New Edition

The Law of Contempt in Canada, Second Edition

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Chapter 6: Disobedience of Court Process and Procedures

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Chapter Six

Disobedience of Court Process and Procedures

6.1 Some relevant statutory provisions

(a) Criminal Code:

Section 484

Marginal note: "Preserving order in court"

Every judge or provincial court judge has the same power and authority to preserve order in a court over which he presides as may be exercised by the superior court of criminal jurisdiction of the province during the sittings thereof.[1]

Section 708

Marginal note: Contempt

(1) A person who, being required by law to attend or remain in attendance for the purpose of giving evidence, fails, without lawful excuse, to attend or remain in attendance accordingly is guilty of contempt of court.

Marginal note: Punishment

(2) A court, judge, justice or provincial court judge may deal summarily with a person who is guilty of contempt of court under this section and that person is liable to a fine not exceeding one hundred dollars or to imprisonment for a term not exceeding ninety days or to both, and may be ordered to pay the costs that are incident to the service of any process under this Part and to his detention, if any.[2]

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1. *Criminal Code*, R.S.C. 1985, c. C-46, s. 484; *Criminal Law Amendment Act*, R.S.C. 1985, c. 27 (1st Supp.), s. 203.
2. *Criminal Code*, s. 708; *Criminal Law Amendment Act*, s. 203.

Marginal note: Form

(3) A conviction under this section may be in Form 38 and a warrant of committal in respect of a conviction under this section may be in Form 25. R.S.C. 1985, c. C-46, s. 708; R.S., 1985, c. 27 (1st Supp.), s. 203.

(b) Section 15 of the Youth Criminal Justice Act:

Marginal note: Jurisdiction of youth justice court

(1) Every youth justice court has the same power, jurisdiction and authority to deal with and impose punishment for contempt against the court as may be exercised by the superior court of criminal jurisdiction of the province in which the court is situated.

Marginal note: Jurisdiction of youth justice court

(2) A youth justice court has jurisdiction in respect of every contempt of court committed by a young person against the youth justice court whether or not committed in the face of the court, and every contempt of court committed by a young person against any other court otherwise than in the face of that court.

Marginal note: Concurrent jurisdiction of youth justice court

(3) A youth justice court has jurisdiction in respect of every contempt of court committed by a young person against any other court in the face of that court and every contempt of court committed by an adult against the youth justice court in the face of the youth justice court, but nothing in this subsection affects the power, jurisdiction or authority of any other court to deal with or impose punishment for contempt of court.

Marginal note: Youth sentence – contempt

(4) When a youth justice court or any other court finds a young person guilty of contempt of court, it may impose as a youth sentence any one of the sanctions set out in subsection 42(2) (youth sentences), or any number of them that are not inconsistent with each other, but no other sentence.

Marginal note: Section 708 of *Criminal Code* applies in respect of adults

(5) Section 708 (contempt) of the *Criminal Code* applies in respect of proceedings under this section in youth justice court against adults, with any modifications that the circumstances require.[3]

3. *Youth Criminal Justice Act*, S.C. 2002, c. 1.

(c) Section 27 of the Youth Criminal Justice Act

> Marginal note: Failure to attend
>
> (4) A parent who is ordered to attend a youth justice court under subsection (1) and who fails without reasonable excuse, the proof of which lies on the parent, to comply with the order
>
> (*a*) is guilty of contempt of court;
>
> (*b*) may be dealt with summarily by the court; and
>
> (*c*) is liable to the punishment provided for in the *Criminal Code* for a summary conviction offence.
>
> Marginal note: Warrant to arrest parent
>
> (5) If a parent who is ordered to attend a youth justice court under subsection (1) does not attend when required by the order or fails to remain in attendance as required and it is proved that a copy of the order was served on the parent, a youth justice court may issue a warrant to compel the attendance of the parent.[4]

6.2 What constitutes contempt "in the face of the court"

We have already seen that threatening a witness in a courthouse elevator can be a contempt not in the court's face,[5] while illegal picketing outside a courthouse can be *in facie*.[6] Then again, recording testimony on day one of a trial can amount to a contempt in the court's face on day two, even though it is unclear whether counsel is still using the recorder on that second appearance.[7] See Section 2.5 for greater detail.

6.3 Contemptuous behaviour by counsel in the face of the court

6.3(a) The actus reus*: contumacious behaviour as distinct from "mere discourtesy"*

Policy dictates that mere discourtesy by counsel should not be subject to contempt proceedings.[8] Thus, John Diefenbaker's reply to the Supreme Court of Canada justice who warned, during argument,

4. *Ibid.*
5. *R. v. Vermette* (1983), 6 C.C.C. (3d) 97 (Alta. C.A.), affirmed [1987] 1 S.C.R. 577 (S.C.C.).
6. *Re B.C.G.E.U.*, [1988] 2 S.C.R. 214 (S.C.C.).
7. *R. v. Barker*, [1980] 4 W.W.R. 202 (Alta. C.A.).
8. See *R. v. Danson* (1981), 57 C.C.C. (2d) 519 (Ont. C.A.); *R. v. Chippeway*, [1994] 10 W.W.R. 153 (Man. C.A.); *R. v. McNiven* (1974), 6 O.R. (2d) 127 (Ont. C.A.); Law Reform Commission of Canada, *Contempt of Court: Offences Against the Administra-*

"Mr. Diefenbaker, in my view there is no basis for your appeal." Apparently, the future prime minister emerged personally unscathed after responding, "Well, my Lord, there are six other judges."[9]

In fact, counsel has a "duty to be firm with the court."[10] A famous dictum of Lord Reid holds:[11]

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But as an officer of the court concerned in the administration of justice, [the advocate] has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.

This is echoed in professional rules of conduct such as those, widely adopted or adapted, of the Canadian Bar Association.[12]

Legally, "mere discourtesy" does not amount to the *actus reus* of a criminal contempt, namely, "conduct which seriously interferes with or obstructs the administration of justice or which causes a serious risk of interference or obstruction."[13] Thus, where, because of trouble with his automobile, counsel is fifty minutes late for court on an inclement morning, this amounts to discourtesy, not contempt. The fact that counsel might have been late in any event (having left for court very near the time it was to commence) did not, without more, make counsel's behaviour contemptuous.[14]

Moreover, the court should not use its summary contempt powers "to suppress methods of advocacy which are merely offensive."[15]

6.3(b) Failure to appear in court / "Double-booking"

Obviously, in most situations counsel must appear in court at the appointed time. Failure to do so is, perhaps paradoxically, a contempt in the face of the court, and is thus subject to the exercise of the court's summary powers.[16] The failure must be deliberate, or it must manifest

tion of Justice (Working Paper 20) (Ottawa: Minister of Supply and Services, 1977) ("LRC"), at 6-7, and the follow-up *Report on Contempt of Court* (Ottawa: Minister of Supply and Services, 1982). As the authors of the latter two documents suggest, easy resort to the contempt sanction can look to the general public like empire-building or a reactionary defence of entrenched interests.

9. A.M. Maloney, Q.C., "The Role of the Independent Bar" *in Abuse of Power* (1979), *Law Society of Upper Canada Special Lectures* at 54.
10. *Ibid.* at 58.
11. *Rondel v. Worsley*, [1969] 1 A.C. 191 (U.K. H.L.) at 227.
12. See Chapter IX of those Rules (Ottawa, 2009).
13. *R. v. Glasner* (1994), 119 D.L.R. (4th) 113 (Ont. C.A.) at 130-131.
14. *R. v. Fox* (1977), 70 D.L.R. (3d) 577 (Ont. C.A.).
15. *Parashuram Detaram Shamdasani v. R.*, [1945] A.C. 264 (Bombay P.C.), quoted with approval in *R. v. Glasner*, *supra*, note 13.

indifference to counsel's obligation to the court and counsel's client. "Mere inadvertence, falling short of indifference" is not contempt, "even though some degree of negligence is attributable to the solicitor."[17]

What this means in practice is that the Crown or moving party must prove that any non-attendance was wilful and intended or calculated to frustrate the administration of justice.[18] The distinction here among "wilful," "intended," and "calculated" is not entirely clear. Apparently "wilful" generally is meant to qualify the *actus reus* — wilful commission of the act that interferes or is apt to interfere with the administration of justice. (See the definition of *contumacious*, Section 2.3.)

The putative distinction between "wilful or calculated" is more troubling, but it seems that in order to avoid the application of absolute liability, "calculated" must be read as suggesting a form of actionable negligence, such as recklessness or indifference.[19] Thus, in one leading case the court defined "calculated" to include "fitted, suited," or "apt to."[20] In other words, one must fail to appear deliberately ("wilfully"), in circumstances designed to interfere with the administration of justice, or must be reckless that such interference might occur.

Given the mental gymnastics in the case law over "calculated," "apt," "intend," etc., it is not surprising that some courts ball them up. A variation on this theme is where the court takes literally the admonition that contempt can exist without the intent to commit a contempt. The court then concludes, at least inferentially, that there is no *mens rea* involved at all. But the *mens rea* for contempt in these cases is never simply an intent to bring the court or the administration of justice into disrepute.[21] Therefore, in terms of *mens rea*, the question becomes whether, in failing to appear, (a) counsel intended seriously to interfere with or cause risk to the administration of justice; or, (b) counsel was reckless as to whether the failure would result in serious interference or risk. In other words, the safest practice, perhaps, is to follow the lead of McLachlin J. in *U.N.A. v. Alberta (Attorney*

16. *R. c. McKeown*, [1971] S.C.R. 446 (S.C.C.); *R. v. Pinx* (1979), 105 D.L.R. (3d) 143 (Man. C.A.) at 147-148.
17. *R. v. Jones* (1978), 42 C.C.C. (2d) 192 (Ont. C.A.) at 195. See also *R. v. Chippeway*, *supra*, note 8, in which counsel double-booked accidentally and arranged for other counsel to be present at one of the hearings. The trial judge refused to hear the substitute counsel.
18. *R. v. Chippeway*, *supra*, note 8.
19. *R. v. Barker*, *supra*, note 7.
20. *R. v. Hill* (1976), 73 D.L.R. (3d) 621 (B.C. C.A.). Note that the accused must still intend to fail to appear. See the discussion on this point in the main text.
21. *Ibid*., and see *R. v. Perkins*, (1980), 51 C.C.C. (2d) 369 (B.C. C.A.). But compare *R. v. Chippeway*, *supra*, note 8.

General), with the necessary changes for *in facie* contempt. (*U.N.A.* concerned the breach of a court order.): "To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*)."[22]

As well, in *R. v. Glasner* Laskin J.A. remarks:[23]

> *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. As Cory J. said in *U.N.A. v. Alberta (Attorney-General)* at p. 238 C.C.C., p. 622 D.L.R.: "The *actus reus* for the offence of criminal contempt must be conduct which causes *a serious public injury"* (emphasis added.) ... Recently, this court in *R. v. Carter* (endorsement, December 20, 1993), acquitted a lawyer of contempt 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" [emphasis added]. ...
>
> 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*. Nothing short of that will do. [Emphasis added.]

Thus, where in good faith, defence counsel misapprehends that he can appear any time on a given day to speak to Crown counsel before the matter is called, he is not guilty of contempt for non-appearance when the Crown calls the case "to be spoken to" and no one answers.[24] Then again, if counsel otherwise acts in good faith, it is no contempt if he arranges for another lawyer to appear at the trial of client B — even after an adjournment and a warning by the court that trial was definitely to proceed on that next set date — but the substitute fails to appear. In this particular case, the supposedly contemptuous counsel was in the courthouse but at a jury trial that had continued longer than he had anticipated. Although the trial judge accused him (*in absentia*) of double-booking, he was available to represent B but unaware that B's case had been called. On counsel's appeal of his contempt conviction, the court rejected argument that his failure to secure B's consent for the (ghost) substitute counsel was integral to the alleged contempt. If the judge below considered B's consent "important in the contempt proceedings, he could have made the necessary inquiries to determine whether [B] would have proceeded" with the proposed

22. *U.N.A. v. Alberta (Attorney General)* (1992), 71 C.C.C. (3d) 225 (S.C.C.).
23. *Supra*, note 13 at 130-131.
24. *Ibid.* at 113.

substitute. The appeal court held as well that the judge below wrongly drew an adverse inference from a supposed pattern of non-appearance by lawyers at the appellant counsel's firm.[25]

Nor is contempt necessarily made out even where counsel usurps the judge's jurisdiction to decide whether to grant an adjournment — the proviso being that counsel was following an established practice by writing to the Crown well in advance of the hearing date, explaining that he would not be available, and requesting that the Crown seek adjournments in the relevant matters.[26] (Nonetheless, this practice is not to be recommended, one imagines.)

The distinction in *R. v. Jones* between "indifference" and "some degree of negligence" — which latter usually is not actionable — merits special note: while the court will not sanction "carelessness" which does not amount to indifference,[27] it may find indifference, constructively, where counsel's negligence could not help but bring disrespect to the court.[28] (Again, this seems to suggest circumstances where counsel's behaviour is *apt to* interfere with the administration of justice, as distinct from a direct intent to interfere.) In *R. v. Anders*, the court found that counsel had not acted deliberately to interfere with the administration of justice, but it upheld his contempt conviction. Counsel had booked an appearance in another court, aware that he was already scheduled to appear at a sentencing hearing. On the morning scheduled for the sentencing hearing, he gave Crown counsel thirteen minutes' notice that he would be away on other matters. The court ordered that he or another lawyer appear the next morning, but counsel instead delivered a letter explaining that he would be engaged in a jury trial and that he felt it would be unfair to his client in the sentencing matter to turn her case over to other counsel. The court became aware of the letter (which also requested an adjournment of about three weeks) only once the contemnor's client presented it to the clerk after proceedings were in session, leaving the court without alternative work for the morning. The Court of Appeal agreed with the trial judge that the contemnor's conduct displayed a serious indifference to his obligations to the court as well as to his client, and that this indifference amounted to an "affront to the court."[29]

25. *R. v. Watkins*, 2000 CanLII 16975, 51 O.R. (3d) 358 (Ont. C.A.).
26. *R. v. Danson*, *supra*, note 8.
27. *Ibid.*
28. *R. v. Barker*, *supra*, note 7.
29. *R. v. Anders* (1981), 136 D.L.R. (3d) 316 (Ont. C.A.), affirming (1981), 34 O.R. (2d) 506 (Co. Ct.). Note that Anders was unaware that the court had ordered he could send other counsel in his place. See also *R. v. Hill*, *supra*, note 20 at 630:

> 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. It is my

In *R. v. Barker*, the Alberta Court of Appeal holds that there are two "qualifications" to the requirement of proving intent:[30]

> The one is the absolute liability to be found in contempt where it is a publication, as in a newspaper, there being no statutory amendment as is now to be found in Britain. The second is in instances where perhaps there may not have been a guilty intent but the behaviour was so clearly or openly likely to bring disrespect on the court, or where there is a degree of negligence or recklessness in the behaviour which could not help but bring disrespect on the court.

Where counsel attempts to excuse absence by claiming illness, the court may require more evidence of incapacity than the word of counsel, his associate, and counsel's spouse. Otherwise, counsel's apparent indifference could amount to serious interference with the administration of justice and process of the court.[31] "In contempt proceedings the attitude or intent of the actor is all important."[32] (Again, this is not necessarily the case with publication contempts, and intent as to what is always relevant.)

Thus, where the court refused a reasonable request for an adjournment and a young barrister stated that, to protect his client's rights, he would withdraw, contempt was not made out:[33]

> The lawyer who deliberately and of set purpose frustrates the due carrying on of court proceedings by a wilful act of non-attendance is surely on a different footing from the lawyer who, like Mr. Swartz here, impulsively reacts to an adverse and rather shattering ruling of the court by attempting to withdraw. The first is a case of wilful and contumacious conduct. The second is at worst an error in judgment. . . . [W]hile Mr. Swartz's withdrawal does not win our applause, it clearly was not unprecedented in the traditions of the bar. Certainly it should not have been regarded as contempt.

> opinion, certainly in a case such as this where conduct exhibiting an apparent indifference to, and a contemptuous disregard for, the consequences of repeated non-appearance by counsel has been shown, a trial Judge is not in error in concluding that such conduct is calculated to delay, disrupt, and bring the judicial process into contempt.

30. *Supra*, note 7 at 218-219.
31. *R. v. Hill*, *supra*, note 20. Note that in this case, counsel's failure to appear amounted to disobedience of a specific order by the court: during an appearance by Hill's associate, Hill's clients expressed the wish that Hill represent them at trial. The court specifically ordered that Hill appear forthwith, or by the next morning at the latest. *Cf. R. c. McKeown*, *supra*, note 16.
32. *R. v. Swartz*, [1977] 2 W.W.R. 751 (Man. C.A.) at 755, per Freedman C.J.M., quoted with approval in *R. v. Glasner*, *supra*, note 13 at 135.
33. *Ibid.* at 755-757.

Only if the moving party adduces evidence of an intention to mislead will that party prove that counsel deliberately has misled the court as to the reasons for counsel's non-attendance.[34] However, whether the alleged contemnor intended to bring the court into contempt remains irrelevant to proving contempt for non-appearance.

Otherwise, the court must consider all of the relevant evidence. This includes the accused's apologies and statements about the matter, what counsel intended to achieve for their clients (for example, as in *Swartz* above, it was relevant that counsel was motivated by his client's best interests), and the impact of counsel's conduct on the administration of justice.

As well, the court should consider counsel's beliefs and aspects of his personal history which might influence his state of mind in the circumstances. In *R. v. Kopyto* the Ontario Court of Appeal holds that, during a contempt hearing for counsel's failure to appear, the trial judge should have considered that the accused was a Jewish Holocaust survivor, and that he had believed honestly but mistakenly that by ordering him to appear on a certain day the judge was denying him his right to celebrate a Jewish holiday.[35]

The court should also consider[36]

> the consequences of failing to appear. The nature of the proceedings, delay, inconvenience to the participants — jurors, witnesses, lawyers and judge — 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.

Many of the "non-attendance" cases involve "double-booking," where counsel schedule more than one court appearance on one day or part of a day. While conventional wisdom deems the practice inappropriate (if sometimes unavoidable), in *Glasner*, Laskin J.A. holds that:[37]

> There is no hard and fast rule that if counsel books one matter in a courtroom on a particular day, even a case to be spoken to or a pre-trial, he or she cannot book another matter elsewhere on that day. ... While counsel have an obligation to honour their court commitments — and by

34. *R. v. Kopyto* (1981), 122 D.L.R. (3d) 260 (Ont. C.A.), leave to appeal refused [1981] 1 S.C.R. xii (note) (S.C.C.).
35. *Ibid.* See also *R. v. Glasner*, *supra*, note 13 at 133.
36. *R. v. Glasner*, note 13 at 130-131. At 134, Laskin J.A. remarks that counsel is less likely to inconvenience a court contemptuously by failure to appear in such circumstances as governed here (pre-arraignment, at an adjunct to a first-appearance court), as compared to failure to appear at the time set for trial.
37. *Ibid.* at 135.

> double booking they run the very risk that occurred in this case — it does not follow that their non-attendance because of a commitment elsewhere automatically translates into a conviction for contempt.

Still, historically the rule of thumb seems to be that counsel should avoid the double-booking "gamble":[38]

> Double booking is a dangerous game. The lawyer who engages in it should be aware of its hazards and should take adequate measures to meet those hazards. Specifically, if he finds himself committed to attend two Court hearings at the same or approximately the same time, he should arrange to have another lawyer, suitably prepared for the task, in attendance at the hearing at which he himself is unable to be present. . . .
>
> Let me say at once — and here I speak for the Court — that double booking is a practice to be deplored. The less we hear of it in the future, the better.

Generally, a lawyer's absence from court does not merit an immediate contempt hearing.[39] The court must accord the lawyer the opportunity to make full answer and defence, which, at a minimum, requires that the court give counsel notice that they face a contempt allegation. In certain circumstances, the notice need not be in writing, perhaps, but written notice is always desirable.[40]

6.3(c) Contemptuous statements by counsel in the face of the court

In *Re Shumiatcher*,[41] Davis J. seems to draw a fair inference from the common law in holding that Lord Atkin's famous dictum on scandalizing the court applies equally to alleged contemptuous remarks *in facie*:[42]

> 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. The path of criticism is a public way: the wrong headed are permitted to

38. *R. v. Pinx*, *supra*, note 16 at 145 (Man. C.A.), *per* Monin C.J.M. See also *R. v. Chippeway*, *supra*, note 8.
39. *R. v. Chippeway*, *supra*, note 8:
    For our part, we are not prepared to conclude ... that an *in facie* contempt not involving a disruptive act in the courtroom requiring immediate judicial action cannot be referred to another judge, even if the court is an inferior one. Such a conclusion would fly in the face of the long-standing practice that has been adopted in courts across the country.
40. *R. v. Pinx*, *supra*, note 16 at 148.
41. (1967), 64 D.L.R. (2d) 24 (Sask. Q.B.).
42. *Trinidad & Tobago (Attorney General) v. Ambard*, [1936] A.C. 322 (Trinidad & Tobago P.C.) at 335.

> err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer scrutiny and respectful, even though outspoken, comments of ordinary men.

The leading Canadian case on "scandalizing *in facie*" is *Re Duncan*,[43] which concerns an objection made by counsel during an appearance in the Supreme Court of Canada. When the court called the case in which Duncan acted, he alleged that "the administration of justice would not be served by Mr. Justice Locke sitting on this appeal. It is in the interest of my client and in my personal interest that Mr. Justice Locke should withdraw." Locke J. professed complete ignorance of Duncan, who refused to explain his allegations. Locke J. recused himself from the appeal, and in a contempt hearing subsequently, Duncan told the court that he felt Justice Locke had developed an "antipathy" to him thirty years previously, after an associate of Locke J. (who was then a practising lawyer) spoke ill of Duncan. Duncan alleged that this antipathy had biased Locke J. against him in earlier proceedings. The court (still minus Justice Locke) held that there was no basis in fact or law for the allegations, which were calculated to bring the court "and a member thereof into contempt and to lower its authority."

More recently, in *R. v. Doz*[44] the Alberta Court of Appeal upheld the conviction of counsel who had accused a judge of unfairness in basing his decision (against the accused's client) on an authority of which counsel had been unaware. The court particularly noted that counsel had used "the words 'shame' and 'ashamed' ... with abandon":[45]

> I have nothing but shame for you. You were aware of that *Stilwell* case and you didn't tell me about it. You knew I had a defence to call. Shame on you. ...
>
> I'm concerned, you trapped me. Don't you even suggest to me that this is a fair court. ... You should be ashamed of yourself, sir.

In the contempt matter, the court found that these words "connote improper behaviour in the form of dishonourable or disgraceful conduct. ... In short, the appellant accused the judge of

43. [1958] S.C.R. 41 (S.C.C.).
44. (1985), 37 Alta. L.R. (2d) 253 (Alta. C.A.), reversed (on the ground that the provincial court judge lacked jurisdiction to hear the contempt citation) [1987] 2 S.C.R. 463 (S.C.C.).
45. *Ibid.* at 277.

having deceived him — of acting dishonestly." Perhaps echoing the *Shumiatcher* dictum on scandalizing, the court concluded that the words "were calculated to scandalize and ridicule the judge and to bring disrespect upon him."[46]

The law recognizes that "scandalous" comments by lawyers, as compared to remarks by "a private citizen," could have "a more serious effect on the integrity of the judicial process." On the other hand,[47]

> it is equally recognized that the adversary process used in our court systems must make allowance for counsel and, yes, judges, coming out with remarks in the heat of battle, as it were, that would not normally be expected from those same persons. A certain amount of give and take is to be expected between court and counsel on occasion, and this, of course, comes from the recognition that counsel has a duty to serve his client, to stand up for the client resolutely and courageously.

Which brings us back to Mr. Diefenbaker, *supra*.

In *Re Roy*, during a murder trial the court objected to defence counsel's various attempts to elicit hearsay evidence so as to attack the credibility of a Crown witness. Ultimately, the court summarily convicted the barrister for her persistence, as well as on the allegation that she had misled the jury by reading into the record only a portion of transcripted evidence. The Quebec Court of Appeal overturned the conviction on the bases that, first, even were the hearsay evidence inadmissible for counsel's express purpose (the appeal court agreed with counsel that it had been admissible for the limited purpose which she put forward), counsel's "zeal and tenacity" coupled with her "honest and reasonable belief" that the evidence should be admitted, "fell well short of that flagrant misconduct obstructing the judicial process that is required for application of the remedy of last resort constituted by citation for contempt of an advocate defending the interests of one accused of murder."[48]

Second, the court finds it important that counsel knew that the judge and Crown counsel were following along as she read in evidence from the transcript. This made it unlikely, the court holds, that counsel meant to mislead anyone: she was not acting in a way calculated to interfere with the administration of justice. The court concludes:[49]

> In any event it is my opinion that, even if intent and danger were proved, a single such incident did not amount, to repeat, to that flagrant misconduct obstructing the judicial process that is required for the

46. *Ibid.* at 280.
47. *R. v. Barker*, *supra*, note 7.
48. (1992), 71 C.C.C. (3d) 558 (C.A. Que.) at 569.
49. *Ibid.* at 571.

> application of the remedy of last resort constituted by citation for contempt of an advocate defending the interests of a client.

The manner in which counsel says the impugned words may be just as important as the language. In *Shumiatcher*, Davis J. holds:[50]

> It was not always so much what [the contemnor] said but the manner in which he said it. A rapier is sometimes more effective than a club. It has long since been recognized that contempt may be shown as well by manner as by language and even by language not offensive itself, if uttered offensively: *Carus Wilson's Case* (1845), 7 Q.B. 984, 115 E.R. 759.

Indeed, given the circumstances reported in *Shumiatcher* (counsel suggested that the court was intervening improperly in examinations and was badgering a witness), it would appear that, today, the words themselves would not constitute a contempt of court. Whether this signifies a general erosion of courtesy in litigation, if not society at large, is for a separate inquiry.

Finally, judges have sanctioned counsel for contempt for criticizing other participants in court process, a jurisdiction for which there is ancient authority.[51] In *R. v. Paul*, the Ontario Court of Appeal upheld the contempt conviction of a lawyer who was the accused in some criminal matters, and also was the complainant in a related trial. Paul was convicted in one matter and after the Crown declined to call evidence on Paul's own complaint, that charge was dismissed. When Paul appeared as accused in a remaining matter, he complained of persecution and twice alleged that Crown counsel (the same prosecutor acted in all the matters) was corrupt. Crown counsel sought the protection of the court and submitted that Paul was in contempt. The court found that Paul's allegations were without foundation, but Paul declined to apologize. On a show-cause hearing he alleged that Crown counsel was biased in favour of the other parties. In a 3:2 decision, Zuber J.A., for the majority, holds:[52]

> Language which forms the basis of a charge of contempt is most often directed at the Bench but words or actions directed at others such as jurors, counsel, or other officers of the Court and which words or actions

50. *Re Shumiatcher*, *supra*, note 41 at 31-32. In reducing the sentence opposed (and finding it had no jurisdiction to review the conviction) the Saskatchewan Court of Appeal holds that the words "were uttered in the midst of a lengthy, hard fought case while crucial points were before the Court": [1969] 1 C.C.C. 272 (Sask. C.A.) at 273. See also *R. v. Barker*, *supra*, note 7 at 222.
51. See Sir David Eady and A.T.H. Smith, eds., *Aldridge*, *Eady and Smith on Contempt*, 4th ed. (London: Sweet and Maxwell, 2011) ("AES"), at para. 1-2.
52. (1978), 44 C.C.C. (2d) 257 (Ont. C.A.) at 259. It is worth noting that Paul was exasperated after many court appearances and a longstanding property dispute with the other parties; had asked for a different judge to sit on the final matter; and had made intemperate remarks about judicial conduct in the whole affair. When the judge asked

> interfere or tend to interfere with the administration of justice can properly be regarded as contempt of Court: see *Ex parte Pater* (1864), 5 B. & S. 299, 122 E.R. 842; *Re Johnson* (1887), 20 Q.B.D. 68; *Parashuram Detaram Shamdasani v. King-Emperor*, [1945] A.C. 264.

Laskin C.J.C. upholds this view on appeal, noting, "There is no doubt that there may be contempt of Court if allegations tending to bring the administration of justice into disrepute are made in Court against officers of the Court."[53]

While Zuber J.A. allows that courtroom atmosphere is often charged and tense,[54] he finds that Paul's language amounted

> to more than mere abuse or insult. In this Province the Crown Attorney is an officer of the court ... and an agent of the Attorney-General. ... The deliberate false allegation made in the face of the Court that the criminal proceedings against him were the work of a corrupt Crown Attorney can be nothing other than an interference in the course of justice and hence contempt of Court.[55]

Finally, it should be added that, according to the precedent cited in *Paul*, it is a rare and provocative case where comments directed at counsel or litigants will be held to interfere with the administration of justice. It seems that *Parashuram Detaram Shamdasani* still applies to Canadian law in this respect:[56]

> It must be rare indeed for words used in the course of argument, however irrelevant, to amount to a contempt when they relate to an opponent, whether counsel or litigant. If in the course of a case a person persists in a

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Paul what he meant by corrupt, he provided synonyms such as "rotten," "depraved," "not fully capable," "worthless," "wicked," "dissolute," and remarked, "I go mainly on the word 'rotten'." He further alleged that Crown counsel had taunted him in the parking lot.

53. *R. v. Paul* (1980), 111 D.L.R. (3d) 626 (S.C.C.) at 629.
54. See, for example, *Barbacki c. Lalande* (1992), 97 D.L.R. (4th) 479 (C.A. Que.), in which counsel made intemperate remarks on the first day of proceedings but thereafter showed restraint and apologized sincerely during a contempt hearing. The Quebec Court of Appeal overturned the contempt conviction, finding extenuating circumstances which included the fact that counsel had believed criticisms by the judge were directed at him when they were directed at his client; and the matter had been adjourned seventeen times, most of those before counsel became solicitor of record.
55. See also *Hébert v. Quebec (Attorney General)* (1966), [1967] 2 C.C.C. 111 (C.A. Que.) at 135 *per* Tremblay C.J.Q., citing *Quebec (Attorney General) v. Constantin* (1963), 40 C.R. 154 (Que. Q.B.):
    > In that case, Constantin had, during the course of a trial, publicly done certain things which were particularly injurious to an official of the Attorney-General who was acting in the trial. These things were of such a nature as to undermine the confidence of the witnesses in this particular counsel acting for the Attorney-General, and to impede him in the presentation of the evidence for the Crown. They were also of such a nature as to diminish the respect which the jury had for him, and to prejudice them against the Crown. They were therefore of such a nature as to hamper the Court in the execution of its function, which was to render an impartial decision.
56. *Parashuram Detaram Shamdasani v. R.*, *supra*, note 15 at 268-269.

> line of conduct or use of language in spite of the ruling of the presiding judge he may very properly be adjudged guilty of contempt of court, but then the offence is the disregard of the ruling and setting the court at defiance. So, also, if a litigant or an advocate threatened or attempted violence on his opponent, or conceivably if he used language so outrageous and provocative as to be likely to lead to a brawl in court, the offence could be said to have been committed. An insult to counsel or to the opposing litigant is very different from an insult to the court itself or to members of a jury who form part of the tribunal.

6.3(d) Withdrawal from record by counsel

The Supreme Court of Canada has affirmed a statement by the Alberta Court of Appeal that a court order "refusing counsel's request to withdraw may be enforced by the court's contempt power."[57] Counsel defending a man accused of sexual assault had sought to remove herself from the record when Yukon Legal Aid stopped funding the defence because the accused had failed to provide financial information. Supported by her law society, she argued that[58]

> the proper approach is for a court to presume that lawyers act ethically and that any professional transgressions are best addressed by the law society. In exceptional cases, however, Ms. Cunningham [counsel cited] and the Law Society of Yukon say that the contempt power would be available to a court where counsel seeks to withdraw for an improper purpose or where the manner of withdrawal warrants a citation for contempt. The Canadian Bar Association and the Criminal Lawyers' Association state that there must be clear evidence of a breach of an ethical standard or an abuse of process for a court to cite counsel for contempt.

The high court did not comment further on these positions.

6.4 Witnesses

6.4(a) Refusal to appear, testify, or answer particular questions

As noted above, if a party or witness fails to appear, the court may issue an arrest warrant and deal with the contemnor summarily.

Absent a "justifiable" or "lawful" reason, a refusal to testify is a contempt in the face of the court.[59] *A fortiori*, so is a refusal to be

57. *Cunningham v. Lilles*, [2010] 1 S.C.R. 331 (S.C.C.) at 354, citing *R. v. Creasser* (1996), 110 C.C.C. (3d) 323 (Alta. C.A.) at 327, leave to appeal refused [1997] 1 S.C.R. vii (note) (S.C.C.).
58. *Ibid.* at 334.

sworn.[60] Indeed, it has been thus "in England, Canada and the United States for well over 100 years"[61] — now, more than one hundred fifty. *R. v. Larsen* provides an example of a "justifiable reason." The accused was a young student who breached a subpoena to attend trial because he was taking part in a school trip planned long before service of the subpoena. The student had explained his predicament to the constable who served the subpoena, and had concluded from the ensuing discussion that he was excused from attending unless he heard from the constable anew.[62] Presumably, more generally a "justifiable reason" is one demonstrating that the accused lacked the necessary *mens rea* to frustrate the course of justice.[63]

While under s. 484 of the *Criminal Code* a provincial court judge has the same power as a superior court judge to preserve order in a courtroom, "the mere refusal of a witness to testify without lawful excuse" does not amount to the type of disorder which would trigger the section. However, the provincial court retains inherent jurisdiction to punish as a contempt such a refusal at trial.[64] When a witness refuses to testify at a preliminary inquiry, the powers of the presiding justice are limited by s. 545:[65]

> 545. (1) Where a person, being present at a preliminary inquiry and being required by the justice to give evidence,
>
> (a) refuses to be sworn,
> (b) having been sworn, refuses to answer the questions that are put to him,
> (c) fails to produce any writings that he is required to produce, or
> (d) refuses to sign his deposition, without offering a reasonable excuse for his failure or refusal, the justice may adjourn the inquiry and may, by warrant in Form 20, commit the person to prison for a period not exceeding eight clear days or for the period during which the inquiry is adjourned, whichever is the lesser period.
>
> (2) Where a person to whom subsection (1) applies is brought before the justice on the resumption of the adjourned inquiry and again refuses to

59. *R. v. Larsen* (1974), 19 C.C.C. (2d) 574 (Ont. C.A.); *R. v. Cohn* (1984), 13 D.L.R. (4th) 680 (Ont. C.A.) at 694; *Yanover v. Kiroff* (1974), 53 D.L.R. (3d) 241 (Ont. C.A.).
60. *Re Gerson* (1946), 87 C.C.C. 143 (S.C.C.). Regarding proper procedure for contempt citations in these circumstances, see *R. v. K. (B.)*, [1995] 4 S.C.R. 186 (S.C.C.) and Chapter Five.
61. *R. v. Cohn* (1984), *supra*, note 59.
62. *R. v. Larsen*, *supra*, note 59.
63. In the case of an official commission or administrative tribunal, the test might be different, particularly where the tribunal cannot cite for contempt but must rely on a court to decide if a named person had held the tribunal in contempt. See, *e.g.*, *Yanover v. Kiroff*, *supra*, note 59.
64. *R. v. Dunning* (1979), 50 C.C.C. (2d) 296 (Ont. C.A.) at 299, citing *R. v. McKenzie* (1978), 41 C.C.C. (2d) 394 (Alta. C.A.), and *R. v. Bubley* (1976), 32 C.C.C. (2d) 79 (Alta. C.A.).
65. *R. v. Dunning*, *ibid.*

> do what is required of him, the justice may again adjourn the inquiry for a period not exceeding eight clear days and commit him to prison for the period of adjournment or any part thereof, and may adjourn the inquiry and commit the person to prison from time to time until the person consents to do what is required of him.[66]

In 1995 the Supreme Court of Canada had occasion to consider an especially provocative example of this contempt, but did not itself rule that the preliminary hearing judge was limited to invoking s. 545. In *R. v. K. (B.)* a young man who was already in custody, and who would have been the Crown's only witness, refused to testify, called the judge obscene names, put his feet up on the ledge of the witness box, and threw the court Bible on the floor. Relying on s. 484, the preliminary hearing judge purported to convict the witness *instanter* of contempt. The Supreme Court of Canada overturned the conviction on the basis that the *instanter* conviction violated the witness's procedural rights mandated by natural justice.[67]

While obfuscation and avoidance can constitute refusal, the trier must apprise witnesses of where their testimony falls short. Evasiveness short of outright refusal to answer can also constitute contempt, but:[68]

> the charge must specify which part of the testimony is complained of. . . .
>
> . . . . .
>
> An accused person who is sentenced to a long term in prison for evasive answers regarded as amounting to a refusal to testify is entitled to purge himself of his contempt by providing answers that are not evasive. In order to be able to do this he must know quite clearly which questions require better answers.

In certain circumstances, perjury might constitute contempt, but not every perjury (let alone every misstatement of the facts) will attract such sanction.[69]

In a 1986 judgment of ambivalent application,[70] the Ontario Court of Appeal holds that, while a witness cannot refuse to answer a question on his own determination that the question is irrelevant, his contempt conviction — for refusal to answer the question — cannot stand if, on appeal, the court finds that the question was in fact

66. *Supra*, note 1, s. 472.
67. *R. v. K. (B.)*, *supra*, note 60. Regarding the procedural issues, see Chapter Five.
68. *Cotroni c. Québec (Police Commission)* (1977), 80 D.L.R. (3d) 490 (S.C.C.) at 497. (The accused had testified for nine days before a Quebec commission investigating organized crime. Finding that the accused's "attitude, behaviour and the way in which [he] avoided giving an actual or reasonably probable meaning to the words used by [him]," the commission sentenced him to a year in prison.)
69. *R. v. Côté* (1972), 11 C.C.C. (2d) 551 (C.A. Que.).
70. *R. v. Fields* (1986), 28 C.C.C. (3d) 353 (Ont. C.A.).

irrelevant. Practically (and sometimes probably quite impractically), this approach makes the appeal two-pronged: before considering the appropriateness of the contempt conviction, the appeal court must consider the relevance of the impugned question. Dubin J.A. justifies this procedure, in which the characterization of an appellant's behaviour hangs not on that witness's conduct and intent, but on the legal characterization of a question asked, on the very fact that the witness has a right of appeal against the contempt conviction. The entire court (including Grange J.A. in dissent) seems deliberately to confound the test for what is contemptuous with a test for the admissibility of evidence. That is, the question before the court was *not* the relevancy of the evidence, but whether the witness acted in a way calculated or apt to interfere with the administration of justice. It seems, in other words, that the court reached the right result (certainly from a principled approach) for the wrong reasons.

Perhaps the better approach lurks in the shadows of the judgment: if the witness refuses to answer on the ground of irrelevancy and there is *clearly a live issue* as to that question, the judge should hear submissions, make a ruling on the question, then point out to the witness that thenceforth the judge and counsel shall vet questions for relevancy, and that the witness should no longer object on that ground. This takes the focus off of relevancy, *per se*, and places it on whether the witness has a reasonable excuse for refusing to answer. (It also assumes that the witness is not a party acting as her own counsel. Probably, to protect the effectiveness of counsel's examination of the witness, the judge should hear submissions concerning relevancy in the witness's absence. Thorson J.A. suggests that the judge simply explain the question's relevancy to the witness, but the difficulty in this is that it could compromise advocacy tactics, as well as prolong the trial, putting perhaps too much control in witness hands.) If the judge is clearly on record as considering relevancy, the witness's refusal is no longer an evidentiary question, but subversion of the court's authority to control its process. The witness is now also on notice that she is not the arbiter of proper evidence in the cause. Of course, if the witness continues to object and the court persists in ordering her to answer, an appeal court reviewing a contempt conviction still would be obliged to consider the threshold question of relevancy.

Then again, in a sense the same appeal court had endorsed this two-pronged approach — on appeal or review — more than a decade earlier, in *Yanover v. Kiroff*, which concerns the refusal of witnesses before a public commission to testify in public. As the commission's

enabling legislation required that it adjudicate whether any such refusal was "without lawful excuse," and then to refer the putative contempt to the Divisional Court, Estey J.A. writes that

> if the reason behind the refusal was tenable in that an arguable case was raised for the opinion of the Divisional Court, then it would be difficult to hold that the witness in refraining, pending the determination by the Divisional Court of his compellability, was acting without lawful excuse. Of course, if the objection raised is so ill-founded as to be absolutely without merit and was not raised in good faith, the Divisional Court could, and doubtless would hold, that the witness refused without lawful excuse in the second sense of that expression.[71]

Again, the issue becomes admissibility (or the legal question of compellability), not the witness's recalcitrance. Paradoxically, Estey J. himself notes, later in his decision, that it is the witness's "disregard of the Judge's ruling which constitutes contempt of Court and for which he is punishable, not his insistence on the Judge deciding whether the question must be answered."[72] Justice Estey adds, however, that once the court determines that the witness (who heretofore has otherwise acted reasonably, if erroneously) is compellable, he should be given the opportunity to comply before the court imposes any penalty.

Further complicating the issue, in 1995 a single judge in chambers of the Ontario Court of Appeal held that, although a support order in a family law matter might be varied on appeal, the court would immediately commit the husband for contempt of that support order (i.e., before the appeal was heard). In other words, in this instance, the outcome of the appeal was irrelevant to the husband's current behaviour in respect of the court order, whereas the opposite was true in the *Yanover* and *Fields* cases insofar as there would be no committal for contempt unless the appeal court affirmed the order below. One can make the distinction in this last case, however, that the husband was not appealing the contempt order, but the support order, whereas, in *Yanover* and *Fields*, the appellants appealed the contempt orders.[73] Then, too, in one case we have an *in facie* contempt, in the other an *ex facie* disobedience of an adjudicated matter.

In any event, the Ontario Divisional Court more lately has held that a refusal to testify before a public commission is not lawful where the refusal is based on a witness's assertion that he "has no faith in the Ontario justice system or the mandate of the inquiry; he is a 'scapegoat'; the process is a cover-up; he was forced to appear against his will; and he could add nothing to his 'will state.'"[74]

71. *Supra*, note 59 at 247.
72. *Ibid.* at 249.
73. *Estrien v. Estrien* (1995), 10 R.F.L. (4th) 321 (Ont. C.A.).

Failure to make reasonable efforts to disclose relevant evidence as part of the discovery process can constitute contempt of court.[75] When parties act with malice and "contumaciously" in refusing to answer proper questions during examination for discovery, they risk having their pleadings struck, where procedural rules allow such a remedy.[76] Generally, failure to make reasonable efforts to disclose relevant evidence in a civil action can constitute contempt, under court rules and at common law. Whether this is a contempt in the face of the court is debatable. Where the court considers striking out pleadings to be too draconian, it may still order contempt and costs sanctions.[77]

Regarding *Criminal Code* s. 708 and s. 15 of the *Youth Criminal Justice Act*, treating contempt for failure to attend or remain to give evidence, see Section 6.1.

6.4(b) Protection by journalists of sources and source documents

As noted in Chapter Three, in 2010 Binnie J., of the Supreme Court of Canada, noted that while there has been some advocacy for a so-called "journalists' privilege" in their sources, this has yet to be realized in the contempt context. Section 10 of Britain's *Contempt of Court Act 1981* provides:[78]

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

6.4(c) Tampering with witnesses

It is a contempt to threaten a witness, even after the proceedings have concluded and the court does not require the witness's testimony.[79] There is ancient authority for this. See, for instance, *Aldridge*, *Eady and Smith On Contempt*.

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74. *Cornwall Public Inquiry Commissioner v. Dunlop*, [2008] O.J. No. 560, 2008 CarswellOnt 908 (Ont. Div. Ct.) at para. 8.
75. *Skipper Fisheries Ltd. v. Thorbourne* (1994), 31 C.P.C. (3d) 334 (N.S. S.C.), reversed on other grounds (1994), 31 C.P.C. 354 (N.S. C.A.)
76. *Wismer v. MacLean-Hunter Publishing Co. (Nos. 4, 5 & 6)* (1954), 13 W.W.R. (N.S.) 102 (B.C. C.A.) at 105.
77. *Skipper Fisheries Ltd. v. Thorbourne*, *supra*, note 75.
78. 1981, c. 49.
79. *R. v. Vermette*, *supra*, note 5 (Alta. C.A.), affirmed on other grounds [1987] 1 S.C.R. 577 (S.C.C.). After his conviction, Vermette followed the witness into an elevator and threatened her that "she would remember this day when she got her pretty face slashed."

6.5 Intoxication during court proceedings

In *R. v. Perkins*, a man charged with impaired driving arrived at court in the morning, prepared to plead guilty. After learning that his case would not be called until the afternoon, he drank beer to "kill time," to the point that he was unable to instruct counsel or comprehend the proceedings. The British Columbia Court of Appeal held that, though the contemnor did not intend to obstruct the course of justice, his intent to "consume a considerable quantity of alcohol, knowing full well that his presence would be required in Court shortly thereafter, and knowing full well what effect the alcohol would have on him," was contemptuous. The contemnor's impairment prevented the court from proceeding with his "trial" and was thus "calculated to interfere with the course of justice" in the *Hill* sense.[80]

Where before coming to court in the morning a juror drank two quarts of beer and was incapable of fulfilling his duties, the Ontario County Court sentenced him to thirty days in jail, with forfeiture of his jury fees. In convicting the contemnor, MacDougall Co. Ct. J. remarked on the social and political importance of jury trials, and that, although the parties had consented to proceed with eleven jurors, the contemnor had interfered in the proper administration of justice.[81]

6.6 Disrupting court proceedings

6.6(a) Disruption by persons lacking a right of audience

In 1995, a provincial court judge in 100 Mile House, British Columbia, was conducting a trial of aboriginal individuals accused of illegally occupying private property and violently resisting attempts to remove them. Ontario lawyer Bruce Clark arrived, "like the fictional Don Quixote," according to the trial judge, and claimed to act as agent for the accused, on whose account he was "seeking justice." Clark was not qualified to practise law in British Columbia, nor was he a party to proceedings or retained by any party to them. When the judge refused to hear him and told him to leave, Clark "lost his temper and became violent." The court had Clark arrested and convicted him *instanter* of contempt of court. Subsequently, although the matter had been set down for appeal on written argument only, Clark applied to appear in person so that he might argue that the trial court's "assumption of jurisdiction" over him "*qua* agent for natives upon and in relation to

Query whether the better procedure would have been to charge Vermette with a specific *Criminal Code* offence, e.g., intimidation.

80. *Supra*, note 20. *Cf. R. v. Jolly* (1990), 57 C.C.C. (3d) 389 (B.C. C.A.), discussed *supra*.
81. *R. v. Rogers*, [1952] 1 O.W.N. 492 (Ont. Co. Ct.).

unpurchased Indian territory is *prima facie* extra territorial, [and is] treasonable and fraudulent and, arguably, complicity in genocide." The British Columbia Court of Appeal held that this contention, and the fact that Clark claimed to seek justice, were irrelevant to the contempt matter:[82]

> It was not the message the appellant sought to deliver that led to the finding of contempt; it was the conduct that ensued when the appellant was denied an audience for his message. The nature and content of the message was [*sic*] irrelevant to the finding of contemptuous conduct. It follows that the nature and content of the message is [*sic*] irrelevant to the issue before this Court, namely whether the Provincial Court judge committed reversible error when he convicted the appellant. It further follows that there is no point to hearing the argument. There is, therefore, no purpose to be served by the presence of the appellant at the hearing of the appeal on the merits.

Regarding the sentencing in this case, see also Section 12.7(b).

6.6(b) Fighting in the courtroom

In 1971 the Ontario Court of Appeal disagreed with a trial judge who remarked, in sentencing two men for "a fight or a brawl" in court, "I don't know of a greater contempt in the face of the court than by starting a fight." Gale C.J.O. held that he could conceive of "many greater contempts" *in facie*,[83]

> than by two persons who, on the spur of the moment, engage in a fight. I can conceive of persons bringing into a courtroom firecrackers to set off during the proceedings, and I know of cases where people have entered a courtroom for the very purpose of disturbing and disrupting the court by shouting and other means.

See Section 6.6(a) for an example of the latter, and consider the facts behind *Balogh*, detailed in the introduction to this book, where a court clerk planned to introduce laughing gas, stolen from a hospital, into the trial of an obscenity prosecution he found tedious.[84]

82. *R. v. Clark*, 1997 CanLII 4102, 88 B.C.A.C. 213 (B.C. C.A.) at para. 12.
83. *R. v. Ball* (1971), 14 C.R.N.S. 238 (Ont. C.A.) at 239. In dissent, Schroeder J.A. agreed that the contemnors' behaviour was not of the most serious variety, but observed that more serious contempts "would call for vastly more severe punishment than 60 days' imprisonment" (at 240).
84. *Balogh v. Crown Court at St. Albans*, [1974] 3 All E.R. 283 (Eng. C.A.).

6.6(c) Interruption of proceedings by a court employee

The presiding judge should consider intent and motivation in these cases in the same way that the court would assess those when adjudicating alleged contempts by counsel. Thus, where a court employee used a public address system to page a lawyer throughout the courthouse and thereby interrupted court proceedings, he was not guilty of contempt insofar as he was new on the job and had acted in good faith.[85]

6.7 Other contempts of court process and procedure

The "laundry list" of possible contempts by misbehaviour in court usually includes "assaults committed in court; insults to the court; interruption of court proceedings; refusal on the part of a witness to be sworn, or having been sworn, refusal to answer."[86] "Working Paper 20" adds throwing an egg at the judge (tomatoes have also been documented, as has the more dubious instance of a dead cat),[87] smoking in court, obstreperous conduct by an unrepresented party, demonstrations which interrupt the proceedings, and so on.[88] Specifically, leading Canadian cases have examined:

6.7(a) Refusing to stand when a presiding judicial officer enters and leaves court

> The custom or practice seems to be an inseparable attribute of Court procedure and a mark of veneration or respect on the part of the public towards a Court, and when the Court officer in ushering into Court the presiding judicial officer addresses the words "Order in the Court," the public arises almost instinctively as a token of its esteem and respect to the Court, which Court through the instrumentality of the presiding judicial officer represents Her Majesty as the fountain of justice.[89]

85. *R. v. Cote* (1973), 14 C.C.C. (2d) 432 (C.A. Que.). A police sergeant had advised the appellant that the matter was urgent, and his employers had not given him specific instructions about the use of the public address facility. The Quebec Court of Appeal held that the appellant had made an error in judgment, but had not acted contemptuously.
86. *R. v. Cohn*, *supra*, note 59 at 686. See also J.C. McRuer, "Criminal Contempt of Court Procedure: A Protection to the Rights of the Individual" (1952), 30 Can. Bar Rev. 225 ("McRuer"), at 227.
87. R.E. Megarry, *Miscellany-At-Law* (London: Stevens and Sons, 1955) at 295.
88. LRC, at 19-20.
89. *Re Hawkins* (1965), 53 D.L.R. (2d) 453 (B.C. S.C.) at 458.

6.7(b) Accusing the court of prejudice

It is not improper for litigants to inform the court that they fear the court has prejudged the issues or is otherwise biased. In *R. v. Flamand*,[90] during a long trial in the heat of July, the accused alleged twice that the judge was biased. On the second occasion, he remarked, "I no longer have any confidence in you, your Honour, and you know why. You are not fit to try this case because your own son is a member of the Provincial Police." Having offered to recuse himself previously, on this occasion the judge convicted the accused *instanter* of contempt, which conviction was upheld on appeal. The Supreme Court of Canada overturned the conviction, and expressly endorsed the dissenting judgment of Mayrand J.A. of the Quebec Court of Appeal.

Justice Mayrand had found that, while the accused had spoken bluntly, he was doing no more than requesting that the judge recuse himself, apparently because of an honestly-held apprehension of bias. (The accused's lawyer immediately thereafter brought a former recusal motion.) Mayrand J.A. also noted that the first outburst had been provoked by an attack by the judge on a defence witness, such that "the accused could see his defence collapsing and feared judgment against him."

Mayrand J.A. also found that, although in convicting the accused of contempt the judge had asked the accused to provide any other reasons why he should recuse himself, this did not amount to permitting the accused to make full answer and defence. Conviction *instanter* was improper procedure in the circumstances.

6.7(c) Obstructing access to the courts of justice or otherwise interfering with persons having business at the courts

In *Re B.C.G.E.U.*, the Supreme Court of Canada holds that a judge on his own motion may find that the picketing of courthouses by labour unions (conduct "within the immediate precincts of the courthouses, obvious to all who approached") constitutes contempt in the face of the court.[91] The offending demonstration fell within the class of contempts which included interfering with parties, their legal representatives, witnesses, and judicial officers attending at court proceedings. The court notes that the judge had not required that the strikers attend work (*i.e.*, he found only the picketing contemptuous), that the facts of the picketing were uncontested (including an arrangement by the union to allow certain selected individuals "passes"

90. (1982), 65 C.C.C. (2d) 192 (S.C.C.).
91. *Supra*, note 6.

through the picket line, which the judge took as evidence of intent to obstruct all others), and that the judge had made express provision that his order could be set aside by motion. While control of labour strikes was within the constitutional purview of the provinces, strike behaviour which amounted to criminal contempt fell within federal jurisdiction.

This decision hinges on the policy argument that interference with the daily business of the courts gravely obstructs the administration of justice and the constitutional rights of those with business in the courts. The gravity and urgency of the situation entitled the judge to act *ex mero motu* and summarily. As Dickson C.J.C. put it in 1988:[92]

> 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.

In that case, the Supreme Court ruled that, even where a strike is illegal, if picketers intend to impede access to a court of justice, the strike interferes with the administration of justice and therefore is a criminal contempt of court.

92. *Newfoundland (Attorney General) v. N.A.P.E.*, [1988] 2 S.C.R. 204 (S.C.C.) at 213. The court holds that, insofar as a picketing at a courthouse is a criminal contempt, a union representing the picketers cannot discipline one of its members for crossing the picket line.

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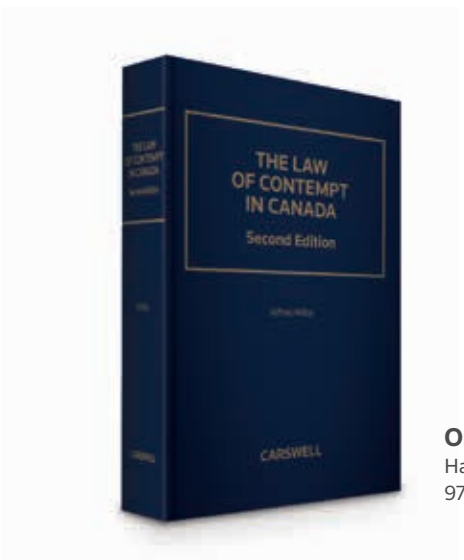

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