



**A MATTER OF PRIVILEGE:  
A DISCUSSION PAPER ON CANADIAN PARLIAMENTARY  
PRIVILEGE IN THE 21<sup>ST</sup> CENTURY**

*Subcommittee on Parliamentary Privilege  
of the Standing Committee on Rules, Procedures, and the Rights of Parliament*

*Members*

The Honourable George Furey, Chair  
The Honourable Serge Joyal, P.C.  
The Honourable Elaine McCoy  
The Honourable Pierre Claude Nolin  
The Honourable Vernon White

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Clerk of the Subcommittee: Charles Robert  
Analyst from the Library of Parliament: Dara Lithwick

## TABLE OF CONTENTS

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INTRODUCTION: AN OPPORTUNITY TO REVIEW AND RENEW PARLIAMENTARY PRIVILEGE IN CANADA .....	1
A.    The Senate Rules Committee Subcommittee on Parliamentary Privilege .....	4
PART I: PARLIAMENTARY PRIVILEGE: TRACING ITS HISTORY TOWARDS A CONTEMPORARY APPROACH .....	5
A.    Parliamentary Privilege: History .....	5
B.    Towards a contemporary approach: Evolution of parliamentary privilege in the UK, Australia, and New Zealand .....	7
1.    The United Kingdom.....	7
2.    Australia.....	12
3.    New Zealand .....	16
PART II: PARLIAMENTARY PRIVILEGE IN CANADA.....	19
A.    Privilege Since Confederation .....	19
1.    Privilege and the Constitution .....	19
2.    Parliamentary Reviews of Rights, Immunities and Privileges.....	21
B.    The Courts, Parliamentary Privilege and the <i>Canadian Charter of Rights and Freedoms</i> .....	23
1.    “Necessity” as the frame to interpret a privilege .....	24
2.    The Supreme Court of Canada, Parliamentary Privilege, and the Charter .....	26
C.    Privilege in the provinces: Varying approaches to codification .....	33
D.    Observations of the Subcommittee on Parliamentary Privilege in Canada .....	37
PART III: FRAMEWORK TO ADAPT ELEMENTS OF PARLIAMENTARY PRIVILEGE IN CANADA TO CONTEMPORARY NORMS.....	39
A.    From the Necessity Test to an Accountability Framework: A Canadian Approach to Renew Parliamentary Privilege .....	39
B.    Freedom of Speech .....	40
1.    Should the scope of freedom of speech be modified?.....	41
2.    Proceedings in Parliament .....	47
3.    Observations of the Subcommittee to Adapt the Privilege of Freedom of Speech to Contemporary Norms.....	49
C.    The Collective Rights of the Senate and House of Commons to Regulate their Internal Affairs/ Exclusive Cognizance .....	52
1.    Developments abroad .....	53
2.    Canadian developments: Parliament is not a “statute-free zone”.....	54
3.    Observations of the Subcommittee to Adapt the Collective Rights of the Senate and House of Commons to Regulate their Internal Affairs to Contemporary Norms.....	55
D.    Disciplinary Powers .....	57

1.	Procedural Fairness: Disciplining Individual Parliamentarians .....	58
2.	Procedural Fairness: Disciplining non-Parliamentarians .....	61
3.	Observations of the Subcommittee to Adapt the Disciplinary Powers of the Senate and House of Commons to Contemporary Norms .....	65
E.	Freedom from Arrest in Civil Actions and Related Individual Privileges .....	68
1.	Freedom from arrest in civil actions .....	68
2.	Freedom from being subpoenaed to attend court as a witness.....	71
3.	Freedom from jury service.....	73
4.	Freedom from obstruction, interference, intimidation and molestation.....	76
CONCLUSION: LOOKING AHEAD .....		79
BIBLIOGRAPHY .....		81
A.	Legislation.....	81
1.	Canadian – Constitutional and Federal.....	81
2.	Canadian - Provincial .....	81
3.	International.....	82
B.	Jurisprudence .....	82
1.	Canadian .....	82
2.	International.....	83
C.	Parliamentary Materials and Government Reports.....	84
1.	Canada .....	84
2.	International.....	85
D.	Secondary Materials.....	85

## INTRODUCTION: AN OPPORTUNITY TO REVIEW AND RENEW PARLIAMENTARY PRIVILEGE IN CANADA

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Parliamentary privilege, an essential component of parliamentary democracy, exists to enable Parliament to function effectively and efficiently without undue impediment. Originally developed in Westminster as a means of preventing interference by the sovereign in the workings of Parliament,<sup>1</sup> it has developed in parliaments throughout the British Commonwealth. In Canada, it is enshrined in the *Constitution Act, 1867*, at section 18 and through its preamble,<sup>2</sup> And is further confirmed in section 4 of the *Parliament of Canada Act*.<sup>3</sup>

The rights and immunities associated with parliamentary privilege include the following<sup>4</sup>:

- The rights of individual parliamentarians (as well as witnesses at committees) and the collective rights of the Senate and House of Commons to freedom of speech from outside impeachment for things said in the course of parliamentary proceedings;
- The collective rights of the Senate and the House of Commons to regulate their own affairs related to their debates and proceedings, also known as exclusive cognizance;
- The collective rights of the Senate and the House of Commons to sanction or discipline for breach of their privileges and for contempt;
- The freedom of individual parliamentarians from arrest in civil actions and related privileges (i.e. freedom from being subpoenaed in court as a witness, freedom from jury service, freedom from obstruction, interference, intimidation and molestation).

While for decades the understanding of parliamentary privilege was reasonably uniform and standard throughout the British Commonwealth, the evolution of parliamentary democracy has impacted the development of the law of privilege both in Canada and abroad. No longer are concerns about privilege centred on the relationship between Parliament and the Crown. Rather, in the late 20<sup>th</sup> and now in the 21<sup>st</sup> century discourse about parliamentary privilege centres on how privilege should function in a rights-based legal system exemplified here in Canada by the *Canadian Charter of Rights and Freedoms*, and where the public expects increased transparency and accountability for the decisions made by parliamentarians.<sup>5</sup>

Different jurisdictions have taken divergent approaches to adapting parliamentary privilege to contemporary norms. Parliaments in the UK, Australia, and New Zealand, for example, have all

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<sup>1</sup> And enshrined in the 1689 Bill of Rights, which followed the English Civil War, the struggle between King Charles I and Parliament: UK, *Bill of Rights 1689* (An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown), 1 William & Mary Sess 2 c 2.

<sup>2</sup> As discussed further on, at the federal level, section 18 of the *Constitution Act, 1867* grants Parliament the authority to enact parliamentary privileges that exceed privileges inherent in the creation of the Senate and House of Commons, provided they do not exceed the privileges enjoyed by the House of Commons of the UK at the time of such enactment. This provision was enacted by the UK by an amendment to the *Constitution Act, 1867* in 1875: *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.

<sup>3</sup> *Parliament of Canada Act*, R.S.C., 1985, c. P-1.

<sup>4</sup> Discussed in detail below.

<sup>5</sup> Colette Mireille Langlois, "Parliamentary Privilege: A Relational Approach", *Journal of parliamentary and political law*, Vol. 6, March 2012, pp. 129-160.

undertaken initiatives to assess and modernize parliamentary privilege, which can be helpful comparisons for analysis. Indeed, in 1999, the UK Joint Select Committee on Parliamentary Privilege framed the need for a review of parliamentary privilege in a manner that recognizes the need for the law of privilege to meet contemporary expectations of transparency, fairness, and reasonableness:

Our examination of parliamentary privilege also concentrated on fundamental issues: do the law and practice of parliamentary privilege meet present and future needs? Do the existing procedures satisfy contemporary standards of fairness and public accountability? A modern code of parliamentary privilege should be principled and coherent. The overall guiding principle is that the proper functioning of Parliament lies at the heart of a healthy parliamentary democracy. It is in the interests of the nation as a whole that the two Houses of Parliament should have the rights and immunities they need in order to function properly. But the protection afforded by privilege should be no more than Parliament needs to carry out its functions effectively and safeguard its constitutional position. Appropriate procedures should exist to prevent abuse and ensure fairness. Thus the thread running through this report involves matching parliamentary privilege to the current requirements of Parliament and present-day standards of fairness and reasonableness.<sup>6</sup>

However, while useful, Canada is distinguished from fellow Commonwealth jurisdictions by the constitutional entrenchment of the *Charter*. And until now, no parliamentary or legislative body in Canada has ever completed a comprehensive study of parliamentary privilege.

Furthermore, courts in Canada and throughout the Commonwealth have also pronounced on elements of privilege. Indeed, over the past twenty years the Supreme Court of Canada has issued three helpful judgments on elements of parliamentary privilege. In the leading case of *House of Commons v. Vaid*, the Supreme Court of Canada defined parliamentary privilege in Canada as follows:

Parliamentary privilege in the Canadian context is the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions.

Parliamentary privilege does not create a gap in the general public law of Canada but is an important part of it, inherited from the Parliament at Westminster by virtue of the preamble to the *Constitution Act, 1867* and in the case of the Canadian Parliament, through s. 18 of the same Act.<sup>7</sup>

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<sup>6</sup> Joint Committee on Parliamentary Privilege (UK), *Parliamentary Privilege – First Report – Volume 1*, 9 April 1999 (1999 UK Joint Committee) at para 32.

<sup>7</sup> *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 SCR 667 at para 29 (*Vaid*). Citations omitted. Other leading texts on parliamentary privilege include the authoritative British text on privilege, Malcolm Jack, ed, *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24<sup>th</sup> ed. LexisNexis, London, UK, 2011.; Joseph P. Maingot, *Parliamentary Privilege in Canada*, 2<sup>nd</sup> ed., co-published by the House of Commons and McGill-Queen's University Press, Ottawa, ON, 1997.; and Audrey O'Brien and Marc Bosc, *House of Commons Procedure and Practice*, 2<sup>nd</sup> ed., House of Commons, Ottawa, ON, 2009. The latter source contains a useful chapter on privileges and immunities that includes a historical perspective on parliamentary privilege and a summary of the privileges and immunities exercised by and in the House of Commons.

As well, in *Vaid* the Supreme Court established the procedure courts should follow in evaluating privilege cases, while emphasizing that it is for Parliament to determine whether the exercise of a privilege is appropriate in any particular case:

- “[T]he first step a Canadian court is required to take in determining whether or not a privilege exists within the meaning of the *Parliament of Canada Act* is to ascertain whether the existence and scope of the claimed privilege have been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster.”<sup>8</sup>
- If the existence and scope of the privilege are not clearly established, the court must do so by applying the “necessity test”: “In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly’s work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.”<sup>9</sup>
- Indeed, “the party who seeks to rely on the immunity provided by parliamentary privilege has the onus of establishing its existence.”<sup>10</sup>
- Finally “once the category (or sphere of activity) is established, it is for Parliament, not the courts, to determine whether in a particular case the exercise of the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts.”<sup>11</sup> [emphasis added]

Despite it being up to Parliament to determine how to exercise its privileges, the lack of any comprehensive parliamentary review of privilege in the era of the *Charter* suggests that Parliament has to date been wanting in this regard and that now be an opportune time for such a review. As well, while the Supreme Court has set out the outline of a Canadian interpretation of parliamentary privilege, the lower courts have experienced difficulty in adjudicating claims of privilege, with judgments on elements of parliamentary privilege resulting in conflicting outcomes. Furthermore, court decisions are necessarily piecemeal in their approach, focused on a particular set of facts rather than on a comprehensive and principled assessment of parliamentary privilege.<sup>12</sup>

Lastly, despite its importance, parliamentary privilege is an area of law often ignored or misunderstood by lawyers, legislators, and the Canadian public.<sup>13</sup>

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<sup>8</sup> *Vaid, supra*, at para 39.

<sup>9</sup> *Vaid, supra*, at para 46.

<sup>10</sup> *Vaid, supra*, at para 29.

<sup>11</sup> *Ibid.*

<sup>12</sup> See generally Charles Robert and Vince MacNeil, “Shield or Sword? Parliamentary Privilege, *Charter* Rights and the Rule of Law”, *The Table*, Vol. 75, 2007, pp. 17-38.

<sup>13</sup> See for example Derek Lee, “The Need for Codification of Parliamentary Privilege”, *Canadian Parliamentary Review*, Vol. 28, No. 1, 2005, pp. 2-3.

Given these circumstances, the Subcommittee on Privilege believes that the time is ripe to proactively<sup>14</sup> re-evaluate and reconsider parliamentary privilege in the contemporary Canadian context. The objective of this paper is to initiate debate as to how best Parliament may adapt its understanding and exercise of parliamentary privilege to meet the needs and expectations of Canadian parliamentary democracy in the 21<sup>st</sup> century. By doing so the goal is to ensure the credibility and utility of parliamentary privilege in Canada in the decades to come.

#### **A. The Senate Rules Committee Subcommittee on Parliamentary Privilege**

On 1 April 2014, the Standing Senate Committee on Rules, Procedures and the Rights of Parliament approved the establishment of a subcommittee to study parliamentary privilege. The subcommittee met on four occasions in the spring of 2014 to discuss the state of parliamentary privilege in Canada. This discussion paper is the fruit of the Subcommittee's initial deliberations, and is intended to serve as a tool to help guide the Subcommittee going forward.

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<sup>14</sup> Indeed, reviews of parliamentary privilege in the UK, Australia and New Zealand were all undertaken in reaction to court decisions or other events that the parliamentarians believed could undermine the law of privilege. In Canada there is the opportunity to take a proactive approach before there is pressure to do so as a result of an ill-considered court decision or other issue.



## PART I: PARLIAMENTARY PRIVILEGE: TRACING ITS HISTORY TOWARDS A CONTEMPORARY APPROACH

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### A. Parliamentary Privilege: History

Parliamentary privilege traces its origins to the emergence of the British Parliament in the Middle Ages. As initially construed it was concerned with “privilege” in terms of the status or power of members of Parliament (a select group itself) vis-à-vis the Crown. The 17<sup>th</sup> century saw a turning point in the relationship between the monarch and Parliament, culminating in 1689 with passage of the *Bill of Rights*. In the first part of the 17<sup>th</sup> century, James I pointedly informed the Commons in 1621 that their privileges existed only by his permission. When the Commons countered back, James I ordered that the *Journals* of the House be sent to him, “tore out the offending page of protest and then summarily dissolved Parliament.”<sup>15</sup> By 1642, during the reign of James I’s successor Charles I, relations between the King and Parliament had deteriorated so far that war (known as the English Civil War) resulted, culminating in Charles I’s beheading in 1649 and the institution of a republican regime led by Oliver Cromwell. Following Cromwell’s death in 1658, the republic fell apart. Charles II restored the monarchy in 1660, and his brother James II, openly Catholic, became King following Charles II’s death in 1685.

Concern about the implications of James II’s Catholicism led to the Revolution of 1688, when a union of English Parliamentarians with the Dutch William of Orange overthrew James II and secured a Protestant throne jointly occupied by William (now called William III) and his wife Mary II of England. It was at this point that the main powers of Parliament became secured with the December 1689 passage of the *Bill of Rights*, a statutory restatement of the Declaration of Right presented to William and Mary inviting them to become joint sovereigns of England. Essentially the *Bill of Rights* clarifies the limits on the powers of the crown, sets out the rights of Parliament, the requirement for regular elections, and the right to petition the monarch without fear of retribution. The *Bill of Rights* finally confirmed the basic privilege of parliament, freedom of speech, stating in Article IX that the “freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”<sup>16</sup>

As noted in *Erskine May*, as early as the 17<sup>th</sup> century it became clear that the exercise of parliamentary privilege involved the balancing of “two potentially conflicting principles”:

On the one hand, the privileges of Parliament are rights ‘absolutely necessary for the due execution of its powers’; and on the other, the privilege of Parliament granted in regard of public service ‘must not be used for the danger of the commonwealth’.<sup>17</sup>

In recognition of the need to protect necessary privileges while avoiding risks of using privilege to undermine the best interests of the nation, in 1704 it was agreed that neither House of Parliament

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<sup>15</sup> *House of Commons Procedure and Practice (2nd ed)*, *supra*, at p. 65.

<sup>16</sup> *Erskine May* 24<sup>th</sup> ed., *supra*, at p. 209.

<sup>17</sup> *Ibid.* at p. 217.

could create for itself any new privileges “not warranted by the known laws and customs of Parliament.”<sup>18</sup>

Through the late 18<sup>th</sup> and 19<sup>th</sup> centuries systematic studies of the history of privilege and parliamentary practice took place, and several manuals were published in the UK on parliamentary procedure. Amongst them was the first edition of Thomas Erskine May’s *Treatise upon the Law, Privileges, Proceedings and Usage of Parliament*, published in 1844. The 14<sup>th</sup> edition, published just over a century later in 1946, is regarded as a high-water mark of efforts to elucidate the workings of Parliament, at a time when privilege was uniformly understood throughout the Commonwealth. As noted in *House of Commons Procedure and Practice (2nd ed)*, “This edition presented a thorough and elaborate examination of parliamentary privilege based on an exhaustive examination of the *Journals* and the principles of the law of Parliament.”<sup>19</sup>

As well, the 19<sup>th</sup> century saw a number of court cases on privilege, “which helped to determine the bounds between the rights of Parliament and the responsibility of the courts.”<sup>20</sup> Of these, *Stockdale v. Hansard* is perhaps the most important.<sup>21</sup> In this case the courts tried to determine the precise extent, or scope, of the claimed privilege of freedom of speech. The printers of the House of Commons, Messrs Hansard, had printed by order of the House a report prepared by the inspector of prisons against which Mr. Stockdale brought an action for libel.<sup>22</sup> The court ultimately held that while parliamentary privilege protected papers printed by order of the House for the use of its own members, this protection did not extend to papers made available outside the House to members of the public.<sup>23</sup>

In response the House passed the *Parliamentary Papers Act 1840*, in order to reverse the decision. As noted in the 1999 UK study on parliamentary privilege discussed below, “Parliamentary freedom of speech would be of little value if what is said in Parliament by members, ministers and witnesses could not be freely communicated outside Parliament. There is an important public interest in the public knowing what is being debated and done in Parliament.”<sup>24</sup>

In the 20<sup>th</sup> century court judgments in particular have narrowed the scope and exercise of parliamentary privilege in response to, and to take into account, the relationship between Parliament and the electorate, and the corresponding shift in preference towards responsible government. First, the expansion of the franchise during the 19<sup>th</sup> and early 20<sup>th</sup> centuries placed an emphasis on the democratic aspect of Parliament (implicitly altering the scope of privilege as originally conceived and practiced). Second, the passage of international instruments such as the Charter of the United Nations in 1945 (which in its preamble reaffirms faith in fundamental human rights, dignity, and equality), and the Universal Declaration of Human Rights a few years later (adopted by the UN

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<sup>18</sup> *Ibid.*

<sup>19</sup> *House of Commons Procedure and Practice (2nd ed)*, *supra*, at p. 67.

<sup>20</sup> *Ibid.*, at p. 66.

<sup>21</sup> *Stockdale v. Hansard* (1839) 9 Ad & E 1, (1839) 112 ER 1160 (*Stockdale v. Hansard*).

<sup>22</sup> The inspector’s report described as indecent and obscene a book on anatomy found in Newgate prison library. Mr Stockdale was the publisher of the book.

<sup>23</sup> *Erskine May* 24<sup>th</sup> ed., *supra*, at p. 289.

<sup>24</sup> 1999 UK Joint Committee, *supra*, at para 341.

General Assembly in 1948) reframed an individual's relationship to government as being one based on respect for individual rights, the rule of law, due process, and an expectation of increased government transparency. Indeed, the shift towards responsible government, respect for human rights and expectations of transparency and due process has had particular impact on the scope and exercise of parliamentary privilege in Canada where such principles are explicitly guaranteed in the *Canadian Charter of Rights and Freedoms*, part of the Constitution of Canada. As observed in a letter sent by five Senators to New Zealand's Privileges Committee in the context of their 2012 review of parliamentary privilege, the contemporary rights-based approach to law and governance "is radically different from one based on advantage which marked the competition of Parliament with the Crown and its courts in the seventeenth century."<sup>25</sup>

## **B. Towards a contemporary approach: Evolution of parliamentary privilege in the UK, Australia, and New Zealand**

Since the 1960s, parliaments in the United Kingdom, Australia and New Zealand have analysed and attempted to reformulate parliamentary privilege for the 20<sup>th</sup>, and now the 21<sup>st</sup>, centuries. Australia (in 1987) and New Zealand (as recently as August 2014) have both enacted legislation clarifying elements of parliamentary privilege, while the United Kingdom has thus far determined that it is unnecessary at this time to try to legislate parliamentary privilege (despite a recommendation to do so in a well-regarded 1999 report). All three attempts at modernizing the law of privilege reflect the change in the relationship between the public and Parliament.<sup>26</sup> All three recognize that today public figures are accountable to the public, and that parliamentarians should exercise self-restraint to ensure that privileges are used responsibly and transparently.

### **1. The United Kingdom**

#### **a. The 1967 and 1977 reports**

Various commentators have observed how the British House of Commons, since the mid-20<sup>th</sup> century, has taken a more narrow approach to parliamentary privilege focussed on parliamentary proceedings. An expression of this shift in thinking was expressed in the 1967 report of the UK House of Commons' Select Committee on Parliamentary Privilege, which recommended that legislation be introduced to extend and clarify the scope of privilege, and expressed the conviction that the recognized rights and immunities of the House "will and must be enforced by the courts as part of the law of the land" [emphasis added].<sup>27</sup> The House took note of this report, but it was never adopted.

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<sup>25</sup> Letter to the Hon. Christopher Finlayson, MP, Chairperson, Privileges Committee, New Zealand, by Senators David Smith (then Chair of the Senate's Standing Committee on Rules, Procedures and the Rights of Parliament) and George Furey (then Head, Working Group on Parliamentary Privilege), co-signed by Senators Gerald Comeau, Serge Joyal and David Braley, 29 November 2012.

<sup>26</sup> See for example Charles Robert and Dara Lithwick, "Renewal and Restoration: Contemporary Trends in the Evolution of Parliamentary Privilege, publication forthcoming in the Volume 82, 2014 edition of *The Table*.

<sup>27</sup> *Ibid*, citing United Kingdom, House of Commons, *Report from the Select Committee on Parliamentary Privilege, Together with the Proceedings of the Committee, Minutes of Evidence Taken Before the Select Committee on Parliamentary Privilege in Session 1966-67, and Appendices*, December 1, 1967 (reprinted 1971), pp. xiii-xiv, par. 38.

A decade later, in 1977, the UK Committee of Privileges looked again at the meanings of privilege and contempt and reiterated the conclusions of the 1967 report. This 1977 report was adopted by the House. In it the Committee “recommended that the application of privilege be limited to cases of clear necessity in order to protect the House, its Members and its officers from being obstructed or interfered with in the performance of their functions.”<sup>28</sup> The set of recommendations not adopted by the House were those recommending legislative changes to codify privilege.

**b. The 1999 Joint Committee report, the 2012 Government Green Paper, and the 2013 Joint Committee report**

**(i) The 1999 Joint Committee Report**

Some 20 years later, in 1999, the Joint Committee of the House of Commons and the House of Lords of the United Kingdom (1999 UK Joint Committee) published what has become an extremely influential report on parliamentary privilege, even though it was not adopted by the House of Commons and no legislation resulted from its recommendations.<sup>29</sup> Building on what had been undertaken some 30 years earlier, the report represented an ambitious, in-depth and comprehensive study of the various rights and immunities that make up parliamentary privilege, their historic origins, and their contemporary applications. It discussed the adequacy of the current understandings and uses of parliamentary privilege and made various recommendations on how to adapt parliamentary privilege to modern needs and realities. The Committee’s study was guided by the following fundamental questions:

- Do the law and practice of parliamentary privilege meet present and future needs?
- Do existing procedures satisfy contemporary standards of fairness and public accountability?

The Committee noted that there was an important need to review parliamentary privilege given several important developments, including<sup>30</sup>:

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<sup>28</sup> *House of Commons Procedure and Practice* (2nd ed.), *supra*, at pp. 67-68, referring to the United Kingdom, House of Commons, Select Committee of Privileges, 1977, Third Report.

<sup>29</sup> 1999 UK Joint Committee, *supra*.

<sup>30</sup> *Ibid* at paras 27-31.

- Several decisions on parliamentary privilege had been rendered by the House of Lords in the 1990s, including *Pepper v. Hart*<sup>31</sup> and *Prebble v. Television New Zealand*<sup>32</sup>, both of which engaged in a comprehensive analysis of parliamentary privilege.
- The U.K. enacted the *Human Rights Act, 1998*, which incorporated the *European Convention on Human Rights* into domestic law. The Committee considered that some judgments of the European Court of Human Rights, interpreting and applying the Convention, had a potential impact on parliamentary privilege.<sup>33</sup>
- The UK Parliament, in the *Defamation Act 1996*, itself modified the privilege of free speech by providing that members and other persons may waive parliamentary privilege, so far as it relates to them, in actions for defamation. This clause (section 13 of the law) attracted much controversy. The Committee criticised section 13 as undermining the basis of parliamentary privilege and creating anomalies in its application.<sup>34</sup>
- The government at the time was contemplating proposals to reform corruption statutes (including relating to bribery of Members) which would have important implications for parliamentary privilege.

One of the legacies of the Committee is its re-articulation of the basic proposition that necessity is the basis for all the privileges claimed by Parliament. This proposition has since become the central feature in any analysis of parliamentary privilege, whether in parliamentary studies or court judgments.

Among the Committee's recommendations:

- That legislation be enacted to enable both Houses to waive parliamentary privilege but only where to do so would not expose a member or other person making a statement (or doing an act) to civil or criminal liability. This would enable proceedings in Parliament to

<sup>31</sup> *Pepper v. Hart*, [1993] AC 593. In this ruling the House of Lords opined that when primary legislation is ambiguous then, in certain circumstances, a court may refer to statements made in the House of Commons or House of Lords in an attempt to interpret the meaning of the legislation. Before this ruling, such an action would have been seen as a breach of parliamentary privilege

<sup>32</sup> *Prebble v. Television New Zealand*, [1995] 1 AC 321. *Prebble* involved a libel case brought by a New Zealand MP and former government minister for statements made in the course of a television programme. At issue for the Judicial Committee of the Privy Council was whether Article IX of the Bill of Rights 1689 prevented the defendant from referring to statements made by Prebble in the NZ House of Representatives in order to justify the allegations made by the defendant in the broadcast. The Judicial Committee agreed with the New Zealand Court of Appeal that to allow the defendant to use such evidence would be contrary to Article IX. Per this case, parties to litigation could not bring into question anything said or done in the House by suggesting that "the actions or words were inspired by improper motives or were untrue or misleading", though there would be no objection to referring to Hansard to prove the occurrence of a statement so long as its propriety was not questioned.

<sup>33</sup> They cited one case in particular where the Court found that the Maltese House of Representatives' pursuit of a claim for breach of privilege against a journalist violated the journalist's Convention right to a fair hearing before an independent and impartial tribunal. *Demicoli v. Malta* (1992) 14 EHRR 47.

<sup>34</sup> The Committee observed the following about section 13 at paragraph 69: "A fundamental flaw is that it undermines the basis of privilege: freedom of speech is the privilege of the House as a whole and not of the individual member in his own right, although an individual member can assert and rely on it. Application of the new provision could also be impracticable in complicated cases; for example where two members ... are closely involved in the same action and one waives privilege and the other does not. Section 13 is also anomalous: it is available only in defamation proceedings. ... The Committee considers these criticisms are unanswerable."

be examined by a court, but only where there would be no risk of liability for a parliamentarian or other person.<sup>35</sup>

- That legislation be enacted to define “proceedings in Parliament” to include “all words spoken and acts done in the course of, or for the purposes of, or necessarily incidental to, transacting the business of either House of Parliament or of a committee.”
- That standards of procedural fairness be introduced for witnesses to parliamentary proceedings.
- That a set of modified parliamentary privileges be codified to reflect the modern needs of Parliament.

The role that the 1999 UK Joint Committee report has played in influencing parliamentary, governmental, and judicial thinking on parliamentary privilege is widely acknowledged.<sup>36</sup> In particular, the report’s recommendations have been cited in a number of leading court decisions which have articulated the scope of privilege, including the Supreme Court of Canada judgment in *Canada (House of Commons) v. Vaid*,<sup>37</sup> *R v. Chaytor*<sup>38</sup> in the UK, and *Gow v. Leigh*<sup>39</sup> in New Zealand.

## (ii) The 2012 United Kingdom Government Green Paper

The United Kingdom government released its Green Paper on parliamentary privilege in April 2012.<sup>40</sup> The paper was largely motivated by developments in recent UK case law on parliamentary privilege, particularly the UK Supreme Court judgment in *R. v. Chaytor* dealing with the scope of parliamentary privilege. In *Chaytor*, the Court held that privilege could not be invoked by several parliamentarians charged with expenses fraud against both chambers to shield them from prosecution.<sup>41</sup> The paper was also prepared in part because the government considered that a review was long overdue and in part to respond to the 1999 UK Joint Committee report.

While the Green Paper represented, according to the UK government, the first government-led comprehensive review of the major issues relating to parliamentary privilege in the UK, its

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<sup>35</sup> Of note, in June 2014 the House of Lords introduced a *Parliamentary Privilege (Defamation) Bill* that would repeal section 13 of the *Defamation Act 1996*, though without replacement, as recommended in the 2013 UK Joint Committee report, discussed below.

<sup>36</sup> Gareth Griffith, *Parliamentary Privilege: the continuing debate*, New South Wales Parliamentary Research Service, Background Paper No 2/2014, March 2014, p. 1 (Griffith).

<sup>37</sup> *Vaid, supra*.

<sup>38</sup> *R. v. Chaytor*, [2010] UKSC 52 (Chaytor). The case concerned the trials of three former Members of Parliament for false accounting in relation to a parliamentary expenses scandal that took place in 2009. The three MPs unsuccessfully argued that their expenses claims were covered by parliamentary privilege and could not be the basis of criminal charges. Court at all three levels (trial, appeal, Supreme Court) rejected their arguments regarding parliamentary privilege.

<sup>39</sup> *Attorney General and Gow v. Leigh* [2011] NZSC 106 (*Gow v. Leigh*). In *Gow v Leigh*, the NZ Supreme Court held that statements made by an official to a Minister for the purpose of replying to questions for oral answer are not themselves parliamentary proceedings. In consequence, such statements could be the subject of court proceedings as they would not be protected by absolute privilege though they would still be protected by qualified privilege.

<sup>40</sup> HM Government (UK), *Parliamentary Privilege*, April 2012 (Green Paper).

<sup>41</sup> *R. v. Chaytor*, [2010] UKSC 52 (*Chaytor*).

conclusions step back from those found in the 1999 UK Joint Committee report. Indeed, the Green Paper concluded that there is no reason to consider a comprehensive codification of the law of parliamentary privilege (as was done in Australia in 1987). As well, it found that the boundaries of parliamentary privilege are sufficiently clear to preclude any need to depart from the UK's basic constitutional principles that underlie the law of parliamentary privilege, while acknowledging that there may be discrete areas of privilege that may require legislative change.

(iii) **The 2013 UK Joint Committee Report**

Finally, in July 2013 The UK Joint Committee on Parliamentary Privilege issued a report that shifted from what it had recommended in 1999, towards the proposals and observations made in the 2012 U.K. government Green Paper.<sup>42</sup> For example, the 2013 report recommended that there was no need for new legislation on privilege unless “absolutely necessary”. Like the 1999 report, though, it reaffirmed necessity as the basis for parliamentary privilege. It also explicitly endorsed the approach taken by the Supreme Court of Canada in *Vaid*, which elevated the approach into a “doctrine of necessity”<sup>43</sup>, noting the following:

24. We endorse the approach adopted in *Vaid*. Absolute privilege attaches to those matters which, either because they are part of proceedings in Parliament or because they are necessarily connected to those proceedings, are subject to Parliament’s sole jurisdiction.

25. One of the advantages of the “doctrine of necessity” is that it ensures a degree of flexibility. The working practices of Parliament change, and our understanding of what is or is not subject to Parliament’s sole jurisdiction needs to adapt and evolve accordingly.<sup>44</sup>

In the 2013 report the Committee adopted the position that parliamentary privilege must be reviewed and assessed as a flexible concept, capable of adapting to the changing needs and working practices of Parliament. It also acknowledged the new constitutional reality of the U.K. being subject to a bill of rights following the U.K.’s incorporation of the *European Convention on Human Rights* in 1998. Recommendations made in the 2013 report to clarify privilege include:

- That the House of Commons and House of Lords should reassert their power to investigate and, if necessary, punish those who interfere with or obstruct the work of committees, while at the same time setting out procedural safeguards to ensure that such investigations are entirely fair;
- That the law on the reporting and broadcasting of parliamentary proceedings should be modernized, for example to confirm that broadcasts made under the authority of either House, including online publication, enjoy absolute privilege;
- That provision should be made to establish that privilege applies to all fair and accurate media reports of Parliamentary proceedings, unless they can be proved to have been motivated by malice; and

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<sup>42</sup> Joint Committee on Parliamentary Privilege (U.K.), *Parliamentary Privilege: Report of Session 2013–14*, 18 June 2013 (2013 UK Joint Committee).

<sup>43</sup> *Ibid* at para 23.

<sup>44</sup> *Ibid* at paras 24 and 25.

- That while the Committee did not support the introduction of legislation to limit judicial questioning of parliamentary debates or committee reports, they left the door open to the introduction of legislation if required.
- That section 13 of the *Defamation Act, 1996* should be repealed without replacement on the basis that the potential challenges it creates are more damaging than the issue it was intended to cure, and that there is no persuasive argument for granting either House a power of waiver, which would have the potential to undermine the fundamental constitutional principle of freedom of speech in Parliament.<sup>45</sup> Of note, in June 2014 the House of Lords introduced a *Parliamentary Privilege (Defamation) Bill* that would repeal section 13 of the *Defamation Act 1996*, without replacement, in accordance with the recommendation from the 2013 UK Joint Committee report.<sup>46</sup>
- Finally, the Committee concluded that draft clauses in the Green Paper that would have removed the absolute freedom of speech in Parliament, as enshrined in Article IX of the 1689 Bill of Rights, in respect of criminal prosecutions, were unnecessary and would have a damaging effect upon free speech in Parliament.<sup>47</sup>

The Government published its response to the report in December 2013. The Government indicated that it “agrees with the Committee that there is no strong case for a comprehensive codification of Parliamentary privilege. However, as rightly recognised in the Report, this does not mean that steps cannot be taken both by Parliament and by Government to clarify the application of privilege where appropriate.”<sup>48</sup>

## 2. Australia

Australian law on parliamentary privilege differs from that in the United Kingdom in that it is codified in comprehensive legislation, the *Parliamentary Privileges Act 1987*<sup>49</sup> (an approach recently adopted by New Zealand, as discussed below). This was in response to a 1984 report on privilege by a parliamentary committee, as well as two court decisions which, according to critics, failed to adequately protect parliamentary privilege.<sup>50</sup>

### a. The 1984 Joint Select Committee Report

The 1984 report prepared by a joint select committee<sup>51</sup> contained a comprehensive list of recommendations that it proposed implementing through the adoption of legislation, modification of existing Standing Orders, and the passage of resolutions in each House:

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<sup>45</sup> *Ibid* at para 170.

<sup>46</sup> Parliamentary Privilege (Defamation) Bill [HL] 2014-15, sponsored by Lord Lester of Herne Hill, introduced in the House of Lords on 10 June 2014, 2<sup>nd</sup> reading on 27 June 2014.

<sup>47</sup> Joint Select Committee, “”, 3 July 2013.

<sup>48</sup> HM Government (UK). “Government Response to the Joint Committee on Parliamentary Privilege”, December 2013.

<sup>49</sup> Australia, *Parliamentary Privileges Act 1987*, Act No. 21 of 1987, as amended.

<sup>50</sup> The Act, however, made a number of significant modifications to the changes to the law recommended by the select committee: see *Odgers*, *infra*, at p. 48.

<sup>51</sup> Select Committee on Parliamentary Privilege (Australia), *Final report*, Parliamentary Paper No. 219/1984, 3 October 1984 (Australia *Final Report*).



- **Legislation** – Pursuant to section 49 of the Australian Constitution<sup>52</sup>, legislation was required to amend the law of parliamentary privilege (as section 49 provides that unless and until the Australian Parliament declares privileges it only possesses the privileges possessed by the UK House of Commons at the time of Australia’s establishment). The *Final Report* stated that the purpose of the legislation was not to codify privilege, which would imply forfeiting flexibility to achieve more certainty. Rather, the report sought a middle ground where some selected aspects of privilege would be confirmed or clarified in statute, and others would be left open-ended.<sup>53</sup>
- **Standing orders** – The joint select committee determined that some changes could be implemented by amending the Standing Orders (procedures) within each House.<sup>54</sup>
- **Resolutions** – Finally, the joint select committee observed that resolutions would be an appropriate tool to use to implement recommendations that required each House to adopt a new policy, attitude, or practice. Counterpart resolutions in each House would need to be as similar as possible in order to avoid confusion.<sup>55</sup>

#### b. *R. v. Murphy* and Freedom of Speech

After the report was published, the Supreme Court of New South Wales issued two decisions (one in 1985 and another in 1986) collectively referred to as *R. v. Murphy*.<sup>56</sup> The decisions narrowed the existing understanding of the privilege of freedom of speech, as expressed in Article IX of the 1689 UK Bill of Rights (incorporated into Australian law by virtue of section 49 of the Australian Constitution) by allowing the questioning and impeachment of statements made within parliamentary proceedings in court. Per *R. v. Murphy* Article IX

“had only the effect of preventing what has been said and done in the course of parliamentary proceedings from being itself the subject of criminal or civil actions in the courts. It did not prevent proceedings in Parliament being used as evidence of an offence committed elsewhere. Where a member of Parliament sues in respect of an alleged libel the narrower principle would equally not rule out the use of parliamentary materials to rebut the charge that an offence had been committed elsewhere than in Parliament.”<sup>57</sup>

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<sup>52</sup> Section 49 states: “The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are **declared by the Parliament, and until declared** shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.” [emphasis added]

<sup>53</sup> Australia *Final Report*, at pp. 157 and 158.

<sup>54</sup> *Ibid.*, at p. 160.

<sup>55</sup> *Ibid.*, at p. 161.

<sup>56</sup> The first judgement is unreported. The citation for the second decision is *R. v. Murphy* (1986) 5 NSWLR 18. The accused was a judge alleged to have attempted to pervert the course of justice. The judge had testified before a parliamentary committee and his testimony was relevant to the court proceedings. In the first decision, the court qualified Parliament’s absolute privilege by creating a legal test to determine when parliamentary evidence could be admitted in court proceedings. In the second decision, the court allowed parliamentary statements to be used as long as they were not themselves the basis of the claim.

<sup>57</sup> Geoffrey Marshall, “Impugning Parliamentary Impunity”, [1994] *Public Law* 509 at 512.

*Odgers' Australian Senate Practice* summarizes the effect of these decisions, which resulted in attacks against parliamentarians on the truthfulness and motive of their comments made during parliamentary proceedings:

The effect of both judgments in *R v Murphy* was that the prosecution and the defence made free use of the evidence given before the Senate committees for their respective purposes. The defendant and the prosecution witnesses were subjected to severe attacks using their committee evidence, attacks not only on their court evidence, but on the truthfulness of, and the motives underlying, their committee evidence.<sup>58</sup>

However, while the Australian Parliament rejected the interpretation of Article IX adopted in *R v. Murphy* (as detailed below) and opted instead to codify a broad interpretation of Article IX via statute, not all agreed with Parliament's approach. Late renowned British constitutional theorist Geoffrey Marshall suggested that Hurd J.'s more circumscribed approach to the privilege of freedom of speech in *R v. Murphy* might make the most sense in a contemporary context:

What today should we make of the sweeping provisions in Article 9 of the Bill of Rights that the freedom of speech in Parliament should not be impeached or questioned in any court or place out of Parliament? Can it be, if not impeached, impugned, or challenged, or queried, or examined, or denounced, or criticised? If none of these things could be done in any place out of Parliament the rights of citizens to criticise the behaviour of proceedings of their representatives would be non-existent. But if there is no threat to the free-working of Parliament in vigorous challenge or criticism of Parliament's proceedings or activities in the press or on the hustings, why should Parliament be in danger if criticism of the remarks or behaviour of members or ministers is made in the course of legal proceedings?<sup>59</sup>

### **c. Parliamentary Privileges Act 1987**

The *Parliamentary Privileges Act 1987* implemented the joint select committee's recommendations, with modifications, and overturned the two *R. v. Murphy* decisions by enacting a more expansive interpretation of Article IX.<sup>60</sup> The Act established the following:

- Set out the essential element of offences, specifying that "conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member." (section 4)

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<sup>58</sup> Harry Evans and Rosemary Laing (eds.), *Odgers' Australian Senate Practice*, 13<sup>th</sup> ed., Parliament of Australia, 2012, Chapter 2 at p. 48 (*Odgers'*),

<sup>59</sup> Geoffrey Marshall, "Impugning Parliamentary Impunity", [1994] *Public Law* 509 at 512.

<sup>60</sup> *Ibid.*, pp. 45 and 49. According to *Odgers'*, *supra*, the decisions were not authoritative, because they were inconsistent with other court decisions.

- Provided that unless expressly stated otherwise in the Act, the powers, privileges, and immunities enjoyed by each House and its members per section 49 of the Constitution continue to be in force (section 5).
- Abolished contempts by defamation by stating that “words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member”, while specifying that words spoken or acts done in the presence of a House or committee could still constitute contempt (section 6).
- Set out what sorts of penalties could be applied by a House (imprisonment for a period not exceeding six months in certain circumstances, imposition of a fine) and how those penalties are to be applied (section 7).
- Specified that a House does not have the power to expel a member from membership of a House (section 8)
- Specified that “it is a defence to an action for defamation that the defamatory matter was published by the defendant without any adoption by the defendant of the substance of the matter, and the defamatory matter was contained in a fair and accurate report of a proceedings at a meeting of a House or Committee” (section 10). Further, the Act provided that no criminal or civil action could be made against an officer of a House in respect of a publication to a member that has been tabled in a House (section 11).
- Included a clause for the protection of witnesses giving evidence in a House or committee proceeding (setting out penalties for trying to improperly influence a person in respect of evidence being given, or trying to otherwise harm someone on account of any evidence given or to be given) (section 12).
- Set out penalties for the unauthorised disclosure of in camera evidence (section 13).
- Set limits and parameters on the immunity that a member or officer of a House could claim from arrest and attendance before courts, with the default being that except as otherwise provided in this section, “a member, an officer of a House and a person required to attend before a House or a committee has no immunity from compulsory attendance before a court or a tribunal or from arrest or detention in a civil cause by reason of being a member or such an officer or person.” (section 14)
- Set out how laws in force in the Australian Capital Territory are to apply in relation to Parliament buildings, subject to section 49 of the Constitution (section 15).
- In response to *R. v. Murphy*, specified that Article IX of the Bill of Rights 1689 apply to the Australian Parliament, and that “proceedings in Parliament” “means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee”; that proceedings in Parliament could not be used to establish motives or intentions in a court proceeding; and that courts could not require the production or admission into evidence of material from in camera proceedings. Some exception is provided for cases arising under the Act itself, or where the use of a record of a proceeding is needed to assist in the interpretation of another Act (section 16).

As well, the Senate also adopted “Privilege Resolutions” to implement additional changes. No similar resolutions were adopted by the House of Representatives, and recommended changes to the Standing Orders were not implemented.<sup>61</sup>

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<sup>61</sup> *Odgers*, *supra*, at p. 40.

### 3. New Zealand

The expansive approach to interpreting the privilege of freedom of speech (codified in Australian law) was challenged with the 2011 New Zealand Supreme Court decision in *Gow v. Leigh*.<sup>62</sup> In this case the Supreme Court upheld the decisions of the lower courts finding that a public servant assisting a Minister to answer questions in Parliament is not protected by absolute privilege against claims for defamation arising from what was said to the Minister. Rather, the public servant is protected by a qualified privilege. The Court arrived at this finding on the nature of the privilege by determining that it was not *necessary* for the proper functioning of the New Zealand House of Representatives for public servants to have any greater protection than that.

The Court's finding arguably reflected an attempt to balance privilege with the rights of the individual who had allegedly been defamed. As such the finding is consistent with a contemporary approach to parliamentary privilege. Indeed, this is the position that was taken by the Canadian Senators who submitted observations to New Zealand's Privileges Committee following a request to do so in 2012:

The courts of New Zealand seem to have reached an appropriate balance. They have recognized the need to protect the genuine interests of Parliament and its activities without jeopardizing legitimate access of others to the protection and benefit of the law. In assessing the three causes for action in this particular case, the courts were unanimous in acknowledging the absolute privilege of the Minister to speak freely in the House of Representatives. At the same time, the courts properly limited the extent of this privilege to the Minister alone. The protection of qualified privilege was assessed as sufficient to safeguard the activities of the Minister's departmental officials in preparing written and oral information to assist the Minister in carrying out his duties and making an informed statement in Parliament. The protection of qualified privilege does not forfeit the right of anyone to have the proper benefit of the law in an action for defamation, but it does raise the bar by requiring evidence of deliberate malice to secure a conviction and in this way provides adequate protection to the departmental staff.<sup>63</sup>

However, parliamentarians in New Zealand took a different approach. In response to *Gow v. Leigh* the Privilege Committee of the New Zealand House of Representatives undertook a study of parliamentary privilege<sup>64</sup> and recommended that the Government introduce a Parliamentary Privilege Bill. In turn, the New Zealand government introduced the *Parliamentary Privilege Bill* (179-1) in December 2013.<sup>65</sup> It received Royal Assent and was renamed the *Parliamentary Privilege Act 2014* on 7 August 2014.<sup>66</sup> As demonstrated below, the recommendations made by the Privilege

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<sup>62</sup> *Gow v. Leigh, supra*.

<sup>63</sup> Letter to the Hon. Christopher Finlayson, MP, Chairperson, Privileges Committee, New Zealand, *supra*.

<sup>64</sup> Privilege Committee of the New Zealand House of Representatives, *Question of Privilege concerning the defamation action Attorney-General and Gow v. Leigh*, June 2013 (N.Z. Committee Report (2013)).

<sup>65</sup> The Privilege Committee reported on the bill, recommending some modifications, in June 2014, and the bill, as amended, received second and third reading in July 2014. New Zealand Parliament, "Parliamentary Privilege Bill", legislative history, 14 August 2014.

<sup>66</sup> New Zealand, *Parliamentary Privilege Act 2014*, 2014 No 58, assented to 7 August 2014. Per section 2 of the Act, it came into force on the day that it received Royal Assent.

Committee were reflected in the Act (the section of the Act corresponding to the Committee recommendation is in brackets):

- contain a clear statement of purpose to aid in determining the extent and scope of parliamentary privilege; (section 7)
- define “proceedings in Parliament” and what is meant by “impeaching and questioning” such proceedings, as set out in Article IX of the Bill of Rights; (section 10)
- explicitly provide that a member of Parliament or someone participating in or reporting on a parliamentary proceeding who affirms or adopts what another person has said in the House or in a committee will not be held liable for such a statement unless the statement in and of itself is defamatory; (sections 10, 11)
- enable the House to fine for contempt; (section 22)
- enable the House to administer oaths or affirmations in respect of witnesses giving evidence; (section 24)
- confirm that the House does not have the power to expel its members; (section 23)
- provide that live broadcast of Parliamentary proceedings, and that delayed broadcasts made by order or under the authority of the House of Representatives, is protected by absolute privilege; (sections 17, 18)
- provide that fair and accurate reports of House proceedings, or summaries of House proceedings, are protected by qualified privilege; (section 20)
- provide that the broadcast of extracts of parliamentary proceedings not made by order or under the authority of the House of Representatives are protected by qualified privilege. (section 20)

As well, the Act:

- Reaffirmed and clarified aspects of Article IX of the Bill of Rights (section 9);
- More fully set out the scope of prohibited impeaching or questioning in court or tribunal proceedings, of proceedings in Parliament (sections 11-15);
- Set out the privileges and immunities of witnesses giving evidence on oath or affirmation (section 25); and
- Set out a process whereby Members and certain officers could be exempted from participation in court or tribunal proceedings (through application to the Speaker and by meeting certain conditions) (sections 26 to 31).

As set out in the explanatory notes of the Act, it used concepts and terminology found in the Australian example drafted more than 25 years earlier.



## **PART II: PARLIAMENTARY PRIVILEGE IN CANADA**

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The evolution of parliamentary privilege in Canada largely followed that of the United Kingdom, including the adoption of procedures around privilege following the publishing of the 14<sup>th</sup> edition of *Erskine May*, and early considerations of reform of parliamentary privilege in the 1970s and thereafter following similar studies in the UK Parliament. The patriation of the Constitution and the advent of the *Canadian Charter of Rights and Freedoms* in 1982 heralded a shift in Canadian law to a constitutionally entrenched rights-based legal system. The power of the *Charter* as a document enjoying the same constitutional status as parliamentary privilege has begged the question of how best to reconcile parliamentary rights and immunities with the rights of Canadians.

As noted above, the Supreme Court of Canada, at three occasions, has explored the interplay between the *Charter* and parliamentary privilege, though as of yet there has been no comprehensive review of parliamentary privilege in the era of the *Charter*<sup>67</sup>. The distinct nature of the Canadian constitutional system suggests that a made-in-Canada approach to parliamentary privilege should be developed.

As well, today Canada's Parliament endeavours to be open and accessible to Canadians by broadcasting proceedings, increasingly uploading documents used in committee studies, and engaging in numerous educational programs in concert with schools and segments of the public. It is understood that what happens today in Parliament can have significant implications for Canadians. How should Parliament assert its privileges in this context?

### **A. Privilege Since Confederation<sup>68</sup>**

#### **1. Privilege and the Constitution**

The *Constitution Act, 1867* applied the privileges found in the UK House of Commons to Canada. First, the preamble of the *Constitution Act, 1867* states that Canada has a "Constitution similar in Principle to that of the United Kingdom", in other words a Westminster parliamentary system including the privileges necessary for parliament to function. As well, section 18 of the *Constitution Act, 1867* grants Parliament the authority to enact parliamentary privileges that exceed privileges inherent in the creation of the Senate and House of Commons, provided they do not exceed the privileges enjoyed by the House of Commons of the UK at the time of such enactment:

**18.** The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons

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<sup>67</sup> Though, as noted below, engaging in such a study was contemplated a decade ago during the 37<sup>th</sup> Parliament, though Parliament was dissolved before any such review could take place.

<sup>68</sup> For an overview of privilege in the pre-confederation British North American colonies, see *House of Commons Procedure and Practice (2nd ed.)*, *supra*, at pp. 68-70.

House of Parliament of the United Kingdom of Great Britain and Ireland,  
and by the members thereof.<sup>69</sup>

In accordance with this section, Parliament can adopt legislation claiming new privileges provided that these privileges are also held by the UK House of Commons. Of note, as section 18 of the *Constitution Act, 1982* pertains exclusively to the Senate and the House of Commons, it could be amended via legislation in accordance with section 44 of the *Constitution Act, 1982*.<sup>70</sup>

As well, the main body of privileges of the Canadian Parliament have a legislative source: the *Parliament of Canada Act*. Section 4 of the *Parliament of Canada Act*<sup>71</sup> confirms that the Senate and the House of Commons each enjoy all of the privileges contemplated in section 18 of the *Constitution Act, 1867*:

4. The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise

(a) such and the like privileges, immunities and powers as, at the time of the passing of the *Constitution Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with that Act; and

(b) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

The references found in section 4 of the Act are to inherent and legislated privileges. The inherent privileges are found in section 4(a) and described as those privileges enjoyed by the UK House of Commons or its members in 1867. The legislated privileges are those defined by an Act of Parliament, provided those privileges do not exceed the privileges held by the House of Commons of the UK or its members. The privileges of the UK House of Commons, thus, serve as the benchmark for parliamentary privilege in Canada, whether *inherent* or *legislated*.

#### a. Constitutional Limits on Privilege

The preamble as well as section 18 of the *Constitution Act, 1867* constrain the exercise of the collective privileges of Parliament and the individual privileges of its members in two ways. First, section 18 provides that Parliament cannot give itself greater privileges than those existing at that

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<sup>69</sup> This is a modification from what was originally stated, which was repealed and re-enacted by the *Parliament of Canada Act, 1875*, 38-39 Vict., c. 38 (U.K.). The original section read as follows:

18. The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.

<sup>70</sup> *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Section 44 provides that “Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.”

<sup>71</sup> *Parliament of Canada Act, supra*.



time by the United Kingdom's House of Commons. Second, the adoption of a Westminster parliamentary system (in the preamble) implies that any privileges exercised must be necessary to ensure the functioning of that system of government.

As well, other provisions in the *Constitution Act, 1867* limit the exercise of parliamentary discretion, for example by setting out requirements for quorum (see sections 35 and 48), the use of English and French (section 133), and voting patterns (see sections 25 and 49 which provide that questions arising in the Senate and the House of Commons are to be decided by a majority vote).

Finally, section 1 of Chapter 23 of the Statutes of Canada of 1868,<sup>72</sup> one of several laws dealing with the privileges, powers, independence and management of Parliament passed in that year, expresses the commitment to interpret the Canadian constitution in a holistic manner, whereby parliamentary privilege would not be construed as being at variance with the rest of the constitution, but as an integral part of it, stating that, "...the Senate and the House of Commons... shall, hold, enjoy and exercise such and the like privileges, immunities and powers... [of] the Commons House of Parliament... so far as the same are consistent with and not repugnant to the said [Constitution] Act" [emphasis added].<sup>73</sup>

## 2. Parliamentary Reviews of Rights, Immunities and Privileges

In the House of Commons a committee has only been specifically charged by order of reference to examine the rights, immunities and privileges of the House on three occasions (no such order of reference has ever been issued to a Senate committee):<sup>74</sup>

- In the 30<sup>th</sup> Parliament (1974-1979) a Special Committee on Rights and Immunities of Members was created under the Chairmanship of James Jerome that presented two reports, on one privilege (in the first session, 1976)<sup>75</sup>, and one on the *sub judice* (before the court) convention limiting freedom of speech in Parliament (in the second session, in 1977)<sup>76</sup>. In the first report on privilege the Special Committee stated that the purpose of privilege was "to allow Members of the House of Commons to carry out their duties as representatives of the electorate without undue interference." It echoed a finding from the 1967 UK Select Committee report on privilege, preferring the term "rights and immunities" over "privilege" as the latter term could give risk to misconceptions on the part of the public. The Special Committee also reported on the advisability of precisely defining "Parliamentary Precinct" and "proceedings in Parliament."
- In the Second Session of the 34<sup>th</sup> Parliament Standing Committee on Elections, Privileges, Procedure and Private Members' Business was charged with the examination

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<sup>72</sup> *An Act to Define the privileges, immunities and powers of the Senate and House of Commons...*, S.C. 1868, c. 23.

<sup>73</sup> See Charles Robert, "Parliamentary Privilege in the Canadian Context: An Alternative Perspective, Part I: The Constitution Act, 1867", *The Table*, Vol. 78, 2010, pp. 32-47, at p. 39.

<sup>74</sup> Summarized from *House of Commons Procedure and Practice (2nd ed)*, *supra*, at pp. 75-77.

<sup>75</sup> House of Commons, *Journals*, 1<sup>st</sup> Session, 30<sup>th</sup> Parliament, 12 July 1976 at 1421-1423.

<sup>76</sup> House of Commons, *Journals*, 2<sup>nd</sup> Session, 30<sup>th</sup> Parliament, 29 April 1977 at 720-729.

of the rights, immunities and privileges of the House. While the Committee studied the matter,<sup>77</sup> no report was presented to the House.

- Finally, in December 1989, a special committee was created to review the *Parliament of Canada Act* “regarding the powers, duties and obligations of Members, and the authority, responsibilities and jurisdiction of the Board of Internal Economy”.<sup>78</sup> In its Second Report, the Committee stated that it endorsed the principle that Members of the House of Commons were “not above the law”<sup>79</sup>: “Laws must be applied equally to all. Members are not entitled to special treatment, but they deserve assurance that their rights will not be jeopardized or sacrificed. It must be recognized that Members and their activities will be subject to intense public scrutiny.”<sup>80</sup> In other words, the Committee recognized that parliamentary privilege should not unduly exempt parliamentarians from the application of the laws of the land. Yet the Committee also reaffirmed the importance of ensuring that parliamentarians be free to do their work in Parliament [ability to exercise their privileges] by recommending that the House reaffirm a number of principles which applied to its members, including that “a Member has the constitutional rights and immunities applicable to that office free from interference or intimidation.”<sup>81</sup>

#### a. A Comprehensive of Study of Parliamentary Privilege and the *Charter* that Never Was

Finally, in 2004, during the 37<sup>th</sup> Parliament, the House of Commons Standing Committee on Procedure and House Affairs almost succeeded in recommending that a committee be appointed to undertake a comprehensive review of parliamentary privilege with particular attention paid to the impact of the advent of the *Charter* on the exercise of privilege. However, the 37<sup>th</sup> Parliament was dissolved before the report containing the recommendations could be adopted.<sup>82</sup> The idea for such a review came about after the Committee received an order of reference, arising out of a *prima facie* question of privilege, to consider the question of the immunity of Members of the House from being to attend court during, immediately before, and immediately after a session of Parliament.<sup>83</sup>

In its Eighth Report to the House, which was never adopted due to Parliament’s dissolution, the Committee recommended the following:

The time is perhaps appropriate for the Canadian Parliament to undertake a systematic review of its privileges and those of its members. Not only has such a review not been conducted in many years, but the introduction of the *Canadian Charter of Rights and Freedoms* and

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<sup>77</sup> House of Commons Standing Committee on Elections, Privileges, Procedure and Private Members’ Business, *Minutes of Proceedings and Evidence*, 2<sup>nd</sup> Session, 34<sup>th</sup> Parliament, 30 January 1990, Issue No. 20. This study arose out of discussions among House Leaders following testimony given before a committee relating to police investigations and certain Members.

<sup>78</sup> *House of Commons Procedure and Practice (2nd ed)*, *supra* at p. 76, citing House of Commons, *Journals*, 2<sup>nd</sup> Session, 34<sup>th</sup> Parliament, 14 December 1989, at 1011, *Debates*, at 6939-6940.

<sup>79</sup> *House of Commons Procedure and Practice (2nd ed)*, *supra*, at p. 76.

<sup>80</sup> House of Commons Special Committee on the Review of the Parliament of Canada Act, Second Report, *Minutes of Proceedings and Evidence*, 2<sup>nd</sup> Session, 34<sup>th</sup> Parliament, 16 February 1990, Issue No. 7, p. 5, presented to the House on February 16, 1990 (*Journals*, p. 1233) and concurred in on March 7, 1990 (*Journals*, p. 1301).

<sup>81</sup> *Ibid.*

<sup>82</sup> *House of Commons Procedure and Practice (2nd ed)*, *supra*, at p. 76.

<sup>83</sup> House of Commons, *Journals*, 3<sup>rd</sup> Session, 37<sup>th</sup> Parliament, 6 February 2004, at 25.

parliamentary developments, such as the broadcast of proceedings, have inexorably affected the environment within which we operate.<sup>84</sup>

The need to undertake such a study remains as prescient now as it was in 2004. Indeed, given recent developments in New Zealand (passage of its *Parliamentary Privilege Act 2014* in August 2014) and in the United Kingdom (the July 2013 report of the UK Joint Committee on Parliamentary Privilege), which may be of interest to Canada, now may be an appropriate time to engage in a comprehensive review of parliamentary privilege in Canada.

## **B. The Courts, Parliamentary Privilege and the *Canadian Charter of Rights and Freedoms***

The courts have a legitimate role to play in developing the law of privilege. It is settled law that the Courts are competent (or have jurisdiction) to inquire whether a privilege exists and to determine its scope or extent. If it is so determined, the courts will not inquire into how Parliament chooses to exercise or apply the privilege. In cases of uncertainty, there is broad acceptance that the courts have jurisdiction to determine the precise extent, or scope, of a claimed privilege.<sup>85</sup>

Indeed, section 5 of the *Parliament of Canada Act* states that the privileges, immunities and powers of the Senate and the House of Commons “are part of the general and public law of Canada”, indicating that the courts must judicially take notice of, as well as “interpret and defend these privileges as they would any branch of law.”<sup>86</sup>

The principle that the courts have the authority to determine the scope of a privilege was recently confirmed by the Supreme Court of Canada in the *Vaid*, discussed below.<sup>87</sup> This principle is reflected in the doctrine of necessity, elaborated by the Court in *Vaid*, under which courts preserve their jurisdiction to inquire into the existence and scope of privilege, but once a privilege has been found to exist, and its scope is considered appropriate, it will not question how Parliament exercises or applies a privilege.<sup>88</sup>

The 1999 UK Joint Committee report offers a useful analysis of the respective roles to be played by Parliament and the courts in advancing the law of parliamentary privilege:

There may be good sense sometimes in leaving well alone when problems have not arisen in practice. Seeking to clarify and define boundaries may stir up disputes where currently none exists. But Parliament is not always well advised to adopt a passive stance. There is

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<sup>84</sup> House of Commons Standing Committee on Procedure and House Affairs, *Eighth Report*, 3<sup>rd</sup> Session, 37<sup>th</sup> Parliament, March 2004, at para 11 (see also para 13).

<sup>85</sup> This is a long-standing principle, derived from the case *Stockdale v. Hansard*, *supra*.

<sup>86</sup> *House of Commons Procedure and Practice (2nd ed)*, *supra*, at p. 77.

<sup>87</sup> *Vaid*, *supra*.

<sup>88</sup> A number of scholars have commented that it may be difficult to apply this principle in practice, that the distinction between scope and exercise may often be blurred. Evan Fox-Decent argues that depending upon how broadly or narrowly courts define the scope of a privilege, they may subject a claimed privilege to more intense scrutiny, intruding too deeply into the affairs of Parliament, perhaps even intruding into the exercise of a privilege. In particular, depending upon how a judge frames an issue, a particular exercise of privilege may be reviewed under the guise of scope: Evan Fox-Decent, “Parliamentary Privilege and the Rule of Law,” *Canadian Journal of Administrative Law and Practice*, July 2007 (20:2), at 117.

merit, in the particularly important areas of parliamentary privilege, in making the boundaries reasonably clear before difficulties arise. Nowadays people are increasingly vigorous in their efforts to obtain redress for perceived wrongs. In their court cases they press expansively in areas where the limits of the courts' jurisdiction are not clear. Faced with demarcation problems in this jurisdictional no-man's land, the judges performe must determine the position of the boundary. If Parliament does not act, the courts may find themselves compelled to do so. [emphasis added]<sup>89</sup>

This approach highlights the importance of Parliament itself being proactive in defining what privileges are necessary to ensure that the courts will not define privilege in ways that may undermine the functioning of Parliament. Indeed, lower courts in Canada have taken an inconsistent approach to interpreting parliamentary privilege, deviating from the leading Supreme Court of Canada judgment in *Vaid*.<sup>90</sup>

Taking a proactive approach to defining privileges in a modern context will not only contribute to the development of the law of privilege on contemporary terms that are essential for Parliament and which respect fundamental individual rights, it will also serve to provide the courts with the knowledge that only parliamentarians possess through their experiences working within Parliament.<sup>91</sup>

## 1. “Necessity” as the frame to interpret a privilege

As discussed above, the original purposes of parliamentary privilege were related more to protecting Parliament and parliamentarians from incursions by the reigning monarch or his or her courts. The protections served to insulate members against detention, imprisonment, and disruption of Parliament’s work by the Crown.

Modern interpretations of privilege and necessity have shifted the focus to the modern purposes of privilege. Some have described this new approach as the “purposive connection” or “necessary connection” test.<sup>92</sup> In other words, the valid exercise of a privilege must be necessary for the contemporary conduct of parliamentary functions. Such a connection must be more than reasonably incidental and must relate to the core, or essential, functions of Parliament.

The 1999 UK Joint Committee, expressed necessity in terms of Parliament’s needs in fulfilling its constitutional role. Parliament and its members need certain rights and legal protections in order to carry out their essential public duties of scrutinizing legislation, enacting laws, holding the executive to account, and, in the House of Commons, to grant supply to the government. Parliament was also characterized by the Committee as “the grand inquest of the nation ... where any grievance may be

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<sup>89</sup> 1999 UK Joint Committee, *supra*, at para 26.

<sup>90</sup> See for example Charles Robert, “Falling short: How a decision of the Northwest Territories Court of Appeal allowed a claim of privilege to trump statute law”, *The Table*, Vol. 79, 2011, pp. 19-36; *Northwest Territories (A.G.) v. Fédération Franco-Ténoise*, 2008 NWTCA 06, leave to appeal to SCC refused.

<sup>91</sup> Roy, Marc-André, « Le Parlement, les tribunaux et la Charte canadienne des droits et liberté: vers un modèle de privilège parlementaire adapté au XXIe siècle » *Les Cahiers de Droit*, Vol. 55, No. 2, June 2014, pp. 489-528.

<sup>92</sup> Gareth Griffith, *supra*.

aired, however great or small.”<sup>93</sup> While emphasizing that Parliament should be “vigilant” in protecting the rights and immunities that are necessary to carry out these functions, the Committee also commented that Parliament should be “equally rigorous” in discarding others that are not strictly necessary for the effective functioning of Parliament.

This approach to interpreting privilege has been used by the appellate courts of Canada, the United Kingdom and New Zealand. These courts were greatly influenced by the 1999 UK Joint Committee’s formulation of necessity, that “the privileged areas must be so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament’s sovereignty as a legislative and deliberative assembly.”<sup>94</sup>

The Supreme Court of Canada drew considerable inspiration from the 1999 UK Joint Committee report in developing its own doctrine of necessity. As noted above and further discussed below, in *Vaid*, Binnie J. set out a number of helpful propositions to explain the contents of the doctrine:

- 1) Parliamentary privilege is the sum of privileges and immunities without which parliamentarians could not discharge their functions
- 2) Privilege provides the necessary immunity to enable legislators to do their legislative work.
- 3) The historical foundation of every privilege is necessity.
- 4) Continuing necessity, judged in accordance with a modern Canadian context, is required even for inherent privileges that have strong historical foundations.<sup>95</sup>

Based on these and other propositions drawn from the Court’s review of the case law and various sources of privilege, Binnie J. articulated the test of necessity that needs to be met to sustain a claim of privilege, focusing on the purposive connection that must exist between the claimed privilege and the fulfilment by the member or the assembly of its functions as a legislative and deliberative body:

In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly’s work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.<sup>96</sup>

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<sup>93</sup> 2013 UK Joint Committee, *supra*, at para 11.

<sup>94</sup> 199 UK Joint Committee, *supra*, at para 247.

<sup>95</sup> *Vaid*, *supra*, at para 29.

<sup>96</sup> *Vaid*, *supra*, at para 46.

Indeed, the articulation of the necessity test in *Vaid* is particularly distinct and dynamic, in that it was agreed by the Supreme Court that necessity should be understood in a contemporary context (implying that uncodified privileges could be circumscribed if they no longer correspond to contemporary circumstances). As discussed in a letter written by five Canadian Senators to the New Zealand House's Privileges Committee in 2012, the approach adopted in *Vaid* echoes that of the "living tree" doctrine used in constitutional interpretation, "in keeping with a view that sees parliamentary privilege not as static and immutable, but as an adaptable component of Parliament designed to better ensure its ability to function properly and effectively with minimum infringement of the legitimate rights of others."<sup>97</sup>

More recently, building on Canadian and other Commonwealth case law, the 2013 UK Joint Committee reaffirmed the opinion that "necessity" is the best test to reconcile the competing interests at play in determining the scope, or extent, of a parliamentary privilege.

As well, the "necessity" test may be a more appropriate tool to interpret parliamentary privilege in the 21<sup>st</sup> century than using Article IX, from a different era, as a frame of reference. The "necessity" test forces parliaments to consider privilege in a forward-looking manner. Indeed, when parliaments in Australia and New Zealand codified their contemporary understanding of Article IX in legislation they did so to try to conserve a traditional, broad interpretation of privilege in the face of courts' attempts to limit the scope of privilege.

In Canada and the United Kingdom it has been accepted that the "necessity" test for determining the scope of a parliamentary privilege serves as a strong anchor to root parliamentary privileges in contemporary times. Indeed, examining a privilege through the lens of necessity works well in a rights-based legal system by recognizing that parliamentary privileges must co-exist with the rest of public law.

Yet the utility of the "necessity" test is also limited, quite appropriately, by design. As noted throughout, the test provides a dynamic means to determine the parameters, or scope, of privilege. On the other hand, determining the contents and exercise of privilege remains the bastion of parliament, and parliamentarians. The challenge of how parliamentarians ought to exercise their privileges in a manner that is, in the words of an author, "more in keeping with the ultimate accountability of a democratic legislature"<sup>98</sup> is a primary concern of the Subcommittee on Privilege. Establishing a framework for the exercise of parliamentary privilege that is consistent with public values of accountability, transparency and the rule of law as enshrined in the Canadian Constitution, is, in the Subcommittee's opinion, a responsibility incumbent upon parliamentarians. Such a framework would be an essential complement to the "necessity" test developed by the Supreme Court of Canada and adopted in the United Kingdom.

## **2. The Supreme Court of Canada, Parliamentary Privilege, and the Charter**

Prior to the adoption of the *Canadian Charter of Rights and Freedoms*, "the question as to whether and how the constitutional rights of individuals might affect the exercise of constitutional powers by

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<sup>97</sup> Letter to the Hon. Christopher Finlayson, MP, Chairperson, Privileges Committee, New Zealand, *supra*.

<sup>98</sup> Colette Mireille Langlois, *supra*, at p. 132.

various institutions was not often raised by the courts.<sup>99</sup> Indeed, prior to 1982 there was only one major judgment that challenged Parliament's freedom of speech.<sup>100</sup> Since 1982, though, the Supreme Court of Canada has rendered three significant judgments suggesting how parliamentary privilege and the rights protected the *Charter* can coexist. As noted by Maingot, the adoption of the *Charter* "ushered in a flood of constitutional litigation, gave Canadian courts a greater degree of superintendence over government, and drastically changed the form and forum of politics. It was thus inevitable that the Canadian legislative assemblies and Houses of Parliament would become implicated in the *Charter*."<sup>101</sup>

These three Supreme Court judgments all touch on the doctrine of necessity and what constitutes a "proceeding in parliament." As well, the lower courts have rendered numerous judgments on various elements of specific privileges. The three Supreme Court cases are discussed below.

**a. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*.<sup>102</sup>  
How do parliamentary privilege and the *Charter* relate to each other?**

At issue in *New Brunswick Broadcasting* was whether television camera operators had the right, under the *Canadian Charter of Rights and Freedoms*, to film proceedings of the Nova Scotia legislative assembly, or whether the assembly had the right to exclude them from filming from the public galleries. In this case, the Nova Scotia legislature refused to allow video cameras inside the assembly, prompting the CBC to take the Speaker of the Assembly, Arthur Donahoe, to court.

The CBC claimed that it had a right, pursuant to section 2(b) of the *Charter* guaranteeing freedom of expression, to televise the proceedings of the assembly from the gallery with its own unobtrusive cameras. In a narrow decision the Supreme Court of Canada held that the privilege of the legislative assembly to exclude strangers enjoys constitutional status as part of the Constitution of Canada, and cannot be abrogated by another part of the Constitution, being the *Charter*. The exercise of an inherent privilege, one that was necessary to the effective functioning of a legislative chamber, could not be subjected to Charter scrutiny.

In determining whether the assembly had, as part of its privileges, the ability to exclude the CBC from the legislature, McLachlin J (writing part of the judgment on behalf of herself, L'Heureux-Dubé, Gonthier, Iacobucci JJ., with LaForest in general agreement) noted the following about the "necessity" test:

The test of necessity is not applied as a standard for judging the content of a claimed privilege, but for the purpose of determining the necessary sphere of exclusive or absolute "parliamentary" or "legislative" jurisdiction. If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld,

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<sup>99</sup> *House of Commons Procedure and Practice (2nd ed)*, *supra*, at p. 79.

<sup>100</sup> *Roman Corporation Limited v. Hudson's Bay Oil and Gas Co.*, [1971] O.R. 418; appeals dismissed [1972] 1 O.R. 444 and [1973] S.C.R. 820: This case involved an action brought against the Prime Minister and Minister of Energy, Mines and Resources for announcement made in the House of Commons. The Ontario High Court disavowed any jurisdiction over statements made in Parliament based on Article IX of the UK *Bill of Rights, 1689*.

<sup>101</sup> Maingot, *supra*, at p. 303.

<sup>102</sup> *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319.

courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body. Thus the test of necessity for privilege is a jurisdictional test.<sup>103</sup>

With respect to the protection of inherent privileges, she observed:

In summary, it seems clear that, from an historical perspective, Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional. The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege.<sup>104</sup>

... I conclude that the legislative assembly of Nova Scotia possesses an inherent constitutional right to exclude strangers from its chamber, where it concludes their presence is disruptive of the Assembly's business.

An issue that remained unresolved following the judgment in *New Brunswick Broadcasting* was whether legislated privileges, or privileges enacted pursuant to a grant of power under the Constitution, also had constitutional status. This was settled in *Vaid, infra*.

**b. *Harvey v. New Brunswick (Attorney General)*<sup>105</sup>: Towards reconciliation**

A few years following the judgment in *New Brunswick Broadcasting*, the Court was asked to consider whether New Brunswick's electoral legislation violated the *Charter* rights of a member of the Legislative Assembly of New Brunswick with its requirement that he vacate his seat and be barred from contesting an election for five years following his conviction for an illegal practice (inducing a person who was not of voting age to vote). The majority in *Harvey* proceeded on the assumption that the legislation was subject to the *Charter* as none of the parties ground their arguments in parliamentary privilege (only the intervener Attorney General of Canada raised the issue).<sup>106</sup> The majority held that the legislation violated the claimant's voting rights under section 3 of the *Charter*, broadly defined as the right to meaningful participation in the electoral process, but the limit was held to be reasonable and proportionate in accordance with section 1 of the *Charter*.

Justice McLachlin (as she then was), writing a separate opinion concurring in the result, however, would have decided the case on the basis of *inherent* parliamentary privilege. Indeed, it has been observed that in *Harvey*, the Chief Justice refined her approach to parliamentary privilege when the *Charter* is invoked.<sup>107</sup> Unlike in *New Brunswick Broadcasting*, where the Chief Justice, writing for the majority, held that section 2(b) had no application to privilege in that case, in *Harvey*, the Chief

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<sup>103</sup> *Ibid*

<sup>104</sup> *Ibid*.

<sup>105</sup> *Harvey v. New Brunswick (Attorney General)*, [1996] 2 SCR 876 (*Harvey*).

<sup>106</sup> *Ibid*, at para 20.

<sup>107</sup> Warren J. Newman, "Parliamentary Privilege, the Canadian Constitution and the Courts," *Ottawa Law Review*, Vol. 39, 2007, pp. 573-609, at p. 595.



Justice developed a more nuanced “balancing” approach that attempts to reconcile privilege with *Charter* rights, where they come into apparent conflict:

Because parliamentary privilege enjoys constitutional status it is not “subject to” the *Charter*, as are ordinary laws. Both parliamentary privilege and the *Charter* constitute essential parts of the Constitution of Canada. Neither prevails over the other. While parliamentary privilege and immunity from improper judicial interference in parliamentary processes must be maintained, so must the fundamental democratic guarantees of the *Charter*. Where apparent conflicts between different constitutional principles arise, the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them.

The necessary reconciliation of parliamentary privilege and s. 3 of the *Charter* is achieved by interpreting the democratic guarantees of s. 3 in a purposive way. The purpose of the democratic guarantees in the *Charter* must be taken to be the preservation of democratic values inherent in the existing Canadian Constitution, including the fundamental constitutional right of Parliament and the legislatures to regulate their own proceedings. Express words would be required to overthrow such an important constitutional principle as parliamentary privilege. It follows that s. 3 of the *Charter* must be read as being consistent with parliamentary privilege.<sup>108</sup>

McLachlin J then added that privilege should not be used to avoid the application of the *Charter*:

To prevent abuses cloaked in the guise of privilege from trumping legitimate *Charter* interests, the courts must inquire into the legitimacy of a claim of parliamentary privilege. As this Court made clear in *New Brunswick Broadcasting*, the courts may properly question whether a claimed privilege exists. This screening role means that where it is alleged that a person has been expelled or disqualified on invalid grounds, the courts must determine whether the act falls within the scope of parliamentary privilege.<sup>109</sup>

She then proceeded to provide some guidance on how this process of reconciliation is achieved:

Section 3 of the *Charter* guarantees that candidates will not be denied electoral office by reason of discrimination on the basis of such grounds as race, class or gender. It does not, however, oust the historic privilege of the legislature to deny membership to those who disqualify themselves by crime, corruption or other misconduct. The courts may review an act or ruling of the legislature to determine whether it properly falls within the domain of parliamentary privilege. If it does not, they may proceed with *Charter* review. If it does, they must leave the matter to the legislature. This approach preserves parliamentary privilege and the principle of the separation of powers, while at the same time assuring the protection of the right under s. 3 of the *Charter* not to be excluded from public office on

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<sup>108</sup> *Harvey, supra*, at paras 69, 70.

<sup>109</sup> *Ibid* at para 71.

grounds unrelated to the need of the legislature to maintain order and the integrity of its processes.<sup>110</sup>

These passages from *Harvey* may be helpful to this Committee in developing a principled basis for privilege that incorporates *Charter* rights in its understanding and application of parliamentary privilege: i.e., how privilege may be reconciled with the modern realities in which Parliament conducts its affairs, including respect for human rights as guaranteed by the *Charter* and other instruments.

**c. *Canada (House of Commons) v. Vaid*<sup>111</sup>: applicability of statute law on the House's right to regulate its internal affairs**

*Vaid* involved a claim made by the former chauffeur to the Speaker of the House of Commons who had filed a discrimination and harassment complaint against the Speaker and the House after his position was declared surplus. Both the House and the Speaker asserted parliamentary privilege in relation to “management of employees” to challenge the jurisdiction of the Canadian Human Rights Commission to investigate the chauffeur’s complaints.

In considering the validity of the House’s claim of privilege in relation to “management of employees”, the “Court established criteria to clearly evaluate the validity of a claim of privilege and presented an analysis that framed the use of privilege in a contemporary setting,”<sup>112</sup> namely through the doctrine of necessity. These elements are further discussed below.

Following its analysis the Court held that the privilege asserted by the appellants had not been authoritatively established either in Canada or the United Kingdom, and did not meet the necessity test. The Court’s analysis underscored its understanding that Parliament is not a “statute-free” zone, whereby privilege acts as an exception to the law of the land, but rather that the application of statutes such as the quasi-constitutional *Canadian Human Rights Act* will be evaluated vis-à-vis the necessity of a particular privilege. While this case did not specifically address the application of the *Canadian Charter of Rights and Freedoms*, it reiterated the finding in *New Brunswick Broadcasting* that “parliamentary privilege enjoys the same constitutional weight and status as the *Charter* itself”<sup>113</sup> (emphasis in original).

Ultimately, the Supreme Court of Canada determined that the Canadian Human Rights Commission did not have jurisdiction to hear the chauffeur’s complaints as Parliament had determined that workplace grievances of parliamentary employees are to be dealt with under the *Parliamentary Employment and Staff Relations Act*, which covers complaints about violations of statutory standards found under the *Canadian Human Rights Act* and has parallel enforcement machinery to that provided under that Act.

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<sup>110</sup> *Ibid* at para. 74.

<sup>111</sup> *Vaid, supra*.

<sup>112</sup> Senator Serge Joyal, PC, “The Vaid Case and the Protection of Parliamentary Employees Against Human Rights Discrimination”, *Canadian Parliamentary Review*, Vol. 28, No. 4, 2005.

<sup>113</sup> *Vaid, supra*, at para 34.

(i) **Legislated vs. inherent privileges**

One issue that remained unresolved following the judgment in *New Brunswick Broadcasting* was whether *legislated* privileges, or privileges enacted pursuant to a grant of power under the Constitution, also had constitutional status. This was settled by the unanimous judgment of the Court in *Vaid*, where Binnie J. held that it is the nature of the function, not the source of the legal rule that determines its constitutional nature:

The immunity from external review flowing from the doctrine of privilege is conferred by the nature of the function (the Westminster model of parliamentary democracy), not the source of the legal rule (i.e., inherent privilege versus legislated privilege). The doctrine of privilege attaching to a constitution “similar in Principle to that of the United Kingdom” under the preamble to the *Constitution Act, 1867* is not displaced by the wording of s. 32(1)<sup>114</sup> of the *Charter*. As was pointed out in *New Brunswick Broadcasting*, parliamentary privilege enjoys the same constitutional weight and status as the *Charter* itself.<sup>115</sup>

This conclusion has great significance, but some scholars have expressed concern that the Court has added an unwritten doctrine to the definition of the Constitution of Canada, which is defined in section 52(2) of the *Constitution Act, 1982*.<sup>116</sup>

(ii) **Steps to follow where a privilege claimed has not been authoritatively established**

As noted by Binnie J., “the first step a Canadian court is required to take in determining whether or not a privilege exists within the meaning of the *Parliament of Canada Act* is to ascertain whether the existence and scope of the claimed privilege have been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster.”<sup>117</sup> As well, due diligence must be exercised when examining a claim of parliamentary privilege that “would immunize the exercise by either House of Parliament of a power that affects the rights of non-Parliamentarians.”<sup>118</sup>

Such a claim to a privilege (whether inherent or legislated) that has not been authoritatively established may then be tested against the doctrine of necessity (though the courts will give deference to Parliament’s understanding of how much autonomy it needs to fulfil its functions):

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<sup>114</sup> Section 32 of the *Charter* states: 32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

<sup>115</sup> *Vaid, supra*, at para. 34.

<sup>116</sup> Professor Peter Hogg writes that courts should be cautious about adding new elements to the Constitution. He observes as well that up to now only written instruments are included in the definition of the Constitution of Canada (30 instruments, including the *Parliament of Canada Act*, listed in the schedule to the Constitution Act, 1982, are defined as forming part of the Constitution of Canada): Peter J. Hogg, Hogg, Peter J., *Constitutional Law of Canada*, 5<sup>th</sup> ed., Carswell, Toronto, ON, 2007, at pp. 1-9 to 1-10 (Hogg).

<sup>117</sup> *Vaid, supra*, at para 39.

<sup>118</sup> *Ibid*, citing *Stockdale v Hansard, supra*, at p 1192.

Thus, when a claim to privilege comes before a Canadian court seeking to immunize Parliamentarians from the ordinary legal consequences of the exercise of powers in relation to non-Parliamentarians, and the validity and scope of the privilege in relation to the U.K. House of Commons and its members have not been authoritatively established, our courts will be required (as the British courts are required in equivalent circumstances) to test the claim against the doctrine of necessity, which is the foundation of all parliamentary privilege. Of course in relation to these matters, the courts will clearly give considerable deference to our own Parliament's view of the scope of autonomy it considers necessary to fulfill its functions.<sup>119</sup>

As noted in earlier cases, the courts will examine the existence or scope of a claimed privilege, and not "the propriety of its exercise in any particular case"<sup>120</sup> (emphasis in original).

(iii) **The doctrine of necessity**

In *Vaid*, Justice Binnie emphasized the long-standing principle that privilege applies to words and acts that are necessary for the House and for its members to discharge their parliamentary functions:

To the question "necessary in relation to what?," therefore, the answer is necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding government to account for the conduct of the country's business.<sup>121</sup>

In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.<sup>122</sup>

It would appear, however, that Canadian courts will not likely accept without question the existence or scope of a claimed privilege as beyond review. In *Vaid*, the Court noted that historical evidence of the existence of a privilege should be treated as evidence that the privilege has been historically-established. Historical evidence is highly relevant, but it will not be treated as conclusive. It must be established that the privilege has continuing relevance.<sup>123</sup> Legal commentators support this view. Evan Fox-Decent notes that, taken together, *Vaid* and *New Brunswick Broadcasting* establish that

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<sup>119</sup> *Vaid, supra*, at para 40.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid* at para. 41.

<sup>122</sup> *Vaid, supra*, at para. 46.

<sup>123</sup> *Ibid* at para. 29, point 6.

reference to past practice can strengthen a claim to privilege, but the claim must also pass the test of necessity.<sup>124</sup>

(iv) **Parliament's responsibility with respect to matters covered by privilege**

As matters that are determined to be within the scope of parliamentary privilege (that are necessarily connected with the work of Parliament) are within the exclusive competence of Parliament, Parliament must be cognizant of the significant legal consequences that its actions may have on both members and non-members:

It should be emphasized that a finding that a particular area of parliamentary activity is covered by privilege has very significant legal consequences for non-members who claim to be injured by parliamentary conduct, including those whose reputations may suffer because of references to them in parliamentary debate, for whom the ordinary law will provide no remedy. In *New Brunswick Broadcasting* itself, it was held that the press freedom guaranteed by s. 2 (b) of the *Charter* did not prevail over parliamentary privilege, which was held to be as much part of our fundamental constitutional arrangements as the *Charter* itself. One part of the Constitution cannot abrogate another part of the Constitution (*Reference reBill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *New Brunswick Broadcasting*, at pp. 373 and 390). ***In matters of privilege, it would lie within the exclusive competence of the legislative assembly itself to consider compliance with human rights and civil liberties.*** The House, “with one voice, accuses, condemns and executes”: *Stockdale v. Hansard*, at p. 1171.<sup>125</sup> [emphasis added]

As suggested in *Vaid*, for those matters that fall under privilege Parliament should take care in ensuring that it exercises its privileges in a way that respects the contemporary values that Parliament seeks to uphold in Canadian society, for example with respect to human rights and civil liberties. Indeed, parliamentarians are masters within the parliamentary domain, and it is incumbent upon parliamentarians to determine how best to exercise parliamentary privilege in a way that serves the values set out in the Canadian constitution.

**C. Privilege in the provinces: Varying approaches to codification**

Almost all of the Canadian provinces have attempted to codify, at least partially, their understandings of their privileges via statute law, generally in the law respecting the provincial legislative assembly.<sup>126</sup> For example, Quebec, Canada's civil law province rooted in a tradition of codification embodied in the civil code, has codified privilege via Division 1 of Chapter 3 of *An Act Respecting the National Assembly*.<sup>127</sup> Titled “Rights, Immunities, and Privileges”, this Division sets out both the

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<sup>124</sup> Evan Fox-Decent, “Parliamentary Privilege, Rule of Law and the *Vaid* Case” *Canadian Parliamentary Review*, Vol. 30, No.3, Autumn 2007, pp. 27-35.

<sup>125</sup> *Vaid, supra*, at para 30.

<sup>126</sup> For a history of parliamentary privilege in the Canadian provinces see Charles Robert and David Taylor, “Then and Now: Necessity, the Charter and Parliamentary Privilege in the Provincial Legislative Assemblies of Canada”, *The Table*, Volume 80, 2012, pp. 17-40.

<sup>127</sup> Quebec, *An Act Respecting the National Assembly*, R.S.Q. c. A-23.1.

collective privileges of the National Assembly as well as the individual privileges of its Members. It focuses on: the ability of the National Assembly to protect its proceedings against interference (at section 42); the independence of Members in carrying out their duties (section 43); Members' freedom of speech (section 44); and immunities from civil arrest and being subpoenaed in civil actions while the National Assembly is sitting (sections 45 and 46). It also provides examples of actions that constitute breaches of the privileges of the Assembly (55), though does not specify the penalties for the breaches.

Ontario and the rest of the provinces, more rooted in the common law tradition which has generally eschewed codification, has nonetheless codified some elements of parliamentary privilege in its *Legislative Assembly Act*.<sup>128</sup> In particular, the Act sets out the legislature's understanding of the privilege of freedom of speech (section 37), freedom from arrest in civil actions (section 38), exemption from serving as jurors (section 40), and the jurisdiction of the Assembly to act as a court of record to punish various breaches of privilege and contempts (as set out in section 46). It also contains a saving provision (not found in the Quebec legislation) specifying that "except so far as is provided by section 41, nothing in this Act shall be construed to deprive the Assembly or a committee or member thereof of any right, immunity, privilege or power that the Assembly, committee or member might otherwise have been entitled to exercise or enjoy" (section 53).

Alberta takes a slightly different approach from Ontario in the way it specifies privileges of the legislative assembly and its members in Division 2 ("Assembly's Privileges, Immunities and Powers") of its *Legislative Assembly Act*.<sup>129</sup> The Act specifies the Assembly's exclusive jurisdiction in respect of the regulation of its proceedings, the lawfulness of its proceedings, and the conduct of its business and affairs (section 8). At section 9 the Act emphasizes that in addition to the privileges, immunities and powers set out therein, the Assembly and its Members have the same privileges and immunities as those held by the House of Commons of the UK as held at the passing of the *Constitution Act, 1867*. As in Quebec and Ontario, Alberta's Act provides the Assembly may inquire into, adjudicate and punish contempts of the Assembly, such as those listed in section 10. Section 11 sets out some of the liability for a breach of privilege or contempt found in section 10, consisting of imprisonment during the session of the Assembly then being held, a fine determined by order of the Assembly, or suspension (in the case of a Member) of a Member's right to sit and vote in the Assembly for a certain period of time. Accordingly, the Assembly acts as a court for the purposes of sections 10 and 11 (section 12). Section 14 provides that the Assembly as well as its committees can compel the attendance of witnesses. Finally, section 13 addresses the privileges of individual Members of the Assembly, providing for freedom of speech and immunity from civil arrest.

British Columbia addresses the privileges of its legislative assembly in a stand-alone *Legislative Assembly Privileges Act*.<sup>130</sup> It defines its privileges as follows:

The Legislative Assembly and its committees and members have the privileges, immunities and powers that were held and exercised by the Commons House of Parliament of the United Kingdom and its committees and members on February 14, 1871, so far as not

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<sup>128</sup> Ontario, *Legislative Assembly Act*, R.S.O. 1990, c. L.10.

<sup>129</sup> Alberta, *Legislative Assembly Act*, R.S.A. c. L-9.

<sup>130</sup> British Columbia, *Legislative Assembly Privilege Act*, R.S.B.C. 1996 c.. 259.

inconsistent with the *Constitution Act* and whether held or exercised by custom, statute or otherwise. (section 1)

The Act then sets out the Assembly's powers to compel witnesses (section 2) and issue a Speaker's warrant (section 3) when necessary. Sections 5 and 6 of the Act provide the powers of the Assembly to inquire into and to punish breaches of privilege and contempts (as enumerated). Per section 7, someone who violates section 5 may be liable to imprisonment for a period during the session of the Legislative Assembly. According to section 9 of the Act, the decision of the Assembly on a proceeding under the Act is final and conclusive.

Back to the Prairies, Manitoba's *Legislative Assembly Act*<sup>131</sup> sets out the powers and privileges of the Assembly to summon witnesses and take evidence in its sections 34-39. The jurisdiction of the Assembly to inquire into and punish breach of privilege and contempts is established in section 41, while section 41 provides that someone who violates section 40 may be liable to imprisonment for a period during the legislative session. The Act also provides that Members of the Assembly are protected by the privilege of freedom of speech (section 45(1)), are immune from civil arrest during a session of the Legislature (section 45(2)), and are exempt from jury service (section 46). The Manitoba legislation also contains a saving clause akin to the one found in Ontario's legislation, which states that "Except so far as is provided in this Act, nothing herein deprives the Legislative Assembly, or any committee or member thereof, of any rights, immunities, privileges, or powers, that the assembly, committee, or member might, but for this Act, have been entitled to exercise or enjoy" (at section 52).

Division 4 of Saskatchewan's *Legislative Assembly and Executive Council Act, 2007*,<sup>132</sup> titled "Jurisdiction, Rights, Privileges, Immunities and Powers" provides at the outset that "In addition to the rights, privileges, immunities and powers conferred by this Act, the Legislative Assembly, its members and its committees have the same rights, privileges, immunities and powers as those held by the House of Commons of Canada, the members of that House and the committees of that House" (section 23). It then sets out the jurisdiction of the Assembly to inquire into and punish breaches of privileges and contempts (section 24), and provides that those found to have committed a breach or contempt could be liable for imprisonment, a fine, and in the case of a Member, suspension of the member's right to sit vote in the Legislative Assembly (section 25). The Legislative Assembly may compel the attendance of witnesses (section 35). Individual members are protected by the privilege of freedom of speech (section 28(1) and (2)), and are immune from civil arrest or detention during the period when the Legislative Assembly is sitting (section 28(3)). Service of civil proceedings are not to be made in the legislature or a room or place where a committee of the Legislative Assembly is meeting (section 29). There is also a provision providing for the exemption from jury service for members and various staff of the Legislative Assembly (section 30).

In the Maritime provinces, New Brunswick's *Legislative Assembly Act*<sup>133</sup> contains one clause in its first section pertaining to parliamentary privilege, stating that:

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<sup>131</sup> Manitoba, *The Legislative Assembly Act*, C.C.S.M. c. L110.

<sup>132</sup> Saskatchewan, *The Legislative Assembly and Executive Council Act, 2007*, S.Sask. 2007, c. L-11.3.

<sup>133</sup> New Brunswick, *Legislative Assembly Act*, R.S.N.B. 1973, c. L-3.

In all matters and cases not specially provided for by any Statute of the Province, the Legislative Assembly of New Brunswick, and the committees and members thereof respectively, shall hold, enjoy and exercise such and the like privileges, immunities and powers, as are held, enjoyed and exercised by the House of Commons of Canada and by the respective committees and members thereof; and such privileges, immunities and powers of the Legislative Assembly shall be deemed to be and are part of the general and public law of New Brunswick, and it shall not be necessary to plead the same, but the same shall in all courts of justice in this Province, and by and before all justices and others, be taken notice of judicially.

In distinction, Part IV of Nova Scotia's *An Act Respecting the Constitution, Powers and Privileges of the House of Assembly*<sup>134</sup> is more akin to legislation found in the other provinces, first setting out the privileges, immunities and powers of the House of Assembly in general fashion (section 26). The House also has the power to compel attendance and the production of documents (section 30), and provide for rules to govern the House (section 32). As in other provincial acts, the Nova Scotia legislation specifies that the House can inquire into and to punish breaches of privilege and contempts (sections 37 and 38). The powers of committees of the House are set out in sections 33 through 36. With respect to individual members, they enjoy the privileges of freedom of speech (section 27), immunity from civil "arrest, detention, or molestation" during the fifteen days preceding or following a legislative session (section 28), and exemption from jury duty (section 29).

Prince Edward Island's *Legislative Assembly Act*<sup>135</sup> contains a number of sections pertaining to the privileges of the Legislative Assembly, including the following general provision (at section 27):

The Legislative Assembly and the committees and members thereof hold and enjoy such and the like privileges, immunities and powers as, and the privileges, immunities and powers of the Legislative Assembly and of the committees and members thereof, are hereby defined to be the same as for the time being are held, enjoyed and exercised by the House of Commons of Canada and by the respective committees and members thereof.

It also includes clauses to compel the attendance of witnesses (section 28) and administer oaths (sections 35-37), and to specify that the Assembly can inquire into and to punish breaches of privilege and contempts (sections 31 and 32). The Act does not enumerate the privileges of individual members of the Assembly.

Finally, Newfoundland and Labrador's *House of Assembly Act*<sup>136</sup> contains sections specifying that the House has the power to establish its internal rules (section 6), can compel the attendance of witnesses (section 11), and can inquire into and to punish breaches of privilege and contempts (section 12). Section 15 provides that members of the House enjoy the immunity afforded by the

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<sup>134</sup> Nova Scotia, *An Act Respecting the Constitution, Powers and Privileges of the House of Assembly*, R.S.N.S. 1989 (1992 Suppl.) c. 1.

<sup>135</sup> Prince Edward Island, *Legislative Assembly Act*, c. L-7.

<sup>136</sup> Newfoundland and Labrador, *House of Assembly Act*, R.S.N.L. c. H-10.



privilege of freedom of speech. Finally, section 19 contains a general statement on the privileges enjoyed by the House of Assembly:

19. The House of Assembly and the members of the House of Assembly shall hold, enjoy and exercise those and similar privileges, immunities and powers that are now held, enjoyed and exercised by the House of Commons of the Parliament of Canada and by the members of that House of Commons.

While much of the original impetus for the provinces to codify their privileges was in order to establish the “court of record” status of a provincial legislature to ensure that it would have power to address contempts, the approaches taken by the provinces have been quite varied. There can be advantages and disadvantages to attempting to codify privilege. While codification can provide some clarity around how the privileges will be exercised, in order to remain relevant the codified versions of the privileges must be kept up to date to reflect their continuing evolution. On the other hand, by avoiding the expression of one’s understanding of the nature and extent of parliamentary privilege, a legislature risks the possibility of confusion as courts, legislatures, and individuals may interpret the privileges in different ways.

#### **D. Observations of the Subcommittee on Parliamentary Privilege in Canada**

Developments in the theory and practice of privilege are evident across the Commonwealth. The United Kingdom has written several major reports and Australia and New Zealand have codified privilege. These actions demonstrate the recognition that privilege needs to be adapted to the current environment and modern expectations to remain effective and relevant. Canada is faced with the same challenges and conditions, but to date, steps to modernize privilege has been led by the courts, not Parliament.

The prominent role being played by the courts is in large measure due to the distinct nature of our rights-based legal system. Canada is unique in the Commonwealth in having a constitutionally entrenched *Charter* of rights and freedoms. When faced with challenges to privilege brought forward in litigation, Canada’s courts have been obliged to respond to resolve apparent conflicts between privilege and individuals’ other constitutional (including *Charter*) rights.

Until now, no body of Parliament anywhere in the country has undertaken an in-depth study of privilege and how it should be adapted to suit contemporary circumstances that includes the *Charter*. However, the need to undertake this study is increasingly clear. Indeed, it can be argued that the existence of the *Charter* effectively imposes the obligation upon Parliament to determine how it should exercise its privileges in a manner consistent with the values enshrined within it. It is a challenge that the Rules Committee of the Senate has decided to embrace.

Using the test set out in the Supreme Court of Canada’s decision in *Vaid* as a starting point, the next part of this discussion paper provides an overview of the elements of parliamentary privilege as well as the Subcommittee’s analysis of how each element may be adapted to contemporary norms. While *Vaid* set out the test to determine the scope or parameters of a privilege, the Subcommittee builds on the values expressed in *Vaid* and founded in the Canadian Constitution to begin to elaborate a framework for the exercise of parliamentary privilege. In the Subcommittee’s opinion it is

incumbent upon Parliament and its members to exercise their privileges in a manner that is accountable, responsible, and transparent.

### **PART III: FRAMEWORK TO ADAPT ELEMENTS OF PARLIAMENTARY PRIVILEGE IN CANADA TO CONTEMPORARY NORMS**

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It is difficult to compile a comprehensive list of privileges exercised by parliamentarians in Canada as different sources group and refer to them differently. Still, it may be useful to consider the suite of parliamentary privileges in two categories, one being the rights and immunities exercised by individual parliamentarians, and the other being the corporate rights, privileges and powers exercised by the Senate and the House of Commons. Generally speaking, an individual parliamentarian's rights are subject to those of the Senate or House, respectively, in order to protect Parliament against any abuses by individual members.

Freedom of speech has been recognized as the most important or essential of the various privileges, and actually accrues to both individual parliamentarians as well as to Parliament itself. It is addressed on its own.

The primary corporate privileges of each House of Parliament are the rights of the Senate and the House to regulate their own internal affairs and the power to discipline. The right to regulate one's own affairs could include the right to provide for one's proper constitution, to compel the attendance of members, to judge the lawfulness of its own proceedings (such as the number of readings of a bill, participation in committee meetings),<sup>137</sup> and to institute inquiries and call for witnesses and papers. As well, although generally considered as an aspect of exclusive cognizance, the disciplinary powers of Parliament are often given separate treatment.

Other privileges that have been asserted by individual parliamentarians include the privilege of freedom from arrest in civil actions and the related privileges of not being required to attend court as a witness (immunity of subpoena during parliamentary sessions) and being exempted from jury service.

#### **A. From the Necessity Test to an Accountability Framework: A Canadian Approach to Renew Parliamentary Privilege**

The Subcommittee on Privilege agrees that the "necessity test" articulated in the Supreme Court of Canada's decision in *Vaid* is a useful starting point to interpret parliamentary privilege for the 21<sup>st</sup> century. Examining the scope of a privilege on the basis of its ongoing necessity serves to fix it in a contemporary setting. The value of this approach is to test how privilege should be adapted to meet two goals: to sustain the protection of Parliament in the performance of its core functions and, at the same time, to limit the infringement of any constitutional rights.

Yet using the "necessity test" to determine the scope of a privilege is only the first step. Arguably the greater challenge facing parliamentarians today is determining how privileges should be exercised. The Subcommittee posits that the exercise of parliamentary privilege should, in the words of one author, "be informed not only by history, but by a vision of the relationship between the legislative branch and its constituents that is in keeping with the democratic values of today and that is

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<sup>137</sup> Note that a Federal Court challenge is currently underway seeking judicial review of a decision made by the House of Commons' Board of Internal Economy (BOIE). A preliminary question to be decided in the case will be whether the decision of the BOIE falls within parliamentary privilege and should not be subject to court review: *Alexandre Boulerice et al v AGC et al*, Federal Court file numbers T-1539-14 and T-1526-14.

responsive to public expectations for accountability, transparency, natural justice and respect for human rights.”<sup>138</sup>

This approach balances the necessity test which can define the scope of a privilege and the obligation to be accountable in the exercise of a privilege in way which respects the values and principles set out in the *Charter* and consistent with our rights-based legal system. The Subcommittee proposes using the following methodology to evaluate the various collective and individual privileges exercised by parliamentarians:

1. Is the privilege necessary to protect parliamentarians in the discharge of their legislative and deliberative functions, and Parliament’s work in holding government to account for the conduct of the country’s business (*Vaid* para 41)?
2. Does the contemporary context provide reasonable limits on the scope and exercise of the privilege?
3. How can this privilege be exercised to respect the values and principles expressed in the *Canadian Charter of Rights and Freedoms*?
4. How can the scope and exercise of this privilege be aligned with the standards of transparency and accountability essential to Parliament’s public reputation?

## **B. Freedom of Speech**

Freedom of speech in parliamentary proceedings is the most important right accorded to parliamentarians, and, by extension, to Parliament itself. The privilege of freedom of speech, dating to the 16<sup>th</sup> century,<sup>139</sup> was confirmed in statute in Article IX of the UK *Bill of Rights 1689*, which states: “That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.” While originally used to protect Parliament and parliamentarians from the Crown and its courts, the modern interpretation of Article IX is now broader. Today it is used to protect members of both Houses from any civil or criminal liability in any court or tribunal for anything said in the course of proceedings in Parliament. The breadth of the immunity afforded by the privilege of freedom of speech suggests a concomitant responsibility to use such a privilege responsibly.

The legal immunity granted by Article IX is absolute. It protects parliamentarians from defamation actions for anything said in the course of proceedings in Parliament. Even statements made maliciously and with knowledge that they are false are protected from outside review. The immunity also extends to non-parliamentarians, witnesses before committees in particular, who participate in proceedings in Parliament.

*Odgers’ Australian Senate Practice* posits that there are two aspects to the immunity afforded by the privilege of freedom of speech:

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<sup>138</sup> Colette Mireille Langlois, *supra*, at pp. 132-133.

<sup>139</sup> See Lois G. Schworer, *The Declaration of Rights, 1689*, Johns Hopkins University Press, London, UK, 1981.

First, there is the immunity from civil or criminal action and examination in legal proceedings of members of the House of witnesses and others taking part in proceedings in Parliament... Secondly, there is the immunity of parliamentary proceedings as such from impeachment or question in the courts.<sup>140</sup>

The second aspect to the immunity afforded by freedom of speech is, as further noted by Odgers', "a safeguard of the separation of powers: it prevents the other two branches of government, the executive and the judiciary, calling into question or inquiring into the proceedings of the legislature."<sup>141</sup>

This understanding of freedom of speech was adopted in Canada when the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the Gomery inquiry) determined that allowing transcripts from a committee to be used in a public inquiry to question witnesses could result in the actual proceedings in the committee "being questioned or impeached,"<sup>142</sup> a finding that was upheld by the Federal Court.<sup>143</sup>

The courts have also confirmed that freedom of speech is also a collective privilege of Parliament, in that motions carried by the Senate or House are expressed collectively by their members and cannot then be challenged in a court of law.<sup>144</sup>

It is important to note that one implied exception to the protection afforded by freedom of speech is that of perjury. As noted in a letter sent by five Senators to New Zealand's Privileges Committee in the context of their 2012 review of parliamentary privilege, in Canadian law "the charge of perjury against witnesses dates from 1875, four years after its enactment in the UK and, for both, perjury constitutes an implied amendment to the text and meaning of Article 9 of the *Bill of Rights*. A perjury charge overrides freedom of speech and allows for the proceedings in Parliament to be questioned and impeached in a court of law outside Parliament."<sup>145</sup>

## **1. Should the scope of freedom of speech be modified?**

In recent times, questions have arisen as to whether the scope of the immunity afforded under the privilege of freedom of speech should be narrowed, particularly where third-parties are concerned.

### **a. Developments abroad**

The 2013 New Zealand Supreme Court judgment in *Gow v. Leigh*, discussed above, illustrates the shift in thinking about the scope of freedom of speech. Again, in *Gow v. Leigh*, the Supreme Court applied a necessity test to uphold the decisions of the lower courts finding that a public servant

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<sup>140</sup> Odgers, , *supra*, at p. 43.

<sup>141</sup> *Ibid* at p. 44.

<sup>142</sup> *House of Commons Procedure and Practice (2nd ed)*, *supra*, at p. 90, referring to the Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible?: Fact Finding Report*, Vol. 1, Public Works and Government Services Canada, Ottawa, ON, November 2005 at pp. 622-628.

<sup>143</sup> *Gagliano v. Canada (Attorney General)*, 2005 FC 576; appeal dismissed 2006 FCA 86.

<sup>144</sup> *Michaud c. Bissonnette*, 2006 QCCA 775 at paras 35 and 36.

<sup>145</sup> Letter to the Hon. Christopher Finlayson, MP, Chairperson, Privileges Committee, New Zealand, *supra*.

assisting a Minister to answer questions in Parliament is not protected by absolute privilege against claims for defamation arising from what was said to the Minister.<sup>146</sup> Rather, the Supreme Court held that the protection afforded by qualified privilege (a concept from defamation law) would be sufficient to safeguard the activities of the public servant in preparing written and oral information to assist the Minister in carrying out his duties. Qualified privilege generally protects communications made pursuant to a duty (such as a duty to provide advice on a matter) unless it can be proven that the communication was made with malice.<sup>147</sup> The Court's finding arguably reflected an attempt to apply a modern interpretation of privilege rooted in the doctrine of necessity to reconcile the claimed privilege with the rights of the individual who had allegedly been defamed. The legislature's response to *Gow v. Leigh* through the recent passage of the *Parliamentary Privilege Act 2014*, though, was to re-assert the more expansive position of the legislature on privileged communications between a minister and departmental officials.

Concerns about the need for such a broad privilege of free speech have also been expressed in the European Court of Human Rights, where a strong dissent was registered by one judge against the unfairness and lack of protection for a constituent who was subjected to harsh, and potentially defamatory, comments by a Member of Parliament in the House.<sup>148</sup>

Various proposals for reform to the privilege have been made in recent years. The 1999 UK Joint Committee considered a number of modest modifications to the privilege to provide some protection to individuals (parliamentarians and third parties) affected by harmful statements that are subject to privilege. The Committee recommended the enactment of legislation to enable both Houses to waive parliamentary privilege so long as such waiver would not expose a member or other person making a statement (or doing an act) to civil or criminal liability. This would enable proceedings in Parliament to be examined by a court, but only where there would be no risk of liability for a parliamentarian or other person. It would enable the use of otherwise privileged statements to be used for defensive purposes.

The Committee also considered a limited right of reply modelled on Australia's process to enable individuals who feel they have been unfairly criticised or their reputations harmed by statements made by a parliamentarian to respond to those statements, though it ultimately rejected the idea.<sup>149</sup>

More significant reforms have been suggested where criminal conduct by parliamentarians is concerned. The UK Government in its 2012 Green Paper proposed important exemptions to free speech in Parliament in the area of criminal prosecutions. It suggested that the immunity granted by Article IX should be "disapplied" in the following contexts for the purpose of using otherwise privileged communications as evidence:

- Hate speech;
- Threatening or abusive behaviour;

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<sup>146</sup> *Gow v. Leigh, supra*, at para. 1.

<sup>147</sup> A leading Canadian case on libel, slander and defamation that discusses the defence of qualified privilege is *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CanLII 59 (SCC).

<sup>148</sup> *A. v. The United Kingdom*, [2002] ECHR 35373/97 (European Court of Human Rights).

<sup>149</sup> 1999 UK Joint Committee, *supra*, at paras 217-223.

- Encouragement of terrorism;
- Criminal contempt of court;
- Breach of Official Secrets Act; and
- Misconduct in public office.<sup>150</sup>

The 2012 UK Green Paper noted that this would not represent a significant change as crimes can rarely be committed “in” or as part of proceedings. The government identified the following examples of crimes where parliamentary proceedings could contain relevant evidence:

- Bribery and corruption;
- Making false or misleading statements inducing persons to make investments;
- Conspiracy to defraud; and
- Blackmail.<sup>151</sup>

In these contexts and for these specific crimes, it may be necessary for a prosecution to question what was said in Parliament and to rely on statements made in parliament as evidence, rather than simply referring to the fact of the statement.<sup>152</sup>

## **b. Recent Canadian developments**

Recent Canadian jurisprudence suggests that there is ongoing confusion with respect to how speech uttered in Parliament can be used outside of parliament, and whether parliamentary speech should be afforded absolute immunity or rather something more qualified. This jurisprudential uncertainty in turn can have an adverse impact on Parliament itself as expectations on those appearing before Parliament are unclear, and the powers of Parliament and the courts to address statements made in Parliament are not well understood.<sup>153</sup> As well, the constitutional nature of the *Charter* makes it more

<sup>150</sup> UK Green Paper, *supra*, at p. 27.

<sup>151</sup> *Ibid.*, at p. 28.

<sup>152</sup> As using parliamentary privilege to protect malicious statements effectively undermines Parliament itself.

<sup>153</sup> For example, in the *Second Report of the Independent Advisor in to the Allegations Respecting Financial Dealings Between Mr. Karlheinz Schreiber and the Right Honourable Brian Mulroney*, Privy Council Office, PWGSC, Ottawa, ON 2008, Independent Advisor David Johnston expressed the following regarding the privilege of freedom of speech: *In my first report, I suggested that one of the options that the Government might consider was an inquiry in which the Commissioner is instructed to consider the testimony already given before the Ethics Committee, working largely from that testimony but supplementing it as he or she considered necessary and appropriate. I understand that this suggestion prompted an expression of concern from Parliamentary Counsel that proceeding in this manner might infringe parliamentary privilege. I will leave it to others to evaluate and address this concern as might be required in the course of a public inquiry. However, I do not understand that the doctrine of parliamentary privilege could operate to prevent me from taking into account information that emerged from evidence before the Ethics Committee in making recommendations concerning the appropriate scope of an inquiry. Nor do I understand that parliamentary privilege was raised as a barrier to my taking into account that information as part of the general body of publicly available information in executing my mandate. As set out above, my mandate specifically required that I review information considered by the House of Commons Standing Committee in formulating my recommendations. I have done what I was mandated to do. [emphasis added].* The Gomery Inquiry also encountered questions around the use of statements made in Parliament, resulting in court actions: *Gagliano v. Canada (Attorney General)* (F.C.), *supra*.

difficult for Parliament to legislate after the fact over what it may consider to be unsatisfactory jurisprudence interpreting the scope of a privilege.

Most recently, in a decision released in June 2014<sup>154</sup>, the Ontario Superior Court upheld the absolute immunity afforded by the privilege of freedom of speech in the context of ongoing litigation brought pursuant to the provincial *Tobacco Damages and Health Care Costs Recovery Act*.<sup>155</sup> The Ontario Crown is claiming \$50 billion for the cost of health care benefits resulting from tobacco-related disease or the risk of such disease that have been or will be paid by the Crown for insured persons. The Crown alleges that the defendant tobacco companies have continually misrepresented the risks of smoking, including in presentations made to the House of Commons Standing Committee on Health, Welfare and Social Affairs in 1969, to federal legislative committees in 1987 and 1988, and to the House of Commons Standing Committee on Health in December 1996. The Crown further alleges that the misrepresentations made in parliamentary committees was one of the means by which the defendants furthered their conspiracy.

In his analysis Conway J. reviewed the application of parliamentary privilege in Canada. In deciding to strike references to the parliamentary testimony of the defendants, he held that the defendants' testimony was protected by the privilege of freedom of speech, and while the parties incorrectly<sup>156</sup> stated that such privilege can be waived, "the privilege belongs to Parliament and therefore it is up to Parliament- not the person who made the statement – to decide whether privilege is to be waived in a particular case."<sup>157</sup> Conway J. made the following observations about the privilege of freedom of speech:

First, as can be seen from the authorities, the privilege applies broadly to those who participate in parliamentary proceedings— a witness, counsel, a "stranger", "the public", a "person", "those who participate", or "others whose assistance the House considers necessary for conducting its proceedings". There is no suggestion in the case law that the privilege only extends to those who are compelled to attend. Indeed, Article IX of the Bill of Rights does not refer to any particular class of individuals, but rather insulates parliamentary "freedom of speech", "debates" and "proceedings" from external review.

Second, there is nothing in the authorities that ties the privilege to or justifies it on the basis that the statement in question was made under oath.

Third, because the immunity is absolute, any self-serving motivations of the person participating before the committees would not affect the privilege. Motive is irrelevant to an absolute privilege. In *Roman Corp. v. Hudson's Bay Oil & Gas*, the court struck out a statement of claim noting that it had "no power to inquire into what statements were made in

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<sup>154</sup> *Ontario v. Rothmans et al*, 2014 ONSC 3382 (CanLII).

<sup>155</sup> *Tobacco Damages and Health Care Costs Recovery Act*, S.O. 2009, c. 13.

<sup>156</sup> For a discussion on how the ability to waive privilege has been misconstrued, see Charles Robert and Blair Armitage, "Perjury, Contempt and Privilege: The Coercive Powers of Parliamentary Committees", *Canadian Parliamentary Review*, Winter 2007, 29-36.

<sup>157</sup> *Ontario v. Rothmans et al*, at para 21.



Parliament, why they were made, who made them, what was the motive for making them or anything about them”.<sup>158</sup>

He added that it is established law that “Once a person attends and participates in a parliamentary committee proceeding, the absolute privilege applies to his statements made in the course of that proceeding, with the result that the statements cannot be used in a civil action against him. The surrounding circumstances are simply not relevant.”<sup>159</sup>

Finally, Conway J. noted that “the freedom of speech privilege is not restricted to defending a defamation claim” and can be used in a misrepresentation claim as was the case at hand. Even if words spoken in a parliamentary proceeding are misleading, “they are nonetheless immune from review in the civil courts”<sup>160</sup>. Indeed, it is “Parliament, not the court, which has the power to impose sanctions for the misleading statement”.<sup>161</sup> This is because to determine otherwise would interfere with Parliament’s jurisdiction: “the courts were permitted to adjudicate on the misleading statement, they would be intruding on the jurisdiction of Parliament.”<sup>162</sup> As well, there would then “be a risk of conflicting decisions as between the court and Parliament, which is one of the very things that the privilege is intended to avoid.”<sup>163</sup>

Of interest, in *Ontario v Rothmans et al*, Conway J. took a different approach to applying the privilege of freedom of speech to references to parliamentary testimony than what was taken in another health care costs recovery case against tobacco companies. Indeed, in *R. v. Rothmans Inc*<sup>164</sup>, Cyr J. of the Court of Queen’s Bench of New Brunswick held that because the factual background giving rise to the alleged privilege was absent from the record, it could not decide whether what the defendants said to parliamentary committees was privileged. This decision was to be left to the trial judge:

[33] Imperial and CTMC argue that all such submissions and statements, made in the context of proceedings of parliament, are subject to a common law and statutory parliamentary privilege. Accordingly, all such references should be struck from the pleadings on the basis that they are prejudicial, vexatious, and constitute an abuse of this court’s process.

[34] The parties seeking to rely on the immunity provided by parliamentary privilege has the onus of establishing its existence.

[35] In this case, the factual background given rise to the alleged parliamentary privilege is completely absent from the record. Consequently, I am not in a position to embark on the analysis of the existence of the alleged privilege.

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<sup>158</sup> *Ibid* at paras 29-31.

<sup>159</sup> *Ibid* at para 32.

<sup>160</sup> *Ibid* at para 38.

<sup>161</sup> *Ibid*.

<sup>162</sup> *Ibid*.

<sup>163</sup> *Ibid*. at para 39.

<sup>164</sup> *R. v. Rothmans Inc.*, 2010 NBQB 291.

[36] Nevertheless, whether the Province will ultimately be permitted at trial to lead evidence of what was said by certain representatives of the defendants during parliamentary proceedings and/or committee hearings will be an evidentiary determination better left for the trial judge.

[37] There is no evidence that all references contained in the Statement of Claim and Statement of Particulars made in the context of parliamentary proceedings and/or House of Commons standing committee hearings may prejudice, embarrass, or delay a fair trial of the action. Moreover, Imperial and CTMC have failed to convince me that the references are in any way scandalous, frivolous, or vexatious. Nor have they persuaded me that they constitute an abuse of the process of the court.

[38] For these reasons, Imperial and CTMC's motions to strike paragraphs of the Statement of Claim and Statement of Particulars on the basis of parliamentary privilege are hereby dismissed.<sup>165</sup>

Pursuant to the conflicting approaches taken in the two Rothmans cases, it may be worthwhile to consider whether any guidance should be introduced to address the use of statements made in parliamentary proceedings in court cases. Indeed, Parliament today relies significantly on its engagement with witnesses, and legislative bodies as well as the public often rely on testimony made in Parliament. How can Parliament protect its sovereignty and the need to be able to receive candid testimony from witnesses while at the same time preventing privilege from being claimed more than necessary?

Finally, with respect to waiver of privilege, as suggested earlier, it would not appear appropriate for one house of Parliament to have the capacity to waive a privilege (after the fact), for example of freedom of speech, save by statute, as otherwise one house of Parliament would effectively be able to overrule the other. As noted in a recent study, there is danger in varying the protection afforded by parliamentary privilege, after the fact, to witnesses (as it may make them less willing to provide complete answers). By analogy,

...the *Canada Evidence Act*, first adopted in 1893, prohibits the use, under certain conditions, of incriminating testimony that was given under compulsion from being used or admissible in any subsequent legal proceeding, either criminal or civil. The underlying principle of natural justice behind this Act may also explain why authorities such as Maingot and the UK Joint Committee on Parliamentary Privilege reject the idea of *ex post facto* waiver. Both maintain that any regime to allow a waiver of privilege can only be accomplished before the fact by the enactment of an explicit statute which suggests that a waiver of a parliamentary privilege, a part of the law, could not be subsequently done by a resolution. Their assertion is supported by precedents like the *Oaths Act*." [emphasis added, citations omitted]<sup>166</sup>

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<sup>165</sup> Ibid at paras 33-38.

<sup>166</sup> Charles Robert and Blair Armitage, "Perjury, Contempt and Privilege: The Coercive Powers of Parliamentary Committees", *Canadian Parliamentary Review*, Vol. 30, No. 4, Winter 2007, pp. 29-36, at p. 33.

## 2. Proceedings in Parliament

The privilege of freedom of speech is regarded as being limited to “proceedings in Parliament”. Related to the question of the scope of the immunity granted by freedom of speech requires is that of what constitutes a “proceeding in Parliament”. In Canada courts have been reluctant to extend the immunity applying to freedom of speech beyond the context of parliamentary proceedings.<sup>167</sup>

### a. Developments abroad

In broad terms, according to the 1999 UK Joint Committee, proceedings in Parliament means “what is said or done in the formal proceedings of either House or the committees of either House, together with conversations, letters and other documentation directly connected with those proceedings.”<sup>168</sup> At a granular level, it is more difficult to comprehensively define the particular activities that constitute proceedings in Parliament. Certain activities can clearly be identified: debates, motions, votes, parliamentary questions, committee proceedings and proceedings on bills. Similarly, some activities not covered by privilege can also be distinguished, including the repetition outside a legislative chamber of statements made inside the chamber and casual conversations made in the chamber.

Reforms have been suggested to clarify the meaning of “proceedings in Parliament”. The 1999 UK Joint Committee recommended legislation to define “proceedings in Parliament” to include “all words spoken and acts done in the course of, or for the purpose of, or necessarily incidental to, transacting the business of either House of Parliament or of a Committee.”<sup>169</sup> Note that the Australian definition, in contrast, does not include the qualifier “necessarily” before “incidental”, which the 1999 UK Joint Committee feared left the definition “too loose”.<sup>170</sup> Examples of “proceedings in Parliament” would include: evidence given before a committee; the presentation or submission of documents to a House or committee; the preparation of a document for the purposes of transacting the business of a House or committee; and the formulation, making or publication of a document by a House or committee.

The 1999 UK Joint Committee further took the view that, in the absence of an exhaustive definition of “proceedings in Parliament,” the following matters may be said to be authoritatively established in the sense that they may not be challenged in court:

- procedures adopted by each chamber, particularly for the adoption of legislation;<sup>171</sup>
- proceedings in Parliament – words spoken in debate, votes cast or decisions taken; and

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<sup>167</sup> See Maingot, *supra*, at pp. 90, 92-94.

<sup>168</sup> 1999 UK Joint Committee, *supra*, at para 12.

<sup>169</sup> *Ibid* at para 129.

<sup>170</sup> *Ibid* at para 128.

<sup>171</sup> See also Charles Robert, “Parliamentary Privilege in the Canadian Context: An Alternative Perspective – Part I: the Constitution Act, 1867”, *supra*. Commenting on exclusive cognizance and the legislative process, Mr. Robert observes that were the House of Commons to reform its procedures to permit only two readings of a bill in order to expedite more legislation, the procedures would be immune from judicial review.

- actions taken by parliamentarians, office-holders or officials which are necessarily linked to proceedings in Parliament.<sup>172</sup>

As noted above, both the Australian *Parliamentary Privileges Act 1987* (at section 16) and New Zealand's *Parliamentary Privilege Act 2014* (at section 10) have defined the term "proceedings in Parliament." Should "proceedings in parliament" be defined by statute?

## b. Canadian developments

In Canada the Federal Court has determined that communications to constituents, for example through householders (or today via tweets or blog postings) are not "a proceeding in Parliament" and do not constitute parliamentary papers. Thus they are not protected by parliamentary privilege.<sup>173</sup>

With respect to technology, consideration should be given as to how technological developments, such as the ability to engage in virtual meetings or other online interactions, should be protected as proceedings in Parliament. Indeed, one can imagine an example whereby a parliamentary committee receives testimony from a witness stationed in another country. How should that witnesses' testimony be protected? Which country's law should apply? What if the conferencing is done via a server located in a third country? How can such information that perhaps should be subject to parliamentary privilege actually be afforded protection?<sup>174</sup>

On another note, turning to the concern raised by the 1999 UK Joint Committee about the scope of protection to be afforded to matters incidental to parliamentary proceedings, it might be worthwhile to consider how much protection Parliament would wish to afford. For example, should a parliamentary committee receive defamatory material from a witness, what level of protection should such material receive? As has been noted elsewhere, "The absolute privilege of free speech is limited by place and circumstances. A Member or witness has no immunity from suit for defamation when repeating what was said in the House or in committee in an environment that is not a proceeding in Parliament."<sup>175</sup> Indeed, "if a Member is not immune in such circumstances, how can the preparation of the material outside of the parliamentary environment be entitled to the protection of absolute privilege?"<sup>176</sup> This would have the odd effect of giving witnesses or staff the ability to claim privilege beyond what can be claimed by a Member him or herself. It has been suggested that qualified privilege would be a sufficient protection against any charge of defamation regarding material submitted to a Member or a committee, as qualified privilege requires that deliberate malice be a factor in order to make a successful case (though once integrated into a proceeding the protection would become absolute).<sup>177</sup> Indeed, this was the position taken by the New Zealand Supreme Court *Gow v. Leigh*, though the legislature overturned the decision in its *Parliamentary Privilege Act 2014*.

<sup>172</sup> 2013 UK Joint Committee, *supra*, at para 29.

<sup>173</sup> *Pankiw v. Canada (Human Rights Commission)*, 2006 FC 1544, in particular par. 113 and 114; appeal dismissed 2007 FCA 386; application for leave to appeal to the Supreme Court dismissed (SCC file 32501).

<sup>174</sup> See Deborah Palumbo and Charles Robert "Videoconferencing in the Parliamentary Setting" *Canadian Parliamentary Review*, Vol. 22, No. 1, Spring 1999, pp. 18-26..

<sup>175</sup> Letter to the Hon. Christopher Finlayson, MP, Chairperson, Privileges Committee, New Zealand, *supra*.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

### **3. Observations of the Subcommittee to Adapt the Privilege of Freedom of Speech to Contemporary Norms**

Freedom of speech has been recognized as the most important right accorded to parliamentarians, and, by extension, to Parliament itself. Today the privilege of freedom of speech is used to protect parliamentarians from any civil or criminal liability in any court or tribunal for anything said in the course of proceedings in Parliament. The Subcommittee on Privilege believes that the breadth of the immunity afforded by the privilege of freedom of speech carries with it a concomitant duty to use that privilege responsibly.

An evaluation of the privilege of freedom of speech also necessarily involves an evaluation of the term “proceedings in Parliament”.

#### ***1. Is the privilege of freedom of speech necessary to protect parliamentarians in the discharge of their legislative and deliberative functions, and Parliament’s work in holding government to account for the conduct of the country’s business (interpreting Vaid at para 41)?***

It is the Subcommittee’s opinion that the privilege of freedom of speech is the most important/fundamental privilege possessed by parliamentarians and by Parliament itself. Nonetheless, it must be adapted to the 21<sup>st</sup> century. The necessity of the privilege is well established: If parliamentarians’ speech could be questioned or impeached outside of Parliament, then parliamentarians could effectively be subject to control and intimidation which would seriously restrict their ability to do their work. It remains a clear necessity that should enjoy near absolute protection.

#### ***2. Does the contemporary context provide reasonable limits on the scope and exercise of the privilege?***

Given the public character of contemporary parliamentary proceedings enhanced by modern communications technologies, free speech should be practiced with an awareness of the risk of potential harm, particularly to third parties. As noted below, procedures should be put in place to review any charge against a member based on the accusation of defamatory malice.

The total or absolute immunity of free speech should be limited to parliamentarians themselves. Immunity from charges of defamation (often what the privilege of free speech protects against) should remain in place except possibly where there is clear evidence of malice. The commission of malice, in normal circumstances an illegal act, has no real legitimate role in the consideration of current affairs nor does it enhance the public reputation of Parliament.

The absolute immunity of free speech should not extend to matters incidental to actual proceedings in Parliament. Rather, the protection of staff and others involved in assisting parliamentarians in the preparation of material that become an actual part of parliamentary proceedings should fall under what is understood to be “qualified privilege” in the field of defamation law. Qualified privilege provides protection where remarks that may otherwise be defined as defamatory are conveyed without malice and for an honest and well-motivated reason. As was noted by the Supreme Court of Canada in *Hill v Church of Scientology*:

Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself [...]

(A) privileged occasion is . . . an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. [...]

The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with **malice**. Where the occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express **malice**.<sup>178</sup> [emphasis added]

This was the position taken by New Zealand's Supreme Court in *Gow v. Leigh*, which stated that those providing support to parliamentarians would be adequately protected by qualified privilege as they should not be able to speak maliciously with impunity:

It cannot be conducive to the proper and efficient functioning of the House to give those communicating with a Minister in present circumstances a licence to speak with impunity when predominantly motivated by ill will, nor a licence to take improper advantage of the occasion by using it for an improper purpose. It is very much in the interests of the proper functioning of the House that those communicating with a Minister in present circumstances, whoever they are, have a disincentive against giving vent to ill will or improper purpose. What use can it be to Parliament for those who are assisting Ministers to answer parliamentary questions to be motivated predominantly by ill will in doing so? That could only lead to a risk that Ministers might answer questions inaccurately.<sup>179</sup>

A similar approach should be taken with respect to the participation of witnesses before committees. Witnesses should be clearly warned prior to hearing their testimony or sending written submissions that their participation in parliamentary proceedings is not a license to abuse the freedom of speech by circumventing the law that protects fellow citizens through the law of defamation. Committees should be vigilant in exercising their right to disallow testimony and to refuse written briefs that involve attacks on the character or reputation of third parties particularly where it does not assist the committee in the pursuit of its mandate.

### ***Proceedings in Parliament***

Finally, it is worth reiterating that the scope of the privilege of freedom of speech is limited to proceedings in Parliament. The meaning of proceedings in Parliament is also an important aspect of

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<sup>178</sup> *Hill v Church of Scientology of Toronto*, *supra*, at paras 143 and 144.

<sup>179</sup> *Gow v. Leigh*, *supra*, at para 19. Note though that the New Zealand legislature later opted to extend the privilege of free speech to matters incidental to proceedings in Parliament.

the collective privilege of Parliament to control its internal affairs. While it has never been precisely defined, there is some appeal in linking freedom of speech as a means of identifying what is a proceeding in Parliament. In many respects, there is a mutual or reciprocal relationship between the two so that where freedom of speech exists, it is likely a proceeding in Parliament and, equally, where there is a proceeding of Parliament, there is also freedom of speech.

The Subcommittee agrees that the absolute privilege should not be applied, as has been done in Australia and New Zealand, to matters “incidental” to proceedings in Parliament. Qualified privilege may apply to matters incidental to proceedings in Parliament.

In today’s age of Twitter and social media it is also worth reiterating accepted Canadian law that communications made outside of parliamentary proceedings, for example tweets or blog posts, are not protected by parliamentary privilege. Nor are householders sent by members of Parliament to constituents.

On the other hand, the Subcommittee also agrees that parliamentary privilege should apply to proceedings in Parliament that take place outside of the physical confines of the parliamentary precinct, for example a committee meeting where a witness stationed in other country appears via videoconference. The practical issue would be how that witness’ testimony could be protected extra-territorially.<sup>180</sup>

Finally, the prohibition against the use of parliamentary proceedings by courts or tribunals that do not actually “question and impeach” the proceedings should probably be abandoned. There is no evidence to substantiate the fear expressed in other overseas jurisdictions that the use of parliamentary proceedings by the courts for purposes that clearly do not attempt to assess directly the character or value of the remarks might exert a “chilling effect” that would inhibit the privilege of freedom of speech.<sup>181</sup>

### **3. How can this privilege be exercised to respect the values and principles expressed in the Canadian Charter of Rights and Freedoms?**

“Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication” is deemed to be a fundamental freedom protected by section 2(b) of the *Charter*. Yet even this fundamental freedom is not absolute. It does not protect hate speech, perjury, or defamation, for example.

Similarly, the privilege of freedom of speech should not be used as a shield to engage in perjury, defamation, or hate speech. Indeed, perjury is already an implied exception to the protection afforded by the privilege of freedom of speech, as in order to prove perjury a court must be able to analyze the alleged statement made by the impugned parliamentarian or witness.

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<sup>180</sup> See Deborah Palumbo and Charles Robert “Videoconferencing in the Parliamentary Setting” *supra*.

<sup>181</sup> Indeed, Canadian parliamentarians take pride in how their statements or publications may be used by the courts. See for example Senator George Baker, “This example is perhaps a lesson for all honourable senators in realizing that what they say in the Senate is often quoted in our courts. What they say in the House of Commons is never quoted; but what we say in the Senate is often quoted. I see it in the case law that I read every day. [...]”, *Debates of the Senate (Hansard)*, 3<sup>rd</sup> Session, 40<sup>th</sup> Parliament, volume 147, Issue 77, 13 December 2010 (Senator George Baker),.

The Subcommittee believes that Parliament is the appropriate body to guard against defamatory and hateful speech made by both parliamentarians and witnesses. This may require the development of internal mechanisms to ensure that hateful or defamatory speech is not allowed to slip by without consequence.

#### **4. How can the scope and exercise of this privilege be aligned with the standards of transparency and accountability essential to Parliament's public reputation?**

The privilege of freedom of speech must be exercised responsibly by parliamentarians and witnesses testifying at parliamentary committees. Internal mechanisms should be developed in order to address abuses of the privilege of free speech, for example where a parliamentarian takes advantage of the shield of free speech in order to insult or impugn the character of someone outside of Parliament. One approach could involve amending the Senate Rules (such as chapter 6, the Rules of Debate). This would preserve the privilege (not allowing outside interference in speech taking place in a parliamentary proceeding) while providing a check against excess. Parliament has the authority to regulate its members under the privilege of exclusive cognizance.

#### **C. The Collective Rights of the Senate and House of Commons to Regulate their Internal Affairs/ Exclusive Cognizance**

It is well recognized that the Houses of Parliament must have the exclusive control to regulate their internal affairs, particularly with respect to their own debates, agenda and proceedings as they relate to their "legislative and deliberative"<sup>182</sup> functions. Parliament's need to regulate such aspects of its own affairs includes determining its own procedures as a legislative body, determining whether there has been a breach of its procedures, and determining how to deal with such breaches. This element also includes the right of Parliament to discipline its own members for misconduct and to mete out punishment to members and non-members for interfering in a substantial way with the proper conduct of Parliament.<sup>183</sup>

As noted by Maingot, "the privilege of control over its own affairs and proceedings is one of the most significant attributes of an independent legislative institution."<sup>184</sup> Maingot includes the following under the right of Parliament to regulate its internal affairs:

- The right to enforce discipline on Senators and Members by suspension, commitment, and expulsion. However, with respect to Members of the House, this creates no disability to stand for re-election.
- The right to secure the attendance of persons on matters of privilege, and to deliberate and examine witnesses, and to do so behind closed doors (*in camera*). This latter aspect

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<sup>182</sup> *House of Commons Procedure and Practice (2nd ed)*, *supra*, at p. 119. As noted above, Australia's *Parliamentary Privileges Act 1987* set limits and parameters on the immunity that a member or officer of a House could claim from arrest and attendance before the courts in its section 14. As well, New Zealand's *Parliamentary Privilege Act 2014* sets out a process whereby Members and certain officers could be exempted from participation in court or tribunal proceedings (at sections 26-31)

<sup>183</sup> 1999 UK Joint Committee (1999), *supra*, at paras 13-14.

<sup>184</sup> Maingot, *supra*, at p. 183.



may properly be considered to be included with the right to exclude strangers from the precincts.<sup>185</sup>

- The right to control the publication of its debates and proceedings and those of its committees by prohibiting their publication.
- The right to administer its affairs within the precincts and beyond the debating Chamber, such as regulating the sale of intoxicating beverages within the precincts, and appointing and managing its staff. **[Note** that here Maingot relied on *R. v. Graham-Campbell; Ex parte Herbert*, discussed below, which was set aside by the Supreme Court of Canada's decision in *Vaid*. Following *Vaid*, Parliament's right to administer its internal affairs is not absolute, and can be subject to legislation of general application.]
- The right to settle its own code of procedure.
- The power to send for persons in custody.<sup>186</sup>

## 1. Developments abroad

The 1999 UK Joint Committee set out what it considered to be the essential elements or rights of each House that make up what it refers to as the privilege of “exclusive cognizance” (control of internal affairs):

- The right to provide for their proper constitutions;
- The right to judge the lawfulness of their own proceedings;
- The right to institute inquiries and call for witnesses and papers;
- The right to administer their internal affairs within their precincts.

The 1999 UK Joint Committee made no recommendations to reform the first two rights and suggested consideration of certain rights for witnesses before committees under the third heading. With respect to the latter right – the right to administer a House's internal affairs – the Committee expressed concern that the term was unhelpful. It was too “loose” and “potentially extremely wide” in its scope.<sup>187</sup>

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<sup>185</sup> As well, legal documents may not be served on the precincts without a Speaker's permission. Police officers may not access the precincts to investigate, to search the precincts or to interrogate persons on the precincts without a Speaker's permission. Police officers may not arrest someone on the precincts without a Speaker's permission.

<sup>186</sup> Maingot, *supra*, at p. 183.

<sup>187</sup> 1999 UK Joint Committee, *supra*, at para 241: “In one important respect this heading of privilege is unsatisfactory. ‘Internal affairs’ and equivalent phrases are loose and potentially extremely wide in their scope. On one interpretation they embrace, at one edge of the spectrum, the arrangement of parliamentary business and also, at the other extreme, the provision of basic supplies and services such as stationery and cleaning. This latter extreme would be going too far if it were to mean, for example, that a dispute over the supply of photocopy paper or dismissal of a cleaner could not be decided by a court or industrial tribunal in the ordinary way. Here, as elsewhere, the purpose of parliamentary privilege is to ensure that Parliament can discharge its functions as a legislative and deliberative assembly without let or hindrance. This heading of privilege best serves Parliament if not carried to extreme lengths.”

Of interest, both the Australian *Parliamentary Privileges Act 1987* (at section 8) and New Zealand's *Parliamentary Privilege Act 2014* (at section 23) specified that a House of Parliament does not have the power to expel a member from membership of a House.

The New Zealand legislation further specified that the House is able to administer oaths and affirmations in respect of witnesses giving evidence (at section 24).

## 2. Canadian developments: Parliament is not a “statute-free zone”

The Supreme Court of Canada, in *Vaid*, also considered (like the 1999 UK Joint Committee) the term “internal affairs” to be too broad in scope. At issue was the 1934 Court of King’s Bench decision in *R. v. Graham-Campbell (ex parte Herbert)*<sup>188</sup> whereby the court of the day determined that the general law respecting the sale of alcoholic beverages did not apply to the UK House of Commons. As noted in a commentary on the decision, “this decision, poorly made and poorly understood, obscured the dividing line between those areas of internal affairs that ought to be protected by parliamentary privilege from those that do not deserve protection.”<sup>189</sup> The result of the *Graham-Campbell* decision had been a perpetuation in the UK and elsewhere in the Commonwealth that Parliament is a “statute-free zone”.

In *Vaid*, the House of Commons initially framed the expansive privilege it was claiming based on *Graham-Campbell*. It argued that control over its internal affairs implied that the Courts should not intervene in the employment relationship between the Speaker and his chauffeur and, more importantly, that the *Canadian Human Rights Act* did not apply to that relationship. In other words, the House implied that regular statutes did not apply to Parliament in its control over its “internal affairs”. The Supreme Court of Canada, however, commented that the term had “great elasticity.” In its view the term referred to the right of the House to control its own agenda and proceedings, not everything.<sup>190</sup> In doing so the Court effectively set aside *Graham-Campbell*.<sup>191</sup> Ultimately the Supreme Court considered the House’s claim of privilege to manage *all* employees to be too broad.<sup>192</sup> This finding suggests that the immunity over internal affairs should be perhaps limited to control over elements of proceedings in Parliament, and that Parliament is not a “statute-free zone”.

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<sup>188</sup> *R. v. Graham-Campbell; Ex parte Herbert*, [1935] 1 K.B. 594 [*Graham-Campbell*].

<sup>189</sup> Charles Robert, “An Opportunity Missed: The Joint Committee on Parliamentary Privilege, *Graham-Campbell*, and Internal Affairs”, *The Table*, Volume 74, 2006, 7-21 at 8.

<sup>190</sup> *Vaid, supra*, at para. 48.

<sup>191</sup> *Graham-Campbell, supra*.

<sup>192</sup> *Vaid, supra*, at paras 75 and 76: I have no doubt that privilege attaches to the House’s relations with *some* of its employees, but the appellants have insisted on the broadest possible coverage without leading any evidence to justify such a sweeping immunity, or a lesser immunity, or indeed any evidence of necessity at all. We are required to make a pragmatic assessment but we have been given no evidence on which a privilege of more modest scope could be delineated. As pointed out 166 years ago in *Stockdale v. Hansard*:

The burden of proof is on those who assert [the privilege] and, for the purposes of this cause, the proof must go to the whole of the proposition . . . . [Emphasis added; p. 1201.]

In any event, it would not be fair to the respondent *Vaid* to substitute at this stage a description of a narrower privilege that he was not called upon to address.

Finally, not all statutes stipulate whether they apply to Parliament, which may cause some confusion. On the one hand, some federal statutes are clear in this regard. For example, section 4 of the *Official Languages Act* specifies that “English and French are the official languages of Parliament, and everyone has the right to use either of those languages in any debates and other proceedings of Parliament.”<sup>193</sup> As well, other examples of quasi-constitutional legislation such as the *Privacy Act*<sup>194</sup> and the *Access to Information Act*<sup>195</sup> contain definitions that do not include Parliament or parliamentarians.<sup>196</sup> However, some legislation is not so obvious, and while the Supreme Court of Canada was relatively clear in *Vaid* in stating that parliaments do not have unlimited control over their internal affairs, in particular with respect to the employment contracts of parliamentary employees, lower courts have been inconsistent in their application of *Vaid*.<sup>197</sup> As well, lower courts have not all applied the guidelines set out in *Vaid* for evaluating the scope of a claimed privilege vis-à-vis statutes of general application.<sup>198</sup> It may be worthwhile for Parliament to consider how best to ensure clarity with respect to its intended application of statutes to Parliament itself.

### **3. Observations of the Subcommittee to Adapt the Collective Rights of the Senate and House of Commons to Regulate their Internal Affairs to Contemporary Norms**

This exclusive right of each Chamber to regulate its affairs is an acknowledged privilege that was first guaranteed in statute by the 1689 Bill of Rights. Each House has the authority to make its own rules for the conduct of its business. However, at the federal level, this authority is limited by virtue of other provisions of the Constitution with respect to certain specific aspects of proceedings including majority voting, quorums, and the use of French and English. Outside of these limitations,

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The appellants having failed to establish the privilege in the broad and all-inclusive terms asserted, the respondents are entitled to have the appeal disposed of according to the ordinary employment and human rights law that Parliament has enacted with respect to employees within federal legislative jurisdiction.

<sup>193</sup> *Official Languages Act* R.S.C., 1985, c. 31 (4th Supp.).

<sup>194</sup> *Privacy Act*, R.S.C., 1985, c. P-21.

<sup>195</sup> *Access to Information Act*, R.S.C., 1985, c. A-1.

<sup>196</sup> Though some have argued for Parliament’s inclusion.

<sup>197</sup> See for example *Scott v. Office of the Speaker of the Legislative Assembly and Larsen*, 2005 BCHRT 550 (B.C. Human Rights Tribunal). This case involved a complaint against the Office of the Speaker of the Legislative Assembly alleging discrimination against Angela Larsen, a supervisor in the Speaker’s office, for her treatment of her employee Bonnie Scott, who was suffering from temporary hearing difficulties due to a virus. The complaint alleged discrimination against Ms. Scott because of her physical disability, contrary to section 13 of British Columbia’s *Human Rights Code*. Despite purporting to apply what was then the recent Supreme Court of Canada decision in *Vaid*, the Human Rights Tribunal nonetheless held that the complaint fell under parliamentary privilege and thus the *Human Rights Code* did not apply, even though the Speaker’s office did not explain “how Ms. Scott’s duties were closely and directly related to the Speaker’s performance of his legislative and deliberative duties” (para 49), and dismissed the complaint.

<sup>198</sup> As discussed in Charles Robert, “Falling short: How a decision of the Northwest Territories Court of Appeal allowed a claim of privilege to trump statute law”, *supra*, the Court of Appeal in the Northwest Territories did not follow the guidelines established in *Vaid* in determining whether the NWT *Official Languages Act* applied to the legislature. As noted by Robert, the Court of Appeal “did not identify the actual legislative privilege involved and relationship of that privilege to the obligations of the OLA. Instead, it relied on a generic assessment, based on “strong authority” that decisions relating to publishing and broadcasting ‘are generally subject to privilege as being part of the publication of proceedings and the control of internal proceedings’... According to *Vaid*, the onus for proving a specific privilege should rest with the claimant, in this case the Legislative Assembly. Furthermore, in considering the claim, *Vaid* requires that it be measured against necessity, the foundation for all parliamentary privileges.” (at p. 25). See *Northwest Territories (A.G.) v. Fédération Franco-Ténoise*, *supra*.

the decisions of each House with respect to the manner of its deliberations are beyond review by the courts or any other judicial body.

As was noted in the 1999 UK Special Committee Report on Parliamentary Privilege,

The principle manifests itself as a collection of related rights and immunities. It is perhaps these privileges particularly which must be measured against the test we set ourselves at the outset of our inquiry: is each right and immunity necessary today, in its present form, for the effective functioning of Parliament? Does it balance fairly the needs of Parliament with the rights of the individual?<sup>199</sup>

The meaning of proceedings in Parliament is an important aspect of this privilege. While it has never been precisely defined, there is some appeal in linking freedom of speech as a means of identifying what is a proceeding in Parliament. In many respects, there is a mutual or reciprocal relationship between the two so that where freedom of speech exists, it is likely a proceeding in Parliament and, equally, where there is a proceeding of Parliament, there is also freedom of speech.

Elements included under the rubric of “regulation of internal affairs” or “exclusive cognizance” are the rights of each House of Parliament to regulate and administer its precinct; to maintain the attendance of its members, to institute inquiries, to administer oaths to witnesses, and to publish papers. Although generally considered as an aspect of exclusive cognizance, the disciplinary powers of Parliament are often given separate treatment. The primary contemporary issue regarding the regulation of internal affairs is whether, and to what extent, the general law applies to Parliament.

***1. Is the privilege of exclusive cognizance necessary to protect parliamentarians in the discharge of their legislative and deliberative functions, and Parliament’s work in holding government to account for the conduct of the country’s business (interpreting Vaid at para 41)?***

The Supreme Court of Canada’s decision in *Vaid* determined that the scope of the privilege of exclusive cognizance, or regulation of internal affairs, is not absolute. It is now clear that Parliament is not a statute-free zone, though the administration of the law may generally be a responsibility is incumbent upon Parliament itself.

***2. Does the contemporary context provide reasonable limits on the scope and exercise of the privilege?***

Insofar as possible, Parliament should exercise its authority in such a way as to respect the general law. As was recommended in the 1999 UK Joint Committee report, it may be worthwhile to stipulate that “the privilege of each House to administer its own internal affairs in its precincts applies only to activities directly and closely related to proceedings in Parliament.”<sup>200</sup>

One issue that is in constant evolution is that of maintaining security through the Parliament buildings (there are separate Senate and House security staff under the jurisdiction of the respective

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<sup>199</sup> 1999 UK Joint Committee, *supra*, at para 230.

<sup>200</sup> 1999 UK Joint Committee, *supra*, at para 251.

Speaker) and the grounds of Parliament (under the jurisdiction of the RCMP and the Ottawa police), while not unduly limiting parliamentarians' access to Parliament. While it is within the collective privileges of the Senate and House to administer the security within their zones, the contemporary context may also require collaboration and some compromise.

### **3. How can this privilege be exercised to respect the values and principles expressed in the Canadian Charter of Rights and Freedoms?**

The Supreme Court of Canada's findings in *Vaid* suggest that the immunity regarding internal affairs should be perhaps limited to control over elements of proceedings in Parliament, and that Parliament is not a "statute-free zone". General legislation should apply to Parliament and its members unless clearly exempted. The immunity should not be exercised in such a way that violates the constitutional rights of others (for example equality rights or expressive rights).

### **4. How can the scope and exercise of this privilege be aligned with the standards of transparency and accountability essential to Parliament's public reputation?**

First, as discussed above, the scope of the privilege of Parliament to administer its internal affairs could be limited to activities directly and closely related to proceedings in Parliament. Not all statutes stipulate whether they apply to Parliament, which may cause some confusion. It may be worthwhile for Parliament to consider how best to ensure clarity with respect to its intended application of statutes to Parliament itself.

## **D. Disciplinary Powers**

Although generally considered as an aspect of exclusive cognizance, the disciplinary powers of Parliament are often given separate treatment. These powers are typically exercised against members and non-members to deal with contempts against Parliament, or acts that interfere with Parliament's operations.<sup>201</sup> At issue is whether and how Parliament's coercive powers should be

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<sup>201</sup> *Erskine May* (in its 19<sup>th</sup> edition) distinguishes between breaches of privilege and contempts in the following way: *When any of these rights and immunities, both of the Members, individually, and of the assembly in its collective capacity, which are known by the general name of privileges, are disregarded or attached by any individual or authority, the offence is called a breach of privilege and is punishable under the law of Parliament. Each House also claims the right to punish actions which, while not breaches of any specific privilege, are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its officers or its Members. Such actions, though often called "breaches of privilege" are more properly distinguished as contempts. Erskine May, 19<sup>th</sup> ed at 68, cited in Maingot, supra, at 225. Maingot distinguishes breaches of privilege and contempts in the following way:*

1. Privileges are enumerated and known and thus may be breached, whereas contempts are not enumerable.
2. The extent of the law of privilege is a proper subject of inquiry for a court, whereas the House of Commons is the judge as to whether in a particular case a breach of privilege or a contempt of the House has been committed.
3. Contempt is more aptly described as an offence against the authority or dignity of the House.
4. While privilege may be codified, contempt may not, because new forms of obstruction are constantly being devised and Parliament must be able to invoke its penal jurisdiction to protect itself against these new forms; there is no closed list of classes of offences punishable as contempt of Parliament.

retooled to better respect the norms of natural justice and procedural fairness that characterize a rights-based legal system.

“Contempts” have been defined by the 1999 UK Joint Committee as “any conduct, including words, which improperly interferes, or is intended or likely improperly interfere, with the performance by either House of its functions, of the performance by a member or officer of the House of his duties as a member or officer.”<sup>202</sup> The kinds of conduct that can constitute contempt are numerous and open-ended. They can range from disrupting the proceedings of a committee, assaulting or threatening a member or officer of a House, leaking or premature publication of a committee report, interfering with a witness or bribing or attempting to bribe a parliamentarian.

Parliament’s power to decide what constitutes contempt is generally recognized as being within the purview Parliament’s exclusive power. It is essential for Parliament to have the power to sanction contempts to enable it to discharge its responsibilities. Its power to discipline its members is generally unquestioned, and is manifest in many ways. The Speaker requires this power to control proceedings in Parliament. A range of penalties are available for breaches of the different bodies of rules in place in either chamber. Remedies may include suspension, or loss of speaking privileges or loss of financial benefits for failure to attend chamber business. These would fall unquestionably within the privilege of exclusive cognizance.

The disciplinary powers of Parliament have two main purposes: to *compel*, for example witnesses who may not be willing to cooperate in a hearing, and to *sanction* those who have not complied with the orders of a committee or a house of Parliament. Many of the powers to deal with contempts are rooted in history. Some powers may no longer make sense or seem relevant in a contemporary context. Examples include the power of imprisonment (discussed below). Other powers merit further review to assess their adequacy, their need and whether reforms ought to be considered. Indeed, should “these coercive powers be retooled to maximize their usefulness in the contemporary context? Has there been any impact on them as a result of the proclamation of the Charter with the guarantee of individual rights, including due process and the protection of self-incrimination”?<sup>203</sup>

Parliamentarians and third party witnesses at committees accused of contempt or a breach of privilege may suffer damage to their reputations, employment prospects, and more. Counterpart jurisdictions have considered how to ensure that procedures undertaken by Parliament against individuals are based in some understanding of procedural fairness.

## **1. Procedural Fairness: Disciplining Individual Parliamentarians**

In Canada, there has been minimal academic commentary or government or parliamentary guidance on the issue of the fair treatment of parliamentarians facing a disciplinary proceeding. In both chambers, the procedural rules set out the basic right of discipline, but lack precision on the processes to be followed in disciplining a member or criteria on appropriate punishments for given transgressions and contempts. The 1999 UK Joint Committee recommended reforms to provide

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<sup>202</sup> 1999 UK Joint Committee, *supra*, at para. 264.

<sup>203</sup> Charles Robert and Blair Armitage, “Perjury, Contempt and Privilege: The Coercive Powers of Parliamentary Committees”, *supra*, at p. 29.

members accused of contempt or facing a disciplinary process with various procedural rights. The Committee suggested that at a minimum, these could include:

- a precise statement of the allegations against the member;
- an opportunity to obtain legal advice;
- the opportunity to be heard in person;
- the right to call witnesses and examine witnesses; and
- the opportunity to attend any meeting at which evidence is given and to receive transcripts of evidence.

The Committee suggested that such a use of procedural fairness standards would be consistent with the European Convention on Human Rights which the U.K. incorporated into its domestic law in 1998 with the enactment of the *Human Rights Act, 1998*. The decision of the European Court of Human Rights pursuant to the Convention in *Demicoli v. Malta* was considered highly relevant in this regard. In that case, the Maltese legislature had found the editor of a satirical magazine guilty of contempt. The Court found that Article 6 of the Convention (right to an independent and impartial tribunal for determining civil rights or criminal culpability) had been breached because the individual faced the possibility of imprisonment. The significance of the case lay in the fact that the Court applied Article 6 to proceedings of a legislative body.<sup>204</sup>

Of interest, Australia's *Parliamentary Privileges Act 1987* sets out what sorts of penalties can be applied by a House (imprisonment for a period not exceeding six months in certain circumstances, imposition of a fine) and how those penalties are to be applied (at section 7).

(i) **Developments in Canada: Conflict of Interest Regimes in Parliament and the Public Service**

One area that has received attention both in Canada and abroad is the treatment of real and perceived conflicts of interest by parliamentarians and members of the public service. Both the Senate and House of Commons have regimes in place regulating conflicts of interests:<sup>205</sup>

- The *Ethics and Conflict of Interest Code for Senators (Senators' Code)*,<sup>206</sup> adopted by the Senate in May 2005 and most recently revised in June 2014, is administered by the Senate Ethics Officer, Lyse Ricard. As well, the Standing Committee on Conflict of Interest for Senators is responsible for all matters relating to the Code.
- The *Conflict of Interest Code for Members of the House of Commons (Members' Code)*,<sup>207</sup> in place since 2004, applies to all 308 elected members of Parliament and is a part of the

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<sup>204</sup> 1999 UK Joint Committee, *supra*, at para 271.

<sup>205</sup> The Executive branch of government also has the *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2, which came into force in 2007. It applies to over 3,000 public office holders, including the prime minister, ministers, ministers of state, parliamentary secretaries and ministers' exempt staff, as well as full-time Governor in Council appointees, including deputy and associate deputy ministers and heads of agencies, Crown corporations, boards, commissions and tribunals, and numerous part-time public office holders.

<sup>206</sup> *Ethics and Conflict of Interest Code for Senators*,

<sup>207</sup> *Conflict of Interest Code for Members of the House of Commons*, Appendix 1 to the Standing Orders of the House of Commons.

Standing Orders of the House of Commons. Oversight responsibility for the Code is delegated to the House of Commons Standing Committee on Procedure and House Affairs. It has been noted in *House of Commons Procedure and Practice (2nd ed)* that: “The establishment of the Code is a manifestation of the House’s right to regulate its internal affairs and to discipline its Members for misconduct.”<sup>208</sup> Conflict of Interest and Ethics Commissioner Mary Dawson administers the Members’ Code, as well as the *Conflict of Interest Act*.

Both the Senators’ Code and the Members’ Code define conflicts of interests as the inappropriate furthering of one’s private interests. Section 8 of the Senators’ Code provides that “When performing parliamentary duties and functions, a Senator shall not act or attempt to act in any way to further his or her private interests or those of a family member, or to improperly further another person’s or entity’s private interests.” Similarly, section 8 of the Members’ Code provides that “When performing parliamentary duties and functions, a Member shall not act in any way to further his or her private interests or those of a member of the Member’s family, or to improperly further another person’s or entity’s private interests.” Both codes contain numerous other obligations to prevent potential conflicts of interest.

As well, both the Senators’ Code and the Members’ Code set out processes for the examination of alleged violations of the respective codes. In terms of possible sanction, section 44 of the Senators’ Code provides that “a breach of the Code by any one Senator affects all Senators and the ability of the Senate to carry out its functions, and may lead the Senate to impose sanctions or order remedial measures.” The Standing Committee on Conflict of Interest for Senators’ takes into consideration the report made by the Senate Ethics Officer (section 49(1)) and shall recommend, in a report to the Senate, appropriate remedial measures.<sup>209</sup> Section 49(4) of the Senators’ Code sets out examples of what sanctions may be proposed:

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<sup>208</sup> *House of Commons Procedure and Practice (2nd ed)*, *supra*.

<sup>209</sup> On 18 September 2014 the Senate adopted the Sixth Report of the Standing Committee on Conflict of Interest for Senators (Obligations of the Honourable Senator Boisvenu under the *Conflict of Interest Code for Senators*), the first report under the Senators’ Code. In debate on the report, Senator Serge Joyal spoke about the Committee’s role in exercising the privilege of the Senate to discipline members: *The way the conflict of interest committee is set up is unique. The committee is made up of five members. Two are chosen by secret ballot by the government caucus in the Senate. Two others are chosen by secret ballot by members of the opposition caucus. Senators from each caucus are individually called upon to choose their representatives on this committee. The four senators who are chosen in this process then elect, by secret ballot, the fifth member of the committee from among all the senators who put their name forward, whether they be Conservative, Liberal or independent.*

*As a result, senators themselves are directly responsible for the make-up of the conflict of interest committee and for good reason: the Committee on the Conflict of Interest for Senators is responsible for exercising one of the privileges of this chamber, namely, to discipline members, a duty that inherently belongs to each senator, not just to the leaders of the respective parties or political groups represented in the Senate.*

*[...] the first condition that must be satisfied for a proper disciplinary process, one that is inspired by the principles of natural justice — that is, it must be a fully independent tribunal.*

*The second observation I wanted to make to my honourable colleagues has to do with the procedure the committee must follow when it receives a report from the Senate Ethics Officer regarding the conduct of a senator.*



Where the Senate Ethics Officer has determined that the Senator has breached his or her obligations under the Code, the Committee shall recommend, in a report to the Senate, the appropriate re-medial measures or sanctions taking into account section 31 of the Constitution Act, 1867. The recommendations available to the Committee include, but are not limited to, the following:

- (a) the return of any gift or other benefit;
- (b) any remedial measure;
- (c) the reduction or removal of access to Senate resources;
- (d) the removal of assignments, duties or powers conferred by the Senate;
- (e) a limitation on the right to speak or vote;
- (f) an invitation or order to apologize;
- (g) a censure, admonition or reprimand; or
- (h) a suspension.

In contrast, the Members' Code does not specify what type of sanctions may be recommended by the Conflict of Interest and Ethics Commissioner, simply providing at section 28(6) that "(6) If the Commissioner concludes that a Member has not complied with an obligation under this Code, and that none of the circumstances in subsection (5) apply [mitigated contravention], or is of the opinion that a request for an inquiry was frivolous or vexatious or was not made in good faith, the Commissioner shall so state in the report and may recommend appropriate sanctions." Also, reports of the Conflict of Interest and Ethics Commissioner pursuant to the Members' Code are reported directly to the House, via the Speaker (section 28).

## **2. Procedural Fairness: Disciplining non-Parliamentarians**

Parliament historically has claimed the power to reprimand, imprison, or fine witnesses who ignore their obligation to testify or disclose documents or engage in other forms of contempt. However, some of these powers have not been used against non-members for some time, and may have lapsed.

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*This is very important, because the disciplinary procedure must guarantee that the process is transparent and fair. That is also one of the fundamental principles of justice. In other words, on the one hand, senators must know what to expect when the committee is asked to rule on whether a senator has violated the code, and on the other hand, they must be certain that the rights of the senator in question are clearly identified and protected and that that senator has the right to full answer and defence.*

*The Conflict of Interest Code explicitly sets out the procedure the committee must rigorously follow when dealing with investigation reports from the Senate Ethics Officer.*

(i) **Developments abroad**

Reforms have been suggested, particularly over the question of whether Parliament should have exclusive jurisdiction to punish contempts by non-members. The 1999 UK Joint Committee was open to the idea of transferring jurisdiction for contempts to the courts, with Parliament retaining a residual jurisdiction. It argued that this would be appropriate, in particular, for acts of contempt that also constitute criminal offences.<sup>210</sup> Non-criminal acts that could be subject to court proceedings, including fines and imprisonment, include wilfully failing to attend before a parliamentary committee when summoned to answer questions or produce documents, or deliberately altering, suppressing or destroying documents required by Parliament.<sup>211</sup>

The 2013 UK Joint Committee, on the other hand, opposed criminalizing contempts. The principal objection, particularly legislation creating a criminal offence of contempt of Parliament, is that it would permit more intrusive judicial review of the processes in Parliament. The Committee noted, for example, that were an individual to be charged with contempt, a court would likely need to inquire whether an offence had been committed and, more intrusively, it may be required to evaluate the procedures by which Parliament attempted to compel evidence, whether adequate notice was given, whether the witness was fairly questioned or whether the questioning was oppressive. This kind of judicial oversight would likely lead to a significant erosion of the privilege of exclusive cognizance, or control over internal affairs.<sup>212</sup>

The 2013 UK Joint Committee also proposed reforms for situations where witnesses are facing contempt proceedings. The Committee endorsed the approach in the New Zealand and Australian parliaments where resolutions and standing orders in each parliament set out what may constitute contempt as well as procedural fairness rights for witnesses. The Committee sets out in the appendices to its report a draft resolution and a draft standing order that detail the procedures it considers appropriate for dealing with contempts against Parliament. The draft resolution defines what may constitute a contempt, including:

- disrupting proceedings in Parliament or inciting others to do so;
- refusing to produce documents or give evidence to a committee when ordered to do so;
- misleading the House or a committee;
- obstructing or intimidating a member or a member's staff in performing their parliamentary duties;
- obstructing or intimidating a witness, or penalizing a witness for giving evidence in a parliamentary proceeding;
- improperly influencing, or attempting to improperly influence, a member or his or her staff, or a witness; and
- attempting to bring legal proceedings in respect of proceedings in Parliament.<sup>213</sup>

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<sup>210</sup> 1999 UK Joint Committee, *supra*, at paras 304–314.

<sup>211</sup> 1999 UK Joint Committee, *supra*, at para 310.

<sup>212</sup> 2013 UK Joint Committee, *supra*, at paras 65-70.

<sup>213</sup> 2013 UK Joint Committee, *supra*, at Annex 2.

The draft standing order sets out the elements of procedural fairness in any inquiry into a contempt. These elements include:

- a clear account of the allegations of contempt against the witness;
- an opportunity to respond fully to those allegations;
- an opportunity to respond to allegations that may damage a witness's reputation;
- an opportunity to have the matter dealt with in private;
- access to information;
- intervention by legal counsel for a witness; and
- mechanisms to deal with possible bias by members of a committee inquiring into allegations of contempt.<sup>214</sup>

What the UK, Australia and New Zealand examples, as well as the scholarly writings, demonstrate is that there is considerable support for the idea of procedural fairness rights for witnesses to parliamentary proceedings. The idea is founded not only on basic notions of what is right and fair, but also what may be required under our constitutional and legal structure based on the rule of law and the *Charter*.

(ii) **Canadian developments: Impact of the *Charter***

Reforms in the area of procedural fairness for witnesses,<sup>215</sup> particularly where Parliament purports to engage its penal powers for alleged contempts against Parliament have been urged in various quarters. One commentator has suggested that procedural fairness rights analogous to the rights provided under administrative law principles would be appropriate.<sup>216</sup> He suggests that a number of principles may be drawn from various legal sources to support greater procedural rights. In *Wells v. Newfoundland*,<sup>217</sup> the Supreme Court of Canada held that while legislative bodies are not subject to a duty of procedural fairness, individuals in government using their authority unlawfully against individuals over whom they have power may be personally liable for the tort of abuse of office. Further authority for this proposition may be found in the landmark case of *Roncarelli v. Duplessis*, in which the Court held that individuals acting arbitrarily and beyond the scope of their duties would be contrary to the rule of law.<sup>218</sup> What these cases have in common is that they are founded on the principle of the rule of law.

Whether or not these principles would persuade a court that some procedural fairness rights be accorded to witnesses appearing before committees is beside the point. They may serve as another

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<sup>214</sup> *Ibid.*, at Annex 3.

<sup>215</sup> See for example Rob Walsh, "Fairness in Committees", *Canadian Parliamentary Review*, Vol. 31 No. 2, 2008, pp. 23-26, which discusses the determination made by the House of Commons on 8 April 2008 that Barbara George, Deputy Commissioner of Human Resources for the Royal Canadian Mounted Police, to have made misleading or false statements in earlier testimony before the Standing Committee on Public Accounts.

<sup>216</sup> Peter Doody, "Should Persons Affected by Parliamentary Committees be Treated Fairly?" *Journal of Parliamentary & Political Law*, Vol. 4, 2011, pp. 263-274..

<sup>217</sup> *Wells v. Newfoundland*, [1999] 3 S.C.R. 199.

<sup>218</sup> *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

authoritative legal basis and justification for Parliament establishing its own procedures to protect witnesses. Because both judgments are founded on the principle of the rule of law, they would be consistent with the contemporary interpretations of parliamentary privilege that is part of the general law and must be applied in a manner consistent with the rule of law and the protection of individual rights.

Indeed, Parliament's contempt powers have remained largely static since Confederation, though the context in which privilege and contempt powers are used have changed dramatically since then.<sup>219</sup> Parliament now operates in public, with expectations of transparency and accountability to the public. As has been noted by commentators, "the coercive powers of Parliament were developed long before human rights were constitutionally entrenched in the *Charter*." The commentators cite the Supreme Court decision in *Vaid* as evidence that "old assumptions about the powers and privileges in Parliament cannot be taken for granted."<sup>220</sup> As they observe, the "coercive powers [of Parliament] need to be reviewed and immunized against potential challenge. In particular, the power to imprison, when exercised for punitive purposes, is vulnerable to challenge under the *Charter*" [emphasis added].<sup>221</sup> It would be worthwhile for Parliament to consider how best to exercise its punitive and disciplinary powers in a way that is consistent with the *Charter* and expectations of procedural fairness.

On a related note, other commentators have observed that "given that privilege originally developed over the centuries as a shield against interference from the Crown, the modern use of privilege as a sword against individual rights may serve to fuel public cynicism and damage Parliament's reputation."<sup>222</sup> Indeed, the authors cite two examples where principles of procedural fairness and natural justice were at odds with the exercise of parliamentary privilege.

The first example involved a resolution adopted by Quebec's National Assembly in 2000 denouncing remarks made by non-member (at the time he was a Parti Québécois candidate in a byelection) Yves Michaud about an ethnic community in the course of a radio interview.<sup>223</sup> As a non-member Mr. Michaud had no standing or recourse to address the censure motion either within or outside of the National Assembly. In another example, newspaper columnist Jan Wong aroused public debate and controversy when she published an article titled "Get under the desk" in the *Globe and Mail* on 16 September 2006. In the article she drew a link between shootings at the École Polytechnique, Concordia University and Dawson College (all in Montreal), and Quebec's linguistic struggle.<sup>224</sup> A

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<sup>219</sup> Charles Robert and Blair Armitage, "Perjury, Contempt and Privilege: The Coercive Powers of Parliamentary Committees", *supra*, at p. 33.

<sup>220</sup> *Ibid* at p. 34.

<sup>221</sup> *Ibid*.

<sup>222</sup> Charles Robert and Vince MacNeil, "Shield or Sword? Parliamentary Privilege, *Charter* Rights and the Rule of Law", *supra*, at p. 22.

<sup>223</sup> *Ibid* at 23. See Quebec, National Assembly, *Votes and Proceedings*, 14 December 2000, No. 153.

<sup>224</sup> Jan Wong, "Get under the desk", *The Globe and Mail*, 16 September 2006. The paragraph at issue read: "What many outsiders don't realize is how alienating the decades-long linguistic struggle has been in the once-cosmopolitan city. It hasn't just taken a toll on long-time anglophones, it's affected immigrants, too. To be sure, the shootings in all three cases were carried out by mentally disturbed individuals. But what is also true is that in all three cases, the perpetrator was not *pure laine*, the argot for a "pure" francophone. Elsewhere, to talk of racial "purity" is repugnant. Not in Quebec"

few days later, on 20 September 2006, the House of Commons unanimously passed a motion requesting an apology for the column.<sup>225</sup> As has been observed, “the parliamentarians in question seem to have proceeded in the confidence that their privileges override individual rights.”<sup>226</sup> Indeed, “in both cases, the condemnations were made on the fly – without notice, without debate, without any real consideration, and without affording any procedural fairness or opportunity to answer the allegations. In addition, once these pronouncements were made, the media were free to repeat the condemnations with impunity.”<sup>227</sup>

In the post-*Charter* and post-*Vaid* context, how can Parliament ensure that privileges “are fair and reasonable in a modern context by balancing the institutional imperatives of a parliamentary body with the need to minimally impair individual rights and freedoms”<sup>228</sup>?

### **3. Observations of the Subcommittee to Adapt the Disciplinary Powers of the Senate and House of Commons to Contemporary Norms**

The right of Parliament to regulate its internal affairs includes the authority to enforce its orders and to sanctions actions that interfere with the conduct of parliamentary business. The origin of this power is linked to the identity of the early English Parliament with the functions of a court of law.

There is no precise definition as to the categories of offenses which might constitute a breach of privilege or contempt that might prompt Parliament to consider a charge and impose a sanction. While this lack of precision has been accepted in the past, in an era of rights and the rule of law, it is increasingly problematic. Furthermore, because the federal Parliament’s privileges are identified with those of Westminster, the sanctions available are limited to reprimand, admonishment, or imprisonment. There is no power to fine, though the 1999 UK Joint Committee recommended that the “House of Commons should have power to fine members and that the power of the House of Lords to fine should be confirmed,” while it held that the power to imprison members is no longer needed or appropriate. It further recommended that the power to suspend members be clarified by the House of Lords, as it is already clearly established in the UK House of Commons.<sup>229</sup>

At issue is whether and how Parliament’s coercive powers should be retooled to better respect the norms of natural justice and procedural fairness that characterize a rights-based legal system. The considerations may vary depending on whether the disciplinary powers are being applied to fellow parliamentarians or third parties.

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<sup>225</sup> House of Commons, *Journals*, 1<sup>st</sup> Session, 39<sup>th</sup> Parliament, 20 September 2006, at p. 403.

<sup>226</sup> Charles Robert and Vince MacNeil, “Shield or Sword? Parliamentary Privilege, *Charter* Rights and the Rule of Law”, *supra* at p. 23.

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid* at p. 37.

<sup>229</sup> 1999 UK Joint Committee, *supra*, at para 279.

**1. Is the power to discipline members and non-members necessary to protect parliamentarians in the discharge of their legislative and deliberative functions, and Parliament's work in holding government to account for the conduct of the country's business?**

Disciplinary powers are typically exercised against members and non-members to deal with contempts against Parliament, or acts that interfere with Parliament's operations. It is essential for Parliament to have the power to sanction contempts to enable it to discharge its responsibilities. Its power to discipline its members is generally unquestioned, and is manifest in many ways.

**2. Does the contemporary context provide reasonable limits on the scope and exercise of the privilege?**

Parliamentarians and third party witnesses at committees accused of contempt or a breach of privilege may suffer damage to their reputations, employment prospects, and more. Counterpart jurisdictions have considered how to ensure that procedures undertaken by Parliament against individuals are based in some understanding of procedural fairness.

The Subcommittee agrees with the assertion that "the boundaries of parliamentary privilege and the need to protect a person's fundamental rights ought to be examined with regard to what is necessary to both govern effectively and preserve the public trust."<sup>230</sup>

**3. How can this privilege be exercised to respect the values and principles expressed in the Canadian Charter of Rights and Freedoms?**

*With respect to members*

The Subcommittee on Privilege wishes to reiterate the reforms recommended by the 1999 UK Joint Committee to provide members accused of contempt or facing a disciplinary process with various procedural rights. The 1999 UK Joint Committee suggested that at a minimum, these could include:

- a precise statement of the allegations against the member;
- an opportunity to obtain legal advice;
- the opportunity to be heard in person;
- the right to call witnesses and examine witnesses; and
- the opportunity to attend any meeting at which evidence is given and to receive transcripts of evidence.

The Subcommittee on privilege agrees that these procedural rights should apply to members accused of contempt or facing an internal disciplinary process. Indeed, these procedural rights are largely included in the *Ethics and Conflict of Interest Code for Senators* (Senators' Code) and the counterpart *Conflict of Interest Code for Members of the House of Commons* (Members' Code). However, these two codes are somewhat limited in application. Mechanisms may be considered to ensure that investigations of serious charges of contempt or breach of privilege have appropriate procedural safeguards in place.

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<sup>230</sup> Roger Macknay, "Oversight as it intersects with Parliament", *Australasian Parliamentary Review*, Vol. 28, No. 2, Spring 2013, pp. 56-70, at p. 69.

*With respect to non-members*

As noted above, the 2013 UK Joint committee endorsed the approaches taken in New Zealand and Australia where the resolutions and standing orders in each parliament set out what may constitute contempt as well as procedural fairness rights for witnesses. The Subcommittee on privilege considers that this may be an approach worth adopting here in Canada.

In the appendices to its report the 2013 UK Joint Committee set out a draft resolution and a draft standing order detailing the procedures it considered appropriate for dealing with contempts against Parliament. The draft resolution defined what may constitute a contempt, including:

- disrupting proceedings in Parliament or inciting others to do so;
- refusing to produce documents or give evidence to a committee when ordered to do so;
- misleading the House or a committee;
- obstructing or intimidating a member or a member's staff in performing their parliamentary duties;
- obstructing or intimidating a witness, or penalizing a witness for giving evidence in a parliamentary proceeding;
- improperly influencing, or attempting to improperly influence, a member or his or her staff, or a witness; and
- attempting to bring legal proceedings in respect of proceedings in Parliament.<sup>231</sup>

The draft standing order set out the elements of procedural fairness in any inquiry into a contempt. These elements include:

- a clear account of the allegations of contempt against the witness;
- an opportunity to respond fully to those allegations;
- an opportunity to respond to allegations that may damage a witness's reputation;
- an opportunity to have the matter dealt with in private;
- access to information;
- intervention by legal counsel for a witness; and
- mechanisms to deal with possible bias by members of a committee inquiring into allegations of contempt.<sup>232</sup>

While it is true that "in some circumstances, the work of parliamentary committees may make full provision of natural justice impractical or inappropriate"<sup>233</sup>, and it may be necessary to preserve some element of discretion in what protections committees provide to witnesses, "the importance of the principle of procedural fairness means that it should be presumptively applicable, and should be overridden only where strictly necessary for the proper functioning of parliament." The Subcommittee

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<sup>231</sup> 2013 UK Joint Committee, *supra*, at Annex 2.

<sup>232</sup> *Ibid.*, at Annex 3.

<sup>233</sup> Roger Macknay, *supra*, at p. 69.

agrees that this is “consistent with a proper understanding of the source and purpose of parliamentary power and privilege.”<sup>234</sup>

In the opinion of the Subcommittee on privilege there is considerable support for the idea of procedural fairness rights for witnesses to parliamentary proceedings. The idea is founded not only on basic notions of what is right and fair, but also what may be required under our constitutional and legal structure based on the rule of law and the *Charter*.

#### **4. How can the scope and exercise of this privilege be aligned with the standards of transparency and accountability essential to Parliament’s public reputation?**

In the post-*Charter* and post-*Vaid* context, it is the Subcommittee’s opinion that Parliament must ensure that privileges “are fair and reasonable in a modern context by balancing the institutional imperatives of a parliamentary body with the need to minimally impair individual rights and freedoms.”<sup>235</sup>

### **E. Freedom from Arrest in Civil Actions and Related Individual Privileges**

Finally, individual Canadian parliamentarians are protected and exempted from the following:

- arrest in civil actions,<sup>236</sup>
- being subpoenaed to attend court as a witness,
- jury duty. and
- obstruction, interference, intimidation and molestation

Elements of these privileges are deserving of adaptation to the contemporary context.

#### **1. Freedom from arrest in civil actions**

This immunity preserves the interests of Parliament by asserting its pre-eminent claim to the attendance and service of its members who are not to be restrained or intimidated by means of legal arrest in civil process. This immunity provides no protection from any criminal process nor does it protect a Member from any process arising from conduct or actions performed as a private citizen. As well, recent jurisprudence has confirmed that no privilege protects parliamentarians from being

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<sup>234</sup> *Ibid* at pp. 69-70.

<sup>235</sup> Charles Robert and Vince MacNeil, “Shield or Sword? Parliamentary Privilege, *Charter* Rights and the Rule of Law”, *supra*, at p. 37.

<sup>236</sup> *House of Commons Procedure and Practice (2nd ed)*, *supra*, suggests that this includes provincial and statutory offence proceedings. There is nonetheless no immunity from arrest resulting from actions taken as private citizens such as traffic violations, investigations under the *Income Tax Act*, or criminal proceedings. Maingot states that members may be arrested for statutory offences: at p. 156.



named defendants in civil actions.<sup>237</sup> The traditional duration of the privilege is 40 days before and after a session of Parliament, and 40 days following the dissolution of Parliament.<sup>238</sup> This 40 day time period reflects an earlier era where cross-country travel was lengthy and cumbersome.

This immunity also extends to the following persons while they are attending or required to attend parliamentary proceedings:

- senior parliamentary officers and officials,
- witnesses,
- petitioners for private bills or other matters,
- counsel, and
- parliamentary agents.<sup>239</sup>

It could be worthwhile for the Committee to consider how best to adapt the privileges relating to the immunity from civil arrest and attendance before the courts to the 21<sup>st</sup> century.

#### **a. Developments Abroad**

The 1999 UK Joint Parliamentary Committee noted in its report that this immunity lost most of its importance in the United Kingdom in 1870 when, with a few exceptions, imprisonment for debt was abolished. It added that “such justification as exists for its continuance resides in the principle that Parliament should have first claim on the service of its members, even to the detriment of the civil rights of others.”<sup>240</sup> Indeed, both the 1967 UK House of Commons Committee and the 1999 UK Joint Committee on Privilege “took the view it was wrong for the claims of individuals to be obstructed by use of members’ immunity from arrest, and considered the privilege anomalous and of little value.”<sup>241</sup> The 1999 UK Joint Committee agreed with its 1967 counterpart that the privilege should be abolished through legislation, as did the 2013 UK Joint Committee (though this has not taken place).

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<sup>237</sup> *Arthur c. Gillet*, 2007 QCCA 470 at para 9: “The first question that must be addressed is whether the appellant has proved the existence of the claimed privilege to require the postponement of the civil process launched against him. The response must be in the negative since, although parliamentarians at Westminster did once enjoy this privilege, it was abolished on June 24, 1770 by the *Parliamentary Privilege Act*. Not only does that law affirm that members of both houses can be the object of a civil action, but it also specifies that ‘no such action, suit, or any other process or proceeding thereupon shall at any time be impeached, stayed, or delayed by or under colour or pretence of any privilege of Parliament’ [translation, quotation from 1770 Act in English in original].

<sup>238</sup> Maingot, *supra*, at p. 155. Some jurisdictions have shortened the time limit from 40 to 5 days.

<sup>239</sup> See *House of Commons Procedure and Practice (2nd ed)*, *supra*, at p. 105; Maingot, *supra*, at p. 160.

<sup>240</sup> 1999 UK Joint Committee, *supra*, at para 327.

<sup>241</sup> *Ibid.*

**b. Observations of the Subcommittee to Adapt the Privilege of Freedom from Civil Arrest to Contemporary Norms**

**1. Is the privilege of freedom from arrest in civil actions necessary to protect parliamentarians in the discharge of their legislative and deliberative functions, and Parliament's work in holding government to account for the conduct of the country's business (interpreting Vaid at para 41)?**

The 1999 UK Joint Parliamentary Committee noted in its report that this immunity lost most of its importance in the United Kingdom in 1870 when, with a few exceptions, imprisonment for debt was abolished. It added that “such justification as exists for its continuance resides in the principle that Parliament should have first claim on the service of its members, even to the detriment of the civil rights of others.”<sup>242</sup> Indeed, both the 1967 UK House of Commons Select Committee and the 1999 UK Joint Committee on Privilege “took the view it was wrong for the claims of individuals to be obstructed by use of members' immunity from arrest, and considered the privilege anomalous and of little value.”<sup>243</sup> The 1999 UK Joint Committee agreed with the 1967 UK House of Commons Select Committee that the privilege should be abolished through legislation, as did the 2013 UK Joint Committee (though this has not taken place). It may be time to consider the same in Canada.

**2. Does the contemporary context provide reasonable limits on the scope and exercise of the privilege?**

The privilege of freedom from arrest in civil actions is already limited in a number of respects: It does not apply to criminal or quasi-criminal matters, and does not apply to actions which affect Members but do not directly relate to the performance of their parliamentary functions (for example being summoned to court for a traffic violation or the investigation of an income tax return)<sup>244</sup>.

Should the privilege not be abolished, one area that can be subject to limitation in the contemporary context is the duration of the period in which the privilege applies before and after a session of Parliament as can be done with the related privilege of exemption from being subpoenaed to attend court as a witness.

**3. How can this privilege be exercised to respect the values and principles expressed in the Canadian Charter of Rights and Freedoms?**

More generally, while not specifically a *Charter* issue, the privilege should be exercised in a way that does not adversely affect the administration of justice in civil proceedings.

**4. How can the scope and exercise of this privilege be aligned with the standards of transparency and accountability essential to Parliament's public reputation?**

While the underlying rationale of the privilege- to ensure that parliamentarians are able to attend to their parliamentary duties – remains sound, the need to exercise this privilege is so limited as to be

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<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> House of Commons Procedure and Practice (2<sup>nd</sup> ed), *supra*.

practically non-existent. The privilege may be abolished, as has been recommended in the United Kingdom. Alternatively, the scope can be further limited by shortening the duration of the period in which the privilege applies before and after a session of Parliament, as the period of 40 days no longer makes sense in a contemporary context.

## **2. Freedom from being subpoenaed to attend court as a witness**

This privilege has a long and varied history. The rationale for the privilege from being subpoenaed to attend court as a witness is the same as that for the freedom of civil arrest: to ensure that parliamentarians are not restrained from attending to their parliamentary duties. It exempts all parliamentarians and some officials from the obligation to obey court subpoenas to appear as a witness in a trial whether civil, criminal or military. This immunity is taken to cover the parliamentary session and a period of 40 days before the session begins or ends. The privilege has also been understood to prohibit the service of court documents within the precincts of Parliament.

### **a. Developments abroad**

The 1999 UK Joint Committee Report noted that “vexatious subpoenas are a problem that assails all public figures,” and that “Members of the Commons perhaps suffer more from this than most others”.<sup>245</sup> The 1999 UK Joint Committee held that “while a degree of protection is justified”, it is not right in principle that only parliamentarians (and not others subject to vexatious lawsuits) can decide for themselves whether a subpoena is vexatious.<sup>246</sup> It recommended “that the exemption from attendance as a witness should be abolished, but a subpoena should not be issued against a member without the leave of a master or district judge (or the equivalent)” in order to prevent vexatious subpoenas. As well, it recommended that the judiciary be informed of “the need to be flexible when a member of either House is attending court as a witness.”<sup>247</sup>

The 2013 UK Joint Committee took a different approach, recommending that the privilege be maintained:

We do not recommend any change in Members’ right not to respond to a court summons as a witness. There is no evidence that application of this privilege has caused any harm, and given the frequency of vexatious litigation, it is reasonably foreseeable that ending it could interfere with Members’ primary duty to attend Parliament.<sup>248</sup>

### **b. Canadian developments**

Parliament’s guidance in this area would be most useful as courts in different provinces have interpreted this privilege in conflicting ways, imposing different immunity periods for federal parliamentarians in different jurisdictions. For example, in *Telezone Inc. v. Canada (Attorney General)*, the Ontario Court of Appeal held that the scope of the privilege of testimonial immunity of

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<sup>245</sup> 1999 UK Joint Committee, *supra*, at para. 333.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

<sup>248</sup> 2013 UK Joint Committee, *supra*, at para 265.

Members of Parliament extends to 40 days before and after legislative sessions.<sup>249</sup> The Prince Edward Island Supreme Court had arrived at the same finding.<sup>250</sup> However, in *Samson Indian Nation and Band v. Canada*, the Federal Court held that the immunity extended to 14 days before and after legislative sessions in matters before the Federal Court, finding that the 40 day rule is obsolete due to advances in communication and transportation.<sup>251</sup> British Columbia went even further, holding in *Ainsworth Lumber Co. v. Canada (Attorney General)* that the scope of the privilege of testimonial immunity for federal parliamentarians only applies while the House is in session.<sup>252</sup>

Furthermore, a number of Canada's provinces have much shorter time periods for their legislators, providing immunity from arrest in civil actions and attendance in court for members of the legislature ranging from two days before or after a sitting (in Quebec), to fifteen (e.g. Nova Scotia) or twenty days (e.g. Ontario, British Columbia) in other provincial jurisdictions.<sup>253</sup>

### **c. Observations of the Subcommittee to Adapt the Privilege of Freedom from Being Subpoenaed to Attend Court as a Witness to Contemporary Norms**

Given the current practice of lengthy sessions with extended adjournment periods during the year, this privilege is ripe for modernization. Among the features of the privilege which could be updated is the reduction (or elimination) of the forty days which should be applied to adjournments rather than sessions.

#### **1. Is the privilege from being subpoenaed to attend court as a witness necessary to protect parliamentarians in the discharge of their legislative and deliberative functions, and Parliament's work in holding government to account for the conduct of the country's business (interpreting Vaid at para 41)?**

The rationale of the immunity from being subpoenaed to attend court as a witness in civil cases is to ensure that parliamentarians are able to attend parliamentary sittings and perform their parliamentary duties. The rationale of the privilege remains necessary.

It is the Subcommittee's opinion that the privilege can be maintained, though the 40 day time period can be limited.

#### **2. Does the contemporary context provide reasonable limits on the scope and exercise of the privilege?**

Given the current practice of lengthy sessions with extended adjournment periods during the year, this privilege is ripe for modernization. Among the features of the privilege which could be updated is the reduction of the forty days which should be applied to adjournments rather than sessions.

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<sup>249</sup> *Telezone Inc. v. Canada (Attorney General)*, 69 OR (3d) 161, 2004 CanLII 36102 (ON CA). The motion judge had held the period to be 14 days before or after a session.

<sup>250</sup> *R. v. Brown*, 2001 PESCTD 6.

<sup>251</sup> *Samson Indian Nation and Band v. Canada* (F.C.), 2003 FC 975.

<sup>252</sup> *Ainsworth Lumber Co. v. Canada (Attorney General)*, 2003 BCCA 239 (CanLII).

<sup>253</sup> See discussion above regarding privilege in the provinces. See also Charles Robert and Vince MacNeil, "Shield or Sword? Parliamentary Privilege, Charter Rights and the Rule of Law", *supra*.

As well, the privilege is not intended to be used to impede the course of justice, and is regularly waived, particularly for criminal cases.<sup>254</sup> It could be worthwhile to develop internal controls to ensure that the privilege is not abused in such a way as to impede the course of justice.

The service of court documents should also be revisited. It is difficult to understand today how the service of court documents, at least by mail, actually infringes privilege. It should also be made clear that this privilege does not apply in situations where the parliamentarian (or official) is a party to a court action.

### **3. How can this privilege be exercised to respect the values and principles expressed in the Canadian Charter of Rights and Freedoms?**

More generally, while not specifically a *Charter* issue, the privilege should be exercised in a way that does not adversely affect the administration of justice in civil proceedings.

The *Charter* sets out certain protections for persons charged with criminal and penal offences. The privilege from being subpoenaed to attend court as a witness should only be exercised in a way that does not infringe on the rights and freedoms of individuals charged with criminal and penal offences.

### **4. How can the scope and exercise of this privilege be aligned with the standards of transparency and accountability essential to Parliament's public reputation?**

The scope and exercise of this privilege should be tailored so as not to give the impression that it is being used to avoid a court process. Parliamentarians are not, and should not be seen as being, above the law.

The 40 day rule, product of another era, should be set aside. Rather, a principles-based approach should be adopted to ensure the fair administration of justice taking into account the parliamentarian's responsibilities and the rights of other parties in the litigation.

As well, parliamentarians can choose not to exercise the privilege especially where the court and other parties show flexibility when trying to arrange for a member of either House to attend court as a witness.

### **3. Freedom from jury service**

Similar in objective to the privilege of freedom from arrest in civil actions, it is intended to assert the prior claim of Parliament to the attendance and service of members. As has been noted:

Since the House of Commons has first claim on the attendance and service of its Members, and since the courts have a large body of individuals to call upon to serve on juries, it is not essential that Members of Parliament be obliged to serve as jurors. This was the tradition in the United Kingdom long before Confederation and this has been the Canadian practice since 1867. The duty of Members to attend to their functions as elected representatives is in the best interests of the nation

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<sup>254</sup> *Maingot, supra*, at p. 159.

and is considered to supersede any obligation to serve as jurors. It has also been recognized in law.<sup>255</sup>

This privilege also extends to officers of Parliament whose duties support its activities and deliberations. A similar understanding is found in Australia's *House of Representatives Practice*.<sup>256</sup> Of note, jury selection is a matter of provincial jurisdiction, and it is standard in the provinces to exempt legislators from jury service.

The law in New Zealand goes even further and provides that Members of Parliament there are not to serve on any jury in any court on any occasion: "Rather than being exempt from serving on juries, members are now disqualified from doing so".<sup>257</sup>

#### a. Developments abroad

In 2003, the United Kingdom's *Criminal Justice Act 2003* Parliament abolished this privilege as of right in England and Wales<sup>258</sup> with the reasonable expectation that parliamentarians would be excused from jury service when it would interfere with their legislative responsibilities.<sup>259</sup> However, the 2013 UK Joint Committee expressed discomfort with requiring a Member of a legislature to have to seek permission from the judicial branch of government in order to perform parliamentary duties:

Nevertheless we consider it objectionable in principle for a Member of the legislature to be in the position of having to seek permission of another branch of government in order to perform his or her parliamentary duties, which might cover, for example, participating in a vote of confidence in a Government uncertain of its majority. We recognise that some Members will have a strong preference to perform what they conceive to be their civic duty, if the occasion arises, so we do not advocate a complete exemption or disqualification for Members.<sup>260</sup>

The 2013 UK Joint Committee thus recommended that the Government "bring forward legislation providing that Members of either House should be among those who have a right to be excused from jury service in England and Wales."<sup>261</sup>

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<sup>255</sup> House of Commons Procedure and Practice, (2<sup>nd</sup> ed), *supra*. Note that jury selection is a matter of provincial jurisdiction. While exemption from jury duty is claimed as a right by the House of Commons, provincial jury legislation usually includes Members of Parliament as one of the exempt categories. In some provincial statutes, the staff of Members of the Legislative Assembly and officers of the Assembly may be exempted from jury duty. See, for example, New Brunswick, *The Jury Act*, S.N.B. 1980, c. J-3.1, s. 3; Quebec, *Jurors Act*, R.S.Q., c. J-2, s. 5; Saskatchewan, *The Jury Act, 1998*, S.S. 1998, c. J-4.2, s. 6.

<sup>256</sup> Australia, *House of Representatives Practice*, 5<sup>th</sup> ed., Parliament of Australia, 2012, at p. 748. This exemption is incorporated in the Jury Exemption Act 1865 which provides that Member of Parliament are not liable, and may be summoned, to serve as jurors in any Federal, State or Territory court.

<sup>257</sup> David McGhee, ed., *Parliamentary Practice in New Zealand*, 3<sup>rd</sup> ed., Dunmore Publishing, New Zealand, 2005,) at p. 638, referring to the *Juries Act 1981*.

<sup>258</sup> Section 321 and Schedule 33, *Criminal Justice Act 2003* (UK) repealed schedule 1 to the *Juries Act 1974*, which codified in statute the traditional parliamentary privilege of exemption from jury service.

<sup>259</sup> 2013 UK Joint Committee, *supra*, at para 252.

<sup>260</sup> *Ibid*.

<sup>261</sup> *Ibid* at para 253.

While the rationale for the privilege of exemption from jury duty is to ensure that parliamentarians are able to attend and perform their parliamentary duties, there are additional reasons to maintain the exemption. First, parliamentarians possess special knowledge about legislation and the legislative process, as do lawyers and other classes of people generally exempt from jury duty. Second, jury selection is a matter of provincial jurisdiction, and that the standard in the provinces is to exempt legislators from jury service.

**b. Observations of the Subcommittee to Adapt the Privilege of Freedom from Jury Service to Contemporary Norms**

***1. Is the privilege of exemption from jury service necessary to protect parliamentarians in the discharge of their legislative and deliberative functions, and Parliament's work in holding government to account for the conduct of the country's business (interpreting Vaid at para 41)?***

Yes, the rationale of the privilege, to ensure that parliamentarians are able to attend and perform their parliamentary duties, remains necessary.

***2. Does the contemporary context provide reasonable limits on the scope and exercise of the privilege?***

First, the Subcommittee agrees with the observation made by the 2013 UK Joint Committee, that it is "objectionable in principle for a Member of the legislature to be in the position of having to seek permission of another branch of government in order to perform his or her parliamentary duties, which might cover, for example, participating in a vote of confidence in a Government uncertain of its majority." This concern is quite real in the contemporary context, which has seen a number of minority parliaments in recent years.

Second, beyond the original rationale for the privilege there is an additional reason for parliamentarians to be exempt from jury service (though this is not the position taken in the UK since 2003): Juries are responsible for determining the facts in a trial, while the judge is responsible for interpreting the law. Judges, lawyers, legislators and police officers are often excluded in provincial law from jury service as they are responsible for developing, interpreting and enforcing laws. This specific knowledge can interfere, or be seen to interfere or suggest bias, with the determination of the facts in a trial. Such suggestions of interference, whether or not they are founded, may adversely impact the length, conduct, and outcome of a trial (for example by leading to more questions about aptitude, possible grounds for appeal, etc.).

***3. How can this privilege be exercised to respect the values and principles expressed in the Canadian Charter of Rights and Freedoms?***

The ability of parliamentarians to serve as jurors should not interfere with the administration of justice. Allowing parliamentarians to serve as jurors in some cases and not others might actually lead to more confusion and delay in determining whether a parliamentarian is fit or available to serve.

#### **4. How can the scope and exercise of this privilege be aligned with the standards of transparency and accountability essential to Parliament's public reputation?**

The rationale for continuing to exempt parliamentarians from jury service should be made clear. It could also be worthwhile to clarify that jury selection is a matter of provincial jurisdiction, and that the standard in the provinces is to exempt legislators from jury service.

#### **4. Freedom from obstruction, interference, intimidation and molestation**

Finally, to properly and effectively perform parliamentary and representative functions, a member must be able to operate without fear of undue interference or intimidation. This obstruction can take various forms, some involving corruption or bribery are clearly illegal while others are more properly categorized as improper harassment or molestation. Both kinds of interference can violate this privilege if their impact prevents the members from carrying out their parliamentary duties. As has been observed:

Members are entitled to go about their parliamentary business undisturbed. The assaulting, menacing, or insulting of any Member on the floor of the House or while he is coming or going to or from the House, or on account of his behaviour during a proceeding in Parliament, is a violation of the rights of Parliament. Any form of intimidation ... of a person for or on account of his behaviour during a proceeding in Parliament could amount to contempt.<sup>262</sup>

While attempts to obstruct, impede, interfere, intimidate, molest or otherwise bother parliamentarians may be considered contempts of Parliament, because these matters relate so closely to the right of the Parliament to the service of its members, they are often considered to be breaches of privilege.<sup>263</sup>

##### **a. Observations of the Subcommittee to Adapt the Privilege of Freedom from Obstruction, Interference, Intimidation and Molestation to Contemporary Norms**

##### **1. Is the privilege of freedom from obstruction, interference, intimidation and molestation necessary to protect parliamentarians in the discharge of their legislative and deliberative functions, and Parliament's work in holding government to account for the conduct of the country's business (interpreting Vaid at para 41)?**

It goes without saying that parliamentarians must be able to function in a climate free from obstruction, interference, and intimidation in order to serve effectively. However, it is worthwhile to distinguish between forms of physical obstruction – such as traffic barriers, security cordons and picket lines, and non-physical obstruction, such as damaging a member's reputation. Both types can raise questions of privilege.

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<sup>262</sup> *Maingot, supra*, at pp. 230-231.

<sup>263</sup> House of Commons Procedure and Practice (2<sup>nd</sup> ed), *supra*.



**2. Does the contemporary context provide reasonable limits on the scope and exercise of the privilege?**

It is under the authority of the Speaker of each House of Parliament and of the Houses of Parliament themselves to address *prima facie* questions of privilege arising from attempts at obstruction or molestation.

Some forms of physical obstruction, such as security or construction measures, might be necessary for the greater good of Parliament. Parliamentarians should be understanding in cases of reasonable interference or delay. In cases of abuse, however, members may claim a breach of privilege.

With respect to non-physical acts that can be considered obstruction, such as the making of comments that can damage a Member or third party's good name or reputation, or the intentional provision to members of false or misleading information, or the intimidation of members or witnesses at a committee meeting, the Subcommittee is of the opinion that procedures should exist and be enforced to ensure that the dignity of Parliament is not undermined.

**3. How can this privilege be exercised to respect the values and principles expressed in the Canadian Charter of Rights and Freedoms?**

The rights of a parliamentarian to do his or her work in an atmosphere free from obstruction, interference, intimidation and molestation should not unduly infringe on anyone else's right to safety or security of the person.

**4. How can the scope and exercise of this privilege be aligned with the standards of transparency and accountability essential to Parliament's public reputation?**

As has been noted, it "is impossible to codify all incidents which might be interpreted as matters of obstruction, interference, molestation or intimidation and as such constitute *prima facie* cases of privilege."<sup>264</sup> Still, attempts to address such incidents should be dealt with in a transparent manner.

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<sup>264</sup> *Ibid.*



## CONCLUSION: LOOKING AHEAD

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Parliament has evolved significantly since parliamentary privilege was originally developed to prevent the interference of the sovereign in the workings of Parliament. The evolution of the parliamentary system has impacted the development of the law of privilege both in Canada and abroad. Parliament, originally a semi-private institution, is now the centre of public democratic life. It is expected that Parliament will be transparent, accessible, and accountable to the public, and reflect contemporary norms of natural justice and procedural fairness. Today the discourse about parliamentary privilege centres on how privilege should be exercised in a rights-based legal system exemplified in Canada by the *Canadian Charter of Rights and Freedoms*.

Other Commonwealth jurisdictions, namely the United Kingdom, Australia, and New Zealand, have all undertaken initiatives to assess and modernize parliamentary privilege. By contrast, until now no parliamentary or legislative body in Canada has completed a comprehensive analysis of parliamentary privilege. Indeed, the need for such a review in Canada is accentuated by the constitutional entrenchment of the *Charter*, a unique feature among fellow Commonwealth countries.

As was noted by the Supreme Court of Canada in its leading decision on parliamentary privilege *Canada (House of Commons) v. Vaid*, it is for Parliament, not the courts, to determine whether in a particular case the exercise of a privilege is necessary or appropriate. While in *Vaid* the Supreme Court set out a framework for analysing the existence and need of a claimed privilege, lower courts in Canada have experienced difficulty in adjudicating claims of privilege, leading to conflicting results.

These circumstances suggest that Parliament should proactively re-evaluate and reconsider parliamentary privilege in the Canadian context, to reassess privilege in a way that allows Parliament to function adequately without infringing on the rights of others. The Subcommittee's observations contained in the previous section of this paper reflect its consideration of possible options to renew parliamentary privilege in the 21<sup>st</sup> century.

Ultimately Parliament may determine that a set of modified parliamentary privileges ought to be codified, through statute or otherwise, to reflect the modern needs of Parliament.

Canadians expect Parliament to conduct itself in a manner appropriate to its role. A contemporary, Canadian interpretation of parliamentary privilege can help facilitate and protect the work of parliamentarians, while helping to instil pride in the institution throughout Canada and the Commonwealth.



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