Parliamentary Privilege: A Relational Approach

by

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Abstract

Parliamentary privilege encompasses certain special rights and immunities deemed necessary to protect legislatures and members from undue interference so that they can effectively carry out their functions of inquiring, debating and legislating. The doctrine has engendered conflicts that have never been wholly resolved between courts and legislatures, and between individual rights and parliamentary privileges. The advent of modern human rights and emphasis on democratic values such as accountability and transparency has brought a new urgency to this problem. The current passive and defensive approach of Canadian legislatures is unsustainable, as is the approach taken by the SCC in recent jurisprudence. The paper argues against expanding the scope of judicial review of privilege claims as a solution, and in favour of open modernization processes led by parliamentarians, and involving public participation. Further, the paper advocates for the application of a “relational approach” versus the traditional “contest approach” to parliamentary privilege.
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Chapter 1
Introduction

1 Introduction

Parliamentary privilege encompasses certain special rights and immunities deemed necessary to allow legislatures to protect themselves and their members from undue interference so that they can effectively carry out their functions of inquiring, debating and legislating.¹ The doctrine emerged over several hundred years of English history in response to genuine threats to the House of Commons from the Crown and the House of Lords, and continues to evolve both in Britain and in its former colonies.² Somewhat paradoxically, privilege is at once part of the ordinary law of the land, and an exception from it.³ The extent of the jurisdiction of the courts over matters of privilege has never been entirely resolved.

The general categories of parliamentary privilege include both corporate elements, and individual elements, in particular members’ freedom of speech in debates and proceedings, immunity from arrest in civil actions, exemption from jury duty, and exemption from attendance as a witness.⁴ Fundamentally, however, as Erskine May’s Treatise states, “it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members.”⁵ The broad categories of privilege enjoyed collectively by the House are the power to discipline for contempt and breach of privilege and to expel members for “disgraceful conduct”, the regulation of internal affairs, the “authority to maintain the attendance and service” of members, the right to establish inquiries, to compel witnesses and the production of documents, and to administer oaths to witnesses, and the right to publish papers with defamatory contents.⁶

Privilege often has the result of conferring immunity from judicial review on legislatures and

³ Erskine May 23rd, supra note 1 at 75.
⁴ Marleau & Montpetit, supra note 1 at 51.
⁵ Erskine May 23rd, supra note 1 at 75.
⁶ Marleau & Montpetit, supra note 1 at 51.
their individual members and officers, which has significant consequences for constituents who are thereby deprived of rights and remedies otherwise ordinarily available to them through the courts. It is therefore not surprising that the history of privilege tracks not only the rise of democracy and the triumph of the House of Commons over its enemies, but also a dark line of appalling abuses of power. Indeed, a long-recognized tension exists between Parliament’s claims to protect its ability to duly exercise its powers, and a concern that Parliament’s privileges not be exercised “for the danger of the commonwealth”.7

What we might today identify as such a danger has been transformed by the emergence in recent decades of human rights and natural justice as integral parts of the ordinary law of the land, and by increasing public expectations of transparency and accountability. These developments have lead to a resurgence of privilege cases before the courts, and calls for legislatures to justify, eliminate, or overhaul what appears to some an anachronistic and undemocratic doctrine. To some extent there has already been a gradual shift reflecting the broader political changes: as the threat to legislative assemblies from other institutions of government has lessened, the general direction has been toward narrowing the definitions of the rights and immunities associated with parliamentary privilege, as Marleau and Montpetit point out, “reflecting the reality that all privileges enjoyed by the House and its Members ultimately derive from the electorate”.8 However, despite Marleau and Montpetit’s view, which I share, that these privileges remain as “vital to the proper functioning of Parliament” in contemporary Canada as they were in early modern England9, there remains an underlying question of what continuing role a doctrine that originated in medieval times, before any concept of the separation of powers, natural justice, or human rights, can or should have in modern democracies.

While in the last twenty-five years committees in the U.K. and Australia have conducted comprehensive reviews, which, in the Australian case, ultimately resulted in a codification of privilege, efforts by Canadian legislatures toward the articulation of a modern definition of the scope and content of privilege have been meager. Academic and professional commentary on the relationship between parliamentary privilege and the Canadian Charter of Rights and

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7 Erskine May 23rd, supra note 1 at 93. 8 Marleau & Montpetit, supra note 1 at 50. 9 Ibid. at 53-54.
Freedoms\textsuperscript{10} has also been sparse. Canadian assemblies faced with decisions on whether to raise privilege arguments in response to legal actions against them and their members, and courts that decide such cases, do not have the benefit of an array of policy instruments and arguments developed with the Charter and other aspects of twenty-first century Canadian society in mind. Consequently, they must rely heavily on nineteenth century and earlier precedents and foreign sources. So far, neither Canadian parliamentarians nor courts have succeeded in modernizing the doctrine of privilege or fully explaining the rationale for its continued existence. This should be a concern, because, as the many examples provided in this paper illustrate, the potential for conflicts between human rights and parliamentary privilege is very real, and the failure to reconcile them undermines both democratic values, and public perception of the legislative branch.

Most commentary on privilege, both historically and today, is preoccupied with the question of justiciability, or who as between legislatures and courts should regulate the exercise of privilege, and to what degree. One shortcoming of this approach is that it does not adequately address the reality that by far the majority of decisions about whether to exercise privilege are made by speakers and the governing bodies of legislatures, not only in the course of preparing strategies to defend against legal actions, but also, for example, in negotiations with other parties, and in developing policy and procedures. Only a fraction of the situations that call for parliamentarians to make such decisions end up before judges. Further, the larger the potential scope of judicial review, the more legislatures may feel compelled to aggressively assert and defend their privileges even in situations where they would prefer to use less heavy-handed alternatives, for fear of having the courts erode them.

The Supreme Court of Canada (SCC) has only commented on parliamentary privilege three times since the late nineteenth century, most recently in the 2005 Vaid decision.\textsuperscript{11} In Vaid, the Court provided its first unanimous articulation of a test for determining the legitimacy of an

\textsuperscript{10} Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter].

asserted privilege, and consequently the justiciability of the claim against the defendant legislature. In general terms, the test is based on a principle of necessity for the fulfillment of legislative and deliberative functions, which is an idea that dates back at least to the early eighteenth century.\textsuperscript{12} The Court in \textit{Vaid} defined its role as limited to determining whether privilege extends to a particular sphere of activity based on the necessity principle. Specific exercises of privilege within an established sphere of activity are entirely within the province of the legislature and beyond review by the courts. Evan Fox-Decent has critiqued \textit{Vaid} based both on internal legal criteria and a concern that it will lead to results that undermine public accountability.\textsuperscript{13} Fox-Decent proposes that contrary to the Court’s approach, specific exercises of privilege should be subject to judicial review in order to require the party claiming privilege to provide reasons, which would in his view further both accountability and the rule of law. Although I agree with Fox-Decent’s criticism of the approach taken by the Court in \textit{Vaid}, I argue in this paper that increasing the scope of judicial review, as he recommends, will not necessarily lead to more or better accountability. Instead, I argue that accountability can be better achieved through a modernization exercise led by parliamentarians, which would engage public discussion in a way that litigation cannot.

Such a modernization process has been recently advocated by Charles Robert and Vince MacNeil, who argue that Parliaments must become more proactive in defending their privileges to avoid what they see as twin dangers of the more passive stance so far favoured by Canadian legislatures: that privilege will be taken out of the hands of parliamentarians and come to be defined by the courts; and that continued invocation of privilege against individual rights may increase public cynicism.\textsuperscript{14} While, like Robert and MacNeil, I support the idea of a modernization process similar to that undertaken by the UK and Australian parliaments, I suggest that the Canadian context, and in particular the \textit{Charter}, would require more soul-searching and a deeper probing into the core of parliamentary privilege and fundamental values than has taken place in other jurisdictions. Although the UK and Australian experiences

\textsuperscript{12} See Holt CJ’s dissent in \textit{Ashby v. White} (1703) 92 ER 126, 2 Lord Raymond 939 (Q.B.) [\textit{Ashby v. White} cited to ER].


identified several important reforms, and would provide a useful base from which to launch a Canadian modernization process, I think we would soon find ourselves venturing into new terrain in seeking to reconcile the necessity of parliamentary privilege with Charter values. In this paper, I argue that a “relational approach” to rights and privilege, along the lines of the framework Jennifer Nedelsky presents for reconceiving rights and constitutionalism,\(^\text{15}\) could be a useful guide in that terrain. This approach would shift our focus to the kinds of relationships we want to foster and to our core values, and away from the “contest approach” which seems to have dominated so far, where either the right or the privilege must trump the other.

Although I think the relational approach has the most potential to be of service in the kind of public dialogue a comprehensive modernization process would engender, I believe it could also have some benefit if internalized as a decision-making tool when specific privilege matters arise. Regardless of which institution of government is deciding an issue of privilege, the decision should be informed not only by history, but by a vision of the relationship between the legislative branch and its constituents that is consistent with the democratic values of today and that is responsive to public expectations for accountability, transparency, natural justice and respect for human rights.

Where once the focus of privilege was on relationships between powers of government, which primarily concern issues of jurisdiction, it has now shifted to relationships between legislatures and constituents, which primarily concern the reconciliation of individual rights with the need for legislatures to be able to carry out their functions. The relational approach could assist in resolving specific conflicts, and guide parliamentarians in proactive exercises to develop policy and legislative instruments that would provide greater accountability and transparency than is the case today, and that perhaps would make judicial deference on matters of privilege more acceptable.

This analysis is divided into four chapters. The next chapter of this paper will provide brief overviews of the origins and historical development of parliamentary privilege, and current approaches to privilege outside of Canada. The section on the history of privilege is intended

to provide some background on why privilege evolved as it did and how we arrived at our current status, to demonstrate that the basic conflict today between privilege and individual rights is not a new concern, and to set the stage for the discussion of the relational approach to privilege in Chapter 4. The section comparing other polities’ approaches to privilege is intended to provide background on how privilege operates in other polities, to situate the SCC within this context, to provide a brief overview of other approaches – with the conclusion that despite some efforts at reform, no jurisdiction has found a way to resolve the conflict between privilege and modern democratic values. Chapter 3 will discuss the risks inherent in the current status of privilege in Canada, and two possible responses which have been put forward by commentators: a more proactive approach on the part of parliamentarians; and an expansion of the scope of judicial review of privilege. In Chapter 4, I will argue for a normative basis for decisions on privilege by both legislatures and courts based on a concept of rights as relationship, which I will illustrate with hypothetical case studies. I conclude that this relational approach has many potential advantages, primarily as the basis for a comprehensive and public dialogue about the modernization of privilege, but also for the resolution of specific conflicts.
Chapter 2
Historical and Comparative Review of Parliamentary Privilege

2 Historical Development of Parliamentary Privilege

Privilege has been both the bulwark of English liberty and the most ruthless oppressor of the rights of the subject. It has proved a means for the advancement of democracy and representative government and institutions in the hands of some, and again, it has been a tool of oppression in the hands of a corrupt, mercenary, time-serving oligarchy of politicians desirous of perpetuating their power.¹⁶

As the above quotation from Carl Wittke’s The History of English Parliamentary Privilege suggests, there are lessons to be learned both in the critical role that privilege played in the political struggles that led to the emergence of democracy in England, and in the existence of many examples illustrating its susceptibility to abuse. Conflicts with relatively young values such as human rights and accountability may be new, but privilege has always had both a light and a dark side. This part of the paper provides a very brief historical background of how privilege came to be seen as necessary for legislatures, how it was sometimes misused as a “tool of oppression” against the very democratic values it evolved to protect, and how the still unresolved question of the extent to which the courts may inquire into matters of privilege developed into its present form.

2.1 Origins of Parliamentary Privilege and Early Conflicts

Parliamentary privilege originated in royal protections bestowed on the advisors to the King to ensure his access to them was not impeded by arrests or other obstructions to their attendance.¹⁷ Despite these beginnings, from an early date, Parliamentarians insisted that their privilege claims did not depend on royal favour, but rather rested on the “ancient law and custom of Parliament” and statutes and resolutions made from time to time.¹⁸ Privilege later became a weapon with which to resist the Crown’s interference in Parliament, which in 1397 included a real threat of confiscation of

¹⁶ Wittke, supra note 2 at 206.
¹⁸ Wittke, ibid. at 21.
property and execution for treason for introducing a Bill displeasing to the King.19 Two centuries later during the reign of Queen Elizabeth, Peter Wentworth could still be imprisoned in the Tower of London for statements championing freedom of speech in the Commons and deploiting the monarch’s interventions in parliamentary matters, and jailed yet again for comments concerning the royal succession that offended the Queen.20 Parliament’s decisive triumph over the Crown was the codification of its long-asserted right to independence in Article 9 of the 1689 Bill of Rights enacted in the wake of the Glorious Revolution: “That 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.”21 Article 9 concerns not only the protection of free debate, but also the indispensable right of the House to control its own proceedings, including matters such as the discipline of members, the exclusion of strangers, the determination of the order of matters for consideration, and the publication of debates.22

Notwithstanding its victory over the monarchy, the House of Commons still faced a substantial threat from the House of Lords, and by extension, from the judiciary. An important source of the conflict between the Lords and the Commons was that both shared a common ancestry in the old King’s Council, which gave rise to competing jurisdictional claims.23 The judicial and legislative functions of the High Court of Parliament were not clearly separated for a very long time, and both Houses often acted without a clear understanding of when they were adjudicating and when they were legislating.24 Because the House of Lords was the final appeal from the ordinary courts of the land, the Commons was especially concerned to avoid consideration of questions of its privileges by those courts, and claimed the existence of a lex parliamenti that, like admiralty and ecclesiastical law, was distinct from the lex terrae and therefore outside the courts’ and the Lords’ jurisdiction.25

The courts may have initially taken a more deferential approach to the Commons, as in the 1452

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19 See ibid. at 22 for a discussion of Thomas Haxey’s case.
20 See discussion in ibid. at 26-27.
21 1 Will. & Mar. sess. 2, c. 2 [1689 Bill of Rights].
22 Erskine May 20th, supra note 17 at 77-89.
23 Wittke, supra note 2 at 13.
24 Ibid. at 13-14.
25 See generally ibid. and Erskine May 23rd, supra note 1 at 176.
Thorpe’s case,\textsuperscript{26} which is the first known privilege case before the courts, but through the seventeenth century began increasingly to question the Commons’ claims.\textsuperscript{27} The conflicts resulted in scenes such as two judges from the court of King’s Bench being summoned before the Commons to answer for decisions adverse to privilege claims\textsuperscript{28}, arrests by the Sergeant at Arms of lawyers bringing suit against the Commons, and subsequent attempts by Black Rod to arrest the Sergeant at Arms\textsuperscript{29}, and a sheriff being served with conflicting orders from the two Houses, rendering him susceptible to punishment by both.\textsuperscript{30} In the following sections, I will discuss some of the major historical privilege cases to illustrate the development of the themes, conflicts and questions which present-day courts and legislative bodies continue to grapple with.

\subsection*{2.2 The Dark and Light Sides of Privilege}

Wittke characterized privilege as having served at once as “a bulwark of liberty and individual freedom” and a champion for “the cause of the people” – what we might call its light side - and as “the greatest oppressor of the subject’s liberty” – what we might call its dark side.\textsuperscript{31} Historically there were very legitimate needs for privilege, such as preventing Crown control of the parliamentary agenda and retribution for statements displeasing to the monarch,\textsuperscript{32} ensuring parliamentarians were not obstructed or dissuaded from attending to their duties by arrest, harassment, bribery, threats and/or seizure of estates and property either through violence or litigation,\textsuperscript{33} and avoiding interference by the Crown and the Lords in the composition of the House, for example, through rulings on elections disputes.\textsuperscript{34} Although these particular threats are no longer as relevant, threats of obstruction, harassment and violence by members of the public are perhaps

\begin{footnotes}
\item[26] 5 Rot Parl 239-240; 1 Hatsell 28-34. See discussion of the case in Erskine May 23\textsuperscript{rd}, ibid. at 83 and Wittke, ibid. at 34.
\item[27] Erskine May 23\textsuperscript{rd}, ibid. at 178.
\item[28] See the discussion in Wittke, supra note 2 at 108, of the aftermath of Jay v. Topham (1682-9), Saunders Repts., 131b.
\item[29] See the discussion of late 17\textsuperscript{th} century litigation and associated conflicts between the Lords and the Commons in Wittke, ibid. at 82-89.
\item[30] See the discussion of Stockdale v. Hansard (1839) 112 ER 1112, 9 Ad KE1 113 [Stockdale v. Hansard cited to ER], and associated litigation in Wittke, ibid. at 142-159, and in Erskine May 23\textsuperscript{rd}, supra note 1 at 184-188.
\item[31] Ibid. at 15.
\item[32] See supra note 20 for an example.
\item[33] Wittke, supra note 2 at 32-33 and 43. See also at 37-38 the discussion of the case of Lord Arundel, which although the detainee was a Lord and not a Commoner, illustrates the threat of arbitrary detention by the Crown at that time, and the discussion of the practice of “pricking for sheriff” (a practice by the Crown of appointing persons with undesirable views to the office of sheriff, which rendered them ineligible to sit in Parliament).
\item[34] See ibid. at 55-60 for examples.
\end{footnotes}
even more of a concern than in the past, as modern communications media have made parliamentarians individually recognizable and accessible in a way they were not a century ago. Further, power struggles between the three branches of government continue to exist, although they are less dramatic, and are no longer expressed through violence, but more typically through carefully worded correspondence and public statements. Privilege also has a role in regulating interactions among parliamentarians, which is of course still relevant.

However, there were also many oppressive uses of privilege, including the traffic of privilege protections\(^\text{35}\); prosecution of trespasses and other offences as breaches of privilege with the effect of denying defendants the rights, process and appeals available through the courts and submitting them to the justice of the plaintiff and his peers\(^\text{36}\), the prosecution as a breach of privilege of plaintiffs (and sometimes the lawyers, judges, sheriffs involved as well) for bringing civil suits against members, thereby denying the plaintiff a remedy and sometimes punishing him for attempting to enforce his legal rights\(^\text{37}\); contempt proceedings against critics of the House and its members\(^\text{38}\); and repeated refusals to allow duly elected members to take their seats despite the clear will of their constituents\(^\text{39}\).

### 2.3 Ashby v. White

The early eighteenth century case of *Ashby v. White*\(^\text{40}\) serves to demonstrate that misgivings about the potential for privilege, particularly when viewed in absolutist terms, to run roughshod over individual rights, arose long before modern concepts of democracy and human rights. This case, which concerned interference with a voter’s franchise, seems to have attracted the first expression of

\(^{35}\)See the discussion in ibid. at 39-43. The traffic was made possible by the extension of privilege to members’ servants, as there was a concern that interference with such individuals, like interference with property, was one way members might be prevented or discouraged from serving the House. An individual being sued could purchase immunity by having a member claim him as a servant. Parliament recognized this as a problem and eventually dealt with it by ending the protections for servants by way of statute in 1770, 10 George III, c. 50.

\(^{36}\)See ibid. at 43-47 for several examples of incidents treated as breaches of privilege and referred to committees of the House for investigation, including the killing of rabbits in a warren belonging to a member, fishing in a member’s pond and removal of boundary stones from his property, and the removal of a tree from a member’s land.

\(^{37}\)See *supra* notes 28, 29 and 30 for examples.

\(^{38}\)See ibid. at 49-51 for examples.

\(^{39}\)For examples, see the Wilkes Case, discussed in ibid. at 115-122 and the Bradlaugh case, discussed in ibid. at 160-169.

\(^{40}\)*Supra* note 12.
concern by the courts that privilege might be extended to the point of becoming “a menace to those fundamental rights of life and liberty guaranteed to all Englishmen by the common law.”  

Ashby, an indigent, was prevented from voting by constables in Aylesbury pursuant to a resolution of the House of Commons denying the vote to anyone receiving alms, which Ashby contended he was not. Ashby brought suit against the returning officer, White, and won his case at the first instance. However he lost at Queen’s Bench, with the majority of the court holding that it was not for them to interfere with the right of the Commons to determine its membership. Holt CJ in dissent argued that the action should be allowed. He began by setting out the basis for the right to vote, stressing the “great injury” of depriving the plaintiff of his exercise of this right, and the need for a remedy. In response to the argument by his fellow justice that the matter was for Parliament to determine and outside the court’s jurisdiction, Holt CJ insisted that the court must intervene, as Parliament could not provide the plaintiff with a remedy, and distinguished the case before them from cases of elections disputes between candidates, which at that time would have been settled by Parliament. Thus, his reasons seem to turn on the ideas that the lack of remedy for the infringement of the plaintiff’s rights absent the intervention of the court would leave an unacceptable gap in the law, and that where such a gap exists, the court can and should determine the matter.

The House of Lords reversed the decision of the Queen’s Bench. This lead to further litigation and a protracted dispute between the Commons and the Lords, which ended only when Queen Anne prorogued Parliament. As Wittke argues, the Commons’ vociferous opposition to the decision can be seen as a reflection of the ultimate importance it placed on the principle that questions of

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41 Wittke, supra note 2 at 62-63.
42 Supra note 12 at 134-137.
43 Ibid. at 137-138. “[M]y brother says, we cannot judge of this matter, because it is a Parliamentary thing. O! by all means be very tender of that. . . . [T]hey say, that this is a matter out of our jurisdiction, and we ought not to enlarge it. I agree we ought not to incroach or enlarge our jurisdiction; by doing so we usurp both on the right of the Queen and the people: but sure we may determine on a charter granted by the King, or on a matter of custom or prescription, when it comes before us without incroaching on the Parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever such a petition heard of in Parliament, as that a man was hindred of giving his vote, and praying them to give him remedy? The Parliament undoubtedly would say, take your remedy at law.”
44 Although Holt CJ also suggests a public policy argument for allowing the action: promoting accountability and impartiality among elections officers. Ibid. at 137.
45 Ashby v. White (1703) 1 ER 417, 1 Brown 62.
privilege must be kept out of the purview of the ordinary courts and of the Lords, as to do otherwise would have been “nothing less than signing its own death warrant as a free and independent part of Parliament”.\textsuperscript{46} It should be noted however that a few dissenters in the Commons spoke in support of Holt CJ’s decision and apparently shared his concern about the impact of privilege on individual rights.\textsuperscript{47}

In addition to showing that the potential for conflict between individual rights and parliamentary privilege was recognized, at least by a few, as early as three centuries ago, Holt CJ’s dissent in \textit{Ashby v. White} is significant in that it helped to set the stage for the landmark decision of \textit{Stockdale v. Hansard}\textsuperscript{48} nearly 150 years later, in which the court refused to accept the absolutist view of privilege.

\subsection*{2.4 Stockdale v. Hansard}

Several cases in the eighteenth and nineteenth centuries helped to define the boundaries of privilege, among which \textit{Stockdale v. Hansard} is one of the most frequently cited. The case illustrates both the emerging ideas of necessity as the basis of privilege and of the role of the court in monitoring the boundaries – the same ideas that form the basis of the \textit{Vaid} decision – and the atrocious consequences for individuals caught in the middle of the jurisdictional battle between the Commons and the courts.

In 1837, Stockdale published a medical book, which a report published by order of the House of Commons referred to as obscene and indecent. Stockdale sued Hansard for libel. The Court of Queen’s Bench found in Stockdale’s favour, reasoning that it did have jurisdiction to inquire into whether a claim of privilege falls within the jurisdiction of the Commons and that the privilege of publication was unnecessary and unsupported by precedent. Damages were awarded to Stockdale, however instead of appealing the decision, the Commons ordered the sheriff not to pay the damages out, and eventually had him taken into custody by the Sergeant at Arms for breach of privilege for having seized and sold Hansard’s property. At the same time, the sheriff was at risk of being in

\textsuperscript{46} Wittke, \textit{supra} note 2 at 67-68.  
\textsuperscript{47} Ibid. at 70-71.  
\textsuperscript{48} \textit{Supra} note 30.
contempt of the court, which, notwithstanding his imprisonment, served a second order on him to pay out the funds, and also at risk of being held personally liable by Stockdale and his creditors. Ironically, the same court upheld the speaker’s warrant of committal for the sheriff on the basis of a presumption that the Commons’ power to imprison was exercised with sufficient reason.

The *Stockdale v. Hansard* impasse was eventually resolved in 1840 when Parliament passed legislation staying all actions and protecting the publishers of parliamentary papers. Nonetheless, Wittke argues the result was a victory for the courts because the Commons was forced to resort to legislation to get the result it wanted, rather than relying on a “mere declaration of privilege.” As I will discuss more fully in the next section, to this day, the boundary between the jurisdictions of the law courts and the Houses of Parliament in privilege matters is still not entirely resolved, although there is broad agreement on the principles and nature of privilege.

Apart from providing an example of how problematic the conflict between the House of Commons and the courts could be for individuals, *Stockdale v. Hansard* suggested two principles which remain significant today: the concept of “necessity” as the basis for privilege, and the idea that the courts should inquire into the existence of privileges, but not into their specific exercise. The first principle is captured in the following excerpt from Patteson J’s reasons:

> Privilege, that is, immunities and safeguards, are necessary for the protection of the House of Commons, in the exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive, the greatest benefits from the exercise of those functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing; it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences.

Patteson J is grappling with essentially the same difficulty as Holt LJ in *Ashby v. White* and the SCC in *Vaid*: how to distinguish between genuinely necessary exercises of privilege and abuses of power.

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49 See *Sheriff of Middlesex* (1840) 113 ER 419, 11 Ad & E 273.
50 *Parliamentary Papers Act, 1840*, 3 & 4 Vict. c. 9.
51 Wittke, *supra* note 2 at 156.
52 *Erskine May* 23rd, *supra* note 1 at 176.
53 *Supra* note 30 at 1192. The excerpt is cited in part in *Vaid, supra* note 11 at ¶39.
The idea of separating an inquiry into whether a privilege exists from an inquiry into its specific exercise can be seen in Denman CJ’s statement that, “[w]here the subject matter falls within [the House of Commons] jurisdiction, no doubt we cannot question their judgment; but we are now enquiring whether the subject matter does fall within the jurisdiction of the House of Commons.”\(^{54}\) Indeed, this same statement is cited by McLachlin J in NB Broadcasting, a 1993 SCC case discussed below, in support of the justiciability of determining the necessity of a privilege versus the non-justiciability of an exercise of the privilege, the latter falling within the exclusive jurisdiction of the legislature.\(^{55}\) As I will argue in section 3 below, the SCC appears to be one of the closest adherents to the principles of necessity and the scope/exercise distinction, while other high courts seem to be diverging in their approaches to privilege.

### 2.5 The Blackstonian and Millian Paradigms

As stated in the introduction, there has not been a great deal of academic commentary on privilege cases. Josh Chafetz’ contribution to theorizing privilege in his recent work *Democracy’s Privileged Few* is therefore especially valuable.\(^{56}\) Chafetz identifies two basic paradigms, based on the ideas of William Blackstone and John Stuart Mill, which he sees as characterizing the development of privilege. I will use these paradigms, both of which are still in evidence today, in commenting on recent SCC jurisprudence and on cases in the next section that illustrate the current approaches of different parliaments and high courts around the world.

In the Blackstonian paradigm, which dominated in the earlier history of privilege in cases such as Thorpe’s, the Commons is seen as the only democratic element of the constitution, so that privilege has the function of protecting the House from outside interference at all costs: to threaten the power of the House is to threaten democratic values.\(^{57}\) This is a “geographical” concept of privilege which focuses on actions taking place within the physical confines of the House.\(^{58}\) The media and the public are viewed as potential threats rather than parts of the democracy, and the overriding purpose of defending the legislature from the nobility and the monarch justifies impositions on the rights of

\(^{54}\) Ibid. at 1168.  
\(^{55}\) Supra note 11 at ¶122.  
\(^{57}\) Ibid. at 4.  
\(^{58}\) Ibid. at 5.
citizens and the neglect of any role for constituents.\textsuperscript{59} “Ensuring a tight nexus between the actions of the Commons and the wishes of its constituents was an afterthought, if it was a thought at all. Indeed, Blackstone seems at times simply to have assumed that protecting the House of Commons was tantamount to protecting the rights of citizens.”\textsuperscript{60}

In contrast, the Millian paradigm, which we can see emerging in Holt LJ’s dissent in \textit{Ashby v. White}, in \textit{Stockdale v. Hansard}, and in American case law, views privilege as serving “to facilitate something approaching popular sovereignty – that is, to promote the convergence of the will of the public with the actions of the state.”\textsuperscript{61} The Millian paradigm is characterized by a “functional” concept of privilege that protects only the essential functions members require to carry out their public duties.\textsuperscript{62} With the decline of the threat to the Commons from other political actors, it could afford to defend its constitutional role in a more precise way that fine-tunes, rather than merely increases its relative power.\textsuperscript{63} Chafetz likens this concept of privilege to a semi-permeable membrane rather than the solid wall of the Blackstonian paradigm.\textsuperscript{64}

Chafetz’ central argument is that the two paradigms form a continuum, and that the appropriateness of the particular interpretation of privilege adopted depends on the political climate and the relative security of the legislature’s position: the ultimate purpose of privilege should be to strengthen democracy. I agree with Chafetz, although I would emphasize the change in relationship between citizens and legislatures over the last several centuries, and the change in relative importance between that relationship, and relationships between the Crown, the Lords and the Commons, as the most key aspects of the political climate. I argue in Chapter 4 that the purpose of strengthening democracy could be better achieved in Canada through modernization exercises and decision-making informed by a relational approach that includes a vision of the kinds of relationships we want to foster.

\textsuperscript{59} Ibid. at 5-6.  
\textsuperscript{60} Ibid. at 6.  
\textsuperscript{61} Ibid. at 7.  
\textsuperscript{62} Ibid.  
\textsuperscript{63} Ibid.  
\textsuperscript{64} Ibid. at 7-8.
2.6 Summary and Conclusions

In this section, I have attempted to provide a brief background for the evolution of privilege to its current state, focusing in particular on why it came to be seen as necessary, and how vulnerable it has been to misuse over the centuries. While the conflicts between the Crown and parliamentarians, and between the House of Lords and House of Commons clearly dominated early struggles over privilege, as *Ashby v. White* demonstrates, concerns about the impact of privilege on individual rights have been around for at least three hundred years. The ideas of necessity as the basis of privilege and of the court’s role as limited to inquiring into the existence, but not exercise, of privileges, both of which are at the heart of the SCC’s reasons in recent cases, can be traced back to the mid-nineteenth century case of *Stockdale v. Hansard*. Chafetz identifies two basic approaches to privilege, the Blackstonian or “geographic”, and the Millian or “functional”, which are useful in describing and analyzing both early and contemporary cases. For example, Holt LJ’s dissent in *Ashby v. White* is typical of the Millian paradigm, while the reasons of his colleagues are more typical of the geographic approach. I agree with Chafetz’ arguments that the approach to privilege should be informed by the political climate and that its purpose should be to strengthen democracy, and will take them up again in Chapter 4 in the context of setting out a relational approach to privilege.

3 Comparing Approaches to Privilege

This section of the paper attempts to situate Canada in the context of other polities’ approaches to privilege.\(^6\) I will argue that the necessity of some form of privilege is more or less universally recognized, that other polities are also grappling with the respective jurisdictions of legislative bodies and courts, and with conflicts between privilege and democratic values, particularly human rights, and that despite some efforts toward reform, these conflicts have not been fully resolved anywhere. I will also draw on the experiences of other jurisdictions for examples of problems that could arise in Canada in the future if no change is made to our current course.

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3.1 The Universal Value of Privilege

Parliamentary privilege is a global phenomenon. Although the characteristics and scope of privileges and immunities vary from state to state, the institution “is undoubtedly imbued with universal and permanent value”\(^\text{66}\) and may even have existed in rudimentary form in ancient Rome\(^\text{67}\) and India.\(^\text{68}\) This appears to be especially true of the principle of freedom of speech, referred to in some polities as “non-accountability” (\textit{irresponsabilité}), which protects parliamentarians from prosecution for statements made and votes cast in exercising their mandates, and which exists in some form in almost every country.\(^\text{69}\) The justification for the existence of parliamentary privileges and immunities is based on the idea that, according to Van der Hulst, “the representatives of the people must enjoy certain guarantees, on the one hand to underline the dignity, gravity and importance of their office and, on the other and more importantly, to give them the peace of mind they need to discharge their mandate.”\(^\text{70}\)

Modern privilege had its origins in medieval England, as discussed in the previous section, and was also taken up in France after the 1789 revolution.\(^\text{71}\) These powers generated the two basic approaches to privilege seen in the world today, influencing its development in their respective empires, and in the case of France, in much of continental Europe as well.\(^\text{72}\) Two of the most notable differences between the models are the “quintessentially British institution” of “contempt of parliament” which is alien to most states, and the French concept of “inviolability”, which is significantly broader than the English “freedom from arrest and molestation.”\(^\text{73}\) “Contempt of parliament” grants criminal jurisdiction to an assembly to punish anyone, member or not, who breaches its privileges, and derives not from the legislative function of the House of Commons, but

\(^{66}\) Marc Van der Hulst, \textit{The Parliamentary Mandate: A Global Comparative Study} (Geneva: Inter-Parliamentary Union, 2000) at 63 [Van der Hulst].

\(^{67}\) Ibid.

\(^{68}\) \textit{Raja Ram Pal v. Speaker (Lok Sabha)}, (Writ Petition 1 (civil) of 2006), [2007] 3 S.C.C. 184, online: Supreme Court of India \url{http://judis.nic.in/supremecourt/chejudis.asp} at 38 [\textit{Raja Ram Pal} cited to online version].

\(^{69}\) Supra, note 66 at 66. The two exceptions cited by Van der Hulst are Cuba and Kazakhstan.

\(^{70}\) Ibid. at 63.


\(^{73}\) Van der Hulst, \textit{supra} note 66 at 79 and 129.
from the ancient English notion of the “High Court of Parliament” that predated any concept of the separation of powers. 74 “Inviolability” in the French model requires that the legislature be promptly notified of the arrest of one of its members, and that the proceedings not continue until the legislature has determined whether the charges are founded. 75 In the British model, freedom from arrest is limited to civil matters, and became largely meaningless with the effective elimination of imprisonment for debt. 76 Despite these differences, both models share a core of freedom of speech/non-accountability.

3.2 Privilege and Justiciability

The assemblies of many former British colonies derive their parliamentary privileges from relatively broad constitutional and statutory provisions referencing the United Kingdom House of Commons. For example, the preamble to the Canadian constitution, which states an intention to establish “a Constitution similar in Principle to that of the United Kingdom” 77, has been held by the SCC to in itself confer on Canadian legislatures “those historically recognized inherent constitutional powers as are necessary to their proper functioning” similar, though not necessarily identical, to the privileges of the UK House of Commons. 78 Article 105 of the Constitution of India specifically entrenches freedom of speech in Parliament, and incorporates by reference the other privileges, powers and immunities of the British House of Commons. 79 The US Constitution, while it does not reference Westminster, incorporates wording similar to Article 9 of the English Bill of Rights directly into clause 1 of Article I §6,

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74 Erskine May 23rd, supra note 1 at 76. See Wittke, supra note 2 for discussion of the gradual historical shift in emphasis from the adjudicative to the legislative function.
75 Van der Hulst, supra note 66 at 79.
76 Erskine May 23rd, supra note 1 at 88. The difference in approaches is attributed to the fear of the executive power that followed the French Revolution, and the resulting principle that responsibility for deciding “whether proceedings are fair and well-founded and not attributable to persecution on political or personal grounds” should reside with a committee that reports to the National Assembly. In England, parliamentarians did not require special immunities of their own as they were able to rely on generally available protections for individual rights that gradually evolved in the common law to guard against illegal and arbitrary proceedings, arrests, and detentions. (Ibid. at 64 and 79).
78 NB Broadcasting, supra note 11 at ¶112. Note the privileges of Canada’s federal House of Commons and Senate have a different basis in s. 18 of the Constitution Act, 1867, which grants Parliament the power to enact legislation defining its privileges, immunities and powers. Parliament has exercised this power in s. 4 of the Parliament of Canada Act, R.S.C. 1985, c. P-1, which simply incorporates by reference whatever privileges the UK House of Commons “held, enjoyed and exercised.” See also Vaid, supra note 11 at ¶35-36.
79 Although Art. 105(3) no longer refers specifically to the UK House of Commons it is substantially unchanged: Shubhankar Dam, “Parliamentary Privileges as Façade: Political Reforms and the Indian Supreme Court” (2007) 49 Sing. J.L.S. 162 at 162-163 [Dam].
also known as the “Speech or Debates Clause”. A small minority of states, notably Australia and South Africa, have attempted more comprehensive statutory codifications of privilege, rather than relying on broad constitutional provisions.

As can be seen from recent case law around the world, the question of the respective jurisdictions of judiciaries and legislatures on matters of privilege remains at issue. Within the last several years, this question has been considered by national high courts in several countries, including Canada, Australia, Fiji, India, Kiribati, Nauru, New Zealand, South Africa, St. Vincent and the Grenadines, Tuvalu, and the UK, as well as the European Court of Human Rights. As Erskine May 23rd describes the situation today from the UK perspective,

[a]fter some three and a half centuries, the boundary between the competence of the law courts and the jurisdiction of either House in matters of privilege is still not entirely determined. There is a wide field of agreement on the nature and principles of privilege, but the questions of jurisdiction which occasioned furious conflict in the past … are not wholly resolved.

3.2.1 Raja Ram Pal and de Lille

Two recent cases from the Indian and South African high courts serve to illustrate not only the validity of Erskine May’s assessment, but also the range of views on privilege from absolutist to minimalist, and the potential for serious political and legal ramifications of decisions. The Raja Ram Pal case considered the powers of the Indian Houses of Parliament to expel their members. Eleven members from both houses were unseated following the scandal that ensued when they were caught on camera taking bribes from undercover journalists in exchange for raising questions during debate. Shortly after the footage aired, the Houses established committees to investigate, and, on the committees’ recommendations, adopted motions expelling the members. The members brought an

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80 The “political questions doctrine” has also influenced US courts’ treatment of what would be considered privilege matters elsewhere. For a discussion see supra note 56 at 51-67.
81 Parliamentary Privileges Act 1987 (Cth) (Australia); Powers, Privileges and Immunities of Parliaments and Provincial Legislatures Act, 2004, No. 4 of 2004 (South Africa). The South African Act does not include the same range of reforms as the Australian Act and is therefore not discussed in further detail in this paper.
83 23rd, supra note 1 at 176.
action in the Supreme Court, which included allegations that the Houses did not have jurisdiction to expel them, and that their fundamental rights to natural justice had been violated. In what is perhaps one of the strongest Blackstonian assertions of privilege in the last 150 years, the presiding officers of the Houses refused to be enjoined as respondents, and articulated a much publicized view that “the matter of privileges was the exclusive preserve of the Parliament” and further, that “for the Court to take cognizance of the matter was an act of constitutional transgression.”

Shubhankar Dam argues in his comment on the case that the response of the Court was perhaps more subtle, but nonetheless embedded in the judgment. According to Dam, the two implicit messages were that “the Speaker was plainly mistaken in concluding that the Supreme Court did not have anything to do with the matter” and that the Speaker’s “obstinate refusal to participate in the proceeding was misguided: he underestimated the Court’s ability to behave ‘responsibly’.” The Court ultimately found that the Houses of Parliament had acted within their jurisdiction, and the conflict dissipated there. One might, however, wonder whether a serious constitutional crisis would have ensued had the Court reached a different result.

A recent decision by the South African Court of Appeal provides a contrasting example of a much more assertive judiciary. Despite a very strongly worded statutory privative clause, the Court intervened in one of the most sacrosanct spheres of privilege – the internal proceedings of the House – by reviewing a decision of the National Assembly to suspend a member for 15 days following allegations she made against several of her colleagues. In reaching its decision, the Court adopted a narrow reading of the legislature’s power to regulate its own internal proceedings that excluded any power to suspend (let alone expel) members for punitive reasons, and ultimately found that the

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84 Dam, supra note 79 at 162-163. Emphasis in original. Dam is highly critical of the reasoning used in the decision, and in particular of how the Court used foreign law.

85 Ibid. at 163.

86 Ibid. at 164.

87 de Lille, supra note 82. The Court made a particularly strong assertion of its jurisdiction at ¶14: “any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorized by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances.”

88 Powers and Privileges of Parliament Act No 91 of 1963, s. 5, which purported to allow the Speaker to issue a certificate requiring a court to stay any proceedings which concerned the privilege of Parliament.
suspension violated the member’s constitutional right to freedom of speech.\textsuperscript{89} This minimalist approach to privilege could conceivably affect the nature and perhaps even the outcome of debates by curtailing the ability of the House to enforce its rules and ensure order among its members.

As Chafetz’ arguments would predict, where a polity situates itself on the continuum between the two extremes exemplified by South Africa and India likely has a great deal to do with the political environment and power balances between the judicial and legislative branches. However, as those two examples, along with the historical examples provided in the previous section also illustrate, approaches to resolving privilege issues do not necessarily only reflect the political climate, but may also contribute to its definition.

3.2.2 \textit{NB Broadcasting and Vaid}

The SCC, perhaps because of the different nature of the privilege issues it has considered in recent years, has arguably invested the most of any national high court in elaborating the “necessity test” and the distinction between the existence of specific privileges and their specific exercise suggested in Stockdale \textit{v. Hansard}, and may be the best current example of the Millian paradigm. The first of these recent cases was \textit{NB Broadcasting}, which considered privilege in the context of the freedom of expression guaranteed by the \textit{Charter}. The New Brunswick Broadcasting Corporation sought relief under the \textit{Charter} from the Nova Scotia Legislative Assembly’s ban on the filming of proceedings in the chamber. The Court held, although not unanimously, that parliamentary privilege, and in this case the long-established right to exclude strangers from the House, was not subject to the \textit{Charter} because the right has constitutional status, and therefore cannot be derogated by another part of the constitution. In explaining the Court’s recognition of the right to exclude strangers, and the Court’s role in interpreting parliamentary privilege, McLachlin J (as she then was) wrote, “if a matter falls within …[the] necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such

\textsuperscript{89} For other examples of judicial intervention, see \textit{Latasi v. Tausi}, supra note 82, in which the Tuvalu High Court nullified the Speaker’s decision to declare a member’s seat vacant following repeated absences by the member for medical reasons; and \textit{Teangana v. Tong}, supra note 82, in which the Kiribati Court of Appeal reviewed the timing of the Speaker’s decision to convene Parliament, which the executive complained was too early to allow it to prepare adequately.
questions will instead fall to the exclusive jurisdiction of the legislative body”.

Necessity in this case is founded on “the highest importance that debate in ... [the] chamber not be disturbed or inhibited in any way”. The Court continued its elaboration of the “necessity test” in Vaid, in which it held that the sphere of activity for which privilege is claimed must be

so closely and directly connected with the fulfillment 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.

The Court further held that once privilege is extended to a sphere of activity, specific exercises of that privilege are within the jurisdiction of the legislature, and immune from review by the courts.

These cases are described here primarily to situate the SCC in the middle ground somewhere between the two extremes of Raja Ram Pal and de Lille. As I will discuss in more depth in Chapter 3, the middle approach they represent requires subjectivity and generates problems of interpretation and application that the absolutist and minimalist approaches do not have to contend with. In the next section I will focus on those few cases where human rights and privilege have been considered together.

3.3 Privilege and Human Rights

To date only a handful of cases pitting human rights and parliamentary privilege against one another have come before high courts. This is likely due to a combination of factors including the general infrequency of parliamentary privilege cases, the relative newness or lack of comprehensive human rights legislation in those states that have generated the highest volume of recent jurisprudence on privilege, and the rareness of imposition of penalties for findings of contempt on non-members. Even Canada, where the Charter has been in effect since 1984, has had only two cases of this nature.

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90 Supra, note 11 at ¶126.
91 Ibid. at ¶140.
92 Supra, note 11 at ¶46. The facts of Vaid are discussed in more detail below.
93 Ibid. at ¶47.
considered by the SCC. The only other high court case that provides a significant basis for comparison is the European Court of Human Rights’ decision in A v. UK, which, as I will describe in this section, takes an entirely different approach from the necessity test that more closely resembles the proportionality analysis undertaken under section 1 of the Charter.

3.3.1 Vaid

The two Canadian decisions, NB Broadcasting and Vaid were, at least in retrospect, relatively easy fact situations. Although, as outlined above, the Court in NB Broadcasting found in favour of the parliamentary privilege argument, the infringement of the right to freedom of expression did not seriously prejudice any individuals, and concerned one of the most sacrosanct privileges: the right to control over the Chamber during proceedings.

Vaid concerned the jurisdiction of the Canadian Human Rights Commission to investigate allegations of discrimination and wrongful dismissal brought by the former chauffeur of the Speaker of the House of Commons. Vaid argued that the Speaker’s invocation of privilege with respect to his dismissal amounted to an overreach, if not a trivialization of the true role and function of “such lofty doctrine”, and that even if privilege covered some employees whose duties were closely tied to the legislative process, the Speaker went too far “in attempting to throw the mantle of this ancient doctrine over the dealings of the House with such support staff as chauffeurs, picture framers, locksmiths, car park administrators, catering staff and others who play comparable supporting roles on Parliament Hill.” The Court sided with Vaid, rejecting the Commons’ argument that its privileges included exclusive jurisdiction over the hiring and firing of all employees as failing to be “so closely and directly connected with the fulfillment by the assembly or its members of their

\[\text{95 A third case, } Harvey, \text{ supra note 11, is not discussed as the majority of the Court did not consider parliamentary privilege in its reasons, and issues left open by the minority opinions were resolved in the unanimous Vaid decision. Harvey considered whether s. 12 of the Charter, the right not to be subjected to cruel or unusual punishment, applied to the expulsion of a member of the New Brunswick legislature convicted of illegal practices under the province’s Elections Act. The majority of court did not address privilege in its reasons as it did not find that the treatment of the member consisted of cruel and unusual punishment. In a minority opinion, Lamer CJ stated that the expulsion of the member was an exercise of privilege, and that the Charter should therefore be applicable. In another minority opinion, McLachlin J stated that the action fell within parliamentary privilege, and should therefore be immune from judicial review. According to McLachlin J, the role of courts is to “inquire into the legitimacy of a claim of parliamentary privilege”; once a claim has been established as legitimate, the action is immune from judicial review. (at ¶71). Supra, note 13 at ¶22.}\]
functions as a legislative and deliberative body… that outside interference would undermine the level of autonomy required to enable … [them] to do their work with dignity and efficiency”, and thereby failing to meet the necessity test.\footnote{Ibid. at ¶46. The Court found on separate statutory grounds that the Commission did not have jurisdiction to consider Vaid’s complaint. A recent decision by the South Australian Industrial Relations Court considering \textit{Vaid}, held that privilege did extend to the secretary to a legislative committee, with the effect of preventing him from seeking to enforce his statutory right to overtime pay before the court: \textit{President of the Legislative Council (South Australia) v. Kosmas}, [2008] SAIRC 41, discussed in Gareth Griffith. \textit{Parliamentary privilege: first principles and recent applications}, Briefing Paper No 1/09 (Sydney: New South Wales Parliamentary Library Research Service, 2009) online: Parliament of New South Wales \url{http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Parliamentaryprivilege:firstprinciplesandrecentapplications}.}

Although the results in \textit{NB Broadcasting} and \textit{Vaid} seem intuitively correct, as Fox-Decent argues, and I agree with him on this point, the reasoning used to arrive at them may not stand up to more difficult fact situations.\footnote{Supra note 13 at 128.} I will return to a more detailed discussion of Fox-Decent’s arguments and the SCC’s approach to privilege in Chapter 3.

\subsection*{3.3.2 A. v. UK}

A recent decision of the European Court of Human Rights, \textit{A v. UK}, which involved both serious harm to an individual and the sacred privilege of freedom of speech, provides an example of a much more difficult case. In July 1996, an MP speaking in the UK House of Commons identified a constituent by name and address, characterized her and her children as “another example of neighbours from hell”, and referred to reports of disruptive activities associated with their home including: “threats against other children; … fighting in the house, the garden and the street outside; … people coming and going 24 hours a day – in particular, a series of men late at night; … rubbish and stolen cars dumped nearby;… alleged drug activity; and … all the other common regular annoyances to neighbours that are associated with a house of this type.”\footnote{Supra note 82 at ¶13.} The MP’s remarks, along with photographs of the constituent, were widely publicized in the media.\footnote{Ibid. at ¶14.} The target of the allegations, A, subsequently received threats and hate mail, was harassed and verbally abused by strangers, and was forced to relocate to another public housing unit for safety reasons.\footnote{Ibid. at ¶16-18.} A wrote to
the MP outlining her complaints, and received in return a letter from the office of the Speaker advising her that the MP’s comments were protected by parliamentary privilege. A subsequently filed a complaint with the European Commission on Human Rights, which included allegations that this parliamentary immunity, in preventing her from taking legal action, violated her right of access to a court and her right to privacy under the Convention for the Protection of Human Rights and Fundamental Freedoms. The case attracted interventions from eight other European states in support of the UK’s defense of parliamentary freedom of speech. In the end, six of the panel of seven judges reached the conclusion that the immunity could not “in principle be regarded as imposing a disproportionate restriction” on A’s rights of access to a court and privacy, and A was therefore left without a remedy.

At least one of the concurring judges in the A v. UK seems to have experienced considerable discomfort with the result of the decision. Costa J’s minority opinion bears quoting at length:

It is certainly essential for democracy that the elected representatives of the people should be able to speak freely in Parliament … without the slightest fear of being prosecuted for their opinions … But should this sacrosanct principle not be tempered? Since the 1689 Bill of Rights or the 1791 French Constitution … relations between parliaments and the outside world have changed. Parliaments are no longer solely or chiefly concerned with protecting their members from the sovereign or the executive. Their concern should now be to affirm the complete freedom of expression of their members, but also, perhaps, to reconcile that freedom with other rights and freedoms that are worthy of respect. … [this case] did not, in my view, appear to lend itself to efforts to bring about such a reconciliation. … I am not at all sure that it should be for a court … to impose any particular model on the Contracting States in such a politically sensitive field. However, I am convinced that some progress in that field is desirable and possible on their part, and I was anxious to convey that point.

Aside from providing an example of a difficult fact situation, A v. UK appears to signal a different approach to judicial consideration of privilege grounded in proportionality analysis, rather than the “necessity test” or interpretation of constitutional and statutory texts. Although the European Court of Human Rights granted considerable deference to the UK House of Commons, it did so not on the

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102 Ibid. at ¶19
103 Ibid. at ¶3. 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5, Arts. 6§1 and 8 [European Convention].
104 Austria, Belgium, Finland, France, Ireland, Italy, the Netherlands, and Norway.
105 Ibid. at ¶83 and 102. The sole dissenting voice was Loucaides J, who found that the absolute privilege claimed was disproportionate to both the right of access to the courts, and the right of privacy.
106 Ibid. at ¶0-1 15-16.
basis of Parliament’s exclusive jurisdiction in matters of privilege, but on the basis that the harm to an individual’s right to privacy is not disproportionate to the interests underlying the protection of freedom of speech in Parliament. In other words, the public interest in the protection of parliamentary privilege is sufficiently important so as to justify a plaintiff being deprived of her ability to seek legal redress for violation of her right to access the courts and her right to privacy.

This proportionality-based approach is arguably a significant departure from both the Blackstonian and Millian paradigms, which Chafetz likens respectively to a wall and to a semi-permeable membrane, as it seems to dissolve any barrier between the legislature and the courts. It does not bring us any closer to a contemporary rationale for privilege and seems to be an even more clearcut case of the contest approach in which either the right or the privilege must triumph over the other. Further, it does not provide any more clarity or objectivity than the necessity test. The A v. UK approach is perhaps not any less reasonable than that of the SCC, but it does not offer any clear advantage in resolving conflicts between privileges and rights. It simply frames those conflicts differently – as problems of balancing privileges and rights rather than problems of defining the scope of privilege – without offering a clearer or less subjective decision-making process or a better theoretical basis for understanding privilege.

3.4 Modernization Efforts

Codification of privilege, where it has occurred, has not done much better than the courts at resolving the underlying conflict between privilege and human rights or other modern democratic principles. First, there have been very few attempts at such codification. It is perhaps not surprising that efforts have been very sparse, for as A.V. Dicey once wrote, “[n]othing is harder to define than the extent of the indefinite powers or rights possessed by either House of Parliament under the head of privilege or law and custom of Parliament.”\(^{107}\) The US Constitution does specifically provide for some privileges beyond the freedom of speech, such as the powers of the Houses to determine their own rules of procedure, to judge the qualifications of their members, and to discipline their members, including expulsion, but the provisions of course predate significant nineteenth century and later case law as well as modern human rights legislation, and many of them, such as the freedom of speech, are drafted broadly and open to a

range of interpretations. Australia is exceptional in having enacted a modern statute that attempts to outline the scope of privilege and respond to recent case law, however it does not have comprehensive human rights legislation, and therefore operates in a very different context from Canada: the hearings and dialogue that took place leading up to the codification did not need to consider privilege against a document similar to the Charter. It is notable that despite a comprehensive committee review and report recommending the enactment of privilege legislation, the UK has yet to do so a decade later.

The most extensive effort at modernization to date has been that of Australia. The Australian Parliamentary Privileges Act 1987 (Cth.), which applies to the two federal Houses, made several changes to the common-law by, among other things, defining breach of privilege or contempt, establishing associated maximum penalties, abolishing the Houses’ power to expel its own members, and reducing the periods of members’ immunities from arrest and attendance before the courts to 5 days before and after sitting and committee meetings (from the common law period of 40 days). The legislation has been supplemented by resolutions adopting a right of reply procedure, and in the Senate, setting out the details of matters that could be contempts, procedures for protection of witnesses, and procedures to be followed by the Committee of Privileges. Although this initiative does speak to some issues that would bring privilege into conflict with Charter and European Convention values, such as the fairness of contempt proceedings, as well as rationalizing the concept of “necessity”, for example by recognizing the comparatively short travel

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108 Art. 1§5.
109 Supra note 81.
111 South Africa has also recently revised its legislation, likely in response to the de Lille decision discussed above. See supra note 81.
112 S. 4. The section reads: “Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, 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 as a member.”
113 S. 7. Penalties require a resolution of the House. Under s. 9, the House must set out the particulars of the offence before imposing a term of imprisonment. The maximum term of imprisonment is set at 6 months, and maximum fines are set at $5,000 for an individual and $25,000 for a corporation. Arguably, the power to fine no longer exists at common law, so this may actually represent an expansion of the Houses’ powers.
114 S. 8.
115 S. 14. Note this common law immunity has recently been of concern in Canada with respect to the difficulty of obtaining members’ testimony in cases such as the ongoing Telezone litigation: see e.g. Lorne Gunter, “Paring down parliamentary privilege” National Post, December 31, 2008 online: National Post http://www.nationalpost.com/opinion/story.html?id=1128969&p=2
116 Wright, supra note 72 at ¶7.1.
times today between constituencies and the legislature to put some limit on the extent to which parties to litigation might be deprive of access to justice, it does not come close to addressing justiciability, nor the range of conflicts that could arise between privilege and modern democratic values, for example, the anti-discrimination provisions at issue in Vaid.

The right of reply procedure might be seen as an antidote to the situation typified in A. v. UK, but its effectiveness is controversial. The procedure, which has also been adopted in Ireland, New Zealand\(^\text{117}\) and South Africa\(^\text{118}\), is intended to counteract misuses of the freedom of speech privilege, and allows members of the public who believe they have suffered adverse effects as a result of reference to them in the House, to ask to have a response included in the record of proceedings.\(^\text{119}\) Proponents of the right to reply suggest it is efficient, effective, available to anyone regardless of skill or financial means, and may act as a deterrent to abuses of the freedom of speech.\(^\text{120}\) However, critics including the UK Joint Committee on Parliamentary Privilege, have argued that it may raise expectations which cannot be met: for example, a reply would likely not be published until weeks after the initial remarks, and may not receive as much profile.\(^\text{121}\) Further, when, as in A. v. UK much of the damage to the plaintiff was caused by the revelation of her personal information, a right of reply would do nothing to remove that information from the public domain. I would argue that given the scope of the right of reply procedure and the criticisms noted above, its effectiveness would likely be limited to a very small minority of conflicts, and that it would therefore not contribute a great deal to an overall reconciliation of privilege and individual rights. Although I do not personally support the implementation of right of reply procedures in Canada, I do think that it would be useful to include consideration of them in public discussions leading up to a modernization process.

The UK has come closest to following the Australian example through the report of its Joint Committee on Parliamentary Privilege in the late 1990s.\(^\text{122}\) The report recommended the adoption of legislation similar to the Australian Act, however did not support the introduction of a right of reply for the general public.

\(^\text{117}\) Ibid at ¶6.6.
\(^\text{118}\) Powers, Privileges and Immunities of Parliaments and Provincial Legislatures Act, 2004, supra note 81, s. 25.
\(^\text{120}\) Ibid. at 76.
\(^\text{121}\) Ibid. at 77.
\(^\text{122}\) Supra, note 110.
reply, and would have substantially reformed the law on contempt and breach of privilege by
transferring jurisdiction over non-members for the most part to the courts. The report also
recommended the enactment of a provision to the effect that the privilege to manage internal affairs
“applies only to activities directly and closely related to proceedings in Parliament”125. The Joint
Committee’s recommendations would, arguably, go further than the Australian legislation in
reconciling human rights with parliamentary privilege by substantially transferring contempt
proceedings to the courts and by limiting the scope of the management of internal affairs along the
lines adopted by the SCC in Vaid, however, the recommendations have never been implemented.

Although a discussion of the suitability for Canada of the individual reforms undertaken by
Australia or recommended by the UK Joint Committee is beyond the scope of this paper, as I state in
the introduction, I agree that they would provide at least a good starting point for Canadian
modernization efforts. However, I believe that Canadians, if they want to achieve a reconciliation
between privilege, human rights and other democratic values, would find a need to do their own
soul-searching. This process would I think take us beyond the experiences of other jurisdictions and
require that we look deeply into the cores of those principles and values and what they mean in our
polity, particularly in the context of the Charter and our own unique vision of what relationships
between legislatures and citizens we want to foster. In Chapter 4, I will return to this soul-searching
process and how it might be assisted by a relational approach to privilege.

3.5 Summary and Conclusions

I have described in this section the “universal value” of privilege, and in particular its core component of
freedom of speech, accepted in polities around the world. In recent years, several national high courts
have grappled with their role in monitoring its exercise. The SCC, which has remained perhaps the most
faithful adherent to the principles of necessity and justiciability set out in Stockdale v. Hansard, occupies
a middle ground between absolutist and minimalist approaches to privilege, both of which are still in
evidence in some polities today. Courts around the world have had little experience with cases involving

123 Ibid. at ¶217-223. Ironically, in light of A v UK, one of the reasons given was that as a practical matter defamatory
attacks on non-members were not a problem at Westminster.
124 Ibid. at ¶309-10 and 324.
125 Ibid. at ¶251.
direct conflicts between human rights and privilege, and neither they nor legislatures have succeeded in reconciling the two. The proportionality approach used by the European Court of Human Rights in _A v. UK_ does not offer any advantage over the necessity test used by the SCC. Although Canadians could learn from the modernization experiences of other jurisdictions, and in particular Australia and the UK, we would need to do our own soul searching to identify for ourselves what parliamentary privilege should be for us in the 21st century.

Arguably, the cases considered by the SCC to date have been relatively easy fact situations. _A v. UK_ provides an example of more difficult questions we are bound to face in the future if we do not achieve a better understanding and rationalization of privilege. As the experiences of other jurisdictions show, the potential for more serious conflicts between privilege and human rights than have occurred as of yet in Canada is very real. Failure to reconcile the two sets of values these principles represent undermines our democratic values, public perception of the legislative branch, and ultimately the relationship between Canadians and their assemblies.
Chapter 3
Avoiding a Collision Between Rights and Privilege

4 Risks and Possible Responses

As suggested in the previous chapter, the claims in the only two SCC cases to elaborate on the Charter in the context of parliamentary privilege, NB Broadcasting and Vaid, were, in hindsight at least, relatively easy to situate within or outside the scope of privilege. However, as A v. UK demonstrates, the potential for more difficult conflicts exists, and sooner or later the SCC will be faced with another one. Some recent cases have already forced other Canadian courts to address less clearcut clashes between rights and privileges. Lower and appellate courts have, for example, considered whether officers appointed by resolution of the assembly can have their appointments revoked without opportunity for a hearing, whether privilege overrides language rights, and whether the legislature can denounce, by resolution, statements made by a non-member under the protection of privilege. In another recent case, the Federal Court held that the Speaker’s exclusion of a journalist from the Parliamentary press gallery fell within the scope of privilege and outside the Court’s jurisdiction; this was after the UN Committee on Human Rights had found that the same exclusion was a violation of the International Covenant on Civil and Political Rights.

In this chapter, I will discuss two possible responses to reconciling privilege with individual rights: a more proactive approach toward privilege on the part of parliamentarians, as advocated by Robert

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126 Roberts v. Northwest Territories (Commissioner), 2002 NWTSC 68, [2003] 1 W.W.R. 98, in which the court held that Roberts’ dismissal without a hearing by resolution of the Legislative Assembly was unfair and did not fall within the Assembly’s privilege to govern its internal affairs; March v. Hodder, 2007 NLTD 93, [2007] 62 Admin L.R. (4th) 281, in which the court, on similar facts, reached an opposite conclusion.

127 Fédération Franco-Ténoise v. Canada (A.G.) 2008 NWTCA 6, [2008] 440 A.R. 56 leave to appeal to S.C.C. refused, 32824 (March 5, 2009), in which the court held that the decision to publish Hansard in English only fell within the privileges of the Legislative Assembly; Knopf v. Canada (Speaker of the House of Commons) 2006 FC 808, [2006] 295 F.T.R. 198 upheld in 2007 FCA 308, [2008] F.C.R. 327, leave to appeal to S.C.C. refused, 32416 (March 20, 2008) in which the court held that a legislative committee’s choice to refuse to distribute a document because it had been tabled in English only fell within privilege (the Court of Appeal upheld the ruling on other grounds without reference to the privilege arguments).


and MacNeil; and a more interventionist approach on the part of the judiciary, as advocated by Fox-Decent. I agree with Robert and MacNeil’s assessment of the risks involved in maintaining the current defensive, absolutist stance that has characterized many legislatures’ responses to questions concerning privilege and individual rights, as well as their advocacy for an active modernization effort on the part of parliamentarians, however, as I argue in the previous chapter, I think that Canadians will need to go beyond the experiences of other jurisdictions to successfully reconcile privilege and other democratic values. Although I agree with much of Fox-Decent’s critique of the SCC’s analysis in Vaid, as I will discuss below, I do not share his view that expanding the justiciability of privilege matters will lead to greater accountability. In Chapter 4 I will pursue the idea of a relational approach, which would shift the focus in privilege conflicts away from jurisdictional questions and toward the underlying values and relationships of power, trust and responsibility.

4.1 Moving Beyond the Traditional View of Privilege

If human rights and parliamentary privilege are on a collision course, is there a way of avoiding impact? Charles Robert and Vince MacNeil argue that what is needed is for Parliaments to be more proactive in defending privilege to avoid what they see as two dangers of a more passive stance: that privilege will be taken out of the hands of parliamentarians and come to be defined by the courts; and that continued invocation of privilege against individual rights – what they refer to as the “sword” aspect of privilege - may increase public cynicism. Robert and MacNeil argue, “even when privilege is successfully asserted, many will regard it an abuse when privileges trump the rights of individuals. … such conflicts present an opportunity to re-evaluate and modernize the privilege in question, so that to the greatest extent possible the claimed privilege can co-exist with individual rights”. Further, they state,

It is essential that parliamentarians come to grips with the fact that in modern times privilege is rarely claimed as a shield against attacks by the executive or by the judiciary acting as a proxy for the executive. In reality, and in public perception, privilege has become a sword,

130 Supra note 14.
131 Supra note 13.
132 Supra note 14.
133 Ibid. at 24.
with the practical effect of denying, or at least interfering with, the rights and freedoms guaranteed to individuals by the Constitution.\textsuperscript{134}

The authors identify several vulnerabilities of traditional privileges, including the clash between the absolutist view of parliamentary freedom of speech and procedural fairness\textsuperscript{135}, uncertainty about the extent to which the freedom applies to parliamentary papers, uncertainty about the boundaries of “proceedings in Parliament”, the doubtful necessity of a continued power for legislatures to punish for contempt, and the lack of a consistent, rational basis for the time periods around sessions and committee meetings when members are exempt from court appearances.\textsuperscript{136}

Robert and MacNeil are right to criticize the passive and defensive strategy of Canadian legislatures, which is “limited to asserting and defending privilege in matters raised by other actors through the courts.”\textsuperscript{137} This course, which has cast the courts as principal actors in the attempt to reconcile the Charter with parliamentary privilege one narrow question of law at a time, has made for a piecemeal, disjointed, confusing and contradictory modernization process to date.\textsuperscript{138} Not only does this approach wait for complainants to challenge a privilege before attempting to prove its existence or necessity, but it appears to reflect an assumption that privilege trumps all, including the Charter.\textsuperscript{139} The strategy of “vagueness and obscurity” which once served the interests of maximizing and protecting privilege has outlived its usefulness and can now only serve to undermine it.\textsuperscript{140} While there are some indications that Canadian parliamentarians are becoming dissatisfied with the traditional approach to privilege\textsuperscript{141} no steps have been taken toward a comprehensive modernization. Robert and MacNeil argue for an active approach drawing on the Australian and British experiences, which are based on necessity and “an understanding of privilege that is restricted to what is required in the modern context”, and which, in their view, “demonstrate that a comprehensive review would allow Canadian parliamentarians to protect and maintain

\textsuperscript{134} Ibid. at 37.
\textsuperscript{135} Exemplified, for example, in the events surrounding both A v. UK and Michaud v. Bissonnette.
\textsuperscript{136} Supra note 14 at 28-35.
\textsuperscript{137} Ibid. at 18.
\textsuperscript{138} Ibid. at 37.
\textsuperscript{139} Ibid. at 22.
\textsuperscript{140} Ibid. at 37.
\textsuperscript{141} See ibid. at 24-26. Although the Standing Committee on Rules, Procedures and the Rights of Parliament was tasked with examining the application of the Charter to the Senate in February 2007, as of this writing it has yet to report or conduct any substantial hearings on this matter.
parliamentary privilege within the current legal context.” Although I agree with this general argument, I would emphasize the need for a made in Canada process that takes into account our unique context, and which, I will argue in Chapter 4, could be assisted by a relational approach.

It is true that the British and Australian reforms might begin to address some of the vulnerabilities of traditional privileges Robert and MacNeil identify, for example, by establishing timeframes for the immunity from subpoena that are reasonable in a modern context, or, (to the extent that we believe in its effectiveness), establishing a right of reply procedure. However, as argued in the previous chapter, these efforts have not fully unpacked privilege or identified principles or decision-making approaches that would reconcile it with other rights. For example, the definitions of “proceedings in Parliament” used in the Australian legislation and recommended in the British Joint Committee report are still broad enough to allow for considerable interpretation, and may be problematic in themselves. Thus the necessity-based Canadian review envisioned by the authors would have to go beyond the British and Australian experiences in order to achieve their goal of a fair and reasonable balance between the Charter and parliamentary privilege.

4.2 Expanding the Justiciability of Privilege

If the defensive, absolutist posture of legislatures is problematic and can at most be only partially addressed by learning from the experiences of the modernization efforts undertaken in Australia and the UK, the SCC’s approach as articulated in Vaid also falls short of providing a solution to conflicts between rights and privileges. In a recent commentary on Vaid, Evan Fox-Decent argues that the distinction between inquiring into categories of privilege and specific exercises of that privilege is difficult to draw in practice, is based on weak reasoning, in particular the claim that broadening the scope of judicial review would open the floodgates to litigation, and leads to results that undermine

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142 Ibid. at 27. Floyd W. McCormick has argued that while Robert and MacNeil’s proposed modernization effort may be worthwhile, its influence on the courts should not be overestimated due to a combination of factors such as the popularity of the Charter in Canadian society and relative acceptance of the legitimacy of the SCC as arbiter of Charter cases, the limited understanding of parliamentary privilege, and the tendency of the Canadian public to hold judges in higher esteem than politicians: see “Reconciling Parliamentary Privilege with the Canadian Charter of Rights and Freedoms: Who Gets to Decide?” (Paper Presented during, Australia and New Zealand Association of Clerks-at-the-Table Conference, Norfolk Island, January 2009) online: Australia and New Zealand Association of Clerks-at-the-Table: www.anzacatt.au.org

143 Campbell, supra note 119 at 29.
public accountability. In his view, the SCC should have taken an approach grounded on the best rationale for parliamentary privilege: “members of the legislature must be free to deliberate, legislate and hold the government of the day to account, but exclusively for the sake of the common good and through means consistent with Canada’s fundamental values.” According to Fox-Decent, this rationale “confirms the legitimacy of the House’s authority to settle disputes between its members within the realm of privilege, while leaving the Court with a principled basis to intervene when the facts so warrant.” The work of the legislature can be conducted in a way that respects Canadian fundamental values, rather than undermining them, “by ensuring that these activities occur within a transparent public regime that is both constituted and constrained by law.” Fox-Decent proposes that contrary to the approach outlined in Vaid, which limits judicial review to determining the scope of privilege, specific exercises of privilege should also be subject to judicial review in order to require the party claiming privilege to provide reasons, which would further both accountability and the rule of law. As I will discuss in more detail below, I disagree that a judicial process can provide the kind of accountability that will be meaningful in these conflicts.

In Fox-Decent’s view, the approach of the SCC in Vaid, which eschews reason-giving, rather than constituting deference, “conveys indifference to the idea that legislative assemblies and their members should be treated as full participants in the ongoing construction of a legal order based on public justification, as well as indifference to the possibility that they can and should give reasons if they seek to invoke privilege to immunize themselves from the reach of the ordinary law.” For Fox-Decent, this is especially problematic where strangers to the House are involved as it contradicts the fundamental legal principle that “no person should be judge and party of the same cause”. His answer to these problems is that both the scope and actual exercises of privilege should be subject to judicial review. This would, he argues, “require the privilege-holder to give reasons to justify her reliance on privilege, and this giving of reasons can only further the accountability of legislative officials who seek to escape the reach of ordinary law through

144 Supra note 13.
145 Ibid. at 119.
146 Ibid. at 119-120.
147 Ibid. at 120.
148 Ibid. at 135.
149 Ibid. at 136.
Further, he proposes that the SCC use a “pragmatic and functional” approach to privilege, along the lines of that adopted in the administrative law context, which uses a series of contextual factors to determine the appropriate standard of review. The implication of human rights issues or strangers’ rights would constitute contexts where a less deferential standard of review would be appropriate, whereas an absence of these factors would warrant a deferential standard of patent unreasonableness. Ultimately, argues Fox-Decent, it is “through the public exchange of reasons that all parties can participate with the Court in the development of a legal culture that reflects a shared commitment to the rule of law, one which gives pride of place to transparency and public justification, and therefore, to accountability.”

Fox-Decent is right to both challenge the floodgates argument, and point out the arbitrariness of the scope / exercise distinction given that “minimal judicial craft is required for judges to review a particular exercise of privilege under the guise of a review of scope”. For example, the scope of parliamentary privilege to manage an employee like the executive assistant (EA) to the Speaker could be defined as “management of the Speaker’s EA”, but could as easily be defined as “management of the Speaker’s EA consistent with respect for human rights”. Obviously the final outcome in such a case would have a lot to do with which definition is chosen.

Although I also agree with Fox-Decent’s aspiration for more accountability, I think his proposal for how to achieve this through a broader scope of judicial review and a pragmatic-functional approach is problematic in that it seems to assume the litigation process can provide the kind of accountability that is desired. I would suggest this assumption is questionable. Faced with litigation over an exercise of privilege, a legislature will either settle with the plaintiff behind closed doors, in which case there will be little or no public accountability, or mount a legal defense in court. Such a defense is likely to be based on a mixture of precedent, technical arguments about the appropriate interpretation of statutory or constitutional texts, and factual allegations. The arguments will be

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150 Ibid. at 133.
152 Ibid.
153 Ibid. at 140.
154 Ibid. at 134.
155 Ibid. at 129.
specific to the particular issue of privilege at hand, will be crafted by lawyers for the purpose of convincing a judge rather than informing and engaging public dialogue, and will be limited to answering the narrow questions and invoking the mixture of principles and technical arguments the parties see as relevant to the particular case at hand. Such an exercise might have some instrumental value in that it might provoke legislatures to engage in the kind of work Robert and MacNeil argue for if only to avoid having privilege shaped and defined by the judicial branch, but I do not think that it can achieve real public accountability in itself.

Further, while I agree that reasons would in many instances be appropriate and further accountability, I do not think this will be achieved by the kinds of reasons typically provided by legal counsel in the course of litigation. I would argue that these are the only kinds of reasons that are likely to be produced in an atmosphere of increased justiciability, because legislative bodies will become more defensive and less forthcoming as the risk that their communications will be subject to judicial review increases. A better approach might be to institute a practice of providing reasons similar to speakers’ rulings on points of order and other issues arising during debates, which are crafted to demonstrate impartiality and accountability rather than to defend against legal action. However, as long as the spectre of greater judicial intervention in privilege matters looms over parliamentarians, I think that they will understandably be reluctant to make such statements and run the risk of having them prejudice them in later legal proceedings.

Another weakness in Fox-Decent’s argument is that while he asserts that he does not intend “to cast doubt on the legitimacy of the Speaker’s authority to govern Parliamentarians for the sake of order and decorum in Parliament”, he never provides an explanation for distinguishing such cases other than to cite Binnie J.’s statement in Vaid that courts should generally avoid examining the inner workings of Parliament as its rules and procedures are best known to the Speaker and others within the House. This justification seems to have a frailty similar to that of the scope /exercise distinction in that “order and decorum of Parliament” is subject to varying interpretations. Aside

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156 Lorne Sossin and Adam Dodek suggest that speakers’ rulings might serve as a model for governors general to provide justifications for decisions such as that taken by Governor General Jean in December 2008 to prorogue Parliament on the advice of Prime Minister Harper. In “When Silence Isn’t Golden: Constitutional Conventions, Constitutional Culture, and the Governor General” in Peter H. Russell & Lorne Sossin, eds. Parliamentary Democracy in Crisis (Toronto: University of Toronto Press, 2009) at 102.
157 Supra note 13 at 138.
from the possibility of arriving at different definitions of the scope of the inner workings of Parliament, a further reason for not taking its sanctity for granted is that, as discussed above, some courts outside of Canada have ventured into this terrain.\footnote{E.g. de Lille and Teangana v. Tong, supra note 82.} I think he is right to arrive at the result that the courts should not intervene in the Speaker’s exercise of authority in governing debates themselves. The unquestioned authority to maintain order is clearly necessary for the legislature to carry out its functions without the potential for constant interruptions while members seek injunctions and other judicial remedies against the Speaker. My point is that Fox-Decent never explains why this particular authority falls within the exclusive jurisdiction of the legislature while other aspects of internal proceedings, which in Canada at least would under the current \textit{Vaid} approach most likely attract judicial deference, should be reviewable by the courts. Thus we are left with as fuzzy a line as with the scope/exercise distinction. For example, if a Canadian speaker’s decision to convene the legislature on a certain date were to be challenged, as it was in the Kiribati case of \textit{Teangana v. Tong},\footnote{Ibid.} would Fox-Decent argue in favour of intervention by the court? This is not exactly a matter of order and decorum, yet the power to convene a parliament seems as necessary to its functions as the authority to preside over debates.

Several additional arguments might be made against increasing the scope of judicial review in matters of privilege. First, we might question whether analogies to administrative law, such as the “pragmatic and functional approach” proposed by Fox-Decent, which has since been rejected by the SCC,\footnote{See supra note 151.} are even appropriate. Administrative decision-makers are usually far removed from the Ministers who are accountable to the legislature for their actions. The doctrine of ministerial responsibility is in some sense a fiction – in most cases Ministers have oversight over such a large number of administrators that they could not possibly have anything approaching actual knowledge of all their decisions.\footnote{See, e.g. Sharon Sutherland, "Responsible Government and Ministerial Responsibility: Every Reform is its Own Problem," Canadian Journal of Political Science 24,1 (March 1991): 91-120 at 91 and at 100, where she argues that Ministerial responsibility “is not about a real capacity of the Minister as a natural person to dominate all action managerially.”} Further, in many cases, particularly when complex tribunals are involved, the possibility of Ministerial intervention is heavily constrained by statute. In light of the practical impossibility of achieving accountability through an elected official, for example, by having an
appeal to the Minister for every administrative decision, it makes sense for the courts to be able to intervene. The situation of claims of privilege is very different, as decisions about them are not made by middle managers or appointed agencies, but, in the case of claims of corporate privilege, by the Speaker him or herself, generally with the involvement of other members of the House sitting on a board of management, and on the advice of senior officers with expertise in parliamentary procedures and practice. The capacity of the Speaker and board for actual as opposed to constructive oversight of decisions affecting individuals’ rights might therefore warrant greater deference than administrative decision-making. Further, privilege, unlike the statutory regimes administered by government agencies and officials, is part of the Constitution and itself carries a greater authority.

A second argument against expanding judicial review of privilege is that it may intensify the defensive tendencies of legislatures by aggravating the already existing incentive for them to press privilege claims whenever they can, regardless of the facts, for fear of having those privileges eroded. There are certainly cases where, in acknowledgement of the legitimacy of a plaintiff’s grievance, legislatures might prefer to waive privilege, but feel it must be defended it to ensure it is still available when it is needed. Expanding the scope of judicial review can only exacerbate this situation.

A third concern is with whether the courts are the best situated to make the broad political decisions involved in balancing privilege and the Charter.\textsuperscript{162} Even setting aside arguments that might be made based on the separation of powers or the legitimacy of non-elected officials deciding political issues, pragmatic political decision-making may sometimes achieve better results than legal proceduralism.

\textsuperscript{162} For a discussion of the worldwide trend toward the judicialization of political decisions, see Ran Hirschl, “The New Constitutionalism and the Judicialization of Pure Politics Worldwide” (2006) 75 Fordham Law Review 721. As Hirschl argues at 745, it is difficult to see how judges’ decisions on megapolitical issues (and I would argue the conflict between privilege and rights, which goes to the heart of the separation of powers and the fundamental relationship between citizens and legislatures can be properly described as megapolitical) would be based on qualitatively different criteria from the principles or considerations that would arise in legislative processes or referenda. Further, he writes, “The practice is equally problematic from a representative democracy point of view. The ever-accelerating reliance on courts for articulating and deciding matters of utmost political salience represents a large-scale abrogation of political responsibility, if not an abdication of power, by elected legislatures whose task is to make accountable political decisions. It may undermine the very essence of democratic politics as an enterprise involving a relatively open, at times controversial, but arguably informed and accountable deliberation by elected representatives.” (at 745). See also Jeremy Waldron, \textit{Law and Disagreement} (Oxford: Oxford University Press, 1999) for arguments against the elevation of judicial decision-making over decision-making by legislators. As Waldron states at 16, courts, “though they have many advantages, … are not necessarily the most representative or the most respectful of the contending voices in the community.”
Chafetz provides some compelling examples of why it should not be assumed that judicial decision-making is somehow more reasonable or otherwise superior to the results of political processes. In one example, an election in Louisiana involved intimidation in some parishes, which were known to be Republican strongholds, by members of the Democratic party. The political resolution to the crisis was to count only those votes returned from parishes where intimidation had not occurred. A judicial process would likely have resulted in a new election being called, which, although representing the legal ideal, would, as the politicians were well aware, only have resulted in more violence.

A final, practical, concern is that expanding the scope of judicial review would not lead to any improvement in terms of accountability and transparency in the many cases which are settled out of court, or which are dropped by plaintiffs for various reasons.

4.3 Summary and Conclusions

To summarize, the current status of parliamentary privilege in Canada is unsatisfactory: legislatures have maintained a passive and defensive strategy with respect to privilege, and the framework for judicial review of privilege claims developed by the SCC is based on weak grounds and opens the door to a certain amount of arbitrariness. As a result, the contemporary necessity of parliamentary privileges has never been clearly and comprehensively articulated despite changes in other areas of the law brought about by the Charter especially; the respective jurisdictions of legislatures and courts in interpreting privileges remain uncertain; and there is insufficient transparency and public accountability for exercises of parliamentary privilege. Robert and MacNeil propose that parliamentarians take a more active approach to defending and defining their privileges in the modern context, however the precedents available to inform such a project lack sufficient consideration of human rights norms to provide much of a template for addressing conflicts between privilege and the Charter. Fox-Decent proposes broadening the span of judicial review to avoid the arbitrariness of the scope / exercise distinction, however, it is questionable whether judicial review

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163 Supra, note 56 at 185-192.
164 Hunt v. Sheldon (1869) 3 Cong. El. Cases 530 (41st Congress). As Chafetz points out at 186, had the result not been that a Republican candidate won, this would not have been an appropriate course of action for Congress to take, as it would have had the effect of rewarding the instigators of the violence.
can provide genuine public accountability. Further, Fox-Decent’s account does not provide a clear basis for distinguishing the Speaker’s right to govern members in the interests of order and decorum from other spheres that he considers should be reviewable by the courts.

Although failure of legislatures to take an active approach to privilege, as advocated by Robert and MacNeil, may make an expansion of the jurisdiction of the courts into privilege inevitable, I argue that it would be far preferable for parliamentarians to take on the challenge of defining and applying the principles that should be used to reconcile privilege with the *Charter* and other individual rights through comprehensive and public modernization processes. While it should be kept in mind that, as both Chafetz and Fox-Decent point out, there is in such an approach a risk of legislative self-dealing and violation of the principle that no one should be a judge and a party to the same action\(^\text{165}\), there are also strong potential benefits to accountability and transparency interests. Legislative processes such as committee hearings are much better equipped for meaningful dialogue on broad public policy issues than are the courts. The level of discourse can range from the highly technical to the plain language, procedures and venues can be adjusted to maximize accessibility, and dialogue can be ongoing rather than ending with a decision. Further, the more that legislatures lay down principles, rules and procedures in advance of specific contests between privilege and rights, the lesser the risk of self-dealing.

In addition to a comprehensive modernization process, there will still be a need for decisions to be made on specific conflicts between privileges and rights. While, as discussed above, analogies to administrative law should be applied with caution, parliamentarians might find it useful to borrow some principles. For example, the *Baker* decision of the SCC established factors affecting the duty of fairness, which might be relevant to privilege issues.\(^\text{166}\) Accountability and transparency might be enhanced through the provision of reasons by speakers, however, this may be a longer term goal, as it will be difficult to institute such a practice if parliamentarians are concerned about the potential

\(^{165}\) *Supra* note 13 at 136 and *supra* note 56 at 18. As Fox-Decent points out at 133-134, legislatures do in effect have the final say through their ability to legislate their privileges. Thus they can self-deal in any case, so long as they are upfront and transparent about it.

\(^{166}\) *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 at ¶21-28. Or example, two of the factors enumerated by the court which might be relevant to privilege cases are “the importance of the decision to the individual or individuals affected” (at ¶25) and “the legitimate expectations of the person challenging the decision” (at ¶26).
for judicial review of those reasons. Parliamentarians could also benefit from cultivating an understanding of rights that is as rich as their understanding of privilege so that they can better appreciate the consequences of their privilege claims. In Chapter 4, I will argue that a concept of rights as relationship is uniquely suited to the task of reconciling rights with the necessity of parliamentary privilege.
5 Privilege as Relationship

In this section of the paper, I argue that the relational approach to rights advanced by Jennifer Nedelsky is especially suited to reasoning through apparent conflicts between rights and parliamentary privileges. Although Nedelsky presents this framework primarily for use in context of judicial review, there is nothing that should prevent its application by parliamentarians both as they make decisions about whether to pursue privilege claims, and as they go about the overall project of modernization.

5.1 Nedelsky’s Concept of Rights as Relationship

For Nedelsky, “rights are collective decisions about the implementation of core values.” Nedelsky rejects the metaphors of constitutional rights as trumps or as boundaries, and suggests that a relational approach can provide a useful framework to understand and evaluate the collective choices manifested in both constitutional rights and in laws that appear to violate them. Nedelsky seeks to construct a solution to the problem of how constitutional rights can at once be understood as the result of collective choices, and still act as a safeguard against illegitimate force. Two central points to her argument are first, that the way relationships of power, trust, responsibility, etc. are structured provides the best basis for analyzing decisions about rights, and second, that the best way of understanding the protection of rights through the constitution is as “a dialogue of democratic responsibility.”

Nedelsky’s relational approach has three steps: first, an examination of the conflict to determine what values are at stake; second, a consideration of what types of relationships would advance those values; and third, a determination of how relations would be structured differently by competing

\[167\] Supra note 15.
\[168\] Ibid. at 139.
\[169\] Ibid.
\[170\] Ibid. [emphasis in original]
\[171\] Ibid.
versions of a right, with the second two steps sometimes blurring into one another.\textsuperscript{172} “Values” refer to the broad, abstract statements a given society uses to articulate what it sees as essential to “the good life for its members” or for humanity, while rights are the “particular institutional and rhetorical means” through which such values are expressed, contested and implemented.\textsuperscript{173} Nedelsky’s essential claim is that we will do better at making these difficult decisions, such as what should be treated as a right, how to enforce rights, and how to interpret rights, if our focus is on what relationships we want to foster, what values are at stake in these situations, and which conceptual and institutional means will best contribute to fostering those relationships.\textsuperscript{174} She writes,

In this vision, rights do not “trump” democratic outcomes, and so they and the institutions that protect them do not have to bear a weight of justification that is impossible to muster. Rather when we begin with a focus on the relationships that constitute and make possible the basic values – which we use rights language to capture – then we have a better understanding not only of rights, but of how they relate to another set of values, for which we use the shorthand “democracy.”\textsuperscript{175}

How might such an approach to rights affect our understanding of parliamentary privilege? As argued above, privilege no longer serves primarily to mediate the relationships between the House and the Crown or between the upper and lower chambers, but most importantly the relationship between the legislature and its constituents. The relational approach encourages us to look at the how the values that make up privilege – e.g. the idea that there is a virtue involved in the legislature being able to fulfill its functions of debating and law-making – relate to other values such as freedom of speech and procedural fairness rather than seeing the two as in conflict. Some characteristics of this relationship might include ideas that legislatures are there to serve and represent constituents’ collective will, that it is in constituents’ communal interest that legislatures are able to carry out their responsibilities, and that legislatures should facilitate rather than undermine the fulfillment of other values such as human rights.\textsuperscript{176} The following examples serve to illustrate how this might apply to specific cases.

\textsuperscript{172} Ibid. at 141.
\textsuperscript{173} Ibid. at 145.
\textsuperscript{174} Ibid. at 142-143.
\textsuperscript{175} Ibid. at 147.
\textsuperscript{176} Strengthening the role of parliaments as guardians of human rights is, for example, an objective of the Inter-Parliamentary Union: see “Parliamentary Work on Human Rights” at http://www.ipu.org/hr-e/parliaments.htm Note also Senator Joyal’s remark during the meeting of the Senate’s Standing Committee on Rules, Procedures and the Rights of
5.2 Example 1

In the first example, a Member alleges that the Speaker is discriminating against him on a prohibited ground such as religion or ethnicity, by consistently delaying to recognize him until after most other Members have spoken. This is the type of situation that falls into the internal proceedings sphere which is generally recognized by the courts as protected by parliamentary privilege and outside the scope of their review.\(^7\) This is also an example of what, as discussed in the previous section, Fox-Decent seems to assume is completely within the Speaker’s authority without articulating why. On a traditional privilege analysis, this would be seen as a need to balance a conflict between the Speaker’s authority to govern the proceedings of the House, and the right of the Member to have recourse to justice in order to remedy the discrimination against him, with the first interest likely winning out. On a relational approach, the decision-making body, which might be the Speaker, an internal governance board, or the entire assembly, depending on the assembly’s structure and norms and on how the conflict develops and plays out, would first look at the underlying values, which might be something like representative democracy, and equality. The next consideration would be what types of relationships are most likely to advance those values. For example, Speakers need authority, much of which is discretionary, to fulfill their function of maintaining order and decorum in the House so that it can transact its business. A component of respect for and acceptance of the authority of that office, even when in specific instances one or more members might be unhappy with a Speaker’s exercise of that authority, would likely be one important component of the relationship between the Speaker and members. Also important would be that the Speaker act in such a way so as to maintain members’ confidence. Another characteristic of the relationship would be that the Speaker not discriminate against members in exercising his or her authority. If we take these three components as descriptive of the kind of relationship we want to foster, we can then ask

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\(^7\) Parliament on May 13, 2008, during which members considered *Vaid* and different options for clarifying the status of parliamentary employees in relation to privilege: “we, as Parliament, are like the wife of Caesar. We must appear to be concerned about respect for human rights because, in all the legislation that we adopt, the first question we ask is: Does that legislation respect the Charter rights?” online: Parliament of Canada http://www.parl.gc.ca/39/2/parlbus/commbus/senate/Com-e/rul2_e/03ev-e.htm?Language=E&Parl=39&Ses-2&comm_id=89

\(^7\) However, for exceptions see *supra* note 158.
what institutional arrangement would best achieve this. We might say that granting jurisdiction to an outside authority, such as a human rights tribunal or a court, to deal with the matter could undermine the Speaker’s authority and ability to ensure order in the House, for example, by leaving room for complaints made for partisan reasons.

On this view, maintaining internal jurisdiction over the matter is preferable, because it fosters the first two components of the aspired relationship. However, this leaves the problem of how to foster the non-discriminatory aspect of the relationship in the absence of oversight by an independent third party. This is partly addressed by the ability of the majority of the House to remove the Speaker, but this mechanism depends on the will of the majority to take up the aggrieved member’s cause. This result might be good enough for some, however, others might propose that internal mechanisms be created to provide some forum for the member to air his or her grievance. These procedural questions are ones that I would say each assembly would need to work out for itself, in accordance with its particular norms, history and political climate. The process would likely involve reference to judicially established principles of equality, but it would consider them in the particular parliamentary context, and would also allow for more appropriate remedies. The appropriate solution could be tailored to the needs of the individual polity where the grievance occurred.\(^{178}\)

### 5.3 Example 2

This conclusion can be contrasted with a second example, resembling the facts in *Vaid*, in which a member of the kitchen staff, not directly connected to the debates and proceedings of the House, alleges that he has been harassed by the Speaker in a manner that would contravene human rights legislation. The relationship is somewhat different in this case, as the staff member is not involved in the debates and proceedings of the House, and has no influence on the appointment of the Speaker. The values at stake here are similar to the first example. However, when we consider the types of relationships that foster these values, we arrive at different results. The tie between respect

\(^{178}\) The other relationship that might be considered in this example is that between the legislature and constituents. While the individual member is the subject of the alleged discrimination, the discrimination, if it does exist, this could compromise the quality of representation enjoyed by constituents. The relationship between the legislature and the public will be considered in a later example.
for the Speaker’s authority and the value of representative democracy is much more tenuous here. It is therefore much more difficult to make the argument that allowing an outside body to examine the issue is problematic. There might be reason to prefer a special independent body other than the human rights tribunal or the courts to maintain separation from the judicial branch (for example, a case of a judge harassing a staff member would be considered by other judges, not by a legislative committee), however, there is no clear necessity for keeping the matter internal at the potential expense of the values of access to justice and non-discrimination if the relationships between staff and parliamentarians would be better served by an external process.

5.4 Example 3

The first two examples considered what might happen in a situation where the Speaker him or herself is allegedly at fault. The next two examples consider situations where decisions of the entire legislature are engaged. In the third example, the Law Clerk of the House, has his appointment revoked by a resolution of the assembly without a hearing. The values at stake here include procedural fairness, and representative democracy, in particular the house’s access to legal advice in order to perform its functions. Important components of the relationship to foster those values might include professionalism, respect and non-harm to the institution on the part of the law clerk, and fair treatment of appointees on the part of the legislature. This is a more difficult situation to analyze, because of the importance of the legislature having full confidence in its officers in support of the democratic value, on the one hand, and of the procedural fairness value on the other. The relationship here is much closer than that of the kitchen worker, yet the law clerk, unlike the member in the first example, does not have a vote. In many if not all cases, the law clerk would also have a great deal more bargaining power than the kitchen worker in negotiating terms of employment or contract. I would argue that the law clerk is so close to the debates and proceedings of the house and the value of confidence in that officer so fundamental to the relationship that priority should be to maintain that confidence, even if that means curtailing what would normally be considered procedural fairness. In some sense by signing on to such a position of confidence, a law clerk might be considered to be agreeing to waive entitlements to fairness that another contractor or

179 This is similar to the fact situations in supra note 126.
staff member less closely connected to the core functions of the assembly (and presumably with less contractual bargaining power) would expect to enjoy. It would perhaps help the relationship if an open discussion about the importance of confidence and the potential consequences of a loss of that confidence, regardless of any actual wrongdoing, took place during the course of contract negotiations, and if appropriate terms reflecting that discussion were included in the contract itself.

5.5 Example 4

The final example considers a decision by the legislature’s governance body to deny a group the ability to hold a demonstration directly in front of the doors of the House.\textsuperscript{180} The values here include representative democracy and freedom of speech and assembly. Some aspects of the relationship between constituents and the legislature that might be considered important in furthering these values are avoidance of harassment of members that would interfere with their ability to carry out their duties (e.g. threats of violence), the possibility of constructive dialogue between demonstrators and the legislature, and the accessibility of the legislature to all constituents, including the demonstrators. The conclusion would likely be that the assembly should have authority to make the call about whether to allow the demonstration, in the interest of securing its ability to carry out its functions, however, the other desirable aspects of the relationship would encourage compromise and dialogue in order to find a mutually satisfactory solution, such as allowing the demonstration to take place provided that a corridor is kept open for persons to enter and exit the building and that any security concerns are addressed.

5.6 Application of the Relational Approach to Privilege

What can be seen from these examples is that the relational approach does not mandate specific outcomes. The conclusions might vary depending on context. What is important is that the approach provides a framework for considering problems that does not cast them as competing rights, where one must trump the other, but rather opens to the possibility of other solutions that do a better job of advancing the values and interests that underlie the rights and privilege claims. Using such an approach in \textit{A v. UK}, for example, the UK House of Commons might have looked at the situation as

\textsuperscript{180} For actual cases involving similar issues see \textit{Ontario (Speaker of the Legislative Assembly) v. Casselman} [1996] O.J. No. 5343; and \textit{R. v. Behrens}, 2004 ONCJ 327, 126 C.R.R. (2d) 50.
a problem of what kind of relationship it should have with its constituents rather than as a problem of defending parliamentary freedom of speech at all costs, and might have come to a different decision about how to handle the plaintiff's initial complaint to the Speaker. In a case like Vaid, the need for litigation might have been avoided in the first place had those involved been able to make decisions at various steps with a clear understanding of the relationship between staff and members to be fostered, perhaps reflected in clearer legislation and/or policies than existed at the time in order to guide employees and members.  

Although the relational approach might have some value in resolving individual cases, such as the examples provided above, likely its greatest power would be in informing a comprehensive modernization exercise, along the lines contemplated by Robert and MacNeil, that includes broad dialogue about values and principles. For one thing, it is doubtful that legislatures would be comfortable shifting from their defensive approach if they are not assured of commensurate judicial deference. This deference is unlikely to happen in the absence of a comprehensive articulation of principles of privilege that demonstrates consideration for other basic values, as opposed to piecemeal application of the relational approach in individual cases. One of the advantages the relational approach could bring to such an exercise is that it can avoid some of the technical analysis of precedent and text that is required to deal with rights claims, and can work on a more user-friendly, intuitive level that would allow for participation by a broader cross-section of the public. The result might be a combination of legislation, changes to the legislature's rules of procedure, and public statements of principle, which would together provide accountability and transparency, and would, it is to be hoped, provide legislatures with the flexibility to relax their defensive approach, lead to more careful and principled decisions about the exercise of privilege, and result in fewer causes for complaint. To critics who might argue that the approach is too ill-defined and ephemeral, I would only say that the more legalistic approaches of codification and criteria established by the

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181 For example, different options for clarifying the status of parliamentary employees in relation to privilege in the aftermath of Vaid were considered during the discussion of the Senate's Standing Committee on Rules, Procedures and the Rights of Parliament on May 13, 2008, supra note 176.
courts have not achieved certainty either, and have furthermore avoided identifying and dealing with the basic values at stake. 182

As Nedelsky argues, the relational approach to rights is capable of providing an answer to some critiques of rights generally, including the concern that liberal traditions tend to overemphasize the individual versus the social aspects of human beings, and that rights are “obfuscatory”, as when they become the centre of political debates they obscure the real issues and misdirect the energies of political actors. 183 The approach can transform and overcome these problems by making clear that the function of rights is and has always been to construct relationships, shifting the focus of analysis from an abstract concept of individual entitlement to an examination of how rights will shape relationships and how those relationships will themselves either foster or undermine the values at stake. 184 Further, understanding rights as structuring relationships, transforms the problem of obfuscation. 185 I would argue that both the critiques of rights and the solution provided by the relational approach could apply equally well to privilege, and that the words “individual entitlement” and “rights” in the previous two sentences can be substituted with “legislative entitlement” and “parliamentary privilege”. Writes Nedelsky,

[t]here will almost certainly still be people who want the kind of relationships of unequal power and limited responsibility that the individualistic liberal rights tradition [and, I would argue, the traditional view of parliamentary privilege] promotes and justifies. But at least the debate will take place in terms of why (liberty values, for example) people think some patterns of human relationships are better than others and what sort of legal rights will foster them. 186

Shifting the debate around parliamentary privilege in this way will not eliminate the potential for abuses of privileges, but can discourage them through a kind of transparency and accountability that does not exist today.

182 An example of a non-legal document that guides the actions of parliamentarians is the Conflict of Interest Code for Members of the House of Commons, appendix to Standing Orders of the House of Commons (June 2009) online: Parliament of Canada http://www.parl.gc.ca/information/about/process/house/standingorders/toe-e.htm.
183 Supra, note 15 at 151.
184 Ibid. at 141.
185 Ibid. at 150-151.
186 Ibid. at 150.
5.7 Summary and Conclusions

In this chapter, I have presented Nedelsky’s concept of rights as relationship, which encourages us to focus on the kinds of relationships we want, on the values at stake, and on what concepts and institutions would promote those relationships. I argue, using four examples as illustrations, that this concept could assist decision-making specific cases involving conflicts between privilege and individual rights. However, I also argue that the greatest benefit of a relational approach would be in informing a comprehensive, public modernization exercise including broad dialogue about values and principles. While a relational approach would not eliminate abuses of privilege, it could foster a greater transparency and accountability that would discourage them. Further, it may help to resolve the impasse between legislatures and courts.
Chapter 5
Conclusion

6 Conclusion

Legislative assemblies and courts continue to grapple today with a centuries old problem of finding a balance between the former’s claims of privilege to protect their ability to duly exercise their powers, and the need to curtail abuses of those privileges that may endanger the commonwealth. Parliamentary privilege, while it developed in a very different context than today, is still necessary to allow legislatures to carry out their functions of inquiry, debate and law-making. The fact that some form of privilege exists in most polities today, and that it might be said to have a universal value, underscores this. However, parliaments have not clearly articulated privilege in the modern context, and the role of the courts in overseeing it remains unclear. The result is a problem of transparency and accountability, as well as an ongoing jurisdictional conflict. Further, privilege remains unreconciled with human rights.

The historical record shows privilege as having both a light and dark side, at once champion and oppressor of democracy and the people. Although human rights and the emphasis on transparency and accountability in modern states are relatively new phenomena, judicial concerns about the potential for privilege to interfere with individual rights can be traced back to at least the early eighteenth century. Neither courts nor legislatures have successfully resolved this basic conflict.

The current SCC approach, which relies on the concepts of “necessity” and the distinction between the scope and exercise of privileges, and which perhaps remains closest to the principles at the heart of the landmark mid-nineteenth century case of Stockdale v. Hansard, as Fox-Decent argues, relies on weak reasoning and will be difficult to apply in practice. The cases considered by the SCC to date have been relatively easy fact situations to analyze. However, experiences in Canadian lower courts and internationally suggest it is only a matter of time before the SCC is faced with more challenging problems for which the Vaid reasoning will likely prove inadequate. The approaches of other high courts, with views of privilege ranging from minimalist to absolutist, and, in particular, the proportionality-based approach of the European Commission on Human Rights as applied in A. v. UK, do not offer any obvious advantages over the SCC’s analysis.
On the legislative side, as described by Robert and McNeil, Canadian parliamentarians have adopted a passive and defensive stance toward privilege which is unsustainable. Other jurisdictions, notably Australia and the UK, have undertaken comprehensive modernization exercises, in the Australian case leading to codification of some aspects of privilege. Although this work would likely provide a good starting point for Canadian legislatures, I have argued that our unique context, including the Charter, will require a made-in-Canada approach and a good deal of soul-searching if we are to reconcile privilege with our fundamental values.

I have argued in this paper against Fox-Decent’s proposal to address the flaws in the SCC’s approach by expanding the scope of judicial review of privilege claims. Although I share his concern with accountability, the kind of accountability that can be achieved through litigation is in this case, I think, inferior to the accountability that could come from public political processes, in particular comprehensive modernization projects such as that advocated by Robert and McNeil.

In this paper I have also argued for a relational approach that frames issues in terms of context and underlying values in place of the traditional contest approach, which amounts to a competition between rights and privileges. I believe this approach is especially appropriate for reconciling the interests of constituents and those of legislatures, which are the parties to, I would argue, the most salient relationship today where parliamentary privilege is concerned. That is not to say that it could not also be used to assist in resolving other conflicts, such as that which still exists, albeit in a somewhat dormant form, between the respective mandates of the legislative and judicial branches. This relationship will also need better definition if legislatures are to institute new practices, such as providing reasons for privilege claims, to make themselves more accountable. If this brand of accountability is not accepted by the courts as being on an equal footing with the accountability achieved through litigation, these practices will only become ammunition in the hands of plaintiffs and undoubtedly will be short-lived. In the absence of judicial deference, whatever reforms or accountability measures are put in place will be doomed to failure.

Although the greatest promise of the relational approach would be in its contribution to broad political processes aimed at modernizing privilege, it could also assist decision-making in specific cases. Indeed, an important advantage is that it can be used across all stages of decision-making, including those that take place long before a matter is brought before a court. Thus, not only could
the relational approach provide greater transparency and accountability, it has the potential to help avoid the abuses of privilege and adversarial, protective stances that are so often at the root of conflict in the first place.
Bibliography

Legislation

Bill of Rights (1689) 1 Will. & Mar. sess. 2, c. 2.
Parliamentary Papers Act, 1840, 3 & 4 Vict. c. 9.
Parliamentary Privileges Act 1897 (Cth) (Australia).

Cases

Ashby v. White (1703) 1 ER 417, 1 Brown 62 (H.L.).
Ashby v. White (1703) 92 ER 126, 2 Lord Raymond 939 (Q.B.).
Jay v. Topham (1682-9), Saunders Repts., 131b.
President of the Legislative Council (South Australia) v. Kosmas, [2008] SAIRC 41.
Raja Ram Pal v. Speaker (Lok Sabha), (Writ Petition 1 (civil) of 2006), [2007] 3 S.C.C. 184, online: Supreme Court of India http://judis.nic.in/supremecourt/chejudis.asp
Sheriff of Middlesex (1840) 113 ER 419, 11 Ad & E 273.
Speaker (National Assembly) v. de Lille, [1999] ZASCA 50.
Stockdale v. Hansard (1839) 112 ER 1112, 9 Ad KE1 113.
Thorpe’s Case (1452) 5 Rot Parl 239-240; 1 Hatsell 28-34.

Other Sources
Fox-Decent, Evan, “Parliamentary Privilege, Rule of Law and the Charter after the Vaid Case” (2007) 3 Canadian Parliamentary Review 27.
firstprinciplesandrecentapplications


Interparliamentary Union, “Parliamentary Work on Human Rights” online: Interparliamentary Union [http://www.ipu.org/hr-e/parliaments.htm](http://www.ipu.org/hr-e/parliaments.htm)


