Court File No. CV-17-0504-00

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

RYAN ALFORD

Applicant

- and -

CANADA (ATTORNEY-GENERAL)

Respondent

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENER

Application under Rule 14.05(3)(h) of the *Rules of Civil Procedure*

INTERVENER'S FACTUM

December 2, 2021

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PART I: OVERVIEW

1. The Canadian Civil Liberties Association is a national, non-partisan, nonprofit, non-governmental organization dedicated to the furtherance of civil liberties in Canada. CCLA intervenes in this application by order of the Honourable Justice J.S. Fregeau, dated August 5, 2021.

2. CCLA intervenes to assist this court in its consideration of the scope of parliamentary privilege and Parliament's ability to eliminate the application of parliamentary privilege through mere legislation. CCLA's submission is directed at addressing the key question of whether freedom of speech and debate in Parliament is an absolute right that cannot be abrogated by: (a) providing information on whether freedom of speech and debate is absolute in other Westminster-based jurisdictions; and (b) reconciling the exercise of parliamentary privilege with the *Canadian Charter of Rights and Freedoms* in Canada's contemporary rights-based legal system.

3. In other Westminster-based jurisdictions *(i.e.*, the United Kingdom, Australia, and New Zealand), legislation comparable to the *National Security and Intelligence Committee of Parliamentarians Act* (the **NSICPA**) preserves parliamentary privilege. Australia and New Zealand have also enacted legislation codifying their interpretation of the scope of parliamentary privilege but the legislation in both these countries prohibits evidence from parliamentary proceedings from being used in court proceedings.

4. Both parliamentary privilege and the *Charter* enjoy constitutional status so parliamentary rights and immunities must be reconciled with the rights of Canadians as codified in the *Charter*. But section 12 of the NSICPA waives parliamentary privilege in a way that abrogates the constitutional rights of parliamentarians to freedom of speech and exceeds the scope of Parliament's collective privilege to regulate its internal affairs.

PART II: FACTS

5. The CCLA takes no position on the facts.

PART III: LAW AND AUTHORITIES

A. Canada's Approach to Parliamentary Privilege in the NSICPA Diverges from the Approach Taken by Other Westminster-based Jurisdictions

6. In other Westminster-based jurisdictions like the United Kingdom, Australia, and New Zealand, parliamentary privilege is absolute, in that all words spoken or acts done by parliamentarians during parliamentary proceedings or other incidental purposes cannot be used against them in criminal proceedings.

7. Canada's approach to parliamentary privilege parallels the United Kingdom given that the *Constitution Act, 1867*, made the privileges of the British House of Commons applicable to Canada. The Preamble of that *Constitution Act, 1867*, which states that Canada has a "Constitution similar in Principle to that of the United Kingdom", entrenched a Westminster-style parliamentary system, including the historical privileges necessary for such a system to function.

8. The parliamentary privileges enjoyed by Canadian parliamentarians are not unlimited. Under section 18 of the *Constitution Act, 1867*, Parliament may not confer on itself any greater privileges than those enjoyed at that time by the House of Commons of the United Kingdom. A second limit flows from the Preamble—necessity must serve as the foundation for all privileges. Similarly, the British Parliament also requires that necessity serve as the foundation for all privilege.

Canada (House of Commons) v Vaid, 2005 SCC 30 at para 41.

9. That said, since Canada enacted the NSICPA in 2017, the symmetry between the scope of parliamentary privilege in British and Canadian Parliaments no longer extends to the use of parliamentary privilege as a defence to disclosing sensitive information. The British Parliament enacted legislation much like the NSICPA in 2013 (the *Justice and Security Act 2013*), which created a new Intelligence and Security Committee of Parliament to oversee the wider government intelligence community. Unlike the NSICPA, which expressly suspends the application of parliamentary privilege to parliamentarians serving on the National Security and Intelligence Committee of Parliamentarians under section 12, the British Act does not remove parliamentary privilege from parliamentarians serving on intelligence and security committees to oversee the wider government intelligence community

Justice and Security Act 2013 (UK), c 18

10. New Zealand and Australia, two other Westminster-based jurisdictions, also have legislation comparable to the NSICPA. Neither Australia's *Intelligence Services Act* nor New Zealand's *Intelligence and Security Committee Act* have any provisions suspending parliamentary privilege. New Zealand's *Act* goes further by expressly preserving parliamentary privilege. Subsection 16(2) of New Zealand's *Act* states, "anything said or any information supplied or any document, paper, or thing produced by any person in the course of any inquiry or proceedings of the Committee under this Act shall be privileged in the same manner as if the inquiry or proceedings were proceedings in Parliament."

Intelligence Services Act, Act No. 152 (2001), Part 4 (Australia); *Intelligence and Security Committee Act*, No. 12 (2001), Part 4 (New Zealand)

11. Like Canada, the United Kingdom, Australia, and New Zealand are also part of the Five Eyes intelligence sharing alliance. As a result, if the Canadian government is concerned that the sharing of sensitive information by parliamentarians serving on the National Security and

Intelligence Committee of Parliamentarians would damage its foreign relations, particularly with the Five Eye countries, it has little reason to be concerned given that members of the Five Eyes alliance have maintained parliamentary privilege for parliamentarians serving on similar committees.

12. The United Kingdom, Australia, and New Zealand have all undertaken initiatives to modernize parliamentary privilege to better reflect the current relationship between the public and Parliament. While the United Kingdom has not enacted legislation clarifying elements of parliamentary privilege, it has released many reports in recent years examining its scope. In 1999 the Joint Committee of the House of Commons and the House of Lords of the United Kingdom published a report on parliamentary privilege that listed among its recommendations that legislation be enacted to enable both Houses to waive parliamentary privilege but only where to do so would not expose a member or other person making a statement or doing an act to civil or criminal liability. The rationale for this recommendation was that it would enable proceedings in Parliament to be examined by a court, but only where there would be no risk of liability for a parliamentarian.

> UK, HC and HL, "Report of the Joint Committee on Parliamentary Privilege", vol 1 (30 March 1999)

13. In July 2013, the UK Joint Committee on Parliamentary Privilege issued a report assessing parliamentary privilege following the release of a Green Paper in 2012 by the UK Government. Among the conclusions and recommendations in the 2013 Report was the determination that draft clauses in the 2012 Green Paper that would have removed the absolute freedom of speech in Parliament, for criminal prosecutions, were unnecessary and would damage free speech in

Parliament. These reports highlight the consistent view among parliamentarians that parliamentary privilege should protect parliamentarians from criminal prosecutions.

> UK, HC and HL, "Joint Committee on Parliamentary Privilege: Parliamentary Privilege Report of Session 2013-14", (3 July 2013); UK, HC, "Parliamentary Privilege", Cm 8318 (2012)

14. Unlike Canada and the United Kingdom, both Australia and New Zealand have enacted legislation clarifying elements of parliamentary privilege. Australia enacted comprehensive legislation on parliamentary privilege, known as the *Parliamentary Privileges Act 1987*, which among other things, sets out the essential element of offences against the House as conduct that amounts to "an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties" (section 4). The *Act* also clarified that the freedom of speech applies to the Australian Parliament and defines "proceedings in Parliament" as "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" (section 16). The *Parliamentary Privileges Act* 1987 states that evidence from proceedings in Parliament cannot be used to establish motives or intentions in a court proceeding.

> *Parliamentary Privileges Act 1987* (Cth)

15. New Zealand has also codified its modern-day interpretation of parliamentary privilege in the *Parliamentary Privilege Act 2014*. New Zealand's *Act* uses concepts and terminology from Australia's *Parliamentary Privileges Act 1987*, including what constitutes "proceedings in Parliament" (section 10). Like Australia's *Act,* New Zealand's legislation also prohibits evidence from Parliamentary proceedings from being used in court proceedings (section 11).

> *Parliamentary Privilege Act 2014* (NZ), 2014/58

16. The efforts in the United Kingdom, Australia, and New Zealand to modernize the law of privilege reflect the changing relationship between the public and Parliament. The law of privilege in these jurisdictions recognize that today public figures are accountable to the public and that parliamentarians should exercise self-restraint to ensure their privileges are used responsibly and transparently. While Canada is not obliged to pass legislation in lockstep with its Commonwealth allies, it is nonetheless notable that in taking the unusual step of depriving parliamentarians of their *Charter* right to free expression in order to serve on this important national security oversight committee, Canadians are similarly deprived of the accountability that would be afforded if committee members were allowed to speak freely when important matters of public importance arose, with the protection that parliamentary privilege would provide. It is also telling that despite being close partners with Canada for gathering and sharing intelligence, these allies did not consider an abridgment of privilege necessary to protect national security.

> Standing Committee on Rules, Procedures, and the Rights of Parliament, "A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century" (June 2015) at page 7.

B. Parliamentary Rights and Immunities must be Reconciled With the Rights of Canadians as Codified in the Charter

17. By enacting section 12 of the NSICPA, Parliament has waived parliamentary privilege for parliamentarians serving on the National Security and Intelligence Committee of Parliamentarians in a way that unreasonably abrogates the *Charter* protected rights of these parliamentarians to freedom of speech.

18. The question of how parliamentary rights and immunities are to be reconciled with the rights of Canadians as codified in the *Charter*, is relevant to the question of whether freedom of speech is an absolute right in Parliament. Since both parliamentary privilege and the freedom of expression,

under section 2 of the *Charter*, are entrenched in the Canadian Constitution and enjoy the same constitutional status, parliamentary rights and immunities must be reconciled with the rights of Canadians. As noted by the Senate of Canada in its report on privilege, "No longer are concerns about privilege centred on the relationship between Parliament and the Crown. Rather, in the late 20th and now in the 21st century discourse about parliamentary privilege centres on how privilege should function in a rights-based legal system exemplified here in Canada by the Canadian Charter of Rights and Freedoms, and where the public expects increased transparency and accountability for the decisions made by parliamentarians."

> Standing Committee on Rules, Procedures, and the Rights of Parliament, "A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century" (June 2015) at page 1.

19. The Supreme Court of Canada has dealt with the question of the relationship of parliamentary privilege to other parts of the Constitution, particularly the *Charter*, three times. Each time, the Supreme Court of Canada did not resolve the conflict by subordinating one to the other, but instead tried to reconcile them. The Court has consistently held that since parliamentary privilege and *Charter* rights are both part of the Canadian Constitution, each has equal value. The *Charter* does not override parliamentary privilege and parliamentary privilege does not override the *Charter*.

> *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at paras 319-331; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 SCR 876 at paras 2-6; *Canada (House of Commons) v. Vaid*, [2005], 1 SCR 667 at para 33.

20. The Standing Committee on Rules, Procedures, and the Rights of Parliament released an interim report in June 2015 to the Senate of Canada on the topic of Canadian parliamentary privilege in the 21st century. The report proposed the following methodology, which incorporates the

"necessity test" set out in the Supreme Court of Canada's decision in *Vaid*, to reconcile the collective and individual privileges exercised by parliamentarians:

> (a) Is the privilege necessary to protect parliamentarians in the discharge of their legislative and deliberative functions, and Parliament's work in holding government accountable to account for the conduct of the country's business?
>
> (b) Does the contemporary context provide reasonable limits on the scope and exercise of the privilege?
>
> (c) How can this privilege be exercised to respect the values and principles expressed in the Canadian Charter of Rights and Freedoms?
>
> (d) How can the scope and exercise of this privilege be aligned with the standards of transparency and accountability essential to Parliament's public reputation?
>
> Standing Committee on Rules, Procedures, and the Rights of Parliament, "A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century" (June 2015).

21. As noted by the interim report of the Standing Committee on Rules, Procedures, and the Rights of Parliament, a Member of Parliament's individual right to claim parliamentary privilege over freedom of speech can be reconciled with the *Charter* by maintaining carve-outs for hate speech, perjury, and defamation. As a result, parliamentarians, including those serving on the National Security and Intelligence Committee of Parliamentarians, should be able to continue enjoying their privilege of freedom of expression to speak in parliamentary proceedings on issues of national security if it serves the objective of holding the Government accountable on issues of national security and brings increased transparency on such issues.

22. Under section 12 of the NSICPA, any disclosure of information obtained or accessed by a member of the Committee while performing their duties that a department is taking measures to

protect is prohibited no matter if the information is disclosed to hold the Government accountable and bring transparency and does not constitute hate speech, perjury, or defamation.

23. The NSCIPA does not reconcile the individual rights of parliamentarians to freedom of expression with the collective right of Parliament to regulate its own affairs. Rather, the individual rights of parliamentarians to freedom of expression and their related parliamentary privilege to freedom of expression has been suspended in favour of the collective right of Parliament to regulate its own affairs. This exceeds the scope of Parliament's collective privilege.

24. Parliamentary rights and privileges are required to be reconciled with the *Charter* rights of Canadians. But the NSICPA unreasonably elevates the collective right of Parliament to regulate its own affairs and subordinates the individual rights of parliamentarians to freedom of expression and their ability to hold the government accountable to Canadians.

PART IV: ORDER REQUESTED

25. Further to the order of the Honourable Justice J.S. Fregeau granting CCLA leave to intervene in this proceeding, CCLA seeks no costs and asks that no costs be awarded against it.

26. CCLA takes no position on the outcome of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of December, 2021.

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PROCEEDING COMMENCED AT
THUNDER BAY

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