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PARLIAMENTARY PRIVILEGE: THEN AND NOW

Report of the Standing Committee on Rules, Procedures and the Rights of Parliament

The Honourable Leo Housakos, *Chair*
The Honourable Serge Joyal, *Deputy Chair*
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INTRODUCTION

The Standing Committee on Rules, Procedures and the Rights of Parliament (the Committee) is pleased to present this interim report as part of its study on parliamentary privilege. This study is further to one the Committee undertook in the 41st Parliament.

In June 2015, the Committee conducted a study on parliamentary privilege with a view to, "initiate debate as to how best Parliament may adapt its understanding and exercise of parliamentary privilege to meet the needs and expectations of Canadian parliamentary democracy in the 21st century."[1] The Committee compared the Canadian parliamentary privilege model to those in the United Kingdom, Australia and New Zealand. The Committee analyzed recognized categories of privilege and presented its observations on their nature, scope and relevance, as well as the need to modernize them.

As part of this study, the Committee heard from six witnesses during the 42nd Parliament, including professors who specialize in constitutional law and legal theory, a British lawyer specializing in constitutional and public law, a former Supreme Court of Canada Justice, a former Speaker of the Senate of Canada, and a former Speaker of the Legislative Assembly of Ontario.

These witnesses shared their parliamentary privilege expertise with Committee members in order to identify and study specific issues. Matters raised included the historical reasons for parliamentary privilege, the possibility of codifying the Senate's privileges, and protecting the rights and freedoms of third parties when parliamentary privilege is exercised.

1 Senate, Standing Committee on Rules, Procedures and the Rights of Parliament, A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century, Interim Report, 2015, p. 4.

CHAPTER 1: BACKGROUND

Parliamentary Privilege: Background and Application

Parliamentary privilege plays an essential role in parliamentary democracy. It is described as, "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."[2] Its origins can be traced to the emergence of the United Kingdom Parliament, specifically to the passage of the *Bill of Rights* in 1689, which confirmed the privilege of freedom of speech in debates or proceedings in Parliament.

The Canadian parliamentary system is modelled on the United Kingdom Parliament.[3] When the *Constitution Act, 1867*, was passed, the Canadian Parliament was granted the same privileges as the United Kingdom House of Commons. These parliamentary privileges are enshrined in section 18 of the Constitution Act, 1867, which recognizes Parliament's authority to prescribe privileges, and are applied pursuant to section 4 of the Parliament of Canada Act. The relevant provisions provide as follows:

> *Constitution Act, 1867*
>
> **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.
>
> *Parliament of Canada Act*
>
> **4.** The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise
>
> (a) such and the like privileges, immunities and powers as, at the time of the passing of the Constitution Act, 1867, were held, enjoyed and exercised by the Commons House of Parliament of the

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2 Joseph J.P. Maingot, *Parliamentary Immunity in Canada*, 3rd ed., LexisNexis, 2016, p. 13; Canada (House of Commons) v. Vaid, 2005 SCC 30, par. 29.

3 The preamble of the Constitution Act, 1867, states that Canada has a "Constitution similar in Principle to that of the United Kingdom."

> United Kingdom and by the members thereof, in so far as is consistent with that Act; and
>
> (b) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

These provisions allow Parliament to adopt legislation claiming new privileges, provided that these privileges do not exceed those held by the House of Commons of the United Kingdom Parliament. Furthermore, s. 18 of the *Constitution Act, 1867*, can be amended by passing an Act of Parliament, as it pertains exclusively to the Senate and the House of Commons.[4]

Categories of Privilege and the Jurisprudential Framework

The sections cited above do not recognize parliamentary privilege; rather, they recognize Parliament's authority to prescribe privileges. When it is asked of them, Canadian courts have a role in determining whether a parliamentary privilege exists, as well as its actual scope. However, courts do not intervene in the exercise of privilege due to the principle of the separation of powers. This principle grants legislative assemblies a degree of autonomy from the executive and judicial branches of government. To date, courts have recognized the following categories of privilege:

- freedom of speech;
- Parliamentary control over debates or proceedings in Parliament, including day-to-day procedure in the Houses;
- the power to exclude strangers from proceedings;
- Parliament's disciplinary authority over members and non-members who interfere with the discharge of parliamentary duties; and
- immunity of members from subpoenas during a parliamentary session.[5]

In order to determine the existence and scope of parliamentary privilege, courts (both Canadian and British) have developed the "necessity test."[6] Necessity must be established

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[4] Section 44 of the *Constitution Act, 1867*, provides that, "Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons."

[5] Canada (House of Commons) v. Vaid, 2005 SCC 30.

in cases where the privilege claimed has not already been pre-emptively established by either the Canadian Parliament or UK Parliament.[7]

In a landmark 2005 decision, the Supreme Court of Canada clarified the scope and extent of parliamentary privilege based on the necessity test. In *Canada (House of Commons) v. Vaid*, the Supreme Court was called upon to determine whether the parliamentary privilege of "management of employees" existed, as claimed by the Speaker of the House of Commons.

The Speaker maintained that parliamentary privilege prevented the courts and tribunals from reviewing his decision to dismiss his chauffeur. The Supreme Court ruled that this privilege does not exist: while parliamentary privilege applies to some relations between the House of Commons and certain of its employees, it does not extend to the Speaker's chauffeur.

In its ruling, the Supreme Court developed an analysis framework to determine the scope of the claimed privilege based on necessity. On behalf of the Court, the Honourable Ian Binnie, then a puisne justice of the Supreme Court of Canada, said in his reasons that, to sustain a claim of parliamentary privilege, one "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 … 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."[8] The Supreme Court also stated that parliamentary privileges that meet the necessity test have constitutional status, protecting them from challenges under the *Canadian Charter of Rights and Freedoms*.[9]

In 2018, the scope of parliamentary privilege relating to the management of employees was restricted in *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*. In this case, the Supreme Court of Canada concluded that the President of the National Assembly of Quebec's dismissal of security guards was not protected by parliamentary privilege because it was not essential to the exercise of the Assembly's constitutional role.

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6 The concept of "necessity" was described by the United Kingdom Joint Committee in 1999 in terms of Parliament's needs in fulfilling its constitutional role. The Supreme Court of Canada used the Joint Committee's concept of a necessity test in its interpretation of privilege and in developing its own doctrine of necessity (for example, in *Vaid*).

7 In *Vaid*, the Supreme Court stated that, to determine whether a parliamentary privilege exists, it must first be ascertained whether the claimed privilege, as well as its scope, have been authoritatively established in the Canadian Parliament or the House of Commons at Westminster. If it is so established, the privilege will be conceded. If it is not so established, the courts must establish whether the claimed privilege is necessary to Parliament in the fulfillment of its functions as a legislative and deliberative body (*Vaid*, paras. 39–40).

8 Ibid., para. 46.

9 Ibid., para. 34; New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 SCR 319.

Therefore, the dismissal of the security guards was not protected from external review.[10] More recently, in *Canada (Board of Internal Economy) v. Boulerice*, the Federal Court of Appeal established that decisions made by the Board of Internal Economy, the House of Commons management body, were subject to parliamentary privilege in relation to internal affairs (pre-emptively established) and therefore were immunized from judicial review.[11]

In February 2018, in *Singh v. Attorney General of Quebec*, the Quebec Court of Appeal ruled on a matter involving the principles of parliamentary privilege and fundamental freedoms (of religion and expression). The Court ruled that the authority of the National Assembly to exclude kirpans was an assertion of parliamentary privilege over the exclusion of strangers from debate, a parliamentary privilege that has constitutional status, as recognized in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*.[12]

Committee's Study on Parliamentary Privilege: Interim Report Published in 2015

The Committee has previously studied parliamentary privilege. In 2014, the Committee approved the establishment of a subcommittee that had a mandate to study parliamentary privilege. This subcommittee undertook a study with the objective of "[initiating] debate as to how best Parliament may adapt its understanding and exercise of parliamentary privilege to meet the needs and expectations of Canadian parliamentary democracy in the 21st century."[13] This was the first comprehensive study of parliamentary privilege carried out by a parliamentary or legislative body in Canada.

The subcommittee produced a discussion paper on its initial proceedings, which was adopted by the Committee in May 2015 as an interim report (entitled A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century). Although the interim report does not contain formal recommendations, the Committee underscored the need for Parliament to "re-evaluate and reconsider parliamentary privilege in the Canadian context, to reassess privilege in a way that allows Parliament to function adequately without infringing on the rights of others."[14] The Committee also made suggestions to clarify or improve certain privileges, including:

- **Freedom of speech**: The Committee recognized that, in Canada, there is ongoing uncertainty regarding how words spoken in Parliament can be used (outside of Parliament) and whether free speech should be afforded absolute immunity or more

10 Chagnon v. Syndicat de la fonction publique et parapublique du Québec, 2018 SCC 39.
11 Canada (Board of Internal Economy) v. Boulerice, 2019 FCA 33, para. 102.
12 Singh v. Attorney General of Quebec, 2018 QCCA 257; New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 SCR 319.
13 Senate, Standing Committee on Rules, Procedures and the Rights of Parliament, A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century, Interim Report, June 2015, p. 4.
14 Ibid., p. 77.

limited protection. The Committee was of the opinion that absolute immunity of free speech in the context of parliamentary proceedings must be limited to parliamentarians. Immunity from charges of defamation should remain in place, "except possibly where there is clear evidence of malice."[15] For matters incidental to actual proceedings in Parliament and the protection afforded to witnesses, the Committee believed that the privilege of freedom of speech should be maintained, on the condition that it was not malicious (i.e., qualified immunity).[16]

- **The right of the Senate and the House of Commons to regulate their internal affairs**: The Committee indicated that Parliament should, insofar as possible, exercise its privilege in such a way as to respect the law. In addition, even if the courts have ruled that Parliament is not a "statute-free zone," it "may be worthwhile for Parliament to consider how best to ensure clarity with respect to its intended application of statutes to Parliament itself."[17]
- **Disciplinary powers:** The Committee was of the opinion that parliamentarians accused of contempt or facing an internal disciplinary process should enjoy procedural rights (these rights are already included in the *Ethics and Conflict of Interest Code for Senators*).[18] Regarding disciplinary measures for those who are not parliamentarians, the Committee indicated that "there is considerable support for the idea of procedural fairness rights for witnesses to parliamentary proceedings."[19] It added: "The idea is founded not only on basic notions of what is right and fair, but also what may be required under our constitutional and legal structure based on the rule of law and the Charter."[20]
- **Freedom from arrest in civil actions**: The scope of this privilege was considerably reduced when imprisonment for failing to repay debts was abolished in the 19th century. Therefore, the Committee was of the opinion that this privilege could be abolished, or its duration could be limited (the privilege currently applies during the parliamentary session and for 40 days before and after the session).[21]
- **Freedom from being subpoenaed to attend court as a witness:** There is a rationale for this privilege, but the Committee stated that its scope and exercise "should be tailored so as not to give the impression that it is being used to avoid a court process. Parliamentarians are not, and should not be seen as being, above the

15 Ibid., p. 48.
16 Ibid., pp. 48–49.
17 Ibid., p. 56.
18 Ibid., p. 65.
19 Ibid., p. 67.
20 Ibid.
21 Ibid., pp. 67–69.

law."[22] Similarly to freedom from arrest in civil actions, the Committee proposed setting aside the 40-day rule and adopting a principles-based approach "to ensure the fair administration of justice taking into account the parliamentarian's responsibilities and the rights of other parties in the litigation."[23]

22 Ibid., p. 72.
23 Ibid., p. 72.

CHAPTER 2: HISTORICAL EVOLUTION OF PARLIAMENTARY PRIVILEGE AND ITS RATIONALE

While the understanding of parliamentary privilege is relatively uniform and standard throughout the Commonwealth, the application of parliamentary privilege and its rationale have evolved in Canada and elsewhere. As Dave Levac, former Speaker of the Legislative Assembly of Ontario, noted: "The privileges of Parliament are ancient, but the context in which they are exercised has changed considerably and continues to evolve."[24] Originally intended to prevent the interference of the monarch or their courts in parliamentary affairs, parliamentary privilege has slowly developed to include a set of collective (of the Senate and the House of Commons) and individual (of parliamentarians and witnesses appearing before committees) rights and immunities.

The Committee's 2015 report, which provides an overview of the historical origins of parliamentary privilege in the United Kingdom and Canada, as well as the evolution of parliamentary privilege in Commonwealth countries, made the following observation: "No longer are concerns about privilege centred on the relationship between Parliament and the Crown."[25] The current discourse on parliamentary privilege focuses primarily on the public's expectations for increased transparency and accountability for the decisions made by parliamentarians. There is also an expectation that this privilege applies within the rights-based legal system exemplified by the *Canadian Charter of Rights and Freedoms*.[26] In its 2015 report, the Committee pointed out that other Commonwealth countries had recognized that "privilege needs to be adapted to the current environment and modern expectations to remain effective and relevant."[27]

As the Supreme Court of Canada stated in *Chagnon*, "the necessity of a privilege must be assessed in the contemporary context."[28] According to Richard Gordon, a barrister, the conditions justifying the existence of parliamentary privileges have changed, but parliamentary privilege is still justified on the basis that "it is needed to enable Parliament to undertake governmental functions in the public interest."[29] He stated that parliamentary privileges such as freedom of expression are equally important now as they were in the 17th century, but for different reasons:

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24 RPRD, Evidence, 19 March 2019 (Mr. Dave Levac, Former Speaker, Legislative Assembly of Ontario).

25 Senate, Standing Committee on Rules, Procedures and the Rights of Parliament, A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century, Interim Report, June 2015, p. 1

26 Ibid.

27 Ibid., p. 36.

28 Chagnon v. Syndicat de la fonction publique et parapublique du Québec, 2018 SCC 39, para. 31.

29 RPRD, Evidence, 1 May 2018 (Richard Gordon, Barrister, Brick Court Chambers).

> Freedom of expression is no longer a bulwark against attempted tyranny. It is, rather, a necessary adjunct to much of the functions undertaken in Parliament.[30]

Maxime St-Hilaire, Professor at the Université de Sherbrooke, noted that the conditions that justify the protection of parliamentarians have changed over time, and that parliamentary privilege needs to be reconsidered.[31] In his view, while a number of changes have taken place in the relationships between the legislative, executive and judicial branches since the 17th century, the "basic principle, to protect parliamentarians against the other powers, remains relevant."[32] However, Mr. St-Hilaire noted that the challenge is to adapt that principle to the current conditions of a modern parliamentary democracy. As part of this study, witnesses discussed the reasons for parliamentary privilege and its evolution in order to respond to current needs.

Parliamentary Privilege as Protection for Parliamentary Minorities

Mr. St-Hilaire raised the idea that parliamentary privilege in the current system, where party discipline is common, is a way to protect the parliamentary minority from the parliamentary majority, "meaning that the threat to the legislative branch is no longer the executive being separate from the legislative."[33] He defined parliamentary minorities as being "the parliamentary groups that do not hold a clear majority, the independent members, the minority parties whose role can be quite crushed by the majority." He explained that various parliamentary mechanisms, including internal mechanisms, disciplinary measures and financial control, expose parliamentary minorities to the risk of being oppressed by the parliamentary majority:

> There is the risk of the collective power being used to adopt and apply procedures. This is because parliamentary privilege is also the privilege of the chamber to have its speaker make the final decision as to how the regulations shall be applied, sometimes in a committee. There is a risk of the collective and institutional power being used to make regulations of a political nature and to muzzle the collective or individual rights of the political minority.[34]

Mr. St-Hilaire concluded by emphasizing the importance for Canadian parliamentarians to "establish guarantees to protect the political minority" and "consider the need for special protection or for adapting parliamentary privilege to this special need to protect the

30 Ibid.
31 RPRD, Evidence, 27 March 2018 (Maxime St-Hilaire, Professor, Université de Sherbrooke).
32 Ibid.
33 Ibid.
34 Ibid.

political minority."[35] To adapt privilege in order to better protect parliamentary minorities, he suggested that the test of necessity be applied to reduce the collective power—used by the parliamentary majority—to increase protection for individual freedom of expression.[36]

Furthermore, Mr. St-Hilaire stated that "[t]here is nothing uniquely Canadian in the need to protect … the parliamentary minority from the majority."[37] To that effect, he proposed examining other studies on parliamentary privilege, beyond Commonwealth countries, such as the work of the Venice Commission of the Council of Europe, or other independent bodies or experts.[38]

Expertise on the Propriety of the Legislative Function and Parliament's Autonomy with Respect to the Courts

Under the Constitution, both Houses of Parliament enjoy a high degree of autonomy. The Honourable Ian Binnie, former puisne justice of the Supreme Court of Canada, said that "it would make parliamentary life impossible if the courts were to micromanage what goes on in the Senate or the House of Commons."[39] To illustrate the risks of such interference, he provided the following example:

> What one must always keep in mind in dealing with the courts is that it's very easy to start a court case, and it takes a long time and is complicated. In the meantime, you may well find the proceedings in Parliament suspended, which is very much against the public interest.[40]

In addition to the level of autonomy required by Parliament to exercise its legislative power, Mr. Binnie said that the courts do not have the expertise to address issues surrounding the propriety of the legislative function: this expertise lies entirely with parliamentarians.[41] This means that parliamentarians, who are responsible for exercising privilege, are best positioned to determine its contents and propriety. According to Mr. Gordon, "it is surely incumbent on those claiming the privilege to justify its continuation in any form."[42] In the same vein, McGill University professor Evan Fox-Decent raised the idea of legal pluralism, "the idea that courts alone are not the only institutions

35 Ibid.
36 Ibid.
37 Ibid.
38 Ibid.
39 RPRD, Evidence, 22 May 2018 (The Honourable Ian Binnie).
40 Ibid.
41 Ibid.
42 RPRD, Evidence, 1 May 2018 (Richard Gordon, Barrister, Brick Court Chambers).

that ought to be recognized to have authority to interpret and apply the law to people within their care or within their jurisdiction."[43]

The witnesses also expressed a variety of opinions about the respective roles of the courts and Parliament regarding the exercise of parliamentary privilege. When asked how Parliament could exercise parliamentary privilege in the current context while respecting the rights of third parties under the *Canadian Charter of Rights and Freedoms*, Mr. Gordon stated that there needs to be cooperation between both institutions in the form of consultative processes. He recommended devising "mechanisms which provide a link between the courts and Parliament," and he said that "systematically there should be much more dialogue between judges and parliamentarians."[44]

Mr. Gordon believes that recognizing a privilege that would have the effect of breaching a fundamental right would be a question of law that would justify creating such a mechanism. However, Mr. Gordon did acknowledge that judges and parliamentarians may be reluctant to take such an approach, for fear of threatening judicial independence and parliamentary autonomy.[45]

Mr. Binnie disagreed with such an informal undertaking because of the respective independence of the two institutions and the potential risks to procedural fairness for third parties. Mr. Binnie cited the *Vaid* case as an example, stating that if Parliament had had private discussions with the judges of the Supreme Court of Canada and that a decision was made regarding the applicability of parliamentary privilege, Mr. Vaid could have challenged the independence of the judicial system and his right to be present and provide input in discussions concerning him.[46]

The Honourable Dan Hays, former Speaker of the Senate, also responded to Mr. Gordon's suggestion. Mr. Hays stated that it would be difficult to establish a process that could compromise the independence of the courts. However, he qualified his position, stating that it would be possible to set up a participatory process for sharing ideas between jurists and parliamentarians on questions of privilege.[47]

Spatial Boundaries of Privilege

To justify the relevance of privilege in a contemporary context, witnesses also raised the importance of clarifying the spatial boundaries of parliamentary privilege, particularly in light of recent technological developments. The issue surrounding the spatial boundaries of

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43 RPRD, Evidence, 2 October 2018 (Evan Fox-Decent, Professor, Faculty of Law, McGill University).

44 RPRD, Evidence, 1 May 2018 (Richard Gordon, Barrister, Brick Court Chambers); Mr. Gordon said that there should be "a mechanism that enabled, for example, the judges to refer a question before them to a special parliamentary committee" and that "a court would make the decision, but it would only make it after giving the greatest weight to a committee of Parliament."

45 Ibid.

46 RPRD, Evidence, 22 May 2018 (The Honourable Ian Binnie).

47 RPRD, Evidence, 8 May 2018 (The Honourable Dan Hays, P.C., former Speaker of the Senate).

the privilege of freedom of speech was raised in the Committee's 2015 report.[48] The Committee agreed that "parliamentary privilege should apply to proceedings in Parliament that take place outside of the physical confines of the parliamentary precinct, for example a committee meeting where a witness stationed in other country appears via videoconference."[49] In this respect, the 2015 report highlighted the need to have procedures in place to review cases where a parliamentarian is accused of defamatory malice.

According to Mr. St-Hilaire, "[t]he highest court in Great Britain has confirmed that parliamentary privilege exists outside Parliament in certain respects."[50] He nonetheless acknowledged that questions remain regarding the application of privilege to the modern functions of parliamentarians:

> The working conditions of parliamentarians have changed. Beforehand, it was easier to limit the scope of privilege to the parliamentary precinct, because the working conditions of parliamentarians were not the same. The means of communication and transmission were not the same. Geographically, the work of parliamentarians is a little broader now. That raises important questions.[51]

One solution for clarifying the extent of parliamentary privilege and its spatial boundaries may be to codify it. However, codification could run the risk of imposing a form of rigidity and reducing the flexibility enjoyed by Parliament in exercising privilege. This will be discussed in greater detail in the following chapter.

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48 It is established that the privilege of freedom of speech is limited to "parliamentary proceedings," although there are still questions as to what "parliamentary proceedings" include.

49 Senate, Standing Committee on Rules, Procedures, and the Rights of Parliament, A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century, Interim Report, June 2015, p. 50.

50 RPRD, Evidence, 27 March 2018 (Maxime St-Hilaire).

51 Ibid.

CHAPTER 3: CODIFYING PARLIAMENTARY PRIVILEGE

In its 2015 report, the Committee identified the need for Parliament to proactively re-evaluate and reconsider its privileges, and analyzed possible options for renewing privilege. The Committee stated that Parliament "may determine that a set of modified parliamentary privileges ought to be codified, through statute or otherwise, to reflect [its] modern needs."[52] However, the Committee cautioned that codification would require constant updates to ensure that privileges remain in line with modern reality, as highlighted in the following excerpt:

> There can be advantages and disadvantages to attempting to codify privilege. While codification can provide some clarity around how the privileges will be exercised, in order to remain relevant the codified versions of the privileges must be kept up to date to reflect their continuing evolution.[53]

In the context of the present study, most of the witnesses addressed the issue of codifying parliamentary privilege. They discussed both the possibility of codification and what forms that could take. The witnesses' opinions differed as to the extent to which such a codification should or could take place. Some witnesses also discussed parliamentary jurisdiction in this context.

Advantages of Codifying Privilege

Several witnesses were in favour of codifying parliamentary privilege, while others expressed some reservations. Mr. Hays falls into the first category. He first stated his support of the Committee's conclusion in its 2015 report to the effect that "privilege needs to be adapted to the current environment and modern expectations."[54] He also agreed with "the findings of the 1999 joint committee in Britain that a comprehensive Parliamentary Privileges Act is now required if we are to truly modernize Parliament as opposed to stitching it up."[55]

In addition, Mr. Hays recommended that the Committee study the codification experiences of Australia, New Zealand and the Quebec National Assembly. Stating that it may end up being problematic for the Senate to proceed alone in this area, he recommended the

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52 Senate, Standing Committee on Rules, Procedures, and the Rights of Parliament, A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century, Interim Report, June 2015, p. 77.
53 Ibid., p. 36.
54 RPRD, Evidence, 8 May 2018 (The Honourable Dan Hays, P.C.).
55 Ibid.

establishment of a joint committee on parliamentary privilege tasked with studying the current needs of Parliament and Canadians.

Mr. Gordon also believes that privilege needs to be codified, in part to reflect third-party interests (this will be discussed in Chapter 4). In his view, codification is necessary in a modern context which requires the scope of the privilege to be clear and to have clearly defined terms. He said that although codification exposes privilege to judicial interpretation, the fact remains that clear legislation reduces ambiguity and could even limit the court's jurisdiction in certain circumstances. Mr. Gordon also said that he hoped that any codification would accommodate "the role of Parliament, by conferring a remit for the scope of internal rules, and the courts by laying down the statutory template for how fundamental rights should be addressed and factored into the application of parliamentary privilege."[56]

Mr. Binnie said that the possibility of codifying parliamentary privilege was appealing, as the words currently used to define privilege are ancient. He believes that codification would benefit both Parliament as an institution and the public, providing the latter with a better understanding of privilege. Mr. Binnie also identified categories of privilege that would lend themselves particularly well to codification: the Senate's privilege over "the management of internal affairs"[57] and parliamentarians' freedom of speech, particularly with respect to hate speech.

With respect to the possibility that codification would result in a loss of the flexibility that parliamentary privilege currently enjoys, an argument that was raised in the Committee's 2015 report and by Mr. Levac in his testimony, Mr. Binnie maintained that he does not see this as a valid argument. He illustrated his opinion as follows:

> What I was thinking is that codification can mean anything from a handful of articles in the Charter to the Criminal Code with its 700 closely and densely worded sections, or the Income Tax Act, and lord knows how many sections it has now. … [I]f the codification attempted more precision than the subject matter is really capable of, it would inhibit the development of the law of privilege and the ongoing review of what is necessary and what is not necessary.
> But I don't think codification requires a loss of flexibility, just as I don't think we lose flexibility by taking some of the old common law doctrines of free speech and putting them into the Charter.[58]

Mr. Binnie pointed out that a code could simply contain general statements setting out the parameters articulating parliamentary privilege in modern language. A code written in such a way could be annotated with rulings by Speakers and by the Senate itself in order to

56 RPRD, Evidence, 1 May 2018 (Richard Gordon).
57 RPRD, Evidence, 22 May 2018 (The Honourable Ian Binnie).
58 Ibid.

develop "a kind of jurisprudence"[59] that is not binding. He also suggested that a clause could be inserted into the code leaving the possibility for certain unspecified issues to be covered by privilege, thereby preventing a possible loss of flexibility.

Similarly, Mr. Fox-Decent does not believe that codification would necessarily result in rigid, pre-determined categories of privilege, but rather open-textured legislation that could evolve. He said that a simple crystallization of existing principles could be beneficial to avoid having to go back to relatively ancient precedents whenever parliamentary privilege is invoked.[60]

Disadvantages of Codifying Privilege

Some witnesses expressed reservations about codification. While acknowledging certain positive aspects of codification, Mr. Fox-Decent also pointed out some of the risks:

> There is a risk with codification. The risk is that once something becomes codified it can ossify. It can lose the open textureness you have when you are dealing with judicial decisions because judicial decisions are typically referred to as principles, whereas provisions in a statute are norms and rules. They are typically taken to have a harder edge and often will have that harder edge.[61]

Mr. Levac explained that Ontario's approach to its privileges was to avoid comprehensive codification, with the Legislative Assembly instead opting to "selectively advocate for its privileges in the courts and legislate them only when necessary."[62] These occasions have been relatively rare, as the provisions of the Legislative Assembly Act governing privileges have been amended only once since 1876. Certain privileges have been codified, such as the freedom of speech of Members and protection from arrest in civil actions. Furthermore, s. 53 of the Legislative Assembly Act includes an exception provision stating that the Act does not deprive the Assembly, its committees or members of any unspecified privilege.

Mr. Levac also said that a comprehensive codification, which would aim to codify all privileges and their scope, would have the benefit of clarifying the privileges that Parliament enjoys. However, he noted that such a codification would also mean reduced flexibility, since it would be difficult to foresee all possible situations that would require the application of privilege. He believes that it would be impossible for comprehensive codification to cover all scenarios. According to Mr. Levac, Senators would necessarily "regret"[63] not stating certain applications of privilege that were not foreseeable at the time codification took place.

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59 Ibid.
60 RPRD, Evidence, 2 October 2018 (Evan Fox-Decent).
61 Ibid.
62 RPRD, Evidence, 19 March 2019 (Dave Levac).
63 Ibid.

The former Speaker of the Legislative Assembly of Ontario therefore recommends selective codification or the "pragmatic use of statutes"[64] that would "maintain a flexible and adaptable framework"[65] for interpreting parliamentary privileges. He explained that it may be advantageous to adopt certain definitions and specific examples while maintaining flexibility and avoiding codifying everything in detail.

Jurisdiction and Parliamentary Self-government

While discussing the codification of privilege, one witness said that Parliament would benefit from asserting its legislative authority to define its privileges. Mr. St-Hilaire pointed out that Parliament remains competent to establish and restrict the scope of its privileges in accordance with section 18 of the Constitution Act, 1867. He explained that section 18 does not recognize specific privileges, but rather the power of the Canadian Parliament to claim privileges, subject to a certain limit. On the other hand, he believes that by establishing the necessity test in *Vaid*, the Supreme Court "removed"[66] this power, substituting its own necessity test for legislative will, thus allowing the courts to define the scope of privilege. He therefore considers that it may be urgent to "revive the idea that Parliament must be competent to define and regulate parliamentary privileges."[67]

Similarly, Mr. Fox-Decent believed that parliamentary privilege must be approached from the perspective of parliamentary self-determination, that is, Parliament's authority "to govern its own affairs and to govern affairs that will touch on third parties."[68] He illustrated this by comparing Parliament to an administrative body that is clothed with the authority to enforce and interpret the laws within its jurisdiction outside the traditional legal system. Parliament should therefore be seen as a "public self-governing entity"[69] that is responsible and able to interpret and apply its own privileges. Mr. Fox-Decent proposed that Parliament draw its inspiration for self-regulation from other autonomous public institutions, such as the professions and the judiciary, which are governed by their own codes of ethics and standards.

Like these witnesses, the Committee considers it important to affirm the Senate's legislative capacity to codify all or part of its own privileges, if it deems it necessary, for example in response to a judicial decision or a specific event justifying it. However, at this time, the Committee does not consider it appropriate to recommend the codification of any privilege.

Indeed, although there are some notable advantages to codification, the associated risks remain significant. The concept of ad hoc codification as needed

64 Ibid.
65 Ibid.
66 RPRD, Evidence, 27 March 2018 (Maxime St-Hilaire).
67 Ibid.
68 RPRD, Evidence, 2 October 2018 (Evan Fox-Decent).
69 Ibid.

is also of interest, and the Committee believes that this should be the option promoted by the Senate in the future.

While codification is not contemplated at this time, it remains essential that all senators, and particularly those who will join the institution in the future, have a shared vision and theoretical basis as to the definition, effects and scope of parliamentary privileges as they are understood and interpreted today. To this end, this report, the Committee's 2015 report and recent case law should serve as a foundation for the senators' understanding of privilege in a modern context. Therefore, the Committee recommends:

> **That the Senate instruct the Senate administration to review the existing information documents for senators on parliamentary privileges and the manner in which it informs senators about parliamentary privilege. Further, that the information be made available as a compilation, that it reflect this report, the Committee's 2015 report and recent case law on parliamentary privilege and that it include a preamble citing section 18 of the *Constitution Act, 1867*.**

CHAPTER 4: PROTECTING THE RIGHTS AND FREEDOMS OF THIRD PARTIES

The modern emergence of the recognition of fundamental rights poses particular problems with regard to parliamentary privileges, which may offend or violate these rights. For several years, some have questioned the need to balance the rights of third parties protected by the *Canadian Charter of Rights and Freedoms* with the exercise of parliamentary privilege. It is understood that these rights and privileges are constitutionally protected, and therefore it follows that "parliamentary privilege enjoys the *same* constitutional weight and status as the Charter itself."[70] This can be a potential source of conflict, particularly when a fundamental right (such as freedom of religion) conflicts with a parliamentary privilege (such as the privilege to exclude strangers). This was exemplified in the recent *Singh* case (see Chapter 1) which was the subject of a ruling by the Quebec Court of Appeal.

In its 2015 report, the Committee made certain observations with respect to the rights of third parties regarding the exercise of parliamentary privilege. In particular, the report states that parliamentarians' freedom of speech should be practised "with an awareness of the risk of potential harm, particularly to third parties,"[71] and states that certain internal mechanisms should be developed to govern abuses of the privilege of freedom of speech when it is used to damage a third party's reputation.[72]

Several witnesses recognized the need to protect the rights and freedoms of third parties when they are confronted with the exercise of parliamentary privilege. For some, this protection necessarily involves an exercise in codifying privilege, while others suggest establishing internal complaint mechanisms to reconcile the various rights at play. As Mr. Binnie points out, "[t]here are many examples where you can read down one but preserve the essential purpose, the necessity, without sacrificing the other."[73]

For Mr. St-Hilaire, it is important to recognize that parliamentarians continue to have the authority to "set their own limits"[74] on this issue, despite Supreme Court jurisprudence that holds that parliamentarians largely escape the application of the *Canadian Charter of Rights and Freedoms* in the exercise of their privileges. This self-determination can be achieved, for example, by adopting a codification or more restrictive standards than privileges currently allow. Parliamentarians may therefore, of their own free will, set limits on the privileges they hold in order to ensure respect for the rights and freedoms of third parties. Mr. St-Hilaire added that parliamentary privilege or immunities in several countries

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

71 Senate, Standing Committee on Rules, Procedures, and the Rights of Parliament, A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century, Interim Report, June 2015, p. 48.

72 Ibid., p. 51.

73 RPRD, Evidence, 22 May 2018 (The Honourable Ian Binnie).

74 RPRD, Evidence, 27 March 2018 (Maxime St-Hilaire).

are restricted in this sense. However, he observed that in practice, the enforcement of a decision of one of the chambers of Parliament, such as by forcing a witness to testify, has occurred only very rarely in the past.

For his part, Mr. Gordon considers that parliamentary privilege, particularly the freedom of expression of parliamentarians, must be reformed to take into account the interests of affected third parties. He recalled that in the early days of parliamentary privilege, this issue did not arise:

> It should be borne in mind that at its inception, the notion of independent third party interests coming up against the interests of Parliament simply did not exist. The development of fundamental rights has emerged only gradually. Very little thought has thus far been focused on the potential for conflict between the rights and obligations of third party individuals and other bodies, on the one hand, and on the other the duties of Parliament going about its daily work.[75]

He stated that in order to adapt privilege to reflect the modern context, especially with respect to the interests of third parties, the scope of privilege must be clear. As noted in Chapter 3, in his view, this strongly supports the codification of privilege. He said that the codification process could be an opportunity for Parliament to bolster the procedural guarantees of third parties through internal regulations or legislative amendments.

Mr. Binnie agreed, pointing out that codification would benefit not only Parliament itself, but also third parties who might feel "insulted or defamed"[76] by what is said in Parliament. It would also allow parliamentarians to focus on "exactly what they regard as essential and necessary to their legislative function and matters associated with their legislative function."[77] He also made the following observation:

> The fact is that Canadians have individual rights that can be asserted and which ought to apply equally across the board, and parliamentary privilege, while it is part of the same public law, is an exception to the ability of the individual citizen to exercise his or her rights. … It seems to me that is an argument to have a codification because of that complexity, and it ought to be addressed.[78]

Mr. Binnie believes it is vital for there to be a process to allow third parties to file a complaint about the exercise of a privilege. Using the courts as an example, he said that a third party can file a complaint with the Canadian Judicial Council if a judge makes

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75 RPRD, Evidence, 1 May 2018 (Richard Gordon).
76 RPRD, Evidence, 22 May 2018 (The Honourable Ian Binnie).
77 Ibid.
78 Ibid.

inappropriate remarks. He believes that a similar forum could be created for the Senate and the House of Commons.

Mr. Hays believes that the solution may lie in introducing a grievance process, a forum where aggrieved Canadians could present their arguments in response to a parliamentary decision or action. He suggested creating a parliamentary committee as a potential forum. Mr. Levac said that it is up to Parliament or the Legislative Assembly to determine whether legislation is needed to establish checks and balances between the rights of third parties and the exercise of privilege.

Lastly, as a general remark, Mr. Fox-Decent argued that it is still important for the Senate to have a say in matters involving it, whether or not a third party is involved:

> My own view is that nothing should go to the courts where there is a matter of dispute with respect to a ruling of the house or the Senate, or a dispute between third parties that have something to do with the house or the Senate, without some institution within the house or the Senate having an opportunity to express its view. Then, generally speaking, if a court challenge is raised and if the matter is an in-house matter, the bar for intervention by the courts should be very high.[79]

Given the insightfulness of the witnesses' arguments and the importance for third parties to have their fundamental rights protected, the Committee believes that it would be worthwhile to continue this study in the future, focusing on this particular issue.

[79] RPRD, Evidence, 2 October 2018 (Evan Fox-Decent).

CONCLUSION

The evidence heard in this study has shed light on contemporary problems and issues related to parliamentary privileges and raised several questions and food for thought on the matter. Striking a delicate balance between the privileges of parliamentarians, essential to the exercise of senators' constitutional duties, and the fundamental rights of third parties who interact with the Senate, as enshrined in the *Canadian Charter of Rights and Freedoms,* continues to be a major challenge. Clearly, a fair balance between codifying certain privileges, allowing certainty and clarity, and ensuring the necessary flexibility for privileges to evolve, is necessary.

Consequently, this report is only the beginning of the Committee's study of the issue of parliamentary privileges and the protection of the rights and freedoms of third parties. Work in this area will necessarily develop as events in parliamentary life unfold and modernization efforts take place in the Senate of Canada in the coming years. As such, the Committee's conclusions and observations presented in its 2015 report continue to be relevant.

Finally, in the Committee's view, the understanding of parliamentary privileges exercised in the Canadian Parliament should be similar in both chambers. In this view, a partnership with the House of Commons on this issue seems appropriate. Consequently, the Committee recommends that:

> **Following the next general election, since both Houses have a common interest to share a contemporary understanding of the exercise of parliamentary privileges, that the Senate invite the House of Commons to participate in a special Joint Committee on this subject.**
>
> **The mandate of the Special Joint Committee would be: to review the recent judicial decisions of the Supreme Court of Canada and Federal Court of Appeal on the criteria defining parliamentary privileges; to evaluate the scope of parliamentary privileges in relation to electronic communications and devices, Internet sites, social media platforms, and other electronic supports used by parliamentarians, if any; to evaluate the need to clarify the applicable rules; and to consider the various initiatives that could be undertaken to protect third party rights and freedoms in regard to parliamentary privileges.**

APPENDIX A – List of Witnesses

Tuesday, March 27, 2018

Maxime St-Hilaire, Professor, University of Sherbrooke

Tuesday, May 1, 2018

Richard Gordon, Barrister, Brick Court Chambers

Tuesday, May 8, 2018

The Honourable Dan Hays, P.C., former Speaker of the Senate

Tuesday, May 22, 2018

The Honourable Ian Binnie

Tuesday, October 2, 2018

Evan Fox-Decent, Professor, Faculty of Law, McGill University

Tuesday, March 19, 2019

Dave Levac, Former Speaker, Legislative Assembly of Ontario

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