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Minister of Transpirtion  
& Infrastructure*

*2020-09-14*

*Burns.*



*House of Assembly  
Newfoundland & Labrador*

Privileges and Elections Committee

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**Question of Privilege:**

**The Premature Distribution of a Report of an  
Officer of the House of Assembly**

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Report to the House of Assembly  
September 2020



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**This report is privileged until tabled in the House of Assembly.**



## TRANSMITTAL

Mr. Speaker,

The Privileges and Elections Committee has considered the matter to them referred and has directed me to submit this report.

Respectfully submitted,

Hon. Derrick Bragg, MHA  
Fogo Island – Cape Freels  
Chair

### Committee Members:

Derrick Bragg, MHA, Fogo Island - Cape Freels  
Pam Parsons, MHA, Harbour Grace – Port de Grave  
Carol Anne Haley, MHA, Burin - Grand Bank  
David Brazil, MHA, Conception Bay East-Bell Island\*  
Alison Coffin, St. John's East – Quidi-Vidi\*\*

\*Mr. Brazil recused himself from participating in the discussion of this matter; Mr. Kevin Parsons, MHA, Cape St. Francis, substituted.

\*\*Ms. Coffin recused herself from participating in the discussion of this matter; Mr. Jim Dinn, MHA, St. John's Centre, substituted.



## INTRODUCTION

On December 2, 2019, the CBC Radio Morning Show aired a story respecting the findings of a “Citizens’ Representative report”, referred to in the news article as “The Mitchelmore Report”. A related web article on the [www.CBC.ca/nl](http://www.CBC.ca/nl) website was posted at approximately 7:00AM.

During the December 2 sitting of the House, both the Official Opposition and the Third Party asked questions respecting the report by referencing the news articles.<sup>1</sup> During Routine Proceedings, but after Oral Questions, the report was tabled. The Government House Leader then raised a Point of Privilege:

*Before we get into petitions, I rise on a point of privilege. O'Brien and Bosc are very clear, which are the legislative authorities and the procedure and practice of the Legislature of the House of Assembly, as well as the House of Commons.*

*Under the Joint Committee on Parliamentary Privilege, there are some types of contempt. This was written in the O'Brien and Bosc book. I'm going to use this as one of the most serious, egregious issues around protected documents and privileged documents – I'm quoting from the book itself – “divulging or publishing the content of any report or evidence of a select committee before it has been reported to the House.”*

*Today, in Question Period and throughout, I guess, this morning, there has been public debate around a report that has just been tabled – literally, just been tabled in this House. There have been a select few in this House of Assembly – a very select few, Mr. Speaker – who would have had access to that report prior to your tabling it today.*

*I can say that I think that it is a breach of privilege of all Members of this House and a breach of parliamentary practice that is very serious and could even be considered contempt of this House. I ask the Speaker to review the matter and make his considerations.<sup>2</sup>*

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<sup>1</sup> Newfoundland and Labrador. House of Assembly. [Hansard](#), December 2, 2019, pp. 1172-1174; 1180-1181.

<sup>2</sup> *Ibid.*, p. 1183.



After hearing further commentary from other Members and recessing briefly to consider the matter, Speaker Reid ruled there was a *prima facie* case of privilege by way of contempt:

*I would like to rule now on a matter raised by the Government House Leader with respect to the apparent release of a report of the Citizens' Representative. O'Brien and Bosc, third edition, on page 142 states: "A complaint on a matter of privilege must satisfy two conditions before it can be accorded precedence over the Orders of the Day. First, the Speaker must be convinced that a prima facie case of ... privilege has been made and, second, the matter must be raised at the earliest opportunity."*

*With respect to the timing of the point of privilege, I am satisfied that the Member has raised the issue within the time required. The press report was this morning, and the matter of the release of information in question is still evolving.*

*With respect to the first condition, prima facie simply means: apparent on its face. O'Brien and Bosc states that: "... the issue put before the Speaker is not a finding of fact, it is simply whether on first impression the issue that is before the House warrants priority consideration over all other matters, all other orders of the day that are before the House."*

*Maingot on Parliamentary Privilege, page 227, puts it this way: "Does the act complained of appear at first sight to be a breach of privilege...or to put it shortly, has the Member an arguable point? If the Speaker feels any doubt on the question, he should...leave it to the House."*

*I find that there is a prima facie point of privilege by way of contempt. Discipline of Members is part of the privileges of this House, and those Members have a right to the information contained in such a report before it is released to the public. I ask the Government House Leader to move her motion.<sup>3</sup>*

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<sup>3</sup> Ibid., p. 1187.



## ORDER OF REFERENCE

The Committee carried out its work in accordance with the resolution passed by the House on December 2, 2019. The Government House Leader moved the following motion which, after some debate, was passed unanimously:

*I move, seconded by the Minister of Transportation and Works, that the matter raised as a question of privilege by myself earlier today and the responses made be referred to the Standing Committee on Privileges and Elections and the Committee submit its report to the House of Assembly.<sup>4</sup>*

The Committee understands its mandate to be to determine whether there has been breach of parliamentary privilege by way of contempt by the premature release of the report.

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<sup>4</sup> Ibid.



## WORK OF THE COMMITTEE

The Committee met twice in the winter of 2020, on February 11 and March 3, prior the COVID-19 pandemic. The Committee resumed its work in August 2020, and met twice more on August 26 and September 10.

1. The Committee discussed the resolution. All members agreed on the seriousness of the issue.
2. The Committee reviewed related media reports. It was noted that the media reports referenced The Mitchelmore Report as the title of the Citizens' Representative report. In fact, The Mitchelmore Report was the title of the larger Commissioner for Legislative Standards Report to which the Citizens' Representative report was appended (the title of the Citizens' Representative report was Report of the Citizens' Representative in the Matter of a Public Interest Disclosure Made Under Part VI of the House of Assembly Accountability, Integrity and Administration Act). The Committee concluded that it was therefore impossible to determine with certainty which version of the report had been leaked.
3. The Committee reviewed a timeline of the movement of both reports and a list of individuals who had known access to the reports while subject to privilege (that is, prior to the Commissioner for Legislative Standards' report being tabled in the House). In reviewing the list, the Committee concluded that the number of individuals to whom the reports had been circulated originally, in addition staff who may have had secondary access to them (assistants, public servants, etc.), was unknown and perhaps unknowable.
4. The Committee discussed the feasibility of further investigation of the identity of the individual who had perpetrated the leak, as well as the resources that would have to be deployed to carry out an investigation.
5. The Committee commissioned and reviewed a jurisdictional scan of legislatures for similar instances of leaked confidential reports. Most instances related to draft committee reports or draft reports of statutory officers.



- In Alberta, the contents of two Auditor General reports and a report of the Ethics Commissioner were prematurely disclosed. The Speaker ruled that there was no *prima facie* case based on the fact that there was no parliamentary or statutory authority for a finding of breach of privilege. The Speaker stated further that on the basis of the fact that the source had not been identified he would not have found a *prima facie* case of breach of privilege even if there had been statutory or parliamentary authority for such a finding, noting that a finding of contempt in the circumstances would ‘cast a cloud of suspicion’ over those who had the right to have advance copies of the documents. The Speaker did state however that these matters should be taken seriously and that they demonstrated a blatant disregard for the statutory provisions that entitle Members to receive the reports before they are made publicly available.<sup>5</sup>
- The House of Commons Public Accounts Committee undertook a self-initiated review of a number of leaks of draft Auditor General reports which they referred to as breaches of privilege. No action was taken as the sources were not known but the Committee concluded that premature disclosure of information in Auditor General reports represented a disregard of the statutory right of the House of Commons to receive these reports before their release to the general public, could interfere with and impede the work of the House of Commons, and constituted a contempt of parliament.<sup>6</sup>
- The Senate Committee on Rules and Procedures issued a report on the premature disclosure of an Auditor General report which had been ruled *prima facie* a breach of privilege. The leaked report in question was a final, not a draft report, which the Senate committee acknowledged but pointed out that the categories of contempt were not limited. At p.14 the report stated “The unauthorized disclosure or leak of confidential information intended for a legislative chamber is considered a breach of parliamentary privilege.” The Senate report stated that the matter in question would fall under the corporate right of the Senate to regulate its internal affairs, sometimes referred to as exclusive cognizance. The

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<sup>5</sup> Alberta. Legislative Assembly. Hansard, November 17, 2005, pp.1719-20.

<sup>6</sup> Canada. House of Commons. Standing Committee on Public Accounts. The Premature Release or Leaking of Reports of the Auditor General to the Media before their Presentation in the House of Commons. 2007.





committee concluded that it did not have the ability to investigate the matter but decided to make recommendations that might help forestall other such incidents.<sup>7</sup>

- In Ontario, a committee considered the premature disclosure of a committee report but did not recommend punishment as it could not identify the source of the leak.<sup>8</sup>
- In Quebec, the Chair has not had to rule on the premature disclosure of a statutory officer report. The National Assembly however does provide for stiff penalties for breaches of its privileges - a maximum fine of \$10,000 for non-Members and for Members a number of sanctions the most severe being loss of Seat.<sup>9</sup>
- The Northern Ireland Assembly experienced an instance of a leaked Comptroller and Auditor General draft report. An investigation commissioned by the Public Accounts Committee (PAC) was inconclusive. The matter was referred to the Committee of Standards and Privileges. That committee ordered a second independent inquiry that made no finding of fact but made recommendations. The Interim Commissioner of Standards who had conducted the enquiry included in his report some comments of Members of the PAC on the negative effect of the leaks on them and their colleagues, for example:
  - the leaking raised issues of trust between Members and others who had access to their offices;
  - causes suspicion and undermines trust between Members;
  - undermines accountability between the Assembly and the Executive;
  - had an effect on the non-partisan position of the PAC and had the potential to affect trust amongst Member;
  - jeopardized the work of the Committee but particularly in sensitive cases...;
  - had undermined the PAC's scrutiny role as it had led to draft reports now being made available for only a short period in advance of the meeting;

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<sup>7</sup> Canada. Senate. Standing Committee on Rules, Procedures and the Rights of Parliament. Report on the Case of Privilege Relating to Leaks of the Auditor General's Report on the Audit of Senators' Expenses, April 2017.

<sup>8</sup> Email from officials from the Legislative Assembly of Ontario, March 13, 2020; ON Hansard, January 16, 1986, p. 3136.

<sup>9</sup> Email from officials from the National Assembly of Quebec, March 19, 2020.



o caused Committee staff to feel they were being blamed for the leak.<sup>10</sup>

- In a case in Newfoundland and Labrador of a leaked report of the Privileges and Elections Committee, the Member responsible admitted the leak and was suspended for three days from the service of the House. The Chair in tabling the report made the following comments that express sentiments similar to those above from Members of the Northern Ireland Assembly: “A Committee which meets *in camera* depends for its success on mutual trust among its members which must respect the confidentiality without which such a committee would be seriously hampered in carrying out its parliamentary duties”.<sup>11</sup>

#### 6. The Committee reviewed the authorities on privilege and contempt.

The classic definition of privilege is that of Erskine May:

*Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.*

*Certain rights and immunities such as freedom from arrest or freedom of speech are exercised primarily by individual Members of each House. They exist in order to allow Members of each House to contribute effectively to the discharge of the functions of their House. Other rights and immunities, such as the power to punish for contempt and the power to regulate its own constitution, belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity.<sup>12</sup>*

The leading Canadian authority on privilege J.B. Joseph Maingot , Q.C., defines privilege as follows:

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<sup>10</sup> Northern Ireland. Northern Ireland Assembly. Committee on Standard and Privileges. Second Report on the Unauthorised Disclosure of a Draft Report of the Public Accounts Committee, p. 33.

<sup>11</sup> NL Hansard, July 17, 1988, p. R3164.

<sup>12</sup> Sir Erskine May, Treatise on the Law, Proceedings, Privileges and Usages of Parliament, 25th Edition (Online). Para. 12, Part 2, Chapter 12, <https://erskinemay.parliament.uk/browse/?part=2&chapter=12> .



*Parliamentary privilege is the necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces and two territories, in order for these legislators to do their legislative work. It is also the necessary immunity that the law provides for anyone while taking part in a proceeding in Parliament or in a legislature. In addition, it is the right, power, and authority of each House of Parliament and of each legislative assembly to perform their constitutional functions. Finally, it is the authority and power of each House of Parliament and of each legislative assembly to enforce that immunity and to protect its integrity.<sup>13</sup>*

Maingot distills his definition to the following:

*If someone improperly interferes with the parliamentary work of a Member of Parliament – i.e. any of the Member’s activities that have a connection with a proceeding in Parliament – in such a case that is a matter involving parliamentary privilege. An offence against the authority or dignity of the House is a contempt.<sup>14</sup>*

The leading Canadian authority on parliamentary procedure, House of Commons Procedure and Practice notes:

*The classic definition of parliamentary privilege is found in Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament:*

*Parliamentary privilege is the sum of certain rights enjoyed by each House collectively... and by Members of “each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.*

*The rights and immunities accorded to Members individually are generally categorized under the following headings:*

- *freedom of speech;*
- *freedom from arrest in civil actions;*
- *exemption from jury duty;*
- *exemption from being subpoenaed to attend court as a witness; and*

<sup>13</sup> J.P. Joseph Maingot, Parliamentary Privilege in Canada, Second Edition, p.13.

<sup>14</sup> *Ibid.*, p.14.



- *freedom from obstruction, interference, intimidation and molestation.*

The rights and powers of the House as a collectivity include:

- *the exclusive right to regulate its own internal affairs (including its debates proceedings and facilities) and*
- *the power to discipline: that is the right to punish persons guilty of breaches of privilege or contempts and the power to expel Members guilty of disgraceful conduct.*<sup>15</sup>

Examples of breach of privilege include misconduct of individuals in the presence of the House or a Committee; refusing to attend as a witness when summoned, corruption of Members of officers; presenting forged or falsified documents.

Not every disregard for or attack on the rights of Members or of the House as a corporate body is a breach of privilege however. Offences against the dignity or authority of the House which do not fall amongst those that are enumerated and known are contempts and may also attract discipline or punishment. As House of Commons Speaker Sauvé stated in a 1980 ruling:

*Throughout the Commonwealth most procedural authorities hold that contempts, as opposed to privileges, cannot be enumerated or categorized. "... while our privileges are defined, contempt of the House has no limits. When new ways are found to interfere with our proceedings, so too will the House, in appropriate cases, be able to find that a contempt of the House has occurred.* <sup>16</sup>

Erskine May states on the subject of contempt:

*Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of their duty, or which has a tendency, directly or indirectly, to produce such results, may be treated as a contempt even though there is no precedent of the offence it is therefore impossible to list every act which might be considered to amount to a contempt as Parliamentary privilege is a 'living concept'.*<sup>17</sup>

<sup>15</sup> Marc Bosc and Andre Gagnon, House of Commons Procedure and Practice, 3rd edition, 2017, p. 58.

<sup>16</sup> Canada. House of Commons. Debates, October 29, 1980, p. 4214.

<sup>17</sup> Erskine May, Paragraph 15.2.



## FINDINGS

The Committee considered the information available to it with respect to the premature disclosure of the reports of the Citizens' Representative and the Commissioner for Legislative Standards and decided that the investigation that would be required to ascertain the source of the leak would be an imprudent use of resources, human and financial, and decided against undertaking such a task which would be unlikely to lead to a resolution in any case.

The Committee finds however that the premature disclosure of reports of statutory officers submitted to the Management Commission for tabling in the House is a serious matter and in principle similar to the types of premature disclosure that have been found breaches of privilege or contempts. These documents were intended for the House and should not have been made available to the general public before being provided to the Members of the House for whom they were intended.

When the source of the source of the leak is not known all those who legitimately had access to the information before its public release may be, to quote a former Speaker of the Alberta Legislative Assembly, under a 'cloud of suspicion' which can interfere with working relationships.

If Members are unable to rely on their colleagues to maintain confidentiality their ability to carry out their parliamentary duties is impaired.

It appears to the Committee the actions of the person or persons who disclosed the report(s) of the Citizen's Representative and/or the Commissioner for Legislative Standards prematurely are an affront to the House and offend against its authority and dignity. In different circumstances the actions described would quite possibly be found to be a contempt and punishable.

The Committee finds the breach of confidentiality that occurred in this case troubling and unworthy of a Member of the House of Assembly or a public servant. In order to obviate a repetition of this type of offence the Committee commends to the House the rulings of Speakers of the House of Commons and Speakers of other legislative assemblies to the effect that questions of privilege concerning leaked reports will not be considered unless a specific charge is made against an individual, organization or group, and that the charge must be levelled not



only against those outside the House who had made the material public, but must also identify the source of the leak within the House itself.<sup>18</sup>

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<sup>18</sup> Bosc and Gagnon, p. 1085.



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## RECOMMENDATIONS

The Committee recommends to the House of Assembly that it consider implementing the following:

- that documents to be tabled by statutory officers be channeled through the Clerk's Office and deemed tabled to obviate the possibility of premature disclosure;
- that circulation/receipt of a document while still privileged require an oath or other signed commitment not to disclose the contents by all those who handle it; and/or that investigating officers or bodies write to all parties to receive an advance copy of a privileged report reminding *them of their responsibility to follow appropriate procedures to protect the confidentiality* the report, and not release the copy to the official until a written acknowledgement of the responsibilities is received;<sup>19</sup>
- that consideration be given to amending the Standing Orders to require that a Member raising a point of privilege alleging premature disclosure of information identify the person responsible for the breach;
- that MHA training include a segment on the prohibition against premature disclosure of documents to be tabled in the House;
- that the Members' Parliamentary Guide be reviewed for the need of a specific reference to deliberate premature disclosure of information as a breach of privilege;
- that prior to tabling all documents be watermarked: "Privileged Until Tabled"; and/or that all privileged reports contain a notation within the report itself that it is privileged until tabled;
- that training on privilege, confidentiality, and related document management standards (in the context of privileged reports) be prepared and presented to all staff of the House of Assembly, including caucus staff;

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<sup>19</sup> Standing Committee on Public Accounts, p. 3.



- that consideration be given to amending the Standing Orders or legislation to include a penalty for any person other than a Member who breaches the privileges of the Assembly;
- that the Speaker make a statement in the House to remind Members, Statutory Officers and Civil Servants of their responsibility towards privileged documents;
- that the Clerk of the House of Assembly write to the Clerk of the Executive Council to remind members of the Executive Branch that privilege is attached to certain documents to be tabled in the House of Assembly; and
- that individualized markings be made on certain restricted documents so that their owner is identified.