The Pearson Inquiry Paper Chase

by Senator Finlay MacDonald

On May 4th, 1995, the Special Senate Committee on the Pearson Airport Agreements was established. Its mandate was to examine all matters leading up to and including the agreements to redevelop Terminals 1 and 2 at Toronto's Lester B. Pearson International Airport as well as circumstances surrounding cancellation of the agreements by the Liberal Government in 1993. The Committee was empowered to send for "persons, papers and records". Such powers were central to its ability to conduct a complete and thorough inquiry. This article explores the issue of obtaining full disclosure of documentary evidence from the government. It calls for changes to create an efficient and orderly way for future inquiries, be they parliamentary or judicial, to receive the documentation necessary for them to carry out their mandate.

The establishment of the Special Senate Inquiry followed a practice common over the years by which governments appoint Royal Commissions or Special Inquiries to deal with potentially sensitive political subjects. The technique is useful in that it takes a particular subject out of the day to day glare of parliamentary scrutiny. It also allows in-depth study, usually by a group with some expertise in the subject matter.

For the most part such inquiries have been allowed to do their work unimpeded by the government. However, this no longer seems to be the case. Recent inquiries have encountered frustrating, and seemingly insurmountable obstacles. For example the Inquiry into the deployment of Canadian Forces to Somalia faced numerous road blocks, most of which were erected by the very department that was being investigated.[1] Similarly the inquiry by Mr. Justice Krever into Canada's blood supply system was challenged by some of the most powerful figures in Canada's health establishment. These challenges dealt with the intent of the Inquiry to assign blame for a blood supply system that infected thousands of Canadians.[2]

Senator Finlay MacDonald was Chairman of the Special Senate Committee on the Pearson Airport Agreements. He retired from the Senate on January 4, 1998.

Our Special Senate Inquiry had its own serious, albeit less publicised, problems throughout the entire term of its mandate. Ultimately the problems we faced became the subject of a report authored by myself as Chairman and the Vice Chairman, Senator Michael Kirby.[3] This article covers some of the main points in that report.

Background

Long before I undertook the task of chairing the Special Senate Committee, I had a preview of what was in store for us. I was at a meeting of the Standing Joint Committee for the Scrutiny of Regulations in December, 1994 when the Deputy Minister of Justice indicated that his department was in the process of finalising a paper on the powers of committees vis à vis witnesses and documents. I understood it to be a comprehensive update of the 1990 document issued by the Privy Council entitled "Responsibilities of Public Servants in Relation to Parliamentary Committees" and I requested a copy.

Seventeen months later, in May 1996, I again asked, this time as Chairman of a Special Parliamentary Inquiry, whether this paper would be made public. The Department of Justice had developed what could be a very helpful paper and would not release it because they argued that they were not in a solicitor-client relationship with the Senate. I should have known that troubled waters lie

ahead. We began the paper chase without the guidebook written by the Department of Justice.

The powers of standing committees to deal with documentation and witnesses are set out in Rule 91 of the *Senate Rules* and in Standing Order 108(1) of the House of Commons. Ms. Diane Davidson, General Legal Counsel in the House, has written on the importance of these two provisions which include the innocuously-stated authority to "send for persons, papers and records." No distinctions are made between different types of documents or categories of witnesses. "The very simplicity of the words granting this authority would appear to belie the strength of the power thereby delegated. When coupled with the rights a committee enjoys as a constituent part of Parliament these are very full powers indeed."[4]

What these grants of power mean, of course is that, provided a committee's inquiry is related to a subject-matter within Parliament's competence and within the committee's own order of reference, Committees have virtually unlimited powers to compel the attendance of witnesses and to order the production of documents.

The rights and powers of a parliamentary committee are little understood and have been rarely exercised. There may be a simple reason for this. No majority government would permit a Special House of Commons Committee to conduct a "post-mortem" on the wisdom of legislation or decisions of its own making. A Senate dominated by the same party would suffer the same fate.

> ***One may then argue that it is only the Senate (one of a different political stripe than the government in the House of Commons) that could establish a Special Committee which would test the powers of a parliamentary committee.***

Insofar as summoning witnesses is concerned this is easier said than done because of the absence of effective sanctions. "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."[5]

The theoretical power to obtain documents we found to be equally problematic. Following discussions between the Senate Committee and the Department of Justice on behalf of all Government Departments the following procedure was used to provide the Committee with documentary evidence.

- The Department of Justice asked all relevant government departments to identify any documents that might be of potential interest to the Committee.
- Copies of all the documents were made and delivered to an organising team Assembled by the Department of Justice on June 13th, 1993.
- A data base was created so that relevant documents could be recalled on a subject matter and potential witness basis.
- As witnesses were identified by the Committee and the order of their appearance became known, those documents authored or received by the witness or that were otherwise relevant were gathered together.
- A team of public servants from the Department of Justice and the Privy Council Office reviewed the documents. Material relating to cabinet confidences, matters of personal or commercial privacy, advice to ministers and documents protected by solicitor-client privilege were removed and the expurgated documents were then sent back to the document organising group.
- The expurgated documents were placed in binders, an index for each binder was prepared, and the documents were sent to the Clerk of the Committee who made them available to Committee members. A total of 103 volumes of documents were delivered to the Committee, a volume typically containing 350 pages.

The way this process worked in practice left a great deal to be desired. The Department of Justice retained an Ottawa law firm, who in turn employed a Toronto firm of forensic auditors. These two "outside" agencies, after taking an oath of confidentiality, were among the first ones allowed to see the documents and flag documents they thought should be censored. The law firm and the forensic auditors were paid by the government an amount in excess of $1 million, five times more than the budget of our entire Committee.[6]

There were problems of timing and disclosure in the practical operation of the process. Initially, the main difficulty was that relevant documentation did not arrive in member's hands until immediately before the appearance of the particular witness. This problem diminished as the hearings progressed and documentation pertaining to specific witnesses began to arrive in a more timely manner.

However, the committee was quite disturbed about an incident that occurred just prior to the completion of its hearings. In early September, the Committee was advised that documents remained which had not yet been released because they did not relate to a witness who testified or were outside the time frame or subject area of the witness' anticipated evidence.

The Justice Department further indicated that the documents were currently being reviewed and would be released in the near future. No mention was made again of these documents until they were delivered to the Clerk's office at 4:00 p.m. on Friday, 3 November, 1995. The last day of hearings was scheduled for the following Monday.

The release of these documents at the eleventh hour was highly disconcerting. Justice officials made no effort to give the Committee advance notice that these documents were about to be released. Moreover, Committee members were very disturbed to discover that a number of the documents were highly relevant and related directly to evidence already given by earlier witnesses. The explanation offered by the Justice Department was that these particular documents were simply overlooked during the initial review.

In August the Committee was informed that there still remained a large number of undisclosed, non-confidential documents. In the opinion of the Justice Department, these documents would not be of interest to the Committee. Justice officials agreed to produce a master list of these documents. On November 16th, 1995, four months after the inquiry was commenced and ten days after the Committee had completed its hearings, the master list of 6,015 documents was provided to counsel for the Committee.

This was unacceptable. Should a committee of inquiry similar to the Pearson Committee be established in the future, members should be aware of the possibility of this happening. They should guard against it, by making routine weekly inquiries of the Department of Justice as to the status of documentation.

Mr. Thomson, the Deputy Minister of Justice, acknowledged in his appearance before the Pearson Committee that the document disclosure process was not perfect. It left the committee in a situation where members did not know if all relevant documents had been produced. As well, because documents were reviewed prior to disclosure, and parts of them erased under an attempt to comply with the *Access to Information Act*, members were prevented from obtaining complete information.

Information Withheld From the Committee

In deciding which information was to be withheld officials from the Department of Justice and the Privy Council Office followed the principles embodied in the *Access to Information Act*, although this Act is not applicable to Parliament. Questioned on this point the Deputy Minister of the Department of Justice, testified that the principles traditionally followed by the Government in deciding what information to make available to parliamentary committees are the same as those set out in the Act.[7]

One reason for withholding or censoring a document was that it contained cabinet confidences. But with respect to Cabinet confidence, I want to make it clear no member of my Committee asked any witness a question which would have breached this convention. As Chair I would have rule out any such a question. There are differences of opinion as to what constitutes a cabinet confidence and I will discuss these shortly.

Other reasons were cited for withholding or censoring documents. They could not contain personal information, third party confidential commercial information or advice to a Minister. The most frequently cited grounds for us receiving documents with large sections whited out was solicitor-client privilege.

> ***If the Department of Justice is the solicitor, and all government departments are their clients, it became apparent that "you can't fight City Hall."***

The constant invocation of solicitor-client privilege plagued the committee throughout its hearings but the failure to obtain key Treasury Board Documents was particularly frustrating. The problem centred around an August 1993 document which we never did obtain. In it Treasury Board was asked to give approval for the Minister of Transport to conclude the Pearson agreements. To assist in its deliberations, documents containing internal government advice and analysis, including a review of the potential dangers and risks associated with the Pearson agreements, were submitted to Treasury Board.

Ms. Bloodworth of the Privy Council Office testified that these Treasury Board submissions were confidential cabinet documents of the Campbell government. We argued, without success, that this type of cabinet record consisting of reports containing background analysis and discussion could and should be made available to a parliamentary committee.[8]

We were also told that there exists in Canada a well established convention, respected by successive governments, that a newly elected administration may not have access to the confidential cabinet documents of previous governments. When a change of government occurs, cabinet records are left in the custody of the Clerk of the Privy Council. She argued that the release of these documents without the authorisation of former Prime Minis-

ter Kim Campbell would constitute a violation of the convention.

We heard conflicting evidence from non governmental experts on this matter.[9] But it was my belief that if the practice of refusing access to members of the incoming government applies, it should only apply to politically sensitive, inner cabinet records. The Treasury Board submissions sought by the Committee clearly did not fall within this narrow category.

Despite all the theoretical arguments there was no denying that in August 1993 these very Treasury Board submissions were released, ostensibly in error, to Robert Nixon shortly after he was appointed by Mr. Chrétien to conduct a review of the Pearson agreements. Why would the Government continue to deny us access to these documents which were given to Mr. Nixon and reviewed carefully by him and his associates?

> ***Unless the government is committed to full and open disclosure, inquiries should not be established. Anything less than full disclosure makes a mockery of our system of attempting to discern truth and make recommendations based on these findings.***

To complicate matters further, the Treasury Board documents had also been leaked to a reporter, Greg Weston, in September, 1993. Two articles appeared in the *Ottawa Citizen* in which Mr. Weston relied heavily upon the information and defended cancellation of the Pearson agreements.[10] In 1995 Mr. Weston wrote another column claiming that our Senate inquiry was a waste of time and money because without the Treasury Board submissions, the Committee did not have the full picture.[11]

In response the Committee twice invited Mr. Weston to appear and to make the Treasury Board documents available. The managing editor of the *Citizen*, on behalf of Mr. Weston, declined the Committee's invitation. He cited the Supreme Court of Canada finding that journalists should not be compelled to testify or to disclose documents unless alternative channels have been exhausted. When we pointed out that the Committee had no way of knowing exactly what documents Mr. Weston had in his possession and was relying upon to cast suspicion over the Committee inquiry, the newspaper decided to publish yet another article outlining exactly what documents Mr. Weston possessed.[12]

In the face of a ludicrous situation where we were reading in the newspaper what the government was refusing to give us, the Committee resorted to a very unusual parliamentary procedure. We 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.[13]

According to the *Manual of Official Procedure of the Government of Canada* , the confidentiality of the advice contained in cabinet documents belongs to the Governor General and it is within his or her prerogative to release the documents. Disclosure of Cabinet records is regulated by the Privy Councillor's oath and the concept that Cabinet decisions are advice to the Sovereign which may only be revealed with his consent.

Therefore our Second Reported noted:

> "In order to carry out its mandate it is critical that your Committee be granted access to the Treasury Board Submissions of August 1993 concerning the Pearson Airport Agreements. Your Committee is satisfied that the release of these documents is in the public interest and constitutes a reasonable exception to the customary practice of respecting Cabinet confidentiality.

Therefore your Committee recommends that a humble address be presented to His Excellency the Governor General praying that he will cause to be laid before the Senate a copy of the Submissions to Treasury Board in August 1993 relating to the Pearson Airport Agreements."[14]

I spoke to the Report a few days later in the Senate outlining why we thought access to these documents did not breach any cabinet confidence.

> "I do not mind your telling me that this report is quixotic; that it may be doomed to failure; that it is not worth doing; that since we may not get the documents, we should not even ask for them. At the end of the day, all that is being asked of this chamber of parliamentarians, this House of Parliament is that you adopt our report; a report that employs a traditional and appropriate procedure for asserting the rights and powers of Parliament, which has given a mandate to a committee which, in turn, automatically becomes an integral part of Parliament."[15]

Other members of the Committee including Senator Kirby spoke in the debate. He agreed with the need to obtain these documents but suggested a different means be used. He proposed an amendment which would strike out the last paragraph and replace it with the following:

> "Therefore the Committee recommends that an inquiry be made of the Right Honourable Kim Campbell as to whether she is prepared to authorise the release of Submissions to the Treasury Board, dated August 1993 that related to the redevelopment of Pearson Airport."[16]

In the end neither the report nor the amendment came to a vote and the report died with the termination of the First Session of the Thirty-Fifth Parliament.

Recommendations

The problems we encountered in obtaining information could be resolved by a number of fairly simple techniques.

First, the principle of cabinet confidentiality is being interpreted too broadly by government officials. Documents containing background factual analysis should not be treated as cabinet confidences. The classification of confidential advice given by Civil Servants to Ministers inhibits both questioning by committee members and answering by public servants. New rules governing what properly constitutes a "cabinet confidence" and in what circumstances cabinet confidences should not be treated as confidential, are needed.

Secondly, Counsel to an investigating Committee must be permitted to review all of the expurgated documents, after having taken an oath of confidentiality. (Our proposal along these lines was rejected on the grounds that counsel to the Committee was not an agent of the Government.)

Thirdly, the procedure whereby the deletion of large sections of documents takes place on the basis of solicitor-client privilege should be reviewed. Counsel to the Inquiry should be allowed to review such deletions. I hope no future Committee finds itself in the ludicrous position where documents that were withheld from it have already been released to the public under the *Access to Information Act* , or to the courts in the litigation process.

Fourthly, some method must be found for a Committee to satisfy itself that it is in possession of all relevant documentation. I hold to the view that in making the necessary information available, the presumption should always be in favour of providing information and against withholding it.

Finally the issues I have outlined should be studied either by a Senate Committee specifically established for that purpose, or perhaps a Special Joint Committee of both Houses. The powers of Committees to carry out investigations are of vital importance to our democratic system. Methods must be found so that these investigations can be carried out with full documentation in the hands of Committee members.

Notes

1. Chapter 38 of the *Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* entitled "Openness and Disclosure of Documents" deals in some detail with the frustrations of the Somalia Commission in relation to documentary evidence. Commenting on this matter, the Commission stated "Through its actions, DND hampered the progress and effectiveness of our Inquiry and left us with no choice but to resort to extraordinary processes to discharge our mandate appropriately."
2. The Krever Inquiry faced a challenge on the grounds that Mr. Justice Krever lacked the authority to levy findings of blame against those who controlled and administered the blood system in the last decade. On September 26, 1997, the Supreme Court of Canada determined that this inquiry could, in fact, lay blame. However, the Commission was cautioned by the court not to draw conclusions of civil or criminal liability.
3. See "The Power to Send for Persons, Papers and Records: Theory, Practice and Problems" in *Report of the Senate Special Committee on the Pearson Airport Agreements*, December 1995. I am grateful to Will Hinz and John Nelligan of Nelligan Power for their assistance in preparing that report and to Bruce Carson for assistance in adapting it for publication in this article.
4. See Diane Davidson, "The Powers of Parliamentary Committees", *Canadian Parliamentary Review*, Vol. 18 (Spring 1995).
5. For a discussion of the problem of summoning witnesses see Gary Levy "Summoning and Swearing of Witnesses: Experience of the Pearson Airport Committee", *Canadian Parliamentary Review* , Vol. 19 (Spring 1996) pp. 2-7.
6. Senate, Special Senate Committee on the Pearson Airport Agreement, *Proceedings*, September 21, 1995, pp. 22:66.
7. *Ibid.*, p 22:85.
8. *Ibid* p. 22:7.
9. See testimony by Professors Andrew Heard, John Wilson and J.R. Mallory in *Ibid*, September 25, 1995, pp. 24:3 - 24:57. Also John Wilson " The Status of the Caretaker Convention in Canada". *Canadian Parliamentary Review*, Vol. 19 (Winter 1995-96) pp. 12-19 and Andrew Heard "Constitutional Convention and Election Campaigns", *Canadian Parliamentary Review*, Vol. 19, (Autumn 1995) pp. 8-11.
10. See *Ottawa Citizen*, September 25th and 26th, 1993.
11. See *Ottawa Citizen*, September 25th, 1995.
12. See *Ottawa Citizen*, October 12, 1995.
13. The procedure for an address to the Governor requesting the disclosure of documents finds authority in Rule 133 of the *Rules of the Senate* .
14. Senate, Special Senate Committee on the Pearson Airport Agreements, *Proceedings*, October 17, 1995, p 28:3.
15. Senate, *Debates*, October 19, 1995 p. 2145.
16. *Ibid.*, October 31, 1995, p. 2160.