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TAKING CONTEMPT SERIOUSLY

by

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To Henry,
for the inspiration,
dedication to family,
hard work, and encouragement
which made this possible.

ABSTRACT

Contempt of court has a special status among offences. It is responsible for protecting courts of law from acts which tend to interfere with their process and which undermine their authority. Few if any other laws approach the breadth of the contempt power's mandate, for by protecting courts of law, the contempt power ultimately supports the rule of law and social order.

So important is the contempt power that it forms a part of the court's inherent jurisdiction. It is a "core power" which cannot be separated from the court without changing the nature of Canada's courts - a task that would require constitutional amendment. Without the contempt power, it would not be possible in all cases for the court to act quickly enough to stop interference with its process and prevent a loss of public confidence.

The common law of contempt has developed to the point where it is a comprehensive guide for judges and alleged contemnors and their counsel. One form of contempt is committed by lawyers failing to appear in court at the appointed date and time. An examination of the elements of this form of contempt shows that the law has adapted itself to the peculiarities of the circumstances, is fair to the alleged contemnor, and applies the same guiding principle as governs all findings of contempt - it punishes for serious instances of disrespect to the court. Respect, and the lack of respect, is a theme that permeates the law of contempt. Even judges in exercising the contempt power must act in such a way that all concerned - the potential contemnor and the public included - will ultimately respect the courts.

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INTRODUCTION

The phrase "contempt of court" may trip off the tongue easily, but it is worthy of being taken seriously. It signifies a great power in the hands of the court and is invoked to serve an important cause. In this thesis I will show that contempt of court - the power it represents and its substance - is a necessity for Canadian courts of law.

In the first chapter I consider the role of the contempt power in preserving and protecting the authority of the courts. The contempt power is important in this respect because effective and well-respected courts preserve the rule of law and social order. Without courts it is feared that law and order would be replaced with the law of the jungle. The absolute necessity for the contempt power is evident even from the earliest days of the common law, when contempt of court was contempt of the king himself. Interfering with the king or his courts of law was known as "criminal contempt".

In the first chapter I examine as well the parameters of the crime of contempt, i.e., what kinds of acts constitute the crime. There are few acts which by themselves have the potential to cause serious harm to the courts. It will be seen, however, that the cumulative effect of a wide variety of smaller acts of interference and disrespect can harm the courts. For this reason, the most important work of the contempt power is to prevent and stop those acts of disrespect (or "contempt") which have the potential to undermine public confidence in the courts.

In the second chapter I investigate the "inherent jurisdiction" aspect of the contempt power. So important is the contempt power that it forms part of the courts' "core powers" - powers which cannot be legislated away from the courts without changing the nature of Canada's system of government. The contempt power is essential to maintaining the independence of the judiciary. I examine the development of rules of court, which

represent a codification of courts' inherent jurisdiction to control their process, and note parallels with a proposed codification of the courts' inherent jurisdiction to find contempt. These parallels show that while the law of contempt may be codified, the contempt power cannot be eliminated. It must remain a residual power of the courts to act where necessary to protect their integrity and preserve public confidence.

One aspect of the courts' inherent jurisdiction to find contempt is the power to deal with contempt by means of a summary process. In urgent circumstances, courts are empowered to convict a person instantly. In less urgent circumstances, they retain the power to employ any process which is just and fair. The summary process is essential for courts to prevent and stop harmful acts before they can become too serious.

In the third and fourth chapters I examine one particular form of contempt - lawyers failing to appear in court - with a view to establishing that the common law of contempt is well-developed and abundantly clear as to its constituent elements. The *actus reus* of this form of contempt matches the goal of contempt law generally, namely, that it is found in acts of disrespect for the courts and their process. In the case of lawyers failing to appear, the act of disrespect includes breaching professional duties to clients and official duties to courts. For a number of reasons, not all courts agree on the degree of disrespect which must be shown in order to support a contempt conviction.

In the case of the *mens rea* element of the offence, I examine fault in relation to the elements of the *actus reus* and conclude that fault relates directly to the disrespectful act committed. It does not relate to interfering with the administration of justice or undermining public confidence. The necessary mental element is established where a lawyer deliberately, recklessly or (according to some courts) negligently fails to appear in court at the appropriate time. At the show cause hearing, the courts look for evidence of the lawyer's indifference to his or her obligations to clients and to the court. They look for evidence of intended, reckless or (sometimes) negligent disrespect. The lawyer is entitled

to demonstrate, by his explanation and even by his apology, that he meant no disrespect to the courts.

In the final chapter I consider the courts' duty to exercise the contempt power in such a way that it enhances public confidence in them. Courts are obliged to take care that they reflect an appropriate demeanour when dealing with instances of contempt. Patience and tolerance are preferred over impatience and anger. Courts must consider whether other options, such as humour, can be employed to deflate a potentially contemptuous situation. They must consider the appropriate speed at which to conduct contempt proceedings. They must avoid the appearance of injustice where it may appear that a judge concurrently assumes the roles of prosecutor, witness and judge. When dealing with lawyers, courts must be aware of lawyers' important function in the administration of justice and the conflicting roles which they play when they appear in court. When dealing with contemptuous forms of communication, courts must consider freedom of expression. These considerations are all made in an effort to make the exercise of the contempt power just and fair to all.

Proposals have been made for codification of the contempt power. In each chapter I argue that codification is neither necessary nor advisable. For a code to supplant the common law, it would either have to be extremely comprehensive and complex, like the common law, or extremely simple and vague. Where the simple option is selected, codification would add uncertainty to the law and would require reference to the common law. This would make the code redundant. Confusion about the court's residual inherent jurisdiction to find contempt may compromise the courts' ability to preserve law and order. The importance of contempt of court may be forgotten. I conclude that codification is not an option. Contempt must be taken seriously.

CHAPTER I THE FUNDAMENTAL IMPORTANCE OF THE CONTEMPT POWER

"Contempt of court" is the name of Canada's only remaining common law offence. Section 9 of the *Criminal Code*[1] provides that no person shall be convicted of an offence at common law, an offence under British statute, or an offence under any statute of a province or territory before it became a province of Canada, *except* for the offence of contempt of court.

It might be supposed that contempt of court, receiving as it does such limited reference in the *Criminal Code* and bearing such a quaint and old-fashioned-sounding name, would be a fairly insignificant offence. One would expect it to be a relic from the past, dusted off and applied only occasionally in some strange circumstances involving a court of law. As a matter of fact, however, the offence of contempt of court is neither insignificant, nor a relic from the past, nor applied only occasionally. Today it is resorted to frequently by courts across Canada, ultimately in order to preserve our way of life.

In this Chapter I shall examine the fundamental importance of the law of contempt of court, both in terms of what it seeks to preserve and protect, and how it undertakes the responsibility of preserving and protecting it. I shall examine these points under the following headings:

A. What the law of contempt seeks to preserve and protect -
   1. the social order;
   2. the rule of law;
   3. the authority of courts of law;

B. The contempt power's role in protecting courts of law;

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[1]R.S.C. 1985, c. C-34, as amended.

C. The contempt power's historical importance in protecting courts of law;

D. The parameters of the "crime" of contempt;

1. undermining the rule of law;

2. interfering with the course of justice;

3. committing acts of disrespect;

(a) "any" act may constitute contempt;

(b) any act which "tends to" interfere with the course of justice;

(c) a common denominator: disrespect;

4. acts too trivial to be considered contempt: the requirement of seriousness;

(a) harm to the court's reputation;

(b) what is serious and what is trivial?

(c) political dangers of the contempt power;

E. Recommendations with respect to reform proposals.

A. What the Law of Contempt Seeks to Preserve and Protect

One way of measuring a thing's value is to do without it. As Joni Mitchell sings, "you don't know what you've got till it's gone."[2] The loss of something of value can be one of life's most bitter experiences. The loss of employment or wealth, the loss of good health, and the loss of a loved one are poignant examples. Fortunately, people learn from such experiences or abstract from the experiences of others and take steps to prevent such losses, wherever possible at least. They take steps to protect what they value.

The law of contempt is built on the desire to protect something of value. In this section it will be shown that the law of contempt directly protects courts of law against those who

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[2]"Big Yellow Taxi", *Ladies of the Canyon*, 1970.

would interfere with them and undermine their authority. The courts in turn protect the rule of law, and the rule of law protects the social order.

1. The Social Order

Canadian society values social order and takes steps to protect it from loss. Social order is evident in everything around us - in family structure, organized religion, compulsory education, business, political institutions, unemployment statistics - even in birthday parties, wedding etiquette and handkerchiefs. Each culture may organize itself according to different values, but there is always a customary and acceptable way of doing things.

Furthermore, there is always someone or some element of society which does not accept the social order. There are always rebels or misfits for whom the social order offers few or no advantages, and whose appetites demand more than what the social order permits them to have. They defy the social order and indulge in self-gratification, at the expense of all those who support the social order. They take what must not be taken, and do what must not be done. They cause the mainstream loss and injury. They threaten harmonious social relations. Moreover, even "ordinary" people can conflict in their day-to-day life projects. Such conflict leads, at least, to inconvenience; at most, to violence.

Society therefore takes steps to protect itself from the loss which can be occasioned by the rebels, misfits and self-indulgent, and from the conflicts of civil society. It creates laws which define the social order, which make the law compulsory for everybody, and which penalize those who violate the law. Society sets apart an institution (formerly the king, today the government) and clothes it with authority to make and enforce these laws on behalf of society generally.

Criminal law is typically the form of law which penalizes those who violate the social order. A "crime" has been described as nothing more profound than an act which is

prohibited with penal consequences.[3] Various acts may be criminalized and de-criminalized according to society's changing views of the moral blameworthiness attaching to those acts; nevertheless, a crime is generally a public wrong which is believed to have a harmful effect on society (as well as on any individual victim(s) involved) and which is generally considered to run counter to public morality.[4]

Criminal law, or punishment for crime, has several objectives. The *Criminal Code* now lists some of these in a section entitled "Purpose and Principles of Sentencing" as follows:

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

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[3]Lord Atkin in *Proprietary Articles Trade Association* v. *A-G for Canada*, [1931] A.C. 310 at 324, as quoted in J.C. Smith and Brian Hogan, *Criminal Law* (6th ed) (London: Butterworths, 1988) at 21; *RJR-MacDonald* v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1.

[4]Smith & Hogan, *ibid.* at 17-20.

Another important traditional goal of punishment is retribution, or retaliation.[5] Together, these goals of punishment are thought to promote a just, peaceful and safe society, and promote respect for the law. Criminal law, therefore, promotes and protects the social order. It constitutes an important aspect of the "rule of law".

2. The Rule of Law

The framers of Canada's constitution valued social order and the "rule of law". The "rule of law"[6] has been defined on a general level in the following terms:

> The "rule of law" is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.[7]

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[5]Smith & Hogan, *ibid.* at 4-7. The authors suggest at 7 that "the retributive approach to sentencing was for many years out of favour with criminologists who thought it anachronistic and, indeed, barbarous. Recently there has been a change of thought and a 'Return to retribution in penal theory.' [cite omitted] This is at least partly because experience has shown that we simply do not know how to reform offenders and because sentences imposed purely on the basis of prevention of crime may be unfair and oppressive. The attitude of the English judges has changed little, if at all, having always been generally retributivist."

[6]The term "rule of law" eludes precise definition. There are, however, various explications of its meaning. See, for example, the theories summarized by Judith Shklar in "Political Theory and the Rule of Law" in *The Rule of Law: Ideal or Ideology*, Allan C. Hutchinson and Patrick Monahan, eds (Carswell: Toronto, 1987) at 1-16. Included in these theories are the views of Aristotle, who saw the rule of law as the rule of reason. The human intellect could devise principled rules based on fairness, and live by them. Montesquieu, on the other hand, believed the rule of law consisted of institutional restraints which prevented government from oppressing the rest of society. These two ideologies are quite distinct in many respects, but both are evident in modern judicial definitions of the rule of law as quoted below. For various theories of the meaning of "law", see H.L.A. Hart, *The Concept of Law* (2d ed) (Oxford: Clarendon Press, 1994).

[7]Laskin C.J.C., Dickson, Beetz, Estey, McIntyre, Choinard and Lamer JJ. in *Re Resolution to Amend the Constitution of Canada*, [1981] 1 S.C.R. 753 at 805-806, 1

The concept has also found judicial expression in the following words:

> The rule of law, a fundamental principle of our *Constitution*, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life.[8] ...
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> Additional to the conclusion of the rule of law in the preambles of the *Constitution Acts of 1867 and 1982*, the principle is clearly implicit in the very nature of a constitution. The *Constitution*, as the supreme law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence ...[9]

The "rule of law" imports the ideas of (a) the creation and maintenance of positive laws such as criminal law; (b) the absence of arbitrary power; and (c) the idea of a normative social order and justice. It may include the concept of a representative democracy. Traffic laws, zoning by-laws, procedures for declaring someone a dependent adult; procedures for conducting civil and criminal litigation; fundamental rights and freedoms; rules of natural justice - these are among the "rules" which Canadians accept as law and order. They apply to the lawmakers as well as to the citizens.[10] Everyone is subject to the same law. Law is supreme. Canada's *Constitution Act, 1982, Schedule B*, expressly states in its preamble that the nation of Canada is founded upon principles that recognize the

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C.R.R. 59 at 99.

[8]*Reference re Language Rights under Section 23 of the Manitoba Act, 1870, and Section 133 of the Constitution Act, 1867*, [1985] 1 S.C.R. 721 at 748-9; 19 D.L.R. (4th) 1.

[9]*Ibid.* at 750-1.

[10]The lawmakers are, through elected representatives, the citizens themselves.

supremacy of God and the rule of law. In 1985 the Supreme Court of Canada said *en banc*:

> The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by the rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.[11]

The rule of law is an important aspect of the Canadian way of life. Without the rule of law, life would be quite different. Imagine what it would be like without traffic laws, without procedures for conducting civil and criminal litigation; without fundamental rights and freedoms, without the rules of natural justice. Such a life has been imagined to be chaotic and, in Hobbes' words, "nasty, brutish and short".[12] Might would be right. Only the fittest would survive. The "law of the jungle" would prevail. Such imagining is only on a theoretical basis and may bear no relation to what would actually result from an absence of the rule of law. Hobbes' view of a life without the "rule of law" is but a hypothesis not proven theoretically or empirically. Nevertheless, it is a hypothesis which appeals to intuition, and is a presupposition of our system of law.

3. The Authority of Courts of Law

Civilized societies prefer the rule of law to the law of the jungle. They value it a great deal and have taken steps to maintain it and protect it. To this end they have created courts of law. Courts of law are primarily involved in adjudicating disputes between litigating parties. On a more fundamental level, however, they perform more than an adjudicative function. Courts of law apply the positive laws which have been created to accord with society's normative social ordering. They breathe life into the black letters of legislative

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[11]*Reference re Language Rights under Section 23 of the Manitoba Act, 1870, supra* note 8 at 751.

[12]Thomas Hobbes, *Leviathan* (1651), Pt. 1, Ch. 4 at 13.

and common law. They give the law effect. Where the law is insensitive to circumstances, or where it is wrong, they change it. Where access to the courts must be improved, they improve it. Where adjudication is an inadequate means of resolving disputes, they mediate instead. Every service provided by the courts is intended to support and maintain the rule of law and justice. Courts of law are created to serve and administer justice according to the rule of law, and they do so free of any influence from those who make and enforce it.[13]

Courts of law are absolutely essential to maintaining the rule of law. Imagine life without them. There would be no just means of bringing the force of law to bear upon those who offend it. On arresting a criminal, the police could impose their own sentence and dispense with a trial. There would be no means of obtaining an impartial adjudication of rights at a fair hearing. Private litigants could determine other means of settling disputes. If such a means included a criminal offence, once again the police would be free to arrest and impose their own sentence. There would be no means of "guaranteeing" basic human rights and freedoms. In the case of *B.C.G.E.U.* v. *British Columbia (Attorney General)*, Dickson C.J. imagined life without courts of law to apply *Charter* rights and freedoms. He said:

> Let us look first at the preamble to the *Charter*. It reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". So we see that the rule of law is the very foundation of the *Charter*. Let us turn then to s. 52(1) of the *Constitution Act, 1982* which states that the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the

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[13]Courts are independent of the executive and legislative arms of government. Section 96 of the *Constitution Act, 1867* and s. 11(d) of the *Charter* are considered constitutional guarantees of an independent judiciary. See Peter W. Hogg, *Constitutional Law of Canada* (3d ed) (Toronto: Carswell, 1992) at 185-86. See also *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714 at 735. See also W.N. Renke, "Invoking Independence: Judicial Independence as a No-Cut Wage Guarantee" 5 Points of View (Centre for Constitutional Studies, 1994), and *Reference re: Public Sector Pay Reduction Act (P.E.I.)*, [1997] 3 S.C.R. 3; 118 C.C.C. (3d) 193.

> extent of the inconsistency, of no force or effect. ... To paraphrase the European Court of Human Rights in *Golder* v. *United Kingdom* (1975), 1 E.H.R.R. 524 at p. 537, it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. As the Court of Human Rights truly stated: "The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings." And so it is in the present case. Of what value are the rights and freedoms guaranteed by the *Charter* if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the *Charter* if court access is hindered, impeded or denied? The *Charter* protections would become merely illusory, the entire *Charter* undermined.[14]

To prevent *Charter* protections from becoming illusory, access to courts of law must be constitutionally protected and guaranteed to all Canadians as a fundamental right. McIntyre J. confirmed the existence of such a constitutional right in the following words:

> In my view, the right of such free access [to the courts] is *Charter*-protected, and I agree with the Chief Justice where he said ... 'There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice' ... I cannot believe that the *Charter* was ever intended to be so easily thwarted.[15]

Access to courts of law is as essential to Canadian life as the rule of law and the social order it supports. Once again, this is a hypothesis, or a theory. There is no theoretical or empirical proof that non-existence of courts of law would signal the end of the rule of law or social order. The proposition does, however, appeal to our intuition. Again, it is a presupposition of our system of law.

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[14]*B.C.G.E.U.* v. *B.C. (A.G.)*, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1 at 11-12.

[15]*Ibid.* at 27-28, McIntyre J. In making this statement, McIntyre J. expressed what had hitherto been hinted at in *Reference Re Language Rights Under Manitoba Act* that access to a court of law is a fundamental right of Canadian citizens.

B. The Contempt Power's Role in Protecting Courts of Law

Courts of law, which play such an important role in Canadian society, must be protected from those who act in such a way as to undermine their authority or interfere with their process. The rebels, misfits, self-indulgent and ordinary citizens who fail to appreciate the importance of courts of law would otherwise be free to tamper with them and cause others to lose confidence in them. Courts of law cannot perform their function in sustaining the rule of law and the social order if public confidence in them is lacking.

Courts of law are therefore equipped with the contempt power - the power to punish those who interfere with the course of justice and undermine the courts' authority. In the words of McLachlin J: "Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependant on the ability of the courts to enforce their process and maintain their dignity and respect."[16] Lord Denning said in *Morris* v. *Crown Office*: "The phrase 'contempt in the face of the court' has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts."[17]

The contempt power is instrumental in maintaining law and order. The Canadian Judicial Council has stated recently that a number of judges believe that the contempt power "is one of the principal reasons why Canadian judicial proceedings are generally conducted with dignity and efficiency."[18] Because the contempt power protects the courts, it is an

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[16]*United Nurses of Alberta* v. *Alberta (Attorney General)*, [1992] 1 S.C.R. 901, [1992] 3 W.W.R. 481 at 492.

[17][1970] 2 Q.B. 114 at 122, [1970] 1 All E.R. 1079 at 1081.

[18]*Some Guidelines on the Law of Contempt* (Ottawa: Canadian Judicial Council, Sept. 1996) at 1. It adds in the context of civil contempt that "the powers of the courts to enforce their order may have a general salutary influence upon the maintenance of the Rule

important protector of constitutional rights and freedoms and the rule of law generally. Dickson C.J. said in *Newfoundland Association of Public Employees*:

> The point is that courts of record have from time immemorial had the power to punish for contempt those whose conduct is such as to interfere with or obstruct the due course of justice; the courts have this power in order that they may effectively defend and protect the rights and freedoms of *all* citizens in the only forums in which those rights and freedoms can be adjudicated, the courts of civil and criminal law. Any action taken to prevent, impede or obstruct access to the courts runs counter to the rule of law and constitutes a criminal contempt. The rule of law, enshrined in our Constitution, can only be maintained if persons have unimpeded, uninhibited access to the courts of this country.[19]

What would become of access to the courts without the court's power to prevent and punish for interference with its business? What would become of the courts without the power to upbraid or punish those who act disrespectfully toward the court and who undermine public confidence in its ability to administer justice? We can only imagine the answer. Litigants and others would be free to hurl abusive language at judges. They could circulate false accounts of judicial biases. They could bribe, threaten or otherwise influence the jury in order to elicit a certain verdict. They could storm the courthouse, or block

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of Law."

[19]*Newfoundland Association of Public Employees* v. *Newfoundland (Attorney General)*, [1988] 2 S.C.R. 204 at 213. Farris J, in the famous case of *Poje* v. *Attorney General of British Columbia*, (1952), 6 W.W.R. (N.S.) 473 at 478, aff'd (1953), 7 W.W.R. (N.S.) 49 *(sub nom. Can. Tpt. Co.* v. *Alsbury)*, aff'd [1953] 1 S.C.R. 516, 17 C.R. 176, 105 C.C.C. 311; [1953] 2 D.L.R. 785, imagined the absence or loss of the contempt power in the following terms: "Over the centuries our laws have been built up to give the greatest protection to all classes of our society and only through the medium of the freedom and independence of the courts are these privileges protected. Once our laws are flouted and orders of our courts treated with contempt the whole fabric of our freedom is destroyed. We can then only revert to conditions of the dark ages when the only law recognized was that of might. One law broken and the breach thereof ignored is but an invitation to ignore further laws and this, if continued, can only result in the breakdown of the freedom under the law which we so greatly prize."

access to it. They could refuse to participate as witnesses in criminal proceedings. They could ignore court procedures, and ignore court judgments. They could treat the courts with disdain and disrespect and get away with it. Without a means of preserving order and punishing those who create disorder, the courts would be weak and defenseless. They would not long survive.

Once again, this is a theoretical assumption. Courts have always had and employed the contempt power to protect themselves and maintain their authority. There is no way of ascertaining with certainty that the contempt power is either necessary or effective in protecting the courts. Most of us rely on our common sense for the idea that the court needs the power to protect itself from those who would abuse it. In fact, common sense has led to the enactment of several *Criminal Code* offences which parallel some forms of contempt power.[20] There may be disagreement about what forms of conduct threaten the integrity of the courts,[21] and there may be disagreement about how egregious the conduct must be to warrant punishment, but generally our system of law assumes that courts must have the power to defend themselves against disrespect and interference.

The law of contempt is divided into two types: civil and criminal. Civil contempt is characterized primarily by a failure to comply with court orders. The court's civil contempt power is the power to enforce its orders, and it does so not only to maintain its authority, but to assist private parties who have succeeded in litigation before the courts. Criminal contempt, on the other hand, is characterized by interference with the course of justice, either within a particular case, or more generally by undermining public confidence in the courts. There are many ways of committing criminal contempt, but they are generally classified as being either *in facie* (in the face of the court) or *ex facie* (away

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[20]Examples include bribing a judicial officer (s. 119), disobeying a court order (s. 127), perjuring oneself (s. 131), fabricating evidence (s. 137), obstructing justice (s. 139), and committing a seditious libel (s. 59).

[21]The offence of scandalizing the court is a prime example of this.

from the court). The importance of this distinction is primarily jurisdictional, inferior courts lacking jurisdiction to punish contempts not committed in their face. Criminal contempt committed in the face of the court may be found in any conduct which interferes with the course of justice by interrupting, disrupting, or obstructing court proceedings. Criminal contempt committed away from the court relates primarily to *sub judice* contempt, which is the publication of words which tend to affect the outcome of a trial, and to "scandalizing the court", which is the publication of words which tend to undermine public confidence in a particular judge or the court generally.[22] This thesis is concerned primarily with criminal contempt.

C. The Contempt Power's Historical Importance in Protecting Courts of Law

To better understand the sheer power which is involved in the contempt power, and to bring into relief the necessity for such a power, it is useful to consider its origins. Historically, the law of criminal contempt was the law of kings.[23] The king was divinely ordained to govern the people, and in order to do so he required obedience, cooperation and respect. He demanded respect. God and natural justice were on his side. Disobedience and resistance were treasonous and unthinkable.[24] The King administered justice himself. He *was* the judiciary. Which of the King's subjects appearing before him seeking justice would insult him or act disrespectfully? Which of his subjects would attempt to interfere

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[22]Sir Gordon Borrie and Nigel Lowe, *Borrie and Lowe's Law of Contempt*, (2d ed) (London: Butterworths, 1983) [hereinafter "Borrie & Lowe"] at 2-3; *R.* v. *Gray*, [1900] 2 Q.B. 36 at 40. *R.* v. *Lefroy* (1873), L.R. 8 Q.B. 134. See also Jeffrey Miller, *The Law of Contempt in Canada* (Toronto: Carswell, 1997) [hereinafter "Jeffrey Miller"] at 13-19.

[23]The law of civil contempt, on the contrary, was not the law of kings. Civil contempt is a wrong for which the law gives a remedy to one party as against another party. The king is not a party. The punishment is a form of execution for enforcing the right of a suitor. See Sir John Charles Fox, *the History of Contempt of Court* (London: Professional Books Limited, 1972) [hereinafter "Fox"] at 1.

[24]Goldfarb, Ronald L., *The Contempt Power* (New York: Columbia University Press, 1963) [hereinafter "Goldfarb"] at 11-12.

with his deliberations? Which of them would defy his rulings and his judgments? To offend the King in his judicial capacity would have been a perilous undertaking.

When the king established the machinery of government, and that machinery became too large for him to oversee personally, he exercised his powers through representatives. He appointed judges to make decisions on his behalf. Both the common law and equity courts represented the king's judicial capacity, and the contempt power which they exercised was actually the king's authority to punish disobedience, obstruction or disrespect for his authority to judge. Contempt of court was contempt of the king's sovereign judicial authority.[25] As Justice Wilmot explained in a seminal 18th century judgment,[26]

> By our constitution, the king is the fountain of every species of justice, which is administered in this kingdom. The king is "de jure" to distribute justice to all his subjects; and because he cannot do it himself to all persons, he delegates his power to his judges, who have custody and guard of the king's oath, and sit in the seat of the king "concerning his justice".[27]

A contempt of court was "indirectly a contempt of the King, who originally himself sat in the Aula Regis".[28] Littleton expounded in *Stroud's Case*: "There can be no question made of it but that all contempts of what kind soever that are punishable by the laws of the realm

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[25]A.C. Forster Boulton, *Oswald's Contempt of Court* (3d ed) (Cdn. ed) (Toronto: Canada Law Book, 1911) [hereinafter "Oswald"] at 1; *R.* v. *Lefroy, supra* note 22 at 137; Goldfarb, *ibid.* at 12; John Charles Fox, "The King v. Almon" (1908) 24 L.Q.R. 184 at 195.

[26]Wilmot J. prepared a judgment in 1765 in respect of a case tried before him known as *The King* v. *Almon*. It was afterwards discovered that the rule nisi which had led to the trial had erroneously referred to another title of proceeding, and consequently the entire case was abandoned, including the judgment. The never-pronounced judgment was published posthumously in the form of Wilmot's *Notes* and subsequently formed the basis of much of England's law of contempt. See Fox, *supra* note 23 at 5, 8, and Goldfarb, *ibid.* at 19.

[27]*R.* v. *Almon* (1765), Wilm. 243, 97 E.R. 94 at 99.

[28]Fox, *supra* note 23 at 49.

are against the king and his government immediately or mediately.[29] In fact, in early English history, "contempt of court" was referred to as "Contempt of the King".[30] By the end of the twelfth century, "contempt of court" was a recognized expression,[31] although there is also documented reference during this time period to "contempt of the King's Majesty".[32]

In the thirteenth century, Bracton stated bluntly that there was no greater crime than contempt and disobedience, for all persons ought to be subject to the King as supreme, and to his officers.[33] In 1765, Justice Wilmot echoed this truth, contending that an arraignment of the justice of the judges (contempt by scandalizing the court) is an arraignment of the King's justice; that it impeaches the King's wisdom in the choice of his judges; that it excites dissatisfaction with judicial determinations and indisposes the minds of people to obey them. Scandalizing the court was, according to Wilmot J., a most fatal obstruction of justice and called for a more immediate redress than any other obstruction.[34]

The delegation of the king's judicial authority to judges, the rule of law, the magnitude of the wrong committed by criminal contempt of court, and the justice which is done by exercise of the contempt power, are vividly portrayed in the following story from early 13th century England, reported in Law French:

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[29](1629), 3 How. St. Tr. 267 (cited in Fox (1909) 25 LQR at 246-247).

[30]Fox, *supra* note 23 at 45. Sir William S. Holdsworth, *A History of English Law* (3d ed) (London: Methuen & Co. Ltd., 1923) [hereinafter "Holdsworth"] vol. III at 391 states that "disobedience to the king's writ was a contempt of the king."

[31]Fox, *ibid.* at 46.

[32]*Ibid.*

[33]*Ibid.* at 47.

[34]*R.* v. *Almon*, *supra* note 27 at 100 (E.R.).

The most renomed prince, kynge Henry the fifte, late kynge of Englande, durynge the life of his father was noted to be fierce and of wanton courage. It hapned that one of his seruantes whom he well fauored, for felony by hym committed, was arrayned at the kynges benche; whereof he being aduertised, and incensed by light persones about hym, in furious rage came hastily to the barre, where his seruant stode as a prisoner, and commaunded hym to be unygued and sette at libertie, where at all men were abasshed, reserued the chiefe iustice, who humbly exhorted the prince to be contented that his seruaunt mought be ordred accordyng to the auncient lawes of this realme, or if he wolde haue hym saued from the rigour of the lawes, that he shuld optaine, if he moughte, of the kynge, his father, his gracious pardone; whereby no lawe or iustice shulde be derogate. With whiche answere the prince nothynge appeased, but rather more inflamed, enduored hym selfe to take away his seruant. The iuge consideringe the perilous example and inconuenience that moughte thereby ensue, with a valiant spirite and courage commaunded the prince upon his alegeance to leue the prsoner and departe his waye. With whiche commandment the prince, being set all in a fury, all chafed, and in a terrible maner, came up to the place of uigement - men thinkyng that he wolde haue slayne the iuge, or haue done to hym some damage; but the iuge sittyng styll, without mouynge, declarynge the maiestie of the kynges place of iugement, and with an assured and bolde countenance, hadde to the prince these words folowyng: Sir, remembre your selfe; I kepe here the place of the king, your soueraigne lorde and father, to whom ye owe double obedience, wherefore, eftsones in his name, I charge you desiste of your wilfulnes and unlaufull entreprise, and from hensforth gyue good example to those whiche hereafter shall be your propre subiectes. And nowe for your contempt and disobedience, go you to the prisone of the kynges benche, where unto I committe you; and remayne ye there prisoner untill the pleasure of the kyng, your father, be further knowen. With which e wordes being abasshed, and also wondrynge at the meruailous grauitie of that worshipful Justice, the noble prince, layinge his waipon aparte, doinge reuerence, departed and went to the kynges benche as he was commaunded. Wherat his seruants disdainyng, came and shewed to the kynge all the hole affaire. Wherat he a while studienge, after as a man all rauisshed with gladness, holdyng his eien and handes up towarde heuen, abrayded, sayinge with a loude voice, O mercifull god, how moche am I, aboue all other men, boude to your infinite goodnes; specially for that ye haue gyuen me a iuge, who

> feareth nat to ministre iustice, and also a sonne who can suffre semblably and obey iustice.[35]

The king's satisfaction with the outcome of Prince Henry's brush with the law is palpable. The supremacy of the rule of law is evident. The importance of the contempt power is clear. Imagine the outcome if the judge had not possessed the power to commit Prince Henry for his contempt. The judge considered the "perilous example and inconvenience that might thereby ensue", particularly because those who heard or would hear of the incident would one day be Prince Henry's subjects. Upon this reflection, Prince Henry was abashed. He laid down his weapon, did reverence to the judge, and went willingly to prison as he had been commanded. Prince Henry understood the enormity of his deed and the importance of the contempt power in stopping it.

D. The Parameters of the "Crime" of Contempt

In his fierce and wanton courage, Prince Henry had done something which tended to undermine the rule of law. He had done something which seriously interfered with the course of justice as administered by the king's bench. If someone had asked him at the outset what he was doing, however, he would have responded that he was merely saving his loyal servant from being punished. Three levels of activity are involved: undermining the rule of law, interfering with the course of justice or undermining the court's authority, and saving a loyal servant from punishment. With which level is the law of contempt primarily interested? What is the "crime" of contempt of court? Contempt of court is found in acts which (1) undermine the rule of law; and (2) interfere with the course of justice. It is primarily interested, however, in (3) acts which show the offender's disrespect for the courts.

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[35]Sir Thomas Elyot, *The Gouernour* (1531: ed. 1880) vol, 2, p. 61, quoted in R.E. Megarry, *A Second Miscelleny-at-Law* (London: Stevens & Sons Limited, 1973) at 77-78.

1. Undermining the Rule of Law

The law of contempt of court is, to be sure, concerned with those acts which undermine the rule of law. An act committed for the express purpose of undermining the rule of law would probably involve, however, some grand and heinous scheme to topple society's belief in courts of law, the rule of law and even social order generally. Such a scheme is not likely to surface so as to be dealt with by the courts. In fact, such a scheme may not be imaginable. There is no law prohibiting the "destruction of the rule of law". It is a crime too egregious to express in writing. Crimes of sedition, treason or terrorism approach the concept to some extent.

2. Interfering with the Course of Justice

There is a law prohibiting the "wilful obstruction of the course of justice".[36] This crime is more tangible. One can imagine an act committed for the express purpose of interfering with the course of justice. Bribing the trier of fact, inciting a riot in the court house, and destroying court records would fall under this category of contempt. The perpetrator of such a crime would have formed the specific intent to interfere with or obstruct the court in the conduct of its business. This is a serious form of contempt. Punishment for such a crime would be swift and severe.

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[36]See s. 139 of the *Criminal Code*, particularly ss. 139(2) which provides: "Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years." According to *Martin's Annual Criminal Code 1998* at CC/238, this section, although framed in the language of an attempt, is in fact a substantive offence, the gist of which is the doing of an act which has a tendency to prevent or obstruct the course of justice and which is done for that purpose, citing *R.* v. *May* (1984), 13 C.C.C. (3d) 257 (Ont. C.A.), leave to appeal to S.C.C. refused [1984] 2 S.C.R. viii, 56 N.R. 239n.

The vast majority of acts which interfere with the course of justice and which undermine public confidence in the courts are not, however, committed for those purposes. They are committed only to effect a more immediate outcome, such as to save an employee from punishment, or to demonstrate one's dissatisfaction with a judgment. They are also committed out of disrespect for the courts and out of a failure to appreciate the importance of courts of law in supporting the Canadian way of life. These instances of disrespect constitute the bulk of the contempt power's mandate.

3. Committing Acts of Disrespect

An act of disrespect is any act which tends to interfere with the court's process or which undermines public confidence in the courts. This is the essence of the traditional common law definition for criminal contempt of court as expressed by Lord Russell of Killowen in *R.* v. *Gray* in 1900. The definition provides that

> [a]ny act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the court is a contempt of court.[37]

Two very important aspects of the law of contempt may be extracted from this definition: (a) the fact that "any" act which interferes with the court or lowers the court's authority can be a contempt; and (b) the fact that an act need only "tend to" interfere with the court or lower its authority in order to constitute contempt.

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[37]*Supra* note 22 at 40.

(a) "Any" Act may Constitute Contempt

Lord Russell's use of the phrase "any act done or writing published" is important in the law of contempt. Contempt of court can be committed in *any* number of ways. The definition of contempt does not detail the particular acts or words which are restricted. It does not list categories of deeds which are particularly contemptuous. Lord Tucker said in *Izuora* v. *R.* that it was not possible "to particularize the acts which can or cannot constitute contempt in the face of the court."[38] Contempt of court has been described as "a kaleidoscopic subject, known as the Proteus of the legal world because of its almost infinite diversity of forms."[39] Contempt of court may be found in any act or words which tend to lower the court's authority or which tend to obstruct or interfere with the due course of justice.

(b) Any Act which "Tends to" Interfere with the Course of Justice

The second important aspect of contempt law is identified in Lord Russell's use of the the word "calculated" in his definition of both classes of contempt.[40] "Calculated" in the context of this definition means "tending to" or "likely to" or "presenting a risk of" or "fitted to" or "suited to" or "apt to".[41] It does not mean "reckoned, estimated, devised

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[38]*Izuora* v. *R.*, [1953] A.C. 327 at 336, 1 All E.R. 827, 2 W.L.R. 700.

[39]Douglas Mackintosh, "Contemptus in Facie Curiae" (1987) 2 Crown's Newsletter 31 at 32; C. Gaylord Watkins, "The Enforcement of Conformity to Law Through Contempt Proceedings" (1967) 5 Osgoode Hall L.J. 125 at 129; Borrie & Lowe, *supra* note 22 at 1.

[40]The first class of contempt distinguishes the contempt of scandalizing the court.

[41]*R.* v. *Hill* (1976), 33 C.C.C. (2d) 60 at 68 (B.C.C.A.); adopted in *R.* v. *Aster (No. 1)* (1980), 57 C.C.C. (2d) 450 at 454 (Que. S.C.), Hugessen A.C.J. and *R.* v. *Anders* (1980), 34 O.R. (2d) 506 at 516, 25 C.R. (3d) 12, 136 D.L.R. (3d) 316 (Co. Ct.). See also *Borrie & Lowe*, *supra* note 22 at 60 and The Hon. J.C. McRuer, Chief Justice, High Court of Justice, Ontario "Criminal Contempt of Court Procedure: A Protection to the Rights of the Individual" (1952) 30 Can. Bar Rev. 225 at 227-8. See also Smith and Hogan, *supra* note 3 at 769.

with forethought" as it does in modern English language.[42] Thus it is not only those acts which actually *do* lower the court's authority or which actually *do* interfere with the due course of justice which constitute contempt. It is also those acts which would *tend to* have that effect if they were to go unstopped or unpunished.

The determination of whether an act *tends to* undermine the court's authority can be a difficult one for the court to make.[43] Obviously the court cannot empirically calculate the probability of an act undermining public confidence in the court. It must make the calculation in a conceptual sense, in a manner similar to the way in which we evaluate a thing's tendency to harm us. We can appreciate on a common sense level, for example, that harm may befall us if we were to ride a bicycle on a freeway, although we cannot be absolutely certain that we will be struck. The court undertakes the same kind of "analysis". It applies its understanding of the social order, the law, and the common sense of cause and effect to determine whether a given act has a tendency to undermine the court's authority. It is not an exacting exercise, to be sure, but it is a necessary one. To fail to evaluate the "tendency" would amount to either finding every trivial discourteous act a contempt or finding no act a contempt. Neither option is desirable.

(c) A Common Denominator: Disrespect

Courts have determined an important method of analysis. The common denominator of all contempts is disrespect. A contemptuous act is one which displays disrespect, or a failure to show respect for the courts. The law of contempt is fundamentally about respect. To respect something is "to treat or regard with deference, esteem, or honour"; "to esteem, prize, or value" it; "to treat with consideration; to refrain from injuring or interfering with;

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[42]The Oxford English Dictionary (2d ed) (Oxford: Clarendon Press, 1989) vol. II at 777.

[43]In fact, in the Ontario Court of Appeal's view in *R.* v. *Kopyto (No. 2)*, (1987), 61 C.R. (3d) 209 at 259, 62 O.R. (2d) 449 (Ont. C.A.), it is simply too difficult to make in the context of contempt by scandalizing the court *ex facie*. This difficulty rendered the offence unconstitutional.

to spare."[44] The law of contempt discourages any activity which shows a want of respect for the courts, simply because it tends to undermine public confidence in the courts. Borrie and Lowe, authors of a leading text on contempt law, state in an oft-quoted passage:

> It is therefore thought important to maintain the respect and dignity of the court and its officers, whose task it is to uphold and enforce the law, because without such respect, public faith in the administration of justice would be undermined and the law itself would fall into disrepute.[45]

Note the logical progression of ideas expressed in this passage: without respect, public confidence in the courts is eroded, and the rule of law itself is in jeopardy. As seen in Part C above, Prince Henry had been contemptuous of the authority of the court; utterly disrespectful. When the implications of his contempt were explained, however, he willingly desisted and became respectful. He understood that his isolated contempt could set a dangerous example. Others might in due course become like-minded. Contempt of court is the power of the court to stamp out the sparks of disrespect before they can become flames.

The law of contempt, therefore, addresses primarily the much more mundane, every-day acts of disrespect which tend to discredit the courts. It is the disrespectful (i.e., contemptuous) acts or omissions of individuals which tend to "chip away" at public confidence in the courts and which, given their persuasive and cumulative effect, tend to lead to a loss of confidence in courts of law and ultimately to destruction of the rule of law. By dealing with each contempt committed against the courts, the law of contempt preserves public confidence in the courts and protects the rule of law.

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[44]The Oxford English Dictionary, *supra* note 42 at vol. xiii at 733, meanings 4(a), (b) and (c).

[45]Borrie & Lowe, *supra* note 22 at 226.

This understanding of the law of contempt is evident in a great number of the definitions of contempt and in much commentary on the objects of the contempt power. According to Nitikman J. of the Manitoba Queen's Bench, "[t]he importance of the traditional respect that has always accorded the dignity and majesty of the courts cannot be overemphasized. Any act contributing to loss of that respect is bound to adversely affect the orderly operation of our judicial processes and impair the due administration of justice."[46] Oswald, another eminent author on the law of contempt, states that contempt "is defined or described to be a disobedience to the Court, an opposing or a despising the authority, justice, or dignity thereof."[47] Contempt of court is "any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation."[48] The *Canadian Law Dictionary* defines contempt of court as "disobedience to the court, in opposing or despising the authority, justice or dignity thereof."[49] *Black's Law Dictionary* defines contempt of court as "any act which is calculated to embarrass, hinder, or obstruct court in the administration of justice, or which is calculated to lessen its authority or dignity."[50] *Jowitt's Dictionary of English Law* defines contempt of court as "any act which may tend to hinder the course of justice or show disrespect to the court's authority", "interfering with the business of the court"; obstructing or attempting to obstruct the officers of the court on their way to their duties".[51] The *Oxford English Dictionary* states that contempt of court "includes any disobedience to the rules, orders, or process of a court ... and any disrespect or indignity offered to the judges in their judicial capacity within or without the

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[46]*Re Borowski* (1971), 3 C.C.C. (2d) 402 at 412 (Man. Q.B.).

[47]Oswald, *supra* note 25 at 5, following *Miller* v. *Knox* (1878), 4 Bing N.C. 574 at 588.

[48]*Ibid.* at 6.

[49](Toronto: Law and Business Publications (Canada) Inc., 1980) at 90, citing *Austman and Oddson* v. *Bjarnason*, [1932] 2 W.W.R. 20 (Sask. C.A.).

[50]6th ed., (St. Paul, Minn: West Publishing Co., 1990) at 319.

[51]*Jowitt's Dictionary of English Law* (2d ed by John Burke) (London: Sweet & Maxwell Limited, 1977) vol.1 at 441.

court."[52] The words "contumacious"[53] and "contumelious"[54] are frequently used to describe contemptuous behaviour.[55]

Contempt, therefore, may be *anything* or *any* conduct which is contemptuous, i.e., disrespectful, of the authority of the court. Anything, that is, that is not too small to be considered a contempt.

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[52]*Supra* note 42 at vol. III at 814.

[53]Meaning "insubordinate; stubbornly or wilfully disobedient." See *The Concise Oxford Dictionary* (8th ed) at 251.

[54]Meaning "reproachful, insulting, or insolent." See *The Concise Oxford Dictionary* (8th ed) at 251.

[55]The *Modern Legal Glossary* (Charlottesville, Va: The Michie Company, 1980) defines "contempt of court" at 133 as "[a]n act or words which tend to embarrass or obstruct a court in the administration of justice or which lessens the dignity of or respect for the court." John Indermaur in *Principles of the Common Law* (10th ed) (London: Stevens and Haynes, 1904) states at 377-8: "Contempt of Court consists in any refusal to obey an order or process of a Court of competent jurisdiction, or in offending against particular statutes which render such offending a contempt of Court, or in interfering with, or violating, established rules of Court, or in behaving in a disrespectful or improper manner towards the Court, or any judge or officer thereof." Sir William Blackstone in his *Commentaries on the Laws of England* (Philadelphia: Rees Welsh & Co., 1898) [hereinafter "Blackstone"] Book 4 at 285-286 writes: "Some of these contempts may arise in the face of the court, as by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication; by breach of the peace, or by any wilful disturbance whatever; others in the absence of the party, as by disobeying or treating with disrespect the king's writ, or the rules of process of the court, by perverting such writ or process to the purposes of private malice, extortion, or injustice, by speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by any thing, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people."

4. Acts Too Trivial to be Considered Contempt: The Requirement of Seriousness

While the courts have always been conscious that it is the relatively small acts of disrespect (as opposed to actual attempts to undermine respect for the courts) which tend to undermine public confidence in the courts, they have also recognized that treating trivial acts of disrespect as contempts may have an equally damaging effect on the administration of justice.

(a) Harm to the Court's Reputation

By convicting for very small contempts, courts may damage their own reputation. Courts may be viewed by those it serves as being "obsessive" about respect; overly sensitive; inequitable; even tyrannical. Lord Morris warned in *McLeod* v. *St. Aubyn* that "[t]he careless or overzealous enforcement of the law of contempt in this particular class of case may tend to bring the courts themselves into contempt."[56]

Contempt of court is a crime: an act with penal consequences for the contemnor.[57] The court should not be too hasty in finding a person guilty of a crime. When the court acts in the name of contempt of court, it has a number of objectives. The first of these is to stop the contemptuous activity. To stop it as soon as possible limits the damaging effect of the contempt. The existence of the contempt power also prevents the contemnor from repeating his error, and deters others from committing it as well. A third objective of contempt is to vindicate the court's authority - to reassert its authority in the view of all those who have witnessed the contempt. The court would do no justice if it permitted the

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[56][1899] A.C. 549 at 561 (P.C.).

[57]The penalty may be a fine, or time in jail, or both. Depending on the circumstances, other forms of penalty may be appropriate, such as temporary suspension of a lawyer's licence to practice law (*British Columbia (Attorney General)* v. *Cram* (1994), 95 B.C.L.R. (2d) 1) or an order to make public apology (*Re Borowski*, *supra* note 46.

citizens whom it served to believe that the court did not care whether it was respected or not. The court vindicates itself by reacting to the contempt in any appropriate manner ranging from a warning, to a citation for contempt, to an immediate conviction for contempt. The court needs to distance itself from the contemptuous conduct and to denounce it publicly. Punishing the contemnor serves a retributory objective. The court takes something from the contemnor in recompense for the contemnor taking something away from the court.

A great many acts and words may be safely ignored or dealt with in other ways than by a finding of contempt.[58] Litigants may show their ignorance of court etiquette and procedure. They may display their emotions. They may forget their manners. This does not mean they do not respect the court, and it does not mean the court's authority is, or is likely to be, undermined.[59] English authors Arlidge and Eady argue that contempt should not be found for just *any* conduct which tends to interfere with the administration of justice: "There are good grounds in principle for re-defining the *actus reus* of contempts to which *mens rea* applies. If that *actus reus* is defined to include trivial acts the law will be disobeyed and brought into disrepute."[60] They say that toward the end of the 19th century, the English Court of Appeal began to distinguish between technical contempts which fell within the general definition of contempt but carried only a slight risk of interference with the administration of justice, and contempts which carried a serious risk of interference. The court would punish the latter, but not the former. Then, for the first

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[58]Chapter 5 deals with alternative means of addressing contempts or acts which are not sufficiently serious to constitute contempts.

[59]Dickson C.J. in *Newfoundland Association of Public Employees* v. *Newfoundland (Attorney General)*, *supra* note 19 at 212-213 states that "the power to punish for criminal contempt is not intended to insulate the courts from life's vicissitudes; it is not intended to place the courts in Elyseum, a blessed abode free from the slings and arrows which afflict all others; it is not intended to vindicate the dignity of the courts or the judges."

[60]Anthony Arlidge and David Eady, *The Law of Contempt* (London: Sweet & Maxwell, 1982) [hereinafter "Arlidge & Eady"] at 152.

half of the 20th century, the courts moved away from the "technical contempt" nomenclature in favour of merely excluding all conduct which did not raise a serious risk of interference.[61]

A number of powerful judgments implore judges to exercise restraint in finding contempt. Lord Morris stated in *McLeod* v. *St. Aubyn*: "Committal for contempt of court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice."[62] Lord Jessel, M.R. stated *In re Clements and the Republic of Costa Rica* v. *Erlanger*:

> ...[T]his jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched and exercised ... with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode ... which can be brought to bear upon the subject... I have always thought that necessary though [this jurisdiction] be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found.[63]

Lord Goddard said in *Parashuram Detaram Shamdasani v. King-Emperor:*

> Their Lordships would once again emphasize what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended....[64]

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[61]*Ibid.* at 151.

[62]*Supra* note 56.

[63](1877), 46 L.J. Ch. 375 at 383.

[64][1945] A.C. 264 at 270, 61 T.L.R. 448.

> Their Lordships would, indeed, go further, and say that it would have been more consonant with the dignity of the Bar to have ignored a foolish remark which has been made over and over again, not only by the ignorant, but by people who ought to know better, and, no doubt, will continue to be made so long as there is a profession of advocacy. To treat such words as requiring the exercise by the court of its summary powers of punishment is not only to make a mountain out of a molehill but to give a wholly undeserved advertisement to what had far better have been treated as unworthy of either answer or even notice.[65]

S. Tupper Biggelow, a Canadian magistrate, wrote in 1958: "The exercise of the power of exclusion or punishment for contempt should be done with great forbearance, and not hastily, or under feelings of exasperation, however natural; but with the sole view to the maintenance of proper order and decorum during the prosecution of the magistrate's judicial proceedings."[66] Cory J. said in *United Nurses of Alberta* v. *Alberta (Attorney General)*: "I agree that the criminal contempt power should be used sparingly, with great restraint and only in those circumstances when it is required to protect the rule of law... If the penalty is of undue severity and disproportionately greater than that which is appropriate then it will diminish rather than enhance respect for the administration of justice."[67] Judges should guard against the over use of their contempt powers lest "a process of which is to prevent interference with the administration of justice should degenerate into an oppressive or vindictive abuse of the court's powers."[68]

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[65]*Ibid.* at 268-69.

[66]"Contempt of Court, being a Consideration of Contempt of Court in the Face of the Court before Magistrates and Justices of the Peace" (1958-59) Crim. L. Q. 475 at 477-78, citing *Heywood* v. *Wait* (1869), 18 W.R. 205 and *Day* v. *Carr* (1852), 7 Exch. 887.

[67]*Supra* note 16 at 511.

[68]*Re Milburn* (1946), S.C. 301 at 315 (Ct. of Session, 1st Div. Scotland), Lord President Normand.

More recently in Canada, the court in *Re Bertrand*, looked for a "serious, real, imminent risk of obstruction of the administration of justice."[69] In *R.* v. *Glasner*, Laskin J.A. stated that "the *actus reus* of criminal contempt is conduct which seriously interferes with or obstructs the administration of justice or which causes a serious risk of interference or obstruction.[70] In *R.* v. *Yellow Rabbit Theatre*, the Alberta Court of Appeal stated that *sub judice* contempt would be found where there was a "real and substantial risk that a fair trial would be impossible."[71]

(b) What is "Serious" and what is "Trivial"?

To avoid the harms inherent in finding contempt for trivial acts, the court must distinguish trivial contempts from serious contempts. What distinguishes them? The term "serious" is both normative and relative. A finding of "seriousness" involves a judge's individual sense of what is right and what is wrong, relative to other rights and wrongs perceived also on a normative basis. Thus, the evaluation of "seriousness" is a subjective determination. The assessment may vary from judge to judge, depending on his or her particular outlook. There are, however, means of making the evaluation more objective. For example, there are very clear extremes which, by nearly anyone's assessment, would constitute either an obvious contempt or an obvious non-contempt. The repeated and unexplained absence of a lawyer from court when she is scheduled to conduct a trial or trials is *prima facie* a case

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[69]*Re Bertrand* (1989), 70 C.R. (3d) 361 (Que. S.C.).

[70]*R.* v. *Glasner* (1994), 19 O.R. (3d) 739 at 748-50 (C.A.), rev'g (1991), 14 W.C.B. (2d) 276 (Ont. Prov. Ct.).

[71][1992] 3 W.W.R. 481 at 511.

of contempt.[72] On the other hand, a lawyer's arrival in court 10 minutes late due to being stuck in the court house elevator would obviously *not* qualify as a contempt of court.[73]

Evaluating the consequences of the contemptuous act is an *actus reus*-related means of narrowing the question. Was the lawyer absent for the commencement of trial, or was she absent for a "to be spoken to" court date?[74] Did the absence result in a massive wastage of human resources and money,[75] or had the crown attorney been notified in time to advise the witnesses? Evaluating the lawyer's excuse for non-attendance, and his demeanour, is a *mens rea*-related means of narrowing the question. Did the lawyer have no intention of attending court at the appointed date and time?[76] Or did the lawyer become ill on the way to the court house,[77] or forget to diarize the date in his daytimer?[78]

Evaluating the total effect of the *actus reus* and *mens rea* on the administration of justice is of great assistance in determining what is a "serious" case of contempt; nevertheless the cases show considerable divergence of opinion between judges on the same facts.[79] Perhaps this is one of the reasons why a conviction for contempt of court in the face of the

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[72]See, for example, *R.* v. *Aster (No. 1)*, *supra* note 41 at 451 and see Chapter 3, heading B "Acts as "*Prima Facie* Contempt".

[73]See further discussion of the "seriousness" issue in Chapter 3, heading D "The Measure of Contempt".

[74]In *R.* v. *Glasner*, *supra* note 70, Laskin J.A. thought this was a significant difference, whereas Labrosse J.A. did not.

[75]In *R.* v. *Aster (No. 1)*, *supra* note 41, Aster's failure to appear for the commencement of trial resulted in the court sending some 80 prospective jurors home, plus witnesses and counsel.

[76]Mr. Young in *Canada* v. *Young*, [1991] M.J. No. 659 (QL), it was found, did not actually intend to attend court to defend three individuals on criminal charges.

[77]*R.* v. *McKeown*, [1971] S.C.R. 446, 16 D.L.R. (3d) 390.

[78]*R.* v. *Jones* (1978), 42 C.C.C. (2d) 192 (Ont. C.A.).

[79]See discussion in Chapter 3, heading D "The Measure of Contempt"; subheading 3 "Institutional Differences in Assessment".

court could not, until 1972, be appealed.[80] The determination does, to a significant extent, depend on the outlook of the judge conducting the contempt hearing. This is true even though the standard of proof is the criminal standard of proof beyond a reasonable doubt.

One way by which a judge should *not* make a determination of seriousness is to weigh the contemptuous act against its overall effect on the rule of law, or on its damaging effect on the administration of justice or on public respect for the administration of justice generally. Courts must not look too far beyond the actual courtroom to determine whether the lawyer has committed contempt of court. The offence is entitled contempt of *court*, not contempt of the *rule of law*, or contempt of *the administration of justice*. A contempt should be found, not only where a contemnor causes the court house to be closed, but where he displays serious disrespect for the court. Judges must not try to determine the effect of a particular failure to appear on the overall administration of justice in the province, or in the nation, for that matter. They must find contempt where anything less than a finding of contempt would not sufficiently deter this particular offender or others like him from showing such discourtesy, disrespect and contempt of the court. They must find contempt where anything less would not sufficiently denounce such conduct. They must find contempt where anything less would not sufficiently penalize this particular offender for his misconduct. Very importantly, they must find contempt where anything less would fail to preserve public respect for the administration of justice.

(c) Political Dangers of the Contempt Power

Even with the court's focus on acts which tend to seriously harm it, the contempt power is not without political dangers. It is possible that the court may abuse its contempt power by convicting a person who commits a trivial contempt, or by failing to convict a person

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[80] *Criminal Code (Amendment) Act*, S.C. 1972, s. 4.

who commits a serious contempt. In this event the court itself risks undermining public confidence in its impartiality.

While this danger is always present in the court's exercise of the contempt power, it is not unique to the law of contempt. The court may act with bias, or *appear* to act with bias, in respect of any decision it renders. In the law of torts, one court may find a "clear" case of negligence where another court would refuse to consider the possibility. In contract law, one court may find unequivocal acceptance of an offer in circumstances which would appear to another court to be a dubious indication of acceptance. In the area of statutory interpretation, one court may interpret the word "may" as being permissive where another court would find it mandatory. Examples such as these abound and are generally accepted as inevitable in an imperfect world. Presumably only if there were *one* judge deciding all cases for all time would there be complete consistency in court judgments (although still no guarantee of impartiality).

Is the danger enhanced for criminal contempt? Certainly criminal contempt involves the liberty interest and raises the risk of improper conviction of a potential contemnor. But a finding of criminal negligence bears the same risk and is constitutionally accepted in Canada.[81] Further, apparently contradictory judgments in tort law and contract law, which do not risk the liberty interest, can have a serious impact on a party, yet they are accepted. There is nothing to indicate that the contempt power is *more* susceptible to abuse than other kinds of judicial decision-making authority.

A number of remedies are available where there is a perception of bias. Appeals from conviction and from sentence may be made. Mistrials may be declared where there is a reasonable apprehension of bias. Complaints about judicial conduct may be directed to the

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[81]See *R.* v. *Creighton*, [1993] 3 S.C.R. 3, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189 and *R.* v. *Hundal*, [1993] 1 S.C.R. 867, 79 C.C.C. (3d) 97, 19 C.R. (4th) 169, and see discussion in Chapter III, subheading C(3), "Negligence and Inadvertence".

Canadian Judicial Council or to the various provincial judicial councils. If the problem is perceived to involve the judiciary generally, then Parliament may choose to make constitutional changes and legislate to restrain the contempt power. The media could become involved by making public criticism of the court's use of the contempt power. Since *bona fide* criticism of court decisions is not contempt of court,[82] and since courts must concern themselves with maintaining public confidence, media pressure may force courts to change unpopular practices. With these checks and balances in place, the possibility of judges abusing their contempt power is minimized or controlled.

E. Recommendations with respect to Reform Proposals

The foregoing has shown that the contempt power, or the law of contempt, is not just another criminal offence to be squeezed somewhere between the firearm and sexual offence provisions of the *Criminal Code*.[83] In fact, if contempt of court were to be included in the *Criminal Code* it would warrant a place at the very beginning, to signify its status as the *sine qua non* of law and order generally. Contempt of court stands apart from criminal offences against person and property. "While other crimes occur in society and the law merely defines or criminalizes them, contempt of court does not occur in the absence of a court."[84] Contempt of court is a very important power and ought to be understood as such.

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[82]See Chapter 5, heading G "Due Consideration for Freedom of Expression" and cases discussed under that heading.

[83]This is where the *Criminal Code* places "Offences Against the Administration of Law and Justice".

[84]Lamer C.J. in *MacMillan Bloedel Ltd.* v. *Simpson*, [1995] 4 S.C.R. 725 at 746, 130 D.L.R. (4th) 385.

Contempt of court also stands apart from both existing and proposed "administration of justice" offences, including the existing "obstruction of justice" offence,[85] because they represent only a small sample of the infinite variety of acts which may constitute contempt of court. It would be impossible to enumerate in any code the ways in which contempt may be committed. The best that could be done is to reiterate Lord Russell's words, "Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court..."[86] Unfortunately, this definition would do little to satisfy those who complain that contempt of court is a definitionless offence.

Existing and proposed "administration of justice" offences also fail to convey the pith and substance of the offence of contempt. They do not evoke the sense that the law of contempt is about respect, and that its mandate is to address acts and words which show disrespect, or contempt, for the court.[87] Neither do they suggest that the finding of disrespect is an exercise of judicial discretion made only on a judge's serious consideration of whether the act or words would lower the authority of the court, or whether they represent disrespect or merely discourtesy. Codified contempt offences camouflage the fact that it is the court's duty, not the attorney general's duty, to administer the law of contempt.

CONCLUSION

The contempt power is an important defence for courts of law, and combats a potentially serious crime. While it is unlikely that one act of contempt could undermine public

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[85]This offence is excluded because it represents only a small portion of the contempt power's mandate. It addresses only those acts where proof of specific intent to obstruct justice is evident.

[86]*R.* v. *Gray*, *supra* note 22.

[87]Note that the dictionary definitions for contempt *do* convey this information.

confidence in the courts and threaten the rule of law and social order, it is assumed by the law of contempt that the cumulative effect of smaller acts of contempt will have precisely that effect. Thus the law of contempt is involved primarily in addressing the small contempts, the isolated acts of disrespect which make the courts appear weak and inefficacious.

In the course of protecting themselves, courts must be careful to address only those acts which have a real tendency to undermine public confidence. The courts do not punish an individual for discourteous behaviour which is too trivial to be considered contempt. They look for a "serious" risk of harm to public confidence. While it is not always easy to draw the line between trivial and serious contempts, and while the line may be drawn differently by different courts, the line must be drawn on each occasion of a potential contempt. To let a serious contempt to pass unnoticed, or to punish a mere discourtesy as a serious contempt, may in itself constitute a contempt. It is the court's duty and responsibility to take contempt seriously.

CHAPTER II THE INHERENT JURISDICTION TO FIND CONTEMPT

In Canada, the rule of law and the social order which it supports are of paramount importance. The rule of law is constitutionally guaranteed. Courts of law are important because they apply and enforce the rule of law. They are also constitutionally guaranteed. Such important institutions must themselves be protected. The contempt power provides that protection. As Lord Denning stated,

> [t]he course of justice must not be deflected or interfered with. Those who strike at it, strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power - a power instantly to imprison a person without a trial - but it is a necessary power.[88]

Lord Denning refers to two very important aspects of the contempt power: (A) that judges "must have" it; and (B) that it includes the power to deal summarily with a contemnor. The first aspect is commonly referred to as the "inherent jurisdiction" of courts to deal with contempt; the second is commonly referred to as the "summary power". An examination of these two aspects of the contempt power shows that it is essential to the very existence of a court.

A. Inherent Jurisdiction of the Courts

I shall explore the "inherent jurisdiction" aspect of contempt under the following headings:

1. The constitutional status of the contempt power;
2. The consistency of the inherent jurisdiction with parliamentary sovereignty and the rule of law;

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[88]*Morris* v. *Crown Office*, *supra* note 17 at 122.

3. Parallels with the position of rules of court; and
4. The practical difficulties of codification.

1. The Constitutional Status of the Contempt Power

As the power of the monarchy waned and the power of the courts increased, the contempt power became viewed, not as the king's delegated power, but as an inherent right of English courts. This view is expressed in numerous early judgments,[89] but none so authoritatively as in that of Wilmot J. in *R.* v. *Almon* where he reasoned:

> The power, which the courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice ... And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage as supports the whole fabrick of the common law; it is as much the 'lex terrae,' and within the exception of Magna Charta, as the issuing any other legal process whatsoever.[90]

Sir William Blackstone echoes this view in his *Commentaries on the Laws of England.* He states that contempt of court is an inherent component of the court's jurisdiction, used by the superior courts since time immemorial to punish direct insult or resistance to the powers of the courts or the judges, and to punish acts or words which tend to create a universal disregard of the authority of the judges.[91]

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[89]For example, "It is incident to every superior court of Justice to have the power to fine and imprison for contempt": *R.* v. *Clement* (1822), 11 Price 68, 147 E.R. 404 at 87, cited in *C.B.C.* v. *Cordeau* (1979), 48 C.C.C. (2d) 289 at 299 (S.C.C.); "[The] power is necessary for the due administration of justice, to prevent the court being interrupted": *R.* v. *Lefroy*, *supra* note 22 at 137-8; "The privilege of committing for contempt is inherent in every deliberative body invested with authority by the Constitution": *Stockdale* v. *Hansard* (1837) 3 St. Tr. (N.S.) 854, Lord Denman, C.J.

[90]*R.* v. *Almon*, *supra* note 27 at 99.

[91]Blackstone, *supra* note 55 at 283.

The court's inherent jurisdiction to find contempt is said to be derived from the very nature of a court. It is an indispensable and inalienable part of the court's jurisdiction. Sir I.H. (Jack) Jacob's eloquent and oft-quoted words to this effect are as follows:

> ...[T]he jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent." This description has been criticised as being "metaphysical," but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.[92]

Jacob's statement of the law has been adopted by the Supreme Court of Canada in *MacMillan Bloedel Ltd.* v. *Simpson*.[93] In that case, the British Columbia Supreme Court had found a youth in contempt of court for disobeying an injunction prohibiting the blockading of roads leading to Clayoquot Sound on Vancouver Island. The youth appealed the conviction on the basis that the *Young Offenders Act* excluded all courts but the Youth Court from making a finding of contempt in relation to a youth. Lamer C.J., on behalf of the majority, held that legislation which purports to remove from the superior court's jurisdiction the power to find contempt is *ultra vires* and must be struck. The contempt power as it now exists (including the summary power) cannot be removed from the

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[92]Sir I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23 [hereinafter "Jacob"] at 27-28, quoted with approval by Lamer C.J. in *MacMillan Bloedel Ltd.* v. *Simpson*, *supra* note 84 at 749-50.

[93]*MacMillan Bloedel*, *ibid.*

jurisdiction of the court without constitutional amendment, for to remove it would be "tantamount to abolishing" the superior court.[94] The contempt power is an essential core power inherent in superior courts; so essential that the court could not survive without it:

> Without this core jurisdiction, s. 96 could not be said either to ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary.[95]
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> ... [N]o aspect of the contempt power may be removed from a superior court without infringing all those sections of our Constitution which refer to our existing judicial system as inherited from the British, ... and the principle of the rule of law recognized both in the preamble and in all our conventions of governance.[96]
>
> Essential historic functions of superior courts cannot be removed from those courts and granted to other adjudicative bodies to meet social policy goals if the resulting transfer contravenes our Constitution.[97]

He added that a system of codified offences would be antithetical to our system where the superior court plays the central role, because nothing can oust the court's inherent jurisdiction.[98]

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[94] *Ibid.* at 753-54.

[95] *Ibid.* at 741.

[96] *Ibid.* at 756.

[97] *Ibid.* at 739.

[98] *Ibid.* at 745. The Supreme Court in this case was not the first to consider whether the legislature has the power to regulate contempt of court. Laskin J. in *R.* v. *McKeown*, *supra* note 77 at 6 asked the same question (without answering it) in respect of both substance and procedure, and whether the right to appeal to a provincial appellate court was a matter for the legislature.

2. Consistency of the Inherent Jurisdiction with Parliamentary Sovereignty and the Rule of Law

Lamer C.J.'s view was not unopposed. McLachlin J., supported by three judges to form a strong minority, took the view that the contempt power is *not* inalienable from the superior courts - at least not the power to find contempt *ex facie*. McLachlin J. argued that Parliament *may* legislate, and has legislated, to limit the superior courts' powers with respect to contempt of court.[99] Provincial legislatures, for example, have set guidelines for finding contempt of court.[100] In the *Criminal Code*, Parliament has prescribed how a court must deal with contempts arising in certain circumstances.[101] The very preservation of the common law offence of contempt by s. 9 of the *Criminal Code* is implicit recognition that some jurisdiction over contempt law is assumed by Parliament.[102] McLachlin J. queried whether it is necessary to build an impregnable wall around core court powers if the position of the superior courts is to be preserved.[103] She noted that, in spite of jurisdiction transferred to tribunals, the superior courts have retained their jurisdiction to review tribunal decisions as to the basic requirements of legality and

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[99]*MacMillan Bloedel*, *supra* note 84 at 772-774. Note that England has legislated much of the law of contempt in the form of the *Contempt of Court Act, 1981* (U.K.) c. 49. That legislation was based on the recommendations of the Phillimore Committee in its *Report of the Committee on Contempt of Court* (London: Her Majesty's Stationery Office Cmnd. 5794, 1974).

[100]McLachlin J. does not provide references. She may be referring to court rules such as Alberta's *Rules of Court* 701 through 704 regarding civil contempt.

[101]Sections 127(1), 708(1), 605(2), 484, 486(1) and (5), for example.

[102]Words in the *Criminal Code* which simply purport to preserve the contempt power are something quite different from legislating in respect of the contempt power. Legislating the contempt power would involve defining the parameters of the *actus reus* and *mens rea*, something which has obviously not been done in the *Criminal Code*. Further, McLachlin J.'s argument may be a *non sequitur*. Parliament has on numerous occasions legislated in an *ultra vires* manner. The very constitutional question under consideration in *MacMillan Bloedel* is an example of legislation being challenged as being *ultra vires* parliament.

[103]*MacMillan Bloedel*, *supra* note 84 at 775.

fairness.[104] McLachlin J. suggested that by this process the "primal position" of the superior courts may have been enhanced or elevated. She argued that the removal of civil contempt power from the superior court in respect of youths does not erode essential power of the superior courts. "What is essential to maintaining the authority of a court is that consequences attach to the disobedience of its order. It would seem immaterial whether the consequences derive from the same court as issued the initial order, or from a different court. It is the attachment of criminal consequences which gives the order its force, not the source of those consequences."[105] The Attorney General would occupy its usual role in gathering evidence and prosecuting offenders.[106]

This reference to the consequences of disobedience highlights a weakness in McLachlin J.'s argument. Penal sanctions or "consequences" to either civil or criminal contempt must be promptly applied in order to be effective. This is why a finding of contempt is made by summary process. To wait for the Attorney General to investigate, prepare the documentation, set a date for the matter to be spoken to and undertake the gamut which is ordinary criminal procedure, is to wait too long. The injury would be permitted to go unstopped and unpunished too long. Justice would not be done, either for a party in whose favour a court order was made, or for the court which must protect itself from abuse in order to function effectively.

Furthermore, penal sanctions for, or "consequences" of, civil or criminal contempt must be applied directly by the court which has been disobeyed, insulted or obstructed. Its authority would be diminished by its having to make a referral to another court or to the Attorney General. Implicit in the referral would be a lack of authority, a weakness. Its

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[104]She cites *Crevier* v. *Attorney General of Quebec*, [1981] 2 S.C.R. 220.

[105]*MacMillan Bloedel*, *supra* note 84 at 776. Here McLachlin J. may be overlooking the power of summary procedure, which is an indispensable element of the contempt power. See discussion below.

[106]*Ibid.* at 777.

authority would be further weakened by the loss of the denunciatory objective of punishment. Additionally, the independence of the judiciary is compromised. An independent court should be seen to defend itself and not rely on the Attorney General to protect it. The Attorney General may exercise a discretion to forego prosecuting contempts which it considers are not worthy of pursuit. It may not share the court's appreciation for the dangers inherent in contempt, and may permit many contempts to go unpunished. In the result, the judiciary would be tied to the executive to protect it from acts and words which interfere with its orderly process.

As if she anticipated these arguments, McLachlin J. concedes that her remarks relate to civil contempt only, and that the criminal contempt power must remain with the court.[107] The foregoing arguments, however, apply equally to civil contempt. The authority of the court is best maintained when the court itself controls the process of contempts committed against it. Disobedience of a court order is no less an affront to the authority of the court than disrespectful conduct in its face.

McLachlin J.'s other comments relate primarily to Parliament's or the legislatures' ability to legislate in respect of the court's inherent jurisdiction. Her difficulty with Lamer C.J.'s approach concerns the implication that there are aspects of the superior court's jurisdiction which cannot be touched by the legislature or by parliament. In her view, "the superior courts of this country are controlled by an elaborate matrix of statute and regulation limiting the way they exercise powers over their own process."[108] Parliament and the legislatures are entitled to control how the court conducts itself in the administration of justice. She argues that provincial rules of court are a primary example of this. Rules of court are legislated. Courts are not permitted to substitute their own ideas of appropriate rules for those passed by the legislature. Core powers of the court, such as the inherent

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[107] *Ibid.* at 778.

[108] *Ibid.* at 773.

jurisdiction of the court to control its process, defy the principle of the supremacy of Parliament and the legislatures. "All of this is simply to restate the general principle that courts must conform to the rule of law. They ... must generally abide by the dictates of the legislature. It follows that parliament and the legislatures can legislate to limit the superior courts' powers, including their powers over contempt..."[109]

McLachlin J. makes a good point. In a liberal democracy such as ours, courts of law apply the law as it is made by the people through their elected representatives. Courts are delegated the responsibility of administering the existing law. They apply sanctions to those who offend the *Criminal Code*, for example. They impose penalties on those who commit regulatory offences. They do much more than that, however. They also interpret legislation. They settle disputes between private litigants according to the common law. They determine whether one party's legal rights take priority over another's. They develop the common law by creating legal rules and tests which organize particular legal problems and make their solutions predictable and consistent. They strike down legislation which does not conform with paramount legislation, or which places expediency before fairness or justice. They change law. They make law.

Since courts make law as well as apply it, they share with Parliament and the legislatures a role in developing the rule of law. McLachlin J. states only half the truth when she says that "courts must conform to the rule of law."[110] In fact, legislatures and the courts, together with the executive, are partners in forming and administering the rule of law. One is not more important than the other. According to Peter Hogg, "[t]here is no general 'separation of powers' in the *Constitution Act, 1867*. The *Act* does not separate the legislative, executive and judicial functions and insist that each branch of government

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[109]*Ibid.* at 774.

[110]*Ibid.* at 774.

exercise only 'its own' function."[111] A partnership requires mutual respect and cooperation in order to achieve its goals.

3. Parallels with the Position of Rules of Court

Historically, all rules of court were made by judges. Parliament did not intervene. Rules were the result of decisions and directions given in particular cases. Rules, or orders, developed according to these decisions and directions. Judges of the superior courts gradually built up a common law procedure suited to the character of the issues coming before them. The "inherent jurisdiction" of the court to control its own process and to prevent abuse of its process was well recognized. Parliament then began to legislate in respect of various aspects of the common law. "[W]hen Parliament set out upon its career as law reformer about the middle of the nineteenth century, ... rather than upset a useful and established custom, it clothed the custom with its sanction and elevated it to the dignity of statute law."[112] Jacob states that English judges exclusively made rules regulating court procedure until 1830, when Parliament officially recognized and approved the exercise of this power and conferred on judges further specific powers to make rules to regulate court proceedings. In 1832, Parliament delegated the power to the judges of the superior courts, to their Rule Committee, on the understanding that the rules would have the force of law. In 1894 the Rule Committee was extended to include practising lawyers.[113]

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[111]P.W. Hogg, *supra* note 13 at 184, as cited by McLachlin J. in *MacMillan Bloedel Ltd.*, *ibid.*at 760. She quotes Hogg in support of her proposition that legislatures may legislate in respect of judicial functions. I quote Hogg in support of the proposition that courts share the law-making function with Parliament and the legislatures (and the executive).

[112]Samuel Rosenbaum, *The Rule-Making Authority in the English Supreme Court* (Boston: The Boston Book Company, 1917) at 3-4.

[113]Jacob, *supra* note 92 at 33-34.

According to Jacob, the establishment of the Rule Committee and the process of statutory rule-making did not remove the court's inherent jurisdiction to make rules to govern its process. He states that the existence of the Rule Committee of the Supreme Court "provides a typical example of judicial power in England and constitutes a characteristic feature of the English legal system."[114] Jacob continues by saying:

> But of course, the creation of rule-making authorities, such as the Rule Committee of the Supreme Court, has not destroyed or exhausted, but only to a certain extent regulated, the inherent jurisdiction of the court to regulate its proceedings which continues to flourish and to be exercised on a considerable scale in the form of what are called Practice Directions. By this means, every branch of the Supreme Court seeks to regulate its proceedings in the areas of procedure which are not directly regulated by Rules of Court... Even the House of Lords employs the method of issuing Practice Directions to regulate its proceeding.[115]

The Alberta Court of Queen's Bench inherits its inherent jurisdiction from England via the *Judicature Act*, and consequently it includes the jurisdiction to make rules.[116] The *Court of Queen's Bench Act*, however, provides that the lieutenant governor in council by regulation may make rules governing the practice and procedure in the court.[117] The *Court of Queen's Bench Act* also creates in s. 23 a Rules of Court Committee, one half of whose members are judges, and whose role it is to consider the rules of court made under the Act and any other Act and make recommendations respecting those rules of court to the Minister of Justice and the Attorney General. Because the court's input to this process of rule-making is limited, the *Alberta Rules of Court* expressly authorizes judges of the Court of Queen's Bench to make additional rules where necessary. Rule 964 of the *Alberta Rules of Court* provides: "The judges of the Court of Queen's Bench and Court of Appeal are

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[114]*Ibid.* at 34.

[115]*Ibid.* at 34-35.

[116]R.S.A. 1980, c. J-1, s. 4.

[117]R.S.A. 1980, c. C-29, s. 18(1).

hereby authorized to alter and amend any Rules of Court or tariffs of costs or fees for the time being in force, or make additional Rules or tariffs." This rule is essentially a codified residual inherent jurisdiction to make rules. It has not been directly judicially considered and may never have been invoked, except possibly to the extent of issuing practice directions.

The development of rules of court has been and continues to be a successful exercise of cooperation between the judicial, legislative and executive branches of government. Today the court's inherent jurisdiction to make or "bend" rules of court is primarily residual. In 1990 the Supreme Court of Canada had opportunity to consider a rule similar to Alberta's Rule 964. Rule 7 of the Supreme Court Rules stated that when the Rules contained no provision for exercising any right, the Court was able to specify and adopt a procedure not inconsistent with the Rules or the governing Act. Sopinka J. said in relation to this rule:

> In my opinion, it would be extraordinary if the court were powerless to remedy the injustice that is conceded as present in this case. As a general principle, the rules of procedure should be the servant of substantive rights and not the master. I believe that this is the underlying rationale of Rule 7...[118]

A number of the *Alberta Rules of Court* attest to the fact that rules of court are intended to be servants, not masters, in the effort to provide an effective means of litigating. They suggest the power of the court to alter rules and adopt new rules according to the demands of justice. Rule 3, for example, provides: "These Rules shall apply so far as may be practicable, unless otherwise specially provided, to all proceedings taken on or after that day in all actions and other proceedings then pending." Rule 4 provides that all matters not provided for in the Rules shall be regulated by analogy thereto. Rule 558 provides that where there is non-compliance with the Rules, the act or proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with.

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[118] *Reekie* v. *Messervey*, [1990] 1 S.C.R. 219 at 222.

The court's involvement in the rule-making process is therefore a co-operative endeavour between the three branches of government. A small cloud of suspicion, however, tends to hover over this highly effective process: "What if the court uses its power to do something wrong?" This may have troubled McLachlin J. and the minority in *MacMillan Bloedel Inc.*, and it troubles Professor Dockray of The City University of London. In a recent article entitled "The Inherent Jurisdiction to Regulate Civil Proceedings", Dockray cites, without the benefit of context, examples of English courts using the inherent jurisdiction to deny a litigant a full hearing, to make orders without listening to the party affected, to decline to hear an advocate, to exclude a party or the public from the courtroom, to arrest or to grant bail, to order a party to speak or to keep silent, to require parties to surrender their property before judgment, and to submit to search and seizure.[119] He asserts that extravagant claims have been made to the effect that the court has inherent jurisdiction to order anything it thinks necessary to do justice in pending proceedings.[120] "Such a rule is too vague", he says. It is too "unpredictable to be treated as having the quality of law. Taken literally, this claim is an invitation to the court to assume virtually despotic powers".[121]

Dockray's comments are somewhat alarmist and surprisingly un-English. They belie a lack of confidence in courts (a) to respect their proper role in government, and (b) to administer the law judiciously. This is unfortunate, for the entire common law tradition depends on confidence in the courts to develop the law according to concepts such as fairness and natural justice. Dockray may not appreciate the law-making function of courts of law. He may not view the rule of law as a cooperative endeavour between the three

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[119]M.S. Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 L.Q.R. 120 [hereinafter "Dockray"] at 120.

[120]He cites no authority for this proposition.

[121]Dockray, *supra* note 119 at 128-129.

branches of government. Like Iago in Shakespeare's *Othello*, he sows seeds of distrust between the partners.

Dockray is not the first to have been wary of the court's inherent powers. Jacob acknowledges the potential for abuse, but finds an even greater potential for abuse without the inherent powers. He says:

> It may be objected that this view of the nature of the inherent jurisdiction of the court postulates the existence of an amplitude of amorphous powers, which may be arbitrary in operation and which are without limit in extent. The answer is that a jurisdiction of this kind and character is a necessary part of the armoury of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers, and free from the restraints of their jurisdiction in contempt and the Rules of Court, it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice.[122]

If Dockray's words are taken merely as a warning to the courts to continue to observe the limits or boundaries of their inherent jurisdiction, then his comments are useful. For example, he urges that where "major innovations in procedural law" are concerned, the inherent jurisdiction should be reserved for residual matters only. He states:

> Where procedure is as important as substance, procedural change requires the same degree of political accountability and economic and social foresight as reform of an equivalent rule of substantive law. Major innovations in procedural law should therefore be recognized as an institutional responsibility, not a matter on which individual judges should respect to the please of particular litigants. Procedural revolutions should appear first in statutes or in the Rules of Court, not in the law reports.[123]

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[122]Jacob, *supra* note 92 at 51-52.

[123]Dockray, *supra* note 119 at 131.

Dockray urges courts to use their inherent jurisdiction in areas of civil procedure which are "only lightly touched by statute or rules or where there has been an important change in circumstances."[124] In fact, Canadian courts are aware of limits to their inherent jurisdiction. The Supreme Court has stated that courts are to exercise their inherent jurisdiction only where there is a legislative gap; where the court needs to act in the circumstances but has no legislative basis on which to do so.[125] Because the law of contempt in Canada is not legislated, the gap is filled by the common law.

3. The Practical Difficulties of Codification

As for the ability of the legislature to codify contempt,[126] McLachlin J.'s argument may one day prevail. The constitutional hurdle may be overcome, and the law of contempt may become codified in Canada as it has been in England. In that event, the common law of contempt will continue to evolve; but it will evolve instead around the various contempt provisions of the *Criminal Code* or in a separate "Rules of Contempt". Codification of the common law of contempt would, and should, parallel the codification of the rules of court. It should reflect as nearly as possible the common law of contempt as it exists today, for the law as it exists has been fine-tuned over centuries of development. Parliament or the legislatures should not attempt to "re-invent the wheel" without first coming to appreciate that the law of contempt is currently very well suited to its goals. This fact will be seen in the chapters which follow. As with the rules of court, judges should have considerable input into the codification and on-going creation and revision of the rules of contempt. Cooperation and mutual respect among the three branches of government should be reflected in control of the contempt power as it is reflected in the rule-making power. The court's inherent jurisdiction would remain intact. It would not be destroyed or exhausted,

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[124]*Ibid.*

[125]*Beson* v. *Newfoundland (Director of Child Welfare)*, [1982] 2 S.C.R. 716.

[126]Note that this question was not before the court, and its comments are *obiter dicta*.

but only to a certain extent regulated. In the event of legislative gaps, or in circumstances where application of a rule would defeat justice, the court would resort to its inherent jurisdiction in performance of its duty to protect the court from those who would abuse it.

That said, there exists no compelling reason to codify the law of contempt - as there is no compelling reason to codify the law of torts or the law of contract. The law of contempt is a substantial body of law. Chapters 3 and 4 of this thesis are devoted to understanding the elements of only one isolated form of contempt - one form among possibly several dozen. If the law of contempt were codified, a substantial code would be required, possibly as substantial as the current form of the rules of court. It would be in constant need of revision, as new varieties of contempt are committed from time to time, as new circumstances arise, and as changes to the law are required to reflect changing perspectives of fairness and justice. Codifying the law of contempt would be an undertaking comparable to codifying the law of tort.

There is a further difficulty with which drafters of a code of contempt must contend. The court's inherent jurisdiction to punish for contempt of court may, depending on the circumstances of the case, overlap two other areas of inherent jurisdiction.[127] Where the court punishes a solicitor, the contempt power overlaps the court's supervisory jurisdiction over officers of the court.[128] Where the court punishes a person for interfering with the

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[127]It is not known whether the court's inherent jurisdiction is one power or several distinct powers. In Dockray's opinion, there are several inherent jurisdictions, not one. See Dockray, *supra* note 119 at 121.

[128]Sir William Holdsworth writes in his *History of English Law*, *supra* note 30 at vol. III, p. 391, that the contempt power was originally used, "firstly, to punish direct disobedience to the process of the court, and secondly, to punish all kinds of irregularities and misfeasances of officials of the court." The court applied a summary power of committal over its officers in respect of contempts done in the execution of their office. See Sir John Charles Fox, "The Summary Process to Punish Contempt" (1909) 25 L.Q.R. 238 at 245. Court officers included barristers and solicitors, receivers, liquidators, sequestrators, sheriffs, bailiffs, jurors, witnesses and even judges of inferior courts. See

court's procedure, the contempt power overlaps the court's inherent jurisdiction to control its process and prevent abuse of process. Speaking in relation to the overlap of the contempt power and the court's power to control its process, Jacob states: "The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction."[129] Presumably where the overlap of these jurisdictions involves a lawyer, the court's supervisory jurisdiction becomes involved as well. The result is a complex combination of powers. Where the court is seized with a situation where a lawyer interferes with the conduct of litigation by failing to appear, three heads of powers are engaged. The court may punish the lawyer for contempt of court, for interfering with its process, for dereliction of duty or misfeasance,[130] or for any combination thereof.[131]

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also Holdsworth, *ibid.* at 391-394. The reference to inferior court judges being susceptible to the contempt power is interesting. Sir William Blackstone indicates in his *Commentaries*, *supra* note 55 at 284 that inferior judges and magistrates were summarily punished for acting "unjustly, oppressively, or irregularly in administering those portions of justice which are intrusted to their distribution, or by disobeying the king's writs issuing out of the superior courts by proceeding in a cause after it is put a stop to or removed by writ or prohibition, certiorari, error, supersedeas and the like, for, as the king's superior courts (and especially the courts of king's bench) have a general superintendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority whose duty it is to keep them within the bounds of justice." At the same time, jurors were fined for eating and drinking before giving their verdict, or for failing to appear. Sheriffs and undersheriffs were attached for permitting the jury to go at large. Attorneys were punished for irregularities such as scandalizing the court or for sharp practice. See Holdsworth, *ibid.* at 392. They were punished for fraud and corruption, injustice to their clients or other dishonest practice. See Sir William Blackstone, *ibid.* at 284. They were punished for purposely causing delay in litigation and for issuing frivolous process. For these offences they could be imprisoned without bail, fined and struck off the rolls. These officers fell under a special disciplinary jurisdiction. See Fox, *ibid.* at 244-45. It was thought that malpractice of the officers reflected some dishonour on their employers which, if it went unpunished, would create among the people a disgust against the courts themselves. See Sir William Blackstone, *ibid.* at 284.

[129]Jacob, *supra* note 92 at 25.

[130]The court's inherent jurisdiction to punish officers of the court continues to exist despite legislation such as Alberta's *Legal Profession Act*, R.S.A. 1980, c. L-9.1 which

This phenomenon of overlapping jurisdictions has not been problematic in the common law because the court's goal has always been one: to maintain the court's integrity. The cases do not always describe the particular heads of jurisdiction which are invoked to punish a lawyer for failing to appear in court at the appointed date and time. Nevertheless it is clear that the three heads of jurisdiction are involved in a significant number of the cases. Any proposal to codify the law of contempt must be sensitive to the existence of several inherent jurisdictions. It must ensure that the court retains its jurisdiction to supervise officers of the court. This would require a special section relating to officers of the court. It would require a listing of (a) the duties of each kind of officer;[132] (b) the ways in which those duties may be breached; (c) the required *mens rea* for each breach of duty; and (d) penalties and remedies in respect of each form of breach of duty. This would be a substantial undertaking.

B. The Summary Process

The inherent jurisdiction is also manifest in the summary process employed when the contempt power is invoked. The court may employ the procedure which best suits the circumstances. Where the contempt is committed away from the court and is not urgent,

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establishes the Law Society and its discipline committee. In *Myers* v. *Elman*, [1940] A.C. 319, Lord Wright imposed costs sanctions in respect of a lawyer who had acted improperly in the conduct of litigation and said: "The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally... This summary procedure may often be invoked to save the expense of an action... The jurisdiction is not merely punitive but compensatory." Costs sanctions against lawyers are now contained in the rules of court and the court need not invoke its inherent jurisdiction. This is a further example of overlapping inherent powers.

[131]There is an interface as well with the law society's disciplinary process and the provincial code of ethics.

[132]The rights and duties of receivers, sheriffs, lawyers, bailiffs, etc., would differ from one another.

the court may choose to summon the alleged contemnor to a show cause hearing to be held within two weeks. Where the contempt is committed in the face of the court and is particularly egregious, the court may choose to hold the show cause hearing the same or the following day, or even make a finding of guilt immediately. In each case the judge must determine the most appropriate procedure, guided by the object of contempt power on the one hand, and by principles of fairness on the other. A great deal of trust is reposed in a judge to exercise her powers judiciously. If the judge fails to employ the contempt power judiciously, she may be appealed from, reprimanded by the chief justice or may ultimately be removed from office.[133] Removing the contempt power is not an option.

The summary process is an extremely important aspect of the contempt power. Some interpret the word "power" in the term "contempt power" to be summary process itself.[134] Summary process means essentially that the court adopts a method of procedure which is different from the ordinary trial procedure. The court exercises its powers without a normal trial.[135] Jacob writes, "The distinctive and basic feature of the inherent jurisdiction of the court is that it is exercisable by summary process, i.e., without a plenary trial conducted in the normal or ordinary way, and generally without waiting for the trial or for

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[133]See *Judges Act*, R.S.C. 1985, c. J.1, Part II regarding removal of superior court judges.

[134]Adrian Popovici, author of *L'outrage au tribunal* (Montreal: Themis, 1977) refers at 130 to contempt of court as part power and part offence. There is an offence which attracts penal sanctions, and there is a power of the court, notably to find and penalize for the offence by means of the summary procedure. Popovici is cited with approval by Lamer C.J. in *MacMillan Bloedel*, *supra* note 84 at 745. I would disagree with Popovici. The "power" in the "contempt power" is the very jurisdiction of the court to find someone in contempt and punish accordingly. The jurisdiction to act in a summary fashion is additional to this power; it is a complementary power; essential in some circumstances but not in others.

[135]Summary proceedings against *all* manner of contempts of court is said to have been derived primarily from the practice of the Star Chamber and which was adopted by common law judges (at least since 1641) when the Star Chamber was abolished. See Jacob, *supra* note 92 at 26; Holdsworth, *supra* note 30 at 393.

the outcome of any pending or other proceeding."[136] The exact procedure for the summary determination of a case of contempt may vary from case to case.[137] The Canadian Judicial Council gives judges a broad discretion to act as the circumstances of each case may require:

> The judge can adjourn the matter until the end of a pending trial, if any, or deal with it immediately as circumstances may require, and the judge can rely upon his or her own knowledge if relevant, or hear evidence or read affidavits or act on a combination of these sources of fact. The important point is that the court is not required to conduct a trial or hearing alleging criminal contempt in accordance with the Rules of Court. There are no pleadings (although there may be affidavits). There may or may not be discovery or cross-examination on affidavits as the court orders. There is no right to trial by jury, and the matter may be resolved expeditiously or in a more formal way as the court considers appropriate.[138]

The court is not bound by time limits or other procedural rules "except, of course, the principles of fairness",[139] which have been summarized as follows:

> (a) the alleged contemnor is in fact invited to answer in respect of a specific offence;
> (b) if he opposes the motion he has the right of a full and fair trial;
> (c) he is presumed innocent until he is proven guilty;
> (d) the Crown has the burden of proving his guilt beyond a reasonable doubt;
> (e) he has the right to call witnesses in his defence;
> (f) he cannot be compelled to testify;

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[136]Jacob, *supra* note 92 at 25.

[137]*Some Guidelines*, *supra* note 18 at 17. There are several degrees of summary process, and the fact that the procedure adopted was by originating notice rather than by indictment already indicates a form of summary process. See *Tilco Plastics Ltd.* v. *Skurjat*, [1967] 1 C.C.C. 131 at 147 (Ont. H.C.).

[138]*Some Guidelines*, *ibid. at* 20-21.

[139]*Ibid.* at 18.

(g) before he even appears in court he is presented in an affidavit form with all of the evidence against him and knows exactly not only the charge which he must answer but also the evidence which he must meet; and,

(h) he has the full right of appeal from conviction and sentence by virtue of the *Criminal Code*.[140]

According to Jacob, the summary process was used "from earliest times" in relation to the offences of (a) contempt in the face of the court, (b) disobedience to the process of the court, and (c) irregularities and misfeasances of its officers. Proceeding by means of summary process was therefore typical of cases involving the court's inherent jurisdiction.[141] Lord Blackburn explained the reason for this in *Skipworth's Case*:

> Now, it may happen, and in many cases does happen, that persons interfere for the purpose of preventing that ordinary course of justice. There are many decided cases in which such an attempt has been made ... Most things which are done in that way may be liable to punishment by the criminal law, or they may be conspiracies punishable by the criminal law, or they may be assaults punishable by the criminal law; and generally, if there are attempts to influence the due course of justice, they would be punishable by the criminal law. But then, if we are to wait for that to be done by ordinary criminal process and an ordinary trial, there might be great mischief done, because that process is slow, and before that process could come into train the mischief would be done by the due administration of justice being hampered and thwarted. For that reason, from the earliest times, the Superior Courts ... have always had power to deal summarily with such cases.[142]

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[140]Re Smallwood (1980), 25 Nfld. & P.E.I.R. and 68 A.P.R. 198 at 204-205 (Nfld. S.C.); *R.* v. *Robinson-Blackmore Printing and Publishing Co.* (1989), 48 C.R.R. 327 (Nfld. S.C.). The Canadian Judicial Council supports this statement of the law in *Some Guidelines*, *ibid.* at 21.

[141]In making this statement, Jacob relies on the highest authorities: Fox, *History of Contempt of Court*, *supra* note 23, and Holdsworth, *History of English Law*, *supra* note 30, which were based on articles published by Fox in 24 L.Q.R. (1908), pp. 184 and 266 and 25 L.Q.R. (1909) at 238 and 354. Jacob also relies on *Oswald*, *supra* note 25 at 3.

[142][1873] L.R. 9 Q.B. 230.

Possibly the most important purpose of the contempt power is to *prevent* interference with the administration of justice. The contempt power seeks to curtail actions which, if left unstopped, would tend to[143] impede the course of justice. Prevention can only occur where there is the power to act *before* there is actual interference with the administration of justice, or to *stop* the interference where it has begun.[144] Laskin J. stated in *R.* v. *McKeown* that "[t]he summary procedures had and have their justification in the need, according to the circumstances, to deal immediately with any obstruction or outrage affecting the conduct of judicial proceedings or interfering with the orderly processes of the law or involving a disobedience to the orders of a court or Judge."[145] Spence J. added in the same case that "[w]hen a contempt is 'in the face of the court', in most cases it cannot be dealt with efficiently except immediately and by the very judicial officer in whose presence the contempt was committed. No other course would, in most cases, protect the administration of justice."[146]

The existence and exercise of the summary process is controversial. In fact, according to the Law Reform Commission of Canada in its *Report 17*, the *majority* of criticism levelled against contempt of court relates to the summary procedure.[147] Much of the controversy

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[143]The *actus reus* of contempt consists of acts which either do or which "tend to" interfere with or obstruct the course of justice. See Chapter 1, subheading D(3) "Committing Acts of Disrespect", and Chapter 3, headings A "The Meaning of the Term 'Calculated'", and D "The Measure of Contempt".

[144]*Phillimore Report*, *supra* note 99 at 2. One author on the subject of contempt has stated, "Though all societies punish people for what they have done, only the common law punishes man 'in order to do violence to his incoercible freedom to do or not to do something' ... The sanction is aimed at resisting will." See Goldfarb, *supra* note 24 at 3.

[145]*R.* v. *McKeown*, *supra* note 77 at 9, Laskin J.

[146]*Ibid.* at 7. He continued at p. 8: "When, however, the contempt is not "in the face of the court", then it can be dealt with subsequently before any other tribunal ... with the accused being permitted all the protections of an ordinary trial for an ordinary offence."

[147]Law Reform Commission of Canada, *Report 17: Contempt of Court* (1982) at 15.

revolves around the summary process being applied to contempts committed away from the court. Sir John Charles Fox devoted lengthy essays and an entire book to the thesis that the summary process was not originally applicable to contempts committed away from the court.[148] Resort to the summary process may involve a curtailment of a party's right to have his case on the merits heard by a court of law in the ordinary way at a trial.[149] Laskin J. stated in *R.* v. *McKeown* that the principles of fair hearing before an impartial tribunal "have had a stunted application at best in the summary procedures that have for long characterized judicial control of various types of contempt, whether committed in the view of the court or out of court."[150] This is a primary reason why the courts are urged to find contempt only in the clearest cases where contempt is evident beyond reasonable doubt or argument. "The exercise of the jurisdiction should not be pressed a single point beyond the genuine necessities of the case - necessities, I mean, that are founded on realities estimated by a mind that shirks no issue and turns a blind eye to no facts."[151] Since 1982, criticism of the summary power has been made by *Charter* challenge.

Charter challenges have taken the following forms:

- alleged violations of s. 7, right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, including alleged violations of the right to be notified of the particular allegations of contempt, the right to a hearing, the right to make full answer and defence including the right to

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[148]*Supra* notes 23, 25 and 128. Fox's essays and book attack Wilmot J.'s pronouncement in *R.* v. *Almon*, *supra* note 27: " And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage as supports the whole fabrick of the common law; it is as much the 'lex terrae,' and within the exception of Magna Charta, as the issuing any other legal process whatsoever."

[149]Jacob, *supra* note 92 at 30.

[150]*R.* v. *McKeown*, *supra* note 77 at 8-9.

[151]*Attorney General* v. *O'Kelly*, [1928] I.R. 303 at 326 (High Ct.), Meredith J.

counsel, the right to cross-examination and the right to submit or call evidence, and the right not to be compellable as a witness at the hearing.

- alleged violations of s.10(b), the right to obtain and instruct counsel;
- alleged violations of s.11(a), the right to be informed of the specific offence; and
- alleged violations of s. 11(d), protection against conviction by a biased tribunal and the right to be presumed innocent until proven guilty beyond a reasonable doubt.

None of these challenges has resulted in a finding that the summary procedure violates *Charter* standards.[152] While courts must generally extend to alleged contemnors every *Charter* protection available to them, there remain possible circumstances in which a court might be justified in denying a *Charter* protection. Lamer C.J. said in *R.* v. *K. (B.)* that natural justice requires the court to put the witness on notice that he or she must show cause why they should not be found in contempt. The court must provide an adjournment sufficient to offer the alleged contemnor an opportunity to be advised by counsel and to be represented by counsel if he or she chooses. The court must, upon finding contempt, provide the opportunity to make representations as to appropriate sentence. "[T]here may be some exceptional cases, involving misbehaviour in court, where the failure to take one or all of the steps I have outlined above will be justified subject to whatever qualifications

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[152]See, for example, *McClure* v. *Backstein* (1987), 17 C.P.C. (2d) 242 (Ont.H.C.); *R.* v. *Winter* (1986), 46 Alta. L.R. (2d) 393, 72 A.R. 164, 53 C.R. (3d) 375 (C.A.) (*sub nom. Winter* v. *R.*); *Doz* v. *R.* (1985), 37 Alta. L.R. (2d) 253, 59 A.R. 185 (*sub nom. R.* v. *Doz*), 19 C.C.C. (3d) 434 (Alta. C.A.), reversed on other grounds [1987] 2 S.C.R. 463, 55 Alta. L.R. (2d) 289; *R.* v. *Cohn* (1984), 15 C.C.C. (3d) 150, 13 D.L.R. (4th) 680 (Ont. C.A.), leave to appeal to S.C.C. refused (1985), 58 N.R. 160; *R.* v. *Bridges* (1990), 58 C.C.C. (3d) 1, 48 C.R.R. 356 (B.C.S.C.); *Everywoman's Health Centre Society (1988)* v. *Bridges*, (1990), 62 C.C.C. (3d) 455, 78 D.L.R. (4th) 529, 54 B.C.L.R. (2d) 273 (C.A.), supplementary reasons at 47 C.P.C. (2d) 97. And see Jeffrey Miller, *supra* note 22 at 24-32.

might be warranted in the context of a *Charter* challenge to *instanter* proceedings."[153] The *R.* v. *K. (B.)* decision relates only to cases where the summary procedure takes the *instanter* form. The merely abbreviated format for contempt procedures generally has never been constitutionally challenged.

The importance of the summary procedure to the contempt power highlights an interesting aspect of the law of contempt, namely, that the law of contempt is essentially procedural law. Both the control-of-procedure and contempt-of-court aspects of the court's inherent jurisdiction are exercisable as part of the *process* of the administration of justice. Inherent jurisdiction is part of the "machinery" of justice. The inherent jurisdiction of the court to regulate its proceedings and to punish for contempt is primarily procedural law, and secondarily substantive law.[154] The court's inherent jurisdictions (the contempt power, control over court process, and control over officers of the court) represent procedures which the court employs to keep the streams of justice flowing. Taking measures summarily to prevent abuse of its process keeps the litigation process fair and true to its purpose. Punishing summarily a person in contempt "provides a protective umbrella under which the litigant parties may fairly proceed to the determination of the issues between them free from bias and prejudice and free from any interference and obstruction of the due process of the court."[155]

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[153]*R.* v. *K. (B.)*, [1995] 4 S.C.R. 186, 102 C.C.C. (3d) 18 at 26. Lamer C.J., on behalf of the majority, overturned the conviction because the alleged contemnor had not been afforded time to secure counsel, etc. It was the dissenting opinion of Major J., however, that the facts amply warranted the application of *instanter* proceedings. See also discussion in Chapter 5, heading D "The Appropriate Speed at which to make a Finding of Contempt".

[154]Jacob, *supra* note 92 at 24. Certainly the law of contempt is a body of substantive law as well. Chapters 3 and 4 show this to be true. The substantive law concerns the circumstances in which the contempt power is engaged. The substantive law serves a procedural purpose.

[155]*Ibid.* at 29.

The procedural aspect of the contempt power is a further point which must be considered in the drafting of any proposed code of contempt. Proposals for codification have been made on the assumption that contempt rules would be included in the *Criminal Code*. Lamer C.J. has stated, however, that "criminal contempt is unique among crimes. It may even be inappropriate to call it a crime."[156] He referred to contempt as a "power". The "power [of contempt] is commonly expressed, in the English and American jurisprudence and s. 9 of the *Criminal Code*, as the judge's power to punish for contempt."[157] Section 9 of the *Criminal Code*, indeed, refers on the one hand to common law offences, and on the other hand to "the power, jurisdiction or authority that a court, judge, justice or magistrate had, immediately before the 1st day of April, 1955, to impose punishment for contempt." In *Vaillancourt* v. *The Queen*, Chouinard J. on behalf of the court adopted the following words of the trial judge:

> [Translation] The first point to be noted from reading this section is that the legislator makes a very clear distinction between an offence contained in the *Criminal Code* or in an Act or ordinance in force, and the power, jurisdiction or authority of a Court to impose a penalty for contempt of court. He has accordingly created a very clear distinction between offences and crimes, on the one hand, and the power to impose a penalty for contempt of court on the other.[158]

Chouinard J. concluded that a finding of contempt was not the same as a conviction for an offence under the *Criminal Code* or any other statute.[159] Chouinard J. was referring to the fact that the contempt power is applied primarily in an effort to keep the course of justice

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[156]*MacMillan Bloedel*, *supra* note 84 at 743.

[157]*R.* v. *K. (B.)*, *supra* note 153 at 195 (emphasis in original).

[158][1981] 1 S.C.R. 69 at 72 (emphasis in judgment of Chouinard J.).

[159]*Ibid.* at 74. Cf. *R.* v. *Cohn*, *supra* note 152 at 14 (C.R.) where Goodman J.A. states that for the purposes of *Charter* protections relating to due process, contempt of court in the face of the court "has the characteristics of a criminal offence and constitutes a criminal matter."

clear, and secondarily in an effort to punish those who would obstruct it. Accordingly, a proposed codification of the law of contempt should reflect not only its "criminal" aspect but also its procedural aspect. This may involve a "code of ethics" or "criminal code" format, or it may involve a "rules of court" format, or a combination of the two. Clearly a codification of the contempt power cannot consist solely of a statement of prohibited conduct, for this would eliminate the power to proceed summarily - something which should not and cannot be done.

CONCLUSION

The court's inherent jurisdiction to keep the streams of justice flowing freely is, as Jacob suggests, absolutely essential to the court. The power is its very life-blood; its very essence, its immanent attribute. In the case of the power to prevent abuse of process, the court must have the power to penalize litigants who misuse the legal process. "Without such a power, the court would have form but would lack substance." In the case of misfeasance of officers of the court, the court must have the power to correct and to discipline. In the case of the contempt power, the court must have the coercive power to punish contemnors. This was the thrust of the account of Prince Henry's contempt of court, reviewed in Chapter I. The court must have the authority to fulfil the judicial function of administering justice. The power - the coercive force - found in the contempt power is manifest in the fact that it is inherent in the very nature of a court of law, and that it may be exercised immediately if necessary. In the event that contempt provisions are codified, the court's jurisdiction to punish for contempt outside of those provisions remains in reserve. The jurisdiction cannot be removed from a court without rendering the court entirely powerless, without jeopardizing the rule of law.

CHAPTER III LAWYERS FAILING TO APPEAR IN COURT: THE *ACTUS REUS*

Occasionally a lawyer fails to appear in court at the appointed date and time to conduct litigation on behalf of his or her client. This failure to appear has been found to be a contempt of court. It is but one kind of contempt, one isolated manifestation of disrespect. Because the law is fairly well-developed in respect of this kind of contempt, however, it is capable of revealing much about the nature of the offence.

It reveals that each kind of contempt has characteristics in common with other kinds of contempt. These characteristics are found primarily in the broad and general principles of the offence, namely, that the object of the offence is to stop, prevent and punish for conduct which is disrespectful of the court - that is, conduct which undermines public confidence in the court and interferes with the court's business. It reveals that there remains some tension in the law as to whether to punish as contempt disrespectful conduct which tends to undermine public confidence. Appellate courts tend to overlook this aspect of contempt. They concentrate their efforts on punishing those who grind the court's business to a halt in a serious and somewhat shocking way.

A close look at this one form of contempt also reveals that each kind of contempt has characteristics which are unique to it. These characteristics are found primarily in the details of the offence. Contempt committed by a lawyer failing to appear, for example, involves a lawyer. A lawyer has a number of duties and privileges by virtue of engaging in the profession of law. A failure to appear in court implies the breach of several of these duties. One of the duties involves the failure to meet a standard of conduct expected of a lawyer who has double-booked court appearances. This common law standard of conduct is a perfect example of the intricate workings of the law of contempt. The common law has crafted the offence in such a way as to be sensitive not only to the general objects of

the contempt power, but also to the details of the particular form of contempt. While it may or may not be possible to say this of every form of contempt, the cases on lawyers failing to attend court provide a sufficient indication of the offence. The "line dividing discourtesy from contempt" (a phrase discussed below) may not be drawn with exact precision, but neither is it unduly vague. It was held in *R.* v. *Nova Scotia Pharmaceutical Society* that a statutory provision or an offence is unconstitutionally vague only where it does not provide an adequate basis for legal debate, or does not sufficiently delineate any area of risk.[160] In the case of lawyers failing to appear in court, it will be seen that there is a very clear area of risk and sufficient basis for legal debate.

This Chapter examines the *actus reus* of contempt by a lawyer failing to appear in court, with a view to identifying the wrong committed and noting its complexity. The next chapter examines the *mens rea* in the same light. To better understand the particular offence, the reader is referred to the 16 cases digested in the Appendix to this thesis. They provide a brief overview of the ways in which this form of contempt has been committed (or not committed, as the case may be).

The *actus reus* of an offence generally is the conduct which is required, by the offence's definition, to have occurred for the offence to be committed.[161] In Chapter I the traditional definition for criminal contempt of court was set out as follows:

> Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing published

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[160]*R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289.

[161]Colvin, Eric, *Principles of Criminal Law* (2d ed) (Toronto: Thomson Professional Publications, 1991) at 49.

> calculated to obstruct or interfere with the due course of justice or the lawful process of the court is a contempt of court.[162]

It is the second class of contempt which captures contempt by a lawyer's failure to appear in court. Contempt by failing to appear is an act calculated to obstruct or interfere with the due course of justice or the lawful process of the court. Jurisprudence addressing this failure to appear shows that there is more to this definition than meets the eye.

In this Chapter I shall consider the following issues bearing on the *actus reus* of contempt by a lawyer's failing to appear:

A. The meaning of the term "calculated";
B. Acts as "*prima facie* contempt";
C. The harms caused by failing to appear, including
    1. breach of duty to client;
    2. breach of duty to the court
        (a) disobedience of a court order;
        (b) breach of the standard of conduct;
        (c) causing inconvenience and embarrassment;
D. The measure of contempt;
    1. the line that divides discourtesy from contempt;
    2. the requirement of seriousness;
    3. institutional differences in assessment;
        (a) appellate courts fail to appreciate the gravity of contempt;
        (b) trial level judges are overly sensitive;
        (c) judges have various understandings of their contempt jurisdiction;

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[162]*R.* v. *Gray*, [1900] 2 Q.B. 36 at 40.

(d) trial judges appreciate that stopping "petty contempt prevents erosion of public confidence;

(e) implications of institutional differences;

E. Recommendations with respect to reform proposals.

A. The Meaning of the Term "Calculated"

It was established in Chapter I that the word "calculated" in the traditional definition for contempt means "tending to" or "likely to" or "presenting a risk of".[163] McIntyre J.A. stated in *R.* v. *Hill*:

> The word "calculated" as used here is not synonymous with the word "intended". The meaning it bears in this context is found in the Shorter Oxford English dictionary as fitted, suited, apt: see Glanville Williams *Criminal Law: General Part*, 2nd ed (1961), p. 66.[164]

The law of contempt is interested in acts or words which affect the administration of justice on two levels. Contempt is found in acts or words which actually, visibly, concretely or obviously obstruct the court or interfere with its process. It is also found in acts or words which tend to, or which are likely to, or which are fit or apt or suited to obstruct the court or interfere with its process. Either one or both of these levels of *actus reus* may operate in a finding of contempt by a lawyer failing to appear. If it is the court's duty to prevent interference with the administration of justice,[165] then it must have the power to punish,

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[163]Borrie & Lowe, *supra* note 22 at 60; The Hon. J.C. McRuer, *supra* note 41. See also Smith & Hogan, *supra* note 3 at 769 where the authors state that the *actus reus* of criminal contempt of court is any conduct which either (a) has a tendency or (b) is intended to obstruct or prejudice the course of justice in present or future legal proceedings.

[164]*R.* v. *Hill*, *supra* note 41 at 68 (B.C.C.A.), adopted in *R.* v. *Aster (No. 1)*, *supra* note 41 at 454 and *R.* v. *Anders*, *supra* note 41 at 516 (O.R.).

[165]*Re Duncan*, [1958] S.C.R. 41, 11 D.L.R. (2d) 616, Kerwin C.J., quoting with approval from *Halsbury's* vol. 8 (1954) at p. 5: "It is not from any exaggerated notion

not only for interferences already committed, but for interference which is about to be committed. Acts which tend to obstruct the course of justice are dealt with in the same manner as acts which have actually obstructed the course of justice.[166]

B. Acts as "*Prima Facie* Contempt"

It has been said on many occasions that the failure of counsel to appear at a duly fixed court hearing is *prima facie* a contempt of court.[167] The very failure to appear is the *actus reus* of the offence because it obstructs or interferes with the due course of justice or the lawful process of the court, and the court has seen the failure to appear with its own eyes, so to speak. It has a *prima facie* case against the accused contemnor. When a lawyer fails to appear for court, the client's case cannot proceed. The administration of justice is delayed, not only in respect of the particular case which cannot proceed, but in respect of subsequent cases as well. Labrosse J.A. in *R.* v. *Glasner* stated, "As criminal cases fail to move forward because of indifferent conduct of defence counsel, public respect for the administration of justice suffers."[168] He quoted from *R.* v. *Askov*: "The failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to

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of the dignity of individuals that insults to judges are not allowed, but because there is imposed on the court the duty of preventing *brevi manu* any attempt to interfere with the administration of justice."

[166]See discussion of the implications of the words "tend to" in Chapter I, heading D(3) "Committing Acts of Disrespect".

[167]*R.* v. *Aster (No. 1)*, *supra* note 41 at 451, *R.* v. *Pinx*, [1980] 1 W.W.R. 77 at 86, 50 C.C.C. (2d) 65 (Man. C.A.); *Barrette* v. *The Queen* [1977] 2 S.C.R. 121, (1976), 29 C.C.C. (2d) 189, 68 D.L.R. (3d) 260; R. v. *McKeown* (1971), 2 C.C.C. (2d) 1, 16 D.L.R. (3d) 390, [1971] 2 S.C.R. 446; *R.* v. *Jones*, *supra* note 78 at 194 (C.C.C.); *Canada* v. *Young*, *supra* note 76 at 22. In *R.* v. *Jones*, the Ontario Court of Appeal stated: "[Judge Dodds] held that failure to attend at a preliminary hearing, when under an obligation to do so, was *prima facie* contempt of court. We are in agreement that this is an accurate statement of the law."

[168]*R.* v. *Glasner*, *supra* note 70.

the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures."[169]

Failing to attend court at the appointed date and time is the *actus reus* of contempt.[170] Although convictions for contempt are normally made where a lawyer has failed to appear for a trial or a preliminary inquiry or a pretrial, the nature of the court appearance - whether it is a trial or a set-date - is not determinative. "The cases must be decided on their own facts and there may be a finding of contempt for any scheduled appearance for which the lawyer has agreed to appear on his client's behalf where his failure to do so is likely to impede the administration of justice."[171] Tardiness in appearing may also, under certain circumstances, constitute a contempt of court.[172] Repetitive failure to appear, or repetitive tardiness for that matter, may lead to a finding of contempt.[173] In *R.* v. *Stong* for example, the court found no contempt because Stong showed no disposition to be constantly in disregard of his obligations to the court.[174]

The pronouncement that failure by counsel to appear is *prima facie* contempt of court may appear to suggest that contempt of court is an absolute or strict liability offence. In fact,

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[169]*R.* v. *Askov,* [1990] 2 S.C.R. 1199 at 1221, quoted by Labrosse J.A. in *R.* v. *Glasner, ibid.*

[170]*R.* v. *Anders* (Co. Ct.), *supra* note 41 at 521, *R.* v. *Aster (No. 1), supra* note 41 at 454. The *actus reus* must be proved beyond a reasonable doubt; although this is rarely, if ever, necessary for the offence of failing to appear in court since the failure to appear takes place in the presence of the court: *R.* v. *Anders*, *supra* note 41 at 513.

[171]*R.* v. *Glasner*, *supra* note 70 at 753 per Labrosse J.A., dissenting.

[172]*R.* v. *Fox* (1976), 13 O.R. (2d) 246 at 248, 30 C.C.C. (2d) 330, 70 D.L.R. (3d) 577 (C.A.).

[173]*R.* v. *Bickerton* (1985), 46 C.R. (3d) 286 at 288 (Ont. H.C.).

[174]*R.* v. *Stong* (1975), 9 O.R. (2d) 785 at 787, 26 C.C.C. (2d) 330 (Ont. C.A.). "Disposition" in this context is a reference to the *actus reus*. Stong did not commit the act on a frequent basis.

this is not so.[175] It indicates only that the course of justice has been obstructed and that it looks as though the lawyer may have committed a contempt. It must still be shown that the lawyer had no reasonable excuse for his failure to attend, and it must be shown that the *mens rea* element was present beyond a reasonable doubt. Excuses and *mens rea* are examined at the show cause hearing, which is discussed in Chapter IV.

C. The Harms Caused by Failing to Appear

The various judgments discussing contempt by failing to appear comment extensively on the "wrong" underlying a lawyer's failure to appear. Interfering with or obstructing the court's business is the most obvious "wrong" committed, but it represents only the most superficial level of the harm caused by the *actus reus* of contempt. Interference and obstruction are only the bare bones of the *actus reus*. Judicial commentary (i.e., the common law) puts meat on the bones. It shows what is really wrong with a lawyer's failure to appear. In doing so, the common law provides insight into the goals or objectives of the contempt power.

Judicial commentary on the *actus reus* is premised to a considerable extent on the role of lawyers in the administration of justice. Lawyers are "officers of the court". They hold a position which carries with it a number of privileges and duties. The privilege of practising law lies essentially in the function of advocating a fellow citizen's interests or rights before tribunals where those interests or rights will be adjudicated. The honour

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[175]It has been suggested, for example, that *sub judice* contempt and contempt by scandalizing the court, both of which are forms of "constructive" contempt, are absolute liability offences (see M. David Lepofsky, "Open Justice 1990: The Constitutional Right to Attend and Report on Court Proceedings in Canada" in David Schneiderman ed, *Freedom of Expression and the Charter* (Toronto: Thomson Professional Publishing Canada, 1991) 485. This suggestion is based on a mistaken view of the *mens rea* of the offence of contempt. See further discussion in Chapter IV, heading A, "Fault in Relation to the *Actus Reus*".

inherent in this position has been ably expressed by Serjeant Sullivan K.C. in his 1928 address to the Cambridge University Law Society:

> One thing ... ought to be learned by every man who contemplates the law as his profession, is that the barrister is an independent officer in the administration of justice. His office and his dignity are no less than the office and dignity of the judge. He functions for a different purpose, but he contributes as much to doing right and to maintaining law and social stability as any other officer, no matter in what position in Court he sits and no matter what his emoluments may or may not be; and the independence of the Bar is the bedrock foundation of public confidence in the true administration of justice, and the position of the barrister is one to which any man should be proud to attain, and in the practice of which any man should be proud to spend his life even though he lived and died a poor man.[176]

A lawyer's position in the administration of justice warrants the respect of citizens and adjudicators, but the lawyer must respect the administration of justice in return. A lawyer must respect the fellow citizens whom she serves, as well as the judges and tribunals which administer justice. Failure to do so represents the breach of important duties, including the breach of duty to (1) the client; and to (2) the court.

1. Breach of Duty to Client

Nearly every case chides the non-attending lawyer for being derelict in his or her duty to the client. In *R.* v. *Chippeway*, the trial judge sympathized for the accused who had been left at the bar without counsel: "I think she's been sorely used. I don't think [Mr. Bunn's failure to appear] is at all conscionable."[177] In *R.* v. *Jones* and *R.* v. *Glasner*, the court found Mr. Jones and Mr. Glasner "indifferent" or "seriously indifferent" to their

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[176]Serjeant A.M. Sullivan, K.C., "The Last Forty Years of the Irish Bar" (1929) *The Cambridge Law Journal* 365 at 367.

[177]*R.* v. *Chippeway*, [1994] 10 W.W.R. 153 at 157 (Man. C.A.), rev'g [1993] 8 W.W.R. 344 (Man. Prov. Ct.).

obligations to their clients.[178] In *R.* v. *Hill*, the first concern of the trial judge before whom Mr. Hill failed to appear was for the two accused who were left in court without counsel. "[M]y difficulty is this; that accused persons are entitled to counsel and counsel have responsibility to turn up for the trial set..."[179] The Court of Appeal in that case stated that there was no doubt that a failure of counsel to attend court when duty bound to do so amounts to a breach of duty to that client.[180] The trial judge in *R.* v. *Pinx* indicated that the failure of counsel to appear was a breach of duty to client, the likes of which may warrant disciplinary action by the law society.[181]

The fact that the court is concerned about the lawyer's duty to the client shows that the court is asserting its inherent supervisory jurisdiction over lawyers as officers of the court. Irresponsible conduct by an officer of the court reflects poorly on the officer's "employer",[182] the court. The court's duty is to preserve respect for the administration of justice, and it disciplines the errant lawyer accordingly and in accordance with the general objectives of punishment. Punishment is denunciatory; the court wishes to distance itself from the officer's conduct. Punishment is deterrent; the court wishes to deter the lawyer and other lawyers from failing to appear. Punishment is retributory; the court wishes to punish the lawyer for her misconduct. In each case, the lawyer is punished, not only for interfering with the course of justice, but for breaching his duty as officer of the court.

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[178]*R.* v. *Jones*, *supra* note 78 at 195 (C.C.C.); *R.* v. *Glasner*, *supra* note 70 at 748, particularly the judgment of Labrosse J.A. See also *Canada* v. *Young*, *supra* note 76 at 49.

[179]*R.* v. *Hill*, [1975] 6 W.W.R. 395 (B.C. Co. Ct.) at 399-400.

[180]*R.* v. *Hill* (B.C.C.A.), *supra* note 41 at 67.

[181]*R.* v. *Pinx*, *supra* note 167 at 84, Monnin J.A.

[182]I borrow this term from *Blackstone's Commentaries on the Laws of England*, *supra* note 55.

A lawyer has other duties as officer of the court. She must obey its orders; comply with undertakings given to the court; treat the court with respect; conduct herself courteously toward the court and other officers of the court; communicate candidly with the court; and act with integrity. Where the court sees dereliction of these duties, it acts in its supervisory jurisdiction over officers of the court in an effort to correct the situation, in the long run to preserve respect for the administration of justice and to prevent its being interfered with or obstructed.

2. Breach of Duty to the Court

There is virtually unanimous agreement in the cases that failing to appear is a breach of the lawyer's duty to the court. One aspect of that duty is to appear before the court to represent a litigant at the appointed time. In *R.* v. *Glasner*, Laskin J.A. states that

> [l]awyers are officers of the court and a lawyer who undertakes to appear in court on behalf of a client at a specified time commits to being present at that time... A lawyer's ethical and professional obligation is the same whether the court attendance is for a murder trial or to speak to sentence or even to attend on a matter to be spoken to.[183]

Even within the particular contempt of failing to appear, the breach of duty to the court has a number of dimensions. Most notably, it may involve (a) disobedience of a court order; (b) disrespect for the court and a failure to abide by a certain standard of conduct; or (c) causing inconvenience or embarassment.

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[183] *R.* v. *Glasner*, *supra* note 70 at 750.

(a) Disobedience of a Court Order

In several of the cases, the lawyer's failure to appear was accompanied by the breach of direct court orders to appear before the judge to explain an absence. In *R.* v. *Hill*, for example, Mr. Hill failed to heed three separate orders of the trial judge to appear before him.[184] Mr. Kopyto sent his secretary and went home in respect of such an order.[185] Mr. Anders was ordered to attend the following day or send substitute counsel in his stead, but opted to send a letter with his client seeking a further adjournment.[186] There is little doubt that a failure to appear, followed by a failure to abide by an order of the court, exacerbates the contempt. Mr. Hill's and Mr. Anders' contempt convictions were sustained on appeal, and Mr. Kopyto's conviction was quashed because he had misinterpreted the court order as a threat to his freedom of religion - a reasonable interpretation in the circumstances.

In *R.* v. *McKeown*, the failure of counsel to appear is actually equated to disobedience of a court order. In his dissenting reasons, Spence J. viewed McKeown's failure to appear as disobedience of an order of the court. This placed the contempt within the parameters of s. 108 of the *Criminal Code*, an indictable offence from which an appeal was available. Spence J. indicates that Martin Co. Ct. J., in setting a date for trial, "ordered" that the hearing proceed on that particular date, and McKeown's failure to appear as ordered was disobedience. In the same case, Laskin J. refers to McKeown's obligation to appear in court as an "undertaking".[187] In *R.* v. *Carter*, Kelly J.A. of the Ontario Court of Appeal indicates that a lawyer, in effect, undertakes to appear as the client's representative.[188]

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[184]*R.* v. *Hill* (Co. Ct.), *supra* note 179.

[185]*R.* v. *Kopyto (No. 1)* (1981), 32 O.R. (2d) 585 at 590, 21 C.R. (3d) 276, 122 D.L.R. (3d) 260 (Ont. C.A.).

[186]*R.* v. *Anders*, *supra* note 41.

[187]*R.* v. *McKeown*, *supra* note 77 at 14.

[188]*R.* v. *Carter* (1975), 28 C.C.C. (2d) 219 at 221 (Ont. C.A.).

This failure to appear has occasionally been considered a breach of undertaking or a breach of court order.

Except for these isolated opinions, however, the jurisprudence treats breach of a court order as a separate form of contempt. Failing to appear in court is not generally considered to be a breach of court order. It is consequently curious that the Law Reform Commission of Canada in its 1982 *Report on Contempt of Court* would propose for this type of contempt a *Criminal Code* section espousing this very uncommon view of the common law. The *Report* recommends the following words for the offence: "Every one commits an offence who ... (b) *disobeys* an order made by or under the authority of a court in connection with the conduct of a judicial proceeding."[189] For reasons stated, this provision does not address a lawyer's failure to appear in court. Few lawyers themselves would, I submit, consider a trial date an order of the court, except possibly where it is made peremptory by court order.

(b) Breach of the Standard of Conduct

There is an important body of law concerning what a lawyer is expected to do when she finds herself double-booked for a particular hearing date. The court has recognized that lawyers, sometimes of necessity, have multiple and conflicting time commitments for one block of time. In these circumstances, the court says that other arrangements must be made, and the failure to make these other arrangements amounts to contempt. "The standard of conduct required of a lawyer who finds himself or herself scheduled to be in two courts at the same time is contained in the reasons for judgment of Freedman C.M.J. and Huband J.A. in *R.* v. *Pinx*... The lawyer cannot stand by and do nothing for he must

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[189]Law Reform Commission of Canada, *Report 17*, *supra* note 147 at 22-23, 43.

be taken to know if he fails to attend in court the case cannot properly proceed in his absence."[190] Arrangements must be made to do one or more of the following:

i. seek to be excused on one of the court obligations or obtain an adjournment;[191]
ii. engage substitute counsel;[192]
iii. ensure that substitute counsel meets with client's approval;[193]
iv. notify the Crown (or opposing counsel) of the difficulty;[194]
v. notify the court on a timely basis;[195]
vi. at the very least, send somebody to court to speak to the adjournment and to the setting of another date.[196]

In a majority of cases it is the failure to make suitable alternative arrangements in respect of a double booking dilemma which results in a citation or conviction for contempt of court.[197] Courts have opined that "double booking is a practice to be deplored";[198] it is an

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[190]*R.* v. *Anders*, *supra* note 41 at 522.

[191]*R.* v. *Pinx*, *supra* note 167 at 78 (C.C.C.); *R.* v. *Chippeway*, *supra* note 177 at 160-161 per Corrin Prov. Ct. J.; *R.* v. *Glasner*, *supra* note 70 at 750.

[192]*R.* v. *Pinx*, *ibid.*; *R.* v. *Chippeway*, *ibid.*; *R.* v. *Anders*, *supra* note 41 at 510, 512; *R.* v. *Glasner*, *ibid.*; *R.* v. *Bickerton*, *supra* note 173 at 288; *Canada* v. *Young*, *supra* note 76 at 48.

[193]*R.* v. *Hill* (Co. Ct.), *supra* note 179 at 420; *R.* v. *Chippeway*, *ibid.*

[194]*R.* v. *Chippeway*, *ibid.*; *R.* v. *Anders*, *supra* note 41 at 510, 512; *Canada* v. *Young*, *supra* note 76 at 47.

[195]*R.* v. *Chippeway*, *ibid.*; *R.* v. *Anders*, *ibid* at 510, 512; *R.* v. *Bickerton*, *supra* note 173 at 287.

[196]*R.* v. *Aster (No. 1)*, *supra* note 41 at 457-58; *Canada* v. *Young*, *supra* note 76 at 47.

[197]In *Canada* v. *Young*, *ibid.*, the Judge found Young in contempt for failing to do anything to extricate himself from the conflict in responsibilities until several days before the court date. He waited too long.

[198]*R.* v. *Pinx*, *supra* note 167 at 78, Freedman C.J.M.

"untenable" practice; a "dangerous policy".[199] This opinion is not, however, universal. Laskin J.A. states in *R.* v. *Glasner* that there should be no hard and fast rule against double booking. "I rather expect that such an inflexible rule would impede, not enhance, the administration of justice. By double booking, counsel run the risk of a contempt citation, but it does not follow that their non-attendance because of a commitment elsewhere automatically translates into a conviction for contempt."[200] In a similar vein, Huband J.A. in *R.* v. *Pinx* states:

> It is not unusual that a lawyer will have two or more concurrent obligations and will allow those obligations to stand for some time, on the assumption that before the date is reached only a single will remain unresolved. If and when it becomes clear that there will be more than one obligation on the same date and time, then an attempt is made - on a timely basis - to adjourn one of the obligations, to be excused from attending or to find substitute counsel.[201]

It is only where the lawyer fails to find substitute counsel or make suitable alternate arrangements that he breaches his duty to the court (and to the client).

(c) Causing Inconvenience and Embarrassment

Causing inconvenience to fellow participants in the legal process is an indication of discourtesy and disrespect.[202] Laskin J.A. in *R.* v. *Glasner* stated that when determining

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[199]*R.* v. *Bickerton*, *supra* note 173 at 286, 288.

[200]*R.* v. *Glasner*, *supra* note 70 at 754.

[201]*R.* v. *Pinx*, *supra* note 167 at 91.

[202]It is the consequences of the failure of a lawyer to appear which prompt the court to find a *prima facie* case of contempt. The court is shocked by the trouble caused by the failure to appear; it sees interference with the administration of justice. Only a justifiable excuse would exculpate the lawyer under those circumstances. Is this a reverse onus? See discussion in Chapter 4, heading D, "The Relevance of Explanation to Fault".

whether to make a finding of contempt, the court should consider the consequences of failing to appear in the following terms:

> "The nature of the proceedings, delay, inconvenience to the participants ... prejudice to the client, wastage of court time and resources, and repetitious conduct may all be relevant in assessing the consequences of a lawyer's non-attendance on the administration of justice. Conduct that has little or no effect on the administration of justice cannot support a conviction for contempt."[203]

In Glasner's case, he left a message with duty counsel to the effect that he would be late. Laskin J.A. noted in respect of this conduct:

> When a lawyer leaves a message, he leaves the court with a fait accompli. His client is unrepresented. Obviously the case cannot proceed. The court must either adjourn the matter or wait for counsel. Either way, the accused, the witnesses and the Crown Attorney will be inconvenienced. The court itself may well come to a standstill. The result is a direct interference with the administration of justice.[204]

It is clear from a number of the cases that the court is extremely embarrassed by a lawyer's failure to appear. This embarrassment is possibly felt most keenly by the actual trial judge presiding. When Mr. Fox failed to appear at a trial that was to have resumed at 10:00 a.m., the judge queried how it was that the entire jury could arrive on time in inclement weather but that the accused's lawyer could not. While Fox's conviction for contempt was overturned on appeal, the Court of Appeal was quick to add that it did not wish to minimize the impact of the inconvenience caused by his lateness.[205] Laskin J. in *R.* v. *McKeown* stated that there was no doubt that the Court, Crown counsel and Crown

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[203] *R.* v. *Glasner*, *supra* note 70 at 750.

[204] *R.* v. *Glasner*, *ibid.* at 747-48.

[205] *R.* v. *Fox*, *supra* note 170 at 247, 248.

witnesses were inconvenienced by the failure to appear.[206] When Mr. Aster failed to appear at the commencement of trial, 80 prospective jurors and a number of witnesses had to be sent home. Their fees and travelling expenses represented a large sum of money. Crown counsel, court staff and the court itself had wasted valuable time for nothing.[207] In *Canada* v. *Young*, Mr. Young's absence meant that three trials could not proceed. "The process of the court and the administration of justice was disrupted and delayed."[208]

In *R.* v. *Hill*, similar inconvenience was evident. "Time was wasted and the process of the court was interfered with ... There was delay and interference with the court's business."[209] "The course of justice was hampered, witnesses ready to give evidence were sent away to be called another day, expense no doubt was incurred and the trial delayed."[210] The trial judge's stronger language reveals his frustration: Hill "paralyzed" and "prevented" the administration of criminal justice in the County Court of Vancouver; he "delayed" and "defeated" the commencement of two scheduled criminal trials.[211] He stated, "I wish to address some remarks to witnesses in Court, all of whom are very busy people and in particular to lay witnesses here today. I wish to express the regret I have in that the cases have not proceeded, but you have all been here and you have heard what has happened."[212] The cases report of only one lawyer who recognized how his failure to appear embarrassed the court. At his show cause hearing, Mr. Bunn apologized unreservedly for "any inconvenience or embarrassment" resulting from his absence.[213]

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[206]*R.* v. *McKeown*, *supra* note 77 at 18.

[207]*R.* v. *Aster (No. 1)*, *supra* note 41 at 451.

[208]*Canada* v. *Young*, *supra* note 76 at 48.

[209]*R.* v. *Hill* (B.C.C.A.), *supra* note 41 at 63.

[210]*R.* v. *Hill* (B.C.C.A.), *ibid.* at 67.

[211]*R.* v. *Hill* (Co. Ct.), *supra* note 179 at 420.

[212]*R.* v. *Hill* (Co. Ct.), *ibid.* at 403.

[213]*R.* v. *Chippeway*, *supra* note 177 at 159.

D. The Measure of Contempt

It was submitted in Chapter I that a primary goal of the law of contempt is to maintain respect for the court, not only on the part of the public generally but on the part of each individual who comes before it. In *R.* v. *Anders*, Borins J. stated that "[t]he doctrine of contempt is to promote respect for the courts and through them the administration of justice."[214] All tribunals are entitled to the same respect and the same courteous treatment from the public and the bar.[215] In *R.* v. *Carter*, the court took the view that failure to appear was primarily a matter of disrespect.[216] The trial judge in *R.* v. *Pinx* stated that "completely and utterly disrespectful action" is sufficient to constitute contempt.[217]

Breaching duties to clients and to the court, however, does not necessarily indicate the complete and utter disrespect that warrants a finding of contempt. The disrespect shown by a lawyer who fails to appear may amount to something less than contempt. I will consider two conceptual tools employed by judges to measure disrespect: (1) the line that divides mere discourtesy from contempt; and (2) the requirement of seriousness. I will then consider (3) institutional differences in measuring disrespect or contempt, notwithstanding the use of these conceptual tools.

1. The Line that Divides Discourtesy from Contempt

Discourtesy is something different from disrespect. Discourtesy is the opposite of courtesy. It is "rude or uncivil behaviour"[218] which may be caused by inadvertence,

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[214]*R.* v. *Anders*, *supra* note 41 at 522.

[215]*R.* v. *Pinx*, *supra* note 167 at 86-87, Monnin J.A.

[216]*R.* v. *Carter*, *supra* note 188 at 222.

[217]*R.* v. *Pinx*, *supra* note 167 at 84.

[218]*The Oxford English Dictionary*, *supra* note 42, vol. IV at 752.

clumsiness, shyness, bad manners or the absence of knowledge about how to behave courteously, politely and civilly. Discourtesy does not necessarily carry with it the negative connotations inherent in the word "disrespect", which involves feelings of low regard or contempt. According to Lord Tucker in *Izuora* v. *R*,[219] a very well-known failure-to-appear decision, the difference between these two concepts is what differentiaties non-contempt from contempt. A lawyer who fails to appear may have acted discourteously, but not contemptuously. Lord Tucker said:

> It is not every act of discourtesy to the court by counsel that amounts to contempt, nor is conduct which involves a breach by counsel of his duty to his client necessarily in this category. In the present case, the appellant's conduct was clearly discourteous, it may have been in breach of r. 11 of Ord. 16, and it may, perhaps, have been in dereliction of his duty to client, but in their Lordships' opinion it cannot properly be placed over the line that divides mere discourtesy from contempt.[220]

There is a line which divides mere discourtesy from contempt. This is one of the most difficult concepts in the law of contempt for failing to appear. The line is obviously extremely elastic; it is "rather vague and uncertain".[221] Nevertheless, the cases since *Izuora* repeat, "not every act of discourtesy amounts to contempt."[222]

Mr. Glasner was indisputably discourteous, but not contemptuous.[223] Mr. Danson may have been guilty of some discourtesy in failing to attend on Judge Hryciuk personally to request an adjournment, but there was not the necessary degree of fault for a finding of

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[219]*Izuora* v. *R.*, *supra* note 38.

[220]Labrosse J.A. in *R.* v. *Glasner*, *supra* note 70 stated at 761, "I agree that the conduct on which a finding of criminal contempt is premised must give rise to more than mere discourtesy or inconvenience."

[221]*R.* v. *Bickerton*, *supra* note 173 at 288.

[222]*Ibid.* at 287.

[223]*R.* v. *Glasner*, *supra* note 70 at 755.

contempt.[224] Mr. Fox's lateness in arriving at court in the circumstances was a discourtesy warranting a reprimand, but this conduct did not cross the line between discourtesy and contempt.[225] Mr. Bunn's double booking and failure to find substitute counsel until the last minute was discourteous but did not cross the line dividing discourtesy and contempt.[226] Bickerton's failure to appear without any notice to the court did not cross the line between discourtesy and contempt because it was a relatively isolated incident caused by his illness.[227] Huband J.A. found that Mr. Pinx' discourtesy was unintended and was not contempt.[228] The trial judge in the same case, however, stated that he could not apply the facts in such a way to find a mere discourtesy.[229] Anders' conduct indisputably "went beyond mere discourtesy."[230] In *R.* v. *Hill*, both the the trial judge and the Court of Appeal found Hill's conduct surpassed mere discourtesy and amounted to criminal contempt.[231] In *Canada* v. *Young*, the court asked with respect to the *actus reus* element, "Did the conduct of Mr. Young amount to contempt of court or were his actions an inadvertent lapse or discourtesy falling short of contempt?"[232] The court found contempt.

It is clear that judges employ Lord Tucker's formula in order to weigh the mitigating and aggravating factors in a given case. When, in their judgment, the factors do not amount to disrespect or interference sufficient to justify the criminal sanction of contempt, they say the conduct amounts to discourtesy but not to contempt. They consider whether the lawyer

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[224] *R.* v. *Danson* (1981), 57 C.C.C. (2d) 519 at 524 (Ont. C.A.).

[225] *R.* v. *Fox*, *supra* note 170 at 248.

[226] *R.* v. *Chippeway*, *supra* note 177 at 164.

[227] *R.* v. *Bickerton*, *supra* note 173 at 288.

[228] *R.* v. *Pinx*, *supra* note 167 at 84.

[229] *Ibid.*

[230] *R.* v. *Anders*, [1982] O.J. No. 78 (QL) at 5, 67 C.C.C. (2d) 138, 136 D.L.R. (3d) 316 (Ont. C.A.).

[231] *R.* v. *Hill* (B.C.C.A.), *supra* note 41 at 66.

[232] *Canada* v. *Young*, *supra* note 76 at 23.

may have been merely inadvertent or clumsy in appearing or failing to appear before the bench. They consider whether rudeness was intended. They look for signs of completely and utterly disrespectful conduct containing no trace of relatively innocent inadvertence or clumsiness. Eventually they arrive at a decision that the conduct is either discourtesy on the one hand, or contempt on the other. If contempt is found, the "line" has been crossed which divides mere discourtesy from contempt. The judge has measured the conduct and found sufficient disrespect to make a finding of contempt.

2. The Requirement of Seriousness

Lord Tucker's "line that divides mere discourtesy from contempt" is essentially a reformulation of "the requirement of seriousness" discussed in Chapter I. Contempt should be found only in serious cases where the contemnor has shown complete and utter disrespect, otherwise the court itself is made to appear petty and vindictive. "The careless or overzealous enforcement of the law of contempt ... may tend to bring the courts themselves into contempt."[233] Lord Goddard said that to treat the impolite words of counsel as contempt "is not only to make a mountain out of a molehill but to give a wholly undeserved advertisement to what had far better have been treated as unworthy of either answer or even notice."[234] To use the contempt power to suppress methods of advocacy which are "merely offensive" is to use it for a purpose for which it was never intended.[235] A finding of contempt is reserved for serious cases only.

In *R.* v. *Glasner*, Laskin J.A. preferred the "seriousness" formulation to the concept of the "line that divides discourtesy from contempt". He said: "The existence of the criminal contempt power is one thing; the circumstances in which it should be exercised quite

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[233] *McLeod* v. *St. Aubyn*, *supra* note 56, Lord Morris.

[234] *Parashuram Detaram Shamdasani* v. *King-Emperor*, *supra* note 64 at 268-69.

[235] *Ibid.* at 270.

another. There are many authorities which hold that the criminal contempt power is to be used only for serious cases."[236] "The *actus reus* of criminal contempt is conduct which seriously interferes with or obstructs the administration of justice or which causes a serious risk of interference or obstruction."[237] In *R.* v. *Carter*,[238] the Ontario Court of Appeal acquitted a lawyer because it could not find "that the appellant's misconduct caused a serious, real, imminent risk of obstruction of the administration of justice accompanied by a dishonest intention of bad faith."[239] In *R.* v. *Kopyto (No. 2)*, a case involving criminal contempt by scandalizing a judge, Dubin J.A. of the Ontario Court of Appeal stated:

> With respect, I find nothing in the authorities to support the conclusion that there is some assumption that the words which are the subject matter of the charge will bring the court into contempt or lower its authority, or that a person could be convicted under the present law where the words complained of could have little or no effect on the administration of justice.[240]

In that case, Dubin J.A. relied on Lord Morris' statement in *A.G.* v. *Times Newspapers Ltd.*: "A court will therefore only find contempt where the risk of prejudice is serious or real or substantial. If a court is in doubt whether conduct complained of amounts to "contempt", the complaint will fail."[241] In *R.* v. *Glasner*, Laskin J.A. stated that the trial judge was justifiably annoyed by Glasner's non-appearance but was unreasonable in concluding that his conduct caused the kind of serious interference with the administration of justice which could support a conviction for contempt. He reviewed the *R.* v. *Hill*, *R.* v. *Anders* and *R.* v. *Aster (No. 1)* cases and noted that they concerned failures to appear

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[236]*R.* v. *Glasner*, *supra* note 70 at 748.

[237]*Ibid.* at 749.

[238]*R.* v. *Carter*, [1993] O.J. No. 3135 (Ont. C.A.).

[239]*Ibid.*, quoted in *R.* v. *Glasner*, *supra* note 70 at 750.

[240]*R.* v. *Kopyto (No. 2)*, *supra* note 43 at 511-12 (O.R.).

[241][1973] 3 All E.R. 54 at 67 (H.L.).

in respect of trials and sentencing hearings where serious inconvenience to the participants was obvious. Laskin J.A. doubted whether a lawyer could be convicted of contempt for failing to appear for a matter to be spoken to (as was the case in *R.* v. *Glasner*).[242] The hearing was not an important enough form of hearing, and the failure to appear was not serious enough conduct to warrant a finding of contempt.

3. Institutional Differences in Assessment

Unfortunately, like the line that divides discourtesy from contempt, the term "serious" is also rather vague and uncertain. In *R.* v. *Glasner*, Laskin J.A. found the failure to appear for a matter "to be spoken to" was not sufficiently serious to warrant a contempt conviction. Labrosse J.A., on the other hand, viewed the matter as quite serious and stated in no uncertain terms,

> In my view, it makes little difference whether the case was to be pretried or to be spoken to. It was on the docket to be dealt with and the appellant had made a commitment that he would be there. I do not interpret the jurisprudence as restricting the offence of contempt to failure to attend at a trial, preliminary hearing or sentencing, despite the factual background of some of the cases. These cases must be decided on their own facts and there may be a finding of contempt for any scheduled appearance for which the lawyer has agreed to appear on his client's behalf where his failure to do so is likely to impede the administration of justice.[243]

The *Glasner* case is typical of most failure to appear cases. What is serious in the opinion of one judge may be merely discourteous in the opinion of another. In *R.* v. *Stong*, the trial judge found that Stong had "flagrantly disregarded his obligations to the court".[244] The Court of Appeal noted "the seriousness with which the provincial judge took the

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[242] *R.* v. *Glasner*, *supra* note 70 at 753-54.

[243] *Ibid.* at 757.

[244] *R.* v. *Stong*, *supra* note 174 at 786.

matter"[245] but then concluded that it was "obvious that the conviction [was] without legal foundation."[246] Similarly, the Court of Appeal in *R.* v. *Fox* was not persuaded that Fox had committed a contempt by being 50 minutes late to court in inclement weather, whereas the trial judge had convicted him without hesitation. Of the 16 cases digested in the Appendix to this thesis, 14 represent appeal court decisions. Of these 14 appeal court decisions, 9 represent disagreements with the trial judge's assessment of the seriousness of the disrespect and inconvenience caused by the non-attending lawyer.[247]

There are several possible explanations for the apparent lack of consensus between courts, and even between judges of the same court. These include the following: (a) appellate courts may not appreciate the gravity of the act; (b) trial level judges may be overly sensitive; (c) various judges have different understandings of their jurisdiction to find contempt; and (d) trial level judges may better appreciate the need to stop "petty contempt" before it erodes public confidence in the courts.

(a) Appellate Courts Fail to Appreciate the Gravity of Contempt

It may be that appellate courts overturn trial level court decisions on contempt with such frequency because they do not appreciate the gravity of the lawyer's conduct in failing to appear. Trial judges, on the other hand, can see vividly the consequences of the failure to appear. Trial judges witness the murmurings and incredulous looks of lawyers, witnesses, jurors and others in the courtroom. They are keenly aware of the disrespect and

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[245] *Ibid.* at 787.

[246] *Ibid.* at 786, 788.

[247] *R.* v. *McKeown*, *supra* note 77 (dissenting opinions, majority did not consider merits); *R.* v. *Stong*, *ibid.*; *R.* v. *Fox*, *supra* note 170; *R.* v. *Jones*, *supra* note 78; *R.* v. *Danson*, *supra* note 224; *R.* v. *Bickerton*, *supra* note 173; *R.* v. *Glasner*, *supra* note 70; *R.* v. *Chippeway*, *supra* note 177; *R.* v. *Pinx*, *supra* note 167 (dissenting opinion only, majority did not consider merits).

discourtesy shown and inconvenience caused to all those present. They recognize that the administration of justice has been obstructed and delayed. They are embarrassed on behalf of the administration of justice. In righteous indignation, they cite the lawyer in contempt and vindicate the wrong committed against the administration of justice. Appellate courts normally treat the judgments of trial courts with deference for the precise reason that the trial judge has the advantage of seeing first-hand the demeanour of the parties and witnesses. It may be that the same deference is not shown to the decisions of trial judges in cases of contempt of court.

(b) Trial Level Judges are Overly Sensitive

It is also possible that trial judges are impatient and overly sensitive with respect to the gravity of the situation. A trial judge must endure a certain amount of discourtesy, unpreparedness, even incompetence, from lawyers on a regular basis, and occasionally frustration may boil over into a hasty contempt citation. The Manitoba Court of Appeal stated in respect of the trial judge's citation of Mr. Bunn for contempt, "Judge Corrin pronounced, in words lacking the sense of detachment and impartiality that one would expect of a judicial officer, his intention to cite Mr. Bunn for contempt of court."[248] In *R.* v. *Fox*, Judge Street had stated between 10:09 and 10:12 a.m. (i.e., very shortly after 10:00 a.m.) that he would treat Fox's lateness or absence as contempt of court. He disregarded the weather conditions and failed to accept Fox's explanation regarding car trouble or Fox's subsequent apology.[249] In *R.* v. *McKeown*, the trial judge convicted McKeown notwithstanding cogent evidence of the absence of *mens rea*. The Canadian Judicial Council has stated, "A judge should conduct contempt proceedings calmly and judicially and it is usually preferable to refer any matter to another judge if there is any

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[248] *R.* v. *Chippeway*, *ibid.* at 157, 162.

[249] *R.* v. *Fox*, *supra* note 170 at 247.

reasonable perception of bias or prejudgment."[250] Trial judges may lack the sense of judicial detachment which appeal judges possess. They are not sufficiently tolerant of disruptive conduct.

(c) Judges have Various Understandings of their Contempt Jurisdiction

Another explanation for the lack of consensus about the "seriousness" of contempt is that various judges have various understandings of their jurisdiction to find contempt. In particular, few judges may be aware of their inherent supervisory jurisdiction over lawyers as officers of the court. It is possible that trial judges, being on the "front lines" of the court, have a better sense of their supervisory jurisdiction and apply it more readily. The contempt power has been used traditionally as a means of disciplining lawyers and teaching them to respect the court and its process. In this disciplinary context, the contempt power is intended to maintain high standards of respect for the courts. The court acts because it wishes to stop conduct which brings the court into disrepute. In *R.* v. *Stong*, for example, there is a strong suggestion that the trial judge found contempt out of his supervisory jurisdiction over lawyers. The Ontario Court of Appeal stated,

> I think I ought to say that it has been brought to the attention of several members of this court, and from more than one source, that while the judges of the provincial Court have no difficulties with the experienced and busy members of the criminal bar who appear before them, they have been having increasing difficulty with young members of the bar who appear to treat the matter of the arrangement of lists in the Provincial Court as one in which the primary consideration is the convenience of the solicitor and not that of the court, the accused or the witnesses.[251]

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[250] *Some Guidelines on the Use of Contempt Powers*, *supra* note 18, No. 11.

[251] *R.* v. *Stong*, *supra* note 174 at 787.

Stong was very likely a young lawyer, disciplined in order that he, and particularly other young lawyers, would be deterred from failing to appear. The Court of Appeal concluded: "However, we are concerned here only with this particular case. It is obvious to all of us that the conviction is without legal foundation"[252] A number of the cases (*R.* v. *Danson*, *R.* v. *Glasner* and *R.* v. *Bickerton*, for example) appear to be attempts by trial judges to curb the practice of double booking. Their cases serve to deter other lawyers from treating the practice of double booking lightly. Contempt citations and convictions in this respect serve a valuable function in maintaining order and respect in the courts, at least by lawyers as officers of the court.

(d) Trial Judges Appreciate that Stopping "Petty Contempt" Prevents Erosion of Public Confidence

A further explanation for the lack of consensus may be that trial level judges better appreciate that their duty to prevent interference with the administration of justice begins by preventing, stopping and punishing relatively small incidents which erode respect for the courts. They have their eyes not only on the very serious (even dangerous) offenders who clearly obstruct the course of justice, but also on the petty criminals whose disrespect erodes respect for the courts. It may be that judges of the appeal courts are interested in stopping only the serious offenders. Rather than look at the contemnor and ask whether he has been seriously disrespectful of the court, appellate courts look at the administration of justice and ask whether it has been seriously harmed by the disrespect paid to it. Thus Laskin J.A., possibly the most outspoken proponent of the appellate level philosophy, states: "Conduct that has little or no effect on the administration of justice cannot support a conviction for contempt."[253] Cory J., of the same school of thought, has said: "The *actus reus* for the offence of criminal contempt must be conduct which causes a *serious*

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[252] *Ibid.* at 787-788.

[253] *R.* v. *Glasner*, *supra* note 70 at 750.

public injury."[254] Note his use of the words "public injury". Would he wait until the administration of justice was actually seriously impaired before using the contempt power to stop it?

The differences in approach between trial level and appellate level judges in failure-to-appear cases indicate different views of (i) the ability of the courts to withstand disrespect; and (ii) the court's duty in dealing with non-public disrespect. The trial level court (or one philosophy) holds that continued public confidence in the administration of justice cannot be taken for granted, that it may be easily shaken, and that the court's duty is to apply the contempt power to preserve public confidence by enforcing respect generally without reference to its actual effect on the administration of justice, i.e., when it "tends to" interfere with the court's business and reputation. The appellate level (or another philosophy) holds that continued public confidence in the administration of justice is the norm, that it is not easily shaken, and that the court's duty is to apply the contempt power only where the disrespectful acts or words threaten the administration of justice in a serious and public way.

Both approaches have merit. Serious disrespect must be dealt with in some way. Respect must be encouraged. On the other hand, discourtesies should be overlooked or dealt with by measures other than a contempt conviction. A finding of contempt involves a possible loss of liberty, and that form of punishment should be reserved for serious cases. The solution lies in the variety of alternative measures which courts may apply to deal with contempt, such as public reprimand, an order to pay punitive costs, or a referral to the law society for professional discipline. These penalty options are considered in Chapter V.

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[254] *United Nurses of Alberta* v. *Alberta (Attorney General)*, *supra* note 16 at 510 (W.W.R.).

(e) Implications of the Institutional Differences

Given the divergence of opinion between levels of court, an alleged contemnor may ask how she is to know when she approaches the line between discourtesy and contempt, or when her conduct is considered "serious" enough to support a conviction for contempt. The answer is that such a degree of precision is impossible. Because the circumstances surrounding each contempt are different, and because each judge is inevitably different in his appreciation of what acts present a tendency to seriously harm the courts, there can be no means of drawing precise lines. There is, however, a fairly clear risk zone, and it is this risk zone which the contemnor must take as defining the offence. The risk zone is entered whenever disrespect is shown to the court, or whenever a course of conduct could interfere with the court's business or undermine public confidence in the courts. The risk zone is entered whenever it could debated whether the conduct amounts discourtesy or contempt. Again, this risk zone is not unique to the law of contempt. It is equally impossible to draw precise lines around the tort or crime of negligence, yet negligence is not considered to be excessively vague. If the idea of a risk zone or debatable tort or offence is unacceptable, offences including criminal negligence, intimidation, fraud, sedition, defamatory libel and public incitement of hatred may also be found void for vagueness because their commission also involves a zone in which words or conduct may or may not be found to form the *actus reus*.

E. Recommendations with respect to Reform Proposals

This inquiry into the *actus reus* of contempt by lawyers failing to appear reveals its complexity. It is evident that this form of contempt represents an interface between professional responsibility and criminal law. It represents an interface between the independence of the bar and compulsory respect for the courts and court process. It represents a conceptual difficulty in determining how serious disrespect must be before it warrants a criminal sanction. A lawyer's failure to appear means much more than simply

"interfering with" or "obstructing" the due course of justice. It means breaching professional duties to client and to court. It means breaching a common law standard of conduct where double-booking is the cause of the breach.

The *actus reus* of failing to appear reveals that there is more to the offence than meets the eye. The common law has obviously gone some distance toward setting parameters around the offence. It has attempted to establish a threshold below which contempt should not be found. In doing so it acknowledges the serious nature of contempt as a criminal offence. The common law has set guidelines for lawyers which govern their conduct in relation to court appearances. The common law has set guidelines for judges to govern their determinations of whether breaches of duty have been committed and, if so, whether they constitute contempt.

In substitution for this thoughtfully-crafted product known as the *actus reus* of contempt by failing to appear, the Law Reform Commission of Canada has suggested a rather meagre group of words which bear little relation to the actual offence. Their 1982 proposal reads:

> Every one commits an offence who ... disobeys an order made by or under the authority of a court in connection with the conduct of a judicial proceeding.[255]

If not outright misleading, this reference to disobedience to an order by or under the authority of a court does not convey much about what is wrong with failing to appear in court. It is quite unhelpful to anyone involved in the situation of a lawyer failing to appear in court. It is so unhelpful and vague, in fact, that a judge or an accused must make immediate recourse to the common law in order to understand anything about it. Yet the entire thrust of the proposal to incorporate the offence in the *Criminal Code* is to avoid the

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[255]Law Reform Commission of Canada, *Report 17*, *supra* note 147.

anachronism of a common law offence; to bring the law of contempt in line with the fundamental rule *nulla poena sine lege*; to correct the negative image of contempt which results from ignorance of its basic principles; and to demystify and clearly explain the offence.[256] The Law Reform Commission of Canada's 1987 attempt to codify the law of contempt is even more brief and uninformative: "Everyone commits a crime who substantially disrupts public proceedings."[257]

These "definitions" of contempt are not satisfactory. They are unrecognizable as definitions for contempt. They fail to meet their objectives. They are misleading and dangerously vague. The contempt power serves a very important function, even if it is not frequently invoked. After centuries of refinement, the law of contempt should not be reduced to a nebulous set of words on the pages of Canada's *Criminal Code*.

CONCLUSION

By looking at just one aspect of one form of contempt (the *actus reus* of lawyers failing to appear in court), one can appreciate that the law of contempt is intricate and tailored to suit various circumstances. The *actus reus* cannot be stated, without more, in a brief sentence. Even the traditional definition of contempt requires investigation as to its application to lawyers who fail to appear. While all contempt boils down to disrespect for the court, such disrespect involves, for lawyers, breaching duties to clients and to the court. Less serious contempts, or discourtesies, are ignored or treated otherwise than by a finding of contempt. Courts look for serious contempts, although there appears to be a lack of consensus between appellate and trial level courts as to what constitutes "serious"

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[256]*Ibid.* at 4, 5. The *Report* states at 5: "Can citizens really be blamed, though, for not being familiar with an offence which is not defined by statute, and whose rules are essentially contained in case-law?"

[257]Proposed s. 25(2) in Law Reform Commission of Canada, *Report 31: Recodifying Criminal Law* (Revised and Enlarged Edition of Report 30) (Ottawa: 1987) at 117.

contempt. The lack of consensus is probably inevitable given the various outlooks represented in the judiciary. It is a far lesser evil than the Law Reform Commission of Canada's attempt to codify the offence in a brief and exceedingly vague sentence. Certainly the law of contempt, as evidenced in this Chapter, is a well-developed body of law, capable of guiding judges and litigants in its proper and judicious application.

CHAPTER IV LAWYERS FAILING TO APPEAR IN COURT: THE *MENS REA*

An examination of the *mens rea* of contempt by lawyers failing to appear in court adds weight to the conclusion reached in the examination of *actus reus* - that the common law of contempt is a rich and complex body of law, perfectly suited to its task of protecting the courts and the administration of justice from contemptuous acts committed before it. It is sensitive to the requirements of justice and treats the alleged contemnor fairly. Its doctrines guide judges in applying the contempt power and also offer alleged contemnors insight into how they may defend against citations for contempt.

The *mens rea* for contempt of court is in many respects similar to the *mens rea* for other criminal offences. It may be inferred from the circumstances.[258] It must be proved beyond a reasonable doubt.[259] The terms "intent", "wilful", "deliberate", "reckless" and "indifferent" are used to describe *mens rea*. As with the law of criminal liability generally, "negligence" as a form of *mens rea* (or fault) is on the borderline. It appears to have been embraced by some courts as an adequate form of *mens rea*, whereas other courts say it sets too low a standard. Courts consider the alleged contemnor's explanation, and even his apology, for evidence of intent. The alleged contemnor's attitude toward the court and toward his act is vitally important to the finding of contempt.

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[258]McLachlin J. in *United Nurses of Alberta* v. *Alberta (Attorney General)*, *supra* note 16 at 494.

[259]*R.* v. *Hill* (Co. Ct.), *supra* note 41 at 416; *Videotron Ltee* v. *Industries Microlec*, (1992) 96 D.L.R. (4th) 376 at 400; *R.* v. *Aster (No. 1)*, *supra* note 41 at 454; *R.* v. *Jones*, *supra* note 78 at 195; *R.* v. *McKeown*, *supra* note 77 at 6, 24-25; *R.* v. *Anders*, *supra* note 41 at 513, 521, citing *R.* v. *Prue* (1979), 96 D.L.R. (3d) 577 (S.C.C.); *Canada* v. *Young*, *supra* note 76 at 22.

In this Chapter I shall consider the following issues bearing on the *mens rea* of contempt through a lawyer's failure to appear:

A. Fault in relation to the elements of the *actus reus*;
B. Contempt as a general intent offence;
C. Degrees of fault -
    1. deliberate conduct;
    2. recklessness, knowledge, indifference;
    3. negligence and inadvertence
        (a) trial level acceptance of objective fault;
        (b) appellate level refusal to accept objective fault;
D. The relevance of "explanation" to fault;
    1. acceptable explanations
    2. unacceptable explanations
E. The relevance of "apology" to fault; and
F. Recommendations with respect to reform proposals.

A. Fault in Relation to the Elements of the *Actus Reus*

The definition for contempt of court contains no reference to *mens rea*. Contempt is simply "any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the court."[260] This has led some to the mistaken assumption that the offence is an absolute or strict liability offence. Huband J.A. of the Manitoba Court of Appeal stated in *R.* v. *Pinx*: "It does not appear that *mens rea* is a necessary ingredient of

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[260]*R.* v. *Gray*, *supra* note 22 at 40. As discussed above, the word "calculated" means "tends to" or "likely to". It is an *actus reus*-related word and does not mean "intended" as it does in modern English usage. See Chapter III, heading A "The Meaning of the Term 'Calculated'".

criminal contempt."[261] The trial judge in that same case stated that "[y]ou don't even have to have the intention; just completely and utterly disrespectful action in itself is such to do so."[262]

Huband J.A.'s conclusion may have been occasioned by a source of confusion regarding the *mens rea* of contempt. The "intent" of contempt of court does not relate to obstructing or interfering with the due course of justice. The "intent" relates to the commission of the particular act which in turn obstructs or interferes with the due course of justice.[263] In *R.* v. *Hill*, Hill argued unsuccessfully that his failure to appear, while a breach of duty to the client and possibly a basis for law society discipline, was not a contempt of court because it was not done with the intent to interfere with the course of justice by delaying and impeding the conduct of the court's business. McIntyre J.A. responded to this argument as follows:

> It is my opinion that an intent to bring a court or Judge into contempt is not an essential ingredient of this offence. In Canada, the proposition in *R.* v. *Gray*... has been accepted ... These words have received the approval of the Supreme court of Canada in *Poje* ... and in *Re Duncan*... In my view they express the law as it now stands in this country....[264]
>
> The weight of authority found in the English cases, which in my opinion has been applied in Canada, does not go so far as to require proof of an intent to disrupt, hinder or delay the course of justice in order to warrant a finding of contempt."[265]

What must be found is an intent to commit an act - any act - which tends to undermine public confidence in the courts or which tends to obstruct or interfere with the course of justice.

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[261]*R.* v. *Pinx*, *supra* note 167 at 90.

[262]*Ibid.* at 84.

[263]Jeffrey Miller, *supra* 22 at 9. Miller refers to this *mens rea* trait as one of the two major confusions manifest in the law of contempt. (The second major confusion is confusion about the word "summary".)

[264]*R.* v. *Hill* (B.C.C.A.), *supra* note 41 at 67-68.

[265]*Ibid.* at 68, adopted by Dickson C.J. in *B.C.G.E.U.* v. *B.C. (A.G.)*, *supra* note 14 at 15.

This particular fact is interesting, for it confirms the understanding of contempt as being concerned primarily with the various instances of contempt (or disrespect) which "chip away" at the administration of justice and the rule of law.

To be sure, the law of contempt is interested in stopping or preventing those who actually intend to undermine public confidence in the courts or obstruct the course of justice. This elevated form of *mens rea* would certainly support a conviction for contempt. The *mens rea* for criminal contempt is considered primarily in relation to the contemptuous act, however, in order to parallel the *actus reus*, which is established where any act or word *tends to* or is *likely to* undermine public confidence in the court. It would not make sense to find the *actus reus* in the angry use of vulgar and abusive language in court, yet require a *mens rea* which looks for an intent by that abusive language to undermine public confidence in the court. It would not make sense to expect a person who refuses to abide by a court order because he does not like its terms, to have also intended to obstruct the course of justice. Their actions, if permitted to go unpunished, may lead to an erosion of public confidence in the courts, but their intention was not to erode public confidence. The first contemnor intended only to express himself in a vulgar and abusive manner. The second contemnor intended only to defy a court order. They had no ambitions in relation to the administration of justice generally.[266]

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[266]The law of contempt in this respect does not differ from other criminal offences which involve an underlying offence. In *R.* v. *DeSousa*, [1992] 2 S.C.R. 944, 15 C.R. (4th) 66, 76 C.C.C. (3d) 124, Sopinka J. on behalf of the court said at 967 (S.C.R.) that "[t]o require fault in regard to each consequence of an action in order to establish liability for causing that consequence would substantially restructure current notions of criminal responsibility." There must be an element of personal fault in regard to a culpable aspect of the *actus reus*, but not necessarily in regard to each and every one of the *actus reus* elements. It is sufficient to find the *mens rea* for contempt in the commission of an act which has detrimental effects on the administration of justice.

B. Contempt as a General Intent Offence

Assuming for a moment that fault for the offence of contempt is found only on a subjective basis, i.e., upon examining only the intentions of the alleged contemnor himself, it can be said that contempt is a "general intent" offence. It is committed as an end in itself.

Nemetz C.J. in *R.* v. *Perkins*[267] cited McIntyre J.A. in *R.* v. *Hill* and noted that examining the contemnor for evidence of an intention to interfere with the administration of justice is equivalent to examining him for his motive. As with other criminal offences, the motive does not constitute fault for the crime. Nemetz C.J. said: "But whether [the contemnor] intended to interfere with the judicial process, in the sense that achieving that result was the barrister's motive in acting as he did, is irrelevant."[268] "Again, it is clear that the intent of the act is relevant only insofar as it pertains to the commission of the act itself, and not to its consequences [for the administration of justice]."[269] Nemetz C.J.'s comments allude to a somewhat controversial conceptual division in the types of *mens rea*. It has been noted that some criminal offences are committed as a means to an end ("specific intent" offences), and other criminal offences are committed as an end in themselves ("general intent" offences).[270] In this context, the *mens rea* for criminal contempt is "general intent", which is intention applied to acts considered apart from their purposes.[271] According to Don Stuart, the distinction between general and specific intent offences is unnecessary and logically indefensible because it refers to motive. One cannot be convicted for a motive; only for an act committed with the intent to commit it.[272]

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[267][1980] 4 W.W.R. 763 (B.C.C.A.)

[268]*Ibid.* at 766.

[269]*Ibid.* at 767.

[270]See Alan W. Mewett and Morris Manning, *Mewett & Manning on Criminal Law* (3d ed) (Toronto: Butterworths, 1994) at 172.

[271]See *R.* v. *George*, [1960] S.C.R. 871 at 877, Fauteux J.

[272]Don Stuart, *Canadian Criminal Law* (3d ed) (Toronto: Carswell, 1995) at 217-220.

A constitutional argument may be made that contempt should be found only where *mens rea* is established in relation to the interference with the court's business or the undermining of public confidence in the courts. In support of such an argument would be cited the case of *R.* v. *Martineau*,[273] where Lamer C.J. suggested that fault attaches to *each* element of the *actus reus*, not simply to one element. In circumstances of an underlying offence followed by murder, Lamer C.J. held that *mens rea* must be found in relation to the underlying offence, but also in relation to the murder. Following *Martineau*, the argument would be that a court must find that an alleged contemnor not only intended not to appear in court, but intended as well to interfere with the court's business or undermine public confidence in the courts.

Notwithstanding McIntyre J.A.'s rejection of this approach to the *mens rea* of contempt in *R.* v. *Hill*,[274] the law since *Martineau* has held the constitutional *mens rea* requirement to be satisfied where intention does *not* extend to all of the required consequences of an offence. In *R.* v. *DeSousa*,[275] it was held that, absent express legislative direction, the mental element of an offence attaches only to the underlying offence and not to the aggravating circumstances. Similarly, in *R.* v. *Creighton* it was held that in addition to the *mens rea* of the underlying offence, there must be found the objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act. It is not necessary to find foreseeability of the risk of death. The seriousness of the offence of manslaughter and the stigma attached to it does not require a minimum *mens rea* of foreseeability of death in order to meet constitutional (*Charter* s. 7) standards.[276] Accordingly, in order for the *mens rea* of contempt to meet constitutional standards it is not necessary for the alleged contemnor to have formed the subjective intent to interfere with the course of justice. It is sufficient that

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[273]*R.* v. *Martineau*, [1990] 2 S.C.R. 633, 79 C.R. (3d) 129, 58 C.C.C. (3d) 353.

[274]*R.* v. *Hill* (B.C.C.A.), *supra* note 41.

[275]*R.* v. *DeSousa*, *supra* note 266.

[276]*R.* v. *Creighton*, *supra* note 81.

there was an objective foreseeability that the contemnor's conduct would interfere with the course of justice.

If the *mens rea* of contempt could be satisfied only by a specific intent to undermine public confidence in the courts or interfere with the course of justice, the courts would have no remedy against many contempts committed against it. It would not be able to stop those who employ vulgar and abusive language in court, who defy court orders, who refuse to testify, who attend court while drunk, who threaten witnesses, or who intimidate the jury panel. If there is no remedy to stop such conduct, then it is practically condoned as permissible conduct. The court would fail in its duty to maintain the rule of law.[277] Instead, contempt is a "general intent" offence. Fault attaches to the disrespectful act committed as an end in itself.

C. Degrees of Fault

While it need not be shown that an alleged contemnor intended to obstruct or interfere with the due course of justice, the *mens rea* of the offence remains an important element in making

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[277]It is now permissible in Ontario to insult a judge in his judicial capacity and to suggest that the administration of justice is corrupt, provided the insult and suggestion are made *ex facie*. In *R.* v. *Kopyto (No. 2)*, *supra* note 43, the Ontario Court of Appeal declared the offence of contempt by scandalizing the court *ex facie* unconstitutional as a violation of freedom of expression guaranteed by s. 2(b) of the *Charter*. In that decision, Cory J.A. suggested a new test for the law of contempt by scandalizing the court which would aim only at those who actually intended to interfere with the administration of justice. He said at 287:

> For example, if the Crown were to prove that an act was done or words were spoken with the *intent to cause disrepute to its administration of justice*, or with reckless disregard as to whether disrepute would follow in spite of the reasonable foreseeability that such a result would follow from the act done or words used ... then the acts or words could be punishable as a criminal offence in order to ensure the functioning of the judicial process. [emphasis added]

This higher level of *mens rea* clearly condones or sanctions those acts or words which tend to, or which are likely to, cause disrepute to the administration of justice but which which were not specifically intended to do so.

a conviction. Several degrees of fault support a conviction for contempt: (1) deliberate conduct; (2) recklessness, knowledge and indifference; and (3) *perhaps* negligence and inadvertence. I say "perhaps" negligence and inadvertence because lower courts seem to be open to finding contempt on the basis of negligence where appeal courts do not. Because appeal courts overturn lower court decisions on the basis of (primarily) error of law, lower courts must be taken to be in error. The "error" may be explained by the fact that trial level judges, being on the "front lines" of litigation, are more attuned to the damaging effects which even a negligent failure to appear may have on the administration of justice. Their approach may be that the potentially serious consequences of failing to appear warrant an objective evaluation of fault.

1. Deliberate Conduct

The *mens rea* in relation to a lawyer's failure to appear in court is found, first and foremost, in the deliberateness of his conduct. A lawyer who "deliberately and of set purpose frustrates the due carrying on of court proceedings by a wilful act of non-attendance" engages in "wilful and contumacious conduct"[278] and will be found guilty of contempt. In *R.* v. *Anders*, the court stated the *mens rea* of the offence of failing to appear in the following manner:

> Thus, the *mens rea* consists of either deliberate or intentional conduct likely to disrupt, hinder or delay the course of justice, or indifference, or recklessness to the lawyer's obligation to the court and to his client likely to have the same effect: cf Smith and Hogan, *Criminal Law*, pp. 54-56; Williams, *Textbook of Criminal Law* (1978) pp. 67, 105. A similar view was stated by Freedman C.J.M. in *R.* v. *Swartz*, 34 C.C.C. (2d) 477, [1977] 2 W.W.R. 751, where it was stressed that the "attitude or intent" of the lawyer was most important and that the lawyer must be proved to have deliberately frustrated the judicial process by a wilful act of non-attendance.[279]

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[278] *R.* v. Swartz, [1977] 2 W.W.R. 751, 34 C.C.C. (2d) 477 at 481 (Man. C.A.).

[279] *R.* v. *Anders*, *supra* note 41 at 522.

Anders' failure to appear was (a) a deliberate act likely to impede the administration of justice, and (b) conduct exhibiting serious indifference to his obligations to the court and to the client.[280] In *R.* v. *Aster (No. 1)*, Hugessen A.C.J. stated that if there is a deliberate absence from trial, knowing of the trial, then it is conduct calculated to interfere with the due course of justice.[281] Aster's failure to be present at trial was a deliberate action calculated to interfere with and impede the administration of justice.[282] In *R.* v. *Jones*, the court stated that "[t]he deliberate failure of counsel to appear when a case is called is a contempt of court as constituting conduct likely to impede the administration of justice."[283] Laskin J.A. stated in *R.* v. *Glasner*: "In short, the fault requirement for criminal contempt calls for deliberate or intentional conduct, or conduct which demonstrates indifference, which I take to be akin to recklessness."[284] Laskin J.A. did not find the fault element in Glasner's double booking; however, Labrosse J.A. in dissent stated that Glasner's deliberate scheduling of conflicting court dates was the *mens rea*. In *Canada* v. *Young*, the evidence clearly showed that Mr. Young had no intention of being in court as required. His failure to appear was deliberate and he was convicted accordingly.[285] Young, Hill, Bickerton, Aster and Anders were the most deliberate in their failure to appear in court. Except for Bickerton, whose assessment of the circumstances was thought to have been clouded by illness, all were convicted of contempt. Their convictions were not overturned on appeal.

2. Knowledge, Recklessness and Indifference

The *mens rea* of contempt does not reside solely in the deliberate failure to appear. Knowledge and recklessness have occasionally been referred to in relation to *mens rea*, and

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[280] *Ibid.* at 522.

[281] *R.* v. *Aster (No. 1)*, *supra* note 41 at 454.

[282] *Ibid.* at 458.

[283] *R.* v. *Jones*, *supra* note 78 at 195.

[284] *R.* v. *Glasner*, *supra* note 70 at 751.

[285] *Canada* v. *Young*, *supra* note 76 at 46.

indifference has received particular attention in the context of lawyers failing to appear in court.

Where the alleged contemnor is a lawyer, knowledge of the circumstances and consequences may form the basis of a further finding of *mens rea*. Knowledge is easily attributed or imputed to lawyers, either objectively or subjectively, because they are officers of the court who deal with the law on a regular basis. The court opined in the case of Mr. Anders: "The lawyer *must be taken to know* if he fails to attend in court the case cannot properly proceed in his absence. [emphasis added]"[286] It was said of Mr. Pinx: "We are not dealing with an illiterate, ignorant citizen who, for the first time in his life, faces the irritation of the court. Mr. Pinx is well aware of the proceedings in our courtrooms."[287] Of Mr. Hill it was said: "This is a lamentable chronicle of events, attributable to an experienced member of the criminal bar of this province."[288]

This attitude of the court stands to reason. Messrs. Hill, Pinx and Anders had accumulated some experience as members of the defence bar. They had been officers of the court for some time. They had been called to the bar. They had "sworn" to perform their duties to the public and to the court. By virtue of this knowledge, which must reasonably be imputed to them, their failure to appear in court, absent a good excuse, must mean they formed some intention to remain absent.[289] They may have deliberately intended to remain absent. As a minimum, they were reckless or indifferent in respect of their absence. Given their knowledge, it may be inferred that they were reckless or indifferent. It is a scenario of this type which prompted McLachlin J. to state: "Therefore when it is clear that the accused must have known his or

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[286]*R.* v. *Anders*, *supra* note 41 at 522.

[287]*R.* v. *Pinx*, *supra* note 167 at 88.

[288]*R.* v. *Hill* (Co. Ct.), *supra* note 41 at 420.

[289]The lawyer is, of course, free to show the court that he did not know, or could not reasonably have known, that her failure to appear would be a contempt of court.

her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt."[290]

A lawyer's knowledge of the circumstances and consequences of failing to appear may logically result in a finding of recklessness or indifference. Knowledge is, in fact, implicit in the definition for recklessness:

> A person is reckless as to consequences or circumstances if, in acting as he does, he is conscious that such consequences will probably result or that such circumstances probably obtain.[291]

Thus recklessness has been found a sufficient form of *mens rea* for the offence of criminal contempt. It is among the most objective forms of *mens rea*.

The concept of "indifference" as a form of *mens rea* has attracted much more attention. The meaning of "indifference" is slightly different from the meaning of "recklessness". A person is indifferent who is:

> not inclined to one thing or course more than to another, having no inclination or feeling for or against a thing; hence, without interest or feeling in regard to something; unconcerned, unmoved, careless, apathetic, insensible.[292]

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[290]*United Nurses of Alberta* v. *Alberta (Attorney General)*, *supra* note 16 at 494. This comment was made in relation to a case of breach of injunction which took on a public and criminal contempt aspect.

[291]The Law Reform Commission of Canada, *Report 31*, supra note 257 at 24. It suggests an alternative definition as well: A person is reckless as to consequences or circumstances if, in acting as he does, he consciously takes a risk, which in the circumstances known to him is highly unreasonable to take, that such consequences may result or that such circumstances may obtain.

[292]*The Oxford English Dictionary*, *supra* note 42 at vol. VII, p. 865.

Laskin J.A. in *R.* v. *Glasner* was of the view that indifference was akin to recklessness, and that such a finding was sufficient to establish the *mens rea* of contempt. Given the definition for indifference, however, indifference is a much more subjective-oriented test of intent. It seeks to determine the contemnor's actual inclinations, interests, feelings. Where those inclinations include apathy, disinterest and lack of concern for the duty to attend court at an appointed date and time, the *mens rea* for contempt is established.

In *R.* v. *Jones*, the court stated that indifference to a lawyer's obligation to the court and to the client will constitute contempt.[293] Failing to arrange for substitute counsel in a double-booking situation, where such conduct is repetitive, displays a "complete indifference" to the judicial process and amounts to contempt.[294] In *Canada* v. *Young*, the judge found that Mr. Young's attitude was one of indifference to his obligation to the Court and to his clients. "It matters not that Mr. Young did not intend to disrupt, hinder, or delay the course of justice and the administration of justice."[295] The trial judge in *R.* v. *Glasner* convicted Glasner of contempt where his non-appearance exhibited a serious indifference to his clients and to the court.[296] Labrosse J.A. agreed with the trial judge in this respect, saying,

> [Glasner's] offence resides in the calculated indifference he demonstrated towards the court by booking two court appearances on the same day and by risking that, should he become tied up in one matter, he would be unable to attend on the other. This indifference is entirely different from mere discourtesy. The appellant engaged in this conduct knowingly and deliberately. Despite the fact that he knew of the conflict well in advance of the relevant dates, he made no effort to seek an adjournment, request to be excused or find substitute counsel ...

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[293]*R.* v. *Jones*, *supra* note 78 at 195, adopted in *R.* v. *Danson*, *supra* note 224 and in *R.* v. *Glasner*, *supra* note 70.

[294]*R.* v. *Bickerton*, *supra* note 173 at 288; *Canada* v. *Young*, *supra* note 76 at 47-49.

[295]*Canada* v. *Young*, *ibid.*, at 49.

[296]*R.* v. *Glasner*, *supra* note 70 at 748.

> His conduct was repetitive in this respect: it cannot reasonably be dismissed as an unfortunate, isolated occurrence...
>
> I cannot see how it can be said that the appellant was not indifferent to his obligations to the court and client.[297]

In *R.* v. *Anders*, the *mens rea* of contempt for failing to appear was specifically stated to include indifference or recklessness to the lawyer's obligation to the court and to the client. His failure to appear was not only a deliberate act likely to impede the administration of justice, but also represented conduct exhibiting serious indifference to his obligations to the court and to the client.[298] The Ontario Court of Appeal disagreed that Anders' acts were deliberate, but agreed that they amounted to serious indifference to his obligations to the court and to the client.[299] Martin Aster was found to be "totally indifferent" and "recklessly indifferent" to his obligations.[300]

3. Negligence and Inadvertence

Whether negligence or inadvertence satisfies the *mens rea* (or fault) requirement is not entirely clear from the cases. According to most appellate decisions, it does not.[301] According to many trial level decisions, it does.

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[297] *Ibid.* at 760, per Labrosse J.A.

[298] *R.* v. *Anders*, *supra* note 41 at 523.

[299] *R.* v. *Anders* (Ont. C.A.), *supra* note 230 at 3.

[300] *R.* v. *Aster (No. 1)*, *supra* note 41 at 458.

[301] McIntyre J.A. in *R.* v. *Hill* (B.C.C.A.), *supra* note 41 stated at 68 that "no proof of intention is required, at least where reckless or negligent behaviour is shown..."

(a) Appellate Decisions

In *R.* v. *Chippeway*, the Manitoba Court of Appeal concluded that "[i]nadvertence ... without a further finding of subsequent wilful or deliberate conduct intended to frustrate, or capable of frustrating, the administration of justice, does not constitute contempt of court."[302] Huband J.A. in *R.* v. *Pinx* held that "inadvertence" and "negligence" does not warrant a criminal conviction for contempt.[303] His brother Freedman C.J.M. held that negligence, i.e., doing too little too late in making arrangements in respect of a double booking dilemma, was not enough to constitute contempt.[304] In *R.* v. *Jones*, the Ontario Court of Appeal was not prepared to hold that failure to appear due to inadvertence or negligence constituted a sufficient degree of *mens rea*, but conceded that an inadvertent lapse may constitute *mens rea* in certain circumstances, such as where there have been more such instances.[305] In *R.* v. *Glasner*, Laskin J.A. stated that the appellant was "misguided, even careless" in the way he proceeded, but not in contempt of court.[306] Bickerton was found to have been extremely careless and negligent in his actions, but not indifferent to the judicial process, and therefore not in contempt. He had committed the offence only once.[307] Hugessen A.C.J. stated in *R.* v. *Aster (No. 1)* that an honest though mistaken belief that a trial is adjourned may be inadvertence, negligence, incompetence and a breach of duty to client, but is not a sufficient *mens rea* to warrant a finding of contempt.[308]

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[302] *R.* v. *Chippeway*, *supra* note 177 at 159.

[303] *R.* v. *Pinx*, *supra* note 167 at 91.

[304] *Ibid.* at 79.

[305] *R.* v. *Jones*, *supra* note 78 at 195.

[306] *R.* v. *Glasner*, *supra* note 70 at 754-55.

[307] *R.* v. *Bickerton*, *supra* note 173 at 287-288.

[308] *R.* v. *Aster (No. 1)*, *supra* note 41 at 454.

These statements denying the sufficiency of negligence as a form of *mens rea* may reflect the old orthodox view of negligence in the criminal law. Dickson J's words in *R.* v. *Sault Ste. Marie* were long thought to dispose of the possibility of applying a negligence standard:

> Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.[309]

The law has more recently changed course somewhat, with cases such as *R.* v. *Creighton*[310] and *R.* v. *Hundal*[311] permitting as a form of fault an objective foresight of risk of harm involving a *marked departure* from the standard of care expected of a reasonably prudent person acting in similar circumstances.

(b) Trial Level Decisions

Trial level judges appear to pay only lip service to Dickson J.'s pronouncement that mere negligence is excluded from the concept of the mental element required for conviction. Trial judges have made numerous contempt convictions on the basis of negligence. The trial court judge in *R.* v. *Jones* found Jones in contempt for failing to take reasonable care to ensure that he would appear. He had forgotten to diarize a client's file for a preliminary hearing. The Ontario Court of Appeal stated that negligence, combined with inadvertence may, in some circumstances, constitute contempt of court, but that the particular carelessness demonstrated by Jones was not a sufficient finding of fault.[312] Anders apologized to the court and explained that he had left matters too late, that he didn't mean any disrespect by leaving matters too late,

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[309][1978] 2 S.C.R. 1299 at 1309-10, 3 C.R. (3d) 30.

[310]*Supra* note 81.

[311]*Supra* note 81.

[312]*R.* v. *Jones, supra* note 78 at 195.

that he had been somewhat negligent, and that if he had had better foresight he would have done things differently. The court convicted him nevertheless.[313]

Negligence may well have been the foundation for guilt in a number of trial level convictions which were subsequently overturned on appeal. Stong, for example, ought to have known that his letter to the Crown Attorney, which stated "please be advised that I represent the above named accused" could make its way to the court and would cause the court to understand that Stong was "on the record" for that client.[314] When Fox encountered car trouble he attempted to work on the car. He ought to have known that to be in court at 10:00 a.m. required him to put down his tools and call a cab sooner than he did.[315] Jones had carelessly forgotten to diarize a court date for the resumption of a preliminary hearing. He had relied on his apparently unreliable client to remind him of the court date.[316] Pinx had known more than three weeks before the scheduled court date that he was double booked. He ought not to have waited until the day before the hearing to arrange for alternate counsel.[317] MacIntosh ought to have known that he shouldered some responsibility in ensuring that he was off the record.[318] Glasner ought to have known that double booking, even for different times on the same day, could lead to his failure to appear on one or the other committments.[319] With the exception of MacIntosh, these lawyers were "forgiven" their "inadvertences"; their "carelessnesses".

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[313]*R.*. v. *Anders*, *supra* note 41.

[314]*R.* v. *Stong*, *supra* note 174.

[315]*R.* v. *Fox*, *supra* note 170.

[316]*R.* v. *Jones*, *supra* note 78.

[317]*R.* v. *Pinx*, *supra* note 167.

[318]*Steward* v. *Minister of Employment and Immigration (No. 2)* (1988), 84 N.R. 240 (Fed. C.A.). MacIntosh was convicted of contempt by an appeal court and his conviction was not overturned.

[319]*R.* v. *Glasner*, *supra* note 70.

D. The Relevance of "Explanation" to Fault

The show cause hearing to which an alleged contemnor is summoned is a summary trial for the purpose of determining the elements of contempt. It is the alleged contemnor's opportunity to explain his conduct and to show that he meant the court no disrespect. A show cause hearing does not involve a presumption of guilt. The burden on the alleged contemnor is an evidentiary or tactical burden, the same kind of burden placed on other accuseds faced with an established *actus reus*.[320] Any inferences of intent made by the court are permissive, not mandatory, and the alleged contemnor is free to rebut any such inferences with an explanation of his intent at the time of the alleged contempt.

The fact that an explanation may negate liability for contempt may appear strange, and may be interpreted to imply that the explanation has a retroactive effect. In fact, however, there is no retroactive effect. The alleged contemnor's explanation provides new evidence with respect to the facts as they unfolded when the contempt was committed. The explanation consists of present testimony of what occurred when the contempt was committed. The explanation therefore sets the context for drawing inferences in relation to intent.

In the case of lawyers failing to appear in court, the explanation concerns only the *mens rea* element. In Chapter III it was noted that courts consider a lawyer's failure to appear to be a *prima facie* case, simply because the lawyer who failed to appear has committed the *actus reus* in the face of the court. The show cause hearing is the alleged contemnor's opportunity to put forward a defence, to give an explanation or a justifiable excuse for her absence from court, and to show that she is not at fault.[321] "Where the fact of non-appearance is established

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[320] *R.* v. *Doz*, *supra* note 152; *R.* v. *Cohn*, *supra* note 152.

[321] *R.* v. *Hill* (Co. Ct.), *supra* note 41 at 421; *R.* v. *Anders*, *supra* note 41 at 508. It is the accused's opportunity to make full answer and defence: *R.* v. *Pinx*, *supra* note 167 at 81. A show cause hearing does not eliminate the presumption of innocence. In *R.* v. *Cohn*, *supra* note 152, Goodman J.A. explained at 695 (D.L.R.) that a citation for contempt immediately puts the accused on his defence. Where there has been a citation for contempt, there is

clearly, all that is in issue is the explanation."[322] It is the unexplained failure of counsel to attend court which constitutes contempt of court.[323] The Ontario Court of Appeal stated in *R.* v. *Carter*:

> No doubt, the deliberate and unexplained absence from a Court ... would, in the strict technical sense, be a foundation for holding the absent solicitor guilty of contempt in the face of the court... A solicitor's mere absence from the court in which he is due to attend is not *ipso facto* contempt; his absence may be brought about by causes beyond his control, under which circumstances he is showing no disrespect for the Court.[324]

Spence J. in *R.* v. *McKeown* gave as an example of a "justifiable excuse" the possibility of the non-appearing lawyer being struck by an automobile as he crossed University Avenue on the way to the court house. Because events of this nature may cause lawyers to fail to appear in court, the show cause hearing, or contempt trial, is essential to give the court the opportunity to determine the existence of *mens rea*.[325] The court scrutinizes the alleged contemnor for indications that disrespect or contempt led to the failure to appear. "In contempt proceedings the attitude or intent of the actor is all important."[326] The court hearing a contempt charge is strictly bound to consider the accused's explanation because in the explanation may be found

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already a *prima facie* case beyond a reasonable doubt, and therefore it is incumbent on the alleged offender to adduce evidence to avoid a conviction. This procedure is no different than for a person accused of a *Criminal Code* offence where the prosecution has a *prima facie* case. The show cause hearing represents a shifting of the burden of evidence, not a shifting of the burden of proof. See also *R.* v. *Doz*, *supra* note 152. Where the facts are not known to the judge, however, a show cause hearing may offend s. 11(d) of the *Charter* as a reverse onus.

[322]*R.* v. *Hill* (B.C.C.A.), *supra* note 41 at 65. A person undergoing contempt proceedings is not compellable as a witness. This is consistent with the common law and with *Charter* guarantees protecting the right against self-incrimination: *Videotron Ltee.* v. *Industries Microlec Produits Electroniques Inc.*, *supra* note 259.

[323]*R.* v. *Fox*, *supra* note 170 at 247.

[324]*R.* v. *Carter*, *supra* note 188 at 221-222.

[325]*R.* v. *McKeown*, *supra* note 77 at 6, Spence J.

[326]R. v. *Swartz*, *supra* note 278 at 481 (C.C.C.), Freedman C.J.M.

the reasonable doubt of *mens rea* which necessitates an acquittal.[327] Consequently, a merely perfunctory reference to an explanation is not enough. Where the judge overlooks an aspect of the lawyer's explanation and yet finds contempt, a conviction may be overturned.[328]

A great variety of explanations have been either (1) accepted or (2) rejected by the courts in negativing the *mens rea* of failing to appear. Acceptance or rejection appears to have much to do with the totality of the offence, including both the amount of inconvenience caused and the alleged contemnor's attitude toward his deed.

1. Acceptable Explanations

When appellate level decisions are considered, the courts have accepted far more explanations than rejected them. Bickerton's behaviour was found to be inconsistent with his normal professional conduct because he was ill.[329] The trial judge heard from several counsel as to Bickerton's excellent reputation for honesty and integrity among his peers.[330] This evidence demonstrated that Bickerton, except for his illness, would not have breached his duties to client and court.[331] He was simply not "in his right mind" when he failed to appear. His judgment was clouded. It could not be said that he felt contemptuous or indifferent toward the court. He intended no disrespect. Similarly, McKeown's onset of diabetes, according to Laskin J., would have excused his non-attendance.[332] Stong's explanation that he had not

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[327]*R.* v. *Glasner*, *supra* note 70 at 751.

[328]*Ibid.* at 747.

[329]*R.* v. *Bickerton*, *supra* note 173 at 287.

[330]*Ibid.*

[331]Aster, on the other hand, produced an equally impressive number of witnesses who spoke to his good character and reputation, but to no avail. The enormity of his act of failing to appear, and the enormity of his indifference to obligations, could not be overcome by testimonials as to his reputation and integrity generally. See *R.* v. *Aster (No. 1)*, *supra* note 41 at 452.

[332]*R.* v. *McKeown*, *supra* note 77.

actually been retained by the "client" satisfied the Court of Appeal that he intended no disrespect to the court.[333] Fox explained that car trouble had caused him to be late.[334] Jones explained that he had forgotten to diarize the resumption of the preliminary hearing.[335] Pinx explained that the double booking dilemma had been imposed on him; that he had been denied a request for an adjournment.[336] Danson explained that he had followed local custom in requesting adjournments by letter and in assuming they would be granted.[337] Aster's belief that the trial had been postponed would have negatived the *mens rea* if it had been an honestly-held belief, even where the belief was mistaken, even where the judge found the belief unreasonable.[338]

These explanations appear to be of two varieties. The first variety consists of justifications as opposed to excuses. They suggest that the conduct was not, in fact, wrong. Stong explained that the accused was not actually his client; therefore he was justified in not attending. Danson explained that his method of requesting an adjournment was customary for that particular court; therefore he was justified in not attending. The second variety of explanation consists of assertions that the question of attendance or non-attendance was not within the contemnor's control; that the contemnor's ability or free will to attend had been removed from him. Car trouble, illness, honest belief that the trial was postponed, and denial of an adjournment fall into this category.

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[333] *R.* v. *Stong*, *supra* note 174.

[334] *R.* v. *Fox*, *supra* note 170.

[335] *R.* v. *Jones*, *supra* note 78.

[336] *R.* v. *Pinx*, *supra* note 167.

[337] *R.* v. *Danson*, *supra* note 224.

[338] *R.* v. *Aster (No. 1)*, *supra* note 41 at 454.

2. Unacceptable Explanations

There are also a number of explanations which have *not* been accepted by the courts in negativing the *mens rea* of contempt. Aster's heavy professional, religious and personal pressures did not constitute adequate excuses.[339] Anders' failure to engage substitute counsel because of the low legal aid fee paid for attending on an adjournment failed as an excuse.[340] His being engaged in a jury trial which went longer than anticipated also failed as an excuse because he did not notify the court in a timely fashion.[341] Hill claimed that sending an employee in his stead was sufficient to constitute attendance. His failure to attend court when ordered to do so was necessitated by his illness, he claimed, yet he saw a client and could not provide convincing evidence of his illness.[342] Young stated that he could not attend for the three trials because another client had asked him to remain an extra day in Ottawa to attend a press conference.[343]

These rejected excuses have a somewhat different texture. The lawyers had the choice of attending or making alternate arrangements but chose not to attend or to make alternate arrangements. There was no impediment which was beyond their control to remove. They did not have a good excuse. Unfortunately the excuses do not always fall neatly into acceptable and non-acceptable categories. Anders' involvement in a prolonged jury trial was not much different from Pinx's double booking dilemma. In Glasner's case, his being detained in other courts was rejected as an explanation at the trial level but was accepted at the appellate level. In fact, Laskin J.A. praised his efforts to "squeeze" the new clients into his busy schedule.[344]

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[339]*Ibid.* at 457.

[340]*R.* v. *Anders*, *supra* note 41 at 511.

[341]*Ibid.*

[342]*R.* v. *Hill* (B.C.C.A.), *supra* note 41 at 65.

[343]*Canada* v. *Young*, *supra* note 76.

[344]*R.* v. *Glasner*, *supra* note 70.

Discrepancies with respect to the acceptability or unacceptability of excuses may arise when the judge considers the totality of the offence. The judge throughout is engaged in weighing the moral turpitude involved in the failure to appear. The lawyer's explanation is a means of evaluating the alleged contemnor's intent. In the explanation can be found evidence of disrespect or indifference to the courts. The factor receiving primary consideration is the lawyer's attitude. His attitude, as evidenced by the explanation, tips the scales in favour of a conviction or an acquittal.[345]

E. The Relevance of "Apology" to Fault

Some might think it extraordinary that a lawyer's apology could be relevant to the determination of fault. It is extraordinary, however, only if the apology is made as an expression of remorse, for to apply an apology to *mens rea* in this sense would be contrary to principles of justice. It is not extraordinary to consider an apology in relation to *mens rea*, however, where the apology has an evidentiary effect. In an apology may be found further evidence of intent, or it may provide an alternate inference in relation to intent. Seen in this way, an apology is not a retroactive way of erasing liability. Rather, it is useful in evaluating the *mens rea*. The court's consideration of an apology furthers the purpose of the contempt power. The court sees that the alleged contemnor has purged any contempt for which he may or may not be convicted.

The contemnor's attitude may be expressed in the form of an apology. An apology may represent further important evidence that the lawyer, by his failure to appear, meant no disrespect for the court. A sincere apology spoken by the alleged contemnor at the show cause hearing may be sufficient to demonstrate to the judge that the alleged contemnor *does*,

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[345]"In contempt proceedings the attitude or intent of the actor is all important": *R.* v. *Swartz*, *supra* note 278 at 481, cited with approval in *R.* v. *Glasner*, *supra* note 70 at 754: "The appellant's attitude was to help his clients and he set out on the task with 'good intentions'."

in fact, respect the courts and the administration of justice. To the judge presiding over the show cause hearing, an apology is relevant in determining the alleged contemnor's state of mind.[346] *R.* v. *Glasner* was a case in which the apology was applied to the evaluation of *mens rea*. Laskin J.A. stated, "An apology by itself will not negate conduct otherwise contemptuous in all cases, but it may be considered in assessing whether the appellant exhibited indifference to his obligations."[347] Glasner's apology buttressed the court's conclusion that Glasner's conviction could not stand.[348]

Of course a judge must be extremely cautious in applying an apology to *mens rea*, otherwise a contemnor could commit a contempt and then offer a feigned but sincere-sounding apology and be relieved of any liability. For this reason an apology is often viewed as a form of repentance only. Masten J. in *McDonald* v. *Lancaster Separate School Trustees* said: "If in courts of law repentance condoned offence, offenders would multiply. On any other basis our Courts of Justice would soon lose their hold upon public respect, and the maintenance of law and order would be rendered impossible."[349] Labrosse J.A., dissenting in *R.* v. *Glasner*, stated that "although the appellant did utter a one-line 'apology', it was not unreasonable for the trial judge to determine that it did not negate contempt... The apology does not negate the indifference which the appellant exhibited towards the court and his clients, and is insufficient grounds to overturn the conviction."[350]

In *R.* v. *Anders*, where Anders notified the Crown attorney that he would not be attending only 13 minutes before the commencement of court, the apology failed to excuse him or

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[346]*R.* v. *Glasner*, *ibid.* at 752. See also *R.* v. *Martin*, [1946] S.C.R. 538 at 546.

[347]*R.* v. *Glasner*, *ibid.* at 755.

[348]In *R.* v. *Pinx*, *supra* note 167 at 92, the court indicated that discourtesy may be assuaged by an apology.

[349](1916) 35 O.L.R. 614 (H.C.)

[350]*R.* v. *Glasner*, *supra* note 70 at 759.

mitigate his sentence.[351] The Ontario Court of Appeal affirmed the contempt conviction and stated that Anders' apology did not negative the contempt, although it was a mitigating circumstance.[352] In *Canada* v. *Young*, Mr. Young tendered a sincere apology but the Judge responded that "unfortunately", in all the facts and circumstances, the apology cannot excuse Mr. Young's conduct.[353] Jones apologized three times in the course of his show cause hearing, but the judge did not accept his apologies.[354] Stong apologized and explained, yet was convicted by the trial judge.[355]

A judge's failure to seriously consider an apology can be fatal to a conviction made subsequent to that apology. In *R.* v. *Glasner*, the Court of Appeal was struck by the fact that the trial judge had made no reference either to Glasner's desire to assist his clients or to his apology.[356] The trial judgment was overturned because the trial judge "disregarded the salient part of the appellant's explanation and his apology, both of which were relevant in determining the appellant's state of mind."[357] The trial judge in *R.* v. *Fox* similary did not accept Fox's excuse for lateness or his apology, whereas the Court of Appeal did so accept.[358] Huband J.A. of the Manitoba Court of Appeal in *R.* v. *Pinx* was of the view that Pinx's apology should have been accepted.[359] In *R.* v. *Kopyto (No. 1)*, the Court of Appeal found that the trial judge

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[351]He explained that he "left it later than what I should, and ... I didn't mean any disrespect by leaving it to this late time. But, I was engaged in a jury trial. I guess I was concentrating exclusively on the jury trial, the preparation for it. And I was somewhat negligent and I, of course, apologize for that, that I didn't attend more properly to the Ragoonanan matter". *R.* v. *Anders*, *supra* note 41 at 511.

[352]*R.* v. *Anders* (C.A.), *supra* note 230 at 337.

[353]*Canada* v. *Young*, *supra* note 76 at 49.

[354]*R.* v. *Jones*, *supra* note 78 at 193.

[355]*R.* v. *Stong*, *supra* note 174 at 787.

[356]*R.* v. *Glasner*, *supra* note 70 at 747.

[357]*Ibid.* at 752.

[358]*R.* v. *Fox*, *supra* note 170 at 247.

[359]*R.* v. *Pinx*, *supra* note 167 at 92.

had not adequately considered Kopyto's explanation that he deliberately did not appear on his order because of anger. Kopyto essentially explained and apologized thus: "I'm sorry I disobeyed your order, but you made me very angry." The trial judge found this conduct contemptuous, but the Court of Appeal found it justified. Kopyto's anger or indignation related to his being required to explain his conduct in relation to his religious convictions. In Kopyto's view, a gentile had assumed that Kopyto, a Jew, was shirking his duties under the guise of religious observances. Anger in these circumstances may have been understandable. Kopyto explained that he recognized that he should not have reacted in anger, and apologized for that. This apology, the Court of Appeal found, should have been accepted to acquit Kopyto.

An apology may also be considered in relation to lessening the sentence. In *R.* v. *Aster (No. 2)*, Aster showed a genuine contrition for, and an understanding of, the enormity of his conduct. His contriteness was evidenced not only by words (which can be easily feigned) but by conduct as well. As a result, Hugessen A.C.J. imposed no term of imprisonment and reduced his fine below the amount of actual loss or damage occasioned by his failure to appear.[360] Anders' apology also went to penalty. In the course of his testimony he stated, "I didn't mean any disrespect by leaving it to this late time... I do sincerely regret any inconvenience that was caused... And I'm sorry... of course, that it's worked out the way it has... and I say I'm sorry for the inconvenience that was caused... I'm as sincere as I can be in this letter and at this time..."[361] The court said in response to this apology, "I have no doubt that he was sincere in his apology and I have considered it in relation to all of the evidence. However, I do not feel that in the facts and circumstances of this case that it can excuse his conduct, although it may be considered with respect to penalty."[362]

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[360]*R.* v. *Aster (No. 2)* (1980), 57 C.C.C. (2d) 458 at 461 (Que. S.C.).

[361]*R.* v. *Anders*, *supra* note 41 at 511-512.

[362]*Ibid.* at 524.

The alleged contemnor's opportunity to apologize to the court is a unique example of the law of contempt's sensitivity to the *mens rea*. It indicates the court's willingness to examine any and all evidence which would serve to indicate whether the alleged contemnor intended any disrespect. A sincere apology may show the court the alleged contemnor's true attitude toward the court and the administration of justice. The court considers carefully the words employed by the alleged contemnor in explaining that he meant no disrespect. The court searches for evidence of contumely; of "contempt" defined as a feeling. The *Concise Oxford Dictionary* defines "contempt" as a feeling, "a feeling that a person or a thing is beneath consideration or worthless, or deserving scorn or extreme reproach."[363] The court's consideration of an apology is yet another manifestation that the law of contempt is concerned primarily with respect. The court's mandate is to ensure that disrespect is punished; that respect is encouraged. If evidence of respect is found, even in the form of an apology, it may negative, or at least assuage, the *mens rea* of the offence.

F. Recommendations with respect to Reform Proposals

Given the richness of the law of contempt with respect to *mens rea*, it is unfortunate that the 1982 Law Reform Commission of Canada proposal is silent about *mens rea*. It is doubtful whether the Law Reform Commission intended this offence to be one of strict liability. The offence merely reads, "Every one commits an offence who disobeys an order made by or under the authority of a court in connection with the conduct of a judicial proceeding." It may be that the *mens rea* was intended to imitate that for the offence of "obstructing justice".[364] In the 1987 Law Reform Commission of Canada proposal such a specific intent is required. The offence is phrased: "Everyone commits a crime who substantially disrupts public proceedings." Commentary on the phrase states: "By virtue of clause 2(3)(b) this crime can only be committed by a positive act. By virtue of clause 2(4)(3) it can only be committed

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[363](8th ed) (Oxford, Clarendon Press, 1990).

[364]The *mens rea* for obstructing justice is a specific intent to obstruct justice. See *infra* note 36.

purposely."[365] These comments lead to the conclusion that a finding of "disrupting judicial proceedings" may be made only where the offender specifically intends to disrupt judicial proceedings. This would imply that a person who purposely does something which has the effect of disrupting judicial proceedings is not culpable. The comments also lead one to question whether the offence applies to lawyers who fail to appear in court. Is failing to appear in court an omission of sorts? If the failure to appear in court does not fit into this section, the only possible remaining section is proposed s. 25(11), which is the residual offence of obstructing the course of justice. It is intended to cover any sort of obstructing justice which is not already dealt with. Once again, however, by virtue of clauses 2(3)(b) and 2(4)(d), the crime can only be committed by a positive act, and the mental element is purpose.[366]

Would the proposed *Criminal Code* offences even encompass a lawyer's failure to appear? The answer is not known. What is fairly certain, however, is that, if so, the *mens rea* is either indeterminate in respect of the 1982 proposals or is set at a higher level of "purpose" in respect of the 1982 proposals. Neither of these results is positive. Why would anyone resort to the unknown when they could have the tried and tested? Why would anyone resort to a higher *mens rea* level and thereby condone a possible multitude of contempts committed against the court? This brief look into the *mens rea* of only one form of contempt, failure to appear in court, shows that the law is already in place and knowable. It is responsive to the requirements of justice generally in criminal matters. It is fair to assume that the law has been effective in deterring lawyers from failing to appear. It may not be perfect in every respect

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[365]Law Reform Commission of Canada, *Report 31*, *supra* note 257 at 117. Clause 2(3)(b) provides: "Omissions. No one is liable for an omission unless: (i) it is defined as a crime by this Code or by some other Act of the Parliament of Canada; or (ii) it consists of a failure to perform a duty specified in this clause." Clause 2(4)(d) provides: "Where the definition of a crime does not explicitly specify the requisite level of culpability, it shall be interpreted as requiring purpose."

[366]*Ibid.* at 124.

(after all, justice is an ideal). The Law Reform Commission of Canada may be well advised not to throw the baby out with the bathwater.

CONCLUSION

The *mens rea* element for the offence of contempt provides additional support for the view that the law of contempt is primarily concerned with respect for the courts and the lack thereof. *Mens rea* is considered in relation to the contemptuous act committed, with a view to stopping and deterring such acts which may go on to undermine public confidence in the administration of justice. *Mens rea* is not considered in relation to the administration of justice. To stop and deter only those egregious acts which are specifically intended to undermine public confidence in the courts would be to permit a slough of lesser acts which in their totality may have the same effect. *Mens rea* encompasses not only deliberate actions, but stops negligent actions as well. Judges are particularly interested in stopping the attitude of indifference toward the courts. *Mens rea* can be negatived by explanations and apologies which show that the alleged contemnor meant no disrespect. As it stands, the *mens rea* of contempt for a lawyer's failure to appear is both well-suited to its purpose and quite fair to the alleged contemnor. This is a desirable state of the law which should not be displaced by reform proposals which either fail to consider *mens rea* at all or which recommend something less well suited to the offence of contempt.

CHAPTER V APPLYING THE CONTEMPT POWER

Like other criminal offences, the law of contempt is a "big stick". It is a rule backed by a threat. "No person shall, in any way, obstruct or interfere with the course of justice, or he shall be punished." The law of contempt is also much more than a rule backed by a threat. In each of the foregoing chapters there has been clear evidence that the law of contempt is about respect: respect for the king; respect for the courts; respect for the administration of justice; respect for the rule of law. The object of the law of contempt is to acquire the respect of all citizens for the administration of justice and the rule of law.

While it would seem that the law of contempt would, and could, only be interested in ensuring that respect be *shown* to the courts by employing contempt as a "big stick", it is also interested in *earning* for the courts the positive regard and esteem of citizens for the courts. The law of contempt is therefore equally concerned with the circumstances in which the contempt power should *not* be exercised. Courts must consider whether bringing down the "big stick" would, in the circumstances, result in a loss of respect for the court. Courts must consider whether other remedies would be more consonant with the dignity of the bench, such as an adjournment, a warning, a cost sanction or a referral to the law society. The manner in which the courts apply, or refrain from applying, the contempt power is important because whatever the court does, it must earn the respect of citizens.[367] Applying the contempt power judiciously is but one aspect of acting judicially.

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[367]The court earns respect in other ways as well: it abides by the rules of natural justice; it adjudicates with impartiality; it treats litigants fairly and with respect. To act otherwise would, in itself, be a contempt of court of a fashion. When a judge abuses the contempt power she exposes herself to possible discipline from the Canadian Judicial Council. A number of judges in the United States have been disciplined by reprimand, suspension from office, even removal from office, for abusing the contempt power. Sanctions have been most often where there has been a pattern of abuse, "disregard or indifference", acting in "bad faith", "ignoring proper procedure" or a "propensity to 'brandish, threaten and invoke unnecessarily the awesome power of contempt'". Abuse of the contempt

The judicious application of the contempt power has a number of aspects which I shall discuss under the following headings:

A. The consideration of other options;
B. The importance of the court's demeanour;
C. The impropriety of finding contempt for insults to a judge personally;
D. The appropriate speed at which to make a finding of contempt;
E. Avoidance of conflicts of interest and conflicts of roles;
F. Due consideration for the role of lawyers;
G. Due consideration for freedom of expression; and
H. Recommendations with respect to reform proposals.

A. The Consideration of Other Options

Courts are advised to consider carefully what would be the most effective manner of dealing with a contemptuous act - what kind of action would best serve the administration of justice. Watkins L.J. said in a recent English Court of Appeal case: "What is always wise is that no action be taken in haste. Some reflection should be brought to bear on the situation before a judge decides what he will do, if anything at all... Calm reflection and consideration of how best to deal with such a situation is called for."[368]

When the court is faced with disrespect the likes of which could constitute contempt, a number of options are available. Each option must be considered in light of the circumstances. Watkins L.J. also stated that

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power constitutes "conduct unbecoming a judicial officer". See J.M. Shaman, S. Lubet, J.J. Alfini, *Judicial Conduct and Ethics* (Charlottesville, Virginia: The Michie Company, 1990) at 82-88.

[368] *K.*, (1984), 78 Cr. App. R. 82 at 87 (C.A.).

> [t]his Court is well aware of the difficulties confronting judges who from time to time are faced with an obdurate and stubborn person who refuses to give evidence when called upon to do so. There are many ways of dealing with a situation of that kind. Sometimes inaction is as good a way as any and at other times stern measures are called for. It depends entirely on the circumstances how best an incident of that kind is dealt with.[369]

According to the Canadian Judicial Council, "[j]udges should be quick to identify and deal with abuse or misconduct in some way, but slow to commence contempt proceedings... Insults and other indignities in court should be dealt with other than by contempt proceedings, unless the conduct is such that the ability of the court to administer justice properly is significantly impaired."[370] As Lord Watkins indicated above, sometimes inaction is as good a way as any to deal with a relatively minor contempt of court. The Canadian Judicial Council states that "the occasions when judges have overlooked provocative and contumacious conduct far outnumber the cases where judges have erred in the exercise of their contempt jurisdiction."[371]

Occasionally judges have been successful in dealing with a contempt by invoking humour. *Oswald on Contempt of Court* recounts the story of an egg being thrown at Malins V.-C. in court. The egg missed him but broke on his chair. Malins V.-C. replied, "That must have been intended for my brother Bacon."[372] Tradition also relates that a female witness once extracted a dead cat from a paper parcel and threw it, inaccurately, at a county court judge, who observed, "I shall commit you for contempt if you do that again."[373] The Canadian Judicial Council relates:

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[369]Watkins L.J. in *K.*, *ibid.* at 87.

[370]*Some Guidelines*, *supra* note 18 at 4.

[371]*Ibid.* at 2.

[372]Oswald cites no source. See Oswald, *supra* note 25 at 42.

[373]R.E. Megarry, *Miscellany-at-Law* (London: Stevens & Sons Limited, 1955) at 295, fn 19.

> Two Alberta judges have shown great wit and presence. In one case an exasperated young counsel said something about the judge's wisdom which she should not have said. Pretending not to hear her the judge said, "I didn't hear what you said, Miss X, but I think we should adjourn", to which she replied "Good heavens, do you have that problem too?" The judge wisely left the bench. Another Alberta judge was called some unpleasant things by an angry accused to which the judge replied, "That was just a lucky guess on your part", and left the bench.[374]

Leaving the bench is an important option. The Canadian Judicial Council indicates that contempts in the face of the court frequently occur after judgment or a verdict has been delivered or sentence has been pronounced. In those circumstances, "[e]xperienced judges recognize that things are sometimes said or done in such circumstances that are really the product of intense disappointment and should be overlooked, particularly outrage on the part of litigants or their supporters. Often no harm will come to the court's authority if the judge simply leaves the bench."[375]

The Law Reform Commission of Canada states that the court must be somewhat tolerant of discourteous and even contemptuous conduct, since tolerance increases, rather than diminishes, the prestige of the judicial profession.[376] It notes that "[a] comment from the

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[374]No case citations were provided. See *Some Guidelines*, *supra* note 18 at 163.

[375]*Some Guidelines*, *ibid.* at 38. It adds, importantly: "There is, however, no proper time for outbursts by counsel and it might not be so easy to overlook unprofessionalism at this stage..."

[376]*Report 17*, *supra* note 147 at 11. Tolerance, as a form of patience, is a virtue. Aristotle spoke of the "just man" as being one who was not a stickler for his own rights but willing to put up with less than his fair share. To be tolerant of others and others' actions was to be "equitable". (Aristotle's *Ethics*, Book 5, ch. 13) Tolerance is defined as "the disposition to be patient with or indulgent to the opinions or practices of others; freedom from bigotry or undue severity in judging the conduct of others; forbearance; catholicity of spirit": *The Oxford English Dictionary*, *supra* note 42 at vol. XVIII, p. 200.

judge, a mild reprimand, or a mere warning will usually accomplish much more than a prosecution for contempt."[377]

> Legal proceedings, particularly trials, are not a tea party and judges must not be too sensitive. While judges must always be vigilant to preserve institutional dignity and authority, there are many occasions where contumacious conduct should be stared down or overlooked. A court loses respect if it is offended too easily. Many experienced judges have never found it necessary to resort to contempt proceedings in order to preserve order in their courtrooms, or they have wisely ignored much vulgar abuse without doing harm to their dignity or authority.[378]

Adjournments are often successful, not only because they give an opportunity for tempers to cool, but because the contemptuous individual may return to purge the contempt by making an apology. Such an apology may avoid the necessity of making of a contempt citation.[379]

According to the Canadian Judicial Council, outbursts which occur in the course of high profile or semi-political trials are "usually managed by a stern warning and perhaps a brief adjournment. Participants at trials usually behave better after such a judicial *tour de force* and there is something very dignified about a court asserting itself calmly and without unnecessary fireworks."[380] It recommends that, "when things are getting testy in court, or when there is an outburst of some kind, a warning is all that is necessary. On other occasions it is sometimes useful to adjourn court abruptly, with or without a warning, in order to give everyone an opportunity to compose themselves."[381]

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[377]*Report 17, ibid.* at 11.

[378]*Some Guidelines, supra* note 18 at 35.

[379]*Ibid.* at 34.

[380]*Ibid.* at 37.

[381]*Ibid.* at 36. A superior court may also apply the more lenient remedy of injunction to enjoin contumacious conduct: *Some Guidelines*, *ibid.* at 15, citing *Oswald, supra* note

It is interesting to note that, in the Law Reform Commission's view, a codified law of contempt would remove the contempt power from the inherent jurisdiction of judges. Judges would be left with "the normal inherent power of a court to preserve order by admonishing, reprimanding, or expelling a disruptive person."[382] In other words, according to the Law Reform Commission, if the law of contempt were codified, the measures described above (leaving the bench, ignoring the contempt, giving reprimands and warnings) would be *all* the judge could do from his inherent jurisdiction. In circumstances where the contempt power must be invoked, the judge would have to proceed by laying a charge under one of the codified offences.

It is not necessary for the "big stick" to actually strike the contemnor to have effect. The fact that the big stick is poised and ready to strike may have significant effect by itself. This is the coercive, preventive and deterrent element of the law of contempt. The fact that punishment is the ultimate outcome of contempt deters potential contemnors. It encourages them not to display their contempt in outward fashion. It reminds them that their behaviour may be grounds for punishment. It brings them to the realization that their conduct is not appropriate.

Goodman J.A. of the Ontario Court of Appeal considers this element of the law of contempt particularly effective. Speaking in the context of a case in which a witness refused to testify, he describes how the contempt power can be employed to persuade a potential contemnor to comply with court process:

> The major inducement to a recalcitrant witness to give evidence is the knowledge that his actions may constitute contempt of court and if found in contempt he may be sentenced to a substantial term of imprisonment. In those cases where a witness refuses to be sworn or to testify, the trial judge

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25 at 16; *In re Johnson* (1887), 57 L.J.Q.B. 1 at 3.

[382]*Report 17, supra* note 147 at 18.

> is always in a position to threaten that he will cite the proposed witness for contempt and to warn him that if he is found in contempt he may be sentenced to imprisonment. If the witness persists in his refusal after such warning, the trial judge may order him to be brought back from time to time before the case for the prosecution is closed (if he is a witness for the prosecution) or prior to the conclusion of the evidence at trial (if he is a defence witness). The trial judge may actually cite the witness for contempt and order the witness to be brought back from time to time to see if he has reconsidered his position in the light of the warning he has received. If after repeated appearances and repeated warnings he still refuses to testify, it is most unlikely that a finding by the trial judge of contempt will induce such witness to testify where he has refused to do so after the previous warnings. Once he is sentenced, there is no longer any effective inducement, as the court cannot vary a fixed sentence once it is imposed.[383]

The law of contempt, approached in this manner, is also a means of explaining to the potential contemnor that his misconduct is having a serious effect on the administration of justice; of coaching him toward more cooperative conduct.

B. The Importance of the Court's Demeanour

Regardless of the circumstances and the course of action selected, it is important for the judge to remain calm and dignified. The loss of temper or noticeable anger might be a natural reaction to some contempts, but it does not serve the administration of justice. Anger suggests a loss of control. The Canadian Judicial Council states in *Commentaries on Judicial Conduct*:

> All persons in the courtroom are under some stress and passionate statements are to be expected. But whoever else loses control, it must

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[383] *R.* v. *Ayres* (1984), 42 C.R. (3d) 33 at 46 (Ont. C.A.) If the court approaches the contempt in this manner, the potential contemnor has an opportunity to "purge" his contempt. "Purging" one's contempt is a feature of civil contempt, but Goodman J.A., relying on the English case of *R.* v. *Phillips* (1983), 78 Cr. App. R. 88, makes the concept available to criminal contempts as well. See *R.* v. *Ayres* at 45.

never be the judge. The Honourable J.O. Wilson said in *A Book for Judges*:

> Example remains the best teacher and a judge who is moderate, disciplined and courteous in his intercourse with advocates, litigants and witnesses is far less likely to be exposed to immoderate coduct on their part.

The Right Honourable Gerald Fauteux also commented on this aspect of judicial decorum in *Le livre du magistrat.* He said:

> ... By showing moderation, discipline and courtesy in their relationship with lawyers, parties and witnesses alike, judges must create a climate favourable to the course of justice.[384]

In its volume entitled *Some Guidelines on the Law of Contempt*, the Canadian Judicial Council states under the heading "The State of Mind of the Judge":

> As contempt is a legal question, it requires serious detached consideration. As soon as a question of contempt arises, a judge must ask himself or herself: "Am I able to act judicially and with complete impartiality?" and "Will I be perceived by right-thinking persons to so conduct myself?" If those questions cannot both be answered in the affirmative then an adjournment and the assignment of a different judge is required as a debt of justice. A judge should never preside over a court when he or she is angry, however seriously he or she may have been provoked."[385]
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> "A judge should conduct contempt proceedings calmly and judicially and it is usually preferable to refer any matter to another judge if there is any reasonable perception of bias or prejudgment."[386]

In *R.* v. *McKeown*, Justice Laskin suspected that some form of passion, anger perhaps, had motivated the conviction by the trial judge. Laskin J. quoted J.H. Beale as follows:

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[384](Cowansville, Quebec: Les Editions Yvon Blais Inc., 1991) at 77.

[385]*Some Guidelines*, *supra* note 18 at 33.

[386]*Ibid.* at 4.

> A danger always exists in the punishment of any contempt by summary process by the judge who has suffered from the contempt; he is made both judge and jury in his own case, he passes on the facts and on the law, and determines punishment. Such a power in the hands of an angry man is, of course, subject to abuse; and judges, being human, are subject to anger like other men.[387]

In *R.* v. *Chippeway*, the Manitoba Court of Appeal noted that Judge Corrin pronounced, "in words lacking the sense of detachment and impartiality that one would expect of a judicial officer, his intention to cite Mr. Bunn for contempt of court."[388] Anger undoubtedly results in unnecessary contempt citations and convictions.[389]

It is more in keeping with the proper demeanour of a judge to be patient and somewhat tolerant of the foibles of lawyers and citizens who appear in court. The court must appreciate that emotions run high when citizens present their disputes to the court for resolution. It is only natural that some of these emotions occasionally get the better of the citizen. In the Canadian Judicial Council's assessment, however, "[t]here are surprisingly

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[387]Quoted by Laskin J. in *R.* v. *McKeown*, *supra* note 77 at 414 from Professor J.H. Beale, "Contempt of Court, Criminal and Civil", 21 Harv. L. Rev. 161 (1908) at 172.

[388]*R.* v. *Chippeway*, *supra* note 177 at 157.

[389]One such example is found in *R.* v. *Swartz*, *supra* note 278 at 480-481 where the Manitoba Court of Appeal states: "Here then are the events leading to the unhappy conclusion: a young lawyer applies - on tenable grounds, we must say - for a two-week adjournment; his application is brusquely denied; facing now the difficult task of having to go on with the hearing without the evidence that he feels is essential for the defence, he over-reacts by attempting to withdraw; the learned Judge thereupon over-reacts in even a worse fashion, first by ordering the lawyer to remain in the court-room, then by threatening to report him to the Law Society, then by declaring that he will instruct the Crown to take contempt proceedings against him, and finally by directing the constable to take him into custody. From an application for an adjournment the situation quickly deteriorated to a point where the lawyer suddenly found himself under arrest. We are bound to say that the learned Judge's order to arrest Mr. Swartz was most unfortunate. It should not have been made." See also *Young* v. *Saylor et al* (1893), 23 O.R. 513 (Q.B.).

few contempt cases in Canada, largely because judges do not overreact to provocative situations."[390]

C. The Impropriety of Finding Contempt for Insults to a Judge Personally

It has been pointed out on many occasions that a judge is not justified in citing a lawyer in contempt for insults directed at him personally: "[Contempt of court] is not to protect the tender feelings of the judge or to give him any additional protection against defamation other than that which is available to the ordinary citizen by way of the civil action in damages."[391] "Insults against a judge out of court which do not actually interfere with the administration of justice, or are not intended to cause disrepute to a court, are not an offence."[392]

There is a fine line, however, between insulting a judge personally and insulting him or her in his or her judicial capacity. It was explained in the English case of *R.* v. *Davison* where a judge had been insulted in court,

> "In the case of an insult to 'the judge', it is not on his own account that he commits, for that is a consideration which should never enter his head. But, though he may despise the insult, it is a duty which he owes to the station to which he belongs, not to suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the

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[390]*Some Guidelines*, *supra* note 18 at 2.

[391]*Re Ouellet (No. 2)* (1976), 34 C.R.N.S. 234, 28 C.C.C. (2d) 338, 67 D.L.R. (3d) 73 at 93 (Que. S.C.); Oswald, *supra* note at 10. The Canadian Judicial Council states in *Some Guidelines, ibid.* at 36 that the court's contempt jurisdiction is not intended "to assuage the personal discomfort, annoyance or outrage of a judge."See *In re Bahama Islands*, [1893] A.C. 138 (P.C.) for a case where a contempt conviction was overturned on a finding that it involved the judge personally, not judicially.

[392]*Some Guidelines*, *ibid* at 4, 3.; *R.* v. *McKeown*, *supra* note 77.

> dignity of his station, and uphold the law, so that, in his presence, at least, it shall not be infringed."[393]

The Law Reform Commission of Canada in its *Working Paper 20* cites as an example of the dual nature of this rule the accused who shouted in the middle of a jury trial that he was "fed up with the judicial system" because of the judge's "nauseating, biased and dishonest" decision, and that the judge was "just an executioner, a hypocrite, an ignoramus and an incompetent".[394] According to the Law Reform Commission, the words (a) personally insulted and even defamed the judge; (b) brought the administration of justice generally into disrepute; and (c) interfered with the peaceful atmosphere of the trial. The personal insult and defamation were actionable by the judge personally, but the second and third aspects of the outburst would warrant charges of contempt for both scandalizing the court and for misbehaving in court.[395]

D. The Appropriate Speed at which to make a Finding of Contempt

Sometimes it is necessary for the court to find contempt and imprison a contemnor immediately. The Canadian Judicial Council says of this type of situation that it typically involves "cases where something occurs suddenly in the heat of battle". In these circumstances, "[n]ot to act swiftly and decisively ... may be harmful to the proper administration of justice. Those who interfere with a court's process must be dealt with fairly, but promptly. Otherwise the public may lose respect for the judicial process."[396] "...[A] judge should never hesitate to deal firmly and immediately with misconduct which

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[393](1821), 4 B. & Ald. 329.

[394]Citing *R.* v. *Vallieres (No. 2)* (1973), 47 D.L.R. (3d) 363, 17 C.C.C. (2d) 361 (Que. C.A.).

[395]Law Reform Commission of Canada, *Working Paper 20: Contempt of Court* (Ottawa: Minister of Supply and Services Canada, 1977) at 22.

[396]*Some Guidelines*, *supra* note 18 at 2.

arises in the course of proceedings, particularly if other parties will be prejudiced by delay or unpunished misconduct."[397] Using the example of a witness refusing to testify, the Judicial Council encourages swift action, even if it requires an alleged contemnor to be taken immediately into custody.[398] This does not necessarily offend the *Charter*. "After all, suspects are often arrested on the spot."[399] "The court may have to act before counsel for the [alleged contemnor] is available."[400]

> "When a contempt occurs in the face of the court and the facts are all known personally by the judge, or they are within the cognizance of the court, and the alleged contemnor is in court, a judge, without hearing further evidence but after giving the alleged contemnor an opportunity to make an explanation, call evidence or make a submission, may, in a proper case, proceed instantly and summarily to make a finding of guilt and sentence the contemnor appropriately. This is a proper course to follow if immediate action is necessary to preserve order or the authority of the court.[401]
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> ...
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> Whether the court proceeds immediately or at a later time or date depends upon all the circumstances. Generally speaking, an alleged contemnor should be granted an adjournment if he or she requests it and the proper administration of justice will not be harmed. On the other hand, if a person disturbs proceedings either by calling a judge an unpleasant name in court or by some other means, and witnesses are standing by waiting to give their evidence, etc., it may be necessary to deal with the contempt "on the spot". This, however, would be the exceptional case.[402]

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[397] *Ibid.* at 4.

[398] See discussion of the "summary process" in Chapter 2, heading B "The Summary Process".

[399] *Some Guidelines*, *supra* note 18 at 3.

[400] *Ibid.*

[401] *Ibid.* at 15.

[402] *Ibid.*, citing *R.* v. *K.(B.)*, *supra* note 153.

The Canadian Judicial Council states, "What is significant about the summary procedure is that the court has a discretion to determine how to proceed, and the court is not bound by time limits or other procedural rules except, of course, the principles of fairness."[403]

That said, there are very few situations which would warrant an immediate conviction and sentencing for contempt. In *R.* v. *K. (B.)*, a witness had refused to testify at a preliminary inquiry and then verbally abused and insulted the judge at some length. The judge instantly found him guilty of contempt and imposed a six month sentence. The Supreme Court of Canada held that the judge had been "amply justified in initiating the summary contempt procedures" but was not justified in moving as swiftly as he did. Lamer C.J. stated that, even under those difficult circumstances, the contemnor must be given the benefit of the rules of natural justice and the *Charter*. The accused must be put on notice that he or she must show cause why they should not be found in contempt of court, followed by an adjournment to give the accused an opportunity to be advised and represented by counsel. There should also be an opportunity for the accused to make representation as to sentence. There may be exceptional cases "where failure to take one

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[403]*Some Guidelines*, *supra* note 18 at 18. In *R.* v. *Hebert* (1967), 2 C.C.C. 111 (Que. C.A.) at 155, Owen J.A. said: "It can be understood how and why this procedure by summary process involving the power to punish contempt of Court expeditiously came into being. If a person in a Court-room defies the Court or otherwise holds it in contempt, the Court, to maintain its authority, is obliged to exercise it promptly. Similarly if during the course of a trial acts are done or words are spoken or written, not in the face of the Court, which interfere with or obstruct the course of justice in respect to that trial, then again the Court must act promptly and put an end to such interference or obstruction." In *Balogh* v. *St. Albans*, [1974] 3 All E.R. 283 (C.A.), endorsed by the Supreme Court of Canada in *R.* v. *K.(B.)*, *supra* note 153 at 194, Lord Denning stated: "This power of summary conviction is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the judge and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately - so as to maintain the authority of the court - to prevent disorder - to enable witnesses to be free from fear - and jurors from being improperly influenced - and the like. It is, of course to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt... But properly exercised, it is a power of the utmost value and importance which should not be curtailed."

or all of the steps I have outlined above will be justified", but those cases would be subject to the requirements of the *Charter*.[404]

In the case of a lawyer's failure to appear in court, a loss of respect may accummulate as a result of the judge, court staff, jury, counsel, witnesses and public being left to await the arrival of the lawyer who does not, in fact, arrive. The circumstances could not, however, possibly warrant an immediate contempt conviction. The alleged contemnor must first be cited for contempt and given the opportunity to explain his conduct at a show-cause hearing. The rules of natural justice apply, as does the *Charter*. The trial judge in *R.* v. *Chippeway* exercised the contempt power summarily and improperly in the circumstances of a failure to appear. According to the Manitoba Court of Appeal, "Judge Corrin cast himself in the roles of complainant, investigator, and prosecutor, and utimately, the judge. In doing so he challenged to the breaking point, the fundamental principle which governs judicial behaviour, 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'."[405] "Failure to exercise [the contempt power] with "scupulous care" and restraint will inevitably erode the public's respect for, and confidence in, the judicial system."[406] Given remarks such as these and the remarks of the Supreme Court in *R.* v. *K.(B.)*, there is very little scope in Canada today for making a contempt conviction *instanter*.

Making an immediate conviction for contempt, however, is not the same as "dealing" with a contempt instantly. "In some cases ... it might be an abdication of judicial responsibility not to deal with a serious contempt on the spot."[407] "Dealing" with a contempt may or may not, depending on the circumstances, be possible by means other than a citation for

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[404]*R.* v. *K. (B.)*, *supra* note 153 at 195, 197-198.

[405]*R.* v. *Chippeway*, *supra* note 177 at 155.

[406]*Ibid.*

[407]*Some Guidelines*, *supra* note 18 at 28.

contempt. The judge, acting judicially, must determine what the circumstances require in terms of controlling contemptuous conduct. Where a contempt citation is made, strict adherence to natural justice considerations and to sections 7 and 11 of the *Charter* is required. Inadequate notice of the charge has been a significant problem in contempt citations.[408]

E. Avoidance of Conflicts of Interest and Conflicts of Roles

The remark in *R.* v. *Chippeway* about the trial judge casting himself in the roles of complainant, investigator, prosecutor and judge is one that is frequently made. It suggests there is a potential for abuse of the contempt power and unfairness to the alleged contemnor. An angry trial judge could, by his own actions alone, make a contempt citation, conduct an investigation, prosecute and try and alleged contemnor using his own evidence to convict. The facts in *R.* v. *McKeown* easily lend themselves to this kind of criticism.[409] Actual abuse may seldom result; nevertheless, justice must be seen to be done.

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[408]In the failure to appear cases alone, inadequate or confusing notice of the charge to be met was a problem in the cases of *R.* v. *Pinx*, *supra* note 167, *R.* v. *Carter*, *supra* note 188, *R.* v. *Glasner*, *supra* note 70, and in *Steward* v. *Minister of Employment and Immigration* v. *Steward*, *supra* note 318.

[409]*Supra* note 77. Spence J. noted that Mr. McKeown's absence from court occurred on September 9th and 10th. Judge Martin cited him in contempt on September 12th for a September 15th show cause hearing which did not actually take place until September 25th. Spence J. stated that the situation was not urgent and should have proceeded by means which "would have avoided His Honour Judge Martin unnecessarily placing himself in the most invidious position of being an accuser, what amounted to a witness, and also a Judge:"at 8. Laskin J. in the same case noted that "[t]he Judge proceeded entirely *suo motu*, no one appearing on behalf of the Attorney-General to conduct the proceedings. He called three witnesses (in addition to making a statement of facts of his own) and examined them:" at 16. "Judge Martin was in an impossible position when he gave evidence which was challenged by other testimony and yet was not amenable to cross-examination; and, further, when he had to make findings of fact which depended in part on reliance on his own evidence (or on his statement of facts, as he termed it):" at 24.

Judges have long known about this problem and regularly take steps to avoid the appearance of unfairness. They avoid, where possible, making the contempt citation themselves. The Canadian Judicial Council reasons that "[i]n most cases, it will be the wise course for the judge to leave the initiation of proceedings to the parties or to the Attorney General. Indeed, it may be appropriate, particularly where there is a large number of defendants, for the court to request that the Attorney General take conduct of the proceedings."[410] It may not be possible for the court to take this course of conduct, however, in urgent circumstances where it is necessary to make a contempt citation in order to maintain the authority of the court.[411] The trial judge has the ultimate discretion, but is clearly urged to employ a procedure which involves the Attorney General as prosecutor.

Where a contempt has been committed in the face of the court, the presiding judge must make her own record of the evidence. The Canadian Judicial Council encourages judges to do this simply by stating on the court record the event which has just transpired. "[T]he judge is entitled to rely upon the fact of anything which has happened in court and other matters of which cognizance may be taken."[412] The judge's recording of his statement of facts has not, with the exception of *R.* v. *McKeown,* been a problem in the failure-to-appear cases. This is possibly because the fact of non-appearance is relatively non-controversial. In more difficult cases, such as where a lawyer or litigant scandalizes a judge in the face of the court, the precise words are most often recorded directly onto the court record. Once again, this is not highly controversial. Where the scandalous remarks were not made on the record, however, the judge may resort to reciting them, to the best

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[410]*Some Guidelines*, *supra* note 18 at 22.

[411]*Ibid.* The case of a lawyer failing to appear may constitute circumstances where the authority of the court requires the judge to make the citation personally and promptly. In *R.* v. *McKeown*, *supra* note 77 at 24, Laskin J. indicated that in the circumstances of that case it was neither urgent nor imperative that Judge Martin initiate the proceedings.

[412]*Some Guidelines*, *supra* note 18 at 33-35.

of his recollection, for the record. This may present some controversy, although it has not to my knowledge as far as lawyers are concerned.[413]

Most judges who cite a lawyer for contempt are careful to let another judge preside over the show cause hearing. Laskin J. said in *R.* v. *McKeown*, "Indeed, it is the preferable course, where conditions do not make it impracticable, or where there will be no adverse effect upon the pending proceedings by the delay, to have another Judge conduct the contempt charge..."[414] The Canadian Judicial Council notes that a finding of contempt requires serious detached consideration. It recommends: "As soon as a question of contempt arises, a judge must ask himself or herself: 'Am I able to act judicially and with complete impartiality?' And 'Will I be perceved by right-thinking persons to so conduct myself?' If those questions cannot both be answered in the affirmative then an adjournment and the assignment of a different judge is required as a debt of justice."[415] There are probably very few contempt citations, particularly contempts by lawyers who fail to appear, where the judge both cites the lawyer and convicts him.

F. Due Consideration for the Role of Lawyers

Occasionally a lawyer may say or do something which appears disrespectful but which is necessary in order to advance a client's interests. A lawyer, it will be recalled, has not only a duty to the court as its officer, but has also a duty to the client to zealously advocate her interests. Judges and lawyers alike must be sensitive to the existence of a possible

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[413]While this issue of evidence is not serious, the Law Reform Commission of Canada recommends in its *Report 17*, *supra* note 147 at 63 that no judge under any circumstances should be permitted to testify on behalf of the Crown or the accused as to the facts. "In other words, if the Attorney General can find no witness other than the judge and can find no other evidence upon which to base a prosecution, there will be no prosecution."

[414]*R.* v. *McKeown*, *supra* note 77 at 23.

[415]*Some Guidelines*, *supra* note 18 at 33.

conflict between these duties. A body of law has developed to prioritize the duties, the effect of which is that a lawyer must be given a certain latitude in her conduct of litigation.

The first proposition in this body if law is that the lawyer's duty of zealous advocacy is vitally important to the role of a lawyer. *Oswald's Contempt of Court* states the lawyer's position in the following terms:

> An advocate is at liberty, when addressing the Court in regular course, to combat and contest strongly any adverse views of the Judge or Judges expressed on the case during its argument, to object to and protest against any course which the Judge may take and which the advocate thinks irregular or detrimental to the interest of his client, and to caution juries against any interference by the Judge with their functions, or with the advocate when addressing them, or against any strong view adverse to his client expressed by the presiding Judge upon the facts of a case before the verdict of the jury thereon. An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client's case.[416]

Occasions may arise when the advocate must say or do something which may appear discourteous to the court. This was recognized in the case of *Izuora* v. *R.* where Lord Tucker said: "It is not every act of discourtesy to the court by counsel that amounts to contempt...."[417] Similarly, Lord Goddard in *Parashuram Detaram Shamdasani* v. *King-Emperor* cautioned that the contempt power should not be used "to suppress methods of advocacy which are merely offensive."[418] This position was recently reinforced by the

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[416]Oswald, *supra* note 25 at 56-57.

[417]*Supra* note 38 at 336 (A.C.), 705 (W.L.R.).

[418]*Supra* note 64. Leading texts on contempt of court relate the following exchange which took place between the famous English advocate Erskine and Judge Buller about the wording to be used in a jury verdict in a case known as *Dean of Asaph*:

Erskine:	I stand here as an advocate for a brother citizen and I desire that the word "only" may be recorded.
Buller J.:	Sit down, Sir; remember your duty, or I shall be obliged to proceed in another manner.

Supreme Court of Canada in *Young* v. *Young*. Mr. How, solicitor for Mr. Young in a custody battle, had been penalized with an order to pay costs personally for his part in adding unnecessarily to the length and complexity of the case and for his part in advancing a claim of "little merit". In words which apply equally to the contempt power, McLachlin J. stated that "courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling."[419]

Notwithstanding the lawyer's duty to zealously advocate the client's interest, the lawyer's duty to the court takes precedence. In *Rondel* v. *Worsley*, Lord Denning M.R. stated:

> [The barrister] must accept the brief and do all he honourably can on behalf of his client. I say "all he *honourably* can", because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes

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Erskine: Your Lordship may proceed in what manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct.

Apparently Erskine was later commended for "this noble stand for the independence of the Bar." Cited in Borrie & Lowe, *supra* note 22 at 28. Oswald, *supra* note 25 states at 54: "An over-subservient Bar would be one of the greatest misfortunes that could happen to the administration of justice in England."

[419][1993] 8 W.W.R. 513 at 542. Cumming J.A.'s words at the appellate level are equally apposite: "Solicitors who think that they may be mulcted in costs for advancing points which they honestly believe to be fairly arguable may not act fearlessly and in the best traditions of an independent profession. If solicitors are limited in what they think they can say or do on behalf of their clients, then the rightws of those clients are also necessarily limited. The potential for a chilling effect, ... underscore the need for judges to exercise caution in the making of such orders. See (1990), 29 R.F.L. (3d) 113 (B.C.C.A.).

> allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline; but he cannot be sued in a court of law.[420]

The paramountcy of the lawyer's duty to the court is also evident in Canadian codes of professional conduct. The Canadian Bar Association's *Code of Professional Conduct* provides, for example, that "[t]he lawyer should at all times be courteous and civil to the court and to those engaged on the other side. Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit disciplinary action."[421] Alberta's *Code of Professional Conduct* provides: "A lawyer's dealings with the court must be courteous and respectful." It continues:

> As officers of the court, lawyers are obliged to maintain the dignity, order and decorum of judicial proceedings so that the legal system functions properly. Disrespect for the court displayed by counsel, clients or witnesses would erode the confidence of the public in the administration of justice. A lawyer must therefore remain respectful and self-controlled and must take reasonable steps to ensure that those subject to the lawyer's direction act in a similar fashion.[422]

Recall from Chapter 4 that the *mens rea* category of "knowledge" may be imputed to a lawyer by virtue of the lawyer's training and role in the administration of justice. This would suggest that a lawyer must be particularly careful that he not offend the court. For

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[420]*Rondel* v. *Worsley*, [1966] 3 All E.R. 657 at 665.

[421]Chapter IX, "The Lawyer as Advocate", para. 14, p. 39.

[422](1995), Chapter 10, rule 12 and Commentary at 117-18.

example, Draper C.J. noted in *Re the Recorder and Judge*, that while tempers and passions are frequently excited during the course of litigation, they should never be adopted by counsel. He said:

> If such apparent indecorum proceeds from a member of the bar, ... it becomes the more indispensable for the judge to exercise his full powers to put it down, for the barrister has not the excuse of the personal excitement of the suitor, and must be assumed to know that it is his duty to aid not to embarrass the judge in the faithful discharge of his functions.[423]

In *R.* v. *Barker*, Morrow J.A. of the Alberta Court of Appeal indicated that a comment by a lawyer may have a more serious effect on the integrity of the judicial process than if made by a lay person, and for this reason it should not be ignored.[424] Gibbs J.A. of the British Columbia Court of Appeal stated in *R.* v. *Clark* that a lawyer does not have the privilege of pleading ignorance in matters of contempt. A lawyer must be taken to know what he is doing, the effect of what he is doing, and the probable consequences if he is called to account.[425]

One may deduce from the above that, while a lawyer has a certain latitude in saying what she must say in order to advocate her client's interests, she must not go so far as to be disrespectful of the court. Even when disagreeing with rulings of the judge, the lawyer must show respect for the court and for the position of the judge. The same considerations do not apply to a lawyer who fails to appear in court at the appointed time. In the circumstances of failing to appear, the lawyer fails in both his duty to the court and in his duty to the client. In the lawyer's absence, the court's options are somewhat narrowed. The judge cannot "stare down" the disrespect or issue a warning. Yet she is embarrassed

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[423](1864), 23 U.C.Q.B. 376 at 379.

[424][1980] 4 W.W.R. 202 at 220-21, 20 A.R. 611 (Alta. C.A.), citing *Re Ouellet*, *supra* note 391.

[425]*R.* v. *Clark*, [1997] B.C. J. No. 763 (QL) at 10 (paras. 5, 6).

on behalf of the administration of justice. The failure to appear "looks bad", and the judge feels that something should be done to show the court's disapproval. It is apparent from the cases that judges in these circumstances have often cited the lawyer in contempt of court. It is also apparent that the convictions that followed were frequently overturned on appeal. The failure to appear has often amounted to a discourtesy, but not to a contempt of court. Where the judge does not cite a lawyer for contempt, the judge may announce his disapproval by thanking all those present and apologizing on behalf of the absent lawyer. Is this enough? Can or should something more be done?

The court has the following options available to deal with this situation: (a) reprimand; (b) referral to the law society; (c) practice directions; and (d) awarding costs against the lawyer personally.

(a) Reprimand

One option for the court might be to require the lawyer to attend in open court or in private chambers in order to receive a reprimand. Technically this is a viable option. The lawyer, in his capacity as officer of the court, is disciplined by his "supervisor", the court. Accordingly, in *R.* v. *Fox*, the Court of Appeal found Fox's conduct in arriving 50 minutes late to trial warranted a reprimand but not a contempt citation and conviction. Judges seldom, however, resort to this method. They may prefer to refer disciplinary matters to the law society.

(b) Referral to the Law Society

On a surprising number of occasions the judge considers reporting the incident to the provincial law society. The law society of a province is empowered, and required, to discipline solicitors for breaches of the code of professional conduct and for misconduct

and unprofessional conduct.[426] Failing to appear in court is certainly unprofessional conduct, particularly where the *actus reus* and *mens rea* of contempt are present. In fact, judges consider referring a failure to appear to the law society even where they make a finding of contempt.[427] The trial judge in *R.* v. *Pinx* indicated that, while he would deal with Pinx's contempt of court in Pinx's capacity as officer of the court, the breach of duty to client might be the cause of disciplinary action by the law society.[428] Similarly, in *Steward* v. *Minister of Employment and Immigration* the Federal Court of Appeal who convicted MacIntosh of contempt fined him and directed the court registry to transmit a record of the contempt proceedings to the Law Society of British Columbia.[429]

Other courts resort to a referral to the law society when the conduct is not serious enough to be a contempt. In *R.* v. *Kopyto (No. 1)*, for example, the Ontario Court of Appeal overturned Kopyto's conviction but stated that they did not condone his conduct. "His professional conduct is a matter for the Law Society."[430] Hugessen A.C.J. in *R.* v. *Aster (No. 2)*, however, had some reservations about referring the matter to the law society. He said:

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[426]*Legal Profession Act*, S.A. 1990, c. L-9.1, Part 3 - Conduct of Members.

[427]Because of the lawyers two roles, this may not expose him or her to double jeopardy. See, e.g., *R.* v. *Wigglesworth*, [1987] 2 S.C.R. 541, 45 D.L.R. (4th) 235; *R.* v. *Van Rassel*, [1990] 1 S.C.R. 225, 53 C.C.C. (3d) 353; *R.* v. *Shubley*, [1990] 1 S.C.R. 3, 65 D.L.R. (4th) 193.

[428]*R.* v. *Pinx*, *supra* note 167 at 84.

[429]*Steward* v. *Minister of Employment and Immigration*, *supra* note 318 at 243.

[430]*R.* v. *Kopyto (No. 1)*, *supra* note 185 at 591. In *R.* v. *Stong*, *supra* note 174 at 787, the court stated that failure to appear - to be in constant disregard of obligations to the court, would doubtless be deplored by the law society if they knew that it was happening. In *R.* v. *Chippeway*, *supra* note 177 at 157 it was the Crown prosecutor who suggested to Judge Corrin that the matter might be addressed to the law society. In *R.* v. *Hill* (B.C.C.A.), *supra* note 41 at 67, Hill attempted to deflect contempt proceedings by suggesting that his failure to appear was a cause for disciplinary action by the law society but was not a contempt of court.

> Indeed, I have even given serious consideration to the question whether it was my duty to communicate with [the bars of Quebec and Ontario]. I have decided not to do so out of fear that any communication on the subject from me would almost surely be regarded as a request to act. I think it very probable that both bodies will, in any event, learn of these proceedings. I would not want in any way to interfere with their discretion to take such action as they see fit but I equally would not want them to feel obliged to take any action at all. The real possibility of Mr. Aster's being subject to professional discipline inclines me to clemency.[431]

Hugessen A.C.J. was concerned about independence of the judiciary and independence of the bar. The court is the judicial arm of government. The law society is a professional organization. If the law society's discipline committee is called on by the court to discipline a member for contempt, both the independence of the bar and the impartiality of the courts may be, or may appear to be, compromised. Note that Hugessen A.C.J. considered not only the different functions of the law society and the court but also commented on the imbalance of power between them. A referral from the court, in his opinion, would amount to a request to take disciplinary action. Could the law society refuse such a request? Where the law society and the court are each independent of one another, there is absent a natural flow of communications or commands. One body may misinterpret the intentions of the other. In the Canadian Judicial Council's guidelines on contempt, the following appears in a footnote:

> Some professional bodies refuse to discipline their members for professional discourtesy on the ground that they do not wish to act in circumstances where the court has not exercised its jurisdiction in contempt. This is a misconception because, for the reasons stated, much discourtesy does not amount to contempt, and judges are expected to resort to contempt only in aggravated circumstances.[432]

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[431] *R.* v. *Aster (No. 2)*, *supra* note 360 at 462.

[432] *Some Guidelines*, *supra* note 18 at 58-59, fn 172.

Not only does a law society referral create an "independence of the courts/independence of the bar" problem, but the two bodies may have somewhat different objectives in disciplining lawyers. The law society's discipline function exists to maintain the integrity of the legal profession, while the court's discipline function for contempt exists to maintain the integrity of the administration of justice as a whole. The law society disciplines a lawyer in his capacity as a member of the law society for breaches of its code of ethics, whereas a court disciplines a lawyer for contempt and for dereliction of duty as an officer of the court. The jurisdictions of the law society and the court may overlap to a considerable extent, yet each body is an important presence in and of itself, with its own attitudes and approaches. The law society may be inclined to discipline a lawyer only for egregious misconduct, whereas the court may be inclined to discipline a lawyer immediately for acts of disrespect. It would seem strange indeed for a law society to punish a lawyer for breaching his duty as officer of the court, just as it would be improper for a court to discipline a member of the law society for violation of the code of ethics.

That the law society and the courts have different views of a lawyer's conduct is evident from the *Clark* case. In *R.* v. *Clark*, the Law Society of Upper Canada considered a number of serious contempts, including intemperate statements to a justice of the British Columbia Court of Appeal, abusive letters to judges in Ontario and British Columbia, preparation and delivery of documents from a non-existent court purporting to convict an Ontario judge of various crimes, accusations that the British Columbia judiciary and the Crown conspired to commit crimes of genocide against aboriginal people, and an attempt to perform a citizen's arrest of a panel of the British Columbia Court of Appeal on charges of treason and complicity to genocide. Clark was not disciplined by the Law Society for any of this conduct. A British Columbia Provincial Court judge finally brought him to account, saying,

> Surprisingly, and regrettably, the Law Society of Upper Canada seemed to condone much of Clark's hectoring as "zealous" advocacy - necessary

> because judges did not give him a proper audience or consider his argument. That is a false premise. Judges have listened patiently and carefully to his argument. Must a court listen to the same legal argument for the 41st time when that argument has been rejected 40 consecutive times at all levels in Canada?[433]

A third problem with leaving contempt matters to a law society is that it gives the court the appearance of abdicating its responsibility. Matters of contempt should be dealt with by the court because the court should be *seen* to be protecting itself and the administration of justice. If the insulted court does not defend itself, it appears weak and inefficacious; its authority undermined. Mr. Justice Gibbs said on Mr. Clark's appeal: "But this man must be deterred and restrained and other minded to engage in similar conduct must likewise be deterred and restrained. As Chief Justice Evans said, we are concerned 'with the absolute necessity of vindicating the dignity of the Court itself.'"[434]

The fourth problem concerns speed and efficiency. Many contempts must be dealt with quickly, if not to immediately commit for contempt in extreme cases then to immediately cite in contempt. This is necessary to prevent further harm to the administration of justice. It is necessary for its deterrent effect and as a means of visibly vindicating the dignity and authority of the court. The law society does not have this summary power. It is not present in cases where contempts must be dealt with on an urgent basis, and it does not have the powers inherent in the court to deal directly and expeditiously with contempt. Further, contempt of court is most easily dealt with by the court, especially where the contempt is committed in the face of the court. The court, which has in many instances seen the contempt, has best access to the evidence required to prove the offence.

Thus a court referral to the law society for a lawyer's failure to appear (or any other type of contemptuous conduct) is problematic. Nevertheless, it is probably practiced in some

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[433] *R.* v. *Clark*, [1997] B.C.J. No. 715 (QL) at para 56, Friesen Prov. Ct. J.

[434] *R.* v. *Clark*, *supra* note 425 (C.A.) at 16 (para 11), Gibbs J.A.

courts. Lawyers are disciplined for failing to appear in court;[435] their failure to appear must in some instances be referred to the law society by the court.

(c) Practice Direction

A practice direction (or "directive") is a rule of court made by the judges of a court. A practice direction has the same effect as a legislated rule of court unless and until it is successfully challenged as conflicting with a statute or other rule of court. Practice directions represent a powerful means of controlling the court's process. In the case of *R.* v. *Danson*, the Ontario Court of Appeal referred to a practice direction issued by the Chief Justice Howland in May, 1979 concerning the court's expectations of lawyers in respect of their attendance in court. This practice direction is clearly a response to problems which had arisen in the past, and represented an effort to set guidelines for lawyer's conduct in terms of appearing in court at the appointed time.

> The decisions reached by the Committee have been approved by the Bench and Bar Committee and by the Ontario Courts Advisory Council and will be effective *Monday, June 18, 1979* throughout Ontario. They are as follows:
>
> 1. *Trial dates in Provincial Courts (Criminal Division)*
>
> When a date for trial has been fixed by the Provincial Court (Criminal Division) with the agreement of counsel for the Crown and for the defence, the trial will be expected to proceed on the date fixed. By consenting to the date, both counsel will be considered to have committed themselves to be present on the date fixed and to have undertaken to make no other commitments that will render their attendance impossible.
>
> 2. *Subsequent Dates for Trials and Appeals*
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> In fixing subsequent dates for trials or appeals, the Supreme, County and District, and Provincial Courts will endeavour to ensure that their

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[435]See, for example, the Law Society Discipline Digest (LSDD) database on Quicklaw.

respective schedules do not make it impossible for counsel to honour undertakings which they have already given if fixing a date for trial in the Provincial Court (Criminal Division). It will be the responsibility of counsel to notify the presiding judge in the Supreme, County or District, or Provincial Court of the previous commitments which counsel has made in another court which might conflict with a proposed date for trial or for an appeal.

3. *Adjournments*

Once a trial date has been fixed, adjournments will only be granted in exceptional circumstances, e.g. the illness of a key witness, or the illness of Crown or defence counsel occurring so near to the date of trial that it would be impossible for other counsel satisfactory to the Crown or to the accused (as the case may be) to be properly briefed. Applications for adjournments should be made as soon as the need for an adjournment is apparent so as to assist in the utilization of the court's time which has already been scheduled, in the event the adjournment is granted. Such applications must be made at least three days before the trial date so that the witnesses who have been subpoenaed can be notified that their attendance will no longer be required. The judge hearing the application will not necessarily be the judge before whom the trial is to proceed. Reasonable notice of an application for an adjournment must be given to the other parties including co-accused who are jointly charged. Appropriate arrangements will be made for such applications to be heard by the Provincial Courts (Criminal Division).

4. *Default on part of Counsel*

If counsel for the Crown or for the defence fails to attend on the date fixed for trial, the trial judge will require that such counsel attend before him and will have his explanation for his absence recorded. If the trial judge is not satisfied with his explanation, he will send a copy of the transcript to the Chief Judge of the Provincial Courts (Criminal Division) for forwarding to the Law Society of Upper Canada so that appropriate disciplinary proceedings can be taken. Similarly, if counsel for the Crown or for the defence has not applied for an adjournment in accordance with paragraph 3, where one was required, then on the date for trial the trial judge will cause the explanation of counsel for such default to be recorded. If he considers the default to be serious, he will send a copy of the transcript to the Chief Judge of the Provincial Courts (Criminal Division) so that he can, iun turn, forward it to the Law Society of Upper Canada for appropriate action.

> The above decisions will bring about important changes in the scheduling of trials and appeals based on the chronological order in which commitments are made by counsel. They should ensure the prime consideration that an accused person will be represented by counsel satisfactory to him or her. They should also substantially reduce the delay in bringing actions on for trial, more effectively utilize the time of the courts, and eliminate unnecessary expense and inconvenience to the public which arise from adjournments. It is hoped that the legal profession will give these changes their full support and cooperation.
>
> May 3, 1979 W.G.C. Howland
> Chief Justice of Ontario

This practice direction is both instructive and informative. Paragraph 1 instructs counsel that once a trial date is selected, not only have counsel committed themselves to be present on that date, but counsel are expected to make no other commitments which conflict with that date. Double booking is not permitted. The trial will be expected to proceed on the date fixed. Paragraph 2 provides that other courts will endeavour to ensure that lawyers can keep their commitments. The Supreme, County and District and Provincial Courts will not set trial or appeal dates which conflict with other trial dates, provided the lawyer advises the court of the previous commitments.[436] Paragraph 3 precludes adjournments being made for family vacations and the like.[437] Adjournments are granted only for exceptional circumstances, such as where a key witness is ill and cannot attend. Adjournments are granted only on application made a minimum of 3 days in advance of the trial date. Adjournments granted in advance of the trial minimize inconvenience to witnesses and others involved in the trial process. Paragraph 4 provides for counsel's punishment in the event he fails to comply with the first three paragraphs. Counsel is to attend court to have the explanation for his absence recorded. This procedure would parallel the show cause hearing in contempt proceedings. Where the "excuse" is not

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[436]This was the problem encountered by Pinx in *R.* v. *Pinx*, *supra* note 167. Another matter had been adjourned, without his advice or consent, to a date on which he was committed to attend a preliminary hearing.

[437]This was the reason for the adjournment in *R.* v. *Danson*, *supra* note 224.

adequate, however, the "contemnor" is not convicted of contempt but is referred to the law society for appropriate disciplinary proceedings.[438]

(d) Awarding Costs Against a Lawyer Personally

Costs may also be applied as a punitive and compensatory measure. Rule 602 of the Alberta Rules of Court provides, for example:

> 602. In any proper case any barrister and solicitor who has acted for any of the parties to any proceeding, may be ordered to pay any of the costs thereof.

This rule, and its equivalent in other other jurisdictions,[439] is being applied with increasing frequency to penalize lawyers for misconduct in the course of litigation, particularly where the conduct has resulted in unnecessary delays and additional expenses to the parties in litigation.[440] This type of rule is a codification of the inherent jurisdiction of the court to punish lawyers and to prevent abuse of process.[441] The rule has been applied in the case of a lawyer failing to appear in court. In *Machtinger* v. *HOJ Industries Ltd.*,[442] counsel

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[438]Note that Chief Justice Howland had no difficulty with the concept of referring a lawyer to the law society for disciplinary purposes.

[439]See also Ontario Rule 57.07(1), for example.

[440]See, for examples, *Cadotte* v. *Cadotte* (1994), 24 C.B.R. (3d) 229, 92 Man. R. (2d) 242; *O.E.X. Electromagnetic Inc.* v. *Coopers & Lybrand* (1992), 75 B.C.L.R. (2d) 384 (S.C.), add'l reasons at (June 28, 1993), Doc. Vancouver C890388 (B.C.S.C.); *Bridlepath Progressive Real Estate Inc.* v. *Unique Homes Corp* (1992), 12 C.P.C. (3d) 109 (Ont. Master); *Cegarra* v. *Canada (Minister of Employment & Immigration)* (1992), 56 F.T.R. 241; *Donmar Industries ltd.* v. *Kremlin Canada Inc. (No. 2)* (1992), 6 O.R. (3d) 506 (Gen. Div.), additional reasons to (1991), 6 O.R. (3d) 501 (Gen. Div.); *Lough* v. *Digital Equipment of Canada* (1986), 15 C.C.E.L. 1, 57 O.R. (2d) 456 (Ont. H.C.).

[441]See F.T. Horne, *Cordery on Solicitors* (8th ed) (London: Butterworths, 1988) at 113, and see *Young* v. *Young*, *supra* note 419 (S.C.C.).

[442][1992] 1 S.C.R. 831.

failed to appear to argue a matter before the Supreme Court of Canada. The court granted a rehearing but required that the non-appearing counsel personally pay the costs of the original hearing and costs of the motion for rehearing.

The cases limit application of this rule to circumstances where there is a gross dereliction of duty,[443] and gross negligence. The conduct must be inexcusable and merit reproof.[444] McLachlin J. in *Young* v. *Young* urged courts to be extremely cautious in awarding costs personally against a lawyer because of its chilling effect on a lawyer's duty of zealous advocacy and his duty to bring forward with courage even unpopular causes.[445] The rule itself may be unavailable to some courts. It is not likely available in the context of criminal proceedings. Its availability is also limited in some provincial civil court proceedings. In Alberta, for example, there is no specific provincial court rule providing for costs payable by a solicitor personally. The civil division may, by virtue of the *Provincial Court Act*[446] apply a rule of court (such as rule 602), but only in limited circumstances. The *Provincial Court Act* provides:

> 19.1 (1) The practice and procedure of the Court shall be as provided in this Act and the regulations.
>
> (2) Where this Act or the regulations do not provide for a specific practice or procedure of the Court that is necessary to ensure an expeditious and inexpensive resolution of a matter before the Court, the Court may
>
> (a) apply the Alberta Rules of Court, and
> (b) modify the Alberta Rules of Court as needed.

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[443]*Kaye* v. *Atlantic Lottery Corp* (1992), 127 N.B.R. (2d) 132, 319 A.P.R. 132 (Q.B.).

[444]*931473 Ontario Ltd.* v. *Coldwell Banker Canada Inc.* (1992), 5 C.P.C. (3d) 271 (Ont. Gen. Div.), additional reasons to (1991), 5 C.P.C. (3d) 238 (Ont. Gen. Div.).

[445]*Young* v. *Young*, *supra* note 419 at 542 (W.W.R.).

[446]R.S.A. 1980, c. P-20.

This section has not been judicially considered. An argument could be made for its applicability in the circumstances of lawyer misconduct, but the success of such an argument remains to be seen.

The costs option should be considered by judges when they are confronted with sufficiently egregious misconduct on the part of a lawyer in the context of civil litigation.[447] It may be a fitting punishment in the circumstances. It avoids the stigma of a criminal conviction while at the same time compensating the parties for expenses unnecessarily incurred. It is a remedy which makes the miscreant pay in order to correct the problem he created.

G. Due Consideration for Freedom of Expression

Depending on the nature of the contempt, freedom of expression may be a further consideration to be made by a judge before finding someone in contempt of court. Freedom of expression has little to do with the contempt of a lawyer failing to appear in court,[448] but is important in the context of *sub judice* contempt and scandalizing the court. The Law Reform Commission of Canada in its *Report 17* states that contempt of court is sometimes seen by uninformed litigants as "the exercise of an arbitrary, even undemocratic power, aimed at protecting selfish interests and muzzling criticism."[449] In fact, the Law Reform Commission was quite concerned about the effect of contempt of court on freedom of expression. This concern has become even more important since freedom of expression was enshrined as s. 2(b) of the *Charter of Rights and Freedoms*. "...[T]he judicial system must be tolerant and patient so as not to prejudice freedom of expression... The right to criticize the administration of justice must therefore be preserved. Neither the judicial

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[447]Punitive costs are also a remedy where a litigant, not a lawyer, is a possible contemnor.

[448]Failing to appear in court would not, under most circumstances, be considered a means of expression, i.e., of communicating or receiving a message.

[449]*Report 17*, *supra* note 147 at 4-5.

system nor judges should be completely isolated from such criticism, as long as it remains reasonable."[450]

There is now a considerable Canadian jurisprudence on the freedom of expression. Courts recognize that freedom of expression is extremely important to the democratic process and to the lifestyle of citizens in a liberal democracy. Over a number of decades a body of important contempt-of-court decisions developed which acknowledges that criticism is a natural and healthy corollary of the justice system. Criticism may appear disrespectful on the face of it, but it should be permitted because of its overall usefulness in advancing the administration of justice. Four English decisions provide the parameters of acceptable criticism. In *Mcleod* v. *St. Aubyn*, Lord Morris said that

> [c]ommittal for contempt is a weapon to be used sparingly and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism... Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them.[451]

In *R.* v. *Gray*, Lord Russell stated in the same vein:

> That description of that class of contempt [scandalizing a judge or a court] is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of Court. The

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[450]*Ibid.* at 11-12.

[451]*Supra* note 56. In this case a colonial newspaper contained the following comments (at 552-555): "[The judge] is reducing the judicial character to the level of a clown ... He has apparently been too wrapped up and intermingled with personal dispute and squabbles of a questionable character to allow him to deal honestly and impartially with questions which come before him to be judicially settled... A man ... narrow, bigoted, vain, vindictive, and unscrupulous."

> law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published....[452]

In *Ambard* v. *Trinidad & Tobago (A.G.)*, Lord Atkin said:

> But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith, in private or public, the public act done in the seat of justice... Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken, comments of ordinary men.[453]

In *R.* v. *Metro Police Commr.; Ex parte Blackburn (No. 2)*, Lord Salmon stated, "... no criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith." Lord Denning said in the same case: "It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice."[454]

These decisions appear to set a tolerance threshold. They indicate that contempt should not be found for criticism unless it is characterized by malice, lies and outright attempts to undermine public confidence in the administration of justice. The tolerance threshold may be adjusted over time and circumstances. It may be entirely removed in some jurisdictions, such as Ontario, where scandalizing the court, at least out of court, became permissible in 1987, even where it is characterized by malice and lies. The case of *R.* v.

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[452]*Supra* note 22.

[453][1936] A.C. 322 at 335; [1936] 1 All E.R. 704 (P.C.). In this case a newspaper editor had commented critically that some judges gave severe sentences while others gave lenient sentences for the same crime committed in similar circumstances.

[454][1968] 2 Q.B. 150; [1968] 2 W.L.R. 1204; [1968] 2 All E.R. 319 at 321 (C.A.).

Kopyto (No. 2)[455] prompted the Canadian Judicial Council to say that "scandalizing by words will rarely be an offence, particularly with regard to completed proceedings. Generally speaking, judges must henceforth be prepared to endure almost any form of out of court criticism."[456]

H. Recommendations with respect to Reform Proposals

Judges must be aware of freedom of expression issues. They must not deny any alleged contemnor the protections of the *Charter*. They must treat the alleged contemnor fairly. They must be careful, when confronted with a contemptuous lawyer, to not trample unnecessarily on the lawyer's duty of zealous advocacy. They must consider discipline options which are less serious than a finding of criminal contempt of court. They must make a finding of contempt only where the conduct tends to seriously undermine public respect, or where the conduct seriously interferes with the course of justice. They must ensure that they are not motivated by anger. They must ensure that they are not proceeding for personal reasons or because they have been insulted personally. They must act swiftly only upon careful reflection and only where swiftness is absolutely essential in the circumstances. They must consider whether a warning about contempt would suffice. They must consider whether an adjournment, the use of humour, or a look of displeasure,

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[455] *Supra* note 43.

[456] *Some Guidelines*, *supra* note 18 at 26. Yet not all would agree with setting such a high tolerance threshold. The Law Reform Commission of Canada stated in its *Report 17*, *supra* note 147 at 12-13 that, while judges may not be able to invoke the contempt power to defend themselves from untrue allegations, and while they may not be able to publicly defend their actions, it would be "perfectly normal" for society to take up the judge's defence. It concluded that if it could resort to codified contempt provisions, society itself could act to vindicate the court. It would appear more just for society (through codified offences) to vindicate the court than for judges to do so, who themselves created the law of contempt. The Law Reform Commission reasons that, while the law of contempt must not restrict or jeopardize freedom of expression, it must be able to "deal severely with blatant and serious attacks in order to preserve the integrity of the system as a whole."

would suffice to stop the disrespectful conduct. They must be tolerant, patient, and longsuffering.

This is a considerable list of guidelines. It could hardly be said that the contempt power today is applied in an arbitrary fashion. "Arbitrary" means "dependent on will or pleasure"; "derived from mere opinion or preference"; "unrestrained in the exercise of will; of uncontrolled power or authority".[457] On the contrary, application of the contempt power today is noted by great restraint, control, and deference to precedent and authority such as the Canadian Judicial Council's guidelines on the use of contempt powers. There is very little room for the allegation that the contempt power is "the exercise of an arbitrary, even undemocratic power, aimed at protecting selfish interests and muzzling criticism."[458]

There is also very little room for a suggestion that codifying the contempt power would make it less arbitrary. Codifying all the guidelines contained in this Chapter would not affect the guidelines one way or another. The only useful purpose to be served by such a codification would be to make the guidelines known to the public, yet the Canadian Judicial Council has made its guidelines available to law libraries.[459] Thus lawyers and members of the public are free to consult the same handbook as do the judges. This is open and fair; hardly deserving of the "negative perception of judicial authority" which according to the Law Reform Commission of Canada in 1982 is typical of a segment of the Canadian public.[460]

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[457]*The Oxford English Dictionary*, *supra* note 42 at vol. I, p. 602, meanings 1, 3, 4.

[458]Law Reform Commission of Canada, *Report 17*, *supra* note 147 at 4-5.

[459]They are available in the Law Society Library at the Edmonton Law Courts, for example.

[460]Law Reform Commission of Canada, *Report 17*, *supra* note 147 at 4.

CONCLUSION

With few exceptions, judges' reliance on the precedents and guidelines set out in this Chapter make them very reluctant to find contempt. Canadian judges have taken the words of Lord Jessell very seriously:

> [The contempt power] ... should be most jealously and carefully watched, and exercised ... with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode ... which can be brought to bear upon the subject... I have always thought that necessary though [this jurisdiction] be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found.[461]

A number of other pertinent remedies have been found and successfully applied. Judges ignore rude remarks. They use humour to deflate tension in the courtroom. They stare down contemptuous conduct, issue warnings, order adjournments and make costs awards in an effort to avoid invoking the contempt power. By doing so, judges bring honour to the courts, enhance their reputation and increase their authority. They make it difficult not to respect the courts and their important function in Canadian society.

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[461] *In re Clements and the Republic of Costa Rica* v. *Erlanger*, *supra* note 63.

CONCLUSION

What does the contempt power mean to us today? It means we can rest assured that our courts will remain a well-respected and effective Canadian institution. It means that our laws will be enforced and developed, and that our way of life will be preserved.

As a venerable, tried and tested law of this land, the contempt power is a source of pride. It is an acknowledgment of our faith in law and order. It protects fundamental rights and freedoms. It is not Draconian or contrary to fundamental freedoms. As one Canadian judge has said,

> [t]he jurisdiction which I here exercise is within such reasonable limits prescribed by law and demonstrably justified in a free and democratic society. To do otherwise would subvert the law of this land and the jurisdiction of this court to what I may term to be the 'law of the jungle'. This cannot be ...[462]

In exchange for the rights and freedoms bestowed on us by our laws and enforced in our courts, we owe a duty of respect. We must respect our courts and the courts' right to demand that respect. We must take the contempt power seriously.

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[462]Holland J., *R.* v. *Ayres* (unreported) December 13, 1982, (Ont. S.C.), quoted with approval by Goodman J.A. in *R.* v. *Ayres*, *supra* note 383 at 41 (Ont. C.A.).

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APPENDIX

This appendix consists of case summaries of some well-known failure-to-appear cases involving Canadian lawyers. The cases appear in chronological order by reporting date.

***R.* v. *McKeown* (*sub nom McKeown* v. *The Queen*) (1971), 2 C.C.C. (2d) 1 (S.C.C.)**

Mr. McKeown had undertaken to defend a convicted person against an application to have him declared an habitual criminal. The matter was scheduled to be heard September 9, 1969 at 10:30 a.m. In chambers on September 9th before Judge Martin, a Mr. Griner appeared on behalf of McKeown and stated that McKeown was ill but would possibly be able to proceed the following day. Mr. Griner advised that he would act as counsel if McKeown was not well enough to proceed. Judge Martin stated that McKeown had telephoned him at about 9:45 advising that he would be a little late, but had made no mention of illness. McKeown testified that feelings of exhaustion had begun to affect him the preceding summer. He had worked long hours over the weekend, and by September 8th he had requested Mr. Griner to appear in his stead on two matters that day and on September 9th as well. On September 10th, no one appeared before Judge Martin when the matter was called. Crown counsel believed that McKeown was under doctor's care. McKeown's client indicated that McKeown had been taken to hospital from the barristers' robing room. Judge Martin stated that McKeown had telephoned him shortly after 10 a.m. to advise that either he or Mr. Griner would appear, but had not mentioned being ill.

McKeown testified that he had gone to the court house with an investigator whom he asked to accompany him because he was feeling dizzy. When he reached the robing room, he had reclined on the couch and lost consciousness. Two to three hours later (after 2 p.m. according to McKeown and after 11:45 according to the investigator), he left the building with the investigator, who subsequently took him to see a Dr. Bernstein. Dr. Bernstein testified that preliminary tests had indicated a diabetic condition. Judge Martin called three

witnesses. A commissionaire on duty in the barristers' robing room testified that McKeown had looked "sick, deathly sick", had spent a considerable amount of time in the toilet, had lain down the rest of the time on the couch, not leaving the common room until after 4:00 p.m. McKeown had not smelled of alcohol. The second witness, the courthouse administrator, had spoken to McKeown on September 8th through the partition of a washroom cubicle and asked McKeown if he was ill. McKeown had replied "No, I am all right." On September 10th he had seen McKeown lying on a chesterfield, muttering, and stated that McKeown "was either under the influence of alcohol or drugs or he could have been mentally ill." The third witness was a police officer who had observed McKeown walking unsteadily down a hallway. The police officer believed that McKeown had been under the influence of either barbiturates or alcohol. McKeown's articled student, his legal secretary, the investigator, and Dr. Bernstein all testified that they had not seen him take any drugs or alcohol, and had not seen any indication of his having taken any. Judge Martin concluded that McKeown's "failure to appear [was] due entirely to being intoxicated by alcohol or drugs". He was convicted of contempt for conduct abusive to the administration of justice.

The Court of Appeal quashed McKeown's appeal, but McKeown appealed the matter further. The majority of the Supreme Court decided that, since failure to appear in court is an offence in the face of the court, no appeal was possible against a conviction. Section 9 of the *Criminal Code* did not at that time permit an appeal in those circumstances. Laskin J. in dissent found that an appeal against conviction was possible because the offence is a hybrid one, committed partly in the face of the court and partly away from the court. He noted that the court, crown counsel and witnesses had been inconvenienced by McKeown's failure to appear, but that there was absolutely no evidence on which to convict McKeown. Judge Martin had made procedural errors and had made findings of fact which went against much cogent evidence to the contrary. Martin J. had preferred evidence which was not far short of a surmise. Spence J., also dissenting, was of the view that the conviction procedure employed by Judge Martin was wrong, and that the case

should be disposed of by referring the matter to the Attorney-General for Ontario for possible indictment proceedings.

_R._ v. _Hill_, [1975] 6 W.W.R. 395 (B.C. Co. Ct.); aff'd (1976), 33 C.C.C. (2d) 60 (B.C.C.A.)

Lawrence Hill had been scheduled to defend two accuseds on trials set for February 26, 1974 at 10:30 a.m. Hill had sent another lawyer, his employee, to conduct the trials, but the clients had rejected the employee as Hill's substitute. Hill had been setting a date on another matter in a nearby municipality. Darling Co. Ct. J. adjourned the matters to 2:30 that afternoon and instructed Hill's employee to instruct Hill to appear to make an explanation for his failure to appear that morning. When court reconvened at 2:30, Hill's employee again appeared without Hill and explained that Hill could not attend because he was preparing for a hearing before the Court of Appeal the next day. Darling J. instructed Hill's employee to advise Hill to attend at 3:00 p.m. (Hill's office was only half a block away), failing which he would consider it further grounds for citing him for contempt. Hill did not appear at 3:00 p.m., and the court instructed Hill's employee to make it clear to Hill that he was ordering him to appear at 10:00 o'clock the following morning, February 27th. At 10:00 o'clock the following morning, Hill's employee advised the court that Hill was "sick, very sick" and would not be able to make it until the following day. Darling J. asked for a doctor's certificate, but none was produced. The matter was put over to the next day, February 28th at 10:00 a.m. Again Hill did not appear. Hill's employee advised that Hill was still sick, but had no medical certificate. Hill later testified that he had gone home sick on February 26th, and had stayed in bed until March 4th. He was a diabetic, but stated that he had thought he had the 'flu. No doctor testified. Hill also testified that he had no obligation to represent one of the clients because the client had not paid Hill the retainer, had not been in touch with him, and had not brought him any witnesses. Schultz Co. Ct. J., who conducted the show cause hearing, found that Hill had paralysed and prevented the administration of criminal justice in the County Court of

Vancouver by delaying and defeating the commencement of two scheduled criminal trials. His failure to appear had been without justifiable excuse. He was convicted of contempt.

The Court of Appeal upheld the conviction. McIntyre J.A. (as he was then) noted that Hill's defence rested in part on the assertion that he had been discourteous but not contemptuous. McIntyre J.A. agreed with Schultz Co. Co. J. Hill's conduct had gone beyond mere discourtesy and amounted to a criminal contempt of court. McIntyre J.A. also deflected Hill's suggestion that the *mens rea* for the offence was an intent to interfere with the course of justice. Such an intent is not an essential ingredient of contempt in Canada, provided that proof of reckless or negligent behaviour is shown. The *mens rea* for contempt is found in conduct exhibiting an apparent indifference to, and a contemptuous disregard for, the consequences of repeated non-appearance by counsel. The trial judge had made no error in finding this indifference in Hill; he had been properly convicted.

***R.* v. *Stong* (1975), 9 O.R. (2d) 785 (Ont. C.A.)**

Mr. Stong had been consulted by a client facing a criminal charge. Stong requested that the client furnish him with a complete written statement of the facts and a retainer. Shortly before the date on which the client was to make an appearance in provincial court, the client attended Stong's office to obtain a letter which he could take to Court in order to obtain an adjournment. The secretary prepared a letter to the Crown Attorney which stated "Please be advised that I represent the above named accused in this regard ... Subject to being retained prior to trial, I would ask that this matter be put over to one of the following dates ..." The client then attended in court alone, presented the letter, and the matter was put over. The judge assumed that Stong was "on the record" since his letter said he was "representing" the accused. Shortly before the trial date, the client again contacted the solicitor, mentioned that he had not yet applied for legal aid but was thinking of doing so, that he had considered asking duty counsel to represent him, and that he had

considered representing himself. Stong did not attend on the date fixed, and the provincial judge cited him for contempt. On the day of the hearing, the provincial judge found Stong guilty of a contempt of court and sentenced him to a fine of $100 or, in default, 10 days in jail. The Ontario Court of Appeal quashed the conviction. Stong had not been "disposed to be constantly in disregard of his obligations to the Court", as was the tendency of other young members of the bar. He had not been among those young members of the bar who treated the matter of the arrangement of lists in the provincial court as one in which the primary consideration was their own convenience.

R. v. *Carter* (1975), 28 C.C.C. (2d) 219 (Ont. C.A.)

Aware that a trial date of December 20, 1974 had already been set in a certain matter, Mr. Carter directed a letter to the court stating that he was prepared to set a trial date for any time during the first three weeks of December. On December 20th, Carter's client attended court, but Carter failed to appear. The presiding provincial court judge instructed the crown attorney to advise Carter that he was required to appear before the court on December 23rd. Carter appeared before the judge on December 23rd, and was convicted of contempt and fined $300. The Court of Appeal quashed the conviction because Carter had been convicted on the basis of unsworn evidence from Carter's client. The Court of Appeal was also concerned that Carter had not received sufficient notice of the allegation against him.

R. v. *Fox* (1976), 13 O.R. (2d) 246, 30 C.C.C. (2d) 330, 70 D.L.R. (3d) 577 (C.A.).

Mr. Fox encountered car trouble on his way to the court house on the second day of a trial for which he was defence counsel. The weather was bad. He had attempted to work on the car, but later gave up and called a taxi. He set out for the court house close to 10:00 a.m. His evidence was that he telephoned Judge Street's secretary at 10:22 to advise that he would be late. At 10:50 he was ready in court and court resumed. Judge Street later

convicted him of contempt of court and fined him $100. The Court of Appeal, however, overturned the conviction. In all the circumstances, Mr. Fox's conduct had been discourteous but did not cross the line between discourtesy and contempt.

***R.* v. *Jones* (1978), 42 C.C.C. (2d) 192 (Ont. C.A.)**

Kevin Jones failed to attend court at the appointed time for the resumption of a preliminary hearing. The matter had been adjourned until July 26, 1976 at 2:00 p.m. but, because of a congested list, the case was not called until approximately 3:00 p.m. on July 27th. When it was called, crown counsel, counsel for the co-accused and the co-accuseds were present. Judge Dodds instructed crown counsel to telephone Jones, and Jones was shocked when he realized what had occurred. He mentioned to crown counsel that the client had not telephoned him to remind him that he was to appear on that date. At the show cause hearing he explained to the judge that the file had not been properly entered into the diary system; that it had been an inadvertence. Judge Dodds found that his explanation did not disclose that Jones had taken reasonable care to ensure that he would appear on the resumption of the hearing, and convicted him. The Ontario Court of Appeal, however, found that Judge Dodds had placed too much weight on Jones' statement that his client had forgotten to contact him. Inadvertence, falling short of indifference, does not necessarily constitute a contempt of court, even though some degree of negligence is attributable to the solicitor. Whether an inadvertent lapse constitutes a contempt of court depends on the particular facts of the case, such as whether there have been other instances of such failure to attend, and whether there has been a failure to take proper care to ensure that his obligations to the court and client were met. In this case, the necessary degree of fault had not been established, and Jones' conviction was quashed. The Court of Appeal pointed out, however, that they did not wish to be taken as whittling down the grave responsibility which rests upon a lawyer who has agreed to represent an accused, to be present when the case is called. If Jones had actually relied on the client to remind him of the date, they would have been disposed to reach the same conclusion as the trial judge.

***R.* v. *Pinx* (1979), [1980] 1 W.W.R. 77 (Man. C.A.)**

Sheldon Pinx was double booked for a preliminary hearing in St. Boniface Provincial Court on Friday, May 11, 1979 at 10:00 a.m. and a preliminary hearing on the same day at another provincial court in Winnipeg. While Pinx did not create this double booking dilemma (the Winnipeg matter had been put over due to the intervening illness of the trial judge, he had known of the double booking problem some 24 days before May 11th. On May 10th, the day before the hearing, he tried to arrange for another member of his firm to take the trial in St. Boniface, but that member was already substituting for an ill member of the firm. Early in the morning of May 11th, Mr. Pinx met with the provincial court judge in Winnipeg and asked to be excused later that morning in time to attend the court in St. Boniface. The judge denied the request, and Pinx was required to stay in Winnipeg. Pinx then telephoned his client, told him to plead guilty to the charge pending in the St. Boniface court and ask for a pre-sentence report. He did not advise crown counsel that there would be a guilty plea, and crown counsel appeared in court with ten witnesses. In these circumstances, the judge refused to accept the guilty plea and adjourned the matter to May 14th, instructing Crown counsel to notify Pinx to be present in person at that time. On May 14th, Pinx apologized and explained his dilemma, but the judge could not apply the facts in such a way to find a mere discourtesy. The trial judge found him guilty of contempt, fining him $500.

The Manitoba Court of Appeal overturned the conviction because the trial judge had not provided Pinx with sufficient notice that he was facing a charge of contempt. The conviction had essentially been made without a charge. Huband J.A. found, in addition, that there had been nothing deliberate about Pinx's failure to appear. The arrangements had been imposed on him. Double booking is not an unusual practice. Lawyers must attempt to adjourn one of the matters, on a timely basis. In this case Pinx, through inadvertence and negligence, left matters too late, but that did not ground a criminal conviction for contempt. Monnin J.A., dissenting, was less concerned about the lack of

notice, saying that "Mr. Pinx well knew that he was being brought on the carpet for failure to attend a hearing which had been fixed more than seven months prior." Pinx must have known of the possibility of contempt proceedings, and his conviction must stand.

***R* v. *Aster (No. 1)* (1980), 57 C.C.C. (2d) 450 (Que. S.C.)**

Martin Aster was counsel of record for an accused on a five-count indictment scheduled for trial by judge and jury in Montreal on September 15, 1980. On that date, the Crown and its witnesses, 80 members of the jury panel, the accused and the judge waited for Mr. Aster for approximately an hour until learning from his office that he was out of town. Mr. Aster's involvement in the case had been somewhat sporadic from the beginning because of personal commitments. Other counsel had stepped in on his behalf on several occasions, and the preliminary hearing had also been adjourned a number of times. On September 2nd he was surprised to learn that the case was set for jury trial and that the date of September 15th had been selected. Crown counsel contacted him on September 9th or 10th to ensure that he would be ready for the trial, and on September 11th Aster applied to the court for an order that a preliminary inquiry be held and that the trial not be before a jury. Because he could not personally attend this motion, he sent his client, and the motion was denied. Jewish Holy Days intervened, and on Sunday, September 14th, at 8 p.m., he telephoned his client's residence and spoke with the client's brother, who understood that the case had been put off. On that basis, Mr. Aster went to Ottawa on the morning of September 15th, and was cited for contempt for failing to appear in court. He explained at his show-cause hearing that he had honestly believed that the trial was postponed. Hugessen A.C.J. found, however, that his belief was not honestly held, and that he had wilfully blinded himself or was reckless with respect to the facts. His failure to at least send somebody to Court on the morning of the 15th to speak to the postponement and to the setting of another date had manifested a "total indifference" to his obligations.

***R.* v. *Danson* (1981), 57 C.C.C. (2d) 519 (Ont. C.A.)**

Mr. Danson represented clients in two separate matters, the first of which was set for trial, on his agreement, for August 29, 1978. Danson subsequently wrote Crown Counsel advising that he was unable to be present on the 29th because he was unexpectedly required to appear in a second matter on that day, the date for which had been set peremptorily. A new date of December 28th was set for the first matter, but Danson wrote another letter stating "Unfortunately, this date does conflict with plans for myself and my family to be away on vacation and it was not anticipated at the time the date was set there would be such a conflict... In the circumstances, I would very much appreciate your consenting to an adjournment...." Based on this request, on December 28th, crown counsel requested the court to adjourn the case. No witnesses were present because the crown had advised them not to attend. Judge Hryciuk requested crown counsel to advise Danson to appear on January 16, 1979 to show cause why he should not be cited for contempt. Crown counsel then advised the court that he had received a similar adjournment request letter from Danson with respect to the peremptorily-set trial date of December 29th. Judge Hryciuk requested crown counsel to send a second letter to Danson to appear before him to show cause why he should not be held in contempt.

Danson testified that he had sent the adjournment request letters in accordance with the common practice in the provincial courts for the seven years he had practised. Others testified as well to this practice, the crown bureau chief testifying that some judges acquiesced as a matter of course and others did not. Judge Hryciuk was of the view that this practice amounted to a usurpation of the judge's jurisdiction to decide whether an adjournment should be granted. Danson was convicted of contempt. The Ontario Court of Appeal quashed the conviction on the basis that, because of the long-term practice in place of sending letters to request adjournments, the necessary degree of fault had not been proved beyond a reasonable doubt. Danson may have been guilty of some discourtesy in failing to attend on Judge Hryciuk personally to request the adjournment, but it is not

every act of discourtesy which amounts to a criminal contempt. The court referred to a practice direction published by the Chief Justice of Ontario on May 11 and 18, 1979 in 29 O.R. (2d) parts 3 and 4, pp. vi and vii, which the court hoped would clarify what the Ontario courts required in terms of lawyers' attendance in court.

_R._ v. _Kopyto (No. 1)_ (1981), 32 O.R. (2d) 585, 21 C.R. (3d) 276, 60 C.C.C. (2d) 85, 122 D.L.R. (3d) 260 (Ont. C.A.)

Harry Kopyto obtained an adjournment of a trial on the grounds that he wished to observe the Jewish religious festival of Hanukkah with his family. Crown counsel consented, and Kopyto's motion was adjourned to the next day, December 3, to fix a new trial date. The next day, crown counsel observed Mr. Kopyto gowned for court on another matter. Crown counsel confronted Kopyto with his having misled the court, and so advised the trial judge. Kopyto did not appear before the judge that day, and the judge ordered that the case to be spoken to on December 5th, and advised Kopyto's secretary that Kopyto must appear. Kopyto's secretary relayed the message to Kopyto, but Kopyto did nothing. He did not attempt to telephone or communicate with crown counsel or the court to clarify what had happened. Instead, he sent his secretary on December 5th to apologize to the judge, fix a date, and tell the court that he was at home. He was cited for contempt of court and the matter proceeded to a show cause hearing.

At the show cause hearing, the evidence of one Rabbi Slonim was that the observance of Hanukkah meant working as usual but celebrating with family and friends in the evenings. Kopyto stated that he had not intended to mislead the trial judge and that he had carefully tried to convey that he could not both defend the client and celebrate Hanukkah because of the evening work that would be required as preparation in the conduct of the defence. As to his failure to appear before the judge to explain his absence from trial and presence in another courtroom, Kopyto stated that he had become very angry at what he perceived to be a Christian interfering with his right as a Jew to be able to celebrate Hanukkah. He

had reacted in anger when he sent his secretary. The trial judge convicted him of two counts of contempt: contempt for misleading the court, and contempt for failing to appear without justifiable excuse when ordered to do so.

The Ontario Court of Appeal quashed the convictions. With respect to the count of misleading the court, there was in fact a reasonable doubt that Kopyto had intended to mislead the court. He may well have intended to convey that he could not properly defend the case because he could not do the evening work required to prepare for it. With respect to the second count of failing to appear when ordered by the judge to appear, the Court of Appeal noted that Kopyto had, in pique, ignored his duty to the Court and his client rather than walk a block from his office to the court. Such a breach of duty was contemptuous conduct on which he could be convicted. It manifested complete indifference to and contemptuous disregard for the judicial process. The Court of Appeal stated, however, that the trial judge had not adequately considered Kopyto's explanation and apology. Kopyto's failing to appear out of anger; which was unprofessional and unreasonable, could be seen as justified in the circumstances. In fact, Kopyto's apology in this respect was not qualified, as the trial judge had found. The trial judge had misapprehended what was said to him when Kopyto apologized. Had he accepted the apology, the trial judge would have reached a different conclusion. Kopyto's conduct was not contempt of court; nevertheless it should not be condoned and was a matter for the Law Society.

R. v. *Anders* (1981) 34 O.R. (2d) 506 (Co. Ct.); aff'd (1982) 136 D.L.R. (3d) 316 (Ont. C.A.)

Kenneth Anders represented a client whose sentencing hearing was set for September 10, 1981. On September 10th, the client was present but Anders was not, nor was any other lawyer to speak on her behalf. The client advised the court that she had spoken to Anders the previous day and that he had advised her that he would not be in court and that he would send someone to adjourn her case. The Crown Attorney indicated that he had

received a message from Anders' secretary at 9:47 that day advising that Anders would not be appearing because he was conducting a trial in another court. Judge Borins adjourned the matter to the next day and ordered (via the crown attorney) that Anders or some other lawyer attend at that time. Apparently Anders did not receive that part of the message requiring some other lawyer to attend if Anders was unable to do so. On September 11, 1981, the client again appeared before Judge Borins, but Anders was not present, nor was any other lawyer. The client presented the court with a letter from Anders addressed to the crown attorney stating that he was engaged in another trial, that he would be leaving the country the next day and would not be returning until the end of September, that he was available on October 1 or October 9, 1981, and that he did not ask another lawyer to attend because he thought it would be unfair to the client. In the circumstances, the client's sentencing hearing was further remanded to October 1, 1981, at which time Anders was cited for contempt.

At the show cause hearing, it was found that Anders had known that he was double booked but had done nothing to advise anybody that he might not be available on September 10th. In fact, he had not even directed his mind to this possibility: "Oh, I didn't because as a practitioner in this City I've seen so many trial dates set and the probability of a trial going ahead on the date set I would suggest is less than even one in two ... probably less than one in four." Anders testified that the trial had taken longer than he had anticipated, but Judge Borins said that even when it was "patently obvious" that the two matters were going to conflict he had made no effort to inform anybody concerned. Anders stated that he could have called the crown attorney, but he "didn't think there was going to be anyone inconvenienced from the Crown side, because the facts had already been read in and submissions made." The first time he notified anybody that he would not be attending court on September 10th was when he or his secretary (he couldn't remember which) telephoned the crown attorney 13 minutes before commencement of court. Anders explained that he "left it later than what I should, and ... I didn't mean any disrespect by leaving it to this late time. But, I was engaged in a jury trial. I guess I was concentrating

exclusively on the jury trial, the preparation for it." With respect to his non-appearance the following day, Anders admitted that sending another lawyer to represent the client would have been the respectful thing to do.

Borins J. noted that Anders had known several weeks before the trial date that his presence would likely be required in two different courts in two different cities on the same date. He had taken no steps to try to overcome this potential conflict. Several days before the trial date he had known for certain that there was a conflict, yet it was not until 13 minutes before the hour scheduled for commencement of court that he advised anybody of the conflict, and then it was not to request an adjournment or to discuss another date, but simply to leave a message that he would not be present. Borins J. convicted Anders because he was "convinced beyond a reasonable doubt not only that Mr. Anders' failure to attend ... was a deliberate act likely to impede the administration of justice, but also that his conduct exhibited a serious indifference to his obligations to the court and to his client. Anders was fined $400, with 30 days' imprisonment in default of payment.

The Ontario Court of Appeal found that Judge Borins had erred in characterizing Anders' conduct as a deliberate act, but agreed that Anders had shown a serious indifference to his obligations to the court and to his client. His conduct was an affront to the court; an act which went beyond mere discourtesy and amounted to contempt.

***R.* v. *Bickerton* (1985), 46 C.R. (3d) 286 (Ont. H.C.)**

Albert Bickerton was scheduled to defend one client on trial in Provincial Court on January 11, 1985, and to represent another client on a bail application before the Court of Appeal also on January 11, 1985. On January 11th he appeared in the court of appeal but gave the provincial court no notice that he could not appear because of the double booking. Bickerton testified that he had been ill on the previous weekend, that as a result of a conversation with one of his secretaries he believed the provincial court had been advised

of his illness, and that on the day before the hearing he was advised by one of his associates that no one was available to take his place in the court of appeal the following day. On January 14, 1985, the date to which the provincial court trial had been adjourned in his absence, Bickerton advised the court of his illness but failed to mention that he had been in the Court of Appeal that day. Bickerton was found to have been "extremely careless and negligent in his actions", but it was also found that his illness had affected his normal professional conduct. Double-booking court dates without arranging for substitute counsel leaves a lawyer open to judicial criticism. It leaves a lawyer open to a finding of contempt if the conduct is repetitive and displays indifference to the judicial process. Bickerton's conduct, however, did not cross the line between discourtesy and contempt.

***Steward* v. *Minister of Employment and Immigration (No. 2)* (1988), 84 N.R. 240 (F.C.A.)**

William MacIntosh was an associate of the John Taylor law firm. On January 5, 1988, John Taylor, the principal of the firm, announced that he was retiring. All associates would be terminated as of January 31, 1988. At a meeting held on February 2, 1988, MacIntosh discussed fees payable to Mr. Taylor for MacIntosh's continued efforts on behalf of a client, Mr. Steward. At the meeting, Mr. Taylor advised the client, Mr. Steward, that the John Taylor law firm would no longer represent him. The next day, an associate of Mr. Steward's asked MacIntosh to represent Steward independently of the John Taylor law firm. MacIntosh said he would think about it. On February 7th, MacIntosh met with John Taylor to discuss further employment and the possibility of purchasing the practice. John Taylor invited MacIntosh to return to work for the firm, and MacIntosh returned to work on Monday, February 8, 1988. On that day, Steward called MacIntosh, and MacIntosh told him that he had been reemployed by the John Taylor firm and that, because the John Taylor firm no longer represented Steward, he could not act for Steward. On February 9, 1988, an employee agreement was reached wherein MacIntosh

was to be paid only for those files assigned to him, and would not be handling any of his previous files unless reviewed and reassigned by Mr. Taylor.

Two months earlier, on December 2, 1987, a date had been set for an appeal of Mr. Steward's deportation order. The hearing date was February 11, 1988 at 10 a.m. Because of MacIntosh's understanding that he no longer represented Steward, he did not attend on behalf of Mr. Steward. He did have occasion, nevertheless, to be in the Federal Court of Appeal that same morning, ungowned, on another matter. He noticed Mr. Steward approach the counsel area of the courtroom but thought nothing of it because he assumed Mr. Taylor had taken care of the matter of the firm's representing Mr. Steward. MacIntosh returned to the office, where Mr. Taylor's secretary showed him a notice which she had just prepared and was ready to file in the Federal Court Registry, indicating that the John Taylor law firm no longer acted for Mr. Steward.

At 11:15 a.m., MacIntosh was served with a letter from the court requiring his attendance for the purpose of a show cause hearing at 2:30 the same day. At that hearing, MacIntosh was found in contempt of Court and was fined $300. The court further directed the registry to transmit the record of the contempt proceedings to the Law Society of British Columbia. MacIntosh appealed his conviction before another panel of the Federal Court of Appeal, primarily on the grounds of lack of proper notice, but the panel determined that it had no jurisdiction to review and set aside a decision of another panel of the same court. The court further declined to grant leave to appeal to the Supreme Court of Canada because, in its view, the jurisdictional question raised by MacIntosh was not of national importance.

***Canada* v. *Young* (Dec. 12, 1991) [1991] M.J. No. 659 (QL) (Man. Prov. Ct.) Conner Prov. Ct. J.**

Mr. Young was scheduled to defend a young offender on charges of sexual assault and sexual interference at Cross Lake, Manitoba on May 16, 1991. On May 14, Mr. Young wrote to crown counsel advising that the young offender would plead guilty and would require a pre-disposition report. The matter could be disposed of once the predisposition report was available. Young would not make the trip to Cross Lake in these circumstances. In court on May 16, however, the young offender pleaded not guilty, and a new trial date was set for June 10. Young wrote again to crown counsel and advised that he was not available on June 10, but that he would be in Cross Lake for two other trials on June 27. Crown counsel did not accede to the request to put the matter over to June 27 and advised Young to rearrange his schedule to be in court on June 10. On June 3, Young met with the provincial court judge who usually presided at Cross Lake and asked to be excused from the June 10th date. The judge did not reply directly, but in court on June 10th he excused Young's absence on the basis of the earlier meeting and held the matter over to June 27th. On June 27, Young did not appear in court for any of the three matters which he was scheduled to conduct on that day. Legal aid duty counsel indicated that Young had contacted her the day before and asked her, not only to speak to these matters, but to conduct the trials. Because of the short notice she had declined to conduct the trials but agreed to speak to their adjournment. The trial judge cited Young for contempt.

At the show cause hearing, Young testified that he was required by other clients to be in Ottawa on June 26th. Before his departure to Ottawa he had spoken to the young offender and his father once again to make arrangements for entering a guilty plea and requesting a pre-disposition report. The young offender's father knew that Young would not be in attendance. With respect to one of the other matters scheduled for trial, Young stated that the accused was going to enter a plea of guilty (even though there was a "problem" with the Certificate of Analysis) and ask duty counsel to speak on his behalf. As it turned out,

this client also failed to plead guilty. A guilty plea was also supposed to have been made by the third client, who instead pleaded not guilty. Young admitted that he had a duty to be in court on June 27, but stated that his obligations in Ottawa were delayed and he could not be back in Cross Lake on time. Young stated that the entire dilemma was a mix-up; a misunderstanding; a mistake. He had made solid arrangements with his clients, all of which failed. While his actions may have caused inconvenience to the court and to the clients, he did not intend to impede the course of justice. Young's failure to appear was an error of judgment; inadvertence; discourtesy.

The judge, however, found him in contempt. Young had known more than a week before trial that he was required to be in Ottawa on June 26 and in Cross Lake on June 27. At no point in his evidence did Young state that he intended to be in Cross Lake on June 27, and the evidence showed that he did not intend to be in court on June 27. He had done nothing to extricate himself from the apparent conflict until several days before June 27 when he spoke to his clients about entering guilty pleas. This, however, did not relieve him of his obligations to his clients. Young did not advise crown counsel or the court that the clients would be entering guilty pleas. This would have enabled the crown to cancel its witnesses. Young had not sought the consent of crown counsel to a further adjournment. He had not instructed duty counsel to seek an adjournment. In these circumstances, it could not be said that his failure to appear was an "inadvertence" or a "discourtesy". His attitude had been one of indifference to his obligations to the court and to his clients. Young sincerely apologized, but the judge concluded that the apology could not, in the circumstances, excuse his conduct.

_R._ v. _Glasner_ (1994), 19 O.R. (3d) 739 (Ont. C.A.)

Mr. Glasner represented two individuals on various criminal charges. The two individuals were American citizens, married to each other, and at the time of their arrest, the woman was pregnant. The husband wished to plea bargain in such a way that his wife could

return to the United States to take care of her newborn child. Glasner first appeared on their behalf on September 17, 1991, when the case was remanded to September 19 to set a date. On September 19, Glasner requested that the case be adjourned to September 27 in "142 Court" in the hope that the matter could be resolved sooner. "142 Court" was designated as a pre-trial court for more complicated matters, but some cases were remanded to that court simply to facilitate a meeting between the Crown and the defence lawyer without the intervention of the presiding judge. This latter objective was the one Glasner sought.

At around noon on September 27, Judge Paris called the matter, but Glasner was at a bail review hearing in another court for another client, and he had told his client as a precaution that if he wasn't there, he should indicate to the court that he could be there by 2:00. Judge Paris, however, stated, "It's twelve o'clock. I don't see why I should wait any longer ... I am directing that a letter be sent to Mr. Glasner to inform him that he has to appear before me to show cause why he should not be held in contempt." In making this statement, Judge Paris also rejected an associate of Glasner's attempt to get in touch with Glasner. Judge Paris adjourned the matter to September 30th, and again, on consent, to October 4, 1991. On October 4, Glasner again did not appear. He was acting in another matter in another court house and thought he would be finished quickly. Unfortunately, he was detained longer than expected, and he telephoned duty counsel in 142 court during the morning to request that his case be held down. Duty counsel reported this to Judge Paris when the matter was called at approximately 1:00 p.m., and Judge Paris refused to stand the matter down. At the conclusion of a show cause hearing, Judge Paris convicted Glasner of contempt and fined him $2,000. Glasner had engaged in two classic examples of double booking and had not done enough to extricate himself from the dilemma. Glasner had exhibited a serious indifference to his clients and to the court.

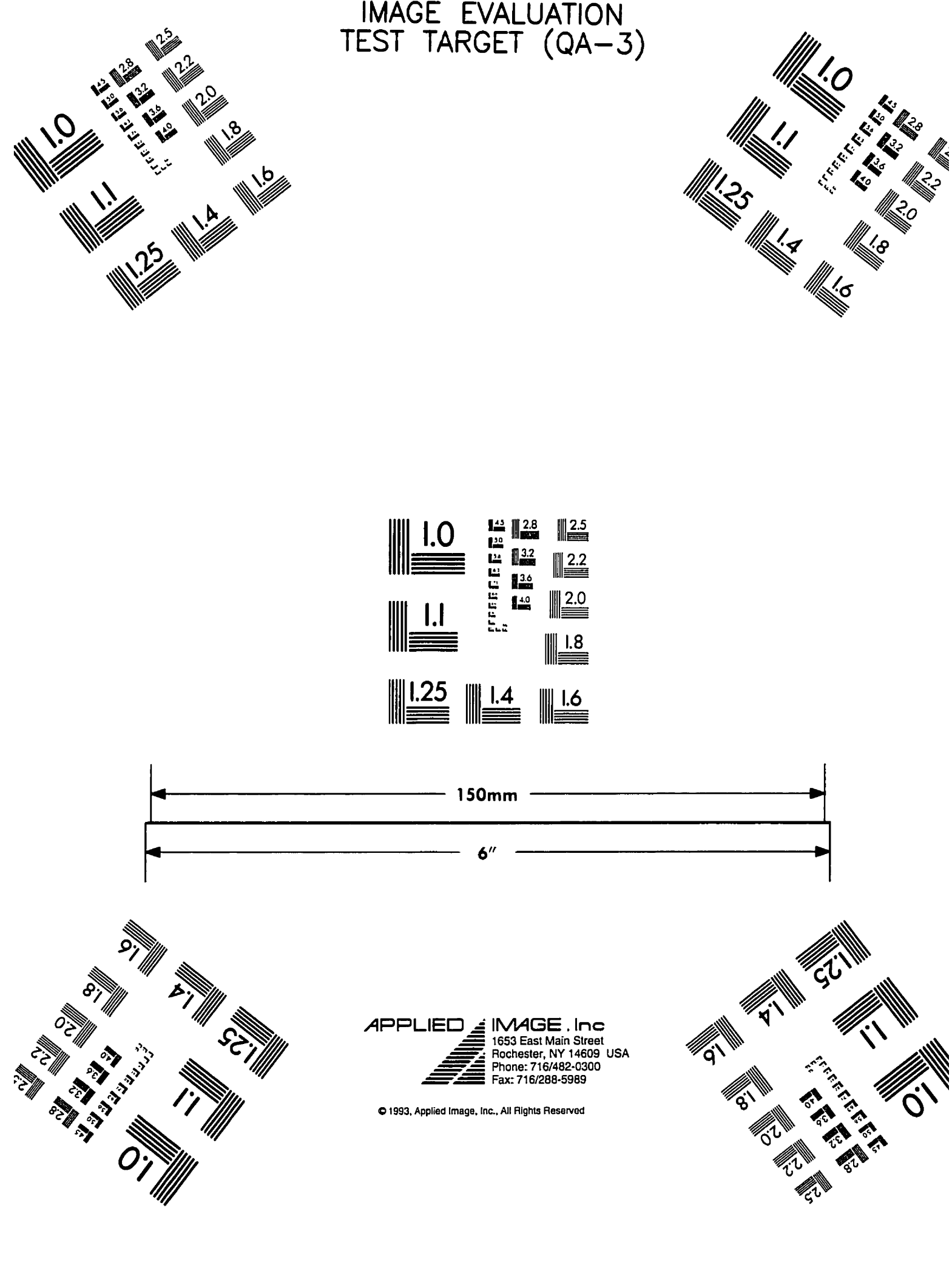
The Court of Appeal overturned the conviction. Laskin J.A. noted that Judge Paris, in his reasons had referred only perfunctorily to Glasner's explanation, and had made no

reference to Glasner's desire to assist his clients by seeking an early resolution of the matter. Most importantly, Glasner's actions did not form the serious kind of interference or obstruction which results in a contempt conviction. The *actus reus* of contempt is a finding that the act complained on had some serious, real or substantial effect on the administration of justice. While Glasner did inconvenience a number of people and cause prejudice to his clients, the conduct did not have sufficient effect on the administration of justice to be found a contempt. It was not a trial or a preliminary inquiry or a sentencing matter which was missed; it was only a matter to be spoken to. Further, the fault requirement called for deliberate or intentional conduct or indifference, which is akin to recklessness. Nothing of that sort was found in Glasner's conduct. Labrosse J.A., dissenting, stated that it made little difference whether the court appearance was a trial or a matter to be spoken to. The failure to appear was serious enough to warrant a conviction. Furthermore, the one-line apology offered by Glasner was not sufficient to overturn the conviction. In addition, Glasner's failure to appear represented indifference toward the court. Glasner had consciously booked two court appearances on the same day, something which constitutes indifference. He did so knowingly and deliberately. His actions gave rise to more than mere discourtesy or inconvenience. His conduct tended to bring the administration of justice by the courts into disrepute, and he was properly convicted.

***R.* v. *Chippeway (sub nom. R.* v. *Bunn)*, [1994] 10 W.W.R. 153 (Man. C.A.)**

Thomas Andrew Bunn, a Winnipeg lawyer, was scheduled to defend Ms Chippeway at trial in provincial Court on December 14, 1992. On December 7th he discovered that he was double booked for that day. He telephoned other solicitors in an attempt to have someone take over the matter on the 14th, but did not inform the Crown or the court of his conflict. Early in the morning of the 14th he contacted another lawyer who agreed to stand in for him. They met at provincial court where Mr. Bunn would introduce the substitute lawyer to his client. The client was, however, late arriving in court due to road

conditions. Mr. Bunn left for the court where the Queen's Bench trial was continuing. When Ms Chippeway arrived after 10:30, the substitute lawyer asked for a short adjournment so that he might speak to her and obtain instructions. The judge denied that request, however, and adjourned the trial instead on the grounds that substitute counsel was not adequately instructed to proceed. The judge stated during Bunn's show cause hearing that "the problem arose undoubtedly through inadvertence" and convicted him of contempt. The Court of Appeal held that inadvertence, without a further finding of subsequent wilful or deliberate conduct intended to frustrate, or capable of frustrating, the administration of justice, did not constitute contempt of court. Bunn's conduct had not crossed the line dividing mere discourtesy from contempt.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TEST TARGET (QA-3)
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