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The Judicialisation of Parliamentary Privilege in Canada: A Cautionary Tale

Lorne Neudorf

La Trobe Law School, La Trobe University, Bundoora, VIC 3086, Australia; l.neudorf@latrobe.edu.au

Abstract: Over the past few decades, Canadian courts have exerted strong influence over the meaning and operation of parliamentary privileges. Starting with a television producer's *Charter* rights claim to access a provincial legislature's public gallery and followed by an employment law claim made by the chauffeur to the Speaker of the House of Commons, the Supreme Court of Canada has articulated an approach under which judges closely scrutinise privileges invoked by legislatures when defending themselves against litigated claims. By applying the doctrine of necessity, Canadian courts make authoritative rulings on what counts as a valid legislative function and the processes and activities needed to fulfil those functions. Canadian courts also require the scope of parliamentary privileges to be pleaded in narrow terms that correspond to the details of a plaintiff's claim, which has resulted in a hollowed-out conception of privilege over time. In scrutinising the necessity and scope of privilege, Canadian courts have chipped away at the separation of powers. Further, the Canadian approach unjustifiably prioritises the judicial vindication of private rights over the institutional needs of the legislature. Courts in other jurisdictions should reject the Canadian approach and avoid scrutinising the propriety of the exercise of privilege through a necessity test. Instead, courts should engage in a more limited jurisdictional test to confirm the availability of a relevant category of parliamentary privilege in law or historical practice. Judicialising parliamentary privileges weakens the autonomy and vitality of legislative institutions, with the Canadian approach serving as a cautionary tale. Ultimately, the legislature is accountable to the electorate for the exercise of its privileges. To promote fairness and reduce the risk of court interference, parliaments should strengthen the accountability and transparency associated with the exercise of their privileges, including by developing guidelines for their appropriate use.

Keywords: parliamentary privilege; legislative privilege; institutional relationships; parliaments and courts; legal institutions; judicial review; separation of powers; constitutional architecture; legislative autonomy; doctrine of necessity; Canadian jurisprudence; comparative law

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1. Introduction

In the Westminster tradition, 'parliamentary privilege' refers to the rights, powers and protections that belong to each House of Parliament to ensure its effective functioning as a legislative assembly.[1] The most well-known privilege is free speech, which facilitates robust debate by shielding legislators from lawsuits for statements made during the course of parliamentary proceedings.[2] Parliamentary privilege forms part of the general law.[3] In

[1] See, e.g., Natzler and Hutton (2019), paragraph 12.1 (United Kingdom); Maingot (1997) (Canada); Bosc and Gagnon (2017) (Canada); Campbell (2003) (Australia); Evans (2016) (Australia). 'Privilege' is a somewhat problematic term to the extent that it suggests total immunity from the law. Privilege is instead part of the general law with recognised categories of privilege forming part of the law and customs of parliament (*lex parliamenti*).

[2] While legislators and committee witnesses cannot be sued in a court of law for defamation in relation to statements made during parliamentary proceedings, they are subject to House rules and orders, including those relating to decorum and speech.

[3] HM Government (2012), page 11. See also *Canada (House of Commons) v Vaid*, page 685.

Australia, for instance, it finds its footing at the federal level in the constitutional text and historical practices of the Westminster Parliament, the model for the Australian Parliament.[4] Historically, Parliament and courts clashed over the meaning and operation of privilege.[5] Today, when privilege is raised as a defence to a litigation claim, courts seek to confirm the existence of the category of the claimed privilege.[6] If confirmed, it is for the House to determine when it should be exercised.[7] In other words, courts approach the litigation pleading of parliamentary privilege like a question of fact: does the privilege exist? If the answer is 'yes', the court will defer to the legislature's judgement of when and in what circumstances the privilege should be invoked. The court's proper role is not to question the wisdom of its use but rather to enforce a jurisdictional limit on its availability when raised to defeat a plaintiff's claim. Judicial deference to the exercise of privilege promotes a sense of mutual respect between the branches of government and affirms the legislature's autonomy over its internal functions. It also recognises that the legislature is in a superior position, particularly as compared to a reviewing court, to assess the need for invoking a recognised privilege to protect the integrity and efficiency of its work in formulating legislation.

Canadian courts have taken a different path. When parliamentary privilege is raised in litigation, Canadian courts do not end their inquiry after confirming the existence of a parliamentary privilege. Judges go on to decide whether the privilege is necessary to protect processes or activities that serve legislative functions. If a privilege is seen by the reviewing court as unnecessary to protect legislative functions in relation to the plaintiff's claim, or its scope is framed too broadly, the court will reject its exercise and decide the case on its merits. By probing necessity and scope, Canadian courts scrutinise parliamentary privilege more intensely than courts in other jurisdictions. To succeed in litigation, Canadian legislatures must put forward a neatly tailored version of privilege that engages with the details of the plaintiff's case to demonstrate why its adjudication would disrupt a process or activity serving a legislative function. Over time, this approach has resulted in the judicialisation of parliamentary privileges and an incursion by the courts into the legislative institution. In their scrutiny of parliamentary privileges, Canadian courts play a supervisory role in relation to legislative functions and regulate parliamentary processes and activities to an extent not seen elsewhere. In Canada, it is courts, and not legislatures, that ultimately decide what counts as a valid legislative function and the processes and activities that are needed to fulfil it. Through the precedential effect of their rulings, judges have hollowed out the content of privilege and incentivised further litigation. This degree of judicial control has eroded the Canadian Parliament's sense of autonomy and vitality. Canada's Senate, for example, has noted the 'prominent' role of the courts in defining the content and scope of its privileges, which distinguishes it from other Westminster parliaments.[8]

I argue that the Canadian approach should not be followed in other jurisdictions for two reasons. First, the exacting judicial scrutiny of parliamentary privilege raised in litigation is misguided under a conception of the separation of powers that seeks to foster mutual respect among the branches of government. Second, as an institution designed to adjudicate individual rights, courts are ill-placed to decide the necessity of processes and activities that fulfil legislative functions. Courts should resist engaging with the propriety of the exercise of a recognised category of privilege. They should instead defer to the legislature's judgement after confirming the existence of a relevant category of privilege either in law or historical practice. The balance between the unfairness caused

[4] *Parliamentary Privileges Act 1987*, as authorised by section 49 of the *Constitution of Australia*.

[5] See Natzler and Hutton (2019), chapter 16 (providing an historical overview of the institutional conflict). See also Groves and Campbell (2007) (discussing the question of justiciability); Robert and Lithwick (2004) (considering recent developments in the law).

[6] This is generally done by reference to evidence of the existence of the pleaded privilege in the Westminster Parliament or by reference to a relevant statute. In Australia, see section 5 of the *Parliamentary Privileges Act 1987* and section 49 of the *Constitution of Australia*.

[7] In Australia, see, e.g., *R v Richards; Ex parte Fitzpatrick and Browne*, page 162.

[8] Senate of Canada (2015), pages 2, 36.

to an individual by the exercise of a privilege to defeat their legal claim as against the protection of legislative functions should be struck not by courts but by legislators who are accountable to an electorate. To promote fairness and reduce the risk of court interference, legislatures should strengthen the accountability and transparency associated with the exercise of privilege. This article, therefore, concludes with a call to action for legislatures to develop guidelines and other mechanisms to ensure the appropriate use of their privileges.

2. Canadian Jurisprudence on the International Stage

Canada has developed an international reputation as a stable democracy committed to the rule of law. Numerous books and articles have been written to highlight uniquely Canadian approaches to legal problems, including its constitutional rights model.[9] Scholars have sought to trace its influence on countries around the world, including common and civil law countries and international courts like the European Court of Human Rights.[10] Canadian public and private law is routinely cited by law reform commissions to help justify proposals to change domestic law and by courts in resolving legal claims.[11] Judgments of the Supreme Court of Canada have been especially influential in foreign courts, with the Supreme Court itself observing that the 'quality of its work and the esteem in which it is held both in Canada and abroad contribute significantly as foundations for a secure, strong and democratic country founded on the Rule of Law'.[12] Judges and scholars have sought to explain the growing influence of Canadian law at the international level. Aharon Barak, for example, has written that 'Canadian law serves as an inspiration for many countries', crediting its popularity to the Supreme Court of Canada's use of comparative law that enriches its decisions.[13] Similarly, Mark Tushnet has written that 'the influence of the United States *Constitution* and Supreme Court around the world has waned while that of the *Canadian Charter* and Supreme Court has increased'.[14] In relation to constitutional law, Tushnet considers a number of factors responsible for the international ascendency of the Canadian approach over that of the United States. He cites the Canadian Constitution's comparatively younger age, its reputation for liberalism, its embrace of proportionality and balancing tests, its rejection of a strict interpretive approach rooted in originalism, its focus on institutional cooperation instead of contestation, its weak form review that encourages institutional dialogue and its openness to using sources of foreign law.

This article does not challenge Canada's place among the world's legal systems as an important comparator jurisdiction—precisely the opposite. There are many good reasons to look to Canada as a model and source of inspiration in tackling pressing legal problems. Canada has a dynamic legal culture that benefits from, among other things, the mixing of common, civil and indigenous legal traditions. Instead, this article seeks to demonstrate on an international stage that Canada can be both a useful model for inspiration and also a model for what *not* to do. The reader is encouraged to develop a stronger sense of discernment when approaching Canadian law: Canada's jurisprudence will not work everywhere, and more to the point, some of its approaches do not work well at home. Through the study of the Canadian law of parliamentary privilege, this article tells a cautionary tale and warns others of the institutionally harmful consequences of going down the path forged by the Supreme Court of Canada.[15]

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[9] See, e.g., contributions from judges and scholars in Albert (2017).

[10] See, e.g., Garlicki (2017) (discussing Canadian case law in the European Court of Human Rights); Chang (2017) (discussing Canadian case law in Hong Kong's Court of Final Appeal and Taiwan's Constitutional Court).

[11] For an example of a law reform commission, see, e.g., Australian Law Reform Commission (2021); for an example of a court, see the Supreme Court of India's judgment in *Bharti Airtel Limited v Vijaykumar V Iyer*.

[12] Supreme Court of Canada (2017).

[13] Barak (2006), page 203.

[14] Tushnet (2013), page 527.

[15] It should be noted that there are important developments in the doctrine of parliamentary privilege in other jurisdictions that are beyond the scope of this paper. For example, see the 2016 judgment of the European Court of Human Rights in *Karácsony v Hungary*. In that case, the Grand Chamber unanimously decided that the legislatures of member states were entitled to a 'wide' margin of appreciation in relation to internal disciplinary

3. Necessity: The Mother of Intervention

While it ultimately found in favour of the provincial legislature, a majority of the Supreme Court of Canada laid the groundwork for a judicially interventionist approach to parliamentary privilege in its judgment in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* ('*NB Broadcasting Co*').[16] On the facts of the case, a television producer brought a claim against the Nova Scotia House of Assembly for refusing its request to access the legislature's public gallery. The producer sought to film the House proceedings for news reporting. The House's refusal was challenged by the producer in court on the basis that it infringed the rights to free expression and freedom of the press that are guaranteed by the *Canadian Charter of Rights and Freedoms*.[17] The House Speaker sought to have the producer's claims dismissed by invoking the privileges of maintaining order and excluding strangers.

In its judgment, the majority first considered a potential jurisdictional hurdle to deciding the case. Article 9 of the English *Bill of Rights 1689* excludes judicial review of 'Proceedings in Parliament'.[18] If this privative clause formed part of the Canadian Constitution, it could block the *Charter* review of parliamentary proceedings, including the House of Assembly's refusal to grant the producer access to the public gallery.[19] The majority held, however, that Article 9 had not been entrenched in Canada's Constitution because the constitutional text did not specifically mention the *Bill of Rights*. Further, the *Constitution Act, 1867*'s preamble—establishing that the Constitution of Canada is 'similar in Principle to that of the United Kingdom'[20]—was formulated broadly and could not, as a matter of interpretation, import a 'specific article' from the *Bill of Rights*.[21]

The majority held that parliamentary privileges themselves had been imported into the Constitution, protecting both the federal Parliament and provincial legislatures.[22] The majority anchored this holding in the constitutional preamble. In the majority's view, the preamble's effect was to entrench the United Kingdom's system of parliamentary democracy in Canada. That system included certain privileges for Canadian legislatures that

proceedings on the basis of parliamentary autonomy (paragraphs 143–46). Nevertheless, the Grand Chamber held that such autonomy could not be abused to suppress the freedom of expression of Members of Parliament, particularly minority members (paragraph 147). See also the judgment of the European Court of Human Rights in *Ikotity v Hungary*.

16 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*. References to the majority opinion (and citations to the judgment unless otherwise noted) refer to the judgment of Justices L'Heureux-Dubé, Gonthier, McLachlin and Iacobucci at pages 368–94, joined by Justice La Forest in a short concurring opinion at pages 367–68. Chief Justice Lamer concurred in the result at pages 332–67 but for different reasons, while Justices Sopinka and Cory arrived at different outcomes at pages 394–99 and 399–414, respectively.

17 *Canadian Charter of Rights and Freedoms*, subsection 2(b). Being constitutionally entrenched, the *Charter* forms part of the supreme law of Canada, taking legal priority over other sources of law: subsection 52(1). The *Charter* provides remedial flexibility for what is 'appropriate and just in the circumstances': subsection 24(1). *Charter* rights are subject to 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society': section 1. Legislation may be declared by a federal or provincial parliament as exempt from most *Charter* rights for a period of up to five years, which can be renewed indefinitely: section 33.

18 *Bill of Rights 1689*, article 9.

19 This outcome would have prioritised the legal effect of one part of the Constitution (a specific privative clause) over another part (generally applicable *Charter* rights). The majority's approach to reconciling conflicts between constitutional provisions is discussed further below.

20 *Constitution Act, 1867*, preamble.

21 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, page 374, although the majority held that the 'principles underlying art. 9' of the *Bill of Rights* formed part of Canadian law in respect of the 'appropriate relationship between the courts and legislative bodies' (page 374); see also Chief Justice Lamer, who wrote at page 353: 'I do not think that the wording of the preamble . . . can be taken to refer to so specific an article of the Constitution of the United Kingdom . . . Article 9 cannot be directly transplanted without specific reference', and at page 354 that constitutionally importing a 'broad principle of the fostering of the independence of the legislative process through the exercise of parliamentary privileges is much more palatable than incorporating a specific article of the *Bill of Rights* of 1689'. If article 9 had been given constitutional effect, it could have prevented the majority from limiting parliamentary privileges through necessity. Notably, what counts as a 'proceeding in parliament' has been given a more restrictive interpretation in the United Kingdom: *R (Miller) v The Prime Minister*; *Cherry v Advocate General for Scotland*.

22 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, page 375. However, see the discussion of *Canada (House of Commons) v Vaid* below.

had been modelled on Westminster.[23] Because of their constitutional status, parliamentary privileges could not be negated by *Charter* rights: 'one part of the Constitution cannot be abrogated or diminished by another part'.[24] Importantly, however, only 'inherent privileges' of the legislature were constitutionally entrenched. Inherent privileges might not cover the full range of legislative processes and activities. Those falling outside the scope of an inherent privilege would be subject to the application of *Charter* rights, although this was not such a case.[25] Moreover, while a legislature might enact legislation to declare its privileges, legislated privileges were not necessarily equivalent to inherent privileges.[26] Inherent privileges were only privileges that could be confirmed by a reviewing court as needed for legislative functions.[27] Citing English and Canadian authorities[28] and academic commentary,[29] the majority held that '[t]he parameters of this jurisdiction are set by what is necessary to the legislative body's capacity to function'.[30] In scrutinising privilege pleaded in a *Charter* case, the reviewing court would not limit its role to confirming the category of pleaded privilege in law or historical practice. Instead, courts would identify the inherent privileges of the legislature case by case by applying a necessity test.

Once a privilege had been accepted by the reviewing court as an inherent privilege, it operated as a complete bar to a *Charter* claim.[31] In future cases, courts would work out which legislative processes and activities fell within the legislature's *Charter*-free zone and which fell outside of it. To constrain the *Charter*-limiting effect of parliamentary privilege and protect individuals from its potential misuse to limit their rights, a line would be drawn

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[23] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, pages 375, 377–79.

[24] *Ibid*, page 373. As two parts of the Constitution were seen to be in conflict, the Supreme Court of Canada had to decide which part of the Constitution prevailed over the other. The majority took the view that privileges took priority over *Charter* rights. Several reasons were offered in support of this conclusion. First, privilege must be held absolutely to secure legislative autonomy. The application of *Charter* rights would limit otherwise absolute privileges, undermining their effectiveness (pages 378–79). Second, the *Charter* was not intended to repeal fundamental constitutional features like parliamentary privilege, which would be an 'extreme' interpretation (pages 377, 389). Third, privilege was a source of constitutional power and not the exercise of constitutional power (a challenging distinction in Canadian law). Under this approach, constitutional powers are not themselves subject to *Charter* scrutiny (pages 390–93). In addition to these reasons, the majority emphasised the *Charter*'s status as a relative newcomer to the constitutional landscape. How could the *Charter* be reconciled with the foundational constitutional architecture without demolishing it? While not discussed, the fact that *Charter* rights are not absolute but subject to reasonable limits (section 1) seemed to play a role in the majority's reasoning.

[25] *Ibid*, page 371 ('the tradition of curial deference to legislative bodies does not support a blanket rule that the *Charter* cannot apply to any of the actions of a legislative assembly'), ('as a public body [the legislature] might be capable of impinging on individual freedoms in areas not protected by privilege'). The question that remained was whether privileges falling outside the scope of inherent (and thus constitutionalised) privileges would still be effective as against ordinary legal claims not involving constitutional rights.

[26] *Ibid*, page 374 (inherent privileges exist based on their preambular incorporation and their necessity 'regardless of whether provisions relating to privilege have in fact been enacted'); see also Chief Justice Lamer, who wrote at page 348: 'the difference in breadth between the inherent privileges of these bodies and those granted by statute must be kept in mind as it may well have an impact on their constitutional status'.

[27] *Ibid*, pages 374–75 ('legislatures must be presumed to possess such constitutional powers as are necessary for their proper functioning'); page 377 ('inherent privileges of Canada's legislative bodies . . . fall within the group of principles constitutionalized by virtue of this preamble'); page 378 ('legislative bodies possess those historically recognised inherent constitutional powers as are necessary to their proper functioning'); page 384 ('The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function').

[28] *Ibid*, pages 381–83.

[29] *Ibid*, pages 379–81.

[30] *Ibid*, page 384. The majority's conclusion that past cases established a precedent for courts to closely scrutinise and adjudicate privilege claims on the basis of necessity is questionable. In England, necessity refers to an explanation put forward as to why privilege supports legislative functions. It does not appear to be a justiciable standard for testing the validity of a privilege claim. In *Stockdale v Hansard*, the Court applied only a limited jurisdictional test, the outcome of which was quickly reversed by legislation. In *Kielley v Carson*, the Court considered whether a colonial legislature had the power to arrest for contempt committed outside the House, a judicial function that was found to have been removed. The judgment was decided before Confederation in 1867, which constitutionalised the status of Canadian legislatures. Later cases, such as *Landers v Woodworth*, followed *Kielley v Carson*. Notably, Justice Ritchie in *Landers v Woodworth* observed, at page 202, that the outcome could be overturned by 'prescription or statute'.

[31] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, page 379 ('privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch'); see also pages 387–88.

by the Court. Seen from an institutional perspective, the majority's holding reflected a re-casting of roles that followed the advent of the *Charter* in 1982. The *Charter* tasked judges with the interpretation and enforcement of certain fundamental rights, a role that had been embraced by Canadian courts.[32] While the majority accepted that certain legislative processes and activities properly excluded *Charter* rights review, parliamentary privilege could not have an impermissibly broad scope in the post-1982 constitutional order. At some point, legislative processes and activities must yield to the *Charter* guarantee.

In applying the necessity test in a *Charter* case, the reviewing judge would examine whether the privilege was properly pleaded as an inherent privilege to ensure that its scope did not stray beyond its necessity to legislative functions. In carrying out the exercise, the court would not accept the legislature's description of what it needed to protect its work from interference. With the *Charter*, too much was at stake. Judges would make an independent assessment: '[i]t is for the courts to determine whether necessity sufficient to support a privilege is made out'.[33] But what was necessary? Courts would first identify important legislative functions and then consider what processes and activities were needed to fulfil those functions.[34] In its reasons, the majority provided only limited guidance on how judges should approach the task. A reviewing court should determine what was necessary for legislative work, not historically but at the present time.[35] Inherent privileges would be those processes and activities 'without which the dignity and efficiency of the House cannot be upheld'.[36] They would relate to the legislature's 'proper functioning',[37] its 'efficient operation',[38] 'the conduct of [its] business'[39] and what legislatures needed to 'perform their functions' and to 'properly discharge their functions'.[40]

In discussing necessity, the majority took pains to distinguish inherent privileges in Canada from the privileges of the Westminster Parliament. According to the majority, the United Kingdom's privileges had not been fully imported into the Canadian Constitution: inherent privileges were not the same as the robust Westminster privileges.[41] This holding challenged previous understandings of Canadian privileges. Since the time of the country's founding in 1867, Canadian parliamentary privileges were seen as generally equivalent to those in the United Kingdom, particularly in relation to the federal Parliament.[42] The

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[32] The majority briefly commented on the impact of the *Charter* on institutional roles: *ibid*, page 389. Considerable scholarship has been published on the transformative effect of the *Charter* on the Canadian legal and political landscapes: see, e.g., Schneiderman and Sutherland (1997) (contributions reflecting on the impact of the *Charter* on law and politics); McLachlin (2007) (reflecting on the *Charter* after 25 years); Neudorf (2023) (discussing the impact of the *Charter* on Canadian national identity).

[33] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, page 382. See also Robert (2010) (noting that necessity involves historical, constitutional and political considerations).

[34] See, e.g., *Egan v Willis & Cahill*, page 676 per Mahoney P: 'The concept of necessity involves that the court must consider, from time to time and as the need arises, what are the functions of the body and the purposes it is to achieve and accordingly what it must be able to do'.

[35] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, pages 385–86 (brief discussion of four main categories of parliamentary privilege).

[36] *Ibid*, page 383.

[37] *Ibid*, pages 375, 377–78.

[38] *Ibid*, pages 375, 385.

[39] *Ibid*, page 379.

[40] *Ibid*, pages 378, 385.

[41] *Ibid*, page 380, citing with approval a passage from Dawson (1970), pages 337–38. Lamer CJ wrote that privilege 'did not develop in the same way in the colonial legislature . . . [and] the powers deemed necessary in the Houses of Parliament in the United Kingdom were not always deemed necessary in other contexts' (pages 343–45).

[42] For instance, in *Payson v Hubert* Justice Davies observed, at page 416, that 'the powers, privileges and immunities of the House of Commons are practically the same as those of the House of Commons in Great Britain'. Privileges of the federal Parliament are constitutionally authorised but limited to those existing in the United Kingdom at the time legislation conferring such privileges was enacted: *Constitution Act, 1867*, section 18. While rejected by the majority, its analysis tends to focus on pre-Confederation colonial legislatures that operated under imperial enabling legislation. It does not account for the significant change to the constitutional status of legislatures brought about by Confederation in 1867. In *Landers v Woodworth*, Justice Ritchie held that the common law of privilege from the United Kingdom did not apply to the Nova Scotia legislature *unless* it had been set out in statute, which was open to it; see also Lamer CJ at pages 346–47 and Robert (2010).

parliaments of both countries played similar legislative roles and were seen by analogy to require the same rights, powers and protections. In 1867, Canada's first Parliament enacted legislation to provide its two Houses with the same privileges as those held by the British House of Commons. The Act remains in force.[43] Moreover, in 1875, the Constitution was amended to clarify that the Canadian Houses could enjoy new British parliamentary privileges, not just those in 1867.[44] The picture was clear: the Canadian Parliament received privileges equivalent to the British House of Commons.

NB Broadcasting Co was not, however, a case about ordinary parliamentary privileges competing against ordinary rights. The case was framed as a series of constitutional questions about the potential clash between parliamentary privilege and *Charter* rights in relation to a provincial legislature. The majority's holding that only inherent privileges had been constitutionally entrenched supplied judges with the jurisdiction to distinguish what they perceived to be the most important privileges from ordinary privileges, resolving the clash by forging a middle ground. Only judicially endorsed privileges would overcome *Charter* rights. By de-coupling inherent privilege from a larger base of Westminster and legislated privileges, the majority carved out a space for judges to select constitutionally entrenched privileges freed from past practice. Yet, this de-coupling also presented an inconsistency. Earlier in its reasons, the majority anchored the constitutional entrenchment of parliamentary privilege in the preamble that established the Canadian Constitution as being similar in principle to that of the United Kingdom. This analogy quickly ran aground, however, in relation to the *content* of those privileges. Westminster's privileges would provide only a starting point for identifying inherent constitutional privileges.[45] Inherent privilege was a question to be decided by courts in light of current legislative needs. What would be needed for Canadian legislatures might be different, and likely more limited, than the needs of the Westminster Parliament.[46]

The majority provided several reasons in support of its view that Canadian provincial inherent privileges would likely be narrower in scope than those at Westminster. First, colonial legislatures operated under overarching limits to their lawmaking authority, unlike the sovereign Westminster.[47] Constitutionally speaking, therefore, the early Canadian legislatures were a lesser kind of institution. Because of this limited role, they did not require the more robust Westminster privileges to carry out their functions. Instead, they needed only 'very moderate privileges': a limitation they passed down to their successor legislative institutions.[48] Second, Canadian legislatures did not engage in power struggles with other branches of government like in the United Kingdom.[49] In the result, Canadian legislatures did not need robust privileges to protect their dignity and standing.[50] Third, judicial functions had been removed from early Canadian legislatures, unlike in the United Kingdom where the Parliament's judicial functions justified stronger privileges.[51] To the majority, the differences meant that Canadian legislatures would 'possess similar, although

[43] *Parliament of Canada Act* (1985). Provinces have enacted legislation to confer the same privileges on their legislatures as enjoyed by the Canadian House of Commons: see, e.g., *House of Assembly Act*, section 26.

[44] *Parliament of Canada Act, 1875*.

[45] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, page 377 ('the Constitution may also include such privileges as have been historically recognized as necessary to the proper functioning of our legislative bodies') and page 378 ('in ascertaining what constitutes powers our legislative assemblies have we should begin by looking at the powers which historically have been ascribed to the Parliament of the United Kingdom'); see also pages 385–86.

[46] This is also discussed in *Canada (House of Commons) v Vaid* below.

[47] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, pages 377–81 citing Dawson (1970), page 338; see also the judgment at pages 367–68 (La Forest J).

[48] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, page 380.

[49] Described in detail by Chief Justice Lamer: *ibid*, pages 342–48.

[50] *Ibid*, page 354, where Chief Justice Lamer wrote that 'we do not share the turbulent history of the United Kingdom with respect to the relationships between the different branches of government'.

[51] *Ibid*, page 379; see also pages 347–48 (Lamer CJ). Judicial functions were removed from the Westminster Parliament with the creation of the new Supreme Court of the United Kingdom that began sitting in 2009.

not necessarily identical, powers'[52] as compared to Westminster and that inherent privileges 'may not exactly replicate the powers and privileges found in the United Kingdom'.[53] What was not stated, however, was likely the main motivation to distinguish Canadian privileges from Westminster: providing a way for courts to curb the exercise of parliamentary privilege to defeat *Charter* rights.

The majority then turned to apply the necessity doctrine to the privileges pleaded by the Speaker. While free legislative debate and the power for the House to exclude strangers could be 'regarded as essential to the proper functioning of a legislature', the majority proceeded to 'ask anew' whether these traditional privileges rose to the level of constitutionalised inherent privileges.[54] The majority engaged in an inquiry to consider whether the pleaded privileges were currently needed for 'modern Canadian democracy as it has been to democracies here and elsewhere in past centuries'.[55] Without referring to any evidence, the majority assessed the value and significance of parliamentary debate in the House to the development of legislation and the potential for persons in the public gallery to interfere 'in a variety of ways'.[56] Following the discussion, the majority concluded that the privileges were genuinely necessary to protect a legislative function of formulating legislation. The majority, therefore, accepted that they were constitutionalised inherent privileges.[57]

Having accepted the pleaded privileges as inherent privileges that operated to defeat the plaintiff's *Charter* claims, the majority turned to a discussion of judicial deference. The majority held that a court had 'no power to review the rightness or wrongness of a particular decision made pursuant to [a] privilege'.[58] It also cautioned that 'necessity is not applied as a standard for judging the content of a claimed privilege'.[59] The majority observed the following:

> Were the courts to examine the content of particular exercises of valid privilege, and hold some of these exercises invalid, they would trump the exclusive jurisdiction of the legislative body, after having admitted that the privilege in issue falls within the exclusive jurisdiction of the legislative body. The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function? A particular exercise of a necessary privilege cannot then be reviewed, unless the deference and the conclusion reached at the initial stage be rendered nugatory.[60]

Each branch of government was required to respect the other branches to ensure that they could 'play their proper role'.[61] No branch should 'overstep its bounds', and 'each [must] show proper deference for the legitimate sphere of activity of the other'.[62] In a constitutional and legal system operating on a system of institutional reciprocity, courts could not insist on their autonomy and independence if they were not in turn willing to provide it to the legislature.[63]

Notably, judicial deference was applied by the majority *after* it accepted the pleaded privileges as necessary to a valid legislative function. Now, at this point, the privileges could be exercised by the legislature to prevent interference in its functions, in this case by the

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52 *Ibid*, page 375.

53 *Ibid*, page 379; see also Chief Justice Lamer at page 353, who wrote that '[s]imilar in principle does not mean identical in the powers it grants'; finally, see Justice La Forest at page 368, who wrote that '[t]he broader parliamentary privileges of the British Parliament were not carried over to this country'.

54 *Ibid*, page 387.

55 *Ibid*.

56 *Ibid*.

57 *Ibid*.

58 *Ibid*.

59 *Ibid*, page 383.

60 *Ibid*, pages 383–84.

61 *Ibid*, page 389.

62 *Ibid*.

63 *Ibid*, page 388.

Court deciding a *Charter* claim.[64] Once necessity had been made out, it was not for courts to question the exercise of privilege or the motives behind its exercise. At first glance, the point seems obvious because courts do not ordinarily question whether or how a defendant exercises their rights in responding to a claim. Nor would courts comment on the wisdom of litigation strategy. What makes *NB Broadcasting Co* unique is that the invocation of privilege was not simply a defendant's response to a rights claim. It represented the exercise of a right of the legislature to remove the court's jurisdiction to adjudicate a plaintiff's claim. The significance of this act presents difficult questions about the extent to which it should be independently scrutinised. According to the majority, courts should examine the necessity of a privilege claim but not its exercise. This holding begs the question of where exactly the line should be drawn between necessity and the exercise of privilege that places it beyond the reach of judicial review. In *NB Broadcasting Co*, the majority held that it would not consider whether filming in the public gallery would *actually* disrupt the debate.[65] While it discussed evidence on this point, the majority simply accepted the Speaker's word for it. The Speaker could decide what amounted to interference in exercising privilege to block the Court from deciding a *Charter* claim seeking access to the legislature's public gallery.

It is also worth questioning whether judicial deference came too late to be meaningful in this case. When applied, the majority had already closely scrutinised the pleaded privileges in the context of the plaintiff's *Charter* claims. It found them to be necessary to legislative functions. In its reasons, the majority acknowledged that debate *could* be disrupted by *Charter* claims, a review standard of plausibility or rational connection to determine whether the plaintiff's claim fell within the scope of the pleaded privileges. At this point, the House had total freedom to decide whether it should block the proposed filming. Pulling back judicial scrutiny at this stage allowed the majority to avoid pronouncing upon the propriety of exercising the privilege to end the case. From the disappointed plaintiff's perspective, judicial deference reinforced that the House was responsible for the outcome and not the Court. It also provided an opportunity for the Court to pay respect to the legislature. Was this kind of judicial deference simply window dressing in light of the judicial scrutiny already applied? After confirming the constitutional significance of the pleaded privileges to a legislative function, the Court would not decide whether that function was *actually* threatened in the case, only that it could be if the Speaker invokes privilege. Late judicial deference provided cover for the Court while allowing it to play the key role in determining the existence, meaning and scope of the privilege: questions intimately connected to whether they would succeed in defeating the plaintiff's claim.

4. Hollowing-Out Privilege by Narrowing the Scope

The Speaker of the Canadian House of Commons receives certain benefits in addition to those provided to ordinary Members of Parliament. Perks include the use of a chauffeured car for 'the fulfillment of the responsibilities of the Speaker's office'.[66] In *Canada (House of Commons) v Vaid*,[67] the Speaker's chauffeur claimed that he had been unlawfully dismissed from his post. The Supreme Court of Canada rejected the privileges put forward by the Speaker relating to internal affairs and the management of employees on the basis that they were framed in overly broad terms, which were unnecessary to protect legislative functions from interference by the adjudication of the plaintiff's claim. The Supreme Court decided the case on its merits.[68]

Vaid provides a compelling illustration of close judicial scrutiny applied to a parliamentary privilege claim. The case goes beyond *NB Broadcasting Co* in two key respects. First, it introduces scrutiny of the *scope* of a claimed privilege as part of a structured two-

64 *Ibid*, pages 384–85.
65 *Ibid*, page 388.
66 Canada House of Commons (2024), chapters 11-3 to 11-11.
67 *Canada (House of Commons) v Vaid*.
68 The chauffer's claim was ultimately rejected on unrelated administrative law grounds. For a comment on the case, see Chaplin (2008).

step approach to necessity. Under this approach, a privilege will be rejected if its scope is pleaded in terms broader than what is necessary to meet the plaintiff's claim. The focus on scope moves the necessity doctrine beyond a more abstract, conceptual inquiry into legislative functions to a contextualised inquiry that is intimately connected with the plaintiff's claim. After *Vaid*, the legislature would need to persuade the reviewing court of the proper scope of a privilege put forward in relation to the details of the case. Second, *Vaid* expanded the judicial regulation of parliamentary privilege by extending the application of the necessity test from its role in identifying constitutionalised inherent privileges of a provincial legislature in a *Charter* case to federal parliamentary privileges pleaded in response to any kind of legal claim.

Writing for a unanimous bench, Justice Binnie opened the judgment by discussing the importance of 'the relationship between the legislature and the other branches of the State'.[69] According to Justice Binnie, an 'equilibrium' must be maintained.[70] When parliamentary privilege is pleaded, a court should respect the legislature by refraining from speculating as to why the claim had been made. A reviewing court should probe only the privilege's 'existence and scope'.[71] While Justice Binnie wrote of mutual respect and judicial deference,[72] the burdens imposed on the Speaker in this case—to tailor the scope of privilege to the chauffeur's employment claim and demonstrate its necessity to legislative functions[73]—provided the Supreme Court with ample latitude to influence the use of privilege. In contrast to its respectful deference rhetoric, the Supreme Court's ruling amounted to a significant encroachment on Parliament's autonomy: in *Vaid*, the Supreme Court overruled the presiding officer of the House on what counted as a valid legislative function and the scope of privilege. In future cases, Parliament would need to plead a stripped-down version of privilege to survive judicial scrutiny. For a chance of litigation success, privileges could not be framed in traditionally robust terms.[74] The Supreme Court's re-formulation of the necessity doctrine also compelled Parliament to participate in the dilution of its privileges. In the uncertainty of litigation, the question becomes the following: what have the courts already accepted under the necessity doctrine? *Vaid*, thus, completed the judicialisation of parliamentary privileges started in *NB Broadcasting Co* by sparking the creation of a new body of law in which parliamentary privileges were defined narrowly, and courts regulated their availability and content.[75]

In *NB Broadcasting Co*, the Supreme Court considered whether provincial legislative privileges were constitutionally entrenched and, if so, how they might be reconciled with *Charter* rights.[76] The majority decided that certain inherent privileges enjoyed constitutional status capable of removing the Court's jurisdiction to adjudicate *Charter* claims. Inherent privileges would be distilled by courts from a broader base of privileges through the doctrine of necessity. *Vaid*, by contrast, was not a *Charter* case.[77] The case focused on the federal Parliament's legislated privileges in the *Parliament of Canada Act*, which had been pleaded

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69 *Canada (House of Commons) v Vaid*, page 675.

70 *Ibid*.

71 *Ibid*, pages 675, 688.

72 *Ibid*, page 680 ('It is a wise principle that the courts and Parliament strive to respect each other's role in the conduct of public affairs'); see also page 681 ('Parliamentary privilege . . . is one of the ways in which the fundamental constitutional separation of powers is respected).

73 *Ibid*, page 676.

74 *Ibid*, page 706 where the Supreme Court notes that it may have accepted a privilege claim in this case if it had been framed in 'considerably narrower' terms; see also page 712 ('I have no doubt that privilege attaches to the House's relations with *some* of its employees, but the appellants insisted on the broadest possible coverage' (emphasis in original)). This appears in contrast with the more robust framing of privilege in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*.

75 *Canada (House of Commons) v Vaid*, page 697 ('it will be for the courts to determine if the admitted category of privilege has the scope claimed for it'). Parliament must yield to the court's view of privilege: pages 682–83. Judges are, however, liable to disagree on questions of privilege as demonstrated by the five separate opinions in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*.

76 See also the judgment of Justice McLachlin in *Harvey v New Brunswick (Attorney General)*.

77 Although the case did touch on constitutional issues, the claim against the Speaker was made under ordinary labour law and human rights legislation and not the *Charter*.

by the Speaker.[78] Under the *NB Broadcasting Co* approach, the necessity doctrine would be irrelevant in *Vaid* because no inherent privileges needed to be identified to defeat a *Charter* claim. The risk was that legislated privileges might remove the Court's jurisdiction to adjudicate a plaintiff's ordinary common law or statutory rights. Were there any limits in such a case?[79] The *Parliament of Canada Act* declares the federal Parliament's privileges in broad terms by incorporating 'such and the like privileges, immunities and powers' held by the Westminster Commons in 1867.[80] Forging a new path, Justice Binnie distinguished privileges at the federal and provincial legislatures. There were 'significant differences' between them as provincial legislatures had 'a different constitutional underpinning'.[81] For the federal Parliament, there were no different levels of privilege. Instead, all federal privileges, including those declared by statute, were held by Parliament absolutely, providing it with 'jurisdictional immunity' for all legal claims, even *Charter* rights.[82] In other words, all federal privileges enjoyed a constitutional status and could be exercised to prevent the courts from adjudicating any claim falling within their scope.[83]

At first glance, this holding appears to significantly broaden the impact of Parliament's privileges. Yet, the elevated constitutional status of all federal privileges had the opposite effect, as it became the justification for judicial scrutiny. Because of the right-limiting consequences of federal privilege, the Court would need to scrutinise its scope to ensure that it did not go beyond what was necessary to fulfil legislative functions. The scope would be judicially delimited. After *Vaid*, courts could use scope to blunt the impact of federal privileges in relation to any kind of legal claim, not only *Charter* claims. The necessity doctrine, an exacting form of scrutiny forged in the heat of a clash between privilege and *Charter* rights, would become more exacting in the context of an ordinary claim. *Vaid*, therefore, cemented the role of the Court as gatekeeper of federal parliamentary privilege.

Justice Binnie articulated a two-step approach for testing privilege claims under the *Parliament of Canada Act*. First, a court should consider whether a category of privilege matched one that had been 'authoritatively established' by precedent or in practice at Westminster, the benchmark that was specified by the Act.[84] If a match of the 'existence and scope' of the claimed privilege was found, the Court should presume its necessity.[85] Second, if there was no match, the Court would carry out an inquiry to determine the current necessity of the pleaded privilege to preserving legislative functions from interference by the Court adjudicating the plaintiff's claim. Necessity should be interpreted broadly by courts to promote the dignity, efficiency and autonomy of the federal Parliament.[86] According to Justice Binnie, the Parliament

> . . . must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.[87]

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78 Notably, the Court held that Parliament limited its privileges to the extent they conflicted with the broadly worded language of the *Canadian Human Rights Act*: *Canada (House of Commons) v Vaid*, pages 683–84.

79 *Canada (House of Commons) v Vaid*, page 691.

80 *Parliament of Canada Act* (1985), subsection 4(a); see also subsection 4(b) in relation to authorising additional parliamentary privileges.

81 *Canada (House of Commons) v Vaid*, page 684. This raises questions about ordinary claims in the context of provincially legislated privileges that may be broader than inherent privileges.

82 *Ibid*, pages 690–93. Privileges provide 'immunity from external review' without regard to the 'source of the legal rule (i.e., inherent privilege versus legislated privilege)'.

83 This is a significant holding as there is only a constitutional authorisation in section 18 of the *Constitution Act, 1867*.

84 *Canada (House of Commons) v Vaid*, page 694.

85 *Ibid*, page 695.

86 *Ibid*, page 687.

87 *Ibid*, pages 699–700.

Justice Binnie noted that the reviewing court should test only the necessity of the 'category (or sphere of activity)' of the privilege to provide the House with some measure of discretion to exercise it.[88] The scope of the privilege would form a critical part of the analysis. Delimiting it would be a 'function of the courts', although the distinction between the scope of a privilege and its exercise 'may sometimes be difficult to draw in practice'.[89]

Despite the respectful deference with which the reviewing court was to apply the two-step approach, its application involved a degree of scrutiny that would make it difficult for federal privilege claims to succeed. In the first step, the matching exercise would often bear little fruit. In his reasons, Justice Binnie acknowledged that the meaning of privilege in the United Kingdom was itself 'a matter of controversy'[90] and that '[m]uch of the U.K. law of privilege remains unwritten'.[91] Further, a reviewing court should prefer English court judgments about privilege over a 'unilateral assertion of privilege by the British House of Commons'.[92] Unfortunately, the problem was the lack of cases: '[t]here has been little formal adjudication of the boundaries of U.K. privilege in British courts'.[93] There might also be important differences between Canada and the United Kingdom, as 'our respective Parliaments are not necessarily in lock step'.[94] Such differences could independently justify a full necessity inquiry, even if a match had been found in the first step:

> It seems likely that there could be 'differences' consisting of parliamentary practices inherent in the Canadian system . . . which would fall to be assessed under the 'necessity' test defined by the exigencies and circumstances of our own Parliament. The point would need to be explored if and when it arises for decision.[95]

It would seem, therefore, that federal privilege claims would end up at the second step, requiring a full-blown judicial determination of necessity. Justice Binnie's application of the second step in *Vaid* illustrates the hurdles that a federal parliamentary privilege claim would need to overcome at this stage to succeed.

Applying the first step to the pleaded privileges, Justice Binnie found no conclusive Canadian authority or direct match at Westminster. In looking at the United Kingdom, Justice Binnie observed that a privilege of employee management went 'well beyond the more limited privilege' mentioned in a British parliamentary committee report.[96] Moving to the second step, Justice Binnie examined the necessity of pleaded privileges. In this step, Justice Binnie focused on the position of the plaintiff: the 'onus was on the [Speaker] to establish a privilege that immunises their conduct from the ordinary law governing the resolution of disputes with support staff such as Mr. Vaid'.[97] Justice Binnie discussed changes to the composition of parliamentary staff since 1867, which had expanded to include 'many departments and services' that employed numerous staff members 'including a locksmith, an interior designer, various curators, five carpenters, a massage therapist, two picture framers'.[98] Under its terms, the privilege put forward by the Speaker would apply to all employees, who could not all be necessary for the House to discharge its function of making legislation.[99] The scope of the privilege pleaded was

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88 *Ibid*, page 688. The level of abstraction at which a privilege is considered has a strong relationship with the degree of control exerted by the court: the more abstract, the more discretion is provided for its exercise.

89 *Ibid*, page 700.

90 *Ibid*, pages 694–95.

91 *Ibid*, page 695.

92 *Ibid*.

93 *Ibid*.

94 *Ibid*. See, e.g., *Bill of Rights 1689*, article 9 relating to privileges of free speech and proceedings in Parliament.

95 *Canada (House of Commons) v Vaid*, page 695. Justice Binnie also wrote, at page 694, that parliamentary privileges in the United Kingdom have 'evolved over time, and continues to evolve within a society, institutions and constitutional arrangements different from our own'.

96 *Ibid*, page 702. Referring to Parliament of the United Kingdom (1999). See the full analysis of the first step in *Canada (House of Commons) v Vaid* at pages 703–709.

97 *Canada (House of Commons) v Vaid*, page 676.

98 *Ibid*, page 710.

99 *Ibid*.

fatally flawed. It had been framed by the Speaker in the 'broadest possible' way, using 'all-inclusive terms'.[100] While Justice Binnie had 'no doubt' a similar privilege with a 'more modest scope' did exist, he refused to consider it on the basis that the Court was 'given no evidence' in relation to it.[101] Justice Binnie also refused to allow the Speaker to amend the pleadings to limit the scope of the privilege claim as 'it would not be fair to the respondent Vaid to substitute at this stage a description of a narrower privilege that he was not called upon to address'.[102] The Speaker's privilege was, therefore, rejected and the case was decided on its merits.[103]

What explains the Supreme Court's new interest in the scope of federal privilege claims? *Vaid* is shot through with judicial concern to decide the plaintiff's claim on the merits, in contrast with *NB Broadcasting Co*, where the position of the plaintiff would only be relevant if the privilege claim failed. Vaid was an employee in need of the law's protection. The facts weighed on the minds of the justices and influenced their scrutiny of the Speaker's privilege pleadings, which carried the potential to cause an injustice. Justice Binnie sympathises with the position of the chauffeur and expresses scepticism for the Speaker's position. He acknowledged that the plaintiff's claim would affect the intensity of judicial scrutiny. Closer scrutiny of privilege is 'especially important when ... [it] is directed against a stranger to the House'.[104] Similarly, '[c]ourts are apt to look more closely at cases in which claims of privilege have an impact on persons outside the legislative assembly'.[105] In applying the necessity test, the reviewing court must 'ensure that a claim of privilege does not immunise from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege'.[106] Justice Binnie wrote as follows:

> It should be emphasized that a finding that a particular area of parliamentary activity is covered by privilege has very significant legal consequences for non-members who claim to be injured by parliamentary conduct, including those whose reputations may suffer because of references to them in parliamentary debate, for whom the ordinary law will provide no remedy.[107]

Vaid emphasises that, without judicial control, parliamentary privilege could overtake individual rights. The role of the court is to ensure that 'legislative bodies ... do not constitute enclaves shielded from the ordinary law of the land'.[108] While parliamentary privilege is also part of the general law,[109] it limits the capacity of the courts to vindicate the plaintiff's rights and provide a remedy to a legal wrong. The court would need to limit privileges to reconcile the institutional interests of the legislature and the legal protection of individuals.

5. A New Era of Judicial Control

5.1. Introduction

Following *NB Broadcasting Co* and *Vaid*, Canadian courts scrutinised parliamentary privilege in dozens of new cases.[110] Many Canadian scholars welcomed the increased

[100] *Ibid*, page 712.

[101] *Ibid*; see also page 706.

[102] *Ibid*, page 712. This holding seemingly ignores section 5 of the *Parliament of Canada Act* (1985), which does not require pleading of privileges described in the Act. The section provides that the statutory privileges 'shall, in all courts in Canada, and by and before all judges, be taken notice of judicially'.

[103] *Canada (House of Commons) v Vaid*, page 712; for the merits decision, see pages 712–23.

[104] *Ibid*, page 675. See also Lamer CJ in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, page 350.

[105] *Canada (House of Commons) v Vaid*, page 690. Despite the claim that privileges are exclusive and can oust *Charter* rights, this is a form of balancing or proportionality that occurs at the front end.

[106] *Ibid*, page 689.

[107] *Ibid*, page 690; see also pages 691–92.

[108] *Ibid*, page 685.

[109] *Ibid*.

[110] This section reviews cases relating to parliamentary privilege from January 2015 until February 2024.

judicial scrutiny of privilege to protect individual rights and the rule of law. Evan Fox-Decent, for example, wrote that while the distinction between the scope and exercise of privilege was flawed, courts should go even further to scrutinise the *exercise* of privilege to promote a culture of public justification.[111] Warren Newman called for balancing privilege with important rights to 'ensure that the exercise of parliamentary privilege by bodies that are inherent political rather than adjudicative in nature is tempered by considerations of fundamental constitutional principle, procedural fairness and the necessities of the case'.[112] Others called for a less confrontational approach.[113] By contrast, Charles Robert and Vince MacNeil encouraged legislatures to more strongly assert their privileges.[114] They argued that privilege had been transformed from a shield against interference to a sword against rights, which might 'fuel public cynicism and damage Parliament's reputation'.[115] The judicial scrutiny of privilege had resulted in 'a parade of legal challenges, and ultimately to a court-driven modernization that is already unsatisfactory to parliamentarians'.[116] The case law was 'piecemeal and disjointed, confusing and contradictory'.[117] Robert and MacNeil called for legislatures to act proactively instead of defensively in litigation.[118] Legislatures should carry out a comprehensive review of their privileges and set them out in legislation, which 'will help ensure that privileges can withstand close judicial scrutiny. It will also serve to ensure that privileges are fair and reasonable in a modern context'.[119]

A survey of post-*Vaid* privilege jurisprudence reveals considerable uncertainty in the law and its application in relation to the constitutional status of privilege, the distinction between federal and provincial privileges, inherent as compared to legislated privileges, the application of the necessity test to legislative processes and activities, the identification of valid legislative functions, the appropriate scope of privilege, how privilege might be waived and who is entitled to plead parliamentary privilege in litigation. In 2018, the Supreme Court of Canada revisited privilege in *Chagnon v Syndicat de la fonction publique et parapublique du Québec*.[120] Three different opinions were written in the case, including a blistering dissent accusing the majority of violating the sovereignty of the Québec National Assembly. Despite the jurisprudential quagmire, one thing remains clear: *NB Broadcasting Co* and *Vaid* unleashed a new era in which judges play a central role in defining the meaning and operation of parliamentary privileges with significant consequences for the autonomy and functioning of the legislative branch.

5.2. Free Speech

One major theme in the cases is the extent to which the privilege of free speech applied to committee evidence and who was entitled to plead privilege. In *Gagliano v Canada (Attorney General)*,[121] the Federal Court considered whether committee testimony could be used to cross-examine a witness before a commission of inquiry. The Federal Court noted the 'controversy over the precise interpretation and scope' of privilege in the United Kingdom.[122] While the category of free speech could be established in law, its scope was undefined, which required the Court to assess its necessity. The Court concluded that free speech was necessary for the House's investigatory function and that its scope covered testimony to encourage witnesses to speak openly.[123] The witness

111 See Fox-Decent (2007) (discussing case law on parliamentary privilege).
112 Newman (2016), page 609.
113 See, e.g., Langlois (2009) (calling for a relational approach).
114 Robert and MacNeil (2007) (advocating for stronger parliamentary assertion of privilege).
115 *Ibid*, page 22.
116 *Ibid*, page 38.
117 *Ibid*, page 37.
118 *Ibid*, page 18.
119 *Ibid*, page 37.
120 *Chagnon v Syndicat de la fonction publique et parapublique du Québec*.
121 *Gagliano v Canada (Attorney General)*.
122 *Ibid*, paragraph 60.
123 *Ibid*, paragraph 77.

could plead privilege to prevent his statements from being used for cross-examination even if there was no risk of penal consequences.[124] In *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v Canada (Commissioner, Royal Canadian Mounted Police)*,[125] the Federal Court held that a police investigation could not be based exclusively on committee evidence, although the scope of the privilege did not prevent an investigation based on other sources of information.[126] A witness was a 'guest' of Parliament, who was entitled to plead privilege.[127] Only Parliament could initiate proceedings and discipline a witness for giving false or misleading testimony.[128] In *Guergis v Novak*,[129] the Ontario Superior Court of Justice held that a former parliamentarian could not compel information from a lawyer relating to committee evidence. To protect the investigatory function of the House, the scope of the privilege extended to transcripts, drafts of testimony and questions relating to the witness's participation.[130] In *Ontario v Rothmans Inc*,[131] the corporate tobacco defendants succeeded in having the Ontario Superior Court of Justice strike part of a healthcare costs recovery claim relating to alleged misrepresentations made by the defendants before parliamentary committees. The Court held that while 'questions may arise about the precise scope of the privilege from time to time',[132] committee evidence could not be used against a witness in a civil action and that the privilege was not negated by the malice or fraud of a witness.[133] Finally, in *R v Duffy*,[134] the Ontario Court of Justice rejected a senator's request to compel a committee to produce an internal audit report related to expense claims. The publication or production of the information did not negate the privilege.[135] According to the Court, if a category of federal privilege had been established, necessity did not need to be demonstrated.[136] Necessity was an analysis not based on evidence but legal argument.[137] Four categories of privilege were held to apply to the facts.

Despite the broad interpretation given by courts to free speech, not all privilege claims succeeded. In *Imperial Tobacco Canada ltée c Conseil québécois sur le tabac et la santé*,[138] for instance, the Québec Court of Appeal decided that the appellant's statements made to a committee were properly admitted at trial because the appellant had waived privilege by publishing the statements in a company newsletter.[139] In *Canadian Pacific Railway Company v Saskatchewan*,[140] the Saskatchewan Court of Queen's Bench admitted parliamentary records on the basis that they were unnecessary to protect legislators in discharging their functions. Free speech could not be an 'absolute bar' on the use of member speeches in civil cases.[141] In other cases, courts considered whether a criminally accused could compel the production of information held by parliamentary committees if the evidence might be needed in their

124 *Ibid*. See also *Ontario (Premier) v Canada (Commissioner of the Public Order Emergency Commission)* in which the Federal Court of Canada held that a member of the Ontario provincial legislature could exercise the privilege of testimonial immunity to refuse to appear as a witness before a commission during a legislative session and that necessity did not need to be demonstrated for an established privilege.

125 *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v Canada (Commissioner, Royal Canadian Mounted Police)*.

126 *Ibid*, paragraph 75.

127 *Ibid*, paragraph 63.

128 *Ibid*, paragraph 65.

129 *Guergis v Novak*.

130 *Ibid*, paragraph 75.

131 *Ontario v Rothmans Inc*.

132 *Ibid*, paragraph 20.

133 *Ibid*, paragraph 14.

134 *R v Duffy* (2015).

135 *Ibid*, paragraph 117.

136 *Ibid*, paragraph 63.

137 *Ibid*, paragraph 105.

138 *Imperial Tobacco Canada ltée c Conseil québécois sur le tabac et la santé*.

139 *Ibid*, paragraph 1218.

140 *Canadian Pacific Railway Company v Saskatchewan*.

141 *Ibid*, paragraph 96.

defence. In *Lavigne v R*,[142] the Ontario Superior Court of Justice held that the presumption of innocence might trump privilege in an appropriate case if the innocence of the accused was at stake. To get around the holding in *NB Broadcasting Co* that the *Charter* could not negate a constitutionally entrenched privilege, the Court held that the presumption of innocence was not only a *Charter* right but was also 'a principle of long standing'.[143] In *R v Basi*,[144] the criminally accused sought access to documents held by an officer of the provincial legislature. While the scope of the privilege extended to certain documents held by the officer, the privilege would not allow information to be withheld if there was a risk of convicting an innocent person.[145] Documents tending to show the accused's innocence did not fall within the scope of the privilege and the Court could compel their disclosure.[146]

5.3. Internal Processes

Control of a legislature's internal processes is also a major theme in the case law. In *Michaud v Québec (National Assembly)*,[147] the Superior Court of Québec held that a resolution of the Québec National Assembly condemning the remarks of a witness before a commission of inquiry was protected by the privilege of holding the government to account.[148] Further, the Court could not compel the Assembly to hear the plaintiff's petition under the relevant legislation, as this would interfere with its internal processes.[149] In upholding the Court's judgment, the Court of Appeal agreed that the legislature had constitutional functions going beyond legislating and holding the government to account.[150] In *Knopf v Canada (House of Commons)*,[151] a parliamentary committee refused to circulate the supporting documents of a witness because they were not available in both official languages. The plaintiff's *Charter* and statutory rights claims were dismissed by the Federal Court as the committee's decision fell within the scope of the privilege to establish rules of procedure and conduct business free from interference.[152] The control of internal proceedings, including the use of documents, was necessary for deliberative functions.[153] Similarly in *Northwest Territories (Attorney General) v Fédération Franco-Ténoise*,[154] the Northwest Territories Court of Appeal held that it could not review the Assembly's decision to publish debates only in English despite a statutory requirement for publication in both English and French. A statute of general application could not abrogate privileges to control proceedings and internal procedures.[155] However, in *Pankiw v Canada (Human Rights Commission)*,[156] the Federal Court held that a member did not hold privilege over a pamphlet that he distributed to constituents. The communication was not a proceeding in Parliament or related to legislative functions.[157] Extending privilege to communications with voters could not be justified by democracy, separation of powers or free speech.[158] The member was subject to the jurisdiction of a human rights tribunal in relation to the pamphlet's contents. Similarly,

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142 *Lavigne v R*. See also the related earlier decision in *Lavigne v Ontario (Attorney General)*, where the Ontario Superior Court of Justice held that the privileges of free speech and control of proceedings or debate were established and should not be tested for necessity (paragraph 29). Courts should not determine how a privilege is to be applied.

143 *Lavigne v R*, paragraph 39.

144 *R v Basi*.

145 *Ibid*, paragraph 57.

146 *Ibid*, paragraph 60.

147 *Michaud v Québec (National Assembly)*.

148 *Ibid*, paragraph 58.

149 *Ibid*, paragraph 74.

150 *Michaud c Bissonnette*.

151 *Knopf v Canada (House of Commons)*.

152 *Ibid*, paragraphs 49–51.

153 *Ibid*, paragraph 56.

154 *Northwest Territories (Attorney General) v Fédération Franco-Ténoise*.

155 *Ibid*, paragraph 287. See Robert (2011) (criticising the Court's judgment).

156 *Pankiw v Canada (Human Rights Commission)*.

157 *Ibid*, paragraph 92.

158 *Ibid*, paragraph 93.

in *Northwest Organics, Limited Partnership v Roest*,[159] the Supreme Court of British Columbia held that information communicated by constituents to a member was not protected by privilege as they did not relate to a legislative function.[160] While it was a wise practice for a member to communicate with voters, it was not necessary for legislating.[161] A member should not become an advocate in promoting one group of constituents.[162] In *Reference re the Final Report of the Electoral Boundaries Commission*,[163] the Nova Scotia Court of Appeal held that a direction by the Attorney General to an electoral commission for it to comply with its terms of reference without taking *Charter* rights into account was not protected by privilege. The direction did not fall within the scope of an internal matter to the legislature and was not necessary to legislative functions as it blemished the dignity and weakened the efficacy of the legislature.[164] In *Laurentian University of Sudbury*,[165] the Ontario Superior Court of Justice reviewed a Speaker's warrant that compelled the disclosure of information from a university. The Court stayed the warrant in relation to documents subject to judicial restrictions in a separate restructuring proceeding predating the warrant. Finally, in *Singh v Senate of Canada*,[166] the Federal Public Sector Labour Relations Board rejected a claim of privilege in relation to emails between senators in the context of a labour grievance. The Board held that the Senate failed to 'authoritatively establish that the Subcommittee members' emails flowed from a legislative mandate within the Senate'.[167] The Senate failed to establish a proper scope of the privilege in relation to emails exchanged between Senators[168] and did not 'attempt to explain' the necessity of the privilege to the Senate's constitutional functions.[169] The Senate was ordered to produce the relevant emails.[170]

Questions also arose in relation to the enactment of legislation with mixed outcomes. In *Joseph Power v Attorney General of Canada*,[171] the New Brunswick Court of Queen's Bench refused to strike out a civil claim against the federal Attorney General. In that case, the plaintiff sought *Charter* damages for a statute that was later held to be unconstitutional. The plaintiff alleged that the government knew that the law was unconstitutional or had proposed the law in bad faith or with wilful blindness, which caused him damage. The Court held that there was no privilege in relation to the enactment of legislation and that an award of damages was possible because it would not expose individual legislators to liability.[172] In contrast, in *Mikisew Cree First Nation v Canada (Governor General in Council)*,[173] the Supreme Court of Canada rejected a challenge to the legislative process by a First Nations community. In that case, Parliament enacted environmental protection legislation without consultation. The legislation could have affected the Mikisew Cree First Nation's treaty rights. A majority of the Supreme Court held that the duty to consult could not be applied to legislative action and that courts should not scrutinise the lawmaking process, including the development of legislation by ministers.[174] Among other principles, the privilege of controlling debates and proceedings would prevent courts from imposing procedural constraints on the legislative process.[175] Imposing such requirements would be a

[159] *Northwest Organics, Limited Partnership v Roest*.
[160] *Ibid*, paragraph 34.
[161] *Ibid*, paragraphs 34–35.
[162] *Ibid*, paragraph 35.
[163] *Reference re the Final Report of the Electoral Boundaries Commission*.
[164] *Ibid*, paragraph 122.
[165] *Laurentian University of Sudbury*.
[166] *Singh v Senate of Canada*.
[167] *Ibid*, paragraph 45.
[168] *Ibid*, paragraph 60.
[169] *Ibid*, paragraph 62.
[170] *Ibid*, paragraph 67.
[171] *Joseph Power v Attorney General of Canada*.
[172] *Ibid*, paragraph 47.
[173] *Mikisew Cree First Nation v Canada (Governor General in Council)*.
[174] *Ibid*, paragraph 50.
[175] *Ibid*, paragraph 37.

significant incursion into the sphere of the legislature.[176] Privilege protected the formulation and introduction of bills from judicial review and was an unfettered freedom.[177] Courts were ill-equipped to respond to the procedural complexities of the legislative process.[178]

5.4. Disciplining and Regulating Members

Courts decided numerous challenges brought by members or former members that related to the privileges of disciplining and regulating members. In *Villeneuve v Legislative Assembly*,[179] a member was alleged to have made false statements in relation to his residency, entitling him to an allowance. After his defeat in the next election, the legislature's Board of Management withheld part of a transition allowance to offset the benefits it had previously paid. The Northwest Territories Supreme Court observed that it was unclear whether the scope of internal administration extended to former members.[180] In applying necessity, the Court held that the privilege was limited to a sphere of activity where judicial scrutiny interfered with the Assembly's work.[181] The Court held that the Board's work related to an internal legislative function and that its decision focused on a member's service and compensation.[182] The decision was not subject to judicial review.[183] In *Boulerice v Canada (Attorney General)*,[184] the Federal Court held that members could challenge a decision of the Board of Internal Economy that found them to have misused parliamentary resources. The Board was not fundamental to democracy, and judicial review would not interfere with the House or prevent it from carrying out its functions.[185] In overturning the decision, the Federal Court of Appeal[186] held that the trial judge should not have applied necessity when the decision fell within the scope of an established federal privilege.[187] The Board acted on behalf of the House, and its decision fell within the scope of three privileges.[188] An injustice in the application of the rules was a matter for the House to resolve.[189] Judicial review would intrude into the internal functions of the House and increase inefficiency.[190] Further, 'allowing the courts to opine on what Parliamentarians need in order to perform their core parliamentary functions would also impact on the dignity and efficiency of the House by demeaning the role of Parliamentarians'.[191] In *Guergis v Novak*,[192] the Ontario Superior Court of Justice held that it could not review a decision by the Prime Minister to dismiss a member from the cabinet and expel her from caucus after receiving allegations about criminal misconduct. The Prime Minister was immune from review when carrying out functions related to his legislative responsibility, and alleged tortious conduct did not negate the privilege.[193] In *Fletcher v The Government of Manitoba*,[194] a member of the legislature was expelled from caucus and was unable to switch parties due to floor-crossing legislation. The member's *Charter* claim failed as the legislation promoted the dignity and integrity of the legislature.[195] The member could still speak in the House as an independent

176 *Ibid*, paragraph 38.
177 *Ibid*, paragraph 122 per Brown J concurring.
178 *Ibid*, paragraph 164 per Moldaver, Côté, Rowe JJ concurring.
179 *Villeneuve v Legislative Assembly*.
180 *Ibid*, paragraph 24.
181 *Ibid*, paragraph 28.
182 *Ibid*, paragraph 34.
183 *Ibid*, paragraph 55. See also *Filion c Chagnon*.
184 *Boulerice v Canada (Attorney General)*.
185 *Ibid*, paragraph 22.
186 *Canada (Board of Internal Economy) v Boulerice*. See also St-Hilaire (2020) (criticising the Court's judgment).
187 *Canada (Board of Internal Economy) v Boulerice*, paragraph 54.
188 *Ibid*, paragraph 66.
189 *Ibid*, paragraph 55.
190 *Ibid*, paragraph 99.
191 *Ibid*, paragraph 126.
192 *Guergis v Novak*.
193 *Ibid*, paragraph 50.
194 *Fletcher v The Government of Manitoba*.
195 *Ibid*, paragraph 80.

member when recognised by the Speaker.[196] In *Duffy v Senate of Canada*,[197] a senator sued the Senate for suspending him in response to alleged improper expense claims, for which he was later cleared in a criminal trial.[198] The Ontario Superior Court of Justice dismissed the claim, holding that four different categories of privilege applied and did not need to be further tested by necessity.[199] The Ontario Court of Appeal upheld the decision.[200] It held that the rule of law did not permit courts to scrutinise the legality of privileged conduct and that the plaintiff had not alleged an 'ordinary crime' in the Senate that might give the Court jurisdiction.[201] Federal privileges, if established, did not need to be tested for necessity, unlike the inherent privileges of provincial legislatures.[202] In *CUPE v HMQ*,[203] the Ontario Superior Court dismissed a claim alleging improper purposes for a governmental decision because of a conflict of interest. The matter fell within the privilege of regulating a member's conduct and discipline, and conflict of interest laws were part of the privilege.[204] In *McIver v Alberta (Ethics Commissioner)*,[205] a member challenged a finding that he had breached conflict rules for questions he asked in the House. The Alberta Court of Queen's Bench dismissed the claim on the basis that conflict rules were part of regulating the standards, conduct, and speech of members and disciplining members. The privileges were necessary for legislative functions.[206] The legislature could limit the free speech of members as part of its privileges.[207] In *Collins v Legislative Assembly of New Brunswick*,[208] the New Brunswick Court of Queen's Bench held that the Speaker could not make a claim for alleged harms caused by officers of the legislature as the matter related to three privileges, which continued to be necessary to legislative functions.[209] Finally, in *Saunders v Nunatsiavut Assembly*,[210] the Supreme Court of Newfoundland and Labrador decided that an Inuit territorial legislative assembly had similar privileges to those of provincial legislatures.[211] The plaintiff challenged her removal from the assembly following disciplinary proceedings. While a privilege to regulate internal affairs was established, the Court required the pleaded privilege's scope to cover 'the factual circumstances' relating to the removal.[212] After reviewing the specific behaviour disciplined, the particular sanction imposed, and whether the disciplinary process complied with the relevant code of conduct, the Court concluded that the privilege applied to the plaintiff's removal.[213]

5.5. Officers of the Legislature

In relation to officers of the legislature, the Supreme Court of Newfoundland and Labrador held in *March v Hodder*[214] that a resolution terminating the plaintiff's appointment to a statutory office could not be reviewed. Debating resolutions was a core deliberative

196 *Ibid*, paragraph 72.
197 *Duffy v Senate of Canada*.
198 *R v Duffy* (2016).
199 *Duffy v Senate of Canada*, paragraphs 38–41.
200 *Duffy v Canada (Senate)*.
201 *Ibid*, paragraph 80.
202 *Ibid*, paragraph 99.
203 *CUPE v HMQ*.
204 *Ibid*, paragraph 56.
205 *McIver v Alberta (Ethics Commissioner)*.
206 *Ibid*, paragraph 45.
207 *Ibid*, paragraph 51.
208 *Collins v Legislative Assembly of New Brunswick*.
209 *Ibid*, paragraph 56.
210 *Saunders v Nunatsiavut Assembly*.
211 *Ibid*, paragraphs 56, 67.
212 *Ibid*, paragraph 79.
213 *Ibid*, paragraphs 145–48. See also the companion decisions of the Supreme Court of Newfoundland and Labrador in *Joyce v Gambin-Walsh*; *Kirby v Chaulk* (examining the scope of the privileges to discipline members and freedom of speech in relation to disciplinary processes for members of the provincial legislature and various claims for damages including breach of statutory duty, malicious prosecution, misfeasance in public office and defamation).
214 *March v Hodder*.

function, and judicial review would intrude on the House's dignity and efficiency.[215] Similarly, in *Marin v Office of the Ombudsman*,[216] the Ontario Superior Court of Justice held that the former ombudsman could not make a wrongful dismissal claim against the legislature. Judicial review would involve questioning internal processes and procedures of the House and its role in holding the government to account through a parliamentary officer.[217] However, in *McBreairty v Information and Privacy Commissioner*,[218] the Supreme Court of Newfoundland and Labrador reviewed the Information and Privacy Commissioner's decision to refuse further applications from the plaintiffs. The relevant functions of the Commissioner were not necessary to legislative functions.[219] Finally, in *Turpel-Lafond v British Columbia*,[220] the Supreme Court of British Columbia held that a contractual claim by a former legislative officer could be reviewed as it did not fall within an established category of privilege and that the 'privilege asserted in this case is cast too broadly'.[221] Judicial review would not interfere with legislative functions or impair the dignity of the House.[222]

5.6. Strangers to the House

In relation to strangers, the Québec Court of Appeal held in *Singh c Attorney General of Québec*[223] that the Québec National Assembly could regulate access to the parliamentary precinct by refusing access to persons in possession of a kirpan (a small symbolic metal knife). The Sikh plaintiffs could not seek judicial review of the decision, even on *Charter* grounds. The exclusion of strangers was well-established, and the Court did not need to consider the application of necessity as a 'rigorous standard of justification that limits parliamentary privilege'.[224] While privilege evolved over time according to its necessity, its necessity was not an independent basis to challenge the exercise of privilege.[225] The privilege could not be limited because of *Charter* rights, even if a claim on religious discrimination would otherwise be likely to succeed.[226]

5.7. Chagnon and Security Management

In 2018, the Supreme Court of Canada released its judgment in *Chagnon*. In its reasons, the majority further curtailed the scope of parliamentary privilege through its application of the necessity doctrine. The judgment, however, revealed a significant fault line among the justices. On the facts, the President of the Québec National Assembly dismissed staff for inappropriately using security cameras. The union brought a claim before a labour arbitrator. The question before the Supreme Court was whether the President's decision was privileged or whether it could be reviewed in the arbitration. Writing for the majority, Justice Karakatsanis held that privilege could not immunise the President's decision from review by the arbitrator. While provincial legislatures enjoyed inherent privileges, their existence and scope had to be 'strictly anchored' to their rationale.[227] The Court would decide whether a category of privilege existed and delimit its scope.[228] Scope would extend only as far as necessary to protect the constitutional functions of the legislature,

215 *Ibid*, paragraph 64.
216 *Marin v Office of the Ombudsman*.
217 *Ibid*, paragraph 72.
218 *McBreairty v Information and Privacy Commissioner*.
219 *Ibid*, paragraph 39.
220 *Turpel-Lafond v British Columbia*.
221 *Ibid*, paragraph 67.
222 *Ibid*, paragraph 66.
223 *Singh c Attorney General of Québec*.
224 *Ibid*, paragraph 14.
225 *Ibid*, paragraph 24.
226 *Ibid*, paragraph 26.
227 *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, paragraph 2.
228 *Ibid*, paragraphs 17, 27, 32.

although defining the scope of a privilege would not be a straightforward task.[229] Because courts cannot review the exercise of a privilege, even on *Charter* grounds, necessity was to be applied strictly: '[t]he necessity test is stringent because . . . parliamentary privilege has the potential to shield parliamentary decision-making from judicial oversight'.[230] In the *Charter* context, a purposive approach should be taken to privilege to 'reconcile' these aspects of the Constitution.[231] A privilege must also continue to be necessary in the contemporary context.[232] Justice Karakatsanis held that a category of privilege of managing some employees did not need to be decided on the facts because the President's decision would fall outside its scope.[233] In future cases, privilege should be framed in narrower terms that relate to the specific functions of certain employees, which would be more straightforward for courts to assess.[234] Here, the President had failed to demonstrate the necessity of managing the security guards in relation to the Assembly's functions.[235] While security guards performed important tasks connected to legislative functions, this connection was insufficient to ground a parliamentary privilege claim.[236] Instead, the President would need to demonstrate that immunity from arbitration was necessary to the autonomy required by the Assembly to carry out its essential functions.[237] The guards were not members of the Assembly and were in need of labour protections.[238] The *Charter* right to freedom of association demonstrated the importance of labour law.[239] The dispute could be resolved under ordinary law, which would not limit the independence of the Assembly or its ability to carry out its work with dignity and efficiency.[240] Further, the delegation by the President to the guards of the privilege of excluding strangers was insufficient to prevent the review of their dismissal.[241] The scope of excluding strangers was not so broad that it could encompass employment decisions of the security guards.[242]

In dissent, Justices Côté and Brown criticised the majority for rejecting the privileges. Their opinion opened with a powerful account of a 1984 armed attack on the Assembly in which three persons were killed and a further 13 persons injured.[243] The attack underscored the necessity of security decisions for the preservation of legislative functions.[244] According to Justices Côté and Brown, privilege was not an exception to the rule of law but an important part of the constitutional architecture.[245] Historically, parliamentary privileges 'ensured the development of a model in which the various branches acquired some independence from one another'.[246] *Charter* rights should not be brought into the necessity analysis to limit the scope of the privilege, which would have the effect of subordinating privilege to the *Charter*: '. . . the necessity test is entirely unrelated to *Charter* rights'.[247] A reviewing court should not engage in close scrutiny of every privilege put forward. Rather, the court had a narrow jurisdiction to determine the existence and scope of a pleaded privilege.[248] The necessity analysis would determine the existence and scope

229 *Ibid*, paragraph 32.
230 *Ibid*, paragraph 42.
231 *Ibid*, paragraph 28.
232 *Ibid*, paragraph 31.
233 *Ibid*, paragraph 36.
234 *Ibid*, paragraph 37.
235 *Ibid*, paragraphs 44, 51, 56.
236 *Ibid*, paragraph 44.
237 *Ibid*, paragraph 41.
238 *Ibid*, paragraphs 42, 44, 56.
239 *Ibid*, paragraph 42.
240 *Ibid*, paragraphs 44, 51, 56.
241 *Ibid*, paragraph 56.
242 *Ibid*, paragraph 56.
243 *Ibid*, paragraphs 76–77.
244 *Ibid*, paragraph 78.
245 *Ibid*, paragraphs 79, 149.
246 *Ibid*, paragraphs 164.
247 *Ibid*, paragraph 147.
248 *Ibid*, paragraph 127.

of the privilege and the sphere of activity excluded from ordinary law applied by courts.[249] Courts must give considerable deference to the Assembly on the scope of the autonomy it considers necessary to fulfil its functions.[250] Privilege should not be 'carved up' to find a specific decision or exercise of privilege that is not covered.[251] It would be unworkable and unrealistic to ask the President to frame privilege in narrower terms that relate to only certain employee tasks. Once a category of privilege and the sphere of activity within the category were ascertained, the inquiry would end. There was no need to further consider whether the arbitration itself interfered with the Assembly's functions.[252] The majority's approach 'could always justify interference by a court or tribunal'.[253] Justices Côté and Brown wrote that the majority inappropriately reviewed the President's duties and caused the Assembly to lose control over its security decisions.[254] Security decisions were essential to the Assembly carrying out its constitutional functions and are a sphere of activity within a privilege of management.[255] The President was responsible for security and must be free to make decisions deemed appropriate, including the tasks performed by security guards. The privilege of excluding strangers also applied as the guards exercised this privilege on the President's behalf.[256] Because of this delegation, the guards' dismissal was the 'ultimate exercise' of the management privilege.[257] The President could not have courts or arbitrators dictating security decisions and requiring him to employ persons that were no longer trusted.[258]

5.8. Post-Chagnon

Following the Supreme Court's ruling in *Chagnon*, courts sought to distinguish the majority holding in relation to federal privilege. In *Duffy v Canada (Senate)*,[259] for example, the Ontario Court of Appeal reiterated constitutional differences between federal and provincial privileges. According to the unanimous bench, *Chagnon* focused on provincial inherent privileges, and the majority did not change *Vaid*'s approach to federal privilege.[260] Unlike provincial legislatures, Parliament was constitutionally authorised to define its privileges. Federal privilege did not need to be tested with necessity if the category and scope of a privilege could be established. In such a case, necessity was already decided and was 'beyond question'.[261] When a *Charter* claim fell within a category of privilege, it was for Parliament to respond to an alleged breach.[262] Courts should not balance privileges against *Charter* rights. Similarly, in *Canada (Board of Internal Economy) v Boulerice*,[263] the Federal Court of Appeal held that the trial judge was incorrect to apply the necessity test to a federal privilege when the activity fell within the scope of an established category.[264] *Chagnon* did not change the *Vaid* approach to federal privileges as it relates to provincial inherent privileges.[265] Necessity could not be revisited for established categories of federal privilege as it would involve the Court intruding into the exercise of a privilege and the

249 *Ibid*.
250 *Ibid*.
251 *Ibid*, paragraphs 134–35.
252 *Ibid*, paragraph 143.
253 *Ibid*, paragraph 144.
254 *Ibid*, paragraph 145.
255 *Ibid*, paragraph 139.
256 *Ibid*, paragraph 137.
257 *Ibid*, paragraph 140.
258 *Ibid*, paragraphs 141–42.
259 *Duffy v Canada (Senate)*.
260 *Ibid*, paragraphs 104–105.
261 *Ibid*, paragraph 99.
262 *Ibid*, paragraph 110.
263 *Canada (Board of Internal Economy) v Boulerice*.
264 *Ibid*, paragraph 54. The Federal Court of Appeal held that a privilege would be established if recognised 'in its own right' or had been previously accepted as necessary: paragraph 63.
265 *Ibid*, paragraph 74.

business of the legislature.[266] It was for Parliament to respond to an injustice in relation to an activity covered by privilege.

Two further post-*Chagnon* cases merit mention. In *Alford v Canada (Attorney General)*,[267] the Ontario Superior Court of Justice ruled as unconstitutional a federal statute removing privilege from members of an intelligence committee in relation to the disclosure of information. According to the Court's reasoning, the constitutional authorisation for the federal Parliament to define its privileges only permitted it to *expand* its privileges but not diminish them.[268] An abrogation or restriction of federal privilege, like in the relevant statute, would require a constitutional amendment. Finally, in *British Columbia (Legislative Assembly) v Illi*,[269] the Supreme Court of British Columbia held that privilege did not exclude 'special constables' from the application of the provincial labour code. The privilege was pleaded in broad terms that could not be accepted as they would 'exclude the entire labour relations regime'.[270] Labour relations rule incorporated protections to give effect to *Charter* rights, which would be undermined by privilege.[271] Privilege had to be reconciled with *Charter* rights.[272] Excluding labour rules was not necessary for the legislature to fulfil its constitutional functions.[273]

6. The Problems of Judicialised Privilege and How to Preserve Legislative Autonomy

The judicialisation of parliamentary privilege, as seen in Canada, is problematic for two reasons. First, it is misguided under a conception of the separation of powers that seeks to foster mutual respect among the branches of government. This more cooperative understanding of this bedrock principle posits that each institution is not completely independent from the others but has a legitimate role to play in a shared system of governance in relation to its constitutional functions. It is also a conception endorsed by the Supreme Court of Canada, such as in its judgment in *Ontario v Criminal Lawyers' Association of Ontario*,[274] where the majority held that each branch of government had 'core competencies' and 'distinct institutional capacities' that 'play critical and complementary roles in our constitutional democracy'.[275] Because of their different functions, 'each branch will be unable to fulfill its role if it is unduly interfered with by the others'.[276] The judicialisation of parliamentary privilege cuts against the grain of this idea by second-guessing and undermining legislative functions instead of recognising and respecting them. It assumes that legislative processes require judicial review and regulation to protect individual rights, which appears to be based on an inherent mistrust of the legislative institution and suspicions about the motives of its actors. While courts play an important function by providing a forum for aggrieved persons to seek redress for legal wrongs and promote the rule of law by enforcing constitutional and legal limits, the exercise of a recognised category of privilege appropriately limits its role. Close judicial scrutiny of parliamentary privilege amounts to judicial overreach that erodes the legislature's control over its own functions, which is needed for it to confidently fulfil its legislative role. The Canadian experience makes clear that cases involving questions of privilege are not only about an individual plaintiff's claim. Such cases impact institutional functions and implicate the nature of the relationship between courts and the legislature. When judges adjudicate privilege, they shape the

266 *Ibid*, paragraphs 125–26.
267 *Alford v Canada (Attorney General)*.
268 *Ibid*, paragraph 47.
269 *British Columbia (Legislative Assembly) v Illi*.
270 *Ibid*, paragraph 61.
271 *Ibid*, paragraph 65.
272 *Ibid*, paragraph 87.
273 *Ibid*, paragraph 66.
274 *Ontario v Criminal Lawyers' Association of Ontario*.
275 *Ibid*, paragraphs 28–29. See also Foran (2022), page 599 (discussing the benefits of a collaborative conception of the separation of powers for rights protection).
276 *Ontario v Criminal Lawyers' Association of Ontario*, paragraph 29. See also *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, page 388.

constitutional architecture relating to legislative autonomy and the balance of state power. Courts should, therefore, approach privilege claims not only with the plaintiff's rights in mind but with a sense of respectful deference to avoid undermining the proper functioning of the legislature as a representative assembly tasked with formulating legislation.

Second, courts are ill-placed to decide which processes and activities are needed for the legislature to carry out its work. While courts are rightly concerned about harsh or unjust outcomes occasioned by the use of privilege to end litigation and its potential use to shield parliamentarians from legal accountability for actions that infringe rights, the judicialisation of parliamentary privilege gives courts an outsized role in regulating the legislative function. From its outside view, the court holds limited knowledge of the lawmaking process and the exigencies of legislative business. It might even be described as discourteous for a court to overrule a parliamentary determination of what is needed to protect its work. However, it is understandable. By design, the court is highly attuned to the perspective of an individual plaintiff and the vindication of their legal rights. This orientation contrasts with that of the legislature, which is tasked with formulating broadly applicable legislation to advance policy goals in the public interest. As noted by Robert and MacNeil, Canadian courts have transformed the conception of privilege as a shield against interference in the legislative process to a sword that cuts down individual rights.[277] When deciding a contest between parliament's more abstract institutional needs and a wronged plaintiff, a judge is unlikely to strike a balance that ensures the integrity of the legislative institution. The Canadian approach is instructive. It demonstrates that when judges closely scrutinise parliamentary privilege, the focus on individual rights, combined with the precedential effect of court rulings, results in the hollowing out of parliamentary privilege. It is a case of death by a thousand cuts. By pronouncing upon the necessity of a narrowly defined scope of privilege pleaded by the legislature in relation to the details of the plaintiff's claim, the reviewing court can take cover in the act of reviewing the exercise of privilege.[278] It doing so, it cuts down the scope of the rights, powers and protections of the legislature, driving an emaciated version of privilege through concerns of fairness and justice to the individual plaintiff.

It is also worth noting that *NB Broadcasting* and *Vaid* represent a sort of paradox. At first glance, the judgments appear to protect legislatures by constitutionalising their privileges. However, this elevation of privilege meant that limits needed to be drawn by courts to reconcile privilege with constitutional rights. Such decisions cast the court in the role of determining the meaning, scope and operation of privilege, further incentivising litigation to test its bounds. In Canada, the erosion of privilege has diminished the legislature's autonomy and sapped its confidence. In a 2015 report, a federal Senate committee observed that there was an 'opportunity to take a proactive approach before there is pressure to do so as a result of an ill-considered court decision'.[279] Parliament should be 'proactive in defining what privileges are necessary to ensure that the courts will not define privilege in ways that may undermine the functioning of Parliament'.[280] According to the Committee, 'the time is ripe to proactively re-evaluate and reconsider parliamentary privilege'.[281] No action was taken. In a later report,[282] the Committee was more cautious.[283] It recommended

277 Robert and MacNeil (2007), page 22.

278 The level of abstraction at which privileges are conceived by the court plays a key role in the ultimate success of the privilege claim: the more detailed the scrutiny, the less likely privilege will be upheld. In *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, the majority started by considering the plaintiffs' claims, drawing privilege into the details of a labour dispute and seeking to balance privilege against labour rights to ensure proportionality. While cases might involve sympathetic plaintiffs, it is worth reiterating that the plaintiff is not the source of interference with legislative functions. It is rather the court's adjudication of the plaintiff's claim and the possible remedy provided through the judicial process. Not all is lost when the court ceases to have jurisdiction, however, as the matter falls exclusively within the *lex parliamenti*.

279 Senate of Canada (2015), page 4, footnote 14.

280 *Ibid*, page 23.

281 *Ibid*, page 4 (footnote omitted).

282 Senate of Canada (2019).

283 *Ibid*, page 16.

that a joint committee be struck to 'review recent judicial decisions', looking to courts for guidance on its privileges.[284]

While Canadian parliamentary privilege operates within a judicialised model, the parliaments of other Westminster jurisdictions should learn from the experience.[285] They should be on the front foot to reduce the risk of courts interfering with their work and hollowing out their privileges. Parliaments should address the reasons *why* courts might be tempted to regulate their privileges. Their responses must make clear the constitutional importance of their work. Moreover, they should not assert privilege on the basis that they are entirely independent from the other branches and a law unto themselves. Instead, parliaments should advance a cooperative notion of the separation of powers that values the unique role that each branch of government has to play in a model of shared governance. Parliaments should highlight their distinct functions and the contributions they make through legislative processes and activities. They must also consider the potential unfairness caused to individuals by the exercise of their privileges. While privilege excludes the jurisdiction of the court from adjudicating a claim to protect the institutional needs of the legislature, it also brings a certain responsibility to the legislature to ensure the appropriate use of its privilege, particularly when it will have an impact on the rights of individuals outside the parliament. Guidelines should be developed for the appropriate exercise of privilege. In relation to potentially defamatory statements, standing rules should establish protocols for members and committee witnesses, including notice, private sessions and opportunities for third parties to reply to adverse information provided about them. Public complaint mechanisms should be established to promote the appropriate use of privilege to further legislative functions, with sanctions available for its misuse. Parliament should establish clear rules to regulate the conduct of members and internal disciplinary processes to enforce those rules. It should consider whether to legislatively extend the application of ordinary law to certain areas otherwise covered by privilege, such as labour and employment rules and associated dispute-resolution processes. To promote transparency, the use of privilege should be reported on by a committee and regularly tabled in parliament. Greater transparency will serve accountability and inform further reforms by making parliament confront the use of its privileges, with ultimate accountability at the ballot box.[286] By remaining proactive, the legislature can both protect its autonomy and properly fulfil its constitutional role as lawmaker-in-chief.

7. Conclusions

While Canadian jurisprudence is frequently held up as a model to be followed on the international stage, in the case of parliamentary privilege, it is a model that should be avoided. The judicialisation of privilege has shifted considerable power away from the legislature and to courts, with judges now supervising legislative functions and regulating parliamentary work to a degree not seen elsewhere. This incursion by the judiciary into the legislative domain has contributed to a weakening of the Canadian Parliament's autonomy and vitality as the democratically elected lawmaker in chief. It has also incentivised litigation to challenge legislative processes and activities before courts that prioritise individual rights over institutional needs, creating a downward spiral of increasing judicial regulation and control with each new case. The Canadian jurisprudence tells a compelling cautionary tale and serves as a warning to other jurisdictions that might gradually adopt a Canadian-style approach to parliamentary privilege. To avoid a similar outcome, courts should be cautious in using Canadian privilege jurisprudence, while legislatures should remain proactive to safeguard their autonomy and vitality.

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284 *Ibid*, page 21.

285 Courts in other jurisdictions should also treat Canadian case law relating to parliamentary privilege cautiously because of the different contexts in which these decisions have been made.

286 *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, paragraph 24 ('while legislative assemblies are not accountable to the courts for the ways in which they exercise their parliamentary privileges, they remain accountable to the electorate', citing Chaplin (2008)).

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