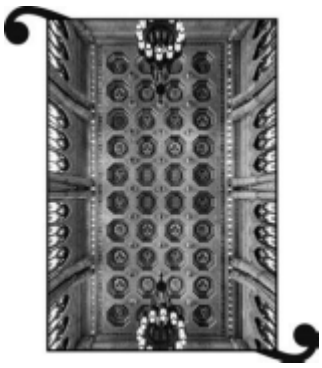
CHAPTER 11

Privileges and Immunities



The origins of parliamentary privilege extend back to the earliest days of the English Parliament when its main purpose was to prevent the sovereign from interfering in the work of Parliament. Today, however, there is discussion on the scope and application of parliamentary privilege and even its evolution. This chapter provides some historical background by identifying key milestones in the development of privilege in the United Kingdom and Canada (Part I), and serves as a guide to raising and resolving questions of privilege in the Senate (Part II).

PART I – DEFINITION AND HISTORICAL OVERVIEW OF PRIVILEGE

1. PRIVILEGE DEFINED

The origins of parliamentary privilege extend back to the earliest days of the English Parliament; however, its evolution cannot easily be traced in a straight line. The scope of privilege and its acceptance over the centuries have been subjected to the vagaries of political events and circumstances thus making it difficult to establish the historical foundations of parliamentary privilege.[1] Sir William Blackstone stated that "[p]rivilege of Parliament was principally established in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the Crown."[2] He also concluded that the list of privileges is necessarily incomplete to accommodate any possible violations of the rights of Parliament: "The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite."[3] As a result, some of the privileges that have been claimed or contested in centuries past are obsolete for all practical purposes today and others have evolved to adapt to new circumstances. Despite the changed social and political circumstances of the modern era, parliamentary privilege remains an integral part of our parliamentary system.

The standard definition of parliamentary privilege, which is still used today, was first formulated in 1946, in the 14th edition of the *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* of Erskine May, and reads as follows:

> Parliamentary privilege is the sum of certain rights enjoyed by each House collectively … and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Some privileges rest solely on the law and custom of Parliament, while others have been defined by statute.[4]

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1 For a detailed discussion on the origins and evolution of parliamentary privilege, see Lieberman.
2 Blackstone, p. 132.
3 Blackstone, p. 132.
4 Erskine May, 24th ed., p. 203.

The term "privilege," in this context, does not refer to a special benefit, advantage or arrangement given to Parliament and its members. Rather, parliamentary privilege is "an immunity from the ordinary law which is recognised by the law as a right of the Houses and their members."[5]

In a 1996 report, the Australian Senate Committee of Privileges described parliamentary privilege in the following way:

> The privileges of Parliament are immunities conferred in order to ensure that the duties of members as representatives of their constituents may be carried out without fear of intimidation or punishment, and without improper impediment. These immunities, established as part of the common law and recognised in statutes such as the Bill of Rights of 1688, are limited in number and effect. They relate only to those matters which have come to be recognised as crucial to the operation of a fearless Parliament on behalf of the people.... [A] privilege of Parliament is more properly called an immunity from the operation of certain laws, which are otherwise unduly restrictive on the proper performance of the duties of members of Parliament.[6]

The purpose of privilege is to enable Parliament and, by extension, its members to fulfill their functions without undue interference or obstruction. Privilege belongs properly to the assembly or house as a collective. Individual members can only claim privilege if "any denial of their rights, or threat made to them, would impede the functioning of the House."[7] In addition, members cannot claim any privileges, rights or immunities that are unrelated to their functions in the house.[8]

Privilege covers parliamentary proceedings only. However, the concept of "parliamentary proceedings" has never been clearly defined and its exact scope is, to some extent, still open.[9] Since there is no statutory definition, the determination of whether something constitutes a proceeding in Parliament is left to Parliament itself and to the courts.[10] Erskine May provides a broad description of a parliamentary proceeding as:

> … some formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognized by its inclusion in the formulation of article IX [of the *Bill of Rights*]. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving

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5 Odgers, p. 40.

6 Australian Senate Committee of Privileges, 62nd report, p. 1.

7 Griffith and Ryle, p. 124, par. 3-003; Erskine May, 24th ed., p. 203; and Report of the U.K. Select Committee on Parliamentary Privilege, p. vii, par. 12.

8 While the term "personal privilege" is sometimes used, it is not related in any way to parliamentary privilege nor to the rights or immunities that individual members enjoy as parliamentarians. Such "points of personal privilege" are discussed in Part II of this chapter.

9 Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, p. 10, par. 12, and p. 17, par. 36-37; and Griffith and Ryle, pp. 127-133, par. 3-009 to 3-018. Although calls to establish a statutory definition of a parliamentary proceeding have been frequently made in Britain, concerns have equally been raised about whether such a statutory definition would limit, restrict or impede the control that Parliament has over its internal affairs. For a list of recent proposals, see Erskine May, 24th ed., pp. 238-239.

10 Erskine May, 24th ed., p. 235; Griffith and Ryle, pp. 127-130, par. 3-009 to 3-013; and Robert, "An Opportunity Missed..."

> substitutes for speaking. Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Members of the public also may take part in the proceedings of a House, for example by giving evidence before it or one of its committees, or by securing the presentation of a petition.[11]

The Australian Parliament enacted a statutory definition of a proceeding in Parliament in the *Parliamentary Privileges Act, 1987*.[12] The definition presented in section 16(2) reads as follows:

> ... *proceedings in Parliament* means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
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> (a) the giving of evidence before a House or a committee, and evidence so given;
> (b) the presentation or submission of a document to a House or a committee;
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

2. COLLECTIVE AND INDIVIDUAL PRIVILEGES, AND CONTEMPTS

As explained earlier, the essential purpose of parliamentary privilege is to allow Parliament to control its proceedings without undue interference and fear of reprisal, as well as to allow members to carry out their parliamentary duties. In describing the specific rights and immunities provided by parliamentary privilege, it is useful to structure them into those rights and immunities that apply to the Senate as a body, and those that apply to senators as individuals.

The rights and immunities that belong to the Senate collectively all relate in some way to the principle that Parliament has the right of control over its own proceedings. These main collective rights include the following:

- the regulation of its proceedings or deliberations, which includes the right to exclude strangers, to debate behind closed doors, and to control publication of debates and proceedings;
- the power to discipline or punish breaches of privilege or contempt;
- the maintenance of the attendance and service of its members;
- the authority to institute inquiries, to summon witnesses and demand papers;
- the administration of oaths to witnesses; and
- the publication and distribution of papers free from civil liability (defamation).

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11 Erskine May, 24th ed., pp. 235-236.

12 [Australia] *Parliamentary Privileges Act, 1987*, Act No. 21 of 1987. In 2014 New Zealand adopted a similar approach, with the adoption of the *Parliamentary Privilege Act 2014*, assented to on August 7, 2014.

The individual privileges that senators enjoy include the following:

- freedom of speech in Parliament and its committees;
- freedom from arrest in civil cases;
- exemption from jury duty and from appearance as a witness in a court case; and
- freedom from obstruction and intimidation.

Regulation of Proceedings

The right of a house to regulate and control its proceedings free from any external interference is paramount to the proper functioning and independence of Parliament. In exercising control over its proceedings, a house of Parliament is entitled to discipline its members, summon witnesses, exclude strangers and meet behind closed doors, control publication of its debates and proceedings, administer statute law relating to its proceedings, establish its own rules of procedure, and send for persons in custody.[13]

Penal Powers

The power to punish for contempt is an inherent right of both houses of Parliament and is comparable to the power held by the courts in this field. It is a discretionary power and punishment can range from a simple finding of contempt with no further action, to a censure, reprimand or admonition of an individual at the bar, and ultimately to incarceration. Since the advent of the *Canadian Charter of Rights and Freedoms*, the power of incarceration has been questioned.[14] The penal powers of Parliament are a means of enforcing and safeguarding its authority and ensuring that it can carry out its duties without obstruction. They also provide a means to deal with situations without having to wait for the courts to resolve them.[15] The *Rules of the Senate* only make one reference to imprisonment and it relates to senators, officers or employees of the Senate appearing before the House of Commons or one of its committees to answer any accusation without the approval of the Senate.[16]

Attendance of Senators

The *Rules of the Senate* impose a duty on senators to attend the Senate whenever and wherever it is in session.[17] Furthermore, both the *Parliament of Canada Act*[18] and the *Rules of the Senate*[19] impose a financial penalty on senators who are absent for more than 21 sitting days in a session.[20] Although the Senate does not usually enforce this privilege, other than through the financial penalty as set out in the Rules, it could nonetheless compel the attendance of one of its members.[21]

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13 For a detailed discussion of all these powers, see Maingot, Chapter 11. These powers do not include the control over quorum, voting or the obligation to use English and French, all of which are set by the Constitution (see Robert, "Parliamentary Privilege in the Canadian Context...").

14 Maingot, pp. 334-341; and O'Brien and Bosc, pp. 77-82 and 127-128.

15 Erskine May, 24th ed., p. 191.

16 Rule 16-4(4).

17 Rule 15-1(1). Also see the standard wording of a senator's commission, such as found in Appendices A and B to Chapter 2.

18 *Parliament of Canada Act,* R.S.C., 1985, c. P-1, ss. 57-59.

19 Rule 15-1(3).

20 For further information on the Attendance Policy for Senators, see Chapter 2.

21 See, for example, *Journals of the Senate*, December 16, 1997, pp. 381-382.

Institute Inquiries, Summon Witnesses and Request the Production of Papers

Parliament, seen as "Grand Inquest of the Nation," is free to institute inquiries, summon witnesses and require the production of documents in its consideration of public policy matters.[22] The only limitations to these powers would be those that are self-imposed. The power to conduct inquires is usually delegated by the Senate to its committees, which are also given the power to send for persons, papers and records.[23] In the exercise of this power, Parliament is not bound by the principles of natural justice such as those relating to admissibility of evidence or hearsay, etc.[24]

Administration of Oaths to Witnesses

This power is neither part of the historically claimed privileges nor part of the customary law of Parliament. Rather, it is a legislated power that provides that any person who wilfully gives false evidence under oath or after making a solemn affirmation and declaration is liable to the penalties of perjury.[25] This legislative provision exposing a witness to the charge of perjury is an implicit limitation on the privileges of Parliament in that during the course of a court hearing on perjury charges, the court will have to inquire and examine the debates and proceedings of Parliament, which normally cannot occur under article 9 of the 1689 *Bill of Rights*. Furthermore, even if a witness has not sworn an oath or made a solemn affirmation and declaration, the witness could still be liable to the charge of contempt of Parliament if the house determined that it or one of its committees had been wilfully misled or given false evidence.[26] A more detailed description of this power can be found later in this chapter.

Protection of Parliamentary Papers

The right of Parliament to publish papers for distribution beyond its precincts immune from any civil liability, including defamation, was established by the enactment of the *Parliamentary Papers Act, 1840*.[27] This law was a direct result of the judgments arising from the *Stockdale v. Hansard*[28] case of 1839, where the court denied the existence of this privilege asserted by the House of Commons. The case is also important because it established the role of the court in determining the existence of privilege and its scope based either on history or necessity.

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22 For additional information, consult Lee.

23 Rule 12-9. For further information on the powers of committees to send for persons, papers and records, see Chapter 9.

24 Maingot, pp. 190-191.

25 *Parliament of Canada Act*, R.S.C., 1985, c. P-1, ss. 10-13; and *Criminal Code*, R.S.C., 1985, c. C-46, ss. 118 and 131-132.

26 Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, p. 82, par. 317-318.

27 [U.K.] *Parliamentary Papers Act, 1840*, 3 & 4 Vict., c. 9. In Canada, similar legislation exists in the *Parliament of Canada Act*, R.S.C., 1985, c. P-1, ss. 7-9.

28 *Stockdale v. Hansard*, (1839) 9 Ad & E 1; 112 E.R. 1112.

Freedom of Speech

Freedom of speech allows senators to carry out their parliamentary duties without fear of harassment or the risk of legal action. It does not provide protection for anything said that is not in relation to a senator's parliamentary duties. As Maingot points out, freedom of speech is not a personal right but one that enables parliamentarians to fulfil their proper duties:

> The privilege of freedom of speech, though of a personal nature, is not so much intended to protect the Members against prosecutions for their own individual advantage, but to support the rights of the people by enabling their representatives to execute the functions of their office without fear of either civil or criminal prosecutions.[29]

Freedom from Arrest in Civil Matters, Freedom from Molestation, Exemption from Jury Duty and Freedom from Appearing as a Witness in a Court Case

Freedom from arrest in civil matters; freedom from molestation, intimidation and obstruction; the exemption from jury duty;[30] and the exemption from being required to appear as a witness in court cases are all based on the age-old principle that attendance in Parliament takes precedence over any other obligations a senator may have outside Parliament and that senators must not be prevented from carrying out their parliamentary duties. Freedom from arrest in civil actions, exemption from a notice for jury duty and exemption from being subpoenaed to attend court as a witness extend to persons who are required to be in attendance upon the Senate or the House of Commons, or one of its committees. Officers of either house are protected in the same way if their duties require them to be in immediate attendance upon the services of the house.[31]

Freedom from arrest is limited only to civil matters. Parliamentarians do not enjoy freedom from arrest in criminal matters. In this respect, they are responsible for their actions like all other persons.[32]

If senators are to carry out their parliamentary duties properly, it is only logical that along with the other privileges listed above, they be protected from interference in the performance of their duties. For example, any attempt to prevent senators from entering Parliament or to intimidate them in carrying out their duties would constitute a breach of privilege. As explained by Maingot, the *Criminal Code* prohibits intimidation of the Parliament of Canada or of any provincial legislature:[33]

> Members are entitled to go about their parliamentary business undisturbed. The assaulting, menacing, or insulting of any Member on the floor of the House or while he is coming or going to or from the House, or on account of his behaviour during a proceeding in Parliament, is a violation of the rights of Parliament. Any form of intimidation (it is a crime to commit "an act of

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29 Maingot, p. 26.

30 In the U.K. the exemption provided by privilege for jury duty was abolished in 2003. However, the immunity from compulsory attendance as a witness still exists.

31 Maingot, p. 160.

32 Maingot, pp. 150-158.

33 *Criminal Code*, R.S.C., 1985, c. C-46, s. 51.

> violence in order to intimidate the Parliament of Canada") of a person for or on account of his behaviour during a proceeding in Parliament could amount to contempt.[34]

Duration of the Protection of Privilege

Some privileges, such as freedom of speech, protect a senator in the moment the words are spoken. However, other privileges are not confined to a single moment or act, and are more generally associated with the service of the house. These privileges may be claimed only during a limited period made up of the session plus a convenient and reasonable time, traditionally 40 days, before and after the session. Erskine May explains the origin of this time period:

> There may be an historical connection between such a right and the fact that in ancient custom writs of summons for a Parliament were issued at least 40 days before its appointed meeting.[35]

There is no clear and accepted consensus in Canada on the length of such a period before and after a parliamentary session. At the federal level, the protection of privilege has generally been taken to be 40 days before and after a session.[36] However, several provincial legislatures have applied, through legislation, shorter periods of immunity than the 40 days, and some do not specify any time frame at all.[37]

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34 Maingot, pp. 230-231.

35 Erskine May, 24th ed., p. 249.

36 In recent years, there have been three court cases in Canada that have addressed the 40-day rule and the obligation of parliamentarians to appear in court. In all three cases, the courts have come to different conclusions as to the length of time during which members are exempt from appearing in court. In *Telezone Inc. v. Canada (Attorney General)*, ([2003] O.J. No. 2543), the Ontario Superior Court held that the 40-day rule is obsolete because of advances in communication and transportation. The court recognized the privilege, but determined that in a modern context of a country the size of Canada, its duration should be only during the sittings of an actual session, as well as 14 days before and after ([2003] O.J. No. 2543, par. 16-20). This decision was overturned in the Ontario Court of Appeal, which reverted to the 40-day rule both before and after the session ([2004], 69 O.R. (3d) 161). In another case, a 14-day rule was adopted by the Federal Court in *Samson Indian Nation and Band v. Canada* (2003) (F.C.J. No. 1238 (QL)(S.C.J.) par. 45). This ruling occurred during a prorogation, and was not appealed. In *Ainsworth Lumber Co. v. Canada (Attorney General)* (2003) (B.C.J. No. 901 (QL), par. 45, 57 and 62), the British Columbia Court of Appeal held that the privilege was limited to the parliamentary session, with no extension before or after it. Leave to appeal *Ainsworth* to the Supreme Court of Canada was denied. The Ontario Court of Appeal ruling on *Telezone Inc. v. Canada* did not disturb the Federal Court decision in *Samson* or the B.C. Court of Appeal decision in *Ainsworth*. Consequently, there are three different decisions applicable to Parliament, depending on the jurisdiction involved (Robert and MacNeil, pp. 33-35).

37 For example, Ontario and British Columbia provide for 20 days of protection, Nova Scotia for 15 days and Quebec for two days before and after a sitting of the National Assembly (Ontario, *Legislative Assembly Act*, R.S.O. 1990, ch. L-10, s. 38; British Columbia, *Legislative Assembly Privilege Act*, R.S.B.C. 1996, ch. 259, s. 5; Nova Scotia, *House of Assembly Act*, R.S. (1992 Supp.), c. 1, s. 28; and Quebec, *An Act Respecting the National Assembly*, R.S.Q., ch. A-23.1, s. 46.)

Contempt

Any actions that substantially obstruct Parliament and its members in the performance of their duties are considered contempts of Parliament.[38] A broad spectrum of severity of contempt exists, ranging from minor breaches of decorum to serious attacks against the authority of Parliament. Erskine May offers the following definition of contempt:

> Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results, may be treated as a contempt even though there is no precedent of the offence. It is therefore impossible to list every act which might be considered to amount to a contempt, the power to punish for such an offence being of its nature discretionary.[39]

The power to discipline for contempt can be seen as a complementary way for Parliament to assert its privilege. The explanation for this is that the houses of Parliament should be allowed to protect themselves against acts that interfere with their functions, and thus maintain the authority and dignity of Parliament. This ability to address affronts, whether or not they fall within the fairly narrowly defined categories of privilege, is essential to achieve this end. Both breaches of privilege and contempts may be raised as questions of privilege.[40]

3. HISTORICAL EVOLUTION OF PRIVILEGE — THE ORIGINS

The establishment and evolution of privilege in English history is the result of the struggle of Parliament to assert its independence from the Crown and all other outside influences. Its history extends at least as far back as the 14th century. On the one hand, certain privileges were claimed and upheld with the consent of the Crown (such as freedom from molestation). On the other hand, many privileges were established by Parliament itself (such as freedom of speech). These latter privileges frequently went against the wishes of the Crown or at the very best enjoyed reluctant support and took many years, even centuries, to be fully enshrined and accepted.[41] As such, parliamentary privilege as it exists today is a concrete expression of the independence of Parliament.

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38 Erskine May, 24th ed., pp. 251-271; O'Brien and Bosc, pp. 82-88; and Maingot, pp. 14-15. For Speaker's rulings dealing with contempt, see *Journals of the Senate*, May 8, 2013, pp. 2235-2237; June 17, 2009, pp. 1134-1137; March 31, 2009, pp. 416-418; May 30, 2006, pp. 178-179; November 23, 2005, pp. 1302-1303; November 4, 2003, pp. 1314-1317; June 11, 2002, pp. 1710-1713; October 2, 2001, pp. 804-806; September 9, 1999, pp. 1840-1841; February 24, 1998, pp. 468-471; May 1, 1996, pp. 163-164; November 7, 1995, pp. 1263-1264; April 1, 1993, pp. 1940-1942; and September 26, 1990, pp. 1245-1246. Also see motion adopted by the Senate on December 16, 1997, pp. 381-382, and related reports on the same matter presented on February 11, 1998, pp. 426-427, and February 19, 1998, pp. 457-458. Also see the Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, pp. 10-11, par. 14.

39 Erskine May, 24th ed., p. 251.

40 Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, pp. 81-82, par. 315. The 1999 report of the U.K. Joint Committee on Parliamentary Privilege does provide a partial list of contempts (see pp. 70-71, par. 264). In addition, the New Zealand House of Representatives has codified contempt in its Standing Orders (see *Standing Orders of the House of Representatives* (2014), Standing Orders 409-410), and more recently that country enacted legislation to codify privilege (*Parliamentary Privilege Act 2014*, assented to on August 7, 2014).

41 Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, pp. 8-9, par. 5.

Pre-1688 Period

Probably the most ancient privilege accorded to members of Parliament is freedom from molestation, which can be traced back to the 14th century.[42] This protection was granted to all members of Parliament during their service to the King in Parliament as well as for a certain time period before and after. It was originally intended to guard members of Parliament against physical restraint, imprisonment or other abuse that would have impeded them from attending to the King's business in Parliament. However, over time, this protection was expanded to include civil legal processes as well. The protection from molestation has never included immunity from criminal acts such as treason, felonies or breaches of the peace, since such acts were offences against the King's own interests.[43]

Other privileges were also claimed by members of the English House of Commons as it attempted to assert its role in Parliament. These privileges were considered necessary to protect members against the powers and interference of the King and the House of Lords. In the early 14th and 15th centuries, several members and Speakers, despite the claims of liberties of the house, were imprisoned by the King, who had been offended by their conduct in Parliament.[44] During this period, there was a growing conviction that Parliament was entitled to certain rights. When Sir Thomas More was elected Speaker of the House of Commons in 1523 he was one of the first Speakers recorded as having petitioned the King to recognize certain privileges of the house.[45] By the end of the 16th century, the Speaker's petition to the King had become a permanent practice. A similar petition, claiming privileges on behalf of the house, is read by the newly elected Speaker of the Canadian House of Commons at the beginning of each Parliament.[46]

Despite these petitions, the privileges of members in England were not readily recognized by the Crown, and in the early 17th century, members were still being imprisoned by order of the Crown.[47] It was only in 1688, with the overthrow of King James II and a shift of power away from the Crown to Parliament, that parliamentary privileges started to be more formally recognized.

1689: *Bill of Rights*

After the establishment of the supremacy of Parliament in 1688-89 during the Glorious Revolution, a number of key events occurred that solidified parliamentary privilege. The first of these occurred in 1689 when freedom of speech and the independence of Parliament were recognized by statute in article 9 of the English *Bill of Rights,*[48] which declared "[t]hat the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." The freedom of speech in article 9 was intended to protect members from possible question, admonition or punishment by the other branches of government, the Crown, the executive and courts of law.[49] The *Bill of Rights* provided an explicit statutory basis for what had previously been implied in earlier claims and

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42 One of the first recorded cases occurred in 1340. See Bryant, pp. 214-215.
43 For a detailed history of this privilege, see Erskine May, 24th ed., pp. 209-215. Also see Lieberman, pp. 112-126.
44 O'Brien and Bosc, p. 64.
45 Erskine May, 24th ed., p. 207.
46 Erskine May, 24th ed., p. 206; and O'Brien and Bosc, pp. 365-366.
47 O'Brien and Bosc, p. 65.
48 [U.K.] 1 Will. & Mar. (2nd Sess.), c. 2, s. 1 [1689 according to the present calendar]. It should be noted that the *Bill of Rights 1689* is also referred to as the *Bill of Rights 1688* in various publications.
49 Erskine May, 24th ed., p. 222; and Maingot, p. 26.

declarations of freedom of speech by the English House of Commons.[50] Furthermore, the statement that "proceedings in Parliament" are protected by parliamentary privilege has, over time, given rise to the concept that not only members of Parliament but also officers of Parliament and the public are protected by parliamentary privilege when participating in proceedings in Parliament.[51]

1704: Limits on the Creation of New Privileges

Although parliamentary privilege is essential to allow parliamentarians to perform their duties, it must also be recognized that there are limits to its scope and applicability. As observed in Erskine May, there is a need to balance two potentially conflicting principles:

> On the one hand, the privileges of Parliament are rights 'absolutely necessary for the due execution of its powers'; and on the other, the privilege of Parliament granted in regard of public service 'must not be used for the danger of the commonwealth'.[52]

Over the course of time, as the authority and independence of Parliament became more clear and certain, the need to assert or claim certain privileges that were not immediately necessary for the execution of parliamentary business diminished. Perhaps with this in mind, Parliament in 1704 agreed by way of a resolution that neither house could grant itself any new privilege "not warranted by the known laws and customs of Parliament."[53] As a result of this decision, "it is now generally accepted that no new privilege can be created except by legislation."[54]

1737 and 1770: *Parliamentary Privileges Act*

The evolution of the privilege of freedom from arrest demonstrates the gradual and voluntary limitations placed on privilege. Protection was expanded to include civil processes in addition to freedom from arrest or obstruction from attending Parliament. Over time, the use of this privilege was reined in. In 1737, the *Parliamentary Privileges Act* allowed civil processes to be started during periods of dissolution and prorogation as well as adjournments of more than 14 days.[55] By 1770, it was established that "any person may at any time commence and prosecute an action or suit in any court of law against peers or Members of Parliament …."[56] This latter statute further clarified that the privilege no longer applied to members' servants.[57] In addition, although civil proceedings may be started under this statute, no member can be arrested or imprisoned as a result.[58] With the passage of the *Judgements Act 1838*, imprisonment in civil cases was, for all intents and purposes, abolished.[59]

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50 Maingot, p. 78.
51 Maingot, p. 77.
52 Erskine May, 24th ed., pp. 217-218.
53 U.K. Commons Journals (1702-1704), February 28, 1704, p. 555; and March 6, 1704, pp. 559-563. Also see Erskine May, 24th ed., p. 218.
54 Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, p. 12, par. 17.
55 Erskine May, 24th ed., p. 212; *Parliamentary Privileges Act, 1737*, ch. 24, 11 Geo. 2 (A.D. 1738).
56 Erskine May, 24th ed., p. 212.
57 Erskine May, 24th ed., p. 218.
58 Erskine May, 24th ed., p. 212.
59 Erskine May, 24th ed., p. 215. Also see the Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, p. 85, par. 327.

1840: Protection of Parliamentary Papers

In the 1830s, the assertion that publications ordered by the House of Commons were protected by privilege was openly challenged in the courts. In 1837, as the result of these earlier court actions, the House of Commons launched an inquiry which culminated in the adoption of a resolution stating that the publication of parliamentary reports, votes and proceedings was protected by privilege.[60] Despite this decision, a further court action was launched in 1839: the case of *Stockdale v. Hansard*.[61] Messrs. Hansard, the printers of the House of Commons, were sued for libel by Mr. Stockdale. Messrs. Hansard had printed, by order of the House of Commons, a report from the inspectors of prisons tabled in the house. The inspectors had found a book on the generative system published by Stockdale in a prison library. In their report they described the book as disgusting, indecent and obscene.[62] The court ruled that the 1837 resolution was not sufficient to extend the protection of privilege to all documents published by order of the house; rather, it extended protection only to papers printed by order of the house for the use of its own members.[63] In other words, the court distinguished between indiscriminate publication and publication for the use of its members. Only the latter is protected by privilege.

To settle the issue once and for all, the *Parliamentary Papers Act, 1840*[64] was passed to provide protection against criminal or civil proceedings to persons who publish papers by order of either house of Parliament.[65]

In providing the protection of parliamentary privilege to publications, the act distinguishes between the publication of complete reports and the publication of partial reports or extracts. Complete reports and copies of authenticated reports enjoy absolute legal privilege and protection from all civil and criminal actions.[66] All that is required in such cases is a certificate from the appropriate authority confirming that such publication is by order of either house of Parliament. Partial reports or extracts enjoy qualified legal privilege and protection in that the contents of these documents are not true to the original as approved by Parliament, but rather have been selected by a publisher and are therefore beyond the control of Parliament. In this latter case, the publisher must conclusively show in court that the partial report or extract was published *bona fide* and without malice to receive a not guilty verdict.[67]

Newspaper reports about parliamentary debates and proceedings are not normally taken from Hansard but rather rely on other means to report information. Consequently, since they are not extracted from an official publication of Parliament, they are not protected under section 3 of the *Parliamentary Papers Act, 1840*.[68] The first case in which a newspaper was sued for libel for having published a report of a debate in

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60 U.K. Commons Journals, 1837, May 30 and 31, 1837, pp. 418-419. Also see Erskine May, 24th ed., pp. 288-289.
61 *Stockdale v. Hansard*, (1839) 9 Ad & E 1; 112 E.R. 1112.
62 Maingot, p. 64.
63 *Stockdale v. Hansard*, (1839) 9 Ad & E 1; 112 E.R. 1112. For a full account of the trials, see Lieberman.
64 [U.K.] Ch. 9, 3 & 4 Vict. The long title of this statute is: An Act to give summary Protection to Persons employed in the Publication of Parliamentary Papers.
65 Erskine May, 24th ed., pp. 225 and 290.
66 [U.K.] *Parliamentary Papers Act, 1840*, 3 & 4 Vict., c. 9, ss. 1-2.
67 [U.K.] *Parliamentary Papers Act, 1840*, 3 & 4 Vict., c. 9, s. 3.
68 Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, p. 91, par. 356.

the House of Lords, *Wason v. Walter*,[69] occurred in 1868. In that case, the court ruled that a newspaper could not be sued for libel for publishing a report of a debate in Parliament as long as such report was a faithful account of the debate. In its decision, the court stated that the privilege granted by the *Parliamentary Papers Act, 1840* did not apply, but that the common law applied to grant qualified legal privilege to the newspaper. The court ruled that the public's right to information about proceedings is more important any inconvenience to a particular individual.[70]

During this era, the concept of necessity had already started to be articulated. This gradual evolution in the understanding of privilege foreshadowed the present era, in which necessity has become an increasingly central element in determining the acceptance of privilege.

Recent Studies and Developments in the United Kingdom

There have been a number of revisions and limitations on parliamentary privilege in the UK during the latter part of the 20th century.

In December 1967, the U.K. House of Commons Select Committee on Parliamentary Privilege issued a report containing 24 key recommendations.[71] The report rejected the suggestion that the exercise of penal jurisdiction ought to be transferred from Parliament to the courts as a more appropriate tribunal for determining whether a contempt or a breach of privilege has been committed.[72] The committee did recommend changes to the procedure for how questions of privilege and contempt should be raised and dealt with by the house.[73] In the decade following the report, only a few of the recommendations were actually implemented.[74]

In 1977, the House of Commons Committee of Privileges was tasked with reviewing the 1967 committee recommendations.[75] The committee made seven key recommendations in its report, which encompassed many of the recommendations made in 1967. The report was adopted in early 1978. All recommendations that did not require legislation were brought into immediate effect.[76] One of the key elements that was endorsed was a 1967 recommendation that penal jurisdiction should be exercised as sparingly as possible and only when it is deemed essential to provide reasonable protection for the house, its members or its officers from obstruction, threat of obstruction or substantial interference with the performance of their parliamentary functions.[77] In the years following the adoption of this guiding principle, there has been a significant reduction in the number of occasions in which the House of Commons or a committee of privileges has had to examine matters of privilege.[78]

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69 *Wason v. Walter* (1868-1869) LR 4 QB 73.

70 Erskine May, 24th ed., pp. 224 and 226; and Maingot, pp. 43-44. For a discussion on other recent issues surrounding the application of the U.K. *Parliamentary Papers Act*, consult Leopold.

71 Report of the U.K. Select Committee on Parliamentary Privilege, pp. xlix-li, par. 205.

72 Report of the U.K. Select Committee on Parliamentary Privilege, pp. xxxvii-xxxix, par. 138-146.

73 Report of the U.K. Select Committee on Parliamentary Privilege, pp. xli-xlvii, par. 159-192.

74 For a list of the 1967 committee recommendations and the actions taken on them, see the Third Report of the U.K. Committee of Privileges, Appendix A, pp. xxiii-xxvii.

75 Third Report of the U.K. Committee of Privileges, dated June 14, 1977.

76 U.K. *Commons Journals*, February 6, 1978, p. 170.

77 Third Report of the U.K. Committee of Privileges, pp. iii-iv, par. 4.

78 Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, pp. 12-13, par. 20-22.

In 1999, the U.K. Joint Committee on Parliamentary Privilege presented a report containing a number of recommendations aimed at clarifying and modernizing the concept and application of parliamentary privilege. The approach taken by the committee was to thoroughly review the basic precepts of privilege. It began by questioning whether all currently existing privileges were still necessary:

> We have asked ourselves, across the field of parliamentary privilege, whether each particular right or immunity currently existing is necessary today, in its present form, for the effective functioning of Parliament. Parliament should be vigilant to retain rights and immunities which pass this test, so that it keeps the protection it needs. Parliament should be equally vigorous in discarding rights and immunities not strictly necessary for its effective functioning in today's conditions.[79]

The concept of necessity was central to the review undertaken by the joint committee. It provided the context in which the committee sought to determine the modern application of the two principal pillars of privilege: freedom of speech and exclusive cognizance. With respect to the former, necessity was used to suggest limits to the absolute protection provided by freedom of speech to parliamentary activities, restricting it to those activities that require this high degree of protection. Recent changes to the law and decisions of the courts have allowed exceptions to the sweeping protection originally ensured by article 9 of the *Bill of Rights*. The committee had mixed views about some of these developments. It accepted the exceptions to article 9 established by the courts so long as they did not question the motives of parliamentarians or cast doubt on the propriety of the proceedings of Parliament.[80] As to the matter of exclusive cognizance, the committee was firm in asserting that the right of Parliament to administer its internal affairs, but this right should be confined to activities directly related to its core functions. This immunity from the application of the law should not be extended to include laws relating to such matters as health and safety or data protection. Put simply, the committee concluded that Parliament should no longer be considered a statute-free zone.[81]

Among its conclusions, the committee accepted that privilege should be codified through a Parliamentary Privileges Act, based on the model enacted in Australia. In the committee's view, a statute on privilege was the natural next step in its modernization. Such a law could be drafted to maintain a useful level of flexibility. More importantly, however, it would provide the basis for a clearer understanding of the purpose and scope of privilege rooted in necessity that would be useful to both parliamentarians and ordinary citizens.[82]

Despite its acknowledged merits, the 1999 report was not adopted by either house and was debated only once in the Commons.[83] As a consequence, none of its recommendations were implemented. A decade later, in 2009, the Westminster Parliament became embroiled in an expenses scandal that included attempts by some parliamentarians to claim immunity from prosecution for fraud on the basis of parliamentary privilege. In the public uproar that followed, the coalition government elected in 2010

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79 Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, p. 8, par. 4.
80 Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, pp. 1-2.
81 Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, pp. 2-3.
82 Report of the U.K. Joint Committee on Parliamentary Privilege, 1999, Vol. 1, p. 7, par. 39, and pp. 95-97, par. 376-385.
83 Commons Hansard, October 27, 1999, columns 1021-1074.

stated in the Queen's Speech opening the new Parliament its commitment to bring forward a bill to reform parliamentary privilege.[84] Before any specific proposal was brought forward, the Supreme Court of the United Kingdome rendered a decision on the merits of the claims to immunity made by the parliamentarians seeking to avoid prosecution for the fraudulent expenses. In *R. v. Chaytor*,[85] decided in December 2010, the court unanimously rejected the assertion that parliamentary privilege, based either on common law or the *Bill of Rights*, protected the three former members from prosecution. This decision seems to have had an impact on the approach subsequently taken by the government with respect to reforming parliamentary privilege. This is clear from its unprecedented consultation document, the Green Paper on parliamentary privilege, published in April 2012.[86] While it acknowledged that the time had come for a comprehensive review, the government concluded that there was no need for codification. A joint committee report on parliamentary privilege issued in July 2013 basically followed the lead of the Green Paper and agreed with most of its findings, including the all-important one regarding codification[87]. This remains the current situation at Westminster.

4. HISTORY AND EVOLUTION OF PRIVILEGE IN CANADA

Unlike the United Kingdom, Canada has never experienced the same type of struggles and challenges to assert and defend parliamentary privilege. Rather, privilege was explicitly authorized by the Constitution and subsequently claimed through legislation. When the *Canadian Charter of Rights and Freedoms* was entrenched in the Constitution in 1982, the environment in which claims to parliamentary privilege had been accepted with little question changed. Since then a number of court challenges have been raised. This section provides an overview of the origin and evolution of privilege in Canada since Confederation.

Historical Background

In Canada, the federal Parliament was authorized to claim privileges through section 18 of the *Constitution Act*, *1867*. The original text of this section limited the privileges that could be claimed in Canada to those held and enjoyed by the British House of Commons at the time of Confederation.

In 1868, the federal Parliament first claimed privilege under the authority granted to it by the *Constitution Act, 1867* by passing *An Act to define the privileges, immunities and powers of the Senate and House of Commons, and to give summary protection to persons employed in the publication of Parliamentary Papers*.[88] This statute made a general claim to all the privileges, immunities and powers held by the U.K. House of Commons at the time of the adoption of the *British North America Act, 1867*. It did not contain an enumeration or definition of the privileges claimed; however, it did specify that it was claiming only those privileges that were "consistent with and not repugnant to" the *British North America Act, 1867*.[89]

84 Lords Hansard, May 26, 2010, column 6.
85 [2010] UKSC 52.
86 *Parliamentary Privilege*, April 2012 (Green Paper).
87 Report of the U.K. Joint Committee on Parliamentary Privilege, 2013.
88 S.C. 1868, c. 23 (assented to on May 22, 1868).
89 See section 1 of the act. Also see Robert, "Parliamentary Privilege in the Canadian Context...".

Furthermore, it also included provisions to protect individuals engaged in the publication of parliamentary papers that closely resembled the protection provided in the U.K. *Parliamentary Papers Act, 1840*.[90] The 1868 statute has since been replaced by the *Parliament of Canada Act*, which contains similar language.[91]

Power to Administer Oaths to Witnesses

Following the general claim of privileges made in 1868, there have only been three instances where further legislation was enacted claiming new powers and clarifying those powers. All of these instances relate to the administration of oaths to witnesses appearing before one of the houses or a parliamentary committee.

The first statute was passed in 1868. Since most applications for divorce were obtained through private bills passed by the federal Parliament, there were serious difficulties in dealing with divorce cases as Parliament was unable to examine witnesses under oath. To remedy this situation, an act was passed that allowed oaths to be administered to witnesses appearing either at the bar of the Senate or before committees of both houses in relation to their consideration of private bills.[92] The 1868 Canadian act went beyond the powers of the U.K. House of Commons at the time by allowing for the administration of oaths to witnesses at the bar of the Senate. Although the 1868 act was never disallowed, the law officers of the Crown in England declared the section of the act pertaining to the administration of oaths at the bar of the Senate "void and inoperative" because it was "repugnant to the provisions of the British North America Act." The other section of the act – relating to the administration of oaths to witnesses by committees in the course of their study of private bills – was not questioned since it was clearly an established power of the U.K. House of Commons.[93]

In 1873, the Pacific Scandal gave rise to the belief that a more general power to swear in witnesses was needed and a new Canadian act relating to the administration of oaths was passed.[94] This statute enabled either house to authorize one of its committees, by way of a resolution, to examine a witness under oath. It was broader in range than the 1868 act in that it was not limited to private bills. This time, the British government disallowed the 1873 statute on the grounds that it was *ultra vires* (i.e., beyond its power).[95] The power to administer oaths in the U.K. House of Commons was only established in 1871.[96] Given the limitation imposed by section 18 of the *Constitution Act, 1867*, the federal Parliament was only authorized to claim the privileges held by the U.K. House of Commons as of 1867.

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90 [U.K.] 3 & 4 Vict., c. 9.

91 *Parliament of Canada Act*, R.S.C., 1985, c. P-1, ss. 4-9.

92 *An Act to Provide for Oaths to Witnesses being administered in certain cases for the purposes of either House of Parliament*, S.C., 1867-68, c. 24. This provision is now contained in sections 10-13 of the *Parliament of Canada Act*.

93 See correspondence from the Secretary of State for the Colonies (Earl of Kimberley) to the Governor General (Earl of Dufferin) in *Journals of the Senate*, October 23, 1873, p. 19. Also see Bourinot, p. 486.

94 *An Act to provide for the examination of witnesses on Oath by Committees of the Senate and House of Commons, in certain cases*, S.C., 1873, c. 1.

95 The disallowance proclamation can be found in the *Journals of the Senate*, October 23, 1873, pp. 19-20, and the correspondence relating to the disallowance can be found on pp. 14-20.

96 [U.K.] *An Act for enabling the House of Commons and any Committee thereof to administer Oaths to Witnesses, 1871*, 34 & 35 Vict., c. 83 (short title: *Parliamentary Witnesses Oaths Act, 1871*).

To resolve this problem, the British Parliament passed the *Parliament of Canada Act, 1875*, which amended section 18 of the *Constitution Act, 1867*.[97] The purpose of the amendment was twofold. First, it established that the Parliament of Canada would no longer be restricted to the privileges of the U.K. House of Commons as they existed in 1867, but could claim any privileges held by the British Parliament.[98] In other words, Canadian law could be enacted to ensure that privileges in Canada kept up with the evolution of privilege in Britain. It was, however, still not permitted for Canadian law to prescribe more extensive privilege than that available to British parliamentarians. Second, it clarified that the 1868 Canadian oaths act[99] "shall be deemed to be valid, and to have been valid" from the date it received Royal Assent and thereby removed any uncertainty as to its status.[100]

As a result of the 1875 amendment to the *Constitution Act, 1867*, the Parliament of Canada in 1876 adopted an act that was identical to the 1873 act giving both houses and their committees the general power to swear in witnesses.[101] Finally, in 1894, the Canadian Parliament enacted further legislation expanding the power to administer oaths.[102] This act accomplished three main things:

- it authorized the administration of oaths at the bar;
- it authorized parliamentary committees to administer oaths when they saw fit;[103] and
- it provided, for the first time, for the possibility of making a solemn affirmation and declaration to those who conscientiously object to taking an oath.

In short, the 1894 statute copied the same provisions that were enacted in the 1871 U.K. *Parliamentary Witnesses Oaths Act* and thereby brought the powers of the Canadian Parliament into line with those of the U.K. House of Commons. The current provisions relating to the power of examination of witnesses under oath in Parliament are now contained in the *Parliament of Canada Act*.[104]

Legislation authorizing the administration of oaths to witnesses entails an implicit limitation of parliamentary privilege – more specifically, to article 9 of the English *Bill of Rights*.[105] Before a statutory exception was enacted, article 9 of the English *Bill of Rights* barred any court from inquiring into any parliamentary proceeding. However, once a statutory exception was enacted, the courts were allowed to admit proceedings in Parliament as evidence in perjury trials.[106] Witnesses who do not take an oath can

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97 [U.K.] *An Act to remove certain doubts with respect to the powers of the Parliament of Canada under section eighteen of the British North America Act, 1867*, 1875, 38 & 39 Vict., c. 38 (short title: *Parliament of Canada Act, 1875*).

98 [U.K.] *Parliament of Canada Act, 1875*, 38 & 39 Vict., c. 38, section 1.

99 *An Act to Provide for Oaths to Witnesses being administered in certain cases for the purposes of either House of Parliament*, S.C. 1867-68, 31 Vict., c. 24.

100 [U.K.] *Parliament of Canada Act, 1875*, 38 & 39 Vict., ch. 38, section 2.

101 *An Act to provide for the examination of witnesses on oath by Committees of the Senate and House of Commons, in certain cases*, S.C. 1876, c. 7.

102 *An Act to provide for the examination of witnesses on oath by the Senate and House of Commons*, S.C. 1894, c. 16 (short title: *The Parliamentary Witnesses Oaths Act, 1894*).

103 Under the 1876 statute, committees could only administer an oath following a resolution by either the Senate or the House of Commons.

104 *Parliament of Canada Act*, R.S.C., 1985, c. P-1, ss. 10-13.

105 [U.K.] 1 Will. & Mar. (2nd Sess.), 1689, ch. 2, s. 1.

106 *Criminal Code*, R.S.C., 1985, c. C-46, ss. 118 and 131-132; Erskine May, 24th ed., p. 240; and Maingot, pp. 144-145 and 192.

still be liable for contempt of Parliament if a house concludes that they were wilfully misleading. However, witnesses who do take an oath can be liable for contempt of Parliament as well as for punishment under the laws of perjury.[107]

Role of the Courts in the Evolution of Privilege in Canada

In addition to legislation claiming and defining the privileges of the federal Parliament, the courts have also played a role in further defining the scope of privilege.

Prior to Confederation, courts dealt with parliamentary privilege by placing limits on the privileges claimed by colonial legislatures. These cases highlighted a clear distinction between the Parliament of the United Kingdom, which was also called "the high court of Parliament," and the simple legislative bodies in the colonies.[108] The Parliament of Great Britain, "from its original nature, possessed attributes which no colonial legislature could ever inherit, and therefore it possessed privileges and powers which no legislative assembly could hope to claim or exercise."[109]

As Canada evolved as a nation post-Confederation, so did the law of parliamentary privilege in the country. A review of three Supreme Court cases provides the following principles with respect to the status of parliamentary privilege in Canada:[110]

- all privilege (both inherent and legislated) is constitutional in nature and, therefore, equal in status to Charter rights with neither being subordinate to the other;
- the burden of proving the existence of a claimed privilege is on Parliament;
- the foundation of all privilege is necessity – in other words, if the immunity is not absolutely necessary for a legislature to carry out its constitutional functions, there is no basis to claim privilege;
- necessity is determined by the contemporary context – this necessity must be proven on two levels: first by demonstrating its historical existence, and second by determining whether the claimed privilege is still necessary today; and
- Parliament is not a "statute-free zone" and, therefore, not outside the ambit of Charter review.

Senate Study of Privilege

In light of the continuing evolution of privilege in Canada, especially since the entrenchment of the Charter, the Senate's Standing Committee on Rules, Procedures and the Rights of Parliament decided to review privilege in Canada in the 21st century. In early 2014 it established a Subcommittee on Parliamentary Privilege,[111] which reported to the committee in early 2015.[112] This marked the first time a

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107 For a discussion on the history and contemporary issues surrounding the administration of oaths and the powers of parliamentary committees, see Robert and Armitage.

108 For a legal opinion on this distinction, see Kennedy, pp. 297-299. For a general description of colonial court cases relating to privilege, see Wittke, (Chapter 7, "Procedure in the Dependencies"), pp. 172-184.

109 Wittke, pp. 172-173.

110 Summaries of some key Canadian court cases relating to parliamentary privilege are found in the appendix to this chapter.

111 Minutes of Proceedings of the Standing Committee on Rules, Procedures and the Rights of Parliament, April 1, 2014.

112 The subcommittee tabled its report with the committee on January 27, 2015. The report is available at www.parl.gc.ca/Content/SEN/Committee/412/rprd/rep/repsub01jan27-e.pdf.

parliamentary body in Canada had ever completed a comprehensive study of parliamentary privilege. The committee subsequently adopted the subcommittee's report as an interim report to the Senate.[113]

PART II – PROCESSES FOR RAISING AND ESTABLISHING A QUESTION OF PRIVILEGE IN THE SENATE

There are various ways in which a question of privilege can be raised[114], including:

- through a substantive motion with one day's notice (rules 5-5(j) and 13-2(2));
- through a self-initiated committee investigation concerning the unauthorized disclosure of confidential committee reports, documents or proceedings (Appendix IV of the *Rules of the Senate*);
- through a committee report bringing a possible issue of privilege to the Senate's attention;
- by rising without notice if the matter arose either after the time for giving written notice or during the sitting (rule 13-4(a)); and
- by providing a written notice before the sitting, followed by an oral notice at the start of the sitting (rules 13-3(1) and (4)) – this final process is the normal procedure for raising such matters in the Senate.

Prior to 1991, a question of privilege could be raised at any time during a sitting by moving a motion calling on the Senate to take action. When such a motion was moved, the consideration of all Senate business (including Orders of the Day) was suspended until the motion was either decided or adjourned. Following major revisions made to the *Rules of the Senate* in 1991, the procedure for raising a question of privilege became more restrictive.

On occasion, senators rise on a "point of personal privilege" in an attempt to make a personal comment or statement, even if there is no question before the chamber. These "points of personal privilege" are not in any way related to either parliamentary privilege or to the rights and immunities that individual members enjoy as parliamentarians. Instead, such statements are usually meant to correct an error in debate, retract a previous statement, apologize to the Senate or make some other general announcement. A point of personal privilege should not give rise to debate and the Speaker retains complete discretion over whether to allow such remarks.[115] Since it is not a matter of privilege, no action is taken after the statement has been made.

Raising a Question of Privilege with One Day's Notice

Rule 13-2(1) states that in order for a question of privilege to be accorded priority, it must, among other things, be raised at the earliest opportunity. If this criterion is not met, the question of privilege can nonetheless be raised by motion after one day's notice.[116] Under this method, the motion is dealt with in the same way as any other non-governmental substantive motion. It will appear on the Notice Paper until moved; it can be debated, amended and adjourned; and it is subject to being dropped from the *Order*

113 Minutes of Proceedings of the Standing Committee on Rules, Procedures and the Rights of Parliament, May 12, 2015.
114 See Speaker's ruling, *Journals of the Senate,* March 25, 2010, p. 166. Also see the definition of "question of privilege" under "privilege" in Appendix I of the *Rules of the Senate*.
115 O'Brien and Bosc, pp. 158-159.
116 Rules 5-5(j) and 13-2(2). Research has not found any cases of such motions being moved since the 1991 rule change.

Paper and Notice Paper if it is called but not taken up after 15 consecutive sitting days.[117] However, unlike the procedure for raising a question of privilege with written notice under rule 13-3, such motions are not subject to the examination of the Speaker to determine if there is a prima facie (first impression) question of privilege before they can be moved.[118]

Raising a Question of Privilege with Respect to the Unauthorized Release of Committee Documents or Proceedings

Following the adoption of a report of the Standing Committee on Privileges, Standing Rules and Orders in June 2000, a procedure was established for dealing with the unauthorized disclosure of confidential committee reports and other documents or proceedings.[119] This procedure allows a committee to initiate an investigation of an alleged leak of confidential material and report its findings to the Senate.

If a leak of a confidential committee report, document or proceeding comes to light, the committee is expected to report the alleged breach to the Senate and advise the chamber that it is launching an inquiry into the matter.[120] The notification of the alleged breach in the Senate would serve as notice regarding a possible question of privilege. The ensuing investigation must be carried out in a timely manner and must establish the facts and address the seriousness and implications (either actual or potential) of the leak.[121] Upon the completion of the investigation, if the committee tables a report disclosing that a leak occurred and that it caused substantial damage to the operation of the committee or to the Senate as a whole, the matter would ordinarily be referred to the Standing Committee on Rules, Procedures and the Rights of Parliament.[122]

Senators may also raise a question of privilege in the chamber relating to a leak by using one of the other processes for raising a question of privilege. In such situations, senators are not penalized for not raising a question of privilege "at the earliest opportunity" if they decide to wait for the committee's investigation to be completed, should the committee decide not to proceed with the matter, or if the matter is not

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117 Rule 4-15(2).

118 Rule 13-5(5).

119 For the full text of the fourth report of the Standing Committee on Privileges, Standing Rules and Orders, see *Journals of the Senate*, April 13, 2000, pp. 521 and 531-539. This report was adopted by the Senate on June 27, 2000 (see *Journals of the Senate*, p. 795). An extract from the report is published as Appendix IV of the *Rules of the Senate.*

120 Appendix IV of the *Rules of the Senate.* This has happened on several occasions. In response to a question during Question Period, the chair of the Official Languages Committee informed the Senate that she would raise the matter at the next committee meeting (see *Debates of the Senate*, March 1, 2007, pp. 1874-1875). In a second case, the Standing Committee on Internal Economy, Budgets and Administration tabled a report informing the Senate about an apparent leak and that it was undertaking an investigation of the matter (see the second report of the committee tabled on June 8, 2006). In another case, the chair of the Standing Senate Committee on Banking, Trade and Commerce made a statement during Senators' Statements to inform the Senate that a leak had occurred and would be investigated (see *Debates of the Senate*, October 3, 2012, p. 2546), and a report was subsequently tabled on October 30.

121 Appendix IV of the *Rules of the Senate.*

122 Appendix IV of the *Rules of the Senate*. Of the cases that have been dealt with under Appendix IV of the *Rules of the Senate*, five have led to final reports, but none of them found that further action was warranted, and none of these reports were adopted by the Senate (see the sixteenth report of the Standing Senate Committee on Legal and Constitutional Affairs, *Journals of the Senate*, October 30, 2014, p. 1301; the seventh report of the Standing Senate Committee on Banking, Trade and Commerce, *Journals of the Senate*, October 30, 2012, p. 1669; the seventh report of the Standing Senate Committee on Official Languages, *Journals of the Senate*, May 8, 2007, p. 1449; the seventh report of the Standing Senate Committee on Fisheries and Oceans, *Journals of the Senate*, November 6, 2003, pp. 1336-1337; and the seventh report of the Standing Senate Committee on Banking, Trade and Commerce, *Journals of the Senate*, February 25, 2003, pp. 524-525). In another instance an investigation under Appendix IV only involved a report informing the Senate of an apparent leak. No final report was ever tabled by the committee (see the second report of the Standing Committee on Internal Economy, Budgets and Administration, *Journals of the Senate*, June 8, 2006, p. 215).

proceeded with in a timely manner.[123] Under this process, if the Speaker finds that a prima facie question has been established, and if the affected committee has not yet submitted a report on the matter to the Senate, any motion to take action would be adjourned until the committee submits its report.[124]

Raising a Question of Privilege by Means of a Committee Report

A committee can bring matters of privilege to the Senate's attention by means of a report. Indeed, in some legislative bodies, including the House of Commons, this is the method used to bring matters of privilege arising from committee work to the chamber.[125] Other methods are available in the Senate.[126] The Speaker has noted that:

> Many parliamentary authorities do indeed state that such a matter should only be considered, except in rare instances, upon a report of the committee in question. However, the *Rules of the Senate* provide, at rule [13-2(1)], that a question of privilege can be raised under the special process for such issues if the "privileges of the Senate, [any of its committees] or any Senator" are at issue. Accordingly, rule [13-2] can be used to raise questions of privilege arising from committee work, although a report of the committee is another vehicle available, as the authorities suggest.[127]

In practice, questions of privilege are rarely if ever raised in the Senate by means of a committee report, except for those related to the unauthorized release of material as described above.

Raising a Question of Privilege Without Notice (rule 13-4(a))

Rule 13-4 states that a question of privilege can be raised without notice, provided that "a Senator becomes aware of [the] matter… either after the time for giving a written notice or during the sitting." In this situation the senator can choose either to raise it during the sitting without notice or to wait until the next sitting. The second option requires that all normal requirements for written and oral notices be met.[128]

If the senator chooses to raise the question of privilege during the sitting without notice, this cannot be done during Routine Proceedings, Question Period or a vote.[129] The senator would generally follow the process for raising a question of privilege described in the following section as far as the circumstances

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123 Appendix IV of the *Rules of the Senate.*

124 Appendix IV of the *Rules of the Senate*. This has happened on two occasions. See Speaker's rulings, *Journals of the Senate*, December 12, 2003, p. 424; and May 27, 2003, p. 851.

125 See O'Brien and Bosc, pp. 149-152.

126 See, for example, Speaker's ruling dealing with a question of privilege raised in the Senate after written and oral notice, *Journals of the Senate,* October 28, 2009, pp. 1384-1386, and a ruling dealing with a question of privilege raised without notice under then rule 59(10) (replaced by current rule 13-4(a), *Journals of the Senate,* of April 21, 2009, pp. 448-449.)

127 Speaker's ruling, *Journals of the Senate*, October 28, 2009, p. 1385. Also see ruling of December 10, 2013, where the Speaker noted as follows: "Since this question of privilege involves events in committee, it is appropriate to note that senators can raise issues of privilege arising from committee proceedings directly on the floor of the Senate. A report of the committee is not essential. The fact that the committee could make a report on the issue has never been understood as bringing the issue of a reasonable alternative process — the fourth criterion [of rule 13-3(1)] — into play" (*Journals of the Senate*, p. 284).

128 Rule 13-4(b).

129 Rule 13-4(a).

warrant. The Speaker has noted that "rule 13-[4] allows flexibility in raising a question of privilege when the matter arises after the time for giving written notice. The rule seeks to accommodate unusual or urgent circumstances."[130] The same ruling established that if the matter giving rise to the question of privilege arose before the sitting but after the time for giving written notice, there is no obligation to give oral notice of it during Senators' Statements (a normal requirement under rule 13-3(4)), and it can simply be raised at the conclusion of Question Period.

When a senator chooses to raise a question of privilege without notice the matter is taken into consideration immediately. The Speaker can, however, at any time direct that further consideration be delayed. The question of privilege would be taken up again at the normal time for considering a question of privilege (the earlier of the end of Orders of the Day or 8 p.m., or noon on a Friday), before any question of privilege for which normal written and oral notices were given.[131]

Proceedings on a question of privilege raised without notice otherwise follow the steps described in the following section (i.e., the Speaker gives a ruling, which can be appealed, and, if it is determined that there is a case of privilege, the senator can move a motion).[132]

Process for Raising a Question of Privilege with Written and Oral Notices

Since 1991, the standard method for raising a question of privilege[133] has involved giving written and oral notices. This process involves the following steps:

- written and oral notices;
- consideration of the matter giving rise to the question of privilege;
- a decision by the Speaker on whether a prima facie question of privilege has been established (if yes, the matter is termed a case of privilege); and
- if a case of privilege is established, a motion is moved for the Senate to take action or to refer the case of privilege to the Standing Committee on Rules, Procedures and the Rights of Parliament.

These steps are described in detail below.

130 Speaker's ruling, *Journals of the Senate*, October 30, 2012, p. 1670.

131 Rule 13-5(2).

132 Rule 13-4(a) specifically states that if a question of privilege is raised without notice it "otherwise generally follow[s] the provisions of … chapter [13 of the Rules]."

133 From June 1991 to September 2013 (end of the 1st session of the 41st Parliament), 70 questions of privilege were raised in the Senate. Fifty-four cases were raised using the normal procedure requiring written and oral notice. Eleven cases were raised without notice under rule 13-4 or the preceding provision that generally covered this point, rule 59(10). There were five cases examined under Appendix IV to the *Rules of the Senate* (three of which were self-initiated by the committee, and the other two were undertaken after the procedure requiring written and oral notice was followed and the Speaker made a prima facie finding). Finally, there were no cases of privilege raised by way of a substantive motion with one day's notice under rule 13-2(2).

Written Notice

A senator wishing to raise a question of privilege must provide a written notice "indicating the substance of the alleged breach" to the Clerk of the Senate at least three hours before the beginning of a sitting of the Senate (or no later than 6 p.m. on Thursday for a Friday sitting).[134] The Clerk, in turn, is responsible for arranging the translation and distribution of the notice to each senator's office.[135] However, the failure of a senator to receive a copy of the written notice does not invalidate the notice and cannot be used as grounds to delay consideration of the question of privilege.[136]

Oral Notice

A senator who has complied with the written notice requirement is recognized during Senators' Statements to give oral notice of the question of privilege. The senator must "clearly identify the matter that will be raised as a question of privilege" and indicate a readiness to move a motion seeking Senate action or referring it to the Standing Committee on Rules, Procedures and the Rights of Parliament.[137]

As with all other senators' statements, a senator is limited to an intervention of three minutes when giving oral notice of a question of privilege.[138] If more than one written notice on distinct questions of privilege is received in advance of the sitting, the Speaker generally recognizes the senators in the order in which the notices were received. If there has been a request for an emergency debate, which would normally result in there being no Senators' Statements, statements are nevertheless called if written notice of a question of privilege has been received, for the purpose of allowing oral notice of the question of privilege.[139]

Consideration of a Notice of a Question of Privilege

The Senate considers a notice of a question of privilege at 8 p.m. (noon on a Friday) or after completing the Orders of the Day, whichever comes first.[140] If more than one notice on distinct questions of privilege is received on the same day, the Senate considers them in the order in which they were received. Debate on one question of privilege is ended before the next is taken up.[141] If a question of privilege is raised without notice under rule 13-4(a) and its consideration is deferred, that debate would resume before the

134 Rule 13-3(1).
135 Rule 13-3(2).
136 Rule 13-3(3).
137 The Speaker has ruled that a notice for a question of privilege must be "sufficiently explanatory and comprehensive." See Speaker's ruling, *Journals of the Senate*, October 26, 2006, pp. 557-560.
138 Rule 4-2(3).
139 Rule 4-4(2).
140 Rule 13-5(1). Debate on the question of privilege can be delayed to deal with either a motion moved after the Speaker has found a prima facie question of privilege or an emergency debate (rules 4-16(2), 8-4(2), 13-6(2) and (11)).
141 Rules 13-5(3) and (4). See *Journals of the Senate*, December 16, 1997, p. 374; and December 17, 1997, pp. 389-390. Although these were treated as distinct questions of privilege for the purpose of debate, the Speaker delivered only one ruling since they were about the same subject matter. See Speaker's ruling, *Journals of the Senate*, February 24, 1998, pp. 468-471.

Senate turns to questions of privilege raised with the normal written and oral notices.[142] On a few occasions the Senate has agreed to postpone consideration of a question of privilege until the next sitting.[143]

The rules for debate at this stage are similar to those governing points of order. The senator who gave notice is recognized first by the Speaker to give a succinct explanation of the matter, along with references to any specific rules, practices, precedents or parliamentary authorities to support the complaint.

Once the initiating senator's intervention is concluded, the Speaker generally chooses to hear from other senators. Although not required to do so, the Speaker often calls upon the initiating senator to reply to any comments made in the discussion before bringing it to a close. During the interventions on a question of privilege, the normal rules regarding both time limits on debate or the number of times a senator may speak do not apply. These matters remain at the sole discretion of the Speaker,[144] who also decides when enough debate has been heard on the matter to determine whether a prima facie question of privilege has been established. The Speaker may either deliver a ruling immediately or take the matter under advisement.[145] On occasion, the Speaker has heard further arguments at a subsequent sitting before taking the matter under advisement.[146] In urgent cases, or when a ruling is required before the Senate can proceed with its business, the Speaker may, with leave of the Senate, suspend a sitting to prepare a decision on the question of privilege immediately.[147]

Resolution of a Question of Privilege Prior to a Speaker's Ruling

On at least one occasion, after written and oral notices had been given, the initiating senator requested that the matter be held over until the next sitting when the Speaker called for debate on the question of privilege. The Senate did not grant leave, and the question of privilege was not proceeded with further.[148] In another case, the Senate reached a consensus during debate on the question of privilege and agreed to allow a motion to refer the matter to the Standing Committee on Internal Economy, Budgets and

142 Rule 13-5(2).

143 *Journals of the Senate*, September 7, 1999, p. 1798; December 16, 1997, p. 382; November 23, 1995, p. 1238; and March 30, 1993, p. 1924. When the Senate has adjourned before dealing with a question of privilege, the matter has been taken up at the appropriate time at the next sitting of the Senate (see Speaker's ruling, *Journals of the Senate*, May 29, 2007, p. 1562).

144 Rule 2-5(1).

145 Rule 2-5(1). On at least one occasion, a ruling was never delivered on a question of privilege due to dissolution. See *Journals of the Senate*, July 12, 1991, p. 2289 (this was the last sitting day of the session). Questions of privilege and points of order are not automatically revived in a subsequent session. They must be raised again once the new session has started. For examples of revived questions of privilege, see *Journals of the Senate*, September 9, 1999, pp. 1840-1841; and October 13, 1991, p. 30. Also see *Journals of the Senate*, September 14, 1999, p. 1893.

146 *Journals of the Senate*, February 26, 2013, p. 1940; and *Debates of the Senate*, February 26, 2013, p. 3331; *Journals of the Senate*, May 28, 2008, p. 1101; *Debates of the Senate*, May 28, 2008, pp. 1415-1416; *Journals of the Senate*, November 27, 2001, p. 1019; and *Debates of the Senate*, November 27, 2001, p. 1799.

147 The only known occasion on which this has occurred in relation to a question of privilege was on December 8, 2011 (*Debates of the Senate*, pp. 852 and 854). This situation has arisen more often in relation to a point of order (*Journals of the Senate*, February 20, 2004, pp. 183-185; *Debates of the Senate*, February 20, 2004, pp. 321-322; *Journals of the Senate*, June 10, 2003, pp. 916-917; and *Debates of the Senate*, June 10, 2003, p. 1576).

148 *Debates of the Senate*, November 23, 2006, pp. 1300 and 1338-1339.

Administration. Since the matter had been resolved by the Senate, the Speaker never gave a ruling.[149] On several other occasions, a question of privilege has been withdrawn after debate had taken place, thus eliminating the need for a Speaker's ruling.[150]

The Role of the Speaker

Prior to the 1991 changes to the *Rules of the Senate*, the Speaker had limited responsibilities in relation to questions of privilege. The Rules now provide a greater role for the Speaker. When a question of privilege is raised by a senator, the Speaker decides whether there appears to be a prima facie question of privilege, that is to say one in which "a reasonable person could conclude that there may have been a violation of privilege"[151]. This practice was patterned after the role developed for the Speaker of the House of Commons in the United Kingdom and subsequently in Canada.[152]

There are certain limitations on matters with which the Speaker can deal. The *Rules of the Senate* limit the authority of the Speaker in ruling on matters relating to the *Ethics and Conflict of Interest Code for Senators*. In such cases, the Speaker is restricted to matters expressly incorporated into the Rules.[153] Furthermore, the Speaker, in keeping with parliamentary tradition and custom, does not rule on constitutional matters or points of law, or hypothetical questions on procedure.[154]

The Speaker, or a senator acting on behalf of the Speaker, cannot participate in the discussion on a question of privilege on which a decision must be made.[155]

If the Speaker is absent when a question of privilege is considered, or when a ruling is to be given, either the Speaker *pro tempore* or the senator acting on behalf of the Speaker may hear the discussion and deliver the ruling. In such cases, the senator acting for the Speaker has the same authority, privileges and powers as the Speaker. That senator's actions have the same effect and validity as if done by the Speaker.[156] Often, however, the Speaker *pro tempore* or the senator acting on behalf of the Speaker takes the matter under advisement to allow the Speaker to review the issue and deliver a ruling.

The role of the Speaker in matters involving privilege is limited to determining whether a prima facie question of privilege has been established.[157] Joseph Maingot offers the following explanation of what constitutes a prima facie question:

> A *prima facie* [question] of privilege in the parliamentary sense is one where the evidence on its face as outlined by the Member is sufficiently strong for the House to be asked to debate the

149 *Journals of the Senate*, November 21, 1991, p. 339; and *Debates of the Senate*, November 21, 1991, pp. 581-584.
150 *Journals of the Senate*, November 29, 2001, p. 1034; November 20, 2001, pp. 988-989; October 2, 2001, p. 809; and February 20, 2001, p. 70.
151 Speaker's ruling, *Journals of the Senate*, May 29, 2007, p. 1562.
152 Beauchesne, 4th ed., pp. 94-96; and O'Brien and Bosc, pp. 71-74.
153 Rule 2-1(2).
154 Speaker's rulings, *Journals of the Senate*, November 20, 1997, pp. 194-195; May 14, 1996, pp. 202-206; May 8, 1996, pp. 183-185; November 23, 1995, pp. 1310-1312; June 22, 1995, pp. 1121-1122; January 30, 1991, pp. 2214-2215; and October 3, 1990, pp. 1812-1813. Also see Beauchesne, 6th ed., §§323-324, p. 97; and O'Brien and Bosc, p. 636.
155 Rule 2-3.
156 Rules 2-4(2) and (3); and the *Parliament of Canada Act*, R.S.C., 1985, c. P-1, ss. 17-19. Also see the point of order on Bill C-259, An Act to amend the Excise Tax Act (elimination of excise tax on jewellery), *Debates of the Senate*, November 23, 2005, pp. 2165-2166, and the subsequent Speaker's ruling, *Journals of the Senate*, November 23, 2005, pp. 1307-1309.
157 Rule 13-5(5).

matter and to send it to a committee to investigate whether the privileges of the House have been breached or a contempt has occurred and report to the House.[158]

In determining whether a prima facie question of privilege has been established, the Speaker evaluates whether the criteria set out in rule 13-2(1) have been met. The matter must:

- "be raised at the earliest opportunity;"[159]
- "be a matter that directly concerns the privileges of the Senate, any of its committees or any Senator;"
- "be raised to correct a grave and serious breach;" and
- "be raised to seek a genuine remedy that the Senate has the power to provide and for which no other parliamentary process is reasonably available."[160]

For a prima facie question of privilege to be established, the question must meet all these criteria.[161]

In short, the Speaker is limited to determining whether, at first appearance, the issue raised has obstructed the work of the Senate, one of its committees or a senator, or whether there appears to be any contempt against the dignity of Parliament. In a ruling, the Speaker does not give an opinion or render a judgment on the actual merits of the question of privilege. This role is reserved exclusively for the Senate as a whole to debate and decide.[162]

In addition to ascertaining whether the criteria are met, the Speaker is obliged to provide reasons for the decision, with references to any rule or relevant practices and authorities.[163] A ruling, particularly if taken under advisement so that the Speaker can prepare a written text, generally begins with a summary of the question of privilege, including key elements raised during debate. This summary serves to frame the context and the issues being examined, as well as the subsequent decision. The ruling will then typically state whether each of the four criteria set out in rule 13-2(1) have been met. The full text of a Speaker's ruling and the outcome of any appeal of the ruling are printed in the *Journals of the Senate*.

Appealing a Speaker's Ruling

A Speaker's ruling on whether a question of privilege has prima facie merits or not is subject to appeal to the Senate.[164] When a decision is appealed, the Speaker puts the question to the Senate using the

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158 Maingot, p. 221. Also see the Speaker's ruling of May 29, 2007 (*Journals of the Senate*, p. 1562), which, after citing Maingot, states as follows: "In effect, this is a means to allow the Speaker to weed out cases that are not questions of privilege. If the Speaker rules that a reasonable person could conclude that there may have been a violation of privilege, the senator who raised the matter is given the opportunity to propose some type of remedy by immediately moving a motion either to refer the matter to the Standing Committee on Rules, Procedures and the Rights of Parliament, or to call upon the Senate to take some action. In the end, the matter remains in the hands of the Senate, with the Speaker only providing an initial review."

159 If not raised at the earliest opportunity, the matter can still be pursued by means of a substantive motion, as discussed earlier, but it cannot be taken into consideration under the procedures provided for in chapter 13 of the *Rules of the Senate* (see rule 13-2(2)). Senate "precedents establish that even a delay of a few days can result in a question of privilege failing to meet this criterion. Attempting to exhaust alternative remedies before giving notice of a question of privilege does not exempt it from the need to meet the first criterion" (Speaker's ruling, *Journals of the Senate*, December 10, 2013, p 284).

160 Rule 13-2(1), subsections (a), (b), (c) and (d) respectively.

161 See Speaker's ruling, *Journals of the Senate*, April 24, 2013, p. 2163.

162 Rules 13-1 and 13-6(1). Also see Speaker's rulings, *Journals of the Senate*, February 28, 2013, pp. 1960-1962; and May 29, 2007, pp. 1562-1563.

163 Rules 2-5(2) and 13-5(5).

164 Rule 2-5(3).

following positive formula: "Shall the Speaker's ruling be sustained?"[165] A decision on the matter must be rendered by the Senate immediately without debate, although the bells can ring for up to an hour if there is a request for a standing vote.[166] The motion must be adopted by a majority vote in order for the decision of the Speaker to be upheld. If there is a tie vote or if a majority of votes are opposed to the motion, the decision of the Speaker on the question of privilege is overturned.[167] According to parliamentary custom and tradition, it is not appropriate to reflect on past rulings or to call them into question once a decision is rendered and any related appeal has been decided by the Senate.[168]

Motion to Deal with a Case of Privilege[169]

If the Speaker rules that a prima facie question of privilege has been established, it is then the role of the Senate to determine whether any privilege was actually breached and what action, if any, should be taken. To this effect, the senator who raised the question of privilege may move a motion immediately following the Speaker's ruling.[170] Conversely, if the Speaker finds that a prima facie question of privilege has not been established, the matter is not proceeded with further.[171]

If a prima facie question of privilege is established, the motion to deal with the subsequent case of privilege can either call on the Senate to take action on the matter or propose that it be referred to the Standing Committee on Rules, Procedures and the Rights of Parliament for investigation and report.[172] Although the motion must be moved immediately after the ruling is delivered, debate can only start at 8 p.m. (noon on Fridays) or at the end of Orders of the Day, whichever comes first.[173]

Senators, including leaders, may speak on the motion for up to 15 minutes and only once. There is no right of final reply.[174] The maximum time allowed for debate is three hours – which can usually be spread over several sittings – after which the Speaker must interrupt proceedings and put all questions necessary

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165 Practice has sometimes varied with respect to the wording of the motion to appeal. Earlier versions regularly used a negative formula such as "That the ruling of the Honourable the Speaker be not accepted by the Senate." Nonetheless, early examples of the use of the positive formula can also be found (see *Journals of the Senate*, April 8, 1915, p. 205; September 4, 1917, p. 385; and December 14, 1964, pp. 773-774). To eliminate any possible confusion, recent practices (since the 1980s) have always used the positive formula. For further information on historical practices relating to appeals and the role of the Speaker, consult Dawson.

166 Rules 2-5(3) and 9-5. Only two rulings on questions of privilege have been challenged on appeal since the 1991 changes to the *Rules of the Senate*. On February 21, 2001 the ruling was sustained (see *Journals of the Senate*, pp. 77-83). On March 31, 2009, the ruling was overturned (see *Journals of the Senate*, pp. 416-419). See Chapter 10 for other examples of appeals to rulings on points of order.

167 Rule 9-1; *Constitution Act, 1867*, s. 36.

168 Speaker's ruling, *Journals of the Senate*, April 29, 2008, pp. 1001-1003; Beauchesne, 6th ed., §168(1), p. 49; and O'Brien and Bosc, pp. 309, 615 and 637.

169 As already noted, once a question of privilege has been found to have prima facie merits, it becomes a "case of privilege." See definition of "privilege" in Appendix I of the *Rules of the Senate.*

170 Rule 13-6(1). If the ruling finding a prima facie question of privilege were overturned on appeal, a prima facie question of privilege would be deemed to have not been established and the matter is not proceeded with further.

171 If the ruling were overturned on appeal, a prima facie question of privilege would be deemed to have been established, and a motion to take action or to refer the matter to committee could be moved (see case of March 31, 2009 (*Journals of the Senate*, pp. 416-419)).

172 Rule 13-6(1).

173 Rule 13-6(2). Unlike a question of privilege, the motion relating to a case of privilege has priority over an emergency debate if both would otherwise be raised at the same time (rules 4-16(2), 8-4(2), and 13-6(2) and (11)).

174 Rule 13-6(3). A ruling on February 28, 2013 noted that if there is a debatable motion moved in relation to the motion on the case of privilege (e.g., an amendment or a motion to refer the motion to committee), senators who have already spoken can speak again. Time taken in this debate counts towards the three hours of debate under rule 13-6(4).

to dispose of the motion. The motion is amendable[175] and debate can in most situations be adjourned, provided that the three-hour limit for debate is not surpassed.[176]

Debate on the motion can continue past the ordinary time of adjournment on the first day of debate[177]. In this situation, if the motion started before the end of the Orders of the Day, the Senate will continue with its business where it was interrupted, once debate on the motion has been adjourned or the question has been put. Business continues until the Senate reaches the end of Orders of the Day, but for no longer than the time spent on the motion relating to the case of privilege. If necessary, the ordinary time of adjournment is suspended.[178] If the motion was taken up after the end of the Orders of the Day, the Senate will automatically adjourn once the motion has been adjourned or concluded.[179] In all cases, the Notice Paper is not proceeded with for that sitting.[180]

If debate on the motion concludes prior to the ordinary daily hour of adjournment, a request for a standing vote may be deferred until 5:30 p.m. on the next sitting day.[181] If debate concludes after the ordinary time of adjournment, the deferral is automatic if a standing vote is requested.[182]

Contempt as Question of Privilege

Even if no privilege has been clearly breached, it is still possible to consider whether an issue amounts to contempt of Parliament. This option is available when the alleged affront against the dignity of Parliament does not fall within one of the specifically defined privileges. The Senate may punish, as contempt, an action that substantially interferes with or obstructs the performance of its duties or offends against its dignity or authority.[183] As explained earlier, contempt has a much larger and less defined scope than privilege. Issues of contempt are raised as questions of privilege and follow the same process.

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175 Rule 13-6(4). See, for example, *Journals of the Senate*, March 5, 2013, p. 1977.

176 Rule 13-6(5). If debate goes beyond the ordinary time of adjournment on the first day of debate, the motion cannot be adjourned, and the Senate must instead continue until debate is concluded or the three hours expire (rule 13-6(6)).

177 In this case debate on the motion cannot be adjourned (rule 13-6(6)).

178 Rule 13-6(10). If the Senate reaches the end of the Orders of the Day before the expiration of the time taken to consider the motion, it would automatically adjourn (rules 13-6(10)(a) and (b)(i)). A motion simply to adjourn the sitting is also possible (rule 13-6(10)).

179 Rule 13-6(9). See, for example, *Journals of the Senate*, February 28, 2013, p. 1966.

180 See rules 13-6(9), 13-6(10)(a) and 13-6(10)(b)(i). This is to underscore the importance and gravity of matters of privilege. See Speaker's statement, *Debates of the Senate*, June 26, 2008, p. 1691. On occasion, with leave, the Senate has continued to consider items on the Notice Paper (*Journals of the Senate*, June 26, 2008, p. 1403; and April 1, 1993, p. 1942). If an emergency debate were to be held on the same day or a question of privilege raised after written and oral notices (or deferred from earlier in the sitting if raised without notice) were to be considered, the adjournment or resumption of the Orders of the Day would be further delayed (rule 13-6(11)).

181 Rule 13-6(7).

182 Rule 13-6(8).

183 For rulings dealing with contempt, see cases cited in section on contempt earlier in this chapter.

Report from Standing Committee on Rules, Procedures and the Rights of Parliament on a Case of Privilege

If a motion is adopted to refer a case of privilege to the Standing Committee on Rules, Procedures and the Rights of Parliament, the committee studies the matter and submits a report to the Senate containing its assessment of the matter. The report can contain recommendations for action by the Senate. Once the report is presented to the Senate, it is treated like any other committee report and placed on the Orders of the Day for consideration. The report can be debated, adjourned and amended. A decision of the Senate on the report is required before any of the recommendations contained in the report can take effect or be implemented.

APPENDIX: Key Canadian Court Cases Relating to Privilege

Kielly v. Carson (1842 – Newfoundland)

One notable case prior to Confederation was that of *Kielly v. Carson* in 1842 in Newfoundland. Carson, a member of the House of Assembly, had made remarks in the assembly about the management of the hospital in St. John's. Kielly, who was the manager of the hospital, reproached the member outside the chamber. As a result, Kielly was found in contempt by the assembly and after refusing to apologize at the bar, he was committed to jail. Kielly later brought a lawsuit against the Speaker and Carson. The Supreme Court of Newfoundland decided in favour of the Speaker. The Judicial Committee of the Privy Council overturned that decision and stated that the assembly only had such powers as were reasonably necessary for the proper exercise of its functions and duties which did not include the power of arrest for a contempt committed outside the house.[184] In other words, a colonial legislature did not enjoy all the privileges and powers that the Parliament in Great Britain did, simply because a colonial legislature did not have a body of ancient precedents. Such privileges and powers could only be granted by means of an imperial statute.[185]

Landers v. Woodworth (1878 – Nova Scotia)

In 1874, Douglas B. Woodworth, a member of the Nova Scotia House of Assembly, accused the provincial secretary of falsifying a public record. An investigation into the matter by a committee of the house determined that the charge was unfounded. The Assembly then passed a resolution finding Woodworth guilty of a breach of privilege and ordering him to appear at the bar of the house to apologize. When Woodworth refused to appear at the bar and apologize, the house ordered the Sergeant-at-Arms to remove him from the house. Woodworth then took the matter to court, claiming that he had been unjustly found in contempt and expelled from the house. The Speaker, David C. Landers, and certain members of the house were named as defendants.[186] In 1878, the Supreme Court of Canada held that Woodworth's removal from the chamber was due to his refusal to offer an apology and not because he was obstructing the business of the house.[187] The court declared that in the absence of any legislation defining privileges, the removal was beyond the legislature's power unless the member was actually obstructing business.

In 1876, the Nova Scotia legislature adopted legislation conferring upon its members such privileges as were held by the Senate and House of Commons.[188]

184 Maingot, pp. 201-202.
185 Maingot, p. 202.
186 Todd, pp. 690-691.
187 *Landers v. Woodworth*, (1878), 2 S.C.R. 158.
188 *An Act respecting the Legislature of Nova Scotia*, S.N.S. 1876, c. 22.

Fielding v. Thomas (1896 – Nova Scotia)

In 1891, the Nova Scotia House of Assembly passed legislation increasing the salary of one of its members, Lawrence, in his capacity as recorder of the town of Truro.[189] The Mayor of Truro, Thomas, published articles and signed a petition accusing Lawrence of misbehaviour in his office of recorder and as member of the legislature, as well as promoting his own salary increase. The House of Assembly subsequently passed a motion charging Thomas with breach of privilege and ordering him to appear before the bar of the house. After appearing before the bar, Thomas refused to return and appear again. As a result, the assembly passed an order for his arrest and committal to the common jail of Halifax for 48 hours. Thomas then brought an action for assault and imprisonment against the members of the assembly who had voted for his imprisonment. Following trials in Nova Scotia, the matter was referred directly to the Judicial Committee of the Privy Council, which ruled that a provincial legislature did have authority, under section 92 of the *Constitution Act, 1867*, to define through legislation the powers and privileges of the provincial legislature. Since the Nova Scotia legislature had legislated its powers and privileges in 1876, it followed that the House of Assembly had the power to make a finding of contempt for failure to obey an orders and to punish such contempt by imprisonment.[190]

Payson v. Hubert (1904 – Nova Scotia)

In 1902, Annabella Hubert created a disturbance in the corridors of the Nova Scotia House of Assembly in relation to a petition that she had presented, and that had not been acted on. The Chief Messenger of the House of Assembly, W.W. Payson, acting on the direct orders of the Speaker, asked Hubert to leave the precinct. Upon her refusal, Payson then removed Hubert from the building "using no more force than was necessary."[191] The House of Assembly was not in session at the time of this event. Hubert subsequently brought a civil suit against the Chief Messenger for assault. This matter was ultimately decided by the Supreme Court of Canada in 1904.[192] The court ruled that the Speaker and other officers of the House of Assembly have the authority to maintain order and decorum in the chamber and in the precincts of the assembly even when the house is not sitting. The ruling also made clear that:

> ... the liberty of access which the public has to attend the proceedings of the House of Assembly and its Committees and to visit the precincts and rooms of the House is not a *right* but a *license* or *privilege* capable of being revoked, and when properly revoked as to any one leaving him or her a trespasser and liable to expulsion as such.[193]

Limits on Freedom of Speech (1976 and 1977 – House of Commons)

There are two notable cases in the 1970s relating to the privilege of freedom of speech. The first is the 1976 *Ouellet No. 1* case. André Ouellet, a federal cabinet minister, had made controversial statements about the decision of a judge in a judicial proceeding to a journalist outside of the House of Commons. The Superior Court of Québec ruled that statements made outside the house were not protected by

189 *An Act relating to the Town of Truro*, S.N.S. 1891, c. 119, s. 3.
190 Maingot, pp. 205-206.
191 *Hubert v. Payson*, (1903), N.S.R. 211.
192 *Payson v. Hubert*, (1904), 34 S.C.R. 400.
193 *Payson v. Hubert*, (1904), 34 S.C.R. 417.

parliamentary privilege.[194] This decision was affirmed on appeal.[195] As a result, Ouellet was found to be in contempt of the court.

The second case arose in 1977, when five members of Parliament brought forward a notice of motion to the Supreme Court of Ontario asking it to determine whether a statutory order under the *Atomic Energy Control Act* prohibiting them from releasing information was a breach of their privilege of freedom of speech.[196] The court ruled that members of Parliament were free to use the information in Parliament and that they could release the information to the media; however, the media would have to decide for themselves whether or not to publish that information. The media would not be able to claim the same privilege that parliamentarians used in releasing the information to them. The court stated: "The privilege of the Member is finite and cannot be stretched indefinitely to cover any person along a chain of communication initiated by the Member. The privilege stops at the press."[197] Finally, the court also held that members of Parliament could not release such information to constituents or anyone else outside of Parliament, noting that things done by a member beyond the walls of Parliament are generally not protected.[198]

Patriation of the Constitution in 1982 and the *Canadian Charter of Rights and Freedoms*

Although inherited from and patterned on the British concept of privilege, Canadian parliamentary privilege has developed in its distinct way. Up until 1982, any changes to the privileges of Parliament could only be made in accordance with the provisions of section 18 of the *Constitution Act, 1867*. However, since 1982, when the Constitution was patriated, the Parliament of Canada has, subject to other provisions of the Constitution, had the exclusive right to make amendments relating to the federal executive government, the Senate and the House of Commons.[199] Parliamentary privilege can therefore be expanded or limited through amendment of the Constitution made by law.

The Supreme Court of Canada has issued three major rulings since the patriation of the Constitution that shed light on the concept and scope of privilege in Canada. Furthermore, these rulings, in keeping with reasoning dating as far back as the *Stockdale v. Hansard* case, have consistently emphasized the principle of necessity in determining the validity of any assertion of parliamentary privilege.

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly) (1993)

This case, commonly referred to as Donahoe,[200] concerned the right of the legislature to exclude strangers from its proceedings. The New Brunswick Broadcasting Co., operating under the name MITV, claimed the right to film the proceedings of the Nova Scotia House of Assembly with its own cameras. It cited section 2(*b*) of the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of the press and other media of communication. The Nova Scotia legislature opposed the claim on the basis that the

194 *Re Ouellet (No. 1)* (1976), 67 D.L.R. (3d) 73, pp. 84-90.
195 *Re Ouellet*, (1976), 72 D.L.R. (3d) 95. Also see Maingot, pp. 92-94.
196 SOR/76-644.
197 *Clark v. Canada (Attorney General)*, (1977), 81 D.L.R. (3d) 33, p. 56.
198 *Clark v. Canada (Attorney General)*, (1977), 81 D.L.R. (3d) 33, p. 56.
199 *Constitution Act, 1982*, s. 44.
200 Arthur Donahoe was the Speaker of the Nova Scotia House of Assembly at the time.

proposal would interfere with the decorum and orderly proceedings of the house.[201] Although lower courts ruled in favour of the New Brunswick Broadcasting Co., the Supreme Court of Canada overturned those decisions on appeal.[202] The majority decision held that:

> [I]t is reasonable and correct to find that the House of Assembly of Nova Scotia has the constitutional power to exclude strangers from its chamber on the basis of the preamble to the Constitution, historical tradition, and the pragmatic principle that the legislatures must be presumed to possess such constitutional powers as are necessary for their proper functioning.[203]

The majority of judges asserted that there were two categories of privilege, which are:

- constitutionally inherent privilege (i.e., not dependent on statute for its existence); and
- privilege that is not constitutionally inherent (i.e., statutory in basis).[204]

With regard to historically inherent privilege, Justice McLachlin, in delivering the majority opinion stated:

> [I]t seems clear that, from an historical perspective, Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional. The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege.[205]

The significance of the decision is that it recognized the complete jurisdiction of a legislative body where a privilege has a historical foundation and is necessary for its functioning. In such a case, the court will not intervene. However, the decision also implied that the court may intervene in instances where it finds that an activity or matter in question is not necessary to maintain or uphold the dignity and efficiency of the legislative body.[206]

Harvey v. New Brunswick (Attorney General) (1996)

This case involved Fred Harvey, who was elected as a member of the Legislative Assembly of New Brunswick in September 1991. He was then charged and convicted of violating sections 111(1) and 111(8) of the New Brunswick *Elections Act*[207] for having induced a 16 year-old to vote even though he knew she was not qualified to vote. As a result, his seat was vacated in January 1993 upon conviction in

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201 Maingot, p. 307.
202 For further information on this case, consult Davidson, "Parliamentary Privilege and Freedom of the Press..." pp. 10-12; and Bonsaint.
203 *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, pp. 374-375.
204 Maingot, p. 307.
205 *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, pp. 384-385.
206 Maingot, p. 342.
207 *Elections Act*, R.S.N.B. 1973, c. E-3.

accordance with section 119(c) of the same act.[208] Harvey challenged his expulsion from the assembly as well as the constitutionality of parts of the *Elections Act* that disqualified him from voting or seeking re-election, both for a period of five years. He alleged infringement of section 3 of the Charter, which guarantees the right to vote and to be qualified for membership of a Legislative Assembly.[209] The trial judge ruled that the portion of section 119(c) requiring a sitting member to vacate his seat upon conviction was justified under section 1 of the Charter.[210] Harvey's appeals to both the Court of Appeal and the Supreme Court of Canada were rejected.

Although the Supreme Court ruling was unanimous in rejecting the appeal, a minority of justices based part of their reasoning on the historical privileges of the legislature. The majority, however, based their reasoning on a determination that Charter rights were not violated. They refused to consider the case as relating to privilege since only one intervener had raised the issue. Neither the appellant nor the respondent framed their action in terms of privilege before the court.

Canada (House of Commons) v. Vaid (2005)

This case involved Satnam Vaid, who worked as a chauffeur to three consecutive Speakers of the House of Commons between 1984 and 1995. In January 1995 he was terminated, but was later reinstated after a successful grievance launched pursuant to the *Parliamentary Employment and Staff Relations Act*.[211] When he returned to work, he was informed that his position had been designated as bilingual imperative. Upon completing French language training, he was then advised that his position would become surplus effective May 1997 due to a reorganisation within the Speaker's office. After his position was made redundant, Vaid complained to the Canadian Human Rights Commission, alleging racial discrimination and workplace harassment. The commission accepted the complaints and referred them to the Canadian Human Rights Tribunal. The Speaker and the House of Commons challenged the tribunal's jurisdiction in the matter. They claimed that staffing, management and dismissal of any employee were protected by privilege and therefore immune from external review. Furthermore, they claimed that acts of Parliament, including the *Canadian Human Rights Act*, that govern other employers, do not apply within the parliamentary precincts. This challenge of the tribunal's jurisdiction was heard by the Federal Court and the Federal Court of Appeal, which both found in favour of Mr. Vaid. Finally, the House of Commons appealed to the Supreme Court of Canada, which agreed to hear the case.[212]

The Supreme Court granted the appeal of the House of Commons on the question of the appropriate body to hear the complaint by agreeing with the House of Commons that, in this particular case, the Canadian Human Rights Tribunal did not have jurisdiction over the matter. Rather, the matter should be pursued under the provisions of the *Parliamentary Employment and Staff Relations Act.* This decision was based on administrative law principles rather than a claim of privilege.[213]

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208 *Elections Act*, R.S.N.B. 1973, c. E-3, s. 119(c).
209 *Constitution Act, 1982*, s. 3.
210 *Constitution Act, 1982*, s. 1.
211 *Parliamentary Employment and Staff Relations Act,* R.S.C., 1985, c. 33 (2nd Supp.).
212 For further information on this case, consult Joyal, "The Vaid Case...;" and Fox-Decent, "Parliamentary Privilege and the Rule of Law." Also see Fox-Decent, "Parliamentary Privilege, Rule of Law and the Charter after the Vaid Case."
213 *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30, par. 6.

Notwithstanding this decision, the court also addressed the claim of privilege made by the House of Commons. The justices stated that the party who seeks to rely on the immunity provided by parliamentary privilege has the onus of establishing its existence, an onus the Speaker and the House of Commons had failed to meet. The court held that while "[l]egislative bodies created by the *Constitution Act, 1867* do not constitute enclaves shielded from the ordinary law of the land," they are entitled to assert a legitimate claim of privilege where appropriate.[214] If the privilege claimed is historically well-founded, courts should not be allowed any oversight of the actions covered by the privilege. However, if the privilege claimed has not already been authoritatively established, then the courts will have a role in determining its legitimacy. Furthermore, the court's role is limited to determining the existence and scope of a claimed privilege, but it cannot render a judgment on the exercise of a legitimately claimed privilege.[215]

Justice Binnie, in delivering the unanimous decision of the court, elaborated on the court's view of privilege by stating that the test of necessity must be used in determining the existence and scope of privilege:

> In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.[216]

The Supreme Court, after applying the necessity test, unanimously rejected the notion that the courts have no jurisdiction over any labour issue arising in Parliament, and concluded that statute law does apply to Parliament.[217]

One of the key points that this case established is that privilege has its limits. It ought not to be asserted to derogate arbitrarily from the legitimate rights of others. With respect to the claim of immunity from the application of statute law, the Supreme Court definitively established that privilege constitutes only partial immunity from the law and only as it relates to the house's core functions.[218]

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214 *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30, par. 29.
215 *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30, par. 40.
216 *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30, par. 46.
217 *Canada (House of Commons) v. Vaid,* [2005] 1 S.C.R. 667, 2005 SCC 30, par. 63-70.
218 *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30, par. 46.