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COMMON LAW SECTION  
UNIVERSITY OF OTTAWA

THE CONTEMPT POWER OF THE CANADIAN  
HOUSE OF COMMONS - THE CASE FOR REFORM

LL.M. Thesis submitted by  
Peter Bernhardt

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1. INTRODUCTION - PARLIAMENT'S PENAL JURISDICTION

The classic definition of parliamentary privilege is found in Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament:

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land is to a certain extent an exemption from the general law.<sup>1</sup>

The immunity provided by the doctrine of parliamentary privilege is regarded as essential to the performance of the legislative function. Thus Joseph Maingot states that:

The legislative body needs this legal protection or immunity to perform its function and to defend and vindicate its authority and dignity. The members of the legislative body enjoy these rights and immunities because the legislature cannot act or perform without the unimpeded use of the services of its members.<sup>2</sup>

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<sup>1</sup> C. J. Boulton, ed., Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament (21st edition), (London: Butterworths, 1989), p. 69.

<sup>2</sup> Joseph Maingot, Parliamentary Privilege in Canada, (Toronto: Butterworths, 1982), p. 13.

It should be noted that in addition to the privileges enjoyed by a legislature in what has come to be known as its corporate capacity, and in addition to those enjoyed by individual members, a third branch of the doctrine gives the same immunity as a member, and affords the protection of the legislature to, every person engaged in a proceeding in that legislature.

Where these rights or immunities are disregarded, an offence termed a "breach of privilege" is committed, and is punishable as a contempt of Parliament. Parliament's authority in this regard can be seen as analogous to that possessed by the courts to punish a person who behaves in a manner evidencing disrespect for judicial authority.

Parliament's penal jurisdiction extends to all contempts committed against it, whether committed by Members or by other persons, and irrespective of whether or not the offence was committed within the walls of the legislature. Moreover, since Parliament reserves the right to punish actions that, although not in breach of any specific privileges constitute an offence

against its dignity and authority, it is frequently stated that situations giving rise to a contempt of Parliament cannot be codified.<sup>3</sup> All that is possible is to state that generally

any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any member or officer of such House in the discharge of his duty, or which has the tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent to the offence.<sup>4</sup>

The traditional formulation of the law concerning the power of Parliament to punish for contempt has become the target of criticism in a number of Commonwealth countries. It has been argued that members are too sensitive to criticism, that the procedure for invoking the penal jurisdiction encourages its use for purposes of publicity, that the scope of Parliament's penal jurisdiction is too wide and that it is contrary to the principles of fundamental justice that Parliament should act as both judge and prosecution in cases involving an allegation of contempt.

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<sup>3</sup> Supra, note 1, p. 115; Ibid, p. 193.

<sup>4</sup> Supra, note 1, p. 115.

In Canada, the inquiry by the House of Commons Standing Committee on Privileges and Elections (now the Standing Committee on Elections, Privileges, Procedure and Private Members' Business) into the "Mackasey Affair" gave rise to a brief flurry of similar criticisms which, although resulting in no public outcry for change, do serve to highlight a number of interesting issues. The discussion that follows explores these issues, particularly in light of suggestions and initiatives for reform originating in other parliamentary jurisdictions and the enactment of the Canadian Charter of Rights and Freedoms.<sup>5</sup>

#### I. Origins of Parliament's Contempt Powers

The rights and immunities of the Senate and the House of Commons of Canada derive from s.18 of the Constitution Act, 1867,<sup>6</sup> which states:

18. The privileges, immunities and powers to be held, enjoyed, and exercised by the Senate and by the House

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<sup>5</sup> Constitution Act, 1982, enacted as Schedule B to the Canada Act, 1982, 30 and 31 Eliz. II, c.11 (U.K.), Part I.

<sup>6</sup> Formerly the British North America Act, 1867, 31 and 32 Vict., c.23 (U.K.), as amended by the Parliament of Canada Act, 1875, 38 and 39 Vict., c.38 (U.K.).

of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof.

Pursuant to this provision, s.4 of the Parliament of Canada Act<sup>7</sup> was passed:

4. The Senate and the House of Commons and the members thereof respectively, hold, enjoy and exercise,

(a) such and the like privileges, immunities and powers as, at the time of the passing of the Constitution Act, 1867, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom, and by the members thereof, so far as the same are consistent with and not repugnant to that Act; and

(b) such privileges, immunities and powers as are from time to time defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of such Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof respectively.

From these two provisions it will be seen that the privileges, powers and immunities of the House of Commons of the

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<sup>7</sup> R.S.C. 1985, c.P-1 (formerly the Senate and House of Commons Act).

United Kingdom in 1867 provide the basis for the privileges, powers and immunities of the Senate and the House of Commons in Canada.<sup>8</sup> Thus, it will be useful to briefly trace the historical development of the penal jurisdiction of the U.K. House of Commons.<sup>9</sup>

The power to commit for contempt has its origins in the medieval concept of Parliament as a court of justice. Unlike the Lords, the Commons, as relative newcomers to Parliament, could not claim the power on grounds of "immemorial antiquity"<sup>10</sup>, and as the Commons came to be recognized as a separate House uncertainty arose as to which privileges it had inherited from the unitary Parliament. As late as the end of the 14th Century the Commons protested that its members were merely petitioners

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<sup>8</sup> The passage of the British North America Act (No. 2), 1949, 13 Geo. VI, c.81 (U.K.) granted the Canadian Parliament the power to amend the Constitution as it sees fit. Such alterations would now have to comply with the amending formula set out in Part V of the Constitution Act, 1982.

<sup>9</sup> This historical development is outlined in Sir Charles Gordon, ed., Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament (20th edition), (London: Butterworths, 1983), pp. 122-133.

<sup>10</sup> Supra, note 1, p. 82.

and did not share in the judgments of Parliament.<sup>11</sup> Nevertheless, by the middle of the 15th century the Commons was exercising the power of commitment, a victory that has been attributed to "the medieval inability to conceive of a constitutional authority otherwise than in some sense a court of justice."<sup>12</sup> The Lords admitted that the Commons had the power of commitment in 1704 in the case of Ashby v. White.<sup>13</sup>

In modern times this power is justified on broader grounds. Erskine May speaks of the "indispensability of the power of commitment to any body responsible to public opinion"<sup>14</sup> which has been demonstrated by experience, and cites the following passage from the judgment of Denman, C.J., in the case of Sheriff of Middlesex:<sup>15</sup>

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<sup>11</sup> United Kingdom. House of Commons. Report from the Select Committee on Parliamentary Privileges, December 1, 1967, H.C. 34 (1967-68), paragraph 27.

<sup>12</sup> Supra, note 9, p. 118.

<sup>13</sup> L.J. (1701-05), 714.

<sup>14</sup> Supra, note 9, pp. 124-125.

<sup>15</sup> 3 St. Tr. (n.s.), 1253.

Representative bodies must necessarily vindicate their authority by means of their own, and those means lie in the process of committal for contempt. This applies not to the Houses of Parliament only, but ... to the courts of justice, which, as well as the Houses, must be liable to continual abstention and insult, if they were not instructed with such powers.

## II. Law and Procedure Relating to Contempts

In its 1967 Report,<sup>16</sup> the U.K. House of Commons Select Committee on Parliamentary Privilege pointed out that a great deal of confusion has arisen over the use of the terms "contempt" and "breach of privilege". The two are not synonymous. "Privileges" refers to the rights and immunities enjoyed by the House and its members. These rights and immunities may be enjoyed either by the House in its corporate capacity or by members in their individual capacity. The first category includes the penal jurisdiction of the House, the power to establish rules of procedure for the House and to enforce them as is seen fit, the right of the House to regulate its own internal

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<sup>16</sup> Select Committee on Parliamentary Privilege, supra, note 11.

affairs and the right to institute enquiries and to call for witnesses and documents. The second category consists of freedom of speech, freedom from arrest ordered by civil courts while the House is sitting, exemption from jury duty, the right to refuse to testify in court and the right to free access to the House.<sup>17</sup>

While a breach of any of these privileges is a contempt of Parliament, so too is any other action that constitutes an offence against its authority or dignity. Accordingly, the Select Committee on Parliamentary Privilege proposed the adoption of the term "rights and immunities" to replace "privileges". Furthermore, it advocated the use of the term "contempt of the House" instead of "breach of privilege."<sup>18</sup> This approach does much to clarify the various concepts which are interwoven in this area of Parliamentary law.

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<sup>17</sup> These rights are discussed in detail in Maingot, supra, note 2.

As Maingot observes, "the member would not require the privileges if he or she was not a member. Nevertheless, such individual privileges...are considered to belong primarily to the member and only indirectly to the House itself." (p. 14.)

<sup>18</sup> Supra, note 11, paragraph 12.

The commencement of privilege proceedings in the Canadian House of Commons takes place when a member "rises on a question of privilege." The member intending to raise a question of privilege must give notice to the Speaker of his intention to do so, unless the question arises "out of proceedings in the Chamber during the course of a sitting."<sup>19</sup> Standing Order 48(1) of the House of Commons states that "whenever any matter of privilege arises, it shall be taken into consideration immediately."

At this point it falls to the Speaker of the House to determine whether a prima facie case of privilege has been made out. This mechanism has been explained as arising in response to the tendency of members to raise under the heading of "privilege" grievances that would otherwise be debated as points of order.<sup>20</sup>

Should the Speaker rule that a prima facie case has been made out, the matter will then be put before the House, usually in the form of a motion that the matter be sent to the Standing Committee on Elections, Privileges, Procedures and Private

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<sup>19</sup> Canada. Annotated Standing Orders of the House of Commons, 1989, Standing Order 48(2).

<sup>20</sup> Supra, note 2, p. 188.

Members' Business, which will then investigate the alleged contempt and report to the House. While this has now become the standard practice, the procedure to be followed where a breach of privilege is alleged has historically not been well established in Canada. In earlier times the practice appears to have been for the House to investigate the matter, either with or without hearing evidence from witnesses, and little use was made of the Standing Committee on Privileges and Elections.<sup>21</sup>

Although the Standing Committee conducts the investigation, it may not commit an individual. Only the House as a whole has the power to commit or punish for contempt. The Committee may only report its opinion that a contempt or "breach of privilege" has occurred, and request that the House take

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<sup>21</sup> W.F. Dawson, "Parliamentary Privilege in the Canadian House of Commons" (1959), 25 Canadian Journal of Economics and Political Science (No. 4), 462 at p. 468; See also Norman Ward, "Called to the Bar of the House of Commons" (1957), Canadian Bar Review 529.

It should also be borne in mind that the House may choose to modify its procedures, or ignore them entirely, by unanimous consent of the members present. On December 22, 1976, the House of Commons, without referring the matter to committee, unanimously adopted a motion that an editorial in that day's edition of the Globe and Mail which accused the speaker of partiality constituted a contempt. (Debates (December 22, 1976), 30th Parliament (2nd Session), pp. 2241-2242.) At the time, the Standing Orders of the House expressly provided for a member's seeking unanimous consent to move a motion in cases of urgent necessity.

action. In Canada, however, adoption of the report takes place only if further punitive action is recommended by the Committee. Since the Committee seldom does so, "it is a rare case indeed to have a report from the Committee on Privileges and Elections relating to privilege being dealt with by the House of Commons itself."<sup>22</sup> The tabling of the Committee's report generally marks the end of the matter.

Under Standing Order 108(1), standing committees are empowered to

examine and enquire into all such matters as may be referred to them by the House, to report from time to time, and except when the House otherwise orders, to send for persons, papers and records, to sit while the House is sitting, to sit during periods when the House stands adjourned, to print from day to day such papers and evidence as may be ordered by them, and to delegate to sub-committees all or any of their powers, except the power to report direct to the House.<sup>23</sup>

Thus, the Privileges Committee has only those powers that attach to any Standing Committee. Although it may call for persons, papers and records, it cannot punish an individual who fails or refuses to appear when summoned, or who appears but refuses to

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<sup>22</sup> Supra, note 2, p. 186.

<sup>23</sup> Canada. Annotated Standing Orders of the House of Commons, 1989.

answer a question. Any misbehaviour relating to a standing committee may only be reported to the House, accompanied by a recommendation for punishment.

In addition, Standing Order 122(1) states:

No witness shall be summoned to attend before any committee of the House unless a certificate shall first have been filed with the Chairman of such committee, by some member thereof, stating that the evidence to be obtained from such witness is, in his or her opinion, material and important.<sup>24</sup>

This does not, of course, preclude merely extending an invitation to a witness to attend.

Just as the House of Commons has been said to be supreme master of its own procedure,<sup>25</sup> so in turn has a standing committee been free to determine the procedure it chooses to follow, and the kinds of evidence it wishes to gather. The committee has not been necessarily bound by the rules of evidence

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<sup>24</sup> Ibid.

<sup>25</sup> Bradlaugh v. Gossett (1884), 12 Q.B.D. 271 at p. 278:

What is said or done within its [the House of Commons] walls cannot be inquired into in a court of law.

as applicable to court proceedings.<sup>26</sup> Furthermore, although it may be argued that as a fundamental principle all tribunals should observe the basic requirements of natural justice, it has been stated that a committee could if it so desired deny a witness natural justice, for example by not giving him the opportunity to be heard.<sup>27</sup>

Although counsel are not generally allowed to take part in proceedings before the Standing Committee, the House of Commons has permitted counsel to take an active role should the

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<sup>26</sup> Section 2 of the Canada Evidence Act, R.S.C. 1985, c. C-5 states:

2. This part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.

This provision has been said, however, only to apply to standing committees if the members of the committee so desire. (Canada. House of Commons. Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections, 32nd Parliament (1st Session), March 29, 1983, p. 23:51.

<sup>27</sup> Canada. House of Commons. Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections, 30th Parliament (1st session), August 11, 1975, p. 25:29.

proceedings reach the stage where an individual is called to the Bar of the House.<sup>28</sup>

### III. Modes of Punishment

Should the House of Commons decide that it was prepared to punish an individual, that person would be called to appear at the Bar of the House. The order may be enforced by means of a warrant ordering the Sergeant-at-Arms to take an individual into his custody. When carrying out such an order, the Sergeant-at-Arms possesses all necessary authority, and his jurisdiction is not restricted to the precincts of Parliament as is normally the case.

In all, there have been eighteen cases of an individual or individuals being called to the Bar of the House of Commons.<sup>29</sup> It should, however, be noted that the last such instance occurred in 1913. Questions were voiced through the Speaker after a motion had been made and adopted that the question be asked, and all proceedings were recorded in the journal of the House.

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<sup>28</sup> Ward, supra, note 21, pp. 543-544.

<sup>29</sup> See Ward, ibid.

Unlike the procedure followed by the Standing Committee, no oath has been demanded of a person called to the bar, although the House could so require. It is interesting that "no settled differences in the way in which the House examines persons summoned to the bar, as distinct from those brought to the bar in custody, have arisen in Canada."<sup>30</sup>

Should the House conclude that imprisonment is appropriate, a warrant of commitment will be issued by the Speaker, to be executed by the Sergeant-at-Arms. A prisoner could be confined within the precincts of Parliament in the custody of the Sergeant-at-Arms, and although in the United Kingdom offenders may be detained in one of Her Majesty's prisons, in Canada there may in fact be some doubt about the power of the federal legislature to commit a person to any jail under provincial jurisdiction.<sup>31</sup>

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<sup>30</sup> Ibid, p. 541.

<sup>31</sup> During the Miller incident in 1913, Sir Wilfred Laurier expressed doubt on this point (Ibid). The House could, of course, simply commit an individual to a federal penitentiary, although Miller was confined in the Carleton County jail.

The penal jurisdiction of the House of Commons in Canada derives, as has previously been discussed, from that possessed by the U.K. House of Commons. Although at one time the U.K. House imprisoned offenders for a specified period of time, it is now considered that the Commons cannot imprison for a period beyond the session.<sup>32</sup> The committal could, however, be renewed in the next session by order of the House. The practice in the United Kingdom would now appear to be to take offenders into custody "during pleasure", that is until an apology and request for release is made, or until a motion for discharge is adopted by the House.<sup>33</sup>

A warrant of committal issued by the Speaker of the House is a good return to a writ of habeas corpus. This does mean that an individual committed by the Commons will be brought before the court by his jailer. Nevertheless, if the reasons for committal are not stated on the face of the warrant, the court will not inquire into the causes of the commitment, nor may it release the offender. The court will only inquire further where reasons are

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<sup>32</sup> Stockdale v. Hansard (1839), 9 Ad. and E 1 at p. 114.

<sup>33</sup> Supra, note 1, p. 109.

stated in the warrant which disclose no legal cause of commitment. Maingot explains that

one court will not question another court of equal jurisdiction, and the House of Commons is a superior court for purposes of jurisdiction over matters of contempt. This is retained from its historical link as part of the High Court of Parliament which gives it at least equal jurisdiction with the superior courts, and in fact all the judicial power of the same High Court of Parliament, but without claiming the supremacy over the courts which the High Court of Parliament enjoyed because that is enjoyed only by Parliament and only in respect of its legislative authority.<sup>34</sup>

Should an individual committed by the House of Commons not be released upon prorogation, he would be discharged by the courts upon a writ of habeas corpus.<sup>35</sup>

Although at one time the House of Commons of the United Kingdom imposed fines, it would now appear that the Commons no longer possesses such a power.<sup>36</sup> This does not mean, however, that is not possible to mete out a punishment other than

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<sup>34</sup> Supra, note 2, p. 183.  
But see Chapter 6, infra, at pp. 158-167.

<sup>35</sup> Supra, note 32.

<sup>36</sup> The House of Commons has not imposed a fine since 1666.  
(Supra, note 1, p. 110)

committal. Less serious offences may result in the admonishment or reprimanding of an offender by the Speaker after the offender has been brought before the Bar of the House. If the contempt has been committed by a member, expulsion or suspension from the House are also possible penalties.<sup>37</sup>

Finally, where a contempt committed against the House of Commons also constitutes an offence at law, that offence may be prosecuted in addition to any action taken by the House itself. The power of the House to punish contempts does not derogate from "the general law of the land, which stands free from, and independent of, all the usages and law of Parliament."<sup>38</sup>

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<sup>37</sup> Ibid., pp. 111-113.

<sup>38</sup> R. v. Bunting (1885), 7 O.R. 524 at p. 526 (Ont. C.A.).

2. REPORT OF THE U.K. SELECT COMMITTEE ON PARLIAMENTARY PRIVILEGES

The Select Committee was appointed by an order of the U.K. House of Commons dated July 5, 1966, and presented its report on November 30, 1967. Its terms of reference were:

To review the law of Parliamentary Privilege as it affects this House and the procedure by which cases of privilege are raised and dealt with in this House and to report whether any changes in the law of privilege or practice of this House are desirable.<sup>39</sup>

The Committee adopted a broad approach in seeking to define the role of privilege in relation to a modern legislature. It asked itself two basic questions: firstly, whether the concept is justifiable in modern times, and secondly what limits should reasonably be placed on a legislature's protection while ensuring that it continues to be able to exercise its proper functions.<sup>40</sup> The absence of any further discussion in the Report

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<sup>39</sup> Supra, note 11, paragraph 1.

<sup>40</sup> Ibid.

of the first question is clear evidence that the Committee regarded it as obviously requiring an answer in the affirmative.

The Committee did agree, however, that many of the criticisms made of Parliament's contempt powers had merit, and also agreed that these matters should not be immune from scrutiny. Although conceding that the uncertainty surrounding Parliament's penal jurisdiction had created fears that this power might be used more than is justified, the Committee felt that such concerns were greatly exaggerated, pointing out that "the House in recent times has exercised its penal jurisdiction most sparingly."<sup>41</sup>

It was also acknowledged that members have tended to over-react to criticism, and have been too quick to seek the invocation of the penal jurisdiction of the House "in respect of matters of relative triviality or which could as effectively be dealt with by the exercise of remedies open to the ordinary

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<sup>41</sup> Ibid., paragraph 18.

It was observed that since 1900 only two strangers have been admonished at the Bar of the British House of Commons and the only imprisonment has been overnight in the custody of the Serjeant at Arms.

citizen."<sup>42</sup> In addition, such matters were raised immediately following question period, a time when they were likely to receive the greatest possible publicity. Most importantly, the Committee concluded that

the present procedure for dealing with complaints does not manifestly comply with the ordinary principles of natural justice or manifestly ensure that all who may be in danger of public criticism should enjoy all reasonable means of defending themselves.<sup>43</sup>

A number of suggestions for reform were put forth by the Committee. At the outset, the proposal that categories of contempt should be codified was rejected. It was felt that not only would codification inhibit the House in that new forms of contempt may spring from new duties or functions of the House, but that codification would require legislation.<sup>44</sup> Presumably it was recognized that this would perhaps involve some transfer of Parliament's authority in this area to the courts, since the latter could well be called on to interpret any such legislation.

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<sup>42</sup> Ibid., paragraph 21.

<sup>43</sup> Ibid., paragraph 22.

<sup>44</sup> Ibid., paragraph 40.

As will be seen later, however, there are jurisdictions where such an alternative has been embraced.

Instead, it was recommended that the following rules or guiding principles be adopted by a resolution of the House:

- (i) The House should exercise its penal jurisdiction (a) in any event as sparingly as possible, and (b) only when it is satisfied that to do so is essential in order to provide reasonable protection for the House, its Members or its Officers from such improper obstruction or attempt at or threat of obstruction as is causing, or is it likely to cause, substantial interference with the performance of their respective functions.
- (ii) It follows from sub-paragraph (i) ... that the penal jurisdiction should never be exercised in respect of complaints which appear to be of a trivial character or unworthy of the attention of the House; such complaints should be summarily dismissed without the benefit of investigation by the House or its Committee.
- (iii) In general, the power to commit for contempt should not be used as a deterrent against a person exercising a legal right, whether well-founded or not, to bring legal proceedings against a Member or an Officer.
- (iv) In general, where a Member's complaint is of such a nature that if justified it could give rise to an action in the courts, whether or not the defendant would be able to rely on any defence available in the courts, it ought not to be the subject of a request to the House to

invoke its penal powers. In particular, those powers should not, in general, be invoked in respect of statements alleged to be defamatory, whether or not a defence of justification, fair comment, etc., would lie.

- (v) The general rule stated in subsections (iii) and (iv) ... should remain subject to the ultimate right of the House to exercise its penal powers where it is essential for the reasonable protection of Parliament as set out in subsection (i) ... . Accordingly, those powers could properly be exercised where remedies by way of action or defence at law are shown to be inadequate to give such reasonable protection, e.g. against improper obstruction of a Member in the performance of his parliamentary functions.<sup>45</sup>

It is interesting to note that the Committee felt that it was unacceptable, in keeping with the general principle that Parliament ought to be reluctant to use its penal powers, that either the House or one of its members should be able to invoke this jurisdiction where it would be possible to commence a court action for defamation. The penal powers should be exercised only in those rare instances where "conduct ceases to be merely

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<sup>45</sup> Ibid., paragraph 48.

intemperate criticism and abuse and becomes or is liable to become an improper obstruction of the functions of Parliament."<sup>46</sup>

The approach adopted by the Committee can be commended on two main grounds. First, since "privileges" are not enjoyed by members in their personal capacities, it follows that anyone obstructing a member from carrying out his duty in fact breaches no individual privilege enjoyed by that member, but rather commits a contempt of the House. Thus, it is in most cases an abuse of the process to invoke contempt proceedings where allegations are made against an individual member. Second, since an individual against whom a complaint of contempt has been made is afforded far less protection than a defendant in a court action, it follows that, whenever possible, the courts should be the forum chosen for the hearing of such matters.

The Committee also examined criticisms and suggestions for reform of the procedure followed in the exercise of the Commons' penal jurisdiction, a procedure which was largely identical to that followed by the House of Commons in Canada. The major objections voiced against this procedure were that the

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<sup>46</sup> Ibid., paragraph 43.

House acts as both judge and prosecutor and that the investigation carried out by the Standing Committee of Privileges does not adhere to the basic principles of natural justice.

One suggestion made to the Committee was to enact legislation to transfer the penal jurisdiction of the House to either the courts or the Judicial Committee of the Privy Council.<sup>47</sup> The Select Committee, however, was overwhelmingly against this suggestion. It was stated that the conduct constituting contempt could not be settled once and for all since the functions of the House are constantly evolving, and that both the question of whether or not a contempt had been committed and the penalty to be imposed are likely to be influenced by political considerations, which the courts either could not or should not be able to take into account.<sup>48</sup> Oddly enough, it could well be argued that the Committee's reasons equally present a case for the removal of Parliament's penal jurisdiction. Certainly they imply that uncertainty and a degree of arbitrariness created by political factors, both as to guilt and

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<sup>47</sup> This was proposed by the Newspaper Proprietor's Association.

<sup>48</sup> Supra, note 11, paragraphs 140-143.

to sentencing, are acceptable under the law of contempt of Parliament.

It was also argued that to transfer its penal jurisdiction to another forum would still mean that the House would have to decide whether or not to make a complaint, and that this might require the House to give the same attention to the matter as would be necessary under the present procedure.<sup>49</sup> Such reasoning seems to be analogous to an argument that the police, or indeed anyone who institutes criminal or civil proceedings, has in effect already made a determination of guilt or liability such that a trial is only a repetition of a process that has already taken place. Obviously the House would not be determining the guilt or innocence of an individual, but would merely be deciding whether the facts of the case warranted the bringing of a complaint.

The Committee also made the quite valid assertion that

it would be contrary to the normal practice of responsible bodies to remove from the House its penal jurisdiction over its own Members and Officers, involving respectively the possibility of expulsion and dismissal. It would also be inconvenient and undesirable to remove from the penal jurisdiction of the

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<sup>49</sup> Ibid., paragraph 144.

House misconduct committed within the precincts and in the sight or hearing of Mr. Speaker, whether committed by a Member, an Officer or a stranger.<sup>50</sup>

This is not to say, however, that jurisdiction to discipline members, or even to punish contempts committed within the precincts of Parliament, could not be separated from the jurisdiction to punish private citizens for contempts committed against Parliament generally. Neither is it an argument for denying any person, whether a member or not, an inquiry that complies with the fundamental principles of natural justice.

A number of other suggestions for the reform of Parliamentary procedure in this area were made. It was recommended that a member should first give notice, along with full particulars, to the Clerk of the Committee of Privileges of his intention to make a complaint of contempt. The Committee of Privileges would then determine whether the complaint warranted a full investigation. If the preliminary decision went against a member, he or she would have the right to move in the House that the Committee be required to take up the matter.<sup>51</sup>

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<sup>50</sup> Ibid., paragraph 145.

<sup>51</sup> Ibid., paragraphs 162-169.

Further recommendations were also made concerning the conduct of an investigation by the Committee of Privileges.<sup>52</sup> The person alleged to have committed the contempt should be given notice of the inquiry, including particulars of the alleged contempt. Both that individual and the complaining member should be permitted to attend all proceedings of the Committee at which evidence is heard, unless the Committee decides otherwise. Both "parties" would have the right to request to be represented by counsel, subject to the Committee's discretion to refuse such a request. Full rights of examination, cross-examination and re-examination should be granted and the Committee should be empowered to permit the calling of witnesses by both the member and the person accused.<sup>53</sup>

The Special Committee on Parliamentary Privilege also turned its attention to the penalties available to the House, concluding that they were unsatisfactory and out of date.<sup>54</sup> It

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<sup>52</sup> Ibid., paragraphs 171-190.

<sup>53</sup> It was also recommended that legal aid should be available to persons accused of contempt.

<sup>54</sup> Supra, note 11, paragraphs 193-197.

felt that the House should be empowered to fine persons found guilty of contempt of Parliament, and that there should be a power to imprison without limit, subject to some maximum prescribed by law. The period of imprisonment should not depend upon "the fortuitous circumstance of the period between the date of the order and the end of the Session."<sup>55</sup>

Although these recommendations recognize that in exercising its penal jurisdiction the House of Commons is essentially acting as a superior court having criminal jurisdiction, and that contempt proceedings may potentially have a profound impact on the liberty of the subject, the rights conferred would still remain subject to the discretion, and dependant on the goodwill, of the Committee of Privileges. The mere fact that allegations of contempt would first be raised not in the House but with the Committee would, however, do much to ensure that such allegations were not made for trivial or political reasons.

An issue not dealt with by the Committee is whether a person found guilty of contempt by Parliament should have the

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<sup>55</sup> Ibid., paragraph 193.

right to have the conviction reviewed by the courts, and if so what the nature of such a review should be. If it is felt that the need to preserve the dignity and authority of Parliament dictates that it be empowered to punish contempts committed against it, a mechanism providing for an appeal to the courts seems intolerable. It would be possible, however, to provide for a more limited form of judicial review. The court could inquire, for example, into whether the proceeding complied with the requirements of natural justice and whether an error of law was committed on the face of the record.<sup>56</sup> This should not be seen as interfering with the exercise by Parliament of its penal jurisdiction. As will be seen later, in the Canadian context the Charter of Rights and Freedoms brings this issue to the fore.

The Select Committee on Parliamentary Privileges presented its Report in December of 1967. It was not, however, until July 4, 1969 that a debate took place on a motion to take

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<sup>56</sup> See D.C. Pearce, "Contempt of Parliament - Instrument of Politics or Law?" (1969), 3 Federal Law Review 241, at p. 268.

See also the recent Australian reforms discussed in Chapter 3, infra.

note of the Report.<sup>57</sup> At the time, no decisions were made on the Committee's recommendations. As regards the exercise of the penal jurisdiction of the House, it would appear that both the law and the procedure followed remain largely as they were prior to the appointment of the Committee. Since 1978, however, Members of the House of Commons are not entitled to raise a complaint of privilege without first submitting the complaint in writing to the Speaker, who must first rule that the matter is one of privilege and should be given precedence as such.<sup>58</sup>

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<sup>57</sup> H.C. Deb. (1968-69) 786, c. 825.

<sup>58</sup> Supra, note 1, pp. 135-136.

3. CONTEMPT OF PARLIAMENT IN AUSTRALIA

Section 49 of the Commonwealth of Australia Constitution Act<sup>59</sup> states:

49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

Unlike the similar provision embodied in s. 18 of the Canadian Constitution Act 1867,<sup>60</sup> s. 49 places no limit on the power of the federal Parliament to define its powers, privileges and immunities. Until recently, the Australian Parliament had not enacted legislation dealing with parliamentary privilege other than as it related to the publication of parliamentary papers and

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<sup>59</sup> (1900), 63 and 64 Vict., c. 12.

<sup>60</sup> 31 and 32 Vict., c. 23.

the broadcasting of parliamentary proceedings,<sup>61</sup> and thus the fundamental source of Australian law concerning contempt of Parliament was the law applicable to the U.K. House of Commons as of January 1, 1901, the date of the establishment of the Australian Commonwealth.<sup>62</sup> The jurisdiction of the Canadian House of Commons and the Australian Houses of Parliament to punish contempts was therefore, to all intents and purposes, identical. Recent legislation has altered the law governing parliamentary privilege at the federal level in Australia considerably. In addition, there are now new procedures in place in the Australian Senate for dealing with matters relating to

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<sup>61</sup> Parliamentary Papers Act 1908-1963, Acts of the Parliament of Australia, 1901-1973, v. 9, p. 21, Parliamentary Proceedings Broadcasting Act 1946-1973, Acts of the Parliament of Australia, 1901-1973, v. 9, p. 25.

<sup>62</sup> For a detailed history of contempt of Parliament at the federal level in Australia see G.S. Reid and Martyn Forrest, Australia's Commonwealth Parliament 1901-1988, (Melbourne: University of Melbourne Press, 1989), pp. 249-302.

The states of Victoria (Victoria Constitution Act, 1855, 18 and 19 Vict., c. 55, s. 35), South Australia (The Constitution Act, 1855-56, 19 and 20 Vict., no. 2, s. 35) and Western Australia (Western Australia Constitution Act, 1890, 53 and 54 Vict., c. 26, s. 36) all were granted the power to define the privileges of their respective legislatures, providing they did not exceed those of the U.K. House of Commons. The privileges of the House of Commons were adopted in the latter two jurisdictions.

In the remaining states, statutory definitions of privilege have been adopted.

privilege. These developments will be described in some detail later in this chapter. The practices of the House of Representatives, however, remain at the time of writing unchanged.

The Australian House of Representatives has had a Standing Committee on Privileges since 1944,<sup>63</sup> and it is now the practice to refer allegations of contempt to the Committee for investigation and report. The Committee may only look into matters referred to it by resolution of the House. Furthermore, express authority must be given before the Committee may send for persons or documents, and only if such authority is granted will a refusal to obey a summons from the Committee itself be treated as a contempt. Witnesses are examined under oath, but it appears that permission to be represented before the Committee by counsel is not given.<sup>64</sup>

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<sup>63</sup> Enid Mona Campbell, Parliamentary Privilege in Australia, (Melbourne: University of Melbourne Press, 1966), p. 116.

<sup>64</sup> Ibid; Joint Select Committee on Parliamentary Privilege, infra, note 79, pp. 107-108.

Where the Committee determines that a charge of contempt is well founded, the House will pronounce punishment, assuming it accepts the Committee's report. A Speaker's warrant of committal may be issued, or an offending individual may be called to the Bar of the House to be reprimanded or admonished. The Senate has also adopted the practice of referring matters relating to contempt to a Privileges Committee, which will conduct an investigation and report to the House.

In cases where a contempt of Parliament is also an offence at law<sup>65</sup>, it has been presumed that the federal Houses of Parliament may direct the Attorney-General to prosecute the offender. At least one author,<sup>66</sup> however, has suggested that this may be an improper interference with the authority of the States.

Criticism of Parliament's penal jurisdiction and proposals for its reform have a history in Australia longer than

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<sup>65</sup> In Canada, it is an indictable offence to commit an act of violence "in order to intimidate Parliament or the legislature of a province". (Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 51.)

<sup>66</sup> Supra, note 63, p. 119.

that of the Commonwealth itself. In 1878 the Legislative Assembly of New South Wales passed a bill concerning its privileges which transferred penal jurisdiction to the courts except for contempts committed by members and contempts committed within the precincts of the Assembly. The bill failed to become law due to disagreement between the Assembly and the Legislative Council.<sup>67</sup> A similar bill died upon prorogation in 1901.<sup>68</sup>

In 1908, a federal Joint Select Committee recommended that contempt of Parliament should be dealt with by the High Court, once a special order of the House had been passed committing the offender to trial. It was felt that "the English procedure for punishment of contempt of Parliament is generally admitted to be clumsy, ineffective, and generally not consonant with modern requirements in the administration of justice."<sup>69</sup>

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<sup>67</sup> V. and P. (L.A.N.S.W.), 1878-9, vol. 1, pp. 74, 114, 318, 405, 454; L.C.J. (N.S.W.), 1878-9, vol. 29, pp. 111, 174, 199, 220 (N.S.W.). (Cited in Campbell, supra, note 63, p. 122.)

<sup>68</sup> V. and P. (L.A.N.S.W.), 1901, vol. 1, p. 290. (Cited in Campbell, ibid.)

<sup>69</sup> Quoted in "Parliamentary Privilege" (1955), 29 Australian Law Journal (No. 3), 97 at p. 98.

Although no action was taken on the recommendations of the Committee at the time, a draft bill including some of its proposals was apparently prepared in 1934, but was never introduced.<sup>70</sup>

The issue of Parliament's penal jurisdiction was again thrust into the spotlight in 1955. In R v. Richards ex parte Fitzpatrick and Browne<sup>71</sup>, two men who owned and edited a small newspaper were refused applications for writs of habeas corpus after having been taken into custody under warrants issued by the Speaker of the House of Representatives. The court refused to inquire into the grounds of the committal, which were not specified on the face of the warrant, holding that a Speaker's warrant is conclusive so long as it is on its face consistent with a breach of privilege. An appeal to the Privy Council was dismissed<sup>72</sup>, and both men were sentenced to jail for three months or until earlier prorogation or dissolution of the House of Representatives.

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<sup>70</sup> Ibid.; Supra, note 63, p. 123.

<sup>71</sup> (1955), 92 C.L.R. 157.

<sup>72</sup> (1955), 92 C.L.R. 171.

This case arose from the findings by the Committee of Privileges that through their newspaper the two men had sought to "intimidate and silence" a member who had been seeking an investigation into municipal corruption. The incident seems to have received widespread public attention and gave rise to a number of criticisms.<sup>73</sup> The two individuals were called before the Committee without any charge being brought against them. Charges arose only out of the content of the answers given by them during their questioning. Representation by counsel was not allowed, nor were the men given any opportunity to cross-examine on the evidence given by others. Concern was expressed that

the power of protecting the freedom of the proceedings of Parliament and its members... might possibly at this time be used not as a shield against oppression but as a weapon of oppression... . [M]any would feel in respect of written contempts committed outside Parliament, that the rather more conspicuously fair procedure adopted by the courts... could without loss be adopted by the Parliament. Others suggest that the trial of questions of breach of privilege should be placed in the hands of the High Court.<sup>74</sup>

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<sup>73</sup> See supra, note 69, p. 97.

<sup>74</sup> Ibid., pp. 97-98.

A series of allegations of contempt brought in the state legislatures of Victoria and South Australia in November of 1968 added credence to many of the criticisms levelled against Parliament's penal jurisdiction<sup>75</sup>. The first incident arose out of the refusal by the chairman of the Public Service Board of the Victoria Legislative Assembly to provide a document to the Committee of Public Accounts. One hour after the refusal, the Chairman of the Committee of Public Accounts moved that this constituted a contempt. Cooler heads prevailed, and it was then moved that although a contempt was committed through misunderstanding, the House should proceed to consider the Orders of the Day. The motion was eventually passed on party lines, but not before the opposition had seized the opportunity to embarrass the government through prolonged debate.

Similar motives were at work on the following day when an opposition member alleged that a statement made to the press by the Premier to the effect that there had not really been a finding of contempt against the chairman of the Public Service Board itself constituted a contempt, since the Premier had knowingly published a false report of the proceedings of the

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<sup>75</sup> These incidents are discussed in D.C. Pearce, supra, note 56, pp. 241-252.

House. The motion was defeated on party lines after a seven hour debate.

A final incident arose as the result of a report presented to a Select Committee studying a bill introduced in the Parliament of South Australia to prohibit scientology. In the report, an allegation of bias was made against the chairman of the Committee. This resulted in the author of the report being called to the Bar of the House and admonished.

It is startling to observe that in none of these cases was the accused given an opportunity to respond to the allegation made against him.<sup>76</sup> While it may be argued that had these cases been referred to committee, as is the practice in the federal parliaments of both Canada and Australia, an opportunity to be heard would almost certainly have been afforded, and while it is true that no severe punishment was handed out in these instances,

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<sup>76</sup> Interestingly, it is the British practice that where a complaint is made against a member "he should be heard in explanation or exculpation as soon as the question on the motion founded upon the complaint is proposed from the chair." (Erskine May, supra, note 1, p. 139.) This is also supposedly the practice in Canada, although apparently it is not always followed. (See Maingot, supra, note 2, p. 227.)

it is still obvious that the proceedings followed did not measure up to the standard usually required of a body exercising penal jurisdiction. Nor does it forgive the partisan politics that coloured the proceedings in the Victoria legislature.

Several Australian jurisdictions long ago carried out reforms in this area. The legislatures of Queensland, Western Australia and Tasmania have codified certain acts for which the penal jurisdiction of Parliament may be invoked.<sup>77</sup> In the first

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<sup>77</sup> Constitution Act, 1867, 31 Vict., no. 38, s. 45 (Queensland); Parliamentary Privileges Act, 1891, 54 Vict., no. 4, s. 4 (Western Australia); Parliamentary Privilege Act, 1858, 22 Vict., no. 17, s. 1 (Tasmania).

The Queensland provision, for example, sets out the following acts as contempts:

(a) disobedience to any order of the House of any committee duly authorized in that behalf to attend or to produce papers, books, records or other documents before the House or such committee unless excused by the House;

(b) refusing to be examined or to answer any lawful and relevant question put by the House or any such committee unless excused by the House;

(c) assaulting, obstructing or insulting any member in his coming to or going from the House on account of his behaviour in Parliament or endeavouring to compel any member by force, insult or menace to declare himself in favour or against any proposition or matter pending or expected to be brought before the House;

(d) sending a member any threatening letter on account of his behaviour in Parliament;

(e) sending a challenge to fight a member;

two jurisdictions, the legislatures are also given the power to impose fines. The enumerated offences are not exhaustive, and oddly enough do not include the most common form of contempt, namely libellous comments directed towards Parliament or its members.

The Legislative Council of the Northern Territories has not only codified contempt, but has transferred the power to punish contempts to the courts. The Legislative Council (Powers and Privileges) Ordinance, 1963 lists a series of offences against the Legislative Council and then states that "Proceedings for a contravention of this Ordinance may be instituted in a court of summary jurisdiction."<sup>78</sup> The use of "may" rather than "shall", however, would seem to indicate that the courts and the Legislative Council have concurrent jurisdiction over such matters.

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(f) offering a bribe to or attempting to bribe a member;

(g) creating or joining any disturbance in the House or in the vicinity of the House while the same is sitting whereby the proceedings of the House may be interrupted.

(Sections 106 and 107 of the Commonwealth of Australia Constitution Act, 1900 continue the constitutions of the states and the powers of state Parliaments as they existed as at the establishment of the Commonwealth.)

These examples can be seen to rebut the contention that contempts of Parliament cannot be codified. What generally seems to be overlooked by those who argue against such codification is that defining contempt of Parliament is not the same as compiling an exhaustive list of activities which constitute a contempt. Statutory definitions need not be exhaustive. An analogy may be drawn to a criminal law provision which sets out in general terms the constituent elements of an offence without attempting to list the particular actions which would constitute the offence in their infinite variety. In fact, it could well be the purpose of a statutory definition of contempt to simply enumerate the more common contempts while providing guidelines as to the other sorts of actions which will be seen to constitute the offence.

At the federal level, the 1984 Report of the Joint Select Committee on Parliamentary Privilege<sup>79</sup> dealt extensively with the

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<sup>79</sup> Australia. Parliament of the Commonwealth. Joint Select Committee on Parliamentary Privilege, Final Report (October, 1984). Parliamentary Paper No. 219/1984.

The Joint Select Committee was established following the finding by the Privileges Committee of the House of Representatives that a certain newspaper article constituted a contempt. The Privileges Committee apparently included a recommendation that such a committee be established in its Report to the House on the specific reference. (See B.C. Wright, "The Joint Select Committee on Parliamentary Privilege

Australian Parliament's penal jurisdiction, making a great number of detailed recommendations for reform. Many of the Committee's recommendations were ultimately incorporated into the Parliamentary Privileges Act 1987,<sup>80</sup> as well as into a series of resolutions passed by the Senate.

The Parliamentary Privileges Act, 1987 does not represent a complete codification of the law relating to parliamentary

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(Commonwealth of Australia)" (1985), 53 The Table 51.) An "Exposure Report for the consideration of Senators and Members", substantially identical to the Final Report, was presented in June of 1984. (Parliamentary Paper No. 87/1984.)

<sup>80</sup> No. 21 of 1987. (Reproduced as Appendix A)  
This legislation was chiefly in response to certain judgments of the Supreme Court of New South Wales which were seen to restrict the scope of freedom of speech in Parliament. When the bill was being prepared it was decided to include provisions to implement those recommendations of the Joint Select Committee which required legislation. (See Harry Evans, "Disagreement With the Courts Over Freedom of Speech: An Australian Parliamentary Commission of Inquiry" (1987), 55 The Table 12). Thus, much of the Act deals with matters such as expanding the definitions of parliamentary proceedings, protection of witnesses appearing before parliamentary committees generally and the role of parliamentary privilege in connection with the giving of evidence in court, all of which are largely outside the scope of the present work.

Interestingly, the Parliamentary Privileges Act, 1987 was proposed as neither a government nor a private member's bill. Rather, it was introduced in the Senate by the Presiding Officer, a procedure never before used.

privilege. Section 5 of the Act preserves the powers, privileges and immunities of each House as in force under section 49 of the Constitution "[e]xcept to the extent that this Act expressly provides otherwise". Thus, any gaps in the legislation may be addressed by recourse to traditional precedents established by the U.K. Parliament. Section 4 of the Act does, however, represent what has been seen by some to be a definition of contempt<sup>81</sup>. It reads:

4. Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Clearly this provision cannot be viewed as a true definition of contempt. Rather, as the heading preceding s. 4 indicates, it is a general statement as to the essential elements of contempt. While it will serve to establish the limits of the actions which will constitute contempts, perhaps the real significance of s. 4 is that it will allow the courts to review a finding by Parliament that a particular act constituted a contempt, at least

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<sup>81</sup> Harry Evans "Parliamentary Privilege: Legislation and Resolutions in the Australian Parliament" (1986), 56 The Table 21, at p. 30.

to the extent of determining whether a given action meets the tests set out in the provision.

The Joint Select Committee had recommended that "the exercise of Parliaments' penal jurisdiction be retained in Parliament."<sup>82</sup> It was well aware of the arguments in favour of a transferral of this jurisdiction: that the traditional system is out of step with modern principles of natural justice, that Parliament should not act as both judge and accuser and that Parliament as an institution is not constituted in a manner equipping it to be the proper forum for what is in effect a trial. Apparently suggestions for a number of alternative systems were made to the Committee, including the creation of a "Privilege Tribunal". Nevertheless, although recommending major changes to the manner in which allegations of contempt were dealt with, the Committee concluded that the penal jurisdiction should remain with Parliament. A number of reasons were given for this conclusion:

(1) If the Committee's recommendation to abolish "defamatory contempts" was implemented, it was felt that the chief source of conflict between Parliament and those who criticize its members would be removed;

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<sup>82</sup> Supra, note 79, pp. 90-94 (Recommendation 17).

(2) Members of Parliament are best equipped "to understand how actions taken by others may obstruct or impede the workings of Parliament and its Members"<sup>83</sup> and thus what actions should or should not be seen to constitute contempt;

(3) History has shown Parliament to be a lenient judge. The flexibility which stems from Parliament's status as a political body also makes it more receptive to public opinion and potential political consequences. The courts are less flexible, and thus likely to be less lenient.

(4) Transferring all or part of Parliament's penal jurisdiction to the courts would greatly increase the likelihood of clashes between Parliament and the courts. Inevitably, situations would arise in which each institution took a different view of the same matter. Moreover, the initial decision as to whether to pursue a given complaint would still have to be made by Parliament.

(5) The exercise of the penal jurisdiction is inherently controversial, newsworthy and political, and it is best that the courts not become involved in such controversies.

The Committee did, however, recommend a limited judicial role with regard to one particular aspect of the penal jurisdiction. After noting the existence of the long-established principle that the courts will not inquire into the validity of reasons for a decision to commit for contempt unless those

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<sup>83</sup> Ibid., p. 92.

reasons are set out in the warrant itself, the Committee observed that

[a] warrant issued under the authority of one of the Houses and expressed in perfectly general terms for the commitment of a person to prison is open to the obvious criticism that effectively it is unreviewable. Hypothetically, a House could act on a completely trivial ground, or could quite misconceive its functions, and commit on a basis which under no circumstances could properly be regard as a breach of privilege or other contempt.<sup>84</sup>

Even when balanced against the need for Parliament to be the judge as to what constitutes contempt and to punish those found to have committed contempts, it was concluded that the absence of any review whatsoever could not be justified.

The solution proposed by the Committee was to require that in all cases where an individual is committed by a House of Parliament, both the resolution of the House and the warrant for

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<sup>84</sup> Ibid., p. 116.

As has been seen, however, where the warrant states the reasons for committal the courts will review the validity of those reasons. The traditional practice at the federal level in Australia was apparently to simply state in the warrant that the named individual had been committed upon having been found guilty of a serious breach of privilege (Ibid., p. 115).

committal should be required to state the ground of commitment.<sup>85</sup> In addition, the Full High Court should be empowered to examine the question of whether the reasons stated in the warrant were sufficient to constitute a contempt. Where the Court found them not to be sufficient a declaration to this effect could be issued. The Court would, however, be restricted in its examination to this narrow issue, and would have no jurisdiction to enforce compliance with such a declaration. "Compliance with the opinion expressed by the Court would be entirely a matter for the House."<sup>86</sup>

The Parliamentary Privileges Act 1987 contains no such mechanism. Apparently it was concluded that this "would amount to conferring an advisory jurisdiction on the High Court" and was therefore unconstitutional.<sup>87</sup> Section 9 of the Act does, however, require that both the resolution of the House imposing a

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<sup>85</sup> The Committee noted that the Powers and Privileges Act, 1963 of South Africa contained such a requirement (Ibid., p. 118).

<sup>86</sup> Supra, note 79, pp. 117-119 (Recommendation 23).

<sup>87</sup> Supra, note 81.

penalty of imprisonment and the warrant of committal "set out particulars of the matters determined by the House to constitute that offence." Thus, the alternative adopted was to confer on the courts a limited power of review via sections 4 and 9 of the statute.

It has already been observed that s. 4 cannot truly be seen to be a definition of contempt of Parliament. Nor, in the view of the Joint Select Committee, was such a definition desirable. The Committee expressly adopted the reasoning of the 1967 U.K. Select Committee on Parliamentary Privileges<sup>88</sup> to the effect that while it is possible to enumerate a number of actions which would clearly constitute contempts, any attempt at an exhaustive definition would necessarily restrict Parliament's powers, since new circumstances may give rise to new forms of contempt.<sup>89</sup> Nevertheless, it was felt by the Joint Select Committee to be desirable to provide some guidance as to the essential elements of contempt. It was recommended that each House adopt guidelines setting out in some detail matters which

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<sup>88</sup> See Chapter 2, supra, at note 44.

<sup>89</sup> Supra, note 79, pp. 80-81.

may be treated as contempts, but which would not purport to be either exhaustive or binding.<sup>90</sup>

Section 6 of the Parliamentary Privileges Act 1987 implements the recommendation of the Joint Select Committee that "defamatory contempts", that is to say contempts arising from comments made about Parliament, its members or its committees, be abolished.<sup>91</sup> It was the view of the Committee that in most

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<sup>90</sup> The guidelines recommended by the Joint Select Committee were adopted in the resolutions passed by the Australian Senate which are reproduced as Appendix B. These guidelines were apparently based on a bill introduced in the Senate by the Opposition in 1981. The bill would have transformed contempt of Parliament into a series of criminal offences. (Supra, note 81, p. 34).

<sup>91</sup> Supra, note 79, pp. 83-87 (Recommendation 15). A similar recommendation was made by the U.K. Select Committee on Parliamentary Privileges. (See supra, note 11, paragraph 48)

Section 6 reads:

6.(1) Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.

(2) Sub-section (1) does not apply to words spoken or acts done in the presence of a House or a committee.

It should be noted that this provision does not affect contempts committed in the face of a House or a committee.

instances there are adequate alternative remedies. For example, Members have recourse to the courts in cases of libel, complaints can be made to press councils, misinformation can be corrected by statements in the House and, in extreme cases such as threats or assaults, recourse may be had to the criminal law. When the defamatory contempts encompassed under either the above remedies or under other grounds for a finding of contempt were eliminated, the remainder were seen to be "superficial".

The recommendations made by the Joint Select Committee in relation to the sanctions which Parliament should possess are reflected in s. 7 of the Act. Section 7 provides for a period of imprisonment not exceeding six months for an offence against a House, although the resolution ordering imprisonment may empower the President of the Senate or the Speaker of the House of Representatives, as the case may be, to order the person discharged either generally or in specified circumstances. A sentence, however, is no longer affected by prorogation or dissolution, it being the view of the Committee that it was "anomalous and absurd that the length of imprisonment may depend on when an offence is committed, and the likelihood or unlikelihood of a newly constituted House taking action to recommit a person who has been committed in the dying days of the

old Parliament."<sup>92</sup> This view is similar to that expressed by the 1967 U.K. Select Committee.<sup>93</sup>

Most importantly, the Act grants to both Houses the power to impose fines as an alternative to imprisonment, up to a maximum of \$5,000 in the case of a natural person and \$25,000 in the case of a corporation.<sup>94</sup> Fines imposed by the Houses are debts due to the Commonwealth and may be recovered in the courts. The Committee felt that the power to impose fines would provide an alternative to imprisonment, which in modern times would be considered only as an absolute last resort, and would be particularly appropriate with regard to corporations.<sup>95</sup> It was

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<sup>92</sup> Supra, note 79, p. 99.

<sup>93</sup> Supra, note 11, paragraph 193.

<sup>94</sup> Oddly enough, the maximum fine suggested by the Committee in the case of a corporation was only \$10,000. (Supra, note 79, p. 100 (Recommendation 19).)

<sup>95</sup> Ibid.  
The Committee had earlier canvassed the question of whether each House did not already possess the power to impose fines, concluding that "the balance of authority favours the view that the power to impose a fine either does not exist or is extremely doubtful." Assuming that there was no power to impose fines, such a power could only be created by statute, as opposed to mere resolutions of the Houses. It has long been established

the firm view of the Committee that "if Parliament is to function effectively, the need for real sanctions remains."<sup>96</sup>

It also bears noting, if only in passing, that the Houses of Parliament, by virtue of s. 8 of the Parliamentary Privileges Act 1987, no longer possess the power to expel members. The Joint Select Committee had concluded that the power of expulsion undermined the principle that the composition of Parliament should be determined by the electorate. It was also observed that expulsion was a particularly severe sanction, particularly when it was likely that the matter would be determined purely on party lines, and with limited debate in the heat of the moment.<sup>97</sup> This rationale has been criticized as being based on a single incident which "has long been regarded as an instance of improper use of the power", as well as for failing to take into account the fact that prolonged or repeated suspensions from the

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that a House cannot create a new privilege by way of resolution, since resolutions cannot change the law. (pp. 94-96. See also Erskine May, supra, note 1, p. 83.)

<sup>96</sup> Ibid., p. 97.

<sup>97</sup> Ibid., pp. 121-126 (Recommendation 25).

House can be imposed, which may amount to de facto expulsion, and the fact that expulsion may be justified in some circumstances.<sup>98</sup>

Perhaps the most significant aspect of the Joint Select Committee's Report is the discussion of, and the recommendations relating to, the procedures for the conducting of inquiries by privileges committees. The Committee concluded that

[t]here has been a good deal of criticism of the way Privileges Committees conduct hearings of complaints. We think much of the criticism is justified and that substantial changes need to be made so that the conduct of hearings and complaints accords with contemporary notions of natural justice.<sup>99</sup>

In reviewing existing procedures it was noted that in the House of Representatives the Privileges Committee met in camera, did not permit witnesses to be represented by counsel and did not afford witnesses the right to be present when other witnesses gave evidence or the right to cross-examine witnesses. In the Senate, there were some instances of evidence having been heard in public, and since 1971 witnesses had been permitted to be

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<sup>98</sup> Supra, note 81, pp. 31-32.

<sup>99</sup> Supra, note 79, p. 104.

accompanied by counsel, who could also address the committee. Although witnesses were allowed to be present while other witnesses gave evidence, the right of cross-examination was not made available.<sup>100</sup>

The Committee took it to be self-evident that such procedures were not in accordance with the principles of natural justice. In its words:

[F]undamentally, one's view of the desirability of retaining the present system depends on which of two alternative courses is thought to be in the interests of Parliament and those who attract the attention of the Houses in contempt matters. Either, in essential respects, things should remain as they are, or else the practices of the Privileges Committees should be reconstituted to meet the basic requirements of natural justice.<sup>101</sup>

To the Committee, the latter alternative was the only acceptable course:

If the question be asked--these days, can the proposition be sustained that a person may be gaoled or fined a substantial sum yet have no opportunity to cross-examine or confront witnesses, to adduce evidence on his own behalf,

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<sup>100</sup> Ibid., p. 105-106.

<sup>101</sup> Ibid., p. 107.

or to be represented by lawyers skilled in those matters--we think there can be only one answer.<sup>102</sup>

The arguments that proceedings of privileges committees are not trials but merely inquiries to obtain evidence and make recommendations and that penalties are not actually imposed by the committees but only by the Houses themselves were described as "irrelevant". It was observed that it is the privileges committee that hears evidence, draws conclusions and makes recommendations. Upon considering the committee's report, the House does not conduct a retrial, nor does a person called to the Bar of the House have any real opportunity to challenge the findings of the Committee.<sup>103</sup> Moreover, such arguments ignore the potential consequences of these proceedings:

So long as Parliament retains its penal jurisdiction and the power to commit--and, if our recommendations are accepted, has the power to fine--persons or organisations whose conduct is being examined... are, semantics aside, often in a very real sense "persons charged."<sup>104</sup>

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<sup>102</sup> Ibid., p. 108.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

Nor was the Joint Select Committee sympathetic to the view that in camera hearings were more conducive to calm, reasoned deliberation:

[I]n camera hearings lend themselves to unintended abuses and can, by their nature be intimidatory. The benefit of public scrutiny is that it acts as a spur and as a caution. It is a spur to guarantee the most exacting standards of fairness; it is a caution against departure from those standards.<sup>105</sup>

The Committee was similarly dismissive of the view that the intervention of lawyers into the proceedings of privileges committees would foster undesirable complexity and technicality. It was rather curtly observed that "Members of Parliament are not, by nature, shrinking violets. They are quite capable of controlling lawyers and making sure that matters stay on the rails."<sup>106</sup>

As a result of its deliberations, the Joint Select Committee made a number of recommendations for revising the

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<sup>105</sup> Ibid., p. 109.

<sup>106</sup> Ibid., p. 111.

procedures followed by the Privileges Committees of both Houses of the Australian Parliament.<sup>107</sup> These included the following:

- hearings should be held in public, subject to the Committee's discretion to proceed in camera where warranted;
- a transcript of evidence should be published and tabled in the House with the Committee report, subject to a discretion to exclude evidence that was heard in camera;
- issues before the Committee should be sufficiently defined so as to allow those against whom a complaint has been made to be fully informed of the nature of the complaint;
- reasonable time should be provided to those against whom a complaint has been made to prepare an answer;
- except for deliberative proceedings, and subject to the discretion of the Committee to exclude persons where proceedings are held in camera, those against whom a complaint is made should have the right to be present throughout the entire proceedings;
- those against whom a complaint is made should have the right to adduce evidence;
- those against whom a complaint is made should, subject to the Committee's discretion, have the right to cross-examine witnesses;
- those against whom a complaint is made should have the right to address the Committee at the conclusion of the evidence;

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<sup>107</sup> Ibid., pp. 113-114 (Recommendation 21).

- those against whom a complaint is made should have the right to full legal representation;
- the Committees should be authorized to recommend the payment out of parliamentary funds of the legal aid costs or costs of legal representation of persons appearing before them.

The Joint Select Committee observed that the work of privileges committees combines "the traditional inquisitional functions of parliamentary committees with duties that are of a judicial or quasi judicial character. There is an inherent tension between these two functions."<sup>108</sup> It was the hope of the Committee that the changes recommended to the procedures of the two Privileges Committees, combined with the retaining of Parliament's penal jurisdiction, would both ameliorate this tension and "reinforce the unique nature of the responsibilities of the Privileges Committees."<sup>109</sup>

It was the view of the Joint Select Committee that the recommendations summarized above should be implemented by way of resolutions introduced in both Houses in as nearly identical a

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<sup>108</sup> Ibid., p. 112.

<sup>109</sup> Ibid.

form as possible. In keeping with this, the Australian Senate adopted a series of resolutions on February 25, 1988.<sup>110</sup>

For the most part, the procedures for the protection of witnesses before the Privileges Committee as set out in the resolutions reflect the recommendations of the Joint Select Committee. Witnesses have the right to counsel and the right to cross-examine other witnesses who give evidence relating to them. Persons against whom allegations are made must be fully informed of the nature of the allegations and given the opportunity to respond, to adduce evidence and to have other witnesses placed before the Committee. A person has the right to be present during the hearing of evidence reflecting adversely on, or containing allegations against, that person. Witnesses must be given an opportunity prior to the presentation of the Committee's report to the House to make representations with respect to any findings of the Committee which affect them. In addition, witnesses must be heard on oath or affirmation and may not be required to answer incriminating questions in public session.

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<sup>110</sup> Australia. Senate. Debates, 35th Parliament (1st session), February 25, 1988, p. 620. (The Senate resolutions are reproduced in Appendix B.)

As yet, the Australian House of Representatives has not adopted similar resolutions, despite the plea of the Joint Select Committee for a co-ordinated approach.

(Except where the Committee determines otherwise, all evidence shall be heard in public session.) The Committee may also recommend that the President of the Senate make reimbursement of all or part of a witness's legal costs.

It has been claimed that the Senate resolutions cannot in fact be seen to adopt the recommendations of the Joint Select Committee.<sup>111</sup> Such a view rests upon the characterization of the Committee's recommendations as a "criminal trial model", while the resolutions themselves are seen to adopt the "royal commission model". The latter is said to recognize that in a privileges committee inquiry "it is not always clear who is the accused. A privileges committee combines the functions of a preliminary investigative agency and a court of first hearing... so that a witness may, in the course of the inquiry, become the accused."<sup>112</sup> Admittedly, the procedures envisioned by the Joint Select Committee assumed the identification of a particular person as the subject of a complaint and required the defining of the issues before the Privileges Committee as the first step in

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<sup>111</sup> Supra, note 81, p. 33.

<sup>112</sup> Ibid.

the process. At the same time, the Senate resolutions do seem to reflect the possibility that the relationship between the Committee and a witness, as well as between witnesses, may shift as matters proceed. Nevertheless, it is suggested that too much should not be made of such a distinction. The rights given to witnesses are those recommended by the Committee, and the rights necessary to safeguard witnesses are largely the same under either model. In fact, the rights set out in the Senate resolutions afford protection to a larger circle of persons than would be the case under the Committee's model, in that they are possessed by all witnesses, as opposed to "a person or organisation against whom a complaint is made". This aside, the purported distinction seems in this application to be largely one of form and not substance.

The Senate resolutions implement a number of other recommendations made by the Joint Select Committee. Guidelines prescribe in some detail matters which may be treated as constituting contempts.<sup>113</sup> As well, several "criteria" have been established which are to be taken into account by the Senate when determining whether a matter possibly involving contempt should

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<sup>113</sup> See Appendix B.

be referred to the Privileges Committee or whether a contempt has been committed, and by the Committee itself in its deliberations.

These are:

- (a) the principle that the contempt power should be used only in respect of serious matters and only where necessary to protect the Senate or its members from obstruction in the performance of their duties;
- (b) the availability of alternative remedies; and
- (c) whether the person who committed the act in question knowingly did so or had a reasonable excuse for so doing.<sup>114</sup>

The resolutions also prescribe a new procedure for the raising of matters of privilege in the Senate. Previously, matters of privilege were required to be raised at the earliest opportunity, and debate on a motion that a matter be referred to the Privileges Committee was dependent upon the Presiding Officer ruling that a prima facie case of contempt had been made out. Consideration of such a motion then took precedence over all other business. The Joint Select Committee concluded that such a procedure led to hasty and ill-considered decisions, and that

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<sup>114</sup> The first two of these criteria are also to be used by the President of the Senate in determining whether a motion arising from a matter of privilege should be given precedence over other business.

rulings of the Presiding Officer on whether a prima facie case had been made out were open to misinterpretation by the public and the press. The Committee recommended that Members give notice to the Presiding Officer in writing of a matter of privilege, and that the requirement that this be done at the earliest opportunity be dropped. The presiding Officer would then rule, after considering the prescribed criteria,<sup>115</sup> whether a motion relating to the matter should be given precedence. If precedence was not accorded the matter, the Member raising it could still give notice of motion in respect of the matter. The Senate resolutions implement the Committee's recommendations in this regard.<sup>116</sup>

Similar concerns over the taking of action following insufficient deliberation led the Joint Select Committee to recommend a seven day "cooling-off period" between the time when

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<sup>115</sup> See ibid.

<sup>116</sup> Supra, note 79, pp. 101-103 (Recommendation 20).  
The previous Senate procedure more closely resembled the present practice in the Canadian House of Commons. The new procedures parallel those of the U.K. House of Commons as amended to implement the recommendations of the 1967 Select Committee. (See Chapter 2, supra, at note 58.)

punishment is proposed and the time when this is considered by the House. It was felt that such a period "would enable Members to inform themselves fully on the question, consult with colleagues, and take soundings of the public reaction to what is proposed."<sup>117</sup> Thus, the resolutions passed by the Senate provide that motions to determine that a person has committed a contempt or to impose a penalty for a contempt may not be moved unless notice of the motion was given at least seven days before the day for moving the motion.

It should also be noted that the Senate resolutions implement the Joint Select Committee's recommendations for the protection of witnesses before parliamentary committees generally. In particular, a witness may object to answering a question. If the committee wishes to require an answer, it must allow the answer to be given in private unless there are essential reasons why the proceedings should continue in public. Other matters addressed include the manner in which evidence shall be requested and given and the furnishing of supplementary documents or other evidence. Where the general procedures for

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<sup>117</sup> Ibid., p. 115 (Recommendation 22).

committees conflict with the special procedures prescribed for the Privileges Committee the latter take precedence, although the general procedures will apply to the Privileges Committee to the extent that they are not inconsistent with its own specific procedures.

One final aspect of the resolutions bears noting. In addition to a call for Senators to exercise their freedom of speech in the House in a responsible and restrained manner, keeping in mind the limited opportunities for non-members to respond to allegations made in Parliament and the need to have regard to the rights of others, the resolutions provide a novel mechanism whereby a person aggrieved by a reference to that person in the Senate may seek the publication of a reply in the parliamentary record. In such instances the person may apply to the President for the opportunity to publish a response. The proposed response is examined by the Privileges Committee if the President determines that the matter is not trivial or frivolous, and if the Committee agrees with this determination. The Committee may then recommend that the reply be printed in Hansard.<sup>118</sup>

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<sup>118</sup> This aspect of the resolutions was apparently the subject of considerable public comment, and faced serious opposition in the Senate itself. (Supra, note 81, p. 34.)

The Joint Select Committee had recommended such a mechanism as a means of counterbalancing the inherent dangers of misuse of the freedom of speech in Parliament. It was concluded that while members of the public did possess a theoretical right of public reply, "a public statement to which little public attention is paid is a poor form of reply to a privileged attack which may attract wide and damaging publicity."<sup>119</sup> Including a refutation or explanation in the parliamentary record would carry the answer back to the forum in which the attack was made, and as such would attract absolute privilege itself.

In recommending that a number of its proposals be implemented by way of resolutions, the Joint Select Committee was conscious that the criticisms that resolutions are not binding on succeeding Houses and lack the force of legislation were not without validity. Nonetheless, it was felt that given the nature of certain recommendations, the implementation of a number of them could best be achieved in this manner:

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<sup>119</sup> Supra, note 79, p. 54 (Recommendation 3).

Resolutions would be quite inappropriate to achieve changes in the law of the land. But for other matters-and particularly when a House wishes to state a decision, declare a policy or attitude or make a statement of a practice to be followed, resolutions are the best means to achieve its ends.<sup>120</sup>

While it is the case that resolutions rely for their operation on the continuing goodwill of the House, it seems correct that they are the most appropriate means of establishing practices and procedures relating to the internal workings of Parliament.<sup>121</sup>

It is evident that the effect of any process of codifying the law and procedures relating to a parliament's penal jurisdiction will result in a narrowing of the powers and immunities of that parliament. This is the inevitable result of attempting to put that law and practice into a precise written form. The recent initiatives at the federal level in Australia clearly illustrate this point. Where formal statutory

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<sup>120</sup> Ibid., p. 161.

The Committee was also influenced by the decision of the U.K. House of Commons to implement certain of the recommendations of its 1967 Select Committee by way of resolution. (See Chapter 2, supra, at note 58.)

<sup>121</sup> Implementation of such resolutions may in some cases require amendments to the standing orders of the House as well.

prescriptions are created, their application will be subject to judicial review. Even the resolutions of the Senate, although not subject to review by the courts, are intended to have an implicit binding effect. Any process of codification will be inherently exclusive as well as inclusive. Moreover, codification removes to some degree the flexibility which has traditionally characterized the law and practice in this area.

It is not surprising then that parliaments have tended to be extremely reluctant to restrict their powers, privileges and immunities by defining them in precise terms. As one commentator has observed, even the recent Australian reforms were "embarked upon not with great enthusiasm and reforming zeal, but as a matter of necessity."<sup>122</sup> The same author (the Clerk of the Australian Senate) refers to the "serious problems" of trying to put the law and practice of parliamentary privilege into detailed written form, lamenting that

now that the Houses have been compelled to go down the path of codifying, to some extent, the law and practice of privilege, they must expect to be called upon to modify and clarify the law and practice in the future. For better or worse, parliamentary privilege at the federal level in Australia now largely depends upon modern legislative prescription, with the need for

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<sup>122</sup> Supra, note 81, p. 21.

precision and comprehensiveness such as is required of new legislation.<sup>123</sup>

That such a turn of events should be reacted to in a negative manner is startling. Often it seems those with experience in the workings of Parliament, whether as Members or officers, become enamoured of tradition and historical precedents, and as a result are reluctant to accept that changing circumstances may reveal deficiencies in those precedents.<sup>124</sup> It must be borne in mind that, as the Joint Select Committee noted, "Parliament's privileges are a mirror of the times when they were gained."<sup>125</sup>

The Committee also went on to conclude that

the powers, privileges and immunities of Parliament, including the power to punish for

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<sup>123</sup> Ibid., pp. 35-36.

<sup>124</sup> The Joint Select Committee observed:

The very word "codification" conjures up in the minds of some Parliamentarians the fear that Parliament may inadvertently find itself in a straightjacket. For our part, we think that the difficulties of codification are frequently exaggerated... . (Supra, note 79, p. 158.)

<sup>125</sup> Supra, note 79, p. 25.

contempt of Parliament, developed in the context of the vindication of the rights of Parliament against outside authority. Perhaps for this reason, and perhaps also because of the wholly different political, social and economic circumstances of those days, not a great deal of thought appears to have been given to the rights of others. In particular, the rights of those ... who are called by Parliament to explain why they should not be held in contempt ... have not always had as much regard paid to them as we think they deserve.<sup>126</sup>

Rather than being viewed with trepidation, the recent Australian initiatives should be seen as a laudable attempt to bring the law and procedures relating to Parliament's penal jurisdiction into conformity with modern circumstances and present-day concepts of individual rights and natural justice, while at the same time seeking to preserve the powers necessary for Parliament to fulfil its functions. Although it is yet too early to assess the effect of these reforms, it is submitted that the recommendations of the Joint Select Committee, as implemented by the Parliamentary Privileges Act 1987 and the Senate privileges resolutions, in large part strike a successful balance between the privileges of Parliament and the rights of the individual. Moreover, the Australian reforms provide a model which could be adapted to other jurisdictions. In Canada in particular, the law and

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<sup>126</sup> Ibid., pp. 25-26.

procedures relating to Parliament's penal jurisdiction, being similar in nature and origin to those of the Australian Parliament at the time of the Committee's Report, are characterized by many of the deficiencies which the implementation of the recommendations of the Joint Select Committee seeks to address.

4. THE CANADIAN EXPERIENCE AND THE "MACKASEY AFFAIR"

In Canada, little concern has been expressed over the exercise by Parliament of its penal jurisdiction. A number of reasons may be put forth by way of explanation.

First, there is the simple fact that although there have been eighteen cases since Confederation of persons being called to the Bar of the House of Commons, the most recent of these arose in 1913. Indeed this latter case, involving the refusal of R.C. Miller to divulge to whom he had made substantial payments for the purposes of securing government contracts, is the only instance of the House committing an individual to jail. Mr. Miller was kept in custody from February 20, 1913 until the prorogation of the House on June 6th.<sup>127</sup> The infrequency of such incidents may be due to a laudable restraint on the part of Parliament in the exercise of its penal jurisdiction. It may

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<sup>127</sup> Ward, supra, note 21.

also "simply be that no case has arisen which, in the opinion of a majority of members, would justify such measures".<sup>128</sup>

It has also been asserted that the Canadian House of Commons has never taken the same "solemn view of its dignity"<sup>129</sup> as has the Parliament of the United Kingdom. Furthermore, the practice in the Canadian House is more informal. Maingot states that because of this

the House of Commons in Canada is accustomed to entertaining many alleged questions of privilege. It is therefore not unfair to say that on most occasions that a member rises to invoke privileges, the remarks do not raise a real "question of privilege".<sup>130</sup>

In fact, members raise questions of privilege without ever intending to move a motion. In the U.K., such matters are not taken so lightly.

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<sup>128</sup> Ward, supra, note 21, p. 545. Ward also suggested that the transfer of Parliament's jurisdiction to try controverted election disputes (Dominion Controverted Elections Act, R.S.C. 1985, c. C-39), may account in part for the dearth of instances of the calling of an individual to the Bar of the House. Three of the eighteen examples of such action being taken involved members who refused to attend meetings of committees trying election petitions. In two other cases, returning officers were summoned into the House.

<sup>129</sup> Dawson, supra, note 21, p. 467.

<sup>130</sup> Supra, note 2, p. 189.

Care must be taken not to infer from the fact that no person has been called to the Bar of the House in over seventy years that Parliament has abandoned its penal jurisdiction. There have been fairly frequent instances of matters being referred to the Standing Committee on Privileges and Elections (now the Standing Committee on Elections, Privileges, Procedure and Private Members' Business) for investigation and report. Even where a "breach of privilege" is found to have been committed, however, it seems to have become the practice for the Committee's report to simply conclude that such a breach was committed, and for the House to take no further action.

One highly publicized "question of privilege" referred to the Standing Committee on Privileges and Elections arose out of the so-called "Mackasey Affair".<sup>131</sup> On March 10, 1983, the Montreal Gazette published a front page story alleging that a firm owned by Liberal member of Parliament and former cabinet minister Bryce Mackasey received a \$400,000 guaranteed loan and \$25,000 in cash to lobby on behalf of a Montreal company seeking

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<sup>131</sup> In fact, this was the first time since 1978 that the Speaker of the House ruled that a prima facie case of privilege had been made out.

to obtain government contracts. Section 32 of the Parliament of Canada Act<sup>132</sup> explicitly prohibits such activity, and states that no person doing so "is eligible as a member of the House of Commons, or shall sit or vote in the said House."

The Gazette subsequently claimed that the payments were made through a shell company owned by Mackasey and were revealed in the course of a bankruptcy hearing concerning the company alleged to have made the payments. Mackasey admitted helping the company, but denied receiving any remuneration. The following day it was revealed that the R.C.M.P. were investigating the bankrupt company.

On March 16, Mackasey rose in the House on a question of privilege. Calling the Gazette's accusations "false and slanderous", he gave notice of his intention to move

[That] the allegations in the Montreal Gazette on March 10, March 11 and March 12 of 1983 that the Hon. Member for Lincoln owned 109609 Company Canada Limited and, through that company, while being a Member of the House of Commons, was a paid lobbyist, be referred to

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<sup>132</sup> R.S.C. 1985, c. P-1 (formerly the Senate and House of Commons Act).

the Standing Committee on Privileges and Elections as soon as possible.<sup>133</sup>

The Speaker noted that such a motion could only be made if the chair made a finding that there was a prima facie case of privilege, and took the matter under advisement.

On March 23, the Speaker ruled that a prima facie case of privilege had been made. It was stated that the ruling was made more difficult by the fact that it was open to Mackasey to seek redress in the courts by means of an action for libel. Opposition concerns over the propriety of Parliament's commencing an inquiry while related matters were before the courts and while a police investigation was underway were also voiced. It was felt by the Speaker, however, that concerns for the reputation of the House and Mackasey's capacity to function as a member were paramount.<sup>134</sup> The motion proposed by Mackasey was passed, despite further opposition concerns that its wording was not

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<sup>133</sup> Debates (March 16, 1983), 32nd Parliament (1st Session), p. 23834.

<sup>134</sup> Debates (March 23, 1983), 32nd Parliament (1st Session), p. 24028.

sufficiently broad to encompass all of the issues raised by the reports in the Gazette.

The Standing Committee on Privileges and Elections began its hearings into the matter on March 29, 1983. On April 27, however, the Committee was informed by the R.C.M.P. that charges might be laid as a result of the police investigation into the affairs of the bankrupt company. The Committee adjourned to allow the investigation to be completed.<sup>135</sup> Charges of "influence peddling" were laid against Mackasey and two others under the Criminal Code<sup>136</sup> on May 17. At the request of the Minister of Justice, the Committee adjourned indefinitely pending the outcome of the criminal proceedings. The charges against Mackasey were dismissed following a preliminary inquiry in which it was ruled that the case for the Crown was not supported by "a shred of evidence."<sup>137</sup>

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<sup>135</sup> Canada. House of Commons. Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections, 32nd Parliament (1st Session), April 28, 1983.

<sup>136</sup> Now s. 121 of the Criminal Code of Canada, R.S.C. 1985, c. C-46.

<sup>137</sup> Montreal Gazette, July 10, 1983, p. 1.

Nevertheless, the Standing Committee voted to resume its inquiry, and its report was presented to the House on November 23, 1983.<sup>138</sup> The eleven paragraph report outlined the incidents leading up the referral of the matter to the Committee, noted that 23 meetings were held, and stated that

some members of your committee feel that the stories were reasonably fair reports of the information obtained by the Montreal Gazette. Other members feel that the Montreal Gazette did not meet acceptable standards of fair reporting.<sup>139</sup>

The Committee took note of the dismissal of the criminal charges against Mackasey and found that the allegations made by the Gazette were unsubstantiated. It concluded by finding that

the allegations reported by the Montreal Gazette have adversely affected the reputation of the honourable member for Lincoln and, through him, the privileges of the House of Commons.<sup>140</sup>

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<sup>138</sup> Debates (November 23, 1983), 32nd Parliament (1st Session), p. 29126.

<sup>139</sup> Canada. House of Commons. Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections, 32nd Parliament (1st Session), November 23, 1983.

<sup>140</sup> Ibid. The minority report by the NDP member of the Committee argued that the majority finding posed a threat to the media's freedom to report. It was felt that since the House was still able to function and since the

The investigation by the Standing Committee on Privileges and Elections into the "Mackasey Affair" underlines a number of the criticisms made in other jurisdictions of the procedure by which the penal jurisdiction of Parliament is exercised. At the outset, it could well be argued that the desire of a member to "clear his name" is not sufficient grounds for the House to commence an inquiry, at least not in situations where an action for libel could be brought in the courts. While the Speaker indicated an awareness of this issue, it was felt that concerns for a member's capacity to function and for the reputation of the House were of primary importance. The U.K. Select Committee on Parliamentary Privilege, however, took a different view:

Your Committee cannot too strongly emphasize the fundamental principle that "privileges" are not the prerogative of Members in their personal capacities... . [T]hey are claimed and enjoyed by the House in its corporate capacity and by its

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reputation of most members had not been affected, the majority had reached the "unacceptable" conclusion that the privileges of the entire House were adversely affected by the tarnishing of the reputation of one member.

It was also pointed out that the Committee was unable even to agree on whether or not the stories were unfair, and that the Gazette could not have been in a position to predict the outcome of the criminal proceedings at the time the stories appeared.

Members on behalf of the citizens whom they represent.<sup>141</sup>

Accordingly, the Select Committee recommended that the penal jurisdiction of Parliament should not be invoked where an action for libel could be brought by a member.<sup>142</sup> The Australian Joint Select Committee on Parliamentary Privilege also recommended that "defamatory contempts" be abolished, a recommendation which has been implemented by the Parliamentary Privileges Act, 1987.<sup>143</sup>

While concern was expressed both in the House and during the inquiry by the Standing Committee on Privileges and Elections<sup>144</sup> as to the effect the Parliamentary proceedings could have on police investigations and civil or criminal court proceedings relating to the same matter, the relationship between these simultaneous proceedings remains unclear. The inquiry was

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<sup>141</sup> Supra, note 11, paragraph 12.

<sup>142</sup> Ibid., paragraphs 43 and 48.

<sup>143</sup> No. 21 of 1987. See Chapter 3, supra, at note 91.

<sup>144</sup> Debates (March 23, 1983), 32nd Parliament (1st Session) p. 24028; Canada. House of Commons. Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections, 32nd Parliament (1st Session), May 17, 18, 1983.

adjourned twice, once pending the completion of the police investigations, and once pending the outcome of the criminal proceedings. In 1913, however, the House proceeded with its examination of Mr. Miller despite his objection that related cases involving him were before the courts. Although statements made to a Committee of the House cannot be used as evidence in court, it was argued that Miller's case could still be prejudiced if he were required to answer questions posed by the Committee.<sup>145</sup> One may wonder whether it would have been proper for the Standing Committee to adjourn if Mr. Mackasey had commenced an action for libel against the Gazette.

There was also a great deal of uncertainty over the mandate of the Standing Committee. In an article appearing in the Ottawa Citizen on March 26, 1983, the Law Clerk of the House and Parliamentary Counsel was quoted as saying that the inquiry would be confined to the allegations mentioned in the motion made by Mackasey, that whether or not Mackasey received the money was

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<sup>145</sup> Ward, supra, note 21, p. 540.

In Australia, however, it has been held that parliamentary proceedings may in fact be used in court to attack the evidence of witnesses or an accused (R. v. Murphy, (1986), 64 A.L.R. 498 (N.S.W.)). The Parliamentary Privileges Act, 1987 (No. 21) is in large part intended to overturn this decision (see Chapter 3, supra, at note 80).

not a concern, and that the Committee would not make any finding of wrongdoing on the part of Mackasey. In his evidence before the Committee, however, it was admitted that although the inquiry was restricted to the four corners of the motion, as master of its own procedure the Committee was free to interpret the motion as it saw fit.<sup>146</sup> Nevertheless, it would seem correct to view the proper mandate of the Committee as having been to determine the propriety of publishing the allegations, rather than as being to inquire into their truth, the latter being a matter for determination by the courts. What seems to have been entirely forgotten was that the Gazette was merely reporting what had been said in testimony under oath in a public proceeding in open court.

This raises the issue of the role in contempt proceedings of the defence of "fair comment." Abraham and Hawtrey's Parliamentary Dictionary states

that to constitute a breach of privilege a statement reflecting on the conduct of a Member in his capacity as a Member need not be untrue, but

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<sup>146</sup> Canada. House of Commons. Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections, 32nd Parliament (1st Session), March 29, 1983.

it must tend to lower the House in the eyes of the public.<sup>147</sup>

In Canada, the Speaker of the House has ruled against finding a prima facie case of contempt on the ground that statements made were fair and reasonable comment.<sup>148</sup> For its part, the U.K. Select Committee on Parliamentary Privilege concluded that "a critic who is in peril of proceedings for contempt if his criticisms... turn out to be inaccurate is likely to be unduly inhibited", and accordingly recommended that

it should be open to the House, in deciding whether or not a contempt has been committed, to take into account an honest and reasonable belief in the truth of the allegations made, provided that they had been made only after all reasonable investigations had taken place, had been made in the honest and reasonable belief that it was in the public interest to make them and had been published in a manner reasonably appropriate to that public interest.<sup>149</sup>

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<sup>147</sup> S.C. Hawtrey and H.M. Barclay, Abraham and Hawtrey's Parliamentary Dictionary (3rd edition), (London: Butterworths, 1970), p. 44.

<sup>148</sup> Debates (May 31, 1956), 22nd Parliament (3rd Session), pp. 4528-4534.

<sup>149</sup> Supra, note 11, paragraph 58. See also the resolutions of the Australian Senate reproduced in Appendix B, as discussed in Chapter 3, supra, at note 114.

The Select Committee was prepared to concede that the scope of inquiries into complaints of contempt would thus be enlarged, but felt that since "fair comment" has always been raised in mitigation anyway, the benefits of the recommendation outweighed this criticism.

In its inquiry into the "Mackasey Affair" the Standing Committee on Privileges and Elections was never able to reach a clear consensus as to the scope of its mandate. Opposition members who earlier had been upset by the implication that it was not for the Committee to determine the truth of the allegations<sup>150</sup> later agreed that their mandate was unrelated to the criminal charges laid against Mr. Mackasey.<sup>151</sup> Government members seeking to suspend the Committee's inquiry saw the substance of the criminal charges as going to the heart of the matter, even going so far as to state that they amounted to de

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<sup>150</sup> In fact, a motion was made that the Law Clerk of the House not be heard by the Committee on the ground that the statements made to the Citizen by him indicated a prejudgment of the case. (Supra, note 146.)

<sup>151</sup> Canada. House of Commons. Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections, 32nd Parliament (1st Session), May 18, 1983.

facto exoneration of the Gazette.<sup>152</sup> Yet the inquiry was resumed after the charges were dismissed.<sup>153</sup> In the words of one Committee member:

We have only had one witness or one series of witnesses who have actually dealt with the question of privilege, and that was the Gazette. The rest of the time we have had a marvellous time hearing everybody who had been in any way associated with the whole case. It had nothing to do with the question of privileges, but it has been very interesting... . The rest of the time we have been trying to act like a criminal court.<sup>154</sup>

Admittedly much of this controversy must be viewed in terms of party politics. Nevertheless, the confusion experienced by the Committee is striking.

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<sup>152</sup> Ibid.

<sup>153</sup> Since the charges laid by the R.C.M.P. were dismissed at the preliminary inquiry, it would seem they can be viewed as having been as unsubstantiated as the allegations made by the Gazette. Quaere then, whether the R.C.M.P. did not also commit a "breach of privilege?"

<sup>154</sup> Canada. House of Commons. Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections, 32nd Parliament (1st Session), May 17, 1983.

Although the uncertainty as to whether persons accused of contempt, in this case the Gazette, appear as witnesses or defendants may be discounted in view of the very mild sanctions which are likely to be imposed, the fact still remains that a person who is made the subject of a penal proceeding is afforded neither the right to counsel nor the right to adduce evidence or to cross-examine other witnesses. While one may question the practical effect of these factors in light of the fact the punishment is usually not meted out, the public perception of these proceedings,<sup>155</sup> if nothing else, dictates that the maxim "justice must not only be done, but must be seen to be done" apply to proceedings in Parliament as well as to matters before the courts.

The "Mackasey Affair" illustrates the validity of many of the criticisms made of the procedure followed in the exercise by Parliament of its penal jurisdiction, a procedure whose most obvious characteristic is its uncertainty. This uncertainty extends to the status of witnesses appearing before the

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An editorial appearing in La Presse on April 12, 1983 criticised the Standing Committee on Privileges and Elections as a "kangaroo court" where members sit in judgment of each other and no means exists for witnesses to defend themselves.

Privileges Committee, to the scope of the inquiry and to the question of what acts will or will not constitute a "breach of privilege,"<sup>156</sup> more accurately labelled a "contempt of the House." In the end, the "Mackasey Affair" may best be described as "demonstrating that such a committee is ill-equipped to study such a problem."<sup>157</sup>

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<sup>156</sup> As has been pointed out, the members of the Standing Committee were not even able to agree that the stories published in the Gazette were unfair.

<sup>157</sup> Editorial appearing in the Ottawa Citizen, November 24, 1983.

5. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

In an editorial appearing in the Montreal Gazette on November 25, 1983 the powers of the Standing Committee on Privileges and Elections were described as "offensive to the principles of fundamental justice." It was pointed out that the Committee accepts hearsay evidence, and does not afford the right to cross-examine witnesses, to call witnesses, or to be represented by counsel. It was also alleged that such procedure violates the Canadian Charter of Rights and Freedoms.<sup>158</sup> More recently, similar sentiments were expressed on the editorial page of the Ottawa Citizen, although in a somewhat different context. In response to the refusal of the Senate Standing Committee on Internal Economy, Budgets and Administration to admit reporters to its meetings and thus abandon its practice of proceeding in camera, the Citizen argued that:

the Charter of Rights and Freedoms supports the Citizen's argument for access to these committee meetings. By keeping reporters outside the

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Constitution Act, 1982, enacted as Schedule B to the Canada Act, 1982, 30 and 31 Eliz. II, c. 11 (U.K.), Part I.

meeting room, the committee is interfering with the press's ability to do its job of informing the public; in Charter terms, it infringes upon the media's and the public's freedom of expression.<sup>159</sup>

Setting aside the rhetoric, as well as the newspapers' obvious vested interest in the matters giving rise to these statements, these editorials pose a fundamental question, namely whether the Charter applies to parliamentary proceedings, in particular those proceedings by which its penal jurisdiction is exercised.<sup>160</sup>

As was described earlier, the courts have traditionally refused to intervene in the internal business of Parliament.<sup>161</sup> In

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<sup>159</sup> July 9, 1988. The proceedings in question related to an inquiry into allegations raised in the Citizen concerning the improper use of Senate supplies and services by Senator Hazen Argue.

<sup>160</sup> It is interesting to note that the press is generally the chief proponent of the reform of Parliament's penal jurisdiction. Indeed, the majority of modern allegations of contempt would seem to arise from the publishing of statements seen by members to be of a libellous nature.

<sup>161</sup> See Chapter 1, supra. Article 9 of the Bill of Rights, 1688 (1 William and Mary, sess. 2, c.2.) states that "the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

refusing to inquire into the exercise of Parliament's power to punish for contempt, the courts have also acknowledged that persons outside the House may also come within its jurisdiction.<sup>162</sup> "In taking this view the courts have in effect treated the power of a House to commit for contempt as in all respects analogous to the power of committal enjoyed by all superior courts."<sup>163</sup> Thus, the exercise of the penal jurisdiction of Parliament has never been subject to judicial review. This may be seen as an exception to the distinction made by the courts between internal proceedings and actions of Parliament which affect persons' rights exercisable outside Parliament. As a general rule, the courts have viewed the latter as being within their jurisdiction.<sup>164</sup>

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<sup>162</sup> As has been seen, this acknowledgement is subject to the qualification that should the reasons for committal be set out in the warrant and disclose no established privilege, the courts will inquire into their sufficiency. (See Burdett v. Abbot (1810), 14 East 1.)

<sup>163</sup> Supra, note 9, pp. 202-203.

<sup>164</sup> Stockdale v. Hansard, supra, note 32.

It has been seen that the privileges and powers of the U.K. House of Commons, as they were held in 1867, form the basis of the privileges and powers possessed by the House of Commons in Canada<sup>165</sup>. In the United Kingdom, however,

[t]here is no fundamental law which cannot be altered by ordinary parliamentary action; there is no constituent instrument which allocates some subject matters of legislation to the Parliament and denies others to it; and there is no bill of rights which denies to the Parliament the power to destroy or curtail civil liberties.<sup>166</sup>

There can be no doubt that in Canada the adoption of the Canadian Charter of Rights and Freedoms places restrictions on the supremacy of Parliament in the exercise of its legislative function. But does the Charter have more far-reaching implications, touching upon other aspects of Parliament's jurisdiction?

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<sup>165</sup> See Chapter 1, supra, at notes 6-8.

<sup>166</sup> Peter W. Hogg, Constitutional Law of Canada (2nd edition), (Toronto, The Carswell Company, 1985), p. 257.

Section 32(1) of the Charter states:

32.(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Thus, there can be no doubt that the Charter operates so as to limit the legislative powers of Parliament. As summarized by Hogg: "any statute enacted by either Parliament or a Legislature which is inconsistent with the Charter will be outside the power of (ultra vires) the enacting body and will be invalid."<sup>167</sup>

This is reinforced by s. 52(1) of the Constitution Act, 1982<sup>168</sup>, which provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."<sup>169</sup> Moreover, s. 24(1)

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<sup>167</sup> Ibid., p. 671.

<sup>168</sup> Schedule B, 30 and 31 Eliz. II, c.11 (U.K.).

<sup>169</sup> One may question whether s. 52(1) adds anything substantive to the scope of application of the Charter.

expressly confers upon the courts the authority to enforce the rights and freedoms guaranteed by the Charter.<sup>170</sup>

Section 32(1) does not on its face, however, limit the application of the Charter to the exercise of the legislative authority of Parliament. Rather, it extends the Charter's application to "all matters within the authority of Parliament". Giving these words their ordinary meaning, it would seem evident that dealing with contempts committed against Parliament is a "matter within the authority of Parliament". It therefore would follow that the Charter must apply to the exercise of Parliament's penal jurisdiction.<sup>171</sup>

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Section 24(1) states:

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

<sup>171</sup>

The French version of s. 32(1) equally supports such a view. It reads:

32.(1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

The limits on Parliament's law-making powers imposed by the Charter represent a significant departure from the traditional doctrine of Parliamentary sovereignty as based on the British concept of this term. With regard to the British model, it is typically stated that in the United Kingdom individual liberty has no constitutional protection:

There is no fundamental law and there are no rights which are fundamental in the sense that they enjoy special constitutional and legal protection against interference by Parliament... . Therefore, in theory, Parliament can make any law whatsoever, no matter how seriously it curtails a cherished civil liberty.<sup>172</sup>

Aside from the limitations and modifications necessitated by the division of powers in a federal state, this doctrine applied in Canada prior to the enactment of the Charter. It is obvious that the adoption of a constitutionally entrenched Charter of Rights alters this situation dramatically. As has been noted, sections 24 and 32 of the Charter and s.52 of the Constitution Act, 1982,

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b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

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Bruce Carson, "Parliament and the Charter", 7 Canadian Parliamentary Review (No. 4, Winter 1984-85) 8 at p. 9.  
See also supra, note 166.

taken together, make it clear that parliamentary supremacy has been derogated from in that all laws made by Parliament are subject to review for the purpose of ensuring they comply with the protections set out in the Charter.<sup>173</sup>

It is natural that examinations of the impact of the Charter on Parliament have focused almost exclusively on its impact on Parliament's legislative supremacy. The most important function of any legislative body is the passing of laws, and it is by this means that Parliament's authority as a governing body is most frequently exercised and expressed. Parliament possesses a number of other powers, however, such as those relating to privilege in general, and its penal jurisdiction in particular, which are exercised in accordance with developed common law doctrines and principles. What of the Charter's application to these? It should be remembered that the Charter applies not only to all laws made by Parliament, but "to the Parliament... of

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<sup>173</sup> Professor Hogg has observed that s. 33 of the Charter, which permits Parliament or a provincial legislature to override sections 2 or 7 to 15 by expressly declaring that a statute operates notwithstanding one or more of these provisions reflects the notion of parliamentary sovereignty and "preserves parliamentary supremacy over much of the Charter." (Supra, note 166, pp. 259-260).

Canada in respect of all matters within the authority of Parliament".

The courts have not hesitated to find that the Charter applies not only to legislation and acts done under statutory authority, but to the exercise of common law or prerogative powers as well. For example, the majority of judges of the Federal Court of Appeal in The Queen v. Operation Dismantle Inc. held that the Charter authorized judicial review of the exercise of the prerogative of the Crown.<sup>174</sup> Mr. Justice Pratte, for instance, stated that:

In view of such a clear provision [s.32 of the Charter], I cannot agree with the appellant's submission that some decisions of the Government of Canada relating to certain matters should nevertheless, be excepted from the application of the Charter.<sup>175</sup>

Mr. Justice LeDain (as he then was), commented that, "the Charter places limits on the sovereignty of Parliament. It is not so

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<sup>174</sup> The Queen v. Operation Dismantle Inc. et al. (1983), 3 D.L.R. (4th) 193 (F.C.A.).  
See also Re Southam Inc. and the Queen (No. 1) (1982), 70 C.C.C. (2d) 257 (Ont. H.C.).

<sup>175</sup> The Queen v. Operation Dismantle, ibid., p. 198.

extraordinary that it should place the same limits on the prerogative power of the Crown."<sup>176</sup>

This position was unanimously affirmed by the Supreme Court of Canada.<sup>177</sup> In dealing with the submission that because s. 32(1)(a) provides that the Charter applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament", the Charter's application to the government is restricted to the exercise of statutory powers, Madame Justice Wilson observed that

the royal prerogative is "within the authority of Parliament" in the sense that Parliament is competent to legislate with respect to matters falling within its scope. Since there is no reason in principle to distinguish between Cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the Charter,<sup>178</sup> I conclude that the latter do so also.

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<sup>176</sup> Ibid., p. 210.

<sup>177</sup> [1985] 1 S.C.R. 441.

<sup>178</sup> Ibid., p. 464.

In writing for the majority, Dickson J. (as he then was) concurred:

I agree with Madame Justice Wilson that Cabinet decisions fall under s. 32(1)(a) of the Charter and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have no doubt that the executive branch of the Canadian Government is duty bound to act in accordance with the dictates of the Charter.<sup>179</sup>

Section 32(1)(a) was again dealt with by the Supreme Court in Retail, Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery Inc.<sup>180</sup> The Court, per McIntyre J., adopted the following view of s. 32:

[I]t may be seen that Parliament and the legislatures are treated as separate or specific branches of government, distinct from the executive branch of government, and therefore where the word "government" is used in s. 32 it refers not to government in its generic sense - meaning the whole of the governmental apparatus of the State - but to a branch of government. The word "government", following as it does the words "Parliament" and "legislature", must then, it would seem, refer to the executive or administrative branch of government... .

It is my view that s. 32 of the Charter specifies the actors to whom the Charter will apply. They

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<sup>179</sup> Ibid., p. 455.

<sup>180</sup> [1986] 2 S.C.R. 573.

are the legislative, executive and administrative branches of government.<sup>181</sup>

The case in question concerned an appeal from the granting of an interlocutory injunction enjoining the defendant from picketing the place of business of the plaintiff. The plaintiff had done business with an employer with whom the defendant union was involved in a labour dispute. After the dispute arose, the plaintiff did similar business with another firm connected with the employer. The defendant union took the position that the two firms with whom the plaintiff did business were allies in the labour dispute and that it could therefore lawfully picket the plaintiff's place of business. The injunction prohibiting such picketing was granted on the basis that

what the union proposes in picketing the plaintiff applicant is secondary picketing for the purpose either of the tort of inducing breach of contract, or of the tort of civil conspiracy in that the predominant purpose of the picketing is to injure the plaintiff rather than the dissemination of information and the protection of the defendant's interest.<sup>182</sup>

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<sup>181</sup> Ibid., p. 598.

<sup>182</sup> [1983] B.C.W.L.D. 100.

On appeal, the British Columbia Court of Appeal rejected the contention that the common law principles applied in granting the injunction infringed the freedoms of expression and association protected by s. 2 of the Charter.<sup>183</sup> Thus, one of the issues before the Supreme Court was also the applicability of the Charter to the common law.

In holding that the injunction restricted the freedom of expression guaranteed by s. 2(b) of the Charter, but was nonetheless a reasonable limit in accordance with s. 1, the Court displayed no hesitation in finding that the Charter applies to common law by virtue of s. 52(1) of the Constitution Act, 1982:<sup>184</sup>

The English text provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". If this language is not broad enough to include the common law, it should be observed as well that the French text adds strong support to this conclusion in its employment of the words "elle

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<sup>183</sup> (1984), 10 D.L.R. (4th) 198.

<sup>184</sup> Section 52(1) reads in full: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

rend inopérantes les dispositions incompatibles de toute autre règle de droit" (emphasis added). To adopt a construction of s.52(1) which would exclude from Charter application the whole body of the common law which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act.<sup>185</sup>

These cases serve as examples by which it is demonstrated that the courts have not restricted the Charter's application to legislation and actions taken pursuant to statutory authority. The juxtaposition of the terms "Parliament" and "government" in s.32(1)(a) has led to the conclusion that the Charter applies to the executive and its exercise of Crown prerogative. The reference to "law" in s.52(1) of the Constitution Act, 1982 includes the common law. But what of the express reference to "Parliament" in s.32(1)(a) of the Charter?

Those examining s.32(1)(a) have generally been satisfied with viewing its application to Parliament solely in terms of that body's legislative powers, while focusing their discussion on the use of the term "government".<sup>186</sup> While it is readily

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<sup>185</sup> Supra, note 180, p. 593.

<sup>186</sup> See, for example, Peter Hogg, supra, note 166, p. 671 and A. Anne McLellan and Bruce P. Elman, "To Whom Does the Charter Apply? Some Recent Cases on

apparent that Charter issues will most frequently be raised in relation to legislation, it is just as apparent that Parliament functions in a number of ways quite apart from the passing of legislation. In Retail, Wholesale and Department Store Union, local 580 et al. v. Dolphin Delivery Ltd., Mr. Justice McIntyre remarked in passing that "It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom."<sup>187</sup> With all due respect, this is patently incorrect.

For example, Parliament is an employer. The traditional view of Parliament's position as employer was stated in Beauchesne's Rules and Forms of the House of Commons of Canada (4th edition):

The control and management of the officers of the Houses are as completely within the privilege of the Houses as any regulation of its own proceedings within its own walls. These officers are under the guidance of certain rules and orders of the House which are among the regulation of its proceedings and as essentially matters of privilege as the appointment of committees, the conduct of public business and the procedure of the

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Section 32" (1986), 24 Alberta Law Review 361.

<sup>187</sup>

Supra, note 180, p. 599.

Houses, generally, including the acts of the Speaker himself in the Chair.<sup>188</sup>

Thus, in House of Commons v. Canada Labour Relations Board and Public Service Alliance of Canada,<sup>189</sup> the Federal Court of Appeal held that Part V of the Canada Labour Code<sup>190</sup> did not apply to employees of the House of Commons, and that the Canada Labour Relations Board therefore had no authority to certify a union to represent such employees. In interpreting the application provisions of the Code, the Court was very much cognizant of the fact that "parliamentarians, rightly or wrongly, consider the right of the House and the Senate to appoint and control the staff as one of their privileges."<sup>191</sup> While Parliament no doubt could have made the relevant provisions of

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<sup>188</sup> Arthur Beauchesne, Rules and Forms of the House of Commons of Canada (4th edition), (Toronto: Carswell 1958), p. 329, s. 446. The notion that the right to function as employer of its staff is one of the privileges of the House of Commons is echoed in Maingot, supra, note 2, p. 157.

<sup>189</sup> [1986] 2 F.C. 372.

<sup>190</sup> Now Part I of R.S.C. 1985, c. L-2.

<sup>191</sup> Supra, note 189, p. 384, (per Pratte J.).

the Code applicable to employees of the House of Commons, an express provision would have been required to abrogate a privilege of Parliament. Since no such express language was included in the statute, this could not have been Parliament's intent.<sup>192</sup>

This case serves as but one illustration of an area in which Parliament may impact upon individual rights and liberties without enacting legislation. Although not directly relevant, in that at the end of the day the issue was merely one of statutory interpretation, one may wonder how a court would react if faced with the claim that actions taken by Parliament in dealing with its employees infringed the freedoms of association or expression guaranteed by s. 2 of the Charter. At least one commentator has

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Shortly after the decision of the Federal Court of Appeal in House of Commons v. Canada Labour Relations Board and Public Service Alliance of Canada Parliament, perhaps partly as a result of that decision, enacted the Parliamentary Employment and Staff Relations Act (R.S.C. 1985, c. 33, 2nd Supp.) to govern employment and employer and employee relations in the Senate, the House of Commons and the Library of Parliament. Section 4(1) provides, however, that nothing in Part I of the Act, which deals with staff relations (and makes up nearly the entire statute), "abrogates or derogates from any of the privileges, immunities and powers referred to in section 4 of the Parliament of Canada Act."

taken it as self-evident that the Charter applies to Parliament's dealings as employer with its employees.<sup>193</sup>

There are also judicial statements which lend support to the view that the Charter binds Parliament in areas other than the exercise of its power to pass legislation. In Penikett et al. v. the Queen et al.; Sibbeston et al., Intervenors<sup>194</sup>, the Yukon Territory Supreme Court dealt with several questions of law arising from a petition seeking a declaration that the rights of residents of the Yukon Territory as guaranteed by sections 7 and 15 of the Charter would be violated by the adoption of the 1987 Constitutional Accord (more popularly known as the Meech Lake Accord). While ultimately ruling that such a declaration would be premature and therefore inappropriate since the agreement between the Prime Minister and the provincial First Ministers in and of itself had no effect in law and since a resolution

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Mary Eberts, "The Equality Provisions of the Canadian Charter of Rights and Freedoms and Government Institutions", in Claire S. Beckton and Wayne MacKay, eds., The Courts and the Charter, (Toronto, University of Toronto Press in Co-operation with the Royal Commission on the Economic Union and Development Prospects for Canada) 133 at p. 172.

<sup>194</sup>

(1988), 43 D.L.R. (4th) 324.

approving the agreement, although passed by the House of Commons and the Senate, had not been passed by the legislature of each province, McDonald J. also dealt expressly with the argument that resolutions by the Senate and House of Commons are not subject to the Charter because such actions do not fall within s.32(1). In this regard, it was held that:

The word "Parliament" as used in s. 32 refers to Acts of The Queen in Parliament (i.e., statutes) and also to acts or decisions in the form of resolutions by any component part of Parliament, such as the Senate or the House of Commons. Any other interpretation of s.32(1) would not reflect a large, liberal and generous interpretation of s.32(1) as is expected of the court...<sup>185</sup>

MacDonald J. went on to conclude that section 33(1) of the Charter indicates that Parliament cannot override a right protected by s. 2 or sections 7 to 15 by means of a resolution. The phrase "may expressly declare in an Act of Parliament" was seen to refer to the sole mechanism by which Parliament may override one of the aforementioned rights and freedoms.<sup>186</sup>

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<sup>185</sup> Ibid., p. 332.

<sup>186</sup> Ibid., p. 333.

Section 33(1) reads:

33.(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

At the end of the day, it seems to have been the position of the Court in Penikett that, while the Charter could apply to resolutions passed by one or both Houses of Parliament, the particular resolution in issue was not such as to have legal effects sufficient to affect any rights protected by the Charter. It is not difficult, however, to conceive of situations in which a resolution of the House might well impact upon the legal rights of an individual, particularly since the privileges of the House will, in many instances, be ultimately exercised by way of resolution. For instance, should the House wish to exercise its penal jurisdiction, either by issuing a reprimand or committing an individual to imprisonment, it would do so by way of a resolution. This would, of course, usually follow consideration of a report of the Standing Committee on Elections, Privileges, Procedure and Private Members' Business.

Contempts of the House may be committed, not only by outsiders, but by members as well. In the latter case two additional sanctions are available, namely suspension and expulsion. Maingot states that "Suspension is a power legally

incidental to a legislature because it is necessary for any such body to be able to discipline its members in such a manner should the circumstances warrant it."<sup>197</sup> Generally, expulsion will be considered where a member has been found guilty by the courts of an offence which the House judges to render him or her unfit to be a member.<sup>198</sup> Thus, "The purpose of expulsion is not so much disciplinary as remedial, not so much to punish Members as to rid the House of persons who are unfit for membership. It may justly be regarded as an example of the House's power to regulate its own constitution."<sup>199</sup> The impact of the Charter on this aspect of parliamentary privilege was dealt with to some extent in the context of a provincial legislature in MacLean v. Attorney-

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<sup>197</sup> Supra, note 2, p. 181.

<sup>198</sup> Expulsion from the Canadian House of Commons has occurred on three occasions. On April 16, 1874, Louis Riel, as a fugitive, was expelled. Following re-election, Riel was again expelled on February 25, 1875. On June 30, 1946, Fred Rose was expelled following his conviction on a charge of espionage arising from a conspiracy to provide information to the U.S.S.R.

<sup>199</sup> Supra, note 9, p. 139.

General of Nova Scotia,<sup>200</sup> an action which concerned a challenge to the validity of An Act Respecting Reasonable Limits for Membership in the House of Assembly.<sup>201</sup>

On October 3, 1986 Billy Joe MacLean, a member of the Nova Scotia House of Assembly, pleaded guilty to four counts of knowingly using forged documents in connection with expenses claimed both as a Member of the Legislative Assembly and as a provincial Minister of the Crown. On October 30th, the House of Assembly passed the Act in question, which purported to expel MacLean, provide for the automatic expulsion of any member upon conviction for an indictable offence punishable by more than five years imprisonment and prohibit any person from being nominated or elected for five years from the date of conviction for such an offence. The Act also purported to be retroactive. MacLean challenged the validity of the Act on the grounds that it infringed sections 3, 7, 11 and 15(1) of the Charter.

While acknowledging the historic right of a legislature to expel, the plaintiff argued that this right was now qualified

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<sup>200</sup> (1987), 35 D.L.R. (4th) 306 (N.S.S.C.).

<sup>201</sup> S.N.S. 1986, c.104.

by the Charter. The defendant countered that the expulsion of MacLean was a valid expression of the privileges of the Assembly with respect to the disciplining of its members and the regulating of its affairs. After citing the standard reference works on parliamentary practice and procedure, Madame Justice Glube (C.J.T.D.) reached the following conclusion:

In my opinion, the power to expel a person by resolution of the Assembly remains a valid function of the Assembly, and if by resolution, would normally not be reviewable by the Court.<sup>202</sup>

Chief Justice Glube then went on to find that the provision of the Act expelling MacLean was severable and could "stand on its

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<sup>202</sup> Supra, note 200, p. 315.

Section 45 of the Constitution Act, 1982 (formerly contained in s.92(1) of the Constitution Act, 1867) provides that the legislature of each province may exclusively make laws amending the constitution of the province. Thus, as Maingot notes (supra, note 2, p.4), each provincial legislature may legislate the same privileges as those possessed by the Canadian House of Commons. Nova Scotia has done this expressly. (House of Assembly Act, R.S.N.S. 1967, c.128, s.28(1).)

In fact, it would seem to be open to a provincial legislature to grant itself privileges beyond those possessed by the House of Commons. Thus, s. 136 of the Quebec National Assembly Act (R.S.Q., c. A-23.1) provides for the imposition of a fine where a member is found to be in a conflict of interest, or for requiring such a member to refund money received as a result of transactions giving rise to such a conflict.

In other provinces, legislation has been passed enumerating acts which may be found to constitute contempts. (See, for example, the Ontario Legislative Assembly Act, R.S.O. 1980, c. 235, s. 45.)

own". Apparently because of this the Court refused to interfere with the expulsion.

It would seem that in refusing to make any distinction between expulsion by resolution and expulsion by Act of the Assembly, the Court implicitly adopted the position that the exercise of its privileges by a legislature is simply not subject to review under the Charter by the courts. Thus, where a particular privilege was exercised by statute, the Court severed the relevant portion of the Act, refusing to deal with it.

Chief Justice Glube did not, however, seem particularly confident in the correctness of such an approach:

If I am wrong in this conclusion, then the Act, including the expulsion, must be looked at under s.3 of the Charter, which states in part, "Every citizen of Canada has the right... to be qualified for membership..." in a legislative assembly... .

I agree that proper standards for its sitting members may be set by the House... . In my opinion no breach of section 3 occurs by the House expelling one of its members.<sup>203</sup>

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<sup>203</sup> Ibid.

Although seemingly obiter, the concluding paragraph of the reasons for judgment indicates that the Court did, in fact, apply the Charter to the provision of the Act expelling MacLean. After concluding that section 1 of the Act, which purported to retroactively prohibit any person convicted of an indictable offence punishable by more than five years from being a candidate for election to the House of Assembly for five years, contravened s.3 of the Charter and could not be saved by s.1 as being "demonstrably justified in a free and democratic society", Chief Justice Glube summarized her decision as follows:

To ensure public trust is maintained in the membership of the House, expulsion is demonstrably justified in a free and democratic society. The restrictions in s. 1 of the Act are not. Section 1 of the Act is null and void.

Having found that the Act violates s. 3 of the Charter and having then analyzed the Act under s. 1 of the Charter and having found that ss. 2 [the provision expelling MacLean] and 3<sup>204</sup> of the Act meet the test of s. 1 of the Charter but s. 1 of the Act does not, I do not propose to discuss the arguments presented under ss. 7 and 15 of the Charter.<sup>205</sup>

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<sup>204</sup> Section 3 of the Act provided that "Nothing in this Act affects or shall be construed to affect the right of the Assembly to expel, suspend or discipline a member according to the practices, rules and procedures of the Assembly or otherwise."

<sup>205</sup> Supra, note 200, p. 319.

The combined effect of these various statements appears more than a little bewildering. Having first apparently decided that the expulsion of a member, whether by statute or by resolution, was an exercise of the privileges of the Assembly and therefore subject neither to the Charter nor review by the courts, the court then observed that even if this view was incorrect, expulsion did not result in a breach of s. 3 of the Charter. By the end of the judgment, however, the Court is expressly stating that it has reviewed the expulsion in the context of the Charter, that expulsion does breach the Charter (one must assume that by now a breach of s. 3 has been found), but that the expulsion provision meets the test set out in s. 1 of the Charter and is therefore valid!

There are other indications in the judgment that the Court did not consider the expulsion of a member of a legislature to be completely immune from review. At one point it is observed that expulsion before Maclean's conviction or plea of guilty "would have been wrong and no doubt could have been challenged."<sup>206</sup> In addition, although the Court in the MacLean

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<sup>206</sup> Ibid, p. 317.

case seemingly did not distinguish between expulsion by statute and expulsion by resolution, it was stated only that expulsion by resolution would normally not be reviewable. One is also left to wonder what sort of "abnormal" circumstances were contemplated. What would seem to be implicit in all this is that while expulsion remains a valid exercise of the privileges of a legislature, and while expulsion does not prima facie give rise to a breach of any particular Charter right or freedom, a court may inquire, at least in cases where the expulsion in question is effected by statute, into whether or not the rationale underlying a particular expulsion, as well as the circumstances and manner in which it is carried out, conform to the Charter. Where expulsion is by way of statute this is clearly consistent with the general principle that the Charter is applicable to statutes passed by Parliament or a legislature.

Thus, while it is impossible to divine any broad principles from the Court's rather murky and muddled reasons, it does seem certain that some sort of Charter analysis was applied to the particular expulsion in question. To conclude, as one commentator has, that the decision in the MacLean case recognizes "the right of the Legislature to expel members by resolution which is not subject to question under the provision [sic] of the

Charter", and that "should an assembly use legislation to expel a member, the Court has refused to interfere with that action, continuing to respect the jurisdiction of the assembly in its internal workings, regardless of the Charter"<sup>207</sup> overstates the Court's reasoning to the point of distortion.

A more direct challenge under the Charter to Parliament's traditional jurisdiction over its privileges began in August of 1988 with the filing on behalf of Southam Inc. and Charles Rusnell, a reporter for the Ottawa Citizen, of a statement of claim in the Trial Division of the Federal Court.<sup>208</sup> The

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<sup>207</sup> John Holtby, "The Legislature, the Charter, and Billy Joe MacLean", 10 Canadian Parliamentary Review (No. 1, Spring 87) 12 at p.14.

For a quite different view of the judgment in Maclean v. A.G. Nova Scotia see Roger Tassé, "Application of the Canadian Charter of Rights and Freedoms", in Gérald-A. Beaudoin and Ed Ratushny, eds., The Canadian Charter of Rights and Freedoms (2nd edition), (Toronto: Carswell, 1989), 65 at p. 72 (footnote 14). Tassé concludes that "the court raised but did not resolve the question of the application of the Charter to the traditional rights and powers of the legislative assembly." (See also New Brunswick Broadcasting Co. v. Donahoe, *infra*, note 220, at p. 61, where the view seems to be expressed that the court in Maclean simply found that the statutory provision expelling MacLean did not contravene the Charter.)

<sup>208</sup> Southam Inc. and Charles Rusnell v. Attorney General of Canada, The Senate, The Senate Standing Committee on Internal Economy, Budgets and Administration and Her Majesty the Queen, [1989] 3 F.C. 147, reversed on jurisdictional grounds August 23, 1990 (C.A.),

statement of claim named the Attorney General of Canada, The Senate, the Senate Standing Committee on Internal Economy, Budgets and Administration and Her Majesty the Queen as defendants and sought, amongst other relief, declarations that the refusal by the Senate Committee to allow the plaintiffs access to its meetings and the provisions of the Rules of the Senate of Canada permitting the Committee to proceed in camera infringed or denied the plaintiff's freedom of expression guaranteed by s. 2(b) of the Charter, and were not demonstrably justified reasonable limits prescribed by law within the meaning of s. 1 of the Charter.

The defendants each moved to be struck out of the action. Although a number of technical grounds were raised, some of which will be discussed later,<sup>209</sup> it was clear to the Court that "[t]he principal issue, however, was that of the jurisdiction of courts in general, and in particular of this Court, to review the

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A-309-89. This action followed the Senate Committee's refusal to allow the Ottawa Citizen access to its proceedings dealing with allegations against Senator Hazen Argue. (See supra, note 159.)

<sup>209</sup>

See Chapter 6, infra, at notes 301-310 and 343-344.

manner of exercise of parliamentary privilege".<sup>210</sup> In his reasons, Strayer J. observed that a substantial part of the submissions of counsel for the Senate and the Internal Economy Committee "was really to the effect that no court has jurisdiction to apply the requirements of the Canadian Charter of Rights and Freedoms to the Senate or its committees."<sup>211</sup>

Mr. Justice Strayer had little difficulty in concluding that the Charter extends to the Houses of Parliament and their committees. Noting that "the adoption of the Charter has fundamentally altered the nature of the Canadian constitution",<sup>212</sup> he gave the following concise summation of the Charter's effect on whatever immunity from judicial review of the exercise of its privileges Parliament may have previously possessed:

The Constitution Act, 1867 contained few express guarantees of personal rights and liberties - guarantees which the courts could enforce as against Parliament, legislatures, and governments. The Charter changed all that.

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<sup>210</sup> Supra, note 208, p. 154.

<sup>211</sup> Ibid, p. 156.  
It should be kept in mind that the privileges possessed by the Senate are identical to those of the House of Commons (Parliament of Canada Act, R.S.C., 1985, c. P-1, s.4).

<sup>212</sup> Ibid, p. 157.

It gave paramount value to certain rights and liberties of the individual and authorized the courts to enforce those rights and liberties as against those public bodies (including Parliament) which are referred to in section 32. Thus our constitution in this respect is no longer "similar in principle to that of the United Kingdom". That is surely what much of the debate was about in Canada over the adoption of the Charter. That is why some statesmen and jurists in the United Kingdom rejoice that their constitution is not similar in principle to ours. I accept that the Charter should not be automatically assumed to override other pre-existing, expressions of the Constitution. I believe, however, that it must be taken to have superseded any implied constitutional immunity, if such there were, from judicial review of the exercise by organs of Parliament of their alleged privileges, at least where such exercise is said to infringe individual rights and freedoms guaranteed by the Charter. Other branches of government have had to accept this consequence of the Charter and so must parliamentary committees.<sup>213</sup>

Counsel for the Senate and its Committee also sought to rely on the statement of the Federal Court of Appeal in House of Commons v. Canadian Labour Relations Board et al. that "an express provision of a statute is necessary to abrogate a privilege of Parliament or its members".<sup>214</sup> Strayer J.,

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<sup>213</sup> Ibid., p. 157.

<sup>214</sup> Supra, note 189, p. 490.

however, held that the language of s. 32 of the Charter made this principle irrelevant to the matters at hand:

It is equally a principle of statutory interpretation that no enactment is to affect Her Majesty's rights or prerogatives unless expressly referred to therein, a principle which is codified in the Interpretation Act. However, in the Operation Dismantle case in 1985 the Supreme Court had little difficulty in finding that by virtue of section 32 the Charter had been made applicable so as potentially to limit the exercise of the royal prerogative. I find it difficult to believe that section 32 does not also, in referring to "Parliament", impose on the constituent elements of Parliament such restraints as may otherwise flow from the language of the Charter just as the reference to "government" in section 32 makes the Charter binding on every component and office of government while acting as such. I therefore find that the argument based on statutory interpretation is irrelevant as the alleged "abrogation" would be imposed by the Charter.<sup>215</sup>

On appeal, the Federal Court of Appeal determined that the Federal Court in fact possessed no jurisdiction to hear the case.<sup>216</sup> In light of this, it was not necessary to address the other issues raised by the parties, "important as they may be as

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<sup>215</sup> Supra, note 208, pp. 158-159.

<sup>216</sup> Supra, note 208. The reasons for this conclusion are discussed in Chapter 6, infra, at notes 301-310.

general questions of public policy and administration".<sup>217</sup>

Nevertheless, it was observed that "the sweep of Strayer J.'s comment that the constitution is no longer similar in principle to that of the United Kingdom is rather wide".<sup>218</sup>

The Court of Appeal also stated that although it could be argued that the Charter applies to the constituent elements of Parliament, "there are questions and arguments to the contrary":

For example, as noted already, paragraph 32(1)(a) of the Charter applies to Parliament, which by section 17 of the Constitution Act, 1867 means all three components of the House of Commons, the Senate and Her Majesty the Queen. But does paragraph 32(1)(a) apply where only one of the House of Commons and the Senate (or one of its committees) is involved? Do the provisions of the Charter not apply because another pre-existing section of the Constitution Act, 1867, namely section 18, expressly confers privileges, powers and immunities on the House of Commons and the Senate? What is the relevance in the Charter area of the jurisprudence to the effect that

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<sup>217</sup> Ibid., p.6.

<sup>218</sup> Ibid., p. 21.

What Strayer J. in fact wrote was that since the Charter authorized the courts to enforce certain individual rights and liberties as against Parliament, the Canadian Constitution "in this respect" is no longer similar in principle to that of the U.K. Parliament.

courts have been reluctant to interfere with the internal proceedings of Parliament...<sup>219</sup>

No conclusion, however, was expressed on the matter.

Thus, although the main issues which gave rise to these proceedings were not in the end adjudicated, the comments made by Strayer J. concerning the applicability of the Charter to Parliament were not rejected by the Court of Appeal, wary though it may have been of their implications, and do represent an express judicial statement as to the impact of the Charter in the area of parliamentary privilege. As recognized by Strayer J., the language of s. 32 cannot be dismissed simply by relying on pre-Charter constitutional principles rooted in ancient British parliamentary traditions. It is suggested that full effect cannot be given to traditional British doctrines of parliamentary privilege in a jurisdiction which possesses a constitutionally entrenched set of rights provisions. In such a situation, it must fall to the courts to ensure that a legislature exercises its privileges in conformity with such constitutional provisions.

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<sup>219</sup> Ibid., pp. 22-23.

This was also the view of Nathanson J. of the Nova Scotia Supreme Court recently in New Brunswick Broadcasting Co. et al. v. Donahoe et al.<sup>220</sup> In issuing a declaration that the plaintiffs had a right of access to the legislature to televise proceedings of the Nova Scotia House of Assembly pursuant to the freedom of expression guaranteed by s. 2(b) of the Charter, the Court rejected the contention that the rules of the legislature were not subject to the Charter. Under the rules of the legislature reporters were permitted to view proceedings and make audio recordings from an audio feed provided, but television cameras were prohibited. It was held that this constituted discrimination such as infringed s. 2(b) and could not be saved by s. 1 of the Charter, in that while maintaining security and decorum in the legislature were sufficiently important to override the plaintiff's guaranteed freedom of expression, the means chosen did not impair this freedom as little as possible. The court expressly adopted the reasoning of Strayer J. in Southam Inc. and Charles Rusnell, agreeing that "The Charter has changed the law as it existed prior to its enactment and is now the paramount law of Canada".<sup>221</sup>

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<sup>220</sup> (1990), 71 D.L.R. (4th) 23.

<sup>221</sup> Ibid., p. 42.

The court recognized that the presence of television cameras in the House without its permission would breach the privileges of the legislature. It was held, however,

American jurisprudence illustrates the relationship between the legislature and the courts with respect to privilege in a jurisdiction possessing both a written constitution and a constitutionally entrenched set of rights provisions, and thus may furnish certain principles which may be applied in the Canadian context. Section 5 of Article 1 of the United States Constitution confers upon Congress the power to punish its members for disorderly behaviour.<sup>222</sup> The United States Supreme

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that the privileges of the House of Assembly do not form part of the Constitution of Canada. Section 52(2) of the Constitution Act, 1982 provides that the Constitution of Canada includes the acts set out in the schedule thereto. Taking the schedule as exhaustive, the fact that it makes no mention of the Constitution of Nova Scotia or the privileges of the House of Assembly was seen to be conclusive. (Although s. 88 of the Constitution Act, 1867 continued the constitution of the legislatures of Nova Scotia and New Brunswick as they existed prior to Confederation "until altered", the enactment of s. 52(2) was found to be such an alteration.) Accepting this conclusion, there could be no doubt that the rights guaranteed by the Charter prevailed over the privileges of the legislature, which were not constitutionally entrenched. This line of reasoning appears open to question, and in any event may not be applicable at the federal level given s. 18 of the Constitution Act, 1867. (See Chapter 6, infra, at note 306.)

It was also doubted that the "Constitution" of a province includes the privileges of its legislature. It is submitted that the position of the court in this regard is incorrect. (See R. v. Mercure, [1988] 1 S.C.R. 234, at 262 (per Laforest J.) and Ontario Public Service Employees Union v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at pp. 37-42 (per Beetz J.).)

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Paragraph 2 of section 5 reads:  
Each House may determine the Rules of its  
Proceedings, punish its Members for disorderly

Court, however, ruled in Anderson v. Dunn<sup>223</sup> that this provision did not imply the exclusion of the power to punish non-members for contempt. The Court observed that

if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the power which the people have intrusted to them. The interests and dignity of those who elected them, require the exertion of the powers indispensable to the attainment of the ends of their creation.<sup>224</sup>

This language is strikingly similar to that traditionally used to describe the need for the privileges of Parliament. Other passages in the judgment reflect similar parallels. For example, it was observed that to hold that the House of Representatives had no power to punish non-members for contempt

leads to the total annihilation of the power of the House of Representatives to guard itself from

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Behaviour, and, with the Concurrence of two thirds, expel a Member.

<sup>223</sup> 6 Wheat (US) 204 (1821).

<sup>224</sup> Ibid., p. 226.

contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived.<sup>225</sup>

Thus, the House of Representatives possessed the power to punish a district attorney who wrote to a newspaper alleging that the real purpose behind the appointment of a House subcommittee to inquire into allegations concerning him was in fact to hinder a grand jury investigation of a member of the House.<sup>226</sup>

Although since 1857 the courts have been authorized by statute to punish those who refuse to answer or to produce documents when summoned by Congress or a joint committee or

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<sup>225</sup> Ibid., p. 228.

The express reference in Article 1 of the Constitution to punishment of members of Congress was explained in the following terms:

The truth is, that the exercise of the powers given over their own members, was of such a delicate nature, that a constitutional provision became necessary to assert or communicate it. Constituted, as that body is, of the delegates of confederated states, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honour or interests of the state which sent him. (Ibid., p. 233.)

<sup>226</sup> Marshall v. Gordon, 37 S. Ct. 449 (1916).

committee of either House,<sup>227</sup> such conduct may also be punished by Congress itself. The statute has been held not to have created a new offence, but merely to specify a punishment for an existing offence and to complement the contempt power possessed by Congress.<sup>228</sup> In Jurney v. MacCracken the U.S. Supreme Court held that the power of Congress to punish for contempt was not impaired by the statute. The purpose of the statute was stated as being to supplement the power of contempt by providing for additional punishment.<sup>229</sup>

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<sup>227</sup> 2 USC, section 192.

The statute authorizes courts to punish persons who, having been summoned as witnesses by authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, any joint committee established by concurrent resolution of the two Houses, or any committee of either House, wilfully make default, or who, having appeared, refuse to answer any question pertinent to the question under inquiry. The offence is a misdemeanour.

<sup>228</sup> Quinn v. United States, 349 US 155, 75 S.Ct 668, (1956).

<sup>229</sup> 55 S. Ct 375 (1934), at p. 379.  
The case involved the destruction of papers by an attorney following receipt of a subpoena to appear before a Senate committee and produce certain of the papers in question.  
It has also been held that imprisonment for a term not exceeding the session of the body in which the contempt occurred is the limit of the authority to deal directly with contempts without recourse to criminal prosecution. (Supra, note 226.)

Anderson v. Dunn was partially overruled by the Supreme Court in Kilborn v. Thompson,<sup>230</sup> in which the Court set aside the conviction of a witness who refused to appear before a Congressional inquiry. Here the Court expressly rejected the notion that the precedents and practices of the British Parliament were relevant in an American context. The Court extensively reviewed the law and precedents relating to the contempt power of the British Parliament, observing that "[t]his power is here distinctly placed on the ground of the judicial character of parliament, which is compared in that respect with the other courts of superior jurisdiction, and is said to be of a dignity higher than they."<sup>231</sup> It was found that Parliament's power to punish contempts derived, not from its status as a representative body, but "by virtue of ancient usage and prescription."<sup>232</sup>

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<sup>230</sup> 103 U.S. 168 (1880).

<sup>231</sup> Ibid., p. 185.

<sup>232</sup> Ibid., p. 188.

The Court refused to accept the argument that Congress, being an assembly with functions analogous to Parliament, must possess similar contempt powers as a part of the common law. Nor was it persuaded that such powers were necessary to the effective functioning of any legislative assembly:

[T]he powers and privileges of the House of Commons of England, on the subject of punishment for contempts, rest on principles which have no application to other legislative bodies, and certainly can have none to the House of Representatives of the United States, - a body which is in no sense a court, which exercises no functions derived from its once having been a part of the highest court of the realm...<sup>233</sup>.

Nevertheless, it was noted that Anderson v. Dunn<sup>234</sup> was decided before the case of Stockdale v. Hansard<sup>235</sup>, the latter being seen as presenting to some extent a reversal of the traditional British doctrines. Anderson v. Dunn was, it was

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<sup>233</sup> Ibid., p. 189.

This conclusion has been criticised for ignoring American colonial precedents. See C.S. Potts, "Power of Legislative Bodies to Punish for Contempt" (1926), 74 University of Pennsylvania Law Review 691.

<sup>234</sup> Supra, note 223.

<sup>235</sup> Supra, note 32.

stated, "a case of the first impression in this court, and undoubtedly under pressure of the strong rulings of the English courts in favour of the privileges of the two Houses of Parliament. Such is not, however, the doctrine of the English courts today."<sup>236</sup>

While the correctness of this assessment may be questioned, nevertheless at the end of the day the Court denied that Congress possesses any general power to punish for contempt. The statement of the Supreme Court of Massachusetts in Burnham v. Morrissey<sup>237</sup> that "the house of representatives [of the state of Massachusetts] is not the final judge of its own powers and privileges where the liberty of the subject is concerned, but the legality of its action may be examined and determined by this court" was quoted with approval. This conclusion was seen to follow from the existence of a written constitution, making it proper for the court to inquire into whether Congress acted in conformity with that document. Thus, while Congress was vested with contempt powers by the Constitution, "the power is limited

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<sup>236</sup> Supra, note 230, p. 199.

<sup>237</sup> 14 Gray (Mass) 226.

to cases expressly provided for by the Constitution, or to cases where the power is necessarily implied from those constitutional functions and duties, to the proper performance of which it is essential."<sup>238</sup>.

In Marshall v. Gordon<sup>239</sup> the court considered the circumstances in which Congress could exercise its power to punish for contempt. It stated that this power

is a means to an end, not an end in itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted.<sup>240</sup>

Thus, the contempt power granted to Congress by the Constitution implicitly follows from the grant of legislative power and extends only so far as it is necessary to preserve and carry out the legislative power granted. This is seen to follow from the separation of legislative, judicial and executive powers

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<sup>238</sup> Ibid.

<sup>239</sup> Supra, note 226.

<sup>240</sup> Ibid., p. 453.  
See also Jurney v. MacCracken, supra, note 229, at p. 378:

It is true that the scope of the power is narrow. No act is so punishable unless it is of a nature to obstruct the performance of the duties of the legislature.

reflected in the Constitution. Congress possesses none of the "blended" judicial and legislative authority historically possessed by Parliament.<sup>241</sup>

The case of Groppi v. Leslie<sup>242</sup> provides a clear statement of the nature of judicial review by the Supreme Court of the exercise of a legislature's contempt power. Here, the Court held that a resolution passed by the Wisconsin legislature citing Groppi for contempt and sentencing him to imprisonment violated the requirement of due process.

Two days prior to the passage of the resolution, Groppi had led a demonstration on the floor of the legislature and had been arrested on charges of disorderly conduct. Although served with a copy of the resolution, he was not given notice, nor was he afforded an opportunity to speak in his defence. Groppi argued that he was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

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<sup>241</sup> Ibid., p. 450.

<sup>242</sup> 92 S. Ct 582 (1972).

The Court had no doubt of its power to review and to insist on the procedures that the Due Process Clause of the Federal Constitution requires a state legislature to meet in imposing punishment for contemptuous conduct.<sup>243</sup> This was not taken to mean, however, that a legislature was required to conduct a full-scale trial, affording a defendant the full rights accorded in a criminal proceeding in the courts. It was noted that legislatures were not equipped to conduct such proceedings, and that the disruption that would result from such a requirement would be unacceptable. This was felt to be the chief reason for the delegation to the courts of part of the contempt powers of Congress.

Nevertheless, the court found that "reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are basic in our system of jurisprudence."<sup>244</sup> Although the nature of the hearing was to be left largely to the discretion of the legislature, the right to be heard had to be respected. In granting relief on habeas corpus, the court concluded that

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<sup>243</sup> Ibid., p. 585.

<sup>244</sup> Ibid., p. 586.

the procedures employed in this case were beyond the legitimate scope of that power [of the legislature to punish for contempt] because of the absence of notice or any opportunity to respond.<sup>245</sup>

The United States Supreme Court has even claimed the authority to review the exercise of powers explicitly granted to Congress under the Constitution. In Powell v. McCormick,<sup>246</sup> it was held that Congress, in judging the qualifications of its members pursuant to Section 5 of Article 1 of the Constitution, is limited to the qualifications for standing set out in that provision. Congress was therefore without power to exclude a duly elected member who was not ineligible under a provision of

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<sup>245</sup> Ibid., pp. 588-589.

<sup>246</sup> 89 S. Ct 1944 (1969). Adam Clayton Powell Jr. had, by resolution of the House of Representatives, been prevented from taking his duly elected seat following charges that he had misappropriated public funds and abused the process of the New York courts.

the Constitution<sup>247</sup>.

An even closer parallel to the Canadian constitutional framework may be found in the Constitution of India.<sup>248</sup> Part III of the Indian Constitution sets out certain "fundamental rights", and can be seen as analogous to the Canadian Charter. Article 118 provides that "Each House of Parliament may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business." Prior to 1978, article 105(3), which was modelled on s.49 of the Australian Constitution,<sup>249</sup> gave to the Parliament of India the same powers

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<sup>247</sup> See Bradlaugh v. Gossett, supra, note 25, as an example of the refusal of the British courts to embark on such inquiries in similar circumstances.

<sup>248</sup> Constitution of India, 1950 (as amended up to the Constitution (Forty-sixth Amendment) Act, 1982). (References to the Indian Constitution are taken from Albert P. Blaustein and Gisbert H. Flantz, eds., Constitutions of the Countries of the World, (Dobbs Ferry, New York: Oceana Publications, Inc. updated to April, 1989), vol. VII.)

<sup>249</sup> See Chapter 3, supra, at note 59. Article 105.(3) now reads:

105.(3) In other respects [preceding subsections deal with freedom of speech and the publishing of reports], the powers, privileges and immunities of each House of Parliament, and of the Members of the committees of each House, shall be such as may from time to time be defined

and privileges as the House of Commons of the United Kingdom, unless the Indian Parliament declared otherwise.

In the Presidential Reference regarding the U.P. Controversy,<sup>250</sup> a number of questions were referred to the Supreme Court of India concerning the respective jurisdictions of the legislature and the judiciary. Among other questions, the Supreme Court was asked to determine whether a court in India has the power to judicially review an order passed by a legislature imposing punishment for contempt, and whether parliamentary privilege overrode the fundamental rights embodied in the Constitution.

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by Parliament by law, and, until so defined shall be those of that House and of its members and committees immediately before the coming into force of Section 15 of the Constitution (Forty-Fourth Amendment) Act, 1978.

Article 194 embodies an identical provision with regard to the state legislatures.

<sup>250</sup> 1965, S.C. 745.  
(This case is discussed in detail in D.C. Jain, Parliamentary Privileges under the Indian Constitution, (New Delhi: Sterling Publishers, 1975), pp. 170-186.)

The court concluded that Indian courts possessed the right to examine even general warrants issued by a legislature. It was stated that

All Legislative Assemblies in India never discharged any judicial functions and their historical and Constitutional background does not support the claim that they can be regarded as courts of record in any sense. If that be so, the very basis on which the English courts agreed to treat a general warrant issued by the House of Commons on the footing that it was a warrant issued by a Supreme Court of Record, is absent in the present case.<sup>251</sup>

Even assuming that the power to commit is a matter of privilege claimed by Parliament, rather than a right claimed by Parliament as a superior court, it was held that Article 32 of the Constitution, which provides for remedies for the enforcement of fundamental rights, was paramount:

To the absolute constitutional right conferred on the citizens by article 32 no exception can be made and no exception is intended to be made by the Constitution by reference to any power or privileges, vesting in the Legislature of this country.<sup>252</sup>

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<sup>251</sup> Ibid., p. 746.

<sup>252</sup> Ibid., p. 786.

The Supreme Court in the UP case was of the opinion that the ultimate authority to interpret the provisions of the Constitution lay with the courts. Parliamentary sovereignty, as that principle developed in England, could not be absolutely claimed by any legislature in a federal state, for the supremacy of the Constitution must be protected by an independent judicial body. In summary:

The Constitution of India is a written Constitution and though it has adopted many of the principles of the English Parliamentary system, it has not accepted the English doctrine of absolute supremacy of Parliament. In this respect it has followed the American constitution.<sup>253</sup>

It is submitted that a similar analysis is now valid in the Canadian context.

Returning finally to the contempt powers of the Canadian Parliament when viewed in light of a constitutionally entrenched charter of rights, it remains necessary to elaborate on one further incident. On December 14, 1981, it was moved in the House of Commons:

That this House demonstrate its real approval of fundamental rights and freedoms by making the provisions of the Charter of Rights and Freedoms apply forthwith to proceedings in this

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<sup>253</sup> Jain, supra, note 250, p. 203.

House as part of the Standing Orders so that the Charter will govern over these ancient usages and customs that now apply.<sup>254</sup>

Because this motion failed to pass, and because s.18 of the Constitution Act, 1867 remains in force, it has been argued that the Charter simply cannot apply to the House of Commons.<sup>255</sup>

The refusal of the House to pass the motion set out above is, however, by no means conclusive of the matter. Firstly, it is clear that the circumstances giving rise to the motion in question were hardly such as to engender a full and serious consideration of an issue of this importance. On December 3, 1981, following a reply by the Minister of Public Works to a question concerning the alleged distribution of advertising relating to budget provisions prior to the budget's introduction, Tom Cossitt, an opposition member, rose on a question of privilege, stating "From the statements which this House has just heard, I have no alternative but to say that the minister has

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<sup>254</sup> Debates (December 14, 1981), 32nd Parliament (1st Session), p. 14009.

<sup>255</sup> Supra, note 2, p. 229 at note 240.

deliberately misled this House."<sup>256</sup> Mr. Cossitt refused to comply with the Speaker's request to withdraw these unparliamentary words, and a motion that he be suspended from the service of the House for the remainder of the day's sitting was subsequently carried.

This rather trivial incident was clearly the reason for the motion made by Howard Crosby, also an opposition member, that the Charter be expressly adopted in the Standing Orders of the House, since the motion was prefaced by the statement that "After an overwhelming majority of members approved the constitutional resolution, which contains a Charter of Rights and Freedoms, this House allegedly followed ancient usage and custom and voted to expel a member for exercising the right to freedom of thought, belief, opinion and expression stipulated in the charter without recognizing the rights enunciated in the charter."<sup>257</sup> In view of the circumstances leading up to this motion, it can safely be said that the matter was regarded by all sides as the aftermath

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<sup>256</sup> Debates (December 3, 1981), 32nd Parliament (1st Session), p. 13685.

<sup>257</sup> Supra, note 254.

of a minor partisan skirmish and was given little or no consideration other than as such.

Secondly, it should be noted that the motion was made under what was then Standing Order 43, which read:

43. A motion may, in case of urgent and pressing necessity previously explained by the mover, be made by unanimous consent of the House without notice having been given under Standing Order 42.<sup>258</sup>

Thus there was no debate on the motion, which was in effect defeated when it was shown that there was not unanimous consent for its making.

At one extreme, from the fact that it was clear that this motion, made without notice and in the circumstances in which it was, had no chance whatsoever of receiving unanimous consent, it can be claimed that it was viewed on all sides as simply an attempt to embarrass the Government and was summarily dealt with as such. At the other extreme, since there was no debate on the motion the parliamentary record gives no indication as to why unanimous consent was not given, and in fact there is no more evidence that it was the view of the House that the Charter did

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<sup>258</sup> Standing Orders of the House of Commons, June, 1978.

not and should not apply to its proceedings than there is that members were of the view that it was clear that the Charter already applied to proceedings in the House and that such a motion was therefore unnecessary. In any event, the motion of December 14, 1981 appears to have little evidentiary relevance to the issues and questions under discussion. Moreover, it should be borne in mind that resolutions of the House cannot in any event have the effect of altering the application of the Charter.

To argue that the Charter is not relevant to the entire area of parliamentary privilege in general, and to the exercise of Parliament's contempt powers in particular, is to ignore the clear language of the Charter. Privilege clearly forms part of the law.<sup>259</sup> Section 52(1) of the Constitution Act, 1982 states that the Constitution of Canada, of which the Charter is one element, is the supreme law of Canada and renders any inconsistent law of no force and effect. The reference in this

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<sup>259</sup> Section 5 of the Parliament of Canada Act, R.S.C. 1985, c. P-1 reads:

5. The privileges, immunities and powers held, enjoyed and exercised in accordance with section 4 are part of the general and public law of Canada and it is not necessary to plead them but they shall, in all courts in Canada, and by and before all judges, be taken notice of judicially.

provision to "law" has been held to include not only legislation but common law and the exercise of crown prerogative. There is no evidence for the exclusion of the law of parliamentary privilege from the reference in s. 52(1). In fact, s.32(1)(a) of the Charter expressly states that the Charter applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament" (emphasis added). Judicial pronouncements to date<sup>260</sup> indicate that the Courts will not balk at the prospect of accepting these words at their face. As one author has observed:

The Charter applies to Parliament in the exercise of its legislative power. It would be incongruous if the Houses of Parliament could ignore the Charter in circumstances where their non-legislative actions violate fundamental values protected by the Charter.<sup>261</sup>

Of course s.18 of the Constitution Act, 1867 forms part of the Constitution of Canada as well. What would therefore seem to be required is that s.18 be read together with s.32 of the Charter. Thus, while the Charter cannot be seen to take away from Parliament's powers, rights and immunities, it may well have the effect of imposing certain requirements with respect to the

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<sup>260</sup> Supra, notes 208 and 220.

<sup>261</sup> Tassé, supra, note 207, p. 72.

means followed in the exercise, and particularly in the enforcement, of these rights, powers and immunities. The distinction is analogous to that between substantive and procedural requirements.

In Reference Re an Act to Amend the Education Act (Ontario) the Supreme Court of Canada held that "It was never intended...that the Charter could be used to invalidate other provisions of the Constitution".<sup>262</sup> Clearly, however, this cannot mean that simply because a power is conferred by the Constitution it's exercise is immune from judicial review under the Charter, since this would render the Charter meaningless. Rather, the case may be seen to reflect the principle that the Charter may not be used to remove completely a power to legislate. As observed by Estey J.:

Action taken under the Constitution Act, 1867 is of course subject to Charter review. That is a far different thing from saying that a specific power to legislate as existing prior to April, 1982, has been entirely removed by the simple advent of the Charter. It is one thing to supervise and on occasion curtail the exercise of a power to legislate; it is quite another thing to say that an entire power to legislate has been removed from the

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<sup>262</sup> [1987] 1 S.C.R. 1148, at p. 1197 (per Wilson J.).

Constitution by the introduction of this  
judicial power of supervision.<sup>263</sup>

It should also be remembered that although s.18 grants to each House the power to define its rights, privileges and immunities, that power is actually exercised by statute, namely the Parliament of Canada Act. It would therefore seem to follow that while only each House of Parliament may define its rights, privileges and immunities, their exercise must be such as not to infringe the individual rights and freedoms guaranteed by the Charter. Thus, the existence of a constitutionally entrenched set of fundamental rights clearly means that traditional British principles of parliamentary sovereignty and privilege must be modified to fit increasingly distinct Canadian circumstances.

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<sup>263</sup> Ibid., pp. 1206-1207.

6. CONTEMPT, THE CHARTER AND THE COURTS

The application of the Canadian Charter of Rights and Freedoms<sup>264</sup> to Parliament means that certain long-established principles governing the relationship between Parliament and the courts are, to some extent at least, no longer applicable in the Canadian context. It is far from clear how this relationship will be redefined. Given the historical reluctance of the courts to enter into examinations of the internal proceedings of Parliament, as well as the infrequency with which such issues command the attention of either Parliament or the courts, any discussion of the changes which are, or may be, occasioned by the Charter must, it is admitted, be rather speculative.

At the outset, it may be useful to keep in mind that when one speaks of the application of the Charter to Parliament's contempt powers, one is concerned chiefly with the legal rights embodied in sections 7 to 14. In addition, the litigation to

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<sup>264</sup> Constitution Act, 1982, enacted as Schedule B to the Canada Act, 1982, 30 and 31 Eliz. II, c.11 (U.K.), Part I.

date indicates that the freedom of the press guaranteed by s.2(b) may also be relevant.<sup>265</sup>

The application of these Charter rights to Parliament's contempt powers could have a significant impact on the manner in

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<sup>265</sup> Southam Inc. and Charles Rusnell v. Attorney General of Canada, The Senate, Senate Standing Committee on Internal Economy, Budgets and Administration and Her Majesty the Queen, supra, note 208. See also New Brunswick Broadcasting Co. v. Donahoe, supra, note 220.

The language guarantees set out in ss.16(1) and 17(1) may be relevant as well. These provisions read, respectively:

16.(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada. ...

17.(1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Although at first glance it appears highly unlikely that proceedings in Parliament would give rise to objections that these provisions had been violated, the spectacle of a committee of the House of Commons berating and threatening to refuse to hear witnesses who had appeared before it with a brief prepared in only one official language demonstrates that no Charter guarantee should ever be taken for granted. (See Canada. House of Commons. Minutes of Proceedings of the Standing Committee on Consumer and Corporate Affairs and Government Operations, 34th Parliament (2nd Session), June 12, 1989.)

which these powers have traditionally been exercised. For example, one can question whether the principle that a warrant of committal which discloses no cause of committal on its face will not be inquired into by the courts upon a writ of habeas corpus can co-exist with s.10(c) of the Charter, which provides that "Everyone has the right on arrest or detention ... to have the validity of the detention determined by way of habeas corpus...". In addition, the possibility of confinement "during pleasure" may be seen to be a violation of section 7 of the Charter, which guarantees "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Where a person who has been accused of committing a contempt is called before the Commons' Committee on Elections, Privileges, Procedure and Private Members' Business as a "witness", the right not to be compelled to give evidence against oneself set out in s.11(c) of the Charter may become relevant. While this right only attaches to persons "charged with an offence", contempt of Parliament has traditionally been characterized as an "offence". Moreover, the marginal note accompanying s.11 reads "Proceedings in criminal and penal matters", indicating that its application may not be restricted to matters which fall within the boundaries of purely "criminal law". There would of course remain the question of

whether persons accused of contempt of Parliament are "charged", and if so at what point in the process this takes place.

It must also be kept in mind that s.1 of the Charter may also be of great relevance to the question of the Charter's effect on Parliament's contempt powers. Section 1 reads:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Thus, if the Charter is found to apply to Parliament's penal jurisdiction, and since it seems evident that some aspects of Parliament's exercise of this jurisdiction do in fact breach rights guaranteed by the Charter, it will remain to be seen whether each such breach is permitted by s.1.

It may well be that it is in the context of s.1 that the need to achieve a balance between the protection of individual rights afforded by the Charter and the traditional rationale for Parliament's contempt powers, according to which it is essential that the legislature have the means to defend its independence, dignity and authority, is brought most sharply into focus. Assuming that the courts will choose to follow the course marked in a preliminary fashion in New Brunswick Broadcasting Co. v.

Donahoe and by Strayer J. in Southam Inc. and Charles Rusnell,<sup>266</sup> as discussed in the previous chapter, the next line of defence likely to be taken by Parliament in seeking to preserve the traditional control over its internal proceedings is to argue that aspects of such proceedings which may be found to breach a Charter guarantee are protected by s.1.<sup>267</sup> At its widest, the argument might even be made that all of Parliament's traditional practices and procedures are prima facie protected by s.1 of the Charter as "reasonable limits prescribed by law" which are "demonstrably justified in a free and democratic society".

Such a position could be grounded on a number of traditional principles all of which have been referred to earlier. As has been seen,<sup>268</sup> there is no doubt that the practices and procedures of Parliament form a part of "the law". In addition, since the scope of the Charter's application is not restricted to statute law, but would seem to extend to all that which can be characterized as "law", it follows that the

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<sup>266</sup> Supra, note 220; supra, note 208.

<sup>267</sup> See, for example, New Brunswick Broadcasting Co. v. Donahoe, ibid.

<sup>268</sup> See Chapter 5, supra.

established practices and procedures of Parliament also meet the test of being "prescribed by law". It would be clearly anomalous that a body of law to which the Charter guarantees applied could not also be saved by s.1.

Turning to the requirements that limits must be "reasonable" and "demonstrably justified in a free and democratic society", reliance might be placed on the classic statements of the origins of, and need for, Parliament's privileges and powers. The existence of an independent legislative body possessing the dignity and authority necessary to carry out its functions is the cornerstone of any democracy. Moreover, if Parliament is to be independent, it must be free from interference from the courts, or from any other institution for that matter. The long existence of Parliament's privileges and the reverent tone in which they are often referred to could also be used as evidence of their reasonableness and justifiability. This line of argument would emphasize the view that Parliament's privileges serve as a "shield", as opposed to a "sword", and that while the exercise of these privileges may possibly lead to some interference with an individual's rights as guaranteed by the Charter, concerns in this regard must be subordinated to the need to ensure the continued existence of Parliament as a democratic

institution. Thus, all of the principles invoked to explain the need for the development of the privileges of Parliament and the immunity of the exercise of these privileges from review by the courts may now be used to buttress the view that they are protected by s.1.

It should be evident that to claim that all aspects of the traditional exercise of Parliament's privileges are prima facie protected by s.1 of the Charter puts the case much too broadly. The historical circumstances which led to the evolution of Parliament's powers and privileges to a considerable degree no longer exist. Moreover, these powers and privileges developed in a context in which the question of the appropriate balance between the rights of the individual and the interests of the state was viewed very differently than it is today. The matter is not resolved simply by pointing to the reasons for the development of certain powers and privileges. Rather, it must be asked whether each aspect of each power and each privilege remains at all justified today, and if so in what ways and to what extent. Furthermore, it must be kept in mind that if some action taken by one of the Houses in the exercise of a privilege is found to contravene a right guaranteed by the Charter, the question becomes one of whether the need for Parliament to

protect itself in that manner outweighs the potential resultant harm to individual citizens. It is submitted that this is consistent with the approach taken in both the United States and in India as illustrated in the previous chapter.

There is also another argument flowing from the Charter itself which may be raised to seek to preclude review by the courts of the exercise of Parliament's privileges. Section 24(1) of the Charter states:

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Thus, an application under s.24(1) must be made to a "court of competent jurisdiction". In Singh et al v. Minister of Employment and Immigration,<sup>269</sup> three of the six members of the Supreme Court of Canada who participated in the judgment took the view that this phrase "premised the existence of a jurisdiction external to the Charter itself". In other words, it is required

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<sup>269</sup> [1985] 1 S.C.R. 177, (per Wilson J., Dickson C.J.C. and Lamer J. concurring).

that "the court be one possessing jurisdiction over the subject matter of the application and the parties thereto."<sup>270</sup>

With regard to Parliament's penal jurisdiction, it has already been seen that the power to punish for contempt is traditionally described as analogous to the contempt powers possessed by the superior courts.<sup>271</sup> Maingot goes so far as to state that "Parliament is a court with respect to its own privileges and dignity and the privileges of its members."<sup>272</sup>

Erskine May expresses a slightly more cautious view:

Whether the House of Commons be, in law, a court of record, it would be difficult to determine; for this claim, once firmly maintained has latterly been virtually

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<sup>270</sup> Supra, note 166, p. 695.  
See also, for example, Re R. and Brooks et al. (1982), 38 O.R. (2d) 545 (H.C.J.), Re Crain (R.L.) Inc. et al. and Couture et al. (1983), 6 D.L.R. (4th) 478 (Sask. Q.B.) and Re Service Employee's International Union, Local 204 and Broadway Manor Nursing Home et al. and two other applications (1984), 48 O.R. (2d) 225 (C.A.). Where there is no such court, jurisdiction falls to provincial superior courts for purposes of the Charter (R. v. Mills, [1986] 1 S.C.R. 863).

<sup>271</sup> Chapter 1, supra.

<sup>272</sup> Supra, note 2, p. 185.  
Maingot cites a Speaker's ruling containing a statement to this effect (Debates (June 19, 1959), 24th Parliament (2nd Session), p. 4929.).

abandoned, although never distinctly renounced.<sup>273</sup>

The recognition by the courts of Parliament's exclusive jurisdiction to punish for contempt adds credence to the view that Parliament can, for certain limited purposes, be viewed as a court. Such a power constitutes one of the defining characteristics of a "court of record".<sup>274</sup> Certainly proceedings which have the potential to deprive the subject of liberty are, in the normal course of events, judicial in nature.

If each House of Parliament is in fact acting as a court when it exercises its jurisdiction with respect to contempt, and given the exclusivity accorded its jurisdiction in this area by the courts, it may be argued that s.24(1) of the Charter precludes review by the courts of proceedings in Parliament relating to contempt. As has been seen, s.24(1) has been interpreted as not conferring any jurisdiction on a court which it did not possess before the enactment of the Charter. Prior to the Charter, exclusive jurisdiction with regard to Parliament's contempt powers rested with Parliament alone in its capacity as a

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<sup>273</sup> Supra, note 9, p. 123.

<sup>274</sup> Supra, note 1, p. 103.

court. Thus, Parliament is not only "a court of competent jurisdiction" for the purpose of s. 24(1), but is in fact the only such court. In other words, while the Charter does apply to the exercise of the contempt powers of a House of Parliament, the only forum in which a remedy for the infringement or denial of a Charter right arising out of proceedings relating to the exercise of these powers may be sought is the particular House itself.<sup>275</sup>

While such a line of argument does possess a certain logical force, it must be remembered that it relies on the presumption that the Canadian House of Commons (as well as the Senate, presumably) is a court. This presumes that such a status was inherited from the British House of Commons at the time of Confederation by virtue of s.18 of the Constitution Act, 1867

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<sup>275</sup> In fact, a similar argument was raised in New Brunswick Broadcasting Co. v. Donahoe, (supra, note 220), based upon s. 35(1) of the Nova Scotia House of Assembly Act (R.S.N.S. 1967, c. 128), which constitutes the House of Assembly as a court of record "for the purposes of summarily inquiring into and punishing" a breach of its privileges. The trial judge concluded, however, that this did not mean that the House was the court of competent jurisdiction for all purposes of s. 24(1) of the Charter. Nor could the jurisdiction possessed by other courts be excluded by such a provision: "No provincial legislation can interpret the meaning of "court of competent jurisdiction" in s. 24(1) or direct what court will be a court of competent jurisdiction". (p. 44)

and, in turn, s. 4 of the Parliament of Canada Act.<sup>276</sup> It must also be presumed therefore that the U.K. House of Commons possessed the status of a court in 1867. Neither of these presumptions, however, are free from doubt.

Although in 1592 the House of Commons passed a resolution stating itself to be a court of record,<sup>277</sup> as Erskine May notes, this claim has not been strongly pressed in recent centuries<sup>278</sup>. In 1774, Lord Mansfield stated that the House of Commons was not a court of record.<sup>279</sup> In Stockdale v. Hansard,<sup>280</sup> it was argued that the High Court of Parliament was a superior court, and that a declaration by it on parliamentary privilege was a binding declaration by a court of exclusive jurisdiction. It therefore followed that the courts had no jurisdiction in matters of

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<sup>276</sup> 31 and 32 Vict., c.23; R.S.C. 1985, c. P-1.

<sup>277</sup> Fitzherbert's Case, 1 Hatsell 233.

<sup>278</sup> Supra, note 1, pp. 103-104.

<sup>279</sup> Jones v. Randall, 1 Cowp. 17

<sup>280</sup> Supra, note 32.

privilege. Although insisting on the jurisdiction of the courts to inquire into whether a claim of privilege fell within the jurisdiction of the House of Commons, all four judges who heard the case conceded that the House had exclusive jurisdiction over its internal proceedings. At least two of the judges, however, were unreceptive to the notion that the House of Commons was a court. Patterson J. was of the view that in passing a resolution setting out its view of its privileges the House of Commons "was not acting as a court either legislative, judicial, inquisitorial, or of any other description."<sup>281</sup> Coleridge J. was even more explicit:

[I]t is said that this and all other courts of law are inferior in dignity to the House of Commons, and that therefore it is impossible for us to review its decision. This argument appears to be founded on a misunderstanding of several particulars; first, in what sense it is that this Court is inferior to the House of Commons; next, in what sense the House is a court at all; and, lastly, in what sense we are now assuming to meddle with any of its decisions. Vastly inferior as this Court is to the House of Commons, considered as a body in the state, ... yet, as a court of law, we know no superior but those courts which may revise our judgments for error; and in this respect there is no common term of comparison between this Court and the House. In truth, the House is not a court of law at all, in the sense in which that term can alone be properly applied here; neither originally, nor by appeal, can it decide a matter in litigation between two parties; it has no means of doing so; it claims no such

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<sup>281</sup> Ibid., at p. 194.

power; powers of inquiry and of accusation it has, but it decides nothing judicially, except where it is itself a party, in the case of contempts. As to them no question of degree arises between courts; and, in the only sense therefore in which this argument would be of weight it does not apply. In any other sense the argument is of no force.<sup>282</sup>

In Bradlaugh v. Gossett, Stephen J. characterized the exclusive jurisdiction of the House of Commons over its internal proceedings in the following terms:

The House of Commons is not a Court of Justice; but the effect of its privilege to regulate its own internal proceedings practically invests it with a judicial character...<sup>283</sup>

He quoted with approval the statement made by Coleridge J. in Stockdale v. Hansard that the principle

[t]hat the House should have exclusive jurisdiction to regulate the course of its own proceedings, and an animadvert upon any conduct there in violation of its rules or derogation from its dignity, stands upon the clearest grounds of necessity.<sup>284</sup>

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<sup>282</sup> Ibid., at pp. 223-224.

<sup>283</sup> Supra, note 25, at p. 285.

<sup>284</sup> Ibid., at p. 279.

These nineteenth-century cases have been described as reflecting the transition from the medieval to the modern conception of the relationship between the House of Commons and the courts.<sup>285</sup> It is suggested that one important aspect of this transition relates to the exclusive jurisdiction of the House over its internal proceedings and its right to commit for contempt. While an exclusive sphere of jurisdiction may originally have been claimed by the House of Commons by virtue of its being one constituent element of the High Court of Parliament, by the nineteenth century the courts, at least, recognize such jurisdiction as being based primarily on principles of necessity. An exclusive jurisdiction is recognized only where necessary for maintaining the efficiency and dignity of the House. Of course, Erskine May also points out that "[t]he decisions of the courts are not accepted as binding by the House in matters of privilege, nor the decisions of the House by the courts."<sup>286</sup> Nevertheless, while the U.K. House of Commons has never expressly abandoned its claim to being a court, it has ceased, as was observed earlier, to insist on it actively.

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<sup>285</sup> Supra, note 9, p. 195. (See also supra, note 1, pp. 145-160.)

<sup>286</sup> Ibid., p. 203.

In Kielley v. Carson the Privy Council stated that the privileges of each House of Parliament were based on the same grounds of necessity as pertained to every legislative body.<sup>287</sup> The sole exception was Parliament's contempt powers which, it was held, derived from the status of each House as a descendant of the High Court of Parliament. It does not follow, however, that the House of Commons continued to exist as a court. It can as cogently be argued that this power was simply asserted over time until, by ancient usage and custom, it became a part of the law. Again, it does not necessarily mean that the House continued to be a court.

Whether the British House of Commons was or was not a court in 1867, it is difficult to see how any such status can have been passed on to the Houses of the Parliament of Canada.

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<sup>287</sup> (1842), 4 Moo. P.C.C. 63, 13 E.R. 225 (P.C.). The case arose out of remarks made in the Newfoundland House of Assembly by a member in relation to the administration of the hospital in St. John's. The manager of the hospital subsequently confronted the member in a threatening manner, was found to have committed a contempt, and was arrested. When brought to the Bar of the House his behaviour was such that he was ultimately placed in jail. Upon release on a writ of habeas corpus he sued the member concerned and the Speaker, among others, for false imprisonment.

Although s.18 of the Constitution Act, 1867 conferred on each House of the Canadian Parliament such "privileges, immunities and powers" as may be "held, enjoyed and exercised by the U.K. House of Commons", possessing the status of a court is not a right, privilege or immunity. While the U.K. House of Commons may possess certain rights, privileges and immunities, specifically those attaching to its contempts powers, by virtue of its being a descendant of the High Court of Parliament, neither House of the Canadian Parliament can claim such ancestry.

As noted above, the Judicial Committee of the Privy Council held, in Kielly v. Carson, that colonial legislative assemblies possessed only those powers necessary for the exercise of their functions. Moreover, the power to commit for contempts committed outside the House was held not to be such a necessary power. The Privy Council went one step further in Doyle v. Falconer,<sup>288</sup> holding that colonial assemblies possessed no contempt powers even with respect to contempts committed by members in the assembly. This is not to imply that only the U.K. Parliament can be possessed of contempt powers. It is clear, however, that colonial legislatures have such powers only if, and

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<sup>288</sup> (1866), 11 Moo. P.C.C. 347, 14 E.R. 727.

to the extent that, they have been conferred on them by the Parliament of the mother country. It seems clear that the principle is similar when applied to the Dominions and the other independent members of the Commonwealth. For example, both the Australian and the Indian constitutions contain provisions similar to s.18 of the Constitution Act, 1867.<sup>289</sup> Thus, the House of Commons possesses its contempt powers neither as a necessary incident to its status as a legislature nor by virtue of ancient usage and custom<sup>290</sup> which has become a part of the common law, but rather because they were conferred by the U.K. Parliament by statute at Confederation and because they remain enshrined as part of the Constitution.

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<sup>289</sup> See Chapter 3, supra, at note 59 and Chapter 5, supra, at note 249.

<sup>290</sup> Often referred to as the "lex et consuetudo". This is not to say that in the absence of legislation on the matter the Canadian Houses of Parliament would possess no contempt powers. The American cases discussed in the previous chapter indicate that an independent (as opposed to a colonial) legislature may possess inherent contempt powers by virtue of necessity. It seems that such legislatures by their nature possess powers in this area which colonial assemblies do not. In the Canadian context, however, the existence of s.18 of the Constitution Act, 1867 and s.4 of the Parliament of Canada Act renders the question purely theoretical.

Since the U.K. Parliament possesses its contempt powers by virtue of ancient custom and usage stemming from its historical roots as one element of the High Court of Parliament, and since the Canadian House of Commons possesses such powers only by virtue of legislation and not as an incident of its existence as a legislative body, it would seem to follow that the Canadian House has in fact never been a court. The statement made by the court in the U.P. case cited in the previous chapter that "Legislative Assemblies in India never discharged any judicial functions and their historical and Constitutional background does not support the claim that they can be regarded as courts of record in any sense"<sup>291</sup> could, it is suggested, also be used as an accurate assessment of the position of the Canadian House of Commons. This is also consistent with the approach taken by the courts in the United States which, although obviously viewing these issues from a much different historical perspective, have found that the contempt powers of the U.K. parliament derive, not from its status as a legislative body, but "by virtue of ancient usage and prescription, and rest upon

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<sup>291</sup> See Chapter 5, supra, note 251.

principles that have no application to other legislative bodies".<sup>292</sup>

Nevertheless, if the House of Commons is not a court, it might still be a "court of competent jurisdiction" for purposes of s.24(1) of the Charter. The French version of s.24(1) uses the term "tribunal", which would seem to be broader than the English "court". Because of this, and because since the Charter is the "supreme law of Canada"<sup>293</sup> it would seem incumbent upon those making decisions of a judicial nature to bear its provisions in mind, it has been argued that s.24(1) encompasses administrative tribunals and other quasi-judicial bodies.<sup>294</sup> The same reasoning could be applied to the House of Commons in the exercise of its contempt powers.

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<sup>292</sup> Kilborn v. Thompson, supra, at notes 230-232.

<sup>293</sup> Constitution Act, 1982, Schedule B, 30 and 31 Eliz. II, c. 11 (U.K.), s.52(1).

<sup>294</sup> Dale Gibson and Scott Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms", in The Canadian Charter of Rights and Freedoms (2nd edition), Gérald-A. Beaudoin and Ed Ratushny eds., (Toronto: Carswell, 1989) 783 at p. 799. See, however, E.G. Ewaschuk, "The Charter: An Overview and Remedies" (1982), 26 C.R. (3d) 54.

At the end of the day, a conclusion as to whether the House of Commons is or is not a court contributes little, in and of itself, to resolving the question of whether, having determined that the Charter does apply to the exercise by the House of its contempt powers, such exercise can be reviewed in the context of the Charter by an external institution, namely the courts.<sup>285</sup> It should be kept in mind that s.52(1) of the Constitution Act, 1982 states that the Constitution is the supreme law of Canada, and renders any conflicting law of no force and effect. It has been argued that "[a]lthough this

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<sup>285</sup> It is interesting, however, to note that an early draft of s.24 conferred seemingly broader enforcement powers on the courts generally, rather than upon courts of "competent jurisdiction":

Where no other effective recourse or remedy exists, courts are empowered to grant such relief or remedy for a violation of Charter rights as may be deemed appropriate and just in the circumstances.

(Federal-Provincial Conference of First Ministers on the Constitution, Federal Draft Proposals Discussed by First Ministers, Document No. 800-010/037 (Ottawa, February 5-6, 1979), cited in Gibson and Gibson, ibid., p. 785.)

Gibson and Gibson also note (at pp. 783-784) that the constitutions of a number of countries, including India, Nigeria, and West Germany, contain express enforcement provisions conferring jurisdiction on a specified court.

provision does not expressly confer on the courts the responsibility of ensuring that Canadian laws comply with the Constitution, this responsibility is implicit in the section."<sup>296</sup> As has been seen, while the privileges, immunities and powers of the House of Commons derive from the Constitution, they must be "defined by Act of the Parliament of Canada."<sup>297</sup> This has been done in s.4 of the Parliament of Canada Act, to which the Charter clearly applies, and which is clearly subject to review by the courts. It has also been seen that the principles underlying this definition form part of the common law, which is also subject to review by the courts. It seems illogical that the courts, having been given the role of enforcing the Charter, should be excluded from performing this role in a single area of the law, namely contempt of Parliament, particularly where the outcome of the proceedings arising in this area can, potentially at least, have a profound impact on the liberty of the subject. To conclude that although the Charter does apply to the exercise by the House of Commons of its contempt powers only the House itself may determine what this entails, and that therefore an individual who considers himself to be aggrieved by the manner in

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<sup>296</sup> Tassé, supra, note 207 at p. 108.

<sup>297</sup> Constitution Act, 1867, s.18

which these powers have been exercised may seek redress from the House alone, seems to make a mockery of the guarantees set out in the Charter. It should be self-evident that it is incongruous to provide a set of entrenched rights and freedoms but then to require that redress for their infringement be sought from the very body whose actions led to the grievance in question.

As was seen in the previous chapter, the courts have extended their jurisdiction for purposes of enforcement of the Charter into aspects of the functioning of both the executive and the legislature not previously subject to judicial review. It has also been argued that the historical factors on which the exclusion of the courts from review of the exercise of Parliament's contempt powers are based are in large part no longer relevant, if indeed they ever truly possessed relevance in connection with the Canadian House of Commons. Having said this, and keeping in mind the principle, as enunciated by the Supreme Court of Canada,<sup>298</sup> that a "purposive approach" should be

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<sup>298</sup> Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

Writing for the majority in R v. Big M Drug Mart Ltd., Chief Justice Dickson described the purposive approach to interpreting the Charter in the following terms:

[T]he purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate

adopted in interpreting the Charter, it is submitted that the conclusion that the Charter applies to the exercise of the penal jurisdiction of the House assumes an effective power of judicial review.

As to the question of which specific court has jurisdiction to undertake such a review, at least one source has implied that judicial enforcement of constitutional rights is an element of the "inherent remedial power" of superior courts.<sup>299</sup>

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the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts. (p.344)

<sup>299</sup> Gibson and Gibson, supra., note 294, pp. 839-840.

The authors point to the Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, as an illustration of this principle. Having found all statutes passed in Manitoba for nearly a century to be invalid by virtue of their being unilingual, the Court conferred them with validity for a temporary fixed period: "The court found the authority to grant such temporary relief in no more explicit a source than the principle of "the rule of

In Canada, this would mean the superior courts of the provinces created pursuant to head 14 of section 92 of the Constitution Act, 1867. Moreover, in R. v. Mills<sup>300</sup> the Supreme Court of Canada observed that a provincial superior court

will always be a court of competent jurisdiction under s. 24(1) of the Charter at first instance, that is to say, in cases where the issue arises in matters proceeding before it or where the proceeding originated in that court because of the absence of another forum with jurisdiction.

It was also stated, however, that the "superior court jurisdiction will not displace that of courts of limited jurisdiction".

In his reasons on the motion arising out of the action concerning Southam Inc. and the Senate Committee on Internal Economy<sup>301</sup> discussed in the previous chapter, Mr. Justice Strayer, rejecting the contention that only the superior court of a province had jurisdiction to apply the Charter to the exercise of privileges by the Senate, ruled that jurisdiction lay with the

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law," upon which the Constitution is based."

<sup>300</sup> Supra, note 270 at p. 956, (per McIntyre J.).

<sup>301</sup> Supra, note 208.

Federal Court to undertake such a review. This conclusion was based on s.18 of the Federal Court Act<sup>302</sup>, which reads:

18. The Trial Division has exclusive original jurisdiction

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

In turn, s.2 of the Act included the following definition of "federal board, commission or tribunal":

"federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867.

Mr. Justice Strayer felt that

[w]hile in normal practice one might not refer to a committee of the Senate as a "federal board, commission or other tribunal" that expression is

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<sup>302</sup> R.S.C. 1985, c. F-7.

specially defined in section 2 of the Act... .  
It appears to me that a committee of the  
Senate is either a "body" or consists of  
"persons"... .<sup>303</sup>

It was also concluded that since the Committee was acting pursuant to privileges placed on a statutory footing in s.4 of the Parliament of Canada Act it was "exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament." No express statement was made as to whether the superior courts of the provinces might not possess concurrent jurisdiction over the matter in question.<sup>304</sup>

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<sup>303</sup> Supra, note 208, p. 160.

In what seems clearly to have been a response to Mr. Justice Strayer's conclusions, Parliament quickly amended section 2 of the Federal Court Act by adding the following subsection:

(2) For greater certainty, the expression "federal board, commission or other tribunal", as defined in subsection (1), does not include the Senate, the House of Commons or any committee or member of either House. (S.C. 1990, c.8, s. 1(4).)

<sup>304</sup> Mr. Justice Strayer seemed to have been impressed, however, by the implication that if jurisdiction resided with the superior courts of the provinces, actions could be pursued in a number of provinces in hopes of receiving a favourable judgment somewhere.

It was also his impression that the true underlying purpose in raising this jurisdictional point was to argue that no court had jurisdiction to apply the Charter to the Senate or one of its committees.

On appeal, the Federal Court of Appeal, in a unanimous judgment, concluded that the Federal Court possessed no jurisdiction to hear such an action.<sup>305</sup> The Court of Appeal disagreed with the reasoning of Strayer J. that Parliament had placed its privileges on a statutory basis by virtue of s. 4 of the Parliament of Canada Act. On the contrary:

The privileges, immunities and powers of the Senate are conferred by the Constitution, not by a statute, although the latter defines or elaborates upon the privileges, immunities and powers. Such a statute then is the manifestation of Senate privileges but it is not its source; the source is section 18 of the Constitution Act, 1867.<sup>306</sup>

Since s. 18 of the Constitution Act, 1867 conferred jurisdiction directly on the Senate, neither the Senate nor its committees could be seen to come within the definition of a "federal board, commission or tribunal" in section 2 of the Federal Court Act.

The Court also reinforced this conclusion on broader institutional grounds, stating that the Senate, as one of the Houses of Parliament, "is an essential part of the process that gives birth to federal boards, commissions or tribunals, and as such the Senate is simply not on the same level as those

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<sup>305</sup> Supra, note 208. The opinion of the Court was rendered by Iacobucci, C.J.

<sup>306</sup> Ibid., pp. 13-14.

entities".<sup>307</sup> In short, "the Senate is central to the Constitution. To treat the Senate as though it were a federal board, commission or tribunal not only belittles its role but also goes beyond the ordinary meaning of those terms".<sup>308</sup>

Moreover, in writing for the Court, Iacobucci, C.J. seemed clearly of the view that Parliament could not confer a power of judicial review over its privileges on the Federal Court even if it so wished. Although s. 101 of the Constitution Act, 1867 grants to the Parliament of Canada the authority to establish courts for the better administration of the Laws of Canada<sup>309</sup>, it would appear that this power may only be exercised for the purpose of administering laws made pursuant to the jurisdiction conferred by section 91 of the Constitution Act, 1867. The statement of Mr. Justice Estey in Attorney General of Canada v. Law Society of British Columbia that "Any jurisdiction in Parliament for the grant of exclusive jurisdiction to the

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<sup>307</sup> Ibid., p. 14.

<sup>308</sup> Ibid., p. 15.

<sup>309</sup> Section 101 reads:

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better administration of the Laws of Canada.

Federal Court must be founded on exclusive federal powers under section 91 of the Constitution Act" was cited as authority for this principle.<sup>310</sup> Jurisdiction over its privileges is, of course, conferred on Parliament by s. 18, not by s. 91, of the Constitution Act, 1867. The reference to the granting of "exclusive" jurisdiction, however, as well as the fact that s. 101 of the Constitution Act, 1867 is stated to apply "notwithstanding anything in this Act" may indicate that jurisdiction over matters within federal legislative competence but falling outside s. 91 may in fact be conferred on the Federal Court provided that concurrent jurisdiction is retained by the superior courts of the provinces.

In the U.K., the House of Commons has never expressly abandoned its claim that it is the sole judge of its privileges, although it can be argued that its right in this regard has lapsed. At the same time, the courts have considered issues of privilege when raised before them, and view privilege as simply a

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<sup>310</sup> [1982] 2 S.C.R. 307 at p. 328. In fact, the Supreme Court has held that Parliament must actually have exercised its legislative competence under s. 91 with respect to a particular matter before it may confer jurisdiction over that matter to a federal court (Quebec North Shore Paper Co. v. Canadian Pacific, [1977] 2 S.C.R. 1054). This decision has, however, been strongly criticized. (See, for example, Hogg, supra, note 166, pp. 144-146.)

part of the law which they are free to interpret as to its extent and application. It has been noted that

since the Houses claim to be the sole judges of their own privileges, and do not concede that the courts have jurisdiction, there is the possibility of an untidy and unseemly conflict whenever the ordinary courts become involved, and particularly where their view of the matter differs.<sup>311</sup>

Erskine May characterizes the caselaw which documents these conflicts as reflecting over the centuries an increasing willingness on the part of the courts to venture further into territory previously claimed as the exclusive domain of Parliament. Nevertheless, "the old dualism remains unresolved."<sup>312</sup>

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<sup>311</sup> Colin R. Munro, Studies in Constitutional Law, (London: Butterworths, 1987), p. 148.

<sup>312</sup> Supra, note 1, p. 203.  
Perhaps the most striking example of such a conflict occurred in the aftermath of Stockdale v. Hansard (supra, note 164). When the Sheriffs of Middlesex acted to enforce the judgment of the court, they were imprisoned by the House of Commons for contempt. Released after giving an undertaking not to execute any orders of the court against Hansard, they were then imprisoned for contempt of court. (Ibid., p. 149.) The stalemate was ended by the enactment of the Parliamentary Papers Act, 1840, 3 and 4 Vict., c. 9 (U.K.).  
At the federal level in Canada, the Parliamentary Papers Act, 1840 has been adopted by virtue of sections 7 to 9 of the Parliament of Canada Act, R.S.C. 1985, c. P-1.

As Maingot observes, however, "the fact that this situation was last tested successfully nearly 150 years ago does suggest that there is no conflict in practice."<sup>313</sup> In Canada, the potential for conflict has been reduced by virtue of the fact that Parliament has by statute established that the privileges, immunities and powers of the Senate and the House of Commons are part of the general and public law of Canada and that judicial notice of them shall be taken.<sup>314</sup> Moreover, this illustrates, as does the eventual resolution of the impasse resulting from Stockdale v. Hansard, that where conflicts in this area do arise between Parliament and the courts, the matter can always be remedied by the passage of legislation.<sup>315</sup>

One aspect on which agreement between Parliament and the courts was reached was that Parliament's contempt powers were within its jurisdiction exclusively. In Canada, it is argued, the enactment of the Charter means that this is no longer the case. As a result, there is now the potential for the renewal of

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<sup>313</sup> Supra, note 2, p. 256.

<sup>314</sup> Parliament of Canada Act, R.S.C. 1985, c. P-1.

<sup>315</sup> See, supra, note 312, as well as pp. 190-191, infra.

conflict between Parliament and the courts over jurisdiction in this area. What precisely will be the role of the courts in enforcing the Charter as it applies to the contempt powers of the House of Commons? While there can be no clear answers, at least at this point, an examination can be made of certain considerations relevant to determining how the courts may view their new jurisdiction. In addition, a number of likely problems and sources of conflict can be noted.

Interestingly, Mr. Justice Strayer himself touches upon the question of the approach the courts ought to follow in such situations in his book The Canadian Constitution and the Courts.<sup>316</sup> The relevant discussion concerns the circumstances in which the courts will defer to other branches of government. While observing that it seems to be "far from clear as to when the courts can and should review questions which have primarily been assigned by the constitution or the law for decision by other instruments of government", Mr. justice Strayer points out that while the courts do claim the authority to determine whether a privilege claimed by Parliament is one recognized at law, this

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The Honourable Barry L. Strayer, The Canadian Constitution and the Courts (3rd edition), (Butterworths: Toronto, 1988), pp. 219-236.

jurisdictional aspect aside, it is "debatable to what extent Parliament's internal processes and the exercise of its historic privileges ... can be reviewed."<sup>317</sup> He then suggests three factors "for consideration by the courts in determining which constitutional norms in their application give rise to justiciable issues, and which must be left to the decision of others."<sup>318</sup> These are:

- (1) the nature of the interest being protected;
- (2) the availability of objective criteria for judicial application; and
- (3) the potential embarrassment in judicial enforcement.

It is suggested that this framework can be usefully applied to the question of the role of the courts in reviewing the exercise of the contempt powers of the House of Commons for compliance with the Charter.

In discussing the first factor, Mr. Justice Strayer states that

one can argue that the public interest is adequately protected in other ways with respect to some decisions. Internal procedures of Parliament or Legislature can be governed by those bodies and

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<sup>317</sup> Ibid., p. 224.

<sup>318</sup> Ibid.

the public has no vital interest in the details as long as the majority can ultimately determine the procedure and express their wishes on the substance. If, however, a Parliament or a legislative assembly tries to prolong its life beyond constitutional limits, or to disenfranchise powerless minorities, or to ignore minority language rights, then the public does have a strong and direct interest, otherwise unguarded, that the courts should protect.<sup>319</sup>

It will be remembered that a distinction has traditionally been made between proceedings in the House which affect rights exercisable outside the House and those which do not. The former are said to be within the jurisdiction of the courts, while the latter constitute internal proceedings and thus are not. The sole exception is the power to commit for contempt, which although it affects rights exercisable outside the House (i.e. the liberty of the subject) was said to be immune from judicial review. It may now be that the Charter has removed this exception. This should not be particularly startling if one views the Charter as but one manifestation of the development of theories of society, and hence in the law as a reflection of society, which emphasize the primacy of individual freedoms and liberties. Since notions of individual rights and the public interest in their protection have not remained static, there

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Ibid., p. 225.

seems no reason to assume that the interrelationship between these notions and the means by which Parliament protects its ability to function as an independent legislative body should not evolve as well.

Clearly, where the contempt powers of the House are exercised against outsiders, both contemporary views of the importance to be accorded the rights of the individual and the existence of a constitutional guarantee of such rights point to a strong public interest in ensuring protection against unwarranted or unjustly or arbitrarily imposed interference with the protected liberties. Moreover, it can certainly be argued that the public interest in this regard can only be protected by the courts. As was indicated previously, a right or freedom may become rather hollow if one is compelled to seek a remedy for its infringement from the very body whose actions gave rise to that infringement.

Mr. Justice Strayer's second factor, namely whether there exist sufficiently objective criteria for the courts to apply, relates to the fact that courts, "while theoretically applying constitutional norms" that existed prior to the action giving rise to the matter before them, "must also decide whether the

acts in question were rationally related to the permitted ends."<sup>320</sup> This will particularly be so in cases involving the Charter:

[T]he advent of the Charter has imposed on all courts the necessity of applying constitutional norms which go beyond traditional Canadian judicial experience. Some of the Charter provisions involve concepts or tests which are familiar: the timeliness of trials; fair and public hearings; or protection from self-incrimination. But other provisions may require judgments which in the past we have thought of as the sole preserve of legislators.<sup>321</sup>

Such concerns will clearly bear upon the position the courts will choose to take if called upon to review the exercise of the contempt powers of the House for compliance with the Charter, and will of course most likely be manifested in the application of s.1. As was indicated earlier in this chapter, the main issue for determination at the end of the day may well be the extent to which s.1 serves to protect and preserve the historic rights and privileges of the House, and in particular the manner in which the power to commit has traditionally been

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<sup>320</sup> Ibid.

<sup>321</sup> Ibid., pp. 232-233.

exercised. There is some element of validity to the contention that if the exercise of the contempt power in the traditional manner is necessary for the protection and preservation of the ability of the House to function, and since Parliament as a legislature is a fundamental democratic institution, then at least some contraventions that arise from the way in which this power is exercised may be "reasonable limits" capable of being "demonstrably justified in a free and democratic society."

In R. v. Oakes,<sup>322</sup> the Supreme Court of Canada prescribed the analysis to be applied to determine whether a limit is reasonable and justifiable in a free and democratic society. After finding that the standard of proof under s.1 is the civil standard of proof by a preponderance of probability (although a "very high degree of probability" will be required), Chief Justice Dickson, writing for the majority of the Court, stated that there were two criteria to meet in establishing a limit as reasonable and demonstrably justified in a free and democratic society:

First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a

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[1986] 1 S.C.R. 103.

constitutionally protected right or freedom": R. v. Big M. Drug Mart Ltd. ... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Secondly, once a sufficiently significant objective is recognized, then the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R v. Big M. Drug Mart Ltd., supra. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.<sup>323</sup>

In turn, the test of "proportionality" is comprised of three elements. The limit in question must be rationally connected to the objective, as opposed to being arbitrary, unfair or based on irrational considerations. The means chosen should impair the right or freedom in question as little as possible. Finally, the objective identified must be proportional to the effects of the measures resulting in the limitation on the Charter right or freedom:

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<sup>323</sup> Ibid., pp. 138-139.

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.<sup>324</sup>

There can be no disputing the conclusion reached by Mr. Justice Strayer upon reviewing the tests formulated in Oakes that "the advent of the Charter has unquestionably put the courts in the business of deciding ... questions normally near the political end of the decision-making spectrum."<sup>325</sup> He also points out that this "balancing of public versus private interests" is not completely foreign to the judiciary:

[S]ome such process can be involved, for example, in determining qualified privilege in the law of defamation or in deciding on the scope of privilege for government documents whose production is sought in litigation.<sup>326</sup>

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<sup>324</sup> Ibid., p. 140.

<sup>325</sup> Supra, note 316, pp. 233-234.

<sup>326</sup> Ibid., p. 235.

Although these types of questions require "subjective judgments which are more intuitive than analytical"<sup>327</sup> the Charter requires that the courts undertake their determination. At the same time, "courts must be cognisant of the limits on their mandate and on their perceived legitimacy as a non-elected branch of government."<sup>328</sup>

It is apparent that these same considerations will be relevant to the determination by the courts of the extent of judicial review of the exercise of the contempt powers of the House of Commons, or indeed whether any such review should be undertaken at all. In a sense, a weighing of these factors will have occurred even before any assessment of the scope of s.1 of the Charter in relation to the exercise of the penal jurisdiction of the House is conducted. Should the courts undertake such an assessment, the very decision to do so will have been made upon an analysis of these same considerations.

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<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

The final factor suggested by Mr. Justice Strayer for consideration by the courts in determining whether judicial intervention to review actions taken by Parliament is acceptable is that of the possibility of "difficulties or embarrassment of judicial enforcement"<sup>329</sup> It is stated that this concern

surely underlies some of the judicial deference which has been and should be shown to the executive and the Legislature. One can imagine the distress which would ensue for both judges and politicians if the former were expected to probe the reasons of the latter for discretionary decisions. What would the effect be, on the pressing and sometimes pragmatic needs of procedural rulings in Parliament, of potential judicial oversight?<sup>330</sup>

At this point the discussion has returned full circle to the unresolved "dualism" which continues to characterize any attempt to formally define the relationship between Parliament and the courts in this area. The potential for conflict remains, and the introduction of the Charter would only seem to increase the likelihood that actual conflict will eventually arise. Perhaps the most cogent observation on such a situation can still be attributed to Professor Laskin (as he then was), who made the

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<sup>329</sup> Ibid., p. 225.

<sup>330</sup> Ibid.

frequently quoted statement with reference to clashes between Parliament and the courts over parliamentary privileges that at this point "[l]aw... dissolves into politics."<sup>331</sup>

The analytical model advanced by Mr. Justice Strayer provides a useful enumeration of the kinds of factors which will be considered by the courts in determining both the extent and manner of their review of the exercise of Parliament's privileges for compliance with the Charter. There is no doubt that at the time of writing of The Canadian Constitution and the Courts Mr. Justice Strayer had reached a definite conclusion on this question. Prior to describing his factors for consideration by the courts, he states that "Clearly the courts could not review the manner in which Parliament exercised its privileges, for example, in punishing a person for contempt of Parliament."<sup>332</sup> This seems, however, to be at odds with the view expressed by him in Southam Inc. and Charles Russell that the Charter

must be taken to have superseded any implied constitutional immunity, if such there were, from

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<sup>331</sup> Bora Laskin, "Constitutional Law-Injunctions and Legislative Proceedings-Court Over Legislature" (Case and Comment), [1955] 33 Canadian Bar Review 215, at p. 219.

<sup>332</sup> Supra, note 316, at p. 224.

judicial review of the exercise by organs of Parliament of their alleged privileges, at least where such exercise is said to infringe individual rights and freedoms guaranteed by the Charter.<sup>333</sup>

Is it possible that the application of the considerations he described in his book led Mr. Justice Strayer to a conclusion which differed from his original impression?

It has been noted that one concern which may influence the courts is the potential for embarrassment resulting from the inability to enforce a judgment rendered against Parliament. The early cases show that while most conflicts between the courts and Parliament concerning the privileges of the latter at some point evolve into stalemate, the courts have had some limited success, at least in the sense of placing in custody parliamentary officers carrying out orders of the Houses at variance with those of the courts. This of course does little to provide a remedy to those who feel aggrieved by some action of the House. It should also be kept in mind that Parliament has the last word, in that it can ultimately resolve an impasse by the passage of legislation. This continues largely to be the case even after the adoption of the Charter, section 33 of which permits

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<sup>333</sup> Supra, note 208, at p. 157.

Parliament or a provincial legislature to override section 2 or sections 7 to 15 of the Charter by express statutory declaration. A brief review of the sorts of remedies which are likely to be sought from the courts where the exercise of the contempt powers of the House are alleged to have infringed a right or guarantee under the Charter serves to highlight potential problems of enforcement.

In Southam Inc. and Charles Rusnell, the plaintiffs sought a declaration to the effect that certain actions taken by the defendant Senate Committee contravened the freedom of the press guaranteed by s.2(b) of the Charter and that such contraventions were not saved by s.1, as well as a declaration that certain provisions of the Rules of the Senate had a similar result and were therefore of no force and effect. A further declaration was sought that the Committee's refusal to receive oral representations from the plaintiffs concerning access to Committee hearings "constitutes a breach of duty ... to receive and consider representations from any person whose rights and freedoms are affected by the denial of access". The plaintiffs also sought an order in the nature of certiorari quashing the decisions to hold hearings in camera and not to allow the plaintiffs to make oral representations in this regard, an

injunction preventing the Committee refusing the plaintiffs access to its hearings, and costs.<sup>334</sup> This introduces many of the remedies which may be relevant to the present discussion.

The plaintiffs in Southam Inc. and Charles Rusnell placed much emphasis on declaratory relief, both in connection with the existence of certain rights and the infringement of those rights. It is suggested that the reasons for this are likely twofold. Firstly, it was certainly contemplated that the Senate Committee would complete the inquiry giving rise to the court action and table its report long before the case was finally heard. This in fact proved to be the case<sup>335</sup>, giving rise to the possibility that the defendants might well argue that the action should be dismissed since the matter was moot. Although it is a general principle that a court will not usually issue a declaration "when the dispute is over and has become academic, or where the dispute

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<sup>334</sup> Statement of claim filed August 22, 1988 (Court No. T-1611-88).

<sup>335</sup> Sixty-Fourth Report of the Standing Committee on Internal Economy, Budgets and Administration. Debates (September 14, 1988), 33rd Parliament (2nd Session), Appendix B, p. 443.

has yet to arise and may not arise"<sup>336</sup>, it has been suggested that "Some Charter issues are of such general significance that they ought to be the subject of a judicial declaration even after the dispute has become moot so far as the immediate parties are concerned."<sup>337</sup>

Secondly, a declaration may have the effect of placing pressure on a given body or institution to address a particular situation of its own accord. The plaintiff's concern may relate more to altering certain practices and procedures in the future than to obtaining a remedy for an action which has occurred in the past:

The beauty of declarations of right is that they can be made in situations where the law does not provide for a more specific remedy. The "practical effect"... may in some cases be the fact that the moral or political force of the

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<sup>336</sup> Solosky v. R., [1980] 1 S.C.R. 821 at p. 832 (per Dickson J., as he then was).

<sup>337</sup> Gibson and Gibson, supra, note 294, at pp. 814-815. The authors point to the decision of the Federal Court of Appeal in Howard v. Stony Mountain Institution, [1984] 2 F.C. 642 (F.C.A.), as one example of such an approach. A declaration was issued concerning inmates' rights at disciplinary hearings even though the particular inmate had completed the sentence imposed as a result of the hearing in question.

declaration itself often leads to appropriate voluntary redress.<sup>338</sup>

The fact that declaratory judgments may not directly give rise to the problems of enforcement that may attach to other remedies<sup>339</sup>, as well as the fact that declarations may be issued where other forms of relief are not provided for, indicates that this may be the most potentially useful remedy to those seeking redress through the courts where a Charter right is perceived to

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<sup>338</sup> Ibid.

<sup>339</sup> This of course will not always be the case. In New Brunswick Broadcasting Co. v. Donahoe (supra, note 220), the Speaker of the House of Assembly argued that the issuing of a declaration that the plaintiff's possessed a right of access to the legislature by virtue of s.2(b) of the Charter would require ongoing supervision by the courts, and that in such circumstances the courts had in the past refused to grant this type of relief. Nathanson J., however, observed that

[I]t is one thing to say that the courts have not been inclined to supervise an obligation to perform a continuous act. I would agree with such a statement. But it is another matter altogether to say that the courts do not have the power to order supervision or to supervise. (p. 39)

Later, it was stated:

If it should become necessary to judge the timeliness of the actions of any of the parties or the reasonableness of the rules adopted, the courts will retain jurisdiction and be obliged, however reluctantly, to discharge that responsibility. (p. 67)

have been breached via the exercise of the contempt powers of the House. Given the usual outcome of contempt proceedings in the House, plaintiffs may wish no more than the satisfaction of obtaining confirmation that they were ill-used. For their part, the courts may see the issuing of a declaration as a means of placing pressure on Parliament without engaging in a direct, or at least a more pointed, confrontation. A declaration could be seen to represent, vis à vis Parliament, a statement of judicial opinion, rather than an explicit order to modify a practice or procedure. Moreover, the placing of pressure on a particular House in this manner may be the most effective means of persuading it to modify its procedures. In some sense then, declarations may be viewed as a political, as opposed to a strictly legal, remedy.

Should an individual actually be placed in custody as the result of a finding by the House that a contempt has been committed, that individual may attempt to challenge the committal in court by way of habeas corpus. As has been described previously, prior to the enactment of the Charter it was clearly established that a warrant of committal issued by the Speaker of the House was a good return to a writ of habeas corpus. In other words, while a person committed by the Commons will be brought

before a court, the court will not inquire into the causes of the committal unless they are stated on the face of the warrant. Section 10(c) of the Charter, however, guarantees everyone "the right on arrest or detention ... to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful." In light of this, there seems some doubt as to whether the traditional restrictions on habeas corpus in connection with detention by way of Speaker's warrant remain in place in Canada. It may be argued that by virtue of section 10(c) of the Charter the courts are not only empowered, but in fact are under a duty, to determine the reasons for the validity of the detention. On the other hand, it would likely be the position of the House that the production of a Speaker's warrant without reasons does not preclude a habeas corpus proceeding, but merely constitutes conclusive proof of the validity of the detention. It is submitted, however, that validity cannot be ascertained in the absence of reasons for detention. The form of the warrant should not be allowed to dictate the scope of a Charter right. Moreover, habeas corpus is a particularly vital mechanism for review in situations such as committal for contempt where no appeal lies from the actual decision to detain.

It seems evident that the introduction of a constitutionally entrenched set of rights and guarantees strikes at the balance which has been achieved in the area of privilege between the courts and Parliament. This in turn increases the potential for conflicts between the two institutions in the nature of those illustrated by the pre-twentieth century British cases referred to throughout this work. There is no shortage of evidence that Parliament continues to guard its privileges jealously.<sup>340</sup> Should the courts seek to impose any remedy, it is not impossible that Parliament will insist upon its right to

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<sup>340</sup> The most recent example being the protestations and outrage expressed by Members over R.C.M.P. inquiries into the expenditures of moneys allocated to Members by the Speaker, and the execution, albeit with the consent of the Speaker, of warrants to search Member's offices. This resulted in a flurry of committee studies relating to privilege and the rules governing expenditures by Members (see Debates (December 14, 1989), 34th Parliament (2nd Session), pp. 6939-6940; Canada, House of Commons. Minutes of Proceedings and Evidence of the Standing Committee on Elections, Privileges, Procedure and Members' Private Business (Respecting Consideration of the Order of Reference respecting the rights, immunities and privileges of Members of the House of Commons), 34th Parliament (2nd Session), 1989-90; Canada, House of Commons. Minutes of Proceedings and Evidence of the Special Committee on the Review of the Parliament of Canada Act, 34th Parliament (2nd Session), 1989-90.), and the introduction of legislation which, among other things, would have required the prior approval of the Board of Internal Economy of the House of Commons for the execution of search warrants against Members (Bill C-79, 34th Parliament (2nd Session).).

ignore the courts, denying their jurisdiction in the field. At this stage of confrontation it is likely that the only possible solutions are political. It is at this point that the potential for judicial embarrassment is most evident, and at which the courts are likely to shy away from confrontation.<sup>341</sup>

Should the courts undertake review of the exercise of the committal powers of the House, the existence of effective remedies would be presumed. While there is a broad range of potentially relevant remedies in addition to the two noted already, these other remedies also illustrate the potential for embarrassment in enforcement.

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<sup>341</sup> In this day and age the possibility of a situation such as arose in the past where officers of the Crown were imprisoned by Parliament for seeking to execute court orders, or officers of Parliament were detained when seeking to carry out an order of the House against officers of the courts, seems rather remote. It would appear far-fetched to predict a circumstance in which the Speaker would issue a warrant to commit a judge for contempt, or vice versa. Nevertheless, allusions to such incidents in the past serve to caution that confrontations in this area of the law can become quite severe. Moreover, recent Australian experience illustrates the relevance of these issues in a modern context (see Chapter 3, supra).

Keeping in mind that any role assumed by the courts would likely be more in the nature of judicial review of the manner in which the exclusive powers of the House had been exercised as opposed to providing an appeal mechanism as such, the other most relevant remedies would seem to be certain prerogative remedies in addition to habeas corpus, namely prohibition, certiorari or mandamus. While these remedies relate to errors in jurisdiction, proceeding in a manner which contravenes the Charter will result in a jurisdictional error that may be reviewed by way of prerogative remedy. While such remedies are also particularly useful where no appeal mechanism exists, the possibility of enforcement difficulties would present itself should the courts order that a decision of the House be set aside or that the House conduct or refrain from conducting a proceeding in a particular matter in an area in which the jurisdiction of the courts is not recognized by Parliament. This is also the case with respect to the granting of injunctive relief. In fact, the potential for conflict may be heightened by the necessity in some circumstances for ongoing supervision by the courts where injunctive relief has been granted.

In the United States, damages have also been awarded for breaches of civil rights. Although there are examples in Canada

of the use of this remedy in connection with the violation of a Charter right,<sup>342</sup> the circumstances in which such a remedy will be appropriate are as yet uncertain. Clearly, however, the potential for confrontation and embarrassment in seeking to enforce such a remedy exists here as well. The same may be said in relation to any circumstance in which an award of costs is seen as a possible remedy.

Where the courts assume a role in the area of parliamentary privilege the potential for an "untidy and unseemly conflict" will invariably exist. This consideration, combined with the difficulties which may lie in the way of providing an effective remedy, may make the courts extremely wary of undertaking a review of the exercise of the contempt powers of the House. Should such a review be carried out, the declaration is likely to be the remedy found most palatable. This is not to say that those who may be involved in contempt proceedings are not protected by the Charter. It appears, however, that effective enforcement of Charter rights in this area depends upon

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<sup>342</sup> See, for example, Collin v. Lussier, [1983] 2 F.C. 218 (F.C.T.D.) and Crossman v. R., [1984] 1 F.C. 681 (F.C.T.D.).

providing a means of enforcement that is acceptable to Parliament and avoids confrontation between Parliament and the courts.

On a more mundane level, the possibility of an individual seeking redress in the courts for an alleged violation of a Charter right arising from a proceeding in the House gives rise to a number of questions of procedure as well. While it is not intended to deal with these in any detail, reference to several of these concerns serves to illustrate a further set of problems which cannot be resolved by reference to British precedents and pre-Charter practice in Canada.

In Southam Inc. and Charles Rusnell, Mr. Justice Strayer ordered that the Senate, the Senate Committee, and Her Majesty the Queen be struck out as defendants, with leave granted to file an amended statement of claim naming as defendants the individual members of the Committee at the time the actions objected to were taken. It was concluded that since neither a House of Parliament nor a committee of a House are suable entities, remedies must be sought against the individual members involved in a particular action or proceeding<sup>343</sup>. Presumably then, any order issuing

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<sup>343</sup> Supra, note 220.

In view of its conclusion that the action fell outside the jurisdiction of the Federal Court, the Court of Appeal did not address these issues. (In New Brunswick Broadcasting

from the court will be directed solely at certain specified members. What will the effect of such an order be on the proceedings of the Committee concerned where membership changes? Will some members be bound by the order while others are not? What of a situation where the action complained of occurs via a resolution of the House, for instance where an individual is committed for contempt? Must all Members of the House be named as parties individually? Should only those who voted in favour of the resolution be named? What will be the implications of a dissolution of Parliament on any order made by the Courts?

Mr. Justice Strayer was also of the view that the Attorney General of Canada was a proper party to the action, although he "may not be a necessary party", and although "it would not be appropriate for him to remain as the sole defendant."<sup>344</sup> No indication was given, however, as to precisely what the role of the Attorney General would be in defending such an action. These examples, in addition to the question of the

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Co. v. Donahoe, supra, note 220, it was not the Nova Scotia House of Assembly that was sued, but rather all of its members.)

<sup>344</sup> Supra, note 208, p. 171.

proper forum for this type of proceeding discussed earlier, are noted simply to draw attention to an additional aspect which remains to be clarified as the courts are confronted with requests to review the exercise of Parliamentary proceedings previously protected from judicial review.

Despite procedural uncertainties, and more importantly the possibility of confrontation between Parliament and the courts, it is submitted that there is no serious argument against insuring that those subject to the penal jurisdiction of the House are afforded the protection of the Charter. Indeed, the language of the Charter itself seems clearly to envision such protection. The question therefore is not whether the Charter applies, but by what mechanisms it should be applied. The existence of uncertainty and the potential for conflict simply point to the desirability of seeking reforms to minimize the likelihood of confrontation and resolve uncertainties.

## 7. CONCLUSION

As one aspect of the privileges of Parliament, the power to punish for contempt has traditionally been viewed as necessary not only for the protection of the dignity and authority of the House, but for the unhindered carrying out of the functions of its members. The concept of parliamentary privilege developed as a defense against interference from the courts, the public and the Crown. Privilege, however, "like so many other parliamentary traditions, can become immersed in a mystique that clouds its purpose for existing."<sup>345</sup>

Parliament in medieval Britain was a fledgling institution. As this institution evolved, the law and procedure relating to its privileges developed accordingly. In particular, the history of the development of the privileges of the House of Commons is inseparably linked to the growth of the power and importance of that body. It could hardly have been otherwise. The House of Commons would not have flourished unless it had the means, both

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<sup>345</sup> Supra, note 56.

in law and in fact, to protect its authority and ensure the ability of its members to carry out their functions:

As originally the weaker body, the Commons had a fiercer and more prolonged struggle for the assertion of their own privileges, not only against the Crown and the Courts, but also against the Lords. What originated in the special protection of the King began to be claimed by the Commons as customary rights, and some of these claims in the course of repeated efforts to assert them hardened into legally recognized "privileges", which could be used by the Commons against threats to their independence from any direction.<sup>346</sup>

The power to punish for contempts committed against it was a vital concomitant to the assertion of the privileges of the House of Commons. Without it, these privileges would have continued to exist only so long as the Crown and the courts gave tacit consent.

Nevertheless, it seems clear that the threats to the authority of the House of Commons which may have existed in the 14th, 15th and 16th centuries are of little more than historical importance today. In 1543, the Commons used their power to obtain the release from custody of a member arrested in breach of privilege, and committed the Sheriffs responsible for the

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<sup>346</sup> Supra, note 9, p. 72.

arrest.<sup>347</sup> Such dramatic incidents seem far removed from the political and social context in which either the U.K. or Canadian House of Commons functions today. Moreover, it can hardly be argued that the Canadian House of Commons was at any time in its history exposed to the same threats to its dignity and authority as was the U.K. House in centuries past. In Procedure in the Canadian House of Commons,<sup>348</sup> W.F. Dawson criticized the modern concept of Parliamentary privilege as manifested in relation to the Canadian House of Commons, concluding:

At the root of the problem is the ignorance of the Canadian House of the true meaning of privilege, which is essentially the defensive weapon of a legislature which has been used to protect itself against interference. The Canadian House has never had to fear such trouble... .

It is also important to remember that the law and practice relating to contempts of Parliament developed at a time when the

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<sup>347</sup> Ferrer's Case, 1 Hatsell 53.

The power to commit has even been exercised against judges. In Jay v. Topham, (1689), 12 State Tr. 821, two judges of the King's Bench were brought before the House, questioned and then placed in custody following their decision against the Sergeant-at-Arms for taking a member into custody pursuant to an order of the House.

<sup>348</sup> W.F. Dawson, Procedure in the Canadian House of Commons (Toronto: University of Toronto Press, 1962), p. 54.

importance accorded individual rights was much less than is the case today. Thus, modern concepts of natural justice and the necessary protection to be afforded to those who are subjected to a penal process are not reflected in the present practice and procedure.

Given the distance, both temporal and conceptual, between the historical roots of parliamentary privilege and the actual experience of the Canadian House of Commons, it is perhaps not surprising to see the "ignorance" cited by Dawson also reflected in the uncertainty which surrounds the notion of contempt of Parliament. In point of fact, the chief characteristic of the exercise of the penal jurisdiction of the Canadian House of Commons is uncertainty. There is uncertainty as to the acts that will constitute a contempt of Parliament (often termed a "breach of privilege"), the extent to which the defence of fair comment is applicable in this area, the proper scope of the inquiry conducted into allegations of contempt, and the role of those who appear as "witnesses", whether it be before the House or the Standing Committee on Elections, Privileges, Procedure and Private Members' Business. A more striking illustration of this uncertainty than the proceedings of the Standing Committee in its exploration of the so-called "Mackasey Affair" would be difficult

to imagine. It is this uncertainty, as much as any inherent oppressiveness in the procedure followed, that has led to the criticism that Parliament exercises its penal jurisdiction in a manner contrary to the principles of fundamental justice.

Nevertheless, one should not lose sight of the fact that the criticisms of Parliament's penal jurisdiction have been not only infrequent but often exaggerated. Aside from the occasional newspaper editorial or academic article, interest in this area, even it would seem among members of the House, has been virtually non-existent. Undoubtedly this is due in large part to the fact that the Canadian House of Commons has exercised a great deal of restraint in the exercise of its penal powers, the most obvious evidence of this restraint being the fact that no person has been called to the Bar of the House in over 75 years. It should also be noted that individuals appearing before the Elections and Privileges Committee are traditionally granted an opportunity to be heard. This has also been true in the case of those called to the Bar of the House. In the latter case, counsel has never been denied when requested. Thus, the process is not as abusive of individual rights as some of its critics would have us believe.

This is not to say that the subject should be dismissed as harmlessly anachronistic. Nor is it sufficient simply to rely on Parliament to continue in perpetuity to demonstrate great restraint in invoking its penal jurisdiction. The inquiry into the "Mackasey Affair" demonstrated that these issues are very much alive, and underlines the desirability of reform. The Australian experience also cautions that issues in this area may take on a very tangible relevance at unexpected times, while illustrating that reforms can be undertaken.

Their uncertainty aside, the major deficiency in the present practices and procedures by which the Canadian House of Commons exercises its penal jurisdiction is their failure to reflect the principles underlying the basic concept of Parliamentary privilege in a fashion relevant to Parliament as a contemporary institution. Any reform in this area must commence with a reassessment of the relevance of these principles. Mechanisms and procedures that have become obsolete should be discarded. Those that are merely outdated must be modernized. That a power has fallen into disuse or become irrelevant is as much an argument in favour of its reform or removal as it is for taking no action whatsoever.

Nor should the failure to comply with basic principles of fundamental justice be taken lightly or treated as a mere theoretical problem. The rights of the individual must be rigorously protected in any proceeding which may result in the imposition of a penal sanction, regardless of how remote may be the risk of actual loss of liberty. Any contempt proceeding will, if nothing else, result in public exposure and the possibility of public censure or criticism. Those subjected to such a process should be fully afforded the means of self-defence. Even if these issues are viewed in purely symbolic terms, it would appear self-evident that Parliament itself, of all institutions, ought not to be seen to embrace a process or procedure which fails to afford adequate protection to individuals required to submit to that process or procedure.

One further relatively recent development heightens the need for a review of the exercise by Parliament of its penal jurisdiction. The enactment of the constitutionally entrenched Canadian Charter of Rights and Freedoms<sup>349</sup> gives rise to a number of questions, and may be seen to place the issues stemming from the exercise of the penal powers of the House in quite a different light. The absence of an analogous document in the

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<sup>349</sup> Constitution Act, 1982, enacted as Schedule B to the Canada Act, 1982, 30 and 31 Eliz. II, c.11 (U.K.), Part I.

constitutional law of the United Kingdom further distances Canadian parliamentary institutions from their historical and conceptual roots, and points toward the desirability of developing practices and procedures which are best suited to meet the needs of a uniquely Canadian parliamentary regime.

The guarantees of individual rights and freedoms set out in the Charter are, it has been argued, prima facie applicable to Parliament, and thus to the exercise of the penal jurisdiction of each House. It is by no means clear, however, precisely what this will entail or how the relevant rights and freedoms can be protected. Thus, the uncertainty prevalent in this area of the law has been compounded. This uncertainty also increases the potential for a renewal of the conflict between Parliament and the courts over the review by the latter of the exercise of the contempt power, as well as of other of Parliament's privileges. It is suggested that the preliminary skirmishes in such a conflict may already be underway.<sup>350</sup>

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<sup>350</sup> See Southam Inc. and Charles Rusnell v. Attorney General of Canada, the Senate, the Senate Standing Committee on Internal Economy, Budgets and Administration and Her Majesty the Queen, supra, note 208, and New Brunswick Broadcasting Co. v. Donahoe, supra, note 220.

Although the arguments in favour of the applicability of the Charter to the exercise of Parliament's penal jurisdiction appear convincing, it must be admitted that at this time it is by no means clear to what extent the courts in Canada will be willing to construe the Charter as reducing the sovereignty of Parliament in areas other than the exercise of Parliament's legislative function. There may well be a reluctance to disturb long established practices and principles. Nevertheless the issue of the applicability of the Charter to the exercise of Parliament's penal jurisdiction ought not to be allowed to obscure the fact that the procedures by which that jurisdiction is exercised are in any event inadequate and in need of reform.

It may be useful, by way of summary, to itemize briefly several particular aspects of the present procedures for the exercise of the penal jurisdiction which are open to objection. With specific reference to the procedures presently followed in the Canadian House of Commons, a number of deficiencies may be enumerated:

- (1) The most fundamental flaw in the present procedure is that the House acts as both judge and accuser. To argue that the courts have always assumed both

roles under their contempt jurisdiction merely shifts the focus away from the real issue, namely whether such a dual role is appropriate where the House moves to exercise its contempt powers;

- (2) The status of "witnesses" appearing before the Privileges and Elections Committee is unclear. A witness may in fact be the accused or, as the Committee proceeds with its inquiry, may become the accused. Such a state of affairs is likely to undermine the right against self-incrimination;
- (3) Witnesses appearing before the Privileges and Elections Committee do not have the right to be represented by counsel<sup>351</sup>;
- (4) Witnesses appearing before the Privileges and Elections Committee whose conduct is being examined

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Counsel have, however, been permitted where an individual is actually called to the Bar of the House. (See, supra, note 28.)

do not have the right to adduce evidence or cross-examine other witnesses<sup>352</sup>;

- (5) Were an individual to be imprisoned for committing a contempt, the length of the sentence could well turn on the time between the making of the committal order and the end of the Session in which it was made, as well as on the willingness of a new Parliament to recommit an individual committed late in the life of the previous Parliament.

Clearly, a House of Parliament does not, and indeed is likely not capable of, functioning in a manner which meets the standards expected of a judicial tribunal. Parliament is, after all, first and foremost a political institution. Any weighing of facts and evidence and application of the law will almost inevitably be coloured by political considerations, partisan or otherwise. This is no less true with respect to parliamentary committees.

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Persons appearing before the Committee or actually called to the Bar of the House have customarily been granted an opportunity to make statements in their defence. (Ibid.)

Concern over this evidently influenced the Speaker of the House of Commons in making a recent ruling as to whether newspaper advertisements placed by the Department of Finance outlining particulars of the proposed federal goods and services tax constituted a prima facie contempt of the House<sup>353</sup>. In particular, it was alleged by the Leader of the Opposition that the advertisements in question indicated that specific changes to tax legislation would come into effect on a specified date, when in fact no such proposed legislation had been introduced in the House and a committee was at the time conducting hearings on a technical paper concerning the proposed tax. It was argued that the authority of the House was diminished by presenting the reforms as a fait accompli<sup>354</sup>.

The Speaker concluded that although the advertisements had been "drafted in a cavalier manner", there was no intention to diminish the dignity of the House and thus a prima facie finding of contempt could not be made<sup>355</sup>. Nevertheless, a

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<sup>353</sup> Debates (October 10, 1989), 34th Parliament (2nd Session), pp. 4457-4461.

<sup>354</sup> Debates (September 25, 1989), 34th Parliament (2nd Session), pp. 3808-3829.

<sup>355</sup> Supra, note 353, p. 4461.

strong admonishment was delivered, and the Speaker's comments in this regard are extremely telling:

However, I want the House to understand very clearly that if your Speaker ever has to consider a situation like this again, the Chair will not be as generous. This is a case which, in my opinion, should never recur. I expect the Department of Finance and other departments to study this ruling carefully and remind everyone within the Public Service that we are a parliamentary democracy, not a so-called executive democracy, nor a so-called administrative democracy. ...

In order that all hon. members know exactly what the procedure is, and in order that members of the public who are watching and listening understand clearly what the procedure is, let me return to what I said before, that if I had decided that this matter ought to go to the House, it would be followed, or could be followed, by a debate and a vote.

I believe it is in the interest of our parliamentary system of government to have a clear statement from the Speaker which cannot be misinterpreted either in debate or by a vote. A vote on this issue might not support the very important message which your Speaker wishes to convey and which I hope will be well considered in the future by governments, departmental officials and advertisement agencies retained by them. This advertisement may not be a contempt of the House in the narrow confines of a procedural definition, but it is, in my opinion, ill-conceived and it does a great disservice to the traditions of this place. If we do not preserve these great traditions, our freedoms are at peril and our conventions become a mockery. I insist, and I believe I am supported by the majority of moderate and responsible members on

both sides of the House, that this ad is objectionable and should never be repeated.<sup>356</sup>

It was clearly feared that partisan political consideration would quite possibly result in a prima facie finding of contempt not being supported by the House. In effect, the question was considered to be too important to be subjected to a vote, and a clearer reprimand could be handed out if there was no finding of contempt. The lack of confidence demonstrated by the Speaker in the ability of Members to address this question underscores the fact that Parliament is, above all else, a political, not a judicial, body.

Having argued that the penal jurisdiction of the Canadian House of Commons is in need of reform<sup>357</sup>, it remains to be asked what form such a revision should take. The recent reforms at the federal level in Australia discussed in Chapter 3 provide a useful model which might successfully be adapted by the Canadian Parliament.

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<sup>356</sup> Ibid.

<sup>357</sup> As has been observed previously, while the focus here has been chiefly on the House of Commons, the Senate possesses identical contempt powers. Thus, the criticisms levelled against the House of Commons, as well as suggestions for possible reform, can in general be said to be relevant to the Senate as well.

The chief characteristic of the Australian reforms is the enacting of legislation relating to the penal jurisdiction of Parliament. Two arguments have been advanced against such an approach. The first is that this would require a statutory definition of contempt. It has often been stated that since a contempt is whatever the House finds to be a contempt, all of the actions constituting contempts cannot be enumerated, and thus a definition is impossible. It is suggested, however, that this is largely a question of semantics. It is clearly possible to describe contempts by reference to their essential elements, regardless of whether or not one wishes to characterize this as a "definition". For example, s. 4 of the Australian Parliamentary Privileges Act, 1987<sup>358</sup> refers to conduct, including the use of words, that "amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member".

Admittedly, legislation defining contempt by referring to its essential elements necessarily entails both interpretation and application by the courts. This introduces the second

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<sup>358</sup> No. 21 of 1987.

argument advanced against legislating with respect to Parliament's penal jurisdiction, namely that this would have the undesirable effect of transferring jurisdiction over such matters from Parliament to the courts.

As has been noted, the suggestion has been made that jurisdiction over contempts committed against Parliament should be transferred completely to the courts. All that would remain for the Houses to determine would be whether to instruct the Attorney General to lay a charge and commence a prosecution. It is argued that this would remove the situation in which a House acts as both judge and prosecutor. In addition, since a legislature cannot and should not be expected to function in a manner expected of a court, such a transfer is seen to be the only means of ensuring that the principles of fundamental justice are observed in contempt proceedings.

This solution was rejected by both the Australian Joint Select Committee on Parliamentary Privilege and the U.K. Select Committee on Parliamentary Privileges.<sup>359</sup> The U.K. Committee pointed to the desirability of retaining jurisdiction to punish

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<sup>359</sup> See supra, Chapter 2 at note 48 and Chapter 3 at notes 82 and 83.

contempts committed within the precincts of Parliament, and over members generally. Both Committees emphasized the inherent importance of political considerations and the greater flexibility possessed by Parliament. It was also felt that transferring the penal jurisdiction to the courts would require the courts to look to unfamiliar sources in order to administer an area of the law with which they had no previous experience. To the argument that Parliament ought not to act as both judge and accuser, the simple reply from the U.K. Select Committee was that the courts have always assumed both roles under their contempt jurisdiction.

While many of these arguments are unconvincing, it is submitted that reforms to the present practices and procedures could be equally effective in protecting the rights of those involved in contempt proceedings. The availability of some form of judicial review, whether pursuant to the Charter or other legislation, would also do much to remedy the present situation. Moreover, requiring Parliament to seek to protect its authority through the courts at first instance would likely be as cumbersome as the process which now exists. Finally, such a transfer to the courts would not be particularly effective in removing from contempt proceedings the possibility of

objectionable partisan political influences, since presumably the House itself would still have to reach a decision as to whether or not a prosecution should be commenced in the courts in the first place. Given all of the above, there does not appear to be sufficient reason for the complete removal of what is, after all, the ultimate means by which Parliament may protect its independence.

As the U.K. Select Committee seems to have recognized, since any legislation dealing with contempt of Parliament necessarily entails the conferring of some jurisdiction on the courts, the arguments used against transferring Parliament's penal jurisdiction to the courts completely may also be used against any legislative initiative.<sup>360</sup> The approach favoured by the Australian Joint Select Committee, as reflected in the Parliamentary Privileges Act, 1987, however, seeks to find something of a middle ground. The enumeration of the essential elements of contempt and the requirement in s.9 of the Act that resolutions of the House imposing imprisonment and warrants of committal set out the particulars of the offence in effect confer a limited appeal jurisdiction on the courts. At the same time, the Privileges Resolutions adopted by the Australian Senate

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<sup>360</sup> Supra, note 11, paragraphs 40, 79 and 144.

clarify and codify the types of situations in which contempt proceedings should be commenced and the procedures to be followed in such instances, as well as provide for compliance with basic principles of fundamental justice. Although resolutions are not legally binding, the review jurisdiction conferred on the courts provides some protection from clear abuses of Parliament's penal jurisdiction.

In Canada, the adoption of the Charter casts the enacting of legislation dealing with Parliament's contempt powers in a somewhat different light. If, as has been argued, the effect of the Charter is to confer upon the courts some power of review over the exercise by each House of its penal jurisdiction, such legislation becomes a much less dramatic development. In Canada, unlike Australia and the U.K., there is also an express statutory declaration that Parliament's privileges, immunities and powers "are part of the general and public law of Canada".<sup>361</sup>

The enacting of legislation governing the exercise of Parliament's penal jurisdiction would provide an opportunity to clarify, codify and modernize the practice and procedure in this area. It would also in large part resolve the question of the

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<sup>361</sup> Parliament of Canada Act, R.S.C. 1985, c. P-1, s.5.

role of the courts, since any such legislation would presumably be subject to judicial review, including review for conformity with the Charter. This would also have the effect of greatly lessening the potential for conflict between Parliament and the courts over their respective jurisdictions.<sup>362</sup> Most importantly, the specific deficiencies enumerated earlier could be corrected so as to provide mechanisms consistent with modern principles of fundamental justice.

The restrictions placed on the power of the Parliament of Canada to define its powers, privileges and immunities by s. 18 of the Constitution Act, 1867 creates an obstacle to the reform of Parliament's contempt powers not encountered by the Australian legislators. It will be remembered that s. 18 provides that the powers, privileges and immunities defined by Act of Parliament may not exceed those held by the U.K. House of Commons at the time of passing of such an Act. The Australian Constitution

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<sup>362</sup> In its Final Report (supra, note 79, at pp. 93-94) the Australian Joint Select Committee expressed the view that a complete transfer to the courts of jurisdiction over contempts committed against Parliament would increase the likelihood of conflicts arising between Parliament and the courts, since their respective views of a particular matter might well differ. Given this outlook, it is difficult to see why the enacting of any legislation dealing with contempt was not seen to lead to a similar result, calling as it must on the courts to interpret such legislation.

contains no such restriction. Thus, for example, the enacting by the Canadian Parliament of a provision such as section 7 of the Australian Parliamentary Privileges Act, 1987, which provides for the imposition by a House of fines for contempts committed against it, would first require a constitutional amendment since the U.K. Parliament does not possess the power to impose fines<sup>363</sup>. It may well be that any substantial revision of the privileges and procedures relating to the exercise of the penal jurisdiction of the Canadian Houses of Parliament will of necessity entail the deletion of the limiting reference in s.18 of the Constitution Act, 1867 to the powers, privileges and immunities possessed by the U.K. House of Commons.<sup>364</sup> This

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Standing Order 158(2) of the Canadian House of Commons provides that strangers committed to the custody of the Sergeant-at-Arms by Order of the House shall not be released until they have paid a fee of four dollars. It seems questionable whether the characterization of this payment as a "fee", as opposed to a "fine", is sufficient to render it valid.

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This was recognized in a private member's bill introduced in the House of Commons by Svend Robinson on December 2, 1987. The bill proposed amending s. 4 of the Senate and House of Commons Act (now the Parliament of Canada Act) as well as s. 18 of the Constitution Act, 1867, in order that the former could also be amended to confer upon both Houses the power to impose fines or other punishments for contempts of Parliament or breaches of parliamentary privilege. (An Act to amend the Constitution Act, 1867, to amend the Criminal Code and to amend the Senate and House of Commons Act, Bill C-274, 33rd Parliament, (2nd Session).) Oddly, the need to amend s. 18 of the Constitution Act, 1867 as a prerequisite to the

ought not to be a difficult obstacle, however, given that s. 44 of the Constitution Act, 1982<sup>365</sup> authorizes the federal Parliament acting alone to amend the Constitution of Canada "in relation to...the Senate and House of Commons".

Arguments in favour of vesting Parliament with the power to impose fines for contempts committed against it focus on the desirability of broadening the range of penalties available, and thus providing greater flexibility to Parliament in the exercise of its penal jurisdiction.<sup>366</sup> On the other hand, there may be a

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empowering of the Houses to impose fines appears to have been overlooked in proposed legislation currently before the House of Commons. Bill C-46, the Members of the Senate and House of Commons Conflict of Interests Act (34th Parliament, (2nd Session), First reading November 8, 1989.) would purport to provide that a member found to have failed to have fulfilled a duty or obligation under the legislation could be required to pay compensation or pay a fine of up to twenty thousand dollars (Clause 46). In that these penalties would be imposed by the relevant House itself, it is submitted that they would be clearly unconstitutional.

<sup>365</sup> Schedule B, 30 and 31 Eliz. II, c. 11 (U.K.).

<sup>366</sup> Interestingly, there is no constitutional restriction on provincial legislatures equivalent to s. 18 of the Constitution Act, 1867. Thus, as was noted previously, the provincial legislatures may have much greater latitude with respect to the sanctions available to them. (See, supra, note 202.) Several provinces, however, have simply adopted the privileges of the Canadian House of Commons as they exist from time to time. (See, for

danger that the availability of an alternative lesser sanction to imprisonment will result in the invoking of Parliament's penal jurisdiction in situations where it would not previously have been considered appropriate. Nevertheless, it seems only logical that Parliament, if it must protect its dignity and authority, ought to possess as broad a range of mechanisms as possible for so doing. Moreover, if Parliament's contempt power is to remain at all relevant, and if the practices and procedures relating to the exercise of that power are to be modernized, Parliament should have the ability to impose a penalty proportionate to the severity of the offence.

As was discussed in Chapter 3, the Australian Parliamentary Privileges Act, 1987 sets out the essential elements which will lead to a finding that a contempt of Parliament has been committed. The existence of such a legislative "definition" provides an appeal mechanism, at least to the extent that the courts in Australia may inquire into whether the necessary elements were present in a particular

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example, the Nova Scotia House of Assembly Act, R.S.N.S., 1967, c. 128, s. 28(1).) Thus, it would seem that any alteration of the privileges of the House of Commons will, pending revision of the relevant provincial legislation at least, also affect the privileges of the legislatures of these provinces.

instance. The focus is likely to be somewhat different if the exercise of Parliament's contempt powers is reviewable by the courts in Canada for compliance with the Charter. Such a review may be concerned more with the procedures followed by the House than with the final "verdict"<sup>367</sup>, although certainly the vagueness of an offence may be a factor in determining whether it constitutes a "reasonable limit" within the meaning of s. 1 of the Charter. Viewed in this light, judicial review for conformity with the Charter may be less intrusive than the powers granted to the courts as a result of the Australian legislation. Nevertheless, any process aimed at reforming the penal jurisdiction of the Canadian Houses should involve a consideration of the desirability of providing in some form a statement, even in a very general way, of the actions which may be found to constitute a contempt of Parliament.

It should be emphasized that neither judicial review for compliance with the Charter nor the authority conferred on the courts as a result of the Australian Parliamentary Privileges Act, 1987 result in a true transfer of jurisdiction with respect

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This is suggested by the approach taken by the American courts in reviewing contempt proceedings of legislatures as evidenced, for example, in Groppi v. Leslie, supra, note 242.

to contempts of Parliament. It remains for the House concerned to decide whether to commence contempt proceedings and whether to make a finding of contempt. The House also fixes the procedures to be followed in making these decisions and determines the appropriate penalty. The legislation merely establishes certain parameters within which the jurisdiction of the House is to be exercised.

The Australian Senate has also implemented a number of changes to the procedures of its Privileges Committee, as well as of its committees generally, by way of resolution.<sup>368</sup> While it is yet too early to pass judgment on their effectiveness, the adoption of these resolutions has apparently done little to stem the tide of criticism directed at Senate committees as a whole for their failure to observe the principles of natural justice.<sup>369</sup> Clearly, one problem is that the resolutions are drafted as guidelines only, and thus it may be relatively easy for committees to ignore them. In addition, these resolutions might not be viewed as binding by future Houses.<sup>370</sup> Presumably

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<sup>368</sup> See Chapter 3, supra, and Appendix B.

<sup>369</sup> See Carolyn Stuart, "Natural Justice on Trial", 4 Legislative Studies (No. 2, Spring 1989) 9.

<sup>370</sup> Erskine May points out that "Orders and resolutions which affect the procedure of either House without any period of duration being fixed are often regarded as

the authoritativeness of the guidelines set out in the resolutions would be enhanced were they set out in the standing orders of the Senate. Even then, however, such procedures would not be reviewable outside the Senate.

If the Charter applies to the exercise of the contempt powers of the Canadian Houses of Parliament, the situation in this country would again be somewhat different. While the courts might well take pains to couch their review in terms of whether the principles of fundamental justice were respected in a particular instance, the conclusion reached would certainly amount to a passing of judgment on the procedures followed by the House, whether prescribed by resolution, in its Rules or Standing Orders, or merely by practice.

The reform of procedures in contempt matters through either resolutions or amendments to the Rules or Standing Orders, would, however, leave the question of the application of the Charter unresolved. Even an express resolution of the House as to whether or not the Charter applied in this area would not be conclusive of the matter, since such resolutions do not alter the

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having permanent validity, although according to the custom of Parliament their effectiveness is concluded by prorogation." (Supra, note 1, p. 4)

law. Thus, the Charter applies or does not apply, as the case may be, irrespective of any opinion of the Houses on the matter expressed by way of resolution. Of course, any such resolution would be likely to have a significant influence on the conclusion reached by the courts in this regard.

The American experience<sup>371</sup> suggests that, in proceedings relating to contempt of a legislature, adherence to the principles of fundamental justice may not require that an individual be afforded the same rights as in a criminal trial in the courts. If this is so, and given the fact that Canadian courts, the Charter notwithstanding, may well be reticent to subject the exercise of Parliament's penal jurisdiction to too harsh an inquiry, it is likely that the guarantee of certain basic safeguards will be satisfactory. Chief among these are the right to be represented by counsel, the right to cross-examine witnesses, and the rights to call witnesses and make representations. It is suggested that the preferable means of affording these rights is through the passage of legislation. Legislation could also be used to clarify issues such as the status of persons appearing as witnesses before the Privileges and Elections Committee. Such legislation should, in addition,

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See Groppi v. Leslie, supra, note 242.

provide for fixed terms of imprisonment, review by way of habeas corpus, the imposition of fines, and perhaps even the availability of legal aid to those in need of assistance. A legislative statement as to the essential elements of the offence of contempt of Parliament also seems desirable.

The enacting of legislation would provide the means both to clarify the considerable uncertainty surrounding the exercise of Parliament's penal jurisdiction and to ensure that individual rights are adequately safeguarded. In addition, antiquated procedures could be discarded and new mechanisms created which more suitably reflect the needs of a modern legislature. Since any such legislation would clearly be subject to the Charter and reviewable by the Courts, a further source of uncertainty would be removed, the potential for conflict between Parliament and the courts would be lessened and protection of the rights of individuals would be ensured. Parliamentary supremacy would be maintained through the power to amend any such legislation, as well as by the possibility of invoking s. 33 of the Charter.

It may be the case that, as in Australia, the details of the procedures to be followed in the exercise of Parliament's penal jurisdiction must of necessity be left to be determined by each House as part of its internal procedures. If so, the

potential for conflict between Parliament and the courts will remain, since it is conceivable that some aspect of such procedures might be assailed for interfering with Charter rights or rights afforded by other legislation. It is perhaps inevitable that there will always be an area where the possibility of such conflict remains, and it may thus only be practicable to seek to minimize, rather than to eliminate, this potential. What is most important is that any reforms recognize and seek to balance the competing interests involved, namely the preservation of the authority and dignity of Parliament and the protection of the individual.

It is time that Parliament undertook a thorough review of its penal jurisdiction, in particular with a view to eliminating anachronisms, clarifying areas of uncertainty, and providing procedures which are consistent with modern principles of fundamental justice. It is not sufficient to simply rely on the fact that the Canadian House of Commons has historically exercised great restraint in invoking its power to reprimand or even imprison. What is crucial is that the possibility of such actions remains. Those who would view any break with British parliamentary traditions and practices as an undermining of the authority of Parliament would do well to consider the concluding

paragraph of the judgment of Coleridge J. in Stockdale v.

Hansard:

The privileges of the House are my own privileges, the privileges of every citizen in the land. I tender them as dearly as any member possibly can: and, so far from considering the judgment we pronounce as invading them, I think that by setting them on the foundation of reason, and limiting them by the fences of the law, we do all that in us lies to secure them from invasion, and root them in the affections of the people.<sup>372</sup>

The traditional practices and procedures relating to the exercise of the Commons' penal jurisdiction fail to reflect either the realistic needs of a contemporary legislature or the importance accorded the rights of the individual in modern society. Left unreformed they may, in the end, harm the dignity of Parliament rather than help preserve it.

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<sup>372</sup> Supra, note 32, p. 243.

APPENDIX A

PARLIAMENTARY PRIVILEGES ACT 1987 (AUSTRALIA)

An Act to declare the powers, privileges and immunities of each House of the Parliament and of the members and committees of each House, and for related purposes

[Assented to 20 May 1987]

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

**Short title**

1. This Act may be cited as the *Parliamentary Privileges Act 1987*.

**Commencement**

2. This Act shall come into operation on the day on which it receives the Royal Assent.

**Interpretation**

3. (1) In this Act, unless the contrary intention appears—

“committee” means—

(a) a committee of a House or of both Houses, including a committee of a whole House and a committee established by an Act; or

(b) a sub-committee of a committee referred to in paragraph (a);

“court” means a federal court or a court of a State or Territory;

“document” includes a part of a document;

“House” means a House of the Parliament;

“member” means a member of a House;

“tribunal” means any person or body (other than a House, a committee or a court) having power to examine witnesses on oath, including a Royal Commission or other commission of inquiry of the Commonwealth or of a State or Territory having that power.

(2) For the purposes of this Act, the submission of a written statement by a person to a House or a committee shall, if so ordered by the House or the committee, be deemed to be the giving of evidence in accordance with that statement by that person before that House or committee.

(3) In this Act, a reference to an offence against a House is a reference to a breach of the privileges or immunities, or a contempt, of a House or of the members or committees.

#### **Essential element of offences**

4. Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

#### **Powers, privileges and immunities**

5. Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force.

#### **Contempts by defamation abolished**

6. (1) Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.

(2) Sub-section (1) does not apply to words spoken or acts done in the presence of a House or a committee.

#### **Penalties imposed by Houses**

7. (1) A House may impose on a person a penalty of imprisonment for a period not exceeding 6 months for an offence against that House determined by that House to have been committed by that person.

(2) A penalty of imprisonment imposed in accordance with this section is not affected by a prorogation of the Parliament or the dissolution or expiration of a House.

(3) A House does not have power to order the imprisonment of a person for an offence against the House otherwise than in accordance with this section.

(4) A resolution of a House ordering the imprisonment of a person in accordance with this section may provide that the President of the Senate or the Speaker of the House of Representatives, as the case requires, is to have power, either generally or in specified circumstances, to order the discharge of the person from imprisonment and, where a resolution so provides, the President or the Speaker has, by force of this Act, power to discharge the person accordingly.

(5) A House may impose on a person a fine—

(a) not exceeding \$5,000, in the case of a natural person; or

(b) not exceeding \$25,000, in the case of a corporation,

for an offence against that House determined by that House to have been committed by that person.

(6) A fine imposed under sub-section (5) is a debt due to the Commonwealth and may be recovered on behalf of the Commonwealth in a court of competent jurisdiction by any person appointed by a House for that purpose.

(7) A fine shall not be imposed on a person under sub-section (5) for an offence for which a penalty of imprisonment is imposed on that person.

(8) A House may give such directions and authorise the issue of such warrants as are necessary or convenient for carrying this section into effect.

#### Houses not to expel members

8. A House does not have power to expel a member from membership of a House.

#### Resolutions and warrants for committal

9. Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.

#### Reports of proceedings

10. (1) It is a defence to an action for defamation that the defamatory matter was published by the defendant without any adoption by the defendant of the substance of the matter, and the defamatory matter was contained in a fair and accurate report of proceedings at a meeting of a House or a committee.

(2) Sub-section (1) does not apply in respect of matter published in contravention of section 13.

(3) This section does not deprive a person of any defence that would have been available to that person if this section had not been enacted.

#### Publication of tabled papers

11. (1) No action, civil or criminal, lies against an officer of a House in respect of a publication to a member of a document that has been laid before a House.

(2) This section does not deprive a person of any defence that would have been available to that person if this section had not been enacted.

### Protection of witnesses

12. (1) A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence.

Penalty: (a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, \$25,000.

(2) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of—

(a) the giving or proposed giving of any evidence; or

(b) any evidence given or to be given,

before a House or a committee.

Penalty: (a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, \$25,000.

(3) This section does not prevent the imposition of a penalty by a House in respect of an offence against a House or by a court in respect of an offence against an Act establishing a committee.

### Unauthorised disclosure of evidence

13. A person shall not, without the authority of a House or a committee, publish or disclose—

(a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera; or

(b) any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence,

unless a House or a committee has published, or authorised the publication of, that document or that oral evidence.

Penalty: (a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, \$25,000.

### Immunities from arrest and attendance before courts

14. (1) A member—

(a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause,

on any day—

- (c) on which the House of which that member is a member meets;
  - (d) on which a committee of which that member is a member meets; or
  - (e) which is within 5 days before or 5 days after a day referred to in paragraph (c) or (d).
- (2) An officer of a House—
- (a) shall not be required to attend before a court or a tribunal; and
  - (b) shall not be arrested or detained in a civil cause, on any day—
- (c) on which a House or a committee upon which that officer is required to attend meets; or
  - (d) which is within 5 days before or 5 days after a day referred to in paragraph (c).
- (3) A person who is required to attend before a House or a committee on a day—
- (a) shall not be required to attend before a court or a tribunal; and
  - (b) shall not be arrested or detained in a civil cause, on that day.
- (4) Except as provided by this section, a member, an officer of a House and a person required to attend before a House or a committee has no immunity from compulsory attendance before a court or a tribunal or from arrest or detention in a civil cause by reason of being a member or such an officer or person.

#### Application of laws to Parliament House

15. It is hereby declared, for the avoidance of doubt, that, subject to section 49 of the Constitution and this Act, a law in force in the Australian Capital Territory applies according to its tenor in and in relation to any building in the Territory in which a House meets, except as otherwise provided by that law or any other law.

#### Parliamentary privilege in court proceedings

16. (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, "proceedings in Parliament" means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes—

- (a) the giving of evidence before a House or a committee, and evidence so given;
  - (b) the presentation or submission of a document to a House or a committee;
  - (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
  - (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.
- (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of—
- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
  - (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
  - (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.
- (4) A court or tribunal shall not—
- (a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or
  - (b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence, unless a House or a committee has published, or authorized the publication of, that document or a report of that oral evidence.
- (5) In relation to proceedings in a court or tribunal so far as they relate to—
- (a) a question arising under section 57 of the Constitution; or
  - (b) the interpretation of an Act,
- neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act.

#### **Certificates relating to proceedings**

17. For the purposes of this Act, a certificate signed by or on behalf of the President of the Senate, the Speaker of the House of Representatives or a chairman of a committee stating that—

- (a) a particular document was prepared for the purpose of submission, and submitted, to a House or a committee;
- (b) a particular document was directed by a House or a committee to be treated as evidence taken in camera;
- (c) certain oral evidence was taken by a committee in camera;
- (d) a document was not published or authorized to be published by a House or a committee;
- (e) a person is or was an officer of a House;
- (f) an officer is or was required to attend upon a House or a committee;
- (g) a person is or was required to attend before a House or a committee on a day;
- (h) a day is a day on which a House or a committee met or will meet; or
- (i) a specified fine was imposed on a specified person by a House, is evidence of the matters contained in the certificate.

APPENDIX B

PARLIAMENTARY PRIVILEGE RESOLUTIONS AGREED TO  
BY THE AUSTRALIAN SENATE, FEBRUARY 25, 1988

1. Procedures to be observed by Senate committees for the protection of witnesses

That, in their dealings with witnesses, all committees of the Senate shall observe the following procedures:

- (1) A witness shall be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear (whether or not the witness was previously invited to appear) only where the committee has made a decision that the circumstances warrant the issue of a summons.
- (2) Where a committee desires that a witness produce documents relevant to the committee's inquiry, the witness shall be invited to do so, and an order that documents be produced shall be made (whether or not an invitation to produce documents has previously been made) only where the committee has made a decision that the circumstances warrant such an order.
- (3) A witness shall be given reasonable notice of a meeting at which the witness is to appear, and shall be supplied with a copy of the committee's order of reference, a statement of the matters expected to be dealt with during the witness's appearance, and a copy of these procedures. Where appropriate a witness shall be supplied with a transcript of relevant evidence already taken.
- (4) A witness shall be given opportunity to make a submission in writing before appearing to give oral evidence.
- (5) Where appropriate, reasonable opportunity shall be given for a witness to raise any matters of concern to the witness relating to the witness's submission or the evidence the witness is to give before the witness appears at a meeting.

- (6) A witness shall be given reasonable access to any documents that the witness has produced to a committee.
- (7) A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in private session, and shall be invited to give reasons for any such application. If the application is not granted, the witness shall be notified of reasons for that decision.
- (8) Before giving any evidence in private session a witness shall be informed whether it is the intention of the committee to publish or present to the Senate all or part of that evidence, that it is within the power of the committee to do so, and that the Senate has the authority to order the production and publication of undisclosed evidence.
- (9) A chairman of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry. Where a member of a committee requests discussion of a ruling of the chairman on this matter, the committee shall deliberate in private session and determine whether any question which is the subject of the ruling is to be permitted.
- (10) Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the

question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate.

- (11) Where a committee has reason to believe that evidence about to be given may reflect adversely on a person, the committee shall give consideration to hearing that evidence in private session.
- (12) Where a witness gives evidence reflecting adversely on a person and the committee is not satisfied that that evidence is relevant to the committee's inquiry, the committee shall give consideration to expunging that evidence from the transcript of evidence, and to forbidding the publication of that evidence.
- (13) Where evidence is given which reflects adversely on a person and action of the kind referred to in paragraph (12) is not taken in respect of the evidence, the committee shall provide reasonable opportunity for that person to have access to that evidence and to respond to that evidence by written submission and appearance before the committee.
- (14) A witness may make application to be accompanied by counsel and to consult counsel in the course of a meeting at which the witness appears. In considering such an application, a committee shall have regard to the need for the witness to be accompanied by counsel to ensure the proper protection of the witness. If an application is not granted, the witness shall be notified of reasons for that decision.
- (15) A witness accompanied by counsel shall be given reasonable opportunity to consult counsel during a meeting at which the witness appears.

- (16) An officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister.
- (17) Reasonable opportunity shall be afforded to witnesses to make corrections of errors of transcription in the transcript of their evidence and to put before a committee additional material supplementary to their evidence.
- (18) Where a committee has any reason to believe that any person has been improperly influenced in respect of evidence which may be given before the committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given, the committee shall take all reasonable steps to ascertain the facts of the matter. Where the committee considers that the facts disclose that a person may have been improperly influenced or subjected to or threatened with penalty or injury in respect of evidence which may be or has been given before the committee, the committee shall report the facts and its conclusions to the Senate.

2. Procedures for the protection of witnesses before the Privileges Committee

That, in considering any matter referred to it which may involve, or gives rise to any allegation of, a contempt, the Committee of Privileges shall observe the procedures set out in this resolution, in addition to the procedures required by the Senate for the protection of witnesses before committees. Where this resolution is inconsistent with the procedures required by the Senate for the protection of witnesses, this resolution shall prevail to the extent of the inconsistency.

- (1) A person shall, as soon as practicable, be informed, in writing, of the nature of any allegations, known to the Committee and relevant to the Committee's inquiry, against the person, and of the particulars of any evidence which has been given in respect of the person.

- (2) The Committee shall extend to that person all reasonable opportunity to respond to such allegations and evidence by:
  - (a) making written submission to the Committee;
  - (b) giving evidence before the Committee;
  - (c) having other evidence placed before the Committee; and
  - (d) having witnesses examined before the Committee.
- (3) Where oral evidence is given containing any allegation against, or reflecting adversely on, a person, the Committee shall ensure as far as possible that that person is present during the hearing of that evidence, and shall afford all reasonable opportunity for that person, by counsel or personally, to examine witnesses in relation to that evidence.
- (4) A person appearing before the Committee may be accompanied by counsel, and shall be given all reasonable opportunity to consult counsel during that appearance.
- (5) A witness shall not be required to answer in public session any question where the Committee has reason to believe that the answer may incriminate the witness.
- (6) Witnesses shall be heard by the Committee on oath or affirmation.
- (7) Hearing of evidence by the Committee shall be conducted in public session, except where:
  - (a) the Committee accedes to a request by a witness that the evidence of that witness be heard in private session;
  - (b) the Committee determines that the interests of a witness would best be protected by hearing evidence in private session; or
  - (c) the Committee considers that circumstances are otherwise such as to warrant the hearing of evidence in private session.

- (8) The Committee may appoint, on terms and conditions approved by the President, counsel to assist it.
  - (9) The Committee may authorize, subject to rules determined by the Committee, the examination by counsel of witnesses before the Committee.
  - (10) As soon as practicable after the Committee has determined findings to be included in the Committee's report to the Senate, and prior to the presentation of the report, a person affected by those findings shall be acquainted with the findings and afforded all reasonable opportunity to make submissions to the Committee, in writing and orally, on those findings. The Committee shall take such submissions into account before making its report to the Senate.
  - (11) The Committee may recommend to the President the reimbursement of costs of representation of witnesses before the Committee. Where the President is satisfied that a person would suffer substantial hardship due to liability to pay the costs of representation of the person before the Committee, the President may make reimbursement of all or part of such costs as the President considers reasonable.
  - (12) Before appearing before the Committee a witness shall be given a copy of this resolution.
3. Criteria to be taken into account when determining matters relating to contempt.

The Senate declares that it will take into account the following criteria when determining whether matters possibly involving contempt should be referred to the Committee of Privileges and whether a contempt has been committed, and requires the Committee of Privileges to take these criteria into account when inquiring into any matter referred to it:

- (a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its

committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate;

- (b) the existence of any remedy other than that power for any act which may be held to be a contempt; and
- (c) whether a person who committed any act which may be held to be a contempt:
  - (i) knowingly committed that act, or
  - (ii) had any reasonable excuse for the commission of that act.

**4. Criteria to be taken into account by the President in determining whether a motion arising from a matter of privilege should be given precedence of other business**

Notwithstanding anything contained in the Standing Orders, in determining whether a motion arising from a matter of privilege should have precedence of other business, the President shall have regard only to the following criteria:

- (a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate; and
- (b) the existence of any remedy other than that power for any act which may be held to be a contempt.

**5. Protection of persons referred to in the Senate**

- (1) Where a person who has been referred to by name, or in such a way as to be readily identified, in the Senate, makes a submission in writing to the President:

- (a) claiming that the person has been adversely affected in reputation or in respect of dealings or association with others, or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded, by reason of that reference to the person; and
- (b) requesting that the person be able to incorporate an appropriate response in the parliamentary record,

if the President is satisfied:

- (c) that the subject of the submission is not so obviously trivial or the submission so frivolous, vexatious or offensive in character as to make it inappropriate that it be considered by the Committee of Privileges; and
- (d) that it is practicable for the Committee of Privileges to consider the submission under this resolution,

the President shall refer the submission to that Committee.

- (2) The Committee may decide not to consider a submission referred to it under this resolution if the Committee considers that the subject of the submission is not sufficiently serious or the submission is frivolous, vexatious or offensive in character, and such a decision shall be reported to the Senate.
- (3) If the Committee decides to consider a submission under this resolution, the Committee may confer with the person who made the submission and any Senator who referred in the Senate to that person.
- (4) In considering a submission under this resolution, the Committee shall meet in private session.
- (5) The Committee shall not publish a submission referred to it under this resolution or its proceedings in relation to such a submission, but may present minutes of its proceedings and all or part of such submission to the Senate.

- (6) In considering a submission under this resolution and reporting to the Senate the Committee shall not consider or judge the truth of any statements made in the Senate or of the submission.
- (7) In its report to the Senate on a submission under this resolution, the Committee may make either of the following recommendations:
  - (a) that no further action be taken by the Senate or by the Committee in relation to the submission; or
  - (b) that a response by the person who made the submission, in terms specified in the report and agreed to by the person and the Committee, be published by the Senate or incorporated in *Hansard*,and shall not make any other recommendations.
- (8) A document presented to the Senate under paragraph (5) or (7):
  - (a) in the case of a response by a person who made a submission, shall be succinct and strictly relevant to the questions in issue and shall not contain anything offensive in character; and
  - (b) shall not contain any matter the publication of which would have the effect of:
    - (i) unreasonably adversely affecting or injuring a person, or unreasonably invading a person's privacy, in the manner referred to in paragraph (1); or
    - (ii) unreasonably adding to or aggravating any such adverse effect, injury or invasion of privacy suffered by a person.

## 6. Matters constituting contempts

That, without derogating from its power to determine that particular acts constitute contempts, the Senate declares, as a matter of general guidance, that breaches of the following prohibitions, and attempts or conspiracies to do the prohibited acts, may be treated by the Senate as contempts.

### Interference with the Senate

- (1) A person shall not improperly interfere with the free exercise by the Senate or a committee of its authority, or with the free performance by a Senator of the Senator's duties as a Senator.

### Improper influence of Senators

- (2) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence a Senator in the Senator's conduct as a Senator or induce a Senator to be absent from the Senate or a committee.

### Senators seeking benefits etc.

- (3) A Senator shall not ask for, receive or obtain, any property or benefit for the Senator, or another person, on any understanding that the Senator will be influenced in the discharge of the Senator's duties, or enter into any contract, understanding or arrangement having the effect, or which may have the effect, of controlling or limiting the Senator's independence or freedom of action as a Senator, or pursuant to which the Senator is in any way to act as the representative of any outside body in the discharge of the Senator's duties.

### Molestation of Senators

- (4) A person shall not inflict any punishment, penalty or injury upon, or deprive of any benefit, a Senator on account of the Senator's conduct as a Senator.

**Disturbance of the Senate**

- (5) a person shall not wilfully disturb the Senate or a committee while it is meeting, or wilfully engage in any disorderly conduct in the precincts of the Senate or a committee tending to disturb its proceedings.

**Service of writs etc.**

- (6) A person shall not serve or execute any criminal or civil process in the precincts of the Senate on a day on which the Senate meets except with the consent of the Senate or of a person authorised by the Senate to give such consent.

**False reports of proceedings**

- (7) A person shall not wilfully publish any false or misleading report of the proceedings of the Senate or of a committee.

**Disobedience of orders**

- (8) A person shall not, without reasonable excuse, disobey a lawful order of the Senate or of a committee.

**Obstruction of orders**

- (9) A person shall not interfere with or obstruct another person who is carrying out a lawful order of the Senate or of a committee.

**Interference with witnesses**

- (10) A person shall not, by fraud, intimidation, force of threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.

**Molestation of witnesses**

- (11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

Offences by witnesses etc.

- (12) A witness before the Senate or a committee shall not:
- (a) without reasonable excuse, refuse to make an oath or affirmation or give some similar undertaking to tell the truth when required to do so;
  - (b) without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so; or
  - (c) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular.
- (13) A person shall not, without reasonable excuse:
- (a) refuse or fail to attend before the Senate or a committee when ordered to do so; or
  - (b) refuse or fail to produce documents, or to allow the inspection of documents, in accordance with an order of the Senate or of a committee.
- (14) A person shall not wilfully avoid service of an order of the Senate or of a committee.
- (15) A person shall not destroy, damage, forge or falsify any document required to be produced by the Senate or by a committee.

Unauthorised disclosure of evidence etc.

- (16) A person shall not, without the authority of the Senate or a committee, publish or disclose:
- (a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee;
  - (b) any oral evidence taken by the Senate or a committee in private session, or a report of any such oral evidence; or

(c) any proceedings in private session of the Senate or a committee or any report of such proceedings,

unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings.

#### 7. Raising of matters of privilege

That, notwithstanding anything contained in the Standing Orders, a matter of privilege shall not be brought before the Senate except in accordance with the following procedures:

- (1) A Senator intending to raise a matter of privilege shall notify the President, in writing, of the matter.
- (2) The President shall consider the matter and determine, as soon as practicable, whether a motion relating to the matter should have precedence of other business, having regard to the criteria set out in any relevant resolution of the Senate. The President's decision shall be communicated to the Senator, and, if the President thinks it appropriate, or determines that a motion relating to the matter should have precedence, to the Senate.
- (3) A senator shall not take any action in relation to, or refer to, in the Senate, an matter which is under consideration by the President in accordance with this resolution.
- (4) Where the President determines that a motion relating to a matter should be given precedence of other business, the Senator may, at any time when there is no other business before the Senate, give notice of a motion to refer the matter to the Committee of Privileges. Such notice shall take precedence of all other business on the day for which the notice is given.
- (5) A determination by the President that a motion relating to a matter should not have precedence of other business does not prevent a Senator in accordance with other procedures taking action in relation to, or referring to, that matter in the Senate, subject to the rules of the Senate.

- (6) Where notice of a motion is given under paragraph (4) and the Senate is not expected to meet within the period of one week occurring immediately after the day on which the notice is given, the motion may be moved on that day.

#### 8. Motions relating to contempts

That, notwithstanding anything contained in the Standing Orders, a motion to:

- (a) determine that a person has committed a contempt; or
- (b) impose a penalty upon a person for a contempt,

shall not be moved unless notice of the motion has been given not less than 7 days before the day for moving the motion.

#### 9. Exercise of Freedom of Speech

- (1) That the Senate considers that, in speaking in the Senate or in a committee, Senators should take the following matters into account:

- (a) the need to exercise their valuable right of freedom of speech in a responsible manner;
- (b) the damage that may be done by allegations made in Parliament to those who are the subject of such allegations and to the standing of Parliament;
- (c) the limited opportunities for persons other than members of Parliament to respond to allegations made in Parliament;
- (d) the need for Senators, while fearlessly performing their duties, to have regard to the rights of others; and
- (e) the desirability of ensuring that statements reflecting adversely on persons are soundly based.

- (2) That the President, whenever the President considers that it is desirable to do so, may draw the attention of the Senate to the spirit and the letter of this resolution.

10. Reference to Senate proceedings in court proceedings

- (1) That, without derogating from the law relating to the use which may be made of proceedings in Parliament under section 49 of the Constitution, and subject to any law and any order of the Senate relating to the disclosure of proceedings of the Senate or a committee, the Senate declares that leave of the Senate is not required for the admission into evidence, or reference to, records or reports of proceedings in the Senate or in a committee of the Senate, or the admission of evidence relating to such proceedings, in proceedings before any court or tribunal.
- (2) That the practice whereby leave of the Senate is sought in relation to matters referred to in paragraph (1) be discontinued.
- (3) That the Senate should be notified of any admission of evidence or reference to proceedings of the kind referred to in paragraph (1), and the Attorneys-General of the Commonwealth and the State be requested to develop procedures whereby such notification may be given.

11. Consultation between Privileges Committees

That, in considering any matter referred to it, the Committee of Privileges may confer with the Committee of Privileges of the House of Representatives.

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THESIS ABSTRACT

The power of the House of Commons to punish contempts committed against it is said to be analogous to the general contempt powers possessed by courts of superior jurisdiction. Historically, this power has been justified as being necessary to protect the dignity and independence of Parliament. This thesis examines the contempt power in light of criticisms that the traditional reasons for its existence are no longer relevant and that present procedures for its exercise are characterized by uncertainty and a failure to conform to principles of fundamental justice.

The contempt power of the House of Commons derives from s.18 of the Constitution Act, 1867, which provides that each House of Parliament possesses such privileges, powers and immunities as are defined by statute, provided they do not exceed those possessed at the time by the House of Commons of the United Kingdom. In turn, s.4 of the Parliament of Canada Act defines the privileges, powers and immunities of both Houses as those enjoyed by the U.K. House of Commons at the time of the passing of the Constitution Act, 1867. Thus, by way of introduction the thesis briefly traces the historical origins of the contempt power of the U.K. House of Commons. The contemporary law and procedure relating to the exercise of the penal jurisdiction of the Canadian House of Commons are also described, as are the mechanisms available for punishing those found to be in contempt of the House.

In 1967, the Select Committee on Parliamentary Privileges of the U.K. House of Commons reviewed the penal jurisdiction of the House in the context of the criticisms noted above. While it was felt that Parliament should retain its penal jurisdiction, a number of proposals were made for the adoption of resolutions to reform the

procedures by which it is exercised. Underlying these proposals was the principle that the penal powers of the House should be used only where essential to protect the House, its members or officers from interference with the performance of their functions. For the most part the Select Committee's recommendations have not been implemented.

These same issues were dealt with at the federal level in Australia in 1984 by the Joint Select Committee on Parliamentary Privilege. Contempt of Parliament has long been an area of controversy in Australia, whose constitution also incorporates the law of parliamentary privilege of the United Kingdom. The Joint Select Committee made a number of detailed recommendations for reform, proposing that certain of these be implemented by means of legislation. The Parliamentary Privileges Act 1987 is in part a response to the Committee's recommendations. Among other things, the Act sets out the essential elements of contempt and codifies the applicable punishments. In addition, a number of the Committee's proposals have been implemented in the Australian Senate by way of resolutions.

Returning to the situation in Canada, the thesis examines the "Mackasey Affair" in detail. In November, 1983, the Standing Committee on Privileges and Elections informed the House of Commons of its finding that the reporting by the Montreal Gazette of certain allegations of impropriety and possible criminal activity on the part of a particular member adversely affected the privileges of the House. It is submitted that the process by which this conclusion was reached illustrates the confusion and uncertainty which characterize the exercise of Parliament's penal jurisdiction.

The enactment of the Canadian Charter of Rights and Freedoms raises a number of issues in this area, and the role of the Charter is a major focus of the thesis. Although traditionally it has been denied that the courts possess jurisdiction to enquire into the exercise by Parliament of its contempt power, it is argued that the adoption of the Charter, which distances the Canadian situation from U.K. parliamentary law and practice, must be seen to alter this principle.

Section 32(1)(a) provides that the Charter applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament". Giving these words their ordinary meaning, it would seem evident that dealing with contempts committed against Parliament is a "matter within the authority of Parliament", and it therefore follows that the Charter must apply to the exercise of Parliament's penal jurisdiction. In order to illustrate that the application of the Charter is not restricted to the exercise of Parliament's legislative authority, case-law is examined which holds that the Charter applies, for example, to the exercise of common law and prerogative powers. More importantly, several court decisions are discussed which deal more directly, at least in a preliminary fashion, with the question of whether the Charter applies to internal proceedings of Parliament and the provincial legislatures. It is concluded that although the Charter cannot be seen to take away from Parliament's powers, rights and immunities as conferred by s.18 of the Constitution Act 1867, it may be seen to impose restrictions on the manner in which they may be exercised.

The application of the Charter to the exercise by the House of its penal jurisdiction means that certain long-

established principles governing the relationship between Parliament and the courts are to some extent no longer applicable. In this connection, suggestions are made as to the possible nature and scope of judicial review, and in particular the considerations which are likely to influence the courts in undertaking such review. Other related issues discussed include the role of s.1 of the Charter, the question of ascertaining which court or courts are "courts of competent jurisdiction" within the meaning of s.24(1) and the potential remedies available should the contempt power be exercised in a manner that infringes a Charter right or guarantee.

In the conclusion to the thesis, the arguments for the reform of the penal jurisdiction are summarized, as are the deficiencies in the present law and practice. The conclusion also touches upon the possible direction such reforms might take, suggesting that the recent Australian initiatives provide an appropriate model which could be adopted to the Canadian context. In particular, the enacting of legislation would provide the means both to clarify the considerable uncertainty surrounding the exercise of Parliament's contempt powers and to ensure that individual rights are adequately safeguarded. Since legislation would be subject to the Charter and reviewable by the courts, a further source of uncertainty would be removed, and the potential for conflict between Parliament and the courts would be lessened.