Loose lips sink ships: SCC upholds restrictions on Parliamentarians' right to disclose national security information

May 15, 2026

In *Alford v. Canada (Attorney General),* 2026 SCC 14, the Supreme Court of Canada upheld the constitutional validity of the limit on parliamentary privilege imposed by s. 12 of the *National Security and Intelligence Committee of Parliamentarians Act,* S.C. 2017, c. 15 (the *NSICOP Act*). Section 12 prohibits members of Parliament and the Senate who sit on the committee established by the NSICOP Act from claiming immunity based on parliamentary privilege in any proceeding against them arising from their public disclosure, in parliamentary proceedings or otherwise, of national security information that they obtained or had access to as a consequence of their committee membership.

The SCC's decision affirms Parliament's powers to define its own privilege and marks the end of an 8-year constitutional challenge against s. 12 of the *NSICOP Act* by Professor Ryan Alford of the Bora Laskin Faculty of Law, who challenged the provision due to concerns that its limit on parliamentary privilege would prevent parliamentarians from disclosing government abuses.

Background

The *NSICOP Act,* enacted in 2017, establishes a committee of parliamentarians, 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). The Committee's mandate is to oversee Canada's national security and intelligence apparatus and prepare reports for the Prime Minister on the matters into which it inquires. Membership on the Committee is voluntary.

Section 11 of the *NSICOP Act* prohibits Committee members from disclosing information if the information meets the following two criteria: (1) it was obtained or they had access to it through participation on the Committee; and (2) if a government department is taking measures to protect the information. Ordinarily, parliamentary privilege would immunize members of the House and Senate against having statements made in Parliament used against them in court. However, s. 12 of the *NSICOP Act* prohibits any member or former member of the Committee from claiming immunity based on parliamentary privilege in any proceeding related to a violation of s. 11.

After initially having his application dismissed for lack of standing, in 2019 Professor Alford was granted public interest standing by the Court of Appeal for Ontario to seek a declaration that s. 12 of the *NSICOP Act* was *ultra vires* Parliament because it impermissibly infringed on parliamentarians' freedom of speech in the course of parliamentary proceedings. At the application hearing, the application judge granted the relief sought by Professor Alford, finding that parliamentary privilege is an essential part of Canada's constitutional democracy and that Parliament lacked the constitutional competence to restrict parliamentary privilege in the manner of s. 12 of the *NSICOP Act*, absent a constitutional amendment.

In 2024, a unanimous decision of the Court of Appeal for Ontario allowed the Attorney General of Canada's appeal and overturned the application judge's decision, finding that Parliament had the legislative authority to limit parliamentary privilege pursuant to s. 18 of the *Constitution Act, 1867*.

The Supreme Court's decision

The Supreme Court dismissed Professor Alford's appeal. Writing for an 8-judge majority, Justice Rowe began by defining parliamentary privilege as "the sum of the privileges, immunities, and powers enjoyed by the Senate, the House of Commons, and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions". Justice Rowe emphasized that the purpose of parliamentary privilege is to ensure the autonomy of the legislature from undue interference from the executive branch or the judiciary. In practice, parliamentary privilege is the legislative bodies' exclusive authority to set and enforce their own rules and conduct their proceedings without interference of the courts. In so doing, Parliament distinguishes areas of legislative body jurisdiction from judicial jurisdiction. Parliament's authority is set out in s. 18 of the *Constitution Act, 1867,* which assigns Parliament the power to "define" its "privileges, immunities, and powers" by passing legislation "from time to time". Citing *Canada (Board of Internal Economy) v. Boulerice*, Justice Rowe noted that Parliament's ongoing power to define legislated parliamentary privileges is subject to the express limit that these privileges do not exceed those of the British House of Commons held at the time of passing of the Canadian legislation.[1]

Justice Rowe undertook a two-step analysis to determine the constitutionality of s. 12 of the *NSICOP Act*. He first considered the text, context, and purpose of s. 18 of the *Constitution Act, 1867* to determine the scope of the provision. Justice Rowe found that the provision grants Parliament the legislative authority to both supplement and to limit its privileges as it deems appropriate to fulfill its constitutional role. Justice Rowe went on to find that Parliament's powers under s. 18 are broad and subject to only three constraints. First, Parliament must not grant itself privileges, immunities, or powers that exceed those of the British House of Commons at the time the legislation is passed, as stated expressly by the provision. Second, s. 18 cannot be used in a manner that would fundamentally undermine Parliament's function as a legislature in Canada's Westminster-styled parliamentary democracy, such as abolishing parliamentary privileges as a whole. Third, s. 18 must be used consistently with other provisions of the Constitution that expressly relate to the functioning of Parliament, such as the constitutional right to speak English or French in debates.

Justice Rowe then evaluated whether s. 12 of the *NSICOP Act* falls within the scope of the legislative authority conferred by s. 18 of the *Constitution Act, 1867*. He concluded

that Parliament had the legislative authority to enact s. 12 and limit the privilege of freedom of speech in favour of parliamentary oversight of national security matters. By imposing this narrow limit on its own privileges, Parliament chose to enlarge the jurisdiction of the courts by permitting them to adjudicate criminal proceedings arising from disclosure of sensitive matters of national security. Justice Rowe also observed that the limit in s. 12 is narrow because it restricts the immunity only of those parliamentarians who have chosen to join the Committee and only applies to national security information meeting the two criteria under s. 11, namely that the information was obtained through membership on the Committee and that a government department is taking measures to protect the information.

In her dissenting opinion, Justice Côté agreed with the majority's interpretive framework for s. 18 of the *Constitution Act, 1867* but disagreed with its application to s. 12 of the *NSICOP Act*, holding that the provision is an unprecedented restriction on parliamentary free speech and that it is *ultra vires* Parliament's authority under s. 18. Justice Côté found that the combined effects of s. 11 and s. 12 of the *NSICOP Act* invite the executive branch of government to define the boundaries of lawful parliamentary speech, and the courts to sanction parliamentarians for crossing those boundaries, without parliamentary oversight or involvement. Justice Côté additionally found that the limit on parliamentary free speech was broad and indeterminate, and that it lacked material safeguards, such as statutory requirements that the information protected from disclosure be of a particular kind or relate to a particular subject.

Key takeaways

- The Constitution of Canada recognizes the need for parliamentary privilege in a Westminster-styled parliamentary democracy. However, it is Parliament's role to define its own parliamentary privileges. Parliament has broad, legislative authority to do so under s. 18 of the *Constitution Act, 1867*.
- Courts should be cautious when reviewing exercises of legislative authority under s. 18 so as to avoid interfering with Parliament's authority to define what it needs to carry out its own constitutional role. On review, a court's role is limited to ensuring that the authority is exercised within the limits of the Constitution, including the constitutional function of Parliament and Canada's constitutional architecture.
- As a result of the Supreme Court of Canada's decision, Canada now differs from other Westminster-style parliamentary democracies such as the United Kingdom, which grant absolute parliamentary freedom of speech, even in relation to highly sensitive contexts such as national security.

Footnote

[1] Borden Ladner Gervais LLP acted for the Board of Internal Economy and the Speaker of the House of Commons in its successful appeal to the Federal Court of Appeal, which found that decisions of the Board of Internal Economy are immunized from judicial review because its decisions are covered by parliamentary privilege : see *Canada (Board of Internal Economy) v. Boulerice*, 2019 FCA 33.

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