Perjury, Contempt and Privilege: The Coercive Powers of Parliamentary Committees

by Charles Robert and Blair Armitage

This paper explores the history and issues surrounding privilege and swearing in witnesses. In summary, it argues that: contempt powers available to committees are not always enough to compel the appearance or testimony of witnesses. By legislating the power to administer oaths, by exempting sworn testimony from the usual protections of privilege when it is used in the case of perjury and by giving the responsibility for prosecuting perjury cases to the courts, Canada has created a more effective mechanism for punishing those who lie to a parliamentary committee. It also argues that the Charter's provisions guaranteeing the rule of law and due process may conflict with Parliament's coercive powers; that other claimed powers, such as the ability to fine offenders, may also be questionable; and that the power to punish for contempt and to fine can no longer be asserted with certainty until they are tested in the courts. In remedy, the paper suggests a comprehensive review of the privileges and powers of Parliament with respect to its committees and that consideration be given to ensuring that they are properly equipped to function in the legal and human rights constructs that comprise the Charter era.

The use of coercive powers by Parliament has two identifiable functions, to compel or to punish. Compulsion can be used with witnesses who may be hesitant or reluctant to cooperate; it deals with the immediate situation. Punishment is used after the fact against witnesses whose behaviour has been found to offend the dignity of the committee. The option to use either remains entirely at the discretion of the committee, subject to confirmation by the House. The history of these coercive powers and their effectiveness has not been the focus of much study or comment. Joseph Maingot's *Parliamentary Privilege in Canada* is one of the few to have reviewed the subject, but this analysis does not pretend to be comprehensive; nor does Maingot really consider whether these coercive powers are still appropriate today, even though he was sensitive to the altered legal environment brought about by the incorporation of the *Charter* into the Constitution. Should these coercive powers be retooled to maximize their usefulness in the contemporary context? Has there been any impact on them as a result of the proclamation of the *Charter* with the guarantee of individual rights, including due process and the protection of self incrimination.

The privileges and powers of Canada's Parliament are derived from British parliamentary practices and traditions. The House of Commons in England has exercised contempt powers for centuries. As a constituent part of the High Court of Parliament, it had an inherent right to insist on the complete cooperation of witnesses called before the bar of the House or before one of its committees. Failure to comply with its demands for information

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could lead to various punishments including admonishment, reprimand and, not infrequently, imprisonment.

As it happened, Parliament's successful assertion of its supremacy in the late 17th century confirmed these powers, and also contributed to their excessive use. The judgment of *Stockdale v. Hansard* includes a list of some of these abuses spanning a century.[1] Among the more egregious examples were violations of members' private property, such as poaching and trespass, and even eviction of tenants for non-payment of rents. These abuses were completely unrelated to the strict understanding of contempt because they did not involve interference in the actual workings of the House or the participation of its members. Such outrageous practices were eventually curbed and the contempt power was more properly limited to enforcing compliance with orders of the House in pursuit of its work.

In addition to the contempt power, the House of Commons sought the right to administer oaths to witnesses, which was fully achieved by statute in 1871. Unlike the House of Lords, the power to swear witnesses was not inherent to the House of Commons because it did not exercise judicial functions. The Commons did, however, deal with quasi-judicial matters such as disputed elections and petitions for divorce. Early attempts to hear witnesses under oath included some irregular practices. At a time when some MPs were also magistrates, they might be called upon to administer an oath. On other occasions, witnesses were sent to be sworn at the bar of the House of Lords. These practices, not authorized in law, were used sporadically over the course of about 100 years until they were abandoned mid 18th century.

The preference to hear witnesses under oath was motivated by at least two factors. One was to impress upon members and witnesses alike the serious nature of some of the committee proceedings. Second, the growing number of private bills highlighted the need to hear petitioners under oath to ensure that Parliament did not enact statutes based on false information.

The 1770 "Grenville Act" was the first statute to replace this *ad hoc* approach with a more systematic one. It was done to allow committees looking into disputed elections to conduct themselves more like a trial. This same Act also empowered the House of Commons to administer oaths at the bar in certain cases. Various amendments were made to this Act, and other similar Acts from 1770 onwards to extend the range of committees and subject-matter where oaths could be administered. The issues being examined primarily dealt with controverted elections and divorce cases.

The *Parliamentary Witnesses Oaths Act of 1871* finally granted the House of Commons and its committees the right to administer oaths without restriction. By its terms, "Any person examined as aforesaid who willfully gives false evidence shall be liable to the penalties of perjury." Before the passage of such statutes, article 9 of the *Bill of Rights* barred the courts from using any aspect of parliamentary proceedings as evidence for any purpose. Laws permitting the swearing of witnesses, and particularly the 1871 Act, removed this impediment by creating a statutory exception to article 9. This interpretation is confirmed by the 1999 UK Joint Committee on Parliamentary Privilege[2] and by Maingot[3]. Until the adoption of the *Defamation Act 1996*,[4] permitting the limited use of *Hansard* by MPs as evidence in defamation proceedings, perjury was the only exception to article 9.

These exceptions to article 9 have not impaired Parliament's coercive powers. On the contrary, with the incorporation of the oath power, witnesses became liable to two distinct charges – contempt and perjury. Either or both could be pursued, depending on the circumstances. This was acknowledged as early as 1844 in the first edition of *Erskine May's* "Treatise on the Law, Privileges, Proceedings and Usage of Parliament". The 1999 UK Report on Privilege also noted the dual liability and was not particularly troubled by it, though one British Justice recently expressed some concern about the possibility of conflicting results if both charges were actually followed. In fact, this has yet to happen and seems quite unlikely.[5]

Only three examples have been identified of perjury charges being recommended by the House of Commons in the nineteenth century. All three predate the 1871 Act, and all involve false testimony in relation to a committee examination of a disputed election.[6]

These examples have led to the perception that a perjury prosecution can take place only on the recommendation of the House, or that a prosecution must take place if the House calls for one. This presumption does not appear to be well founded. In an 1869 appearance before a House of Commons select committee, Erskine May suggested an alternative understanding. Asked whether an indictment for perjury could proceed only with the permission of the House, May answered in the negative, saying:

> … the House of Commons would be in the same position as any other court which administers oaths; and the Act of Parliament would state, as was done in the Act of 1858, that "Any person examined as aforesaid who shall willfully give false evidence, shall be liable to the penalty of perjury." That is the case now with regard to Committees on private bills, and it is the case with regard to the Committees of the House of Lords; and I can see no reason for treating the House of Commons in a different way.[7]

May used the example of the courts to demonstrate that the decision to pursue a charge of perjury would ultimately be made at the discretion of a prosecuting authority. It need not depend on an authorization, or indeed a complaint, of the House of Commons. This view was supported as recently as July 2007 in a report of the House of Lords Constitution Committee on the role of the Attorney General.[8]

Coercive powers have remained a feature of the UK Parliament. They continue to be regarded as useful, but the 1999 UK Report on Privilege recommended that they be updated. Far from suggesting that these powers be compromised or diminished, the Committee suggested means to make them more effective, including the enactment of a power to impose fines as an option for punishing contempts.

Canadian Experience following Confederation

The privileges of the Westminster House of Commons were entrenched in section 18 of the *Constitution Act, 1867*. This included article 9 of the *Bill of Rights* by inference and all the inherent powers to punish for contempt. The ability to administer oaths was not included. The need for this power, however, was soon evident, and steps were quickly taken to provide for it.[9]

The inability to administer an oath was seen as an obstacle in dealing with applications for divorce, which were then obtained through private bills. Within months of its establishment, the Senate was confronted with a divorce bill that gave rise to some serious difficulties, notably the inability of the Senate to examine witnesses under oath.[10] The UK Parliament had passed an act in 1858 to give committees of the Imperial House of Commons a power to swear witnesses. This power was limited to the examination of private bills. But such a power had not yet been enacted in Canada, and so the Senate committee chose to be guided by the evidence sworn before a Superior Court in Montreal.[11]

To avoid relying on this awkward precedent, and to avoid difficulty in future cases, Parliament immediately proceeded to pass an *Oaths Act* in 1868. The power to administer oaths was limited to witnesses appearing at the bar of the Senate, and extended only to select committees on private bills of either House.

In 1873, the Pacific scandal added to the sense that a more general power to swear witnesses was needed.[12] The government was embroiled in allegations of a kickback scheme involving contracts for the Pacific Railway. Parliamentary scrutiny was limited by the lack of a power to swear witnesses. A new *Oaths Act* was passed to grant a more general power to swear witnesses along the lines of the British example of two years earlier.

The British government disallowed the *Oaths Act* on the grounds that it was *ultra vires* since it exceeded the limitations of section 18. In 1875, the UK amended the original *British North America Act* which enabled the Canadian Parliament to update its privileges from time to time, so long as they stayed in line with the UK House of Commons. In its next session, in 1876, the Canadian Parliament adopted a new Act to give both Houses the general power to swear witnesses. Initially, committees could only exercise this power if authorized by the whole House on a case-by-case basis. In 1894, witnesses could be examined at the bar of the House of Commons. This last Act also introduced the possibility of making an affirmation as an alternative to an oath. These provisions remain largely unchanged today.

There are few instances of controversy flowing from the use of the contempt power in Canada. Two exceptions, the *McGreevy case* and the *R.C. Miller case*, reveal its limitations and show it to be weaker than supposed.

In 1891 the House of Commons Privileges and Elections Committee inquired into allegations of wrongdoing in connection with numerous government contracts worth millions of dollars. Central to the allegations was the conduct of a Member of Parliament, Thomas McGreevy. He was an MP from 1867-1891, a member of MacDonald's Liberal-Conservative Party. During the 1880s, he accepted vast sums of money in exchange for using his influence as a Quebec Harbour Commissioner, as well as other corrupt schemes, which netted him almost $250,000.

The Committee took an approach similar to an inquisitorial process. Its report contained reference to more than 400 exhibits and some 1200 of pages testimony from 80 sworn witnesses. The focus was almost exclusively on documenting the criminal case. The Committee made little effort to deal with the administrative issues arising from the episode, such as ministerial accountability and improvements to policy that would prevent the recurrence of such a scandal.[13]

For the most part, McGreevy cooperated with the Committee, appearing voluntarily and agreeing to testify under oath. However, he steadfastly refused to cooperate in one respect. On August 12, 1891 the Committee asked him repeatedly to identify the person to whom he had paid $20,000. In particular, the Committee members wanted him to answer the allegation that he had, directly or indirectly, paid some of this money to the Minister of Public Works. Despite the Committee's insistance, McGreevy refused to answer.

On August 13, 1891 the Committee reported to the House, which in turn ordered McGreevy to attend in his place. When he failed to appear, the Speaker issued a warrant for McGreevy's arrest, and ordered the Sergeant-at-Arms to take him into custody. The Sergeant-at-Arms subsequently reported that he was unable to locate McGreevy, and the House expelled him on September 29, 1891.

The *McGreevy case* was among the first examples of a committee examining allegations of serious wrongdoing in government contracts. Whatever other value it might have, the case serves as an example of the limitations of the contempt power as a means of securing witness cooperation, even under oath. The House used its powers to their full extent, first ordering the committal of the witness, and ultimately expelling him as a member. Nonetheless, the Committee never obtained answers to all of its questions.

The House of Commons was clearly frustrated with the limitations of its contempt power. Their frustration was aggravated by the behaviour of McGreevy, and by their belief that several witnesses before the Committee had perjured themselves.[14] On April 12, 1892 the House subsequently adopted a resolution authorizing the use of its committee transcripts, exhibits and other documents as evidence in the prosecution of a range of offences including conspiracy, misappropriation of funds and perjury.

The House was fully aware that this resolution was a direct violation of its privileges. This understanding is revealed by the text of the resolution because it includes an explicit disclaimer against its use as a precedent. The resolution reads in part:

> … this House, while waiving its privileges in these particular cases … does not in any sense give up its well established and undoubted rights …

The decision to make committee documents available to assist in prosecutions probably had little or no practical effect; it was largely an empty gesture. The bulk of the material was subject to ordinary court orders for the production of documents.[15] Those who testified before the committee (other than the accused) could easily be called to give evidence in court. The only criminal charges that would have relied on parliamentary documents for evidence were those for perjury, for which committee transcripts were already admissible under the *Oaths Act*.

The *R. C. Miller Case*

In the spring of 1912, the House of Commons Public Accounts Committee inquired into whether there had been any bribes for government contracts involving the Diamond Light and Heating Company. They summoned its former president, R. C. Miller, to appear as a witness. He ignored the summons.

A year later, in early February 1913, he finally appeared with counsel, was sworn in, but refused to answer any questions because his answers might prejudice ongoing litigation. The Committee reported this failure to cooperate, and the House ordered Miller to appear at the bar. On February 18, 1913 he appeared with counsel, was sworn, but again refused to answer questions.

The House then ordered Miller's committal until such time as he agreed to answer questions, or until the House ordered his release. He was taken to the Carleton County jail. There is no entry in the *Journals* of any order for his release, and he did not reappear at any time to answer questions. It is assumed that he remained in jail until the House was prorogued on June 6, about three and a half months later.

Faced with an obstinate and determined witness, the House was once again unable to secure his cooperation using the traditional contempt powers. If he or his lawyer knew of the *McGreevy case*, he may have feared that Parliament would turn over his testimony before the committee for use as evidence in his civil trial. If this were so, Parliament's decision to violate its own privileges in the *McGreevy case* resulted in the impairment of its capacity to persuade future witnesses to cooperate.

The possibility of such a perverse result was at the heart of a recent court judgment involving the Commission of Inquiry into the Sponsorship Program and Advertising Activities. The Commission had refused to allow cross-examination of witnesses before it based on statements they had previously made in the Public Accounts Committee of the House of Commons. In reasons for rejecting an application for judicial review, Tremblay-Lamer J. wrote in part:

> … it is important to Canadian democracy that a witness be able to speak openly before a Parliamentary committee. This objective will be accomplished if the witness does not fear, while he is testifying before this committee, that his words may subsequently be used to discredit him in another proceeding … Uncertainty as to the scope of the privilege that is granted to him may accentuate a witness's feeling of vulnerability and prevent him from speaking openly, which would obviously reduce the effectiveness of hearings before Parliamentary committees.[16]

Mme Justice Tremblay-Lamer identified the danger of varying the protection afforded by parliamentary privilege, after the fact, to witnesses. Once they become aware of this possibility, witnesses, being apprehensive of the scope of this privilege, would be less inclined to provide truthful and complete answers. With the credibility of

the parliamentary process in doubt, its effectiveness would be seriously jeopardized. By analogy, the *Canada Evidence Act*, first adopted in 1893, prohibits the use, under certain conditions, of incriminating testimony that was given under compulsion from being used or admissible in any subsequent legal proceeding, either criminal or civil.[17] The underlying principle of natural justice behind this Act may also explain why authorities such as Maingot and the UK Joint Committee on Parliamentary Privilege reject the idea of *ex post facto* waiver.[18] Both maintain that any regime to allow a waiver of privilege can only be accomplished before the fact by the enactment of an explicit statute which suggest that a waiver of a parliamentary privilege, a part of the law, could not be subsequently done by a resolution. Their assertion is supported by precedents like the *Oaths Act*. Prosecution for perjury for statements made by a witness must, by definition, rely on the evidence provided to Parliament or one of its committees and necessarily involves the impeachment or questioning of a debate or proceeding in a court or place outside of Parliament.

Divorce Committees

In its first 15 years, Parliament considered 18 applications for divorce. At that time, a request for divorce was managed through legislation and treated like any other private bill. Once the preliminary stages had been completed, including publication of notice and a statement of proof of service made at the bar of the Senate, the petition was referred to a special committee. The subsequent report was extensively debated in the Senate.

It was soon recognized that this time-consuming procedure was impractical. In 1888 a simplified process was put in place, together with a Senate standing committee on divorce.[19] The House of Commons also had a divorce committee, but its review almost always followed that of the Senate. The Senate committee operated for over eighty years; it was dissolved in 1969 after the *Divorce Act* established uniform judicial divorces across the country, including Quebec and Newfoundland, the last jurisdictions to rely upon parliamentary divorces.[20]

Witnesses appearing before the Senate divorce committee were always sworn in. Their examination on oath was a critical feature in determining whether the petition was well founded and whether the divorce should be granted. In remarks made in the Senate in 1962, the long-time Chair of the Divorce Committee, Senator Arthur Roebuck, took note of the importance of the oath by stating that the Committee had had some difficulty with perjured evidence, and that there were currently three people convicted and imprisoned, with more cases pending.[21] Each suspected case of perjury had been reported to the provincial Attorney General.[22]

The divorce process was a genuine strain on the members of the committee and by the 1960s they were dealing with hundreds of petitions each session. By leaving the allegations of perjury in the hands of the Ontario prosecutor who is the chief law enforcement officer for any crimes committed within that jurisdiction, the Committee members were better able to focus on the petitions before them, and not be further encumbered with the onus of punishing those witnesses who were deemed to be lying to the Committee. Furthermore, the Crown was able to press for greater punishments than could be imposed under contempt.[23] This was viewed as desirable since the perjury had led to the passing of an ill-founded *Act of Parliament*. When the accused were brought before the magistrate, all pled guilty, with one receiving five years imprisonment, a term far beyond any allowed through contempt. This criminal process would not have precluded the Senate from pursuing the witnesses for contempt as well, though this does not appear to have happened.

Current Environment

The contempt power has remained largely static since Confederation. The last substantial change to the power to swear witnesses occurred 113 years ago, in 1894 when the *Oath Act* was amended to allow committees of either House to administer oaths and to allow affirmations in plae of oaths. Since then, the context in which the privilege and related powers are used has changed dramatically. The privileges and in particular the coercive powers have been infrequently used. Their adaptation to a modern context is hindered by a lack of practical understanding and real-world application. Parliament's access to information may be compromised if these powers, particularly the coercive ones, are not optimized for the current context.

Parliament now operates in a public domain that is radically different from a century ago. Parliamentary proceedings are disseminated broadly and instantly through every electronic means. Mass media, 24-hour news, and widespread internet access subject the use of powers to broader and more critical scrutiny than was possible a century ago. Suspicion about the possible commission of perjury may now come from sources outside Parliament.

Government has grown exponentially in the last 60 years. In the early years of Confederation, there were fewer than a dozen cabinet ministers, and the role of government was limited. Today, cabinet typically has up to 40 members. Parliament superintends nearly 100 depart-

ments, boards, agencies, commissions, "special operating agencies" and Crown corporations.

There is an ever-increasing need for ready access to reliable information to facilitate the difficult task of scrutinizing an organization as complex as the Government of Canada. In turn, there is an ever-increasing imperative to ensure complete, truthful and accurate testimony from cooperative witnesses.

The coercive powers of Parliament were developed long before human rights were constitutionally entrenched in the *Charter*. The Supreme Court decision in *Vaid* demonstrates that old assumptions about the powers and privileges of Parliament cannot be taken for granted.[24] The lesson drawn, (in the context of this paper), is that coercive powers need to be reviewed and immunized against potential challenge. In particular, the power to imprison, when exercised for punitive purposes, is vulnerable to challenge under the *Charter*.

The entrenchment of rights has also led to a change in attitudes towards public institutions. In an era of constitutionally enforceable rights, people seem to be less deferential and there have been a number of recent court cases challenging some parliamentary privileges and practices.[25] In such an era, the incidence of reluctant or uncooperative witnesses may increase as a result, making the powers of committees all the more important.

As government departments and programs have multiplied, so have the number of parliamentary committees scrutinizing them. To deal with this workload, Parliament has been forced to rationalize its role and internal procedures. It has streamlined the work of the respective Chambers by establishing time limits on debate, by simplifying the supply process and by adopting rules for time allocation. Each Chamber has delegated much of its work to standing committees and to important parliamentary officers such as the Auditor General.

There were a mere handful of witnesses per session in the years following Confederation. Now, thousands of witnesses appear and written submissions are received every session. As a result, the hours spent in committee have increased dramatically as has the number of reports produced. It should be noted that this work comprises the vast majority of a committee's time. The need for examining witnesses under oath has become minimal, given that most witnesses appear voluntarily before committees to provide their opinions and advice on policies and bills. Oaths are now almost exclusively used for fact based investigations that seek to determine the truth or establish a sequence of events.

Parliament has done a lot to accommodate the expansion of its responsibilities, yet it has done very little to review – much less update – its coercive powers.

Options

After more than a century of evolving context, it might be time to review the tools at Parliament's disposal for ensuring access to information. The best time to conduct such a review would be before those powers are put to the test. The quality of information and the effectiveness of the tools that make it available are the measure of a robust democratic government and a healthy public policy process.

The first option to consider would be a stronger *status quo*. A cursory examination could conclude that contempt powers and the right to swear in witnesses are adequate. Developments in the political and communications context may not indicate a need to make any significant changes. Even so, there may be room to improve understanding and to make the application of these powers more consistent and more effective through the development of procedural tests for chairs to determine under what circumstances it would be appropriate to hear witnesses under oath. Moreover, the materials that have been developed for the information of witnesses provide considerable detail on how to make an effective presentation to a committee. They also give an explanation of the protection that privilege affords witnesses. However, the materials are not really comprehensive and contain no explicit information whatsoever about the potential consequences to witnesses who fail to cooperate or who deliberately mislead a committee, whether under oath or not.

Coercive powers are well established, and they have been exercised successfully in the past. This "inertia" is the main advantage of maintaining the *status quo*. Nonetheless, a review would present an opportunity to draw on best practices, to strengthen these powers in the *Charter* era, and to be realistic about the powers that can actually be exercised in a given context. The risk of successful legal or political challenges to the use of these powers might be reduced if a review leads to a principled and coherent procedure for using them in the interest of public policy and democratic accountability.

The disadvantage of maintaining the *status quo* is that it eschews the chance to innovate in this area. It would mean missing an opportunity to develop tools that more effectively guarantee information for the parliamentary process. In addition, there is the significant risk of legal challenges, especially to aspects of these powers that conflict squarely with *Charter* protections.

Another possible outcome of a review would be a decision to simply abandon powers that have largely gone unused, and whose utility is in doubt by an examination of past experience. In a recent Congressional Research

Service report, the inherent contempt powers of the United States Congress were characterized as "unseemly, cumbersome, time-consuming and relatively ineffective".[26] A similar assessment might be made in Canada.

The advantage of doing away with the power generally to imprison, as the UK Report on Privilege recommended, is the abolition of a feature of privilege that many regard as anachronistic and even detrimental to the dignity of Parliament. It would also avoid the clear potential for a conflict with *Charter* rights.

The risk of taking this approach is that Parliament might discover a need for these powers after they have been abolished. In the midst of a conflict with a problematic witness, it would not be possible to re-establish a power that has been eliminated by statute. Such a repeal would also be a simplistic approach that does not consider the complexity of the issues that gave rise to the contempt power.

Finally, there is the option to undertake a review to consider possibilities for updating the existing powers or even developing new means to address the requirement for quality information in the parliamentary process. Such possibilities are wide-ranging, and the experience of other jurisdictions points to innovations that could be adapted to Canadian needs. The means of implementation can range from a change in practices, the adoption of new rules or standing orders, or to the enactment of a statute in certain cases.

For example the Australia *Parliamentary Privileges Act* 1987 has established the power to fine for contempt, as a middle ground between admonishment and imprisonment. The UK Joint Committee has recommended that its Parliament follow suit, but such fines would be imposed by the House in the case of members, and by the courts in the case of non-members.

The United States Congress has built upon the 19th century British model of criminalized false testimony through the inherent contempt power. They have gone further by externalizing the means of dealing with uncooperative witnesses more generally, and subjected uncooperative behaviour to criminal sanction. Moreover, in respect of contempt power, the United States Senate has established a "third way": the legal device of civil contempt has been added to its arsenal of inherent and criminal contempts. Civil contempt, granting to a court the jurisdiction to deal with any action based on a contempt suit brought by the Senate Legal Counsel, has significantly reduced the burden associated with exercising contempt powers, and helped find a middle ground between the almost meaningless punishment of admonishment and the extreme alternative of imprisonment.

Canada has used the American model of criminalizing non-cooperation when it has established certain boards, agencies and commissions under the *Inquiries Act*. Yet they have never considered using this approach to augment the investigative powers of parliamentary committees. Harnessing the criminal process, which has been *Charter*-proofed, has the distinct advantage of minimizing legal uncertainties.

In recent years, the House of Commons has twice considered the possibility of waiving its privileges in connection with the testimony of some witnesses.[27] As mentioned above, several authorities question the legal implications of using a resolution to this end. If waivers are to become a weapon in Parliament's arsenal, the review would help identify and implement a legally sound basis for them, a set of criteria for determining when to use them, and an appropriate procedure for exercising them.

Innovation in the field of parliamentary privileges and powers is not free from risk. Exchanging ancient and well-established powers for new procedures also carries with it the possibility of other legal challenges. However, a comprehensive review that takes into account the modern political, legal, constitutional and social context would help to craft innovative approaches that anticipate and mitigate such risks.

Conclusion

The contempt power and the use of oaths are still useful tools that can be used to maintain the capacity of committees to have access to witnesses and information that parliamentarians need to do their job properly. Today, more than ever, access to reliable information is essential if Parliament is to be effective in its lawmaking and accountability functions. At the same time, there is an equal need to recognize the evolving legal and social climate in which Parliament operates. The *Charter* has profoundly changed attitudes towards personal rights. All the more reason, then, to seriously reconsider the manner in which Parliament uses its coercive powers.

The traditional forms of admonition and reprimand may not be the most effective means of persuading reluctant or stubborn witnesses to co-operate. The cases of *Thomas McGreevy* and *R. C. Miller*, despite the fact that they occurred many years ago, remain useful reminders that Parliament's coercive powers are limited. And now, imprisonment, the most extreme coercive power, is a problematic option, both politically and legally. It is open to question whether any prison sentence imposed by the House of Commons or the Senate could survive a court challenge absent guarantees of procedural fairness. Equally important, any inconsistent application of privi-

leges through a waiver, as occurred in the *McGreevy case*, can also serve to undermine the ability of Parliament to obtain the necessary information or evidence needed to properly form its decisions.

While the use of oaths is allowed in committees of both Houses, punishment for perjury has been rare; all identified cases have related to petitions for divorce, before that process was relegated to the courts in 1969. Nonetheless, experience suggests that the use of the oath power has generally been sufficient in itself to impress upon witnesses the importance of giving truthful answers. This experience may be a useful consideration to the review of Parliament's coercive powers. The strength of its power lies in the fact that all negative consequences for an untruthful witness accused of perjury are achieved through the criminal justice system, which over the years has developed systems and procedures that accord with legal and constitutional norms.

If there is to be a review of Parliament's coercive powers, it appears that there are really three basic options: retain the current powers; abolish all or some of them; or update and develop new ones. In the end, the result could lead to a preference for one of these options or, just as likely, some combination of the three. Whatever the final choice, a review should ensure that Parliament will be ready to deal with future obstacles to obtaining the information that is essential to its proper functioning.

Notes

1. *Stockdale v. Hansard*, (1839), 112 E.R. 1112, p.1117.
2. Joint Committee on Parliamentary Privilege, Parliament of the United Kingdom, *Report and Proceedings*, 318, p.82.
3. See J.P. Joseph Maingot, *Parliamentary Privilege in Canada* 2nd ed., House of Commons and McGill Queen's University Press, 1977 pp. 144-145 and p. 192 n. 71.
4. *Defamation Act* 1996 (UK), s.13.
5. *Pepper v. Hart,* [1993] A.C. 593 and Prebble v. Television New Zealand, [1995] 1 A.C. 321 (P.C.).
6. See UK House of Commons *Journals*: December 8, 1857, p.10, Attorney General is directed to prosecute Edward Auchmuty Glover for presenting false evidence in the Beverley election hearing. January 24, 1860 p.38, Attorney General is directed to prosecute William McGall for giving perjured evidence to the Committee of Elections investigating the Berwick-Upon-Tweed election. April 23, 1866, p. 239, Henry Chambers presented perjured evidence in the Maidstone Election investigation, and the Attorney General was directed to prosecute.
7. *Erskine May* testimony, question 89.
8. United Kingdom House of Commons Constitutional Affairs Committee, "Constitutional Role of the Attorney General", 5th *Report of Session 2006-07*.
9. The Whiteaves divorce case was the impetus for allowing select committees to examine witnesses under oath.
10. Nova Scotia and New Brunswick had existing divorce courts prior to Confederation, which continued unchanged after 1867. As the Province of Canada had no equivalent court, divorce petitions from Ontario and Quebec were referred to the Senate. For further discussion on the need to examine witnesses under oath, see Senate *Debates*, March 31, 1868; April 30, 1868 and May 4, 1868.
11. See Senate *Debates*, April 30, 1868 pp.232-234 and House of Commons *Journals*, May 4, 1868, p.275.
12. See House of Commons *Debates*, April 18, 1873.
13. See the: Reports of the Select Standing Committee on Privileges and Elections relative to Certain Statements and Charges Made in Connection with the Tenders and Contracts Respecting the Quebec Harbour Works and the Esquimalt Graving Dock, bound in volume as *Tarte vs. McGreevy, 1891*, Library of Parliament. See Report 7 in that volume for the detailed charges against McGreevy.
14. See House of Commons *Journals*, September 24, 1891, p.529.
15. See *The Queen v. Connolly and McGreevy*, 1 C.C.C. 468, [1894] O.J. No. 119, 25 O.R. 151, esp. pp.473-475.
16. *Gagliano v. Canada (Attorney General)* (F.C.) [2005] 3 F.C. 555, paras. 77 and 78.
17. *Canada Evidence Act,* s.5(2).
18. See J.P. Joseph Maingot tesstimony to the Subcommittee on Parliamentary Privilege of the Standing Committee on Procedure and House Affairs, Nov. 16, 2004, p.39.
19. *Ibid*.
20. Thomas J. Abernathy, Jr. and Margaret E. Arcus, "The Law and Divorce in Canada", *The Family Coordinator*, Vol. 26, No. 4, October 1977, pp.409-413.
21. *Journals* of the Senate, December 11, 1962, pp.410-11.
22. *Journals* of the Senate, June 1, 1954, p.519.
23. The men could only have been held in prison for contempt until the end of session, on Feb. 6, 1963, a term of less than 3 months. The maximum penalty for perjury is up to fourteen years imprisonment, whereas for a contempt of Parliament, one can only be imprisoned until the end of that session.
24. *Canada (House of Commons) v. Vaid*, [2005] S.C.R. 667, 2005 SCC 30.
25. Notably in *Knopf v. Canada* (House of Commons), 2006 FC 808, 3430901 *Canada Inc. v. Canada (Minister of Industry)*, (1999), 177 F.T.R. 161 and *Ainsworth Lumber Co. v. Canada (Attorney General) and Paul Martin*, (2003), 15 B.C.L.R. (4th) 255.
26. Congressional Research Service, *Report for Congress*, "Congress's Contempt Power: Law, History, Practice and Procedure", July 2007, p.15.
27. See especially the 14th Report of the Standing Committee on Procedure and House Affairs, 2004 and the *Report of the Standing Committee on Public Accounts* of June, 2007.