The Powers of Parliamentary Committees

by Diane Davidson

This paper reviews, in the context of parliamentary law, the powers of parliamentary committees with respect to witnesses, particularly public servants. It was presented to the Standing Joint Committee for the Scrutiny of Regulations on the powers of parliamentary committees on November 16, 1994.

I think it crucial, at the outset to establish that while parliamentary committees are often seen as just another player in the overall governmental process. They are an integral part of the House of Commons or the Senate. As such they are empowered by the Senate and the House to examine and inquire into matters referred to them on behalf of the respective Houses, where it would, for obvious reasons, be impractical for the parent bodies themselves to operate.

The right to institute inquiries which is at the heart of the parliamentary committee process, is part of the *lex parliamenti* which is the Latin phrase for the law of Parliament. The privileges, immunities and powers of the House, its Members and committees have a strong foundation in the Constitution of Canada itself through section 18 of the *Constitution Act, 1867* as well as by means of the *Parliament of Canada Act*.

> ***The extensive powers which a parliamentary committee enjoys are not commonly understood and therefore, at times, not properly respected.***

This may be due, in part, to understatement. Consider, for a moment, the powers of Standing Committees as set out in Rule 91 of the Senate Rules and in Standing Order 108(1) of the House of Commons. These include the innocuously-stated authority "to send for persons, papers and records." No distinctions are made between different types of documents or categories of witnesses. The very simplicity of the words granting this authority would appear to belie the strength of the power thereby delegated. When coupled with the rights a committee enjoys as a constituent part of parliament these are very full powers indeed.

What these grants of power mean, of course, is that, provided a committee's inquiry is related to a subject-matter within Parliament's competence and is also within the committee's own orders of reference, Committees have virtually unlimited powers to compel the attendance of witnesses and to order the production of documents.

The classic statement of the duty on witnesses before parliamentary committees is found in Erskine May's 20th edition at p. 746-7. It is a sobering statement of the reality that a witness before committees must answer any and all questions put by members and produce documents as required by the committee.

The obligations and rights of witnesses before committees may be summarized quite readily. When a committee decides that a certain person should appear, it may direct the clerk of the committee to invite the person to appear or if necessary the committee may adopt a motion ordering that person to testify before the committee. Canadian and British authorities mention only two exceptions from the power of the Houses and their committees to summon witnesses; those being members of the House itself and Senators.

Diane Davidson is General Legal Counsel for the House of Commons.

While a witness may be required to swear an oath, and indeed there is provision for this in the *Parliament of Canada Act*, this is an infrequent practice because lying, misleading and giving false evidence constitute clear contempt of the House of Commons and its privileges, even if an oath is not taken. However, it can be argued that in some cases witnesses may seek to shield behind the immunity afforded to them in respect of the use of the oral or written evidence at a subsequent proceeding. A solution to this problem would be to have witnesses give evidence under oath. If a witness made a defamatory or untrue statement under oath, he or she would be subject to prosecution for perjury under the *Criminal Code*. Some committees, depending on the nature of their inquiries, may consider the possibility of increased reliance on an oath or affirmation.

There are legally no grounds upon which a witness can refuse to answer a question.

Witnesses are quite literally at the mercy of the committee and its collective wisdom. For example, a witness cannot refuse to answer a question on the grounds that in doing so he or she risks legal action or because an oath has been taken not to disclose the matter under consideration or because the matter was a privileged communication such, as that between solicitor and a client or because of the risk of self incrimination in other proceedings.

A witness may, however, appeal to the Chair to determine whether an answer should be given to a particular question or Members may object and call for a vote by the committee as to whether a particular question should be put to a witness. The committee, therefore, has considerable flexibility and may balance the needs for an answer with the need to protect a witnesses' interests.

Furthermore, should a parliamentary committee ultimately require a witness to provide evidence that is prejudicial to that witness or to third parties, certain constitutional and legal protections are available. First, there exist the parliamentary law protections. A witness before a parliamentary committee enjoys the same privilege of freedom of speech that a member enjoys in the Chamber itself or in committee. This protection acts as an immunity against legal action being taken against the witness for libel and slander. Also, section 9 of the Bill of Rights of 1689 would prevent courts from inquiring into the proceedings of the House or its committees. Another legal protection can be found in section 13 of the *Charter* which applies to a witness who testifies in any proceeding. This section ensures that incriminating evidence provided to a parliamentary committee may not be used directly in subsequent criminal proceedings except in a prosecution for perjury or for the giving of contradictory evidence. However, it is important to point out that in spite of the legal protections available to witnesses, the possibility exists that as a result of media coverage of the committee proceedings the possibility of a fair hearing in court could still be compromised. For example, while a committee's minutes would not be admissible at a criminal trial, the testimony could assist a police investigation or direct a Crown prosecutor to a line of questioning useful for his or her purposes which otherwise might have been unavailable for the purpose of prosecuting the offence. Again, in such circumstances, the committee may wish to consider holding *in camera* proceedings.

What if the committee is faced with a recalcitrant witness or with a refusal to provide a document which the committee members feel is necessary to assist their inquiry into a matter? The first step is for the committee to adopt a motion ordering the production of the required information or the attendance of the witness and then to report the refusal to the respective Houses. Since committees do not possess contempt powers as of right, it is the Houses themselves, which must decide what action is to be taken. According to *May*, Parliament could force a witness to produce the documents in his or her possession even if for instance they were under the control of a client who has given the witness instructions not to disclose them without his or her express authority. It should be noted, however, that there are few recorded instances of the process to compel the production of documents as just described actually having been used by either House or one of its committees.

Ultimately, as in the case for the production of documents, only the Houses themselves, may deal with the conduct of an individual who refuses to appear before a parliamentary committee, or of a witness who appears but refuses to answer a question by calling that individual before the Bar of the House to answer for his or her conduct or by requiring him or her to return to the committee to justify his or her refusal.

Although a witness who remained defiant was actually jailed for the remainder of the 1913 session, the powers discussed in this context are clearly intended only as extraordinary remedies. It should be noted that by virtue of section 9 of the *Bill of Rights* of 1689, a decision of the House to punish witnesses who fail or refuse to provide evidence to parliamentary committees would not legally be reviewable by the courts. The *Bill of Rights* provides clearly that proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament. That being stated, it may not prevent

someone from making a legal claim before the courts. Then, it would be up to the court to decide if it had jurisdiction to hear the matter.

There has been some mention of the legal rules of evidence and the status of public servants and Ministers and perhaps I might dispose of that issue at this point. The legal rules of evidence do not apply in parliamentary committee proceedings except perhaps for the basic requirement that evidence be relevant to the inquiry. As to the status of public servants and Ministers as a question of law only, I would subscribe to the conclusion of the Ontario Law Reform Commission in its 1981 *Report on Witnesses Before Legislative Committees* (p. 42) that these witnesses are in the same position as any other witness — in theory they could be compelled to testify on any issue, answer any questions or produce any document. There is no legally guaranteed immunity from Parliament's broad power to call for information, and therefore no special status is conferred.

Practically, however, it must be, and usually is, recognized that the question of the nature and scope of Crown privilege is clearly of fundamental importance in a parliamentary system of government. In practice, committees do often afford special consideration in regards to the testimony of and production of documents by Ministers or Senior Public Servants and by other individuals involved in criminal and civil proceedings. Generally speaking, parliamentary committees restrict their questions of public servants to factual and operational matters leaving comments about government policy, wider political ramifications and advice given to ministers to ministers themselves.

It is important to state that there exists no blanket immunity for the executive branch in making a public interest claim against disclosure of confidential information to a parliamentary committee. The so-called "Crown privilege" or its more modern designation "public interest immunity", is often invoked by the Crown and more often by ministers in refusing to divulge matters or to produce certain documents in a lawsuit on the grounds that it would be contrary to the public interest to do so. It should be noted that this immunity has never been formally acknowledged by the House of Commons as inhibiting its investigatory powers. The public interests which need to be considered and weighed in judicial proceedings, are not the same as the public interests to be considered and weighed when evidence is sought for parliamentary purposes. In practice, parliamentary committees have more readily given consideration to claims of Crown privilege when invoked by a Minister in relation to national security matters and international affairs rather than in commercial affairs. However, in the final analysis, the committee remains final arbiter of such claims.

There exists a set of notes "prepared for the guidance of officials appearing before Parliamentary Committees" which purport to "set out the constitutional principles that underlie relationships among Ministers, Officials and Parliament". A review of this document, published by the Privy Council Office in December 1990, may afford some useful insights as to the positions of certain officials appearing before committees.

These notes highlight the conflict which may exist between an official's duty to serve the Minister and his or her obligations to a parliamentary committee. Consider, for example, the following passage found in the text at page 3:

> If public servants violate the trust bestowed on them by Ministers they undermine effective (and democratic) government. If they violate that trust on the grounds that they have a higher obligation to Parliament, then they undermine the fundamental principle of responsible government, namely that it is Ministers and not public servants who are accountable to the House of Commons for what is done by the Government.

A public servant instructed by his or her Minister not to disclose certain matters, is when before a resolute committee, certainly on the horns of a dilemma. In his report, *Witnesses before committees or subcommittees of the National Assembly*, presented to the President of the National Assembly of Quebec in February 1989, the Honourable Justice Mayrand, recommended a solution to this problem. He suggested the following approach:

> ... any committee may adjudge an objection raised by a public sector employee who pleads that a minister has instructed him, by virtue of the convention of ministerial responsibility, not to disclose certain information about the subject on which he is called to testify. If the committee, having considered the preponderance of the disadvantages that sustaining the objection would entail, orders the witness to answer, the latter must comply with this order ...

Members may wish to consider to what extent the proposed rule formulated by Mr. Justice Mayrand is really a codification of existing practice and reinforces the role of the committee as final arbiter.

In their roles as arbiters, committees have used their considerable powers to fashion some interesting compromises! In 1991, when the Solicitor General and Correctional Services Canada refused to provide expurgated reports on "Gingras and Légère" to the Standing Committee on Justice and the Solicitor General, the House upheld the rights of the House and its committees to order the production of the reports. The matter was ultimately resolved and a compromise was

reached whereby all documents were delivered for examination in confidence by the Committee. This is an example of the way in which conflicting interests were balanced in order to reach a *modus vivendi* between the executive and legislative functions. A committee when faced with a valid claim of crown immunity during the course of its proceedings has complete discretion to consider the information *in camera*. Indeed, circumstances may sometimes exist where in the opinion of the committee the public interest is better served by holding the hearings *in camera* than by holding them in public, for example, over matters of subjudice. The committee may also consider the non-publication of some of its evidence if it is satisfied that in doing so it is acting in the public interest.

In other circumstances, a committee may be at is strongest when conducting public meetings. In this session of Parliament, the House Standing Committee on Justice and Legal Affairs has provided a forceful example of this. In May 1994, the Committee recalled the Chairman of the National Parole Board to attend before the Committee and by a series of rigorous questions achieved their objective of revealing the truth. Warren Allmand, Chair of that Committee attributed the Committee's success in holding a senior official accountable, in this case, to rigorous questions, hard work and holding meetings in public. It is interesting to note that in this instance, at least, the Committee was not in conflict with the responsible Minister, but actually earned praise and thanks for its initiative from the Solicitor General.

Whether it is in summoning public servants as witnesses, or in placing them under oath or in submitting public servants to rigorous examination or in reporting lapses of responsibility to the House and accordingly attracting significant media attention to deficiencies in the exercise of functions, parliamentary committees are increasingly insistent on sensitizing the Executive, public servants and other to the rights and powers of committees and their basis in parliamentary privilege. It is my contention that their efforts are well-founded.

With an appreciation of the derivation of committee powers from the Constitution, and based on a recognition of the powers that the Houses themselves could exercise on behalf of a committee faced with a recalcitrant witness, I feel confident in expressing the view that a parliamentary committee is indeed in a very strong position to command acquiescence to its reasonable demands.✦