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CANADA

MEMORANDUM

From: Michel Patrice, Law Clerk and Parliamentary Counsel and Chief Parliamentary Precinct Services Officer
Date: March 27, 2017
Subject: Legal opinion on the powers of the Senate to expel a Senator

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ISSUE

This opinion addresses the question of whether the Senate has the power to expel one of its members.

In order to arrive at a conclusion, the following questions are addressed below:

What are the sources and the scope of the Senate's parliamentary privileges?

Is the disciplinary power over members a recognized privilege in the U.K. House of Commons in 1867?

Has this disciplinary power been conferred on the Canadian Houses of Parliament?

Does section 31 of the *Constitution Act, 1867* limit the privileges of the Senate?

Is the list in section 31 exhaustive and does it preclude the power of the Senate to declare a seat vacant on other grounds?

SUMMARY OF CONCLUSIONS

The Senate holds and enjoys the recognized privilege of "disciplinary authority over its members" including the right to expel one of its members.

1. In the Canadian Federal Parliament, there are two recognized sources from which parliamentary privilege is derived and both enjoy constitutional status:

   a) section 18 of the *Constitution Act, 1867* and the related enactment of section 4 of the *Parliament of Canada Act* ("legislated privileges"); and

   b) the powers that are inherent to a legislative assembly in a Westminster parliamentary model under the preamble of the *Constitution Act, 1867*, i.e. "a

Constitution similar in Principle to that of the United Kingdom" ("inherent privileges)", which are required to be established under the "necessity test".

2. By virtue of section 18 of the *Constitution Act, 1867* and section 4 of the *Parliament of Canada Act,* the Senate (and the House of Commons) holds and enjoys the same privileges, immunities and powers as the U.K. House of Commons.

3. The power to reprimand and expel one of its members (as part of the "disciplinary authority over members") was a recognized privilege in the U.K. House of Commons in 1867 and has been exercised for centuries. The Canadian House of Commons has expelled four members[1] pursuant to this privilege. The Senate has never used its power to expel.

4. The recognized privilege to expel a member is generally characterized as disciplinary or remedial in relation to the conduct of a member. A decision of this nature by the Senate requires a simple majority.

5. Seats have been declared vacant in the past by application of subsection 31(1) of the *Constitution Act, 1867* for non-attendance for two consecutive sessions. It is well-established in law that the Senate has the exclusive jurisdiction to decide whether the seat of a Senator should be declared vacant.

6. A court's review of Senate action is limited to establishing the existence and scope of a privilege; once established, the court cannot extend its review to the exercise of the privilege.

7. The Senate considered whether it had the power to expel in the case of former Senator Thompson in 1998, but made no final determination.

8. Section 31 of the *Constitution Act, 1867* is a constitutional edict that dictates those situations[2] where a seat must be declared vacant when a Senator no longer meets the qualification requirements. It is not, however, an exhaustive list of circumstances where a seat can be declared vacant by the Senate.

9. The power to expel is separate and distinct from the purpose of section 31 of the *Constitution Act*, *1867* both in its legal source and its characteristics.

[1] O'Brien and Bosc, *House of Commons Procedure and Practice*, 2nd edition, 2009, at page 246: "Since Confederation, there have been four cases where Members of the House of Commons were expelled for having committed serious offences. Three cases involved criminal convictions: Louis Riel (Provencher) was expelled twice, in 1874 and in 1875, for being a fugitive from justice; and Fred Rose (Cartier) was expelled in 1947 after having been found guilty of conspiracy under the *Official Secrets Act*. In 1891, Thomas McGreevy (Quebec West) was expelled after having been found guilty of contempt of the authority of the House.".

[2] For example: failure to attend for two consecutive sessions, being adjudged bankrupt or insolvent, or ceasing to be qualified in respect or property or residence.

BACKGROUND

As a result of an *Inquiry Report* ("Report") by the Senate Ethics Officer under the *Ethics and Conflict of Interest Code for Senators* ("Code") concerning Senator Don Meredith, questions have arisen on whether the Senate has the right to expel one of its members as an exercise of its disciplinary power.

While I am cognizant of the Report, this opinion is not meant to address the particulars of it or to address whether, in light of the breach of the Code, expulsion would be an appropriate sanction or remedy. The responsibility rests with the Standing Committee on Ethics and Conflict of Interest for Senators to recommend appropriate remedial measures or sanctions and with the Senate to ultimately decide.

This question is not only an issue of constitutional law but also one of parliamentary law. The Senate is the appropriate body to make a final determination on this matter as it has the exclusive authority over matters concerning its proceedings, the exercise of its parliamentary privilege and the qualifications of its members in accordance with the Constitution, the established privileges in the U.K., the jurisprudence and the parliamentary and legal authorities.

Precedents

No Senator has ever been expelled since Confederation. Since 1867, seats have been declared vacant only for failing to give attendance for two consecutive sessions[3] as provided for under subsection 31(1) of the *Constitution Act, 1867*. None of the other grounds for disqualification provided in section 31 have led to a seat being declared vacant by the Senate. Most of the vacancies for failure to attend occurred in the first 30 years after Confederation. The *Journals of the Senate* record nine such cases between 1876 and 1915.[4]

The question of whether the Senate has the power to expel one of its members was considered in 1998 with respect to former Senator Andrew Thompson's poor attendance and his failure to comply with an order of the Senate to appear before the Standing Committee on Privileges, Standing Rules and Orders. That Committee was given an Order of Reference by the Senate on February 12, 1998 to, among other things, "…obtain further advice of legal counsel in the matter of the power of the Senate to expel, suspend or otherwise deprive Senator Thompson of his seat in the Senate". Two legal counsel provided their opinion to the Committee on the power to expel: Neil Finklestein, who was of the view that the Senate did not have the power to expel Senator Thompson, and Joseph Maingot who held the opposite opinion and opined that the Senate possessed the power of expulsion. On February 19, 1998, the Senate adopted the recommendation of the Committee to suspend Senator Thompson for the remainder of the session as he was found to be in contempt. Senator Thompson resigned on March 23, 1998.

The other occasion where, to my knowledge, the "power to expel" was raised was in the context of the Beauharnois scandal in 1931-32. On February 11, 1932, a Special Committee was established to look into the circumstances of the scandal. Senator McDougald, whose conduct

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3 W.F. Dawson in his article *Resignation and Removal of Canadian Senators* published in *The Parliamentarian* (January 1975, vol. LVI, No. 1, pp.12-20.) mentions cases of Senators whose seats were declared vacant for failure to attend two consecutive sessions.

4 Two Senators had their seats declared vacant following the special five-day war emergency session in 1915 for having missed the prior session.

was under review, and his counsel argued that the Senate had no legal right to expel. Nonetheless, the Special Committee reported, among other things, "…that Senator McDougald's actions were not fitting or consistent with his duties and standing as a Senator."[5] After the adoption of the Report by the Senate, and facing the possibility of a motion of censure, Senator McDougald resigned his seat.

DISCUSSION

Before addressing the question of whether the Senate can expel one of its members as an exercise of its privilege, it is beneficial to establish the source and foundations of parliamentary privilege.

Parliamentary Privilege

The general and public law of Canada includes parliamentary privilege, which consists of the privileges, immunities and powers held, enjoyed and exercised by each House of Parliament and their respective members. Parliamentary privilege is one of the features that supports the constitutional separation of powers.

Parliamentary privilege enables the Senate, its committees and Senators to perform their constitutional functions—that is, deliberate, legislate and hold the government to account—without interference from the executive and the courts. It has been described by *Erskine May* as follows:

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the ordinary law.[6]

In the federal context, there are two recognized sources of parliamentary privilege, both of which enjoy constitutional status[7]:

1) The *Constitution Act, 1867*[8] and the related enactment of section 4 of the *Parliament of Canada Act*[9] ("legislated privileges").
2) The powers that are inherent to a legislative assembly in a Westminster parliamentary model under the preamble of the *Constitution Act, 1867* i.e. "a Constitution similar in Principle to that of the United Kingdom" ("inherent privileges"). These inherent privileges must be established under the "necessity test"[10].

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[5] *Journals of the Senate*, 3rd session of the 17th Parliament, April 22nd, 1932, p.187.
[6] Erskine May, *Parliamentary Practice* (20th ed.) at p. 70.
[7] *Canada (House of Commons) v. Vaid* 2005 SCC 30, para 33-36.
[8] *Constitution Act, 1867*, s. 18.
[9] *Parliament of Canada Act,* R.S.C. 1985, c. P-1, s. 5.
[10] *Vaid* at paragraph 46: "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.".

In *Canada (House of Commons) v. Vaid*[11], the seminal decision from the Supreme Court of Canada on parliamentary privilege, Justice Binnie affirmed various propositions that had been recognized in law and by parliamentary authorities. Of relevance to the subject of this opinion are the following:

> For present purposes, it is sufficient to state a number of propositions that are now accepted both by the courts and by the parliamentary experts.
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> 2. 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 (*Beauchesne's Rules & Forms*, at p. 11; *Erskine May*, at p. 75; *New Brunswick Broadcasting*, at p. 380).
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> …
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> 3. 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 (*New Brunswick Broadcasting*, at pp. 374-78; *Telezone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3d) 161 (C.A.), at p. 165; and *Samson Indian Nation and Band v. Canada*, [2004] 1 F.C.R. 556, 2003 FC 975).
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> …
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> 9. Proof of necessity is required only to establish the existence and scope of a category of privilege. 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: "Each specific instance of <u>the exercise</u> of a privilege need not be shown to be necessary" (*New Brunswick Broadcasting*, at p. 343 (emphasis added in the original)).
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> See also *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595 (C.A.); *Samson Indian Nation and Band*, at para. 13; *Martin v. Ontario*, [2004] O.J. No. 2247 (QL) (S.C.J.), at para. 13; *R. v. Richards; Ex parte Fitzpatrick and Browne* (1955), 92 C.L.R. 157 (Austl. H.C.), at p. 162; *Egan v. Willis* (1998), 158 A.L.R. 527 (H.C.); and *Huata v. Prebble*, [2004] 3 NZLR 359, [2004] NZCA 147.
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> 10. "Categories" include freedom of speech (*Stopforth v. Goyer* (1979), 23 O.R. (2d) 696 (C.A.), at p. 700; *Re Clark and Attorney-General of Canada* (1977), 17 O.R. (2d) 593 (H.C.); U.K. *Bill of Rights* of 1689, art. 9; *Prebble v. Television New Zealand Ltd.*, [1995] 1 A.C. 321 (P.C.); *Hamilton v. Al Fayed*, [2000] 2 All E.R. 224 (H.L.)); control by the Houses of Parliament over "debates or proceedings in Parliament" (as guaranteed by the *Bill of Rights* of 1689) including day-to-day procedure in the House, for example the practice of the Ontario legislature to start the day's sitting with the Lord's Prayer (*Ontario (Speaker of the Legislative Assembly)*, at para. 23); the power to exclude strangers from proceedings *(New Brunswick Broadcasting; Zündel v. Boudria* (1999), 46 O.R. (3d) 410 (C.A.), at para. 16; *R. v. Behrens*, [2004] O.J. No. 5135 (QL), 2004 ONCJ 327); **<u>disciplinary authority over members</u>** (*Harvey*; see also *Tafler v. British Columbia (Commissioner of Conflict of Interest)* (1998), 161 D.L.R. (4th) 511 (B.C.C.A.), at paras. 15-18; *Morin v. Crawford* (1999), 29 C.P.C. (4th) 362 (N.W.T.S.C.)); and non-members who interfere with the discharge of parliamentary duties (*Payson v. Hubert* (1904), 34 S.C.R. 400, at p. 413; *Behrens*), including immunity of members from subpoenas during a parliamentary session (*Telezone; Ainsworth Lumber Co. v. Canada (Attorney General)* (2003), 226 D.L.R. (4th) 93, 2003 BCCA 239; *Samson Indian Nation and Band*). Such

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[11] *Canada (House of Commons) v. Vaid* [2005] SCC 30 at para. 29.

> general categories have historically been considered to be justified by the exigencies of parliamentary work. [*emphasis added*]
> …
> 12. Courts are apt to look more closely at cases in which claims to privilege have an impact on persons outside the legislative assembly than at those which involve matters entirely internal to the legislature (*New Brunswick Broadcasting*, at p. 350; *Bear v. State of South Australia* (1981), 48 S.A.I.R. 604 (Indus. Ct.); *Thompson v. McLean* (1998), 37 C.C.E.L. (2d) 170 (Ont. Ct. (Gen. Div.)), at para. 21; *Stockdale v. Hansard*, at p. 1192).

Legislated Privileges (Section 18 of the Constitution Act, 1867)

When the U.K. Imperial Parliament enacted the *British North America Act, 1867* (as it was called then), it expressly conferred on the Canadian federal Parliament the power to enact privileges for the Senate and the House of Commons in section 18 of the *Constitution Act, 1867* (as amended in 1875):

> **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.

In turn, the Canadian Parliament, through the enactment of section 4 of the *Parliament of Canada Act*, made a general claim to all privileges, immunities, and powers enjoyed by the U.K. House of Commons and its members. Since parliamentary privilege is rooted in the Constitution, parliamentary privilege has constitutional status equal to the other parts of the Canadian Constitution, including the *Canadian Charter of Rights and Freedoms*[12]. Section 4 of the *Parliament of Canada Act* provides:

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

Since Parliament claimed all privileges – as permitted under the *Constitution Act, 1867* – and did not enumerate specific privileges or categories of privileges, an examination of the existing

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12 *Vaid*, para 33 : "In *New Brunswick Broadcasting*, Lamer C.J., writing separate concurring reasons, considered that such "legislated privilege" would lack the constitutional status of "inherent" privilege, and its exercise would be subject to *Charter* review (p. 364). His reasoning was that s. 32(1) of the *Charter* itself provides that "[t]his *Charter* applies ... to the Parliament and government of Canada in respect of all matters within the authority of Parliament". As s. 18 of the *Constitution Act, 1867* places privilege within the authority of Parliament, therefore legislation affecting privilege, as any other legislation, will be subject to *Charter* review. However, the logic of the separate judgments written by McLachlin J. and La Forest J. **point away from such a conclusion**, their view was accepted as correct by a majority of the Court, and the point must now be taken as settled. [*Emphasis added*].

privileges of the U.K. House of Commons at the time of Confederation is required to establish the existence of a privilege in the Canadian context. Binnie J. stated at paragraphs 36-37 of *Vaid*:

> The main body of the privileges of our Parliament are therefore "legislated privileges", and according to s. 4 of the *Parliament of Canada Act* must be ascertained by reference to the law and customs of the U.K. House of Commons which are themselves composed of both legislated (including the Bill of Rights of 1689) and inherent privileges.
> ….
> Nevertheless, the framers of the *Constitution Act, 1867* thought it right to use Westminster as the benchmark for parliamentary privilege in Canada, and if the existence and scope of a privilege at Westminster is authoritatively established (either by British or Canadian precedent), it ought to be accepted by a Canadian court without the need for further inquiry into its necessity. This result contrasts with the situation in the provinces where legislated privilege, without any underpinning similar to s. 18 of the *Constitution Act, 1867*, would likely have to meet the necessity test (Harvey, at para. 73). [*Emphasis added*]

Power to Expel as a Recognized Privilege of the U.K. House of Commons

The power to discipline its members – up to and including expulsion – in order to maintain the authority and dignity of Parliament is clearly one enjoyed by the U.K. House of Commons and is recognized by parliamentary authorities and courts. The long history of the U.K. House of Commons provides many examples. Members have been expelled for having been found guilty of offences such as fraud, perjury, corruption, or for being guilty of contempt, libel, or other offences against the House.[13]

In Erskine May's *Parliamentary Practice*, the power is characterized as follows:

> The purpose of expulsion is not so much disciplinary as remedial, not so much to punish Members as to rid the House of persons who are unfit for membership. It may justly be regarded as an example of the House's power to regulate its own constitution. But it is more convenient to treat it among the methods of punishment at the disposal of the House. [14]

Further, the background paper entitled *Disciplinary and Penal Powers of the House*[15] produced in 2012 by the House of Commons Information Office, outlines the U.K. House of Commons' power to expel:

> The right of House of Commons to discipline offenders has been established by precedent and accepted by the courts. The Commons' power to commit offenders was exercised frequently until the end of the nineteenth century and repeatedly recognised by the courts. The Commons' ultimate power of discipline over one of its own Members is expulsion, thereby creating a vacancy and subsequent by-election in that Member's constituency. This power has not been exercised for decades.

And on page 5 of that same background paper:

> There have been three instances in the twentieth century of expulsion:

[13] See p. 139-140 of the 20th edition of Erskine May (footnotes 12 to 20 and 1 to 3). It provides numerous examples of expulsions, ranging from the late Tudor or early Stuart era to the twentieth century.
[14] Erskine May's, *Parliamentary Practice*, 20th edition, p. 139.
[15] http://researchbriefings.files.parliament.uk/documents/SN06487/SN06487.pdf, 27 November 2012.

> Horatio Bottomley (Independent, South Hackney), was expelled in August 1922, after being convicted of fraudulent conversion of property and sentenced to seven years' imprisonment.
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> Garry Allighan (Labour, Gravesend) was expelled on 30 October 1947, for lying to a committee and for gross contempt of the House after publication of an article in the World's Press News accusing Members of insobriety and of taking fees or bribes for the supply of information.
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> Peter Baker (Conservative, South Norfolk) was expelled on 16 December 1954, after being sentenced to seven years' imprisonment for forgery. In this instance, the motion for expulsion need not have been moved: under the provisions then still in force of the *Forfeiture Act 1870*, he would have been automatically disqualified.

Power to Expel as a Recognized Privilege of the Canadian Houses of Parliament

Having established that the U.K. House of Commons possesses the power to expel and has used that power, it follows that the Houses of the Canadian Parliament also hold that power by operation of section 18 of the *Constitution Act, 1867* and section 4 of the *Parliament of Canada Act*.

This power has never been exercised by the Senate, and as will be more fully addressed later in this opinion, some are of the view that the Senate cannot expel one of its members. The House of Commons, on the other hand, has exercised this power on a few occasions, including in relation to Louis Riel who had been charged with murder and fled justice. The last time the House of Commons exercised the power was in the case of Fred Rose who had been sentenced to 6 years in prison for having committed an offence under the *Official Secrets Act*.

Of greater relevance is that this power appears to have been exercised where the conduct of a member was found to be improper and the continued presence of the member in the House could have brought disrepute or been an affront to the dignity of the House. In the words of Maingot:

> In the light of precedents here [in Canada] and in the U.K., it is unlikely that the House of Commons would take any action unless the offence was one that it felt involved serious moral turpitude rendering the person unfit to be a Member of the House. [16]

Similarly, in Bourinot's *Parliamentary Procedure and Practice*:

> Expulsion from Parliament, though a frequently exercised power, has been reserved for flagrant cases of misconduct, such as would render the person so disciplined unfit to sit in parliament or whose continued membership would be a discredit to the house. [17]

On the issue of the "disciplinary authority over members" in a legislative assembly, the Supreme Court decision in *Harvey v. New Brunswick (Attorney General)*[18], [1996] 2 S.C.R. 876, Justice McLachlin stated:

> [61] If democracies are to survive, they must insist upon the integrity of those who seek and hold public office. They cannot tolerate corrupt practices within the legislature. Nor can they tolerate electoral fraud. If they do, two consequences are apt to result. First, the functioning of the legislature may be impaired. Second, public confidence in the legislature and the government may be undermined. No democracy can afford either.

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[16] Maingot, Joseph, *Parliamentary Privilege in Canada*, 2nd ed., p. 212.
[17] Bourinot, *Parliamentary Procedure and Practice*, 4th edition, p. 65.
[18] *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, p. 913.

[62] When faced with behaviour that undermines their fundamental integrity, legislatures are required to act. That action may range from discipline for minor irregularities to expulsion and disqualification for more serious violations. Expulsion and disqualification assure the public that those who have corruptly taken or abused office are removed. The legislative process is purged and the legislature, now restored, may discharge its duties as it should.

…

[67] It is thus clear that Parliament and the legislatures of Canada are not confined to regulating procedure within their own chambers, but also have the power to impose rules and sanctions pertaining to transgressions committed outside their chambers. The disqualification provisions of s. 119(c) of the *New Brunswick Elections Act* may be seen as an expression of this power. The legislature, in order to ensure the integrity of, and public confidence in, its processes has stipulated that those who abuse its electoral rules cannot sit in the Assembly for a period of five years thereafter.

[68] The power of Parliament and the legislatures to regulate their procedures both inside and outside the legislative chamber arises from the *Constitution Act, 1867*. The preamble to the *Constitution Act, 1867* affirms a parliamentary system of government, incorporating into the Canadian Constitution the right of Parliament and the legislatures to regulate their own affairs. The preamble also incorporates the notion of the separation of powers, inherent in British parliamentary democracy, which precludes the courts from trenching on the internal affairs of the other branches of government. As I wrote in *New Brunswick Broadcasting, supra*, at p. 389:

> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

[69] 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.

…

[77] Expulsion may be justified on two grounds: to enforce discipline within the House; and to remove those whose behaviour has made them unfit to remain as members: Heard, *supra*, at p. 392. Both objectives are important. With respect to the latter, Heard points out that within the past decade, "at least eighteen Canadian legislators were convicted of criminal offences, including sexual assault, assault (on a wife), and murder; while most resigned, a few hung doggedly on until they were expelled by their assembly or defeated at the polls". He adds:

> No legislature can be venerated as an institution of governance if it is populated with such unsavoury characters. Indeed, some would add that the civic virtue of a society requires the removal from public office of the corrupt, criminal, and profoundly immoral.

[78] The right of expulsion on these two grounds -- discipline and unfit behaviour -- is a matter of parliamentary privilege and is not subject to judicial review. Thus Maingot, *supra*, concludes at pp. 161-62:

> What is clear is that the ordinary civil and criminal jurisdiction of the courts does not extend to determining the rights of members to sit in the House, and the courts equally

> have nothing to do with questions affecting its membership except in so far as they have been specially designated by law to act in such matters as, for example, under the *Dominion Controverted Elections Act*.

Disciplinary Power of the Senate (Power to Reprimand or Expel a Member)

Legal and procedural authorities agree that the Senate enjoys the parliamentary privilege of disciplinary authority over its members[19]. However, there have been expressions of doubt on whether the Senate possesses the power to expel one of its members on that basis. While this subject has arisen in debates in the Senate, most notably during the Thompson case in 1998 and the Beauharnois scandal in 1932, the Senate has never made a determination one way or the other on the existence of the power to expel, having never attempted to use it. For the purpose of this opinion, the two positions advanced by legal counsel in the more recent Thompson case will be reviewed.

The Thompson Case and the Power to Expel

The question of whether the Senate has the power to expel one of its members was considered in 1998 with respect to former Senator Thompson's poor attendance and his failure to comply with a Senate order to appear before the Standing Committee on Privileges, Standing Rules and Orders ("Rules Committee"). It was reported that he attended only 47 sittings of the Senate over a 15-year period. He claimed that he was unable to attend Senate sessions due to illness. At all times, he complied with the minimum requirement for attendance set out in subsection 31(1) of the *Constitution Act, 1867*.

On February 19, 1998, the Senate adopted the recommendation of the Rules Committee to suspend Senator Thompson for the remainder of the session for contempt of a Senate Order. He resigned on March 23, 1998. Subsequently, the Senate adopted more stringent rules governing its members with respect to attendance and sick leave while also increasing the financial penalties for missing too many sittings during a session.

During the course of its examination, the Rules Committee was given an Order of Reference by the Senate to, among other things, "…obtain further advice of legal counsel in the matter of the power of the Senate to expel, suspend or otherwise deprive Senator Thompson of his seat in the Senate". Accordingly, the Rules Committee heard the opinion of two legal counsel on this matter. For the purpose of this opinion, we will limit the summary of their positions to the question of the existence of the power to expel in relation to the Senate. The full transcript of their testimony has been made public and is available on the Senate Website[20].

On the view that the Senate possesses the power to expel one of its members, Mr. J.P. Joseph Maingot, Q.C., former Law Clerk of the House of Commons, asserted:

> If the Senate finds an act or omission constitutes contempt, what may it do? What power does it have in that regard? Both the Senate and the Canadian House of Commons have the same powers, privileges and rights as the House of Commons of the United Kingdom. That is set out in the Constitution Act and the Parliament of Canada Act.

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[19] This power is recognized in the *Rules of the Senate* (Rule 15-2 to 15-5) and the *Ethics and Conflict Interest Code for Senators* (s. 49(2)) and has been used at least up to suspension in recent years.

[20] Maingot, Joseph at: https://sencanada.ca/en/Content/SEN/Committee/361/rule/05ev-e; Finkelstein, Neil at: https://sencanada.ca/en/Content/SEN/Committee/361/rule/06ev-e.

> The United Kingdom and Canadian houses may reprimand and expel, and have reprimanded and expelled, members. If the conduct or omission is such as to compel the Senate to do something because of its right to impose discipline on its members, it may administer a reprimand and suspend a member. The more grave punishment of expulsion is not so much disciplinary as remedial, not so much to punish members as to rid the house of persons who are unfit for membership in the estimation of the house involved.
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> From time to time members are suspended for the rest of the sitting. <u>When we hypothetically refer to expulsion from the Senate, we are not speaking of the qualification of a senator or a vacancy in the Senate as those issues are described in the sections of the *Constitution Act*. Rather, it is the issue of what it means when we say that the Senate has the same power as the House of Commons of the United Kingdom</u>.
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> ….
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> If the Senate has the same powers as the House of Commons of the United Kingdom and Canadian House of Commons, it has the right to regulate its internal affairs free from interference, including determining whether a person is unfit for membership, in which case the Senate may act accordingly.
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> You might ask if such a case of expulsion has ever come before the courts. As we all know, it has never been done. Members have been expelled; however, this has never been brought before the courts, as the cases are clear in most instances." [*emphasis added*]

On the other hand, Neil Finkelstein, counsel for the Ontario Legislature in *New Brunswick Broadcasting*, who also appeared before the Rules Committee, expressed the view that the Senate did not possess the power to expel. He stated the following:

> Section 18 of the *Constitution Act*, which was brought to your attention last week by Mr. Maingot, provides that the Parliament of Canada has the discretion by statute to give the Senate powers, privileges and immunity. The restriction on that is that those powers, privileges and immunities cannot exceed those enjoyed by the United Kingdom House of Commons at Confederation.
>
> It is clear that the House of Commons did have the power to expel a member. It is clear that section 4 of the *Parliament of Canada Act* is an exhaustion of the power given to Parliament. Parliament has given all of the powers permitted by section 18 to the Senate.
>
> If the *Constitution Act* stopped there, then there would be no question that the Senate has the power to expel, but it does not stop there. Section 29 of the *Constitution Act* provides that a senator subject to this act -- and that is a very important qualification -- holds office essentially until age 75 when you read through subsections (1) and (2).
>
> How do we read "subject to this act"? Section 29 read by itself would mean that a senator cannot be expelled because that senator holds office until age 75. Section 31 says that the place of a senator shall become vacant simply by operation of law, on the happening of any one of five events. My understanding is that none of those five events has occurred.
>
> Section 31 is not stated to be exhaustive, so one can make the case that those are five ways in which a Senate seat can become vacant but that there are others -- such as expulsion. One can make the case that not only is section 31 an exception to the age 75 rule in section 29 but so is section 18. Again, if one accepts that case, there is expulsion.
>
> I have clients who hate two-handed lawyers who say "on the one hand" and "on the other hand," but, I am sorry, I will give you a two-handed view. On balance, given the specificity and care which has obviously gone into section 31, the intention of the framers of the *Constitution Act, 1867* was that section 31, plus the one on death, plus section 30 on resignation, are exhaustive of the ways in which a Senate seat can become vacant.
>
> A very persuasive case can be put to the contrary. I have tried to give you the outlines of that case.

> At the end of the day, I think the Senate does not have the power to expel when section 18 is read in the context of section 31.

Section 29 of the *Constitution Act, 1867* reads as follows:

> **29.** (1) Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.
>
> (2) A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy-five years.

The analysis and conclusion of Neil Finklestein require closer examination. Essentially, his view is that because of section 29 (tenure) a Senate seat can only become vacant as a result of loss of qualification, resignation (section 30) or death (section 32), notwithstanding section 18 of the *Constitution Act, 1867* and the privileges it expressly confers on the Senate.

It is settled in law that, in the absence of express language, one part of the Constitution cannot invalidate another part. As established in *Vaid*:

> 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 re Bill 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. [*Emphasis added*] [21]

Nonetheless, an examination of Neil Finklestein's analysis from a construction of statutes perspective is warranted, as it formed part of the analysis leading to his conclusion. In his analysis, Mr. Finkelstein interprets two phrases, "in so far as is consistent with that Act" in section 4 of the *Parliament of Canada Act* and "subject to this Act" in subsection 29(2) of the *Constitution Act, 1867*.

Interpretation of "Subject to this Act"

Mr. Finkelstein interprets "subject to this Act" in subsection 29(2) of the *Constitution Act, 1867* as limiting the scope of application of the privileges provided in section 18 of the Constitution. From a drafting perspective, the phrase "subject to this Act" in subsection 29(2) would refer to the Act in its entirety, including section 18. If the intent had been to exclude the application of section 18 to section 29, the simplest and clearest way to have done so would have been to refer to those provisions that applied to section 29 expressly. For example, subsection 29(2) could have read, "subject to sections 30 and 31". This pinpoint reference approach is, in fact, used in subsection 29(1) which reads "Subject to subsection (2)". In that case, lifetime tenure is explicitly qualified by reference to subsection (2).

Another drafting method that could have been used to ensure that the matters provided for in sections 30 and 31 were the only means by which a seat could become vacant would have been simply to say, "the Place of a Senator may become vacant *only/exclusively* in the following

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[21] *Vaid*, para 30.

cases". This is the approach used in sections 91 and 92 of the *Constitution Act, 1867* – the division of powers provisions – to make it clear that the assigned areas were exclusively in the provincial jurisdiction and correspondingly, that anything not within that exclusive jurisdiction was exclusively in the federal jurisdiction. In other words, where the drafters wanted to make exclusivity clear, they did so with express language. Section 91 of the *Constitution Act, 1867* also contains the phrase "notwithstanding anything in this Act". This is a clear indication that none of the other provisions of the Act were to apply, even if they could apply.

The phrase "subject to" is a broad phrase that is not limited to exceptions as Mr. Finkelstein's opinion suggests. It can also mean a certain provision is subordinate to the other provisions of the Act. In the circumstances of section 29, this would mean that tenure is subordinate to all of the other provisions of the Act that can affect it, such as sections 30 and 31, but also including section 18. In the present context, "subject to this Act" in subsection 29(2) would more broadly mean that the constitutional right to hold a seat in the Senate is subordinate to the exercise of any applicable constitutionally protected power in the Act.

Sections 29 to 31 suggest that there are 4 different ways in which a Senator's seat will become vacant by operation of law: losing the required qualification, attaining 75 years of age, resigning or by death. Two of these means (death and attaining 75 years of age) are implied as neither subsection 29(1) nor (2) speak expressly to the Senator's seat becoming vacant. Section 32 of the *Constitution Act, 1867* authorizes the Governor General to summon a fit and "qualified person" to fill the vacancy when the vacancy happens by "Resignation, Death, or otherwise". Again, the operation of section 32 does not create a vacancy; it merely authorizes the filling of a vacancy. What is interesting is the omission of the circumstances of both subsections 29(2) and 31 from section 32. Instead, section 32 once again uses the broad phrase "or otherwise" to capture any other circumstances by which a Senate seat may become vacant. If the circumstances in sections 29 to 31 were the only circumstances under which a Senate seat could become vacant, it would have been very simple to have added "retirement" and "disqualification" to that list. The phrase "or otherwise" coupled with "subject to this Act" suggest that the intention was to capture more than the specific exceptions set out in the Act.

Interpretation of "In So Far As Is Consistent" in the Parliament of Canada Act

The mere fact that there are specific provisions that deal with the subject matter of tenure does not mean that the use of the power to expel conferred under section 18 of the *Constitution Act, 1867* and section 4 of the *Parliament of Canada Act* is "inconsistent" with other provisions that affect tenure. They can coexist. The power in section 18 in fact has nothing to do with the circumstances in sections 30 and 31 that set out the circumstances which, *by operation of law*, will result in a vacancy. Rather, it has to do with the right of tenure in section 29, a right that is expressly subordinated to the provisions of the Act. That the application of the power to expel under section 18 may ultimately lead to the same result as the application of sections 30 and 31 does not automatically mean that they are inconsistent with each other.

This view is supported by the 1928 Supreme Court of Canada reference on the meaning of the word "persons" in the *Constitution Act, 1867*, in which Mr. Justice Duff stated:

> I have not overlooked Mr. Rowell's point based upon section 33 of the *British North America Act*. Sec. 33 must be supplemented by sec. 1 of the *Confederation Act Amendment Act of 1875*, and by section 4 of c. 10, R.S.C., the combined effect of which is that the Senate enjoys the

> privileges and powers, which at the time of the passing of the *British North America Act* were enjoyed by the Commons House of Parliament of the United Kingdom. In particular, by virtue of these enactments, the Senate possesses sole and exclusive jurisdiction to pass upon the claims of any person to sit and vote as a member thereof, except in so far as that jurisdiction is affected by statute. That, I think, is clearly the result of sec. 33, combined with the Imperial Act of 1875, and the subsequent Canadian legislation. And the jurisdiction of the Senate is not confined to the right to pass upon questions arising as to qualification under sec. 33; it extends, I think, also to the question whether a person summoned is a person capable of being summoned under sec. 24. [*Emphasis added*][22]

This reasoning was confirmed on appeal to the Judicial Committee of the Privy Council in 1929 ("Persons Case"):

> Finally with regard to sec. 33, which provides that if any question arises respecting the qualifications of a senator or a vacancy in the Senate the same shall be heard and determined by the Senate that section must be supplemented by sec. 1 of the *Parliament of Canada Act*, 1875, and by sec. 4 of ch. 10 of R.S.C.,… [*Emphasis added*][23]

The finding of the Judicial Committee of the Privy Council in the Persons Case makes it clear that section 18 of the *Constitution Act, 1867* and section 4 of the *Parliament of Canada Act* (formerly s. 1 of the *Parliament of Canada Act*, 1875 (U.K.), and s. 4 of ch. 10 of R.S.C respectively) must be given their full weight as being *supplemental* to, rather than limiting section 33 of the *Constitution Act, 1867* as they relate to the privilege of the Senate.

This clearly establishes that the "power to expel", as part of the recognized privilege of "disciplinary authority over members" conferred by section 18 of the *Constitution Act, 1867* and enacted by section 4 of the *Parliament of Canada Act,* is separate and distinct from the Senate's authority with respect to section 31 of the *Constitution Act, 1867*. The role of the Senate under section 31 is merely to determine that one of the events listed in that section has occurred, and no more. The fact that the exercise of its power to expel and its role under section 31 lead to the same result, i.e. a seat being declared vacant, should not be interpreted as extinguishing the conferral of the privileges of the U.K. House of Commons.

Section 31 of the Constitution Act, 1867: Disqualification of a Senator

The *Constitution Act, 1867* expressly provides for a series of matters that must lead to the disqualification of a Senator and the Senator's ability to sit. Section 31 of the *Constitution Act, 1867* is not a constitutional expression of the Senate's privileges; rather it is a legislative imperative that ensures that some of the essential characteristics of the Senate, identified by the framers of our Constitution, will be maintained. Thus it cannot be construed as limiting the privileges conferred on the Senate by section 18 of the *Constitution Act, 1867* as enacted by section 4 of the *Parliament of Canada Act*. Section 31 reads as follows:

> Disqualification of Senators
>
> **31.** The Place of a Senator shall become vacant in any of the following Cases:

[22] *Reference as to the meaning of the word « persons » in section 24 of the British North America Act, 1867*, 1928 SCC 276, p. 301.

[23] *Decision of the Judicial Committee of the Privy Council on the Reference as to the meaning of the word « persons » in section 24 of the British North America Act, 1867,* 1928 SCC 276*, Privy Council Appeal No.* 121 of 1928, October 18, 1929, p. 13.

> (1) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate;
> (2) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power;
> (3) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter;
> (4) If he is attainted of Treason or convicted of Felony or of any infamous Crime;
> (5) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

As section 31 is not an exercise of the Senate privileges over its members, the determination would be justiciable; that is, the courts would have had jurisdiction over the application of section 31 had the exclusive jurisdiction not been conferred on the Senate pursuant to section 33. Under section 33, it is for the Senate to make a determination of the matters provided in section 31 based on the facts as they apply to a particular Senator. Section 33 of the *Constitution Act, 1867* reads as follows:

> **33.** If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined in the Senate.

Section 31 of the Constitution Act, 1867: An Exhaustive List?

The Judicial Committee of the Privy Council decision in the Persons Case referred to above makes it clear that section 31 of the *Constitution Act, 1867* is not an exhaustive list[24] of matters pertaining to qualifications of a senator. The Judicial Committee of the Privy Council recognized the broad power conferred on the Senate and did not see it necessary to limit the application of that power to section 31. In order to arrive at its conclusion that a woman was qualified to be appointed to the Senate, the Judicial Committee of the Privy Council analysed all relevant provisions. In fact, the "qualification" under review was whether the word "persons" in section 24 of the *Constitution Act, 1867* was restricted to members "of the male sex". As stated in the judgment:

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[24] I note that, Parliament has already enacted an Act of Parliament for other matters that would impact the ability of a Senator to sit. Section 750 of the *Criminal Code* provides:

> **750.** (1) Where a person is convicted of an indictable offence for which the person is sentenced to imprisonment for two years or more and holds, at the time that person is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.
> (2) A person to whom subsection (1) applies is, until undergoing the punishment imposed on the person or the punishment substituted therefor by competent authority or receives a free pardon from Her Majesty, incapable of holding any office under the Crown or other public employment, or of being elected or sitting or voting as a member of Parliament or of a legislature or of exercising any right of suffrage.
> (3)…

This provision has never been used in relation to a Senator, and arguments could be made that it does not apply to Senator since they do not hold office under the Crown or other public employment. However, it can be read as applying to a Senator for subsection 750(2) entertains that a person to whom subsection (1) applies is "incapable of holding any office under the Crown or other public employment, or of being elected or sitting or voting as a member of Parliament…".

> If Parliament had intended to limit the word "persons" in sec. 24 to male persons it would surely have manifested such intention by an express limitation as it has done in secs. 41 and 84. The fact that certain qualifications are set out in sec. 23 is not an argument in favour of further limiting the class, but is an argument to the contrary because it must be presumed that Parliament has set out in sec. 23 all the qualifications deemed necessary for a senator and it does not state that one of the qualifications is that he must be a member of the male sex.
>
> […]
> As yet, no concrete case has arisen to which the jurisdiction of the Senate could attach. We are asked for advice on the general question, and that, I think, we are bound to give. It has, of course, only the force of an advisory opinion. The existence of this jurisdiction of the Senate does not, I think, affect the question of substance. We must assume that the Senate would decide in accordance with the law.[25]

Accordingly, the Senate could also declare a seat vacant on the basis of "qualifications" such as subsection 23(1), which provides that a Senator "shall be of the full age of Thirty years". While unlikely, it is within the realm of possibility that someone younger than 30 years old could have been appointed by mistake. Only the Senate could declare that person's seat vacant. The construction of section 33 and the words used: "**33**. ....respecting the <u>Qualification</u> of a Senator or a Vacancy..." supports the position that the jurisdiction is not limited to section 31. The heading before section 31 is *Disqualification of Senators* and the section itself is about a place becoming *vacant*, while section 23 is about *Qualifications of Senator*.

CONCLUSION

The Senate possesses the power to declare a seat vacant by reason of the recognized parliamentary privileges of disciplinary authority over members as conferred by section 18 of the *Constitution Act, 1867* and the enactment of section 4 of the *Parliament of Canada Act.*

Section 31 of the *Constitution Act, 1867* is not an exhaustive list of situations where a Senate seat can become or be declared vacant nor is it an exclusive limitation on a Senator's tenure. Rather, it is a legislative imperative that ensures that some of the essential characteristics of the Senate, identified by the framers of our *Constitution*, will be maintained. Thus, it cannot be construed as limiting the privileges of discipline over its members conferred on the Senate which is separate and distinct of the role of the Senate to disqualify a senator for the reasons listed in section 31 of the *Constitution Act, 1867*.

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[25] *Decision of the Judicial Committee of the Privy Council on the Reference as to the meaning of the word « persons » in section 24 of the British North America Act, 1867,* 1928 SCC 276*, Privy Council Appeal No.* 121 of 1928, October 18, 1929, p. 12-13.