of criminal or civil libel might unduly prolong the debate and thus prejudice the administration of justice. As long as the issue of defamation is unsettled (which could take some time since the ordinary procedure is used), the judge involved is placed in an awkward position. Indeed the public may be troubled by the litigation until the final decision is handed down. If the judge continues to sit while the case is being heard, the public's perception of his impartiality may be compromised. On the other hand, to prevent him from continuing in his functions while the case is pending would be to reinforce this doubt, and perhaps even to punish the judge. This would also furnish an easy target for guerilla judicial warfare.

A second counter-argument is that this form of contempt can be justified by an analysis of the position of the offended judge. Most public figures have effective ways of protecting themselves from attacks without having to resort to court action. But a judge is defenseless. The politician who is labelled a "lunatic" by his opponent can appeal to public opinion. Through the media or otherwise, he can bring his case before the public, can argue or

accuse his opponent in turn; in other words, he can counter-attack, explain his point of view and let the public judge for itself. He might himself go on the offensive which, or so it is said, is the best defense.

The judge, on the other hand, is in a very different position. He cannot debate the issue in public without destroying his appearance of impartiality. He cannot allow himself to plunge actively into a controversy that exceeds the bounds of his own case and very often encompasses the administration of justice as a whole. Society must not expect him to come to its defence. For this reason, he requires special protection, which the ordinary rules of law or counter-publicity cannot give him.

Thirdly, from the standpoint of legal policy, it would seem difficult to rely simply on the ordinary rules of law. When the impartiality of the system of justice is put in question, either the allegation is correct and the criticism is made in good faith, or it is not. Under the first hypothesis, it should be out of the question to think of laying a charge of contempt. The right to free and open criticism must prevail over judicial sensitivity because, in the long run, it is democratically healthy and fundamentally good to encourage criticism. Criticism gives birth to reform. Under the second hypothesis, where the accusation is unfounded and made in bad faith, the legislator has the duty to intervene. However, the traditional legal mechanisms may fall short of being the best technique available. Other mechanisms must be developed whereby the situation can be remedied without delay, and the violation suppressed quickly before it makes too great an impression on the public. As well, if the infraction occurs during a hearing, the judge involved must be permitted to ensure that the hearing continues rapidly and calmly.

Such, then, are the two opposing schools of thought. Each reflects a particular point of view on the place occupied by the system of justice in society. What avenues of reform are open? One possibility would be to abolish this form of contempt outright and to handle the cases it covers through the other forms. This is a tempting solution which has the advantage of solving the problems relating to the limits of the right to criticize. It has been fully examined and accepted by the English Committee responsible for revising the law of contempt.

A second possibility would be to retain the present law and to retain this type of contempt as a residual power, on the assumption

that the courts would use it with restraint and that, as is presently the case, courts of appeal would control its exercise. If it is decided to keep the existing law, it seems to us that it should at least be codified to clear up existing ambiguities.

A final possibility is to retain this type of contempt but to clarify its limits so as to ensure that it does not overlap or duplicate other forms of contempt. If this were done, it would be necessary to make sure that both the limits of the right to criticize and the procedure to be followed in the event of a violation are defined as clearly as possible.

All things considered the third solution is probably best. Scandalizing the court is perhaps the form of contempt that has the greatest potential for arbitrary use by the courts. Even if such a danger is probably illusory in the present context, the public still has the right to be protected. In any event, the administration of justice's image can only be enhanced. Moreover, we feel that in principle the ordinary procedure should be followed, since borderline cases requiring rapid resolution would be covered by the offence of misbehaving in court and through summary procedure.

A further problem remains. Where the conduct is not true courtroom misbehaviour, should the offended judge be the one who initiates the contempt proceedings and tries the case? Much has been written on the point. Many authors, judges and parliamentarians are opposed to his doing so, on the ground that this might create an impression of partiality. Nevertheless, the existence of a right of appeal is an important safeguard and an effective remedy against abuse. Here again, however, the image of impartiality must be preserved. To codify a rule that another judge must hear the case would be to follow current practice to a certain extent. We would favour legislative recognition of this practice where the judge is personally implicated in the circumstances surrounding the offence and where the act in question could not be classified as misbehaving in court.

In order that there be no connotation of self-vindication, we would suggest that s. 507 of the *Criminal Code* be amended to give the Chief Justice of the court to which the judge in question belongs the power to proceed by preferred indictment, and to hear the case himself or to refer it to one of the other judges of the court.

To avoid placing the judge in an embarrassing position, we suggest that in addition to the Attorney General initiating the

procedure in the ordinary manner, the Chief Justice of the court to which the judge concerned belongs be given the power to proceed by preferred indictment and that the latter not preside over the contempt hearing.

4. Obstructing Justice

Traditionally common law groups under this general heading those acts having the effect of interfering with the orderly administration of justice by corrupting, perverting or defeating its course. It includes attempting to influence a judge, juror, prosecutor, witness or party, attempting to bribe a court official, manufacturing false evidence, systematically obstructing the judicial process. It also includes perjury, contradictory testimony, refusal to appear or to testify, etc.

Structurally, at least, Canadian law differs from the common law model in that specific legislative provisions govern most forms of obstructing justice. For example, ss. 107-137 of the *Criminal Code* cover many of them under the general heading of Offences against the Administration of Law and Justice: bribery of judicial officers (ss. 108, 109), misconduct of peace officers (ss. 117-119), perjury and false testimony (ss. 120-123), contradictory evidence (s. 124), fabricating evidence (s. 125), using false affidavits (s. 126), obstructing justice and corruption (s. 127), failing to appear or to respond to a summons (s. 133(4) and (5)). This list is not exhaustive and other articles dealing with the matter are scattered throughout the Code: refusing to testify (s. 472), refusing to release evidence (s. 533), refusing to appear as a witness (s. 636). And finally, if one gives an extended meaning to "obstructing justice" and does not restrict it to its technical legal meaning, other articles of the Code (such as ss. 68, 118, 184, 246) are also relevant. And, as we have already mentioned, the residual common law power enshrined in s. 8 must be added to this list.

Basis

The basis for this type of contempt, as for all the statutory provisions mentioned above, is easily determinable. Two conditions must be met if the administration of justice is to be sound and orderly. First is the cooperation and collaboration of everyone throughout the entire process. It must be possible to force someone

(other than the accused himself and those whom the law specifically exempts) to come and testify, to take the oath, to produce a document or other evidence, etc.

The second is the honesty of everyone during the process. The basic rules of justice must not be altered or deflected from their original purpose. One must be able to rely upon the honesty and truthfulness of witnesses, and expect that those involved in the administration of justice have not been corrupted. The latter must also be protected against influences that could prevent them from performing their functions or tasks with complete impartiality, etc.

Therefore, the offences dealt with under the *Criminal Code* and those under the concept of contempt of court for obstructing justice in the traditional common law system all have in common that they sanction acts that threaten the normal and even operation of judicial institutions. They constitute "offences against the system of justice" in the true sense of the term.

To question their existence would be a purely academic exercise. No matter what economic or political system a given society has, the criminal law must deal in one way or another with these types of offences, because they attack the very fabric of the judicial system.

Legal policy considerations

The first question concerning legislative policy is how to organize all the offences dealing with the obstruction of justice in a logical manner. How will the codification of some of them affect the traditional law? Is it desirable to retain a residual power in this area?

In our opinion, for general policy reasons going beyond the law of contempt, the various offences of obstructing justice should be codified. This has already been done in part in the Canadian *Criminal Code*. These offences are justifiable in themselves; it is not necessary that they be looked upon as merely examples of the general law of contempt.

Moreover, a codification of the law should meet the following two objectives. First, the grouping of these offences in a single Part of the Code. This would be most helpful to all who make use of the Code.

The second objective is the simplification of the text so as to eliminate unnecessary repetition and to formulate the law in a clear and precise manner. We shall attempt to meet both these objectives in our forthcoming Working Paper dealing with the statutory offences relating to the administration of justice.

Since cases of obstructing justice, although serious, are not normally urgent, it may at first sight seem appropriate to follow the ordinary procedure, as is currently done under the Code. But the summary procedure could still be kept for cases requiring immediate action.

5. Attempting to influence the outcome of a trial

The *sub judice* rule has given rise to an impressive amount of case law both in Canada and in other common law countries. Moreover, it is in this area that there is the greatest divergence of views between Canadian law, and English and American law.

Generally speaking, the offence consists in publishing something designed to affect the impartial nature of proceedings. The purpose of the *sub judice* rule is to prevent publications or public statements that take a stand about a trial currently being heard or about to begin, thereby affecting the climate of impartiality, indirectly influencing court officials or public opinion one way or the other.

With the diversification of the communication media and the development of freedom of information, it is not suprising that this type of contempt has taken the limelight. There is no lack of cases illustrating this: a newspaper article that asserts the guilt or innocence of the accused, argues in favour of a particular sentence, publishes damaging information for one of the parties involved or the past criminal records of the accused or his presumed confessions or inadmissible evidence, reports on a current trial that could jeopardize the impartiality of the hearing, etc.

Applying such a flexible rule to specific cases ought to make a systematic approach to the question difficult. However, one eventually realizes that in spite of this the main rules concerning *sub judice* are set out fairly clearly in the cases.

Basis

There is not one but several bases for the *sub judice* rule. The first is that in any system, justice must be dispensed impartially. Any act that could affect this impartiality must be guarded against and suppressed. To take a hypothetical example, publishing virulent articles in a small town newspaper about someone accused of a particularly violent and revolting crime could create an atmosphere that is prejudicial to the trial, could influence potential jurors and could give the impression of having an influence one way or the other on the decision, thus making it virtually impossible for justice to be dispensed with in an unemotional and detached manner.

The second is that the system of justice must be, and must continue to appear to be neutral if public confidence is to be retained. To prejudice the outcome of a trial is to destroy this image in the eyes of the public and thus indirectly to undermine the authority of the judicial process. As has often been said, justice must not only be done, it must be seen to be done.

If, for example, every newspaper unanimously states that someone who has been found guilty deserves a harsh sentence, one can readily imagine the consequences of this on the public: if the sentence handed down is harsh, the public may believe that this outside pressure had an influence; on the other hand, if it is light, the public may think the judge was reacting negatively to this same pressure. In either case, the interests of justice are not served.

The third basis is more technical. The law of evidence carefully screens the facts to see what ought to be admitted. Evidence is customarily excluded if it is untrustworthy. In fact, the law of evidence is largely made up of rules excluding evidence. Therefore, only a part of the evidence is submitted to the trier of fact. As a result, the entire system of evidence would be undermined if the publication of inadmissible evidence were allowed. For example, one can imagine the effect on the jury if it read in the paper that the accused had made a confession that was inadmissible in court, or if it read about the accused's criminal record, when he had elected not to testify so as to avoid its being placed in evidence.

The foregoing are the three main reasons why the law has developed the doctrine of contempt for breaching the *sub judice* rule.

Obviously, this doctrine conflicts with the public's right to information. For valid reasons, it imposes what amounts to censorship on information concerning a public issue. Some journalists regard the rule as a direct threat to freedom of information, as a muzzle on the press. And the public often misunderstands the real purpose of the rule and considers it a form of judicial persecution. All things considered, however, we feel it is essential to maintain the traditional rule in one form or another, so long as we retain the present legal system. One should not forget that the open and public character of a criminal trial has historically afforded a measure of protection of the accused.

Under existing law, the press does have the right to publish an accurate and objective report of a trial, provided that the report does not contain comments prejudicial to the interests of the parties or to the administration of justice. Naturally, exceptions must be made for criminal cases where total ban on publication has been imposed, either by specific legislation (such as the *Juvenile Delinquents Act*)[22] or a court order (for example an order that a hearing be held *in camera*)[23]. In this country, the press and the media have, with rare exceptions, generally behaved prudently and responsibly in this context. On the other hand, certain "press-trials" in other countries amply demonstrate the danger of a complete absence of control over the media during a trial.

However, to accept the *sub judice* rule in principle does not necessarily mean that one cannot question the manner in which it is applied.

Legal policy considerations

Three principal problems recur time and again in respect of contempt for breaching the *sub judice* rule: the nature of liability, the limits of legal intervention, and the framework of the rule.

a) Nature of liability

A reading of the cases discussing the nature of liability in this area reveals a certain degree of confusion.

Some cases raise the question whether *mens rea* is an essential element of the offence, and whether the good faith of the offender

must be taken into account. The leading cases are to the effect that *mens rea* is not necessary. In other words, someone can be found guilty of contravening the *sub judice* rule even if he did not intend to influence the outcome of the trial or public opinion or to prejudice the case of one of the parties. Can the accused then plead in defence that he did not know that a trial was going on? The answer to this question would be in the negative under Canadian law, unless it were decided to accept the approach taken in British statute law which, under s. 11 of the *Administration of Justice Act* of 1960, recognizes ignorance as a valid defence. The rule is the same for someone who, without knowing it, publishes something that violates the *sub judice* rule. However, the courts in Canada are often reluctant to punish too severely an accused who obviously had no blameworthy intention. They tend to be much more lenient in these circumstances, an approach that may be indirectly influenced by American law.

The degree to which lack of knowledge or intent should be considered raises an important question that must be resolved in proposing legislative reform. As previous Commission papers have stated, the field of strict liability ought to be limited[24]. Criminal law should be aimed primarily at punishing acts that are morally blameworthy, and strict liability offences should be limited to cases where it is absolutely necessary to protect society. Contempt for breaching the *sub judice* rule does not seem to us to constitute such a case. However, to expect the Crown to demonstrate that the accused acted wilfully or recklessly may well put the Crown in an impossible situation and be equivalent to granting an immunity. The law should accept the requirement of *mens rea* but place on the accused the onus of exculpating himself by proving a justification or excuse.

b) Limits of legal intervention

The second problem is to define the limits of the *sub judice* rule. What criteria can be used to define the limits that ought to be placed on freedom of information? On the one hand, it would be unacceptable, apart from highly exceptional circumstances, to say that nothing can be published about a trial from the moment it begins. On the other hand, it would equally be unacceptable to say that the press can publish whatever it wants. The solution must lie somewhere between these two extremes.

Under existing law, publication in good faith of an accurate report of the facts of a trial does not constitute contempt of court, unless the judge has ordered that there be no publicity concerning a preliminary hearing or that the trial be held *in camera*. In other words, the press is free to "follow" or "cover" a trial like any other public event. It cannot, however, make comments that might influence the outcome of a trial, create a bias against one of the parties or affect the evidence to be presented. On the other hand, it can point out and even comment upon the legal difficulties that come up and the points of law that are raised. Therefore, no particular problem arises at either end of the scale; a simple report on the one hand, or a comment designed to influence on the other. But what about the case where a newspaper comments upon, reflects or offers opinions on the general subject matter raised in a particular case? For instance, what if it publishes a report comparing the merits of different makes of cars during a trial in which the very issue is the solidity or resilience of a particular make? What if during an abortion trial, articles questioning the relevance, validity or legitimacy of the present legislation are published? There is no simple answer. On the one hand, it would be naïve to think that such general comments are not likely to have a certain degree of influence on the administration of justice. For example, once a juror has read such a commentary or heard it on the radio, it will be difficult for him to avoid being influenced by it. Even if he tries, it may have a subconscious influence.

In reforming the law the principle of freedom of information must in our view be given first priority. For it is one of the most fundamental values in a democratic society and should not be curtailed except where absolutely necessary. In other words, it is not because the system of justice would theoretically be better off if it were totally immune to external influences that we should wrap it in a cocoon by restricting the diffusion of information. The actions classified as criminal under the *sub judice* rule should be those that are directly harmful to the public interest and that meet the following two conditions:

- that the action in question is *wilful or reckless* as to its possible effects on the impartial administration of justice in a given case;
- that the risk of influencing the administration of justice and thus the outcome of the trial is *serious*.

We think, therefore, that the general rule of mens rea must be retained, and that only those cases in which the risk of influence is serious ought to be treated as criminal.

c) Framework of the rule

The third problem respecting legal policy is to define the exact framework within which the rule is to be applied. From what moment is a case *sub judice*? When should the law intervene? This is a complex problem. As the law now stands, contempt can be committed even before the trial itself has begun: it is enough that litigation be imminent. This rule seems logical. The fountain of justice must not be poisoned at its source.

In this regard, some people have recommended distinguishing between civil and criminal trials, and between jury trials and those before a judge sitting alone.

It would seem, at first sight at least, that the impact of interference and of an attempt to influence would be greater in a criminal than in a civil trial. The case law generally (and we freely admit that it is hard to generalize) seems to be stricter in criminal than in civil cases. Considered objectively, "press-trials" can have more serious consequences in the former case than the latter. However, this theoretical difference should take into consideration the particular circumstances of each case. Interference in some civil cases can sometimes be extremely harmful.

We believe, therefore, that the distinction between criminal and civil offences should not be reflected in the elements of the offence but rather at the level of sentencing, with provision being made for extending the grounds of unconditional release in such a case.

Secondly, should one distinguish between jury trials and trials before a judge alone? The case law certainly reflects the thought that the jury is more open to influence than a judge. Rightly or wrongly, the latter is thought to be more impervious to external influences or at least equipped with better psychological defence mechanisms. However, one cannot totally rule out the possibility that a judge might be subconsciously influenced. As well, it must be borne in mind that the *sub judice* rule has other purposes in addition to

avoiding the possibility of influence. Even if it were proved absolutely impossible to influence a judge under any circumstances, the rule should nevertheless be maintained in order to protect the public image of the administration of justice and to maintain the concept of a neutral and impartial system of justice.

Accordingly, we do not think it useful to distinguish in the legislative definition of the offence between jury trials and trials before a judge alone.

The main problem, whether it be a civil or criminal, a jury or non-jury trial, is to determine when the *sub judice* rule takes effect. Two main legislative solutions are possible. One is to say nothing, to retain the present law and to leave it to the courts to decide whether, on the facts of each case, the rule applies. The other is to try to set out general guidelines in the legislation as part of the general policy of reform. We have opted for the second solution, for the following reasons.

First of all, if the principle of freedom of information is to be safeguarded any exception, such as the contempt rule, must be clearly laid down. Next, the media must have as clear and precise a rule as possible, so that it will know the limits of its own freedom. Freedom of information must not be subject to an uncertain exception which might cause more harm than the good the contempt rule is trying to promote; in other words, in the trade off that ultimately results in these matters, the flexibility of the present contempt power must not be maintained at the expense of the right of expression.

This question of the starting point of the *sub judice* rule has been extensively studied by the English Committee charged with reforming the law of contempt[25]. It concluded that in criminal cases, the period should begin (term *a quo*) at the moment a charge is laid or a summons served. The time the warrant for arrest is issued was rejected as too uncertain, in that the press would not likely know about it. In civil cases, the Committee recommended that the period begin on the date the case is set down for trial. The main reason for this choice was that it was felt there was a smaller risk of influence, since most civil cases are heard by a judge sitting alone.

As for the terminating date (term *ad quem*), the Committee recommended that in both civil and criminal cases the date be the conclusion of the trial at first instance. If an accused was found guilty in a criminal case, however, the press would be free to com-

ment only after sentence was pronounced, and in all cases the restrictions would continue to apply in the event of a mistrial or a new trial. Another reason for adopting this solution was that on appeal there is no longer a jury, no witnesses are heard, and the risk of influencing the appeal court judges is apparently minimal.

One can see that these recommendations are all based solely on the criterion of the risk of possible influence on the outcome of the case, and not on the other rationale for this type of contempt, particularly that of preserving the judicial system's image of impartiality.

From a policy standpoint, it is very important that the beginning and end of the *sub judice* period be clearly determinable, and not be open to uncertainty.

In criminal cases we would prefer that the *sub judice* period *begin at the moment the prosecution commences,* i.e., *at the moment the information is laid.* This evidently raises the thorny problem of the "administrative" enquiries that can precede a criminal trial, such as a coroner's inquest or a fire commissioner's enquiry. Public disclosure of the facts in such hearings may have a very negative impact on the rights of an individual who is later accused. Should these hearings, therefore, come within the scope of the *sub judice* rule? In theory at least, the purpose of these enquiries is merely to determine whether or not a criminal act has taken place or whether the events resulted from natural causes. From this point of view, there is nothing to prevent the evidence from being publicly commented upon. However, the shoe pinches when the procedure is used to obtain additional proof against someone already under serious suspicion; this is, in fact, misusing the institution. It is impossible, however, to justify the reform of a general rule by the presumption of widespread abuse.

As for the end of the period (term *ad quem*), it appears to us more reasonable and more certain to wait for *the final decision on sentence, that is either a decision of the highest level of courts, or of the court at first instance if no appeal has been launched within the stipulated period.* In this way, any uncertainty arising from the fact that an appeal court may order a new trial can be avoided.

In civil cases, the problem is somewhat more complicated. Many lawyers think the risk of influence is smaller in civil cases, because of the nature of the trial on the one hand, and because most are heard by a judge alone on the other. Under existing law, it seems

that the *sub judice* rule applies from the time the writ of summons is issued to the date of final judgment. These two dates have the advantage of being certain and easily ascertainable, thus being clear points of reference. Nevertheless, if the risk of influence is minimal and if the underlying principle is not unduly to restrict freedom of the press, why not at least delay the starting point? Or why not go further and allow the press to comment after decision at the trial. This line of argument was accepted by the English Committee.

As regards the beginning date, everyone knows there is often a relatively long delay between the moment the procedure is set in motion and the date the hearing is actually held. This means that freedom of the press is restricted for a correspondingly long time. As well, many suits are instituted that never go to court. An astute lawyer could thus muzzle the press by immediately commencing a civil action, knowing full well that it would be withdrawn later. Finally, it must not be forgotten that the ordinary tort rules concerning defamation still exist and that they constitute reasonable protection against comments made maliciously or in bad faith.

In accordance with our underlying objectives, therefore, we recommend that *in civil cases the sub judice rule apply only from the moment a case is set down for trial.*

What about the end of the period (term *ad quem*)? It is obviously tempting to accept the argument that the impact on appeal court judges of a published comment about a trial will be virtually nil. Yet, as we have already mentioned, the desire to prevent such impact is only one of the bases of this contempt rule. Others are the public image of the administration of justice and the desire to avoid unduly embarrassing the judges.

It is for this reason that, although the risk of influence appears minimal, *we would be inclined to retain the present rule in civil cases and to fix the ending date (term ad quem) as the date of final judgment rather than the date of judgment at first instance.*

In conclusion, it should be pointed out that the effect of the contempt rules is not to prevent objective reports of public proceedings made in good faith, and that in this area also, the ordinary procedure should normally be used. As well, publications that contravene other rules of contempt would, of course, be prosecuted accordingly.

Such then are, very briefly, some general considerations both as to the existing state of the law and as to the framework for reform.

In the second part of this paper, we will study the basic principles of reform and the ways in which this reform can be legislatively expressed.

II.

A Proposal for Reform

Reform necessarily implies choosing. Some choices are easy to make, but more often they are very difficult. The latter is the case with contempt, where the choices are both difficult and delicate.

In the preceding examination of the various forms of contempt, we have indicated our general ideas as to possible reforms. We must now look at the proposed reform from a more general perspective, and suggest how it can be implemented at a practical level.

The reform of offences against the administration of justice must, of course, fit into the broader context of Canadian criminal law. It must take into account both the present context and the philosophy of reform expressed by the Commission in several papers, notably the report on *Our Criminal Law*[26].

In doing this, we shall consider three different subjects: the framework of reform, the limits of reform, and its implementation.

1. Framework of reform

As we have seen, there are at present two sources for offences against the administration of justice: the traditional common law reflected in the residual power to punish for contempt preserved by s. 8 of the *Criminal Code*, and the various provisions designed to cover particular cases found scattered throughout the Code.

Section 8, as we have already said, is an anachronism in present Canadian criminal law, in that, in conformity with the maxim "*nulla crimen sine lege*", the common law offences were supposed to be

abolished by this very section. But the 1953 Code contradicts this general principle by explicitly retaining in the last lines of the same section the common law power to punish for contempt. However, this is perhaps not too surprising as the codifiers were probably thinking more of the "*power*" aspect of contempt than of its "*offence*" aspect. Nevertheless, we find it difficult to see how these two aspects can readily be distinguished. In the United States, many legislative bodies have been quite active in the field of contempt. In Great Britain, some forms of contempt have been incorporated in legislation and the Philimore Report favours a codification of the law of contempt in its entirety.

If Canadian penal law is really to consecrate the *nulla crimen sine lege* principle, there is no doubt that the anomaly of the contempt provision in s. 8 should go; the different forms of contempt should be spelled out by Parliament.

The first imperative of reform is therefore to incorporate in legislation the whole field of offences against the administration of justice, and particularly the rules of contempt.

In the second place, how can the law of contempt be expressed in concrete terms? Two observations must be made. First, contempt of court must no longer be looked upon as a sort of multiple offence, separated and divorced from other similar offences. Contempt is but one manifestation, one example, of offences directed against the judicial system. It is on the same plane as corrupting witnesses, trying to influence jurors, etc.

The codification of the rules of contempt must therefore be included in the more general framework of a Part of the Criminal Code dealing with the whole field of offences against the administration of justice.

Next, as we have already stated in previous papers, and demonstrated in others, the drafting style must be clear; it must avoid unnecessary enumerations and tedious definitions, and it must set out the rules in the most comprehensive and least technical manner possible. Particular stress must be placed on the formal quality of the suggested texts. They should contain general principles only, and not be cluttered with a welter of detail, as is often the case with today's statutory law. We believe that only a proper expression of legal principles can stimulate jurisprudential creativity and allow the courts to make law and adapt it to each factual

situation, rather than being tied down to a restrictive and literal interpretation.

The rules of contempt should therefore be drafted in a precise yet simple form, clearly expressing general principles and leaving it to the courts to adapt them to the particular facts and circumstances of each case.

2. Limits of reform

To grapple with the limits of reform in this field is in fact to grapple with the limits Parliament should set upon criminal responsibility for obstructing the judicial process.

To begin with, we think it desirable that contempt be used rarely and only in those situations in which the ordinary limits of tolerance have been stretched beyond the breaking point. Contempt is in fact at the outer limit of a large number of individual and collective freedoms. There is a very serious danger that contempt might eventually turn against those using it, and that in the final analysis, involving it too frequently might do more harm than good to the interests of justice. It is evidently extremely difficult to express this policy in legislation. Ought it therefore to remain only as a pious hope? We think not! Reform is not only a change in legislation; it must go hand in hand with a change in attitudes.

Next, before trying to determine the possible direction of reform, two questions must be answered. First, ought the basis of liability be subjective or objective? Secondly, what specific defences ought to be permitted to the various charges of contempt?

Basis of responsibility

As the Commission has stated previously, criminal law should be based on moral considerations. The real choice is between following this concept to the letter so as to apply it to any and all offences against the administration of justice (that is, requiring a guilty intention (*mens rea*) in all cases) and between making some cases of contempt strict liability offences. This question seems somewhat academic so far as the offences of obstructing justice, misbehaving in court and, to a certain extent; scandalizing

the court, are concerned. It is relevant, however, to the offences of disobeying a court order and breaching the *sub judice* rule. For the former, strict liability would mean that any non-compliance with an order, even where the offender lacked *mens rea* or was unaware of the order, would constitute an offence. For the latter, that anyone publishing an article that contravenes the *sub judice* rule, even if he was unaware that a trial was being held or that the article in question existed, would be guilty of an offence.

For all the reasons outlined in our Working Paper 2, Meaning of Guilt, Strict Liability, *we believe that a requirement of mens rea of intent or recklessness should be retained for all cases of contempt.* It only makes sense to classify acts against the administration of justice as criminal if one is thereby trying to sanction the blameworthy intent of the offender. This constitutes a change in the existing law. This should be accompanied by reversing the burden of proof so as to force the accused to prove justification or reasonable diligence.

Specific defences

The question of possible defences to the various offences against the administration of justice must be cleared up in the legislation, so as to avoid the uncertainty that presently exists. In practice, the problem arises only in respect of two types of offences: breaching the *sub judice* rule, and scandalizing the court.

In the former case, the following questions must be resolved. Is ignorance of the fact that a case is *sub judice* a valid defence? Is it also a valid defence to have accurately reported a hearing without comment? As we have already mentioned, we think an offence should exist if, and only if, two elements are present: intention, recklessness or negligence, and a serious danger of causing harm.

The fact that the reform requires that the beginning and ending dates for the *sub judice* rule be set out makes it easier to deal with this issue. We feel that *in principle, ignorance ought to be a defence,* subject to the legal rules concerning personal or vicarious responsibility on the part of the editor. In practice, it will undoubtedly be extremely difficult in such a case for the accused to plead ignorance,

given that the beginning and ending dates will presumably be known and that the publication will therefore be reckless.

Further, apart from orders banning publication or requiring *in camera* hearings, *an accurate report of a hearing, made in good faith, must not be considered an offence* because the opposite course would muzzle the press. Accordingly, proof of this should, in our opinion, constitute a valid defence, as is the case under present law.

The question is more complex in relation to scandalizing the court. Can someone who scandalizes the court properly defend himself by proving the truth of his allegations? Thus, can the litigant who, in the face of the court, or a newspaper reporter who, in an article, accuses the judge of being dishonest or mentally ill submit in defence that what he said is true? One can argue in the affirmative. Why should judges be treated differently from everyone else in society? In our view, however, there are valid legal reasons for questioning this solution, or at least for not accepting truth alone as a defence. First, the pretext of a hearing is perhaps not the most suitable moment to learn of, and to verify the facts. Let us assume that the charge is false: to permit the accused to plead truth is to provide him with an ideal platform from which to continue his slanderous allegations and to delay the proceedings for a lengthy period. But if the charge he makes is true, either it is in the "*public interest*" that the facts be known, or it is not. If it is not, an adequate remedy would be to complain to judicial authorities (such as the Chief Justice of the court). On the other hand, *if it is in the public interest,* this plea could be admitted, as it is now for defamatory libel (ss. 539 and 540 of the *Criminal Code*).

It can be argued that admitting this defence may give rise to serious attacks on the judiciary by activist groups ready to suffer the consequences of their acts for the promotion of their ideology. The danger is real. At the present time we would still favour the opportunity to present a defence of truth and public interest. However, we are by no means sure of this and would certainly welcome comments and criticisms. The choice is simple: on the one hand the law allows this defence and runs the risk of encouraging certain forms of attacks; on the other hand the law ignores the plea of truth and public interest and may cause serious injustice in particular cases.

3. Implementation of the reform

No reform can be complete unless its implementation is assured and unless the requisite procedural mechanisms are provided for in the rules.

In the field of contempt of court, the procedure raises certain difficulties, some of which have been dealt with in the preceding pages. However, it might be useful to sum up these observations here and add some additional comments to complete the picture.

Summary and ordinary procedure

Contempt of court can be handled in two different ways: by ordinary procedure, or by summary procedure. Section 8 of the *Criminal Code* recognizes this. For cases of contempt *ex facie,* it is generally, but not always, the ordinary procedure that is used.

When this procedure is used, the initiative is left up to the parties or to the Attorney-General. The accused is entitled to all the rights and guarantees traditionally recognized by the law: he answers a precise and detailed charge; he has the right to a full and complete defence; he benefits from the presumption of innocence and cannot be compelled to testify against himself; he can call witnesses. The Crown must follow the traditional rules and prove his guilt beyond reasonable doubt.

For certain cases of contempt *in facie,* especially those classified as misbehaving in court, the summary procedure is most often used. The accused is charged on the spot. As the judge himself witnessed the events leading to the contempt, he must formulate the charge clearly and then ask the accused to show cause why he ought not to be immediately convicted. The judge must, however, follow the general rule and give him the benefit of the doubt.

This summary procedure appears arbitrary to many lawyers and members of the public. It is argued that it reverses the burden of proof by requiring the accused to prove that he ought not to be convicted, that it denies him the right to call witnesses (even though most judges allow this in practice), and that it puts the accused in the position of being obliged to testify in order to defend himself. Regardless of the merits of these arguments, which are debatable, it must be admitted that the use of the summary procedure has often projected a very negative image.

The bulk of the criticism, especially from the public, has squarely focussed on the question whether the summary procedure, which at first sight appears arbitrary and anti-democratic, should be retained. The public has reservations about its legitimacy, remarking for example that the judge is simultaneously judge, party and witness in cases of contempt *in facie.*

Two comments must be made. In the first place, while it may be possible in theory to use the summary procedure even in cases of contempt *ex facie,* in practice this is hardly ever done. Secondly, over the years the case law has greatly mitigated the apparent rigours of the summary procedure and has developed a second type of procedure that incorporates some of the basic rules of the ordinary procedure. In practice, someone accused under this new summary procedure often enjoys all the guarantees traditionally offered by the law, except those of opting for a jury trial and of being summoned by writ or warrant: appellate courts are very strict about the precise nature of the charge; the judges generally give the accused an opportunity to call witnesses; unless the judge acts on his own initiative, the accused usually receives a notice and a statement of the facts; finally, in practice Canadian courts do not seem inclined to force the accused to testify.

Moreover, in cases of contempt *in facie*, the judge who has witnessed the events is in a similar position as a judge who has heard evidence about certain events and who has found sufficient proof of inculpating facts as to offer the accused the chance to summon witness or to testify on his own behalf if he wishes.

Therefore, the summary procedure itself has in practice evolved to a certain extent in such a way as to offset its reputation of being an extraordinary and somewhat inquisitory procedure.

If one bases one's view on the criteria of speed and efficiency in judicial proceedings there is no doubt that the classic summary procedure is infinitely preferable to the ordinary procedure. As well, in some cases, it has the advantage of instantly setting an example and "nipping in the bud" certain attempts at confrontation or judicial guerilla warfare. It is a very effective weapon of self-defence for the judicial system. On the other hand, there are serious doubts as to how truly democratic the procedure is and as to its place in the traditional British philosophy of criminal procedure.

As we have seen, it is almost indispensably tied to certain types of contempt. Realistically, it is hard to imagine a proper case of

misbehaving in court being handled through the ordinary procedure. More often than not, it is debatable whether it is appropriate for certain other types of contempt, such as disobeying a court order or disobeying the *sub judice* rule. Finally, the ordinary procedure seems more suitable for certain other types of offences: perjury, bribing officials and, generally, all the offences listed in the present Code as offences against the administration of justice.

Several possibilities are open. The first is to keep the law as it now is and allow (with certain exceptions) total freedom of choice between the summary and ordinary procedures depending on the circumstances, while continuing to rely on the expectation that courts will act with restraint and normally use the new summary procedure. But this is not a full answer to a number of objections that we think are well-founded.

The second solution is to identify each offence, to carefully weigh the balance of inconvenience and to prescribe a particular procedure for each type of offence. Under this approach, misbehaving in court and some forms of disobeying a court order could, as we have already indicated, be dealt with by the summary procedure.

A third solution, which we endorse, is to try to eliminate from the classic summary procedure those elements that seem antidemocratic or not sufficiently respectful of fundamental rights and freedoms. These values, we might add, have long been recognized in practice, and the classic summary procedure *stricto sensu* is now hardly ever used, except for cases of misbehaving in court. A "revised" summary procedure might be as follows: after the act in question had been committed, the accused, if he was not already before the court, would be served with a detailed summons together with the evidence (such as an incriminating piece of writing) if need be; this summons would order him to appear before the court on a fixed day; when this day arrived, the court would ask the accused whether he wanted to be represented by a lawyer, would allow him to lead evidence and to call witnesses if he so desired, and would listen to his arguments. These measures would obviously bring the so-called summary procedure much closer to the ordinary one, and eliminate its more odious aspects, at least in theory. This proposal, it should be noted, adopts the procedure currently followed by the vast majority of Canadian judges.

If the summary procedure is reformed in this way, there is likely to be much less public opposition to its retention. Nevertheless, we would prefer to have its application restricted even further to ensure that it is used only for those cases where immediate action is essential. But it is difficult, if not impossible, to decide these cases either on the basis of theory alone or on the basis of the nature of the offence.

We therefore feel that ordinary procedure should be made the general rule. However, we would retain the possibility of using the new summary procedure, while underlining its exceptional nature, by expressly including in the law the requirement that before using it the judge must be convinced that the interests of justice will be better served by its use. The classic summary procedure would be available only for misbehaving in court.

Initiating the proceedings

Some are worried about the fact that, in the field of contempt of court, the Attorney-General can lay charges. In their opinion, this constitutes a danger. It has even been argued that the Attorney-General might consider it inopportune to lay a charge in certain circumstances and that this refusal would be embarrassing for the judge involved. However, this question does not seem to have presented serious difficulties in Canadian law as a whole. As it now stands, the judge can initiate proceedings himself either at the request of one of the parties or *proprio motu;* this seldom happens when the contempt is committed *ex facie.* Usually, it is the Attorney-General who initiates the proceedings. We do not think it necessary to change this aspect of existing law, subject to our remarks concerning initiating proceedings in cases of scandalizing the court, when the judge in question is personally implicated.

Right to a jury trial

A jury trial is obviously out of the question when the summary procedure is used. But what about other situations? For the cases currently included in the *Criminal Code* as offences against the administration of justice, we feel the right to a jury trial should be

retained, if only because some of these offences are just as serious as many others for which there is a right to trial by jury. Perjury is a good example. In many other situations, however, as has often been said, real difficulties in appreciating facts are rare. It would of course be premature to make a final recommendation on this issue. The problem of jury trials for those new codified forms of contempt, must be considered within the more general perspective of the other offences against the administration of justice. The maximum penalties for disobeying a court order, scandalizing the court or attempting to influence a pending trial should not go over two or three years. This may well be a valid reason for not recognizing the right to a jury trial in these cases.

Sentences

Reading the existing provisions on sentencing in the *Criminal Code* as a whole gives cause for thought. Some sentences are quite definite, because they apply to codified offences; others are not. For example, perjury is punishable by a maximum of 14 years imprisonment (s. 120), disobeying a court order by a maximum of two years (s. 116), etc. Moreover, the dominant line of cases holds that contempt of court is a criminal act and not a mere offence punishable by way of summary conviction. Accordingly, the sentence is subject to the rules contained in s. 658 *et seq.* of the *Criminal Code*, and not to s. 722.

A study of Canadian case law shows that, as a whole, sentences for contempt rarely exceed two years imprisonment. In addition, the Philimore Report in England has recommended this as the maximum penalty. *We consider it realistic for most of what are now the common law offences of contempt of court.*

As for the statutory offences contained in the *Criminal Code*, we will, in the complementary Working Paper we propose to publish later, try to bring these sentences into line with the general policies of the Commission and to re-evaluate them in the light of the other provisions of the Code.

Finally, as we have seen, the same act may be classified in several ways. For example, a person who insults the judge during a hearing, swears at him, accuses him of bias and, in bad faith, launches into a criticism of the administration of justice, simulta-

neously commits the offences of misbehaving in court, obstructing justice, and scandalizing the court. Should he be charged with three different offences? If so, what should be the effect of the first conviction on the others? How can one solve the sentencing problems inherent in these overlapping offences.

We know that the present practice is for the court to take the other convictions into account. For this reason alone it would serve no useful purpose to codify this rule specifically for this one type of offence. However, with the aim of "demystifying" these offences in the eyes of the public and of proving to it that contempt is not an arbitrary and discretionary power, *we suggest that the current practice be codified so as to require the courts to take into account any sentence already imposed for the same act.*

Schedule A

Summary of Principal Recommendations

A complete draft of all the offences against the administration of justice will be presented in our second Working Paper dealing with the statutory offences presently found in the *Criminal Code*. Somewhat archaïc expressions like "scandalizing the court" or even "misbehaving in court" should disappear.

However, before this is done, it is extremely important for the Commission to obtain the reaction of the public and of the legal profession to the outline of the proposed reform of the law of contempt of court, as well as to suggested legislative definitions of the offences.

So that this paper might be more easily used, we thought it useful to include here a list of its principal recommendations.

A. GENERAL RECOMMENDATIONS

1. That the totality of offences against the administration of justice be included in legislation and that the common law offence of contempt of court referred to in s. 8 of the *Criminal Code* thereby disappear.

2. That the customary forms of contempt of court known as misbehaving in court, disobeying a court order, scandalizing the court, obstructing justice, and attempting to influence the outcome of a trial be defined in the *Criminal Code*.

3. That these new statutory offences and those presently included in the *Criminal Code* be grouped together in a single Part of the Code dealing with offences against the administration of justice.

4. That the new texts be drafted in simple language, clearly expressing the rules found in the cases and practice, yet remaining flexible enough that the courts can adapt them to the particular circumstances of each case.

5. That a *mens rea* of intent or recklessness be required for all codified forms of contempt of court.

6. That the law contain the principle that the ordinary procedure remain the general rule, except for cases of misbehaving in court.

7. That the law nevertheless recognize the exceptional possibility of having recourse to a new summary procedure more compatible with basic rights, when the interest of justice so requires.

B. SPECIFIC RECOMMENDATIONS

Misbehaving in court

8. That an offence dealing with courtroom misbehaviour be created to be defined as follows:

Anyone who, by disorderly, insolent or harmful behaviour, disturbs or disrupts the normal conduct of judicial proceedings in the presence of the court is guilty of an offence.

9. That the principle be recognized that any judge, magistrate or justice of the peace may make any necessary orders to suppress disorder in his court, or warn or expel anyone who disrupts a hearing, subject to the provisions of s. 577 of the *Criminal Code.*

Disobeying a court order

10. That the existing offence of disobeying a court order contained in s. 116 of the *Criminal Code* be retained.

11. That the specific offences of disobeying interlocutory orders to testify, to take the oath, etc. contained in the *Criminal Code* (ss. 472, 533(1), 633, 636, etc.) be retained.

C. SCANDALIZING THE COURT

12. That an offence be created, to be defined as follows:

Anyone who insults a judge in the exercise of his functions, or who attacks the integrity, independence or impartiality of the judicial process is guilty of an offence.

13. That the specific defence of truth of the facts and of public interest to disclose them be recognized as a valid defence to a charge of scandalizing the court.

14. That a trial for scandalizing the court be presided by a judge other than the one involved and that it may proceed by way of direct preferred indictment signed by the Chief Justice of the court to which the judge concerned belongs and be heard by the Chief Justice or any other judge to whom it is referred by him.

D. OBSTRUCTING JUSTICE

15. That the existing offences contained in s. 107 *et seq.* of the *Criminal Code* be retained.

E. ATTEMPTING TO INFLUENCE THE OUTCOME OF A TRIAL

16. That an offence of attempting to influence the outcome of a trial be created, to be defined as follows:

Anyone who, wilfully or through recklessness, publishes or allows to be published anything that constitutes a serious risk of obstructing or influencing the impartial development of a judicial proceeding is guilty of offence.

17. That ignorance of the fact that a trial is pending, the burden of proof of which is on the accused, be recognized as a valid defence to the charge of attempting to influence the outcome of a trial.

18. That in criminal matters, a trial be considered pending from the moment the information is laid until the date at which judgment on the sentence becomes final.

19. That in civil matters a trial be considered pending from the moment it is set down for trial until the date at which judgment becomes final.

SCHEDULE B

Endnotes

1. We have purposely limited the footnotes to the very strict minimum so as not to unduly burden the text. A selected bibliography can be found in Schedule C.
2. S.C. 1972, c. 13, s. 4.
3. A. POPOVICI, *L'outrage au Tribunal*, Law Reform Commission, April 1976.
4. *Report of the Committee on Contempt of Court*, London H.M.S.O. 1974, nos. 170 to 176, pp. 73 to 76.
5. *Poje v. Attorney General of British Columbia*, [1953] 1 S.C.R. 516, 105 C.C.C. 311 [1953] 2 D.L.R. 785, (1953) 17 C.R. 176.
6. *Commission de Transport de la Communauté Urbaine de Montréal v. Syndicat du Transport de Montréal*, (1974) S.C. 227.
7. *Commission de Transport de la Communauté Urbaine de Montréal v. Syndicat du Transport de Montréal*, Court of Appeal of Quebec, March 18, 1977, No. 009-00094-748.
8. *St-Jame's Evening Post* Case (1742), 2 Atk. 469, 26 E.R. 683.
9. *R. v. Gray*, (1900) 2 Q.B. 36.
10. *R. v. Larue-Langlois* (1970), 14 C.R. N.S. 68.
11. *R. v. The Vancouver Province* (1954), 18 C.R. 388 (British Columbia Supreme Court).
12. *Criminal Code*, s. 108 and fo.
13. *R. v. McKeown*, [1971] S.C.R. 446, p. 470.
14. *Supra* note 2.
15. P. Picher, "Courts of Record and Administrative Tribunals" Law Reform Commission — June 1976.
16. *Supra* note 13.
17. *R. v. Vallières* (No. 2) (1973), 47 D.L.R. (3d) 363, 17 C.C.C. (2d) 361 (Court of Appeal of Quebec).
18. *Supra* note 5.
19. *R. v. Larue-Langlois, supra* note 10.
20. *R. v. The Vancouver Province, supra* note 11.
21. *R. v. Murphy* (1969), 6 C.R. N.S. 353 (Supreme Court of N.B. Appeal Division).
22. *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3.
23. *Criminal Code*, ss. 441, 442, 465 (*j*).
24. *Studies on Strict Liability*—Law Reform Commission 1974.
25. *Supra* note 4, nos. 115 to 132, pp. 49 to 56.
26. *Our Criminal Law* — Law Reform Commission, 1976.

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