SCC File No.: 41336

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

RYAN ALFORD

Appellant

- and –

ATTORNEY GENERAL OF CANADA

Respondent

-and-

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PART I. OVERVIEW

1. In Westminster parliaments, a fundamental task of elected members of a legislature is to hold the government to account in a forum which is transparent to the public. Parliamentary privileges evolved to protect these democratic imperatives.[1] If Parliamentarians cannot freely debate in Parliament, the legislature cannot hold the government to account and the public is left in the dark. In darkness, democracy and the rule of law erode.

2. None of this is new.[2] It is hardwired into our constitutional order.[3] What is new—and the subject of this appeal—is a national security law that threatens Parliamentarians with potential imprisonment for good-faith debates in Parliament. In determining the constitutionality of this law, this Court must decide the ambit of parliamentary privilege as enshrined in section 18 and the Preamble of the *Constitution Act*.

3. Specifically, this Court must decide whether Parliament has the authority to "define" privilege in a manner that is antithetical to the core purpose of parliamentary privilege through ordinary legislation. Decades of case law and the principles of constitutional interpretation tell us the answer is "no."

4. The British Columbia Civil Liberties Association makes three submissions:

(a) The historical roots of parliamentary privilege and the way this constitutional doctrine has been interpreted by this Court shows that accountability and transparency are the core purposes underlying parliamentary privilege;

(b) section 18 should be interpreted consistently with (a) the purpose of parliamentary privilege, and (b) the internal limits of the *Constitution Act, 1867* and our democratic system; and,

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[1] *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at paras. 21, 29(3) ("***Vaid***"); *Chagnon v. Syndicat de la function publique et parapublique du Quebec*, 2018 SCC 39 ("***Chagnon***"), at paras. 18, 23; and *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 ("***New Brunswick Broadcasting***") at p. 377.
[2] *Vaid,* 2005 SCC 30, at para. 41.
[3] *Duffy v. Canada (Senate),* 2020 ONCA 536 ("***Duffy***") at paras. 25-27.

(c) no constitutional provision is interpreted in a vacuum. In this appeal, the relevant context is national security where too often, grievous rights abuses have occurred under the cloak of secrecy.

5. The BCCLA takes no position on the facts of this appeal or its ultimate disposition.

PART II. POSITION ON THE QUESTIONS IN ISSUE

6. The BCCLA's submissions are set out above at paragraph 4.

PART III. STATEMENT OF ARGUMENT

A. What is really at issue

7. In this appeal, several Attorneys General effectively present a false dichotomy on what is really at issue: section 18 either gives Parliament free reign to legislate as it wishes in respect of parliamentary privilege (their position); or section 18 is unworkable because any changes to parliamentary privilege require a constitutional amendment (how they mischaracterize Mr. Alford's position). That is not what this case is about.

8. Let's start with what is not in dispute (over which the Attorneys General spill much ink). Parliament of course has some ability to legislate in respect of its privilege by way of ordinary legislation.[4] The text of section 18 says so. Parliamentary privilege is not static.[5] These privileges have evolved to respond to the needs of a modern democratic society. Parliament is not fixed in time about how its privileges work.[6] Nor is Parliament's hand tied in many circumstances in how it grows or narrows its privileges.

9. However, the dispute in this appeal is not whether Parliament can finetune its privileges;

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[4] Factum of the Respondent, Attorney General of Canada at paras. 28-31 ("***AG Canada***"); Factum of the Intervener, Attorney General of Ontario, at paras. 9-16.

[5] AG Canada, at para. 47.

[6] Subject to the internal limit in section 18 itself (that Parliament may not confer on itself any greater parliamentary privileges than those enjoyed at the time in 1867 by the British House of Commons) and, in the BCCLA's submission, that Parliament cannot thorough ordinary legislation limit its privilege in such a way as to undermine the core purposes for its constitutional protection.

rather, it is whether Parliament, through ordinary legislation, can surrender its privileges in a way that is contrary to the core *purposes* of parliamentary privilege: to ensure the government is held to account and that democratic processes are transparent to the public.

B. Accountability and transparency are the underlying purposes of parliamentary privilege

10. Accountability and transparency, free from threat of prosecution, are the key democratic values behind parliamentary privilege as evidenced by: (1) the historical roots of parliamentary privilege; (2) the separation of powers; and (3) the functional approach taken by courts to interpreting the scope of parliamentary privilege.

1. The historical roots of parliamentary privilege

11. From its genesis, parliamentary privilege has been 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 the workings of the government are accountable to the legislature and transparent to the public.[7] 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.[8]

12. The historical roots of parliamentary privilege in Canada lie in the United Kingdom.[9] There, parliamentary privilege developed through "the struggle of the House of Commons" for independence from the other branches of government.[10] As Chief Justice Lamer explained, "the Crown and the courts showed no hesitation to intrude into the sphere of the Houses of Parliament."[11] Members of the House of Commons "were arrested by the sovereign if he disagreed

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[7] *Vaid,* at para. 41. See also Senate of Canada, *A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century*, Interim report of the Standing Committee on Rules, Procedures, and the Rights of Parliament, 2015, at 1, citing Colette Mireille Langlois, "Parliamentary Privilege: A Relational Approach", 2012 Journal of Parliamentary and Political Law, vol 6, at 129-160.
[8] *Chagnon*, at paras. 20-21; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 SCR 765, at para. 122 ("***Mikisew Cree***").
[9] *Duffy* at para. 25.
[10] *New Brunswick Broadcasting* at pp. 344-345.
[11] *New Brunswick Broadcasting* at p. 344.

with the Members' conduct or speech in Parliament."[12] Members opposed these arrests, asserting that they were inconsistent with their privileges.

13. Ultimately, parliamentary privilege was accepted as forming part of the common law of England.[13] The doctrine was affirmed in the *Bill of Rights (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."[14] 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 (i.e., "inherent privileges") and was constitutionalized through the Preamble to the *Constitution Act, 1867*.[15]

2. The separation of powers

14. Parliamentary privilege forms an "essential part" of how Canada's constitutional democracy maintains the separation of powers.[16] It is a conduit for the twin democratic values of accountability and transparency, without threat of prosecution, which in turn furthers the autonomy and the legitimacy of our elected legislatures from the other branches of government. This Court has repeatedly acknowledged the relationship between accountability and transparency, without fear of prosecution, and the separation of powers:

(a) In *BC v. Provincial Court Judges' Association*, this Court 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.[17]

(b) In *Vaid*, this 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.

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[12] *Chagnon* at para. 22 [emphasis added].
[13] *Duffy* at para. 26.
[14] *Duffy* at para. 26 [emphasis added].
[15] *Duffy* at paras. 27.
[16] *Duffy* at para. 31.
[17] *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, at para. 66.

Justice Binnie (on behalf of the Court) held 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."[18]

(c) In *Chagnon*, a majority of this Court held that parliamentary privilege did not prevent an arbitrator from adjudicating a union's grievance of the decision of the National Assembly of Québec. The majority reiterated that parliamentary privilege advances the separation of powers "[b]y shielding some areas of legislative activity from external review" and "grant[ing] the legislative branch of government the autonomy it requires to perform its constitutional functions".[19]

15. In other words, parliamentary privilege, with its freedom from prosecution, is a protective principle meant to ensure legislators have autonomy to hold the "government to account" in public. It furthers the legitimacy of our democratic system by ensuring that the workings of government are transparent to citizens, which they may not be if legislators face the fear of prosecution when performing their accountability function.

3. The functional approach to parliamentary privilege

16. The functional approach to parliamentary privilege adopted by the courts is another illustration of the importance of accountability and transparency as underlying values supporting the privilege's robust protection.

17. At the first step of the analysis, the court asks whether the existence of the claimed privilege has been established, based on either Canadian or British precedent. If no, the court asks whether the privilege claimed is supported 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

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

with dignity and efficiency."[20] Under either branch, the right of Parliamentarians to speak freely in Parliament without the fear of prosecution is a protected privilege.

18. Central to claims of privilege is a functional analysis of whether such privilege is meant to enable legislators to perform their duties. One pressing duty of Parliamentarians "is to hold the government to account."[21] In *Chagnon*, a majority of this 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.'[22]

19. The functional approach to parliamentary privilege—and the express justifications for it—demonstrate that the purpose of parliamentary privilege is to protect elected members in the exercise of their accountability function and improve transparency of the workings of government.

C. Section 18 should be interpreted consistently with (a) the purpose of parliamentary privilege, and (b) the internal limits of the Constitution Act, 1867 *and our democratic system*

20. The central issue in this appeal is whether the term "define" in section 18 enables Parliament to limit parliamentary privilege without undertaking a constitutional amendment. This Court should use the lens of accountability and transparency to inform its interpretation of section 18 as well as reading this section of the *Constitution Act, 1867* in the context of the democratic system which the preamble adopts as Canada's own.

1. Section 18's purposes should be given effect

21. While the Court should start its interpretation of section 18 with the text of the provision,[23] that is not the end of the analysis. Constitutional provisions must be "placed in [their] proper

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[20] *Chagnon* at para. 29.
[21] *Vaid*, at para. 41; *Mikisew Cree* at para. 122; *Chagnon* at para. 23.
[22] *Chagnon* at para. 23.
[23] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at para. 8.

linguistic, philosophic and historical contexts."[24] Constitutional texts must be interpreted in a broad and purposive manner.[25] This Court has stressed for decades that the purpose of parliamentary privilege is accountability and transparency, without threat of prosecution. It follows, then, that when this Court is tasked with interpreting a key constitutional provision on parliamentary privilege—section 18—that these purposes must inform the interpretation of section 18. That is constitutional interpretation 101.

22. Regrettably, the Court below adopted a different approach which was divorced from the purposes for protecting parliamentary privilege. It erred in its interpretation by not performing a purposive analysis of section 18 and the privileges it is intended to protect. Even a cursory review of the decision demonstrates this. For example, the word "accountability" or its variations appears only once—namely, in the opening sentence of the judgment. The word "transparency" (or its variations) never appears.

2. The purposes of section 18 should inform its scope

23. All constitutional provisions have limits.[26] Section 18's limit is that it cannot be interpreted in a manner that fundamentally undermines the proper functioning of a Westminster parliament, the system incorporated into Canada through the Preamble, unless this is achieved through constitutional amendment. Otherwise, the very architecture of governance could be changed through ordinary legislation.

24. Unlike the Court below, one must interpret section 18 and the Preamble together with an eye to giving effect to the purposes animating parliamentary privilege (accountability and transparency). The Preamble provides for Canada "a Constitution similar in Principle to that of the United Kingdom."[27] One implication of the Preamble, consistent with section 18, is that Parliament may not confer on itself any greater parliamentary privileges than those enjoyed at the time in 1867 by the British House of Commons.[28]

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[24] *R. v. Big M Drug Mart*, 1985 CanLII 69 (SCC) at para. 117.
[25] *Hunter et al. v. Southam Inc.,* 1984 CanLII 33 (SCC) at pp. 155-56.
[26] *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at para. 36.
[27] *The Constitution Act, 1867*, 30 & 31 Vict, c 3, at Preamble.
[28] *Vaid*, at para. 33; *Duffy* at para. 29.

25. When the Preamble is read together with it, section 18 must be interpreted to ensure that at least the core of parliamentary privilege is respected. This core is freedom of speech—"the single most important parliamentary privilege"[29]—which underlies the values of accountability and transparency. As the Quebec Court of Appeal affirmed, citing the United Kingdom's Joint Committee Report on Parliamentary Privilege, and echoing the U.K. *Bill of Rights*, "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."[30] For a Westminster parliamentary system to properly operate, there needs to be open parliamentary debates. An open debate is one which is free from threat of prosecution. That is the essence of the model.

26. *Power* is instructive to this analysis. In that case, the Court grappled with the liability for damages when the state enacts unconstitutional legislation. While this Court did not reach a unanimous decision, all judges stressed the importance of parliamentary privilege—and in particular the need for free speech in Parliament. The majority in *Power* held that, even in permitting *Charter* damages for legislative debate and drafting, they would not be exposing "individual members involved in the legislative process" to liability.[31] The minority agreed that Parliamentary speech ought not to be "actionable in the ordinary courts"[32] and held that all persons exercising the privilege of freedom of speech in Parliament "are immune from being called to account in the courts or elsewhere, save the Houses of Parliament."[33] Here, the threat to parliamentary free speech is far greater than in *Power* where the issue was whether such speech was actionable (and can result in *Charter* damages) as opposed to whether it is criminal.

27. At the core of parliamentary privilege is freedom of speech and protection from prosecution because these attributes are necessary for the accountability function. Thus, parliamentary privilege is "not so much intended to protect the Members against prosecutions for their own individual advantage, but to support the rights of the people by enabling their representatives to

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[29] *Michaud c. Bissonnette,* 2006 QCCA 775 at para. 46.
[30] *Michaud*, at para. 46.
[31] *Canada (Attorney General) v. Power*, 2024 SCC 26 at para. 85 ("***Power***").
[32] *Power* at paras. 180, 221.
[33] *Power* at paras. 182, 299, citing J. P. J. Maingot, *Parliamentary Immunity in Canada* (Toronto: LexisNexis, 2016) at pp. 71-72 ("***Maingot***").

execute the functions of their office without fear of either civil or criminal prosecutions."[34] If parliamentary privilege is to mean anything, then accountability and transparency, through open debate without fear of prosecution, cannot be abrogated unless the "rules of the game" itself are changed. This, in the BCCLA's submission, can only be achieved through a constitutional amendment.

28. If this Court adopts an interpretation of section 18 *without* ensuring constitutional protection of a core parliamentary privilege—as the Court below did—that would reshape the character of Canada's parliamentary system at a time when democratic institutions and the rule of law are globally under unprecedented pressure. The approach to section 18 taken by the Court below would permit, by legislation, a majority of the House of Commons, loyal to the government in power, to abrogate all privileges, even those necessary to the proper functioning of the legislature, without a constitutional amendment.

29. Such an interpretation of section 18 would upset the constitutional architecture of our separation of powers by effectively neutering the legislative branch and creating the risk of an all-powerful executive subject only to the judicial branch. Such an interpretation cannot be what was intended in 1867 or today by "a Constitution similar in Principle to that of the United Kingdom". In fact, it would create the opposite: legislators would be accountable to the government who could prosecute and imprison them.

30. In this context, the word "define" may permit amendment to the scope of privilege, but it cannot be read to mean "eliminate through simple legislation" where the fundamental purpose of that privilege is at stake. Just as Parliament cannot change other fundamental aspects of the machinery of our democratic system (e.g., unilaterally implement a framework for "consultative elections" for appointments to the Senate)[35] by enacting legislation, it cannot amend for itself and undermine the purpose 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 step

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[34] *Power* at para. 299, quoting Maingot at p. 26.
[35] *Reference re Senate Reform*, 2014 SCC 32 at paras. 60, 110.

of a constitutional amendment while it remains in force.

D. This Court should be alert to the dangers of rights abuses in the national security context

31. 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—an outcome which irreparably harms ordinary Canadians and tarnishes Canada's global reputation as an inclusive democracy.

32. For example, the story of Maher Arar—who was "renditioned" to a foreign country and tortured—is "a potent example…of the importance of robust accountability and oversight."[36] 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.

33. Parliamentary debate on security strengthens the capabilities of national security agencies. Professor Forcese has 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."[37] Parliamentarians entrusted to sit on the committee can also be trusted to use the information they learn appropriately.

PART IV. COSTS | PART V. ORDER SOUGHT

34. The BCCLA seeks no costs and asks that no costs be awarded against it. The BCCLA takes no position on the outcome of this appeal.

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of June, 2025.

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PART VI. TABLE OF AUTHORITIES

Jurisprudence	**Paragraph(s) Referenced in Factum**
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