

# *Witnesses Before Committees: Current Practices and Proposals in Ontario*

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**I**n recent years the growth in the complexity of government has resulted in a substantial increase in the role of committees of the House. In Ontario this was particularly true from 1975-1981 when there was a minority government.

The growth in committee activity means a corresponding increase in the number of witnesses who appear before legislative committees. The role of witnesses who give evidence relevant to committee enquiries is critical to the functioning of the committees.<sup>1</sup> Through the examination of witnesses, members of the Assembly obtain information relevant to the committee's terms of reference. This allows for consideration of issues in a more thorough, comprehensive and informal way than in the House.

In Ontario questions relating to the appearance of witnesses have been the subject of considerable study during the last decade. The matter was considered by the Commission on the Legislature (the Camp Commission) in its fourth report in 1975. The Commission recommended the Standing Orders be amended to provide for rules governing the appearance of witnesses before committees of the House and for their possible right to counsel. The Select Committee on the Fourth and Fifth Reports of the Ontario Commission on the Legislature concurred with the proposal but did not elaborate on the subject.

In 1980, the Standing Procedural Affairs Committee presented a report to the House which outlined certain basic principles pertaining to witnesses before committees of the Assembly. It recommended that the Attorney General refer the subject matter to the Ontario Law Reform Commission for study and recommendation. Their subsequent Report is a thorough and extremely valuable review of the rights and obligations of witnesses appearing before the committees of the Ontario legislature.<sup>2</sup>

The Procedural Affairs Committee considered the Law Reform Commission's recommendations and presented a report to the House on December 9, 1982. It was of the opinion that the practices and conventions concerning witnesses before legislative committees should be set out in as clear and comprehensive a fashion as possible in a manual of practices rather than being included in the

*Legislative Assembly Act* or the Standing Orders. The manual would offer guidance to members on what is necessary to provide adequate protection for witnesses without establishing rigid procedures which could frustrate the functioning of committees as effective instruments of parliamentary investigation. The report of the committee was not debated and remained on the *Orders and Notices* paper until prorogation of the session. Thus despite all the studies and reports no action has been taken in any of the following areas.

## **Oaths**

Section 58 of the *Legislative Assembly Act* provides for an oath to be administered for the purpose of examining a witness. Clearly, the purpose of an oath or affirmation is "to prevent or discourage rash, untrue and defamatory statements of fact or opinion". A witness who makes a defamatory and untrue statement under oath could be subject to prosecution for perjury under the *Criminal Code of Canada*. However, as the Law Reform Commission points out, it is not essential to rely on the oath or affirmation in order to encourage truthfulness or to provide a meaningful sanction against witnesses who perjure themselves. Section 46 of the *Legislative Assembly Act* provides that giving false evidence before a committee constitutes contempt of the Assembly. The provision applies whether or not the evidence was given under oath.

It has been the practice of a number of committees to administer the oath to witnesses who have been requested or ordered to appear and not to those persons who appear voluntarily. The Commission was of the opinion that any distinction based on the category of witness would amount to, and be seen as, an adverse comment on the trustworthiness of a witness. The Commission, recognizing that individuals may be seriously prejudiced as a result of evidence given at the committee hearings, recommended that "where the rights or reputation of an individual or the propriety of an individual's conduct are or may be involved, as a matter of practice committees should employ the oath".<sup>3</sup> This recommendation was adopted by the Procedural Affairs Committee and forms part of its 1982 Report.

The Commission and the Procedural Affairs Committee also considered the wording of the oath or affirmation given to witnesses. To ensure the attention of a witness is specifically drawn to the seriousness of giving false evidence to a committee, the Procedural Affairs Committee recommended that the oath set out in the *Legislative Assembly Act* be repealed and replaced with one

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to read as follows: "The evidence you shall give to this Committee shall be the truth, the whole truth, and nothing but the truth, well knowing that it is a serious offence to give false evidence with intent to mislead the Committee. So help you God."

The Committee also recommended that the form for the affirmation of witnesses who object to the oath on the grounds of religious beliefs or scruples or who are incompetent to judge the meaning of an oath be included in the *Legislative Assembly Act* in the following words: "I solemnly affirm that I will tell the truth, the whole truth, and nothing but the truth, well knowing that it is a serious offence to give false evidence with intent to mislead the Committee."

## Power of Committees to Call Witnesses

The ability of a committee to obtain evidence is an important factor in determining the scope of its enquiry. A committee possesses no authority except that given in its terms of reference by the House. Therefore, a committee cannot require the attendance of witnesses or the production of papers or things without the express authority of the House. As a matter of course, the power to call for persons, papers or things is now conferred on all standing and select committees pursuant to section 35 of the *Legislative Assembly Act*. Without such authority being conferred, the committees would have no power to invite persons to appear as witnesses or to examine persons who offer to appear as witnesses.

The power of committees to obtain information is very wide. Indeed, this power may be said to be virtually unlimited. The 19th edition of *Erskine May* states:

A witness is, however, bound to answer all questions which the committee see fit to put to him, and cannot excuse himself, for example, on the ground that he may thereby subject himself to a civil action, or because he has taken an oath not to disclose the matter about which he is required to testify, or because the matter was a privileged communication to him, as where a solicitor is called upon to disclose the secrets of his client; or on the ground that he is advised by counsel that he cannot do so without incurring the risk of incriminating himself or exposing himself to a civil suit, or that it would prejudice him as defendant in litigation which is pending, some of which would be sufficient grounds of excuse in a court of law. Nor can a witness refuse to produce documents in his possession on the ground that, though in his possession, they are under the control of a client who has given him instructions not to disclose them without his express authority.<sup>4</sup>

Most witnesses, far from needing to be compelled to give evidence, welcome the opportunity to appear before committees. Witnesses are usually first requested to appear rather than summoned. Very few persons disobey a Speaker's warrant to appear and give evidence. In 1981, two public servants of the Government of Canada were summoned to attend a committee to give evidence relating to the involvement of a federal department and its officials in the collapse of a trust company. The public servants appeared before the committee but declined to give evidence on matters which they considered to be within the exclusive constitutional jurisdiction of the Government of Canada. They argued that any evidence which the committee sought would involve an enquiry by

the provincial authority into the policies, practices, views or actions of a department of the Government of Canada and that it was beyond the authority of the Ontario Legislative Assembly to require such testimony from a federal official. The Committee persisted in its stand, against advice given on behalf of the Attorney General for Ontario, and an action was subsequently commenced by the Attorney General of Canada in the Divisional Court of the Supreme Court of Ontario to determine the matter. However, before the matter could be decided by the court, the House was dissolved for an election and the action abandoned.<sup>5</sup>

If a witness summoned by a Speaker's warrant fails or refuses to attend before a committee or refuses to give evidence or to produce papers, the committee may report to the House the circumstances of the matter and the House may find the person in contempt punishable under provisions of the *Legislative Assembly Act*.

It has not been the Ontario practice to differentiate between ministers, civil servants and public servants on the one hand, and private citizens on the other hand with respect to the duty to attend a committee when invited or summoned to answer questions and produce documents. The Ontario Law Reform Commission stated the "contention that there are legal, as opposed to informal, traditional or conventional, limits on the compellability of a civil servant or a public servant (or a minister) appears to fly in the face of the clear language of section 35 of the *Legislative Assembly Act*... The Act empowers the Assembly to compel the attendance and testimony of any person before a legislative committee, and the sanction imposed... does not distinguish between classes of witnesses".<sup>6</sup> Ontario committees have generally respected the doctrine of ministerial responsibility and the anonymity and neutrality of the civil service. Accordingly, they have restricted the types of questions asked civil servants and have generally relied upon ministers to account for the conduct of their officials and to answer questions of policy. If one respects the doctrine of the paramountcy of Parliament, however, which demands that the Legislature must have at its disposal whatever information is considered necessary to perform its functions, one must reject the concept that ministers as well as civil servants have a right to refuse to provide information. Should a conflict occur, a committee or the House, as the final arbiter, may accept a person's refusal to appear, to disclose information or to produce documents as legitimate, or may effect a compromise. Such decisions will necessarily be affected by conventions and practical politics.<sup>7</sup>

## Protection of Witnesses

The 1980 Report of the Standing Procedural Affairs Committee stated that "... the operation of parliamentary committees is only vaguely understood by most people and... appearing before a committee can be an intimidating experience".<sup>8</sup> In such circumstances, the conduct of a committee's hearings should always be fair to witnesses and to persons about whom witnesses may comment. They should strike a balance between what is necessary to achieve adequate protection for witnesses and what is necessary to enable parliamentary committees to function effectively.

In Ontario the practice has been followed in a number of committees of adopting the following procedures for the conduct of hearings where the rights or reputation of a witness are in jeopardy or when the conduct of a witness has been called into question:

- Each witness has been afforded the right to appear with his own counsel to advise and assist him.

- Counsel for the witnesses have been permitted to make objections to questions put to their clients and, in appropriate cases, to give reasons for such objections.
- The right of such counsel to question his own client or any other witness has been restricted so that all such questioning is required to be done firstly by members of the Committee and secondly by members of the Legislative Assembly who are not members of the Committee.
- Witnesses have been subject to recall by the Committee and have not been excluded from the hearings while not giving their testimony.
- Witnesses have been permitted to invoke the protection of the *Ontario Evidence Act* and *Canada Evidence Act*.

In strict legal terms, there is no obligation on a committee to inform a witness of his rights and duties and the powers of the House to deal with defiant witnesses. The Ontario Law Reform Commission recommended that "in view of the generally foreign, and sometimes intimidating, nature of committee hearings to many witnesses and also in view of the fact that some hearings are of an 'investigatory' nature dealing with the conduct of individuals, ...witnesses... should be advised generally of their rights and duties when called to appear, and when appearing, before... committees, and of the possible penalties for non-cooperation"<sup>9</sup> to ensure that witnesses understand the process fully.

The Commission recommended that an explanatory brochure be prepared for the use of witnesses appearing before committees and of the members of such committees. This idea was endorsed by the Procedural Affairs Committee which recommended that persons requested or summoned to appear before a committee should be sent a copy of the brochure far enough in advance of their appearance to give the witnesses a reasonable opportunity to read and comprehend the information on the role and powers of committees and on the rights and duties of witnesses. The brochure would contain the following information:

- a description of the procedures used in legislative committees;
- the powers of committees and the method of examination;
- the duties of a witness, including the duty to answer all questions and produce all documents, if insisted upon by the committee;
- the rights of a witness, including the right to object to questions, to request an *in camera* hearing and to request that all or part of his evidence not be published, with the final decision resting with the committee;
- when the oath or affirmation may be employed and the meaning of the oath and affirmation;
- the statutory provision concerning failure to appear before a committee or to produce papers or things or to give false or misleading evidence; and
- the role of counsel at a legislative committee hearing.

This recommendation has not been acted upon. One committee, however, the Standing Committee on Social Development, undertook to advise witnesses appearing before it during its study of violence in the family of their duties as witnesses.

There is no provision in either the *Legislative Assembly Act* or the Standing Orders for a witness before a committee to be represented by counsel. Legislative committees are the masters of their own procedures and it is within their discretion to determine

whether a witness may have counsel and the role counsel may play. Committees have permitted witnesses to have counsel present to offer professional advice and to help a witness through hearings, especially in cases where a committee is conducting an inquiry into a matter involving allegations of impropriety or misconduct.

The role of counsel has generally been that of advisor rather than representative, although counsel have been permitted to object to procedures or lines of questioning pursued by committees and to present evidence in support of a witness or his submission. In the 1978 hearings of the Standing Committee on Administration of Justice into the conduct of George A. Kerr, QC, MPP, when he was Solicitor General, counsel to Mr. Kerr, Arthur Maloney, was permitted to present a submission in support of his client. The committee did not permit Mr. Maloney to cross-examine any of the witnesses. It is always open to a witness or his counsel to approach a member of the committee and request the member to ask a witness a specific question. This was the procedure followed in the Kerr enquiry.

While the Ontario Law Reform Commission recommended that the right of a witness to retain counsel should be expressly recognized in the *Legislative Assembly Act*, the Standing Committee on Procedural Affairs decided that it could not follow the Commission's recommendations. To enshrine the right of counsel in the Act could create difficulties and turn a committee into a court, particularly if counsel was to determine his own role before a committee. The Standing Committee felt committees should have the discretion to deal with the question of the role of counsel. It recommended the following practices be appended to the Standing Orders:

- It is customary for a committee to give permission to a witness to have counsel present at a committee proceeding.
- The committee has complete discretion in determining what role counsel will play in any committee proceeding.
- Counsel does not have an automatic right to cross-examine any witness.
- A committee may, in its absolute discretion, offer counsel the opportunity to cross-examine; that opportunity may be withdrawn by the committee at any time.
- It may be appropriate for a committee to offer counsel an opportunity to cross-examine when the committee is of the view that a witness has had his or her rights or reputation placed in jeopardy or when the witness's conduct has been called into question.

In the Canadian and British Parliaments witnesses examined before the House or any of its committees are entitled to the protection of the House in respect of anything that may be said by them in their evidence. As Marcel Pelletier, Parliamentary Counsel and Law Clerk of the House of Commons, has stated to the House Standing Committee on Privileges and Elections:

...the witness enjoys the same freedom of speech as the member and the same immunity against any legal action. In a recent publication, to which I referred a moment ago, my distinguished predecessor, Mr. Joseph Maingot, wrote on this matter, and I quote from page 34 of his *Parliamentary Privilege in Canada*: "...witnesses called before the Committee would also be protected against civil or criminal action — except that where the evidence was under oath, the witness may be charged with perjury." Although the House has the power to punish severely a witness for his bad conduct, it takes good

care, however, to protect him against the consequences of any evidence put forward pursuant to an order of the House. Indeed, both Houses will consider as a breach of privilege the taking of court action against anybody as a result of evidence given during proceedings of the House or one of its committees.<sup>10</sup>

The Law Reform Commission considered whether there is a privilege of the Parliament of Ontario relating to evidence given by witnesses before committees. The *Legislative Assembly Act* is silent on the privileges which attach to the use of evidence given by witnesses before legislative committees. Furthermore, there is no other statutory provision or any Standing Order which deals with the subject. After a very thorough discussion of the subject, the Commission concluded the privilege of freedom of speech, in particular, has been held to arise from inherent necessity, a necessity that is present in every legislative assembly. "Freedom of speech is necessary not only for members, but also for witnesses before the Legislature and its committees; the functioning of committees would be substantially impaired if witnesses could not speak freely without fear of the consequences."<sup>11</sup>

In light of some uncertainty concerning the scope of the privilege in favour of witnesses appearing before committees, the Commission felt that it was necessary to enact express legislation to define the right of immunity so that the smooth operation of committees is not impeded. "On the one hand, witnesses who fear that their protection is rather less than absolute may well be reluctant to provide full and open testimony at a committee hearing. On the other hand, witnesses who believe that they are completely protected in respect of their oral and documentary evidence may be lulled into a false sense of security."<sup>12</sup>

To resolve any uncertainty the Commission recommended the enactment of statutory provisions to ensure that "a witness who gives evidence at any legislative committee proceedings — whether such evidence is given orally, by way of affidavit, by the provision of documents, or otherwise — should have the right not to have any evidence so given used against that witness in any subsequent proceeding, except in a prosecution for perjury or for the giving of contradictory evidence. This protection should be accorded automatically to all witnesses, whether they appeared of their own volition, appeared at the request of the committee or were summoned to appear by Speaker's warrant, and whether they gave evidence by means of the proposed affirmation or not."<sup>13</sup>

On this point, the Procedural Affairs Committee recommended to the House that the *Legislative Assembly Act* be amended to provide that evidence given by a person before the Assembly or a committee thereof shall not be used or receivable in evidence against the person in a civil proceeding. The Committee noted that at the present time, evidence given before the Assembly or a legislative committee cannot be used in a criminal proceeding by virtue of section 13 of the *Constitution Act, 1982*, which states: "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

## In Camera Hearings

The matter of *in camera* hearings was also the subject of certain recommendations by the Ontario Law Reform Commission. Ontario committees occasionally hear evidence *in camera* but, as a general rule, most committees place considerable store in their

ability to conduct hearings in open session. The Commission recommended that the current practice of hearing evidence in open session be continued and encouraged. The Commission made two further recommendations. In situations where it is known or anticipated that evidence might tend to incriminate the witness, reflect prejudicially on the reputation, character or conduct of the witness or another party, involve a sensitive, privileged or classified matter, or where for any other reason the committee is of the view that the public interest would be better served by holding the hearing *in camera* than by holding it in public," the Commission recommended that the proceedings be *in camera*.<sup>14</sup>

In situations where a committee is dealing with a matter which is also pending in a court or before a judge for judicial determination (including any quasi-judicial body constituted by the House), the Commission recommended that committee proceedings should be held *in camera* unless the Assembly deemed it to be in the public interest to hold a public hearing. Such a recommendation recognized that a committee may call as witnesses persons involved in a civil suit or criminal proceedings, that witnesses at such hearings may be compelled to answer all questions and to produce all documents in their possession, and that media coverage of such a hearing could severely prejudice any judicial or quasi-judicial proceedings. This was the very argument raised by counsel to the Attorney General for Ontario during the hearings of the Standing Committee on Administration of Justice into the collapse of several trust companies. In this case, the Committee decided that, on balance, it would be in the public interest to hold public hearings.

The Procedural Affairs Committee was of the opinion that the question of *in camera* hearings should be left to the discretion of committees subject to any instructions from the House to hold hearings *in camera*. The Committee recommended that committees should be guided by the following practices to be appended to the Standing Orders:

- A committee will usually conduct its proceedings in open session; however, it has complete discretion in deciding whether it wishes to conduct its proceedings *in camera*.
- A committee may hold its proceedings *in camera* when, for example, it feels that the evidence might or will tend to incriminate the witness, reflect prejudicially on the reputation, character or conduct of the witness or another party, involve a sensitive, privileged, confidential or classified matter, or where for any reason the committee is of the view that the public interest would be better served by holding the hearing *in camera*.
- A committee may also wish to hold its proceedings *in camera* where the matter under consideration is the subject of a pending civil or criminal trial.

## Conclusion

The various reports dealing with witnesses have been of interest and assistance to persons involved in the legislative process. However, the responsibility for debating, adopting, modifying or rejecting these recommendations rests with the House and, to date, the Ontario Legislature has not considered them. As a result, there continues to be uncertainty about the issue of witnesses before legislative committees. This uncertainty may be detrimental not only to the persons who appear before our committees but also to the legislative process itself. In certain cases it may, in fact, seriously hamper the ability of committees to obtain evidence. If

committees are to receive full and complete testimony from witnesses and to ensure that a person is not prejudiced as a result of proceedings in a committee, the witnesses must be secure in the knowledge of their rights and their duties.

## Notes

- <sup>1</sup> There has been some confusion in the recent past as to the status of persons appearing before legislative committees based on the circumstances under which persons appeared as witnesses. However, it is now generally accepted that the term "witness" applies to any person appearing before a legislative committee whether the person has been invited or ordered to appear or whether evidence has been given under oath. Neither the *Legislative Assembly Act* nor the Standing Orders distinguish between different types of witnesses.
- <sup>2</sup> See, Ontario Law Reform Commission, *Report on Witnesses Before Legislative Committees*, 1981.
- <sup>3</sup> *Ibid.*, p. 20.
- <sup>4</sup> May, *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 19th edition, 1976, p. 692.
- <sup>5</sup> Legislative Assembly, Standing Committee on Administration of Justice, 4th Session, 31st Parliament.
- <sup>6</sup> Ontario Law Reform Commission, *op. cit.*, p. 29.
- <sup>7</sup> Such was the case in 1981 when the Standing Committee on Administration of Justice sought and received a Speaker's warrant to require "the

Minister of Consumer and Commercial Relations to produce ...all correspondence, interdepartmental memoranda, memoranda to file, application forms, notes, files and such other documents as are in the possession of any agency, board, commission, registry, branch or division of the Ministry of Consumer and Commercial Relations" relating to the collapse of Re-Mor Investment Management Corporation. The material was not immediately forthcoming and on a second report to the House, a compromise was reached whereby all documents were delivered in confidence to a sub-committee of the Committee. During these hearings, however, the Committee, in addition to examining the Minister, chose to pursue questioning of civil servants and ordered them to answer questions concerning their role in licensing the companies and in the formulation of government policy in the field of trust company regulation. Although these civil servants answered questions after being ordered to answer by the committee, one may assume that they did so with the agreement of their minister. See Legislative Assembly, *Journals*, vol. 114, 1980, p. 213.

- <sup>8</sup> Legislative Assembly, Standing Procedural Affairs Committee, *Report on Witnesses Before Committees*, 4th session, 31st Parliament, pp. 4-5.
- <sup>9</sup> Ontario Law Reform Commission, *op. cit.*, p. 58.
- <sup>10</sup> Canada, House of Commons, Standing Committee on Privileges and Elections, *Minutes of Proceedings and Evidence*, No. 23, Tuesday, 29 March 1983, pp. 49-50.
- <sup>11</sup> Ontario Law Reform Commission, *op. cit.*, p. 104.
- <sup>12</sup> *Ibid.*, p. 111.
- <sup>13</sup> *Ibid.*, p. 112.
- <sup>14</sup> *Ibid.*, p. 76.