Court File No. C70739

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

ATTORNEY GENERAL OF CANADA

Appellant

- and -

RYAN ALFORD

Respondent

-and-

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,
CANADIAN CIVIL LIBERTIES ASSOCIATION,
THE SPEAKER OF THE HOUSE OF COMMONS and
THE SPEAKER OF THE SENATE**

Interveners

FACTUM OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

May 29, 2023

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CONTENTS

PART I. OVERVIEW 1
PART II. FACTS 2
PART III. ISSUE 2
PART IV. SUBMISSIONS 2
A. Accountability and Transparency are the Rationales Behind Parliamentary Privilege 2
1. Historical Roots of Parliamentary Privilege 3
2. Separation of Powers 4
3. Purposive Approach to Parliamentary Privilege 6
B. Accountability and Transparency Should Inform Section 18 7
1. Principles of Constitutional Interpretation 7
2. Role of Accountability and Transparency in Interpreting Section 18 8
PART V. CONCLUSION 10

PART I. OVERVIEW

1. Parliamentary privilege first arose in England in response to Parliamentarians being arrested for their speeches in the Houses of Commons.[1] In 2022, the underlying decision (and this appeal) arose because there is a national security law that threatens Parliamentarians with potential imprisonment for good-faith debates in Parliament.[2] That cannot be correct.[3] This Court should maintain the law's longstanding purposive application of parliamentary privilege with an eye to protecting democratic values of accountability and transparency.

2. At issue is section 12(1) of the *National Security and Intelligence Committee of Parliamentarians Act* which disentitles members of the National Security and Intelligence Committee—comprising Parliamentarians—from claiming immunity based on parliamentary privilege in court proceedings against them arising from the disclosure of information obtained while exercising their role on the Committee.[4] The Superior Court held that this provision was unconstitutional under both section 18 and the Preamble of the *Constitution Act*[5] which accord constitutional status to parliamentary privilege.[6]

3. The British Columbia Civil Liberties Association (the "**BCCLA**") intervenes in this appeal and makes two submissions. First, the twin imperatives of accountability and transparency lie at

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[1] In 1629, Charles I had Sir John Eliot and two other Members of Parliament imprisoned for "sedition for words spoken in debate in the House": see the Honourable Justice Malcom Rowe, Manish Oza, "Structural Analysis and the Canadian Constitution" 101-1 The Canadian Law Review (2023), ("**Structural Analysis and the Canadian Constitution")** at p. 225.

[2] See, for example, *Security of Information Act*, RSC 1985, c O-5, s 13(1)-(3).

[3] Structural Analysis and the Canadian Constitution at p. 225 ("The autonomy of our legislatures is protected from such intervention [i.e. imprisonment]…by Parliamentary privilege").

[4] *National Security and Intelligence Committee of Parliamentarians Act*, SC 2017, c 15, s 12(1).

[5] *The Constitution Act, 1867*, 30 & 31 Vict, c 3, s. 18.

[6] *Alford v. Canada (Attorney General),* 2022 ONSC 2911.

the core of the constitutional protection afforded to parliamentary privilege. In protecting the privilege, the *Constitution Act* recognizes the vital role that parliamentary debate and scrutiny play within our democratic system. This is evidenced by (i) the historical roots of parliamentary privilege; (ii) judicial treatment of the separation of powers; and (iii) the test governing parliamentary privilege.

4. Second, in interpreting section 18 of the *Constitution Act*, this Court should heavily weigh the underlying context of national security. Too often under the cloak of secrecy grievous rights abuses have occurred. There is a heightened need to protect parliamentary privilege to ensure that legislators have adequate means to exercise oversight and review, and inform the public.

PART II. FACTS

5. The BCCLA takes no position on the facts of this appeal.

PART III. ISSUE

6. As set out by the Appellant, the sole issue before this Court is whether Parliament has legislative authority under the *Constitution Act* to enact section 12 of the *National Security and Intelligence Committee of Parliamentarians Act* without a constitutional amendment. To assist the Court on this issue, the BCCLA makes two submissions as set out below.

PART IV. SUBMISSIONS

A. Accountability and Transparency are the Rationales Behind Parliamentary Privilege

7. Parliamentary privilege is afforded constitutional protection to safeguard two values that are integral to a functioning democracy: accountability and transparency. The fact that accountability and transparency as values are at the centre of parliamentary privilege manifests in

at least three ways: (i) the historical roots of parliamentary privilege; (ii) the separation of powers; and (iii) the purposive approach taken by the courts regarding the "test" on parliamentary privilege.

1. Historical Roots of Parliamentary Privilege

8. Privileges and immunities of Parliament "are an ancient and venerable part of the law."[7] As the Supreme Court and this Court have recognized, these privileges developed through historic struggle and with an eye to limiting intrusion from the judicial branch on Parliament and improving accountability.

9. The historical roots of parliamentary privilege in Canada lay in the United Kingdom. There, the doctrine of parliamentary privilege developed in the 16th-17th century through "the struggle of the House of Commons" for independence from the other branches of government.[8] As Chief Justice Lamer explained, "the Crown and the courts showed no hesitation to intrude into the sphere of the Houses of Parliament."[9] Members of the House of Commons "were arrested by the sovereign if he disagreed with the Members' conduct or speech in Parliament."[10] Members opposed these arrests, asserting that they were inconsistent with their privileges. Eventually, as Justice Jamal summarized in *Duffy*, parliamentary privilege was accepted as forming part of the common law of England.[11] Among other things, the doctrine was recognized in the *Bill of Rights*

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[7] Warren J Newman, "Parliamentary Privilege, the Canadian Constitution and the Courts", 39-3 Ottawa Law Review 573 (2008), at p. 575.

[8] See Chief Justice Lamer's summary of the history of parliamentary privilege in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319 ("***New Brunswick Broadcasting***") at pp. 344-345.

[9] *New Brunswick Broadcasting* at p. 344.

[10] *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 ("***Chagnon***"), at para. 22.

[11] *Duffy v. Canada (Senate),* 2020 ONCA 536 ("***Duffy***") at para. 26.

(U.K.), 1688, which provided 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."[12]

10. Parliamentary privilege became part of Canadian law through the common law as being an inherent and necessary component of the legislative function of federal and provincial legislatures. It was also constitutionalized through section 18 of the *Constitution Act* as well as the preamble which affirmed that Canada is to have "a Constitution similar in Principle to that of the United Kingdom."

11. The brief historical review above is clear: from its genesis, parliamentary privilege was about ensuring that legislators had adequate autonomy to debate without the threat of sanction so that they can not only fulfill their legislative duties but also ensure that the workings of the government were accountable to the public. Parliamentary privilege was integral to ensuring that ordinary people could hear from their representatives on the achievements and failures of the government, thus building trust and strengthening the democratic roots of the Westminster parliamentary tradition.

2. Separation of Powers

12. Canadian law has long recognized that sovereign power is divided not only between Parliament and the provincial legislatures, but also among the executive, legislative and judicial branches of the state.[13] Although there are areas of overlap, the branches play distinct roles and have developed different core competencies.[14] Parliamentary privilege forms an "essential part"

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[12] *Duffy* at para. 26.

[13] *Fraser v. Public Service Staff Relations Board*, 1985 CanLII 14 (SCC), [1985] 2 S.C.R. 455 at para. 39; *New Brunswick Broadcasting* at p. 389; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at para. 33

[14] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, at para. 29.

of how Canada's constitutional democracy maintains the fundamental separation of powers between the different branches of government.[15] In describing this function, courts have justified the purpose of parliamentary privilege as a conduit for heightening accountability and transparency.

13. In *BC v. Provincial Court Judges' Association of BC*, the Supreme Court of Canada unanimously held that parliamentary privilege is a "corollary to the separation of powers" because it helps protect the ability of the Senate, the House of Commons, and the provincial legislative assemblies to perform their constitutionally-assigned functions.[16] Such reasoning mirrors previous Supreme Court of Canada decisions in *Vaid* and *Chagnon* (as set out below).

14. In *Vaid*, the Supreme Court unanimously held that parliamentary privilege did not prevent the Canadian Human Rights Tribunal from entertaining a workplace complaint brought against the Speaker of the House of Commons by his former chauffeur. Justice Binnie explained that parliamentary privilege is defined by "the degree of autonomy necessary to perform Parliament's constitutional function": namely, by what is "necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business."[17]

15. In *Chagnon*, a majority of the Court held that parliamentary privilege did not prevent an arbitrator from adjudicating a union's grievance of the decision of the President of the National Assembly of Québec. Again, the majority reiterated that parliamentary privilege advances the

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[15] *Duffy* at para. 31.

[16] *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, at para. 66 [emphasis added].

[17] *Canada (House of Commons) v. Vaid*, 2005 SCC 30 ("***Vaid***") at para. 41 [emphasis added].

separation of powers "[b]y shielding some areas of legislative activity from external review" and ""rant[ing] the legislative branch of government the autonomy it requires to perform its constitutional functions".[18]

16. The courts' approach to the separation of powers exhibits what the existing law understands the foundational purpose of parliamentary privilege to be: a protective principle meant to ensure legislators have autonomy to hold the "government to account."

3. Purposive Approach to Parliamentary Privilege

17. The courts' purposive approach to the "test" on parliamentary privilege is another illustration of how accountability and transparency form the core of parliamentary privilege. Specifically, at the first step, the court asks whether the existence and scope of the claimed privilege have been established, based on either Canadian or British precedent. If the existence and scope of the claimed privilege have been established, the privilege must be accepted by the court. If no, the court asks whether the privilege claimed is supported as a matter of principle under a necessity test: the sphere of activity over which privilege is claimed must be "so closely and directly connected with the fulfillment by the assembly or its members of their functions as a legislative and deliberative body…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."[19]

18. Central to claims of privilege is a functional analysis of whether such privilege is meant to enable legislators to perform their duties. Arguably the most pressing duty of Parliamentarians

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[18] *Chagnon*, at para. 1; *Vaid*, at para. 41 [emphasis added].

[19] *Chagnon* at para. 29 [emphasis added].

(i.e., "the raison d'être") "is to hold the government to account."[20] In *Chagnon*, a majority of the Court held that the test and its purpose are as follows:

> [Parliamentary privilege] is meant to enable the legislative branch and its members to proceed fearlessly and without interference in discharging their constitutional role, that is, enacting legislation and acting as a check on executive power. It guarantees "an independent space for the citizens' representatives to carry out their parliamentary functions; the freedom to debate and decide what laws should govern, and the unfettered ability to hold the executive branch of the State to account."[21]

19. The historical roots of parliamentary privilege, the role of such privilege in preserving the separation of powers, and how the courts have articulated the test governing parliamentary privilege all affirm a single proposition: the democratic imperatives of accountability and transparency lie at the core of parliamentary privilege.

B. Accountability and Transparency Should Inform Section 18

20. A central issue in this appeal is whether the term "define" in section 18 enables Parliament to limit parliamentary privilege on national security issues without undertaking a constitutional amendment. The Court should use the lens of accountability and transparency to inform its interpretation of section 18.

1. Principles of Constitutional Interpretation

21. While the Court should start its interpretation of section 18 with the text of the provision (as urged by the Appellant),[22] that is not the end of the analysis. Constitutional interpretation is a multifaceted exercise. Constitutional provisions must be "placed in [their] proper linguistic,

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[20] *Joseph Power v. Attorney General of Canada*, 2021 NBQB 107 at para. 37.

[21] *Chagnon* at para. 23 [internal citations omitted; emphasis added].

[22] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32.

philosophic and historical contexts."[23] Constitutional texts must be interpreted in a broad and purposive manner.[24] In particular, constitutional texts must be interpreted in a way that is sensitive to evolving circumstances because they "must continually adapt to cover new realities."[25] The underlying organizational principles of constitutional texts, like the separation of powers, are relevant to their interpretation.[26]

2. Role of Accountability and Transparency in Interpreting Section 18

22. Any interpretation of section 18 that this Court adopts should heavily weigh the role of accountability and transparency, for two reasons. First, as evidenced in the case law summarized above, the Supreme Court of Canada (and this Court) have adopted the view that accountability and transparency play an indispensable role in why parliamentary privilege has constitutional status and protection.

23. Second, the interpretation of section 18 must account for the national security context, which the Court should consider as part of its multifaceted interpretive exercise. Open parliamentary debate in the national security realm, which has seen the unfortunate consequences of executive overreach in the past, is vital. A cloak of secrecy risks perpetuating civil liberty breaches—outcomes which irreparably harm ordinary Canadians and tarnish Canada's global reputation as an inclusive democracy. For example, the story of Maher Arar—who was

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[23] *R. v. Big M Drug Mart*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295 ("***Big M Drug Mart***"), at para. 117.

[24] *Hunter et al. v. Southam Inc.,* 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at pp. 155-56; *Big M Drug Mart*, at para. 117; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, at para. 19.

[25] *Reference re Same-Sex Marriage,* 2004 SCC 79, at para. 30; *Reference re Employment Insurance Act (Can.), ss. 22 and 23,* 2005 SCC 56, at para. 9.

[26] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 32; *Reference re Senate Reform*, 2014 SCC 32 at para. 25; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721.

"renditioned" to a foreign country and tortured—is "a potent example…of the importance of robust accountability and oversight."[27] Using the criminal law and the judicial branch to prevent Parliamentarians sounding the "alarm" on problems they identify with respect to the national security apparatus of the executive during parliamentary debate retains the potential for repeating grievous errors. Doing so would also be fundamentally inconsistent with their role as Parliamentarians.

24. Parliamentary debate on security may strengthen the capabilities of national security agencies. For example, Professor Forcese explained that "unreasonable secrecy acts against national security. It shields incompetence and inaction, at a time that competence and action are both badly needed… National security, in other words, is not about insulating governments from embarrassment."[28] Parliamentarians entrusted to sit on the committee can also be trusted to use the information they learn appropriately. It is not the proper role of the executive to be prosecuting and the judiciary to be policing the ambit of appropriate democratic debate in Parliament. To do so undermines the very reason parliamentary privilege is of constitutional significance.

25. It is not an answer to say that Parliament passed the law in question. Parliament may be able to waive the privilege in specific instances, but that does not mean a majority in the House of Commons and the Senate can abridge that privilege in all cases and bind future Parliaments. Just as Parliament cannot change other fundamental aspects of the machinery of our democratic system (e.g., constitutional provisions)[29] by passing simple legislation, it cannot amend for itself and

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[27] Carmen K Cheung, "Oversight and Accountability of Canada's National Security Agencies: A Framework for Discussion", 92-1 Canadian Bar Review 19, (2014) at p. 22.

[28] Craig Forcese, "Clouding Accountability: Canada's Government Secrecy and National Security Law "Complex"", 36-1 Ottawa Law Review 49 (2004) at p. 52 [emphasis added].

[29] *Reference re Senate Reform*, 2014 SCC 32.

abridge for all future Parliaments the ambit of a constitutionally protected privilege through simple legislation. Merely because future Parliamentarians can repeal such legislation does not change the fact that the current law is curtailing an organizational constitutional principle without undertaking the necessary steps (e.g., constitutional amendments).

26. Any interpretation that this Court reaches on the proper reading of section 18 should heavily weigh the values of accountability and transparency. These two imperatives are the law's rationale for why parliamentary privilege has a constitutional status and accordingly should be reflected in section 18. The Respondent's position is better aligned with these values.

PART V. CONCLUSION

27. The ability of legislators to deliberate in an open forum is "perhaps the greatest safeguard of a democratic form of government" and "a fundamental right necessary to ensure the protection of minority opinions… [which] is particularly necessary in matters of national security where the conflict between individual rights and the collective good must be so carefully balanced."[30] A blanket legal prohibition denying lawmakers parliamentary privilege and subjecting them to potential imprisonment for holding the executive accountable has the very real potential to thwart how this balance is struck and in the process the public may be kept in the dark on problems of national security.

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[30] Nicholas A MacDonald, "Parliamentarians and National Security", 34-4 Canadian Parliamentary Review 33 (2011) at p. 38.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of May, 2023.

Per: Michael Fenrick / Mannu Chowdhury

SCHEDULE "A"

Jurisprudence

1. *Alford v. Canada (Attorney General,* 2022 ONSC 2911

2. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly),* 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319

3. *Duffy v. Canada (Senate),* 2020 ONCA 536

4. *Fraser v. Public Service Staff Relations Board,* 1985 CanLII 14 (SCC), [1985] 2 S.C.R. 455

5. *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62

6. *Ontario v. Criminal Lawyers' Association of Ontario,* 2013 SCC 43

7. *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia,* 2020 SCC 20

8. *Canada (House of Commons) v. Vaid,* 2005 SCC 30

9. *Chagnon v. Syndicat de la fonction publique et parapublique du Québec,* 2018 SCC 39

10. *Quebec (Attorney General) v. 9147-0732 Québec inc.,* 2020 SCC 32

11. *R. v. Big M Drug Mart,* 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295

12. *Hunter et al. v. Southam Inc.,* 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145

13. *Reference re Supreme Court Act, ss. 5 and 6,* 2014 SCC 21

14. *Reference re Same-Sex Marriage,* 2004 SCC 79

15. *Reference re Employment Insurance Act (Can.), ss. 22 and 23,* 2005 SCC 56

16. *Reference re Secession of Quebec,* 1998 CanLII 793 (SCC)

17. *Reference re Senate Reform,* 2014 SCC 32

18. *Reference re Manitoba Language Rights,* 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721

19. *Joseph Power v. Attorney General of Canada*, 2021 NBQB 107

Secondary Sources

20. Nicholas A MacDonald, Parliamentarians and National Security, 34-4 Canadian Parliamentary Review 33 (2011)

21. Craig Forcese, "Clouding Accountability: Canada's Government Secrecy and National Security Law "Complex"",) 36-1 Ottawa Law Review 49 (2004)

22. Carmen K Cheung, "Oversight and Accountability of Canada's National Security Agencies: A Framework for Discussion", 92-1 Canadian Bar Review 19 (2014)

23. Warren J Newman, "Parliamentary Privilege, the Canadian Constitution and the Courts", 39-3 Ottawa Law Review 573 (2008)

24. The Honourable Justice Malcom Rowe, Manish Oza, "Structural Analysis and the Canadian Constitution" 101-1: The Canadian Law Review (2023)

SCHEDULE "B"

The Constitution Act, 1867, 30 & 31 Vict, c 3

Preamble

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

Privileges, etc., of Houses

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 House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

Security of Information Act, RSC 1985, c O-5

Purported communication

13 (1) Every person permanently bound to secrecy commits an offence who, intentionally and without authority, communicates or confirms information that, if it were true, would be special operational information.

Truthfulness of information

(2) For the purpose of subsection (1), it is not relevant whether the information to which the offence relates is true.

Punishment

(3) Every person who commits an offence under subsection (1) is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years less a day.

National Security and Intelligence Committee of Parliamentarians Act, SC 2017, c 15

Parliamentary privilege

12 (1) Despite any other law, no member or former member of the Committee may claim immunity based on parliamentary privilege in a proceeding against them in relation to a contravention of subsection 11(1) or of a provision of the Security of Information Act or in relation to any other proceeding arising from any disclosure of information that is prohibited under that subsection.

Evidence

(2) A statement made by a member or former member of the Committee before either House of Parliament or a committee of the Senate, of the House of Commons or of both Houses of Parliament is admissible in evidence against them in a proceeding referred to in subsection (1).

Court File No. C70739

ATTORNEY GENERAL OF CANADA - and - **RYAN ALFORD**

Appellant Respondent

COURT OF APPEAL FOR ONTARIO

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