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

REPORT

contempt of court

Canada

REPORT 17

CONTEMPT OF COURT

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REPORT

ON

CONTEMPT OF COURT

March, 1982

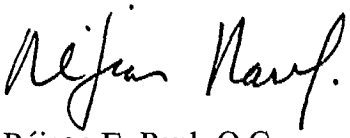
The Honourable Jean Chrétien, P.C., M.P.,
Minister of Justice
and Attorney General of Canada,
Ottawa, Canada.

Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission on contempt of court.

Yours respectfully,

Francis C. Muldoon, Q.C.
President



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Foreword

The Law Reform Commission published Working Paper No. 20 entitled *Contempt of Court* in 1977. The paper recommended, among other things, that this offence be governed by statutory provisions incorporated into the *Criminal Code*.

Shortly after the Working Paper was published, the Commission held a series of individual and group consultations in order to collect comments and criticisms. It consulted groups of practitioners, through the Canadian Bar Association, and representatives of the Crown, as well as numerous judges of superior, county, district and provincial courts across the country, among others. Their observations were of great use to the Commission, which also received written and oral comments from other eminent jurists and from members of the general public. All the advice received was of great value in the preparation of this Report.

This Report, then, expresses the fruit of long and arduous reflections on the part of successive Commissioners and a great number of researchers and expert consultants. This Report is submitted to Parliament by the current Commissioners although its basic text was previously approved by a Commission differently constituted. Some recent adjustments were imported to the proposed legislation and relevant comments by the current Commissioners in order to complete the project after the departures of our former Vice-President, Mr. Justice Jacques Ducros, and our former colleague, Judge Edward J. Houston. Their contributions of time and talent are gratefully acknowledged.

The current Commissioners, in a spirit of collegiality with our former colleagues, respect the previous decisions taken by

the Commission as it was earlier constituted. Nevertheless, recognizing our responsibilities and commitment to a thorough review of the criminal law, we draw to Parliament's attention the possibility that our intended future Report on the classification of offences could have repercussions on the recommendations expressed in this Report. In this process of fundamental review of the criminal law both minor and major adjustments will have to be effected, from time to time, with the evident objective of achieving comprehensive internal coherence and clarification of statutory provisions.

The largely positive nature of the reactions to Working Paper No. 20, prompted the Commission to report its final recommendations to Parliament without further delay. Contempt of court is however included in the broader category of offences against the administration of justice already governed by the *Criminal Code*. That part of the *Code* is also in need of legislative reform. The Commission plans to publish a Working Paper on those latter offences, to be followed eventually by a Report to Parliament.

The Commission thought, nonetheless, that it would be inopportune to delay any further the presentation of the part of this proposed reform concerning contempt, about which there seemed to be a large consensus among the experts. Moreover, the Commission is of the opinion that these reform proposals should be considered for early implementation by Parliament.

Introduction

Contempt of court, as it exists in Canada, is derived from two different sources: firstly, from the statutory rules contained in the *Criminal Code* and in provincial legislation concerning certain forms of civil contempt; and secondly, from common-law rules incorporated into Canadian criminal law by means of the last provision of section 8 of the *Criminal Code*, and from the law of certain provinces.

The Commission obviously does not intend to propose a set of general rules which would cover both civil and criminal contempt. This would run counter to its mandate and would fail to respect provincial jurisdiction over civil contempt. It therefore intends to deal only with the problems of criminal contempt. It is not surprising that, in some cases, the same act can constitute both criminal contempt, liable to be sanctioned penally, and therefore within federal legislative jurisdiction, and civil contempt, subject to the rules adopted by provincial authorities. This is an inevitable consequence of the division of powers in our federal State. Contempt of court is not the only such example.

Nor is it the Commission's intention to recommend that every type of contempt of court, or every form of misconduct with respect to the administration of justice, be made a criminal offence. The Commission still adheres to the general reform philosophy it has expounded on numerous occasions, in particular in its Report entitled *Our Criminal Law*. Penal sanctions should be reserved for very serious cases and used with moderation in order to reaffirm fundamental values solemnly. Criminal law must thus set tolerance thresholds. In matters of contempt, these thresholds must be established on the basis of the values to be protected, and must take into account the fact

that civil contempt is often sufficient to reaffirm the values contravened, or to restore peace, efficacy and impartiality to a situation jeopardized by the act of an individual.

Anyone proposing a change in the existing law bears the onus of proving the urgency, necessity, or relevance of the reform. There is no point in "reform" merely for the sake of change. In its Working Paper No. 20, the Commission came to the conclusion that a reform of the law of criminal contempt is necessary for two main reasons.

Firstly, criminal contempt is the last common-law offence in Canadian criminal law. Even though several traditional forms of contempt have been codified by various provisions of the *Criminal Code*, section 8 preserves the traditional common-law offences. This seems anachronistic in modern Canadian law, even more so when viewed from the perspective of a general reform or revision of the *Criminal Code* as a whole.

Moreover, maintaining a common-law offence in Canadian criminal law is rather inconsistent with the recognized principle of legality and with the fundamental rule *nulla poena sine lege*. This point has been made by numerous people, and the Phillimore Report in Great Britain also came out clearly in favour of a legislative expression of the traditional rules of contempt. Insofar as the criminal law can protect it, the process of judicature in Canada ought to be protected by provisions of law enacted by Parliament itself.

Secondly, it must be recognized that a segment of the Canadian public often has a negative and inaccurate perception of contempt. This leads inevitably, by association, to an equally negative perception of judicial authority and the administration of justice in general. It therefore seems paradoxical that, through a curious turn of events, the law on contempt, which exists to protect the image and efficacy of judicial authority, among other things, has given it a distorted and tarnished image on occasion.

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. Certain reactions to the Working Paper have confirmed this perception. The Commission has noted, however, that those reactions often result from ignorance of the basic principles and rules of contempt. 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? The Commission is of the view that the incorporation into the *Criminal Code* of statutory provisions governing the common-law forms of contempt, and a precise definition of them, will make it possible to dispel this impression, at least partially, by "demystifying" certain concepts and explaining clearly the rationale for having the offences.

FIRST PART

BASIC PRINCIPLES

Only those forms of contempt which represent an intolerable threat to the very integrity of the judicial process should be made criminal offences. Their punishment should be exemplary to show clearly the social disapproval attached to this type of conduct.

Contempt of court, perhaps more than other types of offences, trenches upon the confines of certain individual freedoms, in particular freedom of expression and freedom of information.

I. Contempt of court and freedom of expression

In a democratic society, citizens must have the right to express their opinions publicly on the operation of the State. The right to criticize, within the limits imposed by law and social convention, is the sign of a healthy society. Legitimate criticism is in fact constructive, at least in its effects. It points out certain defects and errors. It opens the way for reform, and thus makes it possible to improve the social system generally.

The administration of justice and the judicial system should not be set apart, or be an exception. It is normal and important for all citizens to feel involved in their system of justice. It is healthy for them to be able to express their views on its imperfections and defects freely, without fear of reprisals, and to propose means of remedying them. Justice must be accessible to the people. It would be contrary to the very democratic process to deny them the right to criticize.

The administration of justice must also be impartial and fair. The State has not only a right but also a duty to see to this. It could therefore not tolerate an individual attempting to

influence unduly the outcome of a trial before a jury by fabricating false evidence, intimidating the jurors, or simply trying to destroy their impartiality, for example. All systems of law try to prevent and to punish such conduct because it diverts freedom of expression from its true purpose in order to serve an antisocial purpose. Some of these abuses are too well known for it to be necessary to dwell on this point.

Judges, for their part, are the supreme representatives of the administration of justice. Their functions place them in a very special situation. Their principal role consists in settling disputes, ending conflicts, and thereby restoring peace. In settling justiciable disputes, it is almost certain that they will displease a particular individual or a group. There is a winner and a loser in every trial. The latter will not necessarily look kindly upon the individual or the system which decided against him. The potential for challenge and criticism of the judicial profession is thus perhaps greater, owing to the very nature of things, than in the case of many other professions. Moreover, since the judicature is not fundamentally based on a consensus model, it is understandably open to both general and individualized criticisms directed against its prominent personification in the judge or the judiciary.

This risk of criticism is all the greater because our system of justice is an open and public one. Citizens or groups who are not directly involved in a dispute can indirectly experience the effects of a judicial decision. Similarly, others may be tempted to identify with one party or the other, and to promote their cause.

Fortunately, the Canadian public and Canadian citizens are familiar with, and understand the role of judges. They agree voluntarily to accept their decisions and rulings because judges are impartial. A litigant who loses, however unhappy he may be to have lost, will accept his lot because he will have inevitably received a decision untainted by prejudice or bias.

Similarly, the great majority of Canadian judges, far from taking offence at criticism, are not afraid of it, accept it, and

even solicit it sometimes, so long as it is made in good faith, and is legitimate and constructive.

It is therefore only to deal with a very small number of cases that the law must intervene in the last resort. In any society, there are a few unscrupulous citizens who, for a variety of reasons, may be tempted to abuse the right to criticize and to express themselves freely, by diverting these rights from their proper purpose. An act of this nature cannot therefore be ignored, even as an isolated incident. It will sometimes be sufficient to destroy the atmosphere of confidence, or to disrupt a process which is delicate by its very nature, and which must be restrained and orderly. It is at this level, and at this level alone, that the law should intervene.

This intervention does not necessarily need to take the form of criminal intervention, however. As the consultations held by the Commission so amply confirmed, certain types of aggressive action directed against the system of justice or against a particular judge are often best settled outside the criminal process.

To take an example, it would be ridiculous, and contrary to sound legislative policy, to treat the slightest breach of courtesy or etiquette in court as criminal disruption of judicial proceedings. There must be a certain amount of tolerance, since this increases the prestige of the judicial profession rather than diminishing it. A comment from the judge, a mild reprimand, or a mere warning will usually accomplish much more than a prosecution for contempt. The judges whom we consulted related to the Commission their significant experience in this regard.

In such circumstances, as in any others which could give rise to a charge of contempt of court, the judicial system must be tolerant and patient so as not to prejudice freedom of expression. Since everything really depends on the particular facts and circumstances, it is ultimately up to the courts to fix the limits of tolerance on the basis of general statutory provisions. All which the civil or criminal legislation can hope to do

is to prescribe the parameters, and the terms and conditions of judicial intervention.

The right to criticize the administration of justice must therefore be preserved. Neither the judicial system nor judges should be completely isolated from such criticism, as long as it remains reasonable. Why then is it necessary to provide special protection?

The answer to this question is essential to an understanding of the law governing offences against the administration of justice in general, and the law of contempt of court in particular. Judges and judicial authority find themselves in a particularly vulnerable situation when compared with politicians, legislators or even administrators. They must remain impartial arbitrators at all times. Unlike the others, therefore, they cannot become personally involved in any debate arising from criticism. They cannot engage in public controversy, nor even sometimes simply reply publicly to the attacks to which they may have been subjected, even where the latter are obviously erroneous, unfair or biased. Our society allows a politician or a public figure whose reputation has been attacked to call a press conference to answer those disparaging him, and to use the media to give the public his version of the facts and his opinion on them. Our society would not, justifiably, tolerate the same conduct on the part of a judge. It would not allow him to engage in a public argument or controversy with a litigant, for example. If he were unfortunate enough to do so, the judge would lose his status of impartiality and detachment since he must, by virtue of his very functions, remain *above and not in the debate*. It is thus perfectly normal for society to take up his defence and restore the peace. One of the ways of doing this is to punish such attacks by the rule of law. It seems clear that society does accord such defence when Parliament enunciates the rule of law, rather than leaving it to the common law of which judges themselves appear to be the real custodians.

It is therefore from this perspective that a reform of the law of contempt of court should be viewed. It must not restrict or jeopardize freedom of expression. It must on the contrary

promote it, but deal severely with blatant and serious attacks in order to preserve the integrity of the system as a whole.

II. Contempt of court and freedom of information

In a democratic society, justice must be public and open to everyone. This is why our criminal law requires that an accused be present at his trial and that the proceedings be public. *In camera* proceedings are invoked only exceptionally, where an overriding interest is involved.

As a corollary to this, the public has a right to be kept informed of the administration of justice and of judicial decisions in particular cases. Our legislation should promote this freedom of information, and not place obstacles in the way of those whose profession or trade is precisely to disseminate this information. There can therefore be no question, in our society, of muzzling the written or electronic media, or of imposing restrictions on them through contempt of court, and thus preventing them from performing their true role. Here again, however, the law should define certain limits, most of which are consistent with those imposed by the common law of defamation. These limits are twofold.

The first concerns the impartiality of the information. In judicial and other matters, freedom of information must not be betrayed by the presentation to the public of partial or biased information, or information which deliberately distorts the facts. However, there is nothing to prevent any individual from giving his "opinion" on these facts. It is important, however, that the factual information be accurate and impartial. There is certainly no need to go on at length on this first limitation.

The second one, on the other hand, is inherent in our criminal justice system. The latter, as we are aware, is particularly concerned with respecting the impartiality of the judicial process, and giving the accused a series of guarantees and rights to prevent any person from being convicted otherwise than according to law.

Under our law, an accused is presumed innocent until found guilty. A finding of guilt occurs only upon the presentation of lawful evidence proving guilt beyond a reasonable doubt. This basic rule should not be altered.

Our criminal law also relies on trial by the accused's peers in the most serious cases. The institution and operation of the system of trial by jury are based on the assumption that twelve impartial and unbiased citizens are capable of determining whether an accused be guilty or not. It is therefore also important to protect the impartiality of jurors.

Over the centuries, our law of evidence has developed precise rules to ensure that the evidence presented against an accused is reliable. The law thus excludes certain types of evidence categorically and makes a rigorous selection among the others. A confession, for example, is admissible in evidence against an accused only if it is established that it was made voluntarily and without force. The prohibition of hearsay removes unreliable evidence from the consideration of the finder of fact. In practice, courts will not allow jurors to be shown particularly horrible or gruesome exhibits or photographs, for fear that these will have an unduly negative influence on their perception of the accused.

These few examples are sufficient to illustrate our point. A trial, particularly a criminal trial, is an extremely delicate mechanism, adhering to precise rules aimed at providing the best possible guarantees that the process will be fair and impartial.

Sometimes, the very equilibrium of this process can be jeopardized by public dissemination of accurate information

which is not necessarily distorted, but whose effect is precisely to short-circuit the system of protection devised by the law.

Thus, certain information may have such an influence on a given segment of the population that it subsequently becomes difficult or even impossible to find twelve impartial jurors in the community. The information may also bring to the attention of the public, and therefore also of the jurors or prospective jurors, a highly prejudicial fact or allegation which, for one reason or another, is declared to be inadmissible at the time of the trial. In addition, grave prejudice may result from the publication of gruesome photographs which will not have been presented during the trial, because they are properly excluded from evidence in regard to the particular accused. Finally, in order to preserve fairness, the law must preserve its rule that an accused is to be convicted or acquitted only upon evidence admitted at trial, not upon myth, rumour or media publications.

As can clearly be seen, the judicial process cannot allow the protective rules it has established to be circumvented indirectly. The stakes, often the liberty of an individual, as well as the protection of the public, are too high. Here again, absolute freedom of information must give way to respect for individual rights.

Criminal law however should intervene only in cases of serious abuse. It should not prohibit all information on the development of the judicial process, but only information which is likely to prejudice it greatly.

III. Contempt of court and the rights of the accused

The majority of the criticisms levelled against contempt of court in recent years has been directed at the recourse to summary procedure. The latter seems arbitrary in the eyes of

many, because it is outside the norms of common law, and because it gives the impression of having less regard for the rights of those who are accused of contempt. The Commission has discussed these points in its Working Paper No. 20 and repeating them here is not necessary.

Over the years, however, Canadian case-law has attempted to temper the apparent rigours of summary procedure in two ways. Firstly, the courts now very seldomly invoke the classic summary procedure in cases of contempt *ex facie*. Secondly, where the classic summary procedure is invoked, the courts take great care to give the accused all the rights and guarantees he has under the criminal law tradition. This is a fortunate initiative on the part of the courts and it deserves to be encouraged.

In its Working Paper, the Commission envisaged three distinct possibilities. The first was to keep the law as it now is, and allow total freedom of choice between the summary and ordinary procedures for all forms of contempt. The second consisted in identifying precisely the necessity of invoking summary procedure for each offence, and resorting to it only in cases where it appeared absolutely necessary. The third possibility, finally, was to make it a rule that the ordinary procedure should always be invoked subject to a few exceptions, and that even in these latter cases summary procedure should reflect the guarantees required under present case-law.

After further consultation and reflection, the Commission reached a compromise position. It thought it would be unrealistic to try to do away with summary procedure altogether. This would be inconceivable in cases of disruption of judicial proceedings, for example, since rapid suppression of the misbehaviour is crucial. In addition to punishing the contemptuous act, the aim is to restore the order which was disrupted, to permit resumption of the judicial proceeding which was interrupted, and to nip in the bud any attempts to repeat the conduct or engage in judicial guerilla warfare. A rapid decision and instant exemplarity are essential, if the situation is to be restored.

These observations may also apply to certain forms of disobedience to court orders, because the threat of immediate punishment can overcome resistance in many cases. This applies to a witness who is required to answer a question in court and refuses to do so. On the other hand, although everyone would like justice to be administered more rapidly, there is ordinarily no essential reason for using summary procedure for other traditional forms of contempt. A person who contravenes the *sub judice* rule, who commits an affront to judicial authority or who attempts to influence the outcome of a trial, can be prosecuted just as well in most cases under the rules of ordinary procedure, without any major disadvantages. These offences should therefore, in principle, be treated in the same way as other offences.

Some of those whom we consulted pointed out, however, that rapid intervention might be desirable in cases other than disruption of judicial proceedings or disobedience to a court order. One of the examples given was that of a small community seriously affected by a flagrant contravention of the *sub judice* rule by one of the local newspapers. It is important in such a case that the presiding judge be allowed to intervene rapidly to prevent repetition, restore the atmosphere of impartiality and confidence in the judicial proceeding, and allow the trial to resume as soon as possible. The same reasoning may apply in cases of affront to judicial authority. It was pointed out to us that if a judge's integrity is attacked, he will probably be reluctant to hear any cases until the true facts have been established and made known to the public.

To wait, by resorting to ordinary procedure, might mean losing one of the chief effects the laying of a charge of contempt can have in such a case.

The Commission recognizes the validity of this argument. It cannot accept, however, that summary procedure should become the rule, and that ordinary procedure be the exception.

There are two situations in which a presiding judge ought to be empowered to proceed without delay in order to protect

the integrity of the on-going proceedings by denouncing and, if appropriate, by imposing punishment upon the offender. One such situation is that in which the proceedings are disrupted by disorderly or offensive conduct, or in which an order made in, and for the purposes of, those proceedings is not obeyed. The other situation is that in which interference with the proceedings of a jury trial is attempted or effected. Interference with proceedings under way before a judge alone, or before a panel of judges, evidently does not require to be dealt with on the sudden as is the case when the court is composed of a judge and jury, where the continuity and orderly sequence of the proceedings are so crucial. In these two situations, the presiding judge ought not to be left helpless, but clearly ought to be empowered to call immediately upon the person who commits the offence to justify the offensive conduct, if possible.

This power of immediate action by the presiding judge for the purpose of preserving order and suppressing disruptions and interference will be further considered in this Report. Suffice it to note at this stage, however, that such a power would not displace the normal inherent power of a court to preserve order by admonishing, reprimanding, or expelling a disruptive person. Nor would or should the exercise of this power ever displace the accused person's rights to be represented by counsel, to call witnesses and, if so advised, to remain silent in the proceedings. These matters will be considered more fully in later passages.

The newly specified offences ought to be charged, if at all, and adjudicated with as much solemnity as the exigencies permit. On behalf of society, then, Parliament should declare them to be indictable offences, thereby emphasizing the serious character of such misconduct. Characterizing these offences as indictable will also accord the accused all the procedural safeguards which go with the prosecution of serious offences.

SECOND PART

THE OFFENCES

I. Specifying the offences

In Working Paper No. 20, the Commission identified five forms of common-law contempt of court:

— obstruction of justice
— disruption of judicial proceedings
— defiance of judicial authority
— affront to judicial authority
— interference with judicial proceedings (*sub judice*).

We examine them one at a time here, in light of the observations and comments made to the Commission about its preliminary proposals.

There is one observation which should be made first, however, concerning the offence of obstructing justice. The present *Criminal Code* contains a number of provisions concerning obstruction of justice, expressed mostly in sections 107 to 137. These provisions should also be examined in detail, in the light of a general reform of the offences against the administration of justice. The problem should therefore be dealt with in a Working Paper. It is possible, in the Commission's view, that a review and reform of these provisions will make it unnecessary to create a special offence in the context of contempt of court.

We shall therefore concern ourselves with an examination of the other four forms of common-law contempt which are the subject of this Report. We foresee them all as being indictable offences.

A. *Disruption of judicial proceedings*

Disruption of judicial proceedings, in the strict sense of the term, consists of any act, gesture or word which hinder or obstruct the normal, harmonious flow of courtroom

proceedings. It is therefore above all, an attack on the *functioning* of the administration of justice.

Characterizing disruption of judicial proceedings as criminal fulfils two different, though complementary, functions. Firstly, and this is essentially its principal aim, it helps restore order and ensure the orderly functioning of judicial hearings by eliminating a "nuisance". Secondly, it provides for the punishment of the offender in order to underline the reprehensible nature of his conduct, and thus it sets a tolerance limit.

As the Commission pointed out in its Working Paper, the offence of disruption of judicial proceedings must not be charged, firstly, to turn harmless or careless acts of discourtesy into criminal offences. In the vast majority of cases, a warning from the bench will be sufficient to restore order. Only serious misconduct, which is fortunately rare, judging by the annals of Canadian case-law, should be declared a criminal offence. The cases have traditionally held that disruption of judicial proceedings is criminal when occurring in a criminal court or in a civil proceeding where it is of a particularly serious nature.

Secondly, conduct may fall under more than one offence-creating section. This would be the case, to take a hypothetical example, where the accused commits an assault during the hearing. Such misconduct could occur within the courtroom itself or outside in the vicinity of the courtroom. The Commission is of the view that only acts which disrupt judicial proceedings should constitute the offence of disruption of judicial proceedings, and be prosecuted as such. Provision for this offence exists to deal with this particular type of conduct, not to punish conduct which is criminal under other provisions of the law.

Finally, the Commission considers that it is also important to ensure compliance with orders made during a judicial proceeding, and to uphold the judge's authority. The Commission is of the view that disregard of judicial orders can also be treated as a form of disruption. It too requires rapid and immediate intervention by the judge, to force compliance. This

applies to a witness who refuses to appear, to be sworn or to testify, or to a lawyer who fails to appear in a case in which he is counsel, for example.

The power to punish this type of conduct forthwith is an inherent aspect of the judge's control over the court, and over judicial proceedings as a whole.

For these two forms of disruption, the traditional summary procedure should be employed. Because of the very nature of the offence and the functions such procedure serves, the Commission is of the view that the summary procedure should continue to be available, since rapid intervention is essential.

The Commission is also of the opinion that it is important to retain the principle that the judge should remain master of the proceedings and retain the power to maintain order in court. The solution of referring the case on the merits to another judge or another court therefore should not be adopted. Having personally witnessed the incident, the presiding judge is in a better position to decide the new issue. Moreover, as the Phillimore Report quite rightly pointed out, the threat of immediate punishment is likely to have a greater deterrent effect than the threat of a future trial. The existence of a right to appeal the conviction, as well as the sentence, is a sufficient guarantee against possible abuses.

B. *Defiance of judicial authority*

Criminal contempt for disobeying a judicial order other than an order issued during court proceedings, is dealt with at present chiefly by the provisions of section 116 of the *Criminal Code*. Canadian case-law has traditionally regarded disobedience to a court order as constituting civil contempt. However, the same case-law regards disobedience to an order of a court sitting in a criminal matter as criminal, just as it regards disobedience to an order of a civil court where the disobedi-

ence constitutes an outright defiance of, or a public challenge to, judicial authority.

The *Criminal Code* also specifically prohibits certain forms of disobedience to a judicial order. This is the case with refusal to testify at a preliminary inquiry (section 472), refusal to release exhibits (section 533), failure to attend or to remain in attendance to give evidence (section 636), cases which would henceforth be covered by the offence of disruption of judicial proceedings.

In its Working Paper, the Commission mentioned that there were two schools of thought on the subject. The first is of the view that all disobediences to a court order should be criminal, because they represent a defiance of, or a challenge to, judicial authority. The second, on the other hand, regards such disobediences as criminal only where they constitute a public and outright defiance, and thus transcend the individual interests involved.

The Commission is of the view that criminal law is and should remain a measure of last resort, and that its power should be used with moderation especially where another remedy (in this case civil contempt) is available. It therefore considers that disobedience to a court order *may* constitute a criminal offence and that this principle should be maintained. However, as is the case at present, criminal charges should be laid in preference to, or simultaneously with, civil contempt proceedings only if the disobedience is an outright defiance of, or a public challenge to, judicial authority. Other cases should, in the Commission's view, be covered by the courts' rules of practice, or by statutory provisions or regulations governing civil procedure.

C. *Affront to judicial authority*

This third type of contempt covers a wide variety of situations ranging from statements insulting to a court, to accusations of dishonesty or bias directed against a judge. The

offence may be committed *in facie*, and thus be similar to disruption of judicial proceedings, or *ex facie*.

To legislate this offence is a difficult task. As we have pointed out, it touches the limits of freedom of opinion, and must not have the effect of silencing criticism of judicial decisions or of the justice system as a whole. It must not give rise, in our democratic society, to a crime of opinion, with respect to justice.

In its Working Paper, the Commission set out three possibilities for legislative reform. The first consisted in abolishing this type of contempt completely and relying on existing civil and criminal sanctions, in particular the common law of defamation. This proposal was adopted in Great Britain by the Phillimore Report, probably chiefly because this form of contempt has practically fallen into disuse in that country, unlike Canada. The second possibility consisted in maintaining the present law and not creating any particular form of statutory offence. The third possibility, finally, which the Commission then favoured, was to create a specific, but also strictly limited, offence.

It became clear during the consultations, that the preference was not for the second solution, firstly, because of the need to legislate in the area of contempt as a whole, and secondly, because of a desire to see some uncertainties in present case-law eliminated. Some of those whom we consulted also pointed out that the first solution involved serious disadvantages: firstly, the creation of an offence of this type has not only a repressive function, but can also have a preventive one as well; secondly, those consulted confirmed the Commission's impression that the special situation of judges does not in fact give them direct access to the various remedies available to ordinary citizens in similar situations.

The Commission recognizes that this form of contempt, even if strictly defined, may involve a potential risk of arbitrariness. It is of the view, however, that our tradition of moderation, the existence of our democratic system, and the judicial

guarantees of the rights of the accused, make it possible to mitigate this danger.

There is another major problem which arises with respect to the offence of affront to judicial authority: should the person who commits the offence be allowed to plead and prove the truth of the facts as a defence? To cite the example we gave in our Working Paper, should an individual who publicly accuses a judge of dishonesty and bias, be allowed to offer to establish the truth of this allegation as a defence.

The Commission received a great number of comments on this point. All the judges consulted and a vast majority of lawyers said they were firmly opposed to this possibility, for the following reasons. Firstly, to allow this defence would leave the way open to judicial guerilla warfare. One can well imagine that certain people, for ideological, political or personal reasons, would not hesitate to make such charges, for the sole purpose of discrediting the justice system, or one of its administrators, and gaining an ideal platform for waging their campaigns, all at a minimal risk. In such a situation, the judge, having been placed in the role of the accused, is in a very difficult position to defend himself, as we have pointed out earlier.

Secondly, even if we assume the allegation to be accurate, it was pointed out by some that proving the truth of the facts in defence is not the most appropriate procedure in the circumstances. In practice, a judge will not hesitate to withdraw from a case if his impartiality is in doubt in the least. In practice, as well, an individual who wishes to draw attention to such an allegation, or to what he feels is improper conduct on the part of a judge, has other means of making himself heard, ranging from reporting the fact to the chief justice, to making a formal complaint to the Canadian Judicial Council or other similar organizations.

In its Working Paper the Commission came out in favour of recognizing this defence, as long as the disclosure is in the

"public interest". However, the arguments we have heard have convinced us that although this criterion is valid in theory, it runs into serious practical problems. It was pointed out to us that the very notion of public interest and its application in each particular case would create serious problems.

This defence is not admissible under present Canadian law, and yet this situation has never created any genuine problems. Evidently there are better, more legitimate means of reporting a judge's misbehaviour than by affronting judicial authority.

The Commission therefore decided to reopen the discussion and reconsider its position. It is now of the view that the arguments presented to it, especially by judges with considerable experience, are valid. Moreover, since there are other ways in which an individual can express his point of view, ways which were not formerly available, and since the risk of injustice initially perceived by the Commission is minimal in concrete terms, it does not think the present law should be changed to give this defence specific legislative recognition. It is not impossible, however, that one day, if it is called upon to deal specifically with this question, Canadian case-law will decide to break with tradition and allow this defence, just as it is allowed in matters of defamatory libel.

The Commission still believes that the current practice in matters of affront to judicial authority whereby the judge who has been insulted does not hear the case on the merits, should be given statutory recognition. In other words, where the judge is personally implicated by the accusations or offensive remarks, the offence should be tried by a judge other than the judge who was the subject of the affront. This would avoid placing the judge in a most embarrassing situation. It would also avoid any implication that the judge is acting as both judge and party, and would give the accused an additional guarantee of impartiality.

D. *Interference with judicial proceedings*

The *sub judice* rule has given rise to an impressive amount of case-law. Considerable developments in the dissemination of information and the increasingly important role played by the media in modern society have given this form of contempt special importance and relevance.

The principal purpose of contempt of court in this case is to preserve the impartiality of the judicial system by protecting it from undue influence which might affect its operation, or at least might appear to do so. Justice must be neutral and must seem to be so in everyone's eyes, so that an atmosphere of genuine confidence can be maintained.

In this area, as in many others in criminal law, flagrant abuses pose few problems. Everyone recognizes, for example, that a virulent and hateful press campaign against an accused in a small town, especially if the latter is being tried before a jury, cannot be tolerated. Similarly, no one sees any harm in a newspaper publishing a series of articles about a trial reporting the proceedings and giving the readers additional technical and other information. The main problem, from a legislative policy point of view, is determining the limits to be imposed on legal intervention in freedom of information.

Working Paper No. 20 asked the Canadian public a number of questions. The Commission obtained the opinions it was seeking on most of them.

Firstly, the Commission is of the view that only those acts which constitute serious interference should be treated as criminal, once again in order to promote the principle of freedom of expression, and so as not to muzzle the press unduly. The assessment will depend on the particular circumstances of each case. It is impossible to formulate a general rule. The matter must therefore be left to judicial interpretation.

Secondly, in the almost unanimous opinion of those whom we consulted, it would be very helpful if the legislation creating

the offence of interference with judicial proceedings stated precisely from what moment and until what time a matter should be considered, for purposes of the offence, to be *sub judice*. There are several reasons for this, one of which stands out particularly. The offence has the effect of restricting freedom of information in the name of a higher interest. In a democratic country, when such a fundamental right is restricted by legislation, we think that this should be done clearly, so that citizens will be aware of the exact limits beyond which they cannot go without incurring the wrath of the law. Freedom of information should not be subject to uncertainty or imponderables. The media have a right to know the exact duration and limits of the prohibition, so as to be better able to comply with them.

The Commission is of the view, however, that a distinction should be made between criminal and civil trials. It recommends that in *criminal cases*, the *sub judice* period extend from the time the information is laid or the indictment preferred, until a final verdict, order or sentence is pronounced thereon.

The Commission discussed at some length whether or not the rule should apply only to the trial stage, or should also be extended to the appeal. On appeal, since there is no jury, the risks of influence are minimal or non-existent. Moreover, the public is well aware of the fact that while juries may be susceptible to outside influence, courts at the appellate level are less so.

Consideration of the *sub judice* rule draws together competing social and legal values which must be reconciled. The *Canadian Bill of Rights* recognizes and declares, in section 1, that freedom of speech and freedom of the press exist in Canada. Equally, it commands, in section 2, that no law of Canada shall be construed or applied so as to:

> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
>
> (*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in

a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or . . .*

To exact by law that no opinion upon the manner of the conduct or the adjudication of court proceedings, and on the appropriateness of the verdict, sentence or judgment of the court, be printed in a newspaper or broadcast until the final and definitive verdict, sentence or judgment be pronounced, might appear to suppress both freedom of speech and of the press, and to contradict the values articulated in paragraphs 2(*e*) and 2(*f*). This, however, is not an instance of suppression, but rather of mere postponement until the judicial process has run its course. Indeed, we have established appellate tribunals in Canada precisely because it is understood that courts of first instance can and do err in their dispositions. Even so, opinions expressed in good faith about the judicial process, although somewhat premature before the process has run its course, should not be objectionable on that ground alone, if it were not also crucial for justice to be plainly seen to be done. Herein lies a dilemma. If the court, during the course of the judicial process, coincidentally reaches impartially the same judgment as that which is urged in published or broadcast opinion, it will inevitably be seen by some sectors of the public to have been influenced. On the contrary, if the court reaches a judgment differing from that which is urged in published or broadcast opinion, it will inevitably be characterized by other sectors of the public as being reactionary or arrogant. The solution to this dilemma, the reconciliation of the competing values, then, resides in postponing public comments which pose serious risk of obstructing or influencing the impartial adjudication of judicial proceedings until the latter have run their course and it therefore becomes possible to evaluate them in a responsible manner.

To speak of judicial proceedings having run their course engages again the consideration of whether the *sub judice* rule ought to apply to appellate as well as trial proceedings. We

*Note the parallel provisions of the *Canadian Charter of Rights and Freedoms* adopted since the writing of this Report.

think that there is infinitely less risk of influencing appellate judges than there is of influencing prospective jurors, jurors and witnesses in a trial. The appeal takes place only after the proceedings of first instance are recorded and crystallized. Therefore, we think that any restrictions on freedom of information or opinion imposed by the new provisions ought to be limited to the trial phase alone.

Once again, it should be clearly established that these rules are in no way aimed at prohibiting or preventing the press from presenting factual, impartial and *bona fide* reports of public proceedings. Their effect is not to muzzle the press, but simply to prevent it from influencing or appearing to influence the outcome of civil or criminal proceedings, either deliberately or through sheer carelessness.

In *civil cases*, as the Commission noted in its Working Paper, the risks are obviously smaller. Still adhering to the principle that freedom of expression should prevail where possible, the Commission recommends that, in civil matters, the *sub judice* rule should apply from the time a case is set down for trial until it is adjudicated and the trial is terminated.

The Commission has not specifically considered the *sub judice* rules adopted by the two houses of Parliament, by legislative assemblies or by municipal assemblies. If such deliberative bodies wish to adopt parallel or even more restrictive rules for debate, they are, of course, free to do so.

II. Rules of procedure and miscellaneous amendments

The definition of the offences suggested in this Report necessitates a number of other procedural and substantive amendments.

◦ Jurisdiction

First of all, the Commission thinks it is important that the law on contempt state clearly when the summary procedure can be invoked and set out the principle that the ordinary procedure is to be followed, except where otherwise provided. It therefore perceives the necessity of a specific section setting out clearly the limits within which resort to summary procedure may be had. It is also of the view that the exclusive jurisdiction of the Superior Court should be maintained, and that there should be no option of a jury trial, particularly in view of the desirability for expeditious judicial intervention in this area.

Mention must, however, be made of two specific rules in that regard. One is contained in the proposed legislation concerning disruption of judicial proceedings. Where the offence is committed in relation to judicial proceedings which are before the court, the court can act forthwith and call on the person to show cause why he ought not to be found guilty. The second one concerns the person interfering with judicial proceedings pending before a court sitting with judge and jury. The proposed legislation parallels the above-mentioned rule and allows the presiding judge to deal summarily with the case.

◦ Appeal

In view of what is at stake in this type of offence, and in order further to preserve justice's image and practice of impartiality, the Commission asserts that there should be in all these offences a right of appeal against both conviction and sentence according to Part XVIII of the *Criminal Code*.

There are two instances in which, we propose, a court could convict an offender forthwith and without the necessity of a trial in the superior court of criminal jurisdiction. One

instance involves interference with judicial proceedings pending in a court composed of a judge and jury. The other instance involves disruptive or disobedient conduct before any court. These two proposed provisions have a few differing ramifications in terms of appeal against conviction and sentence for these indictable offences.

Where an appeal is taken from the disposition of trial proceedings, the situation is quite normal in the sense that Part XVIII of the *Criminal Code* provides for appeals in regard to indictable offences. Since a court composed of a judge and jury is inevitably a trial court the avenue of appeal is clear. In regard to the second instance of convicting an offender forthwith for disruptive or disobedient conduct before *any* court the situation again presents the normal avenue of appeal if that court be a trial court. Indeed, even if that court be the Trial Division of the Federal Court, Part XVIII would still be invoked to carry the appeal to the Court of Appeal of the province or territory in which the accused was convicted, but not to the Federal Court of Appeal. So much, we think, is clear from a careful perusal of our recommendations.

However, what might not be so clear upon a first reading is the necessary ramification of our recommendations, if the court which convicts an offender forthwith for disruptive or disobedient conduct be itself an appellate court. In such an instance there could be no clear or practical avenue of appeal. The conviction and sentence (or — most unlikely, when the court acts forthwith — the acquittal) would simply stand without the opportunity to appeal.

The statutory codification of the recommended varieties of contempt of court, by means of bringing them comprehensively within the confines and procedures of the *Criminal Code*, would thereby effectively close off appeals from the conviction and sentence pronounced by an appellate court which, by acting forthwith, would for that purpose in effect be assuming the role of a trial court. How so? It would be so because the appellate court acting forthwith would be "the court by which an accused was tried", which is properly the definition of a trial court in Part XVIII of the *Criminal Code*, and a convicted

accused could hardly, in law or logic, appeal to the same court even if it were adjudicating in its appellate role. If Part XVIII provides no clear avenue of appeal, neither, it seems, does subsection 41(1) of the *Supreme Court Act*, or subsection 31(3) of the *Federal Court Act*. Although the appeal provision of the *Federal Court Act*, unlike that of the *Supreme Court Act*, does not specifically exclude indictable offence appeals from its ambit, its past history and subsequent supporting provisions do indicate applicability solely to civil rather than criminal appeals. Where the Supreme Court itself would act forthwith under the recommended reform provisions, then the convicted offender would in any event simply have to reconcile himself to having been convicted and sentenced by the highest court of final resort in Canada, from which no appeal lies.

This subject of appeal having been opened with the assertion that there ought, in all these offences, to be a right of appeal against both conviction and sentence, one might well ask whether we ought to have contrived to formulate an avenue of appeal from the conviction and sentence pronounced by an appellate court when it acts forthwith. An unreviewable conviction with the imposition of an unreviewable sentence for an indictable offence at first instance is not to be countenanced lightly. Therefore, only after considerable deliberation and reflection we concluded that, while according a right of appeal in these circumstances would not be undesirable, its functional utility to the convicted person would be so doubtful and its practical operation so problematic as to induce us to make no recommendation to contrive an appeal procedure.

Our reasons for not recommending an avenue of appeal (which, on the other hand, we do not oppose in principle) are as follows. Firstly, appellate courts almost invariably hear appeals "on the record" of a trial court. That is, they have before them a record of the civil or criminal proceedings and the testimony of the witnesses, but because they almost never hear witnesses *viva voce* nor receive evidence or exhibits, appellate courts do not make a stenographic record of their own oral proceedings. Without a transcript, an appeal from a conviction and sentence pronounced at first instance by an appellate court

would have only the judges' and perhaps the clerk's notes, written after the events in question, to produce to the Supreme Court of Canada as a record. This would not be satisfactory, even if one or two of the judges dissented and produced his, her or their own notes. Nor would calling the appellate court clerk to testify *viva voce* before the Supreme Court of Canada be a satisfactory solution. Unsatisfactory as these approaches would be, they or others might well have been adopted in order to contrive an avenue of appeal, were it not for our next consideration.

Secondly, appellate courts are invariably collegial tribunals. The full court, as distinct from a judge in chambers, functions *en banc* with a number of senior and experienced judges. Here the risk of pronouncing a groundless or erroneous conviction would be so negligible as to be non-existent. Here the provocation would have to be so clearly evident as to induce a plurality of judges — the majority at least of the panel then assembled — to act forthwith. We are supported in this assessment by the negligible incidence of contempt of court proceedings reported in appellate courts pursuant to the present uncodified law. We are confident that there would be no increase in the incidence of convictions by appellate courts under our proposed codification.

Finally, the ramifications of our recommendations on appeal in these circumstances bring to mind the evolutionary process of law reform. If an avenue of appeal, however problematic, be later perceived to be needed, it could be formulated at that time. It could be evolved from the experience gained in the actual operation of the recommended codification.

• Repeal of unnecessary sections of the *Criminal Code*

The present *Criminal Code* contains a number of provisions which are no longer necessary in view of the proposed legislative reform. This is the case in the last provision of

section 8, and section 9 whose substance is to be reproduced in the proposed legislative text. This is also the case in various provisions presently contained in the *Criminal Code*: 440, 442(4), 467(3), 472, 533(2), 636. It seems to the Commission that the wording of the sections which it is now proposing is sufficiently broad to cover all these eventualities and therefore make it unnecessary to maintain separate offences. Some of these offences represent real impediments to the administration of justice, however. This problem can be examined and the necessary recommendations made in a Working Paper on statutory offences against the administration of justice.

◦ Sentencing

With respect to sentencing, the Commission has already made certain general recommendations in its Report to Parliament entitled *Dispositions and Sentences in the Criminal Process* (January 1976). Based on those general recommendations, and taking into account the fact that the Commission has not yet formulated recommendations on the classification of offences and the ensuing consequences on sentencing and procedure, the Commission decided that the maximum sentence for the new indictable offences should be two years. Under section 646 of the *Criminal Code*, a fine may be substituted for this term of imprisonment.

◦ Prosecution

After a thorough discussion with representatives of provincial law enforcement agencies, the Commission recommends that no prosecution for the codified forms of contempt be commenced unless consent be given by the Attorney General.

This measure, it is hoped, will prevent contempt prosecution from being used sometimes as a tactical or political measure of pressure. This rule is, of course, subject to certain exceptions, more particularly to the rule allowing a court forthwith to punish for disruption of judicial proceedings.

In our discussions we concluded as well that it would be appropriate to provide for the summary prosecution of these specifically formulated indictable offences at the instance of the Attorney General when that minister deems a summary prosecution to be needed in the interests of justice. We think, however, that a summary prosecution ought not to take any of the essential rights and safeguards from the accused and these ought to be spelled out in the legislation.

• Time limitation

The four specified offences of disruption of judicial proceedings, defiance of judicial authority, affront to judicial authority and interference with judicial proceedings, being properly indictable offences in our opinion, could normally be charged against an accused without any limitation period. By the very nature of the offences alleged, however, the processing and disposition of such charges ought to be effected with despatch. We assert this notion of despatch because if the accused be guilty, the protection of the values inherent in the judicature of our country demands rapid suppression of the obstruction or nuisance created by the offence or effective vindication of those values imperilled by the offence. On the other hand, if the prosecution be not undertaken promptly, if the prosecutor be so unsure or uncaring of whether the conduct of the alleged offender caused or was calculated to cause harm to the judicial branch of government, then the alleged offender should not be subjected to an indefinitely continuing threat of prosecution.

Therefore, the Commission thinks that there must be not only a definite limitation period for the instituting of prosecution for these offences, but also, this period must be relatively short. A limitation period of six months would be appropriate in all cases for these offences, at least until such time as a general system of classification of offences be accepted by Parliament. Then it could be determined whether these newly specified offences ought to be subject to that system, or not.

◦ Judge neither compellable nor competent witness

The purpose of these recommended provisions is to protect the due operation of judicature in Canada by deterring its would-be molesters, through the swift denunciation and punishment, in turn, of any actual molesters. The due operation of the judicature in Canada requires judges to perform their judicial functions without obstruction and they ought not to be appearing as witnesses before other judges.

It would be an unwholesome aspect of the due administration of justice that judges be judging each other's credibility as witnesses. The Commission harbours no doubt that in such situations the overwhelming majority of judges who might be called to testify are and would be found to be thoroughly credible. Such a result would most probably cause ignorant, even if not actually ill-intentioned persons, to spawn something akin to a "conventional wisdom" to the effect that the judiciary as a class are "all in cahoots" or that they inevitably "stick together". That such is in fact not the case is amply demonstrated by not infrequent pronouncements of appellate courts and, again, by disciplinary proceedings and inquiries in regard to the rare but nevertheless real misconduct of some few judges during the course of Canadian history to date. Moreover, provisions for corrective appeals and for disciplinary proceedings are seen to be necessary incidents of our judicial system.

Compelling the appearance and testimony of judges in proceedings for contempt of court is not necessary. It is not necessary because the evidence against the accused would in almost all cases be available from the record of the proceedings, from newspaper columns or broadcast tapes, and in the testimony of court stenographers, clerks, ushers and bailiffs, as well as counsel and spectators. All in all, compelling the testimony of judges in proceedings for any of these offences would create an invidious situation which would not be conducive to achieving the object of the proposed reforms.

It would also be an unwholesome aspect of the due administration of justice that an offender who disrupted that due administration in the first place could thereby and then create a situation in which he could confront the first judge and subject that judge to cross-examination. Here would be an opportunity to be exploited not so much by the offender who transgressed through bad temper, personal obstinacy or perverse pride, but rather by the offender who, for some fanatical and misguided political purpose has set out to subvert the system by whatever means are available to promote that political, or other, purpose. Here again, compelling the first judge to testify would provide the makings of a thoroughly invidious situation which would be entirely counter-productive to the object of the proposed reforms.

If the Commission's appreciation of the invidiousness of such a situation be reasonable, then it follows that no judge ought to be volunteering to testify against an accused, rare as that might be. Therefore, the law ought to provide that no judge is either compellable or competent to testify in these cases. It might then be wondered how the accused's defence would stand if a judge were willing to testify for the accused. The Commission notes the possibility of providing that the first judge might be required to furnish a written report for the record upon the request of the accused only, but we make no recommendation in that regard. Such a provision could arguably create invidious situations, too, because it could introduce subjectivity into proceedings which ought to be as objective as possible. The Commission prefers to adopt the position, after

all, that the prosecution either has an objectively provable case, in which event the accused will be convicted, or it does not have such a case, in which event the accused will be acquitted. Because there are appeal provisions for these indictable offences, the Commission prefers that the testimony — sworn or unsworn — of one judge be not introduced at trial before another judge in these particular cases.

THIRD PART

RECOMMENDATION:

THE PROPOSED LEGISLATION

The legislative project has been drafted with a view to its being inserted in Part III of the *Criminal Code*. The Commission considers that, after appropriate study by Parliament, the reforms recommended could be implemented without awaiting the completion of our full review of the criminal law.

Disruption of judicial proceedings

1. Every one commits an offence who

(*a*) disrupts a judicial proceeding by disorderly or offensive conduct, or

(*b*) disobeys an order made by or under the authority of a court in connection with the conduct of a judicial proceeding.

Defiance of judicial authority

2. Every one commits an offence who disobeys any order of a court where such disobedience constitutes an outright defiance of, or a public challenge to, judicial authority.

Affront to judicial authority

3. Every one commits an offence who

(*a*) affronts judicial authority by any conduct calculated to insult a court, or

(*b*) attacks the independence, impartiality or integrity of a court or of the judiciary.

Interference with judicial proceedings

4. (1) Every one commits an offence who, while judicial proceedings are pending,

(*a*) attempts to obstruct, defeat, or pervert such proceedings, or

(*b*) publishes or causes to be published anything he knows or ought to know may interfere with such proceedings.

(2) This section does not apply to accurate and impartial reports of judicial proceedings published in good faith except where a court has made a lawful order for a hearing *in camera* or for non-publication of such proceedings.

(3) For the purposes of this section, judicial proceedings are pending,

(*a*) in civil matters, from the time the matter is set down for trial until it is adjudicated and the trial is terminated;

(*b*) in criminal matters, from the time an information is laid or an indictment preferred, until a verdict, order, or sentence, as the case may be, is pronounced thereon.

Punishment

5. Every one who commits an offence under section 1, 2, 3 or 4 is guilty of an indictable offence and is liable to imprisonment for two years.

Jurisdiction

6. Subject to the provisions of sections 10 and 11, the superior court of criminal jurisdiction sitting without a jury shall have exclusive jurisdiction to try offences under sections 1, 2, 3 and 4.

Trial by other judge

7. Every one who commits an offence under section 3 shall be tried by a judge other than the judge in relation to whom, or presiding over proceedings in relation to which, the offence was committed.

Prosecution

8. (1) Subject to sections 10 and 11, no one shall be prosecuted for an offence under section 1, 2, 3 or 4 except with the written consent of the Attorney General personally.

(2) Where the offence alleged to have been committed occurred in relation to proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, any prosecution in respect of the offence may be instituted and conducted in like manner.

(3) No other proceedings shall be commenced for an offence under section 1 or 4, if the court in relation to whose proceedings the offence is alleged has dealt forthwith with the offence in accordance with the provisions of section 10 or 11 and pronounced sentence thereon.

(4) No proceedings shall be commenced for an offence under section 1, 2, 3 or 4 after the expiry of six months from the last day upon which the offence is alleged to have been committed.

Summary prosecution by the Attorney General

9. (1) Notwithstanding the usual procedures for indictable offences imported by section 5, the Attorney General or his agent may institute a summary prosecution against a person who is alleged to have committed an indictable offence under section 1, 2, 3 or 4 where he considers that such prosecution is in the interests of justice.

(2) A summary prosecution under subsection (1) shall be instituted by a notice of motion stating the offence together with any relevant documentary evidence, and ordering the accused to appear before the superior court of criminal jurisdiction on a fixed day to answer the charge.

(3) In a summary prosecution under this section, the accused shall have the right to be represented by counsel and to call witnesses but he may not be compelled to testify.

Power of court to act forthwith

10. Where an offence under section 1 is committed in relation to judicial proceedings before a court, that court may call on the person committing it to show cause why he ought not to be found guilty and, in the absence of such cause, shall find him guilty forthwith and sentence him accordingly.

Court sitting with jury

11. Where an offence under section 4 is committed in respect of judicial proceedings pending before a court sitting with a jury, the judge may call on the person committing such offence to show cause why he ought not to be found guilty, and in the absence of such cause find him guilty forthwith and sentence him accordingly.

Inherent power of a superior court to preserve order

12. (1) Nothing in this Part shall be interpreted as restricting the inherent power of a superior court of criminal jurisdiction to make an order for the purpose of preserving order in a courtroom, exercising control over judicial proceedings before it, or expelling anyone disturbing such proceedings.

Idem

(2) Every court has the same power and authority to preserve order in the courtroom, to exercise control over judicial proceedings, or to expel anyone disturbing such proceedings as may be exercised by a superior court of criminal jurisdiction in regard to proceedings over which it presides.

Definition "court"

13. For the purposes of this Part, unless otherwise provided, "court" includes a judge, a magistrate or a justice of the peace.

Judge not compellable or competent witness

14. No judge, magistrate or justice of the peace in relation to whom, or presiding over proceedings in relation to which, an offence is alleged, is a compellable or competent witness in a prosecution for an offence under section 1, 2, 3 or 4.

Appeal

15. Any person convicted of an offence under section 1, 2, 3 or 4, and the Attorney General or counsel instructed by him for the purpose, may appeal from a conviction, sentence or verdict of acquittal, as the case may be, in accordance *mutatis mutandis* with the provisions of Part XVIII.

Amendments

16. (1) Section 8 of the *Criminal Code* is amended by deleting at the end thereof the words "but nothing in this section affects 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 of court".

(2) Section 116 of the *Criminal Code* is hereby repealed and the following substituted therefor:

> "**116.** (1) Every one who, without lawful excuse, disobeys a lawful order made by a person or body of persons authorized by any Act to make or give such order, unless some penalty or punishment or other mode of proceeding is expressly provided by law, is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Where the order referred to in subsection (1) was made in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, any proceedings in respect of a violation of, or conspiracy to, violate that order may be instituted and conducted in like manner.

(3) This section does not apply to:

(*a*) any order made by a court, or

(*b*) any order for the payment of money."

Repeals

17. The following provisions of the *Criminal Code* are repealed:

(*a*) sections 9, 440, 472 and 636;

(*b*) subsections 442(4), 467(3) and 533(2); and

(*c*) forms 22 and 34 in Part XXV

FOURTH PART

ANNOTATED PROPOSED LEGISLATION

Disruption of judicial proceedings

1. Every one commits an offence who

(*a*) disrupts a judicial proceeding by disorderly or offensive conduct, or

(*b*) disobeys an order made by or under the authority of a court in connection with the conduct of a judicial proceeding.

This section provides for the offence of disruption of judicial proceedings. It covers two types of situations: first, disruption by disorderly or offensive conduct, and second, disobedience to a court order.

The first situation (paragraph (*a*)) is defined in terms of disruption and disorderly or offensive conduct. The verb "to disrupt" would connote by itself the intent to impede the proceedings. The words "disorderly or offensive conduct" are self-explanatory.

The second situation (paragraph (*b*)) applies to orders made by or under the authority of a court in connection with the conduct of judicial proceedings. Hence, it covers not only disobeying orders made by a judge in court, but also orders made under the authority of the court, such as subpoenas. The verb "disobeys" would not apply to a mere failure to comply, for it connotes a deliberate action.

Although this offence falls under the general jurisdiction of the superior court of criminal jurisdiction (section 6), section 10 of this proposed draft provides jurisdiction for a court to proceed forthwith against a person committing the offence in respect of proceedings before it.

The section makes no reference to whether the offence must be committed *in facie* or *ex facie*. At common law, this

distinction is relevant in limiting the jurisdiction of inferior courts to punish forthwith such contempts as are committed in their presence.

The offence defined in this section may be committed *in facie* or *ex facie*. Under paragraph (*a*), it suffices that the disorderly or offensive conduct disrupt the proceedings. This would cover not only occurrences taking place in the courtroom but also disruptions made in the near vicinity thereof. Other situations, e.g., a picket line on the street, could fall under section 4 of this proposed legislation.

Paragraph (*b*) applies to all disobediences to orders made by or under the authority of the court, in connection with judicial proceedings before it. Thus, the disobedience does not need to be committed by a person in the presence of the court. For example, a witness, or counsel disobeying an order requiring attendance in court on a fixed date, could be punished forthwith under this provision.

The requirement of an order made in connection with the conduct of judicial proceedings would exclude from the scope of this section judicial orders which are the subject matter of the proceedings, such as an injunction.

Section 12 of the proposed legislation maintains the inherent power of the courts to issue orders for the purpose of preserving order in a courtroom, exercising control over judicial proceedings before them or expelling anyone disturbing such proceedings. Section 12 when read in conjunction with section 1 makes it clear that the court may take action to prevent a disruption without necessarily resorting to a conviction for an offence under section 1.

Defiance of judicial authority

2. Every one commits an offence who disobeys any order of a court where such disobedience constitutes an outright defiance of, or a public challenge to, judicial authority.

This section codifies the common law. The gist of the

offence is an outright defiance of, or a public challenge to, judicial authority. At common law, this is the essence of criminal contempt of court, as opposed to civil contempt. For example, failing to comply with an injunction order would not *in se* constitute this offence, although it may attract civil sanctions. Similarly, disobeying a court order made in connection with the conduct of a judicial proceeding would not in itself fall under this section, although it is an offence under section 1 of this proposed draft. To constitute an offence under this section, the disobedience must manifestly be a challenge to judicial authority which engages public attention. This offence falls under the exclusive jurisdiction of the superior courts of criminal jurisdiction sitting without a jury.

Affront to judicial authority

3. Every one commits an offence who

(*a*) affronts judicial authority by any conduct calculated to insult a court, or

(*b*) attacks the independence, impartiality or integrity of a court or of the judiciary.

This section codifies the existing common-law offence of *scandalizing the court*. The new label "Affront to judicial authority" seems more accurate than the traditional one.

Paragraph (*a*) covers the situation where a person affronts judicial authority by conduct calculated to insult a court. Thus, for the offence to be made out, the insult addressed to the court must reflect on judicial authority. Such would be the case of slurring a judge *qua* judge.

Paragraph (*b*) is self-explanatory.

Proceedings for this offence are within the exclusive jurisdiction of superior courts of criminal jurisdiction sitting without a jury (section 6). Paragraph (*b*) in expressing the offence as an attack should not expose to jeopardy a party who has

legitimate grounds for seeking the disqualification of a judge in a particular case. If the proposed formulation appears to trace too fine a line in such situations, then legislators might consider inserting as opening words "without lawful excuse".

Interference with judicial proceedings

4. (1) Every one commits an offence who, while judicial proceedings are pending,

(*a*) attempts to obstruct, defeat, or pervert such proceedings, or

(*b*) publishes or causes to be published anything he knows or ought to know may interfere with such proceedings.

(2) This section does not apply to accurate and impartial reports of judicial proceedings published in good faith except where a court has made a lawful order for a hearing *in camera* or for non-publication of such proceedings.

(3) For the purposes of this section, judicial proceedings are pending,

(*a*) in civil matters, from the time the matter is set down for trial until it is adjudicated and the trial is terminated;

(*b*) in criminal matters, from the time an information is laid or an indictment preferred, until a verdict, order, or sentence, as the case may be, is pronounced thereon.

Paragraph 4(1)(*a*) is general: attempting to obstruct, defeat or pervert the course of pending judicial proceedings. The verbs "obstruct", "defeat" or "pervert" are those used in section 127 of the present *Code*. The verb "attempts" connotes intentional conduct. The offence consists in the attempt,

and the proceedings do not need to be actually obstructed, defeated or perverted.

Paragraph 4(1)(*b*) aims at publication by the media, of anything which may interfere with the course of judicial proceedings. The words "he knows or ought to know" impart negligence as a sufficient requirement for liability.

Subsection 4(2) provides for the traditional exception in favour of *bona fide* reports of judicial proceedings. The exception does not apply, however, where the reporting itself is prohibited as is the case for proceedings *in camera* or where a non-publication order has been made.

Although this offence falls under the jurisdiction of the superior court of criminal jurisdiction sitting without a jury (section 6), section 11 of this proposed draft provides for the jurisdiction of a court to proceed forthwith against a person committing the offence in respect of proceedings before a jury.

In this regard, the proposed legislation differs from the common law. At common law, a court of superior jurisdiction has the power to proceed summarily against any one committing a contempt as to proceedings before it, whether or not such contempt was committed *ex facie*. Under section 11, the offence can be so prosecuted only if it is in respect of proceedings pending before a court sitting with a jury. The court, that is the judge of the superior or county court, as the case may be, may proceed summarily against the offender. The rationale for this provision is to allow the presiding judge of the court in appropriate jury cases to eliminate the interference with exemplarity and promptitude and to carry on with the proceedings.

The offence of interfering with judicial proceedings can be committed only in respect of "pending judicial proceedings". "Judicial proceedings" are defined in section 107 of the present *Criminal Code* dealing with offences against the administration of law and justice. The inclusion of the proposed draft in Part III of the *Code* would entail the application thereto of the same definition of judicial proceedings.

The definition of "pending", however, raises difficult issues. Although *bona fide* and accurate reports of judicial proceedings are excepted from the scope of the offence, this offence may be viewed as a limit on freedom of expression and information. Yet, it is necessary to shield the judicial process, especially in jury cases, from comments and reports which are likely to influence the verdict. The question is: How far should this protection go? Should it apply only to trials, or extend to appeals? After much pondering and discussion, it was decided that only proceedings of a trial which has not run its course should be so protected. This decision finds its expression in the proposed subsection (3) of this section.

In civil matters, proceedings are "pending" from the time the matter is set down for trial until it is adjudicated and the trial is terminated.

In criminal matters, proceedings are "pending" from the time an information is laid or an indictment preferred, until a verdict, order, or sentence is pronounced thereon.

In both instances the risks of influencing witnesses or a jury, or of otherwise causing a mistrial are eliminated. If a new trial be ordered then its proceedings would naturally be again protected according to the provisions of this section.

Punishment

5. Every one who commits an offence under section 1, 2, 3 or 4 is guilty of an indictable offence and is liable to imprisonment for two years.

This section provides that the offences defined in this legislative draft project (sections 1, 2, 3 and 4) are indictable offences. At present, contempt of court is an offence *sui generis*. It is indictable only if it is actually prosecuted by indictment. In all other cases, the nature of the offence is far from clear. This provision makes the offences indictable, irrespective of the manner in which they are prosecuted. The section also provides for a maximum punishment — two years — applicable to all four offences.

Jurisdiction

6. Subject to the provisions of sections 10 and 11, the superior court of criminal jurisdiction sitting without a jury shall have exclusive jurisdiction to try offences under sections 1, 2, 3 and 4.

This section sets out the general rule that all four offences fall under the exclusive jurisdiction of the superior court of criminal jurisdiction sitting without a jury.

Offences under section 1 or 4, in regard to which any court (judge, justice, or magistrate as the case may be) asserts jurisdiction forthwith pursuant to section 10 or 11, are exceptions to this rule.

Trial by other judge

7. Every one who commits an offence under section 3 shall be tried by a judge other than the judge in relation to whom, or presiding over proceedings in relation to which, the offence was committed.

This section is self-explanatory. Where a superior court judge is the victim of an affront to judicial authority, he has no jurisdiction to try the offender. Only some other judge of the superior court of criminal jurisdiction can do so. This section complies with the well-known principle that no one should be at the same time judge and party in a case.

Prosecution

8. (1) Subject to sections 10 and 11, no one shall be prosecuted for an offence under section 1, 2, 3 or 4 except with the written consent of the Attorney General personally.

(2) Where the offence alleged to have been committed occurred in relation to proceedings instituted at the in-

stance of the Government of Canada and conducted by or on behalf of that Government, any prosecution in respect of the offence may be instituted and conducted in like manner.

(3) No other proceedings shall be commenced for an offence under section 1 or 4, if the court in relation to whose proceedings the offence is alleged has dealt forthwith with the offence in accordance with the provisions of section 10 or 11 and pronounced sentence thereon.

(4) No proceedings shall be commenced for an offence under section 1, 2, 3 or 4 after the expiry of six months from the last day upon which the offence is alleged to have been committed.

The Attorney General should exercise close control over the prosecutions for offences defined in this proposed legislation. This is done by requiring the written consent of the Attorney General personally for such prosecutions. Sections 10 and 11, under which the court may punish forthwith, are exceptions.

Subsection (1) is self-explanatory.

Subsection (2) provides that where an offence is alleged to have occurred during the course of proceedings, instituted or conducted by the Government of Canada, it is the Attorney General of Canada, personally, whose written consent would be required.

Subsection (3) provides that if the court acts under section 10 or 11, prosecution by the Attorney General is foreclosed, in regard to section 1 or 4. Furthermore, there may be a prosecution by the Attorney General for an offence under section 1 or 4 only where the court has not dealt summarily

with the matter pursuant to section 10 or 11. This is necessary in order to avoid multiple prosecutions and to give courts full control over their process.

Subsection (4) prescribes a limitation period of six months from the time at which the incident alleged to constitute the offence occurred for the institution of prosecutions under all of the offence-creating sections. It should be noted that sections 10 and 11 contemplate the court acting forthwith and, accordingly, the six-month limitation period will also apply in the event that a court declines to act under section 10 or 11.

Summary prosecution by the Attorney General

9. (1) Notwithstanding the usual procedures for indictable offences imported by section 5, the Attorney General or his agent may institute a summary prosecution against a person who is alleged to have committed an indictable offence under section 1, 2, 3 or 4 where he considers that such prosecution is in the interests of justice.

(2) A summary prosecution under subsection (1) shall be instituted by a notice of motion stating the offence together with any relevant documentary evidence, and ordering the accused to appear before the superior court of criminal jurisdiction on a fixed day to answer the charge.

(3) In a summary prosecution under this section, the accused shall have the right to be represented by counsel and to call witnesses but he may not be compelled to testify.

The first subsection provides for a special mode of summary prosecution for offences under section 1, 2, 3 or 4. This exception, recognized by the common law, is codified by this section. The Attorney General or his agent may institute it if he considers that it is in the interests of justice.

The summary prosecution is instituted by a notice of motion describing the offence and ordering the accused to appear in court on a fixed day. No limitation period is mentioned; the important factor is that the accused knows of the charge against him.

The right of an accused to retain counsel, to call witnesses, and not to testify, is recognized in order to bring the summary procedure in line with the *Canadian Bill of Rights**.

Power of court to act forthwith

10. Where an offence under section 1 is committed in relation to judicial proceedings before a court, that court may call on the person committing it to show cause why he ought not to be found guilty and, in the absence of such cause, shall find him guilty forthwith and sentence him accordingly.

This section gives the court the power to punish forthwith anyone committing an offence under section 1. Thus anyone disrupting a judicial proceeding by disorderly or offensive conduct, or disobeying an order made by the court in connection with the conduct of judicial proceedings, may be dealt with instantly.

Basically, this section reproduces the common law. One difference, though, needs to be noted: all courts, including justices of the peace, have the power to act forthwith under this section. The procedure to be followed in the exercise of this power is also based on the common law; the court, taking cognizance of the offence being committed, makes an order requesting the offender to show cause why he should not be convicted, and in the absence of such cause being shown, enters a conviction and imposes sentence.

*Note the parallel provisions of the *Canadian Charter of Rights and Freedoms* adopted since the writing of this Report.

This section should be read in connection with section 12 which maintains the powers of superior courts to preserve order in a courtroom and extends those powers to all courts. The powers which are less drastic in nature — calling to order, warnings, expulsion, etc. — would naturally be resorted to before a court decides to act under section 10. Yet, courts must have the power to deal forthwith with offences under section 1 if they are to exercise control over the proceedings before them.

Court sitting with jury

11. Where an offence under section 4 is committed in respect of judicial proceedings pending before a court sitting with a jury, the judge may call on the person committing such offence to show cause why he ought not to be found guilty, and in the absence of such cause find him guilty forthwith and sentence him accordingly.

This section is parallel to section 10. It provides for the power of a court to deal forthwith with a person interfering with judicial proceedings pending before it, while it is sitting with a jury. Interference with judicial proceedings may indeed call for immediate action for the purposes of preventing the offender from actually making it impossible for the jury to carry on with the case. The court, that is the presiding judge, may then proceed summarily against the offender under this section.

Inherent power of a superior court to preserve order

12. (1) Nothing in this Part shall be interpreted as restricting the inherent power of a superior court of criminal jurisdiction to make an order for the purpose of preserving order in a courtroom, exercising control over judicial proceedings before it, or expelling anyone disturbing such proceedings.

Idem

(2) Every court has the same power and authority to preserve order in the courtroom, to exercise control over judicial proceedings, or to expel anyone disturbing such proceedings as may be exercised by a superior court of criminal jurisdiction in regard to proceedings over which it presides.

This section, in substance, is based on section 440 of the present *Code*. Its purpose is twofold: first, to maintain the inherent powers of a superior court to preserve order in the courtroom, and second, to extend such powers to courts of inferior jurisdiction.

Definition "court"

13. For the purposes of this Part, unless otherwise provided, "court" includes a judge, a magistrate or a justice of the peace.

"Court" is defined so as to include a judge, a magistrate or a justice of the peace. By implication, although not so stated, it includes a court composed of a judge and jury (in which instance the powers accorded herein are to be exercised by the judge). By necessary implication also, it includes a court composed of a panel of judges such as a court of appeal or the Supreme Court of Canada.

Judge not compellable or competent witness

14. No judge, magistrate or justice of the peace in relation to whom, or presiding over proceedings in relation to which, an offence is alleged, is a compellable or competent witness in a prosecution for an offence under section 1, 2, 3 or 4.

The provisions of section 14 would prevent a judge, magistrate, or justice of the peace who, or whose judicial function, was the object of an offence from giving testimony at any

subsequent proceedings under this legislation. That judge could never be compelled to testify by either the Crown or the accused. Moreover, that judge would also be prevented from volunteering testimony, because he or she would not be competent to do so.

The effect of section 14 is that if there be no independent witness to give evidence in proof of the alleged offence, whilst the impugned conduct may well be personally insulting to a judge, it can hardly constitute an offence and ought not to be prosecuted as such under section 1, 2, 3 or 4. 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. Of course, individual judges and panels of judges do not perform judicial functions in complete solitude even when proceedings are conducted *in camera*. There are inevitably court clerks, ushers, bailiffs and others to provide testimony rather than the judge or judges.

The objectivity of the proceedings would be better preserved by precluding the examination and cross-examination of the judge, magistrate or justice of the peace who, or whose judicial function, is alleged to have been the object of the offence. That is what section 14 aims to accomplish.

Appeal

15. Any person convicted of an offence under section 1, 2, 3 or 4, and the Attorney General or counsel instructed by him for the purpose, may appeal from a conviction, sentence or verdict of acquittal, as the case may be, in accordance *mutatis mutandis* with the provisions of Part XVIII.

This section reproduces in substance present section 9 of the *Criminal Code*, and provides for a right of appeal by a convicted accused as well as by the Attorney General. By implication it aims to provide rights of appeal as are now provided in any other indictable offence. There is a difference however in that by invoking section 10 a court of appeal

becomes, in effect, a court of first instance as well as the court of sole instance in regard to appropriateness of sentence.

The intent of this proposed section 15 is such that where section 10 is invoked by the Trial Division of the Federal Court, an appeal as to conviction or acquittal on the one hand, or as to sentence on the other hand, would lie to the court of appeal of the province in which the proceedings take place, and not to the Federal Court of Appeal. However, if section 10 were invoked by either a provincial court of appeal or by the Federal Court of Appeal, an appeal as prescribed by present sections 618, 620, 621 *et seq.* of the *Criminal Code* would lie to the Supreme Court of Canada as to conviction or acquittal only, because appeals as to the fitness of a sentence do not lie to the Supreme Court of Canada. Finally, it is to be noted that if section 10 were invoked by the Supreme Court of Canada itself, no appeal would be possible.

Amendments

16. (1) Section 8 of the *Criminal Code* is amended by deleting at the end thereof the words "but nothing in this section affects 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 of court".

(2) Section 116 of the *Criminal Code* is hereby repealed and the following substituted therefor:

"**116.** (1) Every one who, without lawful excuse, disobeys a lawful order made by a person or body of persons authorized by any Act to make or give such order, unless some penalty or punishment or other mode of proceeding is expressly provided by law, is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Where the order referred to in subsection (1) was made in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, any proceedings in respect of a violation of, or conspiracy to, violate that order may be instituted and conducted in like manner.

(3) This section does not apply to:

(*a*) any order made by a court, or

(*b*) any order for the payment of money."

Present section 8 of the *Criminal Code* provides as follows:

Criminal offences to be under law of Canada

8. Notwithstanding anything in this Act or any other Act no person shall be convicted

(*a*) of an offence at common law,

(*b*) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

(*c*) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects 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 of court.

The amendment provided in proposed subsection 16(1) would abolish the common-law offence of contempt of court. This is purely consequential in view of the provisions of this recommended Part which define the offences and the procedure heretofore governed by the common law. It should be noted, however, that section 12 of this draft maintains the power of courts to preserve order in the courtroom.

Present section 116 of the *Criminal Code* provides as follows:

Disobeying order of court

116. (1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by an Act to make or give the order, other than an order for the payment of money is, unless some penalty or punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

Attorney General of Canada may act

(2) Where the order referred to in subsection (1) was made in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, any proceedings in respect of a violation of or conspiracy to violate that order may be instituted and conducted in like manner.

The amendment proposed in subsection 16(2) would restrict the application of section 116 to orders made by a person or body of persons not constituting a court.

Repeals

17. The following provisions of the *Criminal Code* are repealed:

(*a*) sections 9, 440, 472 and 636;

(*b*) subsections 442(4), 467(3) and 533(2); and

(*c*) forms 22 and 34 in Part XXV.

The substance of present section 9 of the *Criminal Code* is reproduced in section 15 of the proposed legislation with modifications.

Present section 440 of the *Criminal Code* is subsumed in section 12 of this proposed legislation.

Section 472 gives a justice of the peace who presides at a preliminary inquiry the power to punish summarily a defaulting witness. This situation is covered by paragraph 1(*b*) of this proposed legislation when read in conjunction with section 13. Section 472, then, is no longer necessary.

Section 636 provides that a person who, being required by law to attend or remain in attendance for the purpose of giving evidence, fails without lawful excuse to do so, is guilty of contempt of court. This situation would come under paragraph 1(*b*) of this proposed legislation.

The repeal of the following subsections is purely consequential. Subsection 442(4) and subsection 467(3) of the *Code* create offfences punishable on summary conviction in the case of non-compliance with a court order. Section 1 of this project provides for the enforcement of such orders. Therefore, these special offences are no longer necessary. Subsection 533(2) provides that any one failing to comply with an order concerning the release of exhibits is guilty of contempt of court. Such orders would be enforced under paragraphs 1(*a*) and 1(*b*) of the proposed legislation.

Forms 22 and 34 apply to a conviction and warrant of committal for the offence defined in section 636 of the *Criminal Code*.