Towards a Theory of Parliamentary Privilege in Canadian Public Law

The Vaid Case and the Protection of Parliamentary Employees Against Human Rights Discrimination

by Senator Serge Joyal

The law of Parliament in Canada with respect to privilege is now substantially clearer due to a unanimous decision of the Supreme Court issued on May 20th, 2005. In this landmark decision, entitled House of Commons and the Honourable Gilbert Parent v. Satnam Vaid and the Canadian Human Rights Commission (Vaid) the Court established criteria to clearly evaluate the validity of a claim of privilege and presented an analysis that framed the use of privilege in a contemporary setting.

The specific issue before the Supreme Court involved the broad nature and scope of privilege over internal affaires claimed by the House of Commons. In a decision written by Mr. Justice Binnie, the position taken by the Commons was rejected and it was affirmed that the *Canadian Human Rights Act* (CHRA), like all statute law, does apply to parliament.[1] However, in this case the Court agreed that the employee could resolve his grievance through the *Parliamentary Employment and Staff Relations Act, 1985* (PESRA).

Aside from the importance of the decision itself, there are several features about the case that make it quite remarkable. Contrary to all precedent, the Attorney General intervened against the House of Commons to assert the constitutional importance of the CHRA. Equally without precedent, two Senators took the step of intervening to argue for a narrower understanding of privilege. Finally, the Court relied on a British Parliamentary report for its understanding of how privilege should be understood and applied. It also used the same report to make a critical assessment of a British court case which the House of Commons had relied upon in making its arguments.

As already indicated, the Court determined that the former chauffeur of the Speaker (Mr. Vaid) could use the *Parliamentary Employment and Staff Relations Act, 1985* to review his complaint of constructive dismissal on the basis of discrimination. In reaching this conclusion, the Court inadvertently created a situation of unequal protection of employees of Parliament that needs to be redressed.

Why is Privilege Necessary?

The Law of Parliament is obscure, convoluted, difficult to tackle, and sometimes buried in historical precedents, conventions and traditions that are not easy to decipher. Privileges, or in modern parlance the Rights of Parliament, are little understood or appreciated by the average MP or Senator.

Even the mere word "privilege" in the contemporary context of democracy often leads to the impression that it is entrenched in a society of another era. It is therefore not particularly marketable in today's populist climate where the use of the word arouses suspicion. Yet without these special rights, parliament could not function effec-

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tively because it could not conduct its business as freely and as openly as is needed to fulfill its function. Hence it is easy to understand why MP's and Senators need to possess privileges and rights; they are the immunities which are essential to the performance of their duties in the House or Senate Chamber. It may seem obvious, but it is in fact essential to the efficient and dignified functioning of Parliament to be shielded from Court intervention.

It is worth noting that in the last fifteen years there have been more decisions made by the courts on the issue of alleged privileges than ever before (or at least since Confederation in 1867), whether at the federal, provincial or territorial level[2]. This trend, concurrent with the culture of rights that now permeates Canadian society, is a healthy phenomenon but carries challenges for every Canadian legislature.

The decision of the Supreme Court in *Vaid* is the latest case in this effervescent period of judicial activity on parliamentary privilege. It provoked a timely reflection on the sum of all of the recent decisions and what conclusive principles should be derived from that legal heritage.

The Inaction of Parliament

Notwithstanding the importance of the subject, no MP saw fit to raise this issue in the House of Commons. [3] The House did not ask the Senate to join in support of its claim of privilege on the management of all employees of parliament, even though, according to the *Constitution Act, 1867*, both Houses share the same privileges.

The Senate itself did not intervene at any level in those proceedings. An explanation for the inaction is that both sides in the Chamber could not agree on a rationale for the arguments, despite the fact that the Senate Standing Committee on Rules, Procedure and the Rights of Parliament held eight meetings and heard at least ten expert witnesses.[4]

All excuses aside, how can one deny human rights protection to approximately 5000 employees of Parliament in a post-Charter Canadian society?[5] It offends any sense of fairness that in joining the staff on the Hill, basic human rights protections are forfeited. Ultimately, beyond the legal arguments lies first and foremost the concept of human dignity.

This strongly held belief motivated two senators to seek intervener status in the Supreme Court.[6] It probably also incited the Minister of Justice and Attorney General of Canada, the Hon. Irwin Cotler to join in the case. What is exceptional is that the Minister intervened to deny that such a privilege over management of all employees ever existed and to support the protection of CHRA for the employees of parliament, even though the Attorney General, as the procurer of the House of Commons, usually stands behind the legal proceedings of that House, according to the parliamentary principle and convention of Responsible Government. This was indeed an unprecedented phenomenon in the annals of parliament![7]

The Decision

The core of the Court's decision, and the focus of the arguments heard by the Court, was based on the following constitutional question framed by Madam Chief Justice McLachlin:

> Is the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, constitutionally inapplicable as a consequence of parliamentary privilege to the House of Commons and its Members with respect to parliamentary employment mattersquestion

The lawyers for the House of Commons maintained that "management of all employees" fell within the ambit of the "internal affairs" of parliament.[8] The Court, in exploring the meaning and scope of the expression "proceedings in parliament", established very specific boundaries or parameters to the concept:

> a) not everything that is said or done within the Chamber during the transaction of business forms part of the "proceedings of parliament" (para 43)
>
> b) the privileged areas must be so closely and directly connected with the proceedings of parliament that intervention by the courts would be inconsistent with parliament's sovereignty as a legislative and deliberative assembly (para 44).

The Court ultimately rejected the position advocated by the lawyers of the Commons[9] that the management of *all* employees was covered under privilege and that the CHRA did not apply, thus preventing the Human Rights Tribunal from receiving any complaint that might be made by an aggrieved employee.

In its analysis of the claim to privilege, the Court sought to establish whether or not the alleged privilege had been legislated by parliament (as empowered in s.18 of the *Constitution Act, 1867*), or if it had been recognized through practice as being necessary for the efficient functioning of the House in its legislative and deliberative role and in its capacity to hold the government accountable.

The Court rejected a view held by some parliamentarians that it is sufficient simply to assert a privilege and that the Court must recognize it without question. This opinion may stem from a superficial reading of the *Parliament of Canada Act i*n section 5:

> The privileges, immunities and powers held, enjoyed and exercised [by parliament]… 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.

However, the purpose of this provision is to limit the role of the Court only when dealing with a privilege that has been recognized. It is not intended to restrict the Court from reviewing the existence and scope of an alleged privilege as in this case. Rather, section 5 asserts that privileges are part of the law, as will be admitted by the courts.

When Parliament establishes privileges, it cannot go beyond those in force in the UK House of Commons at the time (s.18). The Court stated its right to review any "unilateral assertion of privilege by the British House of Commons as any court in Britain would do". The Supreme Court then quoted extensively from the 1999 British Joint Report of the House of Commons and the Lords[10] as a reliable source of information on the current status of privilege at Westminster. As Justice Binnie explained, "Its reasoning…reflects a considered parliamentary view of the appropriate limits to claims of privilege, which seems to me also to reflect the underlying principles of the common law."(para. 45)

The "necessity test" remains of paramount importance with respect to a claimed privilege, particularly if the exercise of the alleged "power" affects a non-parliamentarian. Quoting the judgment of *Stockdale v Hansard*, the Court held that the "necessity" of the claimed privilege has to be clearly established, considering that "the power to invade 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."(para. 39)

The Court reaffirmed strongly the purposive connection between necessity and the "legislative" function (para. 43, 44). The concept of legislative function is entrenched in the terms "proceedings in Parliament" or "internal affairs" (cited in section 9 of the *Bill of Rights 1689*). According to the Court, it is only when parliament is engaged in the performance of its deliberative and legislative duties that Parliament is carrying out its core responsibilities.

The Burden of Proof

Where necessity is used to claim the privilege, the Court stated that there is a burden of proof that must be met by the claimant. That burden, according to the Court, must be closely and directly related to the functions of the assembly as a legislative and deliberative body. Assessing critically the arguments of the House of Commons, Justice Binnie relied closely on the British Joint report, which had expressed misgivings about any broad assertion of privilege over the management of all employees. Thus the Court took a rather restrictive approach in determining what could be deemed necessary to the efficient functioning of parliament. It circumscribed the "categories" of potential privilege related to "proceedings in parliament" to a much more limited number of subjects and narrowed the extent of its scope. In particular, the Court doubted the assertion of privilege when the person affected is a non-parliamentarian. The proximity of that person to the legislative/deliberative function needs to be taken into account to determine the scope of the privilege, once that category has been recognized.

Having disposed of the arguments based on necessity, the Court then turned to judicial decisions cited by the House in support of its claim. In doing so, the Court addressed another claimed privilege: that parliament is a "statute free zone", not bound by the provisions of any statute unless parliament has been explicitly included. This position, as it turns out, is based on an "elastic" interpretation of the English court decision known as *R. v. Graham-Campbell*, (*ex parte Herbert*), that was rendered in 1935.[11] From this judgment, which concerned the unlicensed sale of alcoholic beverages within the parliamentary precincts, it has been generally asserted that statute law does not apply to parliament. The Court did not accept this generous interpretation of privilege used by the Commons in support of its allegation that the CHRA did not apply to its employees. Like the British Joint Report, the Supreme Court also resoundingly rejected the wide conclusions drawn from *ex parte Herbert* since 1935, and basically turned the interpretation of the decision completely on its head. In other words, all statute law applies to parliament unless there is an express exclusion in the Act.[12]

This conclusion is much more in line with the principle of the Rule of Law and with the arguments raised by the Court when it asserted the nature of privilege and its scope. Parliament is not above the law.[13] In reviewing the provisions of CHRA the Court could not identify any section that would have excluded parliament from its application.[14]

The *Vaid* Decision and the *Charter of Rights*

Despite the extensive analysis made by the Court in reviewing the constitutional nature of privilege, there was only a cursory discussion of the relationship of privilege to the *Charter*.[15] However, the Court made important

comments that departed from its previous decisions in *New Brunswick Broadcasting Co v. Nova Scotia (Donahoe)*[16] and in *Harvey v. New Brunswick (Harvey)*.[17]

First, the Court asserted that the decision of the Federal Court of Appeal that the CHRA applied on the basis of an alleged claim of discrimination was wrongly motivated. It concluded that a recognized privilege is not displaced by a claim of violation of a *Charter* right.

Second, the Court restated *Donahoe* where it was recognized that "parliamentary privilege is as much a part of our fundamental constitutional arrangement as the *Charter* itself. One part of the Constitution cannot abrogate another part of the Constitution" (at para. 33, emphasis added). In the words of Chief Justice McLachlin, the Court has to balance both to find the proper equilibrium.

At the same time, the Court dismissed the minority opinion by Chief Justice Lamer in *Donahoe* where he concluded that the power of Parliament to legislate its privileges brings it under the ambit of the *Charter* as much as any other legislative initiative.

Third, the Court affirmed that the comments on privileges contained in *Harvey* (among others those of Chief Justice McLachlin) were obiter and that the decision of the case was made on other grounds. The Court in fact distanced itself from the interpretation of Justice McLachlin where she suggested that the scope of a privilege should be balanced with the protection afforded in the *Charter*.

Fourth, the Court made a reservation: it expressed the possibility to intervene in the context of an allegation of "systemic discrimination."

In other words, once a privilege has been recognized, any allegation of discrimination that runs contrary to the *Charter*, a constitutional right, or the quasi-constitutional protections recognized in CHRA, it is for parliament only to choose whether or not to entertain such a complaint. There is nothing the Court can do to bring the complaint to a fair hearing and an acceptable resolution. Parliament becomes off limits to a judicial intervention, be it a parliamentarian or a non-parliamentarian who would be grieving.

As long as a privilege has been recognized, it is only up to parliament to act or not act on an alleged discrimination complaint.

The Court stopped short of inviting parliament to establish an internal complaint mechanism, even though doing so would recognize the spirit of a "chartered" parliamentary democracy. Should we not uphold the essence of the rule of law, one of the underlying principles of our Constitution, identified by the Court in 1998, by having Parliament adopt in its rules a formal complaint resolution process?[18]

Limited Protection of the Employees Through PESRA

The Supreme Court stated that "CHRA applies to all employees of Parliament", but that Mr. Vaid should use the grievance procedure provided by PESRA since he is a member of a category of employees covered by that Act.

A large number of the employees of parliament are in fact covered by PESRA and the Court ruled that they would therefore have to use its grievance procedure to seek redress for an alleged human rights violation even though, contrary to CHRA protection, there is no judicial review of an arbitration decision. However, PESRA does not provide employees under its protection the same human rights protection that is now afforded to all employees of the public service through the new *Public Service Labour Relations Act, 2003* (PSLRA). This new Act provides for an efficient grievance process that includes a human rights component: adjudicators may give monetary relief for pain and suffering and/or special compensation for willful or reckless behaviour. Notice must also be given to the Human Rights Commission to grant it standing to appear before the adjudication, thus providing its expertise when necessary![19]

PESRA should then be amended to provide a similar system of protection for grievance based on alleged human rights discrimination. Employees who are not covered by PESRA continue to be protected by CHRA and its system of complaints, reviewable by the courts.[20]

As for the protection of the human rights of those employees who could be covered by privileges, the Court recognized that: "it would be within the exclusive competence of the legislative assembly itself to consider compliance with human rights and civil liberties."[21]

The practical implications of the conclusions drawn by the Court are complex and provide for a patchwork system of protection of the human rights and civil liberties of employees of parliament; amendments to PESRA need to be made; and Rules for the Senate and House of Commons should be adopted to express the responsibility within each Chamber to put in place a grievance system to deal with the complaints of those employees whose status is "privileged". The procedure that has been pursued up until this point should be reviewed and adapted according to the conclusions of the Supreme Court.

Conclusion

The practical conclusion of the *Vaid* decision on the protection of the human rights of employees of parliament is that it will lead to different processes of human

rights complaints that do not afford equal protection to employees of parliament. This runs counter to the very notion of human rights and dignity. If there is a more efficient and uniform system of protection against discrimination for federal employees as now provided in PSLRA, there is no philosophical basis for such a differentiation in the system of protection for the employees of parliament, who are, in the end, less protected than their colleagues in the Federal Public Service.

This issue has to be addressed jointly by both Chambers of parliament, inasmuch as the Supreme Court decision in *Vaid* applies to both Houses equally.

Parliament cannot remain passive or indifferent to the human rights protection of its employees, while expecting the rest of the country to be in line with the high standards of human rights protection accepted by Canadians in a post-Charter society. The strength of parliament's commitment to human rights should first be demonstrated in its own house.

Notes

1. *Canada (House of Commons) vs. Vaid* (2005) SCC 30.
2. Since 1991 there have been 48 cases at the provincial and federal level regarding privileges. From 1867-1991, there were only 31 cases (one of which was decided by the British Privy Council in 1896). (Source: Canadian Legal Information Institute, 2005.
3. Even though the *Hill Times* reported the progress of the case as it moved along through the judicial process. See the *Hill Times* "Where's the Common Sense?" August 4, 2003, and *Senate Committee (divided over House privilege case)* Nov 3, 2003 by Paco Francoli.
4. There were 8 meetings in total. Expert witnesses included: Paul Bélisle, Clerk of the Senate, Mr. Brendan Keith, Principal Clerk of the Judicial Office and Registrar of Lords' Interests, Hon. Coulter Osborne, Dr. Dale Gibson, Professor, Professor Peter Mercer, Mitch Bloom, Privy Council Office, Ron Wall, Parliamentary Operations Director, Mark Audcent, Law clerk and Parliamentary Council, Robert Marleau, Former Clerk of the House Of Commons, and Joseph Maingot, former Law Clerk and Parliamentary Council.
5. Library of Parliament, 2005. The Senate has 605, the Library of Parliament 400, the House of Commons 2033, and MPs have 1927 for a total of 4,965. (Senate figures exclude casual and contract employees.)
6. Senators Mobina S. B. Jaffer and Serge Joyal, sought permission to intervene jointly on April 6, 2004, and tabled their Factum on June 2nd.
7. In the other seminal decision of the Supreme Court on Parliament privileges as applicable in Provincial legislature, *New Brunswick Broadcasting Corporation vs. Nova Scotia (Speaker of the Assembly)* [1993] S.C.R.319, both Houses of the federal Parliament intervened in support of a complementary legal position. The Senate was represented by Justice Ian C. Binnie, then legal counsel in the firm of McCarthy Tétrault.
8. On that question, the Court refuted the interpretation given by J.P. Maingot.
9. The House of Commons arguments also failed at the Human Rights Tribunal, (2001) C.H.R.D., No.15 (QL) the Federal Court, (2002) 2 F.C. 583, and Federal Court of Appeal, (2003) F.C. 602.
10. House of Lords, House of Commons, "Parliamentary Privilege – First Report", March 30, 1999, HM Stationary Office.
11. *R. v. Graham-Campbell, (ex parte Herbert)*, (1935) 1 K.B. 594.
12. The Supreme Court also refused to recognize any substantive content to a legislative clause deemed to save or protect a privilege (section 4 of PESRA). Moreover, the Court underlined that no privileges extend to Members on the sole ground that the activity was within the precinct of parliament.
13. The Court added that CHRA is a "quasi-constitutional document and any exemption from its provisions must be clearly stated."(para. 81)
14. In the future, Parliament will have to be more attentive to the impact that legislation it adopted might have on its general operation.
15. On June 29, 2005, Sen. A.R. Andreychuck introduced a motion in the Senate seconded by Senator S. Joyal, c.p., to authorize the committee on Rules, Procedure and the Rights of Parliament "to study the issue of developing a systematic process for the application of the *Charter of Rights and Freedoms* as it applies to the Senate."
16. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 S.C.R.
17. *Harvey v. New Brunswick (Attorney General)* (1996) 137 D.L.R. 42.
18. *Reference re Secession of Quebec*, [1998] 2 S.C.R.
19. See "Human Rights and the Public Service Labour Relations Act", *Communications Magazine*, Vol. 31, No.2, Summer 2005, pp.12-14.
20. Letter of the Chief Commissioner of the Canadian Human Rights Commission, Mary Gusella, dated July 27th, 2005, in response to the letter of June 16th, 2005 from Senator S. Joyal, available online at http://www.sergejoyal.com.
21. The House "with one voice, accuses, condemns, and executes" *Stockdale v. Hansard,* at p. 1171, quoted at para 30 of *Vaid*.