Parliamentary privilege: Federal national security legislation held unconstitutional

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Introduction

On May 13 2022, the Ontario Superior Court of Justice found section 12 of the *National Security and Intelligence Committee of Parliamentarians Act* (the Act) unconstitutional. Section 12 of the Act removes committee members' ability to raise parliamentary privilege as a defence in the event that they contravened the Act by releasing confidential national security information in parliamentary proceedings.

The court found section 12 of the Act to be unconstitutional as it limited protected rights of parliamentary privilege and freedom of speech and debate in Parliament. This decision underscores the high degree of importance Canada's constitution places on parliamentary privilege, and may have important practical implications in the future for how and to what extent the executive will share sensitive national security information with parliamentarians.

Background

In 2017, the Committee was established pursuant to the Act to review national security and intelligence activities of the federal national security apparatus. The Act prohibits Committee members from knowingly disclosing protected information obtained in the course of their duties. Ordinarily, parliamentary privilege would immunize senators and members of Parliament against having statements made in Parliament used against them in court. However, section 12 of the Act purported to strip current and former Committee members of this privilege. This means Committee members could face prosecution for sharing information in parliamentary proceedings about national security or intelligence activities where they believe there is a pressing public need to do so.

Ryan Alford, a law professor at Lakehead University, commenced this action as a public interest litigant, while the Canadian Civil Liberties Association intervened in support.

Decision of the Superior Court of Justice

At the outset, the court examined the origins, constitutional basis and importance of parliamentary privilege. Parliamentary privilege originated in the United Kingdom as its House of Commons established its independence from the Crown. In Canada, parliamentary privilege was gradually accepted as part of Canadian constitutional law, having been recognized by courts as protected by both the preamble and section 18 of the *Constitution Act*, 1867.

The preamble of the *Constitution Act*, 1867 safeguards parliamentary privilege by asserting Canada is to have a constitution similar in principle to that of the U.K. – indicating that Canada has inherited the U.K.'s principles of freedom of speech and debate in Parliament. Section 18 of the *Constitution Act*, 1867 provides further constitutional grounding for parliamentary privilege by granting Parliament legislative authority to define the privileges available to parliamentarians.

Further, parliamentary privilege, according to the court, serves an important democratic and rule of law function:

> parliamentary privilege is one of the ways in which the fundamental constitutional separation of powers is respected [and] is meant to enable the legislative branch and its members to proceed fearlessly and without interference in discharging their constitutional role [of] enacting legislation and acting as a check on executive power. The insulation from external review that privilege provides is a key component of our constitutional structure and the law that governs it.

With the constitutional basis and importance of parliamentary privilege in mind, the court considered whether it was permissible for section 12 of the Act to limit its application in the national security Committee context. As a starting point, the court held that section 18 of the *Constitution Act*, 1867 enables Parliament to expand its privileges, provided such privileges do not exceed those of the U.K.'s House of Commons. However, the court found that section 18 of the *Constitution Act*, 1867 does not empower Parliament to limit parliamentary privilege.

The court specified that limiting parliamentary privilege requires an amendment to the *Constitution Act*, 1867 following the general amendment procedure set out in section 38 of the Constitution Act, 1982. To comply with the general amendment procedure, changes to the *Constitution Act*, 1982 must be approved by Parliament, the Senate, and at least seven provincial legislatures representing more than half of Canada's population.

Section 44 of the *Constitution Act*, 1982 sets out an exception where Parliament may amend the constitution without resort to the general formula. The court held that this exception does not apply to limits on parliamentary privilege because, in accordance with section 42(1) of the *Constitution Act*, 1982, all constitutional changes concerning the powers of the Senate and the Supreme Court of Canada must follow the general amendment procedure. Limiting parliamentary privilege relates to the power of the Senate by reducing its ability to review bills without external interference. This relates to the power of the SCC by potentially requiring the SCC to preside over litigation where committee members are being prosecuted for contravening the Act.

Since section 12 of the Act limits the application of parliamentary privilege, it should have been introduced as a potential constitutional amendment and it should have been

required to comply with all approvals involved in the general amendment procedure. The court's conclusion that section 12 of the Act is unconstitutional is due to not following these steps.

Implications

The decision clarifies that ordinary legislation cannot revoke parliamentary privilege even when it is prompted by national security concerns. Freedom of speech within Parliament and immunity from external review are absolute parts of Canada's constitutional structure. While this decision represents an important defence of parliamentary privilege, it may, however, encourage the executive to withhold crucial national security information from parliamentarians, who are now immunized from disclosing such information in parliamentary proceedings. This may, in turn, impact how the committee and other parliamentarians can hold the executive accountable for sensitive national security and other matters of public importance. As submitted by the Canadian Civil Liberties Association, other jurisdictions have been able to address national security concerns without eroding parliamentary privilege. This decision brings Canada in line with other Westminster democracies, such as New Zealand, Australia and the United Kingdom, in preserving parliamentary privilege.

Canada has not publicly announced whether it will appeal the decision.

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