

Canadian Human Rights Tribunal Tribunal canadien des droits de la
personne

BETWEEN:

SATNAM VAID

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HOUSE OF COMMONS

- and -

THE HONOURABLE GILBERT PARENT

Respondent

RULING ON JURISDICTION

Ruling No. 1

2001/04/25

PANEL: Majority Opinion:

Eve Roberts, Q.C., Member

Mukhtyar Tomar, Member

Dissenting Opinion:

Anne L. Mactavish, Chairperson

I. THE MOTION STATED

[1] The Complainant, Mr. Vaid, worked as a chauffeur to the Respondent, Mr. Parent, in his capacity as the Speaker of the House of Commons. Mr. Vaid laid complaints with the CHRC alleging discrimination on the basis of race, colour and ethnic origin in his employment contrary to ss. 7 and 14 of the *Canadian Human Rights Act* ("*CHRA*").

[2] The Respondents served a Notice claiming that the Tribunal is without jurisdiction with respect to the Respondents, on the grounds that the Speaker and the House of Commons are not subject to the *Act* because of parliamentary privilege.

II. ANALYSIS

A. Does the *Canadian Human Rights Act* (*CRHA*) Apply to the House of Commons?

[3] Section 2 of the *CHRA* sets out that the purpose of the *Act* is to give effect to certain equality principles to matters "coming within the legislative authority of Parliament". The Respondents argue that the *Act* does not apply to the House of Commons because the House is not a federal work or undertaking or business pursuant to s. 91 of the *Constitution Act, 1867*, and thus not within the legislative authority. They also argue that privilege, as part of the constitution, requires express words to override it, and the *CHRA* does not expressly state that the House of Commons is bound by the *Act*.

[4] The Commission argued that ss. 2 and 66 of the *CHRA* and the purposive interpretation given to quasi-constitutional human rights legislation means that the Respondents are subject to the *Act*.

[5] We agree with the Commission. Parliament has legislated on the issue of its own employee relations many times, and we find the issue of employee relations within the "legislative authority" of Parliament. We agree with the reasons of Sopinka J. rather than those of Lamer C.J. in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*⁽¹⁾ on this point. Lamer C.J. found that for something to be within the "legislative authority", it had to be a work, undertaking or business within the meaning of s. 91 of the Constitution, and that the House of Commons was none of those. Sopinka J. found that within the "legislative authority" meant that it must be something over which Parliament was able to legislate.

[6] If Parliament has wished to retain its parliamentary privilege with regard to human rights, it could have expressly done so as it did in s. 4(1) of the *Parliamentary Employment and Staff Relations Act*.⁽²⁾ The Supreme Court of Canada stated in *Winnipeg School Division No. 1 v. Craton*⁽³⁾:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the legislature. It is however, of such nature that it may not be altered, amended or repealed, nor may exceptions be created to its provisions save by clear legislative pronouncement.

[7] The Respondents also argue that the House of Commons is not a "person" about whom a complaint may be laid according to s. 40(1) of the *CHRA*. This point does not go to the issue of parliamentary privilege, and the Respondents will suffer no violation of privilege if this matter is postponed until a hearing when evidence may be given on the point.

[8] The corollary issue of whether the Speaker is immune from personal liability for the actions of the Board of Internal Operations of the House of Commons is not in issue at the moment because the Board is not a party to the complaint.

B. Are the Respondents Protected by Parliamentary Privilege?

[9] The Respondents argue that they enjoy parliamentary privilege granted by s. 5 of the *Parliament of Canada Act*⁽⁴⁾. Counsel cited *Soth v. Ontario (Speaker of the Legislative Assembly)*⁽⁵⁾ as authority for his argument that "the employment of persons in the legislative assembly was part of the Speaker's privilege and not subject to judicial review." He quotes J. P. Maingot⁽⁶⁾ at p.184:

With respect to the staff of each House of Parliament, the natural reluctance of the courts to interfere with matters related to the internal affairs of the House would include employee-employer relations in the House where it could be demonstrated that in effect the House was acting collectively in a matter that fell within the area of the internal affairs of the House.

[10] Respondents' counsel argues that the Supreme Court of Canada in *New Brunswick Broadcasting* ⁽⁷⁾ found that a court could only inquire into whether a privilege existed and could not look at whether the privilege was exercised properly. One must look to see if a matter falls "within the necessary sphere of matters without which the dignity and efficiency of the house cannot be upheld", and not fall into the trap of deciding whether the exercise of a privilege is necessary. He argues that it is well settled that staff relations are in the "necessary" sphere and that we may inquire no further.

[11] Lastly, the Respondents claim that the Tribunal may not reserve its decision on the question of parliamentary privilege until it has heard evidence on the merits of the complaints, as the hearing of evidence would violate the privilege.

[12] The Commission takes opposing positions. Firstly, it argues that the hearing of the objection to jurisdiction should be postponed until the evidence and arguments have been heard. Its position is that privilege applies to the complaints only if the test of necessity can be met, and, to establish necessity, evidence must be introduced.

[13] The Commission argues that necessity applies only in areas impinging on the dignity and efficiency of the House and does not apply to activities far from the core function of a parliament. The job of chauffeuring is neither a necessary nor core function.

[14] Counsel further argued that race and gender are issues which fall outside the rules by which parliament conducts its business, and thus are not subject to parliamentary privilege.

[15] The leading case on the issue is *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* ⁽⁸⁾. New Brunswick Broadcasting wanted to film proceedings of the legislature and argued its *Charter* rights to freedom of speech and of the press would otherwise be violated. The Speaker stood on his privilege and refused to let the broadcaster film without restrictions set by him.

[16] Five members of the Court agreed that the *Charter* did not apply to a legislature when the legislature was exercising its inherent privileges as these enjoyed constitutional status.

[17] But they also agreed that s. 32 (1) of the *Charter* (similar in wording to s. 2 of the *CHRA*) meant that in some circumstances a legislature could be subject to the *Charter* based on a textual and purposive reading of the section.

[18] This 1993 case was followed in 1996 by *Harvey v. New Brunswick (A-G)* ⁽⁹⁾. This case was about whether the disqualification of a member of the legislature because he had committed an electoral fraud was contrary to his *Charter* rights. The majority found they did not have to address the issue of parliamentary privilege because it was raised only by an intervener and was not argued by the parties. They proceeded to decide the case as a *Charter* issue.

[19] McLachlin J., writing for herself and L'Heureux-Dube J., found that the disqualification fell within the privilege of the legislature and was immune from judicial review. She found that the *Charter* and parliamentary privilege had to be reconciled in a way that would "preserve both meaningful legislative privilege as well as the fundamental democratic values guaranteed by the *Charter*". She reconciled s. 3 of the *Charter* and legislative privilege at paragraph 70 thusly:

...s. 3 of the *Charter* must be read as being consistent with parliamentary privilege. However this does not leave s. 3 without meaning. ... s. 3 still operates to prevent citizens from being disqualified from holding office on grounds which fall outside the rules by which Parliament and the legislatures conduct their business: race and gender would be examples of grounds falling within this category.

[20] And at paragraph 71,

To prevent abuses cloaked in the guise of privilege from trumping legitimate *Charter* interests, the courts must inquire into the legitimacy of a claim of parliamentary privilege. ... This screening role means that where it is alleged that a person has been expelled or disqualified on invalid grounds, the courts must determine whether the act falls within the scope of parliamentary privilege.

[21] She answers her question, is parliamentary privilege established in this case, at paragraph 88,

I conclude that the power to disqualify members for corruption is necessary to the dignity, integrity and efficient functioning of a legislature. As such it is protected by parliamentary privilege and falls outside the ambit of s. 3 of the *Charter*.

[22] Asking the right question is important. The question to be asked here may not be "do employee relations fall within parliamentary privilege?" but "does the power to ignore human rights fall within parliamentary privilege? That is, is it necessary for the dignity, integrity and efficient functioning of the House not to be bound by human rights laws?"

[23] In any case, McLachlin J. determined the matter when she found that race and gender are outside of the rules by which parliament and the legislatures conduct their business.

[24] The most recent case to deal with these issues is *Thompson v. McLean*.⁽¹⁰⁾ The assistant to a former Speaker of a provincial legislature claimed damages for wrongful dismissal and damages respecting the employer's response to allegations of sexual harassment committed by the Speaker. The respondents pleaded that parliamentary privilege precluded judicial review.

[25] Campbell J. found that he had to determine the limit of parliamentary privilege in terms of the scope of the employer relationship. "Was the way she was treated in her

employment so central to the work of the legislative assembly that it would interfere with its essential parliamentary function to let her case be determined in court?"

[26] In his discussion, the judge includes "driving" in a list of jobs done by employees of a legislature where the work appears to him to be far from the core of legislative and parliamentary privilege. He concludes that in some cases evidence will be needed to decide whether "all aspects of the employment relationship are immune from judgement by the court".

[27] Campbell J. makes some other telling statements, as he is of the view that necessity and scope are as important as the parliamentary privilege itself. At p. 177 he says,

Parliamentary privilege is not an end in itself, but simply a means to ensure that the legislature has whatever protection it needs in order to go about its parliamentary business without being second guessed by the courts.

[28] And at p. 178:

The courts, while vigilant to ensure that they do not interfere with the business of the legislature, must also be vigilant to ensure that parliamentary privilege is not carried so far that it interferes unnecessarily with the rights of citizens to have access to the courts in relation to matters that do not interfere with the parliamentary business of the legislature.

[29] Applying McLachlin J.'s test of necessity, and given her example of "race" as not a necessity, and given Campbell J.'s discussion of core functions, and given his specific example of chauffeuring, it is apparent that on both of these tests the employment relationship of the complainant is not sufficiently necessary or close enough to the core of the operation of the House of Commons to warrant parliamentary privilege.

III. DECISION

[29] Accordingly, the motion is denied.

Eve Roberts, Q.C., Member

Mukhtyar Tomar, Member

OTTAWA, Ontario

April 25, 2001

DISSENTING OPINION

OF

ANNE MACTAVISH

CHAIRPERSON

[1] Satnam Vaid has filed two human rights complaints wherein he alleges that the House of Commons and the former Speaker of the House, the Honourable Gilbert Parent, discriminated against him on the basis of his race, his colour and his national or ethnic origin. In particular, Mr. Vaid complains that the respondents treated him in an adverse differential manner, that Mr. Parent harassed him in the course of his employment and that the House of Commons failed in its duty to provide him with a harassment-free work environment. Following an investigation by the Canadian Human Rights Commission, both complaints were referred to the Canadian Human Rights Tribunal for a hearing.

[2] The respondents challenge the jurisdiction of the Tribunal to hear these matters on the basis of the parliamentary privilege that they say attaches to the internal functions of the House of Commons and the Speaker's Office. According to the respondents, the internal governance of Parliament and its staff cannot be subject to the scrutiny of the courts or administrative tribunals.

[3] I have had the opportunity to review the reasons of my colleagues wherein they conclude that the hearing in this matter should proceed. With the greatest of respect, I do

not agree with their conclusion. For the reasons set out below, I am of the view that the Canadian Human Rights Tribunal is without jurisdiction to hear Mr. Vaid's complaint.

I. What is Parliamentary Privilege?

[4] Parliamentary privilege has long been a part of the British system of government, and is founded on the principle that, in order to be able to do their job, legislative bodies need to have a certain degree of independence.⁻⁽¹¹⁾ In this regard, the concept is analogous to that of judicial independence.⁻⁽¹²⁾

[5] The Supreme Court of Canada noted in *New Brunswick Broadcasting Co.* that "Canadian legislative bodies properly claim as inherent privileges those rights which are necessary to their capacity to function as legislative bodies." The test is one of necessity: That is, in order to determine whether a claim of parliamentary privilege is well-founded, it must be determined whether the matter in issue falls within the necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld.⁻⁽¹³⁾

[6] The necessity test is a jurisdictional one. The adjudicator's powers are limited to the determination of whether the privilege that is being asserted is one of the privileges necessary to the legislative body's ability to function.⁻⁽¹⁴⁾ Adjudicators have no power to review particular exercises of necessary privileges, for to do so would render the privilege nugatory.⁻⁽¹⁵⁾

III. Are Employment Matters Within the Privileges of the House of Commons and the Speaker?

[7] The Canadian Human Rights Commission says that parliamentary privilege does not attach to every action taken by the House of Commons in matters separate and apart from its core function as a legislative assembly. In particular, the Commission says that not everyone employed by the Speaker or the House of Commons will perform duties that bring them within the sphere protected by privilege. The Commission says that we need to hear evidence about Mr. Vaid's duties and responsibilities before we can determine whether the relationship between the Speaker and his chauffeur/personal assistant was such that it came within the protected core of parliamentary privilege.

[8] In any event, the Commission says that it is not necessary for the functioning of the House of Commons that members be able to commit human rights violations with impunity.

[9] In support of the contention that we need information regarding Mr. Vaid's employment responsibilities before we can properly determine the issue of privilege, the Commission relies upon the decision of the Ontario Court of Justice in *Thompson v. McLean*.⁽¹⁶⁾ In *Thompson*, Campbell J. refused to strike out a Statement of Claim issued against the Speaker of the Ontario Legislative Assembly and the Attorney General in an action for damages arising out of the alleged sexual harassment of Sandi Thompson by Alastair McLean, the then Speaker of the Legislative Assembly. The defendants contended that the Court had no jurisdiction to hear Ms. Thompson's case, because parliamentary privilege protected the acts of the Speaker and the Office of the Assembly from judicial scrutiny.

[10] Justice Campbell commenced his analysis by observing that it was not consistent with modern ideas of employment to conclude that all employees of a legislative body are automatically stripped of the normal protections enjoyed by employees in other workplaces, without first carefully examining the claim. This was particularly so where there appeared to be some dispute as to the underlying facts regarding the nature of Ms. Thompson's employment relationship. He noted that:

The courts, while vigilant to ensure that they do not interfere with the business of the legislature, must also be vigilant to ensure that parliamentary privilege is not carried so far that it interferes unnecessarily with the rights of citizens to have access to the courts in relation to matters that do not interfere with the parliamentary business of the legislature.⁽¹⁷⁾

[11] In Justice Campbell's view, in order to determine whether parliamentary privilege applied, it was necessary to examine the scope of Ms. Thompson's employment responsibilities, to ascertain whether her work was so central to the core political function of the Legislative Assembly that absolute parliamentary privilege prevented the Court from even hearing the case. With respect to the issue of the relationship of the employee's duties to the core political functions of the Legislative Assembly, Justice Campbell stated:

It may be clear that the First Clerk Assistant or the Sergeant at Arms or the legislative assistant of a house leader performs duties and enjoys an employment relationship completely within the core of legislative and parliamentary privilege. It may be that such cases can be determined on the bare pleadings without any evidence. It may not be so clear that a bartender hired to serve drinks or a gardener or a social convenor or a caterer works completely within the core of parliamentary privilege essential for the fulfilment of legislative and political functions.^{—(18)}

Justice Campbell concluded that, without an assessment of the evidence at trial, it was not possible to determine whether the Speaker's conduct and Ms. Thompson's employment relationship were protected by parliamentary privilege. Consequently, he refused to strike out the Statement of Claim.

[12] The Commission urges us not to decide the issue of privilege now. Rather, the Commission says, the Tribunal should allow Mr. Vaid's case to proceed to a hearing in order that evidence can be adduced with respect to the nature and scope of his job responsibilities, and the proximity of those responsibilities to the core legislative functions of the House of Commons and the work of the Speaker.

[13] Parliamentarians themselves clearly see the appointment and control of their staff as one of their privileges, although not everyone necessarily agrees with that proposition.⁽¹⁹⁾ This, however, is not sufficient to bring the matter within the exclusive jurisdiction of the House of Commons. When a case involving a claim of privilege comes before an adjudicator, it is up to the adjudicator to determine the existence of the privilege. As Lamer C.J. observed in *New Brunswick Broadcasting Co.*, were it otherwise, the House of Commons "...could bring any matter within its jurisdiction by simply declaring it to be so."⁽²⁰⁾

[14] In *Parliamentary Privilege in Canada*, Joseph Maingot notes that control over its own affairs and proceedings is "...one of the most significant attributes of an independent legislative institution."⁽²¹⁾ According to Maingot, the House of Commons' right to regulate its own internal affairs, free from outside interference, includes the right to appoint and manage its staff. This view has been accepted by the Federal Court of Appeal: In his concurring judgment in *House of Commons v. Canada Labour Relations Board*, Hugessen J.A. stated "... it seems to me that one of those privileges is precisely that the House shall have the direction and control of its staff just as it does of its officers, the Clerk and the Sergeant-at-Arms..."⁽²²⁾

[15] While I concur with Justice Campbell that 'it jars a little' to apply the concept of parliamentary privilege to a modern public service employer, I cannot agree that the approach that he took in the *Thompson* case is appropriate here. A review of the *Thompson* decision discloses that the test that Campbell J. applied was one of functionality: That is, he asked whether it would interfere with the essential functions of the Legislative Assembly to let the case proceed to trial.⁽²³⁾ With the greatest of respect, the test articulated by the majority decision in *New Brunswick Broadcasting Co.* framed the question slightly differently. According to the Supreme Court of Canada, we must ask whether the matter in issue - that is, the power to appoint and manage its staff - falls within the necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld. In this regard, the weight of judicial and arbitral jurisprudence favours the view that the appointment and management of staff falls indeed within the parliamentary privilege of the Speaker and the House of Commons.⁽²⁴⁾ In light of the foregoing, I am satisfied that the test of necessity has been met.

[16] If one accepts that parliamentary privilege attaches to the general power of the House of Commons and the Speaker to appoint and manage their employees, the *Thompson* approach becomes problematic. This approach requires that the Tribunal embark on an examination of Mr. Vaid's specific job responsibilities as they evolved over the period governed by his complaints, and the proximity of these responsibilities to the

core legislative function of the House of Commons. It seems to me that this would inevitably subject the actions of the Speaker and the House of Commons to Tribunal scrutiny, thus rendering any parliamentary privilege nugatory.⁽²⁵⁾

[17] As to the Commission's argument that it is not necessary for the functioning of the House of Commons that members be able to commit human rights violations with impunity, with respect, this argument asks us to consider, not the necessity for the privilege itself - in this case the power to appoint and manage staff - but rather the way in which that power was exercised in this case.⁽²⁶⁾ As the Ontario Court of Appeal noted in *Zündel*, a tribunal cannot examine the 'rightness or wrongness' of actions, if the claim to parliamentary privilege is made out. This is the situation here, unless it can be shown that the *Canadian Human Rights Act* overrides parliamentary privilege, so as to apply to employees of the Speaker and the House of Commons. This issue will be considered next.

IV. Is the Privilege to Appoint and Manage Staff an Inherent or Statutory Privilege?

[18] In order to determine whether the *Canadian Human Rights Act* overrides parliamentary privilege, it is necessary to consider whether the privilege to appoint and manage staff is an inherent privilege of the Speaker and the House of Commons, or is the creation of statute. The Commission says any such privilege is a mere creature of statute, and is thus subject to the *Canadian Human Rights Act*, because of the paramountcy of human rights legislation.⁽²⁷⁾ In this regard, the Commission points to the *Parliament of Canada Act*,⁽²⁸⁾ which provides, in part:

4. The Senate and the House of Commons, respectively, and the members thereof, enjoy and exercise

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

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

5. The privileges, immunities and powers held, enjoyed and exercised in accordance with section 4 are part of the general and public law of Canada and it is not necessary to plead them but they shall, in all courts in Canada, and by and before all judges, be taken notice of judicially.

[19] There is indeed authority for the proposition that the privileges of the Speaker and the House of Commons are statutory in nature. Section 18 of the *Constitution Act, 1867* states, in part, that:

The privileges, immunities and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, *shall be such as are from time to time defined by Act of the Parliament of Canada ...* [emphasis added]

[20] In *New Brunswick Broadcasting Co.*, Lamer C.J. concluded that this section did not entrench the parliamentary privileges of the House of Commons in the Constitution, but rather, entrenched the power of Parliament to legislate privileges for itself.⁽²⁹⁾ On this point, however, Chief Justice Lamer was writing for himself: The majority decision in *New Brunswick Broadcasting Co.* found that Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning, and that these inherent privileges have constitutional status.

[21] Having already found that the power to appoint and manage staff is necessary for the proper functioning of Parliament, and is thus within the privileges of the Speaker and the House of Commons, I am bound by the majority decision of the Supreme Court of Canada that such inherent privileges enjoy constitutional status.

V. Does the *Canadian Human Rights Act* Apply to the House of Commons and the Speaker?

[22] Given my conclusion that the power to appoint and manage staff is an inherent privilege of the House of Commons and its Speaker, which privilege enjoys constitutional status, I am left to determine whether this privilege has been abrogated by the *Canadian Human Rights Act*.

[23] A statute can indeed abrogate a privilege of Parliament or its members. To do so, however, express language to that effect is required.⁽³⁰⁾ In this regard, the Commission points to s. 2 of the *Act*, which states that it will apply to "... matters coming within the legislative authority of Parliament ..."⁽³¹⁾ Parliament can and, indeed, does legislate with respect to the privileges of the House of Commons and the Speaker⁽³²⁾, and thus, the Commission argues, the *Act* extends to cover matters such as those raised by Mr. Vaid's complaints.

[24] A similar argument was advanced with respect to the ambit of the *Canadian Charter of Rights and Freedoms* in *New Brunswick Broadcasting Co.* Section 32 of the *Charter* contains language comparable to that contained in s. 2 of the *Canadian Human Rights Act*, providing, in part that:

32. This *Charter* applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament ...

[25] In *New Brunswick Broadcasting Co.*, the Supreme Court of Canada was asked to review the actions of the Nova Scotia House of Assembly in excluding television cameras from the House, in light of the *Charter* guarantee of freedom of expression. McLachlin J. observed that a legislative body could be a government actor, and thus subject to *Charter* scrutiny with respect to certain actions. However, absent specific *Charter* language to the contrary, the long history of curial deference to the independence of legislative bodies, and to the rights necessary to the functioning of those bodies could not be lightly set aside.⁽³³⁾ She concluded that the *Charter* did not apply to the actions of the Nova Scotia Legislature in excluding television cameras from the House of Assembly, as the actions in issue had been taken pursuant to a constitutional right, which right could not be abrogated by the *Charter*.⁽³⁴⁾

[26] It seems to me that if the reach of a constitutional instrument such as the *Charter of Rights and Freedoms* does not extend to regulate the exercise of the inherent privileges of the House of Commons and the Speaker, quasi-constitutional legislation such as the *Canadian Human Rights Act* surely cannot do so.⁽³⁵⁾

[27] The Commission has also drawn our attention to certain comments made by McLachlin J. on behalf of herself and Madam Justice L'Heureux-Dubé in *Harvey v. New Brunswick (Attorney General)*.⁽³⁶⁾ *Harvey* dealt with the power of the courts to review the expulsion of a member of the New Brunswick Legislative Assembly, following his conviction on a charge of committing an illegal practice under the provincial elections legislation. In considering the relationship between the *Charter* and parliamentary privilege, McLachlin J. stated that the democratic guarantees contained in s. 3 of the *Charter* must be interpreted in a purposive way, one consistent with parliamentary privilege. She noted that while a legislature's decision to expel a member may be beyond the purview of the *Charter* to the extent that it falls within the scope of parliamentary privilege, the *Charter* still operates to prevent citizens from being disqualified from holding office on grounds that fall outside the rules by which legislative bodies conduct themselves. She cites race and gender as examples of such grounds.⁽³⁷⁾

[28] I have considered Justice McLachlin's comments very carefully as they may apply to this case. I note that her comments were made in the context of an examination of a statutory scheme codifying the grounds for the expulsion of members of the New Brunswick Legislature. In this context, it appears that Justice McLachlin was contemplating situations where legislative action was clearly taken on the basis of illicit considerations such as race or gender. Such an obvious case would, in her view, bring the actions of the legislature into conflict with the values enshrined in the *Charter*.

[29] The problem with applying this approach here is the same one that arose in relation to the *Thompson* decision: it is by no means clear that any actions that may have been

taken by either the House of Commons or the Speaker were taken in consideration of Mr. Vaid's race, colour or national or ethnic origin. Indeed, the purpose of the Tribunal's inquiry would be to determine whether any such considerations were factors in the treatment that Mr. Vaid says he encountered in the course of his employment. We cannot make such a determination without a careful examination of all of the circumstances surrounding the events in issue in Mr. Vaid's complaint. This will, of necessity, involve an examination of the internal workings of the House of Commons and the Office of the Speaker in relation to the management of their employees: issues that I have already concluded fall within the privileges of the respondents.

[30] In other words, it is difficult to see how we can determine if Mr. Vaid's race, colour or national or ethnic origin were factors in the treatment he says he encountered in the course of his employment without abrogating the privileges of the respondents in the process.

[31] In any event, I am of the view that the comments of McLachlin J. in *Harvey* do not apply here. Madam Justice McLachlin was endeavouring to reconcile competing constitutional norms - that is, the inherent privileges of the New Brunswick Legislature and the democratic and equality rights guaranteed by the *Charter*. What is in issue here is not a conflict between two constitutional norms, but a conflict between the constitutional norm of parliamentary privilege, and the quasi-constitutional norms established by the *Canadian Human Rights Act*. Under Canadian constitutional law, the constitutional status of the parliamentary privilege to appoint and manage staff clearly trumps quasi-constitutional human rights legislation.

[32] I note that my conclusions in this regard accord with earlier decisions concerning the application of human rights legislation to matters covered by parliamentary privilege. In *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* [\(38\)](#), the majority of a Divisional Court panel concluded that matters falling within the privileges of the Ontario Legislature were immune from scrutiny under the provincial human rights code.^{[\(39\)](#)} Similarly, in *Canada (Human Rights Commission) v. Lane* [\(40\)](#), the Federal Court of Appeal was careful to distinguish the position of the Chief Electoral Officer from that of the Speaker, in finding that the *Canadian Human Rights Act* applied to actions taken by the former.^{[\(41\)](#)}

[33] For these reasons, I find that the Canadian Human Rights Tribunal is without jurisdiction to hear Mr. Vaid's complaint.

VI. Is the House of Commons a Legal Person?

[34] The House of Commons also objects to the jurisdiction of the Canadian Human Rights Tribunal on the grounds that it is not a 'person' as the term is used in s. 40 (1) of the *Canadian Human Rights Act*, and thus cannot be the subject of a human rights

complaint. In this regard, the House of Commons relies upon the decision of the Federal Court of Appeal in *House of Commons v. Canada Labour Relations Board, supra*. In light of my conclusions with respect to the issue of parliamentary privilege, it is unnecessary for me to deal with this question.

VII. Conclusion

[35] I am fully aware that my conclusion that the Canadian Human Rights Tribunal is without jurisdiction to hear this complaint would represent a draconian result for Mr. Vaid. Unlike other Canadians working within the federal sphere, he would be unable to enjoy the protection of the equality guarantees of the *Canadian Human Rights Act*, legislation of the type that has been described as "...the final refuge of the disadvantaged and the disenfranchised".⁽⁴²⁾

[36] There has been considerable academic and judicial comment with respect to the issue of parliamentary privilege ⁽⁴³⁾, and the question has been asked as to whether the preservation of what Gibson described as the 'constitutional cockroach' of parliamentary privilege accords with the rule of law. While this is, in my view, a valid question, the principle of parliamentary privilege remains a feature of the Canadian constitutional landscape. If Parliament wishes to have the *Canadian Human Rights Act* apply to the House of Commons and the Speaker, then it is up to Parliament to ensure that the *Act* reflects this intent.⁽⁴⁴⁾ Absent such express authorizing language, the Canadian Human Rights Tribunal would, in my view, be overstepping its legitimate constitutional bounds if we sought to interfere with the power of the House of Commons and its Speaker to appoint and manage their staff.

Anne L. Mactavish, Chairperson

OTTAWA, Ontario

April 25, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

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APPEARANCES:

Satnam Vaid On his own behalf

René Duval

Philippe Dufresne For the Canadian Human Rights Commission

Jacques Emond and Lyne Poirier For the House of Commons and the Honourable Gilbert Parent

1. [1993] 1 S.C.R. 391

2. R.S.C. 1985, c. P-1

3. ³ [1985] 1 S.C.R. 150, 6 C.H.R.R. D/435, at p. 156

4. RSC 1985, c. P-1

5. (1997) 32 O.R. (3rd) 440

6. Maingot, J.P., *Parliamentary Privilege in Canada*, 2nd ed. (Toronto: Butterworths, 1997)

7. *Supra* note 1

8. *Supra* note 1

9. [1996] 2 S.C.R. 876

10. C.C.E.L. (2nd) 170 (Ont. Gen. Div.)

11. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at p. 378-9, per McLachlin J. See also Maingot, *Parliamentary Privilege in Canada*, (Scarborough: Butterworths, 1982) at p. 12, where he describes parliamentary privilege as "... [T]he necessary immunity that the law provides for members of Parliament ... in order for these legislators to do their legislative work".
12. *New Brunswick Broadcasting Co.*, *supra* note 1 at p. 354, per Lamer C.J.
13. *Ibid.*, at p. 381-3, per McLachlin J.
14. *Ibid.*, at p. 384, per McLachlin J.
15. *Zündel v. Boudria*, (1999) 46 O.R.(3d) 410. (Ont. C.A.)
16. (1998), 37 C.C.E.L. 170 (Ont. Gen. Div.)
17. *Ibid.*, at p. 178
18. *Ibid.*, at p. 181-182. In light of Justice Campbell's comments with respect to the duties of a bartender, it is noteworthy that an English court had no difficulty in finding that the sale of alcohol by employees of a Parliamentary committee came within the scope of the internal affairs of the British House of Commons. In *R. v. Graham Campbell, ex parte Herbert*, [1935] 1 K.B.D. 594, the Court concluded that such activity fell within the internal affairs of the House, and was thus subject to parliamentary privilege. As a consequence, the courts had no jurisdiction to interfere.
19. In *House of Commons v. Canada Labour Relations Board*, [1986] 2 F.C. 372, Pratte J.A. observed that '... parliamentarians, *rightly or wrongly*, consider the right of the House and the Senate to appoint and control their staff as one of their privileges'. (emphasis added)
20. *Supra* note 1 at p. 349.
21. Maingot, *supra* note 1 at p. 183. See also Beauschene, *Rules and Forms of the House of Commons of Canada*, 4th ed. (Toronto: Carswell, 1964), p. 329, s. 446.
22. *Supra* note 9 at p. 11. See also *Soth v. Ontario (Speaker of the Legislative Assembly)*, (1997) 32 O.R. (3d) 440 (Ont. Div. Ct.).
23. *Supra* note 6 at p. 178.
24. See *House of Commons v. Canada Labour Relations Board*, *supra* note 9, *Soth*, *supra* note 12, and *Senate Protective Services Employees Association v. The Senate of Canada*, February 15, 2001, PSEA Adjudication Award (Nadeau).

25. See *Huet v. Minister of National Revenue*, (1994), 85 F.T.R. 171, at p. 197, where Noël J. referred to an earlier decision in *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 All. E.R. 1112, in which it was noted that if the courts were to examine the content of particular exercises of valid privilege, and hold some of these exercises invalid, they would trump the exclusive jurisdiction of the legislative body, after having admitted that the privilege in issue falls within the exclusive jurisdiction of that body.

26. For an examination of the distinction between the existence of the privilege itself, and the way in which the privilege may have been exercised in a particular case, see the "fruit and tree" discussion at p. 392 of *New Brunswick Broadcasting Co.* *supra* note 1.

27. *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150.

28. R.S.C. 1985, c. P-1, as amended.

29. A similar view was put forward by Dale Gibson in "Monitoring Arbitrary Government Authority: Charter Scrutiny of Legislative, Executive and Judicial Privilege" (1998), 61 Sask. L. Rev. 297.

30. *Duke of Newcastle v. Morris*, (1870) L.R. 4 H.L. 661, cited with approval by Pratte J. in *House of Commons v. Canada Labour Relations Board*, *supra* note 9 at p. 490.

31. Reference should also be made to s. 66 of the *Canadian Human Rights Act*, which provides that the *Act* is binding on Her Majesty in Right of Canada. In my view, this section does not assist, as it is the Speaker and the House of Commons that are under consideration here, not the government of Canada. (See *Senate Protective Services Employees Association v. The Senate of Canada*, *supra* note 14 at p. 23.)

32. In addition to the *Parliament of Canada Act*, already referred to, see as well the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.); the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, s. 3(1); the *Financial Administration Act*, R.S.C. 1985, c. F-11, s. 2; the *Government Employees Administration Act*, R.S.C. 1985, c. G-5, s. 2; the *Translation Bureau Act*, R.S.C. 1985, c. T-16, s. 4; the *Public Sector Compensation Act*, 1991, c. 30, ss. 1 - 22, in force October 3, 1991; *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, c. G-2, Division IV; and the *Canada Pension Plan*, R.S.C. 1985, c. C-8, s. 2.

33. *Supra* note 1 at p. 372. In this regard, McLachlin J. was in agreement with the decision of Lamer C.J. in the same case: see p. 359. Lamer C.J. went on to observe that even though the exercise of an inherent privilege was not subject to *Charter* scrutiny, this did not mean that legislative bodies could exercise parliamentary privilege with absolute immunity. The courts can still review the validity of the claim with respect to the existence of the privilege. Further, even if the members of the legislative body in question may not be accountable to the courts with respect to the way that they choose to exercise a privilege, they are still answerable to the electorate. (at pp. 364-5)

34. *Ibid.*, at p. 368.

35. In this regard I am in agreement with the views of Adjudicator Nadeau in *Senate Protective Services Employees Association v. The Senate of Canada*, *supra* note 14 at pp. 27-28.

36. It should be noted that the majority in *Harvey* specifically chose not to address any issues relating to the application of the *Charter* to matters of parliamentary privilege.

37. *Ibid.*, at pp. 917-8.

38. [2000] O.J. No. 3416. See also *Senate Protective Services Employees Association v. The Senate of Canada*, *supra* note 14.

39. It is noteworthy that the majority came to this conclusion in the face of what the dissenting judge identified as a fairly obvious violation of the complainant's equality rights. (See para. 37)

40. [1990] 2 F.C. 327.

41. The Commission also drew our attention to the observation of the Federal Court of Appeal in *Lane* that it was 'of the view... that the scope of Parliamentary privilege does not extend to protect activities of the type complained of in the case before the Court. The Commission urges us to read that to mean that parliamentary privilege does not extend to protect against allegations of discrimination under the *Canadian Human Rights Act*. I do not read the Court's comments in the way suggested by the Commission: In my view, the Court is saying that parliamentary privilege does not extend to the power to control the right of an individual voter to vote in any particular case.

42. *Zurich Insurance Co. v. Ontario* (Human Rights Commission) [1992] 2 S.C.R. 321.

43. See, for example, Gibson, *supra* note 29 at par. 64-65, and Huet, *supra* note 15 at par. 46.

44. In this regard, it is noteworthy that the *Canadian Human Rights Act* Review Panel recently recommended that the *Act* be amended to give the Canadian Human Rights Commission and the Tribunal express jurisdiction over Parliamentary employees. (See Promoting Equality: A New Vision, Report of the Canadian Human Rights Act Review Panel (Ottawa: 2000) Recommendation No. 156.)