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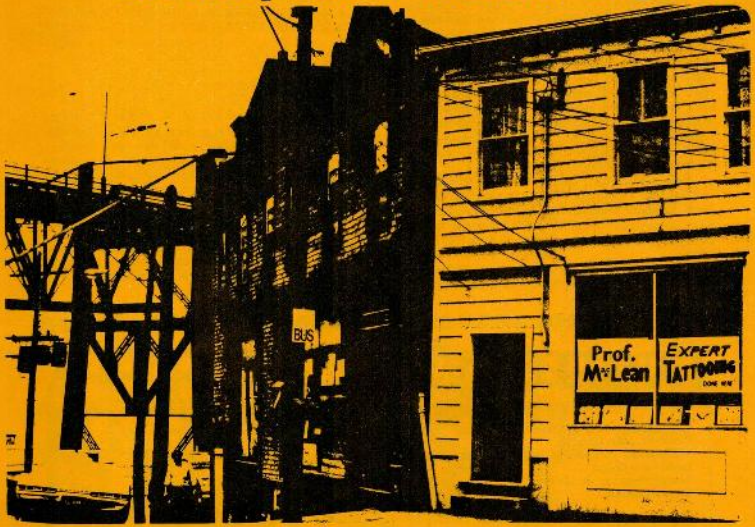
the mysterious east

an independent atlantic magazine



More On The Law

An Abortive Survey

Strong & Free

Ulli Diemer

ABOUT the mysterious east

As this issue of *The Mysterious East* goes to press, Senator Davey and his colleagues have just handed down a lively and controversial report, reserving much of their praise for what they call "the Volkswagen press" – including *The Last Post*, *The Fourth Estate*, and *The Mysterious East*. It's all very pleasant, though a student of irony would have a field day at the sight of, say, the Halifax *Chronicle-Herald* attacking *both* the Senators and the Volkswagen press on the same general grounds. What long-haired pinko irresponsible radicals the Senators turned out to be!

Watching the reaction of the Maritime dailies was good spectator sport, too. The Old Women of Argyle Street, as *The Fourth Estate* put it, proved the charges of news manipulation by "seeking out every Conservative politician to defend them, and attempting to discredit the Committee and Senator Davey." The Fredericton *Daily Weiner* came out with one of its masterpieces of gouty illogic. The *Telegraph-Journal* of Saint John, though stung enough to make some sharp and occasionally wrong-headed comments, nevertheless typically made a better showing than the other Atlantic dailies by making some attempt to understand the report and evaluate it fairly. The Moncton *Times* could see no way the report applied to its own practices -- a telling confession of dullness, if ever there was one.

But all this is history, and for a full look at the Report itself, we urge our readers to buy its first volume, *The Uncertain Mirror*, which constitutes the report proper, and read it for themselves. It is a pungent and eminently readable report; you can get it for $3.50 from the Queen's Printer.

But in one area the Davey Report bitterly disappointed us. Freedom of the press, we argued when we appeared before them, is endangered by two or three *legal* provisions. One of them is the provision that makes *printers* liable for legal penalties as a result of the editorial policies of a publication. We argued that printers, therefore, are forced, for their own protection, to assume the right to censor material that *might* get them into trouble, and we thought the law should not force them into that position; it should leave the responsibility for editorial decisions on the editorial staff.

Again, as an article in this issue makes clear, contempt of court can be used and has been used to harass publications, and we argued that unless a publication can be shown to have damaged the rights of an accused person, it should not be regarded as a contempt. Judges jealous of their personal dignity should not be able to use the contempt power; if they have been libelled, let them sue for libel like anyone else. We believe that the contents of this issue show clearly that there *is* room for for vigorous criticism of the bench, and that the bench will not easily tolerate it. As we go to press, Judge George S. Challies has found Quebec revolutionaries Pierre Valliers and Charles Gagnon in contempt for letters they wrote from prison to Mr. Justice Kenneth Mackay. The letters have not been published; presumably they were abusive. How they have damaged anything except Mr. Justice Mackay's feelings is hard to imagine. It would seem the contempt power is now being used to silence even *private* criticism of the bench. But the Davey report makes only the most fleeting allusion, in one sentence, to the contempt power. We believe this is a serious oversight.

The Davey Report, we think is a good one. We don't propose to discuss it at any great length; it speaks, very eloquently, for itself. But we hope it is the beginning, not the end, of a long hard discussion of the media in Canada, and the way they discharge their responsibilities.

INSIDE

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INTRODUCTION

The editors of *The Mysterious East* don't want to go to jail.

But we *do* want to make some responsible criticisms of the judicial system.

And people who try to do that have a good chance of going to jail for contempt of court.

We have been harried and frustrated ever since we began publication over a year ago by the contempt power. As an article in this issue shows, there is no rhyme or reason to the uses of the power. The power punishes both scurrilous diatribes and reasoned criticism; on other occasions, both kinds of material are tolerated. There is no way of knowing in advance what will be regarded as contemptuous, and what will not; in this area the law is conceded by almost every lawyer we know to be in a state of almost hopeless confusion.

But if one believes in a free press, one *has* to insist that public scrutiny of public institutions, however harsh and biting, must be permissible. Indeed, various courts have often affirmed that principle -- sometimes during the act of jailing a journalist. Our choice, therefore, was to remain silent or to take chances.

We have spent hours and hours over a period of months and months, with a wide variety of lawyers. We have phrased and rephrased material, attempted to anticipate the reactions of prosecutors and judges, tried and tried to ensure that our criticisms, though penetrating, were not uncivil or unfair. We have, in short, tried to make every possible compromise to avoid a contempt action. But the law offers no security to men in our position. We face what Alan Sinclair, a law professor at the University of New Brunswick, has described as "dog law" -- the dog goes and does his stuff, and if he is beaten then he knows it was against the law.

One form of complaint about the judicial system seems to be protected -- a petition to the Queen and her Parliament. As New Brunswick Supreme Court Justice A.L. Palmer said in the Ellis contempt case of 1888:

> *With reference to a Judge, if he has acted corruptly, it is worse than a mere contempt, but is apparent it would not be right that the Court of which he is a member should determine this, and consequently the law has provided a plain and easy method of bringing him to justice by a petition to Parliament. No judge ought, or I think would, complain if such a proceeding were taken against him for his conduct. It would only be right, as he would then be able to defend himself against any false charge, and he could with self-respect answer it and have the satisfaction to have it decided by a fair tribunal.*

The moral seems clear: criticisms of the bench can only fairly be voiced in the form of a petition to Parliament. This seems to us, too, a reasonable procedure -- though we might argue not the *only* reasonable one -- and we have therefore prepared a petition which we propose to submit to Parliament and to the Governor-General as the Queen's representative in Canada. A coupon is printed at the end of the article; if you agree in substance with our view of the way the legal system now operates, please sign it, clip it out and send it to The Editors of *The Mysterious East*, Box 1172, Fredericton, New Brunswick.

A PETITION TO HER MAJESTY ELIZABETH II QUEEN OF CANADA AND HER PARLIAMENT

WHEREAS: *The Mysterious East* was, in a very real sense, born in the chambers of the Supreme Court of New Brunswick, Appeals Division. The group which came together there to assist in the defence of Thomas Murphy on contempt of court charges was distressed by what it saw there. In an allegedly free country we watched a man jailed for publishing his honestly-held criticisms of a public institution. As loyal citizens of Canada, we could not countenance such actions in our name or yours. The form our protest took ultimately became *The Mysterious East.*

Our grievance is that the legal system of this province -- and others, though probably to a lesser extent -- operates on a logic of its own with little reference to the people it ostensibly regulates. It appears to be sensitive particularly to the concerns of prominent and influential New Brunswickers; it is not responsive to the aspirations of other New Brunswickers; it is conservative in its social views and frequently punitive in its actions.

WHEREAS; the Indians, who owned this province before Europeans came here, made treaties with the British Crown. The Canadian courts now hold that treaties and other arrangements made prior to Confederation are invalid. A treaty with the Crown made in 1866 is not binding on the Crown in 1876. Is it surprising that the Indians are reluctant to become part of Canadian society, as current government policy calls on them to do? The society they are invited to join does not respect its own laws, nor does it respect Indians. It does not even grant them the aboriginal rights they have held since time immemorial to hunt and fish for food, regardless of what white law may say about hunting and fishing seasons. The courts have consistently taken the position that Maritime Indians have no special legal rights at all.

AND WHEREAS; the problems of the individual Indian are often compounded by his poverty -- and to be poor in the courts of New Brunswick is generally to lose. We would draw Your Majesty's attention to the case of James Clair, an Indian of the Big Cove Reserve arrested on July 19, 1970, on a charge of breaking and entering, and consigned to the Kent County Gaol in Richibucto. On July 20, he appeared in court, and pleaded not guilty: he was remanded to July 27. Bail was set at the astonishing figure of $10,000.00 on July 22. On July 27, neither the arresting officer nor the crown prosecutor made their appearance; Mr. Clair was not brought from his cell, nor was he consulted about the date of a future hearing. On August 4, with no advance notice, Mr. Clair was escorted to the courtroom where the crown prosecutor asked for and received an adjournment until August 12, because his witness had to go the to United States. On August 11, Mr. Clair was again unexpectedly called up, and another adjournment granted, this time to August 14.

At this point Mr. Clair's case was brought to the attention of the Union of New Brunswick Indians and the Canadian Civil Liberties Association, who between them made arrangements for him to be represented by M. Roger Savoie of Moncton. On August 14, M. Savoie saw Mr. Clair through the preliminary hearing, at which he was committed to trial. On August 18, M. Savoie asked for an immediate trial on the grounds that Mr. Clair had been unable to raise bail. The crown refused: they said they were not ready. On August 20 M. Savoie had the bail reduced to security from two persons for $750.00 each, and the trial date was set for September [illegible].

Whatever the final disposition of the case, Mr. Clair is presumed innocent until proven guilty -- yet he spent *two months* in jail. Suppose he won the case: how could Your Majesty restore two months of his life? Mr. Clair did not receive this shocking treatment because he was an Indian. In effect, Mr. Clair received a sixty-day jail sentence -- for *poverty.*

In New Brunswick, poor people are routinely imprisoned for minor offences like disturbing the peace and petty theft. Sentences in the form of "X dollars or Y days" are commonplace. If a person does not pay it is generally because he is poor, not because he wilfully denies the court order. He is imprisoned, then, essentially by reason of his poverty. Can such procedures be regarded as due process and equality before the law?

AND WHEREAS; legal aid in New Brunswick does not even rise to the level at which it can be described as laughable, nor do current proposals from either the government or the bar envisage a legal aid system that would *really* banish the power of money from the court-room. The legal aid proposals are a salve to the consciences of the powerful: they will have precious little effect on the basic situation in the courts. Is it unduly cynical to suggest that they aren't intended to *be* effective, but only to *look* effective? Nor does the government's cry of poverty carry much conviction. A government which can find three or four million dollars to help a paper mill pollute Lake Utopia could find a million for legal aid -- if, indeed, it really felt the urgencies of the poor people of the province.

AND WHEREAS; one may inquire whether, in a province in which forty percent of the citizens are French-speaking, the courts offer trial in the language of the accused's choice. Hector Legere, 33, of Notre Dame, was arrested in Saint John for failing to pay 71 cents for a restaurant meal. He refused to speak English in court. "I know right well you can speak English," snapped Judge H.S. Prince. "You have spoken to the doctor and you have spoken to the sergeant. If you want to play games, then I will play with you. You will keep on going back [to jail] for a week until you do start talking. If you wish to spend the winter in jail, you are going about it in the right way. You'll keep going back there until you do speak English."

We are appalled, Your Majesty, at this kind of treatment of our fellow-citizens when they wish to use an official Canadian language other than the judge's. Legere, incidentally, was finally tried in English through the use of interpreters. He pleaded guilty, and was sent to jail -- *for a seventy-one cent meal.*

On another occasion, Michel Blanchard, a 22-year-old former student of the Université de Moncton, appeared before Mr. Justice J. Paul Barry in the matter of an interim injunction granted to the Université barring M. Blanchard from the campus. Elaborate simultaneous translation facilities were provided, but a request for a hearing entirely in French was denied -- the facilities, said Judge Barry, were lacking. To his credit, Mr. Justice Barry was at least embarrassed about the failure.

AND WHEREAS; the courts of New Brunswick have displayed a seemingly callous attitude to the young. The petitioners have been concerned about the subject of drugs for months. There is ample sociological evidence that drug sellers only operate at the request of the users, and that the notion of the "pusher" luring the kids into their clutches is stupid, simple-minded, and almost totally false. Yet the courts continue unaware of the fact that most sellers are only kids who do favours for their friends, and continue to regard the "pusher" as a satanic monster. Here is Judge Henry Murphy, handing down a five year sentence to a convicted seller in Moncton:

He is a young looking man and he presents a good appearance. It would be a lot easier for me, I suppose, if he were standing there in the dock with long, dirty hair and a beard and all that sort of thing. But he is standing there in the dock and he is a fine looking young man yet he is mixed up in one of the dirtiest businesses that there is, trafficking in narcotics. Pushers.

And we don't know how many young lives . . . he has ruined by supplying them . . . I have worried a lot about it and what it would do to McIlvena to send him to the Penitentiary. As some of those people from the Board say, "It won't do the person any good to put them in gaol." But I have reached beyond that point.

I am hoping that it will do McIlvena some good but I am going to protect those girls and boys, the young ones, from him for a period of time.

Here you have, Your Majesty, one of your judges admitting in open court that his view of life style and personal appearance probably influences his sentencing practices. He is going to protect the young from this nineteen-year-old -- and yet the girls on whose evidence he relies have perjured themselves rather than participate in what they considered a charade. The judge therefore has to manufacture an injury to them which they don't recognize themselves, in order to justify this overly severe sentence. Moreover one of the girls had testified that she took five dollars from the other to buy hashish for her -- which makes her a trafficker too, a point conveniently overlooked in the witch-hunt against McIlvena.

In addition, Judge Murphy evidently doesn't know that hashish is *not* a narcotic and is *not* regarded as addictive: his comment about ruining lives is like suggesting that the man who gives a youth his first drink makes him an alcoholic. Finally he discusses the view that it will damage McIlvena unjustifiably to jail him for five years, but comments only that "I have reached beyond that point" -- an interesting bit of autobiography, but hardly an argument.

It would seem that a man who apparently displays a lack of knowledge and onesidedness is unqualified to sit in judgment on cases such as these.

"The inertia of the process is incredible. The judges apparently *enjoy* putting up obstacles, finding that things can't be done, finding counsel's preparations out of order, their documents inaccurate, and so forth." In the middle of the appellant's argument, the Chief Justice interjected, "Why is five years too great a sentence in this case anyway? If the courts don't hand out stiff sentences their deterrent is lacking. That may not work, but it has to be tried."

The comment reveals once again the total reliance of the legal system on opinion. Whether there *is* a deterrent effect from heavy sentences in various kinds of cases is a factual question: research in the social sciences may well be able to answer it. The Ouimet Royal Commission Report notes that we have little evidence either way. But there is no provision in the legal system for such research, nor do the judges appear familiar with the methods and findings of social science. "This socio – socio – what's it?" grumbled Chief Justice Bridges at one point in Tom Murphy's trial when the defence was attempting to introduce sociological evidence as to whether Murphy's article *had in fact* influenced public opinion of the courts. That question was the nub of the case – but the court refused to hear evidence on it, and convicted Murphy on the *assumption* that he had affected public opinion.

Indeed, the courts give the impression that they do not object to remaining in ignorance. During the McIlvena appeal, Mr. Justice Barry commented: "LSD, that's the substance that causes people to commit suicide." Ross Archibald, McIlvena's lawyer was obliged to correct him: "According to the *newspapers*, my lord." Later, when Crown Prosecutor Irving Mitton remarked that the young people "know more about it [i.e. the drug situation] than I do" Chief Justice Bridges offered a specimen of his rather ponderous humour; "I should hope so." (Everyone laughed: a judge's jokes are automatically funny.) In fact, of course, if judges and prosecutors know nothing about social circumstances of the crimes upon which they are ruling, they are incompetent to make judgments.

AND WHEREAS; there is also no lack of evidence of the courts' willingness to co-operate with institutions and corporations against radicals and the labour movement. When Dr. Norman Strax was suspended from the University of New Brunswick in 1968, he began a protest sit-in, with some student supporters, in his own office. The University, reacting in panic, repaired to the courts, where Mr. Justice Barry promptly granted an injunction barring Dr. Strax from all university property and enjoining him not to incite students to further protest. There is nothing unlawful about suggesting to students that they protest what they regard as injustice; there is nothing very sinister about continuing to occupy one's own office as a means of dramatizing one's objections to the university's actions. And Dr. Strax's original provocation consisted of nothing more than stacking large numbers of books on the library check-out counter – which hardly constitutes clear and present danger of irreparable damage. What the University was asking the court to do was put its authority behind the University's attempt to curtail Dr. Strax's freedom of speech and his ability to protest. One might have hoped the court would object to being employed for such purposes, but we are not aware of any protest from the bench. Similarly the Appeal Division of the Supreme Court made no protest about being employed in the Murphy case as essentially a facility through which the government could move against student activism

AND WHEREAS; in 1965, the New Brunswick Federation of Labour presented a brief to the provincial government calling for specific changes in the Labour Relations Act which would have forbidden injunctions unless specifically authorized by the Labour Relations Board. The Federation pointed out that briefs against the lavish use of injunctions had been presented regularly since 1949. "Now labour finds itself outlawed by injunctions, some 16 years later!" said the brief. "Is it any wonder that Labour's respect has been diminishing for courts of the Province and those who administer justice in these courts? " The brief castigated the courts for "the extensive granting of injunctions by the judiciary on the flimsiest of evidence by the employer with disastrous results to the legitimate and lawful aspirations of trade unions." The purpose of the brief, said the Federation, was to point out that the injunction "can be a vicious instrument of attack upon the life of a trade union; that it can be used, and has been used of late, in a manner which was never contemplated in law", and that it had recently even outlawed a legal strike.

The Federation referred to the strike by Local 502 of the International Brotherhood of Electrical Workers against several firms in Saint John. The employers met with Mr. Justice W.I.H. Anglin in chambers, and obtained an *ex parte* injunction – *ex parte* meaning that only one side (that of the employers, naturally) was heard. This is the usual procedure, and as the Federation pointed out, the Judge has no way of knowing whether the employer has been bargaining in good faith; he has no knowledge of the facts of the case and must accept the version of one side of the dispute. "At the very best," said the brief, *"his knowledge is based upon hearsay."* (Emphasis in original)

Mr. Justice Anglin not only granted the usual injunction against "picketing, watching, besetting, loitering or congregating" or attempting to do so; he also came up with this:

IT IS ORDERED that the defendant, its officers, members, agents, servants, representatives or substitutes and anyone acting under their instructions or on their behalf, be and they are hereby restrained from:

(a) authorizing, continuing or engaging in the strike by the defendant, its officers, members, agents and representatives against the plaintiffs, or taking any steps to further or promote the same;

which of course is nothing more or less than a court order to stop a legal strike. We hasten to add that New Brunswick's courts are by no means unique in this regard, and that recent actions of the Nova Scotia courts in regard to the fishermen's strike are equally obnoxious, and in much the same way. The horror of an injunction is that a refusal to obey it constitutes contempt of court, which in effect applies criminal sanctions on behalf of one side of a dispute.

Needless to say, the changes the Federation requested in the Labour Relations Act were never introduced, and employers still merrily apply to the courts for injunctions without even telling the unions they are doing so. Has the situation improved since 1965? Not a bit, says Federation Secretary-Treasurer Gregory Murphy; "If anything it's probably worse." Mr. Murphy then referred to the strike by Local 752, International Association of Bridge, Structural and Ornamental Iron Workers against Robert McAlpine Ltd., general contractor for the Macmillan- Rothesay paper mill expansion. On April 29, 1970, the union struck in protest against the dismissal of its president, shop steward Dalton Richards. The company obtained an anti-picketing injunction from Mr. Justice Barry the same day. The union allegedly ignored the injunction; Mr. Justice Barry then ordered Robert McAlpine to institute contempt proceedings against the union leaders.

At a hearing in his own home, Mr. Justice Barry also granted a back-to-work injunction later that month against the Carpenters and Joiners and the Operating Engineers' unions, who had staged a wildcat strike for better water and toilet facilities and more parking at the new Saint John City Hall site. The Carpenters and Joiners were again enjoined the same month by Mr. Justice David Dickson not to "interfere" with or picket Diamond Construction jobs at the University of New Brunswick and the Fredericton Industrial Park. At the same time, C.W. Ritchie and Sons applied for an injunction against the Plumbers and Pipefitters, but dropped the application following an agreement with the union. These cases arose during *one month*. New Brunswick employers clearly have no hesitation about taking labour disputes to court, nor does our evidence indicate that the courts are other than sympathetic to the employers.

AND WHEREAS; we could go on to discuss other failings in the legal system. In Canada, for instance, evidence is evidence no matter how obtained. If a policeman unlawfully enters a Canadian home in order to gather evidence, the fact that he broke the law does not invalidate the evidence he obtained, though it would in the United States. We could discuss the fact that the accused resorts to the appeal procedure -- in theory a means of redress for him, in only about 5% of Nova Scotia cases. In New Brunswick the proportion is even lower.

WHEREAS; we wish rather to draw Your Majesty's attention to the *reasons* for the scandalous condition of the law. To begin with, of course, equal access to the law requires equal access to highly-skilled lawyers, and such access is simply not available to the dispossessed in New Brunswick. More important, we believe, is the class orientation of the judiciary itself. As other material appended to this petition shows, judges are overwhelmingly drawn from elite groups in our society. For instance, the Chief Justice of Prince Edward Island, a former Premier, is the father of the Island's *present* Premier; the Chief Justice of New Brunswick is a former Liberal Attorney-General. They are extremely highly paid -- indeed, current proposals from the Canadian Bar Association would raise the salaries of some federal judges to well over $40,000 -- and the process by which judges are appointed militates against the selection of judges with any social conscience at all. Judges are appointed, by and large, through negotiation between the provincial governments and the federal Department of Justice. There is no provision for the opinions of citizens' groups, representatives of minorities and the like to be heard. Once in place, a judge has almost complete security of tenure to age seventy-five -- a full ten years longer than almost anyone else in our society. Removing a judge is so difficult as almost never to occur. Judges tend to be lawyers with strong political connections of an extremely orthodox kind. -- indeed, positions on the bench are widely believed to be rewards for political services rendered -- and it is almost a contradiction in terms to think of a woman judge (though one very fine judge in this province is Family Court Judge Doris Ogilvie), or a black judge, or a thirty-year-old judge, or an Indian judge.

The typical judge is white, male, elderly, an established Liberal or Tory from a professional family. How can we expect such people to understand the aspirations and the urgencies of people they have scarcely ever even had occasion to meet?

AND WHEREAS: what we have said thus far is not new: courts are widely recognized to be biassed in favour of the wealthy and the powerful. A recent survey of public attitudes by Université de Montréal criminology head Denis Szabo, conducted for the provincial Royal Commission on the Administration of Justice, found 78.1% of Quebeckers of the opinion that the courts discriminated against the poor and over 40% who believed that an accused's chances of a fair trial were less than even. A majority of University of New Brunswick students polled in the Murphy case (readers and non-readers of Murphy's article alike) held that judges make many mistakes in their decisions and that both poor people and political radicals are treated less fairly than other citizens by the courts.

Indeed, one sociologist at least argues that laws are promulgated by that part of society which considers it has the power to enforce them, and are thus of their very nature an instrument through which the powerful express their authority over the weak. We are not prepared to go so far. But we do point out that though there is no reason to think that the proportion of wise and humane judges is any greater than the incidence of such persons in other walks of life, judges are almost never criticised.

Why not?

The reason is simple: if you *do* criticise a judge in public, you stand a very good chance of being jailed for it. In our brief to the Davey Committee on the Mass Media, we drew attention to Tom Murphy's horrifying experience with the contempt laws, and called on the Committee to abolish them as a standing interference with freedom of the press. It was not a hypothetical problem: we face it all the time. For instance, in October many of our readers noticed what appeared to be a misprint in the lead article on Scott Maritimes. It looked like this:

Some 200 acres of land were expropriated around the harbour and the shore front. No one received more than ten dollars an acre. When disputes arose, the matter was taken before the Supreme Court of Nova Scotia. They concluded all the settlements by offering the same thing – $10 an acre. "Of course, " said Ferguson, "that was all – the judge was told what you could tell from the outset. It was just a just a

Originally, it looked like this – before it was blanked out for fear of a contempt action.

Some 200 acres of land were expropriated around the harbor and the shore front. No one received more than ten dollars an acre. When disputes arose, the matter was taken before the Supreme Court of Nova Scotia. They concluded all the settlements by offering the same thing – $10 an acre. "Of course," said Ferguson, "that was all set up by the Nova Scotia government – the judge was told what to offer. It was all pre-arranged, you could tell from the outset. It was just a set up, just a set up."

Again, here is a paragraph cut from our coverage in April of the Sackville drug bust:

Five years in Dorchester will certainly make a better man of Thomas McIlvena. What this polite, intelligent young man needs is five years of exposure to real criminals. Five years of exposure to homosexuality – without an alternative. Problems getting a job on his release. No passports or visas, no civil service jobs, not even the army. Five years to think about the thousands of others who didn't get caught. Five years to remember being told that by doing favours for his friends he was ruining lives – which seems to suggest that Judge Murphy doesn't know that hashish is not addictive. Five years to wonder whether Judge Murphy uses alcohol, a far more dangerous drug than hashish.

What kind of insanity are we up to with our wretched laws? What other than an atmosphere of hysteria and holy war could conceivably explain a civilized community doing this to its children?

And in our April issue we wanted to give a Rubber Duck Award to a judge – Judge Henry Murphy, to whom the above paragraph refers, as a matter of fact – but we couldn't. Contempt again.

In January, we wanted to make some pretty strong comments on Mr. Justice Ralph V. Limerick's appalling New Brunswick Appeal Court decision increasing the sentences of three Fredericton youths on various drug charges. Limerick commented that the courts "should impose every harsh penalty [they] can" and remarked that "the deterrent

factor in sentencing is more important than the rehabilitation of the individual" -- which is pretty paleolithic, even from an admittedly conservative bench. In his written decision, Limerick went on to lecture the young on their life style.

"The drug LSD," he said, "is used to escape from the realities of life, to avoid confronting problems which are a necessary and ever present occurrence in our daily existence. Only by confronting these problems and gaining experience therefrom can we mentally mature." The comment may or may not be true of drugs -- or, for that matter, of gardening. But it has little or nothing to do with any legitimate function of the law. The law does not (praise God) forbid us to be escapists, or to remain immature.

Now none of these comments is a particularly shocking one -- which makes it all the more shocking that they have had to be cut. Nor, for that matter, is Tom Murphy's article, reprinted in the Reasons for Judgment in his case; for which after a prolonged trial he was sent to jail for ten days. But even serious, well-meaning criticism of the courts -- which is what we are trying to provide in this issue -- is normally susceptible to the contempt laws. The courts clearly believe *any* discussion of them is impertinent.

The contempt law means that we can't say what we think about labour conflicts, about drugs, about Indians, about bilingualism, -- about anything, in fact, on which the courts are asked to rule. *The Mysterious East* deals in warm praise -- and harsh criticism. But the courts, alone among our institutions, are immune from criticism, despite the fact that they are at least as fallible as other institutions.

What Tom Murphy says of the courts in his last paragraph -- which is the paragraph to which the Appeal Court took particular exception -- is good sociological theory, though somewhat crudely stated. Yet when Tom Murphy published that article, a distinguished courtroom lawyer, J.F.H. Teed, was pulled out of retirement to prosecute the case before the Appeals Division of the Supreme Court -- the highest court in the province. The procedures of the case did not safe-guard the rights of the accused -- in a companion case, Murphy's editor was obliged to testify against himself -- and instead of proceeding by the Criminal Code, with its more stringent standards of procedure the crown used an antiquated summary procedure. From the beginning of the hearings, the onus of proof lay on the accused. Though one of the most sacred of legal maxims holds that no man should be judge in his own cause, the case was heard before the very bench which regarded itself as impugned. The bench was consistently hostile to the accused, maintaining, for instance, an "inability" to remember the name of his lawyer, Alan Borovoy, who was variously referred to as "Borlohoy", "Borovay" (Mr. Justice Limerick's favorite mispronunciation), and "Boralaboy" The judges rejected sociological evidence which went to the heart of the case, punctuated the hearings with testy remarks like "We want to get this case over with; it's been dragging on far too long," and at last rejected Mr. Borovoy's appeal to withhold the imposition of the jail sentence until he had an opportunity to file notice of appeal.

We are particularly outraged that one of the judges in the Murphy case was Mr. Justice Louis McL. Ritchie, now retired. Prior to his appointment to the bench, Mr. Ritchie was a member of a leading Saint John legal firm which did a great deal of work for K.C. Irving, the industrialist who controls about 40% of this province's economy. Throughout his tenure on the bench, he remained a close associate and friend of Mr. Irving; on one occasion he was reportedly on vacation with Mr. Irving when a case came up, and flew home in Mr. Irving's plane. After his retirement, he returned to Mr. Irving's employ, and attended the hearings of the Special Senate Committee on the Mass Media as Mr. Irving's legal counsel. Yet Mr. Ritchie was highly indignant at any suggestion that the courts have close connections with the corporate elite, and tend to share the elite's viewpoint. Whether the suggestion is true of the whole bench or not, it is certainly true of Mr. Ritchie. And we submit that justice can hardly be expected when such a man judges such cases.

WHEREAS, we wish to refer to a television interview during his tenure as Justice Minister, in which Pierre Elliott Trudeau maintained that the justice ministry and the legal system lay at the core of our social order. When you get married, buy a house, make a contract, take a job, he said, your actions are governed by law, and it is the justice department which makes the laws. If Mr. Trudeau's view of the position of the law is accepted, it follows that informed discussion of the law and its administration, however laudatory or critical, is vital to the public interest. If we live in a society governed by law, we must be able to discuss the law and its administration fearlessly, openly and candidly. Yet the experience of Tom Murphy -- and of Jacques Hebert in Quebec, and of Eric Nicol in Vancouver -- suggests that one criticizes the judicial system at one's infinite peril!

Because of that peril, we have taken the unusual step of addressing our arguments not to our fellow citizens, but to Your Majesty. Though we have not been able to obtain a firm legal opinion, it must surely be the case that we can petition Your Majesty with security so far as contempt of court is concerned. The right to petition the sovereign has been a principle of British constitutional law for centuries; it was formally recognized in the Bill of Rights of 1689. And a petition to the sovereign is a privileged document. If the right to petition is not trivial, it must include the right to *circulate* the petition in order to gain support for it. Such circulation constitutes publication in the legal sense, and we take the view that circulating the petition through the pages of a magazine is no different in principle than circulation from hand to hand.

What actions, then, do we ask Your Majesty to take?

✱ First, we ask for the abolition of the offence of contempt of court for any action other than disorderly and disruptive behaviour within the courtroom itself, unless the alleged contempt demonstrably can damage the rights of an accused person. Even in the case of contempt of court in the face of the court, we argue that a jury trial and an appeal procedure must be made available, as it is not at the present.

✱ Second, we ask that the selection of judges be made in the future by an independent Commission widely representative of the people of New Brunswick, including women, Indians, black people, labour representatives, students, businessmen, consumers, welfare recipients and the French community.

✱ Third, we ask that judges be compulsorily retired at age sixty-five, like most other workers; or, in the alternative, that after the age of sixty-five they be required to take annual tests of mental competence. We see no reason to think that judges are immune to the processes of aging, and we would point out that in New Brunswick, critical social issues are now being decided by old age pensioners who in some parts of the world would not be regarded as competent to drive an automobile.

✱ Fourth, we would ask for the institution of a more accessible impeachment procedure. One small town in the province, for instance, is served by a magistrate who has a severe alcohol problem. Certainly we do not *blame* him for his problem; but we regard it as hypocritical to ask him to make moral and legal judgments on *other* people's activities regarding alcohol. At the moment, however, there is no reasonably accessible method to secure his removal from the bench.

✱ Fifth, we request that judges be paid a salary no greater than that of any ordinary professional person, and in no case larger than $15,000 per year. We do not regard financial incentives as logically relevant to appointment to the bench.

✱ Sixth, we request that judges be required to spend not less than two months per annum in upgrading courses, particularly in the social sciences; that not less than two weeks of their year be spent living with dispossessed minorities in the province -- on an Indian reserve, say, or in a rented room in the South End of Saint John -- and that every year each judge spend a week in the jail to which he most commonly sentences his fellow-citizens, with an additional week every other year in either the Interprovincial Home for Young Women, the correctional school, or the Maritime Penitentiary at Dorchester. We suggest this programme not from vindictiveness, but because we feel judges are rarely aware of the social realities faced by the people who come before them, and even more rarely aware of the conditions of life to which they sentence prisoners. We suggest that such an educational programme might have a beneficial effect on their practices

✱ Seventh, we suggest the immediate appointment of a Law Reform Commission in the province, and of a full-scale legal aid programme, including neighbourhood clinics.

In conclusion, Your Majesty, we would point out once again that we make these criticisms and suggestions about the judicial system not because we wish to destroy the fabric of Canadian society, but because we wish to preserve it. The front pages of any newspaper will tell us that ordinary people are increasingly and violently impatient of institutions which fail to respond to their aspirations, and that an institution which fails to adapt itself to changing social conditions ultimately perishes, often most unpleasantly. We submit that a judicial system as unresponsive and unyielding, as indifferent to the precious human individual as the New Brunswick system, ultimately destroys the respect of the people not only for the judicial system but for the rule of law itself, and perhaps even for the concept of justice. For that to happen in New Brunswick would be a major social calamity. It can only be averted if the judicial system undertakes massive reforms without delay.

To: His Excellency The Governor-General of Canada
Rideau Hall
Ottawa, Ontario

I have read the petition to Her Majesty in the January issue of *The Mysterious East* calling for reform of the judicial system of the Province of New Brunswick. In broad terms I agree with the point of view advanced in the petition, and I wish to associate myself with the petition.

Signature

Address

JUDGEMENT ON A JOURNALIST

R. v. Murphy, Ex parte Bernard Jean,
Attorney General of New Brunswick

New Brunswick Supreme Court, Appeal Division, Bridges, C.J.N.B., Ritchie and Limerick, J.J.A.
March 12, 1969.

APPLICATION by Attorney General to have defendant committed for contempt of court.

The judgement of the Court was delivered by Bridges, C.J.N.B.

BRIDGES, C.J.N.B.: This is an application by the Attorney General to have the defendant committed for contempt of court for having written an article which appeared in the December 3, 1968 issue of the Brunswickan, a publication of the students of the University of New Brunswick with a circulation of 5,500.

The article was published shortly after the Defendant had been a witness at the trial of the case of The University of New Brunswick against Norman Strax, a professor at that institution, held before Mr. Justice Barry of the Queen's Bench Division in the City of Saint John. The article was an attack on that judge and the courts of this province. Judgment was not delivered by Mr. Justice Barry until some time after the publication of the article.

The Attorney General has taken what is known as summary procedure in cases of contempt, which we are of the opinion was the proper course rather than to have proceeded by indictment.

It was not disputed that the defendant wrote the article, which, if a contempt, belongs to the class known as scandalizing a court or a judge. Contempts of this nature are fortunately most uncommon. The only cases we know of in New Brunswick were over eighty years ago. See *Ex parte Baird, In re Ellis,* (1888) 27 N.B.R. 99, also under *Regina v. Ellis,* (1889) 28 N.B.R. 497, and *In re Hawke* (1888) 28 N.B.R. 391, also under *Regina v. Hawke,* (1888) 28 N.B.R. 400.

Full opportunity was given the defendant to present evidence though we did not follow the very old practice of requiring him to answer interrogatories, which was done in the two New Brunswick cases I have mentioned, as we were of the view that practice was archaic and out of date in these times.

The article reads as follows:-

SPADES DOWN — tom murphy

A short while ago, I testified in the Supreme Court of New Brunswick on the Strax case. That court was a mockery of justice. I, along with any of the other defence witnesses, might well have testified to the bottle-throwing mob that on several occasions gathered outside the window of Liberation 130. The treatment would be about the same. Bill Walker's geology pick was Judge Barry's gavel in court. The intent was the same.

Take for instance the attitudes of Judge Barry. I am in no position to accuse a man of being biased; his manners have been self-convicting. Defence counsel was constantly asked to delete or at least rephrase their questions. This request was inevitably accompanied by a recitation of the rules of court, long enough to be inhibiting. The crown, of course, was not subjected to this same sort of treatment.

But this is minor compared to the manner in which Vince Kelly, one of Dr. Strax's lawyers was dismissed.

Just before we had entered the courtroom, Kelly was talking to us (several defence witnesses) about the testimony that we had to offer. The judge's secretary walked

Norman Strax

John Oliver

Tom Murphy

by. Kelly, after receiving her approval, asked her if she would contact Miss Gertrude Gunn, chief librarian, asking her if she could come down and testify. No mention, whatsoever, was made of a court order from the judge. There are four witnesses to this fact.

When Miss Gunn, obviously upset, took her place on the witness stand (just after I had finished), she explained her presence to the judge by saying that she had received a court order issued by him through his secretary. Judge Barry called an immediate recess to clarify the situation. How one can clarify the situation without talking to all parties involved is beyond me - but at any rate, the judge refused to talk to Mr. Kelly.

When court reconvened, Barry immediately told Harper that Kelly was dismissed from the case. Kelly attempted to inject an element of truth into the courtroom but Barry cut him off before he had a chance to be heard. I am sorry to say this, but either Judge Barry, his secretary, or Miss Gertrude Gunn was mistaken . . These are the cold facts. There are no other options.

The courts in New Brunswick are simply the instruments of the corporate elite. Their duty is not so much to make just decisions as to make right decisions (i.e. decisions which will further perpetuate the elite which controls and rewards them.) Court appointments are political appointments. Only the naive would reject the notion that an individual becomes a justice or judge after he proves his worth to the establishment."

It was contended on behalf of the defendant that the contempt of scandalizing a court or a judge should now be regarded as obsolete. We were referred to *McLeod v. St. Aubyn* [1899] A.C. 549 (P.C.) where Lord Morris stated at p. 561 that while committals for such contempts might be necessary in small colonies to preserve the dignity of and respect for the court, they had become obsolete in England as courts were satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. It was submitted that as Canada was now an advanced country such a view should prevail.

In *R. v. Gray* [1900] 2 Q.B. 36, which was heard the year after the *St. Aubyn* case, a newspaper editor was found guilty of a contempt in publishing an article scurrilously abusing a judge in his judicial character and conduct at a trial. In his judgment, Lord Russell of Killowen, L.C.J., said at p. 40:-

"Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a Contempt of Court. The former class belongs to the category which Lord Hardwicke, L.C. characterised as 'scandalizing a Court or a judge'. In re Read and Huggonson, (1742) 2 Atk. 291-469. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

This statement of the law has been applied in *R. v. New Statesman (Editor), Ex parte Director of Public Prosecutions*, (1928) 44 T.L.R. 301. *Ambard v. Attorney General for Trinidad and Tobago*, [1936] A.C. 322 (P.C.) and *Perera v. The Queen* [1951] A.C. 482 (P.C.). See also *R. v. Solloway*, (1936) 67 C.C.C. 77 and *R. v. Western Printing & Publishing Ltd.*, (1954) 34 M.P.R. 129.

I have no hesitation in holding that contempt in scandalizing a court or a judge still exists and that proceedings in respect thereto may be resorted to on necessary occasions.

It was claimed that the article was in no way likely to influence the judge in reaching his decision in the case in question, which was undoubtedly true. It was submitted that the article was, therefore, not calculated to interfere with the course of justice or cause injury to the administration thereof and that for such reasons it should not be held to constitute a contempt of court.

We were referred to a number of authorities by counsel for the defendant, two of which, *Re R. v. Wallbridge*, [1936] O.R. 482 and *R. v. Duffy et al*, [1960] 2 All E.R. 891, do not in the slightest way concern an attack on the judge. I shall deal with three cases which were cited, *In the Matter of a Special Reference from the Bahama Islands*, [1893] A.C. 138, *Craig v. Harney* [1947] 331 U.S. 367, and *R. v. Nicholls*, (1911) 12 C.L.R. 280 (Australia).

In the *Bahama Islands* case the question was whether a published letter of a scurrilous nature commenting on a judge who had refused to accept a basket of pineapples from a successful litigant was a contempt of court. No judgment was delivered, but the Privy Council in their

report to Her Majesty states that under the circumstances the letter was not a contempt as it was not calculated to obstruct or interfere with the course of justice or the due administration of the law. There was no suggestion in the letter that the judge had acted with bias nor in the report is there any mention of contempt in scandalizing a judge.

The decision in *Craig v. Harney* (supra) was not unanimous. It would appear the question of the freedom of the press under the first and fourteenth amendments to the Constitution of the United States was involved. No mention is made in any of the judgments to contempt in scandalizing a court or judge. The editorial and articles were considered wholly from the standpoint of whether they would obstruct the course of justice in a case that was pending. This falls under the second class of contempt, set out by Lord Russell of Killowen in *R. v. Gray* (supra), which is not the class with which we are dealing.

The King v. Nicholls was very strongly relied upon. In that case, on counsel speaking very disparagingly of the government, the judge informed him he would not be allowed to speak in such a manner and, upon an assertion of his right to do so, the judge told him that he was not entitled to speak disrespectfully of a government of the country and those above us. The portion of the editorial which was claimed to be a contempt was to the effect that the judge in question, having been appointed because he had served a political party, was what was believed to be a political judge who would not allow any reflection to be cast on those to whom he was indebted for his judgeship.

It would appear to me from reading the judgment of the aforegoing case that the court rather regarded contempt by scandalizing a judge as obsolete, as reference is made to the statement of Lord Morris in *McLeod v. St. Aubyn* to which I have referred. *R. v. Gray* (supra) was distinguished, it being stated the article there was of a very gross character and might well have been put under the second class of contempt. In holding the article not to be a contempt, it was said that the only question to be determined was whether the words were "calculated to obstruct or interfere with the course of justice or the due administration of the law in this court". These words are practically the same as those used by Lord Russell of Killowen in *R. V. Gray* (supra) in describing the second class of contempt, which I have already said is not the class with which we are concerned.

While it may be necessary in cases of the second class of contempt to show that the writing is calculated to interfere with the course of justice or cause injury to the administration thereof in a case pending before the court, it is, in my opinion, unnecessary to do so in a contempt of the first class, that of scandalizing a court or a judge, which is what is before us.

It was claimed that no intention on the part of the defendant to bring Mr. Justice Barry and the courts of this province into contempt had been proven beyond a reasonable doubt and that under such circumstances a person could not be found guilty of contempt of court. Several other reasons for the writing of the article were suggested as possible inferences. With regard to the necessity for an intention to be established I would refer to *R. v. Odham's Press, Ltd.*, [1956] 3 All E.R. 494. While it was a case dealing with the second class of contempt, the same principles undoubtedly apply to the question of intention. In his judgment, after referring to authorities, Lord Goddard, C.J., said at p. 497:-

> "These cases clearly show that lack of intention or knowledge is no excuse, though it may have a great bearing on the punishment which the court will inflict and in our opinion they dispose of the argument that mens rea must be present to constitute a contempt of which the court will take cognisance and punish. The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result, just as it is no defence for the person responsible for the publication of a libel to plead that he did not know the matter was defamatory and had no intention to defame."

Also see *R. v. Dolan*, [1907] 2 I.R. 260, Palles, C.B. at p. 284.

The question to be determined is not the effect the writer intended his article to have but the effect the article itself is calculated to have.

Counsel for the defendant endeavoured to have two sociologists, Dr. Lyn MacDonald and Dr. Frank Jones give certain evidence. Dr. MacDonald had spent several days in Fredericton and had a number of persons interview students to obtain the reaction to the article. It was sought to have here testify what these persons had told her of the views of students. Such evidence was clearly inadmissable. The testimony of Dr. Jones was to have been his opinion regarding the effect the article would have upon readers of it. We refused to allow this evidence, relying on the statement in *Phipson on Evidence*, 8th ed., p. 385, which was approved by Cartwright, J., as he then was, in *Adam v. Campbell*, [1950] 3 D.L.R. 449. It reads as follows;

> "Neither experts nor ordinary witnesses may give their opinions on matters of legal or moral obligation, or general human nature, or the manner in which other persons would probably act or be influenced."

I have given consideration to the question of whether the article should be regarded as only criticism and not as a contempt of court. Judges and courts have always been open to criticism which may be both harsh and unfair. Greater latitude should undoubtedly be allowed today than some years ago. All the circumstances must be considered. For instance, I would not have been disposed to hold the editorial in *R. v. Nicholls* (supra) a contempt of the first class as the judge there in question by his attitude and improper remark to counsel clearly laid himself open to criticism of the nature contained in the editorial.

There is, however, a limit to what a person may say or write of a judge or court. In my opinion, the defendant exceeded that limit in his malignment of Mr. Justice Barry. He was not even satisfied with that but proceeded to make a most uncalled for attack on the integrity of the courts of New Brunswick. I have no hesitation in holding the article was calculated to bring Mr. Justice Barry and the courts of New Brunswick into contempt.

The defendant must be found guilty.

Application granted.

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Last month the New Brunswick Department of Justice announced it would not prosecute K.C. Irving's premier newspaper, the Saint John *Telegraph-Journal*, for contempt of court. Well, actually, they had never even threatened the paper; they were going to prosecute its former Fredericton correspondent, Gary Bannerman, now with the Vancouver *Sun*.

Eighteen months ago, however, the Justice Department *did* prosecute Tom Murphy, a *Mysterious East* correspondent who was then a fourth year Arts student at the University of New Brunswick. Murphy was found guilty and jailed for ten days. His comments appeared in the UNB student newspaper, *The Brunswickan*. Editor John Oliver was also fined fifty dollars.

Maybe if the students sold the paper to K.C. Irving the Justice Department would take a more tolerant view of their antics. Certainly the two cases put side by side reveal that the problem of contempt of court has as much to do with the crown prosecutor's thought processes as with the courts themselves.

Let's look at the Murphy case, and then compare it with the Bannerman non-case.

The Murphy case really began in September, 1968, when UNB physics professor Norman Strax protested the imposition of photo-identification cards on faculty and students alike by trying to check books out of UNB's Harriet Irving -- there's that name again -- Library without using his card. The librarians refused; Strax set down the books, went to the stacks, selected some more, and tried again. After a while a couple of hundred books were piled at the check-out. Panicky authorities closed the library. Strax, evidently astonished and delighted, came back the next day, and the next. Deans and newspapers, security men and *Brunswickan* photographers, all got into the act. UNB President B. Mackay, now retired, then announced the suspension of Dr. Strax, and the University launched a suit against him in the New Brunswick Supreme Court, Queen's Bench Division, seeking (a) a judgement that Strax had been duly and regularly suspended; (b) punitive damages against him; (c) a permanent injunction barring Strax from University property forever (the University having *already* secured an interim injunction of that kind) and (d) court costs.

In the course of the hearing, which the University ultimately won, Tom Murphy was asked to appear as a defence witness. Murphy was an activist, a vocal opponent of the Vietnam war, a participant in the sit-in in Professor Strax's office which had led to the interim injunction -- and he had never been in a court of law before. Rightly or wrongly, he was outraged by what he saw, and in *The Brunswickan* for December 3, 1969, he wrote an account of his feelings in his regular column, *Spades Down*. This article, which the Court reproduced in full in its judgement (see box) was held to be outrageous enough to justify a ten-day jail sentence for its author and a fine even for the editor, whose offence the court conceded was merely technical.

What is contempt of court?

Some *Mysterious East* editors have been puzzling over that question, and reading up on it, ever since the Murphy trial. If there is a more confused and bewildering field of law, we have yet to find it. In *The Contempt Power* (Columbia University Press, 1963), Ronald Goldfarb defines contempt as "an act of disobedience or disrespect toward a judicial or legislative body of government, or interference with its orderly process, for which a summary punishment is usually exacted. In a broader, more general view, it is a power assumed by governmental bodies to coerce cooperation, and punish criticism or interference, even of a casually indirect nature."

The contempt power goes back to the tenth century in England, when it was virtually indistinguishable from sedition: in those days, contempt was contempt of the sovereign. As courts developed -- and the name itself is significant -- they were viewed as adjuncts of royal power, and as holding some of the privileges and powers of the sovereign. By the fourteenth century the power is well established as a restraint against disobedience to the king or his courts, as well as a punishment for other acts which obstruct the course of justice. Up until the time of Henry V, contempt seems to have been dealt with in the normal criminal way. One who suffered from it was Henry V, himself, as the young Prince Hal (see Shakespear's *Henry IV, Part II*), for trying to take his servant by force from the court of Chief Justice Gascoigne, who reluctantly imprisoned him until the King's pleasure should be known.

up gladstone

(To everyone's surprise, the King was pleased by the conduct of both his firm magistrate and his spirited son.) A later celebrated case saw Andrew Jackson, later U.S. President, convicted in 1814 in New Orleans.

The notorious Court of Star Chamber instituted both summary or non-jury procedures for contempt, and the use of "interrogatories", a sort of question-and-answer procedure through which the accused had to testify against himself, which was used in the Ellis case in New Brunswick in 1889 and was considered, at least, in the Oliver trial. The Oliver and Murphy cases were non-jury summary affairs, and in a later comment on the trial Donald Cameron had a reference to "Star Chamber" procedures deleted by an editor: it is amusing to discover that the Oliver-Murphy procedures actually *did* originate in the Court of Star Chamber.

By 1631, the contempt power was swift and savage. That year a convicted felon threw a brickbat at the Chief Justice. He missed the judge, but his right hand was cut off and fixed to the gibbet, and he was immediately hanged in the presence of the court. Up until 1765, however, the contempt power was still used only to punish misbehaviour in or near the actual courtroom (contempt in the face of the court, as it is known) or failure to obey a court order (often called civil contempt). The Almon case of 1765 is really the beginning of contempt of court away from the court, or "constructive contempt" -- which is what the Oliver-Murphy cases were all about. Almon was a bookseller who had published an alleged libel on the powerful politician Lord Mansfield. Justice Wilmot, who found him guilty of contempt, had been appointed by a Cabinet dominated by Mansfield, and was apparently devoted to his political friend. His opinion was prevented by a technicality from being published until 1802 but apparently influenced the commentaries on contempt by another friend of his, the great legal scholar Blackstone. Wilmot introduced three notions which have coloured contempt ever since. First, he maintained that jury and summary trials rested on the same basis -- "immemorial usage and practice" -- which cleared the way for extensive use of proceedings without juries and other usual safeguards. Second, Wilmot found the contempt power "necessary" and inherent in the very idea of a court: courts must be able to enforce orderly conduct in court and compliance with their orders. (Many systems of law do not have a contempt power, however, and seem to maintain their authority perfectly well without it; many Canadian tribunals -- labour relations boards and the like -- do not have all the powers of contempt, and the U.S. Supreme Court itself, which has the power, has only had to resort to it once.)

Wilmot's third idea, however, opened the real can of worms. He found that contempts *out of the court* also rested on "immemorial usage". The result: by the nineteenth century the contempt power was in almost regular use against the press. According to Ronald Goldfarb, whose book is almost the only recent extensive survey of the subject, English courts have convicted of contempt "innocent distributors of contemptuous matters, matter written without knowledge of the judicial process toward which it was held to be contemptuous, matters written both before a case came to court and after a trial ended, and personal criticism of judges." Viewing the matter from an American perspective, Goldfarb concludes that English experience shows "a frightening picture of the state of press affairs in a jurisdiction which strictly applies the constructive contempt power."

If he thinks England hairy, he ought to take a look at Canada. Writing on "The Law of Constructive Contempt and the Freedom of the Press" in *Chitty's Law Journal* (1966), Toronto lawyer Leonard F. Shifrin surveys the whole field of contempt, and then turns to Canadian cases, which he finds "rigidly interpreted, strictly enforced." Speaking of the "*sub judice* rule" which forbids comment on a case before the courts for fear of prejudicing the interests of one or the other of the parties, he castigates "the most mechanical application of the *sub judice* rule found anywhere in the Common Law world." The *sub judice* rule, incidentally, is one of the few aspects of contempt which can certainly be defended, though perhaps not adequately. The *goal* of the rule is sound, but it has been subverted on occasion. In 1961, in Ontario, Liberal leader John Wintermeyer charged that organized crime was flourishing, and named several persons recently acquitted of bribery charges. Five by-elections were coming up; the issue was going to be a hot one. So the government

launched an appeal. The election passed: the government dropped the appeal. It had done its job. During the campaign, the *sub judice* rule had silenced the Liberals.

Contempt in Canada. Shifrin found, falls into three periods. First, during the nineteenth century, several publishers were found guilty of contempt for interperate comments on judicial manoeuvres relating to elections. Two of the most amusing ones were in New Brunswick, and formed the procedural precedents for the Oliver-Murphy affair. On the 10th, 11th, and 12th of March, 1887, John V. Ellis, Member of Parliament for Saint John and proprietor-editor of the *Saint John Globe* -- now part of K.C. Irving's *Evening Times-Globe* -- published a series of articles dealing with the recent election in Queen's County, when George King won 1191 votes and George Baird 1130. Baird objected that King's deposit had not been paid "by an agent . . . appointed by him" (though it *had* been paid), and that King had not therefore been legally nominated. The returning officer agreed, and declared Baird elected. King applied for a recount and a new declaration from County Court Judge James Steadman, but before the recount Baird obtained a court order from Supreme Court Justice W.H. Tuck forbidding Steadman to carry out the recount. In his paper, Ellis said that this "trick" was a grossly immoral transaction" not to say "a scandal and an outrage of the most abominable character." It was, Ellis wrote, "the worst blow public liberty and public morality have yet received, and no effort should be left untried by the friends of free institutions to prevent the foul deed which Baird and his allies are seeking to perpetrate on the country." Steadman could have been counted upon to do justice -- "But it is not justice that is wanted, and, therefore, Judge Tuck intervenes." Obviously New Brunswick politics -- and journalism -- had distinctly more zing then than now.

Needless to say, the court was not pleased. It found Ellis in contempt.

Even spicier is the *Moncton Transcript* case -- the paper is now owned by K.C. Irving -- of 1888. Owner-editor John T. Hawke was also objecting to election finangling, and in particular to Mr. Justice J.J. Fraser's apparent decision that an election petition from Westmorland County could be heard in December, only to decide, when the petition came up, that it was too late. As it happened, Fraser had made the original decision, but not the latter one. Hawke, who appears to have been a gutsy but not particularly prudent journalist, considered the dismissal "a judicial outrage" by a bench "mainly comprised of defeated Tory candidates." It was "the most disgraceful judicial scandal, the details of which have ever stunk in the nostrils of a free people." In a later article he said:

> *In Gilbert and Sullivan's comic Opera, the Mikado, there is a character named Pooh-Bah, who holds many offices, and as the Lord High Executioner, reverses the decisions of himself in the capacity of Lord Chancellor. Thousands of people on two continents have looked and laughed at this piece of comedy as an innocent play of sarcasm, but in this Province of New Brunswick, to-day, the electors are presented with the spectacle as a reality.*

Thereafter Mr. Justice Fraser becomes, for Hawke, "the judicial Pooh-Bah" or "Mr. Justice Pooh-Bah Fraser". "Is there to be no limit," groaned Chief Justice Sir John Campbell Allen, "to the right of the publisher of a newspaper in such cases? And is it a small matter that the decisions of this, the highest Court in the Province, are to be characterized in the public newspapers as 'judicial outrages'?" The answer: no. Hawke got two months in the York County Gaol and a $200. fine. Addressing the court, Hawke maintained his articles were justified in the public interest, and that "he had been here fighting for a great principle, and he believed the day was not far distant when the arbitrary power sought to be set up by the Court, in restricting the comments outside the Court on proceedings, would be swept away by the legislature of the province." Alas, he was as wrong about that as about Judge Fraser.

Hawke also complained that the Court had been unfair during his trial, that it had ruled he did intend contempt even though he had sworn he did not. On that point, he had some ground for complaint. He was speaking on April 26 to, among others, Mr. Justice A.L. Palmer; two months earlier Palmer had said, in the Ellis case, that "no person can be punished for a contempt of Court unless it is committed in the face of the Court itself . . . or the party charged confesses it; so the moment a person charged with contempt desines it on oath, the Court has no alternative but to acquit, although they do not believe him, or they know he has sworn falsely. The only remedy in such a case would be to indict him for his perjury; he has purged his contempt." This view, that a sworn denial cleared the contemnor, came into the law in the seventeenth century, and was according to Goldfarb "an anomaly which was discarded by the end of the eighteenth century." Except in New Brunswick, where some judges were apparently a full century behind.

CIRCLE OF THE LAW

Then you may be plung'd into the bottomless Gulf o' Chancery, where you begin with Bills and Answers, containing Hundreds of Sheets at exorbitant Prices, 15 Lines in a Sheet, and 6 Words in a Line, (and a Stamp to every Sheet) barefacedly so contrived to pick your Pocket: Then follow all the Train of Examinations, Interrogatories, Exceptions, Bills amended, References for Scandal and Impertinence, new Allegations, new Interrogatories, new Exceptions, on Pretence of insufficient Answers, Replies, Rejoinders, Sur-rejoinders, Butters, Rebutters, and Sur-rebutters; till, at last, when you have dane'd thro' this blessed Round of *Preparation*, the *Tryal* before the Master of the Rolls comes next; Appeals follow from his Honour to the Chancellor; then from the Chancellor to the House of Lords; and sometimes the Parties are sent from thence for a new Tryal in the Courts below -- Good Heavens! what wise Man, permit me to repeat, would enter himself into this confounding *Circle of the Law*?

Samuel Richardson, "Advice to
A Friend against Going to Law, 1741

Mr. Justice Palmer refers to "purging" one's contempt. This "purgint" is another oddity of the power, which provides that one guilty of contempt must apologize and withdraw the offensive remarks, often before he can even be sentenced. He *may* be held in gaol until he does, which poses an appalling dilemna for an honest man who believes what he said. Like heresy, contempt is basically a punishment for thinking thoughts -- and uttering them -- of which the authorities disapprove.

In Canada, the constructive contempt laws evidently fell into almost total disuse around the turn of the century, to the extent that by 1935 *Canadian Bar Review* editor C.A. Wright was wondering out loud about the lack of such cases in Canada. Contempt was still an issue, of course. Courts were granting injunctions against labour unions -- notably against John L. Sullivan and the United Mineworkers, a celebrated American case -- and rewarding disobedience with contempt citations. Contempts in the face of the court were not unknown. But constructive contempt seemed to be obviously dying.

In the early fifties, however, constructive contempt dramatically recovered. The *Ottawa Journal* and the *Windsor Star* were both cited; so was the *Globe and Mail*, for violating the *sub judice* rule in regard to a case it didn't even know was in the courts. And in 1954 and Ontario court convicted the Canadian distributor of an American magazine despite his ignorance of its contents. In the same year, Eric Nicol, one of our contributors in the last issue was found guilty of contempt in B.C. for an allegory against capital punishment in which the judge, jury and public in a recent murder trial were portrayed as murderers themselves. Simultaneously a Newfoundland journalist was found in contempt for criticizing a judicial criticism of coverage of a trial then underway by saying the judge's comments had "a faint tinge of the iron curtain" and suggested Peron's Argentina. According to L.F. Powe of the UBC Law Faculty, in a recent *Canadian Bar Review*, the Nicol decision is "simply a reminder that periodically judges do not appreciate written comments in the press." That seems true of the Newfoundland case too.

Eric Nicol

Meanwhile, in England, though the *sub judice* rule had been vigorously applied, contempt of court by scandalizing the court had all but disappeared. In *McLeod v. St. Aubyn* (1899) Lord Morris laid down the modern rule for England: "Committals for contempt of Court by scandalizing the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them." In 1968, when a contempt action was brought against Quintin Hogg, M.P., for some sharp criticisms of the Court of Appeal in *Punch*, Lord Denning, Master of the Rolls, dismissed the action with these words:

> *Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We donot fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.*
>
> *It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in an court of justice. . . . We must rely on our conduct itself to be its own vindication . . . Mr. Quintin Hogg has criticised the court, but in so doing he is exercising his undoubted right.*

And Lord Justice Salmon added:

> *The authority and reputation of our courts are not so frail that their judgments need to be shielded from criticism . . . Their judgments . . . are often of considerable public importance. It is the inalienable right of everyone to comment fairly upon any matter of public importance . . .*
>
> *It follows that no criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith. The criticism here complained of, however rumbustious, however wide of the mark, whether expressed in good taste or in bad taste, seems to me to be well within those limits. . . . Mr. Blackburn complains that Mr. Hogg has not apologized. There was no reason why he should apologize, for he owes no apology, save, perhaps, to the readers of "Punch" for some of the inaccuracies and inconsistencies which his article contains.*

In those words -- even in Lord Justice Salmon's humour -- one hears the voice of the great tradition of English law. Such a court enhances its dignity by its obvious tolerance and fairness -- which is exactly the reverse of what the theory of contempt would suggest.

Unhappily, L.F. Powe is obliged to wonder whether the Canadian and English approaches to scandalizing the court may have "fundamentally separated over the last two decades" - and he contrasts the Hogg case with the Murphy case by way of illustration.

What was so frightening about the Murphy case?

To begin with, the procedures were the old summary ones, which means that the Attorney-General sought and obtained a ruling from the court that Murphy's article scandalized the court by "commenting on this Honorable Court and on the said trial in a manner calculated to and which does bring this Honourable Court, Mr. Justice Barry

THE SWIFT COW

Readers inclined to suspect *The Mysterious East* of undue or unusual cynicism regarding the law, the courts, and the legal profession might consider the following statement, written by an Anglican clergyman, the Dean of a prominent cathedral, and published in 1726.

I said there was a Society of men among us, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white, according as they are paid. To this society all the rest of the people are slaves.

For example. If my neighbour hatha mind to my cow, he hires a Lawyer to prove that he ought to have my cow from me. I must then hire another to defend my right; it being against all the rules of law that any man should be allowed to speak for himself. Now in this case, I who am the true owner lie under two great disadvantages. First, my lawyer, being practiced almost from his cradle in defending falsehood, is quite out of his element when he would be an advocate for justice, which, as an office unnatural, he always attempts with great awkwardness, if not ill-will. The second disadvantage is that my lawyer must proceed with great caution or he will be reprimanded by the judges, and abhorred by his brethren, as one who would lessen the practice of the law. And therefore I have but two methods to preserve my cow. The first is to gain over my adversary's lawyer with a double fee, who will then betray his client by insinuating that he hath justice on his side. The second way is for my lawyer to make my cause appear as unjust as he can, by allowing the cow to belong to my adversary; and this, if it be skilfully done, will certainly bespeak the favour of the bench; . . . these Judges are Persons appointed to decide all controversies of property, as well as for the trial of criminals; and picked out from the most dextrous lawyers who are grown old or lazy: and having been biassed all their lives against truth and equity, lie under such a fatal necessity of favouring fraud, perjury and oppression that I have known some of them to have refused a large bribe from the side where justice lay, rather than injure the faculty by doing anything unbecoming their nature or their office.

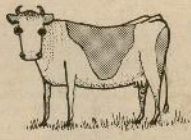
It is a maxim among these lawyers, that whatever hath been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions -- and the judges never fail of directing accordingly.

In pleading, they studiously avoid entering into the merits of the cause, but are loud, violent and tedious in dwelling upon all circumstances which are not to the purpose. For instance, in the case already mentioned: they never desire to know what claim or title my adversary hath to my cow; but whether the said cow were red or black, her horns long or short; whether the field I graze her in be round or square; whether she were milked at home or abroad, what diseases she is subject to, and the like. After which they consult precedents, adjourn the cause from time to time, and, in ten, twenty, or thirty years come to an issue.

It is likewise to be observed, that this society hath a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood, right and wrong; so that it will take thirty years to decide whether the field left to me by my ancestors for six generations, belongs to me or to a stranger three hundred miles off.

In the trial of persons accused for crimes against the state, the method is much more short and commendable: the judge first sends to sound the disposition of those in power, after which he can easily hang or save the criminal strictly preserving all the forms of law.

Of course this is entirely baseless today. In his day, however, Jonathan Swift had to publish it anonymously or disavow it for fear of reprisals.



and the proceedings in said trial into public ridicule and contempt." The ruling ordered Murphy to "show cause" why he should not be cited for contempt. The onus of proof thus rested on Murphy from the beginning: he had to show that he had *not* committed a contempt. But how does one prove the non-existence of a fact? Suppose you are hauled off to court as you read this and asked to prove you have *not* been to Montague, P.E.I.: how could you prove it? Murphy sought to prove it through expert evidence from Dr. Frank Jones and Dr. Lynn McDonald, sociologists from McMaster University and through a survey of readers and non-readers of Murphy's article, designed to see whether attitudes towards the courts differed between the two groups. The attitudes were similar, which suggests that the crime did not exist in fact, but only in law: the court had not been brought into disrepute. The court, however, refused to hear the evidence, ruling that it was hearsay -- a ruling Dr. McDonald has elsewhere persuasively argued was mistaken. Incidentally, this was the first attempt in a Canadian court to introduce survey research as evidence, though the practice is common in the United States.

The action was brought in the Appeals Divison of the New Brunswick Supreme Court, the highest court in the province, which means an appeal could only be heard (and there was some doubt about whether any appeal was possible) by the Supreme Court of Canada, at a cost of several years and several thousand dollars. And in a summary procedure the usual procedural safeguards are sharply reduced. John Oliver, for instance, found himself obliged to take the stand and testify against himself. His defence consisted of procedural objections, though Murphy's case was fully heard.

The government, it seems, was taking no chances. Rather than rely on its own prosecutors, it pulled the distinguished courtroom lawyer J.F.H. Teed, Q.C., an octogenarian, out of retirement to prosecute the cases. Oliver was ably defended by J.D. Harper: his case was finished before Murphy's really began, since Murphy had been out of the province for his Christmas holidays when the documents were first prepared. Murphy appeared in court January 22, having failed to find a lawyer willing to argue that what he had written should not be punishable as contempt. Several lawyers refused the case outright; one said he would only plead Murphy guilty and ask for leniency. "I have to live with these judges," he told Murphy, indicating that he did not feel he could safely fight the case very hard. Murphy and his growing band of supporters looked outside the province, phoned John Diefenbaker and Frank Scott and found them both unable to take the case. They talked to deans of law schools, distinguished courtroom lawyers, civil libertarians. And on January 29, a hundred and fifty of them jammed the courtroom to hear Murphy, on Diefenbaker's advice, ask a two week adjournment to find counsel. Teed protested: Murphy had had "six or seven weeks" to find counsel -- though in fact the case had not begun until after Christmas. Murphy said he wanted counsel experienced in court procedures of this kind, and Teed commented that he was "unable to understand where he can get counsel, experienced in a matter of this kind." He didn't seem embarassed about it.

Murphy at length heard of Alan Borovoy, General Counsel for the Canadian Civil Liberties Association's national office in Toronto, and after some study Borovoy agreed to take the case: it involved civil liberties. A stroke of luck for Murphy, this meant he would have no legal fees, but would have to pay Borovoy's expenses, which in themselves came to about $1400. Ultimately they were covered by the UNB student council.

Borovoy, appearing in court February 4 and 5, mounted a forceful and brilliant defence. He argued (a) that as a consequence of the St. Aubyn case, the contempt charge itself was obsolete in a stable democracy; (b) that to try Murphy before the same judges who had already found the "Spades Down" article contemptuous in the Oliver case could hardly be fair play; (c) that to try a man *first* in the Appeal Court barred him from an appeal, and therefore denied him natural justice; (d) that the summary procedure existed for emergency use, and that since no emergency had been shown the crown should be told to proceed by indictment in the normal way; (e) that the prosecution had not established that the article *had* affected public opinion of the courts, but only *assumed* that it had.

The court rejected all these arguments, announced that it had enough evidence to find Murphy guilty, and invited Borovoy to present further evidence. At the next set of hearings, later that month, Borovoy hammered the theme that mischievous consequences must follow for the article to be a contempt, and attempted to introduce the expert opinion and survey evidence. He also argued that intention to obstruct or interfere with the course of justice must be shown, or that the words presented an imminent peril to the administration of justice -- and he contended the crown had proved neither point. He suggested that the idea that the courts were instruments of the corporate elite were held to be contemptuous, then a great deal of sociological theory could not be taught in New Brunswick, since modern sociologists tend to agree that influential institutions, including the courts, are controlled by people from upper or middle class backgrounds, who are naturally more sensitive to the outlook of their own class than that of a minority or a lower social stratum.

The court seemed to feel that such scandalous ideas should *not* be taught, which leads one to wonder whether the contempt power could not, in theory at least, be used against academic freedom -- the freedom to teach whatever, on the evidence available, one believes to be true. After all, the contempt power is inherently indifferent to truth. Many cases have held, for instance, that one may not impute improper motives to a judge. But suppose the judge *had* improper motives? No matter: you still couldn't say so. Again, one must not lower public respect for the courts. But suppose the court is wilful, arbitrary, wantonly political or just plain incompetent, and *should* be shown to be so in order for reforms to take place? The contempt power assumes that *all* judges, *all* the time, are fully comp-

etent and act from only the highest motives. Such a collection of saints has not been seen, surely since the Last Supper. In making such assumptions about fallible men, the contempt power pits the law against the truth -- and, one might argue, such a situation *itself* brings the law into disrepute.

Throughout, Borovoy stressed that respect for freedom of speech should make the court especially wary of convicting a man for his words unless some concrete injury could be shown. In his brief summation, Teed called Borovoy's argument "ingenious, but not sound on any point." Teed did little more than reiterate that Murphy had "scandalized and belittled the effective work of the courts." The court, to everyone's surprise, withheld judgment till March 12, when it handed down the judgment printed in this issue. Borovoy then argued for a light sentence, pointing out that Murphy had apologized publicly through the *Daily Gleaner* and that the survey which the court had not admitted into evidence did show that no injury had been done the court by the article. Teed, however, argued for a heavy sentence of up to two years, saying Murphy "has been so indoctrinated he is convinced of the truth" of his statements. The court, he thought, should take into account "the situation" across the country, by which he meant student unrest.

Warming to his argument, Teed suggested that "it is very probably that this whole thing is organized . . . in some country outside Canada" (at this there was a gust of laughter from the fifty spectators, and Chief Justice Bridges banged his gavel sternly) and wanted to know where Murphy got the money to pay for his extensive and expensive defence if not from some subversive organization -- which seems to suggest Teed regards it as culpable for a poor accused to have first-rate representation. "There would be no point imposing a fine," he said, "the organization would just pay it." Jumping to his feet, Borovoy snapped that this learned friend had "gone considerably beyond the bounds of propriety" and reeled off the names of some officials of the only organization involved, the Canadian Civil Liberties Association -- former Ontario Lieutenant-Governor J. Keiller Mackay, Pierre Berton, Bruno Gerussi, *Saturday Night* editor Robert Fulford, former Metro Toronto School Board chairman Sydney Midanik, labour officials, officers of all three major political parties, law professors, and so forth. The expenses of the trial were being borne by local people, and Borovoy himself was appearing without fee.

Teed reiterated that Murphy had suggested that the courts sell justice rather than dispense it, and that the "corporate elite" remark was "a very, very nasty thing." Moreover, the apology in the *Gleaner* was not genuine.

The court agreed, and sentenced Murphy to ten days in the York County Gaol, despite Borovoy's plea that the sentence not be executed until Borovoy could file for an appeal to the Supreme Court of Canada.

Thus ended the Murphy case in a kind of stand-off. There was little point in appealing against a sentence already served, as the bench no doubt foresaw. In memory it resolves itself into tableaux: Mr. Justice Limerick putting penetrating questions to a smiling Borovoy; Teed showing the mannerisms of old age but little of its loss of acuity; the three judges, only Limerick younger than seventy, filing slowly through the packed courtroom; the laughter and the calls for order; the contrast between the pretty girls and long-haired youths in the gallery and the aging, robed officers of the court. And the atmosphere, in which the court is seen as of vastly more significance in the life of a society than most of normally take it to be, a creature with a life of its own, fragile and in need of stern defence. If the courts are not exempted of ridicule, Mr. Justice Limerick opined at one point, all society will crumble. Human nature is basically vicious; it must be kept in check like a mean horse.

What clashed in the Murphy case were, essentially, two views of men and society. For Murphy and the academics who surrounded him, man is at bottom ethically neutral: conditions of life make him what he is, and society is a complex interweaving of various individual interests, which institutions like the courts must regulate but do not dominate. Society is a result of peoples' needs: in some form or other it will persist whatever the legal situation. For the judges and prosecutors, society is a thin tissue pasted over the basic savagery of human nature, and the legal system is all that stands between us and a return to the jungle.

Which is another way of saying the Murphy case was an important political trial, for politics is after all only the means by which men organize their society, and conflicting views of men and their nature commonly yield conflicting political views. In constructive contempt, Goldfarb

writes, "courts have been able to go beyond the judicial world and exercise their controls over areas otherwise tangential to the judicial process. The litigated cases in this area have often involved situations with political overtones." The Murphy case is a perfect example. It occurred at a time when New Brunswickers were distressed at an outburst of serious conflict on university campuses, most spectacularly at UNB. Murphy was long-haired and bearded, a picture of a student activist. The Sir George Williams and San Francisco State affairs were still hot news. One can hardly help but think that both the provincial government and the courts viewed Murphy's article in *The Brunswickan* as an action susceptible of harsh punishment -- penalties for this kind of contempt are of their nature, obviously, not reformatory but almost purely punitive - and considered that firm action against a leading activist would make students back off and think twice before jousting with authority. The attitude certainly surfaces in Teed's comments on sentencing, and Mr. Justice Limerick remarked in court that the university environment was of particular importance, making this case different from others cited. "The opinion seems to be spreading among university students," he said, "that the law applies to the rest of the public, but not to them." Mr. Justice Limerick also appeared to be reacting at times against the permissive society as a whole. At one point when Borovoy alluded to freedom of speech, the judge remarked that "This trite expression -- freedom of speech -- has been too freely interpreted at times. There is no such thing as absolute freedom of speech." Many people -- Borovoy included -- will agree, but still regard it as a critically important freedom.

We return, at last, to the Bannerman non-case. Chief Crown Prosecutor John Warner said his office decided not to prosecute, first, because publication of the evidence did not prejudice the case, the accused people pleading guilty. No injury could be shown. Again, that section of the law was new, and its very novelty militates in favour of some leniency. Finally, Bannerman was in British Columbia, and it was not common practice to bring someone back such a long distance to face what is "only" a summary offence.

But look at those reasons in the light of the Murphy case. The survey showed that there was not only no evidence of injury, but actually evidence of *non*-injury. The precedents under which Murphy was prosecuted were hardly novel, but since the procedure hadn't been used since 1888 and had been declared in a high British court in the meantime to be obsolete -- a view fortified only the previous year by the Quinton Hogg case -- there was less reason for Murphy to expect a prosecution than there was for Bannerman. And though Bannerman may have left New Brunswick, the *Telegraph-Journal* and its editors have not -- and Warners office did prosecute John Oliver, Murphy's editor, as well as Murphy himself. It is hard to resist the conclusion that if you're an establishment paper owned by K.C. Irving the government is reluctant to tangle with you, whereas if you're a rowdy student Warner and company will belt you with everything in the legal arsenal.

The contempt power, says Goldfarb, "is less a technical, procedural, legal device than a volatile focal point of significant and timely political issues." So it is -- and a highly dangerous one, too. The power is ill-defined and unpredictable, practically unlimited, operates with a minimum of safeguards, leaves the decision before the people who allege they are offended by the acion, has little or no power of review, and is designed to restrict free speech and independent thought. 'It takes some straining of reason," Goldfarb remarks, "to include the contempt power within the best characteristics of Anglo-American, freedom-conscious law [and]. . . it is still another question whether it ought to be exercised either in the procedural manner or to the quantitative extent that it is now. The summary and comparatively unlimited exercise of the power compounds the danger to individual freedom which its mere existence implies." Bills to abolish the power were introduced in Parliament five times -- in 1833, 1892, 1894, 1896 and 1908. In 1884 Gladstone promised to introduce a government bill to abolish it, but the bill never made its appearance.

Speaking to the British Law Society last September, Lord Denning again spoke against the use of contempt to squash dissent. "There is a duty," he said, "on those in authority to listen to the voice of dissent, and take heed of their demonstrations of protest. If the grievances are well-founded, they must be remedied. If the law is unjust, it must be reformed. If their protests are rejected, they should be told the reason why." In Canada, the contempt power is hardly capable of such reforms. In order to abolish it, one would have to raise a public pressure against it. In order to raise the pressure, one would have to make known cases in which it had been abused, *in such a way as to make their drama and urgency clear.* But given the way Canadian courts interpret contempt, any attempt to do that risks the application of the very power one is protesting.

The power as it now exists is widely felt to be unsatisfactory. Perhaps it should be retained for contempt in the face of the court, and even for the prevention of the publication of evidence during judicial proceedings. That it should be available to harass newsmen and dissenters, however, is hardly compatible with a free society. Surely it is time Canadians caught up with Gladstone, and abolished by statute the offence for which Tom Murphy went to gaol.

THE MARITIMES REMEMBERED

george woodcock

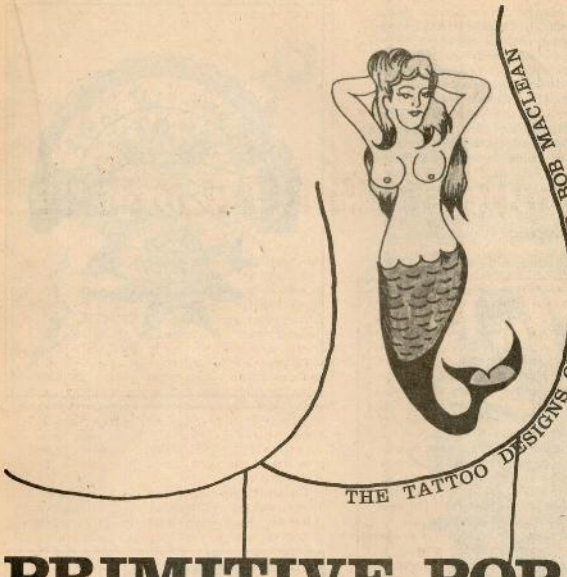
MY IMPRESSIONS OF THE MARITIMES are fabricated of experience: most vividly, perhaps, though farthest away in time, Newfoundland reflected in the memory of landing there after a stormy North Atalntic crossing in April, 1949, the month Newfoundland entered Confederation, and the month I returned finally to live in Canada. Painted wooden houses decaying at their roots into muddy, pothoied streets, at the end of which reared bleak and rocky hills still largely snow-covered; gigantic policemen, in coats which looked as if they had been made of horse-blankets, bodily lifting drunken, diminutive and cloth-capped Newfies out of gutters; barrels of seal flippers like bloody hands on the wharfs (there was obviously a connection between the seals and the boozing) and yellow cabbages from winter cellars in the meagre shop windows; even after years of austerity England, from which I was fleeing, Newfoundland seemed the harshest place I had ever seen (Mexican and Indian poverty were still, for me, in the future).

So vivid in memory is that first impression of Newfoundland that it obliterates my recollection of Halifax at which we landed a couple of days later or of the train journey next day through Nova Scotia and New Brunswick; it is as if we skipped from St. John's to Riviere du Loup, which again is ambered in my mind as a memory dated 1949.

My dominant mental image of Nova Scotia, New Brunswick and Prince Edward Island in fact dates from a much later visit, in 1967, after living nearly two decades in the west, with its mountains, gigantic trees, vast plains, lakes and rivers, and my impression of the Maritimes is thus largely one of smallness; a world in miniature, with small hills, small trees, coastline bitten into small bays and inlets, tiny farms, minute houses, little towns that are real country towns in the European style instead of mere hick settlements like the lesser places of the west.

To that I add a sense of high colour – the New Brunswick woods incandescent in autumn, the blue of Nova Scotia coves, the green fields and red earth of Prince Edward Island; a sense of religious sectarianism, bred of the multiple white wooden churches of small Nova Scotian towns; a sense, except in the larger places, of the absence of the young and the hardness of age – old men working on the road and a waitress in Liverpool with hands so twisted by arthritis that she could hardly manipulate the cutlery; Melvillean exoticisms like a store run by Pakistanis in a small inland village; a feeling, in spite of the shabbiness, in spite of a standard of living far lower than in the west, that life might be full and curious if only one knew how to penetrate it. The everlasting illusion of the traveller.

Do these largely visual images allow me a sense of Nova Scotian history? Only, really, in a limited way, and that through visual impact. Boatsheds with the skeletons of small vessels create the sense – again Melvillean – of a lost maritime prosperity; in Halifax I think of Hugh MacLennan and try to reconstruct mentally on the site a picture of the town ravaged by the great explosion; in Fredericton, I go in search of the barracks where Cobbett was stationed. But it is really the present look and life of the Maritimes that stay in my mind as something so extraordinarily different from the West or the North or Ontario or Quebec; an earnest of how little the uniformities of the Global Village mean in terms of real existence. That is why MacLennan recognizes other solitudes; McLuhan, I like to think, could not have been born in the Maritimes.



PRIMITIVE POP

An exhibition of tattoo designs by Professor Bob MacLean of Halifax was recently organized by Luke Rombout, Director of the Owens Art Gallery at Mount Allison University in Sackville, N.B. The collection has already been seen in Fredericton, and will go on display at the Owens Gallery early in the new year. Many other galleries want the exhibition, which is expected to be shown across Canada, Rombout is working on an article on tattoo art for Arts Canada; *to accompany the exhibition itself he wrote a set of notes about MacLean and his work which -- with their subject -- struck us as fascinating. We are pleased to share them with our readers.*

The drawings in this exhibition were commissioned in the summer of 1970 and were executed by Bob MacLean, tattoo artist in Halifax, N.S. For a couple of years I had been considering the idea of doing a tattoo show, probably because of my involvment in collecting works of art in graphic media and most certainly because of my interest in "grass roots" creative expressions. In 1968/69 I had begun negotiations with a man by the name of Yukon Jim, a lone tattoo artist in Saint John, N.B. He suddenly disappeared. That took me to Halifax.

MacLean's establishment is situated near, and virtually underneath, the famous MacDonald Bridge in Halifax. It is a tough section; miserable slum houses, decrepit stores, dirty kids; in other words, an area where one could expect to find a tattooist.

MacLean was born in Halifax in 1942. His father was a petty officer in the Navy, got out, and ended up an alcoholic. MacLean has vivid memories of his grim childhood and the fact that a whole family of six or seven people all shared the same bedroom. He is in his early thirties and his experiences to date, if documented, would make fascinating reading. He has a crisp kind of intelligence developed in coping adequately with the realities of his kind of life - a sort of innate intelligence which I have found among farmers and fishermen. He is shrewd. He has a surprisingly interesting vocabulary, a sense of humour and views of life which show and express a rather extraordinary understanding of the workings of human nature. The fee for a tattoo, even if it involves one and the same design, is different from one individual to the next. It

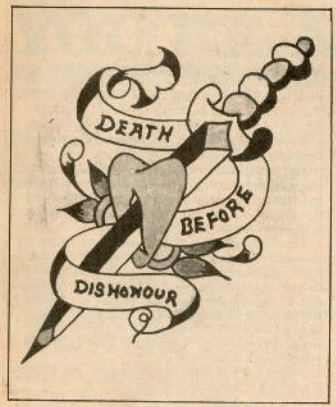
depends solely on whether he likes a man or not. He can figure his people out quickly. Example. He tells me of a well-dressed and obviously educated man who entered his shop with the quiet announcement ". . . if you lock your door I'll pay you double." MacLean obliged. "Right away," he says, "I knew that this man was a masochist. So I say to him 'Listen, you don't want tattoos all over your body just for the sensation do you?'" He nodded in agreement. "Well." MacLean continued, "I ran the needles all over him - dry!" But most of the men coming into his shop for a tattoo, he maintains, "come in to assert their masculinity. No mistake about that . . .Sex," he insists, "Sells everything . . .Freud wasn't wrong there." An amusing observation which seems to imply that MacLean had made a long and careful study of Freud, disagreed with him on almost everything except with the notion as expressed.

I asked him why he calls himself *Prof.* MacLean. "Well,"

he says, "obviously, an education I haven't got. I got out at grade 7. But I tell you something, I made a study of tattooing. I've looked at the whole bit and I *profess* to know everything there is to know about tattooing."

Among his studies he found, as I did independent of this fact, a little book published in England in the 1950's entitled *Pierced Hearts and True Love* by Hanns Ebensten. He makes mention too of the curious tradition of tattooists calling themselves "professor" something which, most amazingly, they seem to equate with "the best". The tradition was started around the turn of the century by American tattooist Samuel F. O'Reilly who used to bestow, apparently, the title on his protegees. It has, I think, a vaudeville and circus kind of ring to it.

MacLean was a protege of Charles Snow, a tattoo artist who worked for many years in Halifax, and died there a few years ago. Many of MacLean's designs stem from Snow, from whom he learned the art, and inherited designs, which frequently "travel" from one tattooist to another. MacLean works in the now traditional method of using a battery-powered electric needles for the skin punctures and printing inks for colouration. The process is relatively simple. The



skin is cleaned with alcohol and then a design is placed upon it. This is done either freehand or with the reverse of an acetate engraving in which charcoal can be rubbed which is then pressed upon the skin. After the outline has been punctured, coloured ink is applied (also with needles) and then wiped off. The latter method is exactly the same as colour intaglio printing on a metal plate. During the whole process, the skin is stretched as much as possible, and kept very tight. After the design is executed it is covered up with a tissue or light bandage. Under no circumstances is the tattoo to be touched for a few days – no washing is "allowed" in the area. Usually a scab forms, which comes off after a few weeks. Needless to say, the infection incidence is high, due to the often unsanitary conditions in a shop.

The process is very quick – small tattoos are done in a matter of minutes, larger ones take up to fifteen or twenty minutes. Contrary to popular belief, tattooing is not very painful. Be this as it may, I saw a number of very tough char-

acters weaken under MacLean's hands. Many come in with a certain kind of bravura which evaporates quickly once "under the needle" – they turn white and speechless, obviously frightened by the rather ritualistic, somewhat mystical experience.

Let me say something of MacLean's activities – his business of tattooing that is. He travels to a number of the country fairs in the Maritimes, particularly those which are near the sea. Many of the fishermen come home for such an event and their homecoming means substantial business for MacLean. Sometimes he nets seven or eight "big ones" (a big one is a hundred dollars) in a few days. "I blow the lot quickly" he says. On what? The best hotel accommodations and parties for an entourage of friends who travel with him. One of his thrills in life, he mentions, is the fact that he can take showers, enjoy clean and com-

fortable rooms, and receive service. Considering the nature of his work, he dresses immaculately. Every time I met him he was in shirt and tie and shining boots – very neat.

The imagery of the drawings in this exhibition are not terribly complex and can be categorized easily. More or less, they fall into the following sections: military and navy; erotic and sexual; religious; fantastic; and utilitarian. The latter category would include those tattoos, for instance, which consist of an individual's name. Some tattoos have traditionally been identified with figures of the underworld. The butterfly or an eagle carrying away a woman, for example, are symbols we find often tattooed on thieves and pimps respectively. Others are overtly erotic. The daggers or swords penetrating roses represent phalli and vulvae. Nudes rising from the centre of flowers may be interpreted in the same manner.

Tattooing is a graphic art which has been practiced for thousands of years and which can be found in cultures of the North (Eskimo) as well as the Far East (Japanese and Chinese) and the South (Maori of New Zealand, Tahitians, etc.). The word tataouwas mentioned by Bougainville in *Voyage autour du Monde 1766-9*. "Tattow" was used in *Captain Cook's First Voyage* published in 1769. Both words, tattaou and tattow, are derived from the Tahitian "tatau" which means "to mark".

Professor Bob MacLean, then, a contemporary Maritime practitioner of an ancient folk art.

luke rombout

NEW OPTIONS

Writing about New Options, a pioneering programme for Halifax high school drop-outs, Pauline Janitch of *The 4th Estate* added this to the story of Professor MacLean:

One of the students at the school is Bob MacLean. He is 28 years old, solidly built with short fair hair. He dropped out of Grade Seven when he was 15 years old and since then has "been on the streets". His current business is a tattoo shop.

He speaks intelligently and eagerly, thoughts and words spilling quickly into each other. He talked about why he comes to the school almost every day.

"The school is a very good thing because you can exchange what you know with other people. The teachers are not teachers as such because they are here to learn also. School here is not a monologue where you just take another guy's words and kick them around.

"It's a more communal approach to education. It's a place where anyone can come to talk and you don't have to feel inferior."

Which nicely confirms Luke Rombout's impression: MacLean is an alert, intelligent man, perhaps more so than many a more conventional professor.

YOU'RE NUTS!

anne crocker and jane likely

The Mysterious East has, for months now, been attempting to gather material for an in-depth, comprehensive article on Women's Liberation in the Maritimes. That task still continues, and we welcome any further information articles about, or analyses of the "movement" which our readers might be able to supply. We chose to publish, however, this report of a survey conducted by a Women's Liberation group in Fredericton because it indicates what professionals -- doctors, lawyers and clergy -- in this one small city think of the Women's Liberation Movement. Could this represent the opinions of professionals in your area of *The Mysterious East?*

FREDERICTON WOMEN'S LIBERATION CAUcus recently surveyed the doctors, lawyers, and clergy of Fredericton in an attempt to determine their support for our goals of free abortion on demand, government supported day care centres, and equal job preparation, opportunity and remuneration.

The 46% return illustrated kindly, interested, uninformed, and occasionally, viciously irresponsible attitudes toward our questions and the social conditions they reflected. Respondents often relied on "the law of nature" stressed the maintenance of the traditional fabric of the home, and showed a belief that our questions reflected personal, not social or economic problems; all these attitudes implied that they did not consider themselves to be involved in our demands in any human or professional capacity.

Fewer than 50% would support egalitarian minimum wage, and only 40% favored the establishment of a Women's Bureau, on the Ontario model, to deal with wage and job inequities. Day care centres were considered by a majority of 60% to be undesirable. After-school programs and community provision of balanced school lunches did not gain the approval of more than 30%. Forty-five percent, considered the present abortion law inadequate; yet only 15% advocated further reform of the law.

We added a comment space under each question, and prefaced the questionnaire with statistical date indicating the conditions which have led to our demands: the 45,000 abortion incidents, and 200 deaths from illegal abortion estimated each year in Canada since 1966; the 350,000 women alone on welfare, with their 1,100,000 children; 1,763,862 women in the labor force, 1,106,018 of them in subordinate status occupations; the working wives (1/5th of the total) who were forced to supplement their husband's below-subsistence wages.

The comments indicated a serious lack of information, and a tendency to diagnose data in favor of prejudice. Free abortion on demand, the respondents believed, would encourage "wide-open extra-marital sex" and would discipline childish women who *should* be disciplined by experience (and their unwanted children too, presumably). It should be withheld until advice on contraception, which is now entirely adequate, could be supplied to women (presumably including those already pregnant).

The proliferation of studies questioning the safety of the pill, and the adequacy of other contraceptive devices (IUD: 8-9% failure; diaphragm: uncomfortable, impractical, expensive; foams and jellies: inadequate) have evidently had little impact on the professionals.

Day care centres were considered unnecessary if women were only forced to chose between work and children; such institutions would undermine society; day care, after-school programs, and school lunches were considered socialistic, utopian, or dangerous.

Studies on the connection between I.Q. loss and nutritional or environmental deprivation have not reached these professionals; some doctors, however, proposed a partial solution in advocating courses in nutrition for welfare mothers.

There was a distressing rabid quality to the clerical replies, which frequently ignored the questionnaire in their fervor to denounce Women's Liberation as "part of an international conspiracy dedicated to the undermining of Christian society". One cleric went to far as to attribute our moral collapse to the reading of *Chatelaine* magazine, "a well-known agent of the communist conspiracy".

The doctors and lawyers contented themselves with levity: one passed the bounds of gallantry in simply ignoring the questionnaire and scrawling, "OOOXXX You're Nuts" on the bottom. Many felt the institution of a Women's Bureau would then necessitate the establishment of a "Men's Bureau". Some resorted to personalism: "What would your husband feel about that, if you have one?" Others plaintively asked: ' Don't you *ever* want to see your children?"

Our sisters in the community must rely upon these people for the information and services which determine the measure of their oppression: this survey indicates its extent.

LIBERATION NOW

references and/or further reading

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BOOK REVIEW BY DONALD CAMERON

STRONG & FREE

NEW PRESS TORONTO $1.25

The Mysterious East's coverage of the crisis in Ottawa continues this month with a review of Strong and Free, *a response to the War Measures Act published by New Press of Toronto, on sale on Atlantic newsstands now by an arrangement with the Rubber Duck Press. The book is reviewed by* Mysterious East *contributing editor Donald Cameron, and one of the essays from it, by David MacDonald M.P. for Egmont, Prince Edward Island, is reprinted here by permission of the author. The review was first heard on CBC radio's* AM Chronicle *in December.*

Imagine this: a book is put into a journalist's hands for review in the magazine he edits. The journalist reads through the book and decides not only to review it, but to see that a thousand copies are given away, and to distribute the book to newsstands himself.

Phenomenal? Yes. Impossible? No.

The book is *Strong and Free*, a new collection of essays on the War Measures Act and its successor, published by New Press. The reason I and my colleagues at the Rubber Duck Press decided to take part of the load from New Press is that we believe *Strong and Free* is a vitally important book, one of the most important in Canada's whole history.

Extreme? Yes. Unjustified? I doubt it.

The book doesn't offer much in the way of reportage or historical background, and certainly it isn't exhaustive. How could it be? It's talking about a situation that changes almost daily. It's being put out in a month, by a loose coalition of people who have never worked together before. Some of them write brilliantly, some of them merely competently. But what they all do is attempt to produce a reasoned opposition to the extreme measures the Canadian people have been induced by the government to support.

They're an impressive group, writing about the right topics. The book leads off with Patrick Watson, who probably did as much to get Pierre Trudeau elected as any one man, with that magnificent interview on TV on the eve of the Liberal leadership convention. "Of all the hard-won gains of our democracies," Watson writes, "respect for difference and dissent is the most fragile." And in Parliament, "where elected representatives are held in law and in tradition to be free to challenge and to inquire to the fullest, critical intelligence appears to have been put to sleep by the simple enormity of the government's initiative."

Then Claude Parisee, President of the Hull branch of the Parti Quebecois, tells – in French – how it feels to be French, separatist and left-wing these days. Dian Cohen, a Montreal economist, shows the basic Quebec economic malaise in which maniac groups like the FLQ are able to breed.

And in one of the most powerful essays in the book, Winnipeg lawyer Nathan Nurgitz, who is also National President of the Progressive Conservative Party, demonstrates beyond question that the Criminal Code contains all the powers that the government needed to deal with the emergency, aside from the extreme extension of arrest and detention procedures. It *did* have powers to act against sedition, treason, murder, kidnapping, unlawful assembly and so forth. It did *not* have the power to arrest innocent people, hold them in jail without charge, and release them without ever bringing them before a judge. "One can only conclude," says Nurgitz, "that the crisis in the Nation and the apparent paralysis of the authorities to act was not as a result of either inadequate Laws or for that matter a vacuum within the Law but rather an inability or an unwillingness of the authorities to act upon the powers conferred upon them many, many years ago."

Peter Desbarats, Associate Editor of *Saturday Night* and host of CBC-TV's *Hourglass* shows in a biting commentary already broadcast on CBC-TV that the police in the Montreal area are, and have been for a long time quite incompetent to deal with even ordinary crime, let alone seditious conspiracy. "The robbery rate in Montreal is three times the Canadian average," he points out, "and the solution rate is the second lowest in the country." Desbarats suggests that perhaps the failure of the police put us into the situation we now face; he also asks whether, if the information upon which the government based its decision came from the police, we shouldn't look again at the decision on the basis of the lousy track record of the enforcement agencies.

Alan Clarke, formerly of the Citizenship Council and the CYC, and now at Algonquin College, asks about the use of the powers against citizen's action groups, and points out that the powers – and many of the fresh powers that some boobies in the Quebec Liberal government are suggesting – aren't really directed towards subversives at all, but are in fact directed against dissenting citizens; Hugh Segal, President of the Student Council at the University of Ottawa, outlines the anguish of the campus moderate who wanted to trust the government, but who finds as the days go by that the government really is *not* prepared to justify its actions, but is instead going to meet criticism with mysterious phrases and wisecracks rather than the serious discussion the emergency demands.

James Eayrs finds Canada's record of using emergency powers reveals the power to be "monuments to folly" and he has some hard things to say about the incompetence of the parliamentary opposition, aside from David MacDonald, the courageous young Tory clergyman from Prince Edward Island. MacDonald himself, in a thoughtful but obviously astonished mood, questions whether we can ever again be smug about our tolerance in the light of the amazing willingness of Canadians to abandon liberty under even moderate stress, and suggests that Pierre Trudeau is "the ideal solution for English speaking Canadians who want to settle the Quebec problem once and for all," "a tame French Canadian" who sees "the world in general and Canada in particular through

Anglo-Saxon glasses."

George Bain, of the Toronto *Globe and Mail*, goes patiently over the evidence and concludes that there is just not enough to justify the measures; he suggests that the split between the Quebec government's apparent willingness to consider making a bargain with the FLQ, on the one hand, and the intransigence of the Ottawa government on the other, may have made a diversionary tactic imperative, and that the War Measures Act admirably provided just such a tactic.

Finally, James Littleton looks over the whole crisis, and concludes that although the federal government has made some short-term gains, the long-term effect of the whole sorry mess is that it has legitimized the FLQ: that it has, by ascribing to the FLQ a kind of power which it never possessed, given it a kind of glamour it doesn't deserve. As a result, the problems of terrorism and violence which we will undoubtedly continue to face in Quebec will be just that much more difficult to solve. In Littleton's view, "The governmental and public reaction as well as the general lack of . . . hard analysis . . . has created a condition in which a frightened and essentially uninformed public goads an eager government into action of greater and greater excess." Littleton asks for an impartial commission to inquire into the whole crisis and reaction, and to put them into some kind of proper perspective. "It is a lot to ask of any government," he concedes, "to consent to having its actions, and the events which have led up to them, examined by an impartial body. But if it fails to do so, we can only conclude that there is something to hide."

So a group in Fredericton is buying a number of complimentary copies for MLA's, journalists, civil servants, leading academics and so forth. And Rubber Duck Press, which publishes *The Mysterious East* is in the book business, somewhat to its own surprise. You should be able to get *Strong and Free* on the newsstands, or in your local bookstore for a dollar and a quarter. If you can't, write to the Rubber Duck Press, Box 1172, Fredericton, and we'll see that you get one. Let us know the shop where you *couldn't* get it too, so that we can get copies off to them.

At the beginning, I said this was an important book: it is, and its importance is that it expresses principled, measured opposition under extremely hostile conditions. The best thing about *Strong and Free* is that so intelligent and persuasive a group should have published it at this particular moment. Canadian democracy has never been in deeper trouble than it is right now – from the federal government, not from the trivial bandits of the FLQ. But if men like these will speak out like this, we may yet recover our liberties; the Jerome Choquettes of the country may not be able to hold onto the dictatorial powers they are reaching for so eagerly. If liberty does come back to Canada, it will be due to people like the authors of *Strong and Free*.

WHERE THE REAL DANGER LIES

The official explanation for the invoking of the War Measures Act and the subsequent temporary Public Order Bill must stand as a classic example of triple think and self-deception.

When the government announced the invoking of the War Measures Act its justification for such action was basically threefold: Firstly, it described a serious state of terror and possible insurrection in the Province of Quebec. Secondly, it indicated it was responding to requests from Quebec and Montreal governments. Thirdly, there was other information which, for obvious reasons, could not be disclosed at that time. Later, under increasing pressure to justify its intervention the official line was altered so as to enumerate the acts of violence and terror carried out in Quebec over the past half dozen years. Finally, when this was seen to be insufficient, a third explanation was forthcoming stating that because an insurrection had not occurred you could not prove that which had not taken place.

If the public's acceptance of this trilogy of explanation is astonishing the gullibility of the Opposition parties is even more so. For not only did they accept the various interpretations offered at almost every step, but they gave the government the legitimacy which it so badly required. Not only did they accept the government's interpretation but they encouraged it to respond with appropriate legislation and, in particular, the temporary Public Order Bill (which, while milder in its repressive aspects than the War Measures Act and its regulations, was, in fact, more dangerous because of its statutory nature). The Opposition became a willing ally in the government's myth-making by urging it to bring forth appropriate legislation to deal with the problem. Apart from mild objection and indecisive questioning as to what, in fact, the problem was, they happily concurred in government policy.

One of the amazing insights resulting from the invoking of the War Measures Act was the willingness of most Canadians to accept, without question, *the suspension of many of their basic rights and protections under the law.* It has been suggested that Canadians willingly allowed their civil liberties to be placed in cold storage because of the gravity of the situation. Yet, the logic of and the necessary relationship between these two events was never seriously examined. Canadians have traditionally regarded themselves as staunch defenders of human rights. The Canadian Bill of Rights passed in 1960 was proof positive, if such were necessary, that we hold strong belief in our basic freedoms. How important these rights are to us is a matter now in very serious question. Was our commitment to these various freedoms a commitment of the mind, heart and will? Or, was our commitment only similar to a religious or political tradition; important if exercised of some sue in identification if not. Either way, the commitment appears to have been of personal interest

and little else.

A second virtue accepted as inherent to all Canadians was our tolerance for dissent. We have taken pride in a past which we believe to be most tolerant in accepting a divergence of opinions and ideals. Indeed, we have seen ourselves as more tolerant than most. When repressive waves of intolerance for political or religious ideals have swept other countries, we have kept our tolerance and remained cool. Indeed, we have taken comfort that such intolerance could not happen here. But those who now express public disagreement with the policy of the government re the War Measures Act, know not only that *dissent is now unwelcome here*, but is now regarded by many as dangerously close to subversion. In fact, when political figures have dared to disagree, they are met with charges of "playing politics" as if that alone was sufficient to indicate the selfish irresponsibility of the dissenter. As an aside, how anyone could imagine that political advantage could be gained from taking a position directly in opposition to that most widely supported, is difficult to understand. We have discovered in a time of perceived national crisis that we are no more tolerant of dissent than our neighbors to the south and in some respects a good deal less so. The Prime Minister well knew this when he indicated that he liked people to make clear choices and avoid "wishy-washy" thinking. He was pushing a polarization of public opinion which would make it easier, in his terms, to govern.

Perhaps the most disturbing element which has emerged from the crisis is the high degree of authoritarianism latent in Canadian society. For decades, the authoritarianism has been an accepted feature of Quebec political life, best evidenced in the concept and cult of "le chef". The Prime Minister in his earlier writings has specifically acknowledged this. Yet, what we have now learned is the even greater predisposition in English Canada for the imposition of "le chef" The primary acquiescence in October, 1970 to "le chef" was not in French Canada, but primarily in English Canada. *Trudeau said he knew what was best for Canada and Canadians accepted without question. The paternalism of his performance was gratefully received by a most willing English speaking Canada.*

It would appear that the presence of Pierre Elliot Trudeau is, in effect, the ideal solution for English speaking Canadians who want to settle the Quebec problem once and for all. Beneath the veneer of polite acceptance and tolerance there has smoldered a resentment that feeds on long standing racial antipathy and misunderstanding coupled with more recent social and economic difficulties. It would have been impossible for English Canada to take a tough position with those who in their estimation have made intolerable demands on them if they had not found their ideal French Canadian. What was required was someone who had all the appearances of a French Canadian but who in reality saw the world in general and Canada in particular through Anglo-Saxon glasses as shaded as their own. They needed their "tame French Canadian". Posing, therefore, as a representative French Quebecer in Ottawa he has said and done all those things that they have longed to have happen. His response to delineated FLQ terror provided convenient cover in their view to "put them all in their place" and settle that "Quebec problem" for good. Quite obviously the dangers inherent in this outlook threaten the very existence of the country, and the freedom of *every one* of its citizens.

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FOLLOW-UP
FOLLOW-UP
FOLLOW-UP

THE RADICAL SENATOR FROM MADAWASKA

THERE WAS SENATOR EDGAR FOURNIER, at the hearing of the Special Senate Committee on Poverty, in Moncton, August 6, talking about the Deuterium of Canada plant at Glace Bay:

You have mentioned some dissatisfaction about the heavy-water plant in Nova Scotia as if you were experts in the matter [The Mysterious East, August]. *Let me tell you also that you have a lot to learn. There are two sides to the coin on this story. Maybe your side is right up to a point but in the meantime all this money has been spent in the Maritimes and it would not have been spent in the Maritimes; it would have been spent somewhere else in Canada. It has produced employment for thousands of people and it will give Canada, when it is completed, even with all the problems there have been to build it, one of the best heavy-water plants in the world . . .*

It is nice to criticize. It is the easiest thing in the world, but when you do criticize you want to learn at your young age, you must offer some constructive criticism, if you want to do what you think you are doing.

Tough talk. The Senator was rapping the knuckles of the editors of *The Mysterious East*, whose brief had said this about industrial development:

In order to attract industries, our [provincial] governments have offered lavish tax and cash incentives, among other things. These incentives must be paid for by the tax money of the already-impoverished Maritime citizen. If the industries succeed, they do not carry their share of the tax load nor do they plow their profits into the Maritime community. And if they fail, the provincial government normally bails them out. The heavy-water plant in Nova Scotia is a classic case in point. Our calculation is that if the Nova Scotia government had paid the plant's potential 190 employees $60,000 per annum each, just as a handout, the consequences for their provincial treasury would have been less catastrophic than going ahead with the plant. The scheme's New York promoter, however, carried off about four million dollars from the venture.

A clear difference of opinion, one might think. But on November 5, in the Senate Fournier had this to say:

And yet today we are so geared that we can spend up to $30,000 to create one job. What a price to pay, honourable senators! What a stupid price, I would say! And to whom is it paid? In most cases to people who are taking advantage of the loose legislation covering the tax payer's money to serve their own interests rather than the public interest.

We can spend millions of dollars to send a satellite over our land so that we can have better television and telephone communication. We can build hundreds of expensive aircraft for defence, costing several million dollars each, and after completion place them in mothballs because we have no use for them – in fact they may never be used. I shall not even mention the Bonaventure *incident. Then there was the lack of judgment and the costly error of the scientists on the Nova Scotia Heavy Water plant . . .*

The Mysterious East brief stressed the impact of automation in producing unemployment:

Increasingly few people are required to sustain and expand production; it follows therefore that large numbers of people can expect to be more or less permanently unemployed in the future.

On November 5, Fournier agreed, quoting a Montreal paper to the effect that a $200 million boost in the Quebec economy would create only 350 permanent jobs.

– this is shocking, but it is the sort of thing we have to face and think seriously about. We are going to be spending millions upon millions of dollars in creating new jobs because everything is becoming automated and mechanized.

Again, our brief said:

The sage of Social Credit, Real Caouette, once commented that when we need a bridge in one of our towns, we do not ask whether we have the men and the materials and the social need; we ask whether we have the money. Though we are hardly willing to give the time of day to Social Credit, we do believe M. Caouette's example does indicate the way human and community needs are constantly subordinated to economic considerations; and we do believe a society based on such a scale of priorities is fundamentally incapable of dealing with the issues which now confront us.

Fournier's November 5 speech bought that idea too.

Today we talk of a shortage of housing - we have ghettos, shacks and slums. We have the experience. We know how. We have the labour force, including the unemployed skilled. We have the timber and the lumber. Our warehouses are overloaded with supplies and building materials. Yet we keep one-third of our working population on welfare, unemployed, producing nothing.

Since our attitudes are so congenial to Senator Fournier, no doubt he was delighted with our brief? Well – ahem – not exactly. In fact he said it was "the cheapest and meanest" brief the Committee had received anywhere in its travels across Canada. The brief was "a series of platitudes with nothing constructive". And he concluded that "nothing in the brief means anything as far as I'm concerned."

But that was in August. By November the Senator had come around to our point of view, and the platitudes looked better.

MEN TEACHERS: PURVEYORS OF OBSCENITY

IN THE DECEMBER ISSUE we published an article on the Obscenity Committee set up by the Saint John Common Council. In that article we wrote of two attempts to surpress books – one at the Saint John Regional Library and the other at a west Saint John school. Since then two more incidents were brought to the Committee's attention, both at Saint John schools.

On October 9, a "Worried Mother" wrote to the Chairman of the Obscenity Committee:

Dear Mr. Murphy:

Since you are interested in removing bad literature from our newsstands, I decided to write to you concerning a matter of indecent books being given out at school.

I complained to no avail to the Simonds New School at Lock Lomond, where two of my children are students taking the English Course or (Sex Course) I call it. Anyway, I was told that is what will be taught if I like it or not.

The two books I am shocked at, being to (sic) a 15 years old and 16 yr old, are "Black Like Me" and "Members of the Wedding".

The following crude, vulgar words are in these books of trash.

piss, pee, shithead, sons of bitches, eating live rats, and numerous other low corrupting words.

If I wanted to learn (sic) my children trash, I would not send them to school, but now I think I'll have my boy quit at 16, if this is what he is learning.

We have never kept indecent literature in our home and I strongly resent any teacher filling their minds with this garbage.

I believe in church going, but what is the use if the school, fill the heads with low morals.

I wish you luck in cleaning up the bookstands for adults, but please stop, if you can, these men teachers who are corrupting our teenagers.

Yours truly
A Worried Mother

While Simonds has solved its problem, Saint Vincent High School has yet to solve their problem. The Roman Catholic girl's school is having difficulty convincing one of its students that she should study a novel chosen for her english course. The book is *Tom Sawyer* and the girl is Penny Brown. Penny is black and, for obvious reasons, does not think very much of the novel, as she expressed to her teacher. Penny refused to attend english class until the book was removed from the course. She called in the principal, the principal was "very understanding" but she could do nothing without the approval of the School Board. Penny talked to a School Board official who told her in a very fatherly way not to take it so seriously. About the book? Oh, yes, he was sorry but it was there to stay.

Penny was not about to give up. She still refused to attend English classes and spent the time reading in the library.

Then she decided to see Joe Drummond, an old family friend and an outspoken member of the black community in Saint John.

Penny's story sounded familiar to Joe – his own sons had been subjected to the same humiliation when they were in school. He told Penny to write him a story about it. At press time Joe Drummond is getting ready to come to Fredericton to tell his story to Richard Hatfield.

POLLUTION PROBE A NEW BOOK

Written by eight full-time project coordinators and former students at the University of Toronto, *Pollution Probe* describes the exciting anti-pollution activities of this highly successful citizen's group, loosely affiliated with the Zoology Department at the University of Toronto, of which Dr. Chant is head. In editing, Donald Chant, a prominent Canadian zoologist, has lent a scientific style to the book without altering the statement of deep concern for the future of our environment.

As a working manual for a citizen's group, it describes the environmental crises, the political and corporate attitudes on pollution and the possible solutions in Canada. The book also offers a wide selection of topics on the environment including a one-act play, "MacBarf" and a "Do It" kit. But most important, it describes how rewarding anti-pollution activities can be for anyone of us.

The first 6,000 copies of *Pollution Probe* sold out in less than a month after its October publication. A second printing of 4,000 copies is selling briskly. Royalties are assigned to Pollution Probe Inc., Toronto

reaction

Dear Sir:

I picked up the September issue of your magazine as I usually do each month. I now wish I hadn't as it was just three days after receiving word of the death of Elmer Blanchard, an old P.E.I. friend.

I wonder if you would be kind enough to publish this short obituary to his memory in your reaction column:

Died: J. Elmer Blanchard age 43, of a heart attack, Minister of Labor and Attorney General of P.E.I. Received Rubber Duck Award in September issue of *Mysterious East* who insulted his intelligence, his convictions and even his English usage.

I first met Elmer Blanchard in Charlottetown in the war years when we were around 14 years of age. We both occasionally attended evening sittings of the P.E.I. Legislature and would discuss the merits of the various speakers while walking home. Even at this early age he obviously had an enthusiasm and interest in public affairs which went far beyond the casual concern of the bobby sox era. This was to continue through various levels of student government at Prince of Wales College which we attended for some four years.

Elmer was a little different, in the first place he was a Roman Catholic, the second he was Acadian, and to be both in Charlottetown in those days required a fair amount of self-control and a solid sense of humor. Elmer had these qualities and more. He was an excellent student and athlete, filled with enthusiasm most considerate of others, sincere and scrupulously honest. In looking back I would say that he was probably the most popular student there, not because he was the hero type but because he was one hell of a fine person. He would have had my vote if I was a resident of P.E.I. I would know that I would be voting for a person I could trust and that's saying something these days. I am sure that his comments on the LeDain report represented the views of the P.E.I. Cabinet and of 99% of the population of P.E.I. This would be his duty and he fulfilled it.

I lost touch with him after leaving P.E.I. in the 1950's. I met him again in Charlottetown in late August of this year and found him the same Elmer and the same boundless enthusiasm for the job he was doing. I am told he was highly regarded by his colleagues and by the people of P.E.I. His untimely death was a tragedy to all who knew him.

Postscript: (1) Mr. Editor, did you have time to get the Rubber Duck Award to Mr. Blanchard or are you planning to send it to the widow and four children?

Postscript: (2) You know, even if the truth hurts, it should perhaps be told in all cases. However, it's the half truths, the distortions and the sneers that must be deplored. It would seem that your magazine should re-examine its reason for being. If you are going to take apart anyone who doesn't happen to agree with you then you become just another biased and bigoted publication and heaven knows there are enough of those around.

Yours very truly
David E. Cornish

THE EDITORS REPLY:

Mr. Cornish fails to distinguish between an attack on the public statements of a public man, and a personal attack on the man himself. He also seems to wish to charge us with tastelessness in giving a Rubber Duck Award to a man who was about to die. In fact, of course, our issue was published well before Mr. Blanchard's death, and we were as distressed at the co-incidence as Mr. Cornish.

Mr. Blanchard's brief to the LeDain Commission was presented on behalf of the Prince Edward Island government, though we assume he endorsed it. He therefore had the entire resources of the government at his disposal in preparing it; if the brief turned out badly – as this one did – he may or may not have been responsible. Nevertheless, under our system of government he is regarded as responsible for the official statements of his department.

The P.E.I. brief was, in our opinion, biased, morally confused, and badly written – and we gave our reasons for that opinion at some length. Mr. Blanchard's comments at the July conference of attorneys-general were of the same stamp. These are public *statements by a* public *man on important issues of* public *policy, and we attacked them with all the force and vigour at our command. We believe they were entirely wrong – and if they had the approval of the people and Cabinet of P.E.I., all the more reason for attacking them. Democratic government does not mean tyranny of the majority. The majority in P.E.I. may be prejudiced against the Acadians, too; that would not give it the right to pass discriminatory legislation. We believe that crimes without victims are not crimes, but moral tyranny over minority conduct, and should not remain on the statute books. We considered Mr. Blanchard to be defending an unjustifiable invasion of civil liberties – not from malice, but from confusion and paternalism – and we said so.*

We did not *comment on Mr. Blanchard's private life or personal character; indeed, we neither knew nor greatly cared about them. In the same way, we don't know or care whether K.C. Irving is a thoughtful husband and kind father; it is his influence on the Atlantic region that concerns us.*

So we aren't surprised – though we are pleased – to learn that Mr. Blanchard was a man of many admirable qualities. We value scholarship, personal charm, humour, and strength of character and we regret the loss of them as much as we deplore some of Mr. Blanchard's public statements. Perhaps the greatest compliment to Mr. Blanchard's memory which we have seen is the fact that it could inspire so eloquent and moving a tribute as Mr. Cornish's.

Dear Sirs:

Your October issue, p. 19, states

The Rubber Duck government proposes to apply in the province the principles of the Carter Commission on Taxation, which the federal parties have all conspicuously ignored, though the Carter Report is widely considered the most intelligent and comprehensive taxation proposal ever developed in any Western nation.

It certainly is, but not *all* federal parties have ignored it, as a glance at the enclosed booklet (prepared by the Ontario NDP with the blessing of the federal party) will reveal.

Fraternally,
Dave Kelly
Research Associate
Ontario NDP Caucus

EDITOR'S NOTE:

The booklet Mr. Kelly enclosed is entitled Tax Reform?: A Cool Look at the White Paper by Ontario New Democrats *and is available from: New Democratic Party Publications, 11½ Spadina Road, Toronto 4, Ontario.*

Dear Sirs:

I was very disappointed in the treatment "Party Platform" gave to fishing. The fishing industry is still vital to the economy, and therefore to the lives of the people, of Atlantic Canada. Your suggested plank on fishing barely scratched the surface of the problems that industry faces today. An incredible amount of research needs to be done on almost all the varieties of fish important to the industry. Nobody seems to know anything about the breeding of lobsters and shrimps -- both very valuable to our fishermen. Quotas on other fish are beginning to be used, but not fully enough.

But another extremely important area is marketing. We are constantly reminded of the food value, delicious flavour etc etc of good red western beef. The supermarkets feature special recipes for chicken and pork. The glories of New Zealand lamb are touted to the skies. But fish is supposed to be cheap and eaten on Fridays. It's regarded as second-best to meat.

Today very few kinds of fish are cheap. And it isn't second-best to meat. It is obviously as high in food value and generally lower in calories, than meat. And can be served in other ways than deep-fried in batter.

More varieties should be promoted and marketed -- why are so many tons of herring ground into fish-meal? So much mackeral used for bait? And why aren't our provincial governments doing more about fisheries research and promotion? Aside from the conversion of redfish into saleable "ocean perch", fish seems to be marketed even more poorly than in the past.

Collective bargaining is the beginning for Fishermen's rights, of course. And co-operative fish processing could lead eventually to less treacherous treatment of the fishermen by fish plants, but much remains to be done.

An alternative to the present parties, even given in jest, should show more solidarity with the fishermen.

Yours truly
Janet Duke
Lockport, N.S.

Dear Sirs:

If Bob Lockhart were to print serious versions of his letter, he would find a welcome market. It does get boring writing letters of protest, and even more boring reading the replies. Perhaps the recipients of such letters will have forms printed as well. e.g.

We are (1) Sorry, forgive us (2) not responsible (3) taking care of it (4) reporting you to the R.C.M.P.

Lynne Vickson
Vancouver, B.C.

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Back of the Book

GLEANINGS FROM THE GLOBE AND MAIL

On the afternoon of December 17, the Fredericton *Gleaner* trumpeted "Guard Boosted Against Shoplifters." Beneath was a story by staff writer Sam McCallum which was, said a box in the story, "the first of a series of articles on shoplifting in the Fredericton area. The stories explain who does it, how and why."

To some readers, the story sounded oddly familiar. Checking back, they found great chunks of it in the previous Monday's *Globe and Mail*.

Senator Davey's committee found that the *Gleaner* carried an exceptionally high proportion of "staff-written" material. Perhaps it might be better described as "staff-typed."

And of course, there's the other question: is it worse to swipe a ballpoint from Woolworth's than an article from the *Globe and Mail*?

SOCIAL CHANGING

How does social change come about? What causes it? Can it be made to happen; and if so, how? *The Mysterious East* tries to show some of the places where change is needed, but we do not feel it our duty to come up with the solutions too. Asking the right *questions* is difficult enough without feeling an obligation to produce the answers as well.

A new magazine from Toronto, however, does propose to take over where we, in a sense, leave off. Called *Transformation*, the journal will be devoted to the theory and practice of social change. The editor, Marjaleena Repo, is a member of the group which produced the outstanding educational quarterly *This Magazine Is About Schools*, and has been actively involved in social work, educational research, community organizing, freelance broadcasting and so forth. She's a highly competent, experienced woman, and we look forward to seeing the first issue of *Transformation*.

Subscriptions to *Transformation* are $5.00 a year, from P.O. Box 6179, Station A, Toronto 1, Ontario.

THEY'VE ARRESTED SANTA

Perhaps the most delightful story to come to our attention over the holiday season is supposed to have occurred about ten years ago at CFB Shearwater, in Dartmouth. We don't know if it's true. We don't *want* to know. As Aristotle might have said, if it's not true, it should be.

It seems that Santa comes to Shearwater by navy helicopter, dropping from the skies to distribute toys among the base's children, who gather on the launching pad. Santa is normally an enlisted man, and on this particular occasion he had geared up with several tots of strong navy rum. Down came the chopper among the kids and smiling parents, and out came Santa, steering a slightly erratic course.

"Merr-ry Chrishmush!" he cried. "It'sh jolly old Shanta. Ho, ho, ho! Fucking ho-ho!"

The base commander, standing nearby, was shocked.

"Military police!" he roared, "arrest that man!"

Two burly MP's seized Santa, hustled him back into the chopper, and it took off again. The kids burst into tears.

"WAAAAA!! THEY'RE TAKING SANTA AWAY! THEY'VE ARRESTED SANTA!!"

Maybe it's not true. But it certainly made the season a lot more jolly for *Mysterious East* staffers.

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hopes to be able to offer summer employment to several students through a grant from Labatt's Breweries to be administered through Pollution Probe at the University of Toronto.

The work would involve research and writing on any of various aspects of the environmental crisis, and might require some travelling. It would extend over three months, at about $300 per month, plus some (but probably not all) expenses.

Applicants should be bona fide students who will be returning to university in the fall. Field of study is unimportant, but energy, intelligence and cheek would be important qualifications, as well as the ability to work effectively under minimal direction.

Please apply in writing, stating what you consider to be your qualifications, and experience if any, and indicate by what date you must have a firm decision. **The Mysterious East** will try to make its decisions almost immediately once its sources of funds are confirmed.