

---

# STATES OF JERSEY



## **BREACH OF PRIVILEGE: *IN CAMERA* DEBATE**

---

**Presented to the States on 16th April 2009  
by the Privileges and Procedures Committee**

---

**STATES GREFFE**

## REPORT

1. On 3rd February 2009 the Chairman of the Privileges and Procedures Committee raised a matter in the States which she believed affected the privileges of the States. The matter was initially considered at a meeting of the Committee, which the Bailiff had been invited to attend, on 23rd January 2009. Following the meeting, and at the request of the Committee, the Chairman gave notice as required by Standing Order 8 to the Bailiff and the matter was therefore raised in accordance with Standing Order 60 which provides that a member of the States may raise a matter of privilege or immunity by stating the facts to which he or she wishes to draw attention and the grounds on which he or she believes that the facts affect the privileges or immunity of the States.
2. The matter in question related to the publication in the Jersey Evening Post and by Senator Stuart Syvret of certain details of an *in camera* debate that had been held on 21st January 2009 in relation to a proposition of the Connétable of St. Helier relating to the suspension of the Chief Officer of the States of Jersey Police. The debate had been held *in camera* in accordance with Article 9(4) of the Police Force (Jersey) Law 1974 which provides that any discussion in the States regarding the appointment, suspension or dismissal of the Chief Officer shall take place *in camera*.
3. The manner in which the Chairman addressed the Assembly is set out as follows in Hansard –

**1. Connétable J. Gallichan of St. Mary (Chairman, Privileges and Procedures Committee):**

*I wrote to you last week to give notice as required under Standing Order 8 but I wish to raise a matter that my committee considers affects the privileges of the States. Following the in camera debate during the last sitting on the proposition of the Connétable of St. Helier, Senator Syvret published information about the content of the in camera debate on his internet blog site. It would clearly be inappropriate for me to refer to what he wrote except to say that he made it very clear that he was aware that he was knowingly publishing this material, even though the debate had been held in camera as required by the Police Force (Jersey) Law 1974 and that he might be sanctioned for that action. If you agree that this matter affects the privileges of the States, Standing Order 60 allows me to propose any matter relating to it without notice. I do not believe that it would be appropriate to hold any substantive debate on this matter today but I would like to propose that the issue is formally referred to P.P.C. (Privileges and Procedures Committee) to allow my committee to investigate it, to allow Senator Syvret to address us if he wishes to do so and to consider what action, if any, is appropriate. I appreciate that the information in question has also been published in the Jersey Evening Post and it is therefore possible that one or more other anonymous Members may have revealed this information to a journalist. If that Member or those Members were to reveal who they are I would also propose that this issue be referred formally to the P.P.C.*

After discussion the States voted by 38 to 5 to refer the matter to the Privileges and Procedures Committee as requested by the Chairman so that it could be investigated.

4. Standing Order 128(f) charges the Privileges Procedures Committee to defend the privileges of the Assembly; and the Committee trusts that all members share its view that the defence of these privileges is fundamentally important. When the Chairman addressed the Assembly on 3rd February 2009 in relation to this matter, she stated in summing up that “the concept of parliamentary privilege is an extremely important one. I fundamentally believe that the privileges of the States must be defended just as I believe that all members of the Assembly are equally bound by the Standing Orders and should be treated without partiality”.
5. Parliamentary privilege is a fundamental component of a functioning parliamentary democracy, with its origins as far back as the days of Charles I and the dispute in that era between the Crown and Parliament. It exceeds the normal legal position and belongs to individual members and to the parliament collectively. PPC is pleased to note that in recent debates several references have been made to the importance of privilege by different members from various parts of the political spectrum.
6. Following the referral to the Committee on 3rd February 2009, PPC gave initial consideration to this issue and noted that there are no formal written procedures in the States of Jersey Law, Standing Orders or elsewhere which set out any particular consequences if a member leaks information following an *in camera* debate. The Committee concluded that it is nevertheless implicit at present that if a debate is held *in camera* it is incumbent on every member not to disclose the content of the debate or the whole principle of holding a debate *in camera* is undermined.
7. PPC decided from the outset that the issue under consideration was much broader than the single incident involving the Internet ‘blog’ of Senator Syvret. The Committee was equally concerned about the leaks that had been given to the Jersey Evening Post that enabled that newspaper to publish certain details of the debate. PPC noted, in fact, that Senator Syvret had at least been open on his Internet ‘blog’, which was not the case for the unnamed members who had spoken to the Jersey Evening Post. In practice, the matter referred to became a very public one very shortly after the leaks, and there were subsequently questions in the Assembly about it, and a public statement issued by the former Minister for Home Affairs which was reported in the media. In the Committee’s view this does not nevertheless diminish the importance of the investigation into the breach and it is, of course, very much the case that nothing would have entered the public domain about the debate if no member had disclosed details of the proceedings.
8. Although the Committee decided to treat the matter as a general issue of principle, it did nevertheless invite Senator Syvret to attend upon it to discuss his own decision to publish information on his ‘blog’, but the Senator did not avail himself of the opportunity to attend as invited.

9. The Committee agreed that it would be helpful to research the position in other jurisdictions and the Greffier of the States was requested to contact colleagues in other Commonwealth jurisdictions for advice. In addition, the Committee discussed the matter on 27th February 2009 with the Bailiff as President of the States.
10. The Committee received extremely helpful advice following the enquiries made by the Greffier, and the Committee believes that the information may be of interest to all members. It is therefore reproduced in full in the Appendix. It can be noted that other parliaments virtually never sit *in camera* and had therefore to seek parallels with other matters, the most common being the premature leak of committee reports or the disclosure of confidential committee proceedings.
11. The information received from other jurisdictions show that there is almost universal agreement from parliamentary clerks that the disclosures to the media and on the Internet in Jersey did constitute a breach of privilege. The Committee found that perhaps the most helpful summary of the position came from the Clerk of the Legislative Assembly of British Columbia which is as follows –

*“The most relevant example from our experience occurred in March 2002, when a draft committee report was leaked and its preliminary conclusions reported on by the media in a newspaper article. A Member of the Committee admitted to sharing a copy of the draft report with union officials, who later offered public criticism of its content. The Committee Member later apologized to the House for her action, but as her statement did not satisfy all Members of the House, the matter was referred to the Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills for further investigation. The Committee decided not to investigate into the role of the newspaper reporter, or the union official, and focussed instead on the actions of the Member herself. A few weeks later, the Committee’s report concluded that the Member should offer an unqualified apology for her actions, and that, in the future, all Members serving on legislative committees be reminded by the Committee Chair or the Clerk to the Committee of the rules pertaining to confidentiality of draft reports and other committee proceedings.*

*At the very least, this final recommendation may prove helpful in the situation in Jersey, as the mechanism to hold in camera proceedings is likely one which the House may wish to employ from time to time. Although many details of that particular in camera meeting are now in the public domain, there is still merit in clarifying expectations about the nature of these proceedings. As it seems unlikely that the Member who posted the confidential matter on his blog will apologize to the House for his actions, the Privileges and Procedures Committee should use the opportunity to carefully articulate a clear statement of expectations for future proceedings.”*

12. The Committee considers that this advice is particularly relevant because it refers not only to conduct by a member, but also to publication in the media.

## CONCLUSION

13. Having considered the matter carefully, the Committee has concluded that the actions of Senator Syvret and of unnamed members who spoke to the Jersey Evening Post did constitute a breach of privilege. It is important to set out the reasons for this view. The Committee's ruling is not simply a retrospective comment on the actions that members took some months ago. The Committee believes that the breach could have implications for the future.
14. One of the fundamental principles of parliamentary privilege is that members are able to speak freely in the Assembly without inhibition. During an *in camera* debate members may wish to mention very serious confidential matters, and need the assurance when the Assembly is sitting *in camera* that their remarks will not subsequently be reported outside. If members believe that anything that they say *in camera* could subsequently be leaked by another member, they may feel constrained in their ability to speak freely and this is therefore the fundamental breach of privilege caused by the actions earlier this year. Members need a guarantee that their remarks made *in camera* will remain confidential and if it became common practice for the content of *in camera* debate to be disclosed by members, members could be prevented from exercising their privileges.
15. PPC wishes to stress that it does not believe it is relevant that Senator Syvret considered that the remarks he made were in the public interest. During the discussion on the matter of privilege on 3rd January 2009 he stated: "*I have absolutely no regrets whatsoever about publishing the information I did. It was a profoundly important piece of public disclosure information, the public good required that it be known.*" PPC wishes to point out most strongly that the public interest test cannot be applied by members in relation to *in camera* proceedings. If members take the view that they can disclose information from an *in camera* debate simply because it is in the public interest, members will not be able to speak freely during such debates for fear of having their remarks reported and their privileges will therefore be breached.
16. PPC has considered whether any action could be taken against the Jersey Evening Post for publishing the material it did. The Committee has concluded that realistically there is no action that can be taken by the Assembly against the media and would stress that the real "culprits" in this matter are the unnamed members who spoke to that newspaper.
17. As mentioned earlier, PPC has a duty to protect the privileges of the States and concludes that Senator Syvret breached those privileges in this example. The Committee does not consider it would be appropriate in the particular circumstances of this case to take any further action or recommend any reprimand or sanction, but the Committee gives notice that it would not necessarily take this view in the future.
18. The Committee urges all members to appreciate the fundamental importance *in camera* debates that may be necessary to discuss highly confidential matters and reminds all members that they must respect the confidentiality of the matters discussed.

## APPENDIX

**'IN CAMERA' DEBATES – ADVICE FROM OTHER JURISDICTIONS****The Greffier's enquiry to colleagues from the Society of Clerks**

On behalf of the PPC the Greffier of the States wrote to a number of colleagues in other Commonwealth jurisdictions asking their advice on the consequences of disclosing the proceedings of an *in camera* debate in their respective jurisdictions.

The Greffier pointed out in his enquiry that, in addition to the normal role of the States of Jersey as a legislature, it undertook a number of other 'executive' functions including the approval of certain public appointments. The relevant function in relation to this enquiry was the appointment and dismissal of the Chief Officer of the States of Jersey Police where the relevant Article of the Police Force (Jersey) Law 1974 read as follows –

**9 The Chief Officer and Deputy Chief Officer**

- (1) The Chief Officer shall be appointed by the States on such terms as to salary and conditions of service as the States Employment Board may from time to time determine.
- (2) The Chief Officer may be suspended from office by the Minister who shall refer the matter to the States at their next Sitting and may be dismissed from office by the States.
- (3) The Chief Officer shall be responsible to the Minister for the general administration and the discipline, training and organisation of the Force and of the Port Control Unit.
- (4) ***Any discussion in the States regarding the appointment, suspension or dismissal of the Chief Officer shall take place in camera.***

The Greffier referred to the proposition brought by the Connétable of St. Helier and to the subsequent publication of certain information about that debate in the Jersey Evening Post and by one senior member on his Internet 'blog'.

The Greffier quoted relevant Standing Orders as follows –

**81 Proposal for conducting business in camera**

*A member of the States may propose without notice that the States conduct any debate or part of a debate upon a proposition or any other part of its business (apart from a vote) in camera for a specified purpose.*

**82 Arrangements for conducting business in camera**

- (1) ***Where any enactment requires that the States debate a proposition in camera or where the States decide to conduct any debate or part of a debate upon a proposition or any other part of its business in camera –***

- (a) *the presiding officer shall order all strangers to withdraw from the precincts of the States and the doors of the Chamber to be closed; and*
  - (b) *the Viscount or, in his or her absence, a person instructed by the presiding officer, shall ensure that the order for strangers to withdraw is complied with.*
- (2) *Any debate or part of a debate or any other business which is conducted in camera may be recorded, for the purpose of the preparation of a transcript, but shall not be broadcast to the public.*
  - (3) *A vote cannot be taken whilst the States are conducting any business in camera.*

And later on re Hansard –

**160 Greffier to prepare transcript of meeting**

- (1) *The Greffier shall prepare a written transcript of a meeting.*
- (2) *The transcript shall include –*
  - (a) *all questions and answers, whether written or oral;*
  - (b) *all matters of privilege raised; and*
  - (c) *all public business.*
- (3) *The transcript may also include –*
  - (a) *such other business as the Greffier, after consultation with the PPC, if necessary, considers appropriate; and*
  - (b) *any supporting or illustrative material that a speaker has distributed to members of the States during a debate.*
- (4) ***A transcript of any part of a meeting conducted in camera shall not be made public, unless the States decide otherwise.***

He further pointed out that Jersey did not have any formal restriction in statute or in Standing Orders about not disclosing the contents of an *in camera* debate although it was implicit that this was not appropriate or the whole principle of sitting *in camera* was undermined. In this regard he quoted the following exchange recorded in Hansard from 2nd December 2008 during the question period that followed the then Minister for Home Affairs' statement on the suspension –

**Senator T.J. Le Main:**

Could I have some advice from the Chair, please? In view that this is held *in camera* what is the repercussions of a Member putting out information gained in this Chamber *in camera* this morning on a blog site or Internet which is currently being done by an arrogant Member of this Assembly? What is the legal implications of standing *in camera* this morning and that information being put on the Internet?

**The Bailiff:**

When the Assembly agrees to meet *in camera* in order to discuss matters which should not be made public, there is an inevitable consequence that Members are not expected to reveal anything which took place during an *in camera* discussion. So far as ... if a Member were to do that I would need notice, Senator, having regard to the specific facts involved, but I am inclined to think that it would be a gross breach of the privilege of the Assembly and could be dealt with by the Assembly accordingly.

The Greffier explained that PPC in Jersey was keen to know what the consequences were of sitting *in camera* in different jurisdictions even though he stressed that he appreciated that very few other parliaments ever sat *in camera* at all and these issues might not therefore have arisen.

-----

**Replies received from other Parliaments**

**AUSTRALIA****Clerk of the Australian Senate**

Dear Colleague

In response to your inquiry, I advise that the Australian Senate has never met in private session, but the unauthorised publication of proceedings in private session of the Senate or of a committee is declared to be a contempt of the Senate and may be punished as such. The relevant Senate resolution provides, in part:

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.

Please let me know if I can be of any further assistance.

-----

---



**Clerk of the Australian House of Representatives**

Greetings Michael. Sorry not to have responded sooner. I am not sure that the Australian House of Representatives can provide much that is applicable to your current challenge, but our practice in this regard is as follows.

The House does not become involved in appointments of the kind to which you refer.

The basic premise of all our meetings is that the Parliament conducts its meetings, with the rarest exceptions, in public. There have been secret sessions, during war times, when Hansard reporters were excluded. However, the clerks and Members remained in the secret sessions.

*In camera* sessions most usually occur in relation to parliamentary committees, but there is no doubt that it remains open to the House in this way. Section 16 of the Parliamentary Privileges Act 1987 states in subsection 16(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 authorised the publication of, that document or a report of that oral evidence.

Of course, there is no guarantee that *in camera* material will retain that status, as a House or a committee can authorise its publication subsequently. However, Members cannot reveal such material until publication is authorised without risking the sanction of the House.

I think my advice would be that a contempt has been committed, and that the House would be best served to consult its own dignity and take no further action in respect of the matter.

All the best in your deliberations.

-----  
**Clerk of the New South Wales Legislative Assembly**

In New South Wales a number of public appointments require approval from parliamentary committees. The approval process for such appointments are held *in camera* and statutory provisions specifically prohibit members from disclosing any information related to such appointments.

For example, section 31BA of the Ombudsman Act 1974 (NSW) provides for the Minister to refer a proposal to appoint a person as Ombudsman, Director of Public

---

Prosecutions, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission to the Joint Committee on the Office of the Ombudsman and the Police Integrity Commission.

Section 31H (1A)–(1C) of the Act provides:

- (1A) If any evidence proposed to be given before, or the whole or a part of a document produced or proposed to be produced in evidence to, the Joint Committee relates to the proposed appointment of a person as Ombudsman, Director of Public Prosecutions, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission, the Committee must (despite any other provision of this section):
- (a) take the evidence in private, or
  - (b) direct that the document, or the part of the document, be treated as confidential.
- (1B) Despite any other provision of this section except subsection (6), the Joint Committee must not, and a person (including a member of the Committee) must not, disclose any evidence or the contents of a document or that part of a document to which subsection (1A) applies.

Maximum penalty: 20 penalty units or imprisonment for 3 months, or both.

- (1C) Despite any other provision of this section except subsection (6), the Joint Committee (including a member of the Committee) must not, and any person assisting the Committee or present during the deliberations of the Committee must not, except in accordance with section 31BA (3), disclose whether or not the Joint Committee or any member of the Joint Committee has vetoed, or proposes to veto, the proposed appointment of a person as Ombudsman, Director of Public Prosecutions, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission.

Maximum penalty: 20 penalty units or imprisonment for 3 months, or both.

Accordingly, any breach of these provisions is a criminal offence and dealt with as such.

In relation to more general matters regarding disclosure of *in camera* proceedings, the Standing Orders of the New South Wales Legislative Assembly are silent on the specific matter of disclosing *in camera* proceedings. However, Standing Order 297 refers to the premature disclosure of evidence by committees generally. It provides:

“A Member or any other person shall not disclose evidence, submissions or other documents and information presented to the committee which have not been reported to the House unless such disclosure is first authorised by the House or the committee.”

However, these standing orders do not deter Members or others from disclosing information from committees before it has been authorised by the committee. The unauthorised disclosure of committee proceedings is part and parcel of political life.

The majority of unauthorised disclosures of committee proceedings are from Members of committees themselves. Many such disclosures are used for political advantage but do not necessarily interfere with the work of a committee and as such would not be considered a contempt.

However, the disclosure of *in camera* evidence has the real potential to interfere with the work of parliamentary committees by undermining the operations of committees and may be treated as a contempt if it is considered serious enough to interfere with the work of a committee.

While the disclosure of *in camera* evidence may be treated as a contempt, it should be noted that the New South Wales Legislative Assembly does not have general powers to deal with contempts committed against it or its committees apart from specific powers under the Parliamentary Evidence Act 1912 (NSW) to punish witnesses who refuse to answer lawful questions during examination. However, the House does have the capacity to make resolutions in regard to breaches of privilege or admonish Members or other persons for contempt.

---

## **CANADA**

### **Clerk of the Senate of Canada**

Thank you for your email of February 13 in relation to a possible breach of privilege in the States. As you note, in modern practice, the Senate no longer meets *in camera*, although in theory it remains possible.

The provisions in Senate practice that are most relevant to the situation you are dealing with are those relating to committees meeting *in camera*. As in Jersey, our Rules did not, until recently, explicitly identify leaks from such meetings as matters of privilege, but a number of Rulings, based on the universal understanding in Canadian and British practice, makes it clear that such is the case. Our Rules do now contain an appendix outlining how such matters are treated (the process differs from that for other questions of privilege).

Based on the information you provided, it appears that there could be grounds to investigate whether an issue of privilege has arisen in Jersey, although such determination is of course for the States to make. In the Senate, the determination that a breach of privilege has occurred does not automatically mean that punishment will be imposed. In some cases, where specific responsibility cannot be determined, Senators and staff were reminded of the importance of dealing with matters dealt with *in camera* in the utmost confidence.

You will find below appendix III of the Senate's Rules. I am also attaching Rulings of September 14, 1999; November 24, 1999; May 4, 2000; and December 12, 2002, relating to the premature disclosure of confidential committee reports and documents.

I trust that this information will be of assistance to you. Please do not hesitate to contact me if you require any further information.

**RULES OF THE SENATE OF CANADA****APPENDIX III****PROCEDURE FOR DEALING WITH UNAUTHORIZED DISCLOSURE OF  
CONFIDENTIAL COMMITTEE REPORTS AND OTHER DOCUMENTS OR  
PROCEEDINGS**

*(Extract from the Fourth Report of the Standing Committee on Privileges, Standing Rules and Orders of Thursday, April 13, 2000. The report was adopted by the Senate on June 27, 2000.)*

- (a) If a leak of a confidential committee report or other document or proceeding occurs, the committee concerned should first examine the circumstances surrounding it. The committee would be expected to report the alleged breach to the Senate and to advise the Chamber that it was commencing an inquiry into the matter.
- (b) While the committee would be required to undertake an investigation of the circumstances surrounding the alleged leak, the means, nature, and extent would rest with the committee. As part of the inquiry, it is likely that the committee members, their staff, and committee staff could be interviewed. The committee would be engaged in a fact-finding exercise - to determine, if it can, the source of the leak. The committee should also address the issue of the seriousness and implications - actual or potential - of the leak. The committee would be expected to undertake this inquiry in a timely manner.
- (c) The committee investigation of the leak would not prevent any individual Senator raising a question of privilege in the Senate relating to the matter. As a general matter, however, and in the absence of extraordinary circumstances, it would be expected that the substance of the question of privilege would not be dealt with by the Senate until the committee had completed its investigation. Thus, if the Speaker finds that a *prima facie* case exists, any consequent motion would be adjourned until the committee had tabled its report.
- (d) Individual Senators would also be able to raise questions of privilege in relation to the leak upon the tabling of the committee report. In other words, while ordinarily a question of privilege is to be raised at the first opportunity, no Senator would be prejudiced by awaiting the results of the committee's investigation. Similarly, no action or inaction or decision taken by the committee in relation to the matter would be determinative in respect of the Speaker's responsibility under the Rules of the Senate to determine whether or not a *prima facie* exists.
- (e) In the event that a committee decided not to investigate a leak of one of its reports or documents, any Senator could raise a question of privilege at the earliest opportunity after the determination by the committee not to proceed in the matter. Similarly, if a committee did not proceed in a timely way, any Senator would be entitled to raise a question of privilege relating to the leak.

- (f) When the committee concerned tabled its report, the matter would ordinarily be referred to your Committee by the Senate if it discloses that a leak occurred and that it caused substantial damage to the operation of the committee or to the Senate as a whole.

-----

**Extract from the Journals of the Senate of September 14, 1999:**

**SPEAKER'S RULING**

I would refer honourable senators to Beauchesne's 6th edition, page 241, citation 877, which states:

No act done at any committee shall be divulged before it has been reported to the House.

Further in the same citation, it states:

The publication of proceedings of committees conducted with closed doors or of reports of committees before they are available to Members will, however, constitute a breach of privilege.

Then, of course, we have our own rules, which are equally clear in that regard. Rule 43(1) states as follows:

The preservation of the privileges of the Senate is the duty of every Senator. A violation of the privileges of any one Senator affects those of all Senators...

Our rules then set out the conditions that the Speaker must consider in deciding whether or not there is a *prima facie* case. These are founded in rule 43(1), which states the matter must:

- (a) be raised at the earliest opportunity.

That has been done.

- (b) be a matter directly concerning the privileges of the Senate...

That has been established.

- (c) be raised to seek a genuine remedy... for which no other parliamentary process is reasonably available.

That will be accomplished with the motion that Senator Andreychuk has indicated she is prepared to make.

- (d) be raised to correct a grave and serious breach.

The comments that I have heard have convinced me that that is the case.

The four conditions having therefore been met, I rule that there is a *prima facie* case. Senator Andreychuk may proceed with her motion.

The Honourable Senator Andreychuk moved, seconded by the Honourable Senator Prud'homme, P.C.:

That the question of privilege concerning the unauthorized release of working drafts of a report of the Standing Senate Committee on Aboriginal Peoples be referred to the Standing Committee on Privileges, Standing Rules and Orders.

The question being put on the motion, it was adopted.

Pursuant to Rule 135(8), the proceedings were interrupted to resume after Royal Assent.

-----

**Extract from the Journals of the Senate of November 24, 1999:**

**SPEAKER'S RULING**

I recall Senator Molgat being asked to rule on a similar question in September. I therefore accept the question of privilege raised by the Honourable Senator Bacon.

The Honourable Senator Bacon moved, seconded by the Honourable Senator Maheu:

That the question of privilege concerning the leak of the second draft of the report of the Standing Senate Committee on Transport and Communications on the reorganization of Canada's air industry in *Le Soleil* and *The Toronto Star* of November 24, 1999, be referred to the Standing Committee on Privileges, Standing Rules and Orders.

The question being put on the motion, it was adopted.

-----

**Extract from the Journals of the Senate of May 4, 2000:**

**SPEAKER'S RULING**

Yesterday, when we reached Orders of the Day, Senator Tkachuk obtained leave to raise a question of privilege under rule 43 even though he had not met the requirement of providing written notice to the Clerk within the prescribed time prior to the Senate sitting. Senator Tkachuk's question of privilege concerned the publication of information based on the Fifth Report of the Standing Committee on Banking Trade and Commerce. This information appeared in a newspaper yesterday before the report was tabled in the Senate. In fact, according to the Senator, the Committee decided to rush the tabling of the report as a consequence of the newspaper story.

Senator Austin then made some comments about the case. He noted that the journalist himself acknowledged that the report had not yet been submitted to the Senate. Citing 877(1) of *Beauchesne's Parliamentary Rules & Forms*, 6th edition at pages 240-241,

the Senator expressed the belief that the circumstances of the case clearly demonstrate that there is a *prima facie* breach of privilege. Shortly thereafter, discussion on this matter was halted when Senator Lynch-Staunton correctly pointed out that any review of the *prima facie* merits of the case should be postponed until after the Orders of the Day have been disposed of.

Today, additional arguments have been made. I want to thank all Honourable Senators who participated in the discussion. I have reflected on the recent rulings of the Speaker and the views expressed yesterday and today. I am prepared to make my ruling.

My obligation as the Speaker *pro tempore* is to consider only whether the evidence presented suggests that a breach of privilege is involved. My role is limited to determining whether there appears to be a *prima facie* case. It is not for me to decide whether there has in fact been a breach of the Senate's privileges. If, however, I do determine that there is a *prima facie* case, then the Senate must resolve how it will dispose of the matter. If the Senate also agrees that the issue might constitute a question of privilege, a motion is usually adopted to refer the matter to the Committee on Privileges, Standing Rules and Orders.

Based on several recent precedents, including the decision by the Speaker of October 13, 1999 dealing with the premature disclosure of a draft report of the Aboriginal Peoples Committee, and on the incontrovertible evidence provided by the journalist who wrote yesterday's newspaper story, I rule that a *prima facie* case of a question of privilege has been made. The matter should be put before the Senate for its determination. Senator Tkachuk you may now proceed. The Honourable Senator Tkachuk moved, seconded by the Honourable Senator Atkins:

That the question of privilege concerning the unauthorized release of the Fifth Report of the Standing Senate Committee on Banking, Trade and Commerce be referred to the Standing Committee on Privileges, Standing Rules and Orders.

The question being put on the motion, it was adopted.

-----

**Extract from the Journals of the Senate of December 12, 2002:**

**SPEAKER'S RULING**

I have listened carefully. In the course of the interventions, I came to the conclusion that I should deal first with the procedure because it is important that I deal with it. It has been raised. A number of the interventions have illustrated the importance of the new procedure in that some of the interventions go to the very issue of whether there is not just a *prima facie* case but an actual breach of privilege. The new provisions of our rules, which have never before been used under these circumstances, have considerable merit, highlighted by the tendency to get into the specifics before setting forth the manner in which a decision will be made.

The rules as they are now, with the appendix from which Senator Austin quoted, Appendix C, would indicate that the substance of the question of privilege would not be dealt with by the Senate until the committee had completed its investigation. This answers the concerns of Senator Lynch-Staunton and Senator Cools. If we follow the

rules, the Banking Committee will present a record to this place, which will be part of the debate because the motion to refer is a debatable motion that can be dealt with by all senators before the matter goes to the Standing Committee on Rules, Procedures and the Rights of Parliament. That is a wise procedure to follow.

The subject matter of the question of privilege is a Reuters newspaper article, which, if I am not mistaken, came out today. While the steering committee has a view on this matter, it may well be that discussion in the committee will produce a record that is important to the decision of the Senate as a whole, which it must make on the debatable motion, which, if the Speaker finds a *prima facie* case, goes to the whole chamber to then be referred to or not, on a vote of everyone here, to the Rules Committee.

I believe there is wisdom in following that approach. I am not sure what the Speaker's role is in that respect. The words of Appendix IV(c) are interesting: "...it would be expected." I thought I would make that point first.

It is fairly clear from the past practice of this place that the leak of a document constitutes a *prima facie* case of privilege. Accordingly, I so find. If we follow the procedures set out in Appendix IV of the *Rules of the Senate*, it would then fall to the Banking Committee to do an investigation and present a record, which would then be the subject matter of debate as part of the motion that comes back here, as it is adjourned until the Banking Committee does the report. It would come before all senators, who would then be asked to make a decision as to whether to refer it to the Rules Committee.

---

#### **Clerk/Greffière of the Canadian House of Commons**

Good afternoon, Michael.

Here are my comments on the situation you described. I do hope that they can be of some assistance.

The Canadian House of Commons has sat *in camera* only a very few times and not since World War II. As well, we do not have any specific Standing Order dealing with the disclosure of *in camera* information. We do treat such disclosure as a matter of privilege. As with the Ontario Legislature, the committees of the House frequently meet *in camera*. Our procedural manual, House of Commons Procedure and Practice, at page 838, describes our procedures for *in camera* meetings.

"Often a committee which has several items on its agenda will hold part of a meeting in public and part *in camera*. At *in camera* meetings, neither the public nor the media is permitted, and there is no broadcasting of any kind. The committee decides, either on a case by case basis or as a matter of general policy, whether a transcript of *in camera* proceedings is to be kept. Minutes of *in camera* meetings are publicly available, but certain information usually found in the minutes of committee meetings is not included. Members of the House who are not members of the committee are expected to withdraw when a committee is meeting *in camera*. However, at the discretion of the committee, non members may remain during *in camera* sessions. Divulging any part of the proceedings of an *in camera* committee meeting has been



ruled by the Speaker to constitute a prima facie matter of privilege." (Footnote: See Speaker Fraser's ruling, Debates, May 14, 1987, pp. 6108-11, and the Seventh Report of the Standing Committee on Elections, Privileges and Procedure, Journals, December 18, 1987, pp. 2014-6. The case in question involved the divulgence by John Parry (Kenora–Rainy River) of the results of a recorded vote held at an *in camera* meeting of the Standing Committee on Aboriginal Affairs and Northern Development. See Debates, March 25, 1987, p. 4540; April 28, 1987, pp. 5329-30; May 5, 1987, pp. 5737-42. See also, Debates, May 31, 2005, pp. 6414-5, June 9, 2005, pp. 6902-3. A committee may itself decide that a meeting held *in camera* should be declared a public meeting. See, for example, Standing Joint Committee for the Scrutiny of Regulations, Minutes, November 5, 1998, Meeting No. 15; Standing Committee on Public Accounts, Minutes, June 18, 2002, Meeting No. 62.)

In our practice, a Member of the House could raise a question of privilege concerning the release of *in camera* proceeding. Usually, the Speaker will hear from other members on the same point and, particularly, from any Member of Parliament who is implicated. The Speaker then decides whether it is a prima facie matter of privilege and, if so, he would invite the Member to move a motion dealing with the matter. The terms of the motion would be up to the Member moving it. It would then be in the hands of the House.

Quite frequently, the terms of such privilege motions stipulate that the matter be referred to the Standing Committee on Procedure and House Affairs, then the adoption of the motion by the House constitutes an order of reference to the Committee. While the Committee is free to determine its own agenda, both the Committee and the House take such matters very seriously. The Committee does not have the power to punish, this power rests with the House. The Committee may only study the matter and report to the House.

Do please let me know how this all turns out.

---

**Clerk of the Ontario Legislative Assembly**

Hello from Ontario Michael,

As you suggest, it is a rare thing for our Legislative Assembly to meet *in camera*. However, it is not uncommon for our Standing Committees to hold *in camera* meetings for the purpose of hearing sensitive testimony or drafting a report. Like you, we have no specific rule in our SO's which speak to the disclosure of any part of the proceedings of an *in camera* meeting except with respect to publication of transcripts.

Notwithstanding that, we have had several rulings based on precedent and parliamentary authorities that the disclosure of any part of the proceedings of an *in camera* meeting constitutes a *prima facie* matter of privilege. [e.g.: November 2, 1994 Speaker: "There can be no doubt that the situation before us concerns the premature disclosure of proceedings that were conducted in closed session and involved a draft committee report that had yet to be filed with the Clerk of the House or presented to this House. Both Erskine May and our own precedent support the notion that such premature disclosure does constitute a breach of privilege and possibly contempt of this House."]

I am inclined to advise, that while the issue of sanction is open to some discretion on the part of the Committee, it is nevertheless important to make a finding of breach of privilege and report as much. Not only does this establish some clarity around the consequences of sitting *in camera* it may also prevent the promulgation of this kind of activity on the part of members in the future.

I'd be interested in knowing how this ends up.

---

**Clerk of the British Columbia Legislative Assembly**

Michael:

The following brief comments may be of some assistance to you:

Although the British Columbia Standing Orders do not provide for in-camera sittings of the Legislative Assembly, *in camera* meetings are an important part of our parliamentary committee process. Parliamentary Practice in British Columbia (4th edition, page 194) states that “when a committee chooses to meet *in camera*, all matters are confidential”. Yet, the British Columbia Standing Orders do not include a specific list of criteria or guidelines for holding *in camera* meetings, thus parliamentary committees have flexibility to be able to respond to their particular needs and demands. Although concerns regarding breaches of confidentiality have arisen in the past, Members have addressed these concerns as they recognize that the ability for a committee to meet *in camera* serves a useful purpose, and this mechanism must continue to be available to committees.

The most relevant example from our experience occurred in March 2002, when a draft committee report was leaked and its preliminary conclusions reported on by the media in a newspaper article. A Member of the Committee admitted to sharing a copy of the draft report with union officials, who later offered public criticism of its content. The Committee Member later apologized to the House for her action, but as her statement did not satisfy all Members of the House, the matter was referred to the Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills for further investigation. The Committee decided not to investigate into the role of the newspaper reporter, or the union official, and focussed instead on the actions of the Member herself. A few weeks later, the Committee's report concluded that the Member should offer an unqualified apology for her actions, and that, in the future, all Members serving on legislative committees be reminded by the Committee Chair or the Clerk to the Committee of the rules pertaining to confidentiality of draft reports and other committee proceedings.

At the very least, this final recommendation may prove helpful in the situation in Jersey, as the mechanism to hold *in camera* proceedings is likely one which the House may wish to employ from time to time. Although many details of that particular *in camera* meeting are now in the public domain, there is still merit in clarifying expectations about the nature of these proceedings. As it seems unlikely that the Member who posted the confidential matter on his blog will apologize to the House for his actions, the Privileges and Procedures Committee should use the opportunity to carefully articulate a clear statement of expectations for future proceedings.

Kind personal regards.

---

## UNITED KINGDOM

### Clerk of the Journals – UK House of Commons

Although we do not use sittings in camera, there is a direct analogy with disclosure of the private deliberations of select committees. The first test -- before any reference to the Committee on Standards & Privileges -- is whether the disclosure of information constitutes a substantial interference with the work of the committee. Members have been suspended for leaking such deliberations -- or the documents discussed at them. We have had several occasions of MPs being suspended for doing this in living memory. If you want chapter and verse, please let me know.

On punishing non-Members, the general approach here is that the House is powerless to do so, not least if the leak emanates from a member who cannot be identified.

We continue to rely as the latest word on these matters to the as yet unimplemented 1999 report of the Joint Committee on parliamentary Privilege see para 300 onwards.

#### *Non-members*

*300. The penal powers of the two Houses are seldom used against non-members. The Lords have not exercised their powers to commit, or even to find a non-member guilty of contempt, since the early nineteenth century. The last time the House of Commons imprisoned a non-member, except overnight in the custody of the Serjeant-at-Arms for disorderly conduct in the galleries, was in 1880 (for failing to attend as a witness). The last time a non-member was summoned to the bar of the House of Commons to apologise or take the consequences, which might have included committal, was in 1957. Since the House of Commons resolved in 1977 to consider using its penal powers only in cases of substantial interference with its work, or the threat of substantial interference, fewer cases have been considered, and in no case has the House punished a non-member.*

---

### Director of Clerking and Reporting – Scottish Parliament

Michael

The short answer from me is that section 7.4.5 of our Code of Conduct for Members makes it unacceptable to disclose any information to which the member has privileged access unless the parliament or relevant committee has agreed otherwise. A specific example of unacceptable behaviour is made of divulging discussions that have taken place in private session.

Any complaint made on this basis would go to our Standards Committee that has a range of sanctions at its disposal.

---

**CAYMAN ISLANDS**

**Clerk of the Cayman Legislative Assembly**

Hi Michael

I am afraid I can't really help that much. Our privileges committee has never met and so we have no precedents from which to draw. I tend to draw on UK, Australia or Canada practice and procedure for guidance. Our Standing Orders in fact provide that - -

SO 88(1): "In any matter not herein provided for, resort shall be had to the usage and practice of the Commons House of Parliament of Great Britain and Northern Ireland, which shall be followed as far as the same may be applicable to this House, and not inconsistent with these Standing Orders nor with the practice of this House."

What I can say is that Finance Committee recently met *in camera* on a matter. The minutes only reported who was present, the title of the subject and that the Committee met to consider same.