# Summoning and Swearing of Witnesses: Experience of the Pearson Airport Committee

by Gary Levy

*On December 13, 1995, a Special Senate Committee established to examine the agreements leading to the lease of Pearson International Airoport and the subsequent cancellation of the lease presented its final report, including a minority opinion and a study of certain procedural issues.This article looks at the Committee's experience in summoning witnesses and taking testimony under oath.*

In March 1992 the Conservative Government of Brian Mulroney called for proposals to redevelop Terminals 1 and 2 at Toronto's Pearson International Airport. Two submissions were considered and on December 7, 1992 Paxport Inc. was judged to have the best overall acceptable proposal. The Government had concerns about the financeability of the 700 million dollar project so Paxport joined with the other bidder, Claridge Properties, to form the Pearson Development Corporation in early 1993. Several months of negotiations between the Government and Pearson Development Corporation followed until leases and other agreements were signed. Meanwhile, a federal election was called on September 8, 1993. On October 2, Prime Minister Kim Campbell gave authority to go ahead and close the deal.

During the campaign the Liberal Opposition demanded a review of the Pearson agreements. After the election Robert Nixon was asked to report to the new Prime Minister, Mr. Chrétien, within 30 days. His report called for cancellation of the Pearson deal. It was accepted and the Pearson Development Corporation launched a suit for damages against the Government. Subsequently legislation was introduced to limit the Government's liability for these contracts but it stalled in the Senate where the constitutionality of the bill was questioned by the Conservatives who still held a majority in the Upper House. On May 4, 1995, after calls for a public inquiry were rejected, the Senate adopted a motion establishing a Special Committee composed of four Conservatives and three Liberals to look at the process leading to the Pearson agreements and the decision to cancel.

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From the outset it was clear the Special Senate Committee would face unusual challenges and would have to resort to rarely used parliamentary procedures. For example, the Committee decided to take all evidence under oath and hired an independent Counsel, John Nelligan who was allowed to question witnesses. The final Report included a study by the Chairman, Senator Finlay MacDonald, and the Vice-Chairman, Senator Michael Kirby, on "The Power to Send for Persons, Papers or Records: Theory, Practice and Problems." It dealt mainly with relations between the Government and the Committee, particularly the manner in which thousands of documents were provided to the Special Committee.

## Summoning Witnesses

Committees of the Senate and House of Commons routinely receive authorization to "send for persons, paper and records". Behind these innocuous words lies very extensive powers, including the power to summon.[1] In fact, few individuals who appear before Committees

are formally summoned. Many ask to appear. Others are invited and are happy to accept. Witnesses who decline because of conflicting engagements or other difficulties are usually accommodated by a Senate Committee.

In this case an investigation into controversial public policy decisions relating to Pearson Airport would only be possible if the Committee was sure it could hear the witnesses it wanted when it wanted them. Therefore, the Committee made known its willingness to use its powers even though preliminary research indicated that no Senate Committee had summoned witnesses in almost a century.[2]

In the end only two of the sixty-five witnesses who appeared were summoned. In part this was because the Committee had a commitment from the Department of Justice, on behalf of the Government, to co-ordinate the appearance of all present and former public officials involved in negotiating the agreements. It was thought this co-operation would expedite the work of the Committee and reduce the possibility that public servants would have to be summoned.

The disadvantage of not following the usual approach of contacting public servants directly or through the responsible Minister was that it left the Executive, the very entity being investigated, a great deal of control in the way its case was presented to the Special Committee. And ultimately a couple of witnesses still had to be summoned.

The individuals summoned were both lawyers from the Department of Justice. At issue was the question of whether a legally binding agreement between the Government and Pearson Development Corporation existed on or before October 7, 1993 and what would have been the legal implications if certain documents had not been signed on October 7, 1993. Various Ministers, Chief negotiators, and other officials including the Deputy Minister of Justice had been asked about this, but none was able to give the Committee a satisfactory answer.

Through its Counsel the Committee asked the Department of Justice to make available the lawyers who worked on the file. The request was rejected. So on September 27, 1995 Senator MacDonald and Senator Kirby, wrote to the Deputy Minister of Justice, George Thomson, "We believe that it is crucial to the work of this Committee that we be able to question Messrs J. Pigeon and R.J. Green on the advice they gave to various public servants with respect to the Pearson Airport Agreements in general and, in particular, on their views on the question of the precise point in time at which the Agreements were fully binding on the federal government."[3]

The Deputy Minister asked the Committee to reconsider its request. "I cannot agree that the position I have taken, both in my testimony and in this letter has serious consequences for the ability of the Senate in general and your committee in particular to carry on its business .... Accordingly I respectfully suggest that it is neither appropriate nor necessary for Messrs Green and Pigeon to appear."[4] The Deputy Minister argued that solicitor-client privilege applied to the Crown and the relationship between the Department of Justice and their clients ought to be respected. A four page supporting memorandum accompanied the letter.[5]

In light of this response Senator MacDonald convened a special meeting of the Committee on October 17, 1995 for the purpose of summoning the two lawyers. The procedure to be followed is outlined in *Beauchesne's Parliamentary Rules and Forms*. A certificate must be filed by a member of the Committee. It is addressed to the Chairman and states "in my opinion that evidence to be obtained from ——— is material and important in the investigation respecting ——."

A certificate was duly signed for each witness and a motion summoning each was adopted. The summons was then hand delivered to both of them. Each witness was asked to "Take notice that you are hereby summoned and required to appear in Ottawa to give evidence before the Special Senate Committee on the Pearson Airport Agreements on October 23, 1995 at 9:00 am. in Committee Room 505, Victoria Building, 140 Wellington Street and to remain in attendance until duly discharged."

Before voting to summon the officials Senator Kirby asked Committee Counsel John Nelligan if there had been further conversations with Justice informing them that the Chairman and Vice Chairman were quite annoyed at the failure of these witnesses to appear voluntarily?

> **Mr. Nelligan**: I did indicate to them what the nature of the proceedings were going to be this morning and they assured me that they heard what I said.
>
> **Senator Kirby**: That proves they are not deaf, counsel. Does it tell us anything else? You weren't able to persuade them to voluntarily appear?
>
> **Mr. Nelligan**: Well, I thought that having advanced that information to them, I might have got further communication from them, but I haven't received it as of yet.[6]

The officials appeared as requested on October 23. Minutes before their appearance a letter from the Deputy Minister of Justice was delivered to the Committee. It said, in part, that Mr. Pigeon and Mr. Green were appearing voluntarily before the Committee and that the Committee had every right to ask them to appear.[7]

The Committee also wanted to hear from numerous non government witnesses including lobbyists and private consultants involved in negotiations leading to the Pearson Agreements. Several were reluctant to appear but when informed they could be summoned they generally agreed to come. The willingness of private individuals to respect the threat of a parliamentary summons was a bit surprising since committees themselves have no power of enforcement. If a person refuses to appear as requested the Committee can do little except report the failure to the Senate (which was not in session during most of the time the Committee was meeting). While the Senate could impose sanctions including even imprisonment there are no recent precedents for any drastic penalties for contempt of Parliament. Perhaps for this reason in the one instance where a summons could have produced important information, no such summons was issued.

Greg Weston, a journalist with the *Ottawa Citizen*, had written two extremely critical columns about the Pearson Agreement in September 1993. These columns were based on confidential Treasury Board memoranda leaked to him. When the Committee learned that Robert Nixon had also seen these memoranda (apparently sent to him by mistake) the Committee tried unsuccessfully to obtain these documents from the Government.

On September 25, 1995 another *Ottawa Citizen* article, also by Greg Weston, called the Senate inquiry a "whitewash" because it was unable to obtain these documents. The article repeated a number of points from previous columns. As a result on September 27 the Committee invited Mr. Weston to appear for the purpose of providing copies of these documents to the Committee. The response from the Editor of the *Citizen* was that,

> by appearing before the committee Mr. Weston would be abandoning his journalistic role of observer to become an unwilling participant and in doing so lose the confidence of his sources. Rather than seeking the assistance of observers, we would expect the committee to draw its information from the original sources including documents and those people directly involved in the decision-making process.[8]

The Committee issued a second invitation to Mr. Weston on September 28 indicating it had no intention of inquiring as to the source of these documents. However, "it is important that Mr. Weston comply with this second request. Mr. Weston may wish to seek legal counsel to understand the consequences of his refusal." The Editor of the *Citizen* again requested the Committee to reconsider its invitation arguing that while journalists must not put themselves above the law, the free press plays a recognized role in the democratic system. He also asked what type of legal action the Committee was considering[9]

In reply the Chairman said the Committee was not threatening the journalist. "Nor do we intend to disturb his employers. The Tower of London and the lash are alternatives not available to us.[10] He pointed out that the Committee had no way of knowing exactly what documents Mr. Weston had in his possession and therefore which ones should be requested from the Government. The newspaper then published an additional article entitled: "Dear Senators: Below please find a road map to lost Pearson papers". It clarified exactly what documents Mr. Weston possessed.[11]

> The Committee then adopted a report to the Senate asking that an address be made to the Governor General requesting that the Treasury Board submissions be made available to the Committee.

This report was debated in the Senate but was not voted upon at the time the Committee ended its work. The Committee in its final report noted its frustration at the withholding of documents but concluded that all essential parts of the record had been produced and subject to public scrutiny.

## The Swearing of Witnesses

The rational for hearing witnesses under oath was put succinctly by Senators MacDonald and Kirby in their study on powers of parliamentary committees. It was to:

> impress upon the witnesses appearing before the Committee the seriousness of the inquiry. Recognizing that many of the public statements that had been made about the Pearson Agreements were based on opinion, innuendo and suspicion, the Committee was determined to get at the facts. It was hoped that testifying under oath would encourage witnesses to be forthcoming and to give serious thought to the matters being discussed. Where opinions were expressed witnessed would be expected to present evidence to substantiate those opinions.[12]

Not all members thought the swearing of witnesses was a good idea. For example Senator John Stewart raised the issue of conflicting oaths during debate on establishing the Committee. He asked:

> Will the authority that will be conferred upon the committee to examine witnesses under oath be a power superior to the oath taken by a Privy Councillor? Or will the former Prime Ministers, the present Prime Minister, and other Privy Councillors be able to plead higher commitment? Thus, the result will be that only ordinary mortals will really be subject to examination under oath, whereas former Prime Ministers, the present Prime Minister and other Privy Councillors will plead their Privy Council oath.[13]

The Committee did not hear from any former or present Prime Ministers. But every one of the 65 witness to appear was required to take an oath or solemn affirmation.[14] Few objected to the swearing process although the very first person to appear, Nick Mulder, Deputy Minister of Transport noted that:

> As a civil servant I have appeared before committees something like 250 or 300 times and this is the first time I have had to swear an oath or make a solemn affirmation. We tend to make a habit to tell the truth and to explain government policy and to tell the facts. But if the Committee insists that we swear an oath or make a solemn affirmation, we are certainly prepared to do that, on the understanding that this will be done for all the other witnesses.[15]

Another Deputy Minister, Harry Swain of Industry Trade and Technology, raised the issue of conflicting oaths when he agree to be sworn "consistent with my oath of office". When questioned as to what that meant he said, "I have sworn an oath of office, an oath of secrecy which means that there are some things that I am not to discuss" This led to the following exchange with Counsel.

> **Mr. Nelligan:** I think Mr. Swain, the concern was, did your oath of office include a promise to lie on certain matters? And I did not think that was the case.
>
> **Mr. Swain:** No sir.[16]

The swearing of witnesses does not, of course, ensure that witnesses will answer all questions. It was anticipated that some might refuse to answer and the Committee agreed that "If, after taking the oath a witness refuses to testify or to answer questions, his or her reasons will be accepted. However, if such should occur, the committee may question the reasons for refusal." [17]

In fact several witnesses did refuse to answer questions. For example the Committee wanted to know how and why the two companies (Paxport and Claridge) competing for the Pearson lease decided to get together three weeks after Paxport was declared to have the best overall acceptable proposal. The President of Paxport, Ray Hession, told the Committee a senior official from Transport Canada approached him "and suggested we should explore the synergies with the Terminal 3 owners". When asked to name the source he replied:

> I would have to again beg the indulgence of the Chair and perhaps seek advice from counsel, but I have a personal pledge not to disclose the name of that person. I was told, look this is a conversation, it is one of those that does not happen. And so I said fine, I will not disclose.[18]

The Committee was interested in following up the rumour reported in several newspapers that there was more than one Nixon report and that an earlier version of his report may have recommended renegotiation rather than cancellation. Paul Stehelin of Deloitte & Touche admitted that someone sent him a different version of the Nixon report several months after the official report was released. He did not keep the second copy and could not remember in detail what was in it. He refused to say where he obtained it.

> I am not going to discuss it. You can go at it any way you want. I have seen two reports, period. Full stop. I only have one. ... Throw me in jail. I am not even going to talk about it.[19]

Other witnesses, including Robert Nixon, who appeared as a witness for five full days, said that certain information was given to him in confidence and he would not divulge it to the Committee.

Another problem with swearing witnesses is that contradictions sometimes arise from differences of opinion and interpretation rather than as a result of deliberate falsehoods. Nowhere was this more apparent that during the discussion of the constitutional convention regarding decision making during an electoral period. At one point a panel of political scientists was asked for an opinion on the constitutional propriety of completing the Pearson deal after an election had been called. Their opinions were quite different and based on different interpretations of constitutional conventions. Was anything gained by making them testify under oath?

On more than one occasion witnesses gave such divergent views of the same incident that even the most generous observer would be tempted to conclude that someone had to be lying. Perhaps the best publicized example centred around the question of whether Jean Chrétien had discussions about the Pearson airport privatization while he was still in private life and if so whether he supported the proposed project at that time.

***Having made the decision to swear witnesses the next logical question is what to do if someone is found to be lying.***

On September 21, 1995 Jack Matthews of Paxport, testified that he discussed the project with Mr. Chrétien in December 1989 or January 1990. He claimed that Mr. Chrétien approved of the project and after the meeting asked for a financial donation to his campaign for the leadership of the Liberal Party.[20] Later that same day another witness who was at the meeting, Mr. Chrétien's law partner Paul Labarge, testified that the meeting took place on April 14, 1989; that the Pearson redevelopment was never discussed; and there was no discussion of campaign contributions while he was present.[21]

The matter became even more complicated when it was revealed under questioning by Senators that Mr. Matthews had recorded a recent telephone conversation with Mr. Labarge concerning their recollections of what went on at the meeting with Mr. Chrétien. Some Senators suggested they listen to the tape or obtain a transcript. This prompted Committee Counsel to interject:

> **Mr. Nelligan**: I am seriously concerned that this committee is getting entirely off the track of what it was intended to do. I am very concerned that it is turning to a test of credibility of what appear to be two very responsible citizens and this is not your primary issue.... . If you produce the tapes, then what was the providence of the tapes? Will we have a technician to see whether the tape has been doctored? Will we have the people who heard the tape machine? We can go on forever.[22]

Thus the Committee had little choice but to accept the word of both witnesses even though they were giving completely different versions of the same event.

## Conclusions

The Pearson Committee experience with summoning witnesses indicates little need for change in current procedures as far as public officials are concerned. It is difficult to imagine circumstances where public officials would deliberately and consistently ignore a summons to appear before a parliamentary committee. Even a Department as jealous of its prerogatives as Justice agreed to send officials when summoned. It even insisted that they were appearing voluntarily.

In the case of private individuals the situation is somewhat different. The absence of effective sanctions makes it difficult for a Committee to threaten to use its power to summons. In the event of non compliance a report back to the full House can take time and become part of political negotiations that may have little to do with the original request. Indeed an attempt to enforce a summons could probably be challenged under the Charter by a private individual and the courts would have to rule on the issue Therefore some consideration should be given to more practical means of enforcement including perhaps appropriate fines for violators.

As far as the practice of swearing witnesses is concerned, members of the Pearson Committee seemed quite pleased with the experience. The very first paragraph of the Chairman's Introduction notes that: "The sworn testimony of witnesses who appeared before us speaks more strongly of the legitimacy of the process, the befits of the Pearson contract and the tragedy of its cancellation that this Report can ever do."[23] The same sentiment, although supporting an opposite conclusion, can be found in the dissenting opinion!

However the arguments against swearing, many of which were apparent during the Pearson process, are considerable. Most significant is the tendency to judicialize proceedings thus sending a message that is at odds with certain parliamentary traditions. For example witnesses are expected to tell the truth. If they lie or mislead a committee they can be punished for contempt following a report to the Chamber. This can be done whether an oath has been taken or not.

There is a further assumption that although Parliament is an adversarial forum it is through tough questioning and debate that truth will eventually emerge. Perhaps these assumptions belong to a simpler, more innocent age. But those who would judicialize our parliamentary proceedings must remember that committees are not courts; chairmen are not judges; and electorates are not juries. Would the art and science of politics be improved by having witnesses accompanied by Counsel or by having separate Counsel for the majority and minority or if we eventually shift to American notions of government based on separation of power rather than responsible government?

## Notes

1. For a discussion of these powers see Diane Davidson, "The Powers of Parliamentary Committees", *Canadian Parliamentary Review*, vol 18, Spring 1995.
2. Several House of Commons Committees have summoned witnesses in recent years. See the *Minutes of Proceedings and Evidence* of the: Standing Committee on Multiculturalism, June 7, 1988; Standing Committee on Consumer and Corporate Affairs and Government Operations, December 8, 1992; Standing Committee on National Defence and Veterans Affairs, December 8, 1992; Standing Committee on External Affairs and International Trade, May 4, 1993. There are also examples of summoning by Joint Committees of the House and Senate such as the Committee on Regulations and Statutory Instruments on February 25 1982 and the Committee on Official Languages in May 1990.
3. See *Proceedings of the Special Senate Committee on the Pearson Airport Agreements*, (cited hereafter as *Proceedings*) no. 28, October 17, 1995, p. 18.
4. Letter from the Deputy Minister, Department of Justice, October 11, 1995.
5. *Ibid.*
6. See *Proceedings*, no. 28, October 17, 1995, p. 19.
7. See *Proceedings*, no. 29, October 23, 1995, p. 4.
8. See *Ottawa Citizen*, October 4, 1995.
9. *Ibid.*
10. *Ottawa Citizen*, October 12, 1995.
11. *Ibid.*
12. See *Report of the Special Senate Committee on the Pearson Airport Agreements*, December 1995, The Power to Send for Persons, Papers and Records: Theory, Practice and Problems, Ottawa, 1995, p. III-16.
13. Senate, *Debates*, May 2, 1995, p. 1569.
14. The Oath and Affirmation are listed in the Schedule of the *Parliament of Canada Act*. Before each meeting the Clerk asked witnesses to indicate if they preferred to take the oath or make a solemn affirmation. For the oath they were given a choice of Bibles. Witnesses were also asked whether they wanted to read the Oath/Affirmation or have it read by the Clerk of the Committee. Most chose to have the Clerk administer the Oath/Affirmation.
15. See *Proceedings*, July 11, 1995, no. 2, p. 13.
16. See *Proceedings*, July 27, 1995, no. 7, p. 5.
17. See *Proceedings*, June 8, 1995, no. 1, p. 5.
18. See *Proceedings*, August 2, 1995, no. 9, p. 44. (On November 9, after the Committee had completed its hearings this information was provided by Mr. Hession.)
19. See *Proceedings*, August 17, 1995 no 13, p. 70.
20. See *Proceedings*, September 21, 1995, 1995, no. 22, pp. 128-148.
21. *Ibid.* p. 49.
22. *Ibid.* p. 162.
23. See *Report of the Special Senate Committee on the Pearson Airport Agreements*, December 1995, Ottawa, 1995, p. vi.