Written evidence from the House of Commons of Canada

Answer for the House of Commons of Canada:

1. **What powers do investigative committees in your Parliament have to summon witnesses and call for the production of documents? Are these powers set out in legislation or in standing orders?**

The Standing Orders of the Canadian House of Commons state that standing committees have the power to send for persons and to order the production of papers and records (Standing Order 108(1)(a)). These powers, rooted in the Constitution and delegated to standing committees by the House, are part of the privileges, rights and immunities attributed to the House of Commons when it was created. They were considered essential to its functions as a legislative body, so that it could investigate, debate and legislate.

The Standing Orders place no explicit limitation on the power to send for persons. In theory, it applies to any person on Canadian soil. In the unusual case of a person in prison, a committee has presented a report to the House recommending that the Speaker issue a warrant ordering the persons and institutions responsible for the inmate's detention to bring him before the committee at a set date and time.[1] Once the report had been adopted by the House, the Speaker issued the warrant. In practice, certain limitations are recognized on the power to order individuals to appear. Because these powers do not extend outside Canadian territory, a committee cannot summon a person who is in another country. The Sovereign (either in Canada or abroad), the Governor General and the provincial lieutenant governors are also exempt from such a summons.

This exemption applies as well to parliamentarians belonging to other Canadian legislatures, because each of these assemblies, like the House of Commons, has the parliamentary privilege of controlling the attendance of its members and any matters affecting them. The same logic explains why a standing committee cannot order a Member or a Senator to appear. At issue in all these examples is the power to order someone to appear; nothing prevents such individuals from appearing voluntarily before a committee following an invitation, apart from the obligation incumbent upon some of them to obtain leave from the House to which they belong.

[1] First Report of the Standing Committee on Access to Information, Privacy and Ethics, presented to the House and concurred in on November 27, 2007 (*Journals*, p. 219). In this instance, the committee recommended that the Speaker issue any necessary warrants for the appearance of businessman Karlheinz Schreiber, who was at that time in the custody of Ontario's Correctional Services at the Toronto West Detention Centre. The day before his appearance, he was transferred to the Ottawa-Carleton Detention Centre. He appeared before the committee on November 29, 2007 (*Minutes of Proceedings*, Meeting No. 5). Mr. Schreiber appeared before the committee again on December 4 (*Minutes of Proceedings*, Meeting No. 6). While at this meeting, he heard that he had been granted bail. Subsequently, he appeared before the committee on a number of occasions. The warrant issued by the Speaker for his initial appearance on November 29 called on the authorities to ensure that the witness would be available to appear before the committee until such time as his presence was no longer required. It provided for Mr. Schreiber's readmission to the detention centre immediately after his appearance.

The Standing Orders do not delimit the power to order the production of papers and records. The result is a broad, absolute power that on the surface appears to be without restriction. There is no limit on the types of papers that may be requested; the only prerequisite is that the papers exist in hard copy or electronic format, and that they be located in Canada. They can be papers originating from or in the possession of governments, or papers emanating from the private sector or civil society (individuals, associations, organizations, et cetera).

In practice, standing committees may encounter situations where the authors of or responsible officials refuse to provide papers or are willing to provide them only after certain portions have been removed. Public servants and Ministers may sometimes invoke their obligations under certain legislation[2] to justify their position. Companies may be reluctant to release papers that could jeopardize their industrial security or infringe their legal obligations, particularly with regard to the protection of personal information. Others have cited solicitor-client privilege in refusing to allow access to legal papers or notices. These situations have no bearing on the power of committees to order the production of papers and records.[3] No statute or practice diminishes the fullness of that power rooted in House privileges unless there is an explicit legal provision to that effect, or unless the House adopts a specific resolution limiting the power. The House has never set a limit on its power to order the production of papers and records. However, it may not be appropriate to insist on the production of papers and records in all cases.[4]

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[2] For example, federally, the *Access to Information Act*, RSC 1985, c A-1, ss 13–26, and the *Privacy Act*, RSC 1985, c P-21, ss 18–28, both contain provisions exempting certain types of records which the government can or must refuse to disclose. In the access to information system, records obtained in confidence from other governments; records which could be injurious to the defence of Canada or any state allied with Canada; records pertaining to industrial secrets; financial, trade and technical information belonging to the government; and confidential Cabinet and Privy Council documents are all examples of records the disclosure of which to requestors may or must be denied. In 1973, the government communicated to the House of Commons its vision of the general principles applicable to papers likely to be tabled in the House in response to notices of motions for the production of papers (*Journals of the House of Commons*, March 15, 1973, p. 187). They were not formally approved by the House, but those principles have been observed ever since.

[3] In his ruling of April 27, 2010 (*Debates of the House of Commons*, pp. 2039–45), Speaker Milliken reaffirmed the authority of the House to order the production of papers, and to determine whether any reasons for withholding documents are sufficient. Having concluded that the government's failure to produce documents constituted a prima facie question of privilege, the Speaker urged the House to find a mechanism that would allow the documents to be produced "without compromising the security and confidentiality of the information they contain". In response, on May 14, 2010, the Minister of Justice and Attorney General of Canada informed the House that an agreement had been reached to create an ad hoc committee whose members would have unfettered access to the documents in a secure location (*Debates*, May 14, 2010, pp. 2847–8).

[4] In 1991, the Standing Committee on Privileges and Elections pointed out: "The House of Commons recognizes that it should not require the production of documents in all cases; considerations of public policy, including national security, foreign relations, and so forth, enter into the decision as to when it is appropriate to order the production of such documents" (*Journals*, May 29, 1991, p. 95). The House of Commons took note of the committee's report and referred it to the Standing Committee on House Management for further study (*Journals*, June 18, 1991, pp. 216–7). In 2009, the government cited national security concerns when it failed to comply with an order of the House to table documents related to the treatment of Afghan detainees. In his ruling on the matter, Speaker Milliken noted that

2. **Are there any recent examples from your Parliament of contempts relating to investigative committees, including non-compliance of witnesses summoned to appear before a Committee?**

In most cases, individuals summoned by committees at the House of Commons have appeared as ordered. In some instances, however, committees were met with a failure to appear, requiring further action. In one case, a committee even took pre-emptive action when agreeing to summon an individual, deciding on further action should the individual refuse to appear as ordered. Below are a few examples of how committees of the House have proceeded when met with difficulties in having individuals appear.

The Standing Committee on Public Accounts, at Meeting 39 on December 9, 2010, invited Christiane Ouimet, the former Public Sector Integrity Commissioner of Canada, to appear before it. After several failed attempts by the clerk of the committee to contact her, the committee, at Meeting 40, ordered the Chair to write to Ms. Ouimet to invite her to appear at a subsequent meeting scheduled for February 1, 2011. Following her failure to appear at Meeting 41, the committee proceeded to summon Ms. Ouimet to its meeting on February 8, 2011. The bailiff reported that he had been unable to serve the summons and Ms. Ouimet did not show up. The committee then met with the House of Commons Law Clerk and Parliamentary Counsel to seek guidance on how to proceed. Ms. Ouimet eventually appeared at Meeting 50, on March 10, 2011. On March 24, 2011, the committee agreed to invite Ms. Ouimet to appear again at its next meeting, though Parliament was dissolved before the meeting could be held.

In June 2010, the Standing Committee on Access to Information, Privacy and Ethics summoned two individuals to appear after they had declined the committee's invitation. During Meeting 19, the Chair noted that the bailiff had been unable to serve the summonses and the committee agreed to the following motion: "That, given the many unsuccessful attempts to serve summonses to appear on Dimitri Soudas and Jillian Andrews, and given the public nature of these summonses, the committee consider the summonses duly served and require Dimitri Soudas and Jillian Andrews to appear before the committee no later than Wednesday, June 16, 2010." Following the failure of the witnesses to appear, the committee then invited the House of Commons Law Clerk and Parliamentary Counsel to a subsequent meeting in order "to explain the consequences of the witnesses' failure to appear before the Committee." In his closing remarks during Meeting 21, the Law Clerk and Parliamentary Counsel stated, "I wish to say to you that the issues before this committee are not ones that are answered in any determinative way by a law clerk. They are matters that are really for the members of the committee, in their political debate, and members of the House, in their political debate, to resolve between them. It's not something that can be resolved by legal answers. But the principles are there to consider." The individuals never did appear before the committee. Although a motion was moved to report the matter to the House, the committee did not adopt it.

In another instance in August 2008, following the refusal of a witness to appear after having been invited, the Standing Committee on Public Safety and National Security agreed during Meeting 40 to summon the individual to appear on a specific date. In the motion to summon the individual, the committee also decided that if the witness did not appear at the meeting in question, it would then report the matter to the House. The motion stated "… Ms. Julie Couillard having been invited to appear before the Standing Committee on Public Safety and National Security on Wednesday, June 18, 2008

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the discretion to decide whether it is appropriate to order certain documents rests with the House, stating that "the reasons given by the government were not found to be sufficient. The House debated the matter and voted to adopt an order for the production of documents despite the request of the government" (*Debates*, April 27, 2010, p. 2044).

and having refused to appear, this Committee send for her and her relevant papers and records by summons and that the summons be for a date and time to be determined by this Committee; And that, in the event Ms. Julie Couillard declines to appear, the Chair on behalf of the Committee report to the House seeking an order to compel her to attend." Parliament was dissolved before the meeting was held. The matter was not pursued.

3. What sanctions are available to your Parliament in cases of non-compliance or other contempts on the part of witnesses?

Although they can send for persons, standing committees do not have the power to punish a failure to comply with their orders in this regard. Only the House of Commons has the disciplinary powers needed to deal with this offence.[5] If a witness refuses to appear or does not appear as ordered, the committee's recourse is to report the matter to the House. Once seized with the matter, the House takes the measures that it considers appropriate.[6]

Among the options available to the House is to endorse the committee's order to produce records by concurring in its report, thus making it a House order to produce the requested records. In the past, the House has sometimes found persons failing to comply with an order to produce records guilty of contempt of Parliament. On occasion, it has even exercised its disciplinary powers.[7]

4. What rules and guidelines do you have to ensure witnesses and potential witnesses before select committees are treated with fairness and due respect?

The House of Commons does not set out comprehensive guidance for fair treatment of witnesses in its Standing Orders. Witnesses must answer all questions put to them by individual committee members. A witness may object to a question asked, but if the committee agrees that the question be put to the witness, the witness is obliged to reply. On the other hand, members have been urged to

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[5] The disciplinary powers of the House include the power to reprimand a person who is not a Member. They also include the power to suspend or expel Members from the House. For a critical discussion of these powers, see Charles Robert and Blair Armitage, "Perjury, Contempt and Privilege: The Coercive Powers of Parliamentary Committees," *Canadian Parliamentary Review* 30, no. 4 (Winter 2007): p. 29.

[6] The mere finding of contempt is often considered sufficient in itself as punishment, as a finding of contempt is an extraordinary one. Nevertheless, there are other sanctions available to punish a contempt found to have been committed by individuals who are not Members of the House:

- Summoning the individual to be admonished at the Bar and to answer for his or her conduct;
- Ordering the individual to attend before a committee to justify his or her conduct; or
- Ordering the individual to be taken into custody of the Sergeant-at-Arms by directing the Speaker to issue a Speaker's warrant.

The exercise of these powers has been a rare occurrence in the Canadian House of Commons. The last time the House ordered a person other than a Member to attend at the Bar and the Speaker issued a warrant to the Sergeant-at-Arms to imprison someone was in 1913.

[7] In 2003, three private companies were found guilty of contempt of Parliament for failing to comply with an order to produce papers from the Standing Committee on Agriculture and Agri-Food (Third Report of the Standing Committee on Agriculture and Agri-Food, presented to the House and concurred in on May 6, 2004 (*Journals*, p. 388)).

display the "appropriate courtesy and fairness" when questioning witnesses.[8] For example, a committee could agree to hear from a witness *in camera*, if they were hesitant to appear in public for a specific reason.

Particular attention is paid to the questioning of public servants. The obligation to answer all questions put by the committee must be balanced against the role that public servants play in providing confidential advice to Ministers. The role of the public servant has traditionally been viewed in relation to the implementation and administration of government policy, rather than the determination of what that policy should be. Consequently, public servants have been excused from commenting on the policy decisions made by the government.

5. What is your assessment of the effectiveness of your Parliament's powers and sanctions to deal with contempts?

In most cases, contempt reports have been related to the refusal of witnesses to appear when summoned; the refusal of witnesses to answer questions; the refusal to provide papers or records; the refusal of individuals to obey orders of a committee; the divulging of events which took place during an *in camera* meeting; the disclosure of draft reports; and witnesses deliberately misleading a committee. Although House is afforded a wide range of penalties for dealing with misconduct, the power to punish for contempt should be used judiciously. The more notable examples of instances of contempt for giving misleading testimony follow:

1) Standing Committee on Foreign Affairs and International Development
Bev Oda, Minister of International Cooperation

On December 9, 2010, the Hon. Bev Oda, Minister of International Cooperation, appeared before the Standing Committee on Foreign Affairs and International Development. During that meeting, the Minister and senior officials were questioned about the government's decision to reject a funding proposal for the Canadian Ecumenical Justice Initiative (KAIROS).

On February 17, 2011, the Sixth Report of the committee was presented to the House. It stated: "In light of other information before the House, your Committee wishes to draw attention to what appears to be a possible breach of privilege and recommends that the House consider all relevant documents and ministerial and other statements and take such measures as deemed necessary." Appended to the report was a dissenting opinion from Members of the Conservative Party of Canada indicating that they did not agree with the report's conclusions. The same day, John McKay rose on a question of privilege concerning the allegations contained in the Report. On March 9, 2011, the Speaker ruled that there was a prima facie question of privilege and invited Mr. McKay to move a motion to refer the matter to the Standing Committee on Procedure and House Affairs. After debate, the motion was agreed to.

The Standing Committee on Procedure and House Affairs held four meetings related to the order of reference for the question of privilege between March 18 and 25, 2011, but did not produce a report before the dissolution of the 40th Parliament.

2) Standing Committee on Government Operations and Estimates
Rahim Jaffer

[8] *Debates*, December 11, 1986, p. 1999.

On April 21, 2010, Rahim Jaffer appeared as a witness during the committee's study of renewable energy products funded by the government. The committee noted what it believed to be inconsistencies between Mr. Jaffer's testimony and that of other witnesses. The committee subsequently invited Mr. Jaffer to appear a second time in order to clarify his testimony. Following his second appearance, the committee presented its Fourth Report to the House on June 17, 2010, drawing the attention of the House to a possible contempt as it believed Mr. Jaffer had misled the committee.

Although the report was presented to the House, the matter was not immediately pursued. The committee subsequently presented its Eighth Report to the House on March 11, 2011, providing additional information to the House about the situation. The report summarized the four main inconsistencies noted in Mr. Jaffer's testimony. The matter was not raised in the House prior to dissolution of the 40th Parliament and no further action was taken.

3) **Standing Committee on Public Accounts**
Barbara George

In 2008, Deputy RCMP Commissioner Barbara George was found in contempt of the House for providing misleading testimony during the Standing Committee on Public Accounts hearings into allegations of mishandling of the RCMP's pension and insurance plans.

On February 21, 2007, the Standing Committee on Public Accounts began a study into the Auditor General's November 2006 Report, Chapter 9 – Pension and Insurance Administration, Royal Canadian Mounted Police. During this hearing RCMP Deputy Commissioner Barbara George was asked several questions about the removal of an RCMP officer from the Ottawa Police Service investigation called Project Probity, which was an investigation into allegations of fraud and abuse in the administration of the RCMP's pension and insurance plans. The Deputy Commissioner denied any involvement and stated that she did not know who ordered the removal of the officer in question. Questions arose as to the truthfulness of her testimony and she was invited back to appear before the committee on three further occasions: April 18, April 30 and December 11, 2007.

On February 12, 2008, the Third Report of the committee was presented to the House. The Report dealt with the testimony of Barbara George and included the recommendation that Ms. George be found in contempt of Parliament "for providing false and misleading testimony" to the committee.

On April 10, 2008, Shawn Murphy rose on a question of privilege based on the Third Report. The Speaker found that a prima facie question of privilege existed and allowed Mr. Murphy to move his motion. The motion did not refer the matter to the Standing Committee on Procedure and House Affairs for further study, but instead recommended "that the House of Commons find Barbara George in contempt of Parliament" and "that the House of Commons take no further action as this finding of contempt is, in and of itself, a very serious sanction" (*Journals*, April 10, 2008, p. 685; *Debates*, p. 4721). The motion was adopted without debate.[9] It is worth noting, however, that there were legal

[9] Although the House did not impose any additional sanction, there were attempts by the RCMP to discipline Ms. George for misleading the committee; however, the RCMP was not able to rely on the proceedings in the House to do so since the proceedings of the House were protected by parliamentary privilege. These issues were the subject of both proceedings under the *RCMP Act* and a decision of the Federal Court (2007 FC 564).

proceedings initiated by Barbara George and that a Member who had accused her in 2007 of making false statements issued a formal apology to her in 2012.[10]

4) **Standing Committee on Government Operations and Estimate**s
George Radwanski

In 2003, the former Privacy Commissioner, George Radwanski, was found in contempt of the House for providing deliberately misleading testimony during hearings of the Standing Committee on Government Operations and Estimates into the financial management and staffing of the Office of the Privacy Commissioner (*Journals*, November 6, 2003, pp. 1245, 1249; *Debates*, pp. 9229-31, 9237).

In September 2003, the committee established the Subcommittee on Matters related to the Review of the Office of the Privacy Commissioner to study the issue. The subcommittee's report became the Ninth Report of the committee, which was presented to the House on November 4, 2003, recommending that former Privacy Commissioner George Radwanski be found in contempt of the House for providing misleading testimony.

On the same day as the presentation of the report, Derek Lee rose on a question of privilege related to the committee's report. On November 6, 2003, the Speaker ruled that the matters set out in the committee's report were sufficient to support a *prima facie* finding of a breach of privilege and invited the Member who raised the question of privilege to move the appropriate motion.

Mr. Lee was prepared to move a motion to have Mr. Radwanski found in contempt and summoned to the Bar. Before he could move the privilege motion, the Chair of the Standing Committee on Government Operations and Estimates (Reg Alcock) rose and read a letter of apology received that day from Mr. Radwanski and received unanimous consent to table it. As a result, Mr. Lee modified the text of his original motion to remove the reference to the Bar and requested that the House agree to conclude the matter. The modified motion was adopted by unanimous consent.[11]

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[10] https://www.theglobeandmail.com/news/national/former-mountie-wants-her-apology-after-being-found-in-contempt/article4899916/

[11] The motion adopted read as follows: "That this House find George Radwanski to have been in contempt of this House, and acknowledge receipt of his letter of apology, tabled in and read to the House earlier today.", *Journals*, November 6, 2003, pp. 1245-49.