

The Confidentiality of Committee Reports

by Senator Jack Austin

In 1999 the contents of certain Senate Committee reports appeared in the media before being tabled in the Senate. As a result the Standing Committee on Privileges, Standing Rules and Orders was asked to study the question of confidentiality. This article is based on the Fourth report of the Committee tabled in the Senate in April 2000 as well as a speech in the Senate by the Chairman of the Committee on May 9, 2000.



Our report was based on two references from the Senate. On October 13, 1999, a question of privilege was raised by Senator Andreychuk based on the leak of a report of the Standing Senate Committee on Aboriginal Peoples that appeared in the *National Post* on September 11, 1999. The second question of privilege was raised by Senator Bacon of the Transport Committee on November 24, 1999, and related to stories that appeared in *Le Soleil* and *The Toronto Star*.

The Senate found a *prima facie* breach of privilege in each of those questions and referred them to the privileges committee. Senator Andreychuk asked the committee not to find fault but to review the practice of committees and to make recommendations with respect to the way in which committees and their chairs could en-

deavour to reduce, if not avoid, questions of leaked reports. Senator Bacon wished the standing committee to be more active in its investigation of her breach of privilege, in particular because of the possibility of substantial damage being done to various individuals as a result of the leak of the draft report.

The committee, in each of those cases, reviewed the practice in the House of Commons as well as practices in Britain and both the Senate and House of Representatives of Australia.

We found much to appreciate in the British and Australian practice. In those jurisdictions, as a result of their experiences, the practice has evolved to request the committee from which the breach has been alleged to undertake, of its own motion, the first investigation of that breach, the idea being that that committee is closest to the event and therefore the committee should, immediately inquire into the possible causes of the breach and the responsibility therefor.

That would not in any way prevent any senator from raising the question in the Senate itself. However, in the case where a committee reported to the Senate that it was undertaking an investigation of the question of a breach, the Speaker would defer the debate on the breach of privilege until the committee had made its report. That particular committee would also be asked to determine whether the breach of privilege caused any substantial damage.

This practice in the British House of Commons and in the Australian Senate and House of Representatives,

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made sense to our committee and we made such a recommendation in our report.

We had some additional observations, with respect to the practice of committees. The level of consciousness of the importance of committee confidentiality needs to be raised substantially so we asked committee chairs to be more careful in the circulation of their reports, not to circulate draft reports except to senators, to number those reports, and to identify the people in the committee room *in camera*. We asked committee chairs not to allow non-senators and non-committee staff into the room except as they believe their presence is necessary, not simply to let people sit around the room because they are staff members of various senators. We asked that the attendance in committees *in camera* be taken.

We have also put forward a caution with respect to the employees of the Senate, those people who are permanent employees. While there is a provision in their employment contracts with respect to confidentiality, our suggestion is that there should also be additional advice to them - although we have no fault to find, I want to say immediately, with respect to the performance of Senate staff.

There is, however, the problem of temporary people, people on contracts. These people come in because they have a specialty or an expertise to contribute to the committee, but they are not necessarily part of the Senate culture, nor do they adopt the Senate culture or feel comfortable with it. One of our problems is that, in a number of cases, people who have expertise also have points of view, and if they are not comfortable with where the committee is going, they may decide to be a little bit adversarial with respect to the way in which the committee is handling its particular business.

Senator Pearson sent the committee a letter raising various issues regarding *in camera* proceedings. The committee found Senator Pearson's letter quite relevant to its work in this instance. The sixth edition of Beauchesne states that committees should make clear decisions on how to circulate draft reports, on how to deal with evidence and on the publication of their minutes.

We do not wish to interfere with the discretion and the responsibility of the chairs of committees, the role of the steering committees or the rights of the members, but it is important for the chairs and the steering committees to agree in advance on the procedure for handling *in camera* hearings and for discussing reports.

On the question of sanctions, the United Kingdom and Australia take breaches of privilege very seriously. There, if a member of the parliament is found in breach of privilege, the member's right to sit and to participate in the business of the chamber is suspended for a period of time. That period of time is decided by the committee and

approved by the chamber. In addition, in those jurisdictions, a journalist who is found to have leaked a report of a committee is normally found to be in breach of privilege. Sanctions, usually relating to the right to be seen on the precincts of parliament, are levied.

Let me quote from our April 2000 report, the procedure we think should be adopted by the Senate for dealing with unauthorized disclosure of confidential committee reports.

26. (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.

27. Your committee deplores all leaks of confidential or in camera materials and information. In the case of committee reports, there is a well-established principle that the chamber has the right to be first informed of the report. Nothing in this report is intended to depart from this privilege of the Senate. Nevertheless, there are some leaks that may be more serious than others — such as those which compromise national security or the security or confidence of witnesses; those which are designed to influence or interfere with the drafting of a committee report; or those which could be used to personal benefit. In order to give rise to sanctions, it will ordinarily be necessary for the committee whose report was leaked to find that the leak was both substantial and damaging. The committee must determine this as part of the fact-finding process.

28. It should be emphasized that, under the proposed procedure, the issues of parliamentary privilege and contempt will continue to be dealt with only by the Senate itself. The committee whose report has been leaked is merely engaged in a preliminary fact-finding process. If the Speaker finds that a *prima facie* case of privilege exists, it will remain the responsibility of the Senate to decide how to deal with it, generally by referring the matter to your committee for detailed investigation and recommendations. Sanctions will continue to be imposed only by the full Senate, usually upon recommendation of your Committee.

29. While individual cases must be assessed on their own merits, your committee reminds everyone that the Senate possesses a range of options in terms of sanctions for breach of privilege and contempt of Parliament. These include apologies, reprimands, censure, suspension, and imprisonment. Your committee notes, in this regard, that the British House of Commons has recently suspended members for the unauthorized and premature release of committee reports. In appropriate cases, your committee will consider recommending sanctions on senators and others persons who breach the privileges of the Senate.

30. Your committee believes that new measures and policies should be adopted by all Senate committees to preserve the confidentiality of draft reports and other confidential or in camera proceedings. In this regard, we suggest that serious consideration be given to the following measures:

(a) that draft reports and other confidential documents be individually numbered, with the number shown on each page;

(b) that each numbered report and other confidential document be assigned exclusively to an individual, and always given to that individual, and this should be carefully recorded;

(c) that if senators are to be given draft reports or other confidential documents in advance of a meeting, or are to take such documents away after a meeting, they be required to sign for them. Certain documents, such as in

camera transcripts, should only be able to be consulted in the committee clerk's office, with the chair's approval;

(d) that the names of all persons in the room at in camera meetings to discuss draft reports — including assistants, research staff, interpreters and stenographers — be recorded, preferably on the record; and

(e) that the chairs of committees ensure that all senators and staff are cautioned and reminded of the nature of confidential and in camera proceedings and documents, the importance of protecting them, and the consequences of breaching such confidentiality....

Conclusion

Our committee hoped that the unfortunate situations involving the reports of the Standing Senate Committees on Aboriginal Peoples and on Transport and Communications act as reminders that confidentiality must not be taken lightly. Without trust and integrity, the Senate and its committees cannot function properly. The issue of confidentiality is a complex one, and must be addressed in a number of ways. Heightened awareness of the issue and contractual terms and undertakings are part of the solution to protect confidentiality. Other measures, including administrative ones, such as security arrangements for draft reports and *in camera* meetings, should also assist. We appreciated that some of the measures outlined above will lead to inconveniences. Nevertheless, the questions of privilege of senators Andreychuk and Bacon led us to conclude that they are necessary to ensure the integrity of Senate committee proceedings, and to prevent further unauthorized leaks.

The premature and unauthorized disclosure of committee reports undermines and compromises the work of the Senate, its committees, and of senators. If the Senate is to work as an institution, confidentiality must be respected.

Finally, I want to be particularly clear on one point. The committee which I chair was not recommending any action be taken against journalists. Freedom of the press and the parliamentary conventions dealing with journalists in breach of privilege have developed over a period of time. However, with respect to questions of privilege we believe there is a more workable system than the one currently in the rules and we have tried to set it out in our report.

Editor's note: The report of the Standing Committee on Privileges, Standing Rules and Orders was adopted by the Senate in June 2000.