

The Enforcement of Conformity to Law through Contempt Proceedings

C. Gaylord Watkins

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Article

Citation Information

Watkins, C. Gaylord. "The Enforcement of Conformity to Law through Contempt Proceedings." *Osgoode Hall Law Journal* 5.2 (1967) : 125-158.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol5/iss2/1>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

OSGOODE HALL LAW JOURNAL

Vol. 5

No. 2

OCTOBER, 1967

THE ENFORCEMENT OF CONFORMITY TO LAW THROUGH CONTEMPT PROCEEDINGS

C. GAYLORD WATKINS*

Contempt may best be defined as "an act of disobedience or disrespect toward a judicial or legislative body of government or interference with its orderly process for which a summary punishment is usually exacted".¹ The contempt power, though technically an enforcement device of remedial and coercive character, has always received much publicity. By the very nature of the power's arbitrary and speedy operation and the areas of its application it continually emerges as a "volatile, focal point of significant and timely political issues".² We see this today in the recent Canadian labour injunction disputes.³ We witnessed this not so long ago in the American congressional investigations into subversion and communism. We are aware of contempt proceedings as the control mechanism of the press, especially in the conflict between the freedom of the press and the individual's right to a fair, unbiased trial. Not so apparent and not so easily rationalized is the civil contempt power, coercive in aim and used to enforce civil decrees and judgments.

The contempt power in Canada is exercisable not only in the traditional realms of the Court and legislative bodies, but, as well, through statutory mandate by certain administrative tribunals, investigatory organs and commissions.

Historical Background

Contempt is an inherited power which, like many of the devices of the common law, developed applications in the hereditary process seemingly incompatible with its original form. Born in the days of kingly rule and well suited to early English rulers and their style of government, contempt was an obvious and effective means of assuring

* C. Gaylord Watkins, B.Sc. (McGill), is a member of the 1967 graduating class of Osgoode Hall Law School.

¹ GOLDFARB, *THE CONTEMPT POWER* (1963) at 1.

² *Id.*, at 5.

³ Discussed *infra* at note 100 and following.

the dignity of and respect for the governing sovereign. Although a product of Anglo-Canadian-American legal doctrine, references to certain judicial punishing powers which looked like contempt (and that were conceded to be a necessary means of official force) are to be found in the writings of Justinian and in the Codes of Canon Law.⁴ Other early law-makers concluded that contempt of a governmental authority should not be punishable, apparently recognizing that respect by compulsion is a contradiction in terms, and no means to a free, libertarian government.⁵

As society grew, the use of bare force alone to enforce obedience and respect proved inadequate. The initial rationalization of an effective power device within a rule-of-law scheme was found in the divine right of kings. Disobedience to the monarch by his subjects then was automatically sinful; respect for divinity and in its aura, the mantle of divinity resulted in obedience to the commands of the sovereign ruler. The contempt power, with this basis, developed and enlarged in scope, aided greatly by adoption and cultivation by men never adverse to expanding their own influence through its exercise. Realistically, later institutions accepted the contempt power more to protect their own dignity and supremacy than because of their relationship to the king.

Eventually, the king discovered that by having agents act for him, the weight and worry of governing greatly decreased. The courts, as agents of the king, derived their use of the contempt power in such cases from the presumed contempt of the king's authority.⁶ In similar fashion, equity courts held that disobedience or obstruction of their orders and judgments issued under the King's seal, was contempt of the King and punishable as such. The right to punish disobedience, obstruction or disrespect thus was treated as an inherent power in the courts themselves, arising from the nature of their relationship with the King.

Rooted in Norman legal practices, the early civil contempt offender was imprisoned until he purged his act of contempt by carrying out the order of the court. The criminal contemnor was liable unconditionally to fine or imprisonment or both. However, in all early cases, contempt was treated procedurally in the ordinary course of the law.⁷ Summary punishment ensued only if the accused person confessed his guilt. Sir John Fox, the most noted scholar on the history of contempt, has discovered that numerous contempts up to the 15th century were treated as ordinary offences and not dealt with by summary process, as would have been the case in the 18th century.⁸

⁴ Canon 1840, tit. 3, bk. 4; Canon 1842, tit. 9. See GOLDFARB, *supra* note 1 at 10.

⁵ *Supra* note 1 at 10: The Theodosian Code; PATTERSON, ON LIBERTY OF SPEECH AND PRESS (1939) at 18.

⁶ Beale, *Contempt of Court; Criminal and Civil*, (1903), 21 HARV. L. REV. 161.

⁷ *Supra* note 1 at 16; Fox, *The Summary Process to Punish Contempt*, (1909) 25 L.Q. Rev. 238, at 241.

⁸ FOX, CONTEMPT OF COURT (1927) at 10.

The Star Chamber, not surprisingly, first allowed the exercise of summary process where it was deemed appropriate because of the immediacy and physical relationship of the contemnor's act to the court. If justice, in these situations, was not immediate, the courts felt that they could not perform their sacred duty of administering justice. Necessity, then, was introduced at that time as an explanation for punishing contempts *in facie curiae* outside the ordinary course of the law.

Not until Blackstone and other subsequent 18th century writers do we find contempt being summarily punished without regard to the locale of the commission. What is now considered to be the basis for such an extension arose from the judgment of Mr. Wilmot in *Rex v. Almon*.⁹ Sir John Eardley-Wilmot, appointed in 1765 to try Almon, a bookseller, for publishing an alleged libel of Lord Mansfield, held that contempts of court, both direct and indirect, in and out of court, were from time immemorial punishable summarily, as well as by indictment and criminal information. This wide summary power was described as being "coeval with the first foundation and institution" of English courts.¹⁰ Due to a procedural defect, Mr. Justice Wilmot's opinion was not delivered, and thus never became a valid legal precedent. Historical analysis, as previously mentioned, has indicated that contempts outside the court, prior to *Rex v. Almon*, had always been tried by regular methods of trial procedure.¹¹ Furthermore, it appears that in all probability, Blackstone merely adopted the views of Mr. Justice Wilmot.¹² It may thus be concluded that "the present scope of the summary power is due almost exclusively to the opinion of one man".¹³ *Rex v. Almon* has been accepted and extended by an unbroken line of English, American and Canadian cases. As well, the Criminal Code of Canada has impliedly sanctioned this use of the summary power by providing an appeal from conviction and sentence in the case of all contempts of court not committed *in facie curiae*.¹⁴ The courts, while asserting that the contempt power, in its present form, has never been abused, have recognized the potentiality for its abuse. Many dicta may be found stressing that this extraordinary power is to be used only when the contempt is clearly proved beyond a reasonable doubt.¹⁵ The contempt power was thus born narrow but grew with time and enthusiastic proponents to its present, much broader form. It is now a right in the courts so well rooted in judicial practice that only precise legislative enactment can remove it.

Contempt of parliament arose as well in the days of the divine rule of kings. Since parliament was originally a council representing

⁹ (1765) Wilmot's Notes 243; 97 E.R. 44.

¹⁰ *Id.*, Wilmot's Notes, at 254.

¹¹ *Supra* note 8 at 8-9.

¹² *Supra* note 1 at 10; THOMAS, PROBLEMS OF CONTEMPT OF COURT, (1934).

¹³ *Id.*, at 5 (THOMAS).

¹⁴ Section 9(2) of the Criminal Code of Canada.

¹⁵ *R. v. Payne*, (1896) 1 Q.B. 577 at 580 (Lord Russell, C.J.); Ziegal, *Some Aspects of the Law of Contempt of Court in Canada, England and the United States*, (1960) 6 MCGILL L.J. 229.

the judicial authority of the king, rendering judgments and enacting law, it naturally adopted the contempt power as a necessary and inherent accessory to its court-like function.¹⁶ Whether the adoption resulted from Parliament's ensuring its position by the exercise of privileges and procedures deemed befitting of its past or because of its original judicial capacity, is a point of conjecture.¹⁷

In any event, what was inherent to the courts also became inherent to the legislature—the House of Commons. However, a modern trend toward restraint in the use of contempt power by Parliament is evidenced by the English cases since the latter part of the 19th century.¹⁸

An important factor affecting the number of situations in which contempt of Parliament is applicable is the government's approach to fact-finding investigations. American investigations are traditionally held by congressional committees within the political arena. These committees by invoking the assistance of the courts wield the contempt of Congress power (with which they are inherently vested) more as a weapon against individuals than as a shield of the government.¹⁹ Commonwealth jurisdictions conduct such investigations not by their legislatures but through Royal Commissions and tribunals of inquiry, which are instruments of the Executive. Even though the contempt power has been normally granted to these investigatory bodies, they have generally functioned in an efficient manner without its direct assistance.²⁰

In Canada, contempt of Parliament exists as an invasion of the rights of the legislature as a whole, from disobedience to its orders, or disorderly conduct before or within it. Scandalous or libellous reflections in the proceedings or on the members in their capacity as members by persons outside Parliament are treated as contempts of Parliament. The contemnor may be summoned to appear before the Bar of the House of Commons to explain or to justify these acts. Punishment may be by public reprimand, delivered by the Speaker, or by imprisonment while the House is in session.²¹ Although some authorities²² consider that the power of commitment is fundamental

¹⁶ *Supra* note 1 at 25.

¹⁷ Poits, *The Power of Legislative Bodies to Punish for Contempt*, (1926) 74 U. PA. L. REV. 691.

¹⁸ *Supra* note 1 at 27-29.

¹⁹ *Id.*, at 45: Goldfarb notes the great and recent increase in the number of witnesses cited for contempt of Congress in the United States. From 1857 to 1949 there were 113 citations, while from 1950 to 1952 there were 117!

²⁰ Royal Commissions and Inquiries originated by the Federal Government or the Government of Ontario have usually been granted the contempt power by virtue of the Inquiries Act, R.S.C. 1952 c. 154 or the Public Inquiries Act, R.S.O. 1960 c. 323. The power has been rarely used. Discussion *infra* at note 68.

²¹ DAWSON, *THE GOVERNMENT OF CANADA*, (1963) at 372, 373. See generally, Fischer, Hugo, *Civil and Criminal Aspects of Contempt of Court*, (1956) 34 CAN. BAR REV. 121, at 132. The House may recommit the contemnor to gaol for further punishment at the beginning of the next session.

²² Ward, *Called to the Bar of the House of Commons*, (1957) 35 CAN. BAR REV. 529.

to parliamentary privilege, it is now fifty years since it was last used. As a device for enforcing conformity to law it cannot be considered as presently relevant in Canada.²³

Classification by the Courts of the Contempt Power

"Contempt is the Proteus of the legal world, assuming an almost infinite variety of forms.²⁴ It has been categorized, sub-classified and scholastically dignified into varying shades, each covering some particular aspect of the general power, respectively governed by a particular set of procedures."²⁵ Legal texts distinguish retributive or criminal contempts from coercive or civil contempts, and those contempts which are directly offensive to the courts from those only constructively contemptuous. Though these are the most prevalent divisions of the contempt power, there are many other classifications. Lord Hardwicke saw contempt as a three-fold creature: "One kind of contempt is scandalizing the court itself. There may also be a contempt of this court in abusing parties who are concerned in cases here. There may also be contempt of this court in prejudicing mankind against persons before the case is heard".²⁶

What is significant about the characterization of the variety of contempt present is that this determination defines the treatment of the contempt that follows: Once classified, specific procedures and limitations come into operation which directly affect the contemnor's liberty and property rights. For example, direct contempts are dealt with summarily²⁷ while indirect contempts demand some hearing.²⁸ Criminal contempts, though pardonable, cannot be purged, the exact opposite being the case for civil contempts. The court may fine or imprison the criminal contemnor for a definite period, while the civil contemnor faces the possibility of an incarceration, conceivably without end, with even the order for discharge being made conditional on payment of costs. As would be expected, the burden of proof for criminal contempts is greater than for civil contempts. Even the rules for appeal differ, although in Canada, it is only since 1955 that criminal contempts have been appealable.²⁹ It is interesting to note

²³ Contempt has also been traditionally used as a means of disciplining solicitors, as officers of the court. See Fischer, *supra* note 21 at 146, in particular at 147: "[T]he court, will, if necessary, use its contempt powers wherever a solicitor neglects to pay out money or hand over papers held by him without lawful excuse or moneys received for charges improperly made." Fischer discusses (at 148) those instances where certain persons and their property are protected from contempt proceedings (e.g., heads of state have a complete privilege or immunity, while members of Parliament are protected from civil contempt proceedings while the House is in session).

²⁴ Moskowitz, *Contempt of Injunctions, Criminal and Civil*, (1943) COLUM. L. REV. Vol. 43 780.

²⁵ *Supra* note 1 at 1.

²⁶ St. James Evening Post, [1742] 2 Atk. 471.

²⁷ *Re Duncan*, [1954] S.C.R. 41.

²⁸ Hébert, [1966] B.R. (P.Q.Q.B.) 197.

²⁹ Section 9 of the Criminal Code of Canada.

that there is apparently no privilege from arrest for solicitors and members of Parliament in criminal contempt cases.³⁰

The comment of Oliver Wendall Holmes that "the substance of the law is secreted in the interstices of procedure" aptly describes the situation. Only by examining the process conveying the contemnor to his punishment may we discover whether the offence is civil or criminal in nature, of private or public significance and concern.

Originally, classification was not considered a problem. Contempts were purely criminal and directed at offensive conduct amounting to active interference with the Crown or its official agents in the course of their duties. Civil contempt was a contempt in procedure and primarily an equitable device used to secure obedience to court orders.³¹ The power of the equity courts to imprison in aid of civil process did accentuate the similarity of civil and criminal contempts which were already so alike in nature and name. Yet there has never been a simple body of law on contempt. Instead there existed a criminal contempt law and a distinct procedural device which looked like contempt, went by the same name, but was not really the same creature. The passage of time has, however, brought all contempts into one family, though somewhat beset by domestic strife. The criminal stigma attached to one member of the family cannot help but infect others in the same domestic setting who have had no direct involvement with anything defined as criminal.

Writers on contempt have attempted repeatedly to distinguish every act of contempt in terms of its civil or criminal nature. Rapalje realistically termed the task impossible, concluding "that the main distinction between the two consisted in the passive non-compliance between private parties typical of civil contempts as contrasted with the positive obstruction or active disrespect to the court which characterizes criminal contempts".³² Oswald basically agreed but placed more stress on the object of the contemptuous act, that is, whether it would result in a private injury, or whether by a deliberate and active interference with the law its consequence was a public offence. The result of the contemptuous act thus evidently determines, in the final analysis, its characterization as civil or criminal.³³ However, to distinguish between the two classes of contempt we must determine the purpose of the punishment. "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."³⁴

Because all contempts do tend to interfere with the due course of justice, civil contempts cannot help attracting a varying number

³⁰ According to the Canadian Encyclopedic Digest, parliamentary privilege gives no protection for criminal contempts though it would bar attachment for a civil contempt: *Wellesley v. Duke of Beaufort*, (1831) 39 E.R. 538.

³¹ HALSBURY, 2nd Ed., Vol. 7, Contempt of Court.

³² RAPALJE, A TREATISE ON CONTEMPT, (1884) at 25.

³³ OSWALD, CONTEMPT OF COURT, (1911).

³⁴ See Fischer, *supra* note 21 at 139 where he quotes *Gompers v. Buck's Stove & Range Co.*, (1911) 221 U.S. 418 at 441.

of criminal contempt characteristics. This overlapping leads to confusion in determining whether the contemnor's conduct interferes with the law or administration of justice in general or whether it is merely an interference with the rights, judicially determined, of a private party.³⁵ The individual is thus unable to foresee the consequences of his future acts. This situation represents a violation of the principle of criminal law that the consequences of all acts be clearly stated in order to forewarn all potential violators.³⁶

As has been indicated previously, direct contempts were originally punished summarily while contempts committed outside the court, that is, indirect contempts, were punishable in the ordinary procedural manner. *Rex v. Almon*³⁷ expanded the initial summary punishment situation to include contempts committed by strangers outside of the court. Generally, "spontaneous, aggressive conduct, expressly aimed at the court itself or the parties to the action, which tended physically to obstruct the administration of justice" has delineated direct contempt (*in facie curiae* or so close thereto as to be physically disturbing); while constructive or indirect contempt has been categorized as "acts of misconduct apart from the immediate proceedings in time or location, which by implication tended to interfere with the administration of justice".³⁸

In the direct contempt situation, the court reasons that since it has personal knowledge of the act of contempt, any requirement of formal proof would be superfluous. The court need not prove what it already knows and may thus punish the contemnor forthwith. Although indirect or constructive contempts may be punished summarily they do require more of a hearing than that given to direct contempts.³⁹ Where there is a sensory awareness of the contempt, the court's power to punish summarily without hearing is more easily rationalized. However, that power has been extended to cases when the contempt so causally affects the administration of justice as to have a clear and obvious impact on it.⁴⁰

Direct contempts have included: insulting protests against the judgments of a court; assault or battery near a courtroom; threatening witnesses near the courtroom, blaspheming the judge, openly insulting a presiding judge, resistance to orders of the court in its presence, acts the court personally knows of or which take place in such a way as to impede proceedings, and disorderly conduct or insulting demeanor.⁴¹ Indirect contempts have been found pre-

³⁵ Discussed *infra*.

³⁶ In fact, as Fischer points out, since *Poje*, *infra* note 98, it is patently obvious that identical behaviour may be classified as both civil, and criminal contempt, depending on the person of the contemnor, or the purpose of the classification. See Fischer, *supra* note 21 at 161 and 126-130. Commentators, as well as judges, find the law of contempt shrouded in obscurity. Fischer at 162, n. 265.

³⁷ 97 E.R. 44.

³⁸ *Supra* note 1 at 1, 2.

³⁹ Hébert, *supra* note 28.

⁴⁰ *Supra* note 1 at 21, and for the U.S. position, 70.

⁴¹ RAPALJE, OSWALD, and HALSBURY: *supra* notes 31, 32, and 33.

dominantly in contempts by publication (unless there is a clear and obvious impact upon the court) but have resulted as well from preventing the service of process, improper communications to or by jurors, withholding evidence from the jurisdiction of the court, and bribing witnesses or jurors.⁴²

The major use of the constructive contempt power has been against contempts arising from press publications. These contempts are acts of criticism, pressure, or interference with trials and their participants, which by implication injuriously affect the administration of justice. Blackstone considered that such acts did disrupt the good order of the kingdom⁴³ and the courts have willingly agreed. However, actual injuries in such cases are seldom clearly connectible to the allegedly contemptuous act, and thus are really speculative in nature.

Rex v. Almon was the first recorded instance when the courts would have punished an individual for critical words written about a member of the judiciary and concerning a court proceeding. That case, it must be remembered, indicated what Mr. Justice Wilmot thought the law should be rather than what the law was at that time. The case, however, has been religiously followed so that the law of constructive contempt may now be brought to bear on the publication of information which might later have been ruled inadmissible at a trial,⁴⁴ allegories on the general imposition of the death penalty,⁴⁵ matters written before a case came to court and after a trial ended,⁴⁶ personal criticism of judges,⁴⁷ material written without knowledge of the judicial process of which it was in contempt,⁴⁸ and many others. It is in the exercise of the constructive contempt sanction that contempt has its broadest application.

Having surveyed the background and scope of the contempt power, it is now relevant to examine its usage by the Canadian courts. It should then be possible to appraise the power's effectiveness as a means of producing obedience to law, assess its various rationalizations, and finally judge the power's compatibility with the ideals, rights, and freedoms of common law jurisdictions and of legal systems productive of good order and justice, generally.

The Direct Contempt Power

Summary treatment of direct contempt of court would appear to be a necessary means of maintaining order within the courts. Ordered procedures of trial and hearing are obviously essential to an impartial and effective administration of justice. Such utilization of the contempt sanction does not directly produce conformity to law,

⁴² *Supra* note 1 at 21, 70.

⁴³ BLACKSTONE COMMENTARIES, at 285.

⁴⁴ *R. v. Clarke* (1910) 27 T.L.R. 32 (K.B.).

⁴⁵ *Re Nichol*, [1954] 3 D.L.R. 690.

⁴⁶ *King v. Davies*, [1906] 1 K.B. 22.

⁴⁷ *R. v. Editor of the New Statesman*, 44 T.L.R. 301.

⁴⁸ *R. v. Odham's Press*, [1957] 1 Q.B. 73, *infra* note 128.

but rather a suitable atmosphere in which the relevant law may be determined and applied. What is first required is an acceptance of the mechanism by which the administrative and judicial process attempts to formulate a just solution for the particular case. Acquiescence to the formal procedure leading to the judicial determination of which party must obey which law is thus an essential pre-requisite of obedience and conformity to law itself. A valid exercising of the contempt power must indicate the presence of a real impediment to or interference with the course of justice.

Direct contempts are predominately criminal in nature and effect. A respected Canadian judge has listed what he considers to be some of the more obvious direct contempts: "demonstrations in the court room by shouting and noisy behaviour; applauding a verdict, or jury, or decision of a judge; refusing to give evidence when properly subpoenaed as a witness, or to answer relevant questions; refusing to leave the court room when ordered to do so, or to obey the orders of a court or its officers with respect to a trial which is in progress, *whether civil or criminal*; or using abusive or disrespectful language to a judge presiding at the trial."⁴⁹ It is seen then that conduct in the face of the court manifesting disrespect, of any form, for the judicial process or the judiciary has been considered sufficiently obstructive to the administration of justice (and to the public interest) to merit summary punishment. Direct contempts are penalized as contumacious behaviour,⁵⁰ although in certain cases (refusal of witnesses to testify), a coercive type of penalty is present.

The power to discipline contempts committed in the face of the court outside the ordinary course of justice is possessed by every court of record.⁵¹ It has been held to be an inherent right and necessary incident of all courts, and with respect to superior courts of justice, is not abrogated by any statutory enactment.⁵² Only superior courts have the power to punish summarily for contempts *ex facie curiae*. Justices of the Peace, and Masters have only the power to order the removal of persons interfering with the orderly conduct of business before them. It has been held that a magistrate does not have the power to commit for contempts *in facie curiae* during a hearing on a summary conviction matter.⁵³ Section 426 of the Criminal Code does though give "every judge and magistrate the same power and authority to preserve order in a court over which he presides as may be exercised by the Superior Court of Criminal Jurisdiction of the province." A magistrate has been allowed under his general power to preserve order to summarily punish a direct contempt in a preliminary hearing where the accused refused to rise when the court was called to order.⁵⁴ Magistrates may also apparently initiate con-

⁴⁹ McRuer, C.J.H.C. of Ontario (as he then was), *Contempt of Court Procedure* (1952) 30 CAN. BAR REV. 225.

⁵⁰ *Lougheed v. Thompson and MacDonald* (1928) 36 O.W.N. 84, 139.

⁵¹ *In re Gerson*; *In re Nightingale*, [1946] S.C.R. 547.

⁵² *Ex parte Lunan*, [1951] O.R. 257.

⁵³ *Re Harry Rose*, [1964] C.C.C. 25 (Ont.).

⁵⁴ *R. v. Hume*; *ex parte Hawkins*, (1966) 53 D.L.R. (2d) 453 (B.C.S.C.)

tempt proceedings by way of information, or by citing the alleged contemnor to show cause why he should not be committed.⁵⁵

Certain direct and "procedural" contempts are punishable by statutory authority.⁵⁶ The failure of a witness to appear, without lawful excuse, may result in a summary punishment of up to \$100 fine, or 90 days in jail, or both.⁵⁷ Refusal to testify at a preliminary hearing is punishable by an immediate imprisonment for a period not exceeding eight days—a penalty which may be repeated for further refusals.⁵⁸

Since 1955, where a court, judge, justice or magistrate summarily convicts a person for a contempt of court *in facie curiae*, the contemnor may appeal against the punishment imposed.⁵⁹ Prior to this there was no appeal for criminal contempt convictions, and even now the discretion of the judge in determining whether such a contempt has been committed is not questionable.

The period of imprisonment for criminal contempts is normally for a fixed term set by the judge concerned in his discretion, unless, of course, the court is proceeding by way of indictment, or other statutory authority, specifically limiting the penalties applicable.⁶⁰ Convictions for contempt when authorized by statute are limited by the statutory enactment, so that punishments in excess of those prescribed are illegal.⁶¹ Tendencies toward harsh or excessive sentences hopefully should be counteracted by the appeal provisions of the Criminal Code.⁶²

In their use of the summary punishment power against direct contempts, the courts have imprisoned a witness for refusing to testify,⁶³ committed an intoxicated juror,⁶⁴ and ordered a barrister to pay \$2,000 or suffer an imprisonment of 60 days for asking in court without any reasonable explanation that a particular judge not sit on the appeal about to be heard.⁶⁵ In the latter case, the judge concerned absented himself while his colleagues in the Supreme Court of Canada heard the appeal. Once the appeal was completed, however, the judge returned, and the Court summarily and severely penalized the indiscrete barrister. The Court noted that judges and courts were open to criticism but that any criticism must be based on reasonable arguments of law or public policy. In other words, an

⁵⁵ *R. v. Taylor: ex parte Crépeau*, (1965) 50 D.L.R. (2d) 432.

⁵⁶ E.g., the Judicature Act, the Habeas Corpus Act.

⁵⁷ Sections 610, 612 the Criminal Code of Canada.

⁵⁸ *Id.*, section 457.

⁵⁹ *Id.*, section 9(1).

⁶⁰ *A. G. v. James et al.*, [1962] 1 All E.R. 255.

⁶¹ *Lefévre v. The Queen*, [1966] 1 C.C.C. 89; Quebec Q.B. Appeals; Conviction quashed under Section 457(1)(b) of the Criminal Code since a sentence of 1 year was in excess of the stated amount of eight days.

⁶² *Supra* note 55.

⁶³ *Supra* note 51 (for one year).

⁶⁴ *R. v. Rodgers; Re Reynolds*, [1952] O.W.N. 492.

⁶⁵ *Supra* note 27.

act calculated to bring a court into contempt, or to lower its authority (in the eyes of the judges), is a contempt and punishable as such.⁶⁶

The courts continuously have warned that the direct contempt power is to be used "cautiously and sparingly, from a sense of duty and under the pressure of public necessity and not to vindicate the judge as a person".⁶⁷ "Such arbitrary and unlimited jurisdiction should be jealously and carefully watched, and exercised with anxiety and reluctance."⁶⁸

Whatever cautions the courts have voiced concerning the contempt power, it has, oddly enough, been granted by legislative enactment to non-judicial commissioners and boards as an aid to investigation and administrative efficiency.⁶⁹ The power has been but rarely exercised, but the potentiality for its use⁷⁰ and abuse continues. Investigating officers under the Combines Investigation Act are given ". . . all powers that are exercised by any superior court in Canada for the enforcement of subpoenas . . . or punishment of disobedience thereof".⁷¹ In 1929, a certain Mr. Singer was imprisoned for his refusal to be sworn as a witness and produce certain documents. Even though he subsequently purged his contempt by doing that which was required of him, his imprisonment continued. It was held that although Singer was properly committed for contempt, his continued imprisonment was illegal and that this constituted an abuse of the judicial power granted to the Commissioner.⁷²

A recent case⁷³ held that the Ontario Municipal Board has the power to punish for direct contempts on the basis of the grant to it by the enabling legislation of the rights and privileges of the Supreme Court with respect to the attendance and examination of witnesses.⁷⁴ The Board may thus compel witnesses to appear and to answer, and following a refusal, commit the unwilling witness to prison.

One must agree with those who find this somewhat paradoxical⁷⁵ for here the contempt power is freely given to officials who may have no legal awareness or judicial conscience. The caution and care which the judiciary have shown in their use of the power obviously does not appear to have had any effect on the legislatures enacting such statutes as the Ontario Municipal Board Act. Efficiency in operation

⁶⁶ *R. v. Gray*, [1900] 2 Q.B. 36, followed in *Re Duncan*.

⁶⁷ *McLeod v. St. Aubyn*, [1899] A.C. 549.

⁶⁸ *Meriden Britannica Co. Ltd. v. Walter* (1915) 34 O.L.R. 518, 520; following *In re Clements* (1877) 46 L.J. Ch. 375, at 383.

⁶⁹ Ontario Municipal Board Act, R.S.O. 1960 c. 274, s. 33, 37; Railways Act, R.S.C. 1952 c. 234, s. 33(3); Ontario Labour Relations Act, R.S.O. 1960 c. 202, s. 277(2)a; Workmen's Compensation Act, R.S.O. 1960 c. 437, s. 65; Royal Commissions and Inquiries: *supra* note 20.

⁷⁰ *Express Traffic Ass'n. v. Montreal*, (1919) 25 C.R.C. 61, (attempt to influence the Railway Board).

⁷¹ R.S.C. 1927 c. 26, s. 22.

⁷² *Re Singer* (1929) 37 O.W.N. 3.

⁷³ *Re Diamond and the O.M.B.*, [1962] O.R. 328.

⁷⁴ Section 37, O.M.B. Act, R.S.O. 1960 c. 274.

⁷⁵ *Johnstone, Contempt Power and Legislative Tribunals*, (1963) 2 Osgoode Hall L.J. 482.

is the over-riding concern—"essential" in the view of Mr. Justice Schroeder of the Ontario Court of Appeal. ". . . is the power to hold a recalcitrant witness in contempt and as a means of coercion to commit him to prison . . . (for otherwise) the administrative machinery of the Board would soon grind to a halt".⁷⁶ Furthermore, under section 9 of the Criminal Code, there is no provision for appeal from contempt convictions by such bodies as the Ontario Municipal Board. Since by implication this summary contempt power has been given to all other bodies with similar enabling legislation, legislative tribunals now possess a contempt power subject to fewer restraints than the judiciary's contempt power, and therefore even more arbitrary in the potentiality of its application. It is evident that the legislators, as well as many judges, do not have a basic understanding and comprehension of the full implications of this power device.

Civil Contempt of Court

Arising out of equity's coercive methods, the civil contempt power differs from its brethren in that it usually operates on the option of the party affected by the disobedience of judgments, writs or orders (including injunctions) of the Court. It is in this context that the contempt power can be seen in the form in which it most directly enforces conformity to law. The power of the Court here is exercised not as a penalty for contumacious behaviour, but to coerce a recalcitrant party into obedience.⁷⁷ Even persons not named in a writ or order of the Court who assist in a breach thereof with knowledge or notice of such judicial commands, are "guilty" of civil contempt of court.⁷⁸ Civil contempts have been found within civil proceedings in such conduct as a failure to comply with a notice or order for the production and inspection of documents, or a failure to attend or answer at an examination for discovery.⁷⁹ As well, the disobedience of orders of a more final nature, as for example a judicial command to give up the possession of certain property, or the custody of a child,⁸⁰ have been considered civilly contemptuous.

In general, no one is liable to contempt proceedings and committal for the non-payment of a sum of money (including costs or charges but not damages).⁸¹ If the indebtedness is for \$100 or more, presently payable, then an arrest of the debtor is permissible where he is about to quit the jurisdiction (Ontario) in order to defraud his creditors. Such committals are limited to two months in duration⁸² and are not open to habeas corpus applications.⁸³ Furthermore, judg-

⁷⁶ *Supra* note 73 at 331.

⁷⁷ *Supra* note 50.

⁷⁸ See *Re Tilco Plastics Ltd. v. Skurjat et al*, Attorney-General for Ontario v. Clark *et al*, [1966] 2 O.R. 547 where the reputation of an injunction in the community was held to be sufficient actual notice.

⁷⁹ *Supra* note 72.

⁸⁰ *Link v. Thompson*, [1917] O.L.R. 227.

⁸¹ Fraudulent Debtors Arrest Act, R.S.O. 1960 c. 155, s. 2. Note that Nova Scotia is the only Canadian jurisdiction that presently allows imprisonment for debt alone.

⁸² *Id.*

⁸³ Habeas Corpus Act, R.S.O. 1960 c. 169 Section 1(1).

ment debtors may be imprisoned for up to one year for refusing to disclose their assets.⁸⁴ A fraudulent intent has allowed the court to consider these contents as criminal and thus set its own period of imprisonment.⁸⁵ An inability to pay if bona fide does act as a good defence to committal and has been enshrined in various statutes ordering payments for the support of dependents.⁸⁶ The civil contempt sanction is thus used as an enforcement device against judgment debtors who having the means to pay refuse to do so, and therefore void the execution procedures of the Court.

Parties wishing to enforce a judgment in their favour thus have imprisonment available as an aid to recovery, even though a fine might be a more appropriate and just remedy. Unless the court of its own motion takes notice of the contempt, the party affected brings it to the attention of the court by a writ attachment or by a motion to commit. Although attachment was originally used for disobediences of judgments or orders of the court and committal for breaches of prohibitory orders, since the Judicature Acts the distinction has not been of any practical importance.⁸⁷ The remedies are now virtually interchangeable, even in the course of the proceedings. In one case, attachment was considered the more appropriate remedy mainly since it carries with it the right to a writ of sequestration, thus allowing one to proceed against the property and the person of the contemnor simultaneously.⁸⁸ Because the liberty of an individual is involved, the courts have required that the specific charge be distinctly stated, that there should be an opportunity to answer the charge before sentence is passed,⁸⁹ that no reasonable doubt remains of the alleged contemnor's guilt, and that the utmost strictness in procedure is maintained.⁹⁰ However, the procedural protections afforded⁹¹ the civil contemnor are fewer than the safeguards allowed the criminal contemnor.

If a definite term of imprisonment is specified by the applicant, (there being no obligation to do so), or is legislatively prescribed, then the contemnor is automatically entitled to release at the end of that term. In order to obtain release in other cases, the contemnor must apply to the court originating the committal order, and give notice to all parties concerned. It is only this discharging order, on the issue of which the court may impose requirements conditional to

⁸⁴ Rule 594 of the Ontario Rules of Practice; See *Charlebois v. Martin*, [1912] 4 O.W.N. 412; *Hobbs v. Scott* (1864) 23 U.C.Q.B. 619.

⁸⁵ *Jones v. MacDonald* (1893) 15 Prac. Rep. 345.

⁸⁶ *Deserted Wives' and Children's Maintenance Act*, R.S.O. 1960, c. 105, s. 12; *Children's Maintenance Act*, R.S.O. 1960, c. 55, ss. 1, 2; *Parent's Maintenance Act*, R.S.O. 1960, c. 284, ss. 7, 8; Several other statutes have contempt provisions: notably, *The Jurors' Act*, R.S.O. 1960, c. 199; *The Habeas Corpus Act*, R.S.O. 1960, c. 169, s. 3; *The Criminal Code and its general catch-all provision*: s. 108.

⁸⁷ R.S.O. 1960, c. 197.

⁸⁸ Rule 547 and note 80, *supra*.

⁸⁹ *MacKell v. Ottawa Separate School Trustees* (1917) 40 D.L.R. 272.

⁹⁰ *General Printers Ltd. v. Thompson* (1964) 46 D.L.R. (2d) 692.

⁹¹ See *The Coercive Function of Civil Contempt*, (1965) 33 V. CHI. L. REV. 122, where the civil contempt power is examined in detail.

release, that clears the contempt.⁹² The court is compelled to release a party entitled to discharge, who neglects to apply for such discharge, immediately. The contemnor, where the limit of his incarceration is not fixed, holds "the key to his prison",⁹³ for once he has complied with the order of the court previously disobeyed, release is the almost inevitable outcome. Unless the court has such an interest in the contempt (due to its possible interference with the judicial process) as to define the length of punishment, once the contemnor has obeyed the order of the court, the contempt is purged by the application for and granting of the order of discharge.⁹⁴

The person "guilty" of a civil contempt may appeal the order of committal, or attack the writ of attachment, or appeal the original order or judgment of which he is in contempt. The discretionary nature of a conviction for contempt may make an interference with the decision by an appellate judge somewhat difficult. This is especially true in higher courts where no appeal lies from a judgment or order made in the exercise of the judicial discretion.⁹⁵ An appeal to the Supreme Court of Canada must be from a final judgment as defined statutorily. Therefore, although criminal contempts are appealable by Section 9 of the Criminal Code, it would appear easier and more fruitful in the case of civil contempts to appeal the original order or judgment from which the contempt arose rather than the contempt conviction itself.

One cannot deny that an act of civil contempt does indicate a disrespect for the orders of the court, as well as an unwillingness to give up to one's opponent in litigation what is his by judicial determination. Although the court is exercising its powers in the execution of a judgment previously rendered, it is at the same time vindicating its own authority. The requirement that there be a wilful breach proven beyond a reasonable doubt⁹⁶ is similar to the treatment of criminal contempts that have always been described as acts of disrespect to the administration of justice. The rationale offered by the courts to explain the strict treatment of civil contempts is the nature of the coercive penalty involved—imprisonment. While this is no doubt a wise course, it does point out that the courts are aware of the underlying criminal element present in all civil contempts. Coercion is practically impossible to separate from the punitive aspects of civil contempt sentences.

The strictness of treatment by the courts of civil contemnors is somewhat deceptive on closer inspection. Normally, the burden of proving an affirmative defence is on the defendant. Even though compliance and inability to comply are complete defences to civil

⁹² *Twigg v. McCusker* (Twigg) [1947] O.W.N. 389.

⁹³ This expression is found throughout the American cases on contempt of court.

⁹⁴ *McDonald v. Lancaster Separate School Trustees*, (1916) 35 O.L.R. 614.

⁹⁵ Supreme Court Act, R.S.C. 1952, c. 259.

⁹⁶ *Tilden Rent-A-Car v. Rollins* (1966) 57 W.W.R. 309, (Alta. Q.B.), following *Savre v. Harris* [1879] N.B.R. (C.A.) 681.

contempt proceedings, these facts must be proved without the benefit of ordinary criminal "due process" safeguards—"even though imprisonment hinges on the outcome of the determination."⁹⁷

Some civil contempts have been considered so blatant an insult to the judicial process that they have been treated and punished as criminal contempts of court. The criminal element had reached the level where it so coloured the act that its predominate effect was a violation of a public interest⁹⁸ and not just an undercurrent in the ordinary private consequences of a civil contempt. The courts have examined the entire case in determining the degree of presence of the criminal element which if present "will not be condoned lightly",⁹⁹ and if pervasive, "will not escape a punitive sentence".¹⁰⁰ The presence of the criminal civil contempt has allowed the court, and the government in the person of the Attorney-General to commence or continue criminal contempt proceedings without the agreement of the party initiating the original civil contempt proceedings, where it is considered that the administration of justice has been detrimentally affected.¹⁰¹ The problem lies in knowing at what point a civil contempt becomes criminal. The courts' treatment of the breach of injunctions, particularly labour injunctions illustrates the impossibility of making a sensible civil-criminal distinction in all cases.¹⁰²

To become criminal in character, the breach of an injunction should (as the courts see it) be of a public nature, that is to say, "a public depreciation of the authority of the Court that would tend to bring the administration of justice into scorn".¹⁰³ Thus non-compliance with an injunction involving, for example, a restraint of trade,¹⁰⁴ nuisance,¹⁰⁵ trademarks, and copyrights,¹⁰⁶ is predominately a private unexposed disobedience, and has accordingly resulted in "conviction" for civil contempt. The focus of the court is thus on the maintenance of *public* respect for judicial orders. It appears that private disobediences of court orders made in civil proceedings are not criminal contempts, even though the identical act, if publicized, suddenly is considered to be a criminal contempt. What disrespect there is for a particular law or how it is administered has not been altered. How the contempt is judicially treated seems to depend on the setting in which it occurred and its probable influence on the community at large.¹⁰⁷

⁹⁷ *Supra* note 91 at 122, 125.

⁹⁸ *Tony Poje et al. v. Attorney-General of B.C.*, [1953] 1 S.C.R. 527.

⁹⁹ *Buck Stove Co. v. Guelph Foundry Co.*, (1905) 6 O.L.R. 116.

¹⁰⁰ *Supra* notes 98 and 78 (*Poje and Tilco*).

¹⁰¹ *Supra* note 98 at 527.

¹⁰² As Fischer has illustrated. *Supra* note 21.

¹⁰³ *Tilco*, *supra* note 78.

¹⁰⁴ *Supra* note 96.

¹⁰⁵ *A.G. for B.C. v. Haney Speedways Ltd.* (1963) 41 D.L.R. (2d) 85.

¹⁰⁶ *Dubiner v. Cheerio Toys and Games Ltd.*, Noel J., Exch., April 1965.

¹⁰⁷ See generally, *Moskovitz*, *supra* note 24. *Poje* (*supra* note 98) is the extreme case. Criticized by Fischer, (*supra* note 4) the case resulted in a criminal contempt conviction from the breach of a civil injunction even though the parties had reached a settlement subsequent to the grant of the injunction.

The conflict between management and labour and the inability of legislators to find an acceptable answer has produced the most recent application of the criminal contempt power arising out of civil proceedings.¹⁰⁸ The court has the power to grant an interim or *ex parte* injunction for a period of no longer than four days if satisfied that "a breach of the peace, injury to a person or damage to property has occurred or an interruption of an essential public service has occurred or is likely to occur", to any deserving applicant.¹⁰⁹ Employers may then in an *ex parte* hearing, by proving a prima facie case, obtain such an injunction limiting the picketing of their business enterprise by striking employees. Organized labour considers such a restriction of their right to strike an example of the pro-management bias of the courts and the property consciousness of the law itself. As a result, by breaching the injunction (by not stopping picketing when ordered to do so¹¹⁰ by not limiting the number of pickets as ordered,¹¹¹ by sympathetic picketing or demonstrations equivalent to picketing¹¹²) and thus necessarily exhibiting a public defiance of the court order, the persons or unions¹¹³ involved are liable to convictions for both civil and criminal contempts of court.¹¹⁴ Even protest demonstrations against the laws governing labour-management relations, when carried on at the same time and place where injunctions limiting picketing are in force have been held to be criminal contempts.¹¹⁵ The courts, when faced with what they consider to be flagrant disrespect for the judicial process and therefore dangerous and great tendencies to diminish the authority of the courts in the eyes of the public, feel obligated to use the contempt power to protect and restore the means through which justice is available to society. Punishment in such cases is to deter open defiance of court orders by organized labour, and as the Court of Appeal of British Columbia recently pointed out, if obedience is not produced by light sentences, heavier sentences would be imposed.¹¹⁶ Unfortunately it appears that what is being punished in these cases is not a disrespect for the administration of justice but rather a disrespect for the law itself. The contempt power is thus being used to enforce obedience to what is considered by many members of the society, an unjust law. The courts as the law now stands have really no alternative—the law is the law and whether it is a just law or not it is to be obeyed.

¹⁰⁸ *Tilco*, *supra* note 78, and *Lenkurt*, a very recent decision of the B.C. Supreme Court.

¹⁰⁹ Judicature Act, R.S.O. 1960, c. 197, s. 17(3). Note that the interim injunction is also available to labour to be used against management provided the same conditions are present.

¹¹⁰ *Upper Lakes Shipping v. Banks* (1964) 50 D.L.R. (2d) 734.

¹¹¹ *Tilco*, *supra* note 78.

¹¹² *Id.*

¹¹³ *Nissho (Canada) Ltd. v. Int'l. Longshoreman's and Warehouseman's Union*, (1965) 54 W.W.R. 295.

¹¹⁴ *Supra* note 107, and note 113.

¹¹⁵ *Supra* note 78, *Tilco*.

¹¹⁶ *Lenkurt*, *supra* note 108.

**Contempts, Indirect and Criminal:
The Constructive Contempt Power**

So far the contempt power has been seen as a means of maintaining order and dignity in judicial proceedings, and of ensuring obedience to legal orders. The courts, however, have also used the contempt sanction for dealing with indirect contempts abusive of the process of the court, or detrimental to the administration of justice. These constructive contempts are in essence, speculative interferences with the administration of justice brought about by the publication of allegedly prejudicial comment or opinion.

I *Publications tending to pervert the impartiality of the judicial process*

Here, the court's central concern is the safe-guarding of the individual's right to a fair trial.¹¹⁷ Publication of comments, the evident tendency of which is to induce the court to reach a different conclusion than one based on the evidence properly adduced, is punishable summarily as contempt of court.¹¹⁸ The use of the summary contempt power in cases of constructive contempt, it will be recalled, stems from *Rex v. Almon*.¹¹⁹ However, even before then the court was aware of the dangers presented by irresponsible comment. Said Lord Hardwicke in 1742: "Nothing is more incumbent upon the courts of justice than to preserve their proceedings from being misrepresented, nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties before the cause is totally heard."¹²⁰

The conflict between free press and fair trial is of more recent vintage. The use of the contempt power as the controlling device of the press has kept pace fairly well with the growth of the press as a mass media of communication. Canadian courts recognize that publicized comments can at times injuriously affect the course of justice—that the right to a fair trial encompasses the requirement that the decision of the court be "founded on the evidence adduced at the trial, and properly admitted, and the law applicable to the issues, *unimpeded and unprejudiced by any other outside influence*".¹²¹ Canada's position lies closer to the English practice of strictly controlling the press by way of the contempt sanction than to the American situation where the constructive contempt power has been "emasculated by statutory and constitutional limitations".¹²²

In criminal trials, the prejudice to the accused resulting from contemptuous publications can take many forms. Both the foreign publisher and local distributor of a publication containing hearsay

¹¹⁷ *Steiner v. Toronto Daily Star* [1956] O.R. 14. See generally, Shifren, *The Law of Constructive Contempt* (1966) 14 CHITTY'S L.J. 281.

¹¹⁸ *R. v. Solloway*, Ex parte Chalmers, [1936] O.R. 469.

¹¹⁹ *Supra* note 9.

¹²⁰ *The St. James Evening Post* [1742] 2 Atk. 469 at 469, 26 E.R. 683.

¹²¹ *R. v. Thomas, Re Globe Printing*, [1952] O.R. 22 at 25 (Welles, J.).

¹²² Freedman, *Fair Trial—Freedom of the Press*, (1964) 3 OSOODE HALL L.J. 52.

evidence about a pending murder case which would not have been admissible at trial have been held to be guilty of contempt of court and liable to fine and imprisonment.¹²³ Broadcast by radio, as well as publication in a newspaper, while a case is *sub judice*, of information that may tend to prejudice potential jurors is an interference with the course of justice meriting contempt proceedings.¹²⁴ Even mistakenly printing evidence given on a *voir dire* and later ruled inadmissible, has resulted in a contempt conviction, although the absence of knowledge, and lack of wrongful intent were considered in determining the penalty to be imposed.¹²⁵ A biographical study, published in a magazine of a man charged with murder and awaiting trial, which included the accused's criminal record, the evidence he gave at a coroner's inquest, as well as statements and confessions allegedly made by him, produced contempt convictions for both the author and the publishing company.¹²⁶ The court in that case stressed that great restraint must be exercised during the pre-trial period, since those who would constitute the jury are easily affected by such comments. A newspaper article that stated as fact, that which would have to be proven in order to find the accused guilty, has been held to be prejudicial to the fair trial of the accused and a valid instance for the application of the contempt sanction.¹²⁷

Publications prejudicial to a fair trial in civil suits are also punishable by contempt of court, but here the publications must be calculated to either deter the parties from continuing or defending the action, or attempt to influence the judge.¹²⁸ Discussion or opinion concerning the applicable law in a pending case is considered allowable.¹²⁹ Of course articles of a factual nature, including accurate statements of witnesses interviewed, without suggestion as to the anticipated verdict, have been held not to be productive of a prejudicial effect warranting the court's intervention.¹³⁰

That the press does render a great service by reporting to their readers matters of public importance is recognized by the Canadian courts. Nevertheless the protection of the individual's right to a fair trial is necessarily a higher overriding judicial consideration. If the court concludes that an article is likely to bring about a real and substantial interference with a fair trial, then punishment as a criminal contempt of court will ensue—an intent on the part of the publisher or writer to prejudice that fair trial being irrelevant.¹³¹

The press at the moment must act at its peril when reporting situations that appear to demand criminal prosecution, for if proceed-

¹²³ *R. v. Bryan*, [1954] O.R. 255.

¹²⁴ *R. v. Robinson & Co., R. v. Nfld. Broadcasting* (1954) 34 M.P.R. 257.

¹²⁵ *R. v. Hamilton Spectator*, [1966] 2 O.R. 503 (C.A.).

¹²⁶ *Re Editions Macleans and Fulford; R. v. Dion, P.Q.*, [1965].

¹²⁷ *Supra* note 117.

¹²⁸ *Vine Products Ltd. v. Green*, [1965] W.L.R. 791; *Fortin v. Moscarella*, [1957] W.W.R. 81.

¹²⁹ *Vine Products, id.*

¹³⁰ *Fortin, supra* note 128.

¹³¹ *A.G. for Manitoba v. Winnipeg Free Press* (1965) 52 W.W.R. 129.

ings are in fact pending or imminent, then a conviction for contempt is a strong possibility.¹³² Even though an innocent, non-negligent, intent does mitigate the imposition of a fine, or imprisonment, the use of the contempt power has expanded here to punish persons attempting to carry out a public service. England was faced with this same problem until 1960, when by the enactment of the Administration of Justice Act,¹³³ persons publishing articles that tended to interfere with the course of justice in connection with any proceeding, pending or imminent, would not be considered guilty of contempt of court, if at the time of publication, they, having taken reasonable care, did not know, and had no reason to suspect, that the proceedings were pending or imminent. This limitation of the English contempt power could reasonably and beneficially be extended to the Canadian scene.

Whether or not the contempt sanction be used as a deterrent to interference with the right to a fair trial, when the possibility of prejudice to that right is present during the trial, it would seem best for the court to order a new trial.¹³⁴ Where constructive contempts do impinge on the judicial process, the individual affected receives no relief from the punishment of the contemnor. The damage in such cases once done usually remains as a more or less permanent blemish so that it is dubious whether even a new trial would effectively combat the initial prejudicial impressions produced by the contempt still lurking in the corners of the court room.

Rather than limp along with the contempt sanction and the uncertain remedy if a new trial, it would seem more reasonable, as, recently suggested,¹³⁵ to enact restrictive legislation. To judicially expand the contempt power in this instance would be to provide a discretionary remedy where the lack of discretion by the press is the very complaint. Definition as a more controllable and predictable solution should be acceptable to all concerned. Legislation proposed¹³⁶ confines the press to the publication of only the facts of arrest and charge, and of any apparent procedural abuses. Coroners' inquests and preliminary hearings should not be publicized unless it is considered to be in the public interest by the public officials or judicial officers concerned. Accurate reports of the trial do no harm, but comments on the merits of the case should be withheld until the verdict is known.

Once the trial is over, judicial opinion in Canada and England favours the view that comment is to be freely permitted,¹³⁷ although

¹³² *Supra* note 123 and note 231.

¹³³ 1960, Ch. 65, 8 & 9 Eliz. II.

¹³⁴ *R. v. Dorian*, (1953) 10 W.W.R. 379 (Man.); In *R. v. MacDonald*, (1939) 4 D.L.R. 377, an order for a new trial was not granted because the jurors had not read the offending articles. This the court may do, although it has appeared loath to do so in uncertain conditions. See *Shifren*, *supra* note 117.

¹³⁵ *Supra* note 122.

¹³⁶ *Id.*, at 74, 75.

¹³⁷ In *Re O'Brien*, (1899) 16 S.C.R. 197; *Glasgow Corp'n. v. Haldervich & Sons*, [1918] S.C. 639.

contempt of court might still be possible in criminal cases where the period for appeal has not yet expired.

II *Publications scandalizing the court*

To disrespectfully criticize the court or members of the judiciary is to face the possibility of contempt proceedings of the most arbitrary nature—"any criticism of the judicial machinery may invoke contempt proceedings".¹³⁸ In an early Canadian case it was stressed that, "vituperation of judges for words spoken by them in discharge of duty is and always has been deemed a contempt of court punished summarily by attachment".¹³⁹ The courts are not bound to take notice of invective, or imputation of false, corrupt, or dishonest motives and, from the small number of such cases, it would appear that the courts have been reluctant to do so.¹⁴⁰ The courts, though, have not left all these matters to public opinion so that the power may hardly be termed obsolete.¹⁴¹ It exists in readiness to be exercised from time to time when the court considers criticism to be so evidently an impairment of justice that its application is necessitated.¹⁴² Vindication of a judge is apparently not an acceptable motivation for a proper use of the power;¹⁴³ dignity of the court, rather than of its judicial officers, being the focus of concern. Nevertheless, the courts have reasoned that criticism of a judge which has a tendency to lower his authority diminishes the authority of the court as well. The courts emphasize that they are not protecting individual judges, (who, like anyone else, may resort to libel actions) but rather are preventing an interference with the due course of justice which could result in the public "having (its) confidence in the court, shaken or destroyed".¹⁴⁴

Reasonable and temperate criticism of any judicial act as contrary to law or the public good will not be treated as contempt of court.¹⁴⁵ In the words of Lord Atkin, the freedom of the press to criticize judicial actions is "no more than the liberty of any member of the public to criticize temperately and fairly, but freely, any episode in the administration of justice".¹⁴⁶

Intent, or *mens rea*, has been held irrelevant in cases of constructive contempts that (in the view of the court) scandalize the court, or diminish its authority, or generally impede the course of justice.¹⁴⁷ However, libels on the court without a clear intent to bring the administration of justice into disorder by an incitement to disobey the lawful orders of the court have not been considered in

¹³⁸ See Fischer, *supra* note 21 at 159: "As the law stands in Canada . . .!"

¹³⁹ R. v. Wilkinson; *Re Brown* (1877) 41 U.C.Q.B. 47, at 96 per Haines, J.

¹⁴⁰ Ziegler, *Some Aspects of the Law of Contempt of Court in Canada, England, and the United States*, (1960) 6 MCGILL L.J. 229.

¹⁴¹ *Id.*, Ziegler views the contempt power as a hovering judicial right.

¹⁴² *Id.*

¹⁴³ *McLeod v. St. Aubyn*, [1899] A.C. 549, (J.C.P.C. at 566).

¹⁴⁴ *Fournier v. A.G. of P.Q.*, (1910) 17 C.C.C. 108 at 110 (Que. C.A.).

¹⁴⁵ *Regina v. Grey*, [1900] 2 Q.B. 36; *Supra* note 121; *R. v. Buller and Glazer*, (1954) 108 C.C.C. 352 P.Q.

¹⁴⁶ *Ambard v. A.G. for Trinidad and Tobago* [1936] A.C. 322 at 335.

¹⁴⁷ *R. v. LaRose*, [1965] Que. S.C. 18.

Canada as seditious.¹⁴⁸ A recent case requires that it should be evident, for a contempt conviction, from a perusal of the entire article in question, that the writer either attributed improper motives to members of the judiciary, made false statements, or was maliciously inspired.¹⁴⁹

One would assume that the regular criminal standard of proof should apply to constructive contempts, and indeed the courts have stated that any doubt raised operates to the benefit of the accused.¹⁵⁰ However, the only real evidence available in these cases is that which establishes the accused as the author of the contempt. Whether the acts of the so-called contemner have caused a visible corrosion of the authority of the court is not determinable through a balancing of probabilities until no reasonable doubt remains of the links in the causal chain. Here, the only test available or possible to determine the accused's guilt is for each judge to ask himself: "Would this act tend to lower the public's respect for me *as an individual*, and hence, because of my intimate connection with the court, lower its esteem in the eyes of the public as well?" The conclusion is unavoidable—in such cases there is no true standard of proof but merely a subjective, speculative, and possibly arbitrary judicial decision.

Contempts of court have been found in public statements casting doubt—baseless in the opinion of the court—on the integrity of a judge who had recently presided over a criminal prosecution which had resulted in a conviction for murder.¹⁵¹ Letters of a public nature which impugned the honesty of the judge while habeas corpus proceedings were pending, led to a conviction of the writer for criminal contempt.¹⁵² Abusive, vulgar references to certain County Court judges accusing them of bias, perversion of justice, and breach of their oaths of office, have been held deserving of severe punishment as a contempt of court of the worst kind.¹⁵³ Accusations, couched in contemptuous and insulting language, that the court had assumed dictatorial powers to assist in a campaign for the suppression of the free press, by warning of the contempt sanction with regard to a certain pending case, brought contempt convictions for both the owners of the newspaper and the columnists involved.¹⁵⁴

As long as there is a tendency to lower the dignity of the court present in the alleged contempt, then a relation in time to any specific litigation may not be necessary.¹⁵⁵ Usually it is obvious to which court or judge the criticism relates, but even where the connection is obscure, the court will not hesitate to use its imagination. An article

¹⁴⁸ *Boucher v. The King*, [1951] S.C.R. 265, and *supra* note 140.

¹⁴⁹ *Supra* note 147.

¹⁵⁰ *Id.*, and *R. v. Sommer* [1963] P.Q.C.A. 417.

¹⁵¹ *A.G. for P.Q. v. Constantin* (1963) 40 C.R. 154.

¹⁵² *Sommer*, *supra* note 150.

¹⁵³ *R. v. Glanser* [1963] 2 O.R. 30.

¹⁵⁴ *R. v. Western Printing and Publishing Ltd.*, (1954) 34 M.P.R. 129 (Nfld.).

¹⁵⁵ *Le Procureur-Général de la Province de Quebec v. Dennis*, [1966] C.S. (Que.) 467.

in the form of an allegory on capital punishment has aroused a court (which had recently sentenced a 19-year old boy to death) to impose the contempt sanction.¹⁵⁶ Eric Nichol's article may have been unfair to those who had such an unpleasant duty to discharge but it is difficult to accept the vindication of the process of justice, and the damage caused to it by Mr. Nichol as the only factors motivating Mr. Justice Clyne in the ensuing contempt proceedings. Mr. Nichol wrote in the article creating the furor: "Although I (meaning the public) did not myself spring the trap that caused my victim to be strangled in cold blood, I admit that the man who did was in my employ. Also serving me were twelve people who planned the murder, and the judge who chose the time and place, and caused the victim to suffer the exquisite torture of anticipation."¹⁵⁷

The court in moving against Nichol's so-called attempt to lower its dignity allowed that "fair criticism made in good faith is a legitimate exercise of the freedom of the press which is essential if the community is to know whether their system of justice is being administered fairly and properly". However, false suggestions made to the public "that the sentence of the court involves any idea of torture . . ." is not to be tolerated, such suggestions "being contemptuous in that they carry with them an imputation of improper motives on the part of the judge who imposed the sentence".¹⁵⁸ Thus it seems that even the expression of sincere convictions can result in contempt proceedings even though sufficient grounds for a libel action were not present.

Evidently the power of contempt has not always been wielded whenever the court has been confronted with criticism which would allow its introduction. Only nine reported cases in such circumstances are to be found between 1877 and 1958 in Canada.¹⁵⁹ Recent cases though indicate the continuing vitality of the power¹⁶⁰ and its permanent incorporation into the judicial philosophy. The power is still considered to be an inherent judicial right applied in the discretion of the judge or court affected, and only to be disturbed on appeal if grossly abused.¹⁶¹

A heartening decision for advocates of free speech, and an excellent summary of the law on contempt is to be found in a recent Quebec case involving the celebrated book "J'accuse les assassins de Coffin".¹⁶² Although the procedural inadequacies of Hébert's "trial" were perhaps enough to quash his conviction for contempt, the majority of the court did realistically consider the degree to which Hébert's book had scandalized the administration of justice. Publica-

¹⁵⁶ R. v. The Vancouver Province, *sub nom. Re Nichol*, [1954] 3 D.L.R. 690.

¹⁵⁷ *Id.*, at 692, but originally appearing as an editorial in the Vancouver Province, in 1954.

¹⁵⁸ *Id.*, at 696.

¹⁵⁹ As determined by Ziegler, *supra* note 140.

¹⁶⁰ *Id.*

¹⁶¹ *Supra* note 155.

¹⁶² Le Procureur General de la Province de Quebec v. Hébert, [1966] B.R. (P.Q. Q.B.) 197.

tion, after all, had not occurred until some seven years after the trial and execution of Wilfred Coffin. In balancing the effect on the process of justice against the benefits of free discussion and comment, the court decided that "if the scales come down in favour of the latter, we do not consider that the act complained of should be regarded as contempt at all".¹⁶³ The court thus indicated that criticism casting doubt on the integrity of a judge was not automatically a contempt of court. There must be as well, the creation of a real tendency toward the loss of public confidence in the manner in which justice is being administered, weightier than the advantages to be derived from free discussion and public debate. In other words, the court moved a step closer to the position where vindication of the judicial process by vindication of the judiciary is not called for unless there is a reasonable and present tendency to foster public disrespect for the administration of justice without good cause. Perhaps to so extend the implications of this decision is more wishful thinking than a valid assessment of probability. Nevertheless, the *Hébert* case represents a long-awaited judicial examination of a power device, perhaps too often used to consolidate and strengthen judicial prestige than for the benefit of society. Perhaps the court is recognizing that the real basis of respect for or confidence in the administration of justice is founded on the ability of the individual judges to adjudicate justly the matters with which they are faced in court.

We have now examined the areas in which the contempt power has been applied in order to produce, either directly or eventually, obedience to law as the courts declare the law to be. In Canada, the enforcement of civil judgments has not often occurred.¹⁶⁴ The potentiality for abuse is, though, very real, for the power's major limitation is the judicial conscience. Fortunately, our judges have reacted objectively in most situations.

The nature of the contempt power, its arbitrariness and unrestricted procedures, represents a situation in conflict with the ordinary and expected treatment of individuals charged with any other act considered detrimental to the good order of society. The restriction of individual liberty in every other case requires procedural safeguards omitted at the pleasure of the judiciary in contempt proceedings. Whether or not the contempt power is an effective means of inducing or coercing obedience to law, it should first be determined if it is compatible with the philosophical ideals and bases of obedience to law and punishment in our society.

The Canadian legal system is conscious of the rights and liberties of the individual, although, admittedly, it is still more motivated by the protection of property rights than by ideologies of individuality. In the normal case, the determination of whether behaviour of a certain, prohibited kind has occurred is made within a procedural framework which helps to protect the accused from bias and arbitrary

¹⁶³ *Id.*, at 208, per Casey, J.

¹⁶⁴ *Supra* note 140.

judgments. In contempt proceedings, because of the contempt power's inherence in the very foundations of governmental and judicial bodies (as the cases assume), the individual is considered to have figuratively sacrificed some of his civil liberties to this "essential expedient" in the adoption of his social contract. Having thus justified the procedural gaps, the courts then proceed to mete out punishment in their discretion for the contemptuous behaviour with which they are faced.

Punishment in most legal systems is generally viewed as a willed consequence of behaviour, and so punishment of criminal contempts (or similar acts under different names) is easily accepted universally. What is not acceptable outside of the common law world is the use of punishment to coerce the commission of certain desired acts. Anglo-American equity in wielding the civil contempt power plainly admits to acting in personam, while civil law jurisdictions, although realizing that coercion and inducement are connected, refuse to coerce an individual into acting in a certain way. Punishment, in other words, should result from the commission of prohibited positive acts. In the view of the civilians, it is not proper "to jail a man even for a single day in order to do violence to his incoercible freedom to do or not to do something".¹⁶⁵ Civil lawyers fear governmental arbitrariness perhaps because civilian judges do not have the independence and power of their common law brethren. As a result, their philosophical approach to the relationship between government and people differs from ours.

It appears, however, that the civilian view of the civil contempt power more accurately mirrors the Anglo-American theories of individual freedoms and punishment than the practices of the common law. Not hypocritical in this area, the civil law jurisdictions declare civil contempt proceedings impossible. As a result, the common law possesses probably the only sanction in the world which in order to achieve restoration of the legal order, "counts upon and aims to provoke the co-operation of the defendant".¹⁶⁶

Inconsistency, with ordinary concepts of punishment is indicated by the very way the magnitude of the coercive penalty in civil contempts is measured—one estimates "the resistance to be overcome rather than the gravity of what has been done".¹⁶⁷ The judge, in essence, engages in an active struggle with the will of the reluctant party, an exercise which in many cases may be futile. Beliefs and attitudes, especially in a sophisticated society, are exceedingly difficult to "frighten" away so that future deterrence is no logical rationalization for coercive sentencing. Furthermore many of the acts from which civil contempt proceedings have arisen are incapable of being changed by reparation, repentance, reformation, or good behaviour. As a noted authority on the American contempt power has said: "It takes some straining of reason to include the contempt power

¹⁶⁵ Pkelis, *Legal Techniques and Political Ideologies: A Comparative Study*, (1943) 41 MICH. L.R. 665 at 674.

¹⁶⁶ *Id.*, at 675.

¹⁶⁷ GOLDFARB, *THE CONTEMPT POWER*, (1963) at 2.

within the best characteristics of Anglo-American freedom-conscious law."¹⁶⁸

Civil contempt and the civil law

The French device of the *astreinte* is often singled out as a possible civilian substitute for the civil contempt power. Defined as "a pecuniary sanction imposed by the court for every single future act, or single period of violation of a judicial decision",¹⁶⁹ it can either result in a single liquidation of damages *in futuro*, or have a coercive or comminatory effect. On close examination, however, any possible similarity with the civil contempt power is fictional. The decision of a tribunal granted an *astreinte* neither operates *in personam*, nor *in rem*. Nor is the plaintiff able to collect the *astreinte* appraised by the court as there is no process of collection to assist him. *Astreinte* is thus no more than "a judicial threat resting on a platonic plane"¹⁷⁰ and but a first step to the finalization of the order. If non-compliance continues, the plaintiff must return to the tribunal which reduces the *astreinte* order to a simple liquidation of damages without any penal element. Preliminary bluffs apparently do have some effect in impressing the parties concerned, the *astreinte* representing the first step to the "final *astreinte*" which consists of an anticipatory liquidation of damages, generously calculated, and payable at a specific time.

The evils of judicial arbitrariness are imagined as so diabolic by civil law systems that even the innocuous *astreinte* is found only in France and the Swiss canton of Geneva, and this in the face of the great influence enjoyed by French law in the civil law world. If the orders of the courts are being flaunted, these states find a satisfactory solution in streamlining and perfecting their execution procedures so that the co-operation of the recalcitrant party is always unnecessary for the satisfaction of the judgment awarded to the injured party. Execution processes are directed against the property of the defendant, the source from which the judgment award must eventually come.

The possibility of similar procedures in the common law world should be considered as a logical, more philosophically acceptable, and no doubt more efficient alternative. It seems ridiculous to even contemplate imprisoning the uncooperative defendant before making use of all other modes of execution, honed to the best possible form. Imprisonment, possibly of an indefinite duration, where no recognized crime has been committed, and arising on the option of an individual member of society, cannot be consistent with a freedom-conscious legal system, productive of good order and respect for just law. Civil contempt may aid in the execution of civil judgments but the fact that

¹⁶⁸ *Id.*, at 3.

¹⁶⁹ *Supra* note 165 at 665 and following.

¹⁷⁰ *Id.*, at 666.

it collides with our rationales of punishment and does violence to the trait of individualism should cause its legislative excision.¹⁷¹

The summary treatment of contempts of courts

The mode in which contempts of court are handled by the judiciary is the first indication to the casual observer that here indeed is an exceptional and anomalous area of the law. Contempts are not dealt with in the ordinary course of the law so that procedural safeguards for the "accused" may be ignored. Summary process in contempt proceedings does not allow the court to absolutely neglect all rights normally held by the "accused", as recent cases have stressed.¹⁷² This, of course, is with respect to criminal contempts, for in the treatment of civil contempts the courts early decided that even a semblance of a trial was unnecessary for acts so obviously contemptuous.

Normally, a person being tried for any offence enjoys the following traditional rights and protections: (1) he is accused of a specific offence; (2) if he pleads not guilty he has the right to a full and fair trial; (3) the Crown has the burden of proving his guilt beyond a reasonable doubt; (4) he is presumed innocent until proven guilty; (5) in serious cases, he is entitled to a trial by jury; (6) he has the right to call witnesses in his defence; and (7) he cannot be compelled to testify.

In contempt proceedings of a summary nature, the alleged contemnor is called before the court to show cause why he should not be condemned and punished for contempt of court. In effect, he is presumed guilty, and carries the burden of proof to show why he should not be convicted and punished. There is no right to a trial by jury, nor is there the right to call witnesses on his own behalf. He may be obliged to testify on the command of the court.

The courts have continually warned that the summary contempt power be used sparingly and only in cases of urgency.¹⁷³ What is urgent, though, is left to the discretion of the court and not until the *Hébert* case¹⁷⁴ last year was any attempt made by the judiciary to limit this great power. Mr. Justice Owen, in that case, stated that contempts may be dealt with either by summary process or in the ordinary course of the law, the latter being the rule—the former the

¹⁷¹ See on civil contempt generally—(1965) 33 U. CHI. L. REV. 120 (*supra* note 91) which supports the "abolitionary" view. At 131: "Coercive punishment is only remedial . . . when the defendant is able to comply." Otherwise the punishment is punitive, and the contempt therefore criminal. At 132: "The mere fact that an imprisoned contemnor remains in jail is evidence that the coercion has not been effective and is grounds for the inference that the imprisonment may continue to be futile." The comment concludes, at 133, by saying: "Its (the civil contempt power) utilization without criminal safeguards can only be justified if its application is limited to situations in which it is both effective and necessary to guarantee rights due other parties. Its use as punishment is unjustifiable and may be unconstitutional. Limiting coercive imprisonment to its proper role can and should be accomplished both by legislation and by judicial restraint."

¹⁷² *Tilco*, *supra* note 78; *Hébert*, *supra* note 162.

¹⁷³ *Supra* note 15 and text.

¹⁷⁴ *Supra* note 162.

exception.¹⁷⁵ It was vigorously affirmed that the summary power should only be used for emergency situations, as in direct contempt cases, or where the fairness of the trial would be prejudiced, and that more definite rules were needed for the guidance of the court.

Indirect contempts have, in general, been treated in a less summary fashion than direct contempts. The only limitation on the defendants in the recent *Tilco* case¹⁷⁶ was that they did not have the right to elect trial by jury. Hébert's conviction was quashed mostly because he was not allowed at his initial hearing to call witnesses on his own behalf.

It may be thought that so small a deviation from the regular methods of trial would not present a great hardship to those individuals concerned. However, any narrowing of the civil liberties of any member of society could possibly lead to injustices, unfair, arbitrary, or unequal treatment, and as such is only justifiable for reasons of absolute necessity.

English and Canadian judges have never spent much time attempting to rationalize their use of the summary contempt power—it has long been considered by them an inherent right of the courts. Even when an explanation is given (as for example, to protect “the individual right of every citizen to an independent administration of justice free from influence or intimidation by improper conduct of any sort.”),¹⁷⁷ the Anglo-Canadian judiciary tends to view itself as without capacity of human error or emotion, wielding the contempt power with perfect discretion, possibly divine sanction, and indubitably divine inspiration. On the other hand, their American brethren, less naïve in this instance, and unsatisfied with the traditional bases of justification, have been motivated to seek real reasons for their use of the summary power. Expedience, the facilitation of the smooth flow of the trial, the deterrence of misconduct in future cases, and promotion of the dignity of the court, have all been offered as possible explanations for the departure from normal judicial techniques.¹⁷⁸

All arguments, it is submitted, logically and naturally become part of a general plea of necessity. The dangers of complete suppression of the function of justice outweigh the lesser evil of harshness on the part of the judge, say supporters of the power, so that contempt is championed as a necessary device to achieve order. Necessity by itself, and without substantiation, means little and should always be treated with suspicion. Livingstone, an American authority on contempt, stated in 1873 that “[i]n the present improved state of the human intellect, people do not so readily submit to the force of the word *necessity* as they formerly did. They inquire, they investigate, and in more instances than one the result has been that attributes heretofore deemed necessary for the exercise of legal power were

¹⁷⁵ *Id.*, at 218.

¹⁷⁶ *Supra* note 78.

¹⁷⁷ *Supra* note 49.

¹⁷⁸ See GOLDFARB, *supra* note 167, and Beale, *supra* note 6.

found only to be engines of its abuse. Not one of the oppressive prerogatives of which the Crown has been successively stripped in England was defended in its day on the plea of necessity".¹⁷⁹ No one can doubt that the courts do need some means to dispel interference with the performance of their functions, but there seems to be little reason to grant them a power greater than even the ordinary right of self-defence.¹⁸⁰

It is an accepted principle that only society as a whole has the right to punish offences and that such punishment is to be determined only according to regular and universal principles. Within this procedural framework, society has placed its beliefs in what constitutes the best atmosphere for the application of justice—that the fair, just, and equal treatment of all facts alleged to be offences against society is an essential and contributing factor to the respect that individuals have for the law and their obedience of the law. Never is it for the individual wronged or attacked (be he judge or ordinary citizen) to go beyond self-protection or self-defence and punish the wrongdoer. Necessity as a rationalization for the use of power, should therefore end with self-defence. In contempt situations, once the interruption of the court's proceedings has been terminated, only society as a whole really has the right to determine the punishment merited.

Allegations have been made by the judiciary that the ordinary process is so slow that by the time punishment in contempt cases has been arrived at, "the mischief would be done by the due administration of justice being hampered and thwarted".¹⁸¹ Procedure by indictment may have been intolerably slow in the past, but it cannot be reasonably accepted today as an excuse for the limitation of individual rights. It is strange for a doctrine to preach that a traitor or murderer has the benefit of the right to a trial in the ordinary course of the law, while those in contempt of court do not.¹⁸² American experience, where the courts have been deprived of more and more of their summary power by the statutory requirement of a jury trial in certain situations, does not indicate any proportional impairment of the administration of justice.¹⁸³ Procedural shortcomings, even if

¹⁷⁹ LIVINGSTONE, COMPLETE WORKS (1873) at 264.

¹⁸⁰ Goldfarb's idea; see his conclusions, *supra* note 167 at 288ff.

¹⁸¹ Skipworth's Case, (1873) 9 Q.B. 230, per Blackburn, J.

¹⁸² See Ziegler, *supra* note 140.

¹⁸³ Examples of the American trend include the Morris-LaGuardia Act, and the Civil Rights Act of 1957. The latter Act prohibits actual or attempted intimidation which might deprive a person of his right to vote in a federal election. Government has available to it under this legislation the remedies of declaratory judgment, and injunction which is enforceable by the power to punish for contempt. The right to a jury trial under the Act arises when a contempt has occurred under the Act, of an indirect nature, criminal in the sense that contempt power is acting as a punishment for the violation of a voting right, where there has been an initial trial at which a fine in excess of \$300. or a 45 day jail term was imposed. The Act has experienced some measure of success in allowing federal authorities to protect Negro voting rights which would have otherwise been restricted by segregationist forces in southern U.S. communities. The statutory introduction of the right to a jury trial in certain contempt cases as above defined does though present a

present, should not be an acceptable reason for the removal of substantive rights of such an important and fundamental character.

Against any rationalizations of the summary power developed by the courts stands the repugnancy of the powers to all the basic principles of criminal law and justice. In many cases the nature of the act constituting a contempt is an ad hoc finding of the court. As well as defining the behaviour criminally contemptuous, the court is thus in fact legislating unto itself the power to punish such acts by imprisonment, outside of ordinary procedures and without the option of a jury trial. It is suggested that this assumption of the administration of criminal law is a constitutionally unacceptable practice that should be considered as intolerable by the responsible legislator.¹⁸⁴

Deification of the judiciary

The danger, exceedingly obvious, of allowing the judge offended to play the role of injured party, prosecutor, and judge—a combination of power which even “the highest executive head of the state does not possess”,¹⁸⁵ has not been recognized to any great degree by the Canadian courts. To maintain that judges possess super-human capacities of patience and objectivity is to naively ignore the questionable applications of the contempt power seen previously. Some commentators have cynically viewed the power’s longevity as directly due to the fact that judges *are* human and therefore are subject to the “natural inclination of men to extend their power”.¹⁸⁶ Judges

problem since it is legend that southern juries will not convict segregationists charged with civil rights violations. The expansion of a civil liberty thus in this area may result in the hampering of civil rights. The very strength of the jury system, the incorporation of the sense and values of the community, has the potentiality here for establishing a double standard of law and justice in this instance depriving a whole body of citizens of their constitutional rights. See: *Civil Rights v. Civil Liberties: The Jury Trial Issue*, (1965) 12 U.C.L.A. L. REV. 48. The highpoint of the jury trial issue came with the *Barnett* case. See *U.S. v. Barnett*, 376 U.S. 681 (1964) from 336 F. 2d 369 (5th Cir) 1963. As will no doubt be remembered, Governor Barnett of Mississippi actively defied and interfered with a court order allowing the registration of Negro student James Meredith at the University of Mississippi. In a divided decision, the Supreme Court of the United States held that as a matter of right that Barnett was not entitled to a trial by jury. However several of the judges expressed the opinion that the American Constitution forbids a trial without a jury except when the sentence was not severe. It would appear from this that the limit of severity was the penalty provided for petty offences of six months. Mr. Justice Goldberg dissented in that the character of the wrong should be examined in each case and if the wrong was in fact a separate crime, then and only then would the defendant be legally entitled to a jury trial. Thus the summary contempt power was narrowed in scope, the trend continuing in the Civil Rights Act of 1964 in which Congress granted jury trials in all cases arising under the Act. Use of the jury in Canadian contempt cases, although idealistically a wise solution to the problem of judicial arbitrariness, does not appear to be presently accepted by the judiciary. The right to a jury trial should be a right of every person accused of a serious contempt.

¹⁸⁴ See Fischer, *supra* note 21 at 155 for the Canadian constitutional context.

¹⁸⁵ TEK SHAND AND SARIN, *LAW OF CONTEMPT OF COURT AND LEGISLATURE*, (1949) 2nd ed., 74.

¹⁸⁶ *Supra* note 12 at 273.

being human, are subject to anger like any other men and when they are angry, they, like any other men, desire no limit to their power."¹⁸⁷

A recent Canadian case noted that while it was preferable for a judge, other than the one faced with the contempt to try the matter, the latter did have jurisdiction and was seized of the matter unless he passed it on to another judge.¹⁸⁸ This would appear to indicate judicial awareness of the problem. Never, however, has our judiciary indulged in the self-analysis and criticism found in the decisions of the American bench. American judges have been much more aware of their own human inadequacies, attempting in many cases to confine the contempt power to "the least possible power adequate to the end proposed".¹⁸⁹ One must agree that "it transcends recognized frailties of human nature to suppose that a judge can be free from natural pique which would be engendered by a direct refusal by the accused to obey an order freshly made by him, and the temptation to strike back which inevitably accompanies ruffled pride."¹⁹⁰ Alternatively the danger to such an arbitrary treatment is in the possible leniency of a judge where harsher punishment would be in the best interests of society and the judicial process.¹⁹¹

The judiciary asserts that through contempt proceedings, it upholds the respect of society for the judicial process. In reality, though, is not the view that "respect and obedience are not engendered by arbitrary and automatic procedures, that in the end such procedures yield only contempt to the courts and the law",¹⁹² a better analysis? Moral rightness is a better foundation for respect than artificial might. Although acts of contempt do tend to indicate a disrespect for the judicial process, the behaviour concerned may be based on a broader social discontent, superficially a disrespect for a law but in fact a craving for justice.¹⁹³ The law is not considered to be a just law by these persons in contempt, and the acts of contempt indicate their disapproval and dissatisfaction. Arbitrary (if only in appearance) and summary treatment in such cases does little to create an atmosphere for rational, unemotional discussion of the social inequities involved. The very application of the contempt power appears as an unjust way of treating the breach of what may be an unjust law.

¹⁸⁷ Beale, *supra* note 6 at 172.

¹⁸⁸ Sommer, *supra* note 150.

¹⁸⁹ First stated in *Anderson v. Dunn*, (1821) 19 U.S. (6 Wheat) 204 at 231.

¹⁹⁰ *Ballantyne v. U.S.*, (1956) 237 F. 2d. 657 at 669, Cameron J. (5th Cir.).

¹⁹¹ See Fox, *Eccentricities of the Law of Contempt of Court*, (1920) 36 L.Q. REV. 394: "The existence of arbitrary power in a judge may cause him to abstain from exercising it . . . when punishment is necessary. In any case, it seems desirable to fix a statutory limit to the period of imprisonment and to the amount of the fine in cases of contempt, especially if it can be shown that the present practice is the result of encroachment on the rules of the common law."

¹⁹² *Green v. U.S.*, (1958) 356 U.S. 165 at 218, Black, J., dissenting.

¹⁹³ See report on the address by J. C. McRuer, then Chief Justice of the High Court of Ontario, present head of the Ontario Law Reform Commission, to the American Bar Association meeting in Montreal, August of 1966, in SATURDAY NIGHT, October, 1966.

It is not proposed that the justifications for civil disobedience be enumerated but where such acts lead to contempt proceedings, the manner of their judicial treatment tends to add the force of judicial vindication to the normal punishment resultant from interference with an interest considered beneficial to the society. Respect for law or the judicial process is in particular not aided by the use of the contempt power to limit criticism that is considered unreasonable or malicious by the judiciary.¹⁹⁴ All members of society have the protection of the laws of libel and slander. Why should judges, where criticism does not actually interfere with trial proceedings, need more? The Canadian attitude, perhaps reflecting our conservative traditions, contrasts remarkably with the freewheeling American position. We have a fear of weakening the judicial fortress, so great that our freedom of speech is a limited right.

A recent criticism of a judge because of his obvious leniency in dealing with an accident-prone hit-and-run driver resulted in disciplinary action, similar to contempt proceedings, by the Quebec Bar Association. The Superior Court of Quebec quashed the action because the person making the criticism was not speaking either as an individual or a lawyer, but in his position as the Minister of Justice.¹⁹⁵ To describe, as Mr. Wagner did, the judge's treatment of the case as a "serious lapse of professional ethics" should be the right of every individual interested in the fair and proper application of law for the betterment of society whether the assessment made is valid or not.

Our judiciary would hardly turn the other cheek if confronted with the opposition and criticism such as the "Impeach Warren" signs prominently displayed on U.S. highways faced and ignored by Supreme Court judges in the United States. Although some commentators presently see the general attitude of our judges as finding contempts only where the action is directed against the judge as an officer of the court rather than as a person,¹⁹⁶ we are far from being able publically to speak our mind. Much more to be desired in this area is the American view of free speech as expressed by Mr. Justice Black: "The assumption that respect can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench would probably engender

¹⁹⁴ See Fischer, *supra* note 21 at 161. Fischer concludes "that the suppression of constructive criticism itself constitutes an interference with the due administration of justice." He cites Laski, *Procedure for Constructive Contempt in England*, (1928) 41 HARV. L. REV. 1031 at 1031, 1033: "It is . . . one thing to make a judge secure; it is another thing to protect him from just comment by the citizen-body . . . to secure for the public the certainty that this criticism will be made is therefore important. . . . Yet no such protection is afforded . . . in English law."

¹⁹⁵ Decision of the Superior Court of Quebec, December, 1966.

¹⁹⁶ Ziegler, *supra* note 140.

resentment, suspicion, and contempt much more than it would enhance respect."¹⁹⁷

The learned and respected Mr. Justice Frankfurter strongly agreed that because judges are fallible beings, a "vigorous stream of criticism expressed with candour however blunt"¹⁹⁸ is needed to ensure that those entrusted with great power and responsibilities do not abuse their privileged position. Criticism of the judicial process after a particular case is finished, whether "uninformed or irresponsible or misrepresentative, is part of the precious right of the free play of opinion (and) whatever violence there may be to truth in such utterances must be left to the correction of truth".¹⁹⁹

Conclusions: Does the contempt power as an enforcement device result in obedience to law?

From a survey of the cases and writings on contempt of court, the conclusion has been reached that in the long run obedience to law is not well served by the contempt power.

Direct contempt proceedings do aid in maintaining the proper atmosphere for judicial determinations. Constructive contempt proceedings provide a necessary control and penalty for acts interfering with the individual's right to a fair trial. These applications do much to set and maintain the stage for trials in the ordinary course of the law and the attendant rights and procedures that ensure that justice is done. To have these interferences treated, however, in any way other than the normal, detracts from and confuses the view that society must have of the judicial process in order to have respect both for it and the law. Equality and fairness of treatment are essential in order to have, and foster, obedience to law from all members of society.

The civil contempt power is directed to the immediate obedience of law and judicial commands, yet it is inconsistent with our concepts of punishment. The restriction of criticism of the administration of justice appears so dangerous as to cancel any possible beneficial effects.

All contempts are examples of unlimited and arbitrary powers which perhaps through the lack of legislative initiative remain as historical accidents and anomalies, inconsistent and incompatible with individual civil liberties and rights and a legal system aware that obedience to law is better motivated than enforced.

To continue the contempt power in its present form is to continue the restriction of basic rights and liberties, the attempts to coerce the uncoercible, the maintenance of respect for the judicial process by the stifling of our freedom of speech without regard to the fact

¹⁹⁷ *Times-Mirror Co. v. Superior Court*, (1942) 86 L. Ed. 192 at 207, Black, J.

¹⁹⁸ *Craig v. Harney*, (1946) 91 L. Ed. 1546 at 1558 per Frankfurter, J.

¹⁹⁹ *Id.*

that "it is man's recognition of the objective truths and values in law which mainly impose the obligation to obey the law".²⁰⁰

Some control is needed, but in the determination of the type of method and the way it is to be used, we must keep in mind the words of John Stuart Mill: "A state which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great things can really be accomplished."

A PROPOSAL FOR REFORM:

Acts constituting contempt of court must be dealt with so that individual rights and liberties are not arbitrarily removed and the administration of justice is not hampered in its essential duty to society of seeking justice for every case with which it comes in contact.²⁰¹

All powers of contempt presently available to courts, administrative bodies and legislatures should be abolished.

A precise criminal offence of contempt should be legislatively enacted with prescribed penalties and areas of application. This offence would operate where all methods of civil execution have failed or where there has been a positive interference with the judicial process or government. Offences of this category would without fail be tried in the ordinary course of the law.

Civil contempts as presently known and treated would cease to exist. The improvement and streamlining of execution procedures for civil judgments would be encouraged and legislatively assisted.

Refusal to testify (after warning and expulsion from the court) as well as the breach of labour injunctions, would probably be considered as ordinary criminal offences.

Interferences tending to alter a fair trial would be dealt with as criminal offences defined under detailed legislation.

Criticism of the judicial process or the judiciary would not be subject to limitation other than the right of a judge, as any other citizen, freely to sue, if necessary and warranted, for libel or slander.

Admittedly, the dangers possible under the present unlimited power are more potential than actual. Nevertheless, if only for the

²⁰⁰ Quoted by Lehtrek, *Chafee on Law and Freedom of Speech*, (1965) 2 CATHOLIC LAWYER, from Chafee's article: *Do Judges Make or Discover Law?* (1949) 91 AM. PHIL. SOC. PRO. 91 at 406.

²⁰¹ See Fischer, *supra* note 21 at 162. He feels that the contempt "problem" has resulted from the application of the old contempt concepts to new social developments. The alternative, in his view, must be a reformation of the contempt concept by the legislative branch of government upon the making of an aware value judgment while cognizant of all the interests to be protected.

Courts sometimes consider that their "inherent" power cannot be restricted by statute. See *Civil Contempt*, *supra* note 91 at 133. Since Parliament is supreme as a law-maker, this view seems questionable.

sake of honesty and consistency, the contempt power should be removed from the hands of our judiciary, despite the fact that they have on the whole so far served us well.²⁰²

²⁰² See GOLDFARB, generally.