COURT OF APPEAL FOR ONTARIO

CITATION: Alford v. Canada (Attorney General), 2024 ONCA 306
DATE: 20240424
DOCKET: C70739

Doherty, Brown and Trotter JJ.A.

BETWEEN

Ryan Alford

Applicant (Respondent)

and

Canada (Attorney General)

Respondent (Appellant)

Alexander Gay and Monika Rahman, for the appellant

Ryan Alford, acting in person

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

Gannon Beaulne, Caitlin Hurren, and Alysha Pannu, for the intervener Canadian Civil Liberties Association

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

Maxime Faille and Keith Brown, for the intervener Speaker of the Senate

Heard: October 3, 2023

On appeal from the order of Justice John S. Fregeau of the Superior Court of Justice, dated May 13, 2022, with reasons reported at 2022 ONSC 2911.

Doherty J.A.:

I

OVERVIEW

[1] The government of the day is accountable to Parliament. Effective oversight of governmental activity by Parliament is essential to the functioning of a parliamentary democracy. Parliament must be able to critically review government conduct and policies, free from executive or judicial interference. To enable the necessary parliamentary oversight, the Houses of Parliament and their individual members are endowed with the privileges, immunities, and powers necessary to discharge their legislative functions. These include the freedom to speak and debate freely in Parliament without fear of being held liable in a court of law or by the government.

[2] Adequate parliamentary oversight of the government in matters involving national security and intelligence raises difficult problems. Some government information and activity must remain confidential and out of the public realm. Improper disclosure of certain information or activities pertaining to national security or intelligence gathering can do great harm to the country. Sometimes, disclosure will cost people their lives.

[3] How is full and independent parliamentary oversight to be reconciled with the need to maintain the strict confidentiality of certain information and activities? The *National Security and Intelligence Committee of Parliamentarians Act*, S.C. 2017, c. 15 (the "Act") is an attempt to achieve that reconciliation.

[4] I will address the Act in more detail below. For present purposes, a broad outline will suffice. The Act creates a Committee of Parliamentarians ("the Committee")[1] appointed by the Governor-in-Council who are given the authority to access classified information pertaining to matters of national security and intelligence. The Committee is charged with the responsibility of preparing reports for the Prime Minister on the matters it inquires into. The reports are eventually tabled before committees of each house of Parliament.

[5] The Act contemplates that members of the Committee will, in the course of performing their duties, come to know highly sensitive and classified information. The Act takes various steps to preserve the secrecy of that information. Those steps include preventative measures intended to maintain the confidentiality of the information, and also the creation of criminal offences for the improper disclosure of information protected under the Act and related statutes. Committee members, present and past, can be charged under these provisions.

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[1] This Committee should not be confused with committees of the House of Commons and the Senate.

[6] In the normal course, were a Committee member to be charged with improper disclosure based on a statement made in Parliament or in a committee of Parliament, that member could claim parliamentary immunity from prosecution. In addition, anything that member said in Parliament or committee would be inadmissible in court in a prosecution for unlawful disclosure of the information. Section 12 of the Act changes all of that.

[7] Section 12 expressly excludes any claim for parliamentary immunity by a Committee member in a proceeding based on the alleged improper disclosure of information obtained as a consequence of membership on the Committee. Statements made in Parliament or in committee by a Committee member can be the subject of a charge under the Act, or related statutory provisions, and statements made by members of the Committee in Parliament or in committee are admissible against the member to prove the alleged improper disclosure.

[8] From one perspective, the Act can be seen as a reasonable attempt by Parliament to balance legitimate and competing oversight and confidentiality concerns. The respondent, Ryan Alford, a law professor with an expertise in constitutional law and national security (the “respondent”), takes a different view. He submits that, whatever one may say about the overall merits of the Act, s. 12 runs afoul of a fundamental constitutional principle. He argues that s. 12 eliminates freedom of speech and debate within Parliament insofar as the substance of any speech or debate is said to constitute an improper disclosure of information under

the Act, or a related statutory provision. The respondent submits that the right to freedom of speech and debate within Parliament is absolute, fundamental to Canadian democracy, constitutionally protected, and cannot be abrogated or limited, except by way of a constitutional amendment under s. 38 of the *Constitution Act, 1982*.

[9] The Act has been in force for six years. No one affected by the Act has challenged its constitutionality. This court, however, in a previous appeal granted the respondent public interest standing to seek a declaration that s. 12 is *ultra vires* Parliament: *Alford v. Canada (Attorney General)*, 2019 ONCA 657, 62 Admin L.R. (6th) 285. Having obtained standing, the respondent was successful in challenging s. 12. The application judge declared s. 12 *ultra vires* and "invalid".

[10] The Attorney General of Canada ("Canada") appeals. Canada contends that the Constitution, and specifically s. 18 of the *Constitution Act, 1867*, authorizes Parliament to enact legislation defining the scope of parliamentary privileges. On Canada's argument, s. 12 of the Act is an exercise of the constitutional authority granted under s. 18 and no amendment to the Constitution is required.

[11] Canada's position is supported on the appeal by the Speaker of the Senate and the Speaker of the House of Commons, both of whom were granted leave to intervene. The Canadian Civil Liberties Association and the British Columbia Civil

Liberties Association have also intervened. They support the position advanced by the respondent.

[12] The court had the benefit of full and capable argument from the respondent, who represented himself, and all counsel involved in the appeal.

[13] I would allow the appeal. I accept Canada's contention that Parliament can, exercising its plenary legislative authority, limit the right to freedom of speech and debate in the manner laid out in s. 12 of the Act. An amendment to the Constitution was not required. I would hold that s. 12 of the Act is *intra vires* the federal Parliament.

II

THE PROVISIONS IN THE ACT

[14] As set out above, the Act creates a Committee of up to 11 parliamentarians consisting of members of the House of Commons and the Senate. The Committee members are appointed by the Governor-in-Council on the recommendation of the Prime Minister, hold their position at pleasure, and must include parliamentarians who are not members of the government party. Despite its name, the Committee is not a committee of either house of Parliament, but is part of the executive: ss. 4, 5.

[15] The Committee is given a very broad mandate to review matters pertaining to national security and intelligence. The mandate includes the review of "any

activity carried out by a department that relates to national security or intelligence": s. 8. The Minister is given a limited power to refuse the Committee access to specified documentation, but only if access to that documentation would be injurious to national security: s. 16.

[16] Membership in the Committee is voluntary. No Senator or Member of Parliament is required to participate in the Committee. Those who do participate do so presumably with knowledge of the Act and, in particular, the limits imposed by the Act on parliamentary privilege. Committee members are required to obtain the necessary security clearances and take an oath or affirmation to maintain the confidentiality of the information made available to them. Members must also comply with the procedures and practices found in the regulations, including those relating to in-camera hearings: s. 10.

[17] The Committee is required to submit an annual report to the Prime Minister, in which it details its reviews conducted under the Act. Other reports are optional. Ultimately, the reports are tabled and referred to various committees of both houses of Parliament. The Prime Minister can order parts of the reports be redacted before they are tabled: s. 21.

[18] The Committee must also inform the appropriate minister and the Attorney General of Canada of any potentially unlawful activity it comes across while conducting its various reviews: s. 31.1.

[19] The Act provides for a review of the Act after five years: s. 34. There is no indication in the record that such a review has been done.

[20] Section 11(1) of the Act sets out the prohibition against disclosure of certain information. This section provides that no member or former member of the Committee may “knowingly disclose any information that they obtained, or to which they have had access, in the course of exercising their powers or performing their duties or functions under [the] Act and that a department is taking measures to protect.”

[21] The prohibition against disclosure of information found in s. 11(1) applies to information that comes to Committee members in the course of their activities as Committee members, and “that a department is taking measures to protect.” That phrase is not defined in the Act, and it is not clear on this record what steps a department would have to take for the information to fall within s. 11(1).

[22] The non-disclosure requirement in s. 11(1) is qualified by s. 11(2). That subsection permits Committee members to disclose the information referred to in subsection (1), either for the purpose of exercising their duties and powers under the Act, or as required by any other law.

[23] The prohibition against disclosing information is not made an offence under s. 11(1). It would appear, however, that disclosure contrary to s. 11(1) would constitute an offence under s. 126(1) of the *Criminal Code*.[2]

[24] Section 11(1) of the Act does not, however, capture the full extent of the prohibition against disclosure of information by Committee members. Under s. 8(1) of the *Security of Information Act*, R.S.C. 1985, c. O-5, current or former members of the Committee are "persons permanently bound to secrecy". Sections 13 and 14 of the *Security of Information Act*, make it an offence for a Committee member, as a "person permanently bound to secrecy", to intentionally, and without authority, communicate information that falls within the meaning of the phrase "special operational information". That phrase is defined in s. 8(1) and includes the identity of confidential informants, plans for military operations, information pertaining to covert operations, and other information or intelligence relating to those matters. The offences created by ss. 13 and 14 are indictable offences. Both are subject to a public interest defence: s. 16.

[25] Because the Committee is not a committee of either house of Parliament, statements made in the Committee are not protected by parliamentary privilege.[3]

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[2] Section 126 provides that anyone who, without lawful excuse, intentionally does anything that is forbidden by an Act of Parliament, but for which no punishment is provided, is guilty of an offence punishable by either indictment or on summary conviction.

[3] See the comments of Michel Patrice, Law Clerk and Parliamentary Counsel to the Senate of Canada: Senate, Standing Committee on National Security and Defence, *Evidence*, 42-1, No. 16 (15 June 2017), at p. 16:115.

Privilege comes into play when information protected by s. 11(1) of the Act is repeated in Parliament or in a committee of Parliament by a member or former member of the Committee established under the Act.

[26] Section 12 of the Act, the focus of this proceeding, provides:

> 12(1) Despite any other law, no member of former member of the Committee may claim immunity based on parliamentary privilege in a proceeding against them in relation to a contravention of subsection 11(1) or of a provision of the *Security of Information Act* or in relation to any other proceeding arising out of any disclosure of information that is prohibited under that subsection.
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> (2) A statement made by a member or former member of the Committee before either House of Parliament or committee of the Senate, of the House of Commons or of both Houses of Parliament is admissible in evidence against them in a proceeding referred to in subsection (1).

[27] Section 12(1) eliminates any claim of immunity based on parliamentary privilege advanced by a member or a former member of the Committee in a proceeding alleging improper disclosure of information under s. 11(1), a proceeding alleging a contravention of the *Security of Information Act*, and any other proceeding arising out of the disclosure of information protected by s. 11(1) of the Act.

[28] Section 12(2) renders statements made by Committee members in Parliament, or in committee, admissible as evidence against that member in any of the proceedings described in s. 12(1).

[29] It is difficult to assess the impact of the Act on proceedings in Parliament. The Act prohibits disclosure of only certain specified information. It does not prohibit debate on matters of national security and intelligence gathering generally, to which that information may have relevance. It seems probable that Committee members, armed with insights gained by the reviews contemplated by the Act, would have little difficulty in addressing important issues of national security and intelligence without revealing specific information protected by s. 11(1). There is no suggestion in this record that the Act has, or has even been seen as posing, any impediment to a fulsome discussion in Parliament, or a committee of Parliament, of matters pertaining to national security and intelligence gathering in the six years since the Act came into force.

[30] Regarding the parliamentary powers, privileges, and immunities that belong to individual members, it is significant that s. 12 of the Act applies only to those members of Parliament who have chosen to be on the Committee, presumably with full knowledge of the limits on their parliamentary privilege that come with membership on the Committee. It is fair to say that members who go on the Committee willingly accept the limits on their privilege found in s. 12.

III

THE REASONS OF THE APPLICATION JUDGE

[31] The application judge began his reasons with a review of the relevant provisions of the Act. He correctly observed that s. 12(1) of the Act limited parliamentary privilege and, in particular, freedom of speech within Parliament, by prohibiting immunity claims based on parliamentary privilege in prosecutions against members of Parliament alleging a breach of s. 11 of the Act, or the relevant provisions of the *Security of Information Act*. The application judge correctly framed the issue arising in the proceeding as requiring a determination of:

> Parliament's constitutional competence, pursuant to s. 18 of the *Constitution Act, 1867*, to pass legislation abridging parliamentary privilege in the circumstances set out in s. 12 of the Act, without a constitutional amendment [para. 12].

[32] In holding s. 12 of the Act *ultra vires*, the application judge made two crucial findings:

- Parliamentary privilege, inclusive of freedom of speech and debate and the immunities flowing therefrom, is an essential part of Canada's constitutional democracy and has been constitutionalized through the preamble of the *Constitution Act, 1867*; and
- Parliament's legislative authority to "define" parliamentary privilege pursuant to s. 18 of the *Constitution Act, 1867* does not provide Parliament with the

constitutional competence to abrogate or restrict Parliamentary privilege in the circumstances set out in s. 12 of the Act, absent a constitutional amendment pursuant to s. 38 of the *Constitution Act, 1982*.

IV

THE POSITION OF THE PARTIES

[33] The parties and interveners agree that the right to freedom of speech and debate within Parliament is a longstanding and well-recognized parliamentary privilege inherent in Canada's constitutional structure, and necessary to the role played by Parliament in Canada's constitutional democracy. The parties and interveners also agree that s. 12 of the Act limits the scope of the right to freedom of speech and debate normally enjoyed by Committee members. Put bluntly, if s. 12(1) is valid legislation, a Committee member who improperly reveals information protected by s. 11(a) in Parliament or in a committee of Parliament can go to jail for the statements made by that member.

[34] While the parties agree on the effect of s. 12 of the Act, they join issue on the question of whether the means chosen by Parliament to limit the scope of freedom of speech and debate within Parliament is constitutionally available. The respondent argues that freedom of speech and debate in Parliament is fundamental and is constitutionally entrenched via the preamble to the *Constitution Act, 1867*. Consequently, freedom of speech and debate can be circumscribed

only by a constitutional amendment that conforms to the amending procedures in s. 38 of the *Constitution Act, 1982*.

[35] Canada counters with s. 18 of the *Constitution Act, 1867*. Canada submits that on a plain reading, s. 18 gives Parliament plenary power to define by legislation all parliamentary privileges, powers, and immunities. Canada maintains that s. 12 of the Act is an exercise of the constitutional power granted to Parliament by s. 18.

V

ANALYSIS

[36] Parliamentary privileges, powers, and immunities, including freedom of speech and debate within Parliament, have been recognized in the United Kingdom for centuries as a manifestation of the common law and as essential to Parliament's discharge of its duties. Prior to Confederation, colonial legislatures in Canada enjoyed, through the common law, many of those same privileges, powers, and immunities. The powers were defined functionally to include any power necessarily incidental to a proper functioning of the legislature: *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at 377-380; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, at para. 29; *Duffy v. Canada (Senate)*, 2020 ONCA 536, 151 O.R. (3d) 489, at paras. 25-26, leave to appeal refused, [2020] S.C.C.A. No. 335.

[37] At Confederation, the provincial legislatures and the Parliament of Canada inherited parliamentary powers, privileges and immunities from the Parliament at Westminster by virtue of the preamble to the *Constitution Act, 1867*, which provides for “a Constitution similar in Principle to that of the United Kingdom”: *Vaid*, at para. 29(3); *Duffy*, at para. 27.

[38] At the federal level, unlike the provincial level, the *Constitution Act, 1867* specifically assigned to Parliament the power to “define” by legislation the powers, immunities, and privileges of the federal Parliament and its members. That power is exercisable “from time to time”. Section 18 reads:

> The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

[39] Parliament moved quickly to exercise the power in s. 18 by enacting s. 4 of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1:

> The Senate and the House of Commons respectively, and the members thereof hold, enjoy and exercise
>
> > (a) such and the like privileges, immunities and powers as, at the time of the passing of the *Constitution Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by members thereof, in so far as is consistent with that Act; and

> (b) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.[4]

[40] Section 4(a) declares that Parliament holds the privileges, immunities and powers held by the House of Commons of the United Kingdom at the time of the passing of the *Constitution Act, 1867.* Those powers, privileges and immunities clearly included freedom of speech and debate: *New Brunswick Broadcasting*, at p. 385.

[41] Section 4(b) of the *Parliament of Canada Act* indicates that Parliament also holds such privileges, immunities and powers as "are defined by Act of the Parliament of Canada". This legislative power is limited only by the requirement in s. 4(b) that any privilege, immunity, or power bestowed by an Act of Parliament not exceed the powers enjoyed by the House of Commons of the Parliament of the United Kingdom at the time of the passing of the Canadian legislation purporting to define parliamentary privileges, immunities and powers.

[42] This appeal turns on the interpretation of s. 18 of the *Constitution Act, 1867*. Constitutional documents must be interpreted in a large and liberal manner, bearing in mind the historical context and the entirety of the constitutional text. The

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[4] Section 4(a) was first enacted by 1867, 31-32 Vict., c. 23, s. 1 (Can.). Section 4(b) first appears in R.S.C. 1886, c. 2, s. 3: see J.P. Joseph Maingot, *Parliamentary Immunity in Canada* (Toronto: LexisNexis, 2016), at p. 20, fn. 25.

interpretation must, however, begin with, and remain true to, the language of the relevant provision. Meaning comes first and foremost from the text: *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, 462 D.L.R. (4th) 1, at para. 65; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at paras. 8-13; *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at paras. 35-38; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 15.

[43] The language of s. 18 plainly and unequivocally gives to Parliament the plenary and continuing legislative power to define parliamentary privileges, immunities, and powers by way of duly enacted legislation. With the exception of the limitation on the expansion of those rights described in the closing language of s. 18, that section places no limit on how Parliament can "define" its privileges, immunities, and powers. To "define" in its normal meaning is to say what something is, and/or what something is not. Whether Parliament expands or limits the scope of parliamentary privileges, immunities and powers, Parliament is engaged in defining those rights: *Vaid*, at para. 32.

[44] Furthermore, on a plain reading, s. 18 applies to all parliamentary privileges, immunities, and powers. Nothing in the text suggests that s. 18 is limited to certain legislated parliamentary privileges, immunities, and powers. I see nothing inconsistent with recognizing that certain privileges, immunities, and powers are inherent in the role of Parliament, while at the same time acknowledging that after 1867, s. 18 of the *Constitution Act, 1867* gave Parliament the authority to define

its parliamentary privileges, immunities, and powers, including those inherent in the role of Parliament.

[45] The interpretation of s. 18 does not, however, end with the text. The meaning of the words must be informed by the fundamental organizing principles of the Canadian Constitution. Those principles are compendiously captured in the preamble's reference to "a Constitution similar in Principle to that of the United Kingdom". Lamer C.J.C. explained the interaction between the preamble and specific provisions of the *Constitution Act, 1867* in *Reference re Remuneration of Judges of Provincial Court of P.E.I.*, [1997] 3 S.C.R. 3, at para. 95:

> But the preamble does have important legal effects. Under normal circumstances, preambles can be used to identify the purpose of a statute, and also as an aid to construing ambiguous statutory language [citation omitted]. The preamble to the *Constitution Act, 1867*, certainly operates in this fashion. However, in my view, it goes even further. In the words of Rand J., the preamble articulates 'the political theory which the Act embodies [citation omitted]. It recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law. [Emphasis added.]

[46] The independence of Parliament from executive and judicial interference is undoubtedly one of the basic principles of Canadian democracy captured by the language of the preamble. It is fundamental that Parliament control its own procedures. Without that autonomy, Parliament could not effectively perform its legislative role: *Vaid*, at para. 29(7).

[47] Parliamentary privilege exists to protect the independence of Parliament and thereby further Parliament's ability to effectively oversee the activities of government. Section 18 of the *Constitution Act, 1867* is consistent with, and promotes, the independence of Parliament by recognizing Parliament's ability to define its own powers, privileges, and immunities. This interpretation of s. 18, which in my view flows easily from the language, is consistent with the principle of the independence of Parliament and facilitates Parliament's oversight role.

[48] It is important to bear in mind that this is not a case in which the executive or a third party seeks to limit the scope of an asserted parliamentary privilege: see *Re Clark et al. and Attorney-General of Canada* (1977), 17 O.R. (2d) 593 (S.C.); *Vaid*. Rather, this is a situation in which Parliament has chosen, through legislation, to limit its own privileges, powers, and immunities to enhance Parliament's ability to oversee certain government activities. Interpreting s. 18 so as to permit legislation like s. 12 of the Act is consistent with the fundamental principles underlying Canadian democracy.

[49] Section 12 of the Act stands as an express and crystal-clear statement of Parliament's decision to exclude reliance on parliamentary privilege in the identified circumstances. Parliament's intention is obvious. As Binnie J. observed in *Vaid*, at para. 29(9):

> Once the category (or sphere of activity) is established, it is for Parliament, not the courts, to determine whether in a particular case the *exercise* of the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts. [Emphasis in original.]

[50] To adapt the language of Binnie J. to the present situation, freedom of speech and debate are clearly recognized categories of parliamentary privilege. Section 12 reflects Parliament's decision that the exercise of parliamentary privilege in the circumstances governed by s. 12 was neither "necessary nor appropriate".

[51] Rowe J. made the same point in his concurring judgment in *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at para. 66:

> In other words, expecting the legislature to comply with its own legislation cannot be regarded as an intrusion on the legislature's privilege. It is not an impediment to the functioning of a legislature for it to comply with its own enactments. Accordingly, when a legislature has set out in legislation how something previously governed pursuant to privilege is to operate, the legislature no longer can rely on inherent privilege so as to bypass the statute. [Emphasis added.]

[52] The respondent submits that s. 12 undermines the rationale for parliamentary privilege and interferes with the independence and autonomy of Parliament. With respect, Canada's interpretation of s. 18 of the *Constitution Act, 1867* gives full force and effect to parliamentary independence from the judiciary and Executive. The courts and the Executive are obligated to respect Parliament's decision as to the appropriate scope of its own powers and privileges in the context of the disclosure of information protected by s. 11 of the Act, or related statutes. It is the respondent's position that collides with both the rationale for the existence of parliamentary privilege and the specific language of s. 18 of the *Constitution Act, 1867*.

[53] Lastly, I turn to the respondent's submissions that s. 12 of the Act prevents Parliamentarians from informing their colleagues about government abuses and "drastically" alters the "constitutional architecture" in Canada. With respect, these submissions overstate the effect of s. 12. There is nothing in the record to support the inference that in the six years since its enactment, s. 12 has had any impact on Parliamentarians, or has interfered with full debate on matters of national security.

[54] The closest one comes to evidence of any interference with the functioning of Parliament is the hypothetical presented by the respondent in his factum (para. 43). In that example, a Committee member becomes aware, by virtue of his participation in the Committee, that a government agency is making payments to

third parties in respect of unlawful activities carried out by a third party in another country. The member wants to expose this activity in Parliament, but is prohibited from disclosing the information by s. 11(1) of the Act, and cannot claim parliamentary privilege by virtue of s. 12 of the Act. The respondent depicts this member as permanently and totally silenced.

[55] I disagree with the submission that the member's privilege of free speech and debate would be totally abrogated in the hypothetical situation posed by the respondent. Section 11(1) prohibits disclosure of specific information, not questions or speeches about matters pertaining to national security. Because certain information may be subject to a non-disclosure obligation under the Act, does not mean that the subject matter to which that information relates cannot be the topic of questions in Parliament or a committee of Parliament. For example, questions about government practices and policies in respect of specific kinds of activities would be entirely appropriate as long as those questions did not disclose specific information protected by s. 11 or related statutes.

[56] In addition, s. 12 does not limit Parliament's *lex parliamenti* privilege to require the production of documents and testimony: see *Maingot*, at pp. 174-77. Multiple speakers of the House of Commons have affirmed that this privilege includes a power to require production, even of documents relating to matters of national security, should members of Parliament in their wisdom pass such an

order.[5] The member in the respondent's hypothetical could, without disclosing any specific information protected by s. 11(a) of the Act or related statutes, request that colleagues in a House of Parliament, or on a committee of Parliament, order the production of documents or testimony in respect of matters relating to national security. If such an order were made in the hypothetical posed by the respondent, parliamentary oversight of national security matters would obviously be enhanced. In fact, it is arguable that if the order was made, disclosure of the information protected under s. 11(1) and related provisions would be permitted under s. 11(2) of the Act, which allows disclosure where disclosure is "required by any other law".

[57] It is fair to say that s. 12 does limit the right to free speech and debate within Parliament. That limitation, however, stops far short of anything approaching a constitutional renovation, or an embargo on parliamentary oversight of matters pertaining to national security.

VI

CONCLUSION

[58] For the reasons set out above, I would allow the appeal. I am satisfied that s. 12 is valid federal legislation. Section 18 of the *Constitution Act, 1867*

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[5] House of Commons Debates, 40-3, No. 34 (27 April 2010), at pp. 2039-2045 (The Honourable Speaker Peter Milliken); House of Commons Debates, 43-2, No. 119 (16 June 2021), at pp. 8548-8550 (The Honourable Speaker Anthony Rota). In this latter ruling, Speaker Rota noted that "Nothing in [*The National Security and intelligence Committee of Parliamentarians Act*] affects or limits the privileges of the House to order the production of documents, even those with national security implications."

contemplates legislation by Parliament which expressly limits or otherwise alters the scope of parliamentary powers, whether inherent or statutory in origin. The arguments pertaining to the powers to amend the Constitution need not be addressed.

[59] Everyone agrees this is not a case for costs.

Released: “April 24, 2024 DD”

“Doherty J.A.”
“I agree. David Brown J.A.”
“I agree. G.T. Trotter J.A.”