



SUPREME COURT OF CANADA

CITATION: Alford v. Canada
(Attorney General), 2026 SCC 14

APPEAL HEARD: November 5 and
6, 2025

JUDGMENT RENDERED: May 1,
2026

DOCKET: 41336

BETWEEN:

Ryan Alford
Appellant

and

Attorney General of Canada
Respondent

- and -

**Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Speaker of the Legislative Assembly of Ontario,
International Commission of Jurists (Canada),
British Columbia Civil Liberties Association,
Canadian Civil Liberties Association,
Canadian Constitution Foundation,
Assemblée nationale du Québec,
Speaker of the Senate and
Speaker of the House of Commons**
Intervenors

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

**REASONS FOR
JUDGMENT:** Rowe J. (Wagner C.J. and Karakatsanis, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)
(paras. 1 to 101)

**DISSENTING
REASONS:** Côté J.
(paras. 102 to 157)

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Ryan Alford

Appellant

v.

Attorney General of Canada

Respondent

and

**Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
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Speaker of the Legislative Assembly of Ontario,
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Interveners

Indexed as: Alford v. Canada (Attorney General)

2026 SCC 14

File No.: 41336.

2025: November 5, 6; 2026: May 1.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O’Bonsawin and Moreau JJ.

Constitutional law — Canadian institutions — Parliament — Parliamentary privilege — Parliament enacting legislation authorizing committee of parliamentarians to access information pertaining to matters of national security and intelligence — Legislation prohibiting committee members from disclosing information obtained by virtue of their participation on committee and from claiming immunity based on parliamentary privilege in proceedings against them arising from disclosure of such information — Whether legislated limit on parliamentary privilege ultra vires Parliament’s constitutional authority to enact legislation defining parliamentary privileges — Constitution Act, 1867, s. 18 — National Security and Intelligence Committee of Parliamentarians Act, S.C. 2017, c. 15, ss. 11, 12.

In 2017, Parliament enacted the *National Security and Intelligence Committee of Parliamentarians Act* (“*NSICOP Act*”), for the purpose of setting up a statutory committee of parliamentarians to oversee Canada’s national security and intelligence apparatus (“*Committee*”). The *Committee* is not a parliamentary committee, but a statutory committee within the executive branch that is composed of members of Parliament and senators appointed by the Governor in Council. Given the mandate of the *Committee*, members are expected to review sensitive national security information. The *NSICOP Act* requires members to obtain and maintain the appropriate security clearance and undertake not to disclose any information obtained in confidence. Section 11 prohibits disclosure of protected information obtained by

Committee members through their participation on the Committee. Section 12 states that no member or former member of the Committee may claim immunity based on parliamentary privilege in a proceeding related to a violation of s. 11.

The constitutional validity of s. 12 was challenged on the basis that it impermissibly limits the privilege of freedom of speech in Parliament and the authority of its Houses to set and enforce their own internal rules of conduct. The application judge concluded that the limitation of parliamentary privilege effected by s. 12 required a constitutional amendment and declared s. 12 *ultra vires* Parliament and constitutionally invalid. The Court of Appeal disagreed and held that s. 12 is *intra vires* Parliament's legislative authority under s. 18 of the *Constitution Act, 1867*, which gives to Parliament the power to define parliamentary privileges, immunities and powers by way of duly enacted legislation.

Held (Côté J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Karakatsanis, **Rowe**, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.: The text of s. 18 of the *Constitution Act, 1867*, when read in its historical and constitutional context, grants Parliament the authority both to supplement and to limit its privileges as it deems appropriate to fulfill its constitutional role. This is subject only to three constraints: (1) Parliament cannot grant itself privileges, immunities, or powers that exceed those of the British House of Commons at the time of the grant; (2) s. 18 cannot be used in a manner that would fundamentally undermine Parliament's function as a legislature in Canada's Westminster-style

parliamentary democracy, as this would run counter to its purpose; and (3) s. 18 must be used consistently with other constitutional provisions that expressly relate to the functioning of Parliament. Section 12 of the *NSICOP Act* represents a narrow limitation of parliamentary privilege, which falls within the authority conferred upon Parliament by s. 18, and therefore was validly enacted.

Parliamentary privilege can be defined 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. Parliamentary privilege forms an important part of Canada's constitutional law. Its purpose is to ensure the autonomy of the legislature from undue interference from the executive and the judiciary, and it is one of the ways in which the fundamental constitutional separation of powers is respected in Canada.

The Constitution of Canada recognises, both implicitly and explicitly, the need for parliamentary privilege in a parliamentary democracy similar in principle to that of the United Kingdom. However, it does not expressly define its content. Rather, the Constitution affirms the authority of legislatures themselves to do so, based on what they regard as necessary and appropriate in order to fulfill their roles within Canada's constitutional order. At the federal level, the authority to define the content of parliamentary privilege is granted to Parliament by the express terms of s. 18 of the *Constitution Act, 1867*.

To determine the constitutionality of s. 12 of the *NSICOP Act*, the scope of Parliament's legislative authority to define the privileges of the Senate and House of Commons must be ascertained, which requires interpreting s. 18 of the *Constitution Act, 1867*. The interpretation of a constitutional provision must be anchored in the meaning of its words, considered in context, with a view to the purpose it was intended to serve. The meaning given to a constitutional provision must also be harmonious with the structure of government implemented by, and consistent with other provisions of the Constitution.

The wording of s. 18 refers to the power to define, by Act of the Parliament of Canada, the "privileges, immunities, and powers to be held" by the Senate, the House of Commons, and their members, without distinction. There is no textual signal to suggest that the phrase describes anything narrower than the sum total of privileges, immunities, and powers that comprise parliamentary privilege at the federal level. The text provides an upper limit on an attempt to supplement the privileges enjoyed by Parliament's Houses and their members: Parliament may only grant them a privilege belonging to the British House of Commons at the time of the grant. However, the text of s. 18 does not contain any express language to preclude the limitation of certain privileges, powers, or immunities. The only constraint consists in the ordinary principle of public law that an authority may not be exercised in a manner that is inconsistent with the purpose for which it is granted, as understood by reference to the historical and constitutional context.

The historical context shows that, unlike the provincial legislatures, the Parliament of Canada lacked the authority prior to 1949 to make laws respecting its own constitution — the Imperial Parliament retained that power. This made it necessary, in 1867, to enact s. 18 as an exception to the rule, to expressly grant Parliament the authority to legislate the privileges of its Houses and their members. As for the constitutional context, s. 18 must be read harmoniously with the Constitution as a whole, including other parts that expressly relate to the functioning of Parliament. The purpose of s. 18 must also be informed by Parliament's essential character as the legislative branch of a government similar in principle to the United Kingdom, as contemplated by the preamble of the *Constitution Act, 1867*. Accordingly, s. 18 is subject to similar limits as s. 44 of the *Constitution Act, 1982*, in that it cannot be used to make changes to the Constitution that are subject to the other amending formulas set out in Part V of the *Constitution Act, 1982*.

Consistent with its text and context, the purpose of s. 18 is to allow Parliament to define the privileges, powers, and immunities it needs to protect its functions as a legislative body. This authority to define privileges includes limiting these privileges. When Parliament does so, it exercises a legislative authority conferred by the Constitution; it does not amend the Constitution itself. Still, a valid exercise of this power cannot be inconsistent with the purpose for which it was granted, and thus cannot fundamentally alter or undermine Parliament's role within Canada's constitutional order.

Section 12 of the *NSICOP Act* does not have these effects but, rather, represents a narrow limitation of parliamentary privilege. By imposing this narrow limit on its own privileges, Parliament chose to enlarge the jurisdiction of the courts by permitting them to adjudicate criminal proceedings arising from conduct that is ordinarily shielded by parliamentary privilege. The effect of s. 12 on parliamentary privilege is limited to the immunity held by those who choose to sit on the Committee. It does not affect free speech in Parliament more broadly, with respect to anything other than protected information made available to Committee members by virtue of the *NSICOP Act* and which they would not have been aware of otherwise. Section 12 was within Parliament's authority to enact pursuant to s. 18 of the *Constitution Act, 1867*. The privilege of freedom of speech in Parliament is not a matter that was entrenched by s. 42(1)(b) of the *Constitution Act, 1982*, nor does the combined effect of ss. 11 and 12 of the *NSICOP Act* change the constitutionally entrenched role of the Supreme Court of Canada under s. 42(1)(d).

Per Côté J. (dissenting): The appeal should be allowed and s. 12 of the *NSICOP Act* declared *ultra vires* Parliament. There is agreement with the majority that s. 18 of the *Constitution Act, 1867* grants Parliament the authority to expand, limit, or otherwise alter any of its privileges, including freedom of speech, subject to three constraints: (1) Parliament cannot grant itself privileges, immunities, or powers that exceed those of the House of Commons of the United Kingdom at the time of the grant; (2) Parliament cannot define its privileges in a manner that would fundamentally undermine its function as a legislature in Canada's Westminster-style parliamentary

democracy; and (3) s. 18 must be used consistently with other constitutional provisions that expressly relate to the functioning of Parliament. However, there is disagreement concerning the application of this framework in the instant case: s. 12 of the *NSICOP Act* is fundamentally incompatible with the role of Parliament in Canada's democracy and is therefore *ultra vires* Parliament's authority under s. 18 of the *Constitution Act, 1867*.

Section 12 of the *NSICOP Act* restricts the privileges of parliamentarians on the Committee, exposing them to potential imprisonment if they disclose in Parliament any information that they obtained, or to which they had access as Committee members and that a department is taking measures to protect, even if that disclosure occurs as part of proceedings in Parliament. This restriction on free speech in Parliament is unprecedented. The ability of elected representatives to speak and debate in Parliament without fear of civil or criminal proceedings is essential to Canada's system of government. The privileges of Parliament, including freedom of speech and debate, emerged from centuries of contestation between the English House of Commons, the Crown, and the courts over the Commons' authority and independence from other branches of government. When the Parliament of Canada and the provincial legislatures were created, they held the same privilege by virtue of their nature as Westminster-style legislatures in a dominion with a Constitution similar in principle to that of the United Kingdom.

The privilege of free speech in Parliament is one of extraordinary breadth. Parliamentarians are immune from being called into account anywhere, except in Parliament, for any words they utter in the course of participating in parliamentary proceedings. Free speech was and is a vital parliamentary privilege that is foundational to Canada's democracy. Its continued and central importance is affirmed by its role in facilitating the everyday business of Parliament and in sustaining the interrelated principles of responsible government, representative government, and the separation of powers. Free speech in Parliament is therefore of the utmost constitutional importance, and restrictions on it must be narrow.

Section 12 of the *NSICOP Act* impermissibly restricts free speech in Parliament. Section 12(1) purports to strip Committee members of their ability to rely on parliamentary privilege if they disclose certain information in Parliament and, as a corollary, s. 12(2) allows statements made in Parliament to be used as evidence to establish a contravention in court. The scope of this limit on privilege can be properly understood only by reference to the prohibition on disclosure set out in s. 11(1), which is characterized by only two requirements. First, the information must have been obtained by or accessible to the member or former member in the course of his or her work on the Committee. The second requirement is that a department is taking measures to protect the information. There is no requirement that the information concern national security or be in any way sensitive or injurious to the national interest. The Committee's mandate is exceptionally broad and it is not unreasonable to expect that members may access a vast and heterogeneous array of government information.

Section 11(1) prohibits the disclosure of any of it — so long as a department is taking measures to protect the information.

The effect of s. 12 of the *NSICOP Act*, paired with s. 11, is therefore that Parliament has delegated to the executive, in the form of government departments under ministerial control, the power to determine what information is prohibited from disclosure in Parliament by parliamentarians. This delegation lacks any material safeguards and could prevent a Committee member from disclosing information in Parliament merely because it was politically embarrassing, without being harmful to people, property, or Canada's national interest. This is not a carefully tailored limit on parliamentary free speech. The effect of s. 12 is also to grant the courts jurisdiction to impose criminal consequences, including imprisonment, for breaching the broad s. 11 limit on parliamentary speech. The *NSICOP Act* does not provide any mechanism for the Houses of Parliament to lift or prevent a potential penalty against a Committee member, nor does it allow a parliamentarian to avoid criminal responsibility by bringing the information forward through an *in camera* session.

Section 12 thus results in a broad double delegation which fundamentally undermines the functioning of Parliament. This legislative arrangement runs counter to responsible government and representative government. Under threat of prosecution, parliamentarians may be less able to hold the executive to account if they come across abuses or other illegality. Committee members will be less able to represent the interests of their constituents if they cannot speak on issues that may well be of

immense importance. Perhaps most importantly, by transferring the determination of whether speech in Parliament is licit to the executive and the power to punish for certain speech to the courts, the *NSICOP Act* fundamentally undermines the separation of powers. Section 12 is far from being narrow. It is unprecedented in Canadian history and undermines Canada's constitutional architecture.

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2003 SCC 44, [2003] 2 S.C.R. 236; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Dill v. Murphy*, (1864), 1 Moo. N.S. 487, 15 E.R. 784; *Canada (Board of Internal Economy) v. Boulerice*, 2019 FCA 33, [2019] 3 F.C.R. 145; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Fielding v. Thomas*, [1896] A.C. 600; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Projet de loi fédéral relatif au sénat, Re*, 2013 QCCA 1807, 370 D.L.R. (4th) 711; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433; *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3.

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v. Hansard (1839), 9 Ad. & E. 1, 112 E.R. 1112; *Landers v. Woodworth* (1878), 2 S.C.R. 158; *Michaud v. Bissonnette*, 2006 QCCA 775; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Duffy v. Canada (Senate)*, 2020 ONCA 536, 151 O.R. (3d) 489; *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Brown and Trotter JJ.A.), [2024 ONCA 306](#), 172 O.R. (3d) 401, 496 D.L.R. (4th) 424, [2024] O.J. No. 1810 (Lexis), 2024 CarswellOnt 5782 (WL), setting aside a decision of Fregeau J., 2022 ONSC 2911, 161 O.R. (3d) 546, 469 D.L.R. (4th) 682, [2022] O.J. No. 2234 (Lexis), 2022 CarswellOnt 6733 (WL). Appeal dismissed, Côté J. dissenting.

Ryan Alford, on his own behalf.

Catherine Lawrence and *Michelle Kellam*, for the respondent.

Waleed Malik and *Josh Hunter*, for the intervener Attorney General of Ontario.

François-Olivier Barbeau, *Jean-Yves Bernard* and *Frédéric Perreault*, for the intervener Attorney General of Quebec.

Written submissions only by *Tyna Mason* and *Alexander Bjornson*, for the intervener Attorney General of British Columbia.

Thomson Irvine, K.C., and *Theodore J. C. Litowski*, for the intervener Attorney General of Saskatchewan.

Wai Lam (William) Wong and Gabriela Dedelli, for the intervener Speaker of the Legislative Assembly of Ontario.

Adam Goldenberg, Javid Dharas, Mathew Zaia and Stéphane Beaulac, for the intervener International Commission of Jurists (Canada).

Michael Fenrick and Mannu Chowdhury, for the intervener British Columbia Civil Liberties Association.

Gannon Beaulne, for the intervener Canadian Civil Liberties Association.

Paul-Erik Veel and Amy Goudge, for the intervener Canadian Constitution Foundation.

Christian Trépanier, Alexandre Belzile, Alexandrine Lahaie and Andrée-Anne Bolduc, for the intervener Assemblée nationale du Québec.

Marc-André Roy and Anne Burgess, for the intervener Speaker of the Senate.

Alyssa Tomkins and John J. Wilson, for the intervener Speaker of the House of Commons.

The judgment of Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. was delivered by

ROWE J. —

I. Overview

[1] Parliamentary privilege is an important component of the constitutional law of Canada. It is an essential feature of any Westminster-style legislative body, such as those that were established or continued by the *Constitution Act, 1867*. The Constitution of Canada recognises, both implicitly and explicitly, the need for parliamentary privilege in a parliamentary democracy similar in principle to that of the United Kingdom. However, it does not expressly define its content.

[2] Rather, the Constitution affirms the authority of legislatures themselves to do so, based on what they regard as necessary and appropriate in order to fulfill their roles within the confines of our constitutional order. At the federal level, the authority to define the content of parliamentary privilege is granted to Parliament by the express terms of s. 18 of the *Constitution Act, 1867*.

[3] Parliament exercised this authority in its very first session in 1868, through the enactment of the predecessor provision to the current s. 4 of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1. Since then, Parliament has largely defined the privileges of the Senate, the House of Commons, and their members by reference to

those held by the House of Commons of the United Kingdom at the time of Confederation. Freedom of speech in parliamentary proceedings has long been among these privileges.

[4] In 2017, Parliament enacted the *National Security and Intelligence Committee of Parliamentarians Act*, S.C. 2017, c. 15 (“*NSICOP Act*”) for the purpose of setting up a statutory committee of parliamentarians to oversee Canada’s national security and intelligence apparatus (“Committee”). Section 12 of this Act contains a provision that prohibits parliamentarians who sat on the Committee from claiming immunity based on parliamentary privilege in a proceeding against them related to the disclosure of national security information obtained through their Committee membership.

[5] The appellant, Professor Ryan Alford, challenges the constitutional validity of this provision, on the basis that it impermissibly limits the privilege of freedom of speech in Parliament and the authority of its Houses to set and enforce their own internal rules of conduct. In so doing, he calls into question the scope of Parliament’s legislative power to define its own privileges under s. 18 of the *Constitution Act, 1867*. He reasons that, because parliamentary privilege has constitutional status, it can only be limited by amending the Constitution of Canada in accordance with the procedures set out in Part V of the *Constitution Act, 1982*, and not by ordinary legislation.

[6] The respondent Attorney General of Canada submits that s. 12 of the *NSICOP Act* is a redefinition of parliamentary privilege that is within Parliament's authority to enact pursuant to the unambiguous terms of s. 18 of the *Constitution Act, 1867*. The respondent relies on the text and context of s. 18 to argue that Parliament possesses broad authority to add to and to limit its privileges as it sees fit from time to time, subject only to the outer boundaries of our constitutional arrangements. He submits that the narrow limitation of privilege imposed by s. 12 of the *NSICOP Act* comes nowhere close to those boundaries.

[7] My analysis proceeds in three parts: first, I describe the nature of parliamentary privilege in Canadian constitutional law; second, I turn to the interpretation of s. 18 of the *Constitution Act, 1867*, in light of its text, historical and constitutional context, and purpose. Finally, I consider whether s. 12 of the *NSICOP Act* falls within the scope of s. 18 of the *Constitution Act, 1867*.

[8] Applying the foregoing, in my view, s. 12 of the *NSICOP Act* was validly enacted under the legislative authority conferred on Parliament by s. 18 of the *Constitution Act, 1867*. Accordingly, I would dismiss the appeal.

II. Facts

[9] The *NSICOP Act* was brought into force in 2017. It establishes an eponymous committee composed of members of Parliament and senators appointed by the Governor in Council, whose mandate is to oversee Canada's national security and

intelligence apparatus. It is noteworthy that this is not a parliamentary committee, but a statutory committee within the executive branch.

[10] Given the mandate of the Committee, members are expected to review sensitive national security information. Several provisions of the *NSICOP Act* are devoted to maintaining the secrecy of this information. These include requiring members to obtain and maintain the appropriate security clearance (s. 10(a)) and swear an oath or solemn affirmation that includes an undertaking not to disclose any information obtained in confidence by a member (s. 10(b) and Sch.); holding meetings where sensitive information is discussed in private (s. 18); and in the case of ss. 11 and 12, allowing for criminal prosecutions relating to the disclosure of protected information.

[11] Section 11 of the Act contains the prohibition against the disclosure of protected information obtained by Committee members through their participation on the Committee. Section 12 of the Act states that no member or former member of the Committee may claim immunity in a proceeding related to a violation of s. 11 based on parliamentary privilege.

[12] The appellant first brought an application challenging the validity of s. 12 of the *NSICOP Act* in 2017. Professor Alford is a law professor. He is not a current or past member of the Committee, nor a parliamentarian. On that basis, the Ontario Superior Court ruled that he did not have standing to bring the application, observing

that “[w]hile [he] may have a special interest as an academic” he had “no real stake in this matter” (2018 ONSC 3984, 53 Admin. L.R. (6th) 338, at para. 18).

[13] The Court of Appeal for Ontario was not of the same view. It granted the appellant public interest standing to raise the “pure question of law” at issue (2019 ONCA 657, 62 Admin. L.R. (6th) 285, at para. 3) and remitted back his application to the Superior Court for determination on the merits.

III. Judgments Below

A. *Superior Court of Justice for Ontario, 2022 ONSC 2911, 161 O.R. (3d) 546 (Fregeau J.)*

[14] The application judge focused on whether s. 12 falls within Parliament’s “constitutional competence to limit or restrict” parliamentary privilege as a function of its authority to “define” privilege under s. 18 of the *Constitution Act, 1867* (para. 25).

[15] Reviewing case law from this Court and the Court of Appeal for Ontario, the application judge concluded that the privileges of the House of Commons and the Senate have constitutional status. The next step in the analysis, he determined, turned on Parliament’s authority to alter a rule that has constitutional status.

[16] Relying on this Court’s decisions in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, and *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, as well as the Ontario

Court of Appeal’s decisions in *Duffy v. Canada (Senate)*, 2020 ONCA 536, 151 O.R. (3d) 489, and *Re Clark and Attorney-General of Canada* (1977), 17 O.R. (2d) 593, the application judge held that “parliamentary privilege, inclusive of freedom of speech and debate” and the immunities of the members of the Houses of Parliament, is an essential part of Canada’s constitutional democracy (para. 44). Further, relying upon *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, the application judge agreed with the appellant that legislation that aims to alter the basic structure of our constitutional order requires an amendment under Part V of the *Constitution Act, 1982*. He concluded that the limitation or abrogation of parliamentary privilege effected by s. 12 of the *NSICOP Act* required a constitutional amendment under Part V.

[17] Finally, the application judge accepted the appellant’s submission that s. 12 exceeds the legislative authority of s. 44 of the *Constitution Act, 1982*, which allows Parliament to amend the Constitution in relation to the Senate and House of Commons. The application judge reasoned that the limitation on parliamentary privilege resulting from s. 12 amounts to an amendment to the “powers of the Senate” within the meaning of s. 42(1)(b) of the *Constitution Act, 1982*, to which s. 44 is expressly subject. Consequently, an amendment under the general procedure set out in s. 38 was required. Therefore, the application judge granted the application and issued an order declaring that s. 12 of the *NSICOP Act* was *ultra vires* Parliament and constitutionally invalid.

B. *Court of Appeal for Ontario, 2024 ONCA 306, 172 O.R. (3d) 401 (Doherty J.A., Brown and Trotter J.J.A. Concurring)*

[18] The Court of Appeal allowed the Attorney General’s appeal and held that s. 12 of the *NSICOP Act* is *intra vires* Parliament’s legislative authority under s. 18 of the *Constitution Act, 1867*.

[19] The Court of Appeal began by considering the operation of the relevant provisions of the Act — ss. 11 and 12 — and held that they work together to prohibit the disclosure of certain specified information but do not prohibit debate in Parliament on matters of national security and intelligence gathering generally.

[20] Turning to s. 18 of the *Constitution Act, 1867*, the Court of Appeal held that it “plainly and unequivocally gives to Parliament the plenary and continuing legislative power to define parliamentary privileges, immunities and powers by way of duly enacted legislation” (para. 43). This power is subject only to the limitation on the expansion of those rights as described in the closing words of the provision.

[21] This conclusion flowed first from the plain wording of the term “define”, which the court held means to say what something is or is not (para. 43). Further, the court observed that the language of s. 18 renders it applicable to all parliamentary privileges, immunities, and powers, including those inherent in the role of Parliament.

[22] The Court of Appeal found this reading of the text consistent with the purpose of parliamentary privilege, which is tied to protecting Parliament’s autonomy and preventing judicial or executive interference. Contrary to the appellant’s submissions, the Court of Appeal held that enacting s. 12 of the *NSICOP Act* does not

undermine Parliament's independence but, rather, is consistent with the obligation of the courts and executive to respect Parliament's decisions as to the scope of its own powers and privileges.

[23] Finally, the court rejected the appellant's argument that s. 12 drastically alters the constitutional architecture of Canada by preventing parliamentarians from informing their colleagues about government abuses. The court found nothing in the record to support this contention and rejected the hypothetical scenarios raised by the appellant to illustrate the manner in which the Act purportedly silences parliamentarians.

[24] The Court of Appeal concluded that s. 12 of the *NSICOP Act* limits the privilege of free speech and debate within Parliament, but that this limit stops far short of "constitutional renovation" or an embargo on parliamentary oversight of matters pertaining to national security (para. 57).

IV. Issue

[25] The sole issue on this appeal is whether s. 12 of the *NSICOP Act* is within Parliament's legislative authority under s. 18 of the *Constitution Act, 1867*.

V. Submissions of the Parties and Speakers of the Houses of Parliament

A. *The Appellant*

[26] The appellant relies on statements from this Court in *New Brunswick Broadcasting* confirming that provincial legislatures are endowed with those privileges necessary to their function as Westminster-style legislative bodies to draw a distinction between the constitutional status of “inherent” and “legislated” privileges at the federal level. While the former would find their source in the preamble of the *Constitution Act, 1867*, the appellant submits that s. 18 of the *Constitution Act, 1867* confers authority only to add to Parliament’s inherent privileges by way of legislation, or to remove or limit the privileges so legislated. It does not grant Parliament authority to limit or abrogate an “inherent” privilege, of which freedom of speech in debate would be the most essential example — this, he claims, must be done by way of a constitutional amendment.

[27] The appellant further argues that s. 44 of the *Constitution Act, 1982* does not permit Parliament to limit freedom of speech as it does through s. 12, because this fundamentally alters the architecture of the Constitution and runs afoul of both paras. 42(1)(b) and (d) by affecting the “powers of the Senate” and the role of this Court. As to the first provision, the appellant argues that s. 12 interferes with the Senate’s inherent authority to discipline its own members. As to the second, he suggests that permitting prosecutions under the Act without the protection of parliamentary privilege will pull this Court into what he calls political disputes between the executive and legislative branches of government. Accordingly, the appellant submits that Parliament can only achieve what it has set out to do in s. 12 of the *NSICOP Act* by way of a constitutional amendment under s. 38 of the *Constitution Act, 1982*.

B. *The Respondent*

[28] The respondent submits that Parliament has ongoing and plenary authority to define its privileges, powers, and immunities under s. 18 of the *Constitution Act, 1867*. The plain meaning of the term “define” in s. 18 gives Parliament the power to articulate the contours and boundaries of its privileges in a way that includes limiting or reducing their scope. The respondent argues that the constitutional status of parliamentary privilege does not affect the authority conferred by s. 18 of the *Constitution Act, 1867*. This authority, which is itself conferred by the Constitution, provides for the power to limit both inherent and legislated privileges, which enjoy the same constitutional status in Canada.

[29] The respondent submits that s. 12 of the *NSICOP Act* cannot properly be characterized as an amendment to the Constitution. It does not amend the text of the Constitution. Nor, says the respondent, does s. 12 affect the architecture of the Constitution by amending the “powers of the Senate” or the role of this Court. Rather, s. 12 is a considered trade-off made by Parliament to grant voluntary members of the Committee access to certain national security information, and thereby permit additional oversight of executive action, in exchange for disclaiming members’ ability to claim immunity based on parliamentary privilege in the event of unlawful disclosure of this information.

C. *The Speakers of the Senate and House of Commons*

[30] The Speakers of both Houses of Parliament intervene in the present appeal. Given their special expertise and direct interest in the issue it raises, it is worth taking note of their submissions.

[31] The Speaker of the Senate argues that Parliament possesses the plenary authority under s. 18 to make laws defining the privileges of its Houses as it sees fit in order to enable them to fulfill their constitutional roles, including by limiting their scope when it deems necessary. The Speaker contends that such ability to define, waive or limit such privileges is itself an essential component of parliamentary privilege. This is supported by the rationale for parliamentary privilege, which is to protect the autonomy of legislative bodies from interference by the courts. In the Speaker's view, Professor Alford's appeal is a paradoxical invitation to the courts to interfere with parliamentary autonomy in the name of parliamentary autonomy (I.F., at para. 24).

[32] The Speaker of the House of Commons emphasizes that parliamentary privilege must be understood harmoniously with other components of the Constitution (I.F., at para. 29). The Speaker also suggests that Parliament's authority under s. 18 is plenary and ongoing, and that such interpretation is consistent with the purpose of parliamentary privilege itself. This includes the power to limit privilege. In support of this view, the Speaker relies on three principles of constitutional interpretation: the primacy of text, the constitutional principles of parliamentary sovereignty and the separation of powers, and the principle that one part of the Constitution may not abrogate another (paras. 41-43). The Speaker submits that the appellant's restrictive

interpretation of s. 18 misapprehends the nature and constitutional status of parliamentary privilege, and warns that it would have grave consequences for the functioning of the Houses of Parliament.

VI. Analysis

A. *Standard of Review*

[33] This appeal raises a question of law for which the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

B. *The Nature of Parliamentary Privilege in Canadian Constitutional Law*

[34] In Canada, parliamentary privilege can be defined 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” (*Vaid*, at para. 29(2), adapted from *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23rd ed. 2004), at p. 75).

[35] Parliamentary privilege was originally a part of the Constitution of the United Kingdom, as settled after the English Civil War (1642-1651) and the Glorious Revolution (1688-1689). It emerged from the centuries-long struggle of the English House of Commons to assert its independence and autonomy from the monarch and

from the courts (*Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at para. 22; *New Brunswick Broadcasting*, at pp. 344 and 379; P. Doherty, “What is this ‘Mysterious Power’? An Historical Model of Parliamentary Privilege in Canada” (2017), 11 *J.P.P.L.* 383, at p. 390).

[36] While it originates in the United Kingdom, parliamentary privilege forms an important part of our own constitutional law, as is recognized by the recital in the preamble to the *Constitution Act, 1867* stating the intent to provide Canada with “a Constitution similar in Principle to that of the United Kingdom” (see *New Brunswick Broadcasting*, at p. 375, per McLachlin J.). Indeed, the necessary insulation from external oversight that privilege provides is constitutionally inherent to any Westminster-modelled legislative body (*New Brunswick Broadcasting*; *Chagnon*, at paras. 1 and 24), such as those created by the Imperial government in the colonies of British North America, Australia and New Zealand (*Kielley v. Carson* (1842), 4 Moo. 63, 13 E.R. 225; see also E. Campbell, *Parliamentary privilege in Australia* (1966), at pp. 12-27; G. W. O’Brien, *Pre-Confederation Parliamentary Procedure: The Evolution of Legislative Practice in the Lower Houses of Central Canada, 1792-1866*, Ph.D thesis, Carleton University (1988), at pp. 108-13, 191-96, 303-4 and 375-77).

[37] Parliamentary privilege comprises corporate privileges belonging to legislative bodies and individual privileges enjoyed by their members (J. P. J. Maingot, *Parliamentary Immunity in Canada* (2016), at p. 18). Both are “a means to the effective discharge of the collective functions of the House” (*Erskine May’s Treatise on The*

Law, Privileges, Proceedings and Usage of Parliament (25th ed. 2019), by D. Natzler and M. Hutton, eds., at para. 12.1). For individual parliamentarians, privilege is often described in terms of immunity, as “an exemption from some duty, burden, attendance or liability to which others are subject” (*Chagnon*, at para. 19, quoting Maingot, at p. 13).

[38] Since at least the 16th century, freedom of speech in Parliament was included among the ancient privileges of the English Houses of Parliament (*Erskine May*, at para. 12.4). This was codified following the Glorious Revolution in Article 9 of the *Bill of Rights* of 1689 (Eng.), 1 Will. & Mar. Sess. 2, c. 2, which provides that “the freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament”. This privilege ordinarily affords parliamentarians immunity from legal liability for statements made in the course of parliamentary proceedings, because such statements may not be used in judicial proceedings (*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.); *Stopforth v. Goyer* (1979), 23 O.R. (2d) 696 (C.A.), at p. 700; *Re Clark*).

[39] Since its inception, parliamentary privilege has been chiefly asserted “against the prerogatives of the Crown [and] the authority of the ordinary [c]ourts” (J. Redlich, *The Procedure of the House of Commons: A Study of its History and Present Form* (1908), vol. I, at p. 46). In line with the history of its development, the purpose of parliamentary privilege is indeed to ensure the autonomy of the legislature from

undue interference from the other branches of the state, namely the executive and the judiciary. It is “one of the ways in which the fundamental constitutional separation of powers is respected” in Canada (*Vaid*, at para. 21).

[40] Accordingly, parliamentary privilege refers to legislative bodies’ exclusive authority to set and enforce their own rules and to conduct their proceedings without interference from the courts. From the latter’s viewpoint, it is primarily a rule of curial jurisdiction (*Canada (Attorney General) v. Power*, 2024 SCC 26, at para. 151, per Jamal J., dissenting in part, but not on this point), precluding judicial scrutiny of the exercise of a set of constitutionally protected privileges. The principles of parliamentary privilege are therefore “a means of distinguishing areas of judicial and legislative body jurisdiction” (*Duffy*, at para. 35; *New Brunswick Broadcasting*, at pp. 383-84; see also *R. v. Chaytor*, [2010] UKSC 52, [2011] 1 A.C. 684, at paras. 14-16; *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112, at p. 1168).

[41] When parliamentary privilege is alleged, the role of a court is to ascertain the boundary between its own domain of jurisdiction and that of the legislative body by determining whether the existence of an asserted privilege is established. Once this dividing line has been set, the court cannot cross it to review the legislative body’s exercise of the privilege (*Vaid*, at paras. 40-41 and 47-48; *Chagnon*, at paras. 2 and 32; *New Brunswick Broadcasting*, at p. 350, per Lamer C.J., and at pp. 384-85, per McLachlin J.; M. Rowe, “The Unwritten Constitution: A Short Description” (2025), 19 *J.P.P.L.* 271, at p. 279). This is so even when it is alleged that such exercises trench

on certain rights protected by the *Canadian Charter of Rights and Freedoms* (*New Brunswick Broadcasting*). Rather, “[i]n matters of privilege, it would lie within the exclusive competence of the legislative assembly itself to consider compliance with human rights and civil liberties” (*Vaid*, at para. 30) through the exercise of its own enforcement powers (*Duffy*, at para. 91; see also Canada, House of Commons, *House of Commons Procedure and Practice* (4th ed. 2025), by E. Janse and J. LeBlanc, at ch. 3).

[42] Thus, while the common law *recognizes* parliamentary privilege, the common law is not its source and cannot vary or otherwise affect the laws and customs of Parliament. Decisions as to such matters are for the legislatures themselves to make, as they see fit, from time to time (Maingot, at p. 304; *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 784-85).

[43] This is reflected in s. 18 of the *Constitution Act, 1867*, which assigns Parliament the power to define its privileges by legislation, subject to the express limit that they do not exceed those of the House of Commons in the United Kingdom.

[44] That power was exercised by Parliament through what is now s. 4 of the *Parliament of Canada Act*. Section 4(a) incorporates by reference in Canadian law the privileges, immunities, and powers held by the British House of Commons at Confederation in 1867. These include freedom of speech in Parliament (*Vaid*, at para. 29(10); *Gagliano v. Canada (Attorney General)*, 2005 FC 576, [2005] 3 F.C.R. 555). As a result, at the federal level, “the ‘main body’ of the parliamentary privileges are

‘legislated privileges’, rather than ‘inherent privileges’” (*Power*, at para. 146, per Jamal J., dissenting, but not on this point, quoting *Vaid*, at para. 36; see also *Duffy*, at paras. 28-30). Regardless of the source of privilege, the jurisdictional immunity it attracts is the same. This is because the immunity “flowing from the doctrine of privilege is conferred by the nature of the function (the Westminster model of parliamentary democracy), not the source of the legal rule (i.e., inherent privilege versus legislated privilege)” (*Vaid*, at para. 34).

[45] Section 4 of the *Parliament of Canada Act* is not itself constitutionally entrenched under s. 52 or Part V of the *Constitution Act, 1982*. It can be amended in a manner similar to other legislation, as is provided by s. 18 of the *Constitution Act, 1867*.

C. *Section 18 of the Constitution Act, 1867*

[46] To determine the constitutionality of s. 12 of the *NSICOP Act*, the scope of Parliament’s legislative authority to define the privileges of the Senate and the House of Commons must be ascertained. This requires interpreting s. 18 of the *Constitution Act, 1867*, to which I turn now.

(1) Principles of Constitutional Interpretation

[47] The interpretation of a constitutional provision must be anchored in the meaning of its words, considered in context, with a view to the purpose it was intended to serve (*R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at para. 16; *Hunter v. Southam*

Inc., [1984] 2 S.C.R. 145, at pp. 155-56). Constitutional documents must be read generously and purposively within their textual, contextual, and historical confines (*Blais*, at paras. 17 and 40).

[48] The meaning given to a constitutional provision must also be harmonious with the structure of government implemented by the Constitution, as expressed through both the 1867 and 1982 *Constitution Acts* (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 50; *Reference re Senate Reform*, at para. 26). The interpretation of a single provision must be consistent with other provisions of the Constitution: one part of the Constitution cannot be construed to deprive another of its effect (*New Brunswick Broadcasting*, at pp. 373 and 390).

[49] The interpretive exercise is therefore guided and “constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies” of the system of government these enactments are intended to establish (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 394).

(2) Text

[50] The first step to interpreting s. 18 is to consider the ordinary and grammatical meaning of its text. Section 18 reads:

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.

18 Les privilèges, immunités et pouvoirs que posséderont et exerceront le Sénat et la Chambre des Communes et les membres de ces corps respectifs, seront ceux prescrits de temps à autre par loi du Parlement du Canada; mais de manière à ce qu'aucune loi du Parlement du Canada définissant tels privilèges, immunités et pouvoirs ne donnera aucuns privilèges, immunités ou pouvoirs excédant ceux qui, lors de la passation de la présente loi, sont possédés et exercés par la Chambre des Communes du Parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande et par les membres de cette Chambre.¹

[51] The wording refers to the “privileges, immunities, and powers to be held” by the Senate, the House of Commons, and their members, without distinction. There is no textual signal here to suggest that the phrase describes anything narrower than the sum total of privileges, immunities, and powers that comprise parliamentary privilege at the federal level.

[52] The parties disagree over what it means to “define” parliamentary privilege. The ordinary and grammatical meaning of the word “define” is “to say what something is and/or what something is not”, “describe or explain the scope, essential qualities, etc. of (something)” or “determine or indicate the boundary or extent of

¹ Conventional federal translation of the *Constitution Act, 1867* reproduced in R.S.C. 1985, App. II, No. 5.

(something)” (C.A. reasons, at para. 43; *Canadian Oxford Dictionary* (2nd ed. 2004), at p. 395).

[53] When asked to interpret the word “define” in s. 35 of the *Victoria Constitution Act, 1855* (U.K.), 18 & 19 Vict., c. 55 — a provision with a comparable purpose to s. 18 in the Australian colony — the Judicial Committee of the Privy Council held that it was equivalent to “declare” these privileges (*Dill v. Murphy*, (1864), 1 Moo. N.S. 487, 15 E.R. 784, at p. 794). Accordingly, I agree with the Attorney General of Canada’s interpretation of the ordinary meaning of the word “define” in s. 18 as being that Parliament has authority “to set or declare the contours or scope of its parliamentary privileges, immunities and powers” (R.F., at para. 28).

[54] Within s. 18, the form that such definition should take — an “Act of the Parliament of Canada” — is unambiguously set out. The text also supports the view that the power to define any of the privileges, immunities, and powers to be held by the Houses of Parliament is ongoing — Parliament may define these privileges by legislation “from time to time”. This runs contrary to the appellant’s contention that some privileges would be frozen in time, beyond the reach of Parliament’s legislative authority.

[55] As for limits on Parliament’s exercise of its legislative authority under s. 18, the text provides only an “upper” limit on an attempt to supplement the privileges enjoyed by its Houses and their members: Parliament may only grant them a privilege belonging to the British House of Commons at the time of the grant (Maingot, at pp.

19-20; *Canada (Board of Internal Economy) v. Boulerice*, 2019 FCA 33, [2019] 3 F.C.R. 145, at paras. 57-58; *Vaid*, at para. 33; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 66, per McLachlin J. (as she then was), concurring in the result). This benchmark is itself not set in time, which further supports the interpretation that the power is ongoing.

[56] The text of s. 18 does not contain any express language to preclude the *limitation* of certain privileges, powers, or immunities. If there is a floor, as the appellant and others contend, it consists in my view in the ordinary principle of public law that an authority may not be exercised in a manner that is inconsistent with the purpose for which it is granted, as understood by reference to the historical and constitutional context.

(3) Historical Context

[57] The current version of s. 18 was enacted by the *Parliament of Canada Act, 1875* (U.K.), 38 & 39 Vict., c. 38. By the terms of that Act's preamble, it replaced the original provision of the *British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3, in order to remove all "doubts . . . with regard to the power of defining by an Act of the Parliament of Canada, in pursuance of the said section, the said privileges, powers, or immunities" which had arisen from the previous wording. The Imperial Parliament's express intention in enacting s. 18 was to confirm the Parliament of Canada's power under this provision to legislate the privileges of its Houses and their members, up to and including any of those held by the British House of Commons.

[58] This mirrored the Imperial Parliament's own power to do so. Indeed, under the Constitution of the United Kingdom, the principle was, and still is, that the British Parliament can define the privileges of its Houses by legislation as an exercise of parliamentary sovereignty. This was described by Blackstone as "the principal privilege of parliament" (*Commentaries on the Laws of England* (1765), Book I, at p. 159). That principle was recently reaffirmed by the Supreme Court of the United Kingdom in *Chaytor*: "It is, of course, always open to Parliament by legislation to provide for the courts to encroach on matters falling within its exclusive cognisance, or even on article 9 privilege . . .", which relates to freedom of speech in Parliament (para. 67; see also *Stockdale*, at pp. 1153-54).

[59] In this regard, s. 18 fully accords with the preamble to the *Constitution Act, 1867*, which provides that the Constitution of Canada is to rest on similar principles to that of the United Kingdom.

[60] The provincial legislatures of Canada already possessed that same competence, as later jurisprudence confirmed. In *Fielding v. Thomas*, [1896] A.C. 600, the Judicial Committee of the Privy Council ruled that provincial legislatures had held the power to define the privileges of their legislative assemblies ever since the enactment of s. 5 of the *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict., c. 63, which gave them the competence to "make laws respecting the constitution, powers, and procedure of such legislature".

[61] The same authority was subsequently carried over in s. 92(1) of the *Constitution Act, 1867* (now repealed) which granted provincial legislatures the competence to make laws for “[t]he Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.” In 1982, s. 92(1) was essentially replaced with s. 45 of the *Constitution Act, 1982*, to the same effect (see *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 33; *Reference re Senate Reform*, at paras. 47-48; *Chagnon*, at para. 60, per Rowe J., concurring; see also W. J. Newman, “Parliamentary Privilege, the Canadian Constitution and the Courts” (2008), 39 *Ottawa L. Rev.* 573, at pp. 580-81).

[62] Unlike the provincial legislatures, prior to 1949, the Parliament of Canada lacked the authority to make laws respecting its own Constitution — the Imperial Parliament retained that power. It was only in 1949 that the *British North America (No. 2) Act, 1949* (U.K.), 13 Geo. 6, c. 81, added s. 91(1) to the *Constitution Act, 1867* (now repealed), to provide Parliament with the competence to make laws for the “amendment from time to time of the Constitution of Canada” subject to a number of listed exceptions, notably matters of provincial interest.

[63] This made it necessary, in 1867, to enact s. 18 as an exception to the rule, so as to expressly grant Parliament the authority to legislate the privileges of its Houses and their members (see L. P. Pigeon, “Are the Provincial Legislatures Parliaments?” (1943), 21 *Can. Bar Rev.* 826, at p. 830).

(4) Constitutional Context

[64] In addition to the historical context, s. 18 must also be read harmoniously with the Constitution as a whole, including other parts that expressly relate to the functioning of Parliament. An example is the right to use either English or French in debates and other proceedings of Parliament, guaranteed by both s. 17(1) of the *Charter* and s. 133 of the *Constitution Act, 1867*. Other examples of provisions expressly directed at the internal operation of Parliament are ss. 53 and 54 of the *Constitution Act, 1867*, which relate to the financial procedures in the House of Commons. It follows that s. 18 of the *Constitution Act, 1867* could not be relied upon to enact legislation that would contravene the requirements of these or similar provisions.

[65] The purpose of s. 18 must also be informed by Parliament's essential character, in our constitutional architecture, as the legislative branch of a government similar in principle to the United Kingdom's, as contemplated by the preamble of the *Constitution Act, 1867*.

[66] Accordingly, s. 18 is subject to similar limits as s. 44 of the *Constitution Act, 1982* in that it cannot be used to fundamentally alter the architecture of the Constitution by way of ordinary legislation (*Reference re Senate Reform*, at para. 97). Section 44, which carried over in many respects s. 91(1) of the *Constitution Act, 1867*, gives Parliament the authority to amend provisions of the Constitution that relate to the federal government so long as the resulting amendment does not affect provincial interests or alter the fundamental structure of the Constitution (W. J. Newman,

“Constitutional Amendment by Legislation”, in E. Macfarlane, ed., *Constitutional Amendment in Canada* (2016), 105, at p. 117; *Reference re Senate Reform*, at paras. 44-48). Likewise, s. 18 cannot be used to make changes to the Constitution that are subject to the other amending formulas set out in Part V of the *Constitution Act, 1982* (see *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 (“*Upper House Reference*”)).

(5) Purpose

[67] The purpose of s. 18 must be connected to the purpose of parliamentary privilege itself: to protect the autonomy legislative bodies need to “ensure the proper functioning of a representative democracy” (*Chagnon*, at para. 20). The preamble to the *Constitution Act, 1867* “gives expression to the nature of the legislative bodies that were continued or established by it” (*New Brunswick Broadcasting*, at p. 368, per La Forest J., concurring) and thereby confirms parliamentary privilege’s purpose to ensure Parliament can function as a legislative body in a Westminster-style parliamentary system of government (*Harvey*, at para. 68).

[68] Accordingly, and consistent with its text and context, the purpose of s. 18 is to allow Parliament to define the privileges, powers, and immunities it needs to protect its functions as a legislative body. This ability to define for itself the extent of the privileges it requires reflects the very autonomy that parliamentary privilege is intended to protect.

[69] It follows that courts should be cautious when reviewing exercises of legislative authority under s. 18 so as to avoid interfering with Parliament's autonomy to define what it needs to carry out its own constitutional role. As McLachlin J. emphasized in *Harvey* (at para. 79), "the legislature is in at least as good a position as the courts, and often in a better position, to decide what it requires to function effectively". Indeed, parliamentary privilege exists "to provide protection against outside interference that is unwarranted and intrusive" (C. Robert, "Falling Short: How a Decision of the Northwest Territories Court of Appeal Allowed a Claim to Privilege to Trump Statute Law" (2011), 79 *The Table* 19, at pp. 25-26 (emphasis added)). Accordingly, it will not usually be an impediment to the functioning of a legislature for it to comply with its own enactments (*Chagnon*, at para. 66, per Rowe J., concurring). In this regard, I agree with the Court of Appeal that the opposite proposition "collides with both the rationale for the existence of parliamentary privilege and the specific language of s. 18 of the *Constitution Act, 1867*" (para. 52).

[70] The courts' role is limited to ensuring that this authority is exercised within the limits set by the Constitution. Among these is the inherent constraint that the authority conferred by s. 18 may only be exercised for the purpose for which it is granted. Thus, s. 18 cannot be used for any purpose other than to enable Parliament to carry out its functions. For example, s. 18 could not properly be relied upon as the source of authority to effectively abolish parliamentary privilege as a whole. Nor could it be used to fundamentally impair the ability of the Houses of Parliament to carry out

their essential functions as deliberative law-making assemblies in which the executive is held to account.

[71] This is consistent with the limit in s. 44 against using ordinary legislation to alter the fundamental structure of the Constitution. In this sense, the purposive and structural limits on s. 18 are two sides of the same coin: the legislative authority it confers cannot be used to fundamentally undermine Parliament's function as a Westminster-style legislature, which itself would constitute a fundamental change to the structure of government created by the Constitution.

(6) Conclusion

[72] Reading the text of s. 18 broadly, in its historical and constitutional context, it is clear that it grants Parliament the authority both to supplement *and to limit* its privileges as it deems appropriate to fulfill its constitutional role. This is subject only to three constraints. First, Parliament cannot grant itself privileges, immunities, or powers that exceed those of the British House of Commons at the time of the grant. Second, s. 18 cannot be used in a manner that would fundamentally undermine Parliament's function as a legislature in Canada's Westminster-style parliamentary democracy, as this would run counter to its purpose. And third, s. 18 must of course be used consistently with other provisions of the Constitution that expressly relate to the functioning of Parliament.

[73] The question that follows is whether s. 12 of the *NSICOP Act*, a legislative effort to limit rather than supplement parliamentary privilege, is *intra vires* Parliament's authority under s. 18. In my view, for the reasons set out below, it is.

D. *Section 12 of the NSICOP Act Is Within Parliament's Authority Under Section 18 of the Constitution Act, 1867*

[74] To determine whether s. 12 of the *NSICOP Act* falls within the scope of the legislative authority conferred by s. 18 of the *Constitution Act, 1867*, I begin by considering the effect of s. 12. It reads in relevant part:

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

[75] As the Court of Appeal noted (at paras. 13-30), s. 12 of the *NSICOP Act* does not function in isolation. It operates in conjunction with s. 11 of the Act, which is the source of the prohibition on disclosure of national security information in respect of which a Committee member may be the subject of a prosecution or other proceeding. Section 11 of the Act prohibits the disclosure of any information that a Committee member obtains by virtue of their membership on the Committee and that a government department "is taking measures to protect".

[76] In my view, it cannot be said that s. 12 of the *NSICOP Act* constitutes an “abrogation” or “elimination” of freedom of speech in Parliament, as the appellant contends. It has a circumscribed effect: it applies only to the disclosure of *specific* national security information that was obtained by members of the Committee *through their participation on the Committee*. First, any information members of the Committee obtain by virtue of their membership is only that which is related to the Committee’s oversight of Canada’s national security apparatus. Indeed, to the extent that the Committee exercises statutory powers under the Act to obtain and review information, this must be tied to the purpose for granting that power. This is confirmed by the wording of s. 13(1), which grants the Committee a right to access “any information that is under the control of a department and that is related to the fulfilment of the Committee’s mandate”. There is a necessary relationship between the Committee’s mandate and the information that may be obtained or accessed in the course of carrying out that mandate.

[77] Second, Committee members are only subject to the non-disclosure obligation under s. 11 if the information in question satisfies both conditions under s. 11. Therefore, s. 12’s limitation of parliamentary privilege would not apply to a Committee member who discloses in Parliament protected information that they obtained outside of their participation in the Committee. Conversely, if a Committee member obtained information as part of their membership, but the government had not taken any measures to protect it, its disclosure would not be prohibited by s. 11.

[78] Finally, the effect of s. 12 on parliamentary privilege is limited to the immunity held by those who choose to sit on the Committee. It does not in any way limit privilege for other parliamentarians. Nor does it affect free speech in Parliament more broadly, with respect to anything other than protected information made available to Committee members *by virtue of* the *NSICOP Act* and which they would not have been aware of otherwise.

[79] By imposing this narrow limit on its own privileges, Parliament chose to enlarge the jurisdiction of the courts by permitting them to adjudicate criminal proceedings arising from conduct that is ordinarily shielded by parliamentary privilege. As noted above, Parliament may “provide for the courts to encroach on matters falling within its exclusive cognisance” (*Chaytor*, at para. 67). Through s. 12 of the *NSICOP Act*, Parliament did exactly that.

[80] The respondent submits that this limit on the privilege of freedom of speech represents a trade-off for additional parliamentary oversight of national security matters that is consistent with the purpose of s. 18 — to define Parliament’s powers, immunities and privileges as Parliament sees necessary to carry out its role (R.F., at paras. 11-15).

[81] Without commenting on the advisability of this trade-off, it is relevant to take stock of the fact that the *NSICOP Act* operates in the national security context. In this context, requiring secrecy from Committee members has a clear connection to the policy objective behind the *NSICOP Act* — oversight of Canada’s national security

apparatus (see C. Forcese, *Fundamentals of National Security Accountability in Canada* (2023), at p. 58).

[82] By s. 8 of the Act, Parliament mandated the Committee to review the legal and administrative framework for national security and intelligence, government activities related to national security, as well as any matter relating to national security referred to it by a minister of the Crown.

[83] This mandate requires access to sensitive information related to national security. This type of access is frequently if not always accompanied by prohibitions against disclosure that are enforced with criminal sanctions (see, e.g., *Foreign Interference and Security of Information Act*, R.S.C. 1985, c. O-5, ss. 13 to 15). It is to be expected, then, that parliamentarians would be required to undertake not to disclose the information in the same manner as others bound to secrecy.

[84] I conclude that s. 12 of the *NSICOP Act* was within Parliament's authority to enact pursuant to s. 18 of the *Constitution Act, 1867*. In addition, as I explain below, the privilege of freedom of speech in Parliament is not a matter that was entrenched by s. 42(1)(b) of the *Constitution Act, 1982*, nor does the combined effect of ss. 11 and 12 of the *NSICOP Act* change the constitutionally entrenched role of this Court under s. 42(1)(d).

E. *Section 12 Does Not Run Afoul of Section 42(1)(b) or (d) of the Constitution Act, 1982*

[85] The appellant argues that s. 12 changes the “powers of the Senate” as described in s. 42(1)(b) of the *Constitution Act, 1982* and the role of this Court in adjudicating disputes arising from prosecutions of parliamentarians as contemplated by the *NSICOP Act*, in contravention of s. 42(1)(d). Such changes could only be implemented by means of a constitutional amendment under the general amending procedure set out in s. 38(1) of the *Constitution Act, 1982*.

[86] In my view, the appellant’s submissions rest on a misinterpretation of the phrase “powers of the Senate”, which does not relate to parliamentary privilege; nor does s. 12 reshape this Court’s constitutional role.

(1) Amendments in Relation to the “Powers of the Senate” (Section 42(1)(b))

[87] The appellant argues, and the application judge accepted, that the limitation on the privilege of freedom of speech in Parliament operated by s. 12 of the *NSICOP Act*, as it applied to senators, was a modification to the “powers of the Senate” within the meaning of s. 42(1)(b) of the *Constitution Act, 1982*. In accordance with the terms of s. 42(1), such a change would have required a constitutional amendment pursuant to the general amending formula set out in s. 38(1) and could not therefore have been achieved by ordinary legislation. In my respectful view, s. 42(1)(b) cannot be so construed.

[88] The phrase “powers of the Senate” in s. 42(1)(b) does not refer to the parliamentary privileges of the Senate but rather to the *legislative* powers of the Senate

as the upper house of Canada's bicameral Parliament. In my view, the type of constitutional amendments which are contemplated by this paragraph is comparable to those introduced, in the United Kingdom, by the *Parliament Act, 1911*, 1 & 2 Geo. 5, c. 13, and the *Parliament Act, 1949*, 1949, c. 103, which enabled legislation to be enacted without the consent of the House of Lords in certain circumstances. These statutes limited the legislative power of the upper house by giving the other constituent parts of Parliament, i.e., the Sovereign and the elected House of Commons, the authority to overcome the Lords' veto after a set period of time has elapsed. Per s. 42(1)(b), such a change to the rules of bicameralism in Canada would require a constitutional amendment passed with the consent of the required number of provinces.

[89] This is so because curtailing the Senate's legislative powers would engage provincial interests. Section 42(1)(b) must be read within the context of s. 42 as a whole, whose clear purpose is to entrench certain matters in which provinces have a significant interest beyond the reach of Parliament's unilateral legislative authority.

[90] This Court in the *Upper House Reference* explained that a primary purpose of the Senate as it was designed at Confederation was to afford protection to the various regional and provincial interests in Canada in relation to the enactment of federal legislation (p. 67). The Court held that while s. 91(1) of the *Constitution Act, 1867* (the predecessor to s. 44 of the *Constitution Act, 1982*) would permit the Parliament of Canada to make changes to the Senate, it would not be open to it to unilaterally alter the "fundamental features, or essential characteristics, given to the Senate as a means

of ensuring regional and provincial representation in the federal legislative process” (p. 78). The Court identified four such features in which the provinces have an interest: the legislative powers of the Senate (at p. 72), the method of selection of its members (at p. 77), the residence requirements of senators (at p. 76), and the number of senators appointed from each region (p. 76; see also *Projet de loi fédéral relatif au sénat, Re*, 2013 QCCA 1807, 370 D.L.R. (4th) 711, at paras. 39-40).

[91] In 1982, the framers explicitly subscribed to the Court’s view that any change to these essential features of the Senate as a regionally representative legislative body would require provincial consent. Indeed, these are all matters which are now listed in the paragraphs of s. 42(1) of the *Constitution Act, 1982*.

[92] The narrow limitation on parliamentary privilege imposed by s. 12 of the *NSICOP Act* does not alter the role of the Senate in the exercise of federal legislative power nor does it affect provincial interests in any way. This is therefore not the kind of change that is captured by s. 42(1)(b) of the *Constitution Act, 1982*.

(2) Amendments in Relation to the Supreme Court of Canada (Section 42(1)(d))

[93] Turning to the appellant’s submissions in relation to s. 42(1)(d) of the *Constitution Act, 1982*, I find them to be without merit. Section 12 does not affect the role of this Court as the final court of appeal for Canada, nor does it undermine the

Court's independence or otherwise alter its relationship with the other branches of government.

[94] The appellant relies on the notion that ss. 41 and 42 of the *Constitution Act, 1982* together fulfill a protective role regarding the Court and raises a functional argument against s. 12 of the *NSICOP Act*. He contends that the Court's role — and the perception of its independence — would be compromised because its jurisdiction would be expanded to include presiding over “political disputes” (A.F., at para. 67) between the executive and legislative branches. I would reject this characterization of the effect of s. 12. The provision does not undermine the role of courts in adjudicating prosecutions relating to a breach of s. 11 nor does it affect this Court's role on appellate review.

[95] Section 42(1)(d) of the *Constitution Act, 1982* captures changes to the structure or function of the Supreme Court other than those amending “the composition . . . of the Court”, which are addressed by s. 41(d). In the *Reference re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21, [2014] 1 S.C.R. 433, while the majority and Moldaver J., in dissent, disagreed over the precise scope of s. 42(1)(d), it is clear that it encompasses at least the Court's role as a general court of appeal for Canada as well as its independence (para. 100, per McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ., and para. 115, per Moldaver J., dissenting).

[96] The appellant's view rests on an assumption that because a s. 11 breach may give rise to prosecution in respect of a statement made by a member of the

legislative branch in Parliament, such a prosecution would necessarily take on the character of a political dispute. But this is not how it would be adjudicated: the question for the court would only be whether the Crown had met its burden to prove all of the elements of the offences charged beyond a reasonable doubt. Courts seized with the adjudication of prosecutions of parliamentarians relating to a breach of s. 11 of the *NSICOP Act* would deal with them as they would any other criminal prosecution. The Crown would be held to the same burden and standard of proof, and the questions before the court would be legal and factual questions within the day-to-day ken of criminal courts across the country.

[97] The same would be true of this Court presiding over questions of national importance or appeals as of right arising from a prosecution relating to a s. 11 breach. In other cases where the Court has been called upon to address a dispute between two branches of government, it has not shied away from that task, albeit undertaking it with a measure of “special prudence” (*British Columbia (Attorney General) v. Provincial Court Judges’ Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506, at para. 64). As the Court held in *Provincial Court Judges’ Association of British Columbia*, cases implicating the separation of powers raise a concern that the courts will overstep their judicial role and unduly interfere with the constitutionally assigned role of another branch of government (para. 64; *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 29). This does not prohibit the Court from adjudicating these types of disputes, as it has done on many

occasions, but instead calls for a measure of caution with which the Court has proceeded each time it has resolved a question of this kind.

[98] The *NSICOP Act* presents no unique risk that a decision of this Court could alter the separation of powers, as the appellant contends, nor does it threaten the perception of judicial independence or institutional legitimacy of the Court. Were this Court tasked with acting as final arbiter over a question arising from a s. 11 breach, it would fulfill its constitutional duty with the same respect for the separation of powers as it has in other cases.

VII. Conclusion and Disposition

[99] Section 18 of the *Constitution Act, 1867* gives Parliament the authority to define its privileges, subject only to the limits of its text and purpose, as understood within the broader context of the Constitution. In my view, for the reasons set out above, this authority includes limiting these privileges. When Parliament does so, it exercises a legislative authority conferred by the Constitution; it does not amend the Constitution itself.

[100] Still, a valid exercise of this power cannot be inconsistent with the purpose for which it was granted, and thus cannot fundamentally alter or undermine Parliament's role within our constitutional order. As I have described, s. 12 of the *NSICOP Act* does not have these effects but, rather, represents a narrow limitation of

parliamentary privilege. Accordingly, it falls within the authority conferred upon Parliament by s. 18 of the *Constitution Act, 1867*.

[101] For these reasons, the appeal is dismissed.

The following are the reasons delivered by

CÔTÉ J. —

I. Overview

[102] For over three centuries, no parliamentarian in Canada, the United Kingdom, Australia, or New Zealand has been criminally prosecuted for what they have said on the floor of Parliament. Parliament's privilege of free speech and debate has protected parliamentarians from civil or criminal proceedings for their words in Parliament — regardless of what they say or why they say it. Our Parliament, and other parliaments throughout the world, have closely guarded this privilege. Throughout rebellions, the First and Second World Wars, the Cold War, the rise of nuclear technology, the threat of terrorism, and interventions alongside Canada's NATO allies and the United Nations, our Parliament has simultaneously maintained Canada's security, the accountability of the executive, and the free speech of its members, without any threat of civil or criminal proceedings.

[103] This unwavering protection is rooted in the importance of free speech in Parliament to our system of government. Free speech serves responsible government, representative government, and the separation of powers — the ability of parliamentarians to hold the executive to account, represent their constituents, advocate for the common good, and ensure the place of the legislature as a forum for open debate. Free speech in Parliament is part and parcel of what it means to be a Westminster-style democracy.

[104] This appeal calls upon our Court to consider the constitutionality of a limit on this parliamentary privilege of free speech. In 2017, Parliament enacted the *National Security and Intelligence Committee of Parliamentarians Act*, S.C. 2017, c. 15 (“*NSICOP Act*”). The *NSICOP Act* created the National Security and Intelligence Committee of Parliamentarians (“Committee”) to review matters relating to national security and intelligence. Section 12 of the *NSICOP Act* restricts the privileges of parliamentarians on the Committee, exposing them to potential imprisonment if they disclose in Parliament “any information that they obtained, or to which they had access” as Committee members and “that a department is taking measures to protect”, even if that disclosure occurs as part of proceedings in Parliament (s. 11(1)).

[105] I agree with my colleague Justice Rowe that, like all parliamentary privileges, freedom of speech is subject to s. 18 of the *Constitution Act, 1867*. That provision expressly empowers Parliament to define its privileges through ordinary legislation. As he rightly shows, s. 18 grants Parliament the authority to expand, limit,

or otherwise alter any of its privileges, subject to three constraints: (1) Parliament cannot grant itself privileges, immunities, or powers that exceed those of the House of Commons of the United Kingdom at the time of the grant; (2) Parliament cannot define its privileges “in a manner that would fundamentally undermine [its] function as a legislature in Canada’s Westminster-style parliamentary democracy”; and (3) s. 18 must be used consistently with other constitutional provisions that expressly relate to the functioning of Parliament (para. 72).

[106] While I agree with my colleague on this framework, I must respectfully part ways with him when it comes to its application in the present case. I conclude that s. 12 of the *NSICOP Act* is fundamentally incompatible with the role of Parliament in our democracy and is therefore *ultra vires* Parliament’s authority under s. 18 of the *Constitution Act, 1867*.

[107] The restriction on free speech in s. 12 is unprecedented. It allows the executive to determine what parliamentarians can and cannot say in Parliament and gives the courts the authority to imprison them for overstepping that line. Importantly, and contrary to the views of my colleague, the effect of s. 12 is not merely to allow prosecutions for the disclosure in Parliament of “*specific* national security information” (para. 76 (emphasis in original)). Rather, it allows prosecutions for the disclosure of “any information” that a member happens to come across in their work and “that a department is taking measures to protect” (*NSICOP Act*, s. 11(1)). This is so regardless of whether that information has anything to do with national security and regardless of

whether its disclosure would be in the public interest. This is a broad and indeterminate limit on free speech, one defined entirely by the actions of the executive. Further, rather than relying on parliamentary mechanisms for enforcement or building in the possibility that the Houses of Parliament could absolve an offending parliamentarian of responsibility for disclosure, s. 12 subjects the speech of parliamentarians directly to curial oversight, without any involvement by Parliament.

[108] This is not a carefully tailored limit on privilege that preserves the functioning of Parliament — it is a sweeping delegation that eviscerates the protections for parliamentary speech and erodes the separation of powers. It remains open to Parliament to use the mechanisms for ensuring secrecy and accountability that have served it well in the past, to enact a more tailored limit that is consistent with s. 18 of the *Constitution Act, 1867*, or to do as other parliamentary democracies, like the United Kingdom, have done and protect sensitive national security information accessed by parliamentary oversight committees without limiting the fundamental privileges of their members.

[109] I would allow the appeal and declare that s. 12 of the *NSICOP Act* is *ultra vires* Parliament.

II. Analysis

[110] The sole issue in this appeal is whether s. 12 of the *NSICOP Act* is within Parliament's legislative authority under s. 18 of the *Constitution Act, 1867*, which provides as follows:

18 The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that 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.

[111] Two provisions of the *NSICOP Act* are relevant to this issue. The first is s. 11, which prohibits Committee members from disclosing certain government information that they access as part of their work:

11 (1) Subject to subsection (2), a member or former member of the Committee, the executive director or a former executive director of the Secretariat or a person who is or was engaged by the Secretariat must not knowingly disclose any information that they obtained, or to which they had access, in the course of exercising their powers or performing their duties or functions under this Act and that a department is taking measures to protect.

(2) A person referred to in subsection (1) may disclose information referred to in that subsection for the purpose of exercising their powers or performing their duties or functions under this Act or as required by any other law.

[112] The second is s. 12, which strips Committee members of the ability to claim immunity based on parliamentary privilege in a proceeding against them for contravening s. 11(1) or for a related offence:

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

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

[113] I proceed below in two parts. First, I set out the fundamental role that the privilege of free speech plays in the functioning of a parliamentary democracy and demonstrate why limits on this privilege must be closely scrutinized. Second, I explain how s. 12 limits this privilege to an unconstitutional degree.

A. *Free Speech in Parliament Is of the Utmost Constitutional Importance, and Restrictions on It Must Be Narrow*

[114] The ability of elected representatives to speak and debate in Parliament without fear of civil or criminal proceedings is essential to our system of government. Free speech plays a foundational role in the daily workings of our parliamentary democracy, in responsible government, in representative government, and in the separation of powers. Restricting this privilege risks the erosion of these key

components of our constitutional architecture. For this reason, any restriction on free speech in Parliament enacted in the exercise of the power conferred by s. 18 of the *Constitution Act, 1867* must be narrow and carefully considered.

(1) Origins and Content of Free Speech in Parliament

[115] The privileges of Parliament, including freedom of speech and debate, emerged from centuries of contestation between the English House of Commons, the Crown, and the courts over the Commons' authority and independence from the other branches of government (*Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at para. 22; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at pp. 344 and 379). As part of this struggle, members of the Commons were at times arrested by the sovereign if he or she disagreed with the members' conduct or speech in Parliament, convicted in court, and imprisoned (see, e.g., *Haxey's case* (1397), 3 Rot. Parl. 434). Perhaps most famously, in 1629 Sir John Eliot and two other members were convicted of seditious speech for words they had spoken on the floor of the House of Commons (*Proceedings against Sir John Elliot, Denzil Hollis, esq. and Benjamin Valentine, esq. for seditious Speeches in Parliament* (1629), 3 St. Tr. 293). In 1632, Sir Eliot died in the Tower of London. Shortly after the English Civil War, his conviction was reversed.

[116] Following the Glorious Revolution, the *Bill of Rights* of 1689, 1 Will. & Mar. Sess. 2, c. 2 was passed and the privilege of free speech was expressly articulated

in statute (*Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (25th ed. 2019), by D. Natzler and M. Hutton, eds., at para. 13.9). In art. 9 of the *Bill of Rights*, the English Parliament proclaimed — as the Parliament of the United Kingdom does to this day — that “the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”. With this Act, parliamentarians gained certainty that they had immunity from criminal or civil suit for their speech and debate in Parliament and that what they said in debate could not be questioned in court.

[117] Almost two centuries later, this privilege was transplanted into what would become Canada. Pre-Confederation colonial legislators enjoyed the same privilege of free speech because of the very nature of the legislative bodies in which they served: “. . . it was inherent to the legislature to have full protection for what its Members said in debate . . .” (J. P. J. Maingot, *Parliamentary Immunity in Canada* (2016), at p. 34). When the Parliament of Canada and the provincial legislatures were created, they held the same privilege by virtue of their nature as Westminster-style legislatures in a dominion with “a Constitution similar in Principle to that of the United Kingdom” (*Constitution Act, 1867*, preamble; see *New Brunswick Broadcasting*, at p. 381; *Chagnon*, at paras. 1 and 24).

[118] This privilege of free speech in Parliament is one of extraordinary breadth. Parliamentarians are immune from being called to account anywhere, except in Parliament, for any words they utter in the course of participating in parliamentary

proceedings. The privilege disallows claims for grievous civil wrongs, such as defamation, and bars quasi-criminal and criminal prosecutions for matters such as violating court orders, engaging in hate speech, or revealing state secrets (subject to the purported limit in the *NSICOP Act*). As Lord Chief Justice Cockburn stated of this privilege, “[i]t is clear that statements made by members of Parliament in either House, though untrue to their knowledge and militating against public interests, or injurious to individuals, cannot be made the foundation of civil or criminal proceedings” (*Ex parte Wason* (1869), 10 B. & S. 580 (Q.B.), at p. 584).

(2) Importance and Role of Free Speech in Parliament

[119] This history demonstrates that Canada did not inherit free speech in Parliament as a mere custom or a simple preference. Rather, free speech was and is a vital parliamentary privilege that is foundational to our democracy. Its continued and central importance is affirmed by its role in facilitating the everyday business of Parliament and in sustaining the interrelated principles of responsible government, representative government, and the separation of powers.

[120] The constitutional force of this privilege, like all of Parliament’s privileges, comes from s. 18 and the preamble to the *Constitution Act, 1867*, which provides that Canada is to have “a Constitution similar in Principle to that of the United Kingdom”. The preamble articulates the political theory and logic of our Constitution, affirms the basic principles that underpin its provisions, and gives them the force of law (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3

S.C.R. 3, at paras. 94-95). It expresses “the manifest intention . . . that Canada retain the fundamental constitutional tenets upon which British parliamentary democracy rested” (*New Brunswick Broadcasting*, at p. 377).

[121] Relying on the preamble, our Court has recognized several constitutional tenets upon which our system of government rests. These include responsible government, the separation of powers, parliamentary privilege, and judicial independence — each of which is also a core feature of the Constitution of the United Kingdom (*OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 38; *Canada (Attorney General) v. Power*, 2024 SCC 26, at para. 48; *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 72). Having been vital aspects of the Constitution of the United Kingdom for centuries, they were transferred to Canada at Confederation (*Beauregard*, at pp. 70-71).

[122] For this reason, the constitutional position of free speech in the United Kingdom is important to note. In the United Kingdom, free speech in Parliament has been described as being “an absolute privilege” and “of the highest constitutional importance” (*Erskine May*, at para. 13.2; *Pepper v. Hart*, [1993] A.C. 593 (H.L.), at p. 638). As early as 1610, a committee of the English House of Commons was of the view that free speech “could not well be taken from us without shaking the foundations of the liberties of Parliament” (*Erskine May*, at para. 12.4). In *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112, at p. 1191, Patteson J. held it to be “[b]eyond all dispute” that “it is necessary that the proceedings of each House of Parliament should

be entirely free and unshackled; that whatever is done or said in either House should not be liable to examination elsewhere”.

[123] Similar observations have been made about the privilege in Canada. Indeed, in *Landers v. Woodworth* (1878), 2 S.C.R. 158, Chief Justice Richards — our Court’s first Chief Justice — wrote of the Legislative Assembly of Nova Scotia, based on the Parliament of the United Kingdom: “One of the first and greatest of its privileges is free speech, and one of the advantages of free legislative bodies is the right of exposing and denouncing abuses by means of such free speech” (pp. 197-98). McLachlin J. (as she then was) said much the same in *New Brunswick Broadcasting*. She recognized that free speech is a constitutional privilege without which a legislature cannot act as a legislature (pp. 380-81). She affirmed the “constitutional right” of parliamentarians to “speak freely in the House without fear of civil reprisal” and stated that this privilege, like all privileges inherent to Westminster-style legislatures, “must be held absolutely and constitutionally if [it is] to be effective” (pp. 378-79 and 385). She forcefully declared that the “need for the right of freedom of speech is so obvious as to require no comment” (p. 385).

[124] The necessity of parliamentary free speech has also been confirmed by parliamentarians and those who have worked in and closely studied Parliament. For example, the Speaker of the Senate, intervening before our Court, observes that “[f]reedom of speech — along with exclusive control over parliamentary proceedings — is one of the most fundamental and ancient of the recognized categories

of parliamentary privilege” (I.F., at para. 20). The procedural reference guide of the House of Commons states that free speech is “the cornerstone of the rights and parliamentary privileges accorded to members. It is both the least questioned and the most fundamental right of the member of Parliament on the floor of the House and in committees” (Canada, House of Commons, *House of Commons Procedure and Practice* (4th ed. 2025), by E. Janse and J. LeBlanc, at para. 3.52; see also A. Fraser, W. F. Dawson and J. A. Holtby, *Beauchesne’s Rules & Forms of the House of Commons of Canada* (6th ed. 1989), at §75).

[125] The importance of free speech derives not only from history but also from its continuing role in facilitating the business of Parliament and in giving life to other fundamental principles of our Constitution. First, free speech is bound up with Parliament’s day-to-day business. Speech and debate are core to Parliament’s legislative role. It is through parliamentary speech that bills or resolutions are brought to the floor, assayed, amended, and eventually passed or voted down (see *Michaud v. Bissonnette*, 2006 QCCA 775, at paras. 33 and 46). As the intervener the Canadian Civil Liberties Association aptly states, “[i]t is an exercise of parliamentary privilege every time a parliamentarian speaks during a parliamentary proceeding, whether in chamber or in committee” (I.F., at para. 13). In short, a House of Parliament “could not work effectively unless its members were able to speak and criticize without having to account to any outside body” (Janse and LeBlanc, at para. 3.57).

[126] Second, free speech plays a pivotal role in safeguarding and facilitating responsible government. Responsible government means that “the executive is responsible to the legislature and enjoys the confidence of a majority of its members” (*Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 138, per LeBel J., concurring). Our Court has described it as the “most important non-federal characteristic of the Canadian Constitution” (*Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4, at para. 28, quoting P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 9:3). It too relies on freedom of speech and debate. As the majority in *Power* wrote, privilege ensures that elected representatives are free to “hold the executive to account, without undue interference from an unelected judiciary” (para. 48). Privilege is necessary to allow legislators to carry out their functions, “including vigorously debating laws and holding the executive to account” (para. 51; see also *Chagnon*, at paras. 22-23). Restricting free speech therefore risks stymying Parliament’s integral role of ensuring the accountability and transparency of the executive.

[127] Third, free speech is integral to representative democracy — ensuring that elected representatives can freely and fully advocate for their constituents and for their understanding of the common good. It is clear that the “legislative chamber is at the core of the system of representative government” (*New Brunswick Broadcasting*, at p. 387). Privilege operates to “cultivate a space in which the voices of the people, including those who hold potentially unpopular opinions, can be heard and considered” and to ensure that “democratically-elected members of the House of Commons can

voice their concerns and independently represent the interests of their constituents” (*Chagnon*, at paras. 20 and 22). In other words, free speech permits parliamentarians to speak “without inhibition, to refer to any matter or express any opinion as they see fit, and to say what they feel needs to be said in the furtherance of the national interest and the aspirations of their constituents” (Janse and LeBlanc, at para. 3.52, citing House of Commons, *Journals*, vol. 122, No. 113, 30th Parl., 2nd Sess., April 29, 1977, at pp. 720-21).

[128] Finally, as the foregoing suggests, outside interference with free speech and debate in Parliament is antithetical to the separation of powers between the legislative, executive, and judicial branches. Though not by any means absolute, this separation allows each branch of government to fulfill its distinct but complementary institutional role without undue interference from the others (*Power*, at para. 50, citing *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 29). As our Court has noted, “[t]here are few issues as important to our constitutional equilibrium as the relationship between the legislature and the other branches of the State on which the Constitution has conferred powers, namely the executive and the courts” (*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 4).

[129] As its history attests, freedom of speech developed in large part to ensure the separation of powers — to protect Parliament from the intrusions of the executive and the judiciary. Today, parliamentary privilege remains an “essential part” of how

Canada's constitutional democracy maintains the separation of powers (*Duffy v. Canada (Senate)*, 2020 ONCA 536, 151 O.R. (3d) 489, at para. 31; *Vaid*, at para. 21; *Chagnon*, at para. 21; *Power*, at para. 77). Indeed, in *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506, our Court unanimously held that parliamentary privilege is a "corollary to the separation of powers" because it protects the ability of legislatures to faithfully perform their constitutionally assigned functions (para. 66).

[130] Taken together, the preamble to the *Constitution Act, 1867*, the practical functioning of our democracy, and the architecture of our Constitution speak to the fundamental importance of free speech in Parliament. The preamble protects free speech and debate in Parliament as a cornerstone of Parliament's functioning. The role of free speech in facilitating the business of Parliament and in protecting and giving life to responsible government, representative government, and the separation of powers confirms its systemic importance in our Constitution. In light of its role, any restriction on free speech in Parliament must be adopted with the utmost caution. Freedom of speech in Parliament requires "firm, resounding, and unequivocal confirmation. Confident legislative assemblies are cradles of popular liberty; timorous ones are instrumentalities of control by the well-situated" (*Power*, at para. 296, per Rowe J., dissenting, but not on this point).

B. *Section 12 of the NSICOP Act Impermissibly Restricts Free Speech in Parliament*

[131] Considering the role of parliamentary free speech in our constitutional order, I conclude that, while Parliament may define its privileges through legislation, the limit on free speech in the *NSICOP Act* fundamentally undermines Parliament's function as a legislature in our Westminster-style parliamentary democracy and is therefore *ultra vires* Parliament under s. 18 of the *Constitution Act, 1867*. Together, ss. 11 and 12 of the *NSICOP Act* have the effect of inviting the executive to define the boundaries of lawful parliamentary speech and the courts to imprison parliamentarians for crossing those boundaries, with no involvement from the Houses of Parliament. Importantly, members and former members of the Committee are exposed to potential imprisonment for disclosing not just information that is related to national security or information that is sensitive or injurious to the national interest, but *any* information they happen to come across in their work so long as the government has taken steps to protect it, regardless of whether those steps are justified. Such limits cannot be sustained by s. 18 and render s. 12 of the *NSICOP Act* unconstitutional. Other options are available for maintaining Canada's security, executive accountability, and free speech in Parliament, so this erosion of parliamentary privilege cannot be overlooked simply because the Committee operates in the national security context.

(1) The Limit on Speech in Parliament Is Broad and Defined by the Executive

[132] Section 12(1) of the *NSICOP Act* purports to strip Committee members of their ability to rely on parliamentary privilege if they disclose information in contravention of s. 11(1) or of a provision of the *Foreign Interference and Security of*

Information Act, R.S.C. 1985, c. O-5. As a corollary, s. 12(2) allows statements made in Parliament to be used as evidence to establish the contravention in court. Therefore, the scope of the limit on privilege imposed by s. 12 can be properly understood only by reference to the prohibition on disclosure set out in s. 11(1). I reproduce the legislative language here for convenience:

11 (1) Subject to subsection (2), a member or former member of the Committee, the executive director or a former executive director of the Secretariat or a person who is or was engaged by the Secretariat must not knowingly disclose any information that they obtained, or to which they had access, in the course of exercising their powers or performing their duties or functions under this Act and that a department is taking measures to protect.

[133] The information protected from disclosure pursuant to s. 11(1) is characterized by only two requirements. First, the information must have been obtained by or accessible to the member or former member in the course of his or her work on the Committee. Importantly, this is broader than information that members “obtain by virtue of their membership” (Rowe J.’s reasons, at para. 76). Rather than being limited to information that Committee members would not have accessed *but for* their membership, the prohibition on disclosure goes further and captures “any information” that Committee members obtain or have access to in the course of doing their work. The second requirement is that a “department is taking measures to protect” the information. Notably, there is no requirement that the information concern national security or be in any way sensitive or injurious to the national interest. While the Committee has a mandate centred around national security and intelligence, that

mandate is exceptionally broad, and it is not unreasonable to expect that, in the course of its work, its members may access a vast and heterogeneous array of government information (see *NSICOP Act*, ss. 8 and 13). By its terms, s. 11(1) prohibits the disclosure of *any* of it — so long as a department is taking measures to protect the information.

[134] My colleague, relying on the Committee’s right to access information set out in s. 13(1) of the *NSICOP Act*, suggests that Committee members only obtain, and are therefore only barred from disclosing, “*specific national security information*” (para. 76 (emphasis in original)). While I agree that the Committee’s right of access in s. 13(1) is limited to information related to the Committee’s mandate, I respectfully disagree that this means the s. 11 prohibition applies only to national security information. First, the Committee’s mandate to review “the legislative, regulatory, policy, administrative and financial framework for national security and intelligence” would clearly require access to information that does not specifically implicate national security or intelligence (s. 8(1)(a)). Second, even if s. 13(1) only provided the Committee with a right to access specific information directly implicating national security or intelligence, the s. 11 prohibition is not limited to information obtained pursuant to s. 13(1). Section 11 could have been drafted that way, but instead it applies to “any information that [members or former members] obtained, or to which they had access, in the course of exercising their powers or performing their duties or functions”, regardless of how or why the member obtained or had access to the information. For these reasons, and with great respect for my colleague, I conclude that the s. 11

prohibition, by its very terms, extends well beyond the disclosure of only “*specific* national security information”.

[135] The effect of s. 12 of the *NSICOP Act*, paired with s. 11, is therefore that Parliament has delegated to the executive, in the form of government departments under ministerial control, the power to determine what information is prohibited from disclosure in Parliament by parliamentarians. All that a government department has to do to prevent Committee members from disclosing information in Parliament is to take measures to protect it.

[136] Importantly, this delegation to the executive of the power to determine the boundaries of permissible speech in Parliament lacks any material safeguards. For example, there are no statutory requirements that the information protected from disclosure be of a particular kind or relate to a particular subject. The information does not need to be subject to a certain level of security clearance or of such sensitivity that its disclosure risks endangering Canadians or Canada’s foreign relations. This type of legislative guidance is not novel. It is found in other, similar legislation, such as the descriptions of purposes that are prejudicial to the safety or interests of the state in s. 3(1) of the *Foreign Interference and Security of Information Act* and the finely tuned criteria for non-disclosure under other regimes like the *Access to Information Act*, R.S.C. 1985, c. A-1. In order to engage s. 11(1) of the *NSICOP Act*, however, departmental efforts to protect information do not need to be justified on any particular grounds. The effect is that the executive could prevent a member or former member of

the Committee from disclosing information in Parliament even if that information was being protected merely because it was politically embarrassing, without being harmful to people, property, or Canada's national interest.

[137] This is not, therefore, a carefully tailored limit on parliamentary free speech. It is a broad and indeterminate limit defined by the executive.

(2) The Limit on Speech Is Subject to Criminal Enforcement in Court

[138] The purported effect of s. 12 of the *NSICOP Act* is also to grant the courts jurisdiction to impose criminal consequences, including imprisonment, for breaching the broad s. 11 limit on parliamentary speech, with no role for the House of Parliament in which the speech took place. As the intervener the Canadian Civil Liberties Association states:

Understood in its proper context, section 12 therefore does not only purport to abdicate Parliament's exclusive authority over privileged matters that may be subject to prosecution for improper disclosure of confidential information under section 11 of the Act. It also necessarily purports to expand curial jurisdiction over those same matters, engaging activities within the scope of — at least — the privileges to discipline members, over parliamentary proceedings, and over free speech. [Emphasis deleted.]

(I.F., at para. 16)

[139] Even when more specific offences under the *Foreign Interference and Security of Information Act* do not apply, it is a criminal offence punishable by imprisonment to contravene a statutory provision like s. 11(1) of the *NSICOP Act* (see

Criminal Code, R.S.C. 1985, c. C-46, s. 126(1); see also 2024 ONCA 306, 172 O.R. (3d) 401, at para. 23).

[140] Importantly, the *NSICOP Act* does not provide any mechanism for the Houses of Parliament to lift or prevent a potential penalty against a Committee member if it becomes clear that the information disclosed in parliamentary proceedings exposes malfeasance or illegality. Nor does the *NSICOP Act* allow a parliamentarian to avoid criminal responsibility by bringing the information to the notice of a House of Parliament or a committee through an *in camera* session. Instead, it is squarely in the hands of the executive and the courts to define and criminally enforce the limit on speech, with no room for the Houses of Parliament to intervene under the Act.

(3) The Double Delegation Fundamentally Undermines the Functioning of Parliament

[141] Section 12 of the *NSICOP Act* results in a broad double delegation. First, through s. 11, Parliament has delegated to the executive, in the form of government departments under ministerial control, the power to determine what information is prohibited from disclosure in Parliament. Second, through s. 12, the courts are empowered to imprison parliamentarians who have disclosed such information in Parliament, even over the objection of the House of Parliament in which the disclosure was made.

[142] This legislative arrangement runs counter to responsible government and representative government. Section 12 allows for parliamentarians on the Committee to be held criminally responsible by the courts for saying what the executive does not want them to say, even if they were attempting in good faith and *in camera* to hold the government accountable. Under the threat of prosecution, parliamentarians may be less able to hold the executive to account if they come across abuses or other illegality. Similarly, Committee members will be less able to represent the interests of their constituents and serve the common good if they cannot speak on issues that may well be of immense importance — bearing in mind that the scope of the information subject to the limit is broad and indeterminate.

[143] Perhaps most importantly, by transferring the determination of whether speech in Parliament is licit to the executive and the power to punish for certain speech to the courts, the *NSICOP Act* fundamentally undermines the separation of powers. While I understand the concern about judicial scrutiny of Parliament's ability to amend its privileges, I agree with the Canadian Constitution Foundation that such a concern "crumbles" in this case. This is because the *NSICOP Act* goes too far and legislates the "impairment of parliamentary independence" by mandating outside interference from the executive branch and the courts in the regulation of parliamentary speech (I.F., at para. 14). In so doing, s. 12 of the *NSICOP Act* undermines the centuries-old purpose of the parliamentary privilege and free speech: ensuring parliamentary independence from the executive and the courts.

[144] The Attorney General of Canada points to the fact that parliamentarians choose to become members of the Committee and that the limit on free speech applies only to them (R.F., at para. 82). This alone cannot save s. 12. Freedom of speech in Parliament is a privilege held by individual members (Janse and LeBlanc, at para. 3.51), who must all have the freedom to hold the executive to account, speak their minds, and advance the interests of their respective constituents — a mandate that is fundamental to the role of legislators in our democracy.

[145] Further, while membership in the Committee is voluntary, it is wrong to suggest that this somehow makes the limit on privilege less serious. First, the Attorney General of Canada rightly admits that this choice does not amount to a waiver of privilege (transcript, day 1, at p. 69). This is sensible, given the concern that various parliaments have expressed over the use of such waivers, particularly as they relate to freedom of speech (Janse and LeBlanc, at paras. 3.66-3.68; *Erskine May*, at paras. 12.1 and 16.19; Australia's *House of Representatives Practice* (7th ed. 2018), by D. R. Elder, ed., at ch. 20; *Parliamentary Practice in New Zealand* (5th ed. 2023), by D. Wilson, ed., at para. 57.6; United Kingdom, Joint Committee on Parliamentary Privilege, vol. 1, *Report and Proceedings of the Committee* (1999), at ch. 2).

[146] Second, at the time when they join the Committee, members are unaware of what information they will be unable to disclose. They do not know what information they will access as part of the Committee. They do not know what information the executive will decide to take measures to protect. They have no legislated definition of

the types or purposes of information that Committee members cannot reveal without punishment. In this context, Committee members cannot be understood to have accepted the limits placed on their speech in any meaningful way.

[147] Third, even if Committee members could voluntarily accept the limits on their speech, s. 12 of the *NSICOP Act* would still impact Parliament's functioning as an institution. If a Committee member uncovered information that needed to be disclosed in Parliament, whether in public or *in camera*, in order to hold the government of the day to account, there would be no mechanism for the member to do so. Parliament as an institution would not know that an issue should have been brought to its attention. It would, as a result, be powerless to do anything about it. This is not consistent with its role in our democracy. While the Court of Appeal noted that a Committee member could skirt s. 12 by requesting Parliament to order the production of documents or testimony, this does not change my analysis. The Committee member continues to be exposed to potential arrest and imprisonment, this work around appears to flout the intent of s. 12, and it does nothing to alleviate the double delegation at the heart of s. 12's unconstitutionality.

[148] As the double delegation resulting from s. 12 fundamentally undermines the functioning of Parliament, it is not validly enacted under s. 18 of the *Constitution Act, 1867*.

- (4) Parliamentary Oversight of National Security Can Occur Without an Unconstitutional Limit on Freedom of Speech in Parliament

[149] This is not, of course, to suggest that all measures to protect information related to national security in the context of parliamentary oversight will necessarily be constitutionally suspect. To the contrary, Parliament can oversee the national security apparatus, and protect sensitive information relevant to that oversight, without the need for unconstitutional limits on parliamentary privilege.

[150] As the intervener the Canadian Constitution Foundation highlights, Parliament has tools to maintain Canada's security, the accountability of the executive, and free speech in Parliament (I.F., at paras. 16-21). Since Confederation, Parliament has proven its ability to regulate debate without any catastrophic disclosure of information and without the need for threats of criminal sanction (N. A. MacDonald, "Parliamentarians and National Security in Canada" (2011), 34:4 *Can. Parl. Rev.* 33, at p. 36; H. MacIvor, "The Speaker's Ruling on Afghan Detainee Documents: The Last Hurrah for Parliamentary Privilege?" (2010), 19 *Const. Forum* 11, at pp. 12-13). Indeed, the appellant argues — and I have been shown nothing to suggest otherwise — that since 1689 no Commonwealth nation, even those under severe crisis, or with weak democracies, has legislatively authorized the prosecution of parliamentarians for what they said in a legislature (A.F., at para. 3).

[151] Instead, Parliament has found alternative methods for managing crises and national security risks while maintaining executive accountability. For example, Parliament can modify its procedure to accommodate heightened security risks. During the First and Second World Wars, secret sessions of the entire House of Commons were

held to discuss the military situation (MacDonald, at p. 36). This minimized the risk of sensitive national security information being disclosed outside of the House, without curtailing the scope of parliamentary free speech or Parliament's authority to manage its own procedure and affairs. A similar strategy has been deployed by members of certain parliamentary committees, who have at times chosen to conduct *in camera* meetings to receive briefings on matters involving sensitive national security information (C. E. S. Franks, *Parliament and Security Matters* (1980), at pp. 34-35). Indeed, the *in camera* nature of the briefings was considered "sufficient protection to ensure that members would not divulge information made privy to them" (MacDonald, at p. 38).

[152] In addition, Parliament may discipline its own members for any speech or conduct that it considers to be a breach of trust or an interference with its proper functioning (see *Chagnon*, at para. 138, per Côté and Brown JJ., dissenting, but not on this point). By virtue of this disciplinary power, Parliament has access to a wide range of penalties to deal with misconduct: a "member may be called to order, directed to cease speaking, 'named' (suspended for the remainder of the day) for disregarding the authority of the Chair, suspended from the service of the House of Commons for a period of time, or expelled" (House of Commons, *Our Procedure: Parliamentary Privilege* (online); Janse and LeBlanc, at paras. 4.101-4.102 and 13.64-13.65; Maingot, at pp. 166 and 192-96; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 62, per McLachlin J., concurring). Like its freedom to control its own procedure, Parliament's power to discipline its members is sufficient to manage the

risk that a legislator will inadvertently or intentionally disclose sensitive national security information, without circumscribing the scope of parliamentary free speech. Parliament has done so successfully for many years.

[153] Other Westminster-style democracies have crafted mechanisms for parliamentary oversight of their national security apparatus without limiting the privileges of their parliamentarians. Perhaps most significantly, a body similar to the Committee, and on which the Committee was modeled, has been constituted in the United Kingdom without limiting the parliamentary privileges of its members (*Justice and Security Act, 2013* (U.K.), 2013, c. 18; see Library of Parliament, *Bill C-22: An Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts*, Legislative Summary 42-1-C22-E, August 22, 2016, at p. 3).

[154] Further, the *NSICOP Act* itself could have contained a narrower limit that might well have passed constitutional muster. It could have defined the nature of the information that cannot be disclosed in Parliament, for example by limiting it to sensitive information implicating national security, rather than capturing everything that the executive takes steps to protect. It could have included safeguards such as a way for the Houses of Parliament to intervene to prevent proceedings before the criminal courts concerning what was said in their chambers. As currently drafted, however, the s. 12 limit is so serious that it slips the bounds of constitutionality.

III. Conclusion and Disposition

[155] When Canada inherited “a Constitution similar in Principle to that of the United Kingdom”, it inherited a privilege of parliamentary free speech — already centuries old — that protects and facilitates responsible government, representative government, and the separation of powers. Given this constitutional foundation, any legislated restriction on free speech must be narrow in order to ensure Parliament’s proper functioning.

[156] With respect, s. 12 of the *NSICOP Act* is far from being narrow. Its effect is to hand to the executive the ability to define what can and cannot be said by Committee members in the Houses of Parliament and to the judiciary the authority to imprison Committee members if they overstep the line set by the executive. It would allow, for the first time in centuries, the prosecution and imprisonment of parliamentarians for what they say in Parliament, with their speech used as evidence against them in court. This is not a narrow limit. It is unprecedented in Canadian history and undermines our constitutional architecture.

[157] As a result, I would allow the appeal and declare that s. 12 of the *NSICOP Act* is *ultra vires* Parliament.

Appeal dismissed, CÔTÉ J. dissenting.

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