

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF **LAURENTIAN UNIVERSITY OF SUDBURY**

**BOOK OF AUTHORITIES OF THE
SPEAKER OF THE LEGISLATIVE ASSEMBLY OF ONTARIO**

January 12, 2022

Conway Baxter Wilson LLP/s.r.l.
400-411 Roosevelt Avenue
Ottawa ON K2A 3X9

David P. Taylor LSO#: 63508Q
dtaylor@conwaylitigation.ca

M. Alyssa Holland LSO#: 66653G
aholland@conwaylitigation.ca

Tel: (613) 288-0149
Fax: (613) 688-0271

Counsel for The Speaker of the Legislative
Assembly of Ontario

To: THORNTON GROUT FINNIGAN LLP
3200 - 100 Wellington Street West
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

D.J. Miller (LSO# 34393P)
Email: djmiller@tgf.ca

Mitchell W. Grossell (LSO# 69993I)
Email: mgrossell@tgf.ca

Andrew Hanrahan (LSO# 78003K)
Email: ahanrahan@tgf.ca

Derek Harland (LSO# 79504N)
Email: धारland@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Co-Counsel for the Applicant/Moving Party

**And To: MINISTRY OF THE ATTORNEY
GENERAL**
Constitutional Law Br., 4th Floor
720 Bay Street
Toronto, ON M7A 2S9

Joshua Hunter (LSO #49037M)
Tel: 416-908-7465
Fax: 416-326-4015
Email: joshua.hunter@ontario.ca

Counsel for the Attorney General of Canada

And To: DEPARTMENT OF JUSTICE CANADA
Suite 3400, Exchange Tower
Box 36, First Canadian Place
Toronto, Ontario M5X 1K6

Jon Bricker (LSO #56714J)
Tel: 416-973-7171
Fax: 416-973-0809
Email: jon.bricker@justice.gc.ca

Counsel for the Attorney General of Canada

STOCKWOODS LLP
TD North Tower
77 King Street West, Suite 4130
Toronto-Dominion Centre
Toronto, ON M5K 1H1

Brian Gover (LSO# 22734B)
Email: briang@stockwoods.ca

Fredrick Schumann (LSO#59377L)
Email: fredricks@stockwoods.ca

Tel: 416-593-7200
Fax: 416-593-9345

Co-counsel for the Applicant/
Moving Party

And GOWLING WLG (CANADA) LLP

To: Barristers and Solicitors
1 First Canadian Place
100 King Street West
Suite 1600
Toronto, ON M5X 1G5

Richard Dearden (LSO#: 19087H)
Tel: 613-786-0135
Email: richard.dearden@gowlingwlg.com

Heather Fisher (LSO#: 75006L)
Tel: 416-369-7202
Email: heather.fisher@gowlingwlg.com

Sarah Boucaud (LSO#: 76517I)
Tel: 613-786-0049
Email: sarah.boucaud@gowlingwlg.com

Tel: 416-862-7525
Fax: 416-862-7661

Lawyers for the Auditor General of Ontario

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TAB 1

**Information and Privacy Commissioner
of Alberta** *Appellant*

v.

**Board of Governors of the University
of Calgary** *Respondent*

and

**Law Society of Alberta, British Columbia
Freedom of Information and
Privacy Association, Information and Privacy
Commissioner of Ontario, Information and
Privacy Commissioner for British Columbia,
Information and Privacy Commissioner
for the Province of Newfoundland
and Labrador, Advocates' Society,
Federation of Law Societies of Canada,
Canadian Bar Association,
Information Commissioner of Canada,
Privacy Commissioner of Canada,
Manitoba Ombudsman, Northwest Territories
Information and Privacy Commissioner,
Nova Scotia Information and
Privacy Commissioner [Review Officer],
Nunavut Information and
Privacy Commissioner,
Saskatchewan Information and
Privacy Commissioner,
Yukon Ombudsman and Information
and Privacy Commissioner and
Criminal Lawyers' Association** *Interveners*

**INDEXED AS: ALBERTA (INFORMATION AND PRIVACY
COMMISSIONER) v. UNIVERSITY OF CALGARY**

2016 SCC 53

File No.: 36460.

2016: April 1; 2016: November 25.

Present: Abella, Cromwell, Moldaver, Karakatsanis,
Wagner, Gascon and Côté JJ.

**Information and Privacy Commissioner
of Alberta** *Appelante*

c.

**Board of Governors of the University
of Calgary** *Intimé*

et

**Law Society of Alberta, British Columbia
Freedom of Information and
Privacy Association, Commissaire à
l'information et à la protection de la vie
privée de l'Ontario, Information and Privacy
Commissioner for British Columbia,
Information and Privacy Commissioner for
the Province of Newfoundland and Labrador,
Advocates' Society, Fédération des ordres
professionnels de juristes du Canada,
Association du Barreau canadien,
Commissaire à l'information du Canada,
Commissaire à la protection de la vie privée
du Canada, Ombudsman du Manitoba,
Commissaire à l'information et à la
protection de la vie privée des Territoires du
Nord-Ouest, Nova Scotia Information and
Privacy Commissioner [Review Officer],
Commissaire à l'information et à
la protection de la vie privée du Nunavut,
Saskatchewan Information and
Privacy Commissioner, Commissaire à
l'information et à la protection de la vie
privée et ombudsman du Yukon et Criminal
Lawyers' Association** *Intervenants*

**RÉPERTORIÉ : ALBERTA (INFORMATION AND PRI-
VACY COMMISSIONER) c. UNIVERSITY OF CALGARY**

2016 CSC 53

N° du greffe : 36460.

2016 : 1^{er} avril; 2016 : 25 novembre.

Présents : Les juges Abella, Cromwell, Moldaver,
Karakatsanis, Wagner, Gascon et Côté.

information for use as evidence in separate litigation against the University, her lawsuit has since ended. In addition, the Privacy Commissioner is not seeking to review the solicitor-client privileged information as evidence in order to decide a legal dispute. The disclosure of the information in this context is therefore not related to the “evidentiary privilege”. Rather, disclosure in this case is more akin to the review of mail being delivered to prison inmates, which this Court addressed in *Solosky*. In that case, as it was described in *Descôteaux*, the Court “applied a standard that has nothing to do with the rule of evidence . . . since there was never any question of testimony before a tribunal or court” (p. 875). Equally, the absence of such a question here highlights the engagement of solicitor-client privilege in its substantive, rather than evidentiary, role.

[43] This Court has repeatedly affirmed that, as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary (*Chambre des notaires*, at para. 28, citing *Lavallee*, at paras. 36-37, *McClure*, at para. 35, *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185, at para. 27, and *Goodis*, at para. 15). Within the evidentiary context of criminal proceedings, for example, the substantive nature of solicitor-client privilege has been interpreted as meaning the privilege only yields in “certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis” (*McClure*, at para. 35). These limited categories, which will only be satisfied in rare circumstances, include the accused’s right to make full answer and defence (*McClure*; *Brown*) and where public safety is at stake (*Smith*).

[44] Given that this Court has consistently and repeatedly described solicitor-client privilege as a substantive rule rather than merely an evidentiary rule, I am of the view that the expression “privilege of the law of evidence” does not adequately identify the broader substantive interests protected by

Il est vrai que l’auteur de la demande cherchait au départ à obtenir les documents pour les utiliser en preuve dans un litige distinct qui l’opposait à l’Université, mais sa poursuite a depuis lors connu son dénouement. En outre, la Commissaire n’entend pas examiner les documents protégés par le secret professionnel de l’avocat comme s’il s’agissait d’une preuve à partir de laquelle serait tranché un litige. Dans le cas qui nous occupe, la communication n’a donc aucun lien avec le « privilège en matière de preuve ». Elle s’apparente plutôt au contrôle du courrier destiné à une personne détenue dans un pénitencier, ce sur quoi la Cour s’est prononcée dans *Solosky*. Pour reprendre la formulation employée dans *Descôteaux*, la Cour « appliquait une norme qui n’a rien à voir avec la règle de preuve [. . .] puisqu’en rien n’y était-il question de témoignages devant un tribunal quelconque » (p. 875). De la même façon, l’absence d’une telle question en l’espèce fait ressortir l’application du secret professionnel de l’avocat en tant que règle de fond, plutôt que comme règle de preuve.

[43] La Cour a maintes fois confirmé que, à titre de règle de fond, le secret professionnel de l’avocat doit demeurer aussi absolu que possible et qu’on ne doit y porter atteinte qu’en cas de nécessité absolue (*Chambre des notaires*, par. 28, citant *Lavallee*, par. 36-37, *McClure*, par. 35, *R. c. Brown*, 2002 CSC 32, [2002] 2 R.C.S. 185, par. 27, *Goodis*, par. 15). Dans le cas, par exemple, de la preuve offerte dans une poursuite criminelle, on a jugé que l’assimilation du secret professionnel de l’avocat à une règle de fond faisait en sorte qu’il ne cède le pas que « dans certaines circonstances bien définies et ne nécessite pas une évaluation des intérêts dans chaque cas » (*McClure*, par. 35). Ces circonstances, qui ne se présentent que rarement, comprennent celles où l’accusé a droit à une défense pleine et entière (*McClure*; *Brown*) et celles où la sécurité publique est en jeu (*Smith*).

[44] Étant donné que, maintes fois et avec constance, la Cour a considéré le secret professionnel de l’avocat plus comme une règle de fond qu’une simple règle de preuve, j’estime que l’expression [TRADUCTION] « privilège que reconnaît le droit de la preuve » n’identifie pas comme elle le devrait les

TAB 2



SUPREME COURT OF CANADA

CITATION: British Columbia (Attorney General) v.
Provincial Court Judges' Association of British
Columbia, 2020 SCC 20

APPEAL HEARD: December 9, 2019
JUDGMENT RENDERED: July 31, 2020
DOCKET: 38381

BETWEEN:

Attorney General of British Columbia
Appellant

and

Provincial Court Judges' Association of British Columbia
Respondent

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General of
Quebec, Attorney General of Saskatchewan, Attorney General of Alberta,
Canadian Superior Courts Judges Association, Canadian Bar Association,
Canadian Association of Provincial Court Judges, Canadian Taxpayers
Federation and Canadian Civil Liberties Association**
Intervenors

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 121)

Karakatsanis J. (Wagner C.J. and Abella, Moldaver, Côté,
Brown, Rowe, Martin and Kasirer JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final
form in the *Canada Supreme Court Reports*.

B.C. (A.G.) v. PROV. CT. JUDGES' ASSN.

Attorney General of British Columbia

Appellant

v.

Provincial Court Judges' Association of British Columbia

Respondent

and

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Canadian Superior Courts Judges Association,
Canadian Bar Association,
Canadian Association of Provincial Court Judges,
Canadian Taxpayers Federation and
Canadian Civil Liberties Association**

Intervenors

Indexed as: British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia

2020 SCC 20

File No.: 38381.

2019: December 9; 2020: July 31.

[64] But as this Court warned in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 89, 97-98, 103 and 109, the outcome of an action brought by one branch of the state against another can effectively alter the separation of powers. Such proceedings call for special prudence to keep courts from overstepping the bounds of the judicial role.

[65] Canadian constitutional law has long recognized that sovereign power in this country is divided not only between Parliament and the provincial legislatures, but also among the executive, legislative and judicial branches of the state: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 389; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 33. Although there are limited areas of overlap, the branches play fundamentally distinct roles and have accordingly developed different core competencies: *Provincial Judges Reference*, at para. 139; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 29.

[66] As this Court underscored in *Criminal Lawyers' Association*, at para. 29, “each branch will be unable to fulfill its role if it is unduly interfered with by the others”. Several doctrines work to prevent undue interference, including the secrecy afforded judicial deliberations (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796), and the recognition of the privileges, powers and immunities enjoyed by the Senate, the

House of Commons and the legislative assemblies: *Constitution Act, 1867*, preamble and s. 18; *New Brunswick Broadcasting Co.*; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687. These doctrines are a corollary to the separation of powers because they help to protect each branch's ability to perform its constitutionally-assigned functions.

[67] The executive, too, benefits from a degree of protection against undue interference. Deliberations among ministers of the Crown are protected by the constitutional convention of Cabinet confidentiality. Constitutional conventions do not have direct legal effect: *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 880-83; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 98. However, as I will explain in greater detail, the common law respects the confidentiality convention and affords the executive public interest immunity over deliberations among ministers of the Crown: see *Carey*; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at paras. 18-19 and 60.

[68] Where the executive plays a role in formulating a government's response to a judicial compensation commission's recommendations, Cabinet will generally determine the position taken by the executive. Ministers' deliberations concerning their appreciation of the recommendations and how the government should respond will usually be protected by Cabinet confidentiality.

TAB 3

Citation: AG Canada v. MacPhee et ors.
2003 PESCTD 06

Date: 20030114
Docket: S1-GS-18867; S1-GS-18869
Registry: Charlottetown

**PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - TRIAL DIVISION**

Between:

**Attorney General (Canada), Canadian Food Inspection
Agency, Don Love and David MacSwain**

Applicants

And:

**Norman MacPhee, Standing Committee on Agriculture,
Forestry and Environment, and Marian Johnston
Clerk Assistant and Clerk of the Committees of the
Legislative Assembly**

Respondents

And:

Speaker of the Legislative Assembly of Ontario

Intervener

BEFORE: The Honourable Justice Wayne D. Cheverie

Eugene P. Rossiter, Q.C. & Martin C. Ward	-	Solicitors for the applicants
Ruth M. DeMone & Barry Burley	-	Solicitors for the respondents
Neil Finkelstein & Catherine Beagan-Flood	-	Solicitors for the intervener

Place and dates of hearing	-	Charlottetown, Prince Edward Island June 11 and 12, 2002

Place and date of judgment	-	Charlottetown, Prince Edward Island January 14, 2003

Citation: A.G. Canada v. MacPhee et ors.

S1-GS-18867; S1-GS-18869

Between:

**Attorney General (Canada), Canadian Food Inspection
Agency, Don Love and David MacSwain**

Applicants

And:

**Norman MacPhee, Standing Committee on Agriculture,
Forestry and Environment, and Marian Johnston
Clerk Assistant and Clerk of the Committees of the
Legislative Assembly**

Respondents

And:

Speaker of the Legislative Assembly of Ontario

Intervener

Prince Edward Island Supreme Court - Trial Division

Before: Cheverie J.

Heard: June 11 & 12, 2002

Judgment: January 14, 2003

[19 pages]

Constitutional law - Committee of the Legislative Assembly conducting inquiry into area of concurrent federal/provincial jurisdiction (agriculture) - whether the Legislative Assembly has the power to summon employees of a federal government agency - whether this power extends to a Committee of the Legislative Assembly - whether witnesses should be exempt from the summons.

Administrative law - judicial review - whether Committee of the Legislative Assembly is a “tribunal” within the meaning of the *Judicial Review Act* - whether the decision of the Committee is subject to the *Judicial Review Act*.

STATUTES CONSIDERED: *Judicial Review Act*, R.S.P.E.I. 1988, Cap. J-3, ss. 1(a),(b),(h); *Constitution Act, 1867*, (U.K.) 30 and 31 Vict. c. 3, s. 95; *Legislative Assembly Act*, R.S.P.E.I. 1988, Cap. L-7, ss. 27, 28 and 29; *Constitution Act, 1982*, s. 45 being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

CASES CONSIDERED: *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Kielley v. Carson* (1842) 4 Moo. P.C.C. 63, 13 E.R. 225 at 234, 236 (P.C.); *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595 (C.A.); *Stockdale v. Hansard* (1839), 112 E.R. 1112 at 1176 (Q.B.); *Gosset v. Howard* (1845), 10 Q.B. 158 (Ex. Chamber); *Ex parte Dansereau* (1875), 19 L.C.J. 210 (Q.B. -

Appeal Side); *McNab v. Bidwell and Baldwin* (1830), Draper 144 at 156 (K.B.); *A.G. Quebec & Keable v. A.G. Canada*, [1979] 1 S.C.R. 218; *Burge v. P.E.I. Liquor Control Commission and P.E.I. Human Rights Commission*, [1995] 2 P.E.I.R. 77; *Morin v. Crawford* (1999), 14 Admin. L.R. (3d) 287.

RULES/TEXTS CONSIDERED: *Rules of the Standing Committees*, rule 32; *Rules of the Assembly*, rules 42; 83; J.P.J. Maingot, *Parliamentary Privilege in Canada*, 2d ed. (House of Commons and McGill-Queen's University Press, 1997).

Eugene P. Rossiter, Q.C. & Martin C. Ward	-	Solicitors for the applicants
Ruth M. DeMone & Barry Burley	-	Solicitors for the respondents
Neil Finkelstein & Catherine Beagan-Flood	-	Solicitors for the intervener

Cheverie J.:

Introduction

[1] Prior to October, 2000, it was thought potato wart disease (*Synchytrium endobioticum*) in an agricultural area in Canada was restricted to Newfoundland and Labrador. However, this changed in October of 2000 when the disease was discovered in a single field in New Annan, Prince Edward Island. The repercussions were swift. By the end of October, the United States Department of Agriculture (U.S.D.A.) closed the U.S. border to the movement of Prince Edward Island seed potatoes and table stock potatoes. The border was not re-opened until April 30th, 2001, some six months later. The impact on the potato industry in Prince Edward Island was considerable, immediate, and unforeseen.

[2] On April 3, 2001, the Legislative Assembly of the Province of Prince Edward Island passed a resolution referring what by then had become known as the “potato wart crisis” to the Standing Committee on Agriculture, Forestry and Environment (the “Committee”) “for a full and complete examination”. (Throughout these reasons, reference to the “Legislative Assembly”, the “Assembly” or the “House” are used interchangeably.) In an attempt to carry out its mandate, Norman MacPhee, M.L.A., Chair of the Committee, extended an invitation to the Canadian Food Inspection Agency (CFIA) to send representatives to appear before the Committee. The CFIA, primarily through its employees, Don Love and David MacSwain, had been heavily involved in the potato wart investigation since discovery of the disease months earlier. MacPhee’s invitation had been extended on September 24, 2001, and after a series of communications between CFIA and MacPhee, as well as between the Clerk of the Legislative Assembly and CFIA, two summonses were issued requiring Don Love and David MacSwain to attend before the Committee. In particular, the summonses were dated December 13, 2001; issued by the Committee Chair, Norman MacPhee; and required Love and MacSwain to attend before the Committee on January 10, 2002.

[3] The Attorney General (Canada), the CFIA, Don Love and David MacSwain (the applicants) seek to quash both summonses and to that end, have initiated this judicial review application. Norman MacPhee, the Standing Committee on Agriculture, Forestry and Environment, and Marian Johnston, the Clerk Assistant and Clerk of the Committees of the Legislative Assembly (the “respondents”) oppose the application. The Speaker of the Legislative Assembly for Ontario (the “intervener”) was granted leave to intervene by Order of this Court dated February 28, 2002, and also opposes the application. Both the respondents and intervener request the application for judicial review be dismissed.

Factual background

[4] For the most part, the facts giving rise to the present application are not in dispute. Each of the parties has set them out in their respective documents. I shall now provide more details. These facts raise questions of constitutional law; questions of administrative law; and questions concerning the very application of the **Judicial Review Act**, R.S.P.E.I. 1988, Cap. J-3.

[5] Some time during the month of October, 2000, potato wart, which is a fungal disease which affects the potato plant, was discovered in a small section of a field in New Annan, Prince Edward Island. Prior to this, it was thought the disease was isolated to Newfoundland and Labrador. Once discovered, it was reported to officials with the Provincial Department of Agriculture and Forestry, as well as to the CFIA, which is an agency of the Government of Canada. Both levels of government were interested by virtue of their concurrent jurisdiction over agriculture. (See the **Constitution Act, 1867**, (U.K.) 30 and 31 Vict. c. 3, s. 95.) The reaction of the U.S.D.A. was swift and decisive in that the United States border was closed to Prince Edward Island seed potatoes and table stock potatoes on October 31, 2000. It remained closed until April 30, 2001.

[6] On April 3, 2001, the Legislative Assembly of the Province of Prince Edward Island passed a “unanimous” resolution referring the potato wart crisis to the Committee for a full and complete examination. The resolution reads as follows:

WHEREAS the potato industry is vitally important to the overall economy of Prince Edward Island;

AND WHEREAS the potato industry has been nurtured for generations by many thousands of Islanders;

AND WHEREAS the discovery in October, 2000, of potato wart in one section of one Prince Edward Island potato field led to the closure of the United States border to potato shipments from the province;

AND WHEREAS this border closure has been devastating to the province’s potato industry;

AND WHEREAS the impact of the potato wart crisis is being felt in many sectors of the Prince Edward Island economy;

AND WHEREAS full disclosure of the events leading up to and subsequent to the discovery of potato wart in Prince Edward Island would be beneficial in ensuring that a similar circumstance never occurs again;

THEREFORE BE IT RESOLVED that the potato wart crisis be referred to the Standing Committee on Agriculture, Forestry and Environment for a full and complete examination.

[7] The Committee met to deal with this resolution on April 17, September 21, November 9, November 20, and December 12, 2001; as well as January 10 and January 23, 2002. The Committee canvassed and received information from representatives of the Prince Edward Island Department of Agriculture and Forestry, the Prince Edward Island Potato Producers Association, the Prince Edward Island Potato Board, and others. In the course of its inquiry, it periodically reported back to the Legislative Assembly. Reports to the House occurred on May 2 and December 4, 2001, as well as April 23, 2002. In each case, the Committee reports were received and adopted and the Committee was authorized to continue its inquiry into the potato wart crisis.

[8] On September 24, 2001, Norman MacPhee, as Chair of the Committee, invited representatives of the CFIA to attend before the Committee as it carried out its examination. This invitation was declined, although the CFIA indicated its intention to respond to written inquiries which might be forthcoming from the Committee. In fact, the respondents admit that approximately 900 pages of documents have been provided to the Committee from the CFIA as the result of an access to information request. Notwithstanding this production, the Committee continued to indicate its desire to have representatives of the CFIA appear before it. On November 9, 2001, the Clerk of the Legislative Assembly indicated to the CFIA in writing the Committee's ongoing desire to hear from them, and failing their attendance, would consider all of its options, including the issuance of a warrant. As his authority, he cited the **Legislative Assembly Act**, R.S.P.E.I. 1988, Cap. L-7 (the "**Act**").

[9] On November 13, 2001, the CFIA again reiterated its earlier offer to respond to written questions that the Committee might pose, but the CFIA maintained its position that it did not intend to appear before the Committee. On November 22, 2001, Norman MacPhee again wrote requesting the input from CFIA officials to assist his Committee, and in turn the Island's potato industry, in avoiding a future crisis of this nature. It was thought that participation in the process by CFIA officials and their provision of meaningful information would help achieve this goal. In his letter, MacPhee described the purpose of the Committee's inquiry and its need to obtain evidence from the CFIA. In the same letter, MacPhee indicated the Committee did intend to forward a list of questions to the CFIA, but would also consider the option of issuing a subpoena demanding the attendance of CFIA officials.

[10] On December 12, 2001, the Committee met to examine the potato wart crisis. It heard from the provincial Minister and Deputy Minister of Agriculture and Forestry, as well as representatives of the Prince Edward Island Potato Board and the Potato Producers Association of Prince Edward Island. On the same day, the Committee met *in camera* and passed a motion to summon Love and MacSwain of the CFIA to appear before it. Those summonses were issued on December 13, 2001 and are identical in nature. They read:

YOU ARE HEREBY SUMMONED TO APPEAR AT THE POPE ROOM OF THE COLES BUILDING IN CHARLOTTETOWN BEFORE THE STANDING COMMITTEE ON AGRICULTURE, FORESTRY AND ENVIRONMENT AT 10 O'CLOCK IN THE FORENOON OF THURSDAY, JANUARY 10, 2002, AND THEREAFTER FROM DAY TO DAY SO LONG AS THE SAID COMMITTEE SHALL SIT AND REQUIRE YOUR ATTENDANCE, THERE TO TESTIFY, TOUCHING ALL MATTERS CONNECTED WITH THE SAID COMMITTEE'S INVESTIGATION INTO THE POTATO WART CRISIS.

AND ALSO TO PRODUCE TO THE SAID STANDING COMMITTEE, AT THE TIME AND PLACE AFORESAID, ALL PAPERS, DOCUMENTS, REPORTS, CORRESPONDENCE AND WRITINGS IN YOUR POSSESSION AND POWER RELATING TO THE SUBJECT MATTER AFORESAID.

YOU ARE HEREBY WARNED AND CAUTIONED THAT IF YOU DISOBEY THIS SUMMONS YOU WILL BE LIABLE TO BE PUNISHED FOR YOUR CONTEMPT.

The applicants seek an order quashing both of these summonses issued to Love and MacSwain and, in the alternative, the applicants seek a declaration that each of Love and MacSwain be exempted from complying with the summonses.

Analysis

[11] Although this case finds its way to the Court by way of an application to quash the summonses and for judicial review, in short, its disposition depends on an understanding of the constitutional issues raised and the division of powers. In essence, the applicants take the position the Committee derives its power from the Legislative Assembly itself, and the **Legislative Assembly Act**. The applicants also refer to the *Rules of the Legislative Assembly of Prince Edward Island, 1988* (the "Rules of the Assembly") and the *Rules for Standing and Special Committees of the Legislative Assembly of Prince Edward Island (As approved by the House on February 21, 1989)* (the "Rules of the Committees"). In the end, the applicants argue the authority purported to be exercised by the Committee was legislative in nature; that the Committee failed to follow its own rules; and therefore, it is subject to judicial review - and the summonses ought to be quashed.

[12] The respondents and the intervener take the position the right of the Committee to require attendance of witnesses and production of documents is included among the inherent privileges of the Legislative Assembly of the Province of Prince Edward Island, and, therefore, is constitutional in nature. They argue this privilege is necessary for the legislative assembly to function. Having reached that conclusion, they rely on the Supreme Court of Canada, in **New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)**, [1993] 1 S.C.R. 319 where the Supreme Court has

said the court has no power to review the rightness, or wrongness, of a particular decision made pursuant to that privilege. It may be if the Committee was acting in the exercise of a legislative privilege, then it matters not whether it followed strictly the codification of that privilege, as referred to and set out in ss. 27, 28 and 29 of the *Act*.

[13] Viewed against this background, the decision in this case requires the answer to the following questions:

1. Does the Legislative Assembly of Prince Edward Island have the power to summon witnesses and order them to produce documents?
2. If the Legislative Assembly of Prince Edward Island does have this power, does it extend to the Committee?
3. If the Committee has the power, should the witnesses, nonetheless, be exempt from the summonses?
4. Does the *Judicial Review Act* apply to the decision of the Committee?

I shall deal with each of the questions in turn.

1. Does the Legislative Assembly of Prince Edward Island have the power to summon witnesses and order them to produce documents?

[14] In their argument, the applicants concede the Legislative Assembly of Prince Edward Island has the power to conduct an inquiry into the potato wart crisis and, further, this power may be delegated to the Committee. The applicants see the root of this power as either pursuant to s. 95 of the *Constitution Act, 1867*, or other related provisions of the Constitution. However, the applicants caution there are jurisdictional limitations, and although the Committee has the jurisdiction to conduct an inquiry into the potato wart issue, it does not have the authority to inquire into the operation of a federal agency, such as the CFIA, by compelling the testimony of its employees and their production of documents. Section 95 of the *Constitution Act* reads as follows:

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

[15] Surely nothing could be more agricultural in Prince Edward Island than the inquiry into a disease affecting potatoes. This goes to the very life blood of this province. The applicants have no difficulty with such an inquiry. However, they suggest what the Committee is really doing is conducting an inquiry into the operation of a federal agency, and that is beyond the jurisdiction of the province. With respect to this suggestion, I find the premise upon which it is based premature, because until the witnesses are brought before the Committee and the questions are actually put to them, it will not be known whether the inquiry crosses that constitutional line to such an extent the Committee is acting beyond its constitutional authority. Put another way, just because the witnesses sought to be summoned happen to be employees of a federal agency does not necessarily mean the Committee is conducting an inquiry into that federal agency.

[16] It is clear from the submissions of all parties that the **New Brunswick Broadcasting** case is the leading case in this country on parliamentary privilege. Each of the parties has referred to it. McLachlin J., as she then was, clearly says the legislatures of the provinces have inherent privileges which are necessary to their proper functioning. Parliamentary privilege has been described as the body of rights, powers and privileges that have developed to provide for the autonomy and effective functioning of the legislature. (See J.P.J. Maingot, Q.C., *Parliamentary Privilege in Canada*, 2d ed. (House of Commons and McGill-Queen's University Press, 1997) at p. 12.) Historically, the legislative assemblies of British North America inherently had every power reasonably necessary for the proper exercise of their functions and duties. (See *Kielley v. Carson* (1842) 4 Moo. P.C.C. 63, 13 E.R. 225 at 234, 236 (P.C.)). These very powers are constitutional in nature, as confirmed by McLachlin J. in the **New Brunswick Broadcasting** case at p. 374-375. Further, if there was any doubt the Legislative Assembly of the Province of Prince Edward Island had the same inherent privileges as other provincial legislative assemblies, as well as the Senate of Canada and the House of Commons, this was put to rest by McLachlin J. at p. 375 of the **New Brunswick Broadcasting** case:

...It is my view that far from contradicting the proposition that Parliament and the legislatures possess inherent constitutional privileges, the wording of our written constitution supports that proposition.

This is evident from the first part of our written constitution, the preamble to the *Constitution Act, 1867*, which announces the intention of securing to the provinces of Canada, Nova Scotia and New Brunswick, a "Constitution similar in Principle to that of the United Kingdom". There is no question that this preamble constitutionally guarantees the continuance of Parliamentary governance; given Canadian federalism, this guarantee extends to the provincial legislatures in the same manner as to the federal Parliament....

The applicants suggest it is not certain the Senate and House of Commons possess the

inherent power to send for persons, papers or records. They go on to add it is even less clear whether this power, if it exists, flows to provincial legislative bodies. In light of McLachlin J.'s statement in *New Brunswick Broadcasting*, the position taken by the applicants on this point is untenable.

[17] The applicants do not concede the legislative assembly has the inherent right to send for persons, papers and records, and, therefore, they argue it is even less clear whether any such power is vested in a committee of the legislative assembly. In support of their position, the applicants primarily rely on the relevant provisions of the *Act*. They argue the legislative assembly, and not a committee of the legislative assembly, is vested with the power to command and compel the attendance of witnesses. (See s. 28 of the *Act*.) Further, they argue whenever the assembly requires the attendance of a person, either before the assembly or a committee thereof, the speaker or the chair of the committee may issue a warrant or a subpoena. (See s. 29 of the *Act*.) They further argue the person sought to be summoned must be named in the order of the legislative assembly, and since the assembly did not issue such an order in this case, the Committee has no authority to require the attendance of the applicants Love and MacSwain. The applicants then go on to refer to certain rules of the legislative assembly and conclude the summonses are not authorized without the Committee first bringing the matter back to the legislative assembly.

[18] The intervener advances the proposition that the power of a provincial legislature to legislate its own privileges by way of amendment to its constitution is now entrenched in s. 45 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The intervener further submits the attendance of witnesses and the production of documents is a necessary, inherent privilege guaranteed to all Canadian legislatures, including the Legislative Assembly of the Province of Prince Edward Island, by the Constitution of Canada. In addition to this inherent privilege, the intervener argues the codification of certain privileges in the *Act* merely supplements the inherent constitutional privileges already accorded to the assembly.

[19] Key then to answering the first question, is whether the power of the legislative assembly to summon a witness and require that witness to produce documents emanates from legislative authority, or constitutional authority, by way of a parliamentary privilege. I believe the weight of authority supports the proposition that the legislative assembly does have the power to summon a witness and require production of documents, and the basis of that power is parliamentary privilege. That being the case, the jurisdiction of a court to delve into, or inquire into, such privilege is extremely limited. The Ontario Court of Appeal put it this way:

[25] Therefore, while it is true to say in the abstract that parliamentary privilege covers those matters which are necessary to the functioning of the House, "necessity" in this context applies to categories of matters, and each

particular exercise of privilege within a category is not scrutinized against a standard of necessity. As noted by McLachlin J., once a court has decided that a category of matters is necessary to the independent functioning of the House, it does not then go on to decide whether each individual exercise of privilege is necessary, but, rather, only has to ask whether the particular exercise in question falls within the recognized category of privilege. If it does, it is not subject to outside review.

(See *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595 (C.A.)).

[20] The Ontario Court of Appeal was not dealing with this issue in a vacuum, but rather relied on the words of McLachlin J. in *New Brunswick Broadcasting*. In particular, the court relied on the following excerpts from her decision which I suggest captures the present case in a nutshell: (pp. 383-385)

The test of necessity is not applied as a standard for judging the content of a claimed privilege, but for the purpose of determining the necessary sphere of exclusive or absolute “parliamentary” or “legislative” jurisdiction. If a matter falls within this 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 questions will instead fall to the exclusive jurisdiction of the legislative body.

...

...the principle of necessity will encompass not only certain claimed privileges, but also the power to determine, adjudicate upon and apply those privileges. Were the courts 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 the legislative body. The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function? A particular exercise of a necessary privilege cannot then be reviewed, unless the deference and the conclusion reached at the initial stage be rendered nugatory.

In summary, it seems clear that, from an historical perspective, Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional. The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege.

[21] Therefore, one has to determine whether the right to require the attendance of witnesses, and for those witnesses to produce documents, falls into a category of matters necessary to the independent functioning of the legislative assembly. The

applicants argue even if this power derives from some inherent privilege, the court must go further and determine whether the privilege claimed, i.e. to summon persons from the CFIA, is necessary for the maintenance of order and discipline in the legislature. Upon a reading of the *New Brunswick Broadcasting* case, and the *Ontario (Speaker of the Legislative Assembly)* case, the position of the applicants cannot succeed. The Supreme Court of Canada has said once it has been determined the privilege claimed is necessary to the capacity of the legislature to function, then the court has no power to scrutinize the exercise of that privilege. To do as the applicants suggest would be to fly in the face of the Supreme Court of Canada ruling in *New Brunswick Broadcasting*. So the question is twofold: does the right to compel witnesses and production of documents fall within the recognized category of privilege necessary to the independent functioning of the assembly, and, secondly, whether the exercise of that privilege, i.e. the issuing of a summons to a witness, falls within that category. If it does, it is not subject to review.

[22] The next step in the analysis is to determine whether the right of a legislative assembly to summon witnesses and have them produce documents falls into a recognized category of privilege. Historically, the Parliament of the United Kingdom possesses the power to require the attendance of witnesses and the production of documents. (See *Stockdale v. Hansard* (1839), 112 E.R. 1112 at 1176 (Q.B.)). *Stockdale v. Hansard* was followed in *Gosset v. Howard* (1845), 10 Q.B. 158 (Ex. Chamber) where Baron Parke, speaking for the Court, indicated the privilege of the House of Commons to institute inquiries and compel the attendance of witnesses was beyond question:

For it cannot be disputed that the House of Commons has by law the particular powers to take into custody which in the three first pleas it is expressly averred to have exercised; and we have nothing to do with any other. First, that House, which forms the [451] Great Inquest of the Nation (4 Inst. p. 11), has a power to institute inquiries and to order the attendance of witnesses, and, in case of disobedience (whether it has not even without disobedience, we need not inquire), bring them in custody to the Bar for the purpose of examination. And, secondly, if there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer it, and a wilful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody and to be brought to the Bar to answer the charge: and, further, the House, and that alone, is the proper judge when these powers or either of them are to be exercised.

Of particular note in this quotation is the court's reference to the power of the house "to institute inquiries and to order the attendance of witnesses" and further the court indicates "the House, and that alone, is the proper judge when these powers or either of them are to be exercised".

[23] In the Canadian context, the intervener cites the case of *Ex parte Dansereau*

(1875), 19 L.C.J. 210 (Q.B. - Appeal Side), reprinted in J.R. Cartwright, Cases Decided on the British North America Act, 1867, vol. II (Toronto: Warwick & Sons, 1887) at 165. This case is cited in support of the proposition that legislative assemblies in this country have the right to summon witnesses and have them produce documents; this right is inherent parliamentary privilege; and the power was exercised as far back as the 1800's. I do not intend to quote extensively from that case, except to refer to page 190 of the case report where the following appears:

Responsible Government, which has been recognised in the Local as well as in the constitution of the General Government, would be a delusion if that power of enquiry was denied, and the enquiry would be valueless without the power of summoning witnesses. I consider this to be a necessary incident of the powers of Legislatures, and of controlling the administration of public affairs, and as such I believe that the House of Assembly had a right to exercise it,...

The intervener goes further and refers to *McNab v. Bidwell and Baldwin* (1830), Draper 144 at 156 (K.B.). In that pre-confederation case, the Court of King's Bench of Upper Canada had the following to say at p. 156:

It is my opinion that the right of enquiry for the purpose of enabling the legislature to exercise their constitutional functions is necessarily incident to both branches; for I do not see how they could join in making laws for the good government of the King's subjects without obtaining the information requisite to form a correct opinion of the measures and alterations proper to be adopted. I think this is an inherent right essential to every legislature. And the right of examination implies a right to compel the answering of all such questions as the law of the land will sanction.

[24] On a review of the authorities cited, I am satisfied the right of the Legislative Assembly of Prince Edward Island to summon witnesses and have them produce documents is necessary for the proper functioning of the assembly, and, therefore, meets the test for recognition as an inherent privilege. It satisfies the test articulated by the Supreme Court of Canada in *New Brunswick Broadcasting*. It is difficult to imagine how the legislative assembly could properly conduct an inquiry within its constitutional jurisdiction without the power to summon witnesses and require the production of records and documents.

2. If the Legislative Assembly of Prince Edward Island does have this power, does it extend to the Committee?

[25] The applicants take the position the Committee has clearly indicated its authority to issue a summons comes from the provisions of the *Act*. The relevant sections are ss. 27, 28 and 29:

27. The Legislative Assembly and the committees and members thereof

hold and enjoy such and the like privileges, immunities and powers as, and the privileges, immunities and powers of the Legislative Assembly and of the committees and members thereof, are hereby defined to be the same as for the time being are held, enjoyed and exercised by the House of Commons of Canada and by the respective committees and members thereof. R.S.P.E.I. 1974, Cap. L-11, s. 32.

28. The Legislative Assembly may at all times command and compel the attendance before the Legislative Assembly or before any committee thereof of such persons and the production of such papers and things as the Legislative Assembly or committee may consider necessary. R.S.P.E.I. 1974, Cap. L-11, s. 33.

29. Whenever the Legislative Assembly requires the attendance of any persons before the Legislative Assembly or before a committee thereof, the Speaker or, as the case may be, chair of the committee may issue his warrant or subpoena directed to the persons named in the order of the Legislative Assembly, requiring the attendance of such persons before the Legislative Assembly or a committee thereof and the production of such papers and things as may be ordered. R.S.P.E.I. 1974, Cap. L-11, s. 34; 1996, c. 24, s.3.

The applicants rely on the statement from the Committee as to the source of its power. In particular, they referred to the letter of November 9, 2001 to the CFIA from the clerk of the legislative assembly. (See affidavit of Norman MacPhee, exhibit "8".) Among the options referred to in the clerk's letter with respect to the attendance of CFIA employees before the Committee, was the issuance of a warrant under authority of the **Act**.

[26] The applicants then argue even if the assembly has the power to command and compel the attendance of witnesses with documents, that does not extend to the Committee. In essence, the position of the applicants is that s. 28 of the **Act** grants power to the legislative assembly and s. 29 sets out the process whereby the assembly exercises that power. When the assembly requires the attendance of a person before the assembly, or a committee, the applicants argue the speaker or the chair of the Committee may issue a warrant directed to the person "named in the order of the Legislative Assembly". There is no question that, in this case, no such order naming Love and MacSwain was issued by the assembly.

[27] The applicants then go on to refer to Rule 32 of the *Rules of the Committees*:

32. When the Committee decides that a certain person should appear as a witness, it may direct the Committee Clerk to invite that person to appear, or if necessary, the Committee may adopt a motion requesting that person to be summoned before the Committee.

The applicants relate this rule back to s. 29 of the **Act** and argue since the Committee did not refer the matter back to the full assembly for an order as provided for in that

section, the process was flawed. By proceeding on its own, as it did, the applicants suggest the Committee had no legislative authority for that conduct.

[28] There is no question but that in attempting to carry out its mandate from the assembly, the Committee did not refer the issue of the summons back to the assembly for its consideration. However, that is not fatal to the process. First of all, let me say that just because the clerk of the assembly indicates the authority for the summons is found in the *Act* does not necessarily make it so. If that authority is rooted in parliamentary privilege, although not referred to specifically by the clerk, that does not extinguish the existence of the privilege. Further, ss. 28 and 29 of the *Act*, in my view, represent a codification of certain inherent parliamentary privileges. They do not represent a codification of “all” parliamentary privileges. If one examines s. 27 of the *Act*, one sees a general adoption of privileges, immunities and powers, both with reference to the legislative assembly and to the committees and members thereof, as were enjoyed and exercised by the House of Commons of Canada. I suggest further support for this proposition can be found in Rule 42 of the *Rules of the Assembly*:

42. Privileges are the rights enjoyed by the House collectively and by the Members of the House individually as conferred by the *Legislative Assembly Act* or other statutes or by practice, precedent, usage, and custom. Matters concerning any departure from the Rules, customary procedure in debate or in the conduct of legislative business are not Matters of Privilege and should be brought to the attention of the House as Points of Order.

[29] So, the Committee, in carrying out the mandate given to it by the Assembly or House, might have exercised its authority in a neater and cleaner manner, but that is for the legislative assembly to decide. It has been said the legislative assembly is the master of its own process including the operation of its Committees. Those Committees are natural extensions of the House, and the House naturally functions through them. As seen in Rule 42, the legislative assembly has made rules for the conduct of its own process which are also protected by privilege. The Ontario Court of Appeal dealt with a similar issue in *Ontario (Speaker of the Legislative Assembly)* where the court indicated the assembly must be free to set its own guidelines for how it conducts its business and the details of such operation must be considered privileged and insulated from outside review.

[30] Rule 83 of the *Rules of the Assembly* reads in part:

83. (1) Committees shall be severally empowered to examine and inquire into all such matters and things that may be referred to them by the House and in addition, Committees, by majority decision of their membership, may meet to examine and inquire into such matters and things as the Committee deems appropriate (subject to Rule 83(3)). (Amended April 4, 1995)

- (2) Committees shall report to the House from time to time their observations and opinions with power to send for persons, papers, and records.

This rule clearly empowers the Committee to send for persons, papers, and records. As I noted earlier, in the course of its inquiry as mandated by the resolution of the assembly, the Committee did report back on several occasions, and on each occasion their report was received and adopted by the assembly. There is nothing to indicate the assembly was not aware of the fact the Committee had issued the summonses in question. On each occasion the Committee reported back to the House, there is nothing to indicate that any member of the House took any exception to the process employed by the Committee. To the contrary, the Committee's reports were endorsed. In any event, in my view, the Committee was functioning at the direction of the full assembly and was fully cloaked with the inherent constitutional parliamentary privilege.

[31] As a final comment on the power of the Committee to send for persons, papers, and records, it is clear the authority for this is not new. It is as old as the legislative assembly itself. To this day, at the opening of each session of the assembly, committees of the House are struck and mandated. Over the years, their powers have been codified from time to time via the Rules of the House. However, one need only refer to the MacPhee affidavit, exhibit "5" to see an example of this authority which existed prior to Prince Edward Island entering Confederation. The example referred to in MacPhee's affidavit is an excerpt from the Journal of the House of Assembly of Prince Edward Island for Tuesday, January 26, 1847. This was the opening of the First Session of the Seventeenth General Assembly. During the course of its opening process, certain committees were struck. In particular, a committee of seven members was appointed to examine and report on the public accounts - "with power to send for persons, papers and records".

[32] There is no doubt but that the Committee has the power to issue the summons in question; that it derives that power from the legislative assembly; that the power is rooted in parliamentary privilege; and it is not for this Court to inquire into how that power was exercised.

3. If the Committee has the power, should the witnesses, nonetheless, be exempt from the summonses?

[33] The applicants argue even if the Committee has the authority to compel the attendance of witnesses, it does not have the authority to exceed its constitutional jurisdiction by inquiring into the administration or the operation of a federal agency. On this basis, the applicant suggests the Committee has no constitutional authority to summon representatives of the CFIA, which is a federal institution. The applicants

argue inter-jurisdictional immunity. In support of that proposition, they rely on the decision of the Supreme Court of Canada in *A.G. Quebec & Keable v. A.G. Canada*, [1979] 1 S.C.R. 218. The applicants state because the Committee seeks to compel employees of the CFIA (Love and MacSwain) to testify before it, then it is conducting an inquiry into a federal agency and has no constitutional authority to do so. The applicants take this position, while, at the same time, acknowledging the Committee has jurisdiction to conduct an inquiry into the potato wart issue by virtue of s. 95 of the *Constitution Act, 1867*.

[34] While the applicants invite me to draw the conclusion that the Committee intends to investigate the administration and operation of the CFIA, quite frankly, there is nothing to support that conclusion other than speculation. The Committee is attempting to carry out the resolution of the legislative assembly requiring it to conduct a “full and complete examination” of the potato wart crisis. It is only when the witnesses appear before the Committee that it will become apparent whether it intends to act within its constitutional sphere of authority or whether it wants to conduct a “fishing expedition” as suggested by the applicants. If the Committee strays beyond its constitutional authority at that time, then the applicants may seek the appropriate remedy. I agree with the contents of paragraphs 82 and 83 of the intervener’s factum, which read:

82. Quite apart from the absence of any evidentiary basis for the Applicants’ guesses as to the questions the Committee would pose if they complied with the Summonses to Witness, the Ontario Speaker submits that it would not be *ultra vires* for the Committee to ask CFIA witnesses about decisions made and actions taken or not taken by the CFIA in responding to the potato wart crisis. So long as the purpose of the questioning, in pith and substance, relates to a matter within the provincial legislative sphere (and the Applicants concede that the potato wart crisis is within that sphere), any incidental reflection on the administration and management of CFIA is permissible.

83. As the Supreme Court of Canada noted,

Further, the general constitutional rule that permits provincial inquiries that are in “pith and substance” directed to provincial matters (in this case local government) to proceed despite possible “incidental” effects on the federal criminal law power was affirmed by Lamer J. in [*Starr v. Houlden*] ...

Consortium Developments (Clearwater) Ltd. v. Sarnia (City), [1998] 3 S.C.R. 3 at p. 40, para. 51.

[35] The applicants rely heavily on the *Keable* case for their submission as it relates to inter-jurisdictional immunity. I have carefully read the *Keable* decision and, with

respect, I do not believe it supports the interpretation advanced by the applicants. There is clearly a distinction between a provincial commission of inquiry as in **Keable** and the proceedings of the Committee in this case, mandated within the jurisdiction of the legislative assembly. The applicants are driven to their conclusions in this regard by reason of their reliance on their earlier argument that the authority of the Committee to issue the summons and order production of documents originates in the **Legislative Assembly Act**. As I have found, the origin of the authority is constitutional in nature and falls within the inherent authority of the legislative assembly. The **Keable** inquiry was initiated pursuant to a provincial statute. It was rightly restricted by the constitutional authority of such a provincial statute. In the present case, the Committee is not limited by a provincial statute in the conduct of its inquiry. Its power is not dependent upon a provincial statute, and this, in itself, distinguishes it from the **Keable** case.

[36] The next argument advanced by the applicants in the context of this part of their submission centers on the proposition that the Committee is acting pursuant to provincial legislation and it is not binding on the federal Crown. For the reasons I have already offered, this argument may be disposed of summarily because I have concluded the Committee does not derive its power to summon witnesses from provincial legislation. Rather, it is exercising its constitutionally protected privilege.

[37] Finally, the applicants argue Love and MacSwain should be exempt from the summonses because of Crown immunity from discovery. The applicants argue the broad sweeping powers contained in the resolution from the legislative assembly, when coupled with the broad wording contained in the summonses to Love and MacSwain, constitute a “discovery”. The applicants rely on the **Keable** case. Again, I am of the view that **Keable** concluded the Solicitor General was not compellable as a witness before that commission because the commission derived its power from a provincial statute. The Committee in the present case is exercising its inherent power to compel the attendance of witnesses which flows from the constitutional authority of the legislative assembly itself. I am not so sure the work of the Committee is so much in the nature of a discovery, as it is a response to the resolution of the legislative assembly itself to make full inquiry into a crisis in the Prince Edward Island potato industry so as to seek ways in which such a crisis may be averted in future. For these reasons, I conclude the witnesses should not be exempt from the summonses.

4. Does the *Judicial Review Act* apply to a decision of the Committee?

[38] The final question raises the most interesting point of all. Is the decision of the Committee to issue summonses to the applicants subject to the **Judicial Review Act** at all? Sections 1(a), (b) and (h) of that **Act** set out the parameters of an application for judicial review and the type of decisions that are subject to it. They read as follows:

1. In this Act

(a) “act” includes an omission or failure to act;

(b) “application for judicial review” means an application to determine whether or not authority conferred on a tribunal by an enactment has been exercised in accordance with the enactment in respect to a decision of the tribunal in relation to the legal rights, powers, privileges, immunities, duties or liabilities of a person or the eligibility of a person to receive, or to continue to receive, a benefit or license;

...

(h) “tribunal” means a person or group of persons upon whom an enactment confers authority to make a decision, whether styled a board or a commission or by any other title, but does not include

(i) the Provincial Court of Prince Edward Island or a judge thereof,

(ii) the Supreme Court of Prince Edward Island or a judge thereof, or

(iii) the Lieutenant Governor in Council when not making a decision pursuant to authority conferred by an enactment.

The parameters of the **Judicial Review Act** are succinctly captured by my brother Jenkins J. when he wrote the following for the Appeal Division of this Court:

...the **Judicial Review Act** provides a procedure for review of **only** those tribunals that exercise statutory power, and only with regard to the purported exercise of statutory power by such tribunals.

(See **Burge v. P.E.I. Liquor Control Commission and P.E.I. Human Rights Commission**, [1995] 2 P.E.I.R. 77 at p. 81.)

[39] The applicants argue, as they have done consistently throughout, that the Committee derived its powers from the **Act**. They argue that in issuing the summonses in question, the Committee was acting pursuant to the provisions of the **Act**. They further argue the Committee is included in the definition of “tribunal” in the **Judicial Review Act** and that since they are not expressly excluded by that definition, then in making their decision pursuant to an enactment, they are caught by the provisions of the **Judicial Review Act**. Since I have found the Committee was really exercising a parliamentary privilege, I cannot accept the position advanced by the applicants.

[40] In ss. 28 and 29 of the **Act**, the assembly sought to codify, in part, some of its inherent parliamentary privileges. I find such codification of procedure was in addition to other privileges, immunities and powers as are referred to in s. 27 of the **Act**.

Sections 28 and 29 merely attempt to codify the power of the assembly and any of its committees to compel the attendance of persons and the production of documents. These sections do not codify “all” of the inherent parliamentary privileges of the assembly and its committees. Rather, it was an attempt by the assembly to spell out certain of its powers. I find the reasoning of Vertes J. in the case of *Morin v. Crawford* (1999), 14 Admin. L.R. (3d) 287 at 312 and 313 (N.W.T.S.C.) quite persuasive:

Does the fact that the legislature chose to spell out certain powers expressly somehow limit the inherent powers of the legislature? Does the fact that the legislature chose to spell out certain powers in a statute convey jurisdiction to the courts to oversee the exercise of those powers? I think the answer to both questions is “no”.

...

The act of legislating some privileges also does not necessarily imply a surrender of those privileges to the jurisdiction of the court. The case of *Temple v. Bulmer*, [1943] 3 D.L.R. 649 (S.C.C.), provides an example of that. That case considered a section of the *Legislative Assembly Act* of Ontario which provided that where a seat in the legislature had been vacant for three months and no election writ had issued, the legislative clerk would immediately issue a writ. A constituent sought an order of *mandamus* directing the clerk to issue the writ. The Supreme Court refused the relief on the ground that the issue of *mandamus* would constitute an intrusion into the functions and privileges of the legislature itself. Duff C.J.C. wrote (at page 651):

We cannot agree with the contention ... that s. 34 of the *Legislative Assembly Act*, R.S.O. 1937, c. 12 confers jurisdiction upon the Courts in relation to Parliamentary elections. Any duty imposed by that section upon the Clerk of the Crown in Chancery is imposed upon him in his character of an officer under the control of the Legislative Assembly and answerable to the Legislative Assembly.

This case is an example of a statutory provision, with wording implying the creation of rights and obligations, being unenforceable in a court because the subject-matter of the right or obligation deals with something that is essentially an aspect of parliamentary privilege.

It follows, then, neither the proceedings of the legislative assembly, itself, nor any of its committees are subject to the *Judicial Review Act*.

[41] As I said earlier in these reasons, a committee of the legislative assembly is merely an extension of the assembly. The Committee derives its authority from the whole assembly, but as long as it acts within its constitutional authority, its proceedings are every bit as parliamentary as the assembly as a whole. Perhaps this was best articulated by the learned author, J.P.J. Maingot, Q.C. where he said at pp. 37-38:

A committee of either House of Parliament is an arm of the House because it derives its existence and its authority from the House. The “proceedings” of a committee of either House or of a joint committee that has an order of reference permitting it to adjourn from place to place in Canada, i.e. to sit beyond the committee rooms in Parliament, are “proceedings in Parliament,” and accordingly freedom of speech applies to them.

The proceedings of the Committee are “proceedings in parliament” and are, therefore, not subject to judicial review.

[42] The legislative assembly must function through the operation of its committees. In this case, the Committee was exercising inherent power necessary to its proper function - i.e. the power to summon witnesses and order the production of documents in order to carry out the task delegated to it by resolution of the legislative assembly to make a “full and complete examination” of the potato wart crisis. The Committee was exercising constitutional power within an area of jurisdiction (agriculture) over which it had authority. This authority did not derive from the **Act** and, therefore, the Committee is not caught by the definition of “tribunal” in the **Judicial Review Act** - i.e. the Committee is not a group of persons upon whom an enactment confers authority to make a decision. Just because the legislative assembly codified some of its privileges, does not mean it intended the exercise of those codified privileges be subject to the **Judicial Review Act**.

[43] For all of the foregoing reasons, I find the **Judicial Review Act** does not apply to the decision of the Committee to issue summonses to the applicants Love and MacSwain.

Summary

[44] It is my conclusion the Legislative Assembly of Prince Edward Island has the power to summon witnesses and order them to produce documents. This power is constitutional by virtue of the fact it is an exercise of inherent parliamentary privilege. The Committee of the House is an extension of the House and possesses the same constitutional power to summon witnesses and order them to produce documents. For the reasons already given, I see no reason why the witnesses (the applicants Love and MacSwain) should be excused or exempt from the summonses. Finally, the **Judicial Review Act** does not apply to a decision of the Committee.

[45] Therefore, the application and the application for judicial review are dismissed.

Costs

[46] The question of costs was not fully canvassed by the parties. In fact, a review of the written arguments indicates the applicants did not seek their costs, nor did the intervener. The respondents did ask for their costs should the application be unsuccessful. As a general rule, costs should follow the disposition of the case. That would dictate costs being awarded to the respondents and the intervener. However, given the novel nature of the issues raised by the facts of this application, and given the constitutional questions which flow from those facts, it would be appropriate for the parties to bear their own costs.

January 14, 2003

J.

TAB 4

2007 FC 564

T-551-07

Deputy Commissioner Barbara George (*Applicant*)

v.

Commissioner Beverly Busson and Royal Canadian Mounted Police (*Respondents*)

and

Attorney General of Ontario (*Intervener*)

T-580-07

Deputy Commissioner Barbara George (*Applicant*)

v.

Attorney General of Canada et al. (*Respondents*)

and

Attorney General of Ontario (*Intervener*)

INDEXED AS: CANADA (DEPUTY COMMISSIONER, ROYAL CANADIAN MOUNTED POLICE) v. CANADA (COMMISSIONER, ROYAL CANADIAN MOUNTED POLICE) (F.C.)

Federal Court, Tremblay-Lamer J.—Ottawa, May 29, 2007.

RCMP — Judicial review of decisions to investigate whether applicant contravened RCMP members' Code of Conduct, to initiate criminal investigation into allegations of perjury before parliamentary committee — Commissioner initiating Code of Conduct Investigation under RCMP Act, s. 40 following applicant's testimony before House of Commons Committee on allegations of wrongdoing respecting RCMP pension, insurance plans — Applicant suspended with pay until outcome of investigation — RCMP grievance process not suitable to resolve preliminary jurisdictional question of whether immunity provided by parliamentary privilege precluding RCMP investigations allegedly based on witness testimony before parliamentary committee — Federal Court not having jurisdiction to review peace officer's decision to initiate criminal investigation — Application to set aside Code of Conduct investigation granted in part, application relating to criminal investigation dismissed.

Constitutional Law — Distribution of Powers — Applicant arguing testimony before Public Accounts Committee protected by parliamentary privilege — Parliamentary privilege respecting fundamental constitutional separation of powers — Designed to prevent courts, other entities from interfering with Parliament's legitimate sphere of activity — RCMP not having jurisdiction to investigate allegation applicant gave false testimony to Public Accounts Committee as testimony protected by parliamentary privilege — Immunity provided by parliamentary privilege ensuring witnesses, Members of Parliament can speak openly, freely before Committee — Parliament alone responsible for disciplining conduct such as deliberately misleading House of Commons.

Federal Court Jurisdiction — Federal Court having no general, inherent jurisdiction to deal with criminal matters — Traditional test for Federal Court jurisdiction reviewed — RCMP officer's decision to initiate criminal investigation against applicant not decision by "federal board, commission or other tribunal" within meaning of Federal Courts Acts, s. 18.1 — However, Federal Court having requisite jurisdiction to review RCMP Commissioner's decisions

This factor also suggests that more judicial scrutiny is warranted in this case.

b. Parliamentary Privilege

i. The Law

[58] Parliamentary privilege is one of the ways in which the fundamental constitutional separation of powers is respected: *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, at paragraph 21. The principle is designed to prevent courts or other entities from interfering with Parliament's legitimate sphere of activity. In Canada, the privilege originates from both the common law and the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5]] which calls for a "Constitution similar in Principle to that of the United Kingdom". Prior to Confederation, absent a specific grant from the Parliament of the United Kingdom, the common-law principle was well established: privileges that were necessarily incidental to a legislature were deemed to exist: J. P. Maingot, *Parliamentary Privilege in Canada*, 2nd ed., (Montréal: McGill-Queen's University Press, 1997), at page 16. Today, the privilege enjoys the same constitutional weight and status as the Charter: *Vaid*, at paragraph 34.

[59] Writing with respect to the historical tradition of parliamentary privilege, Justice McLachlin, as she then was, writing for the majority in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, stated at pages 378-379:

It has long been accepted that in order to perform their functions, legislative bodies require certain privileges relating to the conduct of their business. It has also long been accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch.

[60] Justice Binnie, writing for a unanimous Court, summarized the legal test for parliamentary privilege in *Vaid*, at paragraph 46:

In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment 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.

[61] The first step a Canadian court is required to take in determining whether or not a privilege exists is to ascertain whether the existence and scope of the privilege have been authoritatively established in relation to our Parliament: *Vaid*, at paragraph 39. Some categories, such as freedom of speech in the House and the authority to discipline members for example, have long been recognized as established categories of privilege, justified by the exigencies of parliamentary work: *Vaid*, at paragraph 29.

[62] In the present case, a former witness before the Public Accounts Committee seeks to invoke parliamentary privilege to preclude the RCMP from investigating her on the basis of testimony she gave before that committee. The applicant submits that this claim to privilege fits squarely within the category and scope of privilege recently recognized by this Court in *Gagliano v. Canada (Attorney General)*, [2005] 3 F.C.R. 555 (F.C.). In that decision, I concluded that the power to preclude cross-examination of witnesses using evidence obtained in previous proceedings of Parliament falls within the scope of parliamentary privilege because it is necessary for the functioning of Parliament.

[63] While I do not intend to fully canvass the reasons in *Gagliano*, it is worth emphasizing several key justifications for providing immunity to a parliamentary witness' testimony. First, although witnesses before a parliamentary committee are not Members of Parliament, they are not strangers to the House either. Rather they are guests who are afforded parliamentary privilege because, as with members, the privilege is necessary to ensure that they are able to speak openly, free from the fear that their words will be used against them in subsequent proceedings: *Gagliano*, at paragraph 77. This is related to the more general idea "that whatever is done or said in

either House should not be liable to examination elsewhere”: *Stockdale v. Hansard* (1839), 112 E.R. 1112 (Q.B.), at page 1191. Given the overriding importance of the House of Commons as “the grand inquest of the nation”, it is fundamental that members and witnesses alike are not inhibited from stating fully and freely what they have to say: *Prebble v. Television New Zealand*, [1995] 1 A.C. 321 (P.C.).

[64] Second, without the power to protect witnesses, Parliament’s investigative function would be seriously compromised because witnesses would be less forthcoming: *Gagliano*, at paragraph 83.

[65] Finally, if Parliament has reason to believe that a witness has deliberately misled the House, it is up to Parliament, and Parliament alone, to initiate proceedings and discipline such conduct. Misleading the House is contempt of the House punishable by the House: if a court or another entity was allowed to inquire into whether a member or a witness had misled the House, this could lead to exactly the type of conflict between two spheres of government that the wider principle of parliamentary privilege is designed to avoid. The courts would be trespassing on Parliament’s jurisdiction: *Pepper v. Hart*, [1993] A.C. 593 (H.L.); *Hamilton v Al Fayed*, [2000] 2 All ER 224 (H.L.).

ii. The Decisions of Commissioner Busson

[66] Commissioner Busson’s letter to the applicant dated March 30, 2007 explains that the Commissioner decided to initiate a Code of Conduct investigation under section 40 of the RCMP Act as a result of the applicant’s testimony before the Public Accounts Committee on February 21, 2007, and the testimony of the RCMP group on March 28, 2007.

[67] The formal notice of suspension, also dated March 30, 2007, informed the applicant that pursuant to section 12.1 of the RCMP Act she was suspended with pay pending the outcome of the investigation. The notice also set out three specific allegations against the applicant, which explained why she was being investigated and suspended. The allegations read as follows:

1. That on, or about September 19, 2003, at or near Ottawa, Ontario, you did conduct yourself in a disgraceful manner that could bring discredit on the Force. During a meeting with Chief Superintendent Fraser Macaulay, you advised him that he was on an island by himself and that others would not tell the truth. You explained that Chief Superintendent Macaulay was naïve to think anyone would stand beside him in this type of situation. This is contrary to subsection 39(1) of the *Royal Canadian Mounted Police Regulations, 1988*.
2. That on February 21, 2007, during an appearance before the Standing Committee on Public Accounts, at or near Ottawa, Ontario, you did conduct yourself in a disgraceful manner that could bring discredit on the Force, by giving false testimony, contrary to subsection 39(1) of the *Royal Canadian Mounted Police Regulations, 1988*.
3. That between February 21, 2007, and March 28, 2007, at or near Ottawa, Ontario, you did conduct yourself in a disgraceful manner that could bring discredit on the Force in that, knowing that you had been involved, directly or indirectly, in Staff Sergeant Mike Frizzell’s removal and knowing that I had undertaken, as Commissioner of the RCMP, to provide the Standing Committee on Public Accounts with all of the information pertaining to Staff Sergeant Frizzell’s removal, you failed to inform me, your superior officer, of the above. Failing to disclose the extent of your involvement has resulted in an incomplete response being provided to the Committee. This failure to disclose your involvement is contrary to subsection 39(1) of the *Royal Canadian Mounted Police Regulations, 1988*.

[68] The applicant makes the general submission that Commissioner Busson’s choice to notify the media and other RCMP members of her decisions “was extremely prejudicial to the Applicant” in the face of Parliament’s and the Minister’s ongoing investigations. With respect, I believe this goes too far. In response, I would simply say that a decision to suspend an officer with pay pending an investigation is essentially a non-judgmental and non-disciplinary decision: see *Griffin v. Summerside (City) Director of Police Services*, at paragraph 30. It is a preliminary decision to verify factual allegations and it does not presume guilt. Further, the allegations of wrongdoing respecting the RCMP pension and insurance plans were clearly part of the public arena prior to any

TAB 5

**House of Commons and the Honourable
Gilbert Parent** *Appellants*

v.

**Satnam Vaid and Canadian Human Rights
Commission** *Respondents*

and

**Attorney General of Canada, the Honourable
Senator Serge Joyal, the Honourable Senator
Mobina S. B. Jaffer, Canadian Association
of Professional Employees, Communications,
Energy and Paperworkers Union of Canada
and Speaker of the Legislative Assembly of
Ontario** *Interveners*

**INDEXED AS: CANADA (HOUSE OF COMMONS)
v. VAID**

Neutral citation: 2005 SCC 30.

File No.: 29564.

2004: October 13; 2005: May 20.

Present: McLachlin C.J. and Major, Bastarache, Binnie,
LeBel, Deschamps, Fish, Abella and Charron JJ.

**ON APPEAL FROM THE FEDERAL COURT OF
APPEAL**

*Constitutional law — Parliamentary privilege —
Existence of privilege — Former chauffeur to Speaker
of House of Commons filing discrimination and harass-
ment complaints against Speaker and House after his
position declared surplus — House and Speaker assert-
ing parliamentary privilege in relation to “management
of employees” to challenge jurisdiction of Canadian
Human Rights Commission to investigate chauffeur’s
complaints — Whether claimed parliamentary privilege
exists — Constitution Act, 1867, s. 18 — Parliament of
Canada Act, R.S.C. 1985, c. P-1, s. 4.*

*Human rights — Human rights legislation — Applica-
tion — Parliamentary employees — Whether Canadian
Human Rights Act applicable to employees of Senate*

**Chambre des communes et l’honorable
Gilbert Parent** *Appelants*

c.

**Satnam Vaid et Commission canadienne des
droits de la personne** *Intimés*

et

**Procureur général du Canada, l’honorable
sénateur Serge Joyal, l’honorable sénatrice
Mobina S. B. Jaffer, Association canadienne
des employés professionnels, Syndicat
canadien des communications, de l’énergie
et du papier, et Président de l’Assemblée
législativ de l’Ontario** *Intervenants*

**RÉPERTORIÉ : CANADA (CHAMBRE DES COMMUNES)
c. VAID**

Référence neutre : 2005 CSC 30.

Nº du greffe : 29564.

2004 : 13 octobre; 2005 : 20 mai.

Présents : La juge en chef McLachlin et les juges Major,
Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et
Charron.

EN APPEL DE LA COUR D’APPEL FÉDÉRALE

*Droit constitutionnel — Privilège parlementaire —
Existence du privilège — Ancien chauffeur du président
de la Chambre des communes ayant déposé des plain-
tes pour discrimination et harcèlement contre la Cham-
bre et son président après que son poste a été déclaré
excédentaire — Privilège parlementaire à l’égard de la
« gestion du personnel » invoqué par la Chambre et son
président pour contester la compétence de la Commis-
sion canadienne des droits de la personne d’enquêter sur
les plaintes du chauffeur — Le privilège invoqué existe-
t-il? — Loi constitutionnelle de 1867, art. 18 — Loi sur le
Parlement du Canada, L.R.C. 1985, ch. P-1, art. 4.*

*Droits de la personne — Législation en matière de
droits de la personne — Application — Employés du
Parlement — La Loi canadienne sur les droits de la*

and House of Commons — Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 2.

Administrative law — Human rights tribunal — Jurisdiction — Parliamentary employees — Workplace complaints raising human rights issues — Chauffeur to Speaker of House of Commons declared surplus and filing discrimination and harassment complaints against Speaker and House — Whether Canadian Human Rights Commission has jurisdiction to investigate chauffeur's complaints — Whether chauffeur's complaints should proceed by way of grievance under the Parliamentary Employment and Staff Relations Act — Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 2 — Parliamentary Employment and Staff Relations Act, R.S.C. 1985, c. 33 (2nd Supp.), s. 2.

Following a grievance under the *Parliamentary Employment and Staff Relations Act* ("PESRA"), V was reinstated as chauffeur to the Speaker of the House of Commons. He returned to work, but was not allowed to resume his duties. He was subsequently informed by the Speaker's office that, because of a reorganization, his former position would be made surplus. V complained to the Canadian Human Rights Commission against the Speaker and the House of Commons alleging refusal to continue his employment, harassment and discrimination on the basis of race, colour, and national or ethnic origin. The Commission accepted V's complaints and referred them to a tribunal. The Speaker and the House of Commons challenged the human rights tribunal's jurisdiction, claiming that the Speaker's power to hire, manage and dismiss employees was privileged and therefore immune to external review. The tribunal dismissed the challenge. On an application for judicial review, both the Federal Court, Trial Division, and the Federal Court of Appeal upheld the tribunal's decision.

Held: The appeal should be allowed.

The party who seeks to rely on the immunity provided by parliamentary privilege has the onus of establishing its existence. Within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts. A finding that a particular area of parliamentary activity is covered by privilege therefore has very significant legal consequences for non-Members who claim to be injured by parliamentary conduct. [29-30]

personne s'applique-t-elle aux employés du Sénat et de la Chambre des communes? — Loi canadienne sur les droits de la personne, L.R.C. 1985, ch. H-6, art. 2.

Droit administratif — Tribunal des droits de la personne — Compétence — Employés du Parlement — Plaintes en matière de relations de travail soulevant des questions de droits de la personne — Poste de chauffeur du président de la Chambre des communes déclaré excédentaire — Plaintes pour discrimination et harcèlement déposées contre la Chambre et son président — La Commission canadienne des droits de la personne a-t-elle compétence pour enquêter sur les plaintes du chauffeur? — Les plaintes du chauffeur doivent-elles être instruites par voie de grief sous le régime de la Loi sur les relations de travail au Parlement? — Loi canadienne sur les droits de la personne, L.R.C. 1985, ch. H-6, art. 2 — Loi sur les relations de travail au Parlement, L.R.C. 1985, ch. 33 (2^e suppl.), art. 2.

À la suite d'un grief instruit sous le régime de la *Loi sur les relations de travail au Parlement* (« LRTP »), V a été réintégré dans son poste de chauffeur du président de la Chambre des communes. Il est retourné au travail, mais n'a pas pu réintégrer ses fonctions. Le bureau du président de la Chambre l'a ensuite informé que, par suite d'une réorganisation, son ancien poste deviendrait excédentaire. V s'est plaint à la Commission canadienne des droits de la personne, reprochant à la Chambre des communes et à son président de refuser de continuer à l'employer, de le harceler et d'exercer de la discrimination fondée sur la race, la couleur et l'origine nationale et ethnique. La Commission a reçu les plaintes de V et les a renvoyées à un tribunal. La Chambre et son président ont contesté la compétence du tribunal des droits de la personne, affirmant que le pouvoir du président d'embaucher, de gérer et de congédier les employés était protégé par un privilège et échappait de ce fait à tout examen externe. Le tribunal a rejeté cette prétention. Sur présentation d'une demande de contrôle judiciaire, la Section de première instance de la Cour fédérale et la Cour d'appel fédérale ont confirmé cette décision.

Arrêt : Le pourvoi est accueilli.

La partie qui invoque l'immunité que confère le privilège parlementaire a le fardeau d'en établir l'existence. À l'intérieur d'une catégorie de privilège, le Parlement est seul juge de l'opportunité et des modalités de son exercice, qui échappe à tout contrôle judiciaire. Une conclusion portant qu'un secteur particulier de l'activité parlementaire est protégé par un privilège est donc lourde de conséquences sur le plan juridique pour les non-membres auxquels les actions de la Chambre ou de ses membres auraient causé un préjudice. [29-30]

The appellants have failed to establish the privilege in the broad and all-inclusive terms asserted. The *Canadian Human Rights Act* does apply to employees of Parliament. However, V is obliged by PESRA to pursue his complaints by way of a grievance under that Act. This conclusion, which rests entirely on administrative law principles and has nothing to do with parliamentary privilege, entitles the appellants to succeed. [6] [76] [82-83]

Legislative bodies created by the *Constitution Act, 1867* do not constitute enclaves shielded from the ordinary law of the land. The framers of the Constitution, and Canadian Parliamentarians in passing the *Parliament of Canada Act*, thought it right to use the House of Commons at Westminster as the benchmark for parliamentary privilege in Canada. Accordingly, to determine whether a privilege exists for the benefit of the Senate or House of Commons, or their members, a court must decide whether the category and scope of the claimed privilege have been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster. If so, the claim to privilege ought to be accepted by the court. However, if the existence and scope of a privilege have not been authoritatively established, the court will be required to test the claim against the doctrine of necessity — the foundation of all parliamentary privilege. In such a case, in order to sustain a claim of privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment 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 legislative work with dignity and efficiency. Once a claim to privilege is made out, the court will not enquire into the merits of its exercise in any particular instance. [29] [37-40] [46-48]

In this case, the appellants identified the claimed privilege as “management of employees”. The privilege is said to cover with immunity all dealings with all employees without exception who work for the legislative branch of government. The wide-ranging privilege asserted by the appellants has not been authoritatively established in the courts of Canada or the United Kingdom and is not supported as a matter of principle by the necessity test. While a privilege no doubt attaches to the House's relations with some of its employees, the scope of the appellants' claim clearly exceeded what is considered necessary at Westminster; it is not established by historical precedent

Les appelants n'ont pas établi l'existence du privilège étendu et englobant qu'ils revendiquent. La *Loi canadienne sur les droits de la personne* s'applique aux employés du Parlement. Toutefois, V est tenu par la LRTP de soumettre ses plaintes par voie de grief sous le régime de cette loi. Compte tenu de cette conclusion, qui repose entièrement sur le droit administratif et qui n'a rien à voir avec la question du privilège parlementaire, les appelants doivent avoir gain de cause. [6] [76] [82-83]

Les organismes législatifs créés par la *Loi constitutionnelle de 1867* ne constituent pas des enclaves à l'abri de l'application du droit commun du pays. Les rédacteurs de la Constitution, et les parlementaires canadiens qui ont adopté la *Loi sur le Parlement du Canada*, ont cru bon d'utiliser la Chambre de communes de Westminster comme point de référence en ce qui a trait au privilège parlementaire canadien. Par conséquent, pour décider si un privilège dont jouiraient le Sénat, la Chambre des communes ou leurs membres existe, les tribunaux doivent vérifier si la catégorie et l'étendue du privilège revendiqué ont été établies péremptoirement en ce qui concerne notre propre Parlement ou la Chambre des communes de Westminster. Dans l'affirmative, ce privilège devrait être reconnu par le tribunal. Toutefois, si l'existence et l'étendue d'un privilège n'ont pas été établies péremptoirement, le tribunal devra déterminer si ce privilège satisfait au critère de nécessité — qui sert d'assise à tout privilège parlementaire. En pareil cas, pour justifier leur revendication de privilège, l'assemblée ou le membre qui cherchent à bénéficier de l'immunité qu'il confère doivent démontrer que la sphère d'activité à l'égard de laquelle le privilège est revendiqué est si étroitement et directement liée à l'exécution de leurs fonctions d'assemblée législative et délibérante, y compris de la tâche de l'assemblée législative de demander des comptes au gouvernement, qu'une intervention externe saperait l'autonomie dont l'assemblée ou le membre ont besoin pour accomplir leur travail dignement et efficacement. Une fois l'existence d'un privilège établie, la Cour n'évaluera pas le bien-fondé de son exercice dans un cas particulier. [29] [37-40] [46-48]

En l'espèce, les appelants ont indiqué que le privilège qu'ils invoquent appartient à la catégorie « gestion du personnel ». L'immunité qu'il confère engloberait tous les rapports avec tous les employés qui travaillent pour l'organe législatif du gouvernement, sans exception. Le privilège général invoqué par les appelants n'a pas été établi péremptoirement par les tribunaux du Canada ou du Royaume-Uni et ne peut se justifier, sur le plan des principes, selon le critère de nécessité. Bien qu'il ne fasse aucun doute qu'un privilège protège les relations entre la Chambre et certains de ses employés, la portée de la revendication des appelants excède clairement ce qui

in Canada; and it is not consistent with the classic definition of privilege as being the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, “without which they could not discharge their functions”. [29] [50-52] [53-56]

The *Canadian Human Rights Act* applies to all employees of the federal government, including those working for Parliament. However, the fact that V claims a violation of his human rights does not automatically steer the case to the Canadian Human Rights Commission. Rather, in this case, V’s complaints of discrimination and harassment contrary to the provisions of the *Canadian Human Rights Act* arose in the context of his claim of constructive dismissal and therefore fall within the grievance procedure established under the PESRA. The PESRA created a specific regime governing the labour relations of parliamentary employees. Its system of redress, which covers complaints about violations of statutory standards such as those found in the *Canadian Human Rights Act*, runs parallel to the enforcement machinery provided under the *Canadian Human Rights Act*. While not all potential claims to relief under the *Canadian Human Rights Act* would be barred by s. 2 of the PESRA, there is clearly a measure of duplication in the two statutory regimes, and the purpose of s. 2 of PESRA is to avoid such duplication. Since Parliament has determined that workplace grievances of employees covered by the PESRA are to be dealt with under the PESRA, and as PESRA includes grievances related to violations of standards established by the *Canadian Human Rights Act*, V is obliged to seek relief under the PESRA. There is nothing in V’s complaints to lift his grievance out of its specific employment context. [79-82] [89-95]

Cases Cited

Applied: *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112; **not followed:** *R. v. Graham-Campbell; Ex parte Herbert*, [1935] 1 K.B. 594; **considered:** *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; **referred to:** *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Duke of Newcastle v. Morris* (1870), L.R. 4 H.L. 661; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Ontario Human Rights Commission*

est jugé nécessaire à Westminster; elle n’est pas établie par un précédent historique au Canada; et elle n’est pas conforme à la définition classique du privilège comme la somme des privilèges, immunités et pouvoirs dont jouissent le Sénat, la Chambre des communes et les assemblées législatives provinciales ainsi que les membres de chaque Chambre, individuellement, « sans lesquels ils ne pourraient s’acquitter de leurs fonctions ». [29] [50-52] [53-56]

La *Loi canadienne sur les droits de la personne* s’applique à tous les employés de l’administration fédérale, y compris ceux qui travaillent pour le Parlement. Ce n’est toutefois pas parce que V prétend que ses droits fondamentaux ont été violés que sa cause est nécessairement du ressort de la Commission canadienne des droits de la personne. En l’espèce, les plaintes de V alléguant qu’il y a eu discrimination et harcèlement en violation de la *Loi canadienne sur les droits de la personne* se situent plutôt dans le contexte de son allégation de congédiement indirect et relèvent de ce fait de la procédure de grief établie par la LRTP. La LRTP a créé un régime particulier régissant les relations de travail avec les employés du Parlement. Son système de règlement des différends, qui s’applique notamment aux plaintes pour non-respect de normes légales comme celles prescrites par la *Loi canadienne sur les droits de la personne*, coexiste avec le mécanisme de règlement établi par cette dernière loi. Toutes les demandes éventuelles visant à obtenir réparation sous le régime de la *Loi canadienne sur les droits de la personne* ne seraient pas exclues par application de l’art. 2 de la LRTP, mais il y a manifestement chevauchement entre les deux régimes législatifs et l’objet de l’art. 2 est d’éviter pareil chevauchement. Étant donné que le législateur a prévu que les griefs des employés visés par la LRTP devaient être présentés et réglés sous le régime de la LRTP et que la LRTP inclut les griefs relatifs au non-respect des normes établies par la *Loi canadienne sur les droits de la personne*, V doit obligatoirement demander réparation sous le régime de la LRTP. Rien dans les plaintes de V ne justifie qu’elles soient considérées dans un autre contexte que leur contexte particulier de relations de travail. [79-82] [89-95]

Jurisprudence

Arrêt appliqué : *Stockdale c. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112; **arrêt non suivi :** *R. c. Graham-Campbell; Ex parte Herbert*, [1935] 1 K.B. 594; **arrêt examiné :** *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l’Assemblée législative)*, [1993] 1 R.C.S. 319; **arrêts mentionnés :** *Canada (Vérificateur général) c. Canada (Ministre de l’Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49; *Duke of Newcastle c. Morris* (1870), L.R. 4 H.L. 661; *Insurance Corp. of British Columbia c.*

v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Telezone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3d) 161; *Samson Indian Nation and Band v. Canada*, [2004] 1 F.C.R. 556, 2003 FC 975; *Fielding v. Thomas*, [1896] A.C. 600; *Kielley v. Carson* (1842), 4 Moo. P.C. 63, 13 E.R. 225; *Burdett v. Abbot* (1811), 14 East 1, 104 E.R. 501; *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595; *Martin v. Ontario*, [2004] O.J. No. 2247 (QL); *R. v. Richards; Ex parte Fitzpatrick and Browne* (1955), 92 C.L.R. 157; *Egan v. Willis* (1998), 158 A.L.R. 527; *Huata v. Prebble*, [2004] 3 NZLR 359, [2004] NZCA 147; *Stopforth v. Goyer* (1979), 23 O.R. (2d) 696; *Re Clark and Attorney-General of Canada* (1977), 17 O.R. (2d) 593; *Prebble v. Television New Zealand Ltd.*, [1995] 1 A.C. 321; *Hamilton v. Al Fayed*, [2000] 2 All E.R. 224; *Zündel v. Boudria* (1999), 46 O.R. (3d) 410; *R. v. Behrens*, [2004] O.J. No. 5135 (QL), 2004 ONCJ 327; *Tafler v. British Columbia (Commissioner of Conflict of Interest)* (1998), 161 D.L.R. (4th) 511; *Morin v. Crawford* (1999), 29 C.P.C. (4th) 362; *Payson v. Hubert* (1904), 34 S.C.R. 400; *Ainsworth Lumber Co. v. Canada (Attorney General)* (2003), 226 D.L.R. (4th) 93, 2003 BCCA 239; *Re Ouellet (No. 1)* (1976), 67 D.L.R. (3d) 73; *Landers v. Woodworth* (1878), 2 S.C.R. 158; *Bear v. State of South Australia* (1981), 48 S.A.I.R. 604; *Thompson v. McLean* (1998), 37 C.C.E.L. (2d) 170; *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271; *Temple v. Bulmer*, [1943] S.C.R. 265; *Carter v. Alberta* (2002), 222 D.L.R. (4th) 40, 2002 ABCA 303, leave to appeal refused, [2003] 1 S.C.R. vii; *R. v. Bunting* (1885), 7 O.R. 524; *Penikett v. Canada* (1987), 45 D.L.R. (4th) 108; *Sibbeston v. Northwest Territories (Attorney General)*, [1988] 2 W.W.R. 501; *Pickin v. British Railways Board*, [1974] A.C. 765; *House of Commons v. Canada Labour Relations Board*, [1986] 2 F.C. 372; *Walker v. Jones*, 733 F.2d 923 (1984); *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004] 2 S.C.R. 223, 2004 SCC 40; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *Auclair v. Library of Parliament* (2002), 222

Heerspink, [1982] 2 R.C.S. 145; *Commission ontarienne des droits de la personne c. Simpsons-Sears Ltd.*, [1985] 2 R.C.S. 536; *Zurich Insurance Co. c. Ontario (Commission des droits de la personne)*, [1992] 2 R.C.S. 321; *Harvey c. Nouveau-Brunswick (Procureur général)*, [1996] 2 R.C.S. 876; *Telezone Inc. c. Canada (Attorney General)* (2004), 69 O.R. (3d) 161; *Nation et bande indienne de Samson c. Canada*, [2004] 1 R.C.F. 556, 2003 CF 975; *Fielding c. Thomas*, [1896] A.C. 600; *Kielley c. Carson* (1842), 4 Moo. P.C. 63, 13 E.R. 225; *Burdett c. Abbot* (1811), 14 East 1, 104 E.R. 501; *Ontario (Speaker of the Legislative Assembly) c. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595; *Martin c. Ontario*, [2004] O.J. No. 2247 (QL); *R. c. Richards; Ex parte Fitzpatrick and Browne* (1955), 92 C.L.R. 157; *Egan c. Willis* (1998), 158 A.L.R. 527; *Huata c. Prebble*, [2004] 3 NZLR 359, [2004] NZCA 147; *Stopforth c. Goyer* (1979), 23 O.R. (2d) 696; *Re Clark and Attorney-General of Canada* (1977), 17 O.R. (2d) 593; *Prebble c. Television New Zealand Ltd.*, [1995] 1 A.C. 321; *Hamilton c. Al Fayed*, [2000] 2 All E.R. 224; *Zündel c. Boudria* (1999), 46 O.R. (3d) 410; *R. c. Behrens*, [2004] O.J. No. 5135 (QL), 2004 ONCJ 327; *Tafler c. British Columbia (Commissioner of Conflict of Interest)* (1998), 161 D.L.R. (4th) 511; *Morin c. Crawford* (1999), 29 C.P.C. (4th) 362; *Payson c. Hubert* (1904), 34 R.C.S. 400; *Ainsworth Lumber Co. c. Canada (Attorney General)* (2003), 226 D.L.R. (4th) 93, 2003 BCCA 239; *Re Ouellet (No. 1)* (1976), 67 D.L.R. (3d) 73; *Landers c. Woodworth* (1878), 2 R.C.S. 158; *Bear c. State of South Australia* (1981), 48 S.A.I.R. 604; *Thompson c. McLean* (1998), 37 C.C.E.L. (2d) 170; *Renvoi relatif au projet de loi 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148; *Bradlaugh c. Gossett* (1884), 12 Q.B.D. 271; *Temple c. Bulmer*, [1943] R.C.S. 265; *Carter c. Alberta* (2002), 222 D.L.R. (4th) 40, 2002 ABCA 303, autorisation de pourvoi refusée, [2003] 1 R.C.S. vii; *R. c. Bunting* (1885), 7 O.R. 524; *Penikett c. Canada* (1987), 45 D.L.R. (4th) 108; *Sibbeston c. Northwest Territories (Attorney General)*, [1988] 2 W.W.R. 501; *Pickin c. British Railways Board*, [1974] A.C. 765; *Chambre des communes c. Conseil canadien des relations du travail*, [1986] 2 C.F. 372; *Walker c. Jones*, 733 F.2d 923 (1984); *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2; *Québec (Procureur général) c. Québec (Tribunal des droits de la personne)*, [2004] 2 R.C.S. 223, 2004 CSC 40; *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Québec (Procureur général)*, [2004] 2 R.C.S. 185, 2004 CSC 39; *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929; *St. Anne Nackawic Pulp & Paper Co. c. Section locale 219 du Syndicat*

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APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Linden and Rothstein J.J.A.), [2003] 1 F.C. 602, 222 D.L.R. (4th) 339, 296 N.R. 305, 46 Admin. L.R. (3d) 200, 22 C.C.E.L. (3d) 1, [2002] F.C.J. No. 1663 (QL), 2002 FCA 473, upholding a decision of Tremblay-Lamer J., [2002] 2 F.C. 583, 203 F.T.R. 175, 208 D.L.R. (4th) 749, 38 Admin. L.R. (3d) 252, 14 C.C.E.L. (3d) 125, [2001] F.C.J. No. 1818 (QL), 2001 FCT 1332, dismissing an application for judicial review of a decision from the Human Rights Tribunal (2001), 40 C.H.R.R. D/229, [2001] C.H.R.D. No. 15 (QL). Appeal allowed.

Neil Finkelstein, Jacques A. Emond and Lynne J. Poirier, for the appellants.

Andrew Raven and David Yazbeck, for the respondent Satnam Vaid.

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Létourneau, Linden et Rothstein), [2003] 1 C.F. 602, 222 D.L.R. (4th) 339, 296 N.R. 305, 46 Admin. L.R. (3d) 200, 22 C.C.E.L. (3d) 1, [2002] A.C.F. n° 1663 (QL), 2002 CAF 473, qui a confirmé une décision de la juge Tremblay-Lamer, [2002] 2 C.F. 583, 203 F.T.R. 175, 208 D.L.R. (4th) 749, 38 Admin. L.R. (3d) 252, 14 C.C.E.L. (3d) 125, [2001] A.C.F. n° 1818 (QL), 2001 CFPI 1332, rejetant une demande de contrôle judiciaire de la décision d'un tribunal des droits de la personne (2001), 40 C.H.R.R. D/229, [2001] D.C.D.P. n° 15 (QL). Pourvoi accueilli.

Neil Finkelstein, Jacques A. Emond et Lynne J. Poirier, pour les appelants.

Andrew Raven et David Yazbeck, pour l'intimé Satnam Vaid.

Philippe Dufresne and R. Daniel Pagowski, for the respondent the Canadian Human Rights Commission.

Anne M. Turley, for the intervener the Attorney General of Canada.

Dale Gibson, for the interveners the Honourable Senator Serge Joyal and the Honourable Senator Mobina S. B. Jaffer.

Peter Engelmann and Raija Pulkkinen, for the interveners the Canadian Association of Professional Employees and the Communications, Energy and Paperworkers Union of Canada.

Catherine Beagan Flood, for the intervener the Speaker of the Legislative Assembly of Ontario.

The judgment of the Court was delivered by

1

BINNIE J. — The former Speaker of the House of Commons, the Honourable Gilbert Parent, is accused of constructively dismissing his chauffeur, Mr. Satnam Vaid, for reasons that amount to workplace discrimination and harassment under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. The issue on this appeal is whether it is open to the Canadian Human Rights Tribunal to investigate Mr. Vaid's complaint.

2

The former Speaker denies any impropriety, but he joins the House of Commons in a preliminary objection that the hiring and firing of House employees are "internal affairs" which may not be questioned or reviewed by any tribunal or court outside the House itself. This immunity, the appellants say, emerged from the struggle for independence by the House of Commons from the prerogatives of the King, the authority of the Royal courts of law, and the special rights of the House of Lords reaching back in part to the time of the Tudor Kings and Queens in the 16th century. The appellants contend that these hard-won powers and immunities, collectively referred to as the privileges of Parliament, permit the Senate

Philippe Dufresne et R. Daniel Pagowski, pour l'intimée la Commission canadienne des droits de la personne.

Anne M. Turley, pour l'intervenant le procureur général du Canada.

Dale Gibson, pour les intervenants l'honorable sénateur Serge Joyal et l'honorable sénatrice Mobina S. B. Jaffer.

Peter Engelmann et Raija Pulkkinen, pour les intervenants l'Association canadienne des employés professionnels et le Syndicat canadien des communications, de l'énergie et du papier.

Catherine Beagan Flood, pour l'intervenant le Président de l'Assemblée législative de l'Ontario.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — On reproche à l'ancien président de la Chambre des communes, l'honorable Gilbert Parent, d'avoir congédié indirectement son chauffeur, M. Satnam Vaid, pour des motifs qui constituent un acte discriminatoire et du harcèlement en matière d'emploi au sens de la *Loi canadienne sur les droits de la personne*, L.R.C. 1985, ch. H-6. Dans le présent pourvoi, il s'agit de déterminer si le Tribunal canadien des droits de la personne a compétence pour examiner la plainte de M. Vaid.

L'ancien président de la Chambre des communes soutient n'avoir commis aucune irrégularité, mais il se joint à la Chambre pour présenter une objection préliminaire portant que l'embauche et le renvoi des employés de la Chambre sont des « affaires internes » que seule la Chambre peut examiner et qui ne sont donc pas du ressort des tribunaux. Les appelants soutiennent que cette immunité remonte en partie au XVI^e siècle, à l'époque de la monarchie des Tudors, et qu'elle est le fruit des efforts déployés par la Chambre des communes du Royaume-Uni pour assurer son indépendance par rapport aux pouvoirs de prérogative du Roi, à l'autorité des cours royales de justice et aux droits spéciaux de la Chambre des lords. Les appelants font valoir que ces

and the House to conduct their employee relations free from interference from the Canadian Human Rights Commission or any other body outside Parliament itself.

The respondent Canadian Human Rights Commission, which seeks to investigate Mr. Vaid's allegations, says it is unthinkable that Parliament would seek to deny its employees the benefit of labour and human rights protections which Parliament itself has imposed on every other federal employer.

There are few issues as important to our constitutional equilibrium as the relationship between the legislature and the other branches of the State on which the Constitution has conferred powers, namely the executive and the courts. The resolution of this issue is especially important when the action of the Speaker sought to be immunized from outside scrutiny is directed against a stranger to the House (i.e., not a Member or official) who is remote from the legislative functions that parliamentary privilege was originally designed to protect. The courts below held that parliamentary privilege does not include the freedom to discriminate on grounds prohibited by the *Canadian Charter of Rights and Freedoms* or the *Canadian Human Rights Act* because such discrimination is not necessary to the *proper* functioning of the Senate or House of Commons. On this view, an allegation of discrimination destroys any privilege that might otherwise immunize the Speaker's conduct from external review. I do not agree. The purpose of privilege is to recognize Parliament's *exclusive* jurisdiction to deal with complaints within its privileged sphere of activity. The proper focus, in my view, is not the grounds on which a particular privilege is exercised, but the prior question of the existence and scope of the privilege asserted by Parliament in the first place.

pouvoirs et immunités acquis de haute lutte, collectivement désignés comme les privilèges du Parlement, permettent au Sénat et à la Chambre de gérer leurs relations avec leurs employés à l'abri de l'ingérence de tout organisme autre que le Parlement, et notamment de la Commission canadienne des droits de la personne.

La Commission canadienne des droits de la personne, intimée, qui veut mener une enquête sur les allégations de M. Vaid, affirme qu'il est inconcevable que le Parlement puisse chercher à priver ses employés des protections existantes en matière de relations de travail et de droits de la personne, auxquelles il a lui-même assujéti tous les autres employeurs fédéraux.

Peu de questions revêtent autant d'importance pour notre équilibre constitutionnel que le rapport entre la législature et les autres organes de l'État auxquels la Constitution a conféré des pouvoirs, soit l'exécutif et les tribunaux judiciaires. La résolution de cette question est d'une importance particulière lorsque l'action du président de la Chambre que l'on cherche à soustraire à l'examen d'un organe externe vise une personne étrangère à la Chambre (c.-à-d. qui n'est ni un membre, ni un fonctionnaire de la Chambre) et qui n'a rien à voir avec les fonctions législatives que le privilège parlementaire était initialement censé protéger. Les tribunaux d'instance inférieure ont statué que le privilège parlementaire ne confère pas la liberté d'exercer une discrimination fondée sur un motif interdit par la *Charte canadienne des droits et libertés* ou par la *Loi canadienne sur les droits de la personne*, car cette discrimination n'est pas nécessaire au *bon* fonctionnement du Sénat ou de la Chambre des communes. Suivant ce raisonnement, une allégation de discrimination a pour effet d'écarter tout privilège qui pourrait autrement soustraire la conduite du président de la Chambre à un examen externe. Je ne suis pas d'accord. L'objet du privilège parlementaire est de reconnaître la compétence *exclusive* du Parlement d'examiner les plaintes qui se situent dans sa sphère d'activité protégée. À mon avis, il faut diriger notre attention non pas sur les motifs qui sous-tendent l'exercice du privilège, mais en premier lieu sur la question préalable de l'existence et de l'étendue du privilège invoqué par le Parlement.

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Focussing, then, on the scope of the claimed privilege, the respondents argue that the duties of the Speaker's chauffeur appear too remote from the legislative function of the House and that the respondent Vaid's dismissal is not immunized from external review by virtue of parliamentary privilege. I will deal with this issue at some length in the reasons that follow. My conclusion is that the onus was on the appellants to establish a privilege that immunizes their conduct from the ordinary law governing the resolution of disputes with support staff such as Mr. Vaid, and that the appellants have failed to do so. I would therefore reject the appellants' first ground of appeal based on an alleged parliamentary privilege. I would hold that the language used by Parliament in the *Canadian Human Rights Act* is wide enough to cover its own employees and that the sweeping exemption now asserted by the appellants has not been shown to be intended by Parliament nor, on general principles, is it necessary or justifiable as parliamentary privilege.

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The appellants also put forward a narrower administrative law objection. They contend that the respondent Vaid falls within the group of employees for whom Parliament has enacted a special labour relations regime under the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.) ("PESRA"). Mr. Vaid, on this view, is entitled to invoke the principles of the *Canadian Human Rights Act*, but he must do so by the special procedure governing the bulk of parliamentary employees. I agree that the respondent Vaid's workplace complaints could have been adjudicated under PESRA (as indeed his earlier complaints were dealt with in 1995) and that the appellant House of Commons is entitled to require him to utilize the statutory machinery that Parliament has enacted, which is clearly stated to be the exclusive method of dispute resolution for employees such as the respondent Vaid. This conclusion, which rests entirely on administrative law principles and has nothing to do with

Ainsi, mettant l'accent sur l'étendue du privilège revendiqué, les intimés soutiennent que les tâches du chauffeur du président de la Chambre n'ont pas de lien assez étroit avec la fonction législative de la Chambre pour que le privilège parlementaire mette le congédiement de M. Vaid à l'abri d'un examen externe. Sur cette question, que j'examinerai en détail dans les motifs qui suivent, je conclus qu'il incombait aux appelants d'établir l'existence d'un privilège les soustrayant à l'application des lois ordinaires régissant le règlement des différends avec les employés de soutien comme M. Vaid, et qu'ils ne se sont pas acquittés de ce fardeau. Par conséquent, je suis d'avis de rejeter le premier moyen d'appel fondé sur l'existence d'un privilège parlementaire. J'estime que les termes utilisés par le Parlement dans la *Loi canadienne sur les droits de la personne* sont suffisamment larges pour englober ses propres employés, et qu'il n'a pas été démontré que le législateur a voulu faire bénéficier les appelants de l'exemption générale qu'ils invoquent maintenant, ni qu'en vertu des principes généraux, pareille exemption est nécessaire ou justifiable en tant que privilège parlementaire.

Les appelants présentent aussi un argument plus circonscrit relevant du droit administratif. Ils font valoir que l'intimé, M. Vaid, appartient au groupe des employés à l'égard desquels le Parlement a établi un régime particulier de relations de travail en édictant la *Loi sur les relations de travail au Parlement*, L.R.C. 1985, ch. 33 (2^e suppl.) (« LRTP »). Selon cette thèse, M. Vaid peut invoquer les principes énoncés dans la *Loi canadienne sur les droits de la personne*, mais il doit pour ce faire se conformer à la procédure spéciale qui régit l'ensemble des employés du Parlement. Je conviens que les plaintes de l'intimé, M. Vaid, en matière de relations de travail auraient pu faire l'objet d'un arbitrage sous le régime de la LRTP (les plaintes antérieures de l'intimé ayant d'ailleurs été réglées ainsi en 1995) et que la Chambre des communes, appelante, a le droit d'exiger qu'il ait recours au mécanisme prescrit par cette loi du Parlement, expressément désigné comme mode exclusif de règlement des différends pour les employés

parliamentary privilege, entitles the appellants to succeed. The appeal is therefore allowed.

I. Facts

Satnam Vaid worked as a chauffeur to successive Speakers of the House of Commons between 1984 and 1994. He was initially terminated on January 11, 1995 because it was said he refused to assume new duties under a changed job description and then refused alternative employment. He grieved the termination pursuant to PESRA. The matter was referred to adjudication and on July 27, 1995, the Board of Adjudication found in favour of Mr. Vaid and ordered that he be reinstated to his position as chauffeur ([1995] C.P.S.S.R.B. No. 74 (QL)). The Board also concluded that there was evidence insufficient to support a finding of discrimination:

Mr. Vaid has alleged discrimination and suggested that he might have been asked to clean dishes because of the colour of his skin. The evidence presented certainly does not permit me to reach that conclusion.

Mr. Vaid returned to work on August 17, 1995, at which time he was told that the chauffeur's position had been designated "bilingual imperative". Lacking the necessary French language skills to resume his former post, he was sent for French language training.

In a letter dated April 8, 1997, Mr. Vaid advised the appellant House of Commons that he wished to come back to work. The Speaker's office replied on May 12, 1997 that, because of reorganization, his former position would be made surplus effective May 29, 1997.

Mr. Vaid then filed two complaints with the respondent Commission, both dated July 10, 1997, alleging separately that the appellant Speaker and the appellant House of Commons discriminated against him on the basis of his race, colour and national or ethnic origin. He also complained of workplace harassment. With respect to the appellant

comme M. Vaid. Compte tenu de cette conclusion, qui repose entièrement sur le droit administratif et qui n'a rien à voir avec la question du privilège parlementaire, les appelants doivent avoir gain de cause. Le pourvoi est donc accueilli.

I. Les faits

Entre 1984 et 1994, Satnam Vaid a travaillé en qualité de chauffeur pour plusieurs présidents successifs de la Chambre des communes. Il a d'abord été congédié le 11 janvier 1995 parce qu'il aurait refusé d'assumer de nouvelles fonctions lui incombant selon une nouvelle description de travail et qu'il aurait refusé un autre poste. Il a déposé un grief sous le régime de la LRTP. L'affaire a été renvoyée à l'arbitrage et, le 27 juillet 1995, le conseil d'arbitrage a donné gain de cause à M. Vaid et ordonné qu'il soit réintégré dans son poste de chauffeur ([1995] C.R.T.F.P.C. n° 74 (QL)). Le conseil a aussi conclu que la preuve ne permettait pas de conclure qu'il y avait eu discrimination :

M. Vaid a allégué de la discrimination, laissant entendre que si on lui a demandé de laver de la vaisselle, c'est peut-être en raison de la couleur de sa peau. La preuve produite ne me permet sûrement pas de tirer cette conclusion.

M. Vaid est retourné travailler le 17 août 1995, date à laquelle on lui a dit que le poste de chauffeur avait été désigné « bilingue à nomination impérative ». M. Vaid n'ayant pas les connaissances nécessaires en français pour reprendre son ancien emploi, on l'a envoyé suivre des cours de français.

Dans une lettre datée du 8 avril 1997, M. Vaid a informé la Chambre des communes, appelante, qu'il voulait revenir au travail. Le 12 mai 1997, le bureau du président lui a répondu que, par suite d'une réorganisation, son ancien poste deviendrait excédentaire le 29 mai 1997.

M. Vaid a par la suite déposé devant la Commission intimée deux plaintes séparées, datées du 10 juillet 1997, contre la Chambre des communes et son président, appelants, alléguant qu'ils avaient agi de façon discriminatoire à son endroit du fait de sa race, de sa couleur et de son origine nationale ou ethnique. Il s'est également plaint d'avoir été harcelé au

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House of Commons, he alleged refusal of continued employment.

II. Judicial History

11 In response to these complaints, the appellants challenged the jurisdiction of the Canadian Human Rights Tribunal to inquire into their conduct. The issue was heard by the Tribunal which, by a majority decision on April 25, 2001, ruled in favour of Mr. Vaid and the Commission ((2001), 40 C.H.R.R. D/229). The appellants then sought a judicial review of this ruling. Their application was refused by the Federal Court, Trial Division, [2002] 2 F.C. 583, 2001 FCT 1332, and this refusal was affirmed by a unanimous Federal Court of Appeal, [2003] 1 F.C. 602, 2002 FCA 473.

12 Létourneau J.A., with whom Linden J.A. concurred, noted the quasi-constitutional status of the *Canadian Human Rights Act* and the fully constitutional status of parliamentary privilege. In his view, however, the parliamentary privilege claimed by the appellants did not exist.

13 He defined such privilege as “the powers of the House necessary to ensure its proper functioning and maintain its dignity and integrity” (para. 34). Létourneau J.A. stated that both the existence and the exercise of any power asserted by the legislature must be shown to be necessary.

The Courts’ review function, in cases like the present where a parliamentary privilege is claimed, I believe, involves two steps: the first one to determine that the powers claimed need to exist and the second, when satisfied as to the necessity of their existence, to determine that their exercise was necessary to ensure the proper functioning of the House and maintain its dignity and integrity. [Emphasis added; para. 36.]

14 In the majority view, an allegation of discrimination contrary to the *Charter* or the *Canadian Human Rights Act* was not immunized by parliamentary privilege because such discriminatory conduct, if proven, would actually diminish the integrity and

travail. Il reprochait enfin à la Chambre des communes d’avoir refusé de continuer à l’employer.

II. Historique judiciaire

En réponse aux plaintes de M. Vaid, les appelants ont prétendu que le Tribunal canadien des droits de la personne n’avait pas compétence pour examiner leur conduite. Le Tribunal a instruit l’affaire et a tranché en faveur de M. Vaid et de la Commission dans une décision majoritaire datée du 25 avril 2001 ((2001), 40 C.H.R.R. D/229). Les appelants ont par la suite demandé le contrôle judiciaire de cette décision. Leur demande a été rejetée par la Section de première instance de la Cour fédérale, [2002] 2 C.F. 583, 2001 CFPI 1332, dont la décision a été confirmée à l’unanimité par la Cour d’appel fédérale, [2003] 1 C.F. 602, 2002 CAF 473.

Le juge Létourneau, aux motifs duquel a souscrit le juge Linden, a souligné le statut quasi constitutionnel de la *Loi canadienne sur les droits de la personne* et le statut pleinement constitutionnel du privilège parlementaire. Il a toutefois conclu que le privilège parlementaire revendiqué par les appelants n’existait pas.

Le juge Létourneau a défini le privilège parlementaire comme se rapportant aux « pouvoirs de la Chambre qui sont nécessaires à son bon fonctionnement et au maintien de sa dignité et de son intégrité » (par. 34). Il a affirmé que la nécessité à la fois de l’existence et de l’exercice du pouvoir revendiqué par l’organisme législatif devait être démontrée.

La fonction d’examen de la Cour, dans des cas comme celui qui nous occupe où un privilège parlementaire est revendiqué, comporte à mon avis deux étapes : il s’agit en premier lieu de déterminer si les pouvoirs revendiqués doivent exister et, en second lieu, lorsque la nécessité de leur existence est établie, de déterminer si leur exercice est nécessaire au bon fonctionnement de la Chambre et au maintien de la dignité et de l’intégrité de la Chambre. [Je souligne; par. 36.]

Selon l’opinion majoritaire, le privilège parlementaire ne pouvait être invoqué à l’égard d’un acte discriminatoire interdit par la *Charte* ou par la *Loi canadienne sur les droits de la personne* parce que la conduite en cause, si elle était établie,

dignity of the House, without improving its ability to fulfill its constitutional mandate. The enactment by Parliament of PESRA would, in any event, prevent privilege from applying.

On the administrative law point, Létourneau J.A. held that a clear legislative enactment is required to exempt an employer from the application of human rights obligations. In his view, PESRA is not such a clear legislative enactment. Consequently, parliamentary employees are entitled to invoke the assistance of the Canadian Human Rights Commission.

Rothstein J.A., concurring in the result, disagreed that the courts could review each *exercise* of a claimed privilege. “[I]t is the particular exercise of a valid privilege that is immune from the Court’s scrutiny. However, what constitutes the scope of a valid privilege is a preliminary jurisdictional question” (para. 76). The appellants claimed that the right of the House of Commons to appoint and control its staff was immunized from any external review, but Rothstein J.A. concluded that no evidence or argument had been “put forward as to why a right to discriminate, contrary to the provisions of the CHRA” met the necessity test (para. 81). Accordingly, “parliamentary privilege does not displace application of the CHRA to employees of Parliament” (para. 84).

On the administrative law point, Rothstein J.A. noted that s. 2 of PESRA displaces other tribunals that might otherwise have concurrent jurisdiction. However, he was of the view that PESRA does not provide the comprehensive rights regarding human rights complaints that the *Canadian Human Rights Act* does, and as a result, the two statutes do not provide for “matters similar”. As a matter of statutory interpretation, therefore, PESRA would not exclude application of the *Canadian Human Rights Act*.

porterait en fait atteinte à l’intégrité et à la dignité de la Chambre, sans améliorer sa capacité de remplir son mandat constitutionnel. De toute façon, le privilège ne s’appliquerait pas, compte tenu de l’adoption de la LRTP par le Parlement.

Pour ce qui est de l’argument relevant du droit administratif, le juge Létourneau a conclu que seul un texte législatif clair peut dégager un employeur de ses obligations en matière de droits de la personne. À son avis, la LRTP ne respecte pas ce critère. Par conséquent, les employés du Parlement ont le droit de s’adresser à la Commission canadienne des droits de la personne pour qu’elle intervienne.

Le juge Rothstein, souscrivant au résultat, n’était pas d’accord pour dire que les tribunaux pouvaient contrôler *l’exercice* particulier d’un privilège. « [C]’est l’exercice particulier d’un privilège valide qui est soustrait à l’examen du tribunal. Cependant, le champ lui-même d’un privilège valide constitue une question préjudicielle de compétence » (par. 76). Les appelants ont prétendu que le droit de la Chambre des communes de nommer et de gérer son personnel était à l’abri de tout examen externe, mais le juge Rothstein a conclu qu’aucune preuve ni aucune argumentation n’avaient « été avancées pour expliquer en quoi le droit d’exercer une discrimination, au mépris des dispositions de la LCDP », satisfaisait au critère de nécessité (par. 81). Par conséquent, « le privilège parlementaire ne supprime pas l’application de la LCDP aux employés du Parlement » (par. 84).

Pour ce qui est de l’argument fondé sur le droit administratif, le juge Rothstein a souligné que l’art. 2 de la LRTP exclut les autres tribunaux administratifs qui pourraient par ailleurs avoir compétence concurrente. Toutefois, il s’est dit d’avis qu’en matière de plaintes pour atteinte aux droits de la personne, la LRTP ne confère pas des droits aussi étendus que la *Loi canadienne sur les droits de la personne* et que, par conséquent, les deux lois ne visent pas des « questions semblables ». Ainsi, selon les règles d’interprétation législative, la LRTP n’aurait pas pour effet d’écarter l’application de la *Loi canadienne sur les droits de la personne*.

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18 In the result, Rothstein J.A. agreed with the majority that neither parliamentary privilege nor PESRA precluded the application of the *Canadian Human Rights Act* to employees of either Chamber.

III. Constitutional Question

19 On December 2, 2003, the Chief Justice stated the following constitutional question:

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 matters?

IV. Analysis

20 It is a wise principle that the courts and Parliament strive to respect each other's role in the conduct of public affairs. Parliament, for its part, refrains from commenting on matters before the courts under the *sub judice* rule. The courts, for their part, are careful not to interfere with the workings of Parliament. **None of the parties to this proceeding questions the pre-eminent importance of the House of Commons as "the grand inquest of the nation".** Nor is doubt thrown by any party on the need for its legislative activities to proceed unimpeded by any external body or institution, including the courts. It would be intolerable, for example, if a member of the House of Commons who was overlooked by the Speaker at question period could invoke the investigatory powers of the Canadian Human Rights Commission with a complaint that the Speaker's choice of another member of the House discriminated on some ground prohibited by the *Canadian Human Rights Act*, or to seek a ruling from the ordinary courts that the Speaker's choice violated the member's guarantee of free speech under the *Charter*. These are truly matters "internal to the House" to be resolved by its own procedures. Quite apart from the potential interference by outsiders in the direction of the House, such external intervention would inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business and on that account would

En définitive, le juge Rothstein a convenu avec la majorité que ni le privilège parlementaire ni la LRTP n'empêchaient l'application de la *Loi canadienne sur les droits de la personne* aux employés de l'une ou l'autre des Chambres.

III. La question constitutionnelle

Le 2 décembre 2003, la Juge en chef a formulé la question constitutionnelle suivante :

La *Loi canadienne sur les droits de la personne*, L.R.C. 1985, ch. H-6, est-elle, du fait d'un privilège parlementaire, constitutionnellement inapplicable à la Chambre des communes et à ses membres en ce qui a trait aux relations de travail au Parlement?

IV. Analyse

C'est suivant un principe d'une grande sagesse que les tribunaux et le Parlement s'efforcent de respecter leurs rôles respectifs dans la conduite des affaires publiques. Le Parlement s'abstient de commenter les affaires dont les tribunaux sont saisis conformément à la règle du *sub judice*. Les tribunaux, quant à eux, prennent soin de ne pas s'immiscer dans le fonctionnement du Parlement. Aucune des parties au présent pourvoi ne remet en question l'importance prépondérante de la Chambre des communes en tant que « grand enquêteur de la nation ». Aucune ne doute non plus de la nécessité que la Chambre des communes puisse exercer ses activités législatives libre de toute ingérence de la part d'organismes ou d'institutions externes, y compris les tribunaux. Il serait inacceptable, par exemple, qu'un membre de la Chambre des communes à qui le président n'aurait pas accordé la parole pendant la période des questions puisse se prévaloir des pouvoirs d'enquête de la Commission canadienne des droits de la personne pour se plaindre que le choix du président de la Chambre de permettre à un autre de ses membres de s'exprimer constitue un acte discriminatoire fondé sur l'un des motifs illicites énumérés dans la *Loi canadienne sur les droits de la personne*, ou encore qu'il puisse demander aux tribunaux ordinaires de déclarer que la décision du président est contraire à la *Charte* parce qu'elle a porté atteinte à sa liberté d'expression. Il s'agit là de véritables questions

be unacceptable even if, in the end, the Speaker's rulings were vindicated as entirely proper.

Parliamentary privilege, therefore, is one of the ways in which the fundamental constitutional separation of powers is respected. In Canada, the principle has its roots in the preamble to our *Constitution Act, 1867* which calls for "a Constitution similar in Principle to that of the United Kingdom". Each of the branches of the State is vouchsafed a measure of autonomy from the others. Parliamentary privilege was partially codified in art. 9 of the U.K. *Bill of Rights* of 1689, 1 Will. & Mar. sess. 2, c. 2, but the freedom of speech to which it refers was asserted at least as early as 1523 (*Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23rd ed. 2004), at p. 80). Parliamentary privilege is a principle common to all countries based on the Westminster system, and has a loose counterpart in the Speech or Debate Clause of the United States Constitution, art. 1, § 6, cl. 1.

The respondent Vaid does not quarrel either with the existence or the importance of parliamentary privilege. His argument is that the Speaker's attempt to treat his dismissal from his job as chauffeur as an expression of such lofty doctrine is to overreach, if not trivialize, its true role and function. Even if the employment arrangements of some employees closely connected to the legislative process are covered by privilege, the respondents argue that the Speaker goes 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

« internes relevant de la Chambre » que celle-ci doit régler suivant sa propre procédure. Indépendamment de la possibilité d'ingérence externe dans les affaires de la Chambre, une telle intervention de l'extérieur créerait inévitablement des délais, des perturbations et des incertitudes, et elle entraînerait des frais, paralysant les affaires de la nation. Pour cette seule raison, elle serait inacceptable même si, en définitive, les décisions du président de la Chambre étaient jugées appropriées et validées.

Le privilège parlementaire constitue donc l'un des moyens qui permettent d'assurer le respect du principe fondamental de la séparation constitutionnelle des pouvoirs. Au Canada, ce principe émane du préambule de la *Loi constitutionnelle de 1867*, qui témoigne du désir des provinces d'établir « une constitution reposant sur les mêmes principes que celle du Royaume-Uni ». Chacun des pouvoirs de l'État se voit garantir une certaine autonomie par rapport aux autres. Le principe du privilège parlementaire a été en partie codifié à l'art. 9 du *Bill of Rights* de 1689 du Royaume-Uni, 1 Will & Mar. sess. 2, ch. 2, mais le droit à la liberté de parole auquel il renvoie existe depuis au moins 1523 (*Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23^e éd. 2004), p. 80). Le privilège parlementaire est un principe commun à tous les pays dont le régime parlementaire s'inspire du système britannique et la disposition relative à la liberté de discours ou de débat qui figure dans la Constitution américaine (art. 1, § 6, cl. 1) lui fait écho dans une certaine mesure.

L'intimé, M. Vaid, ne conteste ni l'existence ni l'importance du privilège parlementaire. Il fait plutôt valoir qu'en tentant d'associer son congédiement en qualité de chauffeur à l'application d'un principe aussi noble, le président de la Chambre pousse à outrance, voire banalise la fonction et le rôle véritables de ce principe. Les intimés soutiennent que, même si les conditions d'emploi de certains employés étroitement liés au processus législatif sont visées par le privilège, le président de la Chambre va trop loin en tentant d'appliquer cette doctrine ancienne aux rapports de la Chambre avec ses employés de soutien tels les chauffeurs, les encadrateurs de tableaux, les serruriers, les

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play comparable supporting roles on Parliament Hill.

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Over the years, the assertion of parliamentary privilege has varied in its scope and extent. In the leading English case of *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112 (Q.B.), the court was advised that “[t]he most trifling civil injuries to members [of Parliament], even trespasses committed upon their servants, though on occasions unconnected with the discharge of any Parliamentary duty, have been repeatedly the subject of enquiry [by either Chamber of Parliament] under the head of privilege” (pp. 1116-17), including “[k]illing Lord Galway’s rabbits” and “[f]ishing in Mr. Joliffe’s pond” (p. 1117). The court in *Stockdale v. Hansard* commented on this evidence that privilege “did not and could not extend to such a case” (p. 1156). On the other hand, a leading Canadian authority, *Beauchesne’s Rules & Forms of the House of Commons of Canada* (6th ed. 1989), records at pp. 11-12 a ruling of the Speaker of the Canadian House of Commons on April 29, 1971 asserting a much narrower concept of privilege, as follows:

On a number of occasions I have defined what I consider to be parliamentary privilege. Privilege is what sets hon. members apart from other citizens giving them rights which the public do not possess. I suggest we should be careful in construing any particular circumstance which might add to the privileges which have been recognized over the years and perhaps over the centuries as belonging to members of the House of Commons. In my view, parliamentary privilege does not go much beyond the right of free speech in the House of Commons and the right of a member to discharge his duties in the House as a member of the House of Commons. [Emphasis added.]

(*House of Commons Debates*, vol. V, 3rd Sess., 28th Parl., April 29, 1971, at p. 5338)

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It is evident that there have been variations in the extent of privilege asserted by Parliament over the years, as well as a difference on occasion between

gestionnaires de parcs de stationnement, le personnel de la restauration et d’autres employés de la Colline du Parlement jouant un rôle comparable.

L’étendue et la portée du privilège parlementaire revendiqué ont varié au fil des ans. Dans l’arrêt de principe anglais *Stockdale c. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112 (B.R.), on a plaidé que [TRADUCTION] « [l]es préjudices civils les plus dérisoires causés aux membres [du Parlement], y compris les atteintes à la personne de leurs employés, même dans un contexte sans aucun lien avec l’exercice des fonctions parlementaires, ont en maintes occasions fait l’objet d’enquêtes [de l’une ou l’autre des Chambres du Parlement] sur le fondement du privilège parlementaire » (p. 1116-1117), notamment lorsque [TRADUCTION] « [l]es lapins de lord Galway ont été tués » et « [d]es poissons capturés dans l’étang de M. Joliffe » (p. 1117). La cour a répondu dans *Stockdale c. Hansard* que le privilège [TRADUCTION] « ne s’appliquait pas et ne pouvait pas s’appliquer à ce type de situation » (p. 1156). Par ailleurs, dans la *Jurisprudence parlementaire de Beauchesne* (6^e éd. 1989), qui fait autorité en la matière au Canada, l’auteur reproduit aux p. 11-12 une déclaration du président de la Chambre des communes du Canada, datée du 29 avril 1971, qui exprime une conception beaucoup plus étroite de la notion de privilège :

À maintes reprises, j’ai défini ma conception du privilège parlementaire. Le privilège est la disposition qui distingue les députés d’autres citoyens, leur conférant des droits dont ne jouissent pas les autres. À mon avis, nous devrions exercer une grande prudence lorsque nous tendons, dans des circonstances données, à ajouter des privilèges à ceux qui sont reconnus depuis des années, des siècles peut-être, comme propres aux députés. À mon avis, le privilège parlementaire ne va pas beaucoup au-delà du droit de libre parole à la Chambre et du droit d’un député de s’acquitter de ses fonctions à la Chambre en tant que représentant aux Communes. [Je souligne.]

(*Débats de la Chambre des communes*, vol. V, 3^e sess., 28^e lég., 29 avril 1971, p. 5338)

L’étendue du privilège revendiqué par le Parlement a manifestement varié avec le temps et on a pu constater, à l’occasion, un écart entre l’étendue du

the scope of a privilege asserted by Parliamentarians and the scope of a privilege the courts have recognized as justified (as in *Stockdale v. Hansard*). In resolving such conflicts it is important that both Parliament and the courts respect “the legitimate sphere of activity of the other”:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

(*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*), [1993] 1 S.C.R. 319, per McLachlin J., at p. 389)

To this, I would add the observation of Dickson C.J. in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at p. 91:

There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

At the same time, relations between Parliament and its employees are clearly matters within the legislative authority of Parliament. The statutory language of the *Canadian Human Rights Act*, on its face, is broad enough to cover labour relations on Parliament Hill. There is much to be said for the respondents’ view that Parliament should not be thought to intend to exempt its employees from access to human rights guarantees which Parliament itself has declared applicable to all “matters coming within the legislative authority of Parliament” (*Canadian Human Rights Act*, s. 2).

At this stage, a further constitutional point arises. The appellants say it is a well-established principle

priviège reconnu par les tribunaux et celle du privilège revendiqué par les parlementaires (comme ce fut le cas dans *Stockdale c. Hansard*). Pour résoudre de tels conflits, il importe que le Parlement et le pouvoir judiciaire respectent chacun « le domaine légitime de compétence de l’autre » :

Notre gouvernement démocratique comporte plusieurs branches : la Couronne représentée par le gouverneur général et ses homologues provinciaux, l’organisme législatif, l’exécutif et les tribunaux. Pour assurer le fonctionnement de l’ensemble du gouvernement, il est essentiel que toutes ces composantes jouent le rôle qui leur est propre. Il est également essentiel qu’aucune de ces branches n’outrepasse ses limites et que chacune respecte de façon appropriée le domaine légitime de compétence de l’autre.

(*New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l’Assemblée législative)*), [1993] 1 R.C.S. 319, la juge McLachlin, p. 389)

À cela, j’ajouterais la remarque suivante exprimée par le juge en chef Dickson dans *Canada (Vérificateur général) c. Canada (Ministre de l’Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49, p. 91 :

Il existe tout un éventail de questions litigieuses exigeant l’exercice d’un jugement judiciaire pour déterminer si elles relèvent à bon droit de la compétence des tribunaux. Finalement, un tel jugement dépend de l’appréciation par le judiciaire de sa propre position dans le système constitutionnel.

Or, il est clair que les relations entre le Parlement et ses employés relèvent du champ de compétence du Parlement du Canada. Le libellé de la *Loi canadienne sur les droits de la personne* est suffisamment large, à sa simple lecture, pour englober les relations de travail sur la Colline du Parlement. Beaucoup d’arguments militent en faveur de la prétention des intimés qu’il ne faut pas croire que le Parlement entend priver ses employés des garanties existantes en matière de droits de la personne, alors qu’il les a lui-même déclarées applicables « dans le champ de compétence du Parlement du Canada » (*Loi canadienne sur les droits de la personne*, art. 2).

À ce stade, une autre question se pose sur le plan constitutionnel. Les appellants affirment qu’il

that an express provision of a statute is necessary to abrogate a privilege of Parliament or its members (*Duke of Newcastle v. Morris* (1870), L.R. 4 H.L. 661). The respondents reply that human rights law is to be broadly interpreted, and that short of “[the] legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises”, *per* Lamer J. in *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at p. 158; see also *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, at p. 339. In my view, for the reasons to be explained, the *Canadian Human Rights Act* does apply to the employees of the Senate and House of Commons of Canada.

est bien établi que seule une disposition législative expresse peut abroger un privilège du Parlement ou de ses membres (*Duke of Newcastle c. Morris* (1870), L.R. 4 H.L. 661). Les intimés répliquent que les lois en matière de droits de la personne doivent recevoir une interprétation libérale et qu’à moins que « [le] législateur ne se soit exprimé autrement en termes clairs et exprès dans le Code ou dans toute autre loi, il a voulu que le Code ait préséance sur toutes les autres lois lorsqu’il y a conflit », le juge Lamer dans *Insurance Corp. of British Columbia c. Heerspink*, [1982] 2 R.C.S. 145, p. 158; voir *Commission ontarienne des droits de la personne c. Simpsons-Sears Ltd.*, [1985] 2 R.C.S. 536; *Zurich Insurance Co. c. Ontario (Commission des droits de la personne)*, [1992] 2 R.C.S. 321, p. 339. À mon avis, pour les motifs que j’exposerai plus loin, la *Loi canadienne sur les droits de la personne* s’applique aux employés du Sénat et de la Chambre des communes du Canada.

27 In order to resolve the issues raised by this appeal, it is first necessary to discuss whether or not the privilege asserted by the appellants is well founded, and if so, whether it precludes resort by the respondent Vaid to independent adjudication.

Pour statuer sur les questions soulevées dans le présent pourvoi, il faut d’abord déterminer si le privilège revendiqué par les appelants est bien fondé et, dans l’affirmative, s’il empêche l’intimé, M. Vaid, de soumettre son cas à une instance juridictionnelle indépendante.

A. General Principles of Parliamentary Privilege

A. Principes généraux applicables au privilège parlementaire

28 The contours of parliamentary privilege, and the relationship between Parliament and the courts relative to its exercise, have been dealt with by this Court in a number of cases, most recently in connection with the “inherent” privileges of provincial legislative assemblies in *New Brunswick Broadcasting* and *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876.

Notre Cour s’est prononcée à plusieurs reprises sur les limites du privilège parlementaire et sur le rapport entre le Parlement et les tribunaux en ce qui a trait à son exercice, notamment, relativement aux privilèges « inhérents » des assemblées législatives provinciales, dans les arrêts récents *New Brunswick Broadcasting* et *Harvey c. Nouveau-Brunswick (Procureur général)*, [1996] 2 R.C.S. 876.

29 While there are some significant differences between privilege at the federal level, for which specific provision is made in s. 18 of the *Constitution Act, 1867*, and privilege at the provincial level, which has a different constitutional underpinning, many of the relevant issues concerning privilege were resolved in *New Brunswick Broadcasting* and earlier cases, and there is no need to repeat the analysis

Malgré des différences notables entre le privilège dont jouit le Parlement fédéral, expressément prévu à l’art. 18 de la *Loi constitutionnelle de 1867*, et celui que possèdent les assemblées législatives provinciales, dont le fondement constitutionnel est différent, beaucoup de questions pertinentes en matière de privilège ont été résolues dans *New Brunswick Broadcasting* et d’autres arrêts antérieurs. Il n’est

here. For present purposes, it is sufficient to state a number of propositions that are now accepted both by the courts and by the parliamentary experts.

1. Legislative bodies created by the *Constitution Act, 1867* do not constitute enclaves shielded from the ordinary law of the land. “The tradition of curial deference does not extend to everything a legislative assembly might do, but is firmly attached to certain specific activities of legislative assemblies, i.e., the so-called privileges of such bodies” (*New Brunswick Broadcasting*, at pp. 370-71). Privilege “does not embrace and protect activities of individuals, whether members or non-members, simply because they take place within the precincts of Parliament” (U.K., Joint Committee on Parliamentary Privilege, vol. 1, *Report and Proceedings of the Committee* (1999) (“British Joint Committee Report”), at para. 242 (emphasis in original)).

2. Parliamentary privilege in the Canadian context is the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions (*Beauchesne’s Rules & Forms*, at p. 11; *Erskine May*, at p. 75; *New Brunswick Broadcasting*, at p. 380).

3. Parliamentary privilege does not create a gap in the general public law of Canada but is an important part of it, inherited from the Parliament at Westminster by virtue of the preamble to the *Constitution Act, 1867* and in the case of the Canadian Parliament, through s. 18 of the same Act (*New Brunswick Broadcasting*, at pp. 374-78; *Telezone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3d) 161 (C.A.), at p. 165; and *Samson Indian Nation and Band v. Canada*, [2004] 1 F.C.R. 556, 2003 FC 975).

donc pas nécessaire d’en reprendre ici l’analyse. Il suffira, pour trancher le présent pourvoi, d’énoncer un certain nombre de propositions maintenant acceptées tant par les tribunaux que par les spécialistes du domaine parlementaire.

1. Les organismes législatifs créés par la *Loi constitutionnelle de 1867* ne constituent pas des enclaves à l’abri de l’application du droit commun du pays. « La tradition de retenue judiciaire ne s’applique pas à tous les actes susceptibles d’être accomplis par une assemblée législative, mais se rattache fermement à certaines de ses activités spécifiques, c’est-à-dire à ce qu’on appelle les privilèges de ces organismes » (*New Brunswick Broadcasting*, p. 371). Le privilège [TRADUCTION] « n’englobe pas ni ne protège les activités des individus, qu’ils soient ou non membres de la Chambre, du seul fait qu’elles sont exercées dans l’enceinte parlementaire » (R.-U., Joint Committee on Parliamentary Privilege, *Report and Proceedings of the Committee* (1999) (« rapport du comité mixte britannique »), par. 242 (en italique dans l’original)).

2. Dans le contexte canadien, le privilège parlementaire est la somme des privilèges, immunités et pouvoirs dont jouissent le Sénat, la Chambre des communes et les assemblées législatives provinciales ainsi que les membres de chaque Chambre individuellement, sans lesquels ils ne pourraient s’acquitter de leurs fonctions (*Jurisprudence parlementaire de Beauchesne*, p. 11; *Erskine May*, p. 75; *New Brunswick Broadcasting*, p. 380).

3. Le privilège parlementaire ne crée pas un hiatus dans le droit public général du Canada; il en est plutôt une composante importante, héritée du Parlement du Royaume-Uni en vertu du préambule de la *Loi constitutionnelle de 1867* et, dans le cas du Parlement du Canada, en vertu de l’art. 18 de cette même loi (*New Brunswick Broadcasting*, p. 374-378; *Telezone Inc. c. Canada (Attorney General)* (2004), 69 O.R. (3d) 161 (C.A.), p. 165; et *Nation et bande indienne de Samson c. Canada*, [2004] 1 R.C.F. 556, 2003 CF 975).

4. Parliamentary privilege includes

the necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces . . . in order for these legislators to do their legislative work. [Emphasis added.]

(J. P. J. Maingot, *Parliamentary Privilege in Canada* (2nd ed. 1997), at p. 12; *New Brunswick Broadcasting*, at p. 341; see *Fielding v. Thomas*, [1896] A.C. 600 (P.C.), at pp. 610-11; *Kielley v. Carson* (1842), 4 Moo. P.C. 63, 13 E.R. 225, at pp. 235-36.) The idea of necessity is thus linked to the autonomy required by legislative assemblies and their members to do their job.

5. The historical foundation of every privilege of Parliament is necessity. If a sphere of the legislative body's activity could be left to be dealt with under the ordinary law of the land without interfering with the assembly's ability to fulfill its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist (*Beauchesne's Rules & Forms*, at p. 11; Maingot, at p. 12; *Erskine May*, at p. 75; *Stockdale v. Hansard*, at p. 1169; *New Brunswick Broadcasting*, at pp. 343 and 382).

6. When the existence of a category (or sphere of activity) for which inherent privilege is claimed (at least at the provincial level) is put in issue, the court must not only look at the historical roots of the claim but also to determine whether the category of inherent privilege continues to be necessary to the functioning of the legislative body today. Parliamentary history, while highly relevant, is not conclusive:

The fact that this privilege has been upheld for many centuries, abroad and in Canada, is some evidence that it is generally regarded as essential to the proper functioning of a legislature patterned on the British model. However, it behooves us to ask anew: in the Canadian context of 1992, is the right to exclude strangers necessary to

4. Le privilège parlementaire est

l'indispensable immunité que le droit accorde aux membres du Parlement et aux députés des dix provinces [. . .] pour leur permettre d'effectuer leur travail législatif. [Je souligne.]

(J. P. J. Maingot, *Le privilège parlementaire au Canada* (2^e éd. 1997), p. 12; *New Brunswick Broadcasting*, p. 341; voir *Fielding c. Thomas*, [1896] A.C. 600 (C.P.), p. 610-611; *Kielley c. Carson* (1842), 4 Moo. P.C. 63, 13 E.R. 225, p. 235-36.) La notion de nécessité est donc liée à l'autonomie dont doivent bénéficier les assemblées législatives et leurs membres pour effectuer leur travail.

5. Le fondement historique de tout privilège parlementaire est la nécessité. Si une sphère d'activité de l'organe législatif pouvait relever du régime de droit commun du pays sans que cela nuise à la capacité de l'assemblée de s'acquitter de ses fonctions constitutionnelles, l'immunité ne serait pas nécessaire et le privilège revendiqué inexistant : *Jurisprudence parlementaire de Beauchesne*, p. 11; Maingot, p. 12; *Erskine May*, p. 75; *Stockdale c. Hansard*, p. 1169; *New Brunswick Broadcasting*, p. 343 et 382.

6. Quand l'existence d'une catégorie (ou d'une sphère d'activité) à l'égard de laquelle un privilège inhérent est revendiqué (du moins à l'échelon provincial) est contestée, le tribunal ne doit pas seulement prendre en compte les origines historiques de la revendication, mais aussi déterminer si la catégorie de privilège inhérent demeure, encore aujourd'hui, nécessaire au bon fonctionnement de l'organe législatif. L'histoire parlementaire, bien que fort pertinente, n'est pas un facteur déterminant :

Le fait que ce privilège ait été maintenu pendant plusieurs siècles, tant à l'étranger qu'au Canada, est une preuve qu'il est généralement considéré comme essentiel au bon fonctionnement d'une législature inspirée du modèle britannique. Toutefois, il faut de nouveau nous poser la question suivante : dans le contexte canadien de 1992, le droit

the functioning of our legislative bodies? [Emphasis added.]

(*New Brunswick Broadcasting*, per McLachlin J., at p. 387)

7. “Necessity” in this context is to be read broadly. The time-honoured test, derived from the law and custom of Parliament at Westminster, is what “the dignity and efficiency of the House” require:

If a matter falls within this 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 questions will instead fall to the exclusive jurisdiction of the legislative body. [Emphasis added.]

(*New Brunswick Broadcasting*, at p. 383)

(In my view, the references to “dignity” and “efficiency” are also linked to autonomy. A legislative assembly without control over its own procedure would, said Lord Ellenborough C.J. almost two centuries ago, “sink into utter contempt and inefficiency” (*Burdett v. Abbot* (1811), 14 East 1, 104 E.R. 501, at p. 559). “Inefficiency” would result from the delay and uncertainty would inevitably accompany external intervention. Autonomy is therefore not conferred on Parliamentarians merely as a sign of respect but because such autonomy from outsiders is necessary to enable Parliament and its members to get their job done.)

8. Proof of necessity may rest in part in “shewing that it has been long exercised and acquiesced in” (*Stockdale v. Hansard*, at p. 1189). The party who seeks to rely on the immunity provided by parliamentary privilege has the onus of establishing its existence.

d’exclure des étrangers est-il nécessaire au bon fonctionnement de nos organismes législatifs? [Je souligne.]

(*New Brunswick Broadcasting*, la juge McLachlin, p. 387)

7. Dans ce contexte, le concept de « nécessité » doit être interprété largement. Suivant le critère traditionnel, qui tire son origine de la loi et de la coutume du Parlement de Westminster, il s’agit de déterminer ce que requièrent « la dignité et l’efficacité de l’Assemblée » :

Si une question relève de cette catégorie nécessaire de sujets sans lesquels la dignité et l’efficacité de l’Assemblée ne sauraient être maintenues, les tribunaux n’examineront pas les questions relatives à ce privilège. Toutes ces questions relèveraient plutôt de la compétence exclusive de l’organisme législatif. [Je souligne.]

(*New Brunswick Broadcasting*, p. 383)

(À mon avis, les mentions relatives à la « dignité » et à l’« efficacité » se rapportent également à l’autonomie du Parlement. Pour reprendre les termes utilisés par le lord juge en chef Ellenborough il y a près de deux siècles, une assemblée législative qui n’aurait pas le pouvoir de contrôler sa procédure [TRADUCTION] « sombrerait dans l’inefficacité et le mépris absolus » (*Burdett c. Abbot* (1811), 14 East 1, 104 E.R. 501, p. 559). Les délais engendreraient l’« inefficacité » et une intervention externe causerait inévitablement de l’incertitude. L’autonomie des parlementaires ne leur a donc pas été conférée comme une simple marque de respect, mais parce que la protection contre toute ingérence externe est nécessaire pour que le Parlement et ses membres accomplissent leur travail.)

8. Pour satisfaire au critère de nécessité, il faut notamment [TRADUCTION] « démontrer [que le privilège] est depuis longtemps exercé et reconnu » (*Stockdale c. Hansard*, p. 1189). La partie qui invoque l’immunité que confère le privilège parlementaire a le fardeau d’en établir l’existence.

... The onus of shewing that it is so lies upon the defendants; for it is certainly *prima facie* contrary to the common law. [*Ibid.*, at p. 1189]

The burthen of proof is on those who assert it; and, for the purposes of this cause, the proof must go to the whole of the proposition ... [*Ibid.*, at p. 1201]

9. Proof of necessity is required only to establish the existence and scope of a *category* of privilege. Once the category (or sphere of activity) is established, it is for Parliament, not the courts, to determine whether in a particular case the *exercise* of the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts: “Each specific instance of the exercise of a privilege need not be shown to be necessary” (*New Brunswick Broadcasting*, at p. 343 (emphasis added)).

See also *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595 (C.A.); *Samson Indian Nation and Band*, at para. 13; *Martin v. Ontario*, [2004] O.J. No. 2247 (QL) (S.C.J.), at para. 13; *R. v. Richards; Ex parte Fitzpatrick and Browne* (1955), 92 C.L.R. 157 (Austl. H.C.), at p. 162; *Egan v. Willis* (1998), 158 A.L.R. 527 (H.C.); and *Huata v. Prebble*, [2004] 3 NZLR 359, [2004] NZCA 147.

10. “Categories” include freedom of speech (*Stopforth v. Goyer* (1979), 23 O.R. (2d) 696 (C.A.), at p. 700; *Re Clark and Attorney-General of Canada* (1977), 17 O.R. (2d) 593 (H.C.); U.K. *Bill of Rights* of 1689, art. 9; *Prebble v. Television New Zealand Ltd.*, [1995] 1 A.C. 321 (P.C.); *Hamilton v. Al Fayed*, [2000] 2 All E.R. 224 (H.L.)); control by the Houses of Parliament over “debates or proceedings in Parliament” (as guaranteed by the *Bill of Rights* of 1689) including day-to-day procedure in the House, for example the practice of the Ontario legislature to start the day’s

[TRANSDUCTION] ... Les défendeurs ont la charge d’établir qu’il en est ainsi, parce qu’il y a assurément à première vue contradiction avec la common law. [*Ibid.*, p. 1189]

Le fardeau de la preuve incombe à la partie qui revendique [le privilège] et tous les éléments de l’allégation doivent être étayés par la preuve ... [*Ibid.*, p. 1201]

9. C’est uniquement pour établir l’existence et l’étendue d’une *catégorie* de privilège qu’il faut démontrer la nécessité. Une fois la catégorie (ou la sphère d’activité) établie, c’est au Parlement, et non aux tribunaux, qu’il revient de déterminer si l’exercice de ce privilège est nécessaire ou approprié dans un cas particulier. En d’autres termes, à l’intérieur d’une catégorie de privilège, le Parlement est seul juge de l’opportunité et des modalités de son exercice, qui échappe à tout contrôle judiciaire : « Il n’est pas nécessaire de démontrer que chaque cas précis d’exercice d’un privilège est nécessaire » (*New Brunswick Broadcasting*, p. 343 (je souligne)).

Voir également *Ontario (Speaker of the Legislative Assembly) c. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595 (C.A.); *Nation et bande indienne de Samson*, par. 13; *Martin c. Ontario*, [2004] O.J. No. 2247 (QL) (C.S.J.), par. 13; *R. c. Richards; Ex parte Fitzpatrick and Browne* (1955), 92 C.L.R. 157 (H.C. Aust.), p. 162; *Egan c. Willis* (1998), 158 A.L.R. 527 (H.C.); et *Huata c. Prebble*, [2004] 3 NZLR 359, [2004] NZCA 147.

10. Les « catégories » sont notamment la liberté de parole (*Stopforth c. Goyer* (1979), 23 O.R. (2d) 696 (C.A.), p. 700; *Re Clark and Attorney-General of Canada* (1977), 17 O.R. (2d) 593 (H.C.); *Bill of Rights* de 1689 du Royaume-Uni, art. 9; *Prebble c. Television New Zealand Ltd.*, [1995] 1 A.C. 321 (C.P.); *Hamilton c. Al Fayed*, [2000] 2 All E.R. 224 (H.L.)); le contrôle qu’exercent les Chambres du Parlement sur les [TRANSDUCTION] « débats ou travaux du Parlement » (garanti par le *Bill of Rights* de 1689), y compris la procédure quotidienne de la Chambre, comme la pratique de la

sitting with the Lord's Prayer (*Ontario (Speaker of the Legislative Assembly)*, at para. 23); the power to exclude strangers from proceedings (*New Brunswick Broadcasting; Zündel v. Boudria* (1999), 46 O.R. (3d) 410 (C.A.), at para. 16; *R. v. Behrens*, [2004] O.J. No. 5135 (QL), 2004 ONCJ 327); disciplinary authority over members (*Harvey*; see also *Tafler v. British Columbia (Commissioner of Conflict of Interest)* (1998), 161 D.L.R. (4th) 511 (B.C.C.A.), at paras. 15-18; *Morin v. Crawford* (1999), 29 C.P.C. (4th) 362 (N.W.T.S.C.)); and non-members who interfere with the discharge of parliamentary duties (*Payson v. Hubert* (1904), 34 S.C.R. 400, at p. 413; *Behrens*), including immunity of members from subpoenas during a parliamentary session (*Telezone; Ainsworth Lumber Co. v. Canada (Attorney General)* (2003), 226 D.L.R. (4th) 93, 2003 BCCA 239; *Samson Indian Nation and Band*). Such general categories have historically been considered to be justified by the exigencies of parliamentary work.

11. The role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege (*Re Ouellet (No. 1)* (1976), 67 D.L.R. (3d) 73 (Que. Sup. Ct.), at p. 87). Thus in 1839, almost three decades before Confederation in Canada, the English courts rejected the authority of a formal resolution of the House of Commons that the court believed overstated the true limits of the privilege claimed (*Stockdale v. Hansard*, at p. 1156, *per* Denman C.J.; p. 1177, *per* Littledale J.; p. 1192, *per* Patteson J.; p. 1194, *per* Coleridge J.). The jurisdiction of the courts in adjudicating claims of privilege has since been accepted by authorities on British parliamentary practice (see *Erskine May*, at pp. 185-86). The same division of jurisdiction between the courts and the House was accepted by this Court in *Landers v. Woodworth* (1878), 2 S.C.R. 158,

législature ontarienne de réciter le Notre Père au début de chaque jour de séance (*Ontario (Speaker of the Legislative Assembly)*, par. 23); le pouvoir d'exclure les étrangers des débats (*New Brunswick Broadcasting; Zündel c. Boudria* (1999), 46 O.R. (3d) 410 (C.A.), par. 16; *R. c. Behrens*, [2004] O.J. No. 5135 (QL), 2004 ONCJ 327); le pouvoir disciplinaire du Parlement à l'endroit de ses membres (*Harvey*; voir également *Tafler c. British Columbia (Commissioner of Conflict of Interest)* (1998), 161 D.L.R. (4th) 511 (C.A.C.-B.), par. 15-18; *Morin c. Crawford* (1999), 29 C.P.C. (4th) 362 (C.S. T.N.-O.)); et des non-membres qui s'ingèrent dans l'exercice des fonctions du Parlement (*Payson c. Hubert* (1904), 34 R.C.S. 400, p. 413; *Behrens*), y compris l'immunité contre l'arrestation dont jouissent les membres du Parlement pendant une session parlementaire (*Telezone; Ainsworth Lumber Co. c. Canada (Attorney General)* (2003), 226 D.L.R. (4th) 93, 2003 BCCA 239; *Nation et bande indienne de Samson*). Historiquement, ces catégories générales sont considérées justifiées par les exigences du travail parlementaire.

11. Le rôle des tribunaux consiste à s'assurer que la revendication d'un privilège ne permet pas au Parlement, à ses représentants ou à ses employés de se soustraire au régime de droit commun en ce qui a trait aux conséquences de leurs actes lorsque leur conduite outrepassé la portée nécessaire de la catégorie de privilège en cause (*Re Ouellet (No. 1)* (1976), 67 D.L.R. (3d) 73 (C.S. Qué.), p. 87). Ainsi, en 1839, près de trois décennies avant la Confédération, les tribunaux anglais ont refusé de reconnaître une résolution formelle de la Chambre des communes qui dépassait à leur avis les véritables limites du privilège revendiqué (*Stockdale c. Hansard*, p. 1156, le juge en chef Denman; p. 1177, le juge Littledale; p. 1192, le juge Patteson; p. 1194, le juge Coleridge). Des spécialistes des usages parlementaires britanniques ont depuis reconnu la compétence des tribunaux pour trancher une revendication de privilège (voir *Erskine May*, p. 185-186). Notre Cour a aussi reconnu ce partage des compétences entre les tribunaux et la Chambre

where Richards C.J., our first Chief Justice, had this to say at p. 196:

[T]he courts will see whether what the House of Commons declares to be its privileges really are so, the mere affirmance by that body that a certain act is a breach of their privileges will not oust the courts from enquiring and deciding whether the privilege claimed really exists.

This jurisdictional rule has been accepted by authorities on the law and custom of the Canadian Parliament as well (see Maingot, at p. 66) and is not challenged in this appeal.

12. Courts are apt to look more closely at cases in which claims to privilege have an impact on persons outside the legislative assembly than at those which involve matters entirely internal to the legislature (*New Brunswick Broadcasting*, at p. 350; *Bear v. State of South Australia* (1981), 48 S.A.I.R. 604 (Indus. Ct.); *Thompson v. McLean* (1998), 37 C.C.E.L. (2d) 170 (Ont. Ct. (Gen. Div.)), at para. 21; *Stockdale v. Hansard*, at p. 1192).

dans *Landers c. Woodworth* (1878), 2 R.C.S. 158. Le juge en chef Richards, qui fut le premier à occuper ce poste à la Cour, s'est alors exprimé comme suit à la p. 196 :

[TRADUCTION] [L]es tribunaux regarderont si les choses que la Chambre des communes déclare être ses privilèges en sont vraiment; la simple affirmation par cet organisme qu'un certain acte constitue une violation de ses privilèges n'empêche pas les tribunaux d'examiner et de décider si le privilège revendiqué existe réellement.

Cette règle relative à la compétence a également été reconnue par des spécialistes de la procédure et des usages parlementaires au Canada (voir Maingot, p. 66) et n'est pas contestée dans le présent pourvoi.

12. Les tribunaux peuvent examiner de plus près les affaires dans lesquelles la revendication d'un privilège a des répercussions sur des personnes qui ne sont pas membres de l'assemblée législative en cause, que celles qui portent sur des questions purement internes (*New Brunswick Broadcasting*, p. 350; *Bear c. State of South Australia* (1981), 48 S.A.I.R. 604 (Indus. Ct.); *Thompson c. McLean* (1998), 37 C.C.E.L. (2d) 170 (C. Ont. (Div. gén.)), par. 21; *Stockdale c. Hansard*, p. 1192).

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It should be emphasized that a finding that a particular area of parliamentary activity is covered by privilege has very significant legal consequences for non-members who claim to be injured by parliamentary conduct, including those whose reputations may suffer because of references to them in parliamentary debate, for whom the ordinary law will provide no remedy. In *New Brunswick Broadcasting* itself, it was held that the press freedom guaranteed by s. 2(b) of the *Charter* did not prevail over parliamentary privilege, which was held to be as much part of our fundamental constitutional arrangements as the *Charter* itself. One part of the Constitution cannot abrogate another part of the Constitution (*Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *New Brunswick Broadcasting*, at pp. 373 and 390). In matters of privilege, it would lie within the exclusive competence of the legislative assembly itself to consider compliance with human

Soulignons qu'une conclusion portant qu'un secteur particulier de l'activité parlementaire est protégé par un privilège est lourde de conséquences sur le plan juridique pour les non-membres auxquels les actions de la Chambre ou de ses membres auraient causé un préjudice, y compris ceux dont la réputation peut être ternie parce qu'on parle d'eux dans les débats parlementaires et qui se verront privés de toute réparation en vertu du droit commun. Dans *New Brunswick Broadcasting*, notre Cour a statué que la liberté de la presse garantie par l'al. 2b) de la *Charte* ne l'emportait pas sur le privilège parlementaire, qui fait autant partie que la *Charte* de notre organisation constitutionnelle fondamentale. Or, une partie de la Constitution ne peut en abroger une autre (*Renvoi relatif au projet de loi 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148; *New Brunswick Broadcasting*, p. 373 et 390). Sur des questions relevant de son privilège,

rights and civil liberties. The House, “with one voice, accuses, condemns and executes”: *Stockdale v. Hansard*, at p. 1171.

l’assemblée législative aurait compétence exclusive pour déterminer si les droits de la personne et les libertés publiques ont été respectés. La Chambre [TRADUCTION] « d’une voix unique, accuse, condamne et exécute » : *Stockdale c. Hansard*, p. 1171.

B. *Questions Left Open in the Earlier Cases*

As mentioned earlier, *New Brunswick Broadcasting* and *Harvey* dealt with the inherent privilege of provincial legislatures, i.e., the measure of autonomy that is “inherent” in the creation of a legislative body under the *Constitution Act, 1867*. There was little doubt on the facts that the activity under review in those cases fell within the privilege claimed. The real dispute was over the legal status and effect of “inherent” privilege.

B. *Questions non tranchées dans les arrêts antérieurs*

Comme nous l’avons vu, les arrêts *New Brunswick Broadcasting* et *Harvey* traitaient du privilège inhérent des assemblées législatives provinciales, c.-à-d. du degré d’autonomie « inhérent » à la création d’un organe législatif sous le régime de la *Loi constitutionnelle de 1867*. Dans ces affaires, il ne faisait guère de doute que les activités en cause étaient visées par le privilège revendiqué. Le débat portait plutôt sur le statut juridique et l’effet du privilège « inhérent ».

This case raises two new considerations. Firstly, does the “necessity” test apply to privilege enacted into law by Parliament pursuant to s. 18 of the *Constitution Act, 1867*, or are such laws, by reason of their enactment under a specific constitutional power, conclusive proof of necessity? In *Harvey*, McLachlin J., speaking for herself and L’Heureux-Dubé J., thought there was “much to recommend” such a necessity test in the provincial context (para. 73), but the Court was not called upon to decide the point and a majority of the judges decided the *Harvey* case on grounds unrelated to privilege. Secondly, in the case of an acknowledged category of privilege, to what extent can the courts, rather than the legislative assembly, define its scope and limits without embarking on an impermissible review of the exercise of the privilege itself?

Le présent pourvoi soulève deux nouvelles questions. Premièrement, le critère de « nécessité » s’applique-t-il au privilège établi par une loi du Parlement du Canada adoptée en vertu de l’art. 18 de la *Loi constitutionnelle de 1867*, ou pareille loi, de par son adoption en vertu d’un pouvoir expressément conféré par la Constitution, fait-elle foi de cette nécessité? Dans *Harvey*, la juge McLachlin, s’exprimant en son propre nom et au nom de la juge L’Heureux-Dubé, dans le contexte provincial, a indiqué qu’il y a « beaucoup de raisons de recommander » l’application du critère de nécessité (par. 73), mais la Cour n’avait pas à se prononcer sur cette question et les juges majoritaires se sont appuyés sur des motifs qui n’avaient aucun lien avec le privilège pour trancher le pourvoi. Deuxièmement, lorsqu’une catégorie de privilège reconnue est en cause, dans quelle mesure les tribunaux, plutôt que l’assemblée législative, peuvent-ils en définir l’étendue et les limites sans s’engager sur la voie interdite du contrôle de l’exercice du privilège proprement dit?

(1) Inherent Versus Legislated Privilege

The ruling in *New Brunswick Broadcasting*, read narrowly, affirmed constitutional status for privileges “inherent” in the creation of a provincial legislature. However, unlike the provinces, the federal

(1) Le privilège inhérent et le privilège établi par voie législative

La décision *New Brunswick Broadcasting*, interprétée strictement, confirme le statut constitutionnel des privilèges « inhérents » que les assemblées législatives provinciales possèdent du seul fait de

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Parliament has an express legislative power to enact privileges which may exceed those “inherent” in the creation of the Senate and the House of Commons, although such legislated privileges must not “exceed” those “enjoyed and exercised” by the U.K. House of Commons and its members at the date of the enactment. Section 18 of the *Constitution Act, 1867* (as amended in 1875) provides:

18. 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, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

In *New Brunswick Broadcasting*, Lamer C.J., writing separate concurring reasons, considered that such “legislated privilege” would lack the constitutional status of “inherent” privilege, and its exercise would be subject to *Charter* review (p. 364). His reasoning was that s. 32(1) of the *Charter* itself provides that “[t]his Charter applies . . . to the Parliament and government of Canada in respect of all matters within the authority of Parliament”. As s. 18 of the *Constitution Act, 1867* places privilege within the authority of Parliament, therefore legislation affecting privilege, as any other legislation, will be subject to *Charter* review. However, the logic of the separate judgments written by McLachlin J. and La Forest J. points away from such a conclusion, their view was accepted as correct by a majority of the Court, and the point must now be taken as settled.

leur création. Toutefois, contrairement aux provinces, le Parlement fédéral s’est vu conféré, en termes exprès, le pouvoir d’établir des privilèges plus vastes que les privilèges « inhérents » à la création du Sénat et de la Chambre des communes, mais de tels privilèges établis par voie législative ne doivent pas « excéder » les privilèges « possédés et exercés » par la Chambre des communes du Royaume-Uni et par ses membres au moment de la passation de la loi. L’article 18 de la *Loi constitutionnelle de 1867* (modifié en 1875) est ainsi libellé :

18. Les privilèges, immunités et pouvoirs que posséderont et exerceront le Sénat et la Chambre des Communes et les membres de ces corps respectifs, seront ceux prescrits de temps à autre par loi du Parlement du Canada; mais de manière à ce qu’aucune loi du Parlement du Canada définissant tels privilèges, immunités et pouvoirs ne donnera aucuns privilèges, immunités ou pouvoirs excédant ceux qui, lors de la passation de la [loi en question], sont possédés et exercés par la Chambre des Communes du Parlement du Royaume-Uni de la Grande-Bretagne et d’Irlande et par les membres de cette Chambre.

Dans *New Brunswick Broadcasting*, le juge en chef Lamer, qui a rédigé des motifs concourants distincts, a considéré que le privilège « établi par voie législative » ne bénéficierait pas du statut constitutionnel dont jouit le privilège « inhérent » et que son exercice serait assujéti à un examen fondé sur la *Charte* (p. 364). Selon son raisonnement, le par. 32(1) de la *Charte* prévoit que « [la] charte s’applique [. . .] au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement ». Étant donné que le privilège parlementaire relève de la compétence du Parlement du Canada en vertu de l’art. 18 de la *Loi constitutionnelle de 1867*, les lois qui y ont trait, comme toute autre loi, pourront faire l’objet d’un examen fondé sur la *Charte*. Toutefois, les raisonnements suivis par les juges McLachlin et La Forest dans leurs motifs respectifs tendent à exclure une telle conclusion et les juges majoritaires de notre Cour ont souscrit à leur opinion sur ce point, de sorte qu’il faut maintenant tenir la question pour réglée.

Historically, the legislative source of some privileges (e.g., art. 9 of the *Bill of Rights* of 1689) did not diminish the jurisdictional immunity they attracted.

Historiquement, l’origine législative de certains privilèges parlementaires (celui créé par l’art. 9 du *Bill of Rights* de 1689, par exemple) n’ont pas eu

In *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271, Stephen J. stated, at p. 278:

I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings [Emphasis added.]

The same rule was adopted in Canada (*Temple v. Bulmer*, [1943] S.C.R. 265; *Carter v. Alberta* (2002), 222 D.L.R. (4th) 40, 2002 ABCA 303, at para. 20, leave to appeal refused, [2003] 1 S.C.R. vii). The immunity from external review flowing from the doctrine of privilege is conferred by the nature of the function (the Westminster model of parliamentary democracy), not the source of the legal rule (i.e., inherent privilege versus legislated privilege). The doctrine of privilege attaching to a constitution “similar in Principle to that of the United Kingdom” under the preamble to the *Constitution Act, 1867* is not displaced by the wording of s. 32(1) of the *Charter*. As was pointed out in *New Brunswick Broadcasting*, parliamentary privilege enjoys the same constitutional weight and status as the *Charter* itself.

(2) Section 4 of the *Parliament of Canada Act*

Parliament has conferred on the Senate and House of Commons the full extent of the privileges permitted under the Constitution. In doing so, however, our Parliament neither enumerated nor described the categories or scope of those privileges except by general incorporation by reference of whatever privileges were “held, enjoyed and exercised” by the U.K. House of Commons. Section 4 reads in its entirety as follows:

Parliament of Canada Act, R.S.C. 1985, c. P-1

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

pour effet de réduire l’immunité juridictionnelle en découlant. Dans *Bradlaugh c. Gossett* (1884), 12 Q.B.D. 271, le juge Stephen dit ce qui suit à la p. 278 :

[TRADUCTION] Selon moi, lorsqu’elle applique les dispositions législatives portant sur sa procédure interne, la Chambre des communes n’est pas assujettie au contrôle des tribunaux de Sa Majesté [Je souligne.]

La même règle a été adoptée au Canada (*Temple c. Bulmer*, [1943] R.C.S. 265; *Carter c. Alberta* (2002), 222 D.L.R. (4th) 40, 2002 ABCA 303, par. 20, autorisation de pourvoi refusée, [2003] 1 R.C.S. vii). C’est la nature de la fonction exercée (selon le modèle de démocratie parlementaire du Parlement de Westminster) et non l’origine de la règle juridique (selon qu’il s’agit d’un privilège inhérent ou d’un privilège établi par voie législative) qui confère l’immunité contre les examens externes découlant de la doctrine du privilège parlementaire. Le libellé du par. 32(1) de la *Charte* n’a pas pour effet d’écarter la doctrine du privilège parlementaire lié à une constitution reposant, en vertu du préambule de la *Loi constitutionnelle de 1867*, « sur les mêmes principes que celle du Royaume-Uni ». Comme notre Cour l’a fait remarquer dans *New Brunswick Broadcasting*, le privilège parlementaire a le même statut et le même poids constitutionnels que la *Charte* elle-même.

(2) L’article 4 de la *Loi sur le Parlement du Canada*

Le Parlement a accordé au Sénat et à la Chambre des communes tous les privilèges autorisés par la Constitution. Toutefois, ce faisant, notre Parlement n’a ni énuméré ni décrit les catégories de privilège ou l’étendue de ces privilèges, sauf par renvoi général aux privilèges que « possédaient » la Chambre des communes du Royaume-Uni. Voici le texte intégral de l’art. 4 :

Loi sur le Parlement du Canada, L.R.C. 1985, ch. P-1

4. Les privilèges, immunités et pouvoirs du Sénat et de la Chambre des communes, ainsi que de leurs membres, sont les suivants :

(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.

a) d'une part, ceux que possédaient, à l'adoption de la *Loi constitutionnelle de 1867*, la Chambre des communes du Parlement du Royaume-Uni ainsi que ses membres, dans la mesure de leur compatibilité avec cette loi;

b) d'autre part, ceux que définissent les lois du Parlement du Canada, sous réserve qu'ils n'excèdent pas ceux que possédaient, à l'adoption de ces lois, la Chambre des communes du Parlement du Royaume-Uni et ses membres.

36 The main body of the privileges of our Parliament are therefore “legislated privileges”, and according to s. 4 of the *Parliament of Canada Act* must be ascertained by reference to the law and customs of the U.K. House of Commons which are themselves composed of both legislated (including the *Bill of Rights* of 1689) and inherent privileges.

Par conséquent, les privilèges de notre Parlement sont principalement constitués de privilèges « établis par voie législative » et, selon l'art. 4 de la *Loi sur le Parlement du Canada*, ils seront reconnus en fonction des lois et coutumes de la Chambre des communes du Royaume-Uni, qui comportent elles-mêmes à la fois des privilèges établis par voie législative (dont le *Bill of Rights* de 1689) et des privilèges inhérents.

37 The task of defining such privileges is not straightforward. The scope of parliamentary privilege in the U.K. is a matter of controversy in the U.K. itself (as described at some length in the British Joint Committee Report). Parliamentary privilege in that country has evolved over time, and continues to evolve within a society, institutions, and constitutional arrangements different from our own. As an Australian parliamentary committee noted, the privileges of the Parliament at Westminster are “a mirror of the times when they were gained” (*Final Report of the Joint Select Committee on Parliamentary Privilege* (October 1984), Parliamentary Paper No. 219/1984, at para. 3.9). Nevertheless, the framers of the *Constitution Act, 1867* thought it right to use Westminster as the benchmark for parliamentary privilege in Canada, and if the existence and scope of a privilege at Westminster is authoritatively established (either by British or Canadian precedent), it ought to be accepted by a Canadian court without the need for further inquiry into its necessity. This result contrasts with the situation in the provinces where legislated privilege, without any underpinning similar to s. 18 of the *Constitution Act, 1867*, would

Définir ces privilèges n'est pas chose facile. Même en Grande-Bretagne, l'étendue du privilège parlementaire est sujette à controverse (comme il ressort du rapport du comité mixte britannique). Dans ce pays, le privilège parlementaire a évolué avec le temps et son évolution se poursuit dans un contexte social, institutionnel et constitutionnel différent du nôtre. Ainsi que l'a signalé une commission parlementaire australienne, les privilèges du Parlement de Westminster sont [TRADUCTION] « à l'image de l'époque à laquelle ils ont été obtenus » (*Final Report of the Joint Select Committee on Parliamentary Privilege* (octobre 1984), Parliamentary Paper No. 219/1984, par. 3.9). Les rédacteurs de la *Loi constitutionnelle de 1867* ont néanmoins cru bon d'utiliser le Parlement de Westminster comme point de référence en ce qui a trait au privilège parlementaire canadien et si l'existence ainsi que l'étendue d'un privilège du Parlement de Westminster sont établies péremptoirement (par un précédent anglais ou canadien), ce privilège devrait être reconnu par les tribunaux canadiens sans qu'il soit nécessaire d'en apprécier la nécessité. Ce résultat contraste avec la situation des provinces car, sans fondement analogue à

likely have to meet the necessity test (*Harvey*, at para. 73).

Nevertheless, while s. 18 of the *Constitution Act, 1867* provides that the privileges of the Canadian Parliament and its members should not “exceed” those of the U.K., our respective Parliaments are not necessarily in lock step. It seems likely that there could be “differences” consisting of parliamentary practices inherent in the Canadian system, or legislated in relation to our own experience, which would fall to be assessed under the “necessity” test defined by the exigencies and circumstances of our own Parliament. This point would have to be explored if and when it arises for decision.

Accordingly, the first step a Canadian court is required to take in determining whether or not a privilege exists within the meaning of the *Parliament of Canada Act* is to ascertain whether the existence and scope of the claimed privilege have been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster (*Ainsworth Lumber*, at para. 44). In some matters, free speech in the House for example, the answer will readily be conceded. Other claims to privilege are less well established. Much of the U.K. law of privilege remains unwritten. Being unwritten, it retains a good deal of flexibility to meet changing circumstances, which is considered by some commentators to be a virtue (G. F. Lock, “Labour Law, Parliamentary Staff and Parliamentary Privilege” (1983), 12 *Indus. L.J.* 28, at p. 34). There has been little formal adjudication of the boundaries of U.K. privilege in the British courts, and Canadian courts are no more bound by a unilateral assertion of privilege by the British House of Commons than, as discussed earlier, would be the courts in Britain itself. In that jurisdiction, the courts exercise due diligence when examining a claim of parliamentary privilege that would immunize the exercise by either House of Parliament of a power that affects

l’art. 18 de la *Loi constitutionnelle de 1867*, les privilèges que celles-ci établissent par voie législative devraient vraisemblablement satisfaire au critère de nécessité (*Harvey*, par. 73).

Toutefois, bien que l’art. 18 de la *Loi constitutionnelle de 1867* prévoie que les privilèges du Parlement canadien et de ses membres ne doivent pas « excéder » les privilèges existants en Grande-Bretagne, nos Parlements respectifs ne sont pas pour autant privés de toute latitude. Ainsi, il semble probable qu’il puisse exister des « différences », c.-à-d. des pratiques parlementaires inhérentes au système canadien ou édictées au regard de notre propre expérience. Ces pratiques seraient assujetties au critère de « nécessité » défini en fonction des exigences et circonstances propres à notre Parlement. La Cour examinera cette question en temps et lieu si elle lui est soumise un jour.

Par conséquent, pour décider si un privilège existe ou non au sens de la *Loi sur le Parlement du Canada*, les tribunaux canadiens doivent, dans un premier temps, vérifier si l’existence et l’étendue du privilège revendiqué ont été établies péremptoirement en ce qui concerne notre propre Parlement ou la Chambre des communes de Westminster (*Ainsworth Lumber*, par. 44). Dans certains cas, par exemple en ce qui concerne la liberté de parole à la Chambre, la réponse ira de soi. Par contre, d’autres privilèges ne sont pas reconnus de façon aussi certaine. Le droit britannique en matière de privilège est encore aujourd’hui en grande partie non écrit. Pour cette raison, il conserve une assez grande souplesse pour s’adapter aux circonstances changeantes, ce que plusieurs auteurs considèrent comme un avantage de taille (G. F. Lock, « Labour Law, Parliamentary Staff and Parliamentary Privilege » (1983), 12 *Indus. L.J.* 28, p. 34). Peu de décisions des tribunaux britanniques circonscrivent formellement le privilège existant au Royaume-Uni et les tribunaux canadiens ne sauraient être davantage liés par la revendication unilatérale d’un privilège par la Chambre des communes britannique que ne le seraient, comme nous l’avons déjà vu, les tribunaux britanniques eux-mêmes. En Grande-Bretagne, les tribunaux exercent la diligence qui

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the rights of non-Parliamentarians. As stated in *Stockdale v. Hansard*, at p. 1192:

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. [Emphasis added.]

See also W. R. Anson, *The Law and Custom of the Constitution* (5th ed. 1922), vol. I, at p. 196. No less is expected of the courts in Canada.

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Thus, when a claim to privilege comes before a Canadian court seeking to immunize Parliamentarians from the ordinary legal consequences of the exercise of powers in relation to non-Parliamentarians, and the validity and scope of the privilege in relation to the U.K. House of Commons and its members have not been authoritatively established, our courts will be required (as the British courts are required in equivalent circumstances) to test the claim against the doctrine of necessity, which is the foundation of all parliamentary privilege. Of course in relation to these matters, the courts will clearly give considerable deference to our own Parliament's view of the scope of autonomy it considers necessary to fulfill its functions. In the *Telezone* case, for example, the Ontario Court of Appeal stated:

The views of the two Speakers are not binding on this court. However, given the experience and high reputation of these two parliamentarians, and in the context of a legal dispute that centres on the definition of a parliamentary privilege, it seems obvious that their careful and considered rulings should be accorded

s'impose lorsqu'ils examinent une revendication de privilège parlementaire qui immuniserait l'exercice, par l'une ou l'autre des Chambres du Parlement, d'un pouvoir qui porte atteinte aux droits des non-parlementaires. Reprenons à cet égard les propos tenus dans *Stockdale c. Hansard*, p. 1192 :

[TRADUCTION] Tous devraient se montrer bienveillants lorsqu'il s'agit de préserver les privilèges dont l'exercice est nécessaire au bon fonctionnement de la Chambre et avoir la plus grande confiance dans la capacité de leurs représentants de les exercer correctement. Mais il en va autrement s'il s'agit d'un pouvoir, et surtout d'un pouvoir qui permet une atteinte aux droits d'autrui : on ne l'envisagera pas avec bienveillance, mais avec suspicion; et à moins que sa légalité ne soit établie sans l'ombre d'un doute, ceux qui s'en réclament devront répondre de leurs actes. [Je souligne.]

Voir également W. R. Anson, *The Law and Custom of the Constitution* (5^e éd. 1922), vol. I, p. 196. On ne saurait s'attendre à moins des tribunaux canadiens.

Ainsi, lorsqu'un tribunal canadien est appelé à statuer sur la revendication d'un privilège visant à immuniser les parlementaires contre les conséquences juridiques ordinaires de l'exercice de pouvoirs relativement à des non-parlementaires et que la validité et l'étendue de ce privilège n'ont pas été établies péremptoirement à l'égard de la Chambre des communes du Royaume-Uni et de ses membres, nos tribunaux doivent déterminer — à l'instar des tribunaux britanniques dans des circonstances équivalentes — si la revendication satisfait au critère de nécessité qui sert d'assise à tout privilège parlementaire. Sur ce plan, les tribunaux feront certes preuve d'une grande retenue quant au degré d'autonomie dont notre propre Parlement estime devoir bénéficier pour s'acquitter de ses fonctions. Citons à titre d'exemple l'extrait de l'arrêt *Telezone* dans lequel la Cour d'appel de l'Ontario a dit :

[TRADUCTION] Les opinions des deux présidents de la Chambre des communes ne lient pas la Cour. Toutefois, compte tenu de l'expérience et de l'excellente réputation de ces parlementaires et dans le contexte d'un différend juridique qui porte principalement sur la définition du privilège parlementaire, il me paraît évident que leurs

substantial respect. I do so. [MacPherson J.A., at para. 32]

Having said that, if a dispute arises between the House and a stranger to the House, as in the present appeal, it will be for the courts to determine if the admitted category of privilege has the scope claimed for it. This adjudication, it must again be emphasized, goes to the *existence* and *scope* of the House's jurisdiction, not to the propriety of its *exercise* in any particular case.

(3) The Necessity Test

Parliamentary privilege is defined by the degree of autonomy necessary to perform Parliament's constitutional function. Sir Erskine May's leading text on the subject defines parliamentary privilege as

the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. [Emphasis added; p. 75.]

Similarly, Maingot defines privilege in part as "the necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces and two territories, in order for these legislators to do their legislative work" (p. 12 (emphasis added)). To the question "necessary in relation to what?", therefore, the answer is necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business. To the same effect, see R. Marleau and C. Montpetit, eds., *House of Commons Procedure and Practice* (2000), where privilege is defined as "the rights and immunities that are deemed necessary for the House of Commons, as an institution, and its Members, as representatives of the electorate, to fulfil their functions" (p. 50 (emphasis added)). Reference may also be made to J. G. Bourinot, *Parliamentary Procedure and*

décisions mûrement réfléchies doivent être abordées avec un grand respect. Je les aborde donc ainsi. [Le juge MacPherson, par. 32]

Cela dit, si, comme en l'espèce, un différend oppose la Chambre et une personne qui lui est étrangère, il revient aux tribunaux de déterminer si l'étendue de la catégorie reconnue est celle qu'on prétend lui attribuer. Cette détermination, faut-il le rappeler, touche l'*existence* et l'*étendue* de la compétence de la Chambre, et non l'opportunité de son *exercice* dans un cas particulier.

(3) Le critère de nécessité

Le privilège parlementaire se définit en fonction du degré d'autonomie requis pour que le Parlement soit en mesure de s'acquitter de ses fonctions constitutionnelles. Dans son ouvrage de référence sur le privilège parlementaire, Sir Erskine May en donne la définition suivante :

[TRADUCTION] . . . la somme des droits particuliers dont jouissent chaque Chambre collectivement en tant que composante de la Haute Cour du Parlement, et les membres de chacune des Chambres, individuellement, sans lesquels ils ne pourraient s'acquitter de leurs fonctions, et qui excèdent ceux que possèdent d'autres organismes ou particuliers. [Je souligne; p. 75.]

De même, Maingot le définit notamment comme « l'indispensable immunité que le droit accorde aux membres du Parlement et aux députés des dix provinces et des deux territoires pour leur permettre d'effectuer leur travail législatif » (p. 12 (je souligne)). À la question « indispensable à quel égard? », il faut par conséquent répondre qu'il s'agit de l'immunité qui est indispensable pour protéger les législateurs dans l'exécution de leurs fonctions législatives et délibératives et de la tâche de l'assemblée législative de demander des comptes au gouvernement relativement à la conduite des affaires du pays. Au même effet, voir R. Marleau et C. Montpetit, dir., *La procédure et les usages de la Chambre des communes* (2000), qui définissent le privilège parlementaire comme les « droits et immunités jugés nécessaires pour permettre à la Chambre des communes en tant qu'institution, et à ses députés en tant que représentants de l'électorat, d'exercer leurs fonctions » (p. 50 (je souligne)). Sur ce point il est

Practice in the Dominion of Canada (4th ed. 1916), at p. 37:

It is obvious that no legislative assembly would be able to discharge its duties with efficiency or to assure its independence and dignity unless it had adequate powers to protect itself and its members and officials in the exercise of their functions. [Emphasis added.]

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The British Joint Committee Report adopted a similar approach:

Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members and officers possess to enable them to carry out their parliamentary functions effectively. Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished. [Emphasis added; para. 3.]

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While much latitude is left to each House of Parliament, such a purposive approach to the definition of privilege implies important limits. There is general recognition, for example, that privilege attaches to “proceedings in Parliament”. Nevertheless, as stated in *Erskine May* (19th ed. 1976), at p. 89, not “everything that is said or done within the Chamber during the transaction of business forms part of proceedings in Parliament. Particular words or acts may be entirely unrelated to any business which is in course of transaction, or is in a more general sense before the House as having been ordered to come before it in due course” (emphasis added). (This passage was referred to with approval in *Re Clark*.) Thus in *R. v. Bunting* (1885), 7 O.R. 524, for example, the Queen’s Bench Division held that a conspiracy to bring about a change in the government by bribing members of the provincial legislature was not in any way connected with a proceeding in Parliament and, therefore, the court had jurisdiction to try the offence. *Erskine May* (23rd ed.) refers to an opinion of “the Privileges Committee in 1815 that the re-arrest of Lord Cochrane (a Member of the Commons) in the Chamber (the House not sitting) was not a breach of

également utile de citer J. G. Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (4^e éd. 1916), p. 37 :

[TRADUCTION] De toute évidence, aucune assemblée législative ne serait en mesure de s’acquitter efficacement de ses fonctions et de préserver son indépendance et sa dignité si elle n’était pas investie de pouvoirs adéquats pour se protéger, ainsi que ses membres et représentants, dans l’exercice de leurs fonctions. [Je souligne.]

Dans son rapport, le comité mixte britannique adopte une approche similaire :

[TRADUCTION] Le privilège parlementaire est constitué des droits et immunités que possèdent les deux Chambres du Parlement ainsi que leurs membres et représentants pour pouvoir s’acquitter de leurs fonctions parlementaires efficacement. Sans une telle protection, les membres du Parlement seraient limités dans l’exercice de leurs fonctions parlementaires et l’autorité du Parlement lui-même, lorsqu’il demande des comptes à l’exécutif et sert de forum pour l’expression des préoccupations des citoyens, s’en trouverait diminuée d’autant. [Je souligne; par. 3.]

Bien que chacune des Chambres du Parlement dispose d’une grande latitude, la définition du privilège parlementaire selon cette approche téléologique comporte d’importantes limites. Il est généralement reconnu, par exemple, que le privilège couvre les « travaux du Parlement ». Néanmoins, comme on le dit dans *Erskine May* (19^e éd. 1976), p. 89, ne fait pas [TRADUCTION] « partie des travaux du Parlement tout ce qui est dit ou fait au sein de la Chambre pendant qu’elle siège. Certains mots ou actes peuvent n’avoir aucun lien avec l’objet du débat ou, dans un sens plus général, avec les affaires dont la Chambre est valablement saisie » (je souligne). (Ce passage a été cité avec approbation dans la décision *Re Clark*.) Ainsi, à titre d’exemple, dans *R. c. Bunting* (1885), 7 O.R. 524, la Division du Banc de la Reine a conclu qu’une conspiration visant à renverser le gouvernement en soudoyant les membres de l’assemblée législative provinciale n’était d’aucune façon liée aux travaux du Parlement et que, par conséquent, la cour avait compétence pour juger l’infraction. *Erskine May* (23^e éd.) renvoie à un avis donné [TRADUCTION] « en 1815 par le comité des privilèges selon lequel on n’avait pas porté atteinte au privilège parlementaire en procédant à nouveau

privilege. Particular words or acts may be entirely unrelated to any business being transacted or ordered to come before the House in due course” (p. 116).

The purposive connection between necessity and the legislative function is also emphasized in the British Joint Committee Report:

The dividing line between privileged and non-privileged activities of each House is not easy to define. Perhaps the nearest approach to a definition is that the areas in which the courts ought not to intervene extend beyond proceedings in Parliament, but the privileged areas must be so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament’s sovereignty as a legislative and deliberative assembly. [Emphasis added; para. 247.]

Parliament’s sovereignty when engaged in the performance of its legislative duties is undoubted (*Penikett v. Canada* (1987), 45 D.L.R. (4th) 108 (Y.T.C.A.); *Sibbeston v. Northwest Territories (Attorney General)*, [1988] 2 W.W.R. 501 (N.W.T.C.A.); *Pickin v. British Railways Board*, [1974] A.C. 765 (H.L.), at pp. 788-90). While the British Joint Committee Report may not yet have been formally adopted by the U.K. Parliament, its reasoning in these passages 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.

All of these sources point in the direction of a similar conclusion. In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment 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

à l’arrestation de lord Cochrane (un membre de la Chambre) pendant qu’il était présent à la Chambre des communes (qui ne siégeait pas au moment de l’arrestation). Certains mots ou actes peuvent être sans lien aucun avec l’objet du débat ou avec les affaires dont la Chambre est valablement saisie » (p. 116).

La nature téléologique du lien entre la fonction législative et la nécessité ressort également du rapport du comité mixte britannique :

[TRADUCTION] La ligne de démarcation entre les activités privilégiées et les activités non privilégiées de chaque Chambre n’est pas facile à tracer. La meilleure façon de déterminer où elle se situe consiste peut-être à dire que les questions à l’égard desquelles les cours de justice ne devraient pas intervenir s’étendent au-delà des travaux du Parlement, mais que les questions privilégiées doivent être si étroitement et si directement liées aux travaux du Parlement que l’intervention des cours de justice serait incompatible avec la souveraineté du Parlement en sa qualité d’assemblée législative et délibérante. [Je souligne; par. 247.]

Il ne fait aucun doute que le Parlement est souverain lorsqu’il s’acquitte de ses fonctions législatives (*Penikett c. Canada* (1987), 45 D.L.R. (4th) 108 (C.A.T.Y.); *Sibbeston c. Northwest Territories (Attorney General)*, [1988] 2 W.W.R. 501 (C.A. T.N.-O.); *Pickin c. British Railways Board*, [1974] A.C. 765 (H.L.), p. 788-790). Bien que le rapport du comité mixte britannique n’ait peut-être pas été adopté formellement par le Parlement du Royaume-Uni, le raisonnement suivi dans les passages précités témoigne d’une opinion sur les limites des revendications de privilège qui est réfléchie et, de surcroît, à mon avis, conforme aux principes sous-jacents de la common law.

Toutes ces sources mènent à la même conclusion. Pour justifier la revendication d’un privilège parlementaire, l’assemblée ou le membre qui cherchent à bénéficier de l’immunité qu’il confère doivent démontrer que la sphère d’activité à l’égard de laquelle le privilège est revendiqué est si étroitement et directement liée à l’exercice, par l’assemblée ou son membre, de leurs fonctions d’assemblée législative et délibérante, y compris leur tâche de demander des comptes au gouvernement, qu’une

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of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.

- (4) Once a Claim to Privilege Is Made Out, the Court Will Not Enquire Into the Merits of Its Exercise

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The distinction between defining the scope of a privilege, which is the function of the courts, and judging the appropriateness of its exercise, which is a matter for the legislative assembly, may sometimes be difficult to draw in practice, but can nevertheless be illustrated on the facts of this case. The appellants claim privilege in respect of relations with *all* employees. If the claim of privilege were justified, no court or body external to the House of Commons could enquire into the appellant Speaker's reasons for the constructive dismissal of the respondent Vaid. Such outside bodies would have no *jurisdiction* to do so. Nevertheless the courts are required to determine the *scope* of the privilege claimed. In this case, the inquiry is directed to whether the privilege extends to dealings with *all* categories of employees or just those categories of employees whose work is connected with the legislative and deliberative functions of the House. More specifically, the issue is whether the privilege extends to the ranks of service employees (such as catering staff) who support MPs in a general way, but play no role in the discharge of their constitutional functions.

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Once the issue of scope is resolved, it will be for the House to deal with the categories of employees who are covered by the privilege, and the courts will not enquire into its *exercise* in a particular case. The limitation is of great practical importance. If the courts below were correct about a "human rights exception", for example, any person dealing with the House of Commons could circumvent the jurisdictional immunity conferred by privilege simply by alleging discrimination on grounds contrary to the *Canadian Human Rights Act*. Such a rule would amount to an invitation to an outside body to review

intervention externe saperait l'autonomie dont l'assemblée ou son membre ont besoin pour accomplir leur travail dignement et efficacement.

- (4) Une fois l'existence d'un privilège établie, la Cour n'évaluera pas le bien-fondé de son exercice

En pratique, il pourra être difficile dans certains cas d'établir une distinction entre le fait de définir l'étendue d'un privilège, qui ressortit aux tribunaux, et celui d'évaluer l'opportunité de son exercice, qui ressortit à l'assemblée législative. Le présent pourvoi peut néanmoins servir à illustrer cette distinction, à la lumière des faits de l'espèce. Le privilège revendiqué par les appelants concerne les relations du Parlement avec *tous* ses employés. Si la revendication était justifiée, aucun organe indépendant de la Chambre des communes, y compris les tribunaux, ne pourrait examiner les raisons pour lesquelles le président de la Chambre appelant a congédié indirectement M. Vaid. Les organes externes n'auraient pas *compétence* à cet égard. Il reste toutefois que les tribunaux doivent définir l'*étendue* du privilège revendiqué. En l'espèce, il s'agit de déterminer si le privilège s'étend aux relations avec *toutes* les catégories d'employés ou seulement aux relations avec les catégories d'employés dont le travail est lié aux fonctions législatives et délibératives de la Chambre. Il s'agit plus particulièrement de savoir si le privilège vise les actions touchant le personnel de soutien (comme le personnel de la restauration) qui appuie les membres du Parlement d'une manière générale, mais ne contribue aucunement à l'exercice de leurs fonctions constitutionnelles.

Une fois la question de l'étendue du privilège résolue, il reviendra à la Chambre d'agir à l'égard des employés appartenant aux catégories visées par le privilège et l'*exercice* du privilège dans un cas particulier ne sera pas assujéti à l'examen des tribunaux. Il s'agit d'une restriction fort importante sur le plan pratique. À supposer, par exemple, que les tribunaux d'instance inférieure aient eu raison de conclure à l'existence d'une « exception fondée sur les droits de la personne », quiconque traite avec la Chambre des communes pourrait contourner l'immunité juridictionnelle conférée par un privilège simplement en

the reasons behind the exercise of the privilege in each particular case. This would effectively defeat the autonomy of the legislative assembly which is the *raison d'être* for the doctrine of privilege in the first place.

On the other hand, the respondents' preliminary objection that the appellants have overstated the scope of their privilege by claiming exclusive and unreviewable authority over the hiring and firing of all employees working for the House of Commons goes to the scope of activity covered by the privilege, and as Rothstein J.A. pointed out in the court below, is a preliminary issue properly cognizable by the courts.

C. Description of the Category of Privilege Claimed in This Case

At the hearing of this appeal, the appellants identified the claimed privilege as “management of employees”. I agree that this is a more appropriate category than one of the other terms suggested, “internal affairs”. The latter is a term of great elasticity. If interpreted precisely it refers “especially to [the House’s] control of its own agenda and proceedings” (Marleau and Montpetit, at p. 103). This is also the view taken by the British Joint Committee Report:

... the privilege of each House to administer its own internal affairs in its precincts applies only to activities directly and closely related to proceedings in Parliament. [para. 251]

On the other hand, if the term “internal affairs” were interpreted broadly as suggested by some of the interveners, it would duplicate most of the matters recognized independently as privileges, including the right to exclude strangers from the House (*New Brunswick Broadcasting*), the discipline of members (*Harvey*) and matters of day-to-day

alléguant qu’un acte discriminatoire a été commis en violation de la *Loi canadienne sur les droits de la personne*. Une telle règle équivaldrait à inviter un organe externe à contrôler les raisons qui sous-tendent l’exercice du privilège dans chaque cas particulier. L’autonomie de l’assemblée législative, qui au départ est la raison d’être de la doctrine du privilège parlementaire, serait ainsi, de fait, réduite à néant.

Par contre, l’objection préliminaire des intimés selon laquelle les appelants ont attribué une portée excessive à leur privilège — en prétendant avoir le pouvoir exclusif et non susceptible de contrôle d’embaucher et de congédier tous les employés travaillant pour la Chambre des communes — vise l’étendue de l’activité couverte par le privilège et, comme le juge Rothstein de la Cour d’appel fédérale l’a fait remarquer en l’espèce, il s’agit d’une question préjudicielle qui relève à bon droit des tribunaux.

C. Description de la catégorie de privilège invoquée en l’espèce

À l’audition du présent pourvoi, les appelants ont indiqué que le privilège qu’ils invoquent appartient à la catégorie « gestion du personnel ». Je conviens qu’il s’agit là d’une catégorie plus appropriée que l’une des autres catégories proposées, à savoir les « affaires internes ». Cette dernière expression est très élastique. Ainsi, suivant une interprétation stricte elle s’entend « principalement [du droit de la Chambre] d’être maître du programme de ses travaux et du déroulement de ses délibérations » (Marleau et Montpetit, p. 103). Le rapport du comité mixte britannique exprime le même point de vue :

[TRADUCTION] . . . le privilège de chaque Chambre d’administrer ses propres affaires internes dans son enceinte ne s’applique qu’aux activités directement et étroitement reliées aux travaux du Parlement. [par. 251]

Par contre, si l’expression « affaires internes » devait être interprétée libéralement, comme le proposent certains des intervenants, elle chevaucherait la plupart des objets de privilèges indépendants reconnus, notamment le pouvoir du Parlement d’exclure les étrangers de ses débats (*New Brunswick Broadcasting*), son pouvoir disciplinaire à l’endroit

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procedure in the House itself (*Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)*) (the “Lord’s Prayer” case). The danger of dealing with a claim of privilege at too high a level of generality was also noted in the British Joint Committee Report:

“Internal affairs” and equivalent phrases are loose and potentially extremely wide in their scope. . . . [It] would be going too far if it were to mean, for example, that a dispute over the . . . dismissal of a cleaner could not be decided by a court or industrial tribunal in the ordinary way. [para. 241]

In light of the explicit link made in s. 18 of our *Constitution Act, 1867* to the “privileges, immunities, and powers . . . enjoyed, and exercised by the Commons House of Parliament of the United Kingdom . . . and by the members thereof”, these words of disclaimer by a joint committee of British Parliamentarians deserve careful consideration.

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I therefore turn to the appellants’ contention that “the power of the Speaker of the House of Commons to hire, manage and dismiss House employees is among the constitutionally entrenched parliamentary privileges over which the House has exclusive jurisdiction. This exclusive jurisdiction extends to the investigation and adjudication of workplace discrimination claims” (appellants’ factum, at para. 2). The appellants’ position goes well beyond the more limited privilege outlined in the British Joint Committee Report and would cover with immunity *all* dealings with *all* employees without exception who work for the legislative branch of government.

D. Proof of the Category of Privilege Claimed in This Case

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The onus lies on the appellants to establish that the category and scope of privilege they claim do not exceed those that “at the passing of [the *Parliament of Canada*] Act [were] held, enjoyed, and exercised

de ses membres (*Harvey*) et la procédure quotidienne de la Chambre elle-même (*Ontario (Speaker of the Legislative Assembly) c. Ontario (Human Rights Commission)*) (l’affaire du « Notre Père »). Le rapport du comité mixte britannique souligne également le danger qu’il y a à aborder une revendication de privilège d’un point de vue trop général :

[TRADUCTION] L’expression « affaires internes » et les autres expressions analogues sont vagues et peuvent avoir une portée fort étendue. [. . .] [On] irait trop loin si on l’interprétait, par exemple, comme signifiant qu’un litige portant sur [. . .] le congédiement d’un préposé à l’entretien ne peut être tranché suivant la procédure ordinaire par une cour de justice ou par un tribunal industriel. [par. 241]

Compte tenu du lien explicite que fait l’art. 18 de la *Loi constitutionnelle de 1867* avec les « privilèges, immunités et pouvoirs [. . .] exercés par la Chambre des Communes du Parlement du Royaume-Uni [. . .] et par les membres de cette Chambre », la mise en garde d’un comité mixte de parlementaires britanniques mérite d’être prise sérieusement en considération.

J’examinerai donc maintenant la prétention des appelants selon laquelle [TRADUCTION] « le pouvoir du président de la Chambre des communes d’embaucher, de gérer et de congédier les employés de la Chambre est l’un des privilèges parlementaires garantis par la Constitution et du ressort exclusif de la Chambre. Cette compétence exclusive comprend le pouvoir d’examiner les allégations de discrimination en milieu de travail et de se prononcer sur celles-ci » (mémoire des appelants, par. 2). Selon la position des appelants, qui va bien au-delà du privilège plus restreint décrit dans le rapport du comité mixte britannique, l’immunité engloberait *tous* les rapports avec *tous* les employés qui travaillent pour l’organe législatif du gouvernement, sans exception.

D. Preuve de la catégorie de privilège invoquée en l’espèce

Il incombe aux appelants d’établir que l’existence et l’étendue du privilège qu’ils invoquent n’excèdent pas celles des privilèges qui étaient « lors de la passation de [la *Loi sur le Parlement du Canada*,]

by the Commons House of Parliament of the United Kingdom . . . and by the members thereof”.

I will examine first whether this issue has been authoritatively resolved in the courts of Canada or the United Kingdom and, if not, I will proceed to measure the appellants’ claim against the test of necessity in relation to what is required “in order for these legislators to do their legislative work” (Maingot, at p. 12).

E. *Step One: Has the Existence of a General Privilege in Relation to the “Management of Employees” Been Established by Prior Authority?*

(1) Canadian Authority

The appellants rely on the decision of the Federal Court of Appeal in *House of Commons v. Canada Labour Relations Board*, [1986] 2 F.C. 372. In that case, the court set aside a decision of the Canada Labour Relations Board that had certified a union as the bargaining agent for a unit comprising employees of the House of Commons that included elevator operators and catering employees. However the decision of the Federal Court of Appeal was based on an interpretation of the text of the *Canada Labour Code*. Pratte J.A., for the majority, 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” (p. 384 (emphasis added)). In the court’s view, however, the Houses of Parliament simply did not fall within the statutory definition of an “employer”. (The statutory language of the *Canadian Human Rights Act* presents no such obstacle.)

The appellants can show that historically both the House of Commons in Britain and in Canada had the power to hire and fire employees, but this is not proof of the necessity that such hiring and firing be immunized from judicial review by the doctrine of parliamentary privilege. Both s. 18 of the *Constitution Act, 1867* and s. 4 of the *Parliament*

possédés et exercés par la Chambre des Communes du Parlement du Royaume-Uni [. . .] et par les membres de cette Chambre ».

Je vais d’abord déterminer si cette question a été tranchée péremptoirement par les tribunaux du Canada ou du Royaume-Uni et, dans la négative, je vais soumettre la revendication des appelants au critère de nécessité en fonction de ce qui est requis « pour leur permettre d’effectuer leur travail législatif » (Maingot, p. 12).

E. *Première étape : l’existence d’un privilège général relatif à la « gestion du personnel » a-t-elle déjà été reconnue?*

(1) Les sources canadiennes

Les appelants s’appuient sur la décision de la Cour d’appel fédérale dans *Chambre des communes c. Conseil canadien des relations de travail*, [1986] 2 C.F. 372. Dans cette affaire, la cour a annulé la décision par laquelle le Conseil canadien des relations de travail avait accrédité un syndicat comme agent négociateur d’une unité comprenant des employés de la Chambre des communes, dont des opérateurs d’ascenseurs et des employés du secteur de la restauration. Pour rendre sa décision, la Cour d’appel fédérale s’est toutefois appuyée sur l’interprétation du *Code canadien du travail*. S’exprimant au nom de la majorité, le juge Pratte a fait remarquer que « les parlementaires considèrent, à tort ou à raison, que le droit de la Chambre et du Sénat de nommer et de contrôler les membres de leur personnel fait partie de leurs privilèges » (p. 384 (je souligne)). La cour a toutefois conclu que les Chambres du Parlement n’étaient tout simplement pas visées par la définition du terme « employeur ». (Le libellé de la *Loi canadienne sur les droits de la personne* ne soulève pas de problème sur ce plan.)

Les appelants sont en mesure de démontrer qu’historiquement la Chambre des communes de Grande-Bretagne et celle du Canada avaient toutes deux le pouvoir d’embaucher et de congédier leurs employés, mais cela ne prouve pas qu’il est nécessaire que ces actes soient immunisés contre tout contrôle judiciaire en application de la doctrine du privilège

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of *Canada Act* differentiate among the “privileges, immunities and powers” of Parliament.

parlementaire. Tant l’art. 18 de la *Loi constitutionnelle de 1867* que l’art. 4 de la *Loi sur le Parlement du Canada* établissent des distinctions entre les « privilèges, immunités et pouvoirs » du Parlement.

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Counsel referred the Court to several historical documents which, it was alleged, established the existence of such a privilege in Britain prior to 1867, as well as the existence of that privilege here in Canada. In particular, the *House of Commons (Offices) Act, 1812* (U.K.), 52 Geo. 3, c. 11, allows for complaints as to the “Misconduct or Unfitness of any Clerk, Officer, Messenger or other Person attendant on the House of Commons” to be made to the Speaker, and provides the Speaker with the power to suspend or remove those individuals found to be guilty of such misconduct. This statute is said to codify the practice of the time. In the Canadian context, we were referred to *An Act respecting the internal Economy of the House of Commons, and for other purposes*, S.C. 1868, c. 27, which incorporates much of the same language as the British Act just mentioned.

Les avocats ont porté à l’attention de la Cour plusieurs documents historiques qui établissent selon eux l’existence d’un tel privilège en Grande-Bretagne avant 1867, ainsi que l’existence de ce privilège ici au Canada. Plus particulièrement, la *House of Commons (Offices) Act, 1812* (R.-U.), 52 Geo. 3, ch. 11, autorise le dépôt d’une plainte auprès du président de la Chambre pour [TRADUCTION] « inconduite ou incompétence d’un greffier, d’un employé, d’un officier, d’un messenger ou d’un autre serviteur travaillant pour la Chambre des communes », et confère au président le droit de suspendre de leurs fonctions ou de démettre les personnes reconnues coupables d’une telle inconduite. Cette loi est censée codifier la pratique en vigueur à l’époque de son adoption. Dans le contexte canadien, référence a été faite à l’*Acte concernant l’Économie Intérieure de la Chambre des Communes et pour d’autres fins*, S.C. 1868, ch. 27, dont le libellé est analogue à celui de la loi britannique précitée.

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Standing Order 151 of the House of Commons, which has remained unchanged since its adoption in 1867, provides:

The Clerk of the House is responsible for the safe-keeping of all papers and records of the House, and has the direction and control over all the officers and clerks employed in the offices, subject to such orders as the Clerk may, from time to time, receive from the Speaker or the House. [Emphasis added.]

L’article 151 du *Règlement de la Chambre des communes*, qui n’a pas été modifié depuis son adoption en 1867, prévoit ce qui suit :

Le Greffier de la Chambre est responsable de la garde de tous les documents et archives de la Chambre et a la direction et le contrôle du personnel des bureaux, sous réserve des instructions qu’il peut recevoir, à l’occasion, de l’Orateur ou de la Chambre. [Je souligne.]

While the appellants cite this in support of their claim, the intervenors Senators Joyal and Jaffer point out that Standing Orders are not acts “of the Parliament of Canada” within s. 18 of the *Constitution Act, 1867* and, in any event, Standing Order 151 refers to powers, not immunities.

Les appelants s’appuient sur le texte précité, mais les sénateurs Joyal et Jaffer, intervenants, font remarquer que les articles du *Règlement de la Chambre des communes* ne sont pas des lois « du parlement du Canada » au sens de l’art. 18 de la *Loi constitutionnelle de 1867* et que, de toute façon, dans l’art. 151 il est question de pouvoirs et non d’immunités.

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In any event, the powers conferred by this legislation and Standing Order 151 are equivalent to

Quoi qu’il en soit, les pouvoirs conférés par les lois susmentionnées et par l’art. 151 du *Règlement*

the sort of authority routinely conferred on Deputy Ministers to enable them to manage the departments of government. There is nothing here that purports to *immunize* the exercise of those powers from the constraints imposed by the ordinary law of the land (which in the case of federally regulated employees is largely the creature of Parliament itself).

The appellants argue that the “privilege” respecting labour relations is recognized and affirmed by s. 4(1) of PESRA which states:

4. (1) Nothing in this Part abrogates or derogates from any of the privileges, immunities and powers referred to in section 4 of the *Parliament of Canada Act*.

But, as I see it, s. 4(1) simply begs the question of privilege. If no privilege can be shown to exist, there is nothing from which PESRA can abrogate or derogate.

(2) British Authority

We were not referred to any judicial authority in the U.K. on this point, and the British Joint Committee Report does not support the existence of a compendious privilege over “management of employees”. On the contrary, the Joint Committee of Parliamentarians at Westminster writes:

The Palace of Westminster is a large building; it requires considerable maintenance; it provides an extensive range of services for members; it employs and caters for a large number of staff and visitors. These services require staff and supplies and contractors. For the most part, and rightly so, these services are not treated as protected by privilege. [Emphasis added; para. 246.]

It follows that management functions relating to the provision of services in either House are only exceptionally subject to privilege. [Emphasis added; para. 248.]

I have already referred to the British Joint Committee’s view that it “would be going too far” to hold that “a dispute over the . . . dismissal of a

de la Chambre des communes sont du même type que ceux normalement conférés aux sous-ministres pour leur permettre d’administrer les ministères. Ils ne contiennent aucun élément qui vise à *immuniser* l’exercice de ces pouvoirs contre les contraintes imposées par le droit commun du pays (qui, dans le cas des employés relevant du fédéral, est en grande partie édicté par le Parlement lui-même).

Les appelants font valoir que le « privilège » relatif aux relations de travail est reconnu et confirmé par le par. 4(1) de la LRTP, ainsi libellé :

4. (1) La présente partie n’a pas pour effet d’abroger les droits, immunités et attributions visés à l’article 4 de la *Loi sur le Parlement du Canada* ou d’y déroger.

Mais, selon ma compréhension, le par. 4(1) ne fait que poser la question du privilège. S’il est impossible d’établir l’existence d’un privilège, il n’y a rien que la LRTP puisse abroger ou modifier.

(2) Les sources britanniques

Aucune décision britannique portant directement sur cette question n’a été portée à notre attention et le rapport du comité mixte britannique ne permet pas de conclure à l’existence d’un vaste privilège relatif à la « gestion du personnel ». Au contraire, le rapport du comité mixte britannique dit ce qui suit :

[TRADUCTION] Le Palais de Westminster est un vaste immeuble qui nécessite beaucoup d’entretien; il fournit un large éventail de services aux membres; il emploie et accueille de nombreux employés et visiteurs. Pour offrir ces services il compte sur des employés et des fournisseurs, et il doit avoir accès à diverses fournitures. Dans l’ensemble, ces services ne sont pas considérés comme protégés par un privilège, et ce, à juste titre. [Je souligne; par. 246.]

Il s’ensuit que les fonctions de gestion, pour ce qui est de la fourniture de services dans l’une ou l’autre Chambre, ne sont qu’exceptionnellement assujetties au privilège. [Je souligne; par. 248.]

J’ai déjà fait référence au point de vue exprimé par le comité mixte britannique selon lequel on [TRADUCTION] « irait trop loin » en statuant

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cleaner could not be decided by a court or industrial tribunal in the ordinary way” (para. 241).

« qu’un litige portant sur [...] le congédiement d’un préposé à l’entretien ne peut être tranché suivant la procédure ordinaire par une cour de justice ou par un tribunal industriel » (par. 241).

62 It is clear from these observations that, in the U.K., the management of *some* employees would be covered by privilege but only if a connection were established between that category of employees and the exercise by the House of its functions as a legislative and deliberative assembly, including its role in holding the government to account. A privilege in those terms would be considerably narrower than that claimed by the appellants.

Il ressort clairement de ces observations que, au Royaume-Uni, la gestion du personnel appartenant à *certaines* catégories d’emploi serait assujettie à un privilège, mais seulement si un lien est établi entre la catégorie d’employés visés et l’exécution des fonctions de la Chambre en tant qu’assemblée législative et délibérante, y compris de sa tâche de demander des comptes au gouvernement. Un tel privilège serait d’une portée beaucoup moins vaste que celui qu’invoque en l’espèce les appelants.

63 The appellants also rely on the opinion of the English Court of King’s Bench in *R. v. Graham-Campbell; Ex parte Herbert*, [1935] 1 K.B. 594. In that case, the satirist A. P. Herbert (author of *Uncommon Law* and other parodies) laid an information against fifteen Members of Parliament, and a House employee, for serving alcohol in the Palace of Westminster without a licence. In a brief five paragraph judgment, Lord Hewart stated that the “internal affairs” of the House included the service of alcohol and that in any event the Licensing Acts were, in their terms, “quite inapplicable to the House of Commons” (p. 602). In so holding, Lord Hewart “departed”, as he admitted at p. 602, from the “observations of my illustrious predecessor, Lord Russell C.J., in *Williamson v. Norris* [[1899] 1 Q.B. 7, 12]”. The facts of the case are readily distinguishable, of course. The impact of liquor services would be felt only by members of Parliament and their guests. The *Ex parte Herbert* case did not involve the exercise of powers to the disadvantage of non-members, where *Stockdale v. Hansard*, at p. 1192, requires more careful scrutiny.

Les appelants s’appuient également sur l’opinion exprimée par la Cour du Banc du Roi d’Angleterre dans *R. c. Graham-Campbell; Ex parte Herbert*, [1935] 1 K.B. 594. Dans cette affaire, le satiriste A. P. Herbert (auteur du livre intitulé *Uncommon Law* et d’autres parodies) a déposé une dénonciation contre quinze membres du Parlement et un employé de la Chambre pour avoir servi des boissons alcoolisées, sans permis, dans l’enceinte du Palais de Westminster. Dans une courte décision de cinq paragraphes, lord Hewart a conclu que servir de l’alcool relevait des « affaires internes » de la Chambre et que, de toute façon, compte tenu de son libellé, la législation sur les permis d’alcool [TRADUCTION] « ne pouvait guère s’appliquer à la Chambre des communes » (p. 602). En statuant en ce sens, lord Hewart « s’est écarté », comme il l’a lui-même admis à la p. 602, des [TRADUCTION] « propos de [son] illustre prédécesseur, le lord juge en chef Russell, dans *Williamson c. Norris* [[1899] 1 Q.B. 7, 12] ». Les faits peuvent, bien sûr, aisément être distingués. Ainsi, le fait de servir des boissons alcoolisées ne devrait avoir d’incidence que sur les membres de la Chambre et leurs invités. L’affaire *Ex parte Herbert* ne concernait pas l’exercice d’un pouvoir au détriment de non-parlementaires, alors que l’affaire *Stockdale c. Hansard*, p. 1192, mérite un examen attentif.

The appellants read *Ex parte Herbert* as authority for treating the precincts of Parliament as an “enclave” or “statute-free zone” immune, at least for purposes of the liquor licensing laws, from the ordinary laws of the land. I think this goes too far. The “enclave” theory was explicitly rejected by this Court in *New Brunswick Broadcasting*, as well as by the British Joint Committee Report, at para. 242.

Nevertheless, it is the decision of the Court of King’s Bench in the *Ex parte Herbert* case that is cited by Maingot as the basis for his assertion that parliamentary privilege covers the management of all employees. Maingot writes:

The courts, however, accept that they do not have any jurisdiction over the “internal proceedings” of the House of Commons or of the Senate or of a legislature. Apart from what takes place officially in the House and in committee, this also includes areas of administrative concern, such as the sale of liquor on the premises and the rights of employees in their relations with the House of Commons or Senate . . . [p. 301]

In my view, with respect, Maingot’s statement is too broad. It overgeneralizes from a case dealing with the authority of Members of Parliament to make their own arrangements for drinking alcohol, which is really of concern only to themselves, to an immunity in relation to the exercise of powers of dismissal over *all* categories of employees, whether in violation of the human rights standards established by Parliament itself, or otherwise. As noted in the British Joint Committee Report, while privilege is said to extend to the “internal affairs” of the House, “[t]his heading of privilege best serves Parliament if not carried to extreme lengths” (para. 241).

Lord Hewart’s judgment has been the subject of considerable criticism. Professor R. F. V. Heuston calls the decision a “somewhat unsatisfactory judgment” (*Essays in Constitutional Law* (2nd ed. 1964), at p. 94). *Erskine May* comments that “Lord

Selon les appelants la décision *Ex parte Herbert* consacre le principe que l’enceinte du Parlement est une « enclave » ou une « zone franche » bénéficiant de l’immunité contre l’application du droit commun du pays, à tout le moins en ce qui concerne la législation sur les permis d’alcool. Je crois que cette affirmation va trop loin. Notre Cour, dans *New Brunswick Broadcasting*, et le rapport du comité mixte britannique, au par. 242, ont expressément rejeté la théorie de « l’enclave ».

Il reste que c’est la décision *Ex parte Herbert* rendue par la Cour du Banc du roi que cite Maingot pour appuyer son affirmation portant que le privilège parlementaire couvre la gestion de tous les employés. Maingot écrit :

Cependant les tribunaux admettent qu’ils ne sont pas compétents en ce qui concerne les « délibérations internes » de la Chambre des communes, du Sénat ou d’une assemblée provinciale. Outre ce qui se passe officiellement à la Chambre et dans les comités, les délibérations comprennent aussi des questions d’ordre administratif comme la vente d’alcool dans l’enceinte du Parlement et les droits des employés dans leurs relations avec la Chambre ou le Sénat . . . [p. 314-315]

J’estime, en toute déférence, que l’énoncé de Maingot est trop large. Il généralise à l’excès en partant d’une décision sur le droit des membres du Parlement de prendre eux-mêmes des dispositions relativement à la consommation de boissons alcoolisées, qui ne concerne vraiment qu’eux, pour conclure à une immunité protégeant l’exercice du pouvoir de congédier *toutes* les catégories d’employés, même en violation des normes établies par le Parlement lui-même en matière de droits de la personne. Comme le souligne le rapport du comité mixte britannique, bien qu’on dise que le privilège parlementaire couvre les « affaires internes » de la Chambre, [TRADUCTION] « [c]e privilège sert mieux le Parlement s’il n’est pas porté à l’extrême » (par. 241).

La décision de lord Hewart a fait l’objet de nombreuses critiques. Le professeur R. F. V. Heuston dit qu’il s’agit d’une décision [TRADUCTION] « quelque peu insatisfaisante » (*Essays in Constitutional Law* (2^e éd. 1964), p. 94). Dans *Erskine May*, on

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Hewart CJ took a much more liberal view of the proper extent of the internal proceedings of the House than his predecessor in 1899” (23rd ed., at p. 189). The British Joint Committee Report itself commented as follows:

This decision, which has not escaped criticism, has spawned difficulties and anomalies, mainly but not solely in the field of employment. . . . Parliamentary privilege exists to enable members to discharge their duties to the public. It cannot be right that this privilege should have the effect that Parliament itself, within the place it meets, is not required to comply with its own laws on matters such as health and safety, employment, or the sale of alcohol. [para. 250]

. . . .

Whether the decision in the *A P Herbert* case was in accordance with earlier cases is not a matter we need pursue. The decision has never been considered in a higher court. For the purposes of this review, it is the practical consequences that matter. We consider the practical consequences of this decision are not satisfactory. [para. 251]

(It is useful at this point to note that the Chairman of the British Joint Committee was Lord Nicholls of Birkenhead, one of the Law Lords.)

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An earlier Commons Privileges Committee looking into the showing of a film at Westminster, that was said to be banned on national security grounds (the *Zircon* affair), took a similarly dim view of the enclave theory:

It might be thought . . . that the fact that something is done within the precincts of the House might afford that action some kind of immunity or protection of privilege. This would mean that the precincts of the House would somehow be treated as a sanctuary from the operation of the law, irrespective of whether the activities concerned were a proceeding in Parliament. . . . Your Committee can find no precedent for the House affording its Members any privileges on the *sole* ground that their activities were within the precincts The fact that the *Zircon* film was to be shown in the precincts

trouve le commentaire suivant : [TRADUCTION] « En ce qui concerne l’étendue des délibérations internes de la Chambre, le lord juge en chef Hewart a adopté une position beaucoup plus libérale que celle de son prédécesseur en 1899 » (23^e éd., p. 189). Même dans le rapport du comité mixte britannique on peut lire :

[TRADUCTION] Cette décision, qui n’a pas échappé à la critique, a créé des difficultés et des anomalies, principalement mais pas uniquement dans le domaine de l’emploi. [. . .] Le privilège parlementaire vise à permettre aux membres de remplir leurs obligations envers le public. Le privilège ne saurait faire en sorte que le Parlement lui-même, dans l’enceinte où il délibère, n’ait pas à se conformer à ses propres lois concernant par exemple la santé et la sécurité, l’emploi ou la vente d’alcool. [par. 250]

. . . .

Nous n’avons pas à examiner la question de savoir si la décision *A P Herbert* est conforme à la jurisprudence antérieure. Aucun tribunal d’instance supérieure ne s’est prononcé sur cette décision. Dans le cadre de la présente étude, ce sont les conséquences pratiques qui importent. Or, nous estimons que les conséquences pratiques de cette décision ne sont pas satisfaisantes. [par. 251]

(Il est utile, à ce stade, de souligner que le comité mixte britannique était présidé par lord Nicholls of Birkenhead, un des lords juges.)

Un comité antérieur sur les privilèges de la Chambre se prononçant sur la projection, à Westminster, d’un film que l’on prétendait interdit pour des motifs de sécurité nationale (l’affaire *Zircon*), a exprimé une opinion semblable défavorable à la théorie de l’enclave :

[TRADUCTION] On pourrait penser [. . .] que le fait qu’une chose soit faite dans l’enceinte de la Chambre peut lui conférer une certaine immunité ou lui garantir la protection découlant du privilège parlementaire. Cela signifierait que l’enceinte de la Chambre pourrait, d’une certaine manière, servir de sanctuaire à l’abri de l’application de la loi, indépendamment de la question de savoir si les activités en cause relèvent des travaux du Parlement. [. . .] Le comité n’a repéré aucun précédent permettant à la Chambre d’accorder à ses membres un privilège pour le *seul* motif que leurs activités ont été

therefore gave those responsible no privileged protection. [Emphasis in original.]

(U.K., House of Commons, *First Report from the Committee of Privileges*, “Speaker’s Order of 22 January 1987 on a Matter of National Security”, at para. 17)

In my view, with respect, we should not accept as authoritative the *Ex parte Herbert* case as establishing an immunity covering all rights of all employees “in their relations with the House of Commons or Senate”, as Maingot contends (p. 301). This is a point that Lord Hewart did not purport to decide and, given the criticism the *Ex parte Herbert* decision has received in the U.K. by Parliamentarians themselves (in some sense an admission against interest), I do not think it should be accepted here as resolving the point in dispute.

I conclude that British authority does not establish that the House of Commons at Westminster is immunized by privilege in the conduct of *all* labour relations with *all* employees irrespective of whether those categories of employees have any connection (or nexus) with its legislative or deliberative functions, or its role in holding the government accountable.

F. *Step Two: Can the Privilege Claimed by the Appellants Be Supported as a Matter of Principle Under the Necessity Test?*

I have already discussed the necessity test in an earlier section of this judgment and will not repeat that discussion here.

The employment roster of the House of Commons in 2005 is very different from that of 1867. In the early period, the House of Commons had only 66 permanent staff and 67 sessional employees. At present, according to the Human Resources Section of the House of Commons, there are 2377

exercées dans l’enceinte [. . .] Par conséquent, les personnes responsables de la projection du film de l’affaire Zircon ne bénéficiaient pas de la protection que confère le privilège parlementaire du simple fait que le film devait être projeté au sein de la Chambre. [En italique dans l’original.]

(R.-U., Chambre des communes, *First Report from the Committee of Privileges*, « Speaker’s Order of 22 January 1987 on a Matter of National Security », par. 17)

À mon avis, avec toute la déférence qui s’impose, il ne faut pas considérer que la décision *Ex parte Herbert* fait autorité pour ce qui est de l’existence d’une immunité à l’égard de tous les droits de tous les employés « dans leurs relations avec la Chambre ou le Sénat », comme le prétend Maingot (p. 314-15). Il ne s’agit pas d’une question que lord Hewart entendait trancher et, compte tenu des critiques formulées au Royaume-Uni par les parlementaires eux-mêmes à l’endroit de cette décision (qui constituent en quelque sorte un aveu qui va contre leurs intérêts), je ne crois pas qu’elle doive être tenue pour avoir résolu le point en litige.

Je conclus que la jurisprudence britannique n’établit pas que la Chambre des communes de Westminster bénéficie de la protection du privilège parlementaire en ce qui concerne *toutes* ses relations de travail avec *tous* ses employés indépendamment de la question de savoir s’ils appartiennent à une catégorie d’employés ayant quelque chose à voir (un lien) avec les fonctions législatives ou délibératives de la Chambre ou avec sa tâche de demander des comptes au gouvernement.

F. *Deuxième étape : Le privilège invoqué par les appelants peut-il se justifier, sur le plan des principes, selon le critère de nécessité?*

J’ai déjà traité du critère de nécessité dans les précédents motifs et je n’y reviendrai pas ici.

La composition du personnel de la Chambre des communes est fort différente en 2005 de ce qu’elle était en 1867. Au tout début, la Chambre des communes comptait seulement 66 employés permanents et 67 employés de session. À l’heure actuelle, selon la division des Ressources

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employees. These include many departments and services unknown in 1867. The Library of Parliament alone employs 298 people, more than twice the total number of House employees in 1867. The Information Services for the House now has 573 employees. Not all of these greatly expanded services relate directly to the House's function as a legislative and deliberative body. Parliamentary Precinct Services employs over 800 staff including a locksmith, an interior designer, various curators, five carpenters, a massage therapist, two picture framers, a chief of parking operations and two traffic constables. Parliamentary Corporate Services includes several kitchen chefs, lesser cooks and helpers, three dishwashers/potwashers and other catering support staff. There is no doubt that the House of Commons regards *all* of its employees as helpful but the question is whether that definition of the scope of the privilege it asserts is too broad. Is the management of *all* employees, to use the words of the British Joint Committee Report, "so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative and deliberative assembly"? (para. 247) In other words, can it be said that immunity from outside scrutiny in the management of all service employees is such that without it, in the words of *Erskine May*, the House and its members "could not discharge their functions"? (23rd ed., at p. 75) As stated earlier, this is not the view from Westminster where the British Joint Committee Report said that "... [it] would be going too far if [privilege] were to mean, for example, that a dispute over the ... dismissal of a cleaner could not be decided by a court or industrial tribunal in the ordinary way" (para. 241).

humaines de la Chambre des communes, celle-ci compte 2 377 employés. De nombreux services auxquels ils appartiennent n'existaient pas en 1867. La Bibliothèque du Parlement à elle seule emploie 298 personnes, soit plus du double du total des employés qui travaillaient pour la Chambre en 1867. Les services d'information de la Chambre des communes emploient aujourd'hui 573 personnes. La gamme des services offerts a beaucoup augmenté et ils n'ont pas tous un rapport direct avec les fonctions de la Chambre en tant qu'organe législatif et délibérant. Le Service de la cité parlementaire compte plus de 800 employés dont un serrurier, un designer d'intérieurs, divers conservateurs, cinq charpentiers, un massothérapeute, deux encadreurs de tableaux, un responsable du stationnement et deux agents de circulation. Parmi le personnel des services intégrés du Parlement, on compte plusieurs chefs des cuisines, des cuisiniers et des aide-cuisiniers, trois plongeurs/casseroliers et d'autres employés de soutien du service de la restauration. Certes, la Chambre des communes considère que *tous* ses employés sont utiles, mais il s'agit plutôt de savoir si, ainsi définie, l'étendue du privilège qu'elle revendique est trop vaste. La gestion de *tous* les employés est-elle, pour reprendre les termes du rapport du comité mixte britannique, [TRADUCTION] « si étroitement et si directement liée aux travaux du Parlement que l'intervention des cours de justice serait incompatible avec la souveraineté du Parlement en sa qualité d'assemblée législative et délibérante »? (par. 247) Autrement dit, selon le critère énoncé dans *Erskine May*, peut-on dire que, sans l'immunité contre tout examen externe de la gestion de tous les employés de soutien, la Chambre et ses membres [TRADUCTION] « ne pourraient s'acquitter de leurs fonctions »? (23^e éd., p. 75) Comme je l'ai déjà indiqué, ce n'est pas l'opinion entretenue à Westminster, si l'on s'en remet au rapport du comité mixte britannique qui dit : [TRADUCTION] « ... [on] irait trop loin si on interprétait [le privilège], par exemple, comme signifiant qu'un litige portant sur [...] le congédiement d'un préposé à l'entretien ne peut être tranché suivant la procédure ordinaire par une cour de justice ou par un tribunal industriel » (par. 241).

Nor is it the view from Australia where it was held that an injury to a waitress in a parliamentary restaurant was not part of the internal business of Parliament and was not protected by privilege: *Bear*.

Nor is it the view in the United States, whose Constitution guards the separation of powers at *least* as strictly as does our own. In *Walker v. Jones*, 733 F.2d 923 (1984), the U.S. Court of Appeals for the District of Columbia Circuit considered the application of the Speech or Debate Clause of the United States Constitution in the context of an employment-related discrimination complaint. Ms. Walker managed the House of Representatives' restaurants and claimed that she was terminated on the basis of sex discrimination. Ginsburg J., now of the U.S. Supreme Court, writing for the majority of the Federal Court of Appeals, stated that the purpose of the Speech or Debate Clause is "to secure against executive or judicial interference the processes of the nation's elected representatives leading up to the formulation of legislative policy and the enactment of laws" (p. 928). In finding that Ms. Walker's claim could proceed, the majority found that personnel actions relating to the management of congressional food services were "too remote from the business of legislating to rank 'within the legislative sphere'" (p. 928). Ginsburg J. pointed out that the work of this category of employees may advance a member's general welfare, but did not relate to his or her legislative functions. One must make due allowance, of course, for the fact that the United States has a congressional rather than a parliamentary system, but the conclusion that the claim exceeded what was necessary to a legislative body is consistent with the view taken in parliamentary jurisdictions.

Ce n'est pas non plus ce qu'on pense en Australie, où l'on a statué que le préjudice causé à une serveuse dans un restaurant du Parlement n'était pas une question relevant des affaires internes du Parlement et que la protection conférée par le privilège parlementaire ne pouvait être invoquée à cet égard : *Bear*.

Il en est de même aux États-Unis, dont la Constitution préserve la séparation des pouvoirs avec *autant sinon plus* de rigueur que la nôtre. Dans *Walker c. Jones*, 733 F.2d 923 (1984), la Cour d'appel des États-Unis (circuit du district de Columbia) a examiné l'application de la disposition relative à la liberté de discours ou de débat de la Constitution américaine dans le contexte d'une plainte relative à une conduite discriminatoire en milieu de travail. M^{me} Walker gérât les restaurants de la Chambre des représentants et elle a prétendu que son congédiement constituait un acte discriminatoire fondé sur le sexe. La juge Ginsburg, maintenant juge à la Cour suprême des États-Unis, s'exprimant au nom des juges majoritaires de la Cour d'appel fédérale, a affirmé que l'objet de la disposition relative à la liberté de discours ou de débat est [TRADUCTION] « de garantir que les pouvoirs exécutif et judiciaire ne s'immiscent pas dans le processus par lequel les représentants élus formulent des politiques législatives et édictent des lois » (p. 928). Statuant que la plainte de M^{me} Walker pouvait être entendue, les juges majoritaires ont conclu que les actions en matière de ressources humaines concernant la gestion des services de restauration du Congrès étaient [TRADUCTION] « trop éloignés de l'activité législative pour être du "domaine législatif" » (p. 928). La juge Ginsburg a souligné que le travail exécuté par cette catégorie d'employés pouvait contribuer au bien-être général d'un membre de la Chambre, mais qu'il n'avait rien à voir avec l'exercice de ses fonctions législatives. Bien sûr, il faut tenir dûment compte du fait que les États-Unis sont dotés d'un régime présidentiel et non d'un régime parlementaire, mais la conclusion selon laquelle la revendication allait au-delà de ce qui est nécessaire au fonctionnement d'un organe législatif est compatible avec la position adoptée dans les pays dotés d'un régime parlementaire.

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I have no doubt that privilege attaches to the House's relations with *some* of its employees, but the appellants have insisted on the broadest possible coverage without leading any evidence to justify such a sweeping immunity, or a lesser immunity, or indeed any evidence of necessity at all. We are required to make a pragmatic assessment but we have been given no evidence on which a privilege of more modest scope could be delineated. As pointed out 166 years ago in *Stockdale v. Hansard*:

The burden of proof is on those who assert [the privilege] and, for the purposes of this cause, the proof must go to the whole of the proposition . . . [Emphasis added; p. 1201.]

In any event, it would not be fair to the respondent Vaid to substitute at this stage a description of a narrower privilege that he was not called upon to address.

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The appellants having failed to establish the privilege in the broad and all-inclusive terms asserted, the respondents are entitled to have the appeal disposed of according to the ordinary employment and human rights law that Parliament has enacted with respect to employees within federal legislative jurisdiction.

G. *Do Parliamentary Employees Fall Within the Scope of the Canadian Human Rights Act?*

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The *Canadian Human Rights Act* is the Act dealing with prohibitions and enforcement and is divided into four parts. Part I sets out the prohibited grounds of discrimination. Part II establishes the Canadian Human Rights Commission. Part III describes discriminatory practices and sets out general provisions for investigation, conciliation, settlement, adjudication, compensation and punishment. Part IV makes the Act "binding on Her Majesty in right of Canada".

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Part III is of particular relevance, because it is these investigative and enforcement provisions that

Je ne doute aucunement que le privilège protège les relations entre la Chambre et *certain*s de ses employés, mais les appelants ont tenu à invoquer le privilège le plus large possible, et ce, sans présenter de preuve justifiant une immunité aussi générale, ou de moindre portée, ni même, en fait, quelque preuve que ce soit de l'élément de nécessité. Nous devons faire une évaluation pragmatique, mais nous ne disposons d'aucun élément de preuve nous permettant de circonscrire un privilège d'une étendue plus modeste. Ainsi qu'on l'a souligné il y a 166 ans dans *Stockdale c. Hansard* :

[TRADUCTION] Le fardeau de la preuve incombe à la partie qui revendique [le privilège] et tous les éléments de l'allégation doivent être étayés par la preuve . . . [Je souligne; p. 1201.]

De toute façon, il serait injuste pour l'intimé, M. Vaid, que la Cour considère à ce stade un privilège d'une étendue moindre, étant donné qu'il n'a pas eu la possibilité de faire valoir son point de vue à ce sujet.

Les appelants n'ayant pas établi l'existence du privilège étendu et englobant qu'ils revendiquent, les intimés ont droit à ce que le pourvoi soit tranché sur le fondement des lois ordinaires que le Parlement a édictées en matière de relations de travail et de droits de la personne pour les employés relevant de la compétence législative fédérale.

G. *La Loi canadienne sur les droits de la personne s'applique-t-elle aux employés du Parlement?*

La *Loi canadienne sur les droits de la personne* est le texte législatif qui crée des interdictions et établit les mécanismes d'application de la loi. Elle comporte quatre parties. La partie I énonce les motifs de distinction illicite. La partie II établit la Commission canadienne des droits de la personne. La partie III décrit les actes discriminatoires et édicte des dispositions générales concernant les enquêtes, la conciliation, les règlements, les décisions, l'indemnisation et les peines. La partie IV prévoit que la loi « lie Sa Majesté du chef du Canada ».

La partie III est particulièrement pertinente, parce que ce sont les dispositions qu'elle contient

give rise to the appellants' concern about the potential intrusion of strangers into the workings of the House of Commons. Under s. 43(2), an investigator is designated to investigate the complaint. If the investigator is unable to resolve the issues, the Commission may refer the dispute to a "conciliator" under s. 47(1). If there is no settlement, the matter then goes on to a Canadian Human Rights Tribunal which has broad powers under s. 48.9 to enforce an employer's participation in its hearings. Under s. 54.1(2), a tribunal could require the House of Commons "to adopt a special program, plan or arrangement" containing "(a) positive policies and practices designed to ensure that members of designated groups achieve increased representation in the employer's workforce; or (b) goals and timetables for achieving that increased representation".

On the face of it, the *Canadian Human Rights Act* applies to all employees of the federal government including those working for Parliament. Section 2 provides as follows:

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

The appellants argue that the *Canadian Human Rights Act* "has no application to the House of Commons and its members because it does not so expressly provide" (*Duke of Newcastle v. Morris*). This argument cannot be accepted for a number of reasons. Firstly, the argument presupposes the prior establishment of a parliamentary privilege, which has not been done. Secondly, the "presumption" suggested by Lord Hatherley 135 years ago is out

relativement aux enquêtes et aux mécanismes d'application de la loi qui font craindre aux appelants la possibilité d'une ingérence « externe » dans le fonctionnement de la Chambre des communes. Le paragraphe 43(2) prévoit qu'un enquêteur peut être désigné pour enquêter sur une plainte. Si l'enquêteur ne parvient pas à régler les questions en litige, la Commission peut renvoyer l'affaire à un « conciliateur » en application du par. 47(1). À défaut d'un règlement, l'affaire est renvoyée au Tribunal canadien des droits de la personne, auquel l'art. 48.9 confère de larges pouvoirs lui permettant de contraindre l'employeur à participer à l'instruction. Le tribunal pourrait, en vertu du par. 54.1(2), ordonner à la Chambre des communes « d'adopter un programme, plan ou arrangement comportant des règles et usages positifs destinés à corriger la sous-représentation des membres des groupes désignés dans son effectif ou des objectifs et calendriers à cet effet ».

De prime abord, la *Loi canadienne sur les droits de la personne* s'applique à tous les employés de l'administration fédérale, y compris ceux qui travaillent pour le Parlement. L'article 2 est libellé comme suit :

2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne gracée.

Les appelants soutiennent que la *Loi canadienne sur les droits de la personne* « ne s'applique pas à la Chambre des communes et à ses membres parce qu'elle ne contient pas de disposition expresse à cet effet » (*Duke of Newcastle c. Morris*). Cet argument ne peut être retenu, et ce, pour plusieurs raisons. Premièrement, il présuppose que l'existence d'un privilège parlementaire a déjà été établie, ce qui n'est pas le cas. Deuxièmement, la « présomption »

of step with modern principles of statutory interpretation accepted in Canada, as set out in Driedger's *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [p. 87]

This approach was recently affirmed in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, and *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, and is reinforced by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment “is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”. Such interpretative principles apply with special force in the application of human rights laws.

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There is no indication in the language of s. 2 that the *Canadian Human Rights Act* was not intended to extend to employees of Parliament. There is no reason to think that Parliament “intended” to impose human rights obligations on every federal employer except itself. There is no indication that Parliament intended to exclude its own employees when it stated, in s. 2 of the *Canadian Human Rights Act*, that

all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

As stated earlier, the *Canadian Human Rights Act* is a quasi-constitutional document and we should affirm that any exemption from its provisions must be clearly stated.

évoquée par lord Hatherley, il y a 135 ans, va à l'encontre des principes contemporains d'interprétation des lois reconnus au Canada, tel que Driedger les décrit dans *Construction of Statutes* (2^e éd. 1983) :

[TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. [p. 87]

Cette approche a récemment été confirmée dans *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26, et dans *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, par. 33. De plus, elle est renforcée par l'art. 12 de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui prévoit que tout texte « est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet ». Ces principes d'interprétation s'appliquent avec une rigueur particulière dans le cadre de l'application des lois relatives aux droits de la personne.

Rien dans le libellé de l'art. 2 n'indique que la *Loi canadienne sur les droits de la personne* n'était pas censée s'appliquer aux employés du Parlement. Il n'existe aucune raison de croire que le Parlement avait « l'intention » d'imposer des obligations en matière de droits de la personne à tous les employeurs fédéraux, à l'exception de lui-même. Rien n'indique que le Parlement avait l'intention d'exclure ses propres employés lorsqu'il a énoncé à l'art. 2 de la *Loi canadienne sur les droits de la personne* que

le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.

Comme je l'ai souligné précédemment, la *Loi canadienne sur les droits de la personne* est un texte quasi constitutionnel, qui commande que toute exception à son application soit énoncée clairement.

I conclude therefore that the *Canadian Human Rights Act* does apply to employees of the Senate and House of Commons. That is not an end to the matter, of course. The appellants contend that Parliament has created a specific regime governing the labour relations of its own employees under PESRA. The appellants argue that the complaint of the respondent Vaid falls within the terms of PESRA, to which Parliament has granted exclusive authority in such matters. This is what I referred to earlier as the administrative law argument.

H. *Application of the Parliamentary Employment and Staff Relations Act*

PESRA confers labour relations' jurisdiction over employees like the respondent Vaid, the subject matter of his grievance (discrimination) and the remedial powers to resolve such a grievance. The issue is whether PESRA's system of redress, which runs parallel to the enforcement machinery provided under the *Canadian Human Rights Act*, manifests a parliamentary intention to oust the dispute resolution machinery of the Canadian Human Rights Commission. I conclude that it does.

(1) Jurisdiction Over Parliamentary Employees in the Position of Mr. Vaid

Section 2 of PESRA in its terms applies to all parliamentary employees with some exceptions (s. 4) not here relevant. Section 2 provides:

2. Subject to this Act, this Act applies to and in respect of every person employed by, and applies to and in respect of,

(a) the Senate, the House of Commons or the Library of Parliament, and

(b) a Member of Parliament who, in that capacity, employs that person or has the direction or control of staff employed to provide research or associated services to the caucus members of a political party represented in Parliament . . .

Par conséquent, je conclus que la *Loi canadienne sur les droits de la personne* s'applique aux employés du Sénat et de la Chambre des communes. Évidemment, cela ne règle pas la question. Les appelants font valoir que le Parlement, en édictant la LRTP, a créé un régime particulier qui régit les relations de travail avec ses propres employés. Ils soutiennent que la plainte de l'intimé Vaid est régie par la LRTP, que le Parlement a déclarée applicable à ces questions à l'exclusion de toute autre loi. C'est cette prétention que j'ai décrite plus tôt comme relevant du droit administratif.

H. *Application de la Loi sur les relations de travail au Parlement*

La LRTP est la loi attributive de compétence en matière de relations de travail relativement aux employés comme M. Vaid, à l'objet de son grief (la discrimination) et à l'octroi d'une réparation permettant de régler un tel différend. Il s'agit maintenant de déterminer si le mécanisme de règlement des différends prescrit par la LRTP, qui coexiste avec le mécanisme de règlement prévu par la *Loi canadienne sur les droits de la personne*, témoigne de l'intention du législateur d'écarter le processus relevant de la Commission canadienne des droits de la personne. Je conclus que tel est le cas.

(1) Compétence à l'égard des employés du Parlement occupant un poste comme celui de M. Vaid

Suivant le libellé de l'art. 2, la LRTP s'applique à tous les employés du Parlement, sauf certaines exceptions (art. 4) qui ne sont pas pertinentes en l'espèce. L'article 2 est reproduit ci-dessous :

2. La présente loi, sous réserve de ses autres dispositions, s'applique, d'une part, aux personnes attachées dans leur travail, comme employés, au Sénat, à la Chambre des communes, à la Bibliothèque du Parlement ou à des parlementaires, d'autre part à ces institutions et aux parlementaires qui, ès qualités, les emploient ou qui ont sous leur direction ou leur responsabilité des documentalistes ou des personnes chargées de fonctions similaires affectés au service des membres de groupes parlementaires, ainsi qu'à ces documentalistes ou personnes; . . .

The respondent Vaid is such an employee.

L'intimé M. Vaid répond à la description des employés visés.

(2) PESRA Applies to the Subject Matter of the Respondent Vaid's Grievance

(2) La LRTP s'applique à l'objet du grief de l'intimé M. Vaid

85 PESRA is intended to enforce a full range of employee rights and benefits. Section 5(1) announces that

La LRTP vise à assurer le respect d'un ensemble complet de droits et d'avantages conférés aux employés. Le paragraphe 5(1) dispose :

5. (1) The purpose of this Part is to provide to certain persons employed in Parliamentary service collective bargaining and other rights in respect of their employment.

5. (1) La présente partie a pour objet d'assurer à certaines personnes affectées aux services parlementaires certains droits, dont celui de négociation collective, dans le cadre de leur emploi.

86 Section 62(1)(a)(i) of PESRA permits any employee who feels aggrieved by the interpretation or application of "a provision of a statute" to present a grievance. Reference to a "provision of a statute" would include the human rights norms set out in the *Canadian Human Rights Act*. For ease of reference, s. 62(1) in its entirety reads as follows:

Selon le sous-al. 62(1)a)(i) de la LRTP, tout employé qui se sent lésé par l'interprétation donnée à une « une disposition législative » ou par son application peut présenter un grief. Le terme « disposition législative » englobe les normes établies par la *Loi canadienne sur les droits de la personne* en matière de droits fondamentaux. Par souci de commodité, le par. 62(1) est reproduit ci-dessous :

62. (1) Where any employee feels aggrieved

62. (1) Sous réserve du paragraphe (2), l'employé a le droit de présenter un grief à tous les paliers de la procédure prévue à cette fin par la présente partie, lorsqu'il s'estime lésé :

(a) by the interpretation or application, in respect of the employee, of

a) par l'interprétation ou l'application à son égard :

(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or

(i) soit d'une disposition législative, d'un règlement — administratif ou autre —, d'une instruction ou d'un autre acte pris par l'employeur concernant les conditions d'emploi,

(ii) a provision of a collective agreement or an arbitral award, or

(ii) soit d'une disposition d'une convention collective ou d'une décision arbitrale;

(b) as a result of any occurrence or matter affecting the employee's terms and conditions of employment, other than a provision described in subparagraph (a)(i) or (ii),

b) par suite de tout fait autre que ceux mentionnés aux sous-alinéas a)(i) ou (ii) et portant atteinte à ses conditions d'emploi.

the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Part.

87 It was therefore open to the respondent Vaid to submit a grievance under PESRA in 1997 as did in 1995 (with partial success) to pursue his workplace complaints.

En 1997, M. Vaid pouvait donc déposer un grief sous le régime de la LRTP, comme il l'avait fait en 1995 (obtenant partiellement gain de cause), afin qu'il soit donné suite à ses plaintes en matière de relations de travail.

(3) The Remedial Powers of a PESRA Adjudicator

While the respondent Vaid's complaints do not specify the relief he seeks (appellants' record, at pp. 247-50), PESRA adjudicators are invested with broad powers to resolve workplace grievances. The relief sought by the respondent Vaid in 1995 was reinstatement. The PESRA adjudicator ordered reinstatement once. If the respondent Vaid's complaint of constructive dismissal is well-founded, a PESRA adjudicator has authority to do so again. The PESRA adjudicator also considered (and rejected) the respondent Vaid's earlier complaints of discrimination and harassment, as mentioned above. Those, too, were issues that could be *and were* dealt with under PESRA.

(4) PESRA Jurisdiction Is Exclusive

Section 2 of PESRA provides that where other federal legislation deals with "matters similar to those provided for under" PESRA, PESRA prevails, i.e.,

... except as provided in this Act, nothing in any other Act of Parliament that provides for matters similar to those provided for under this Act ... shall apply ...

I. *Does Labour Adjudication Under PESRA Oust the Investigative and Dispute Resolution Machinery of the Canadian Human Rights Act on the Facts of This Case?*

I have concluded, as stated, that the *Canadian Human Rights Act* anti-discrimination norms are applicable to parliamentary employees. The remaining question is whether the investigatory and adjudicatory *Canadian Human Rights Act* procedures also apply as the respondents contend, or whether the respondent Vaid is obliged to seek relief under PESRA.

(3) Les pouvoirs de réparation de l'arbitre nommé sous le régime de la LRTP

Les plaintes de M. Vaid ne précisent pas quelle est la réparation recherchée (dossier des appelants, p. 247-250), mais il reste que les arbitres nommés en vertu de la LRTP sont investis de larges pouvoirs en ce qui concerne la résolution des différends en matière de relations de travail. En 1995, M. Vaid demandait à être réintégré dans ses fonctions. L'arbitre nommé en vertu de la LRTP a ordonné sa réintégration une première fois. Si la plainte de M. Vaid pour congédiement indirect est bien-fondée, un arbitre nommé en vertu de la LRTP a compétence pour le réintégrer à nouveau. L'arbitre a aussi examiné (et rejeté) les plaintes antérieures de discrimination et de harcèlement déposées par M. Vaid. Ces questions pouvaient elles aussi être tranchées sous le régime de la LRTP et elles l'ont *effectivement* été.

(4) La compétence que confère la LRTP est exclusive

L'article 2 de la LRTP prévoit que, lorsque d'autres lois fédérales régissent des « questions semblables à celles que réglementent » les dispositions de la LRTP, celles-ci l'emportent :

... sauf disposition expresse de la présente loi, les autres lois fédérales qui réglementent des questions semblables à celles que réglement[e] la présente loi [...] n'ont aucun effet ...

I. *La procédure d'arbitrage dans les relations de travail prescrite par la LRTP exclut-elle le recours aux mécanismes d'enquête et de règlement établis par la Loi canadienne sur les droits de la personne dans le contexte factuel du présent pourvoi?*

Je conclus, comme je l'ai déjà indiqué, que les normes antidiscrimination de la *Loi canadienne sur les droits de la personne* s'appliquent aux employés du Parlement. Il reste à décider si la procédure d'enquête et le processus décisionnel prévus à la *Loi canadienne sur les droits de la personne* s'appliquent également, comme les intimés le prétendent, ou si l'intimé Vaid doit obligatoirement demander réparation sous le régime de la LRTP.

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The Court has in a number of cases been required to examine competing legislative schemes to determine which of the potential adjudicative bodies is intended by the legislature to resolve a dispute. Mr. Vaid's claim of workplace discrimination and harassment could potentially fall under both PESRA and the *Canadian Human Rights Act*. The allegation of jurisdiction in such circumstances is a familiar administrative law problem, even in the context of human rights tribunals (see *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004] 2 S.C.R. 223, 2004 SCC 40 ("Charette"), and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39 ("Morin")).

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In the *Morin* case, the Chief Justice said, at para. 14:

... the question in each case is whether the relevant legislation applied to the dispute at issue, taken in its full factual context, establishes that the labour arbitrator has exclusive jurisdiction over the dispute.

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The fact that the respondent Vaid claims violations of his human rights does not automatically steer the case to the Canadian Human Rights Commission because "one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute" (*Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 49; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, at p. 721).

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In this case, the complaint against the House of Commons alleges dismissal and discrimination. The "facts giving rise to the dispute", as set out in the complaint, make only one explicit reference to the respondent Vaid's ethnic origin, namely that "[the Speaker] initiated a conversation about the caste system in India. He pressed me to tell him into which caste I had been born" (appellants' record, at p. 247). Other than that, the respondent Vaid relates a number of events in the course of his employment which, on the face of it, allege demeaning or unreasonable treatment inconsistent with the alleged

La Cour a déjà été appelée dans plusieurs affaires à examiner des régimes législatifs concurrents pour déterminer par laquelle des instances juridictionnelles susceptibles de connaître du litige le législateur avait voulu que l'affaire soit tranchée. La plainte de discrimination et de harcèlement au travail faite par M. Vaid pourrait relever à la fois de la LRTP et de la *Loi canadienne sur les droits de la personne*. Les allégations de compétence en pareilles circonstances sont un problème courant en droit administratif, même en ce qui concerne les tribunaux des droits de la personne (voir *Québec (Procureur général) c. Québec (Tribunal des droits de la personne)*, [2004] 2 R.C.S. 223, 2004 CSC 40 (« Charette »), et *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Québec (Procureur général)*, [2004] 2 R.C.S. 185, 2004 CSC 39 (« Morin »)).

Dans *Morin*, la Juge en chef dit ce qui suit au par. 14 :

Il faut [...] se demander dans chaque cas si la loi pertinente, appliquée au litige considéré dans son contexte factuel, établit que la compétence de l'arbitre en droit du travail est exclusive.

Ce n'est pas parce que M. Vaid prétend que ses droits fondamentaux ont été violés que sa cause est nécessairement du ressort de la Commission canadienne des droits de la personne étant donné qu'« il faut s'attacher non pas à la qualité juridique du tort, mais aux faits qui donnent naissance au litige » (*Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929, par. 49; *St. Anne Nackawic Pulp & Paper Co. c. Section locale 219 du Syndicat canadien des travailleurs du papier*, [1986] 1 R.C.S. 704, p. 721).

En l'espèce, la plainte formulée contre la Chambre des communes contient des allégations de congédiement et de discrimination. L'exposé des « faits qui donnent naissance au litige » figurant dans la plainte ne renvoie expressément qu'une fois à l'origine ethnique de l'intimé Vaid, soit lorsqu'il précise que [TRADUCTION] « [le président de la Chambre] a entamé avec moi une conversation sur le système des castes en Inde. Il insistait pour savoir à quelle caste j'appartenais à la naissance » (dossier des appelants, p. 247). Pour le reste, M. Vaid fait état de plusieurs événements survenus

terms of employment. The respondent Vaid takes the view that this behaviour was *motivated* by racial prejudice. His allegations are specific to the former Speaker and his Executive Assistant, i.e.:

- [The appellant Speaker] suggested that I was over-qualified for the position.
- [The appellant Speaker] questioned my wife regarding her employment and made her feel as though he was trying to assess whether she could financially support me in the event that I lost my job.
- While I was driving the [appellant Speaker] in February 1994, he initiated a conversation about the caste system in India. He pressed me to tell him into which caste I had been born.
- [The Speaker's Executive Assistant] indicated that because of budgetary cuts, he wanted to place me on a split shift and asked me to take on additional duties, including washing dishes. I responded that I would work a split shift, and I would wash dishes if he could demonstrate that other chauffeurs were also asked to take on this duty.
- In March 1994, I started wearing a soft cervical collar on the job, necessitated by a whiplash injury suffered earlier in the year. On March 25, 1994, the Executive Assistant advised me that I was not to drive the [appellant Speaker] while wearing the collar. My driving duties were taken away and assigned to a white, unilingual (English) employee.
- On October 14, 1994, the [appellant House of Commons] contacted me to offer me work as a photocopier operator, a messenger or a mini-van operator. Alternatively, I was offered a severance package. I advised the [appellant House of Commons] that I wished to be reinstated to my position as chauffeur to the Speaker immediately.

au cours de son emploi qui, à première vue, révèlent un traitement dégradant et déraisonnable contraire à ses prétendues conditions d'emploi. L'intimé Vaid estime que ce comportement était *motivé* par des préjugés raciaux. Ses allégations visent directement l'ancien président de la Chambre et son adjoint administratif :

[TRADUCTION]

- [Le président de la Chambre, appellant,] a laissé entendre que j'étais trop qualifié pour occuper le poste.
- [Le président de la Chambre, appellant,] a questionné ma femme à propos de son emploi et lui a donné à penser qu'il tentait d'évaluer si elle était en mesure de me soutenir financièrement si je devais perdre mon emploi.
- En 1994, pendant que je conduisais la voiture [du président de la Chambre, appellant], il a entamé avec moi une conversation concernant le système des castes en Inde. Il insistait pour savoir à quelle caste j'appartenais à la naissance.
- [L'adjoint administratif du président de la Chambre] m'a laissé savoir qu'en raison de réductions budgétaires, il voulait m'attribuer un poste fractionné et il m'a demandé d'effectuer des tâches supplémentaires, entre autres de laver la vaisselle. J'ai répondu que j'étais prêt à occuper un poste fractionné et que je laverais la vaisselle s'il pouvait faire la preuve qu'on avait demandé à d'autres chauffeurs d'en faire autant.
- En mars 1994, j'ai commencé à porter un collier cervical souple au travail, en raison d'un coup de fouet cervical que j'avais subi plus tôt la même année. Le 25 mars 1994, l'adjoint administratif du président de la Chambre m'a informé que je ne pouvais porter ce collier lorsque je conduisais la voiture [du président de la Chambre, appellant]. Mes tâches de chauffeur ont été assignées à un employé unilingue (anglais) de race blanche.
- Le 14 octobre 1994, [la Chambre des communes, appelante,] a communiqué avec moi pour m'offrir du travail à titre d'opérateur de photocopieur, de messenger ou de chauffeur de mini-fourgonnette. On m'a aussi donné la possibilité d'accepter une indemnité de départ. J'ai dit à la [Chambre des communes, appelante,] que je voulais être réintégré sans délai dans mon poste de chauffeur du président de la Chambre.

- Since my driving duties were taken away from me in March 1994, they have been carried out by two other employees, both of whom are white.
- I believe that my right to equal treatment in employment has been infringed upon by the respondent because of my race, colour and ethnic or national origin. [Appellants' record, at pp. 247-50]

There is nothing here, in my respectful opinion, to lift these complaints out of their specific employment context.

- Les deux employés qui ont exercé mes fonctions de chauffeur depuis qu'on m'en a relevé en mars 1994 sont tous deux de race blanche.
- Je crois que la défenderesse a porté atteinte à mon droit à un traitement égal en matière d'emploi, et ce, en raison de ma race, de ma couleur et de mon origine nationale ou ethnique. [Dossier des appelants, p. 247-250]

À mon humble avis, rien de ce qui précède ne justifie que les plaintes de M. Vaid soient considérées dans un autre contexte que leur contexte de relations de travail.

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It is true, as the respondents submit, that PESRA is essentially a collective bargaining statute rather than a human rights statute. The substantive human rights norms set out in the *Canadian Human Rights Act* are not set out in PESRA. Nevertheless, PESRA permits employees who complain of discrimination to file a grievance and to obtain substantive relief. I do not suggest that all potential claims to relief under the *Canadian Human Rights Act* would be barred by s. 2 of PESRA, but in the present type of dispute, there is clearly a measure of duplication in the two statutory regimes and the purpose of s. 2 is to avoid such duplication. Parliament has determined that grievances of employees covered by PESRA are to be dealt with under PESRA. A grievance that raises a human rights issue is nevertheless a grievance for purposes of employment or labour relations (see *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42).

Il est vrai que, comme les intimés le soutiennent, la LRTP est essentiellement une loi en matière de négociation collective plutôt qu'une loi sur les droits de la personne. Les règles de fond énoncées dans la *Loi canadienne sur les droits de la personne* en matière de droits fondamentaux ne figurent pas dans la LRTP. Celle-ci permet néanmoins aux employés qui se plaignent d'avoir été victimes de discrimination de déposer un grief et d'obtenir une réparation substantielle. Cela ne veut pas dire que toutes les demandes éventuelles visant à obtenir réparation sous le régime de la *Loi canadienne sur les droits de la personne* seraient exclues par application de l'art. 2 de la LRTP. Toutefois, dans le type de différend qui fait l'objet du présent pourvoi, il y a manifestement un certain chevauchement entre les deux régimes législatifs, et l'objet de l'art. 2 est d'éviter pareil chevauchement. Le législateur a prévu que les griefs des employés visés par la LRTP devaient être présentés et réglés sous le régime de la LRTP. Le grief qui soulève une question relative aux droits de la personne demeure un grief en matière d'emploi ou de relations de travail (voir *Parry Sound (district), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, [2003] 2 R.C.S. 157, 2003 CSC 42).

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The respondents point out some drawbacks, from the employee's perspective, in PESRA. For example, while judicial review is available (see, e.g., *Auclair v. Library of Parliament* (2002), 222 F.T.R. 124, 2002 FCT 777), enforcement of a valid award is done by filing a copy of the adjudicator's or Board's order, a report of the circumstances and all pertinent documents with the relevant House of Parliament

Les intimés mettent en relief certains désavantages que comporte la LRTP du point de vue des employés. À titre d'exemple, s'il est possible de recourir au contrôle judiciaire (voir notamment *Auclair c. Bibliothèque du Parlement*, [2002] A.C.F. n° 1054 (QL), 2002 CFPI 777), il reste que, pour faire exécuter une ordonnance, il faut déposer auprès de la Chambre concernée une copie de la

(PESRA, s. 14). It is ultimately up to that House to enforce such orders. A similar system operates for federal public servants generally (see *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35). This may be considered an unsatisfactory arrangement by the respondents but Parliament has provided in PESRA how it intends its staff employment grievances to be dealt with. Under our jurisprudence, Parliament is entitled to have that assignment of jurisdiction respected (*Weber; Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *Parry Sound (District) Social Services Administration Board; Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14).

The respondents also contend that while PESRA may be able to respond to Mr. Vaid's particular complaint of workplace discrimination and harassment, the Canadian Human Rights Tribunal is better placed than a PESRA adjudicator to address broader issues such as systemic discrimination, including compliance with the pay equity requirements of s. 11 of the *Canadian Human Rights Act*. They cite *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, [2004] 3 F.C.R. 663, 2004 FCA 113, where this provision of the *Canadian Human Rights Act* was considered. That is not this case. Such an argument raises a different issue in a different context. In *Morin* itself, the terms of the collective agreement were under attack as discriminatory. The dispute was therefore allowed to proceed before the Quebec Human Rights Tribunal. In *Charette*, the nature of the dispute was different, the statutory language more specific, and the proceedings before the Quebec Human Rights Tribunal were stopped. Instead, the dispute was referred to the Commission des affaires sociales. This is not an area of the law that lends itself to overgeneralization.

décision de l'arbitre ou de la Commission, selon le cas, un rapport circonstancié et tous les documents pertinents (LRTP, art. 14). Il revient en bout de ligne à la Chambre d'assurer l'exécution de ces ordonnances. Un système analogue a été mis en place pour les fonctionnaires fédéraux en général (voir la *Loi sur les relations de travail dans la fonction publique*, L.R.C. 1985, ch. P-35). Les intimés peuvent juger ce mécanisme insatisfaisant, mais le Parlement a établi dans la LRTP le processus qu'il souhaitait voir appliqué pour régler les griefs de ses employés. Selon notre jurisprudence, le Parlement a droit au respect de cette attribution de compétence (*Weber; Regina Police Assn. Inc. c. Regina (Ville) Board of Police Commissioners*, [2000] 1 R.C.S. 360, 2000 CSC 14; *Parry Sound (district), Conseil d'administration des services sociaux; Goudie c. Ottawa (Ville)*, [2003] 1 R.C.S. 141, 2003 CSC 14).

Les intimés soutiennent également que, même s'il est possible que la LRTP puisse répondre à la plainte de M. Vaid pour discrimination et harcèlement en milieu de travail, le Tribunal canadien des droits de la personne est mieux placé qu'un arbitre nommé sous le régime de la LRTP pour trancher des questions de portée plus générale, comme la discrimination systémique, y compris le respect de la parité salariale exigé par l'art. 11 de la *Loi canadienne sur les droits de la personne*. Ils citent à ce sujet l'arrêt *Canada (Commission des droits de la personne) c. Lignes aériennes Canadien International Ltée*, [2004] 3 R.C.F. 663, 2004 CAF 113, dans lequel cette disposition de la *Loi canadienne sur les droits de la personne* a été examinée. La présente affaire est tout autre. L'argument des intimés soulève une question différente de celle qui nous est soumise en l'espèce et qui s'inscrit dans un contexte tout aussi différent. Dans *Morin*, le libellé de la convention collective était contesté parce que censément discriminatoire. Pour cette raison, la Cour a statué que le Tribunal des droits de la personne du Québec pouvait entendre la plainte. Dans *Charette*, il s'agissait d'un autre type de différend, le texte de la loi en cause était plus précis et l'instance devant le Tribunal des droits de la personne du Québec a été interrompue. Le différend a plutôt été renvoyé à la Commission des affaires sociales. Il ne s'agit pas d'un domaine du droit qui se prête à une trop grande généralisation.

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In this case, we are not dealing with an allegation of systemic discrimination. We are dealing with a single employee who says he was wrongfully dismissed against a background of alleged discrimination and harassment. A different dispute may involve different considerations that may lead to a complaint properly falling under the jurisdiction of the Canadian Human Rights Commission. But that is not this case.

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The respondents also submit that, under s. 41(1) of the *Canadian Human Rights Act*, it is for the Commission not Parliament to determine whether “the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act”. However, this approach presupposes that the enforcement machinery of the *Canadian Human Rights Act* applies. If, as I conclude, it has been ousted by s. 2 of PESRA with respect to this dispute, then s. 41, along with the other enforcement mechanisms of the *Canadian Human Rights Act*, simply do not apply to the respondent Vaid’s present complaint.

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In the result Mr. Vaid’s workplace complaints ought to have been considered in 1997 as they were (with partial success) in 1995, by way of a grievance under PESRA.

V. Disposition

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The appeal is allowed without costs. The constitutional question is answered as follows:

Q. 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 matters?

A. Given the broad terms in which this question is put, the answer is no. The definition of a more limited category of privilege, and the extent to which it may provide immunity from the *Canadian Human Rights Act*, if at all, must

Dans le présent pourvoi, nous n’avons pas à nous prononcer sur une allégation de discrimination systémique. Nous faisons plutôt face à un seul employé qui dit avoir été congédié injustement dans un prétendu contexte de discrimination et de harcèlement. Il est possible qu’un litige d’une autre nature soulève des questions d’un autre ordre pouvant donner lieu à une plainte qui relève à juste titre de la compétence de la Commission canadienne des droits de la personne. Ce n’est toutefois pas le cas en l’espèce.

Les intimés avancent de plus qu’en vertu du par. 41(1) de la *Loi canadienne sur les droits de la personne*, il revient à la Commission et non au Parlement de décider si « la plainte [peut] avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale ». Toutefois, ce raisonnement présuppose que les mécanismes d’application de la loi établis par la *Loi canadienne sur les droits de la personne* s’appliquent. Si, comme je le conclus, le recours à ces mécanismes est exclu par l’art. 2 de la LRTP pour ce qui est du présent différend, l’art. 41, à l’instar des autres mécanismes d’application de la loi établis par la *Loi canadienne sur les droits de la personne*, ne s’applique tout simplement pas à la plainte de l’intimé, M. Vaid.

En conséquence, M. Vaid aurait dû, en 1997, soumettre ses plaintes en matière de relations de travail par voie de grief sous le régime de la LRTP comme il l’avait fait (obtenant partiellement gain de cause) en 1995.

V. Dispositif

Le pourvoi est accueilli sans dépens. La question constitutionnelle reçoit la réponse suivante :

Q. La *Loi canadienne sur les droits de la personne*, L.R.C. 1985, ch. H-6, est-elle, du fait d’un privilège parlementaire, constitutionnellement inapplicable à la Chambre des communes et à ses membres en ce qui a trait aux relations de travail au Parlement?

R. La question étant posée en termes très larges, nous y répondons par la négative. Pour définir une catégorie de privilège parlementaire plus restreinte, et établir dans quelle mesure un tel privilège peut, le cas échéant, offrir une

await a case in which the question truly arises for a decision.

Appeal allowed.

Solicitors for the appellants: Blake, Cassels & Graydon, Toronto.

Solicitors for the respondent Satnam Vaid: Raven, Allen, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitor for the respondent the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitor for the interveners the Honourable Senator Serge Joyal and the Honourable Senator Mobina S. B. Jaffer: Dale Gibson, Edmonton.

Solicitors for the interveners the Canadian Association of Professional Employees and the Communications, Energy and Paperworkers Union of Canada: Engelmann Gottheil, Ottawa.

Solicitors for the intervener the Speaker of the Legislative Assembly of Ontario: Blake, Cassels & Graydon, Toronto.

immunité contre l'application de la *Loi canadienne sur les droits de la personne*, il faudra attendre que la question se pose véritablement dans le cadre d'un autre pourvoi.

Pourvoi accueilli.

Procureurs des appelants: Blake, Cassels & Graydon, Toronto.

Procureurs de l'intimé Satnam Vaid: Raven, Allen, Cameron, Ballantyne & Yazbeck, Ottawa.

Procureur de l'intimée la Commission canadienne des droits de la personne: Commission canadienne des droits de la personne, Ottawa.

Procureur de l'intervenant le procureur général du Canada: Sous-procureur général du Canada, Ottawa.

Procureur des intervenants l'honorable sénateur Serge Joyal et l'honorable sénatrice Mobina S. B. Jaffer: Dale Gibson, Edmonton.

Procureurs des intervenants l'Association canadienne des employés professionnels et le Syndicat canadien des communications, de l'énergie et du papier: Engelmann Gottheil, Ottawa.

Procureurs de l'intervenant le Président de l'Assemblée législative de l'Ontario: Blake, Cassels & Graydon, Toronto.

TAB 6

**Ontario Supreme Court
Canadian Transit Co. v. Girdhar¹,
Date: 2001-05-14**

Canadian Transit Co.

and

Girdhar et al.

Court File No. 01-CV-209128

Ontario Superior Court of Justice Day J.

Heard: May 14, 2001

Judgment rendered: August 10, 2001

John Contini, for plaintiff (moving party).

Leonard Ricchetti, for defendants (responding parties).

DAY J.:—

Introduction

[1] This motion was heard 14 May 2001 for an interlocutory injunction restraining the defendants from engagement with or soliciting business from any party associated with Buffalo-Fort Erie Peace Bridge Expansion Project and using or disclosing to any party the confidential and proprietary information of the plaintiff obtained by the defendants while engaged or retained by the plaintiff.

[2] In order to meet the exigencies inherent in the motion, a decision was reached on 17 May 2001 manifested by an endorsement on the motion record that the motion was dismissed with reasons to follow. These are the reasons for dismissal of the motion.

Overview

[3] The plaintiff, The Canadian Transit Company (hereinafter referred to as “CTC”) owns, operates and manages the Canadian portion of the Ambassador Bridge, which is the international connection between Detroit and Windsor.

¹ Application for leave to appeal was filed by Canadian Transit Co., and is to be heard on October 24, 2001.

competitive advantage has to do with Earth Tech divulging information on CTC's competitive strategies. As I will address next, the potential breach of confidentiality does not establish irreparable harm.

[24] The breach of contract or negligence relate to Earth Tech's potential breach of the confidentiality agreement. At para. 44 of the transcript of the cross-examination of Remo Mancini, he states that he is "not confident that they will not disclose confidential information..." and that eventually "confidential information will leak through". According to the case law quoted above, a "potential" breach is insufficient. Earth Tech may be able to carry out its work for the competitor without divulging any of CTC's confidential information. Even if the confidentiality agreement is breached, the harm to CTC is speculative. If one does not accept the evidence that the projects are sufficiently related such that Earth Tech's work on one could be used on the other, then how can the competitive strategies related to Ambassador Bridge Project be applicable to the Peace Bridge? Even if CTC fails in its bid for the Peace Bridge Project, it will be impossible to assess what role, if any, divulged confidential information had in the outcome. Thus, any assessment of harm is speculative.

Balance of Convenience

[25] In setting out the balance of convenience assessment in *RJR-Macdonald, supra*, the Supreme Court stated at p. 406:

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 334 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

[26] The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, Lord Diplock cautioned, at p. 408, that:

It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relevant weight to be attached to them. These will vary from case to case.

TAB 7

**Jacques Chagnon, in his capacity as
President of the National Assembly of Québec**
Appellant

v.

**Syndicat de la fonction publique et
parapublique du Québec** *Respondent*

and

**Honourable Serge Joyal, P.C., and Speaker
of the Legislative Assembly of Ontario**
Interveners

**INDEXED AS: CHAGNON v. SYNDICAT DE LA
FONCTION PUBLIQUE ET PARAPUBLIQUE DU
QUÉBEC**

2018 SCC 39

File No.: 37543.

2018: March 15; 2018: October 5.

Present: Wagner C.J. and Abella, Moldaver,
Karakatsanis, Gascon, Côté, Brown, Rowe and
Martin JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
QUEBEC**

Constitutional law — Parliamentary privilege — Scope of privilege — Security guards dismissed by President of National Assembly of Québec — Union grieving dismissals before labour arbitrator — President objecting to grievances on basis that decision to dismiss guards immune from review because of parliamentary privilege over management of employees and parliamentary privilege to exclude strangers — Whether President has established that either parliamentary privilege is necessary for National Assembly to discharge legislative mandate and therefore dismissals should be immune from arbitrator's review — Act respecting the National Assembly, CQLR, c. A-23.1, ss. 110, 120.

Three security guards employed by the National Assembly of Québec were dismissed by the President of the National Assembly for using their employer's cameras to observe activities inside nearby hotel rooms. Their union

**Jacques Chagnon, ès qualités de président de
l'Assemblée nationale du Québec** *Appelant*

c.

**Syndicat de la fonction publique et
parapublique du Québec** *Intimé*

et

**Honorable Serge Joyal, c.p., et président
de l'Assemblée législative de l'Ontario**
Intervenants

**RÉPERTORIÉ : CHAGNON c. SYNDICAT DE LA
FONCTION PUBLIQUE ET PARAPUBLIQUE DU
QUÉBEC**

2018 CSC 39

N° du greffe : 37543.

2018 : 15 mars; 2018 : 5 octobre.

Présents : Le juge en chef Wagner et les juges Abella,
Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et
Martin.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Privilège parlementaire — Portée du privilège — Gardiens de sécurité congédiés par le président de l'Assemblée nationale du Québec — Présentation par le syndicat de griefs contre les congédiements à un arbitre en droit du travail — Opposition du président aux griefs au motif que la décision de congédier les gardiens était à l'abri d'une révision en raison du privilège parlementaire relatif à la gestion du personnel et de celui d'expulser des étrangers — Le président a-t-il établi que l'un ou l'autre des privilèges parlementaires était nécessaire pour que l'Assemblée nationale puisse s'acquitter de son mandat législatif, de sorte que les congédiements devraient être à l'abri d'une révision par l'arbitre? — Loi sur l'Assemblée nationale, RLRQ, c. A-23.1, art. 110, 120.

Trois gardiens de sécurité au service de l'Assemblée nationale du Québec ont été congédiés par le président de l'Assemblée nationale parce qu'ils ont utilisé des caméras de leur employeur pour observer ce qui se passait

grieved their dismissals before a labour arbitrator. The President objected to the grievances on the basis that the decision to dismiss the guards was immune from review because it was protected by the parliamentary privilege over the management of employees and the parliamentary privilege to exclude strangers from the legislative assembly. The arbitrator concluded that the dismissals were not protected by either parliamentary privilege, and therefore that the grievances could proceed. The reviewing judge agreed with the arbitrator's reasoning with regards to the privilege to exclude strangers, but found that the decision to dismiss the security guards was protected from review by the privilege over the management of employees. A majority of the Court of Appeal held that the arbitrator had correctly concluded that the dismissals were not protected by parliamentary privilege.

Held (Côté and Brown JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon and Martin JJ.: The dismissals are not protected by parliamentary privilege and therefore are not immune from external review under the applicable labour relations regime. Although the President is entitled to exercise his management rights and dismiss security guards for a just and sufficient cause, parliamentary privilege does not insulate the President's decision from review under the labour regime to which the guards are subject.

Legislative bodies in Canada, including provincial legislative assemblies, have inherent parliamentary privileges that flow from their nature and function in a Westminster model of parliamentary democracy. Inherent parliamentary privileges help preserve the separation of powers and promote the proper functioning of representative democracy, by protecting some areas of legislative activity from external review. However, the inherent nature of parliamentary privilege means that its existence and scope must be strictly anchored to its rationale. It is the role of the courts to determine whether a category of parliamentary privilege exists and to delimit its scope, whereas it is for the legislative assemblies to determine whether in a particular case the exercise of the privilege is necessary or appropriate. The scope of parliamentary privilege is delimited by the purposes it serves, and extends only so far as is necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business. Because

à l'intérieur de chambres d'un hôtel voisin. Leur syndicat a contesté les congédiements par voie de griefs devant un arbitre en droit du travail. Le président s'est opposé aux griefs au motif que la décision de congédier les gardiens était à l'abri d'une révision parce qu'elle était protégée par le privilège parlementaire relatif à la gestion du personnel et par celui d'expulser des étrangers de l'assemblée législative. L'arbitre a conclu que les congédiements n'étaient pas protégés par l'un ou l'autre des privilèges parlementaires, et que l'instruction des griefs pouvait donc avoir lieu. Le juge en révision était d'accord avec le raisonnement de l'arbitre en ce qui a trait au privilège d'expulser des étrangers, mais il a conclu que la décision de congédier les gardiens de sécurité n'était pas susceptible de révision en raison du privilège relatif à la gestion du personnel. Les juges majoritaires de la Cour d'appel ont statué que l'arbitre avait eu raison de conclure que les congédiements n'étaient pas protégés par le privilège parlementaire.

Arrêt (les juges Côté et Brown sont dissidents) : Le pourvoi est rejeté.

Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon et Martin : Les congédiements ne sont pas protégés par le privilège parlementaire et ne sont donc pas à l'abri d'une révision externe dans le cadre du régime de relations de travail applicable. Bien que le président soit autorisé à exercer ses droits de gestion et à congédier les gardiens de sécurité pour une cause juste et suffisante, le privilège parlementaire ne protège pas sa décision d'une révision dans le cadre du régime des relations de travail auquel les gardiens sont assujettis.

Au Canada, les organes législatifs, y compris les assemblées législatives provinciales, disposent de privilèges parlementaires inhérents qui découlent de leur nature et de leur fonction au sein d'une démocratie parlementaire basée sur le modèle du Parlement de Westminster. Les privilèges parlementaires inhérents contribuent à maintenir la séparation des pouvoirs et à favoriser le bon fonctionnement de la démocratie représentative, en protégeant certains domaines d'activité législative d'une révision externe. Cependant, la nature inhérente du privilège parlementaire signifie que son existence et sa portée doivent être fermement ancrées dans sa raison d'être. Il appartient aux tribunaux d'établir si une catégorie de privilège parlementaire existe et d'en délimiter la portée, tandis qu'il appartient aux assemblées législatives de déterminer si l'exercice de ce privilège est nécessaire ou approprié dans un cas particulier. La portée du privilège parlementaire est délimitée par les objectifs qu'il vise, et ne s'appliquera que dans la mesure où cela est indispensable pour protéger les législateurs dans l'exécution de leurs fonctions législatives

courts cannot review the exercise of parliamentary privileges, even on *Canadian Charter of Rights and Freedoms* grounds, they must ensure that the protection provided by a privilege does not exceed its purpose. Therefore, a purposive approach must be taken when assessing parliamentary privilege claims. Such an approach helps to reconcile the privilege with the *Charter*, by ensuring that it is only as broad as is necessary for the proper functioning of a constitutional democracy.

The party seeking to rely on the immunity from external review conferred by parliamentary privilege bears the burden of establishing its necessity, that is, to demonstrate that the scope of the protection it claims is necessary in light of the purposes of parliamentary privilege. The necessity test demands that the sphere of activity over which the privilege is claimed be more than merely connected to the legislative assembly's functions. The immunity that is sought from the application of ordinary law must also be necessary to the assembly's constitutional role.

In this case, the standard of review applicable to the decision of the arbitrator is correctness. The arbitrator correctly concluded that the President's decision to dismiss the security guards is not subject to parliamentary privilege. First, the President has failed to establish the necessity of a parliamentary privilege over the management of the guards. Admittedly, the guards perform some important tasks that are connected to the constitutional functions of the National Assembly, including protecting it from security threats and helping to maintain decorum in the chamber. However, the National Assembly does not require immunity from outside scrutiny of the general management of the security guards in order to discharge its constitutional functions. The management of the guards could be dealt with under ordinary law without impeding the National Assembly's security or its ability to legislate and deliberate. Permitting the enforcement of basic employment and labour protections for the guards would not undermine the independence required for the National Assembly to fulfil its constitutional mandate with dignity and efficiency.

The question of necessity can be addressed without looking to the *Act respecting the National Assembly*

et délibératives et de la tâche de l'assemblée législative de demander des comptes au gouvernement relativement à la conduite des affaires du pays. Puisque les tribunaux ne peuvent pas réviser l'exercice des privilèges parlementaires, même pour des motifs fondés sur la *Charte canadienne des droits et libertés*, ils doivent faire en sorte que la protection que procure un privilège n'excède pas son objet. En conséquence, une démarche téléologique doit être adoptée lors de l'appréciation des revendications de privilège parlementaire. Une telle démarche aide à concilier le privilège avec la *Charte*, en veillant à ce qu'il n'ait pas une portée plus large que nécessaire pour le bon fonctionnement d'une démocratie constitutionnelle.

La partie qui invoque l'immunité contre une révision externe en application du privilège parlementaire a le fardeau d'en établir la nécessité, c'est-à-dire qu'elle doit démontrer que la portée de la protection revendiquée est nécessaire à la lumière de l'objet du privilège parlementaire. Le critère de la nécessité exige que la sphère d'activité à l'égard de laquelle est revendiqué le privilège soit plus que simplement liée aux fonctions de l'assemblée législative. L'immunité qui est sollicitée à l'égard de l'application du droit commun doit aussi être nécessaire au rôle constitutionnel de l'assemblée.

En l'espèce, la norme de contrôle applicable à la décision de l'arbitre est celle de la décision correcte. L'arbitre a conclu à juste titre que la décision du président de congédier les gardiens de sécurité n'est pas visée par le privilège parlementaire. D'abord, le président n'a pas réussi à prouver la nécessité d'un privilège parlementaire à l'égard de la gestion des gardiens. Il est vrai que les gardiens accomplissent des tâches importantes qui sont liées aux fonctions constitutionnelles de l'Assemblée nationale; notamment, ils protègent celle-ci contre les menaces à la sécurité et aident à faire respecter le décorum dans la salle de l'assemblée. Cependant, il n'est pas nécessaire que l'Assemblée nationale dispose de l'immunité contre toute révision externe à l'égard de la gestion générale des gardiens de sécurité pour s'acquitter de ses fonctions constitutionnelles. Les questions liées à la gestion des gardiens pourraient être réglées sous le régime de droit commun sans porter atteinte à la sécurité ou à la capacité de l'Assemblée nationale de s'acquitter de ses fonctions législatives et délibératives. Permettre que les protections habituellement conférées aux employés et aux travailleurs s'appliquent aux gardiens ne nuirait pas à l'indépendance dont l'Assemblée nationale a besoin pour s'acquitter de son mandat constitutionnel dignement et efficacement.

La question de la nécessité peut être examinée sans se pencher sur la *Loi sur l'Assemblée nationale* (« LAN »).

(“ARNA”). However, while nothing in the legislation abrogates parliamentary privilege, the ARNA establishes that all employees of the National Assembly are managed in accordance with general law. Sections 110 and 120 of the ARNA provide that the employees of the National Assembly are members of the civil service and, as such, are generally subject to a labour relations regime unless they are exempted by regulation. As there is currently no regulatory exemption for the security guards, this demonstrates that the National Assembly does not appear to view exclusive control over their management to be necessary to its autonomy.

As for the parliamentary privilege to exclude strangers, while the existence of this privilege has long been recognized, it is not necessary to a legislative assembly’s ability to perform its constitutional functions that the scope of the privilege be drawn so broadly as to include the decision to dismiss employees who implement it on the president or speaker’s behalf. Such an immunity would impact persons who are not members of the legislative assembly, and undermine their access to the labour regime negotiated in accordance with their s. 2(d) Charter rights. The President has not shown that the application of general labour law to those persons would jeopardize the autonomy, dignity and efficiency required for the fulfilment of the National Assembly’s legislative mandate. Accordingly, the privilege to exclude strangers does not protect the decision to dismiss employees who exercise the privilege from review.

Per Rowe J.: There is agreement that the standard of review is correctness and agreement with the majority that the appeal should be dismissed but for different reasons. Whatever the scope of privilege for management of employees, the *Act respecting the National Assembly* (“ARNA”) resolves this case. When a legislative body subjects an aspect of privilege to the operation of a statute, it is the provisions of the statute that govern. While those provisions remain operative, a legislative body cannot reassert privilege so as to do an end-run around the statute whose very purpose is to govern the legislature’s operations. Parliamentary privilege should not be invoked to bypass the application of a statute enacted by the legislature to govern its own operation. It is not an impediment to the functioning of the legislature for it to comply with its own enactments, and it cannot be regarded as an intrusion on the legislature’s privilege.

Cependant, bien qu’aucune mesure législative ne supprime le privilège parlementaire, la LAN établit que les employés de l’Assemblée nationale sont tous gérés conformément au droit commun. Les articles 110 et 120 de la LAN prévoient que les employés de l’Assemblée nationale font partie du personnel de la fonction publique et à ce titre, ils sont généralement assujettis à un régime de relations de travail, à moins d’en être exemptés par règlement. Puisqu’actuellement, il n’existe aucune exemption prévue par règlement pour les gardiens de sécurité, cela démontre que l’Assemblée nationale ne semble pas percevoir le contrôle exclusif de la gestion de ceux-ci comme étant nécessaire à son autonomie.

Pour ce qui est du privilège parlementaire d’expulser des étrangers, bien que son existence soit reconnue depuis longtemps, il n’est pas nécessaire pour qu’une assemblée législative puisse exercer ses fonctions constitutionnelles que son privilège soit défini largement au point d’inclure la décision de congédier des employés qui l’exercent au nom du président. Une telle immunité aurait une incidence sur des personnes qui ne sont pas membres de l’assemblée législative et minerait leur accès au régime de relations de travail négocié conformément aux droits que leur garantit l’al. 2d) de la Charte. Le président n’a pas démontré que l’application du droit général du travail à ces personnes mettrait en péril l’autonomie, la dignité et l’efficacité dont l’Assemblée nationale a besoin pour s’acquitter de son mandat législatif. En conséquence, le privilège d’expulser des étrangers ne protège pas d’une révision la décision de congédier les employés qui l’exercent.

Le juge Rowe : Il y a accord quant au fait que la norme de contrôle est celle de la décision correcte, et accord avec l’opinion des juges majoritaires selon laquelle le pourvoi devrait être rejeté, mais pour des motifs différents. Quelle que soit la portée du privilège relatif à la gestion du personnel, la *Loi sur l’Assemblée nationale* (« LAN ») résout le litige. Lorsqu’un corps législatif assujettit un aspect du privilège à l’application d’une loi, ce sont les dispositions de la loi qui s’appliquent. Pendant que ces dispositions sont en vigueur, le corps législatif ne peut se prévaloir du privilège pour contourner la loi dont l’objet même est de régir le fonctionnement de la législature. Le privilège parlementaire ne peut être invoqué pour éviter l’application d’une loi que la législature a adoptée afin de régir son propre fonctionnement. Le fait que la législature se conforme à ses propres textes législatifs ne constitue pas un obstacle à son fonctionnement, et cela ne peut être perçu comme une intrusion eu égard à son privilège.

The relationship between statute and privilege is determined through ordinary principles of statutory interpretation. In this case, in the *ARNA*, the National Assembly has defined how the management of its employees is to be carried out under the public service employment scheme. If the National Assembly wants a group of employees to be removed from this scheme, it can do so through the derogation procedure referred to in s. 120 of the *ARNA*. Privilege would then again operate, provided that the employees fell within the scope of privilege.

As the derogation procedure under s. 120 has not been exercised in this case with respect to the security guards, the President cannot now reassert privilege as to the management of the guards, and thereby insulate the decision to dismiss them from the scrutiny of the grievance arbitrator. It would be contrary to the decision of the National Assembly set out in the *ARNA* for the President to exercise authority over the management of employees on a case by case basis, nominally in the exercise of privilege. Accordingly, the arbitrator did not err in determining that he could hear the grievances.

Per Côté and Brown JJ. (dissenting): There is agreement with the majority that the applicable standard of review is correctness because the existence and scope of parliamentary privileges raise a question of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise. The correctness standard also applies because the existence and scope of parliamentary privileges raise a constitutional issue.

However, there is disagreement with the majority's disposition of this appeal. The parliamentary privileges at issue defeat the grievance arbitrator's jurisdiction. The appeal should therefore be allowed and the grievances dismissed.

The jurisdiction of the courts with respect to parliamentary privileges is narrow — they can only ascertain the existence and scope of such privileges. They must give considerable deference to the view taken by legislative assemblies and their speakers or presidents of the scope of autonomy they consider necessary to fulfill their functions. The courts must rely on the necessity test to ascertain the existence and scope of privileges. This test is concerned with a sphere of the legislative body's activity that will be excluded from the ordinary law. The onus is on the legislative assembly to show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their

La relation entre une loi et le privilège est définie en fonction des principes ordinaires d'interprétation législative. En l'espèce, dans la *LAN*, l'Assemblée nationale a prévu la façon dont doit être géré son personnel sous le régime applicable aux employés de la fonction publique. Si l'Assemblée nationale souhaite qu'un groupe d'employés ne soient plus régis par ce régime, elle peut se prévaloir de la procédure de dérogation à laquelle fait référence l'art. 120 de la *LAN*. Le privilège s'appliquerait donc de nouveau, à condition que les employés soient visés par celui-ci.

Comme la procédure de dérogation prévue à l'art. 120 n'a pas été appliquée en l'espèce à l'égard des gardiens de sécurité, le président ne peut maintenant invoquer le privilège en lien avec la gestion des gardiens, et ainsi soustraire la décision de les congédier à l'examen par l'arbitre de grief. Il serait incompatible avec la décision de l'Assemblée nationale énoncée dans la *LAN* que le président exerce son pouvoir sur la gestion des employés au cas par cas, en théorie, en application du privilège. L'arbitre n'a donc pas commis d'erreur lorsqu'il a jugé avoir compétence pour entendre les griefs.

Les juges Côté et Brown (dissidents) : Il y a accord avec les juges majoritaires à l'effet que la norme de contrôle applicable est celle de la décision correcte, puisque l'existence et la portée des privilèges parlementaires soulèvent une question de droit générale à la fois d'une importance capitale pour le système juridique dans son ensemble et étrangère au domaine d'expertise de l'arbitre. La norme de la décision correcte s'applique également parce que l'existence et la portée des privilèges parlementaires soulèvent une question constitutionnelle.

Toutefois, il y a désaccord avec les juges majoritaires quant à la façon de disposer du présent pourvoi. Les privilèges parlementaires en cause font échec à la compétence de l'arbitre de grief. Le pourvoi devrait donc être accueilli et les griefs déclarés irrecevables.

Les tribunaux jouissent d'une compétence étroite en ce qui concerne les privilèges parlementaires — ils peuvent uniquement constater leur existence et leur portée. Ils doivent faire preuve d'une grande retenue quant au degré d'autonomie dont les assemblées législatives et les présidents de ces assemblées estiment devoir bénéficier pour s'acquitter de leurs fonctions. C'est en fonction du critère de la nécessité que les tribunaux doivent constater l'existence et l'étendue des privilèges. Ce critère s'attache à une sphère d'activité de l'organe législatif, qui sera exclue du régime de droit commun. Les assemblées législatives ont le fardeau de démontrer que la sphère d'activité à l'égard de laquelle le privilège est revendiqué est si étroitement

functions as a legislative and deliberative body 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. In the analysis of the necessity test, the sphere of activity must not be carved up — the analysis must not focus on each employee's specific tasks, but rather on the sphere of activity and the category of employees. Once the courts have found that the sphere of activity and the category of employees are necessary to the proper functioning of the legislative assembly, the inquiry ends, since the privilege has been established. There is thus no need to consider whether grievance arbitration may interfere with the proper functioning of the assembly or jeopardize the dignity of the institution.

Security is one of the spheres of activity necessary to proceedings in an assembly. In a parliamentary democracy, there can be no free debate without security. In order for any legislative assembly to perform its constitutional functions with dignity and efficiency, it is essential that it operate in a secure environment. Security is therefore a sphere of activity that is protected by absolute parliamentary privileges. All decisions relating to security fall within this sphere of activity, including all tasks performed by an assembly's security guards.

This case lies at the intersection of the two privileges claimed. All of the tasks performed by the security guards employed by the Assembly fall within a sphere of activity that is necessary to the proper functioning of the Assembly, namely security. This is enough in itself to establish the management privilege. In addition, the guards exercise, in particular, the privilege to exclude strangers on the President's behalf. Employees to whom the exercise of a recognized parliamentary privilege is delegated necessarily perform a function that is closely and directly connected with the Assembly's activities. The connection required to ground a management privilege will therefore be established where it is shown that a category of employees exercises or participates in exercising a parliamentary privilege that is recognized and necessary. Accordingly, the labour relations of such employees fall within the scope of the privilege over the management of employees, and a decision concerning their dismissal is made in the exercise of this privilege. The dismissal of an employee to whom a privilege has been delegated is the ultimate exercise of the management privilege. To preserve the integrity of the privileges of the Assembly and its members, the President must be able to manage the employees who exercise these privileges without having his or her

et directement liée à l'exercice, par l'assemblée ou son membre, de leurs fonctions d'assemblée législative et délibérante, qu'une intervention externe saperait l'autonomie dont l'assemblée ou son membre ont besoin pour accomplir leur travail dignement et efficacement. La sphère d'activité ne doit pas être morcelée lors de l'analyse du critère de nécessité — ce ne sont pas les tâches précises de chaque employé qui font l'objet de l'analyse, mais bien la sphère d'activité et la catégorie d'emploi. Une fois que les tribunaux ont conclu que la sphère d'activité et la catégorie d'emploi sont nécessaires au bon fonctionnement de l'assemblée législative, l'analyse prend fin puisque l'existence du privilège est établie. Il n'y a alors pas lieu de se demander si l'arbitrage de grief peut interférer avec le bon fonctionnement de l'assemblée ou porter atteinte à la dignité de l'institution.

La sécurité est une sphère d'activité nécessaire aux travaux des assemblées. Dans une démocratie parlementaire, il ne peut y avoir de débats libres sans sécurité. Il est essentiel pour toute assemblée législative d'opérer dans un environnement sécuritaire pour qu'elle s'acquitte de ses fonctions constitutionnelles dignement et efficacement. Par conséquent, le domaine de la sécurité est une sphère d'activité qui est protégée par des privilèges parlementaires absolus. Toutes les décisions relatives à la sécurité sont comprises dans cette sphère d'activité, incluant toutes les tâches des gardiens de sécurité d'une assemblée.

La présente affaire se trouve à l'intersection des deux privilèges invoqués. L'entière des tâches qui relèvent des gardiens de sécurité employés par l'Assemblée fait partie d'une sphère d'activité nécessaire au bon fonctionnement de l'Assemblée, soit la sécurité. Cela est suffisant en soi pour établir le privilège de gestion. De plus, les gardiens exercent notamment, au nom du président, le privilège d'expulsion des étrangers. Un employé à qui est délégué l'exercice d'un privilège parlementaire reconnu exerce nécessairement une fonction présentant un lien étroit et direct avec les activités de l'Assemblée. Le lien nécessaire pour établir l'existence d'un privilège de gestion est donc établi lorsqu'il est démontré qu'une catégorie d'employés exerce ou participe à l'exercice d'un des privilèges parlementaires reconnus et nécessaires. Par conséquent, les relations de travail de ces employés sont visées par le champ d'application du privilège de gestion des employés, et la décision relative à leur congédiement relève de l'exercice de ce privilège. Le congédiement d'un employé à qui un privilège a été délégué est l'exercice ultime du privilège de gestion. Pour préserver l'intégrité des privilèges de l'Assemblée et de ses membres, le président doit pouvoir gérer le personnel qui les exerce sans que ses décisions ne soient remises en cause. Les tribunaux ne peuvent dicter

decisions called into question. The courts cannot dictate to the Assembly how it must go about ensuring the security of its members within its walls by forcing it to employ people the President no longer trusts. If a grievance arbitrator could review the President's decision to terminate the guards' employment, this would mean that part of the exercise of the President's own duties becomes *de facto* reviewable by a court or tribunal and therefore that the Assembly would lose control over decisions concerning its security.

The privileges claimed in this case were not abolished with the coming into force of the *ARNA*, and the Assembly did not waive its privilege in relation to the employees concerned by enacting this statute. The courts must respect the view taken by a speaker or president of a statute dealing with the internal affairs of a legislative assembly. The interpretation proposed by the President of the Assembly must therefore be given predominant weight in determining whether the Assembly intended to limit its privileges.

The *ARNA* governs the internal affairs of the Assembly, which are outside the scope of the courts' jurisdiction. The preamble to the *ARNA* recognizes that the Assembly must protect its proceedings from all interference. Section 110 of the *ARNA* states that the Assembly shall continue to be managed within the scope of the Acts, regulations and rules applicable. Except in cases where the Assembly has expressly provided otherwise, the Acts, regulations and rules of the ordinary law have never applied to a sphere of activity that is subject to parliamentary privileges. The ordinary law that continues to apply to the Assembly is thus necessarily defined by privilege, which has been a constant in Canada's constitutional history.

Section 120 of the *ARNA* deals with the power of the Office of the Assembly to exclude categories of employees from the personnel of the civil service and with the management powers granted to the Secretary General, but it does not mention the President's privileges. It is not clear that this provision implicitly abolishes the privilege over the management of the Assembly's employees by incorporating them into the public service or that it partially withdraws the privilege to exclude strangers from the President. Given that the Court has recognized that parliamentary privileges have constitutional status, the statute must be interpreted in such a way that it does not implicitly abrogate these privileges. It is undesirable to adopt an interpretation to the effect that the Assembly implicitly considers a privilege unnecessary, thereby denying its existence. More is needed to abrogate a constitutional

à l'Assemblée la manière dont elle veille à la sécurité de ses membres à l'intérieur de ses murs en lui imposant des employés en qui le président n'a plus confiance. Si un arbitre de grief pouvait réviser la décision du président de mettre fin à l'emploi des gardiens, cela signifierait qu'une partie de l'exercice des fonctions du président lui-même devient *de facto* sujette au contrôle par les tribunaux, et donc que l'Assemblée perdrait le contrôle sur les décisions touchant à sa sécurité.

Les privilèges invoqués en l'espèce n'ont pas été abolis par l'entrée en vigueur de la *LAN*, et l'Assemblée n'a pas renoncé à son privilège à l'égard des employés visés en adoptant cette loi. Les tribunaux doivent faire preuve de respect à l'égard de l'opinion du président sur une loi portant sur les affaires internes d'une assemblée législative. L'interprétation proposée par le président de l'Assemblée doit donc jouir d'un poids prépondérant lorsqu'il s'agit de déterminer si l'Assemblée avait l'intention de limiter ses privilèges.

La *LAN* régit les affaires internes de l'Assemblée, affaires qui sont hors de la portée juridictionnelle des tribunaux. Le préambule de la *LAN* reconnaît que l'Assemblée doit protéger ses travaux de toute interférence. L'article 110 de la *LAN* souligne que la gestion de l'Assemblée continue de s'exercer dans le cadre des lois, règlements et règles qui lui sont applicables. Sauf dans les cas où l'Assemblée l'a expressément prévu, les lois, règlements et règles du droit commun ne se sont jamais appliqués à une sphère d'activité sujette aux privilèges parlementaires. Ainsi, le régime de droit commun qui continue de s'appliquer à l'Assemblée est nécessairement défini par le privilège, qui a été une constante dans l'histoire constitutionnelle du Canada.

Quant à l'art. 120 de la *LAN*, celui-ci traite des pouvoirs du Bureau de l'Assemblée d'exclure des catégories d'emploi du personnel de la fonction publique et des pouvoirs de gestion attribués au secrétaire général, sans faire mention des privilèges du président. Il n'est pas clair que cette disposition abolit implicitement le privilège de gestion du personnel de l'Assemblée en intégrant ses employés à la fonction publique, ou retire au président une partie du privilège d'expulsion des étrangers. Étant donné que la Cour a reconnu que les privilèges parlementaires jouissent d'un statut constitutionnel, il faut interpréter la loi de telle sorte qu'elle n'abroge pas implicitement ces privilèges. Il n'est pas souhaitable de privilégier une interprétation selon laquelle, implicitement, l'Assemblée n'estimerait pas ce privilège nécessaire, niant ainsi son existence. Il faut plus pour abroger un privilège de nature constitutionnelle.

privilege. Without requiring express language in the *ARNA*, the modern approach to statutory interpretation does require clear, unequivocal legislative intent to abolish or modify parliamentary privileges that are still necessary. In the end, the *ARNA* does not have the effect of limiting the privileges held by the President, who may assert them when deemed necessary, and courts and tribunals cannot assume jurisdiction without a clear indication that the Assembly has conferred it on them. Interference by courts or tribunals would be inconsistent with the Assembly's sovereignty.

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By Karakatsanis J.

Applied: *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; **referred to:** *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112; *Jerusalem v. Austria*, No. 26958/95, ECHR 2001-II; *Gravel v. United States*, 408 U.S. 606 (1972); *A. v. the United Kingdom*, No. 35373/97, ECHR 2002-X; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Payson v. Hubert* (1904), 34 S.C.R. 400.

By Rowe J.

Referred to: *Fielding v. Thomas*, [1896] A.C. 600; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271; *Duke of Newcastle v. Morris* (1870), L.R. 4 H.L. 661; *Reference re the Final Report of the Electoral Boundaries Commission, Re*, 2017 NSCA 10, 411 D.L.R. (4th) 271; *Association des juristes de l'État v. Québec (Procureur général)*, 2013 QCCA 1900; *Québec (Procureur général) v. Confédération des syndicats nationaux*, 2011 QCCA 1247; *Michaud v. Bissonnette*, 2006 QCCA 775; *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016.

Sans exiger la présence de termes exprès dans la *LAN*, la méthode moderne d'interprétation des lois requiert une intention législative claire et non équivoque pour abolir ou modifier des privilèges parlementaires qui sont encore nécessaires. En définitive, la *LAN* n'a pas pour effet de limiter les privilèges du président, qui peut les invoquer lorsqu'il l'estime nécessaire, et les tribunaux ne peuvent s'arroger une juridiction sans une indication claire que l'Assemblée la leur confère. L'intervention des tribunaux serait incompatible avec la souveraineté de l'Assemblée.

Jurisprudence

Citée par la juge Karakatsanis

Arrêt appliqué : *Canada (Chambre des communes) c. Vaid*, 2005 CSC 30, [2005] 1 R.C.S. 667; **arrêts mentionnés :** *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2018 CSC 31, [2018] 2 R.C.S. 230; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 R.C.S. 319; *Stockdale c. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112; *Jerusalem c. Autriche*, n° 26958/95, CEDH 2001-II; *Gravel c. United States*, 408 U.S. 606 (1972); *A. c. Royaume-Uni*, n° 35373/97, CEDH 2002-X; *Harvey c. Nouveau-Brunswick (Procureur général)*, [1996] 2 R.C.S. 876; *Association de la police montée de l'Ontario c. Canada (Procureur général)*, 2015 CSC 1, [2015] 1 R.C.S. 3; *Payson c. Hubert* (1904), 34 R.C.S. 400.

Citée par le juge Rowe

Arrêts mentionnés : *Fielding c. Thomas*, [1896] A.C. 600; *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 R.C.S. 319; *SEFPO c. Ontario (Procureur général)*, [1987] 2 R.C.S. 2; *Renvoi relatif à la réforme du Sénat*, 2014 CSC 32, [2014] 1 R.C.S. 704; *Canada (Chambre des communes) c. Vaid*, 2005 CSC 30, [2005] 1 R.C.S. 667; *Bradlaugh c. Gossett* (1884), 12 Q.B.D. 271; *Duke of Newcastle c. Morris* (1870), L.R. 4 H.L. 661; *Reference re the Final Report of the Electoral Boundaries Commission, Re*, 2017 NSCA 10, 411 D.L.R. (4th) 271; *Association des juristes de l'État c. Québec (Procureur général)*, 2013 QCCA 1900; *Québec (Procureur général) c. Confédération des syndicats nationaux*, 2011 QCCA 1247, [2011] R.J.D.T. 690; *Michaud c. Bissonnette*, 2006 QCCA 775, [2006] R.J.Q. 1552; *Procureur général du Québec c. Blaikie*, [1979] 2 R.C.S. 1016.

By Côté and Brown JJ. (dissenting)

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112; *Case of the Sheriff of Middlesex* (1840), 11 Ad. & E. 273, 113 E.R. 419; *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271; *Kielley v. Carson* (1842), 4 Moo. 63, 13 E.R. 225; *Landers v. Woodworth* (1878), 2 S.C.R. 158; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *President of the Legislative Council v. Kosmas*, [2008] SAIRC 41, 175 I.R. 269; *Thompson v. McLean* (1998), 37 C.C.E.L. (2d) 170; *Payson v. Hubert* (1904), 34 S.C.R. 400; *Telezone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3d) 161; *Association des juristes de l'État v. Québec (Procureur général)*, 2013 QCCA 1900; *Duke of Newcastle v. Morris* (1870), L.R. 4 H.L. 661.

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POURVOI contre un arrêt de la Cour d’appel du Québec (les juges Chamberland, Morin et Bélanger), 2017 QCCA 271, 20 Admin L.R. (6th) 93, [2017] AZ-51367748, [2017] J.Q. n° 1274 (QL), 2017

CarswellQue 1071 (WL Can.), setting aside a decision of Bolduc J., 2015 QCCS 883, [2015] AZ-51156941, [2015] J.Q. n° 1752 (QL), 2015 CarswellQue 1786 (WL Can.), allowing an application for judicial review of an arbitrator's decision, 2014 QCTA 696, [2014] AZ-51104370. Appeal dismissed, Côté and Brown JJ. dissenting.

François LeBel, Siegfried Peters and Ariane Beauregard, for the appellant.

Geneviève Baillargeon-Bouchard and Pascale Racicot, for the respondent.

Serge Joyal and David Taylor, for the intervener the Honourable Serge Joyal, P.C.

Catherine Beagan Flood, Emily Hazlett and Christopher DiMatteo, for the intervener the Speaker of the Legislative Assembly of Ontario.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, and Martin JJ. was delivered by

KARAKATSANIS J. —

I. Overview

[1] Legislative bodies in Canada have inherent parliamentary privileges which flow from their nature and function in a Westminster model of parliamentary democracy. By shielding some areas of legislative activity from external review, parliamentary privilege helps preserve the separation of powers. It grants the legislative branch of government the autonomy it requires to perform its constitutional functions. Parliamentary privilege also plays an important role in our democratic tradition because it ensures that elected representatives have the freedom to vigorously debate laws and to hold the executive to account.

[2] However, inherent privileges are limited to those which are necessary for legislative bodies to fulfil their constitutional functions. The inherent nature of parliamentary privilege means that its

CarswellQue 1071 (WL Can.), qui a infirmé une décision du juge Bolduc, 2015 QCCS 883, [2015] AZ-51156941, [2015] J.Q. n° 1752 (QL), 2015 CarswellQue 1786 (WL Can.), accueillant la demande de contrôle judiciaire d'une décision arbitrale, 2014 QCTA 696, [2014] AZ-51104370. Pourvoi rejeté, les juges Côté et Brown sont dissidents.

François LeBel, Siegfried Peters et Ariane Beauregard, pour l'appelant.

Geneviève Baillargeon-Bouchard et Pascale Racicot, pour l'intimé.

Serge Joyal et David Taylor, pour l'intervenant l'honorable Serge Joyal, c.p.

Catherine Beagan Flood, Emily Hazlett et Christopher DiMatteo, pour l'intervenant le président de l'Assemblée législative de l'Ontario.

Version française du jugement du juge en chef Wagner et des juges Abella, Moldaver, Karakatsanis, Gascon, et Martin rendu par

LA JUGE KARAKATSANIS —

I. Aperçu

[1] Au Canada, les organes législatifs disposent de privilèges parlementaires inhérents qui découlent de leur nature et de leur fonction au sein d'une démocratie parlementaire basée sur le modèle du Parlement de Westminster. En protégeant certains domaines d'activité législative d'une révision externe, le privilège parlementaire contribue à maintenir la séparation des pouvoirs. Il accorde à l'organe législatif du gouvernement l'autonomie dont il a besoin pour exercer ses fonctions constitutionnelles. Le privilège parlementaire joue aussi un rôle important dans notre tradition démocratique puisqu'il fait en sorte que les représentants élus peuvent débattre vigoureusement des lois et demander à l'exécutif de rendre des comptes.

[2] Cependant, les privilèges inhérents se limitent à ceux qui sont nécessaires pour que les organes législatifs puissent exercer leurs fonctions constitutionnelles. La nature inhérente du privilège parlementaire

existence and scope must be strictly anchored to its rationale. Because courts cannot review the exercise of parliamentary privilege, even on *Canadian Charter of Rights and Freedoms* grounds, they must ensure that the protection provided by privilege does not exceed the purpose of this doctrine. This case illustrates the importance of taking a purposive approach when assessing parliamentary privilege claims.

[3] The appellant, the President of the National Assembly of Québec, submits that his decision to dismiss three security guards employed by the National Assembly is protected by parliamentary privilege; an arbitrator therefore has no jurisdiction to hear the grievances brought by the respondent union to contest the dismissals. The President says that these employees' dismissals are immune from external review because they fall within the scope of the parliamentary privilege over the management of employees and the privilege to exclude strangers from the National Assembly.

[4] I conclude that the dismissals are not protected by parliamentary privilege. The President has failed to demonstrate that the management of the security guards is so closely and directly connected to the Assembly's constitutional functions that the Assembly requires immunity from the applicable labour relations regime in order to fulfil these functions. Moreover, the *Act respecting the National Assembly*, CQLR, c. A-23.1 (*ARNA*), provides that the employees of the National Assembly are members of the civil service and, as such, they are generally subject to a labour relations regime unless they are exempted by regulation under the *Public Service Act*, CQLR, c. F-3.1.1, s. 64. There is currently no regulatory exemption for the guards or any of the Assembly's other employees. The *ARNA* thus demonstrates that the Assembly does not need exclusive, unreviewable authority over the management of its security guards in order to perform its constitutional role with dignity and efficiency. Further, while the exclusion of strangers is protected by parliamentary privilege, the Assembly's ability to carry out its constitutional mandate does not require the scope of this privilege to extend so far as

signifie que son existence et sa portée doivent être fermement ancrées dans sa raison d'être. Puisque les tribunaux ne peuvent pas réviser l'exercice du privilège parlementaire, même pour des motifs fondés sur la *Charte canadienne des droits et libertés*, ils doivent faire en sorte que la protection que procure le privilège n'excède pas l'objet de cette doctrine. La présente affaire illustre l'importance d'adopter une démarche téléologique lors de l'appréciation des revendications de privilège parlementaire.

[3] L'appelant, le président de l'Assemblée nationale du Québec, soutient que sa décision de congédier trois gardiens de sécurité à l'emploi de l'Assemblée nationale est protégée par le privilège parlementaire; par conséquent, un arbitre n'a pas compétence pour instruire les griefs déposés par le syndicat intimé afin de contester les congédiements. Le président affirme que le congédiement de ces employés est à l'abri d'une révision externe puisqu'il est visé par le privilège parlementaire relatif à la gestion du personnel et par le privilège d'expulser des étrangers de l'Assemblée nationale.

[4] Je conclus que les congédiements ne sont pas protégés par le privilège parlementaire. Le président n'a pas réussi à démontrer que la gestion des gardiens de sécurité est si étroitement et directement liée aux fonctions constitutionnelles de l'Assemblée que celle-ci a besoin d'être soustraite du régime de relations de travail applicable afin d'exercer ces fonctions. De plus, la *Loi sur l'Assemblée nationale*, RLRQ, c. A-23.1 (*LAN*), prévoit que les employés de l'Assemblée nationale font partie du personnel de la fonction publique, et à ce titre, ils sont généralement assujettis à un régime de relations de travail, à moins d'en être exemptés par règlement comme le prévoit l'art. 64 de la *Loi sur la fonction publique*, RLRQ, c. F-3.1.1. Actuellement, il n'existe aucune exemption prévue par règlement pour les gardiens ou tout autre employé de l'Assemblée. Il ressort donc de la *LAN* que l'Assemblée n'a pas besoin d'un pouvoir exclusif et non susceptible de révision quant à la gestion de ses gardiens de sécurité pour exercer son rôle constitutionnel avec dignité et efficacité. De plus, bien que l'expulsion d'étrangers soit protégée par le privilège parlementaire, la capacité de l'Assemblée de s'acquitter de son mandat constitutionnel

to protect the decision to terminate employees who assist in excluding strangers. The President has not established that the immunity he claims is necessary.

[5] For the reasons that follow, I would dismiss the appeal.

II. Background

[6] Three security guards employed by the National Assembly of Québec were dismissed by the appellant, the President of the National Assembly, for using their employer's cameras to observe activities inside nearby hotel rooms. Their union, the respondent, grieved their termination before a labour arbitrator.

[7] The President objected to the grievances on the basis that the decision to dismiss the guards was immune from review because it was protected by the parliamentary privilege over the management of employees and the parliamentary privilege to exclude strangers from the National Assembly.

A. *Arbitral Tribunal, 2014 QCTA 696, [2014] AZ-51104370*

[8] The arbitrator, Pierre A. Fortin, found that the security guards' dismissals were not protected by parliamentary privilege, and thus that the grievances could proceed.

[9] He held that the scope of the privilege to exclude strangers from the National Assembly did not protect the decision to terminate the security guards. He rejected the President's argument that the privilege to exclude strangers includes the ability to dismiss employees who implement this privilege. In any case, he found that the security guards do not have the authority to exclude strangers. If a security issue arises, they can signal the issue but cannot otherwise intervene.

n'exige pas que la portée de ce privilège aille jusqu'à protéger la décision par laquelle sont congédiés des employés qui participent à l'expulsion des étrangers. Le président n'a pas établi que l'immunité qu'il revendique est nécessaire.

[5] Pour les motifs qui suivent, je suis d'avis de rejeter le pourvoi.

II. Contexte

[6] Trois gardiens de sécurité au service de l'Assemblée nationale du Québec ont été congédiés par l'appelant, le président de l'Assemblée nationale, parce qu'ils ont utilisé des caméras de leur employeur pour observer ce qui se passait à l'intérieur de chambres d'un hôtel voisin. Leur syndicat, l'intimé, a contesté les congédiements par voie de griefs devant un arbitre en droit du travail.

[7] Le président s'est opposé aux griefs au motif que la décision de congédier les gardiens était à l'abri d'une révision parce qu'elle était protégée par le privilège parlementaire relatif à la gestion du personnel et par celui d'expulser des étrangers de l'Assemblée nationale.

A. *Tribunal arbitral, 2014 QCTA 696, [2014] AZ-51104370*

[8] L'arbitre, Pierre A. Fortin, a conclu que le congédiement des gardiens de sécurité n'était pas protégé par le privilège parlementaire, et que l'ins-truction des griefs pouvait donc avoir lieu.

[9] Il a déclaré que la portée du privilège d'expulser des étrangers de l'Assemblée nationale ne protégeait pas la décision de congédier les gardiens de sécurité. Il a rejeté l'argument du président voulant que le privilège d'expulser des étrangers inclue la capacité de congédier des employés qui participent à la mise en œuvre de ce privilège. Quoi qu'il en soit, il a conclu que les gardiens de sécurité n'avaient pas le pouvoir d'expulser des étrangers. Si un problème de sécurité survient, ils peuvent le signaler, mais ils ne peuvent pas intervenir d'une autre manière.

[10] Further, the arbitrator found that the guards' dismissals fell outside the scope of the parliamentary privilege over the management of employees. He noted that the verification and surveillance tasks performed by the guards are linked to maintaining the security of the National Assembly. However, unlike other members of the security team, such as police officers and special constables, the guards cannot intervene when issues arise, do not perform acts that could affect proceedings, and are not in contact with members of the Assembly. He concluded that the guards' functions are not closely and directly connected to the Assembly's constitutional functions. As such, their management was not protected by parliamentary privilege.

B. *Quebec Superior Court, 2015 QCCS 883 (Bolduc J.)*

[11] Bolduc J. allowed the President's application for judicial review and held that the arbitrator did not have jurisdiction to decide the grievances.

[12] Although he agreed with the arbitrator's reasoning with regards to the privilege to exclude strangers, he found that the decision to dismiss the security guards was protected from review by the privilege over the management of employees.

[13] The reviewing judge concluded that the arbitrator erred in his assessment of the evidence and gave too little weight to the tasks performed by the guards. He found that the guards are essential to ensuring the security of the parliamentary precinct because they supervise and verify the identity of visitors, and are present in the public gallery during question period. Therefore, he held that the guards' duties are closely and directly connected to the National Assembly's legislative and deliberative functions. Decisions about their management are protected by parliamentary privilege and, as such, are not subject to external review.

[10] De plus, l'arbitre a conclu que le congédiement des gardiens n'était pas visé par le privilège parlementaire relatif à la gestion du personnel. Il a souligné que les tâches de vérification et de surveillance exercées par les gardiens sont liées au maintien de la sécurité à l'Assemblée nationale. Cependant, contrairement à d'autres membres de l'équipe qui assure la sécurité, comme les policiers et les constables spéciaux, les gardiens ne peuvent pas intervenir en cas de problème de sécurité, ne peuvent pas accomplir d'actes susceptibles d'avoir une incidence sur le déroulement des travaux et ne sont pas en contact avec les membres de l'Assemblée. Il a conclu que les fonctions des gardiens ne sont pas étroitement et directement reliées aux fonctions constitutionnelles de l'Assemblée. Par conséquent, la gestion de ceux-ci n'était pas protégée par le privilège parlementaire.

B. *Cour supérieure du Québec, 2015 QCCS 883 (le juge Bolduc)*

[11] Le juge Bolduc a accueilli la demande de révision judiciaire présentée par le président et a conclu que l'arbitre n'avait pas compétence pour trancher les griefs.

[12] Même s'il était d'accord avec le raisonnement de l'arbitre en ce qui a trait au privilège d'expulser des étrangers, il a conclu que la décision de congédier les gardiens de sécurité n'était pas susceptible de révision en raison du privilège relatif à la gestion du personnel.

[13] Le juge saisi de la demande de révision judiciaire a conclu que l'arbitre avait commis une erreur dans son appréciation de la preuve et qu'il n'avait pas accordé suffisamment d'importance aux tâches exécutées par les gardiens. Selon lui, les gardiens sont essentiels pour assurer la sécurité de l'enceinte parlementaire, puisqu'ils effectuent de la surveillance, vérifient l'identité des visiteurs et sont présents à la tribune du public pendant la période de questions. En conséquence, il a conclu que les tâches des gardiens sont étroitement et directement reliées aux fonctions législatives et délibératives de l'Assemblée nationale. Les décisions relatives à la gestion de ceux-ci sont protégées par le privilège parlementaire, et ne peuvent donc pas faire l'objet d'une révision externe.

C. *Quebec Court of Appeal, 2017 QCCA 271, 20 Admin. L.R. (6th) 93 (Chamberland and Bélanger J.J.A., Morin J.A. dissenting)*

[14] The majority of the Court of Appeal allowed the union's appeal. Bélanger J.A., writing for the majority, held that the arbitrator had correctly concluded that the dismissals of the security guards were not protected by parliamentary privilege. The majority agreed with the arbitrator that the guards do not have the power to exclude strangers. Furthermore, the majority held that the privilege over the management of employees did not apply to the guards because their tasks are not closely and directly connected to the National Assembly's deliberative and legislative functions. The majority recognized that preserving the security of the Assembly was of great importance, and that the security guards play a significant role in this endeavour. However, it concluded that it was not necessary for the President to have unreviewable authority over the management of the guards in order to ensure the Assembly's work proceeds with efficiency and dignity. It added that the Assembly has set out the parameters of the independence it requires to discharge its constitutional mandate in the *ARNA*, and that this statute does not limit the ability of the guards to grieve their dismissals.

[15] Morin J.A., dissenting, would have dismissed the appeal. In his view, the termination of the security guards fell within the scope of the privilege over the management of employees. He reasoned that the guards provide front-line security services, without which the Assembly could not carry out its constitutional mandate with dignity and efficiency. He also found that parliamentary privilege supersedes and cannot be limited by the *ARNA*.

III. Issues

[16] The issue in this appeal is whether the arbitrator can decide the grievances, or whether the dismissals of the security guards are protected by parliamentary privilege. The parties have asked

C. *Cour d'appel du Québec, 2017 QCCA 271 (les juges Chamberland et Bélanger, le juge Morin, dissident)*

[14] Les juges majoritaires de la Cour d'appel ont accueilli l'appel interjeté par le syndicat. La juge Bélanger, s'exprimant au nom des juges majoritaires, a statué que l'arbitre avait eu raison de conclure que le congédiement des gardiens de sécurité n'était pas protégé par le privilège parlementaire. Les juges majoritaires ont convenu avec l'arbitre que les gardiens n'avaient pas le pouvoir d'expulser des étrangers. De plus, ils ont affirmé que le privilège relatif à la gestion du personnel ne s'appliquait pas aux gardiens puisque leurs tâches n'étaient pas étroitement et directement reliées aux fonctions délibératives et législatives de l'Assemblée nationale. Les juges majoritaires ont reconnu que le maintien de la sécurité à l'Assemblée était de la plus haute importance, et que les gardiens de sécurité y contribuent de façon importante. Cependant, selon eux, il n'était pas nécessaire que le président dispose d'un pouvoir non susceptible de révision à l'égard de la gestion des gardiens pour faire en sorte que l'Assemblée puisse accomplir son travail dignement et efficacement. Ils ont ajouté que l'Assemblée a établi dans la *LAN* les paramètres de l'indépendance dont elle a besoin pour s'acquitter de son mandat constitutionnel, et que cette loi ne limite pas la capacité des gardiens de contester leur congédiement au moyen de griefs.

[15] Le juge Morin, dissident, aurait rejeté l'appel. À son avis, le congédiement des gardiens de sécurité était visé par le privilège relatif à la gestion du personnel. Il a expliqué que les gardiens fournissent des services de sécurité de première ligne, sans lesquels l'Assemblée ne pourrait pas s'acquitter de son mandat constitutionnel dignement et efficacement. Il a aussi conclu que le privilège parlementaire a préséance sur la *LAN* et qu'il ne peut être limité par celle-ci.

III. Questions

[16] La question en litige dans le présent pourvoi est celle de savoir si l'arbitre peut trancher les griefs, ou si le congédiement des gardiens de sécurité est protégé par le privilège parlementaire. Les parties ont

this Court to determine: (1) whether the decision to dismiss the guards is protected by a parliamentary privilege over the management of employees; and (2) whether it is protected by the parliamentary privilege to exclude strangers. As I shall explain, I would answer that it is not. I agree with the arbitrator and the majority of the Quebec Court of Appeal that this decision is not subject to parliamentary privilege.

IV. Analysis

[17] As a preliminary point, the applicable standard of review in this case is correctness. The majority reasons of the Court of Appeal below were written without the benefit of our Court's reasons in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 (*CHRC*). It suffices to state that the existence and scope of parliamentary privilege is a question of central importance to the legal system and outside the expertise of the arbitrator (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 60; *CHRC*, at paras. 28 and 42). Labour arbitrators do not have specialized expertise in relation to parliamentary privilege. Moreover, while this appeal involves only the National Assembly of Québec, the conclusions regarding parliamentary privilege will affect all other legislative bodies.

A. *Parliamentary Privilege: A Purposive Approach*

[18] Legislative assemblies in Canada, including provincial legislative assemblies, received “certain very moderate [parliamentary] privileges” through the common law as an inherent and necessary component of their legislative function, and by virtue of the preamble of the *Constitution Act, 1867* (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 377, citing R. M. Dawson, *The Government of Canada* (5th ed. 1970), at p. 338; see also *New Brunswick Broadcasting*, at pp. 345 and 374-81; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 29(3); J. P. J. Maingot,

demandé à la Cour de décider : (1) si la décision par laquelle les gardiens ont été congédiés est protégée par le privilège parlementaire relatif à la gestion du personnel; et (2) si cette décision est protégée par le privilège parlementaire d'expulser des étrangers. Comme je l'expliquerai, je répondrais par la négative. Je conviens avec l'arbitre et les juges majoritaires de la Cour d'appel du Québec que cette décision n'est pas visée par le privilège parlementaire.

IV. Analyse

[17] Tout d'abord, la norme de contrôle applicable dans la présente affaire est celle de la décision correcte. Les juges majoritaires de la Cour d'appel ont rédigé leurs motifs sans bénéficier des motifs de la Cour dans *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2018 CSC 31, [2018] 2 R.C.S. 230 (*CHRC*). Il suffit de dire que l'existence et la portée du privilège parlementaire est une question qui revêt une importance capitale pour le système juridique mais qui est étrangère au domaine d'expertise de l'arbitre (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 60; *CHRC*, par. 28 et 42). Les arbitres en droit du travail ne possèdent pas d'expertise spécialisée quant au privilège parlementaire. De plus, bien que le présent pourvoi ne concerne que l'Assemblée nationale du Québec, les conclusions relatives au privilège parlementaire toucheront tous les autres organes législatifs.

A. *Privilège parlementaire : une interprétation téléologique*

[18] Les assemblées législatives au Canada, y compris les assemblées législatives provinciales, reçoivent [TRADUCTION] « certains privilèges [parlementaires] très restreints » en application de la common law, lesquels représentent des éléments inhérents et nécessaires à leur fonction législative, et en vertu du préambule de la *Loi constitutionnelle de 1867* (*New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 R.C.S. 319, p. 377, citant R. M. Dawson, *The Government of Canada* (5^e éd. 1970), p. 338; voir également *New Brunswick Broadcasting*, p. 345 et 374-381; *Canada (Chambre des communes) c. Vaid*, 2005 CSC 30, [2005] 1 R.C.S. 667,

Parliamentary Immunity in Canada (2016), at pp. 13 and 19).

[19] Parliamentary privilege is defined as “the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions” (*Vaid*, at para. 29(2)). These privileges, immunities, and powers exceed those afforded to the general population (*Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (24th ed. 2011), by M. Jack, at p. 203). Therefore, parliamentary privilege “is an exemption from some duty, burden, attendance or liability to which others are subject” (Maingot, at p. 13). Decisions falling within the scope of parliamentary privilege cannot be reviewed by an external body, including a court (*Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112 (Q.B.), at p. 1168; *New Brunswick Broadcasting*, at pp. 350 and 382-84; *Vaid*, at para. 29(9)).

[20] Many countries afford special protections to the legislative branch of government. For instance, numerous civil law and common law jurisdictions guarantee the immunity of elected representatives from liability for speech that relates to their legislative work.¹ Legislative immunities ensure the proper functioning of a representative democracy. They cultivate a space in which the voices of the people, including those who hold potentially unpopular opinions, can be heard and considered.²

¹ See e.g. the United Kingdom *Bill of Rights* (Eng.), 1 Will. & Mar. Sess. 2, c. 2, art. 9; the United States Constitution, art. I, § 6(1); the Constitution of France, art. 26; the Constitution of India, arts. 105 and 194; the Constitution of Italy, art. 68; and New Zealand (see e.g. D. McGee, *Parliamentary Practice in New Zealand* (4th ed. 2017), by M. Harris et al., at pp. 722-24).

² See e.g. *Jerusalem v. Austria*, No. 26958/95, ECHR 2001-II, at para. 36; R. S. Mehta, “Sir Thomas’ Blushes: Protecting Parliamentary Immunity in Modern Parliamentary Democracies” (2012), 17 *E.H.R.L.R.* 309, at pp. 309 and 318; République française, Sénat, Direction de l’initiative parlementaire et des délégations, *L’immunité parlementaire*, Étude de législation comparée n° 250 (June 2014) (online), at p. 8; Council of Europe, European Commission for Democracy Through Law (Venice Commission), *Report on the Scope and Lifting of Parliamentary Immunities*, Study No. 714/2013 (May 14, 2014) (online), at paras. 36-37.

par. 29(3); J. P. J. Maingot, *Parliamentary Immunity in Canada* (2016), p. 13 et 19).

[19] Le privilège parlementaire s’entend de la « somme des privilèges, immunités et pouvoirs dont jouissent le Sénat, la Chambre des communes et les assemblées législatives provinciales ainsi que les membres de chaque Chambre individuellement, sans lesquels ils ne pourraient s’acquitter de leurs fonctions » (*Vaid*, par. 29(2)). Ces privilèges, immunités et pouvoirs excèdent ceux dont jouit la population en général (*Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (24^e éd. 2011), par M. Jack, p. 203). En conséquence, le privilège parlementaire [TRADUCTION] « est une exemption d’une certaine obligation, charge, participation ou responsabilité à laquelle d’autres personnes sont assujetties » (Maingot, p. 13). Les décisions qui sont visées par le privilège parlementaire ne peuvent être révisées par un organisme externe, ce qui comprend les tribunaux (*Stockdale c. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112 (B.R.), p. 1168; *New Brunswick Broadcasting*, p. 350 et 382-384; *Vaid*, par. 29(9)).

[20] Dans bien des pays, l’organe législatif du gouvernement jouit de protections particulières. Par exemple, de nombreux pays de droit civil et de common law garantissent l’immunité des représentants élus à l’égard de leurs propos qui se rapportent à leur travail législatif¹. Les immunités législatives assurent le bon fonctionnement d’une démocratie représentative. Elles permettent l’existence d’un espace où les voix de tous, y compris de ceux qui ont des opinions susceptibles d’être impopulaires, peuvent être entendues et prises en considération².

¹ Voir p. ex. le *Bill of Rights* du Royaume-Uni, (Angl.), 1 Will. & Mar. sess. 2, c. 2, art. 9; la Constitution des États-Unis, art. I, § 6(1); la Constitution de la France, art. 26; la Constitution de l’Inde, art. 105 et 194; la Constitution de l’Italie, art. 68; et la Nouvelle-Zélande (voir p. ex. D. McGee, *Parliamentary Practice in New Zealand* (4^e éd. 2017), par M. Harris et autres, p. 722-724).

² Voir p. ex. *Jerusalem c. Autriche*, n° 26958/95, CEDH 2001-II, par. 36; R. S. Mehta, « Sir Thomas’ Blushes : Protecting Parliamentary Immunity in Modern Parliamentary Democracies » (2012), 17 *E.H.R.L.R.* 309, p. 309 et 318; République française, Sénat, Direction de l’initiative parlementaire et des délégations, *L’immunité parlementaire*, Étude de législation comparée n° 250 (juin 2014) (en ligne), p. 8; Conseil de l’Europe, Commission européenne pour la démocratie par le droit (Commission de Venise), *Rapport sur l’étendue et la levée des immunités parlementaires*, Étude n° 714/2013 (14 mai 2014) (en ligne), par. 36-37.

[21] Legislative privileges also allow legislative bodies to fearlessly hold the executive branch of government to account. They thus help preserve the separation and balance of power between the different branches of government (see e.g. *Gravel v. United States*, 408 U.S. 606 (1972), at p. 616; R. S. Mehta, “Sir Thomas’ Blushes: Protecting Parliamentary Immunity in Modern Parliamentary Democracies” (2012), 17 *E.H.R.L.R.* 309, at p. 309).

[22] In the U.K., the doctrine of parliamentary privilege developed through the struggle of the House of Commons for independence from the other branches of government (*New Brunswick Broadcasting*, at p. 344 and 379; P. Doherty, “What is this ‘Mysterious Power’? An Historical Model of Parliamentary Privilege in Canada” (2017), 11 *J.P.P.L.* 383, at p. 390). Historically, “the Crown and the courts showed no hesitation to intrude into the sphere of the Houses of Parliament” (*New Brunswick Broadcasting*, at p. 344). Members of the House of Commons were arrested by the sovereign if he disagreed with the Members’ conduct or speech in Parliament. Members opposed these arrests, asserting that they were inconsistent with their privileges (Canada, House of Commons, *House of Commons Procedure and Practice* (2nd ed. 2009), by A. O’Brien and M. Bosc, at p. 64). Parliamentary privilege was partly confirmed in statute in the *Bill of Rights* (Eng.), 1 Will. & Mar. Sess. 2, c. 2 (*New Brunswick Broadcasting*, at p. 345). Article 9 states 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”. However, parliamentary privilege in the U.K. extends beyond the protection of free speech (*Erskine May*, at p. 206). Therefore, parliamentary privilege has played a particularly important role in guaranteeing the separation of powers in the U.K. It ensures that democratically-elected members of the House of Commons can voice their concerns and independently represent the interests of their constituents (see also U.K., House of Lords, House of Commons, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege: Report of Session 2013-14* (July 3, 2013), at p. 7; *A. v. the United*

[21] Les privilèges législatifs permettent aussi aux organes législatifs de demander sans crainte au pouvoir exécutif du gouvernement de rendre des comptes. Ils contribuent donc à maintenir la séparation et l’équilibre des pouvoirs entre les différentes branches du gouvernement (voir p. ex. *Gravel c. United States*, 408 U.S. 606 (1972), p. 616; R. S. Mehta, « Sir Thomas’ Blushes : Protecting Parliamentary Immunity in Modern Parliamentary Democracies » (2012), 17 *E.H.R.L.R.* 309, p. 309).

[22] Au Royaume-Uni, la doctrine du privilège parlementaire est ressortie de la lutte de la Chambre des communes pour l’indépendance vis-à-vis des autres branches du gouvernement (*New Brunswick Broadcasting*, p. 344 et 379; P. Doherty, « What is this “Mysterious Power”? An Historical Model of Parliamentary Privilege in Canada » (2017), 11 *J.P.P.L.* 383, p. 390). Historiquement, « la Couronne et les tribunaux n’ont nullement hésité à s’immiscer dans le domaine des chambres du Parlement » (*New Brunswick Broadcasting*, p. 344). Des députés de la Chambre des communes étaient arrêtés par le souverain lorsque celui-ci était en désaccord avec leur comportement durant les débats de la Chambre ou avec les paroles qu’ils avaient prononcées à ce moment. Les députés se sont opposés à ces arrestations en faisant valoir qu’elles étaient incompatibles avec leurs privilèges (Canada, Chambre des communes, *La procédure et les usages de la Chambre des communes* (2^e éd. 2009), A. O’Brien et M. Bosc, p. 64). Le privilège parlementaire a été partiellement confirmé dans le *Bill of Rights* (Angl.), 1689, 1 Will. & Mar. sess. 2, c. 2 (*New Brunswick Broadcasting*, p. 345). L’article 9 de cette loi prévoit que [TRADUCTION] « la liberté de parole et des débats ou travaux au Parlement ne devrait être attaquée ou contestée devant aucun tribunal ni ailleurs qu’au Parlement ». Cependant, le privilège parlementaire au Royaume-Uni s’étend au-delà de la protection de la liberté de parole (*Erskine May*, p. 206). En conséquence, le privilège parlementaire a joué un rôle particulièrement important en assurant la séparation des pouvoirs au Royaume-Uni. Grâce à lui, les députés démocratiquement élus de la Chambre des communes peuvent exprimer leurs

Kingdom, No. 35373/97, ECHR 2002-X, at paras. 66 and 77).

[23] In Canada, parliamentary privilege is grounded in the preamble of the *Constitution Act, 1867*, which provides Canada with “a Constitution similar in Principle to that of the United Kingdom”. It is an inherent and necessary component of the Westminster model of parliamentary democracy. As in the U.K., the inherent privileges of Canadian legislative bodies are a means to preserve their independence and promote the workings of representative democracy. It is meant to enable the legislative branch and its members to proceed fearlessly and without interference in discharging their constitutional role, that is, enacting legislation and acting as a check on executive power (*New Brunswick Broadcasting*, at p. 354; *Vaid*, at paras. 21 and 41). It guarantees “an independent space for the citizens’ representatives to carry out their parliamentary functions; the freedom to debate and decide what laws should govern, and the unfettered ability to hold the executive branch of the State to account” (S. R. Chaplin, “*House of Commons v. Vaid: Parliamentary Privilege and the Constitutional Imperative of the Independence of Parliament*” (2009), 2 *J.P.P.L.* 153, at p. 154).

[24] When tethered to its purposes, parliamentary privilege is an important part of the public law of Canada (see *Vaid*, at para. 29(3)). The insulation from external review that privilege provides is a key component of our constitutional structure and the law that governs it. Judicial review of the exercise of parliamentary privilege, even for *Charter* compliance, would effectively nullify the necessary immunity this doctrine is meant to afford the legislature (*New Brunswick Broadcasting*, at pp. 350 and 382-84; *Vaid*, at para. 29(9)). However, while legislative assemblies are not accountable to the courts for

préoccupations et représenter de façon indépendante les intérêts de leurs électeurs (voir aussi R.-U., House of Lords, House of Commons, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege : Report of Session 2013-14* (3 juillet 2013), p. 7 (rapport du comité conjoint britannique de 2013); A. c. *Royaume-Uni*, n° 35373/97, CEDH 2002-X, par. 66 et 77).

[23] Au Canada, le privilège parlementaire est fondé sur le préambule de la *Loi constitutionnelle de 1867*, qui confère au Canada une « constitution reposant sur les mêmes principes que celle du Royaume-Uni ». Il s’agit d’un élément fondamental et essentiel du modèle de démocratie parlementaire du Parlement de Westminster. Comme au Royaume-Uni, les privilèges inhérents des organes législatifs canadiens constituent un moyen de préserver leur indépendance et de favoriser le fonctionnement des travaux de la démocratie représentative. Ils visent à permettre à la branche législative et à ses membres de s’acquitter sans crainte et sans intervention externe de leur rôle constitutionnel, soit adopter des lois et agir comme contrepoids au pouvoir exécutif (*New Brunswick Broadcasting*, p. 354; *Vaid*, par. 21 et 41). Ces privilèges assurent l’existence d’un [TRADUCTION] « espace indépendant pour les représentants des citoyens afin qu’ils puissent mener à bien leurs fonctions parlementaires; la liberté de débattre et de décider des lois qui s’appliqueront, et la capacité absolue de demander à la branche exécutive de l’État de rendre des comptes » (S. R. Chaplin, « *House of Commons v. Vaid : Parliamentary Privilege and the Constitutional Imperative of the Independence of Parliament* » (2009), 2 *J.P.P.L.* 153, p. 154).

[24] Lorsqu’il est mis en lien avec ses objets, le privilège parlementaire constitue un élément important du droit public du Canada (voir *Vaid*, par. 29(3)). L’immunité contre une révision externe qu’assure le privilège est une composante importante de notre structure constitutionnelle et du droit qui la régit. La révision judiciaire de l’exercice du privilège parlementaire, même sur le plan de la conformité avec la *Charte*, pourrait dans les faits annuler l’immunité nécessaire que cette doctrine vise à conférer à la législature (*New Brunswick Broadcasting*, p. 350 et 382-384; *Vaid*, par. 29(9)). Cependant, bien que les

the ways in which they exercise their parliamentary privileges, they remain accountable to the electorate (Chaplin, at p. 164).

[25] Yet, while the independence of the legislature is a necessary aspect of our constitutional structure and is wholly part of our law, so are its limits. The inherent nature of parliamentary privilege means that its existence and scope must be strictly anchored to its rationale. Notably, it creates a sphere of decision-making immune from judicial oversight for compliance with the *Charter*. It may also impede persons who are not members of the legislature from accessing recourses available under ordinary law (*Vaid*, at para. 30). As this Court explained in *Vaid*, “[c]ourts are apt to look more closely at cases in which claims to privilege have an impact on persons outside the legislative assembly than at those which involve matters entirely internal to the legislature” (para. 29(12); see also para. 4).

[26] The history of parliamentary privilege in the U.K. demonstrates the importance of defining its scope in accordance with its purpose. Indeed, for a time after the passage of the U.K. *Bill of Rights* of 1689, members of the House of Commons sought to use the protection of privilege in their private lives (Doherty, at p. 391; see also O’Brien and Bosc, at p. 65; *Stockdale*, at pp. 1116-17). Such an appeal to privilege is improper as the protection sought does not help preserve the separation of powers and promote the proper functioning of representative democracy. The scope of parliamentary privilege in the U.K. has thus narrowed over time (Canada, Senate Standing Committee on Rules, Procedures, and the Rights of Parliament, *A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century* (June 2015) (online), at pp. 6-7; O’Brien and Bosc, at p. 67; see also U.K. Joint Committee Report (2013), at p. 8).

assemblées législatives n’aient pas à répondre devant les tribunaux de la façon dont elles exercent leurs privilèges parlementaires, elles doivent en répondre devant l’électorat (Chaplin, p. 164).

[25] Toutefois, bien que l’indépendance de la législature soit un élément nécessaire de notre structure constitutionnelle et qu’elle fasse partie intégrante de notre droit, on peut dire la même chose de ses limites. La nature inhérente du privilège parlementaire signifie que son existence et sa portée doivent être fermement ancrées dans sa raison d’être. En particulier, il fait en sorte qu’un domaine décisionnel est à l’abri d’un contrôle judiciaire au regard de sa conformité avec la *Charte*. Il peut également priver des personnes non membres de la législature des réparations prévues par le droit commun (*Vaid*, par. 30). Comme l’a expliqué la Cour dans *Vaid*, « [l]es tribunaux peuvent examiner de plus près les affaires dans lesquelles la revendication d’un privilège a des répercussions sur des personnes qui ne sont pas membres de l’assemblée législative en cause, que celles qui portent sur des questions purement internes » (par. 29(12); voir aussi le par. 4).

[26] L’historique du privilège parlementaire au Royaume-Uni démontre qu’il est important de définir sa portée conformément à son objet. En effet, pendant un certain temps après l’adoption du *Bill of Rights* au Royaume-Uni en 1689, les députés de la Chambre des communes ont cherché à se prévaloir de la protection du privilège dans leur vie privée (Doherty, p. 391; voir aussi O’Brien et Bosc, p. 65; *Stockdale*, p. 1116-1117). Une telle utilisation du privilège est inadéquate puisque la protection sollicitée ne contribue pas au maintien de la séparation des pouvoirs et ne favorise pas le bon fonctionnement de la démocratie représentative. La portée du privilège parlementaire au Royaume-Uni s’est donc réduite au fil du temps (Canada, Sénat, Comité permanent du Règlement, de la procédure et des droits du Parlement, *Une question de privilège : Document de travail sur le privilège parlementaire au Canada au XXI^e siècle* (juin 2015) (en ligne), p. 6-7; O’Brien et Bosc, p. 67; voir aussi le rapport du comité mixte britannique de 2013, p. 8).

[27] Thus, in Canada, the scope of parliamentary privilege is delimited by the purposes it serves (see e.g. *Vaid*, at paras. 41-46). It inheres to the nature and functions of legislative assemblies as a separate branch of government. The reach of inherent privilege extends only so far as is “necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly’s work in holding the government to account for the conduct of the country’s business” (*Vaid*, at para. 41; see also *New Brunswick Broadcasting*, at pp. 381-85). Otherwise, it would unjustifiably trump other parts of the Constitution.

[28] Where the privilege that is claimed could undermine the *Charter* rights of people who are not members of the legislative assembly, a purposive approach helps to reconcile parliamentary privilege with the *Charter*. Neither the *Charter* nor parliamentary privilege “prevails over the other” (*Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 69). They “enjo[y] the same constitutional weight and status” (*Vaid*, at para. 34 (emphasis deleted)). Accordingly, when conflicts between the *Charter* and parliamentary privilege arise, “the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them” (*Harvey*, at para. 69). No doubt it will sometimes be challenging to reconcile these two constitutional imperatives (see e.g. C. Robert and D. Taylor, “Then and Now: Necessity, the Charter and Parliamentary Privilege in the Provincial Legislative Assemblies of Canada” (2012), 80 *The Table* 17, at pp. 19 and 42-43; M.-A. Roy, “Le Parlement, les tribunaux et la *Charte canadienne des droits et libertés*: vers un modèle de privilège parlementaire adapté au XXI^e siècle” (2014), 55 *C. de D.* 489, at pp. 512 and 521-22). In *Harvey*, McLachlin J. sought to reconcile them by adopting a narrower interpretation of s. 3 of the *Charter* so it was consistent with parliamentary privilege, and limiting the scope of the privilege at issue in light of the *Charter* (paras. 70 and 74). A purposive approach to parliamentary privilege recognizes the *Charter* implications of parliamentary privilege. It strives to reconcile privilege and the *Charter* by ensuring that the privilege is only as broad as is

[27] En conséquence, au Canada, la portée du privilège parlementaire est délimitée par les objectifs qu’il vise (voir p. ex. *Vaid*, par. 41-46). Celui-ci est inhérent à la nature et aux fonctions des assemblées législatives en tant que branche distincte du gouvernement. Le privilège inhérent ne s’appliquera que dans la mesure où cela est « indispensable pour protéger les législateurs dans l’exécution de leurs fonctions législatives et délibératives et de la tâche de l’assemblée législative de demander des comptes au gouvernement relativement à la conduite des affaires du pays » (*Vaid*, par. 41; voir aussi *New Brunswick Broadcasting*, p. 381-385). Autrement, il empiéterait de façon injustifiée sur d’autres parties de la Constitution.

[28] Lorsque le privilège revendiqué pourrait porter atteinte aux droits que la *Charte* garantit à des personnes qui ne sont pas membres de l’assemblée législative, une interprétation téléologique aide à concilier le privilège parlementaire avec la *Charte*. Ni la *Charte* ni le privilège parlementaire « ne l’emport[e] » sur l’autre (*Harvey c. Nouveau-Brunswick (Procureur général)*, [1996] 2 R.C.S. 876, par. 69). Ils ont « le même statut et le même poids constitutionnels » (*Vaid*, par. 34 (italique omis)). En conséquence, lorsque surviennent des conflits entre la *Charte* et le privilège parlementaire, « il convient non pas de résoudre ces conflits en subordonnant un principe à l’autre, mais plutôt d’essayer de les concilier » (*Harvey*, par. 69). Nul doute qu’il sera parfois difficile de concilier ces deux impératifs constitutionnels (voir p. ex. C. Robert et D. Taylor, « Then and Now : Necessity, the Charter and Parliamentary Privilege in the Provincial Legislative Assemblies of Canada » (2012), 80 *The Table* 17, p. 19 et 42-43; M.-A. Roy, « Le Parlement, les tribunaux et la *Charte canadienne des droits et libertés* : vers un modèle de privilège parlementaire adapté au XXI^e siècle » (2014), 55 *C. de D.* 489, p. 512 et 521-522). Dans *Harvey*, la juge McLachlin a tenté de les concilier en adoptant une interprétation plus étroite de l’art. 3 de la *Charte*, de sorte qu’il soit compatible avec le privilège parlementaire, et en limitant la portée du privilège en cause à la lumière de la *Charte* (par. 70 et 74). Une interprétation téléologique du privilège parlementaire tient compte des incidences relatives à la *Charte* du privilège parlementaire. Elle vise à concilier le privilège et la *Charte* en veillant à ce

necessary for the proper functioning of our constitutional democracy.

[29] In order to fall within the scope of parliamentary privilege, the matter at issue must meet the necessity test: it must be “so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body . . . 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” (*Vaid*, at para. 46).

[30] The necessity test thus demands that the sphere of activity over which parliamentary privilege is claimed be more than merely *connected* to the legislative assembly’s functions. The *immunity* that is sought from the application of ordinary law must also be necessary to the assembly’s constitutional role. In other words, “[i]f a sphere of the legislative body’s activity could be left to be dealt with under the ordinary law of the land without interfering with the assembly’s ability to fulfill its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist” (*Vaid*, at para. 29(5)).

[31] Previously recognized categories of parliamentary privilege serve as examples of matters meeting this requirement. Take, for instance, the immunity of members of the legislative assembly for their speech insofar as it relates to their mandate, the legislative assembly’s autonomy in controlling its debates or proceedings, its “power to exclude strangers from proceedings”, and its authority to discipline its members as well as “non-members who interfere with the discharge of parliamentary duties” (*Vaid*, at para. 29(10)). That said, given its rationale, the necessity of a privilege must be assessed in the contemporary context. Even if a certain area has historically been considered subject to parliamentary privilege, it may only continue to be so if it remains necessary to the independent functioning of our legislative bodies today (*New Brunswick Broadcasting*, at p. 387; see also *Vaid*, at para. 29(6)).

que le privilège n’ait pas une portée plus large que nécessaire pour le bon fonctionnement de notre démocratie constitutionnelle.

[29] Pour être visée par le privilège parlementaire, la question en cause doit satisfaire au critère de la nécessité : elle doit être « si étroitement et directement liée à l’exercice, par l’assemblée ou son membre, de leurs fonctions d’assemblée législative et délibérante [. . .] qu’une intervention externe saperait l’autonomie dont l’assemblée ou son membre ont besoin pour accomplir leur travail dignement et efficacement » (*Vaid*, par. 46).

[30] Le critère de la nécessité exige donc que la sphère d’activité à l’égard de laquelle est revendiqué le privilège parlementaire soit plus que simplement *liée* aux fonctions de l’assemblée législative. L’*immunité* qui est sollicitée à l’égard de l’application du droit commun doit aussi être nécessaire au rôle constitutionnel de l’assemblée. Autrement dit, « [s]i une sphère d’activité de l’organe législatif pouvait relever du régime de droit commun du pays sans que cela nuise à la capacité de l’assemblée de s’acquitter de ses fonctions constitutionnelles, l’immunité ne serait pas nécessaire et le privilège revendiqué inexistant » (*Vaid*, par. 29(5)).

[31] Les catégories de privilège parlementaire qui ont déjà été reconnues servent d’exemples de questions qui satisfont à cette exigence. Prenons, notamment, l’immunité des membres de l’assemblée législative quant à leurs propos se rapportant à leur mandat, l’autonomie de l’assemblée législative quant au contrôle sur ses débats ou travaux, son « pouvoir d’exclure les étrangers des débats » et son pouvoir disciplinaire à l’endroit de ses membres ainsi que des « non-membres qui s’ingèrent dans l’exercice des fonctions du Parlement » (*Vaid*, par. 29(10)). Cela dit, compte tenu de sa raison d’être, il faut établir si le privilège demeure nécessaire dans le contexte contemporain. Même si un certain domaine a historiquement été considéré comme étant assujéti au privilège parlementaire, il continuera de l’être seulement s’il demeure, encore aujourd’hui, nécessaire au fonctionnement indépendant de nos organes législatifs (*New Brunswick Broadcasting*, p. 387; voir aussi *Vaid*, par. 29(6)).

[32] The party seeking to rely on the immunity from external review conferred by parliamentary privilege bears the burden of establishing its necessity. It must demonstrate that the scope of the protection it claims is necessary in light of the purposes of parliamentary privilege. It is the role of the courts to determine whether a category of parliamentary privilege exists and to delimit its scope. Though the courts “give considerable deference to [the legislative body’s] view of the scope of autonomy it considers necessary to fulfill its functions”, their role is nonetheless to “ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege” (*Vaid*, at paras. 40 and 29(11)). But once the category and its scope are established, “it is for Parliament, not the courts, to determine whether in a particular case the *exercise* of the privilege is necessary or appropriate” (*Vaid*, at para. 29(9) (emphasis in original); see also paras. 47-48). Admittedly, “[t]he distinction between defining the scope of a privilege, which is the function of the courts, and judging the appropriateness of its exercise, which is a matter for the legislative assembly, may sometimes be difficult to draw in practice” (*Vaid*, at para. 47). Yet this distinction strikes a compromise between the fundamental purposes served by parliamentary privilege in our constitutional structure, and the need to ensure that the autonomy afforded through privilege does not belie its purposes (see *New Brunswick Broadcasting*, at pp. 348-50 and 382-84).

B. *Parliamentary Privilege Over the Management of Employees*

[33] Relying on statements in *Vaid*, both parties acknowledge the existence of a parliamentary privilege over the management of some employees. Their disagreement concerns the scope of this privilege. The appellant President submits that the National Assembly holds a privilege over the management of the security guards because there is both a “sufficient” and “a close and direct” connection between the tasks they perform and the Assembly’s

[32] La partie qui invoque l’immunité contre une révision externe en application du privilège parlementaire a le fardeau d’en établir la nécessité. Elle doit démontrer que la portée de la protection revendiquée est nécessaire à la lumière de l’objet du privilège parlementaire. Il appartient aux tribunaux d’établir si une catégorie de privilège parlementaire existe et d’en délimiter la portée. Bien que les tribunaux « feront certes preuve d’une grande retenue quant au degré d’autonomie dont [l’organe législatif] estime devoir bénéficier pour s’acquitter de ses fonctions », leur rôle consiste néanmoins à « s’assurer que la revendication d’un privilège ne permet pas au Parlement, à ses représentants ou à ses employés de se soustraire au régime de droit commun en ce qui a trait aux conséquences de leurs actes lorsque leur conduite outrepassa la portée nécessaire de la catégorie de privilège en cause » (*Vaid*, par. 40 et 29(11)). Cependant, une fois que la catégorie et sa portée sont établies, « c’est au Parlement, et non aux tribunaux, qu’il revient de déterminer si l’*exercice* de ce privilège est nécessaire ou approprié dans un cas particulier » (*Vaid*, par. 29(9) (en italique dans l’original); voir aussi les par. 47-48). Certes, « il pourra être difficile dans certains cas d’établir une distinction entre le fait de définir l’étendue d’un privilège, qui ressortit aux tribunaux, et celui d’évaluer l’opportunité de son exercice, qui ressortit à l’assemblée législative » (*Vaid*, par. 47). Toutefois, cette distinction établit un compromis entre les objectifs fondamentaux du privilège parlementaire dans notre structure constitutionnelle, et la nécessité de s’assurer que l’autonomie que confère le privilège ne soit pas contraire à ses objectifs (voir *New Brunswick Broadcasting*, p. 348-350 et 382-384).

B. *Le privilège parlementaire relatif à la gestion du personnel*

[33] Se fondant toutes deux sur des énoncés de l’arrêt *Vaid*, les parties reconnaissent l’existence d’un privilège parlementaire relatif à la gestion de certains employés. Elles sont toutefois en désaccord quant à la portée de ce privilège. Le président appellant fait valoir que l’Assemblée nationale jouit d’un privilège relativement à la gestion des gardiens de sécurité parce qu’il existe un lien tant « suffisant » qu’« étroit et direct » entre les tâches accomplies

constitutional functions. The security guards play a key role in ensuring security. They provide a first level of defence and are involved in 80 to 90 percent of the Assembly's security work. Security promotes the effectiveness of the Assembly's activities. The respondent union argues that the tasks performed by the security guards are not sufficiently connected to constitutional functions of the Assembly for their management to be subject to privilege. The security guards have no real power to intervene if an issue arises and primarily support the work of the special constables and police officers.

[34] In *Vaid*, the Speaker of the House of Commons asserted a sweeping privilege over the management of all employees of the House, which would have immunized the decision to dismiss his chauffeur from external review (para. 52). The Court noted that, if the privilege claimed by the Speaker existed, its scope would include the management of “service employees (such as catering staff) who support MPs in a general way, but play no role in the discharge of their constitutional functions” (para. 47). It concluded that the appellants had failed to establish the existence of this broad privilege, which had not been shown to satisfy the necessity test (paras. 75-76).

[35] Although the Court stated in *Vaid* that privilege “no doubt . . . attaches to the House's relations with some of its employees”, *Vaid* itself does not establish the existence of any form of privilege over the management of employees (para. 75 (emphasis deleted); see also para. 62). The Court concluded that “[t]he definition of a more limited category of privilege . . . must await a case in which the question truly arises for a decision” (para. 101; see also para. 76). Notably, U.K. courts have not yet recognized the management of any parliamentary employees to be protected by privilege, and some authors suggest that “management functions relating to the provision of services in either House are only exceptionally subject to privilege” (*Vaid*, at para. 61 (emphasis

par ces derniers et les fonctions constitutionnelles de l'Assemblée. Les gardiens de sécurité jouent un rôle important dans le maintien de la sécurité. Ils constituent la première ligne de défense et participent au travail lié à la sécurité de l'Assemblée à raison de 80 à 90 %; cette sécurité favorise l'efficacité des travaux de l'Assemblée. Le syndicat intimé soutient que les tâches exécutées par les gardiens de sécurité ne sont pas suffisamment liées aux fonctions constitutionnelles de l'Assemblée pour que la gestion des gardiens soit assujettie au privilège parlementaire. Les gardiens de sécurité n'ont aucun réel pouvoir d'intervention en cas de problème et ils sont principalement chargés d'appuyer les constables spéciaux et les policiers dans leurs fonctions.

[34] Dans *Vaid*, le président de la Chambre des communes a fait valoir l'existence d'un privilège général relatif à la gestion de tous les employés de la Chambre, qui aurait eu pour effet de mettre la décision de congédier son chauffeur à l'abri de toute révision externe (par. 52). La Cour a souligné que si le privilège revendiqué par le président existait, il viserait la gestion du « personnel de soutien (comme le personnel de la restauration) qui appuie les membres du Parlement d'une manière générale, mais ne contribue aucunement à l'exercice de leurs fonctions constitutionnelles » (par. 47). La Cour a alors conclu que les appelants n'avaient pas réussi à établir l'existence de ce privilège général et à prouver que celui-ci satisfaisait au critère de la nécessité (par. 75-76).

[35] Bien que la Cour ait affirmé dans *Vaid* qu'il ne faisait aucun doute que « le privilège protège les relations entre la Chambre et certains de ses employés », cet arrêt lui-même n'établit pas l'existence d'un quelconque privilège relatif à la gestion du personnel (par. 75 (italique omis); voir également le par. 62). La Cour a statué que « [p]our définir une catégorie de privilège parlementaire plus restreinte, [. . .] il faudra attendre que la question se pose véritablement dans le cadre d'un autre pourvoi » (par. 101; voir également le par. 76). Il convient de souligner le fait que les tribunaux du Royaume-Uni n'ont toujours pas reconnu la gestion de l'ensemble des employés du Parlement comme étant protégée par le privilège parlementaire, et certains auteurs

deleted), citing U.K., Joint Committee on Parliamentary Privilege, vol. 1, *Report and Proceedings of the Committee* (1999), at para. 248; see also G. F. Lock, “Labour Law, Parliamentary Staff and Parliamentary Privilege” (1983), 12 *Indus. L.J.* 28, at p. 29; *Erskine May*, at p. 240).

[36] Thus, *Vaid* did not determine whether a parliamentary privilege over the management of some employees exists. As in *Vaid*, we do not need to decide whether this privilege exists, as the management of the security guards — including their dismissals — would fall beyond the scope of any such privilege. As I shall explain, the tasks performed by the guards are important, but subjecting their management to ordinary law would not hamper the autonomy which the National Assembly requires to discharge its constitutional mandate.

[37] The present case highlights the difficulty with trying to recognize a category of privilege that includes *all aspects* of the management of a group of employees and decisions with regards to *all functions* these employees perform (see E. Fox-Decent, “Parliamentary Privilege, Rule of Law and the Charter after the Vaid Case” (2007), 30:3 *Can. Parl. Rev.* 27, at p. 31). The requirements of the necessity test may be more easily fulfilled where the scope of autonomy that is claimed pertains to control and oversight over certain functions performed by some parliamentary employees, or certain aspects of their employment relationship. That said, the parties have not framed this case in that way. The President asserts a parliamentary privilege over the management of the security guards as a category of employees. This privilege would immunize not only their dismissals, but all of their employment conditions (from salary to seniority) from review on any grounds.

indiquent que les [TRADUCTION] « fonctions de gestion, pour ce qui est de la fourniture de services dans l’une ou l’autre Chambre, ne sont qu’exceptionnellement assujetties au privilège » (*Vaid*, par. 61 (soulignement omis), citant R.-U., Joint Committee on Parliamentary Privilege, vol. 1, *Report and Proceedings of the Committee* (1999) (rapport du comité mixte britannique de 1999), par. 248; voir également G. F. Lock, « Labour Law, Parliamentary Staff and Parliamentary Privilege » (1983), 12 *Indus. L.J.* 28, p. 29; *Erskine May*, p. 240).

[36] C’est donc dire que l’arrêt *Vaid* n’a pas tranché la question de savoir s’il existe un privilège parlementaire relatif à la gestion de certains employés. Comme dans *Vaid*, il n’est pas nécessaire en l’espèce de décider si un tel privilège existe ou non puisque la gestion des gardiens de sécurité — y compris leur congédiement — y échapperait. Comme je l’expliquerai plus loin, les tâches accomplies par les gardiens sont importantes, mais assujettir la gestion de ces derniers au droit commun ne priverait pas l’Assemblée nationale de l’autonomie dont elle a besoin pour s’acquitter de son mandat constitutionnel.

[37] La présente affaire fait ressortir les difficultés liées au fait de tenter de reconnaître une catégorie de privilège qui englobe *tous les aspects* de la gestion d’un groupe d’employés et les décisions relatives à *toutes les fonctions* qu’exercent ces employés (voir E. Fox-Decent, « Le privilège parlementaire, la primauté du droit et la Charte après l’affaire Vaid » (2007), 30:3 *Rev. parl. can.* 29, p. 33). Il pourrait être plus facile de satisfaire aux exigences du critère de la nécessité lorsque la portée de l’autonomie réclamée a trait au contrôle et à la supervision de certaines fonctions exercées par des employés du Parlement, ou de certains aspects de leur lien d’emploi. Cela dit, les parties n’ont pas formulé l’espèce de cette façon. Le président revendique l’existence d’un privilège parlementaire relatif à la gestion des gardiens de sécurité en tant que catégorie d’employés. Ce privilège aurait pour effet de protéger non seulement leur congédiement de toute révision fondée sur quelque motif que ce soit, mais aussi l’ensemble de leurs conditions de travail (du salaire à l’ancienneté).

[38] The security of the National Assembly is undoubtedly important. An assembly cannot function without maintaining its security. As the President states, [TRANSLATION] “a parliament cannot deliberate without a secure setting” (A.F., at para. 84). Secure legislative precincts support an assembly in discharging its constitutional functions.

[39] The tasks performed by the security guards support the National Assembly in fulfilling its constitutional mandate. The arbitrator found that the tasks performed by the security guards include the surveillance of the National Assembly’s buildings, controlling access to them, and verifying the identity of people inside them. Thus, the security guards play a key role in protecting the National Assembly from security threats. Additionally, the guards are sometimes stationed in the chamber and help maintain decorum.

[40] However, many employees support legislative bodies in performing their constitutional functions. Considered broadly, many staff play a role in ensuring that a legislative assembly can fulfil its mandate. But merely demonstrating that a category of employees performs important tasks that promote the ability of the assembly to discharge its functions does not suffice to establish that decisions about their management must be protected by parliamentary privilege.

[41] The close and direct connection between the tasks performed by the employees and the legislative assembly’s constitutional functions is only part of the equation. The necessity test also requires that the immunity that is sought from the executive and judicial branches of government — here a privilege over the management of the security guards — be necessary, in 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” (*Vaid*, at para. 46).

[38] On ne saurait douter de l’importance de la sécurité à l’Assemblée nationale. Il est impossible pour une assemblée de fonctionner si sa sécurité n’est pas préservée. Comme l’affirme le président, « un [P]arlement ne peut pas délibérer sans un cadre sécurisé » (m.a., par. 84). La sécurité de l’enceinte parlementaire permet à l’assemblée de s’acquitter de ses fonctions constitutionnelles.

[39] Les tâches accomplies par les gardiens de sécurité aident l’Assemblée nationale à s’acquitter de son mandat constitutionnel. L’arbitre a conclu que ces tâches comprennent la surveillance des bâtiments de l’Assemblée nationale, le contrôle de l’accès à ceux-ci et la vérification de l’identité des personnes qui s’y trouvent. Par conséquent, les gardiens de sécurité jouent un rôle important dans la protection de l’Assemblée nationale contre les menaces à la sécurité. De plus, les gardiens sont parfois postés dans la salle de l’Assemblée nationale et aident à faire respecter le décorum.

[40] Toutefois, bon nombre d’employés appuient les organes législatifs dans l’exercice de leurs fonctions constitutionnelles. De façon générale, de nombreux membres du personnel contribuent à la réalisation du mandat de l’assemblée législative. Or, il ne suffit pas de démontrer simplement qu’une catégorie d’employés accomplit des tâches importantes qui contribuent à la capacité de l’assemblée de s’acquitter de ses fonctions pour établir que les décisions relatives à la gestion de ces derniers doivent être protégées par le privilège parlementaire.

[41] Le lien étroit et direct entre les tâches accomplies par les employés et les fonctions constitutionnelles de l’assemblée législative ne représente qu’une partie de l’équation. Suivant le critère de la nécessité, l’immunité demandée relativement au pouvoir exécutif et au pouvoir judiciaire — en l’espèce, le privilège relatif à la gestion des gardiens de sécurité — doit également être nécessaire, de sorte qu’une « intervention externe saperait l’autonomie dont l’assemblée ou son membre ont besoin pour accomplir leur travail dignement et efficacement » (*Vaid*, par. 46).

[42] The necessity test is stringent because, as discussed above, parliamentary privilege has the potential to shield parliamentary decision-making from judicial oversight, including for *Charter* compliance. Here, the privilege sought affects employees who are not members of the National Assembly. Further, the privilege claimed by the appellant may undermine the right of the security guards to meaningfully associate in the pursuit of collective workplace goals, guaranteed under s. 2(d) of the *Charter* (*Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 67). It is thus particularly important to keep the purposes underlying privilege in mind in assessing whether the necessity test is met. The sphere of immunity that is sought must be necessary for the legislative body to have sufficient independence from the other branches of government in order to perform its constitutional functions.

[43] In short, the question we must answer in this case is this: is the management of the security guards “so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body . . . 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” (*Vaid*, at para. 46)? In other words, does the National Assembly require unreviewable authority over the management of security guards in order to maintain its “sovereignty as a legislative and deliberative assembly” (*Vaid*, at para. 72 (emphasis added), citing the British Joint Committee Report (1999), at para. 247)?

[44] I agree with the majority of the Court of Appeal that the President has failed to establish the necessity of the immunity it claims, that is, a parliamentary privilege over the management of the security guards. Admittedly, the guards perform some important tasks that are connected to the constitutional functions of the National Assembly. They contribute to the security of the Assembly and to maintaining order and decorum in the part of the

[42] Comme il est expliqué précédemment, le critère de la nécessité est rigoureux parce que le privilège parlementaire est susceptible de protéger le processus décisionnel parlementaire de tout contrôle judiciaire, y compris le contrôle de la conformité à la *Charte*. En l’espèce, le privilège revendiqué par l’appelant vise des employés qui ne sont pas membres de l’Assemblée nationale. De plus, il est susceptible de miner le droit des gardiens de sécurité de véritablement s’associer en vue de réaliser des objectifs collectifs relatifs à leurs conditions de travail, lequel est garanti par l’al. 2d) de la *Charte* (*Association de la police montée de l’Ontario c. Canada (Procureur général)*, 2015 CSC 1, [2015] 1 R.C.S. 3, par. 67). Ainsi, pour décider si le critère de la nécessité est respecté, il est particulièrement important de garder à l’esprit les objectifs qui sous-tendent le privilège parlementaire. L’immunité demandée doit être d’une portée qui est nécessaire afin que l’organe législatif en question soit suffisamment indépendant des autres branches du gouvernement pour être en mesure d’accomplir ses fonctions constitutionnelles.

[43] En somme, la question que soulève la présente affaire est la suivante : la gestion des gardiens de sécurité est-elle « si étroitement et directement liée à l’exercice, par l’assemblée ou son membre, de leurs fonctions d’assemblée législative et délibérante [. . .] qu’une intervention externe saperait l’autonomie dont l’assemblée ou son membre ont besoin pour accomplir leur travail dignement et efficacement » (*Vaid*, par. 46)? Autrement dit, l’Assemblée nationale doit-elle détenir un pouvoir non susceptible de révision à l’égard de la gestion des gardiens de sécurité afin d’assurer sa [TRADUCTION] « souveraineté [. . .] en sa qualité d’assemblée législative et délibérante » (*Vaid*, par. 72 (je souligne), citant le rapport du comité mixte britannique de 1999, par. 247)?

[44] Je souscris à l’opinion des juges majoritaires de la Cour d’appel selon laquelle le président n’a pas réussi à prouver la nécessité de l’immunité qu’il réclame, soit le privilège parlementaire à l’égard de la gestion des gardiens de sécurité. Il est vrai que les gardiens accomplissent des tâches importantes qui sont liées aux fonctions constitutionnelles de l’Assemblée nationale. Ils contribuent à la sécurité de l’Assemblée et au respect de l’ordre et du décorum

Assembly's chamber that is accessible to the public during question period. That said, immunity from outside scrutiny in the general management of the security guards is not such that, without it, the Assembly could not discharge its functions (*Vaid*, at para. 72). The management of the guards could be dealt with under ordinary law without impeding the Assembly's security or its ability to legislate and deliberate (*Vaid*, at para. 29(5)). Permitting the enforcement of basic employment and labour protections for the security guards would not undermine the independence required for the Assembly to fulfil its mandate with dignity and efficiency.

[45] Of course, as the appellant suggests, order and decorum in the chamber is important to a legislative body's ability to discharge its functions (*New Brunswick Broadcasting*, at p. 398; A.F., at paras. 84 and 106; transcript, at pp. 25-27 and 29). Hence, it may be necessary, to maintain order in the National Assembly's chamber itself, for the President to have the absolute right to oversee certain *functions* exercised by a given group of employees or certain *aspects* of their employment relationship. But it does not necessarily require the recognition of a broad privilege over their management. Employees often perform diverse duties and many aspects of managing their employment relationship would have no bearing on the protection of the Assembly's constitutional role. Unreviewable authority over all functions and absolute power over all aspects of how this group of employees is managed is not necessary in light of the purpose of inherent legislative privileges.

[46] The question of necessity can, therefore, be addressed without looking to the ARNA. However, consideration of the ARNA does not detract from the above analysis of the necessity test. While nothing in the legislation abrogates inherent parliamentary privilege, the ARNA does establish that, unless the Office of the National Assembly indicates otherwise

dans la partie de la salle de l'Assemblée, auquel le public a accès pendant la période de questions. Cela dit, l'immunité contre toute révision externe de la gestion générale des gardiens de sécurité n'est pas telle que, sans elle, l'Assemblée ne pourrait pas s'acquitter de ses fonctions (*Vaid*, par. 72). Les questions liées à la gestion des gardiens pourraient être réglées sous le régime de droit commun sans porter atteinte à la sécurité ou à la capacité de l'Assemblée de s'acquitter de ses fonctions législatives et délibératives (*Vaid*, par. 29(5)). Permettre que les protections habituellement conférées aux employés et aux travailleurs s'appliquent aux gardiens de sécurité ne nuirait pas à l'indépendance dont l'Assemblée a besoin pour s'acquitter de son mandat dignement et efficacement.

[45] Comme l'affirme l'appellant, il va de soi qu'il est important de maintenir l'ordre et le décorum dans la salle de l'assemblée législative pour que l'organe législatif puisse s'acquitter de ses fonctions (*New Brunswick Broadcasting*, p. 398; m.a., par. 84 et 106; transcription, p. 25-27 et 29). En conséquence, pour assurer le respect de l'ordre dans la salle de l'Assemblée nationale, il pourrait s'avérer nécessaire que le président soit investi du pouvoir absolu de superviser certaines *fonctions* exercées par un groupe d'employés donné ou certains *aspects* de leur lien d'emploi. Cependant, cela ne requiert pas nécessairement que lui soit reconnu un vaste privilège à l'égard de la gestion de ces employés. Les employés exécutent souvent des tâches variées et de nombreux aspects de la gestion de leur lien d'emploi n'auront aucun effet sur la protection du rôle constitutionnel de l'Assemblée. Compte tenu de l'objectif des privilèges inhérents des législatures, une autorité non susceptible de révision sur l'ensemble des fonctions et un pouvoir absolu à l'égard de tous les aspects de la gestion de ce groupe d'employés ne sont pas nécessaires.

[46] On peut donc se pencher sur la question de la nécessité sans examiner la LAN. Cependant, l'examen de la LAN n'entrave pas l'analyse qui précède relativement au critère de la nécessité. Bien qu'aucune mesure législative ne supprime le privilège parlementaire inhérent, la LAN établit, sauf indication contraire dans un règlement du Bureau de

by regulation, all of its employees are managed in accordance with general law.

[47] Section 110 of the *ARNA* reads:

Subject to this Act, the [National] Assembly shall continue to be managed within the scope of the Acts, regulations and rules applicable.

The Office [of the National Assembly] may, however, by regulation, derogate from the applicable Acts, regulations and rules by specifically indicating the provisions derogated from and the provisions that are to apply in their place and stead.

[48] Section 120 para. 1 states:

Every member of the personnel of the Assembly, except a casual employee, is a member of the personnel of the civil service, whether appointed under the Public Service Act (chapter F-3.1.1) or by derogation by virtue of the second paragraph of section 110, unless, in the latter case, the Office excludes him therefrom.

[49] Employees of the National Assembly (except for casual employees) are members of the civil service (*ARNA*, s. 120). Unless they fall within one of the exceptions set out in s. 64 of the *Public Service Act*, they are members of the respondent union. Their working conditions are negotiated by the respondent and the Conseil du trésor (*Public Administration Act*, CQLR, c. A-6.01, s. 36; *ARNA*, s. 110.2).

[50] The Office of the National Assembly, which is composed of the President, five government members, and four opposition members, has not exercised its rights under s. 110 of the *ARNA* to exclude the management of any of the Assembly's employees, including the security guards, from the applicable general law (see also *ARNA*, ss. 87 and 88). It could have done so if it believed that the Assembly's ability to fulfil its constitutional functions required it to have exclusive control over the guards' management. Thus, as reflected in the *ARNA*, the Assembly does not appear to view exclusive control over the

l'Assemblée nationale, que les employés de cette dernière sont tous gérés conformément au droit commun.

[47] L'article 110 de la *LAN* prévoit ce qui suit :

Sous réserve de la présente loi, la gestion de l'Assemblée [nationale] continue de s'exercer dans le cadre des lois, règlements et règles qui lui sont applicables.

Toutefois, le Bureau [de l'Assemblée nationale] peut, par règlement, déroger à ces lois, règlements et règles en indiquant précisément les dispositions auxquelles il est dérogé et les dispositions qui s'appliqueront en leur lieu et place.

[48] Le premier alinéa de l'art. 120 de la *LAN* énonce ce qui suit :

Tout membre du personnel de l'Assemblée, à l'exception d'un employé occasionnel, fait partie du personnel de la fonction publique, qu'il soit nommé en vertu de la Loi sur la fonction publique (chapitre F-3.1.1) ou par dérogation en vertu du deuxième alinéa de l'article 110, à moins que, dans ce dernier cas, le Bureau ne l'en exclue.

[49] Les employés de l'Assemblée nationale (à l'exception des employés occasionnels) font partie du personnel de la fonction publique (*LAN*, art. 120). À moins de relever de l'une des exceptions prévues à l'art. 64 de la *Loi sur la fonction publique*, ces employés sont membres du syndicat intimé. L'intimé négocie leurs conditions de travail avec le Conseil du trésor (*Loi sur l'administration publique*, RLRQ, c. A-6.01, art. 36; *LAN*, art. 110.2).

[50] Le Bureau de l'Assemblée nationale, composé du président, de cinq députés du parti gouvernemental et de quatre députés de l'opposition, ne s'est pas prévalu du droit que lui confère l'art. 110 de la *LAN* de soustraire la gestion des employés de l'Assemblée, y compris les gardiens de sécurité, à l'application du droit commun (voir également la *LAN*, art. 87 et 88). Il aurait pu le faire s'il avait été d'avis que l'Assemblée, pour être en mesure de s'acquitter de ses fonctions constitutionnelles, devait avoir le contrôle exclusif à l'égard de la gestion des gardiens. Par conséquent, comme il ressort de la *LAN*,

management of its security guards to be necessary to its autonomy.

[51] In short, even if a privilege over the management of some parliamentary employees exists, the management of the security guards would fall outside its scope. Moreover, if the President had only claimed a parliamentary privilege over the *dismissals* of all security guards, I would still conclude that the necessity test was not met. Despite the important functions performed by the security guards, the President has not shown that it requires the unreviewable authority to dismiss this category of employees in order for the Assembly to be able to fulfil its constitutional duties with efficiency and dignity.

C. *Parliamentary Privilege to Exclude Strangers*

[52] The appellant submits that the security guards' dismissals are also subject to the parliamentary privilege to exclude strangers. Before this Court, he does not submit that the security guards are strangers to the National Assembly. His argument is that this privilege includes the President's right to determine who can implement it on his behalf. Because the guards exercise the privilege to exclude strangers when they control access to and within the legislative assembly, the President's decision to terminate their employment is protected from review. If arbitrators and courts were entitled to review the dismissals of the security guards, they could interfere with the President's determination of who has delegated authority to exclude strangers and, by implication, interfere with the exercise of this parliamentary privilege.

[53] While the respondent does not dispute the existence of the parliamentary privilege to exclude strangers, it submits that this privilege does not apply to the decision to dismiss the security guards. The broad manner in which the President has construed this privilege overshoots its underlying purpose and

l'Assemblée ne semble pas percevoir le contrôle exclusif de la gestion des gardiens de sécurité comme étant nécessaire à son autonomie.

[51] En bref, même s'il existait un privilège relatif à la gestion de certains employés du Parlement, la gestion des gardiens de sécurité échapperait à sa portée. Par ailleurs, même si le privilège parlementaire revendiqué par le président s'était limité au *congédiement* de tous les gardiens de sécurité, j'arriverais néanmoins à la conclusion que le critère de la nécessité n'a pas été respecté. Malgré l'importance des fonctions exercées par les gardiens de sécurité, le président n'a pas su prouver qu'il devait disposer du pouvoir non susceptible de révision de congédier des employés appartenant à cette catégorie pour que l'Assemblée puisse s'acquitter de ses responsabilités constitutionnelles efficacement et dignement.

C. *Le privilège parlementaire d'expulser des étrangers*

[52] L'appelant prétend que le congédiement des gardiens de sécurité est également visé par le privilège parlementaire d'expulser des étrangers. Il n'affirme pas devant nous que les gardiens de sécurité sont des étrangers pour l'Assemblée nationale. Il fait plutôt valoir que ce privilège comprend le droit pour le président de décider qui peut l'exercer en son nom. Puisque les gardiens de sécurité exercent le privilège d'expulser des étrangers lorsqu'ils contrôlent l'accès à l'assemblée législative et à l'intérieur de celle-ci, la décision du président de les congédier n'est pas susceptible de révision. Autoriser les arbitres et les tribunaux à réviser le congédiement des gardiens de sécurité revient à leur permettre d'intervenir dans la décision du président à savoir qui peut exercer le pouvoir délégué d'expulser des étrangers et, en conséquence, d'intervenir dans l'exercice de ce privilège parlementaire.

[53] Même si l'intimé ne nie pas l'existence du privilège parlementaire d'expulser des étrangers, il fait valoir que ce privilège ne s'applique pas à la décision de congédier les gardiens de sécurité. La vaste interprétation que le président donne au privilège outrepassé l'objet fondamental de celui-ci et pourrait

could significantly affect the rights of people who are not members of the Assembly.

[54] The inherent privilege of legislative assemblies in Canada to exclude strangers from their proceedings and precincts has deep historic roots. The absolute right to eject strangers from Parliament has been upheld as a matter of privilege in the U.K. for centuries (*New Brunswick Broadcasting*, at pp. 385-87 and 389; *Erskine May*, at pp. 14-15). In Canada, this privilege was recognized as early as 1904, in *Payson v. Hubert* (1904), 34 S.C.R. 400. The existence of this privilege was confirmed in *New Brunswick Broadcasting*, where this Court found it necessary to ensure that elected representatives are able to effectively debate and carry out their legislative functions uninhibited and undisturbed (pp. 387-88). The decision of a legislative assembly to remove or exclude strangers is thus immune from external review.

[55] While the existence of the parliamentary privilege to exclude strangers is not in question, this Court must apply the necessity test to determine whether its scope includes the dismissals of employees who implement it on the President's behalf. The issue here is not whether the President has the power to delegate the exercise of the inherent parliamentary privilege to exclude strangers to the Assembly's employees. Rather, it is whether the dismissals of employees who implement this privilege on the President's behalf must be immune from external review for the Assembly to be able to discharge its legislative mandate (see *Vaid*, at para. 56).

[56] I conclude that it is not necessary to a legislative assembly's ability to perform its constitutional functions that the scope of its privilege to exclude strangers be drawn so broadly as to include the decision to dismiss employees who implement this privilege. This unnecessary sphere of immunity would impact persons who are not members of the legislative assembly, and undermine their access to the labour regime negotiated in accordance with their s. 2(d) *Charter* rights. The appellant has not shown that the application of general labour law

avoir des répercussions importantes sur les droits de personnes qui ne sont pas membres de l'Assemblée.

[54] Le privilège inhérent des assemblées législatives au Canada leur permettant d'expulser des étrangers de leurs débats et de leur enceinte est profondément ancré dans l'histoire. Au Royaume-Uni, le droit absolu d'exclure des étrangers du Parlement est reconnu depuis des siècles comme une question de privilège (*New Brunswick Broadcasting*, p. 385-387 et 389; *Erskine May*, p. 14-15). Au Canada, ce privilège a été reconnu dès 1904, dans l'arrêt *Payson c. Hubert* (1904), 34 R.C.S. 400. Son existence a été confirmée dans l'arrêt *New Brunswick Broadcasting*, dans lequel la Cour a conclu qu'il était nécessaire de veiller à ce que les représentants élus puissent débattre efficacement et s'acquitter de leurs fonctions législatives sans perturbation ou interruption (p. 387-388). La décision d'une assemblée législative d'exclure ou d'expulser des étrangers est donc à l'abri de toute révision externe.

[55] Bien que l'existence du privilège parlementaire d'expulser des étrangers ne soit pas mise en doute, la Cour doit appliquer le critère de la nécessité pour établir si sa portée vise le congédiement d'employés qui l'exercent au nom du président. La question en l'espèce n'est pas de savoir si le président dispose du pouvoir de déléguer aux employés de l'Assemblée l'exercice du privilège parlementaire inhérent d'expulser des étrangers. Il s'agit plutôt d'établir si la décision de congédier des employés qui exercent ce privilège au nom du président doit être à l'abri de toute révision externe pour que l'Assemblée puisse s'acquitter de son mandat législatif (voir *Vaid*, par. 56).

[56] J'arrive à la conclusion que, pour qu'une assemblée législative puisse exercer ses fonctions constitutionnelles, il n'est pas nécessaire que son privilège d'expulser des étrangers soit défini largement au point d'inclure la décision de congédier des employés qui exercent ce privilège. Accorder pareille portée inutile à l'immunité aurait une incidence sur des personnes qui ne sont pas membres de l'assemblée législative et minerait leur accès au régime de relations de travail négocié conformément aux droits que leur garantit l'al. 2d) de la *Charte*. L'appellant

to employees who implement this privilege would jeopardize the autonomy, dignity, and efficiency required for the fulfilment of the Assembly's legislative mandate (see *Vaid*, at para. 29(5)). It is true that allowing the union to grieve the dismissals of these employees may delay the finality of these decisions. Yet these delays would not impede the Assembly's legislative activities.

[57] The privilege to exclude strangers does not protect the decision to dismiss employees who exercise this privilege from review.

V. Conclusion

[58] Obviously, the President is entitled to exercise his management rights and dismiss security guards for a just and sufficient cause. However, parliamentary privilege does not insulate the President's decision from review under the labour regime to which the security guards are subject pursuant to the *ARNA* and the *Public Service Act*. I would therefore dismiss the appeal with costs throughout. As a result, the decision of the labour arbitrator stands.

The following are the reasons delivered by

ROWE J. —

I. Overview

[59] I accept Justice Karakatsanis' statement of the facts, her summary of the judgments below and her conclusion as to the standard of review. I also concur with her in the result, albeit for different reasons. In my view, whatever the scope of parliamentary privilege for management of employees, the National Assembly of Québec's governing statute, the *Act respecting the National Assembly*, CQLR, c. A-23.1 ("ARNA"), resolves this case. When a legislative body subjects an aspect of privilege to the operation of statute, it is the provisions of the statute that govern. While the relevant statutory provisions remain

n'a pas démontré que l'application du droit général du travail à l'égard d'employés qui exercent le privilège en cause mettrait en péril l'autonomie, la dignité et l'efficacité dont l'Assemblée a besoin pour s'acquitter de son mandat législatif (*Vaid*, par. 29(5)). Il est vrai que le fait de permettre au syndicat de contester par voie de griefs le congédiement de ces employés risque d'occasionner des délais quant au caractère définitif de ces décisions. Toutefois, ces délais n'entraveraient pas les activités législatives de l'Assemblée.

[57] Le privilège d'expulser des étrangers ne protège pas d'une révision la décision de congédier les employés qui l'exercent.

V. Conclusion

[58] Il va de soi que le président est autorisé à exercer ses droits de gestion et à congédier les gardiens de sécurité pour une cause juste et suffisante. Toutefois, le privilège parlementaire ne protège pas la décision du président d'une révision dans le cadre du régime de relations de travail auquel les gardiens de sécurité sont assujettis suivant la *LAN* et la *Loi sur la fonction publique*. Je suis donc d'avis de rejeter le pourvoi avec dépens dans toutes les cours. En conséquence, la décision de l'arbitre en droit du travail est maintenue.

Version française des motifs rendus par

LE JUGE ROWE —

I. Aperçu

[59] Je souscris à la description des faits de la juge Karakatsanis, à son résumé des jugements des instances inférieures ainsi qu'à sa conclusion sur la norme de contrôle. Je souscris également au résultat auquel elle arrive, bien que ce soit pour des motifs différents. À mon avis, quelle que soit la portée du privilège parlementaire relatif à la gestion du personnel, la loi qui régit l'Assemblée nationale du Québec, soit la *Loi sur l'Assemblée nationale*, RLRQ, c. A-23.1 (« *LAN* »), résout le litige. Lorsqu'un corps législatif assujettit un aspect du privilège à l'application d'une loi, ce sont les dispositions de

operative, a legislative body cannot reassert privilege so as to do an end-run around an enactment whose very purpose is to govern the legislature's operations. Thus, for the reasons that follow, I would dismiss the appeal and remit the matter to the grievance arbitrator for a determination on the merits.

II. Analysis

A. *Preliminary Question*

[60] The power of provincial legislatures to define their privileges was recognized by the Judicial Committee of the Privy Council which held that, by means of s. 92(1), “the British North America Act itself confers the power (if it did not already exist) to pass Acts for defining the powers and privileges of the provincial legislature” (*Fielding v. Thomas*, [1896] A.C. 600, at p. 610). The *Constitution Act, 1982* repealed s. 92(1) of the *British North America Act, 1867* (when it was renamed the *Constitution Act, 1867*), which had provided the legislature of a province with authority to amend “the Constitution of [a] province”. This was replaced by s. 45 of the *Constitution Act, 1982*, to somewhat similar effect. It would seem to follow that what provincial legislatures could formerly do under s. 92(1) they can now do under s. 45, including defining their privileges.

[61] The jurisprudence on this point, however, is not entirely clear. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 384, McLachlin J. held that parliamentary privileges “are part of the fundamental law of our land, and hence are constitutional”. Sopinka J. commented that by rooting inherent parliamentary privileges in the preamble of the *Constitution Act, 1867*, “these privileges would arguably not be subject to provincial legislation and any change would require an amendment to the Constitution of Canada pursuant to s. 43, or indeed s. 38, of the *Constitution Act, 1982*” (*New Brunswick Broadcasting*, at p. 396). For Sopinka J., the consequence of McLachlin J.’s analysis is that the

la loi qui s’appliquent. Pendant que les dispositions législatives pertinentes sont en vigueur, le corps législatif ne peut pas se prévaloir du privilège pour contourner une loi dont l’objet même est de régir le fonctionnement de la législature. Ainsi, pour les motifs qui suivent, je suis d’avis de rejeter l’appel et de renvoyer l’affaire à l’arbitre de grief pour qu’il se prononce sur le fond du dossier.

II. Analyse

A. *Question préliminaire*

[60] Le Comité judiciaire du Conseil privé a reconnu le pouvoir des législatures de définir leurs privilèges lorsqu’il a jugé que le par. 92(1) de [TRANSDUCTION] « l’Acte de l’Amérique du Nord britannique lui-même confère la compétence (si elle n’existait pas déjà) d’adopter des lois pour définir les pouvoirs et privilèges des législatures provinciales » (*Fielding c. Thomas*, [1896] A.C. 600, p. 610). La *Loi constitutionnelle de 1982* a abrogé le par. 92(1) de l’*Acte de l’Amérique du Nord britannique, 1867* (lorsqu’il a été renommé la *Loi constitutionnelle de 1867*), et ce paragraphe avait conféré à chaque législature le pouvoir de modifier « la Constitution de la province ». Il a été remplacé par l’art. 45 de la *Loi constitutionnelle de 1982*, qui confère pour ainsi dire le même pouvoir. Il semblerait donc que les législatures peuvent désormais faire en vertu de l’art. 45 ce qu’elles étaient autorisées à faire en vertu du par. 92(1), y compris définir leurs privilèges.

[61] Or, la jurisprudence qui porte sur la question n’est pas totalement limpide. Dans *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l’Assemblée législative)*, [1993] 1 R.C.S. 319, p. 384, la juge McLachlin a conclu que les privilèges parlementaires « font partie de notre droit fondamental et sont donc constitutionnels ». Pour le juge Sopinka, si les privilèges parlementaires inhérents tiraient leur origine du préambule de la *Loi constitutionnelle de 1867*, on pourrait soutenir qu’ils « ne sont pas assujettis aux lois de la province et ne pourraient être modifiés que par modification de la Constitution du Canada en vertu de l’art. 43, ou encore de l’art. 38, de la *Loi constitutionnelle de 1982* » (*New Brunswick Broadcasting*, p. 396). Ainsi, pour le juge Sopinka,

provinces would no longer have the legislative powers over privilege recognized in *Fielding*.

[62] In *obiter*, I would be inclined to agree with the view expressed by some commentators that s. 45 of the *Constitution Act, 1982*, as did s. 92(1) before it, includes the power to enact laws in relation to the privileges of a provincial legislature (see P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at pp. 1-16 and 4-34; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 326). This view is supported by comments made by this Court which suggest that s. 45, as the successor to s. 92(1), covers the same subject matter (see *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 33; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at paras. 47-48).

[63] This issue is not dealt with by the parties in this appeal; I refer to the issue as it may arise in the future, including if the National Assembly or another provincial legislature seeks to amend its privileges. In the facts of this case, the management of employees of the National Assembly was dealt with by statute prior to patriation in 1982 (see *Legislature Act*, R.S.Q. 1964, c. 6, s. 55). It seems clear to me that such an enactment in 1964 was authorized by s. 92(1) (see *OPSEU*, at p. 33).

B. *Parliamentary Privilege and Statutory Enactments*

[64] As noted above, I agree with Karakatsanis J. that the standard of review is correctness, both for the reasons she gives, and because the scope of parliamentary privilege is a constitutional question. I would adopt the analysis set out by Côté and Brown JJ. in paras. 86-88 of their reasons.

[65] Parliamentary privilege is “one of the ways in which the fundamental constitutional separation of powers is respected” (*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 21).

l’analyse de la juge McLachlin avait pour effet que les provinces ne jouiraient plus des pouvoirs législatifs, reconnus dans *Fielding*, quant aux privilèges parlementaires.

[62] Je remarque en *obiter* que je suis disposé à souscrire à l’opinion exprimée par certains auteurs selon laquelle l’art. 45 de la *Loi constitutionnelle de 1982*, comme le par. 92(1) avant lui, inclut le pouvoir d’adopter des lois relatives aux privilèges d’une assemblée législative provinciale (voir P. W. Hogg, *Constitutional Law of Canada* (5^e éd. suppl.), p. 1-16 et 4-34; H. Brun, G. Tremblay et E. Brouillet, *Droit constitutionnel* (6^e éd. 2014), p. 326). La Cour a étayé ce point de vue en formulant des commentaires qui suggèrent que l’art. 45, qui a succédé au par. 92(1), couvre le même sujet (voir *SEFPO c. Ontario (Procureur général)*, [1987] 2 R.C.S. 2, p. 33; *Renvoi relatif à la réforme du Sénat*, 2014 CSC 32, [2014] 1 R.C.S. 704, par. 47-48).

[63] Les parties n’ont pas traité de cette question dans le présent appel; j’en parle ici puisqu’elle pourrait se poser dans le futur, notamment si l’Assemblée nationale ou une autre législature souhaitait modifier ses privilèges. Selon les faits de la présente cause, la gestion du personnel de l’Assemblée nationale était régie par une loi avant le rapatriement de 1982 (voir la *Loi de la Législature*, S.R.Q. 1964, c. 6, art. 55). Il me semble clair que l’adoption d’une telle loi en 1964 était autorisée par le par. 92(1) (voir *SEFPO*, p. 33).

B. *Le privilège parlementaire et les textes législatifs*

[64] Comme je l’ai déjà indiqué, je conviens avec la juge Karakatsanis que la norme de contrôle est celle de la décision correcte, tant en raison des motifs qu’elle donne que du fait que la portée du privilège parlementaire est une question constitutionnelle. Je ferais mienne l’analyse énoncée par les juges Côté et Brown aux par. 86-88 de leurs motifs.

[65] Le privilège parlementaire est « un des moyens qui permettent d’assurer le respect du principe fondamental de la séparation constitutionnelle des pouvoirs » (*Canada (Chambre des communes)*

It supports the exercise of parliamentary sovereignty to ensure that a legislature is safeguarded a due measure of autonomy from the other two branches of the state, the executive and the judiciary. Parliamentary privilege protects the operation of the legislature from outside interference, where such interference would impede the fulfilment of its constitutional role. As described in *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*:

Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High court of Parliament; and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.

((24th ed. 2011), by M. Jack, at p. 203)

[66] Parliamentary privilege should not, however, be invoked to bypass the application of a statute enacted by the legislature to govern its own operation. In that regard, I endorse the comments of Charles Robert, now Clerk of the House of Commons:

The fundamental purpose of any parliamentary or legislative privilege is to provide protection against outside interference that is unwarranted and intrusive, or that would impede the Legislative Assembly in controlling its debates or proceedings. Therefore, it seems unreasonable to invoke privilege to disable, and render meaningless, a law which the Assembly itself adopted relating to its administrative operations.

(C. Robert, "Falling Short: How a Decision of the Northwest Territories Court of Appeal Allowed a Claim to Privilege to Trump Statute Law" (2011), 79 *The Table* 19, at pp. 25-26)

In other words, expecting a legislature to comply with its own legislation cannot be regarded as an intrusion on the legislature's privilege. It is not an impediment to the functioning of a legislature for it to comply with its own enactments. Accordingly, when a legislature has set out in legislation how

c. Vaid, 2005 CSC 30, [2005] 1 R.C.S. 667, par. 21). Il permet l'exercice de la souveraineté parlementaire afin d'assurer à la législature une autonomie suffisante par rapport aux deux autres organes de l'État, soit les organes exécutif et judiciaire. Le privilège parlementaire protège le fonctionnement de la législature de toute ingérence extérieure qui l'empêcherait de s'acquitter pleinement du rôle qui lui est dévolu par la Constitution. Comme le décrit l'*Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* :

[TRADUCTION] Le privilège parlementaire est la somme de certains droits particuliers dont jouissent chaque Chambre dans son ensemble en tant que composante de la Haute Cour du Parlement, et les membres de chacune des Chambres, individuellement, sans lesquels ils ne pourraient s'acquitter de leurs fonctions, et qui excèdent ceux que possèdent d'autres organismes ou particuliers.

((24^e éd. 2011), par M. Jack, p. 203)

[66] Par contre, la législature ne peut invoquer le privilège parlementaire pour éviter l'application d'une loi qu'elle a adoptée afin de régir son propre fonctionnement. À cet égard, je souscris aux commentaires de Charles Robert, maintenant greffier de la Chambre des communes :

[TRADUCTION] Les privilèges parlementaires ou législatifs servent essentiellement à protéger l'Assemblée législative de toute ingérence extérieure injustifiée et intrusive, ou qui l'empêcherait d'exercer un contrôle sur ses débats ou ses procédures. Il semble donc déraisonnable d'invoquer un tel privilège pour rendre inopérante, et dénuer de tout son sens, une loi portant sur son fonctionnement que l'Assemblée a elle-même adoptée.

(C. Robert, « Falling Short : How a Decision of the Northwest Territories Court of Appeal Allowed a Claim to Privilege to Trump Statute Law » (2011), 79 *The Table* 19, p. 25-26)

Autrement dit, s'attendre à ce qu'une législature respecte sa propre législation ne peut être perçu comme une intrusion eu égard à son privilège. Le fait qu'elle se conforme à ses propres textes législatifs ne constitue pas un obstacle à son fonctionnement. En conséquence, lorsqu'une législature a prévu dans une loi

something previously governed pursuant to privilege is to operate, the legislature no longer can rely on inherent privilege so as to bypass the statute. Thus, I would distance myself from Stephen J.'s views in *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271, at p. 278, to the effect that "the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings".

[67] Rather, this Court has stated that the relationship between statute and privilege is determined through ordinary principles of statutory interpretation. This approach differs from the approach adopted at common law, the rule in *Duke of Newcastle v. Morris* (1870), L.R. 4 H.L. 661, which holds that privilege was not "struck at unless by express words in the statute" (p. 668). This Court has held that this presumption of non-displacement of privilege is "out of step with modern principles of statutory interpretation accepted in Canada" (*Vaid*, at para. 80; see also *Reference re the Final Report of the Electoral Boundaries Commission, Re*, 2017 NSCA 10, 411 D.L.R. (4th) 271, at paras. 116-19).

[68] Notwithstanding this, Professors Brun, Tremblay and Brouillet have argued that [TRANSLATION] "[a]lthough it was qualified in *Vaid* . . . the rule of interpretation referred to here [the rule in *Duke of Newcastle*] can still apply in appropriate cases" (*Droit constitutionnel*, at pp. 328-29). The Quebec Court of Appeal viewed ss. 110 and 120 of the ARNA as being such an appropriate case in *Association des juristes de l'État v. Québec (Procureur général)*, 2013 QCCA 1900. Relying on the comments of Professors Brun, Tremblay and Brouillet, it held that [TRANSLATION] "sections 110 and 120 of the ARNA did not have the effect of implicitly abrogating the parliamentary privilege over the management of employees of the National Assembly of Québec" (para. 26 (CanLII); see also paras. 27-30). (See to a similar effect *Québec (Procureur général) v. Confédération des syndicats nationaux*, 2011 QCCA 1247, at para. 30 (CanLII); *Michaud v. Bissonnette*, 2006 QCCA 775, at para. 59 (CanLII).)

la façon dont doit être régie une question qui était antérieurement régie conformément au privilège, elle ne peut plus se fonder sur son privilège inhérent pour contourner la loi. Ainsi, je me dissocie de l'opinion du juge Stephen dans *Bradlaugh c. Gossett* (1884), 12 Q.B.D. 271, p. 278, selon qui [TRADUCTION] « la Chambre des communes n'est pas assujettie au contrôle des tribunaux de Sa Majesté lorsqu'elle applique les dispositions législatives portant sur sa procédure interne ».

[67] La Cour a plutôt affirmé que la relation entre une loi et le privilège est définie en fonction des principes ordinaires d'interprétation législative. Cette approche diffère de la règle adoptée en common law, soit celle énoncée dans *Duke of Newcastle c. Morris* (1870), L.R. 4 H.L. 661, selon laquelle le privilège [TRADUCTION] « reste intact à moins qu'une loi ne le prévoit expressément » (p. 668). La Cour a statué que cette présomption portant que le privilège n'est pas écarté « va à l'encontre des principes contemporains d'interprétation des lois reconnus au Canada » (*Vaid*, par. 80; voir également *Reference re the Final Report of the Electoral Boundaries Commission, Re*, 2017 NSCA 10, 411 D.L.R. (4th) 271, par. 116-119).

[68] En dépit de ce qui précède, les professeurs Brun, Tremblay et Brouillet ont soutenu que « [m]ême si elle fut nuancée dans *Vaid*, [. . .] la règle d'interprétation ici évoquée [énoncée dans *Duke of Newcastle*] peut encore jouer dans les cas appropriés » (*Droit constitutionnel*, p. 328-329). Dans *Association des juristes de l'État c. Québec (Procureur général)*, 2013 QCCA 1900, la Cour d'appel du Québec a jugé que les art. 110 et 120 de la LAN constituaient un de ces cas appropriés. En se fondant sur les commentaires des professeurs Brun, Tremblay et Brouillet, elle a conclu que « les articles 110 et 120 de la LAN n'ont pas eu pour effet d'abroger implicitement le privilège parlementaire de gestion du personnel de l'Assemblée nationale du Québec » (par. 26 (CanLII); voir aussi les par. 27-30). (Dans le même ordre d'idées, voir *Québec (Procureur général) c. Confédération des syndicats nationaux*, 2011 QCCA 1247, [2011] R.J.D.T. 690, par. 30; *Michaud c. Bissonnette*, 2006 QCCA 775, [2006] R.J.Q. 1552, par. 59.)

[69] I am inclined to agree with Professors Brun, Tremblay and Brouillet that the rule in *Duke of Newcastle* can still operate in certain circumstances. Such circumstances, however, do not arise in the face of the legislature's organizing statute. The ARNA sets out the administrative structure through which the National Assembly is to operate. To the extent that it is an enactment that "determine[s] the composition, powers, authority, privileges and duties of the legislative [branch]" (*OPSEU*, at p. 39), it bears "on the operation of an organ of the government of the Province" (*Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, at p. 1024), and is constitutional in nature within the meaning given in *OPSEU*, at p. 40. Further, the National Assembly must be presumed to have had its inherent privileges in mind when enacting the ARNA. Accordingly, I would not apply the rule in *Duke of Newcastle* requiring express language to derogate from privilege when dealing with the ARNA.

C. Operation of the ARNA

[70] In the ARNA, the National Assembly has defined how the management of its employees is to be carried out. Section 120 qualifies personnel of the National Assembly as civil servants unless they are appointed by regulation derogating from the *Public Service Act*, CQLR, c. F-3.1.1, and excluded from its membership. This gives to all employees (save those so excluded) the same rights and obligations as members of the civil service. Section 120 also vests in the Secretary General the powers and responsibilities of a deputy minister for the purposes of the *Public Service Act*. Under that Act, a deputy minister is responsible for management of the employees of the National Assembly (*Public Service Act*, s. 37). Sections 16 and 17 of the *Public Service Act* grant a deputy minister the authority to discipline employees, including through dismissal, for a contravention of the standards of ethics and discipline.

[71] In this case, the letters of dismissal by the Secretary General dated July 17, 2012, are an exercise of

[69] Je suis porté à convenir avec les professeurs Brun, Tremblay et Brouillet que la règle énoncée dans *Duke of Newcastle* peut encore s'appliquer dans certaines circonstances. Cela dit, la loi qui régit le fonctionnement de la législature ne constitue pas un exemple de telles circonstances. La LAN décrit la structure administrative de l'Assemblée nationale sur laquelle repose son fonctionnement. Dans la mesure où il s'agit d'une loi qui « [d]étermine [. . .] la composition, les pouvoirs, l'autorité, les privilèges et les fonctions [de l']organ[e] législatif » (*SEFPO*, p. 39), elle porte « sur le fonctionnement d'un organe du gouvernement de la province » (*Procureur général du Québec c. Blaikie*, [1979] 2 R.C.S. 1016, p. 1024) et est de nature constitutionnelle au sens de l'arrêt *SEFPO*, p. 40. En outre, il faut présumer que l'Assemblée nationale tenait compte de ses privilèges inhérents lorsqu'elle a adopté la LAN. En conséquence, dans le cas de cette loi, je suis d'avis de ne pas appliquer la règle énoncée dans *Duke of Newcastle* qui exige que la dérogation au privilège soit expressément prévue dans la loi.

C. Application de la LAN

[70] Dans la LAN, l'Assemblée nationale a prévu la façon dont doit être géré son personnel. L'article 120 précise que les employés de l'Assemblée nationale font partie du personnel de la fonction publique à moins qu'ils soient nommés par un règlement qui déroge à la *Loi sur la fonction publique*, RLRQ, c. F-3.1.1, ou qu'ils en soient exclus. Ainsi, tous les employés (sauf ceux qui sont exclus de cette façon) ont les mêmes droits et obligations que les membres de la fonction publique. L'article 120 confère également au secrétaire général les pouvoirs et les responsabilités que la *Loi sur la fonction publique* attribue à un sous-ministre. En vertu de cette loi, le sous-ministre est responsable de la gestion du personnel de l'Assemblée nationale (*Loi sur la fonction publique*, art. 37). Les articles 16 et 17 de la *Loi sur la fonction publique* confèrent au sous-ministre le pouvoir d'imposer des mesures disciplinaires aux employés, y compris de les congédier, en cas de manquement aux normes d'éthique et de discipline.

[71] En l'espèce, les lettres de congédiement signées par le secrétaire général le 17 juillet 2012

this power. The dismissals were based on breaches of the security guards' obligations under the *Public Service Act* and its *Regulation respecting ethics and discipline in the public service*, CQLR, c. F-3.1.1., r. 3. The grievances that followed were brought by virtue of the rights of the guards pursuant to this legislative scheme. All of this follows from the choice made by the National Assembly when it enacted s. 120 of the *ARNA*.

[72] If the National Assembly wants a group of employees to be removed from this scheme, it can do so through the derogation procedure referred to in s. 120 of the *ARNA*. The management of this group of employees would then no longer be subject to the same rules as those applicable to the civil service. Privilege would again operate, provided that the employees fell within the scope of privilege.

[73] As the derogation procedure under s. 120 has not been exercised with respect to the employees in question, I do not see by what authority the President of the National Assembly can now reassert privilege as to the management of the guards. The President cannot rely on privilege to ignore the *ARNA*, and thereby insulate the Secretary General's decision to dismiss the guards from the scrutiny of the grievance arbitrator. The National Assembly set out in the *ARNA* that the management of its employees is to be carried out under the public service employment scheme; it also provided the Office of the National Assembly a mechanism to exclude categories of employees from that scheme. It would be contrary to the decision of the National Assembly set out in the *ARNA* for the President to exercise authority over the management of employees on a case by case basis, nominally in the exercise of privilege. Accordingly, the grievance arbitrator did not err in determining that he could hear the grievances.

[74] I would add a final perspective. In my analysis, I look to the *ARNA* and find there the basis to resolve the appeal. I do not address the extent of parliamentary privilege; this is deliberate. In my view, one should have regard to constitutional questions

constituent un exercice de ce pouvoir. Les congédiements étaient fondés sur des manquements aux obligations qui incombent aux gardiens de sécurité en application de la *Loi sur la fonction publique* et du *Règlement sur l'éthique et la discipline dans la fonction publique*, RLRQ, c. F-3.1.1, r. 3. Les griefs déposés par la suite étaient fondés sur les droits des gardiens au titre de ce régime législatif. Tous ces faits découlent du choix qu'a fait l'Assemblée nationale lorsqu'elle a adopté l'art. 120 de la *LAN*.

[72] Si l'Assemblée nationale souhaite qu'un groupe d'employés ne soient plus régis par ce régime, elle peut se prévaloir de la procédure de dérogation à laquelle fait référence l'art. 120 de la *LAN*. La gestion de ce groupe d'employés ne serait donc plus régie par les mêmes règles que celles qui s'appliquent aux employés de la fonction publique. Le privilège s'appliquerait de nouveau, à condition que les employés soient visés par celui-ci.

[73] Comme la procédure de dérogation prévue à l'art. 120 n'a pas été appliquée à l'égard des employés en cause, je ne vois pas en vertu de quel pouvoir le président de l'Assemblée nationale pourrait maintenant invoquer le privilège en lien avec la gestion des gardiens de sécurité. Le président ne peut pas se fonder sur le privilège pour ignorer la *LAN*, et ainsi soustraire la décision du secrétaire général de congédier les gardiens à l'examen par l'arbitre de grief. L'Assemblée nationale a prévu dans la *LAN* que la gestion de son personnel serait régie par le régime applicable aux employés de la fonction publique; elle a aussi prévu un mécanisme par lequel le Bureau de l'Assemblée nationale peut exclure des catégories d'employés de ce régime. Il serait donc incompatible avec la décision de l'Assemblée nationale énoncée dans la *LAN* que le président exerce son pouvoir sur la gestion des employés au cas par cas, en théorie, en application du privilège. L'arbitre de grief n'a donc pas commis d'erreur lorsqu'il a jugé avoir compétence pour entendre les griefs.

[74] J'ajouterais un dernier point de vue. Dans mon analyse, j'examine la *LAN* et j'y trouve le moyen de résoudre l'appel. Je n'aborde pas la portée du privilège parlementaire, et ce, de façon délibérée. À mon avis, il ne faut tenir compte des questions

only when necessary. Better to decide matters, where one properly can, by reference to “the ordinary law”. Parliamentary privilege, derived from centuries of conflict and diverse experience, should be circumscribed with great caution and after careful reflection. It is difficult sometimes to see the connections between what is necessary for the autonomy and proper functioning of the legislature and the extent of parliamentary privilege. The legislature is not like a department or a regulatory agency; it is the central pillar of representative democracy. Profound deference should be shown as to how it chooses to operate.

III. Conclusion

[75] I would dismiss the appeal. The grievance arbitrator had jurisdiction to hear this matter on the merits. I would remit the matter back to him to do so.

English version of the reasons delivered by

CÔTÉ AND BROWN JJ. (dissenting) —

I. Introduction

[76] On May 8, 1984, Denis Lortie, a member of the armed forces, set in motion a plan to kill the members of the sovereignist government led by René Lévesque. Three people were shot down in cold blood, and thirteen others were wounded in the Parliament Building where the National Assembly of Québec (“Assembly”) sits. However, the actions of the Sergeant-at-Arms and the entire security staff undoubtedly saved the lives of many others.

[77] The day after those tragic events, the Premier of Quebec gave a speech in the Assembly to express his thoughts and honour the security staff, especially the Sergeant-at-Arms, the police officers and the security officers who had been on the front lines:

[TRANSLATION] Mr. President, yesterday, which was an inconceivably tragic day and which those present in

constitutionnelles que lorsque cela est nécessaire. Il vaut mieux, lorsque cela peut être fait à bon droit, trancher les questions selon le « droit commun ». La portée du privilège parlementaire, issu de siècles de conflits et d’expériences diverses, devrait être circonscrite avec une grande prudence et après mûre réflexion. Il est parfois difficile de voir les liens entre ce qui est nécessaire pour l’autonomie et pour le bon fonctionnement de la législature et la portée du privilège parlementaire. La législature ne se compare pas à un ministère ou à un organisme de réglementation; il s’agit du pilier fondamental de la démocratie représentative. Une grande déférence s’impose quant à la façon dont elle choisit de fonctionner.

III. Conclusion

[75] Je suis d’avis de rejeter l’appel. L’arbitre de grief avait compétence pour se prononcer sur le fond de la présente affaire. Je suis d’avis de lui renvoyer l’affaire pour qu’il le fasse.

Les motifs suivants ont été rendus par

LES JUGES CÔTÉ ET BROWN (dissidents) —

I. Introduction

[76] Le 8 mai 1984, le militaire Denis Lortie met à exécution un plan visant à assassiner les députés du gouvernement souverainiste dirigé par René Lévesque. Trois personnes sont froidement abattues et treize autres sont blessées à l’intérieur de l’Hôtel du Parlement où siège l’Assemblée nationale du Québec (« Assemblée »). Toutefois, l’intervention du sergent d’armes et de l’ensemble des employés de sécurité sauve, sans aucun doute, la vie de plusieurs autres personnes.

[77] Au lendemain des tragiques événements, le premier ministre du Québec prononce un discours devant l’Assemblée pour livrer ses états d’âme et honorer le personnel de sécurité, plus particulièrement le sergent d’armes, les policiers et les « gardiens constables » qui étaient en première ligne :

M. le Président, cette journée d’hier, qui était tragique jusqu’à l’inconcevable et qu’ont eu à subir tout

this Parliament Building especially had to endure, has taken a very heavy toll, of which we are unfortunately all too aware. First of all, I too would like — and I'm sure I speak for all of us, as well as for myself personally — to extend our deepest condolences to the families, friends and colleagues of Camille Lepage, Georges Boyer and Roger Lefrançois, the innocent victims of this unprecedented and senseless violence. I also want to offer our best wishes for a full and speedy recovery to all those who were injured, some of whom are still in hospital in serious condition. We had gotten to know these men and women, some of whom worked here at the National Assembly for a long time, by interacting with them on a regular basis. They helped us do our work as members. They were among those who contribute daily to the proper functioning of the central institution of our democratic system. There is not a single person in this Parliament, or in the government, of course, who does not feel affected by what happened to them and who does not join in the sorrow or worry felt by their loved ones.

Among these people in Parliament, among the involuntary players in this drama, as you just mentioned — but I think it can be said again; in fact, it will be repeated for a long time — was our Sergeant-at-Arms, Mr. Jalbert, who has been with us for a decade now. We were already well aware of his efficiency, tact and courtesousness, and also his humour on occasion, but yesterday he showed us some truly heroic qualities. The word has been used, it is not too strong, and everyone is unanimous in recognizing it. Through his presence of mind, his absolutely extraordinary composure, his sense of duty and responsibility, and a solicitude going beyond the normal performance of the job of protecting others, he changed the course of this incident. He no doubt averted an even greater tragedy. The National Assembly is unanimous — as we saw just moments ago — in saluting Mr. Jalbert's exemplary courage and in thanking him on behalf of everyone for what he did for his fellow citizens. I am also certain that we will be unanimous in finding a more meaningful and lasting way to express our feelings for him soon.

I also note, as you did, Mr. President, that among those who deserve our recognition as well for their bravery and efficiency, it is important to point out the remarkable work done by the regular officers and the tactical squad of the Sûreté du Québec as well as by the city's police officers. It must also be recognized that, given the circumstances, the

particulièrement ceux et celles qui étaient présents dans cet Hôtel du Parlement, se solde par un très lourd bilan que nous ne connaissons que trop hélas! Étant assuré de m'exprimer en notre nom à tous, à mon tour, et en m'exprimant également à titre personnel, je tiens tout d'abord à réitérer, moi aussi, nos plus sincères condoléances aux familles, aux amis et aux collègues de MM. Camille Lepage, Georges Boyer et Roger Lefrançois qui sont les victimes innocentes de cette violence inouïe et insensée. Je veux aussi assurer tous les blessés, dont certains sont encore dans un état sérieux à l'hôpital, de tous nos vœux pour un prompt et complet rétablissement. Ces hommes et ces femmes, dont certains travaillaient ici à l'Assemblée nationale depuis longtemps, nous avons appris à les connaître pour les avoir côtoyés régulièrement. Ils nous aidaient à faire notre travail de député. Ils étaient du nombre de celles et de ceux qui, quotidiennement, concourent au bon fonctionnement de l'institution centrale de notre régime démocratique. Il n'y a personne dans ce Parlement ni au gouvernement, bien sûr, qui ne se sente pas concerné par ce qui leur est arrivé et solidaire aussi de la tristesse ou encore de l'inquiétude qui affligent leurs proches.

Parmi ces gens du Parlement, au nombre des acteurs involontaires de ce drame, comme vous venez de l'évoquer — mais je crois qu'on peut le répéter; ce sera répété longtemps, d'ailleurs — il y a eu notre sergent d'armes, M. Jalbert, qui est avec nous depuis une dizaine d'années maintenant. On lui connaissait déjà bien des qualités d'efficacité, de tact, de courtoisie, d'humour aussi, à l'occasion, mais hier, il nous a révélé des qualités proprement héroïques. Le mot a été employé, il n'est pas trop fort, et tout le monde est unanime à le reconnaître. Par sa présence d'esprit, son sang-froid absolument extraordinaire, son sens du devoir et des responsabilités et un souci qui va au-delà de l'accomplissement normal de la tâche de la protection d'autrui, il a fait dévier le cours de cet événement. Il a sans doute évité que cela ne tourne encore davantage au tragique. L'Assemblée nationale est unanime — on l'a vu, il y a quelques instants — pour saluer le courage exemplaire de M. Jalbert et le remercier au nom de tous de ce qu'il a fait pour les siens. Je suis sûr aussi que c'est unanimement que nous trouverons bientôt une façon plus marquante et plus durable de concrétiser nos sentiments à son endroit.

Je souligne à mon tour, comme vous l'avez fait, M. le Président, que parmi ceux qui méritent aussi notre reconnaissance pour leur bravoure et leur efficacité, il faut souligner le travail remarquable accompli par les agents réguliers et aussi par la brigade tactique de la Sûreté du Québec de même que par les policiers de la ville. On doit

Assembly's security officers did everything they could to carry out their duty, and we know how difficult and trying that must have been.

...

This inevitably leads me for a moment to the issue that keeps coming back to haunt us each time a parliamentary institution is disrupted by acts of violence, namely the issue of security. It is clear — you said it yourself yesterday, Mr. President — that no democratic parliament, at least as far as we are aware, has yet found a solution that is truly fail-safe, if it must at the same time remain democratic. But one thing is certain: while the lives of parliamentarians and the people around them are absolutely as invaluable as those of all other citizens, Parliament, as the very symbol of democracy, must be able to count on having sufficient protection to fulfil its role with the greatest possible serenity. Clearly, this balance is never an easy one to strike. In fact, this is simply a reminder of our fundamental duty to build a society that is increasingly — and ever more firmly — based on respect for others and on non-violence. I say “build” because it has already been said and it still remains true.

Real democracy can never be taken for granted; it must be earned and, in a way, re-earned and strengthened every day; it must also be respected. Let us hope, in any case, that yesterday has made us more aware of the futility, absurdity and inhumanity of violence as a means of expression in a civilized society. [Emphasis added.]

(National Assembly of Québec, *Journal des débats*, vol. 27, No. 90, 4th Sess., 32nd Leg., May 9, 1984, at pp. 6021-23)

[78] This historical aside underscores a fact that we must bear in mind in our analysis: in order for any legislative assembly to perform its constitutional functions with dignity and efficiency, it is essential that it operate in a secure environment. A legislative assembly that works under the threat of violence is neither dignified nor efficient. In fact, no legislative assembly whose proceedings are conducted under duress can truly claim to be democratic. This fundamental imperative ensures that members of the

reconnaître également que compte tenu des circonstances, les gardiens-constables de l'Assemblée ont fait tout ce qu'ils pouvaient pour remplir leur devoir, et on sait à quel point cela a dû être difficile et éprouvant.

...

Ce qui m'amène forcément un seul instant à la question qui revient toujours de façon obsédante, chaque fois que l'institution parlementaire se voit perturbée par des actes violents, soit la question de la sécurité. Il est évident — vous l'avez dit vous-même hier, M. le Président — que dans aucun Parlement démocratique, de ceux que l'on connait en tout cas, on n'a trouvé jusqu'à présent la recette qui soit vraiment à toute épreuve si un Parlement doit en même temps demeurer démocratique. Mais une chose certaine, même si la vie des parlementaires et des gens de leur entourage a strictement le même prix inestimable que celle de tous les autres citoyens, le Parlement, lui, qui est le symbole même de la démocratie, doit pouvoir compter sur assez de protection pour qu'il puisse remplir son rôle avec le maximum possible de sérénité. Évidemment, c'est un équilibre qui n'est jamais facile à trouver. En fait, cela nous rappelle tout simplement notre devoir fondamental de construire une société de plus en plus — et de plus en plus sûrement — fondée sur le respect des autres et sur la non-violence. Je dis bien « construire » parce que cela a déjà été dit et cela reste toujours vrai.

La vraie démocratie n'est jamais une chose acquise, elle doit être méritée, d'une certaine façon regagnée et consolidée tous les jours; elle doit être respectée aussi. Espérons, en tout cas, que la journée d'hier nous aura rendus plus conscients de l'inutilité, de l'absurdité et de l'inhumanité de la violence comme moyen d'expression dans une société civilisée. [Nous soulignons.]

(Assemblée nationale du Québec, *Journal des débats*, vol. 27, n° 90, 4^e sess., 32^e lég., 9 mai 1984, p. 6021-6023)

[78] Cet aparté historique met en évidence un fait que nous devons garder à l'esprit lors de notre analyse : il est essentiel pour toute assemblée législative d'opérer dans un environnement sécuritaire pour qu'elle s'acquitte de ses fonctions constitutionnelles dignement et efficacement. Une assemblée législative qui travaille sous la menace de la violence n'est ni digne ni efficace. En fait, une assemblée législative dont les travaux seraient menés sous la contrainte ne pourrait réellement prétendre être démocratique.

Assembly are able to debate freely in a respectful manner, without violence. Ensuring the Assembly's security is the responsibility of its President (the term used in Quebec for the speaker), who is free to make any decisions deemed appropriate, including decisions as to who it is that will carry out security measures. This process is protected by absolute parliamentary privileges. It follows that decisions relating to security cannot be challenged in or reviewed by a court or tribunal.

[79] In the constitutional framework of British-style parliamentary democracies, parliamentary privileges effect a *modus vivendi* between the legislative branch of government and the other two branches, giving the former the legal tools it needs to perform its constitutional functions free from any interference: M. Groves and E. Campbell, "Parliamentary Privilege and the Courts: Questions of Justiciability" (2007), 7 *O.U.C.L.J.* 175, at pp. 189-90, citing D. McGee, "The Scope of Parliamentary Privilege", [2004] *N.Z.L.J.* 84, at p. 84. As we will explain below, these privileges have deep historical roots. They made it possible to strike the necessary balance for sustaining democracy in the United Kingdom and later in its colonies. Parliamentary privileges are therefore not an *exception* to the rule of law, but rather a distinct pillar in Canada's constitutional architecture.

[80] In the instant case, we are of the opinion that these privileges defeat the grievance arbitrator's jurisdiction. Security guards exercise an essential part of the privilege conferred onto the President. Their employment is therefore closely and directly connected with proceedings in the Assembly. Moreover, these constitutional privileges were not abolished with the coming into force of the *Act respecting the National Assembly*, CQLR, c. A-23.1 ("ARNA"). Interference by courts or tribunals would therefore be inconsistent with the Assembly's sovereignty.

II. Facts

[81] In July 2012, three of the Assembly's security guards were dismissed on the ground that they had

Cet impératif fondamental assure que les membres de l'Assemblée puissent débattre librement dans le respect et la non-violence. La responsabilité d'assurer la sécurité de l'Assemblée échoit à son président qui est libre de prendre toutes les décisions qu'il juge appropriées, y compris celles liées à l'identité des personnes mettant en œuvre les mesures de sécurité. Cet exercice est protégé par des privilèges parlementaires absolus. Il s'ensuit que les décisions relatives à la sécurité ne peuvent être contestées devant les tribunaux ou révisées par eux.

[79] Dans le portrait constitutionnel des démocraties parlementaires de type britannique, les privilèges parlementaires agissent comme un *modus vivendi* entre le pouvoir législatif et les deux autres branches du gouvernement, donnant au premier les moyens légaux d'assumer ses fonctions constitutionnelles, libre de toute interférence : M. Groves et E. Campbell, « Parliamentary Privilege and the Courts : Questions of Justiciability » (2007), 7 *O.U.C.L.J.* 175, p. 189-190, citant D. McGee, « The Scope of Parliamentary Privilege », [2004] *N.Z.L.J.* 84, p. 84. Comme nous l'expliquerons ultérieurement, ces privilèges ont des racines historiques profondes. Ils ont permis d'établir l'équilibre nécessaire pour assurer la pérennité de la démocratie au Royaume-Uni et, subséquemment, dans ses colonies. Dès lors, les privilèges parlementaires ne constituent pas une *exception* à la règle de la primauté du droit, mais plutôt un pilier distinct de l'architecture constitutionnelle canadienne.

[80] En l'espèce, nous sommes d'avis que ces privilèges font échec à la compétence de l'arbitre de grief. Les gardiens de sécurité exercent un volet essentiel du privilège conféré au président. Il existe donc un lien étroit et direct entre leur emploi et les travaux de l'Assemblée. En outre, ces privilèges de nature constitutionnelle n'ont pas été abolis par l'entrée en vigueur de la *Loi sur l'Assemblée nationale*, RLRQ, c. A-23.1 (« LAN »). De ce fait, l'intervention des tribunaux serait incompatible avec la souveraineté de l'Assemblée.

II. Faits

[81] En juillet 2012, trois gardiens de sécurité de l'Assemblée ont été congédiés au motif qu'ils avaient

surreptitiously used surveillance cameras to look inside the rooms of the adjacent hotel and that the relationship of trust with their employer had therefore been severed. Grievances were filed in which the guards, represented by the Syndicat de la fonction publique et parapublique du Québec (“Union”), sought reinstatement in their respective positions and reimbursement of the benefits they had lost. The President of the Assembly, Jacques Chagnon (“President”), challenged the arbitrator’s jurisdiction by way of a preliminary exception. He relied on two parliamentary privileges: the privilege over the management of employees and the privilege to exclude strangers from the Assembly’s precincts.

[82] The arbitrator dismissed the preliminary exception and found that he had jurisdiction to decide the grievances: 2014 QCTA 696, [2014] AZ-51104370. The Superior Court allowed the President’s application and set aside the arbitrator’s decision: 2015 QCCS 883. The majority of the Court of Appeal allowed the appeal and restored the arbitrator’s decision: 2017 QCCA 271, 20 Admin. L.R. (6th) 93.

III. Standard of Review

[83] The President puts three questions to this Court:

- (1) Do the duties of the security guards employed by the Assembly fall within a sphere of activity covered by the privilege over the management of employees? What is the applicable test when this privilege is claimed?
- (2) Did the general reference to the *Public Service Act*, CQLR, c. F-3.1.1, in s. 120 of the *ARNA* have the effect of implicitly abolishing the Assembly’s parliamentary privileges?
- (3) Does the implementation of [TRANSLATION] “control over access to parliamentary precincts”, as part of the privilege to exclude strangers from the Assembly and its precincts, give the President the power to determine who exercises this privilege, including the right to dismiss a person who no longer exercises it?

(See A.F., at pp. 6-8.)

utilisé clandestinement des caméras de surveillance pour observer l’intérieur des chambres de l’hôtel adjacent et que le lien de confiance avec leur employeur a en conséquence été rompu. Représentés par le Syndicat de la fonction publique et parapublique du Québec (« Syndicat »), ils réclament au moyen de griefs la réintégration dans leurs emplois respectifs et le remboursement des avantages qu’ils ont perdus. À titre de moyen préliminaire, le président de l’Assemblée, Jacques Chagnon (« Président »), a contesté la compétence de l’arbitre en invoquant l’existence de deux privilèges parlementaires, soit le privilège de gestion du personnel et le privilège d’expulser les étrangers de l’enceinte de l’Assemblée.

[82] L’arbitre a rejeté le moyen préliminaire et conclu qu’il avait compétence pour décider des griefs : 2014 QCTA 696, [2014] AZ-51104370. La Cour supérieure a accueilli la requête du Président et annulé la décision de l’arbitre : 2015 QCCS 883. Les juges majoritaires de la Cour d’appel ont accueilli l’appel et rétabli la décision de l’arbitre : 2017 QCCA 271, 20 Admin. L.R. (6th) 93.

III. Norme de contrôle

[83] Le Président pose trois questions à la Cour :

- (1) Les fonctions des gardiens de sécurité employés par l’Assemblée appartiennent-elles à une sphère d’activité relevant du privilège de gestion du personnel? Quel est le test applicable à une revendication de ce privilège?
- (2) Le renvoi général à la *Loi sur la fonction publique*, RLRQ, c. F-3.1.1, contenu à l’art. 120 de la *LAN* a-t-il eu pour effet d’abolir implicitement les privilèges parlementaires de l’Assemblée?
- (3) La mise en œuvre du « contrôle de l’accès à l’enceinte parlementaire » compris dans le privilège d’expulser les étrangers de l’Assemblée et de ses environs inclut-elle le pouvoir pour le Président de déterminer qui exerce ce privilège, emportant le droit de congédier une personne qui ne l’exercerait plus?

(Voir m.a., p. 6-8.)

[84] The Union submits that the Court must defer to the arbitrator's findings that the guards' duties do not fall within the scope of the privilege over the management of employees and that the guards do not exercise the privilege to exclude strangers on the President's behalf. According to the Union, these questions relate to the assessment of the facts in this case, which means that the applicable standard is reasonableness.

[85] We cannot accept this argument. In our view, the questions submitted by the President are merely three aspects of the same question, namely the scope of the parliamentary privileges in issue. Moreover, the evidence relating to the tasks performed by the guards is not contested. Therefore, what we are concerned with is not characterizing the role of the guards at the Assembly, but rather defining the scope of the parliamentary privileges — that is clearly a question of law.

[86] We agree with Justice Karakatsanis that the applicable standard of review is correctness because the existence and scope of parliamentary privileges raise a question of general law “that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise”: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26. Like Justice Karakatsanis, we recognize that grievance arbitrators do not have specific expertise in relation to parliamentary privileges. We also recognize that while this appeal involves only the National Assembly of Québec, the conclusions regarding parliamentary privileges could affect other legislative assemblies. The broad and general scope of such a question is clear. It raises the issue of “basic consistency in the fundamental legal order of our country”: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 22; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at paras. 26-27. “Because of their impact on the administration of justice as a whole, such

[84] Le Syndicat soutient que la Cour doit faire preuve de déférence à l'égard des conclusions de l'arbitre voulant que les fonctions des gardiens ne s'inscrivent pas dans la portée du privilège de gestion du personnel et que les gardiens n'exercent pas le privilège d'expulsion des étrangers au nom du Président. Selon le Syndicat, ces questions ont trait à l'appréciation des faits en l'espèce. Ainsi, la norme applicable serait celle de la décision raisonnable.

[85] Nous ne pouvons accepter cet argument. Selon nous, les questions soumises par le Président ne représentent que trois facettes d'une même question, soit celle de la portée des privilèges parlementaires en cause. D'ailleurs, la preuve relative aux tâches effectuées par les gardiens n'est pas contestée. La question qui nous concerne n'est alors pas celle de qualifier le rôle des gardiens au sein de l'Assemblée, mais plutôt celle de définir la portée des privilèges parlementaires, ce qui est manifestement une question de droit.

[86] Nous sommes d'accord avec la juge Karakatsanis que la norme de contrôle applicable est celle de la décision correcte, puisque l'existence et la portée des privilèges parlementaires soulèvent une question de droit générale « à la fois, d'une importance capitale pour le système juridique dans son ensemble et étrangère au domaine d'expertise de l'arbitre » : *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 60, citant *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77, par. 62; *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160, par. 26. Nous reconnaissons, comme la juge Karakatsanis, que l'arbitre de grief ne possède aucune expertise particulière en matière de privilèges parlementaires. Nous reconnaissons également que les conclusions relatives aux privilèges parlementaires — bien que le présent pourvoi concerne uniquement l'Assemblée nationale du Québec — sont susceptibles d'affecter d'autres assemblées législatives. La portée large et générale d'une telle question est évidente. Elle met en cause la « cohérence de l'ordre juridique fondamental du pays » : *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471, par. 22; *McLean c. Colombie-Britannique (Securities*

questions require uniform and consistent answers”: *Dunsmuir*, at para. 60.

[87] We would add that the existence and scope of parliamentary privileges also raise a constitutional issue. This Court has previously recognized the constitutional nature of parliamentary privileges: *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 30; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 379. It is well established that the standard of review applicable to “other constitutional” issues is correctness “because of the unique role of . . . courts [mentioned in s. 96 of the *Constitution Act, 1867*] as interpreters of the Constitution”: *Dunsmuir*, at para. 58; *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504. In *Vaid*, the Court noted the importance of the issue relating to the privilege over the management of employees, stating that “[t]here are few issues as important to our constitutional equilibrium as the relationship between the legislature and the other branches of the State on which the Constitution has conferred powers, namely the executive and the courts”: *Vaid*, at para. 4. The same can be said of issues relating to the Assembly’s inherent, historical privilege to exclude strangers from its precincts, as well as the impact of the *ARNA* on parliamentary privileges. Since all of these issues concern the separation of powers among state institutions, they are constitutional in nature, and the correctness standard must apply.

[88] However, we prefer to refrain from expressing any opinion on the justification put forward by the majority of the Court of Appeal, which found that the correctness standard applied because the case also involved a true question of jurisdiction (paras. 33 and 35). Given that the Court will soon be considering the nature and scope of judicial review — possibly including the concept of “true question of jurisdiction” as used in *Dunsmuir*, at para. 59 — we do not

Commission), 2013 CSC 67, [2013] 3 R.C.S. 895, par. 26-27. Pareille question « doit être tranchée de manière uniforme et cohérente étant donné ses répercussions sur l’administration de la justice dans son ensemble » : *Dunsmuir*, par. 60.

[87] Nous ajoutons que l’existence et la portée des privilèges parlementaires soulèvent aussi une question constitutionnelle. La nature constitutionnelle des privilèges parlementaires a été reconnue par la Cour : *Canada (Chambre des communes) c. Vaid*, 2005 CSC 30, [2005] 1 R.C.S. 667, par. 30; *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l’Assemblée législative)*, [1993] 1 R.C.S. 319, p. 379. Il est bien établi que la norme de contrôle applicable aux questions « touchant par ailleurs à la Constitution » est celle de la décision correcte « à cause du rôle unique des cours de justice visées à l’art. 96 [de la *Loi constitutionnelle de 1867*] en tant qu’interprètes de la Constitution » : *Dunsmuir*, par. 58; *Nouvelle-Écosse (Workers’ Compensation Board) c. Martin*, 2003 CSC 54, [2003] 2 R.C.S. 504. Dans *Vaid*, la Cour a relevé l’importance de la question relative au privilège de gestion des employés. Elle a souligné que « [p]eu de questions revêtent autant d’importance pour notre équilibre constitutionnel que le rapport entre la législature et les autres organes de l’État auxquels la Constitution a conféré des pouvoirs, soit l’exécutif et les tribunaux judiciaires » : *Vaid*, par. 4. Cette qualification peut s’appliquer tout autant aux questions relatives au privilège inhérent et historique de l’Assemblée d’expulser des étrangers de son enceinte. C’est aussi le cas au sujet de l’effet de la *LAN* sur les privilèges parlementaires. Puisque ces questions touchent toutes à la séparation des pouvoirs entre les institutions de l’État, elles sont de nature constitutionnelle, et la norme de la décision correcte doit s’appliquer.

[88] Par ailleurs, nous préférons nous abstenir de nous prononcer sur la justification mise de l’avant par les juges majoritaires de la Cour d’appel, selon qui la norme de la décision correcte s’impose, puisqu’il s’agit aussi d’une question touchant véritablement à la compétence (par. 33 et 35). Étant donné que la Cour examinera prochainement la nature et la portée du contrôle judiciaire — incluant possiblement la notion de « question touchant véritablement à la

think it appropriate to address this issue. Nor is it essential to do so, since the reasons stated above are more than sufficient to justify the application of the correctness standard.

IV. Analysis

[89] Since the origins of parliamentary privileges date back to the beginnings of British parliamentary democracy, we believe it will be helpful to start with a historical overview of the legal principles that underlie our reasoning. We will therefore consider the privileges being claimed, which will lead us to conclude that security is a privileged sphere of activity. Since the security guards' tasks fall entirely within this sphere, and since the guards exercise the privilege to exclude strangers on the President's behalf, they are covered by the management privilege. Moreover, the ARNA does not reveal any clear intention by the Assembly to restrict or waive these parliamentary privileges. Allowing the grievance arbitrator to rule on the merits of the dismissal would therefore be tantamount to authorizing interference with the exercise of parliamentary privileges.

A. *Historical Roots of Parliamentary Privileges*

(1) Origins of the Privileges of the Parliament at Westminster

[90] The precise origins of parliamentary privileges remain uncertain. The assertion of these privileges certainly caused many conflicts, sometimes violent in nature, between the Parliament at Westminster, the Crown and the courts: *New Brunswick Broadcasting*, at p. 344 (concurring reasons of Lamer C.J.); see also S. Pincus, *1688: The First Modern Revolution* (2009), at p. 28.

[91] In the early years of the Westminster system of parliamentary democracy as we know it today, the speaker of the House of Commons asked the monarch to recognize the privileges necessary to the proper functioning of the House on the opening day

compétence » au sens de l'arrêt *Dunsmuir*, par. 59 — il nous paraît inopportun d'aborder cette question. En outre, il n'est pas essentiel de le faire, puisque les motifs énoncés précédemment suffisent amplement à justifier le recours à la norme de la décision correcte.

IV. Analyse

[89] Puisque l'origine des privilèges parlementaires remonte à la même époque que les balbutiements de la démocratie parlementaire britannique, nous croyons utile avant toute chose d'effectuer un survol historique des principes juridiques sur lesquels repose notre raisonnement. Nous examinerons donc les privilèges invoqués, ce qui nous amènera à conclure que le domaine de la sécurité est une sphère d'activité privilégiée. Puisque les tâches des gardiens de sécurité s'inscrivent entièrement dans cette sphère et que ces derniers exercent le privilège d'expulsion des étrangers pour le compte du président, le privilège de gestion couvre les gardiens. En outre, la LAN ne révèle aucune intention claire de la part de l'Assemblée de restreindre ces privilèges parlementaires ou d'y renoncer. Permettre à l'arbitre de grief de se prononcer sur le bien-fondé du congédiement équivaudrait donc à autoriser l'ingérence dans l'exercice des privilèges parlementaires.

A. *Les racines historiques des privilèges parlementaires*

(1) L'origine des privilèges du Parlement de Westminster

[90] L'origine précise des privilèges parlementaires demeure incertaine. Certes, l'assertion de ces privilèges fut la cause de plusieurs conflits, parfois violents, entre le Parlement de Westminster, la Couronne et le pouvoir judiciaire : *New Brunswick Broadcasting*, p. 344 (motifs concordants du juge en chef Lamer); voir aussi S. Pincus, *1688 : The First Modern Revolution* (2009), p. 28.

[91] À l'aube de la démocratie parlementaire de Westminster telle qu'on la connaît aujourd'hui, le président de la Chambre des communes demandait au monarque de reconnaître les privilèges nécessaires à son bon fonctionnement le premier jour où le

of Parliament, in accordance with feudal tradition. The representatives of the Lower House — that is, the knights of the shires and the burgesses — met and chose a speaker to represent them before the monarch. That representative went before the Upper House, where the lords, their authorized representatives, the princes, the barons, the archbishops, the bishops and certain abbots sat. The monarch was usually seated above them in the Upper House and was assisted by a chancellor, who spoke on the monarch's behalf. In the centre of the room were the judges of the realm, the master of the rolls and the secretaries of state: W. Stubbs, *The Constitutional History of England in Its Origin and Development* (3rd ed. 1884), vol. III, at pp. 486-88.

[92] Once in the Upper House, the speaker of the House of Commons began by praising the monarch. The chancellor thanked the Commons for choosing a speaker and called upon the representatives to debate laws. The speaker then asked for recognition of the Commons' privileges so that its members could debate freely without their words being called into question or offending the monarch. He asked that, should such offence occur, the Lower House be permitted to judge and punish the offender itself. The speaker promised not to abuse these powers, and the chancellor then agreed on behalf of the monarch: Stubbs, at pp. 486-88.

[93] We note that, from the start, it was customary for certain parliamentary privileges to protect the servants of members of Parliament as well. The protection extended from the 40th day before the start of each session until the 40th day after the end of each session. The privileges served primarily as a *shield* against attacks by the monarch, which typically took the form of wrongful imprisonment. They therefore also prevented collateral attacks against employees of members of the Parliament at Westminster with respect to all matters except treason, felony or situations endangering public safety: Stubbs, at pp. 514-15.

Parlement était convoqué selon la tradition féodale. Les représentants de la Chambre basse (« *Knights of the shires* » et « *burgesses* ») se réunissaient et désignaient le président (« *Speaker* ») pour les représenter devant le souverain. Ce représentant se rendait devant la Chambre haute, qui réunissait les lords, leurs représentants autorisés, les princes, les barons, les archevêques, les évêques et certains abbés. Dans cette Chambre haute, surélevé se trouvait habituellement le monarque qui était assisté par un chancelier qui parlait en son nom. Au centre de la pièce se trouvaient des juges du royaume, le président de la cour (« *Master of the Rolls* ») ainsi que les secrétaires d'État : W. Stubbs, *The Constitutional History of England in Its Origin and Development* (3^e éd. 1884), vol. III, p. 486-488.

[92] Rendu à la Chambre haute, le président de la Chambre des communes faisait d'abord l'éloge du monarque. Le chancelier remerciait les communes d'avoir désigné un président et enjoignait les représentants à débattre des lois. C'est alors que le président demandait la reconnaissance des privilèges des communes, afin que ses membres puissent débattre librement sans que leur parole ne soit remise en question ou n'offense le monarque. Advenant la survenue d'une telle offense, il demandait que la Chambre basse puisse juger et punir elle-même le coupable. Le président promettait de ne pas abuser de ces pouvoirs. Le chancelier acquiesçait alors au nom du monarque : Stubbs, p. 486-488.

[93] Nous notons que, selon la coutume, dès leur origine, certains privilèges parlementaires protégeaient également les serviteurs au service des membres du Parlement, et ce, pour une période s'échelonnant du 40^e jour avant le début de chaque session au 40^e jour après la fin de chacune d'elles. Les privilèges servaient principalement de *bouclier* contre les attaques du monarque qui prenaient habituellement la forme d'emprisonnements injustifiés. Ils prévenaient donc aussi les attaques collatérales visant les employés des membres du Parlement de Westminster à tous égards, à l'exception des crimes de trahison, de *felony* ou de situations où la sécurité publique était menacée : Stubbs, p. 514-515.

[94] Around 1400, both Houses of Parliament began to avail themselves of the services of a sergeant-at-arms to enforce their privileges. The sergeant-at-arms was responsible for protecting the speaker of the House. It is interesting to note that one of the original functions of the sergeant-at-arms was to act as doorkeeper, a role similar to that of the three employees dismissed in this case: E. Campbell, *Current Issue Paper #68 — The Sergeant-at-Arms: Historical Origins and Contemporary Roles* (1987), at pp. 3-5.

[95] The Parliament at Westminster gradually began to assert its privileges in a more forceful manner. At first, the House of Commons began to exercise its powers of arrest, trial and imprisonment. Later, with the assistance of the sergeant-at-arms, it was able to fight for the recognition of its privileges, especially against the courts, since it now had the coercive power to enforce its independence: P. Marsden, *The Officers of the Commons 1363-1978* (1979), at p. 79; *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (24th ed. 2011), by M. Jack, c. 17.

[96] Privileges were asserted against the common law courts in several phases. Initially, both Houses of Parliament claimed exclusive jurisdiction to judge the existence and scope of their privileges because of their historical status as part of the High Court of Parliament of medieval England: Groves and Campbell, at p. 177.³ With the growth of parliamentary law, known as *lex parliamenti*, the Houses argued in particular that this law was separate from the common law and that the courts therefore had no jurisdiction to decide disputes relating to privileges: Groves and Campbell, at p. 177. Until the 19th century, the courts respected this assertion by Parliament and expressed very few doubts about it.

³ It should be noted that this English constitutional feature virtually disappeared with the reform that led to the creation of the Supreme Court of the United Kingdom and to the elimination of the House of Lords' role as a court of appeal: M.-A. Roy, "Le Parlement, les tribunaux et la Charte canadienne des droits et libertés: vers un modèle de privilège parlementaire adapté au XXI^e siècle" (2014), 55 C. de D. 489, at pp. 495-96; *New Brunswick Broadcasting*, at pp. 347-48.

[94] Vers l'an 1400, les deux chambres du Parlement ont commencé à bénéficier des services d'un sergent d'armes pour assurer le respect de leurs privilèges. Ce dernier était responsable de veiller à la protection du président de la Chambre. Il est intéressant de noter que, à l'origine, le sergent d'armes assumait notamment le rôle de gardien de porte, un rôle similaire à celui dont s'acquittaient les trois employés congédiés dans la présente affaire : E. Campbell, *Current Issue Paper #68 — The Sergeant-at-Arms : Historical Origins and Contemporary Roles* (1987), p. 3-5.

[95] Peu à peu, le Parlement de Westminster a revendiqué ses privilèges avec davantage de fermeté. D'abord la Chambre des communes a pu exercer ses pouvoirs d'arrestation, de jugement et d'emprisonnement. Plus tard, avec l'aide du sergent d'armes, elle a été en mesure de s'engager dans une lutte pour la reconnaissance de ses privilèges, notamment face au pouvoir judiciaire, puisqu'elle détenait désormais le pouvoir coercitif de faire respecter son indépendance : P. Marsden, *The Officers of the Commons 1363-1978* (1979), p. 79; *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (24^e éd. 2011), par M. Jack, c. 17.

[96] L'affirmation des privilèges face aux tribunaux de common law a connu plusieurs phases. D'abord, les deux chambres du Parlement soutenaient qu'elles avaient la compétence exclusive de juger de l'existence et de la portée de leurs privilèges en raison de l'appartenance historique de leur chambre à la Haute Cour du Parlement en Angleterre médiévale : Groves et Campbell, p. 177³. Avec l'essor du droit parlementaire, connu sous le nom de *lex parliamenti*, les chambres faisaient notamment valoir que ce droit ne faisait pas partie de la common law. De ce fait, les tribunaux de droit commun n'avaient pas juridiction pour décider des litiges relatifs aux privilèges : Groves et Campbell, p. 177.

³ Il faut noter que ce dernier aspect constitutionnel anglais a pratiquement pris fin lors de la réforme ayant mené à la création de la Cour suprême du Royaume-Uni et la fin du rôle de tribunal d'appel de la Chambre des lords : M.-A. Roy, « Le Parlement, les tribunaux et la Charte canadienne des droits et libertés : vers un modèle de privilège parlementaire adapté au XXI^e siècle » (2014), 55 C. de D. 489, p. 495-496; *New Brunswick Broadcasting*, p. 347-348.

Note that the jurisdiction of the common law courts at the time was not as broad as it is today. They did not decide matters relating to equity or ecclesiastical law: *Groves and Campbell*, at p. 177 and fn. 9. The argument was therefore not as ambitious as it might seem today.

[97] The courts subsequently assumed jurisdiction over cases in which the privilege being claimed had an impact on the rights exercised outside Parliament: *Groves and Campbell*, at pp. 177-78 and fn. 10.

[98] A turning point in development of privileges was the famous case of *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112 (Q.B.). In that case, Mr. Stockdale, who had published a medical book that was found in the possession of a prisoner in Newgate, brought an action for libel against Messrs. Hansard, printers to the House of Commons. In a report prepared by the prison inspector, Mr. Stockdale's book was described as "disgusting and obscene". The report was later printed by Messrs. Hansard under the authority of the House of Commons and sold to members of the public. In response to the lawsuit, the House of Commons asserted its parliamentary privileges by resolving as follows:

That the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially of this House, as the representative portion of it. That by the law and privilege of Parliament, this House has the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges, and that the institution or prosecution of any action, suit, or other proceeding, for the purpose of bringing them into discussion for decision before any court or tribunal elsewhere than in Parliament, is a high breach of such privilege, and renders all parties concerned therein amenable to its just displeasure, and to the punishment consequent thereon: That for any court or tribunal to assume to decide upon matters of privilege inconsistent with the determination of either

Jusqu'au 19^e siècle, les tribunaux respectaient cette assertion du Parlement et n'exprimaient que bien peu de doutes à son sujet. Notez bien qu'à l'époque, l'étendue de la juridiction des tribunaux de common law n'était pas aussi vaste qu'aujourd'hui. Ils ne décidaient pas des questions d'*equity* ou de droit ecclésiastique : *Groves et Campbell*, p. 177 et note en bas de page 9. L'argument n'était donc pas aussi ambitieux qu'il peut sembler l'être aujourd'hui.

[97] Par la suite, les tribunaux se sont saisis de dossiers où le privilège invoqué avait une incidence sur les droits s'exerçant à l'extérieur du Parlement : *Groves et Campbell*, p. 177-178 et note en bas de page 10.

[98] La célèbre affaire *Stockdale c. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112 (B.R.), a été un moment charnière dans l'évolution des privilèges. Dans cette affaire, M. Stockdale, qui avait publié un livre de médecine s'étant retrouvé entre les mains d'un prisonnier de Newgate, a intenté un recours en diffamation contre MM. Hansard, les imprimeurs de la Chambre des communes. Dans un rapport rédigé par l'inspecteur de la prison, le livre de M. Stockdale était qualifié de [TRADUCTION] « dégoûtant et obscène ». Ultérieurement, ce rapport a été imprimé par MM. Hansard sous l'autorité de la Chambre des communes et vendu aux membres du public. En riposte à cette poursuite, la Chambre des communes a invoqué ses privilèges parlementaires au moyen d'une résolution :

[TRADUCTION] Que le pouvoir de publier les rapports, votes et délibérations qu'elle estime soit nécessaires dans l'intérêt public soit favorables à celui-ci est un élément essentiel des fonctions constitutionnelles du Parlement, plus particulièrement cette Chambre, en tant qu'organe représentatif au sein de celui-ci. Que par l'effet de la loi et du privilège du Parlement, cette Chambre a compétence exclusive pour statuer sur l'existence et l'étendue de ses privilèges; et que toute action, poursuite ou autre procédure intentée, afin que ceux-ci fassent l'objet de débats ou décisions, devant quelque cour de justice ou tribunal ailleurs qu'au Parlement, constitue un manquement grave à ce privilège, auquel cas toutes les parties concernées encourrent le mécontentement légitime du Parlement et sont passibles de sanctions en conséquence : Que la décision de quelque cour de justice ou tribunal d'assumer compétence

House of Parliament thereon, is contrary to the law of Parliament, and is a breach and contempt of the privileges of Parliament. [Emphasis added.]

(United Kingdom, House of Commons, *Parliamentary Debates*, 3rd ser., vol. 49, August 1, 1839, col. 1074-75; see also C. G. Post, *Significant Cases in British Constitutional Law* (1957), at pp. 28-29.)

[99] However, the Court of Queen’s Bench denied the existence of the claimed privilege. In his reasons, Lord Denman C.J. began by rejecting the argument that the House of Commons was the sole and conclusive judge of the existence and scope of its own privileges. For one thing, he found it illogical that the House of Commons and the House of Lords, which together formed Parliament, could claim privileges that might be inconsistent: *Stockdale*, at p. 1154; see also Post, at p. 31. He also noted that the argument that Parliament had *incommunicable* knowledge of its privileges was ludicrous. Clearly, the courts at the time were trying to determine the jurisdictional boundaries of parliamentary privileges. A claim of privilege was not enough to dispose of a case: *Stockdale*, at pp. 1154-56; see also Post, at pp. 31-32.

[100] In the end, Lord Denman C.J. found that it was for the Court of Queen’s Bench to decide the matter, holding that it “is no longer optional with me to decline or accept the office of deciding whether this privilege exist[s] in law”: *Stockdale*, at p. 1169; see also Post, at pp. 33-34.

[101] The saga surrounding the case gave rise to seven separate proceedings and led to the imprisonment of Mr. Hansard, members of his family and certain legal advisors. This dispute concerning the courts’ jurisdiction with respect to privileges caused quite a stir in British society. It was even suggested that there would be armed conflict if tensions escalated: Groves and Campbell, at p. 184.

pour statuer sur des questions relatives au privilège d’une manière incompatible avec les décisions de l’une ou l’autre des chambres du Parlement à cet égard va à l’encontre de la loi du Parlement, et représente un manquement et un outrage aux privilèges du Parlement. [Nous soulignons.]

(Royaume-Uni, Chambre des communes, *Parliamentary Debates*, 3^e sér., vol. 49, 1^{er} août 1839, col. 1074-1075; voir aussi C. G. Post, *Significant Cases in British Constitutional Law* (1957), p. 28-29.)

[99] Pourtant, la Cour du Banc de la Reine a nié l’existence du privilège invoqué. Dans ses motifs, le juge en chef lord Denman a d’abord rejeté l’argument voulant que la Chambre des communes puisse établir l’existence et la portée de ses propres privilèges de façon définitive et exclusive. Selon lui, d’une part, le fait que la Chambre des communes et la Chambre des lords, formant ensemble le Parlement, puissent revendiquer des privilèges potentiellement contradictoires était illogique : *Stockdale*, p. 1154; voir aussi Post, p. 31. D’autre part, il a noté que l’argument voulant que le Parlement possède une connaissance *secrète* relative aux privilèges était saugrenu. De toute évidence, les tribunaux tentaient alors de cerner les contours juridictionnels des privilèges parlementaires. Les invoquer ne suffisait pas pour disposer du litige : *Stockdale*, p. 1154-1156; voir aussi Post, p. 31-32.

[100] En fin de compte, le juge en chef lord Denman a jugé qu’il revenait à la Cour du Banc de la Reine de trancher la question, statuant qu’il [TRADUCTION] « ne m’appartient plus de refuser ou d’accepter la charge de décider si ce privilège existe en droit » : *Stockdale*, p. 1169; voir aussi Post, p. 33-34.

[101] La saga entourant cette affaire a donné lieu à sept poursuites distinctes et mené à l’emprisonnement de M. Hansard, de membres de sa famille et de certains conseillers juridiques. Ce litige relatif à la compétence des tribunaux à l’égard des privilèges a créé beaucoup de remous dans la société britannique. Il a même été suggéré qu’un conflit armé se préparait dans l’éventualité d’une escalade des tensions : Groves et Campbell, p. 184.

[102] In fact, some have speculated that in *Case of the Sheriff of Middlesex* (1840), 11 Ad. & E. 273, 113 E.R. 419 (Q.B.), the courts were cautious in order to avoid exacerbating the conflict that had deeply divided the public: Groves and Campbell, at p. 184. In that case, the Sheriff of Middlesex attempted to execute the judgment rendered in *Stockdale*. The House of Commons considered this a breach of parliamentary privileges, and its Sergeant-at-Arms imprisoned the two men who held the sheriff position. Those men sought to free themselves by seeking a court order for *habeas corpus*. In his reasons, Lord Denman C.J. recognized the power of the Sergeant-at-Arms to imprison individuals who were guilty of contempt of Parliament *on the basis that the Houses of Parliament could not function without the power of protecting themselves*:

It is unnecessary to discuss the question whether each House of Parliament be or be not a Court; it is clear that they cannot exercise their proper functions without the power of protecting themselves against interference. The test of the authority of the House of Commons in this respect, submitted by Lord Eldon to the judges in *Burdett v. Abbot* (5 Dow, 199), was, whether, if the Court of Common Pleas had adjudged an act to be a contempt of Court, and committed for it, stating the adjudication generally, the Court of King's Bench, on a *habeas corpus* setting forth the warrant, would discharge the prisoner because the facts and circumstances of the contempt were not stated. A negative answer being given, Lord Eldon, with the concurrence of Lord Erskine (who had before been adverse to the exercise of jurisdiction), and without a dissentient voice from the House, affirmed the judgment below. And we must presume that what any Court, much more what either House of Parliament, acting on great legal authority, takes upon it to pronounce a contempt, is so. [Emphasis added.]

(*Sheriff of Middlesex*, at p. 426; see also Post, at pp. 35-36.)

[103] Lord Denman C.J. was unable to find any precedent or legal rule that would make it possible to

[102] D'ailleurs, certains ont spéculé que dans *Case of the Sheriff of Middlesex* (1840), 11 Ad. & E. 273, 113 E.R. 419 (B.R.), les tribunaux ont fait preuve de prudence afin d'éviter d'exacerber le conflit qui avait profondément divisé la population : Groves et Campbell, p. 184. Dans cette affaire, le shérif de Middlesex tentait d'exécuter le jugement rendu dans *Stockdale*. La Chambre des communes considérait qu'il s'agissait d'une violation des privilèges parlementaires et son sergent d'armes a emprisonné les deux hommes qui occupaient le poste de shérif. Ceux-ci ont tenté d'obtenir leur libération en demandant à un tribunal judiciaire d'émettre une ordonnance d'*habeas corpus*. Dans ses motifs, le juge en chef lord Denman a reconnu le pouvoir du sergent d'armes d'emprisonner les individus qui commettent un outrage au Parlement *puisque les chambres du Parlement ne peuvent pas fonctionner sans détenir le pouvoir de se protéger* :

[TRADUCTION] Il n'est pas nécessaire d'examiner la question de savoir si chacune des chambres du Parlement constitue ou non un tribunal; il est évident qu'elles ne peuvent exercer les fonctions qui leur incombent si elles n'ont pas le pouvoir de se protéger contre les ingérences. L'analyse permettant de déterminer si la Chambre des communes possède ce pouvoir, que lord Eldon a soumise aux juges dans *Burdett c. Abbot* (5 Dow, 199), consistait à se demander, dans le cas où la Cour des plaids communs aurait jugé qu'un acte constituait un outrage au tribunal et fait incarcérer l'accusé à cet égard, en formulant sa décision de façon générale, si la Cour du Banc du Roi, sur présentation d'une demande d'*habeas corpus* faisant état du mandat, pourrait libérer le prisonnier parce que les faits et les circonstances de l'outrage n'étaient pas énoncés. Répondant par la négative, avec l'accord de lord Erskine (qui s'était montré auparavant défavorable à l'exercice de la compétence) et sans qu'aucune voix dissidente ne s'élève à la Chambre, lord Eldon a confirmé le jugement de première instance. Et nous devons présumer que constitue effectivement un outrage tout ce qu'une cour de justice, et encore davantage l'une ou l'autre des chambres du Parlement, s'appuyant sur de solides assises juridiques, déclare être un outrage. [Nous soulignons.]

(*Sheriff of Middlesex*, p. 426; voir aussi Post, p. 35-36.)

[103] Le juge en chef lord Denman n'a pu trouver de précédent ou de règle de droit permettant

order the Sheriff's release. The new powers of review conferred on the courts in *Stockdale* were thus rather innocuous if, in the same case, Parliament could still exercise its power of imprisonment following a finding of contempt: Groves and Campbell, at p. 184.

[104] Forty years later, the scope of parliamentary privileges was still a point of contention, as evidenced by *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271. In 1883, Charles Bradlaugh was elected to represent the riding of Northampton in the House of Commons. The law required him to swear an oath before he could take his seat. In May 1883, Mr. Bradlaugh asked the Speaker of the House to call him to the table because he wanted to comply with the law and take the oath. The Speaker refused, presumably because Mr. Bradlaugh was a professed atheist. In July 1883, the House of Commons adopted a resolution commanding the Sergeant-at-Arms to exclude Mr. Bradlaugh until he agreed not to further disturb its proceedings. Mr. Bradlaugh brought an action against the Sergeant-at-Arms seeking, among other things, a declaration that the resolution was void and an injunction to prevent the Sergeant-at-Arms from enforcing it: Post, at p. 37.

[105] In *Bradlaugh*, Stephen J. refused to interfere in the internal affairs of Parliament even though, in principle, the *Parliamentary Oaths Act, 1866* (U.K.), 29 Vict., c. 19, authorized Mr. Bradlaugh to take the oath. In his reasons, he explained that he had to show deference. The House of Commons had the exclusive power to interpret that statute because the statute governed its internal proceedings:

This Act requires the plaintiff to take a certain oath. The House of Commons have resolved that he shall not be permitted to take it. Grant, for the purposes of argument, that the resolution of the House and the Parliamentary Oaths Act contradict each other; how can we interfere without violating the principle just referred to? Surely the right of the plaintiff to take the oath in question is “a matter arising concerning the House of Commons,” to use the words of

d'ordonner la libération du shérif. Les nouveaux pouvoirs de révision conférés aux tribunaux dans *Stockdale* étaient donc plutôt inoffensifs si le Parlement pouvait malgré tout, dans la même affaire, exercer son pouvoir d'emprisonnement à la suite d'une condamnation pour outrage : Groves et Campbell, p. 184.

[104] Quarante ans plus tard, la portée des privilèges parlementaires faisait toujours l'objet de discordes comme en témoigne l'affaire *Bradlaugh c. Gossett* (1884), 12 Q.B.D. 271. En 1883, M. Charles Bradlaugh était élu pour représenter le comté de Northampton à la Chambre des communes. Pour qu'il puisse siéger, la loi lui imposait de prêter un serment. En mai 1883, M. Bradlaugh a demandé au président de la Chambre de l'appeler à la table parce qu'il souhaitait se conformer à la loi et prêter serment. Le président a refusé, prétendument en raison de l'athéisme notoire de M. Bradlaugh. En juillet 1883, la Chambre des communes a adopté une résolution enjoignant au sergent d'armes d'exclure M. Bradlaugh jusqu'à ce qu'il s'engage à cesser de nuire aux travaux de la Chambre. M. Bradlaugh a intenté une poursuite contre le sergent d'armes, sollicitant, entre autres, une déclaration d'invalidité de la résolution et l'émission d'une injonction empêchant au sergent d'armes d'exécuter cette même résolution : Post, p. 37.

[105] Dans *Bradlaugh*, le juge Stephen a refusé de s'ingérer dans les affaires internes du Parlement, même si la loi intitulée *Parliamentary Oaths Act, 1866* (R.-U.), 29 Vict., c. 19, en principe, autorisait M. Bradlaugh à prêter serment. Dans ses motifs, le juge a expliqué qu'il devait faire preuve de déférence. La Chambre des communes avait compétence exclusive pour interpréter cette loi, puisque cette loi régit son fonctionnement interne :

[TRADUCTION] La Loi exige que le demandeur prête serment. La Chambre des communes a décidé qu'il ne peut être autorisé à le faire. Il convient de reconnaître, pour les besoins de la discussion, que la décision de la Chambre et la prescription de la loi susmentionnée se contredisent; comment pouvons-nous intervenir sans violer le principe que nous venons de mentionner? Le droit du demandeur de prêter le serment en cause est certainement une

Blackstone. The resolution to exclude him from the House is a thing “done within the walls of the House,” to use Lord Denman’s words. It is one of those “proceedings in the House of which the House of Commons is the sole judge,” to use the words of Littledale, J. It is a “proceeding of the House of Commons in the House,” and must therefore, in the words of Patteson, J., “be entirely free and unshackled.” It is “part of the course of its own proceedings,” to use the words of Coleridge, J., and is therefore “subject to its exclusive jurisdiction.” These authorities are so strong and simple that there may be some risk of weakening them in adding to them. Nevertheless, the importance of the case may excuse some further exposition of the principle on which it seems to me to depend.

The Parliamentary Oaths Act prescribes the course of proceedings to be followed on the occasion of the election of a member of Parliament. . . . Whatever may be the reasons of the House of Commons for their conduct, it would be impossible for us to do justice without hearing and considering those reasons; but it would be equally impossible for the House, with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose, or to accept our interpretation of the law in preference to its own. It seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly. [Emphasis added.]

(*Bradlaugh*, at pp. 279-81; see also *Post*, at pp. 39-40.)

[106] In short, since the decision concerned *a statute dealing with the internal affairs of Parliament and with what happened within its walls*, the courts had no jurisdiction to rule on it.

(2) Parliamentary Privileges in Canada

[107] In the North American colonies, the issue of parliamentary privileges was relegated to the

« question concernant la Chambre des communes », pour reprendre les mots de Blackstone. La résolution visant à exclure le demandeur de la Chambre a été prise « à l’intérieur des murs de la Chambre », selon les termes utilisés par lord Denman. Il s’agit de « procédures à l’intérieur de la Chambre des communes à l’égard desquelles celle-ci est le seul juge », pour reprendre les propos du juge Littledale. De l’avis du juge Patteson, il s’agit d’une « procédure de la Chambre des communes à l’intérieur de la Chambre », laquelle doit donc être « entièrement libre d’agir sans entrave ». Comme l’a affirmé le juge Coleridge, il s’agit d’une instance qui « fait partie des procédures propres à la Chambre », et qui en conséquence « relève de sa compétence exclusive ». Ces assises sont si solides et si simples qu’il pourrait être dangereux de les affaiblir si on y ajoutait. Néanmoins, l’importance de l’affaire peut justifier certaines explications additionnelles au sujet du principe sur lequel la solution de l’instance dépend selon moi.

La Parliamentary Oaths Act prévoit les procédures qui doivent être suivies lors de l’élection d’un membre du Parlement. [. . .] Peu importe les motifs invoqués par la Chambre des communes à l’égard de leur comportement, il nous serait impossible de rendre justice sans être informés de ces motifs et sans les considérer; mais il serait tout aussi impossible pour la Chambre, eu égard à sa propre dignité et à son indépendance, de souffrir que ses motifs soient exposés devant nous à cette fin, ou d’accepter notre interprétation du droit de préférence à la sienne. Il s’ensuit, semble-t-il, que la Chambre des communes possède le pouvoir exclusif d’interpréter la loi [susmentionnée], dans la mesure où la réglementation de ses propres procédures à l’intérieur de ses murs est visée; et que, même si cette interprétation était erronée, la Cour n’a pas le pouvoir d’intervenir directement ou indirectement à cet égard. [Nous soulignons.]

(*Bradlaugh*, p. 279-281; voir aussi *Post*, p. 39-40.)

[106] En somme, puisque la décision concernait *une loi touchant aux affaires internes du Parlement et à ce qui se déroulait dans son enceinte*, les tribunaux n’avaient pas compétence pour se prononcer à son sujet.

(2) Les privilèges parlementaires au Canada

[107] Dans les colonies nord-américaines, la question des privilèges parlementaires était reléguée au

background as a result of the absence of responsible government and dependency on the Imperial Parliament: M.-A. Roy, “Le Parlement, les tribunaux et la *Charte canadienne des droits et libertés*: vers un modèle de privilège parlementaire adapté au XXI^e siècle” (2014), 55 *C. de D.* 489, at p. 498. Even though the Imperial laws establishing the first legislative assemblies did not expressly provide for parliamentary privileges, the Judicial Committee of the Privy Council ultimately held that the assemblies had such privileges because the privileges were part of the common law.

[108] In *Kielley v. Carson* (1842), 4 Moo. 63, 13 E.R. 225 (P.C.), Mr. Kielley argued that the Newfoundland House of Assembly did not have the parliamentary privileges required to arrest and imprison him over a conflict with Mr. Kent, a member of the House, that had arisen outside its precincts. The issue of whether privileges applied in relation to non-members was therefore raised very early in the history of the legislative assemblies of the North American colonies. Although the Judicial Committee of the Privy Council held that the Newfoundland House of Assembly had no power to imprison strangers, it did accept that the House had the inherent privileges that were necessary to its proper functioning. Specifically, it stated that “we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding”: p. 234.

[109] Since Confederation, parliamentary privileges have been entrenched in the *Constitution Act, 1867*, whose preamble provides for “a Constitution similar in Principle to that of the United Kingdom”. The preamble had the effect of incorporating British constitutional principles into our law, including those required for the establishment and proper functioning of a British-style parliamentary system, like the privileges held by legislative assemblies: *New Brunswick Broadcasting*, at p. 375. To that end, the *Constitution Act, 1867* broadened the scope of the parliamentary privileges recognized prior to Confederation: Roy, at p. 499.

second plan en raison de l’absence de gouvernement responsable et de l’assujettissement au Parlement impérial : M.-A. Roy, « Le Parlement, les tribunaux et la *Charte canadienne des droits et libertés* : vers un modèle de privilège parlementaire adapté au XXI^e siècle » (2014), 55 *C. de D.* 489, p. 498. Même si les lois impériales constitutives des premières assemblées législatives ne prévoyaient pas explicitement les privilèges parlementaires, le Comité judiciaire du Conseil privé a éventuellement statué que ces assemblées jouissaient de ces privilèges, puisque ces derniers relèvent de la common law.

[108] En effet, dans *Kielley c. Carson* (1842), 4 Moo. 63, 13 E.R. 225 (C.P.), M. Kielley plaidait que l’Assemblée législative de Terre-Neuve ne bénéficiait pas des privilèges parlementaires nécessaires pour l’arrêter et l’emprisonner en raison d’un conflit l’opposant au député Kent qui avait éclaté à l’extérieur de l’enceinte de l’assemblée. Ainsi, très tôt dans l’histoire des assemblées législatives des colonies nord-américaines, la question de l’application des privilèges à l’égard des non-membres fut soulevée. Même si le Comité judiciaire du Conseil privé a jugé que l’Assemblée législative de Terre-Neuve ne bénéficiait pas du pouvoir d’emprisonner des étrangers, il a tout de même tenu pour acquis qu’elle jouissait des privilèges inhérents nécessaires pour son bon fonctionnement. Plus particulièrement, le Conseil privé a souligné qu’il [TRADUCTION] « ne fait aucun doute pour nous qu’une telle assemblée a le droit de se protéger de tous les obstacles au bon déroulement de ses travaux » : p. 234.

[109] Depuis la Confédération, les privilèges parlementaires sont consacrés par la *Loi constitutionnelle de 1867* dont le préambule prévoit « une constitution reposant sur les mêmes principes que celle du Royaume-Uni ». Ce préambule a eu pour effet d’incorporer dans notre droit les principes constitutionnels britanniques. Ces principes incluent ceux nécessaires à l’établissement et au bon fonctionnement d’un système parlementaire de type britannique, tels que les privilèges détenus par les assemblées législatives : *New Brunswick Broadcasting*, p. 375. Pour ce faire, la *Loi constitutionnelle de 1867* a élargi l’étendue des privilèges parlementaires reconnus avant la confédération : Roy, p. 499.

[110] In addition, in 1878, the principles laid down in *Stockdale* were adopted by the Supreme Court of Canada. In *Landers v. Woodworth* (1878), 2 S.C.R. 158, at p. 196, Richards C.J. wrote that “the mere affirmance by that body [the House of Commons] that a certain act is a breach of their privileges will not oust the courts from enquiring and deciding whether the privilege claimed really exists”: cited by Lamer C.J. in *New Brunswick Broadcasting*, at p. 350. This led to the general rule that Canadian courts will inquire into the existence and scope of parliamentary privileges, but not their exercise.

[111] This is borne out by the subsequent case law, particularly the recent decisions in *New Brunswick Broadcasting*, *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, and *Vaid*. These decisions confirmed the constitutional nature of parliamentary privileges and sought to define their scope in light of Canada’s modern constitutional architecture, especially since the advent of the *Canadian Charter of Rights and Freedoms*. We will consider them in greater detail, since they emphasize the fact that parliamentary privileges rest on solid historical foundations and are part of a long constitutional tradition inherited by Canada and the provinces.

(3) The Modern Approach to Parliamentary Privileges: *New Brunswick Broadcasting*, *Harvey* and *Vaid*

[112] In *New Brunswick Broadcasting*, New Brunswick Broadcasting Co. Limited made an application to the Supreme Court of Nova Scotia for an order allowing it to film the proceedings of the Nova Scotia House of Assembly with its own cameras. The application was based on s. 2(b) of the *Charter*, which guarantees freedom of expression, including freedom of the press. The Speaker of the House of Assembly opposed the application, relying on the privilege to exclude strangers.

[113] McLachlin J., writing for the majority, found that since privileges have constitutional status, they

[110] En outre, en 1878, la Cour suprême du Canada a adopté les principes énoncés dans *Stockdale*. Dans *Landers c. Woodworth* (1878), 2 R.C.S. 158, p. 196, le juge en chef Richards écrivait que [TRADUCTION] « la simple affirmation par cet organisme [la Chambre des communes] qu’un certain acte constitue une violation de ses privilèges n’empêche pas les tribunaux d’examiner et de décider si le privilège revendiqué existe réellement » : cité par le juge en chef Lamer dans *New Brunswick Broadcasting*, p. 350. Il en découle la règle générale que les tribunaux canadiens vérifient l’existence et la portée des privilèges parlementaires, mais non leur exercice.

[111] C’est ce que révèle la jurisprudence subséquente, tout particulièrement les arrêts récents *New Brunswick Broadcasting*, *Harvey c. Nouveau-Brunswick (Procureur général)*, [1996] 2 R.C.S. 876, et *Vaid*. Ces arrêts ont confirmé la nature constitutionnelle des privilèges parlementaires et tenté de définir leur portée, eu égard à l’architecture constitutionnelle canadienne moderne, notamment depuis l’avènement de la *Charte canadienne des droits et libertés*. Il convient d’étudier ces décisions plus en détail, puisqu’elles soulignent le fait que les privilèges parlementaires reposent sur des assises historiques solides et font partie d’une longue tradition constitutionnelle dont le Canada et les provinces ont hérité.

(3) L’approche moderne relative aux privilèges parlementaires : *New Brunswick Broadcasting*, *Harvey* et *Vaid*

[112] Dans l’affaire *New Brunswick Broadcasting*, la société New Brunswick Broadcasting Co. Limited a présenté une requête à la Cour suprême de la Nouvelle-Écosse afin d’obtenir une ordonnance l’autorisant à filmer les débats de l’assemblée législative de la Nouvelle-Écosse avec ses propres caméras. Cette requête était fondée sur l’al. 2b) de la *Charte*, qui garantit la liberté d’expression, y compris la liberté de la presse. Le président de l’assemblée législative s’y est opposé en se fondant sur le privilège d’exclusion des étrangers.

[113] Selon la juge McLachlin, qui a rédigé les motifs des juges majoritaires, puisque les privilèges

can be neither abrogated nor limited by the *Charter*: *New Brunswick Broadcasting*, at pp. 368-69. The preamble to the *Constitution Act, 1867* constitutionally guarantees the continuance of parliamentary governance for both the provincial legislatures and the federal Parliament: *New Brunswick Broadcasting*, at p. 375. It follows that they hold privileges that are absolute and constitutionally entrenched:

It has long been accepted that in order to perform their functions, legislative bodies require certain privileges relating to the conduct of their business. It has also long been accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch. [Emphasis added.]

(*New Brunswick Broadcasting*, at pp. 378-79)

[114] In McLachlin J.'s view, the case law clearly established that the scope of these privileges is determined by the test of necessity: *New Brunswick Broadcasting*, at p. 381. She cited *Stockdale*, in which it was held that “[i]f the necessity can be made out, no more need be said: it is the foundation of every privilege of Parliament, and justifies all that it requires”: *New Brunswick Broadcasting*, at p. 382. She added that

[t]he test of necessity is not applied as a standard for judging the content of a claimed privilege, but for the purpose of determining the necessary sphere of exclusive or absolute “parliamentary” or “legislative” jurisdiction. If a matter falls within this 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 questions will instead fall to the exclusive jurisdiction of the legislative body. [Emphasis added.]

(*New Brunswick Broadcasting*, at p. 383)

[115] In concurring reasons, Lamer C.J. stated that the necessity test is applied in a general sense

ont un statut constitutionnel, ils ne peuvent être ni abrogés ni limités par la *Charte* : *New Brunswick Broadcasting*, p. 368-369. Le préambule de la *Loi constitutionnelle de 1867* garantit constitutionnellement le maintien du gouvernement parlementaire tant pour les législatures provinciales que pour le Parlement fédéral : *New Brunswick Broadcasting*, p. 375. Il en découle que ceux-ci jouissent de privilèges absolus et enchâssés dans la Constitution :

Il est accepté depuis longtemps que, pour exercer leurs fonctions, les organismes législatifs doivent bénéficier de certains privilèges relativement à la conduite de leurs affaires. Il est également accepté depuis longtemps que, pour être efficaces, ces privilèges doivent être détenus d’une façon absolue et constitutionnelle; la branche législative de notre gouvernement doit jouir d’une certaine autonomie à laquelle même la Couronne et les tribunaux ne peuvent porter atteinte. [Nous soulignons.]

(*New Brunswick Broadcasting*, p. 378-379)

[114] Selon la juge McLachlin, la jurisprudence établit sans équivoque que les contours de ces privilèges sont définis par le critère de la nécessité : *New Brunswick Broadcasting*, p. 381. Elle a cité *Stockdale* dans lequel il avait été décidé que [TRADUCTION] « [s]i la nécessité peut être prouvée, point n’est besoin d’ajouter autre chose : c’est le fondement de tout privilège du Parlement, et c’est tout ce qui est exigé » : *New Brunswick Broadcasting*, p. 382. Elle a ajouté que

[l]e critère de nécessité est appliqué non pas comme une norme pour juger le contenu du privilège revendiqué, mais pour déterminer le domaine nécessaire de compétence « parlementaire » ou « législative » absolue et exclusive. Si une question relève de cette catégorie nécessaire de sujets sans lesquels la dignité et l’efficacité de l’Assemblée ne sauraient être maintenues, les tribunaux n’examineront pas les questions relatives à ce privilège. Toutes ces questions relèveraient plutôt de la compétence exclusive de l’organisme législatif. [Nous soulignons.]

(*New Brunswick Broadcasting*, p. 383)

[115] Dans ses motifs concordants, le juge en chef Lamer a précisé que le critère de nécessité s’applique

to a category of privilege — so as to avoid having to consider the specific exercise of the privilege:

It is important to note that, in this context, the justification of necessity is applied in a general sense. That is, general categories of privilege are deemed necessary to the discharge of the Assembly's function. Each specific instance of the exercise of a privilege need not be shown to be necessary. [Emphasis added.]

(*New Brunswick Broadcasting*, at p. 343)

[116] McLachlin J. stated that, in this area, the courts have limited jurisdiction. They can only assess whether the claimed privilege is necessary to the proper functioning of the legislature: *New Brunswick Broadcasting*, at p. 384. If so, the privilege is absolute and the courts must not review its exercise. Indeed, she rejected the argument that the courts should be able to review the exercise of the privilege to exclude strangers for the following reasons:

In my view, this privilege is as necessary to modern Canadian democracy as it has been to democracies here and elsewhere in past centuries. The legislative chamber is at the core of the system of representative government. It is of the highest importance that the debate in that chamber not be disturbed or inhibited in any way. Strangers can, in a variety of ways, interfere with the proper discharge of that business. It follows that the Assembly must have the right, if it is to function effectively, to exclude strangers. The rule that the legislative assembly should have the exclusive right to control the conditions in which that debate takes place is thus of great importance, not only for the autonomy of the legislative body, but to ensure its effective functioning.

But, it is argued, it is not necessary that the right be absolute. The courts should be given the power to monitor the exercise of this power to ensure that only those strangers who are truly disruptive are excluded. In my view, a system of court review, quite apart from the constitutional question of what right the courts have to interfere in the internal process of another branch of government, would bring its own problems. The ruling of the Assembly would not be final. The Assembly would find itself caught up in

généralement à *une catégorie* de privilège — de façon à éviter d'en étudier l'exercice précis :

Il importe de souligner que, dans ce contexte, la justification de la nécessité s'applique globalement. C'est-à-dire que des catégories générales de privilèges sont réputées nécessaires à l'exercice de la fonction de l'Assemblée. Il n'est pas nécessaire de démontrer que chaque cas précis d'exercice d'un privilège est nécessaire. [Nous soulignons.]

(*New Brunswick Broadcasting*, p. 343)

[116] La juge McLachlin a affirmé que, dans ce domaine, les tribunaux ont une compétence limitée. Ils peuvent uniquement évaluer si le privilège revendiqué est nécessaire au bon fonctionnement de la législature : *New Brunswick Broadcasting*, p. 384. Si c'est le cas, le privilège est absolu et les tribunaux ne doivent pas en contrôler l'exercice. D'ailleurs, elle a rejeté, pour les motifs suivants, l'argument selon lequel les tribunaux devraient pouvoir contrôler l'exercice du privilège d'exclusion des étrangers :

À mon avis, ce privilège est tout autant nécessaire pour la démocratie canadienne qu'il l'a été pour les démocraties d'ici et d'ailleurs au cours des siècles passés. L'assemblée législative est l'élément essentiel du système de gouvernement représentatif. Il est de la plus haute importance que les débats qui s'y déroulent ne soient pas perturbés ni paralysés d'aucune façon. Des étrangers peuvent, de diverses façons, entraver la bonne marche des travaux de cette assemblée. L'Assemblée doit donc avoir le droit d'exclure des étrangers si elle veut être en mesure de fonctionner efficacement. La règle selon laquelle l'assemblée législative devrait avoir le droit exclusif de contrôler les conditions dans lesquelles se déroulent ces débats revêt donc une grande importance pour assurer non seulement l'autonomie de l'organisme législatif, mais aussi son fonctionnement efficace.

Toutefois, fait-on valoir, il n'est pas nécessaire que ce droit soit absolu. Les tribunaux devraient pouvoir surveiller l'exercice de ce droit afin d'assurer que seuls les étrangers véritablement gênants soient exclus. À mon avis, un système de contrôle judiciaire créerait ses propres problèmes, indépendamment de la question constitutionnelle de savoir quel droit les tribunaux ont-ils de s'immiscer dans le processus interne d'une autre branche du gouvernement. La décision de l'Assemblée ne serait pas

legal proceedings and appeals about what is disruptive and not disruptive. This in itself might impair the proper functioning of the chamber. This lends support to the venerable and accepted proposition that it is necessary to the proper functioning of a legislative assembly modeled on the Parliamentary system of the United Kingdom that the Assembly possess the absolute right to exclude strangers from its proceedings, when it deems them to be disruptive of its efficacious operation. [Emphasis added.]

(*New Brunswick Broadcasting*, at pp. 387-88)

[117] In her concurring reasons in *Harvey*, McLachlin J. expanded on the relationship between the *Charter* and parliamentary privileges. In that case, an elected member of the Legislative Assembly of New Brunswick had violated provisions of the *Elections Act*, R.S.N.B. 1973, c. E-3. A provision of the *Legislative Assembly Act*, R.S.N.B. 1973, c. L-3, prevented him from sitting because of that offence. He tried to have the provision struck down on the ground that it infringed his *Charter* rights.

[118] Writing for the majority, La Forest J. refused to consider the argument relating to parliamentary privileges because the issue had not been seriously argued before the Court but had only been raised by an intervener: *Harvey*, at para. 20. In concurring reasons, McLachlin J., joined by L'Heureux-Dubé J., saw no good reason to ignore the argument: *Harvey*, at para. 56.

[119] This was the context in which McLachlin J. clarified the interaction between the *Charter* and parliamentary privileges, which in case of conflict must be reconciled in the following way:

Because parliamentary privilege enjoys constitutional status it is not “subject to” the *Charter*, as are ordinary laws. Both parliamentary privilege and the *Charter* constitute essential parts of the Constitution of Canada. Neither prevails over the other. While parliamentary privilege and immunity from improper judicial interference in parliamentary processes must be maintained, so must the fundamental democratic guarantees of the *Charter*. Where apparent conflicts between different constitutional

définitive. L'Assemblée se trouverait aux prises avec des poursuites judiciaires et des appels au sujet de ce qui est gênant et de ce qui ne l'est pas, ce qui pourrait en soi entraver son bon fonctionnement. Cela vient appuyer la proposition séculaire et acceptée selon laquelle il est nécessaire au bon fonctionnement d'une assemblée législative inspirée du système parlementaire du Royaume-Uni que cette assemblée possède le droit absolu d'exclure des étrangers de son enceinte lorsqu'elle estime que leur présence l'empêche de fonctionner efficacement. [Nous soulignons.]

(*New Brunswick Broadcasting*, p. 387-388)

[117] Dans une opinion concurrente de l'arrêt *Harvey*, la juge McLachlin a davantage traité de la relation entre la *Charte* et les privilèges parlementaires. Dans cette affaire, un élu provincial membre de l'Assemblée législative du Nouveau-Brunswick avait violé des dispositions de la *Loi électorale*, L.R.N.-B. 1973, c. E-3. Une disposition de la *Loi sur l'Assemblée législative*, L.R.N.-B. 1973, c. L-3, l'empêchait de siéger en raison de cette infraction. Celui-ci a tenté de la faire invalider au motif qu'elle violait ses droits protégés par la *Charte*.

[118] Au nom des juges majoritaires, le juge La Forest a refusé d'étudier l'argument relatif aux privilèges parlementaires parce qu'il n'avait pas été plaidé activement devant la Cour, mais seulement soulevé par un intervenant : *Harvey*, par. 20. Dans des motifs concordants, la juge McLachlin, à qui la juge L'Heureux-Dubé s'est jointe, n'a vu aucune raison valable d'ignorer l'argument : *Harvey*, par. 56.

[119] C'est dans ce contexte que la juge McLachlin a donné des précisions sur l'interaction entre la *Charte* et les privilèges parlementaires — ceux-ci devant, en cas de conflit, être conciliés comme suit :

Vu que le privilège parlementaire jouit d'un statut constitutionnel, il n'est pas « assujéti » à la *Charte*, comme le sont les lois ordinaires. Le privilège parlementaire et la *Charte* constituent tous deux des parties essentielles de la Constitution du Canada. Ils ne l'emportent pas l'un sur l'autre. De même qu'il faut maintenir le privilège parlementaire et l'immunité contre l'intervention inappropriée des tribunaux dans le processus parlementaire, il faut aussi maintenir les garanties démocratiques fondamentales

principles arise, the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them.

The necessary reconciliation of parliamentary privilege and s. 3 of the *Charter* is achieved by interpreting the democratic guarantees of s. 3 in a purposive way. The purpose of the democratic guarantees in the *Charter* must be taken to be the preservation of democratic values inherent in the existing Canadian Constitution, including the fundamental constitutional right of Parliament and the legislatures to regulate their own proceedings. Express words would be required to overthrow such an important constitutional principle as parliamentary privilege. It follows that s. 3 of the *Charter* must be read as being consistent with parliamentary privilege. [Emphasis added.]

(*Harvey*, at paras. 69-70)

[120] *Vaid* is the most recent case in which this Court considered the issue of parliamentary privileges. The former Speaker of the House of Commons was accused of constructively dismissing his chauffeur for discriminatory reasons and of engaging in workplace harassment against him within the meaning of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. The jurisdiction of the Canadian Human Rights Tribunal to investigate Mr. Vaid's complaint was challenged: para. 1. The House of Commons claimed a privilege over the management of all its employees.

[121] Binnie J., writing for a unanimous Court, set out a 12-point summary of the general principles applicable to parliamentary privileges: *Vaid*, at para. 29. In particular, he reaffirmed the importance of the necessity test on the basis that necessity is the historical foundation of every parliamentary privilege: para. 29(5). Necessity is assessed by reference to the legislative body's "sphere of activity". In other words, parliamentary privilege attaches to a "sphere of activity" if "the dignity and efficiency of the House" require it. This will be the case if the "sphere of activity" cannot be left to be dealt with under the ordinary law of the land without interfering with the assembly's ability to fulfill its constitutional

de la *Charte*. Lorsque surgissent des conflits apparents entre différents principes constitutionnels, il convient non pas de résoudre ces conflits en subordonnant un principe à l'autre, mais plutôt d'essayer de les concilier.

La conciliation nécessaire du privilège parlementaire et de l'art. 3 de la *Charte* est réalisée en donnant aux garanties démocratiques de l'art. 3 une interprétation fondée sur l'objet visé. Il faut considérer que les garanties démocratiques de la *Charte* visent à préserver les valeurs démocratiques inhérentes à la Constitution canadienne actuelle, dont le droit constitutionnel fondamental du Parlement et des législatures de réglementer leurs propres débats. Un principe constitutionnel aussi important que le privilège parlementaire ne peut être renversé que de façon expresse. Il s'ensuit que l'art. 3 de la *Charte* doit être interprété comme étant compatible avec le privilège parlementaire. [Nous soulignons.]

(*Harvey*, par. 69-70)

[120] C'est dans l'affaire *Vaid* que la Cour s'est penchée le plus récemment sur la question des privilèges parlementaires. Il était reproché à l'ancien président de la Chambre des communes d'avoir indirectement congédié son chauffeur pour des motifs discriminatoires, en plus de l'avoir harcelé dans le cadre de son emploi au sens de la *Loi canadienne sur les droits de la personne*, L.R.C. 1985, c. H-6. La compétence du Tribunal canadien des droits de la personne pour examiner la plainte de M. Vaid a été contestée : par. 1. La Chambre des communes a soulevé le privilège de gestion de l'ensemble de ses employés.

[121] Le juge Binnie, écrivant pour une cour unanime, a résumé en 12 points les principes généraux concernant les privilèges parlementaires : *Vaid*, par. 29. Il y a réaffirmé notamment l'importance du critère de la nécessité, puisqu'il s'agit selon lui du fondement historique de tout privilège parlementaire : par. 29(5). La nécessité est évaluée en fonction de la « sphère d'activité » de l'organe législatif. C'est-à-dire que le privilège parlementaire se rattache à une « sphère d'activité » si « la dignité et l'efficacité de l'Assemblée » le requiert. Ce sera le cas si cette « sphère d'activité » ne peut pas relever du régime de droit commun du pays sans que cela nuise à la capacité de l'assemblée de s'acquitter de

functions: para. 29(5) and (7). The necessity test is to be interpreted *broadly*: para. 29(7). Binnie J. also noted that while the recognition of a privilege means that the ordinary law of the land does not apply to the sphere of activity, it would be incorrect to say that parliamentary privilege creates a gap in the general public law of Canada; rather, it is an important part of that law, inherited from the parliamentary system of the United Kingdom by virtue of the preamble to the *Constitution Act, 1867*: para. 29(3).

[122] Having affirmed the place of the necessity test in our constitutional order, Binnie J. described categories of privilege that had already been recognized by the courts and had solid historical foundations. Some of the noteworthy examples he gave were: “the power to exclude strangers from proceedings . . . ; disciplinary authority over members . . . ; and non-members who interfere with the discharge of parliamentary duties” (*Vaid*, at para. 29(10) (emphasis added)).

[123] The issue in *Vaid* was whether a management privilege attaches to all relations between the House of Commons and its employees. Binnie J. reaffirmed the applicable test:

In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment 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. [Emphasis added.]

(*Vaid*, at para. 46)

[124] Binnie J. stressed the importance of the view taken by the Speaker of the House of Commons regarding what is necessary to ensure a sufficient degree of autonomy for a legislative assembly, even where the exercise of powers affects non-members. In this regard, he noted that “[o]f course . . . the

ses fonctions constitutionnelles : par. 29(5) et (7). Le critère de nécessité doit être interprété *largement* : par. 29(7). D’ailleurs, le juge Binnie a noté que, bien que la reconnaissance d’un privilège signifie que le régime de droit commun du pays ne s’applique pas à cette sphère d’activité, il serait faux d’affirmer que le privilège parlementaire crée un hiatus dans le droit public général du Canada; il en est plutôt une composante importante, héritée du régime parlementaire du Royaume-Uni aux termes du préambule de la *Loi constitutionnelle de 1867* : par. 29(3).

[122] Ayant affirmé la place du critère de nécessité dans notre ordre constitutionnel, le juge Binnie a décrit des catégories de privilèges ayant déjà été reconnues dans la jurisprudence et dont les assises historiques sont solides. Il a notamment cité à titre d’exemples : « le pouvoir d’exclure les étrangers des débats [. . .]; le pouvoir disciplinaire du Parlement à l’endroit de ses membres [. . .]; et des non-membres qui s’ingèrent dans l’exercice des fonctions du Parlement » (*Vaid*, par. 29(10) (nous soulignons)).

[123] Dans *Vaid*, il est question de savoir s’il existe un privilège de gestion qui s’applique à l’ensemble des relations entre la Chambre des communes et ses employés. Le juge Binnie réaffirme le critère applicable :

Pour justifier la revendication d’un privilège parlementaire, l’assemblée ou le membre qui cherchent à bénéficier de l’immunité qu’il confère doivent démontrer que la sphère d’activité à l’égard de laquelle le privilège est revendiqué est si étroitement et directement liée à l’exercice, par l’assemblée ou son membre, de leurs fonctions d’assemblée législative et délibérante, y compris leur tâche de demander des comptes au gouvernement, qu’une intervention externe saperait l’autonomie dont l’assemblée ou son membre ont besoin pour accomplir leur travail dignement et efficacement. [Nous soulignons.]

(*Vaid*, par. 46)

[124] Le juge Binnie a insisté sur l’importance de l’opinion du président de la Chambre des communes quant à ce qui est nécessaire pour assurer un degré suffisant d’autonomie à une assemblée législative, et ce, même lorsque l’exercice touche à des non membres. À cet égard, il a souligné que « les

courts will clearly give considerable deference to our own Parliament's view of the scope of autonomy it considers necessary to fulfill its functions": *Vaid*, at para. 40.

[125] In reviewing the Canadian and British case law, Binnie J. was unable to find any decisions supporting a privilege for *all* parliamentary employees: *Vaid*, at paras. 55-70. However, he did state that he had no doubt that privilege covers *some* employees: para. 75. The issue is whether "those categories of employees have any connection (or nexus) with [the House's] legislative or deliberative functions, or its role in holding the government accountable": *Vaid*, at para. 70; see also para. 62.

[126] As mentioned, once a claim to privilege is made out, the Court need not inquire into the merits of its exercise. At para. 48 of *Vaid*, Binnie J. sounded a note of caution that is very relevant in the instant case:

Once the issue of scope is resolved, it will be for the House to deal with the categories of employees who are covered by the privilege, and the courts will not enquire into its *exercise* in a particular case. The limitation is of great practical importance. If the courts below were correct about a "human rights exception", for example, any person dealing with the House of Commons could circumvent the jurisdictional immunity conferred by privilege simply by alleging discrimination on grounds contrary to the *Canadian Human Rights Act*. Such a rule would amount to an invitation to an outside body to review the reasons behind the exercise of the privilege in each particular case. This would effectively defeat the autonomy of the legislative assembly which is the *raison d'être* for the doctrine of privilege in the first place. [Emphasis added; emphasis in original deleted.]

(4) Summary

[127] In our opinion, this historical overview highlights the following principles that guide our analysis of the present case:

tribunaux feront certes preuve d'une grande retenue quant au degré d'autonomie dont notre propre Parlement estime devoir bénéficier pour s'acquitter de ses fonctions » : *Vaid*, par. 40.

[125] En étudiant la jurisprudence canadienne et britannique, le juge Binnie a été incapable de trouver des décisions justifiant l'existence d'un privilège pour l'ensemble des employés du Parlement : *Vaid*, par. 55-70. Il a cependant précisé ne pas douter que le privilège couvre *certain*s employés : par. 75. La question est de savoir si les employés visés « appartiennent à une catégorie d'employés ayant quelque chose à voir (un lien) avec les fonctions législatives ou délibératives de la Chambre ou avec sa tâche de demander des comptes au gouvernement » : *Vaid*, par. 70; voir aussi par. 62.

[126] Rappelons que, une fois l'existence d'un privilège établie, la Cour n'a pas à évaluer le bien-fondé de son exercice. D'ailleurs au par. 48 de *Vaid*, le juge Binnie a émis un avertissement fort pertinent en l'espèce :

Une fois la question de l'étendue du privilège résolue, il reviendra à la Chambre d'agir à l'égard des employés appartenant aux catégories visées par le privilège et l'exercice du privilège dans un cas particulier ne sera pas assujéti à l'examen des tribunaux. Il s'agit d'une restriction fort importante sur le plan pratique. À supposer, par exemple, que les tribunaux d'instance inférieure aient eu raison de conclure à l'existence d'une « exception fondée sur les droits de la personne », quiconque traite avec la Chambre des communes pourrait contourner l'immunité juridictionnelle conférée par un privilège simplement en alléguant qu'un acte discriminatoire a été commis en violation de la *Loi canadienne sur les droits de la personne*. Une telle règle équivaldrait à inviter un organe externe à contrôler les raisons qui sous-tendent l'exercice du privilège dans chaque cas particulier. L'autonomie de l'assemblée législative, qui au départ est la raison d'être de la doctrine du privilège parlementaire, serait ainsi, de fait, réduite à néant. [Nous soulignons; soulignement dans l'original omis.]

(4) Sommaire

[127] À notre avis, ce survol historique met en évidence les principes suivants qui guident notre analyse du présent dossier :

1. Since 1867, parliamentary privileges have been entrenched in the Constitution. They are absolute. Because they have equivalent constitutional status, the *Charter* must be read as being consistent with them and not as limiting or abrogating them;
2. Because parliamentary privileges flow from the fundamental principles of our constitutional system, the fact that the ordinary law does not apply to them is not in any way inconsistent with the rule of law;
3. The jurisdiction of the courts with respect to parliamentary privileges is narrow — they can only ascertain the existence and scope of such privileges. Even then, they must give considerable deference to the view taken by legislative assemblies and their speakers or presidents of the scope of autonomy they consider necessary to fulfill their functions;
4. Only legislative assemblies have jurisdiction over the exercise of their privileges. Furthermore, where a statute appears to limit the exercise of a privilege within a protected sphere, the interpretation proposed by the speaker or president must be given predominant weight in the analysis;
5. The courts must rely on the necessity test to ascertain the existence and scope of privileges. The onus is on the legislative assembly to show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment 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;
6. The necessity test is concerned with a “sphere of activity” of the legislative body that will be excluded from the ordinary law. Within a sphere, each specific instance of the exercise of a privilege need not be shown by the legislative assembly to be necessary;
1. Depuis 1867, les privilèges parlementaires sont consacrés par la Constitution. Ils sont absolus. Vu leur statut constitutionnel équivalent, la *Charte* doit être interprétée comme étant compatible avec ces privilèges, sans les limiter ni les abroger;
2. Puisque les privilèges parlementaires découlent des principes fondamentaux de notre régime constitutionnel, le fait que le droit commun ne s'applique pas à leur égard n'est pas du tout incompatible avec la primauté du droit;
3. Les tribunaux jouissent d'une compétence étroite en ce qui concerne les privilèges parlementaires — ils peuvent uniquement constater leur existence et leur portée. Même, ce faisant, les tribunaux doivent faire preuve d'une grande retenue quant au degré d'autonomie dont les assemblées législatives et les présidents de ces assemblées estiment devoir bénéficier pour s'acquitter de leurs fonctions;
4. Seules les assemblées législatives ont juridiction quant à l'exercice de leurs privilèges. D'ailleurs, lorsqu'une loi paraît limiter l'exercice d'un privilège à l'intérieur d'une sphère protégée, l'interprétation proposée par le président doit jouir d'un poids prépondérant dans l'analyse;
5. C'est en fonction du critère de la nécessité que les tribunaux doivent constater l'existence et l'étendue des privilèges. Les assemblées législatives ont le fardeau de démontrer que la sphère d'activité à l'égard de laquelle le privilège est revendiqué est si étroitement et directement liée à l'exercice, par l'assemblée ou son membre, de leurs fonctions d'assemblée législative et délibérante, y compris leur tâche de demander des comptes au gouvernement, qu'une intervention externe saperait l'autonomie dont l'assemblée ou son membre ont besoin pour accomplir leur travail dignement et efficacement;
6. Le critère de la nécessité s'attache à une « sphère d'activité » de l'organe législatif, qui sera exclue du régime de droit commun. À l'intérieur d'une sphère, il n'est pas nécessaire pour l'assemblée législative de démontrer que chaque cas précis d'exercice d'un privilège est nécessaire;

7. It is well established that legislative assemblies have the privilege to exclude strangers from their proceedings. This privilege is necessary for them to protect themselves from any impediment to their proper functioning. The sergeant-at-arms has historically played an important role in the exercise of this privilege and represents the coercive power required to enforce the independence of a legislative assembly;

8. Though legislative assemblies do not have any privilege over the management of all their employees, a privilege undoubtedly attaches to an assembly's relations with *some* of its employees, namely those who have a connection with its legislative or deliberative functions.

[128] Having identified the applicable principles, we turn to a discussion of the case before us.

B. *The Guards Were Dismissed in the Exercise of the Assembly's Parliamentary Privilege*

[129] In this Court, the President relied on two privileges to ground his jurisdiction: the privilege over the management of employees and the privilege to exclude strangers. In our view, this case lies at the intersection of these two privileges.

[130] We begin by acknowledging that there is some overlap among the different types of privilege. In addition, the privileges claimed in this case are unwritten constitutional principles, which gives them a considerable degree of flexibility. They are subject to just one rule: necessity.

[131] Our position is simple. All of the guards' tasks fall within a *sphere of activity* that is necessary to the proper functioning of the Assembly, namely security. In particular, the guards exercise the privilege to exclude strangers on the President's behalf. In our view, employees to whom the exercise of a recognized parliamentary privilege is delegated necessarily perform a function that is closely and directly connected with the Assembly's activities. As

7. Il est bien établi que les assemblées législatives jouissent du privilège d'exclure les étrangers de leurs débats. Celui-ci est nécessaire pour que les assemblées législatives puissent se protéger contre tout obstacle à leur bon fonctionnement. Historiquement, le sergent d'armes a joué un rôle important dans l'exercice de ce privilège; il représente le pouvoir coercitif nécessaire pour faire respecter l'indépendance des assemblées législatives;

8. Bien que les assemblées législatives ne jouissent d'aucun privilège de gestion sur l'ensemble de leurs employés, il ne fait aucun doute que les relations entre l'assemblée et *certaines* de ses employés sont sujettes au privilège, soit les employés qui ont un lien avec les fonctions législatives ou délibératives de l'assemblée.

[128] Ayant cerné les principes applicables, nous abordons l'analyse du cas d'espèce.

B. *Le congédiement des gardiens fait partie de l'exercice du privilège parlementaire de l'Assemblée*

[129] Devant la Cour, le Président a invoqué deux privilèges pour établir sa compétence : le privilège de gestion des employés et le privilège d'expulsion des étrangers. Selon nous, la présente affaire se trouve à l'intersection de ces deux privilèges.

[130] D'emblée, nous reconnaissons qu'il existe un certain chevauchement entre les différents types de privilèges. D'ailleurs, les privilèges invoqués en l'espèce sont des principes constitutionnels non écrits, ce qui leur confère un degré considérable de flexibilité. Ils obéissent à une seule règle : la nécessité.

[131] Notre position est simple. L'entière des tâches qui relèvent des gardiens fait partie d'une *sphère d'activité* nécessaire au bon fonctionnement de l'Assemblée, soit la sécurité. Ils exercent notamment, au nom du Président, le privilège d'expulsion des étrangers. Selon nous, un employé à qui est délégué l'exercice d'un privilège parlementaire reconnu exerce nécessairement une fonction présentant un lien étroit et direct avec les activités de l'Assemblée.

a result, their labour relations fall within the scope of the privilege over the management of employees. We are therefore of the opinion that a decision concerning their dismissal is made in the *exercise* of this privilege — and that it is not reviewable by a court or tribunal.

[132] As we have seen, the cases clearly establish that parliamentary privilege attaches to a *sphere of activity* that is necessary to the proper functioning of the Assembly.

[133] In light of the fact that both the Assembly and the Parliament of Canada have been the victims of armed attacks in our recent history, we have no difficulty concluding that security is essential to the proper functioning of legislative assemblies. In a parliamentary democracy, there can be no free debate without security. Security is one of the spheres of activity necessary to proceedings in an assembly. This view is not controversial. Indeed, it is shared by our colleague Karakatsanis J. (para. 38), the majority of the Quebec Court of Appeal (para. 79) and Morin J.A., dissenting (paras. 101-2). It should be borne in mind that the coercive power of the Assembly, which has historically been vested in the sergeant-at-arms, has been recognized by the courts as being essential to its functioning. The guards' tasks therefore fall within a *sphere of activity* “so closely and directly connected with the fulfilment 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”: *Vaid*, at para. 46.

[134] Only by carving up this sphere of activity have the majority of the Court of Appeal and our colleague Karakatsanis J. been able to find that the guards' employment is not covered by parliamentary privileges. In particular, Karakatsanis J. states that it might be easier to satisfy the necessity test if the management privilege could protect a limited part of the functions performed by a category of employees: para. 37. This proposition is unworkable and

Par conséquent, ses relations de travail sont visées par le champ d'application du privilège de gestion des employés. Ainsi, nous sommes d'avis que la décision relative à son congédiement relève de l'*exercice* de ce privilège — et qu'elle ne peut être révisée par les tribunaux.

[132] Comme nous l'avons déjà constaté, la jurisprudence établit de façon évidente que le privilège parlementaire se rattache à une certaine *sphère d'activité* nécessaire au bon fonctionnement de l'Assemblée.

[133] Considérant que tant l'Assemblée que le Parlement du Canada ont été victimes d'attaques armées dans notre histoire récente, nous n'avons aucune difficulté à conclure que la sécurité est essentielle au bon fonctionnement des assemblées législatives. Dans une démocratie parlementaire, il ne peut y avoir de débats libres sans sécurité. La sécurité est une telle sphère d'activité nécessaire aux travaux de l'assemblée. Cette opinion n'est pas controversée. D'ailleurs, notre collègue la juge Karakatsanis (par. 38), les juges majoritaires de la Cour d'appel du Québec (par. 79) et le juge Morin, dissident (par. 101-102), y souscrivent. Rappelons que le pouvoir coercitif de l'Assemblée, historiquement attribué au sergent d'armes, a été reconnu par les tribunaux comme essentiel à son fonctionnement. Ainsi, les tâches des gardiens s'insèrent dans une *sphère d'activité* « si étroitement et directement liée à l'exercice, par l'assemblée ou son membre, de leurs fonctions d'assemblée législative et délibérante, y compris leur tâche de demander des comptes au gouvernement, qu'une intervention externe saperait l'autonomie dont l'assemblée ou son membre ont besoin pour accomplir leur travail dignement et efficacement » : *Vaid*, par. 46.

[134] C'est uniquement en morcelant cette sphère d'activité que les juges majoritaires de la Cour d'appel et notre collègue, la juge Karakatsanis, peuvent conclure que l'emploi des gardiens n'est pas visé par les privilèges parlementaires. En effet, la juge Karakatsanis indique notamment qu'il pourrait être plus facile de respecter le test de la nécessité si une partie limitée des fonctions d'une catégorie d'employés pouvait être protégée par le privilège

unrealistic: see *President of the Legislative Council v. Kosmas*, [2008] SAIRC 41, 175 I.R. 269, at para. 31. *Vaid*, a recent decision of this Court, indicates that the analysis must focus on the “sphere of activity” and “categories of employees”, not on each employee’s specific tasks (para. 29(5) and (6) and para. 62). In any event, *all* of the guards’ tasks relate to the sphere of security. Since security is a “necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld” (*New Brunswick Broadcasting*, at p. 383), courts and tribunals have no jurisdiction over it.

[135] Morin J.A., dissenting in the Court of Appeal, also noted that the majority of that court had artificially carved up the relevant sphere of activity. He wrote:

[TRANSLATION] Even though the guards are not armed and have no power of arrest, they clearly help ensure the security of the National Assembly. It is true that special constables and officers of the Sûreté du Québec are also involved in providing security services. However, this sphere of activity cannot be carved up, as the arbitrator did, in an attempt to play down the importance of the duties performed by the National Assembly’s guards, at the risk of undermining the coherence and efficiency of the security system established by the Assembly. [Emphasis added; para. 101.]

[136] The coherence and efficiency of security in general are essentially a matter falling within the exercise of the President’s privilege to ensure the security of the Assembly’s precincts. The decisions made on the front lines are often the most important ones.

[137] Not only is the sphere of activity, which includes all of the guards’ tasks, necessary to the proper functioning of the Assembly — which would be enough in itself to establish the management privilege — but the guards also exercise one of the President’s parliamentary privileges: the privilege to exclude strangers. This is a conclusive reason why the President should succeed; it does not “merely demonstrat[e] that a category of employees performs important tasks that promote the ability of

de gestion : par. 37. Cette affirmation est impraticable et irréaliste : voir *President of the Legislative Council c. Kosmas*, [2008] SAIRC 41, 175 I.R. 269, par. 31. *Vaid*, un précédent récent de la Cour, indique que c’est la « sphère d’activité » et les « catégories d’emploi » qui font l’objet de l’analyse, pas les tâches précises de chaque employé (par. 29(5), (6) et par. 62). De toute façon, *l’ensemble* des tâches des gardiens sont reliées à la sphère de la sécurité. La sécurité étant une « catégorie nécessaire de sujets sans lesquels la dignité et l’efficacité de l’Assemblée ne sauraient être maintenues » (*New Brunswick Broadcasting*, p. 383), les tribunaux n’ont pas compétence en la matière.

[135] Le juge Morin, dissident à la Cour d’appel, a également relevé ce morcellement artificiel auquel ont procédé les juges majoritaires de la Cour d’appel. Il a écrit :

Même si les gardiens ne sont pas armés et n’ont pas le pouvoir d’arrestation, ils contribuent de façon évidente à assurer la sécurité de l’Assemblée nationale. Il est vrai que des constables spéciaux et des agents de la Sûreté du Québec sont aussi impliqués dans les services de sécurité. On ne peut toutefois morceler cette sphère d’activité, comme l’arbitre l’a fait, pour tenter de diminuer l’importance des fonctions exercées par les gardiens de l’Assemblée nationale, au risque de nuire à la cohérence et à l’efficacité du système de sécurité mis en place à l’Assemblée. [Nous soulignons; par. 101.]

[136] Cette cohérence et cette efficacité de la sécurité en général sont en somme une question relevant de l’exercice du privilège du Président d’assurer la sécurité de l’enceinte de l’Assemblée. Les décisions qui sont prises en première ligne sont souvent les plus importantes.

[137] Non seulement la sphère d’activité, dans laquelle s’inscrivent toutes les tâches des gardiens, est-elle nécessaire au bon fonctionnement de l’Assemblée — ce qui serait suffisant en soi pour établir le privilège de gestion — mais ces gardiens exercent aussi un des privilèges parlementaires du Président : soit le privilège d’exclure les étrangers. C’est un motif déterminant pour justifier que le Président doit avoir gain de cause; en effet, il ne fait pas que « démontrer simplement qu’une catégorie d’employés

the assembly to discharge its functions”: reasons of Karakatsanis J., at para. 40. This category of employees does far more than simply *promote* the Assembly’s ability to discharge its functions; it *exercises, on the President’s behalf*, a privilege that is essential to the Assembly’s sovereignty. Karakatsanis J. errs in disregarding this distinction.

[138] It is essential that the Assembly be able to perform its constitutional functions with dignity and efficiency, without any disturbance of its proceedings. Both members of the public and parliamentarians themselves may, through their misbehaviour, interfere with the orderly conduct of proceedings. This is why the Assembly has the parliamentary privilege to exclude strangers and the exclusive power to discipline its members and *non-members* who interfere with the discharge of its duties. For this purpose, the President may order any person to maintain order and decorum. This inherent privilege was recognized by this Court in *New Brunswick Broadcasting and Vaid*. These functions, historically performed by the sergeant-at-arms, are closely and directly connected with proceedings in the Assembly; they are essential to the expression of its sovereignty: H. Cauchon, *Le privilège parlementaire de gestion du personnel des assemblées législatives au Canada* (2008) (online), at p. 83; see also *Thompson v. McLean* (1998), 37 C.C.E.L. (2d) 170 (Ont. C.J. (Gen. Div.)), at paras. 39-41.

[139] In our view, there is no doubt that the connection required to ground a management privilege (*Vaid*, at paras. 70 and 75) will be established if it is shown that a category of employees exercises or participates in exercising, in whole or in part, a parliamentary privilege that is both recognized and *necessary*. The reason is obvious. The President cannot exercise the Assembly’s privileges alone. For example, the exercise of the privilege to exclude strangers and to maintain discipline within parliamentary precincts was historically delegated to the sergeant-at-arms. However, as shown by *Payson v. Hubert* (1904), 34 S.C.R. 400, at pp. 416-17, where a speaker or president orders that someone be removed, the order can be carried out by another person, such

accomplir des tâches importantes qui contribuent à la capacité de l’assemblée de s’acquitter de ses fonctions » : motifs de la juge Karakatsanis, par. 40. Bien plus que simplement *promouvoir* la capacité de l’Assemblée d’assumer ses fonctions, cette catégorie d’employés *exerce au nom du Président* un privilège essentiel à la souveraineté de l’Assemblée. La juge Karakatsanis erre en ignorant cette distinction.

[138] Il est essentiel que l’Assemblée puisse s’acquitter de ses fonctions constitutionnelles digne-ment et efficacement, sans que le déroulement de ses travaux ne soit perturbé. Tant les membres du public que les parlementaires eux-mêmes peuvent, par leur mauvaise conduite, entraver le bon fonctionnement des délibérations. C’est pourquoi l’Assemblée possède le privilège parlementaire d’exclure des étrangers et la compétence exclusive d’assurer la discipline à l’égard de ses membres et des *non-membres* qui s’ingèrent dans l’exercice de ses fonctions. Pour ce faire, le Président peut ordonner à quiconque de faire maintenir l’ordre et le décorum. Ce privilège inhérent a été reconnu par notre Cour dans *New Brunswick Broadcasting et Vaid*. Ces fonctions, exercées historiquement par le sergent d’armes, ont un lien étroit et direct avec les travaux de l’Assemblée; elles sont essentielles à l’expression de sa souveraineté : H. Cauchon, *Le privilège parlementaire de gestion du personnel des assemblées législatives au Canada* (2008) (en ligne), p. 83; voir aussi *Thompson c. McLean* (1998), 37 C.C.E.L. (2d) 170 (C.J. Ont. (Div. gén.)), par. 39-41.

[139] Selon nous, il n’y a aucun doute que le lien nécessaire pour établir l’existence d’un privilège de gestion (*Vaid*, par. 70 et 75) est établi s’il est démontré qu’une catégorie d’employés exerce ou participe à l’exercice, en tout ou en partie, d’un des privilèges parlementaires reconnus et *nécessaires*. Cela s’explique aisément. Le Président ne peut exercer seul les privilèges de l’Assemblée. Par exemple, l’exercice du privilège d’expulsion des étrangers et de discipline dans l’enceinte du Parlement était historiquement délégué au sergent d’armes. Toutefois, comme l’a démontré l’affaire *Payson c. Hubert* (1904), 34 R.C.S. 400, p. 416-417, l’ordre d’expulsion donné par le président peut être exécuté notamment par un gardien de portes, qui, en exerçant un

as a doorkeeper. In exercising a parliamentary privilege, that person comes within a protected sphere of activity and therefore has the immunity conferred by the privilege to exclude strangers. Conversely, the speaker or president — who has the last word within this protected sphere of activity — can at any time revoke this delegation and prevent a guard from exercising this privilege on his or her behalf.

[140] Karakatsanis J. argues that it is irrelevant that the employees exercise a delegated privilege in the performance of their duties, since the issue here is whether “the dismissals of employees who implement this privilege on the President’s behalf must be immune from external review for the Assembly to be able to discharge its legislative mandate”: para. 55 (emphasis added). This distinction disregards the jurisdictional aspect of the issue. In our view, the dismissal of an employee to whom a privilege has been delegated is the ultimate exercise of the management privilege. Otherwise, the delegation of a privilege would automatically mean its extinction, since the President would lose *effective* control of it — that is, control over the identity of the employees responsible for obeying the orders and instructions given by the President for the benefit of parliamentarians.

[141] To preserve the integrity of the privileges of the Assembly and its members, the President must be able to manage the employees who exercise these privileges without having his or her decisions called into question. The courts cannot dictate to the Assembly how it must go about ensuring the security of its members within its walls by forcing it to employ people the President no longer trusts. It would be a subversion of parliamentary privileges to make them subject to judicial discretion.

[142] If the President no longer trusts a guard, for whatever reason, and claims privilege, an arbitration tribunal cannot force the President to rely on such an individual to exercise a privilege. In the present case, the employees concerned are seeking reinstatement. This decision directly affects the *exercise* of the President’s privilege over the management of employees and indirectly affects the President’s privilege to exclude strangers. It has a direct impact

privilège parlementaire intègre une sphère d’activité protégée et, de ce fait, bénéficie de l’immunité que procure le privilège d’expulsion. Inversement, le président — qui a le dernier mot à l’intérieur de cette sphère d’activité protégée — peut à tout moment révoquer cette délégation et empêcher un gardien d’exercer ce privilège en son nom.

[140] La juge Karakatsanis soutient qu’il n’est pas pertinent que les employés exercent un privilège délégué dans le cadre de leurs fonctions, puisque la question en l’espèce est celle de savoir si « la décision de congédier des employés qui exercent ce privilège au nom du président doit être à l’abri de toute révision externe pour que l’Assemblée puisse s’acquitter de son mandat législatif » : par. 55 (nous soulignons). Cette distinction ignore l’aspect de la question relatif à la compétence. À notre avis, le congédiement d’un employé à qui un privilège a été délégué est l’exercice ultime du privilège de gestion. Autrement, la délégation d’un privilège signifierait automatiquement son extinction puisque le Président en perdrait le contrôle *effectif*, soit le contrôle sur l’identité des employés ayant la responsabilité d’obéir à ses ordres et directives données au bénéfice des parlementaires.

[141] Pour préserver l’intégrité des privilèges de l’Assemblée et de ses membres, le Président doit pouvoir gérer le personnel qui les exerce sans que ses décisions ne soient remises en cause. Les tribunaux ne peuvent dicter à l’Assemblée la manière dont elle veille à la sécurité de ses membres à l’intérieur de ses murs en lui imposant des employés en qui le Président n’a plus confiance. Ce serait dénaturer les privilèges parlementaires que de les soumettre au bon vouloir des tribunaux judiciaires.

[142] Si le Président n’a plus confiance en un gardien, peu importe le motif, et qu’il invoque son privilège, un tribunal d’arbitrage ne peut le forcer à compter sur un tel individu pour exercer son privilège. Dans le présent dossier, les employés visés demandent leur réintégration. Cette décision touche directement à l’*exercice* du privilège de gestion des employés et indirectement au privilège d’expulsion des étrangers du Président. En effet, cette décision

on the exercise of the President's absolute privilege to determine the identity and conduct of security staff and the manner in which they ensure that parliamentary proceedings are not unduly interrupted or disturbed. After all, responsibility for the security of the Assembly's precincts rests squarely on the shoulders of its President: s. 116 of the *ARNA*. All decisions relating to security — including decisions concerning the employees to whom the exercise of privileges is delegated — therefore fall within this “sphere of activity”.

[143] Once the courts have found that the sphere of activity and the category of employees are necessary to the proper functioning of the Assembly, the inquiry ends, since the privilege has been established. There is thus no need to consider, as Karakatsanis J. does, whether grievance arbitration — a procedure for reviewing a decision that unquestionably concerns the exercise of privilege — may interfere with the proper functioning of the Assembly: para. 4. This is a serious jurisdictional error that distorts the test laid down in *Vaid*.

[144] Furthermore, Karakatsanis J. does not focus her analysis on the existence of a privilege with respect to a category of employees or a sphere of activity, as required by this Court's decisions: *New Brunswick Broadcasting*, at p. 383; *Vaid*, at paras. 29(5), (6), (7), (9) and (10) and paras. 62 and 70. She erroneously considers whether grievance arbitration may jeopardize the dignity of the institution, even though this question has nothing to do with the necessity test itself. Grievance arbitration as a dispute resolution mechanism is certainly not *undignified*. In truth, this reasoning could always justify interference by a court or tribunal with the labour relations of *all* of the Assembly's employees, regardless of whether their functions are directly connected with its proceedings.

[145] In practice, if a grievance arbitrator could review the President's decision to terminate the guards' employment, this would mean that part of the exercise of the President's own duties becomes *de facto* reviewable by a court or tribunal. The Assembly

affecte directement l'exercice du privilège absolu du Président de décider de l'identité et de la conduite du personnel de sécurité ainsi que de la manière dont celui-ci veille à ce que les travaux parlementaires ne soient pas indûment interrompus ou dérangés. Après tout, la responsabilité d'assurer la sécurité de l'enceinte de l'Assemblée repose directement sur les épaules de son président : art. 116 de la *LAN*. De ce fait, toutes les décisions relatives à la sécurité — notamment celles qui concernent les employés à qui l'exercice des privilèges est délégué — sont comprises dans cette « sphère d'activité ».

[143] Une fois que les tribunaux ont conclu que la sphère d'activité et la catégorie d'emploi sont nécessaires au bon fonctionnement de l'Assemblée, l'analyse prend fin puisque l'existence du privilège est établie. Il n'y a alors pas lieu de se demander, comme le fait la juge Karakatsanis, si l'arbitrage de grief — une procédure visant à réviser une décision qui touche sans contredit l'exercice du privilège — peut interférer avec le bon fonctionnement de l'Assemblée : par. 4. Il s'agit d'une erreur juridictionnelle grave qui dénature le test établi dans l'arrêt *Vaid*.

[144] D'ailleurs, la juge Karakatsanis ne centre pas son analyse sur l'existence d'un privilège à l'égard d'une catégorie d'emplois ou d'une sphère d'activité, tel que le requiert la jurisprudence de la Cour : *New Brunswick Broadcasting*, p. 383; *Vaid*, par. 29(5), (6), (7), (9) et (10) et par. 62 et 70. Elle se demande erronément si l'arbitrage de grief peut porter atteinte à la dignité de l'institution. Pourtant, cette question n'a rien à voir avec le critère de nécessité lui-même. L'arbitrage de grief, comme mécanisme de règlement des différends, n'est certainement pas *indigne*. En vérité, ce raisonnement pourrait toujours justifier l'ingérence des tribunaux dans les relations de travail de la *totalité* des employés de l'Assemblée, que leurs fonctions aient ou non un lien direct avec ses travaux.

[145] En pratique, si un arbitre de grief pouvait réviser la décision du Président de mettre fin à l'emploi des gardiens, cela signifierait qu'une partie de l'exercice des fonctions du Président lui-même devient *de facto* sujette au contrôle par les tribunaux.

would therefore lose control over decisions concerning its security. Courts and tribunals may not interfere in the Assembly's internal affairs in this manner. The sphere of activity relating to security, and most certainly the category of employees that includes the guards, are subject to an absolute privilege. The Assembly is sovereign in this regard, and it is not the role of a court or tribunal to assess the exercise of the privilege over the management of employees once it is claimed.

[146] We explicitly reject the other grounds that appear to underlie Karakatsanis J.'s narrow interpretation of parliamentary privileges.

[147] Karakatsanis J. relies on the concurring reasons of McLachlin J. in *Harvey* to adopt a narrow interpretation of these privileges on the basis that they might undermine the guards' rights under s. 2(d) of the *Charter* (paras. 28 and 56). However, this was not the position taken by McLachlin J. Rather, she stated that since the *Charter* and parliamentary privilege are both part of the Constitution, "[n]either prevails over the other", and it is the *Charter* that "must be read as being consistent with parliamentary privilege": *Harvey*, at paras. 69-70. Yet the argument that a privilege repeatedly recognized as full and absolute must have its *scope* determined in light of the *Charter* subordinates parliamentary privileges to the *Charter*. To be clear, the necessity test is entirely unrelated to *Charter* rights.

[148] Karakatsanis J. readily justifies her narrow analysis of privilege on the basis of the impact that recognizing a privilege over non-members of the Assembly would have: paras. 25 and 56. While it is true that courts are apt to look "more closely" at cases in which privilege has an impact on non-members of a legislative assembly, this statement is of little assistance: *Vaid*, at para. 29(12). Because such issues are especially important to the balance struck by our constitutional system, close scrutiny is required in every case.

L'Assemblée perdrait donc le contrôle sur les décisions touchant à sa sécurité. Les tribunaux ne peuvent s'immiscer ainsi dans les affaires internes de l'Assemblée. La sphère d'activité relative à la « sécurité », et très certainement la catégorie d'emplois qu'occupent les gardiens, est visée par un privilège absolu. L'Assemblée est souveraine à cet égard et il ne revient pas aux tribunaux d'évaluer l'exercice du privilège de gestion des employés lorsqu'il est invoqué.

[146] Nous rejetons explicitement les autres motifs qui semblent sous-tendre l'interprétation restreinte donnée par la juge Karakatsanis aux privilèges parlementaires.

[147] La juge Karakatsanis se fonde sur les motifs concordants de la juge McLachlin dans l'arrêt *Harvey* pour adopter une interprétation restreinte des privilèges parce que ceux-ci pourraient porter atteinte au droit des gardiens protégés par l'al. 2d) de la *Charte* (par. 28 et 56). Or, ce n'est pas la position qu'a défendue la juge McLachlin. Elle a plutôt affirmé que, la *Charte* et les privilèges parlementaires étant tous deux des éléments de la Constitution, ils « ne l'emportent pas l'un sur l'autre », et c'est la *Charte* qui « doit être interprété[e] comme étant compatible avec le privilège parlementaire » : *Harvey*, par. 69-70. Pourtant, l'argument voulant que la *portée* d'un privilège, dont le caractère complet et absolu a été reconnu à maintes reprises, soit déterminée à la lumière de la *Charte* subordonne les privilèges parlementaires à cette dernière. Pour être clair, le critère de la nécessité est totalement indépendant des droits protégés par la *Charte*.

[148] D'emblée, la juge Karakatsanis justifie son analyse restrictive des privilèges à la lumière de l'incidence qu'aurait la reconnaissance du privilège sur les non-membres de l'Assemblée : par. 25 et 56. S'il est vrai que les tribunaux peuvent examiner « de plus près » les affaires où le privilège a des répercussions sur des non-membres d'une assemblée législative, cette affirmation est d'un secours limité : *Vaid*, par. 29(12). Puisque ces questions revêtent une importance particulière pour l'équilibre de notre régime constitutionnel, un examen minutieux est de mise dans tous les cas.

[149] As we have already stated, the fact that parliamentary privileges may exclude a sphere of activity from the application of the ordinary law does not make them an exception to the rule of law; they are a distinct and undeniably important pillar in Canada's constitutional architecture. Binnie J. put this as follows in *Vaid*:

Parliamentary privilege does not create a gap in the general public law of Canada but is an important part of it, inherited from the Parliament at Westminster by virtue of the preamble to the *Constitution Act, 1867* and in the case of the Canadian Parliament, through s. 18 of the same Act (*New Brunswick Broadcasting*, at pp. 374-78; *Telezone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3d) 161 (C.A.), at p. 165; and *Samson Indian Nation and Band v. Canada*, [2004] 1 F.C.R. 556, 2003 FC 975).

(*Vaid*, at para. 29(3))

[150] In fact, the rule of law is upheld by recognizing that courts and tribunals do not have jurisdiction over the exercise of parliamentary privileges, not by creating exceptions that limit the sovereignty of a legislative assembly and by negating constitutional principles.

[151] We therefore have no choice but to conclude that the guards' employment falls within a privileged sphere of activity, that they were dismissed in the exercise of a parliamentary privilege and that, as a result, courts and tribunals have no jurisdiction to interfere.

C. *Impact of the ARNA*

[152] Having found that the President has a privilege in relation to the employees concerned, we must now consider the impact of the *ARNA* and determine whether the Assembly waived its privilege by enacting this statute. In our view, it did not.

[153] First, it is important to note the specificity of the *ARNA* of Quebec as legislation governing the internal affairs of the National Assembly, which are

[149] Comme nous l'avons déjà affirmé, le fait que les privilèges parlementaires peuvent soustraire une sphère d'activité à l'application du droit commun ne signifie pas que ceux-ci constituent une exception à la primauté du droit; ils sont un pilier distinct de l'architecture constitutionnelle canadienne dont l'importance est indéniable. Le juge Binnie l'a exprimé en ces termes dans *Vaid* :

Le privilège parlementaire ne crée pas un hiatus dans le droit public général du Canada; il en est plutôt une composante importante, héritée du Parlement du Royaume-Uni en vertu du préambule de la *Loi constitutionnelle de 1867* et, dans le cas du Parlement du Canada, en vertu de l'art. 18 de cette même loi (*New Brunswick Broadcasting*, p. 374-378; *Telezone Inc. c. Canada (Attorney General)* (2004), 69 O.R. (3d) 161 (C.A.), p. 165; et *Nation et bande indienne de Samson c. Canada*, [2004] 1 R.C.F. 556, 2003 CF 975).

(*Vaid*, par. 29(3))

[150] En fait, la primauté du droit est maintenue en reconnaissant que les tribunaux n'ont pas compétence sur l'exercice des privilèges parlementaires, plutôt qu'en créant des exceptions limitant la souveraineté d'une assemblée législative et en réduisant à néant des principes de nature constitutionnelle.

[151] Nous n'avons donc d'autre choix que de conclure que l'emploi des gardiens appartient à une sphère d'activité privilégiée, que leur congédiement s'inscrit dans l'exercice d'un privilège parlementaire, et que les tribunaux n'ont donc pas compétence pour intervenir à cet égard.

C. *L'effet de la LAN*

[152] Maintenant que nous avons conclu que le président détient un privilège à l'égard des employés visés, il y a lieu que nous nous questionnions sur l'incidence de la *LAN*, et que nous nous demandions si l'Assemblée a renoncé à son privilège en adoptant cette loi. Nous sommes d'avis que non.

[153] D'abord, il importe de souligner que la *LAN* du Québec est particulière puisqu'elle régit les affaires internes de l'Assemblée nationale, affaires qui

outside the scope of the courts' jurisdiction. It bears repeating that in *Bradlaugh*, the Court of Queen's Bench held that the House of Commons "has the exclusive power of interpreting the [*Parliamentary Oaths Act*], so far as the regulation of its own proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly": pp. 280-81 (emphasis added). In the same case, Stephen J. found that the "House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings": p. 278; see also Post, at p. 38. In its report entitled *Parliamentary Privilege: Report of Session 2013-14* (July 3, 2013), to which Karakatsanis J. refers, the House of Lords and House of Commons Joint Committee on Parliamentary Privilege expressed the view that this statement "holds true to this day and should do so in perpetuity": p. 8, para. 18 (emphasis added).

[154] Though not a definitive answer to the question, the interpretation proposed by the President must certainly be given predominant weight in determining whether the Assembly intended to limit its privileges. As Binnie J. recognized in *Vaid*, the courts must respect the view taken by a speaker or president of a statute dealing with the internal affairs of a legislative assembly: para. 40; *Telezone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3d) 161 (C.A.), at para. 32. In any event, we come to the same conclusion, namely that the ARNA does not have the effect of limiting the privileges held by the President, who may assert them when deemed necessary.

[155] The necessary starting point in interpreting the ARNA is undoubtedly its preamble, which recognizes that the Assembly must, among other things, protect its proceedings from all interference:

WHEREAS the people of Québec have a deep attachment to democratic principles of government;

sont hors de la portée juridictionnelle des tribunaux. Il faut rappeler que dans *Bradlaugh*, la Cour du Banc de la Reine a jugé que la Chambre des communes [TRADUCTION] « possède le pouvoir exclusif d'interpréter la [*Parliamentary Oaths Act*], dans la mesure où la réglementation de ses propres procédures à l'intérieur de ses murs est visée; et que, même si cette interprétation était erronée, la Cour n'a pas le pouvoir d'intervenir directement ou indirectement à cet égard » : p. 280-281 (nous soulignons). Dans cette même affaire, le juge Stephen a conclu que « la Chambre des communes n'est pas assujettie au contrôle des tribunaux de Sa Majesté lorsqu'elle applique les dispositions législatives portant sur sa procédure interne » : p. 278; voir aussi Post, p. 38. Dans le rapport intitulé *Parliamentary Privilege : Report of Session 2013-14* (3 juillet 2013), rédigé par le Joint Committee on Parliamentary Privilege de la Chambre des lords et de la Chambre des communes, rapport auquel la juge Karakatsanis fait référence, le comité conjoint a estimé que cette affirmation [TRADUCTION] « demeure vraie encore aujourd'hui et devrait le rester perpétuellement » : p. 8, par. 18 (nous soulignons).

[154] Sans qu'il s'agisse d'une réponse définitive sur la question, l'interprétation proposée par le Président doit certainement jouir d'un poids prépondérant lorsqu'il s'agit de déterminer si l'Assemblée avait l'intention de limiter ses privilèges. Comme l'a reconnu le juge Binnie dans *Vaid*, les tribunaux doivent faire preuve de respect à l'égard de l'opinion du président sur une loi portant sur les affaires internes d'une assemblée législative : par. 40; *Telezone Inc. c. Canada (Attorney General)* (2004), 69 O.R. (3d) 161 (C.A.), par. 32. Dans tous les cas, nous tirons la même conclusion, soit que la LAN n'a pas pour effet de limiter les privilèges du président, qui peut les invoquer lorsqu'il l'estime nécessaire.

[155] Pour interpréter la LAN, il faut sans aucun doute commencer par étudier son préambule, qui reconnaît que l'Assemblée doit notamment protéger ses travaux de toute interférence :

CONSIDÉRANT le profond attachement du peuple du Québec aux principes démocratiques de gouvernement;

Whereas the National Assembly is, through the elected representatives who compose it, the supreme and legitimate organ by which those principles are expressed and applied;

Whereas it behooves this Assembly, as the guardian of the historical and inalienable rights and powers of the people of Québec, to defend it against any attempt to despoil it of its rights and powers or to derogate from them;

Whereas it is befitting, therefore, that the perdurance, the sovereignty and the independence of the National Assembly be affirmed, and that its proceedings be protected against all interference,

[156] Upon reading this preamble, we must consider the scope given by the Union to ss. 110 and 120 of the *ARNA*. These sections are worded as follows:

110. Subject to this Act, the Assembly shall continue to be managed within the scope of the Acts, regulations and rules applicable.

The Office may, however, by regulation, derogate from the applicable Acts, regulations and rules by specifically indicating the provisions derogated from and the provisions that are to apply in their place and stead.

120. Every member of the personnel of the Assembly, except a casual employee, is a member of the personnel of the civil service, whether appointed under the Public Service Act (chapter F-3.1.1) or by derogation by virtue of the second paragraph of section 110, unless, in the latter case, the Office excludes him therefrom.

The Secretary General has, in respect of the personnel of the Assembly, the powers vested in a deputy minister by the Public Service Act.

[157] We have two comments on these provisions. First, s. 110 states that the Assembly “shall continue to be managed within the scope of the Acts, regulations and rules applicable”. In our view, this means that the ordinary law that continues to apply to the Assembly is necessarily defined by privilege, which has been a constant in Canada’s constitutional history. It seems clear to us that, except in cases where the Assembly has expressly provided otherwise, the Acts, regulations and rules of the ordinary law have

CONSIDÉRANT que l’Assemblée nationale, par l’intermédiaire des représentants élus qui la composent, est l’organe suprême et légitime d’expression et de mise en œuvre de ces principes;

CONSIDÉRANT qu’il incombe à cette Assemblée, en tant que dépositaire des droits et des pouvoirs historiques et inaliénables du peuple du Québec, de le défendre contre toute tentative de l’en spolier ou d’y porter atteinte;

CONSIDÉRANT qu’il convient, en conséquence, d’affirmer la pérennité, la souveraineté et l’indépendance de l’Assemblée nationale et de protéger ses travaux contre toute ingérence;

[156] À la lecture de ce préambule, il y a lieu de se questionner sur la portée que le Syndicat donne aux art. 110 et 120 de la *LAN* dont le libellé est le suivant :

110. Sous réserve de la présente loi, la gestion de l’Assemblée continue de s’exercer dans le cadre des lois, règlements et règles qui lui sont applicables.

Toutefois, le Bureau peut, par règlement, déroger à ces lois, règlements et règles en indiquant précisément les dispositions auxquelles il est dérogé et les dispositions qui s’appliqueront en leur lieu et place.

120. Tout membre du personnel de l’Assemblée, à l’exception d’un employé occasionnel, fait partie du personnel de la fonction publique, qu’il soit nommé en vertu de la Loi sur la fonction publique (chapitre F-3.1.1) ou par dérogation en vertu du deuxième alinéa de l’article 110, à moins que, dans ce dernier cas, le Bureau ne l’en exclue.

Le secrétaire général exerce, à l’égard du personnel de l’Assemblée, les pouvoirs que la Loi sur la fonction publique attribue au sous-ministre.

[157] Nous formulons deux remarques sur ces dispositions. Premièrement, l’art. 110 souligne que la gestion de l’Assemblée « continue de s’exercer dans le cadre des lois, règlements et règles qui lui sont applicables ». Ainsi, à notre avis, le régime de droit commun qui continue de s’appliquer à l’Assemblée est nécessairement défini par le privilège, qui a été une constante dans l’histoire constitutionnelle du Canada. Il nous semble évident que, sauf dans le cas où l’Assemblée l’a expressément prévu, les lois,

never applied to a sphere of activity that is subject to parliamentary privileges.

[158] Second, s. 120 of the *ARNA* deals with the power of the Office of the Assembly to exclude categories of employees from the personnel of the civil service, *but it does not mention the privileges of the President*, the person who holds and exercises privileges on the Assembly's behalf. Did the Assembly thus implicitly abolish the privilege over the management of employees *entirely* by incorporating its employees into the public service, even those who have a direct and necessary connection with its legislative and deliberative functions? Section 120 of the *ARNA* also deals with the management powers granted to the Secretary General. Did this delegation just as implicitly have the effect of partially withdrawing the privilege to exclude strangers from the President? It must be acknowledged that the wording of the *ARNA* is not clear. Moreover, the Union did not identify any parliamentary debates or proceedings showing that the members had parliamentary privileges in mind when they were studying the provisions of the *ARNA* dealing with employees' conditions of employment. In contrast, when the British House of Commons studied a bill that would apply labour legislation to its employees, the Deputy Speaker stated: "I have to call the attention of the House to the fact that privilege is involved in these amendments": United Kingdom, House of Commons, *Parliamentary Debates*, 5th ser., vol. 898, October 29, 1975, col. 1693-99. The amendments in question clearly indicated that "(3) Nothing in any rule of law or the law or practice of Parliament shall prevent proceedings under any enactment applied by subsection (1) or (2) above being instituted before an industrial tribunal": *Employment Protection Act 1975* (U.K.), 1975, c. 71, s. 122(3).

[159] This Court has recognized that parliamentary privileges have constitutional status. Logically, therefore, the statute must be interpreted in such a way that it does not implicitly abrogate some of these privileges: *New Brunswick Broadcasting*, at pp. 391-92. Conversely, it is undesirable to adopt

règlements et règles du droit commun ne se sont jamais appliqués à une sphère d'activité sujette aux privilèges parlementaires.

[158] Deuxièmement, l'art. 120 de la *LAN* traite des pouvoirs du Bureau de l'Assemblée d'exclure des catégories d'emploi du personnel de la fonction publique, *sans faire mention des privilèges du Président* — celui qui détient et exerce les privilèges au nom de l'Assemblée. Cette dernière a-t-elle ainsi implicitement aboli *entièrement* son privilège de gestion du personnel en intégrant ses employés à la fonction publique, même ceux ayant un lien direct et nécessaire avec ses fonctions législatives et délibératives? L'article 120 de la *LAN* traite également des pouvoirs de gestion attribués au secrétaire général. De façon tout aussi implicite, est-ce que cette délégation a eu pour effet de retirer au Président une partie du privilège d'expulsion des étrangers? Force est de constater que le libellé de la *LAN* n'est pas clair. Le Syndicat n'a d'ailleurs identifié ni débats ni travaux parlementaires qui démontreraient que les députés avaient les privilèges parlementaires à l'esprit lorsqu'ils ont étudié les articles de la *LAN* portant sur les conditions d'emploi du personnel. En revanche, lorsque la Chambre des communes britannique a étudié un projet de loi visant à assujettir ses employés à une loi du travail, le vice-président (« *Deputy Speaker* ») a déclaré : [TRADUCTION] « Je me dois de porter à l'attention de la Chambre le fait que ces amendements mettent en jeu la question du privilège » : Royaume-Uni, Chambre des communes, *Parliamentary Debates*, 5^e sér., vol. 898, 29 octobre 1975, col. 1693-1699. Les amendements en question indiquaient clairement que : [TRADUCTION] « (3) Aucune règle de droit ni aucune loi ou pratique du Parlement n'a pour effet d'empêcher l'engagement devant un tribunal du travail d'une instance fondée sur les textes de loi applicables en vertu du paragraphe (1) ou (2) qui précède » : *Employment Protection Act 1975* (R.-U.), 1975, c. 71, par. 122(3).

[159] Notre Cour a reconnu que les privilèges parlementaires jouissent d'un statut constitutionnel. Logiquement, il faut donc interpréter la loi de telle sorte qu'elle n'abroge pas implicitement certains de ces privilèges : *New Brunswick Broadcasting*, p. 391-392. À l'inverse, il n'est pas souhaitable de

an interpretation to the effect that the Assembly *implicitly* considers a privilege unnecessary, thereby denying its existence. Yet this is what Karakatsanis J. does. She gives with one hand and takes with the other. This criticism also applies to the reasons of Justice Rowe, who finds that the ARNA must take precedence in this case, even in respect of privileges that are otherwise *necessary*. In his view, the fact that the Assembly's employees are members of the public service and that powers to manage employees have been delegated to the Secretary General means that the management privilege and part of the privilege to exclude strangers have been *implicitly* abrogated.

[160] Considered as a whole, the material before us leads us to adopt the interpretation proposed by the President. In our opinion, more is needed to abrogate a constitutional privilege. In his reasons, Rowe J. argues that ss. 110 and 120 of the ARNA are also constitutional in nature because they are part of the constitution of the province: paras. 68-69. In our view, that conclusion has no bearing on the analysis. As in *New Brunswick Broadcasting*, it is necessary to reconcile constitutional rights rather than subordinating one to the other. The ARNA governs labour relations in the event that the Assembly does not assert its privileges. As a result, neither privilege nor the provisions of the ARNA are rendered meaningless.

[161] The Court of Appeal therefore did not err in its decision in *Association des juristes de l'État v. Québec (Procureur général)*, 2013 QCCA 1900. While it is true that Levesque J.A. cited with approval Brun, Tremblay and Brouillet, who themselves cited *Duke of Newcastle v. Morris* (1870), L.R. 4 H.L. 661 — a decision criticized by Binnie J. in *Vaid* — he did not err in interpreting the ARNA in light of constitutional principles of interpretation:

[TRANSLATION] These authors clearly illustrate their thinking when they add:

Finally, a parliamentary privilege prevails over laws that do not specifically contradict it: *Duke of Newcastle v. Morris* (1870), L.R. 4 H.L. 661. This is why, under

privilégier une interprétation selon laquelle, *implicitement*, l'Assemblée n'estimerait pas ce privilège nécessaire, niant ainsi du même coup son existence. C'est pourtant ce que fait la juge Karakatsanis. Elle donne d'une main et reprend de l'autre. Cette critique s'applique également aux motifs du juge Rowe qui retient que la LAN doit avoir préséance en l'espèce, même à l'égard de privilèges autrement *nécessaires*. Pour le juge Rowe, le fait que les employés de l'Assemblée fassent partie de la fonction publique et que les pouvoirs de gestion des employés aient été délégués au secrétaire général a *implicitement* abrogé le privilège de gestion et une partie du privilège d'expulsion des étrangers.

[160] Considérés dans leur ensemble, les éléments dont nous disposons nous poussent à adopter l'interprétation proposée par le Président. Selon nous, il faut plus pour abroger un privilège de nature constitutionnelle. Dans ses motifs, le juge Rowe soutient que les art. 110 et 120 de la LAN sont aussi de nature constitutionnelle, en ce sens qu'ils feraient partie de la constitution de la province : par. 68-69. Selon nous, cette conclusion n'a aucune incidence sur l'analyse. Comme dans *New Brunswick Broadcasting*, il faut concilier les droits constitutionnels, plutôt que d'en assujettir un à l'autre. La LAN régit les relations de travail advenant que l'Assemblée n'invoque pas ses privilèges. Ni le privilège ni les dispositions de la LAN ne sont ainsi vidés de leur sens.

[161] L'arrêt de la Cour d'appel dans *Association des juristes de l'État c. Québec (Procureur général)*, 2013 QCCA 1900, ne souffre donc d'aucune erreur. Certes, le juge Levesque cite en approuvant leurs propos les auteurs Brun, Tremblay et Brouillet, qui eux-mêmes citent *Duke of Newcastle c. Morris* (1870), L.R. 4 H.L. 661 — une décision critiquée par le juge Binnie dans *Vaid*; il ne commet toutefois pas d'erreur lorsqu'il interprète la LAN à la lumière des principes d'interprétation constitutionnels :

Ces auteurs illustrent bien leur pensée lorsqu'ils ajoutent :

Enfin, un privilège parlementaire prévaut sur les lois qui n'y contreviennent pas spécifiquement : *Duke of Newcastle c. Morris*, (1870) L.R. 4 H.L. 661. C'est

the general provisions of the *Act respecting public inquiry commissions*, R.S.Q., c. C-37, a member cannot be forced to testify while Parliament is in session. Similarly, general labour legislation was found to be inapplicable to employees of the Legislative Assembly in *M.G.E.A. v. Manitoba (Legislative Assembly Management Commission)* (1990), 63 Man. R. (2d) 37 (Q.B.), and *House of Commons v. Canada Labour Relations Board*, [1986] 2 F.C. 372 (C.A.), at p. 384. Also, the Ontario *Human Rights Code* could not be used to challenge the recital of a prayer every day the Legislative Assembly met, as provided for in its Standing Orders: *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 201 D.L.R. (4th) 698 (Ont. C.A.). Although it was qualified in *Vaid*, at pp. 703 and 713-15, the rule of interpretation referred to here can still apply in appropriate cases, in our view.

In short, to say that parliamentary privileges prevail over labour legislation does not necessarily mean that sections 110 and 120 of the ARNA have been stripped of all effect. All aspects of labour relations within the precincts of the National Assembly that are not covered by the parliamentary privilege over the management of employees remain subject to these provisions. It is necessary here to adopt an interpretation that is consistent with the application of constitutional principles. [Emphasis added.]

(paras. 30-31 (CanLII))

[162] Contrary to what Rowe J. argues, it is not a matter here of requiring *express language* in the ARNA; rather, it is a matter of requiring clear, unequivocal legislative intent. Such a requirement is not a retreat from the modern approach to statutory interpretation. In our view, the fact that the employees are members of the public service and that management of the Assembly's day-to-day business has been delegated to the Secretary General is not enough to abolish or modify parliamentary privileges that have such deep historical roots and that are still *necessary*. In fact, the interpretation adopted by Rowe J. implies that an express provision in the ARNA would be required to preserve the Assembly's privileges. In addition, it should be noted that Rowe J. deals only with the management privilege and disregards the impact of his interpretation on the exercise of the inherent privilege to

ainsi qu'on ne peut, en vertu des dispositions générales de la *Loi sur les commissions d'enquête*, L.R.Q., c. C-37, forcer un député à témoigner pendant une session du Parlement. De même, les lois du travail générales furent jugées inapplicables aux employés d'Assemblée législative dans *M.G.E.A. c. Manitoba (Legislative Assembly Management Commission)*, (1990) 63 Man. R. (2d) 37 (B.R.) et *Chambre des communes c. Conseil canadien des relations du travail*, [1986] 2 C.F. 372 (C.A.), 384. Aussi, le *Code ontarien des droits de la personne* n'a pu permettre d'attaquer la récitation de la prière prévue pour chaque séance par le Règlement de l'Assemblée législative : *Ontario (Speaker of the Legislative Assembly) c. Ontario (Human Rights Commission)* (2001), 201 D.L.R. (4th) 698 (C.A. Ont.). Même si elle fut nuancée dans *Vaid*, aux p. 703 et 713-715, nous croyons que la règle d'interprétation ici évoquée peut encore jouer dans les cas appropriés.

Bref, affirmer que les privilèges parlementaires ont préséance sur les lois du travail ne signifie pas pour autant que l'on purge les articles 110 et 120 de la LAN de tout effet. Tous les aspects des relations de travail réalisés dans l'enceinte de l'Assemblée nationale qui ne relèvent pas du privilège parlementaire de gestion du personnel restent assujettis à ces dispositions. Il y a lieu ici de privilégier une interprétation qui respecte l'application des principes constitutionnels. [Nous soulignons.]

(par. 30-31 (CanLII))

[162] Contrairement à ce que soutient le juge Rowe, il ne s'agit pas en l'espèce d'exiger la présence de *termes exprès* dans la LAN, mais plutôt de requérir une intention législative claire et non équivoque. Une telle exigence ne constitue pas un abandon de la méthode moderne d'interprétation des lois. Nous sommes d'avis que l'intégration des employés à la fonction publique et la délégation de la gestion des activités courantes de l'Assemblée au secrétaire général ne sont pas suffisantes pour abolir ou modifier des privilèges parlementaires dont les racines historiques sont aussi profondes et qui sont encore *nécessaires*. En vérité, l'interprétation du juge Rowe sous-entend que la LAN devrait contenir une disposition expresse à cet effet pour que les privilèges de l'Assemblée soient préservés. De surcroît, il faut souligner que le juge Rowe traite uniquement du privilège de gestion et ignore l'incidence de son

exclude strangers, an aspect that affects the employment of the security guards.

[163] In the end, the ARNA did not abolish any parliamentary privileges. Moreover, in view of the real ambiguity in ss. 110 and 120 of the ARNA, it is preferable to adopt the interpretation proposed by the President. The National Assembly of Québec is sovereign. Courts and tribunals cannot assume jurisdiction without a clear indication that the Assembly has conferred it on them.

V. Conclusion

[164] Over the centuries, parliamentary privileges have gradually taken their place within the broader principle of sovereignty of legislative assemblies. Indeed, the assertion of parliamentary privileges, defended on Parliament's behalf by a sergeant-at-arms, among others, has enabled Parliament to achieve a degree of independence from the other branches of government. Parliamentary privileges are not a tool for *protecting* the independence and sovereignty of legislative assemblies, but are in fact what has allowed them to exist. It was the assertion of privileges that ensured the development of a model in which the various branches acquired some independence from one another. Recognition of the fact that parliamentary privileges are an expression of the Assembly's sovereignty makes it all the more necessary to respect the Assembly's jurisdiction.

[165] For these reasons, we are of the opinion that the grievance arbitrator had no jurisdiction to hear the matter. The appeal should be allowed and the grievances dismissed.

Appeal dismissed with costs throughout, CÔTÉ and BROWN JJ. dissenting.

Solicitors for the appellant: Langlois avocats, Québec; National Assembly of Québec, Québec.

Solicitors for the respondent: Poudrier Bradet, Québec.

interprétation sur l'exercice du privilège inhérent d'expulsion des étrangers, une particularité qui touche à l'emploi des gardiens de sécurité.

[163] En définitive, la LAN n'a pas aboli de privilèges parlementaires. De plus, compte tenu de l'ambiguïté réelle des art. 110 et 120 de la LAN, il est préférable de privilégier l'interprétation proposée par le Président. L'Assemblée nationale du Québec est souveraine. Les tribunaux ne peuvent s'arroger une juridiction sans une indication claire que l'Assemblée la leur confère.

V. Conclusion

[164] Au fil des siècles, les privilèges parlementaires se sont progressivement inscrits dans le principe plus large de la souveraineté des assemblées législatives. En effet, l'affirmation de l'existence des privilèges parlementaires, défendus au nom du Parlement notamment par le sergent d'armes, a permis au Parlement de faire preuve d'un certain niveau d'indépendance par rapport aux autres branches du gouvernement. Les privilèges parlementaires ne sont pas un outil pour *protéger* l'indépendance et la souveraineté des assemblées législatives, ils sont bel et bien ce qui leur a permis d'exister. C'est l'affirmation de l'existence des privilèges qui a assuré l'évolution vers un modèle où les différents pouvoirs ont acquis un certain degré d'indépendance les uns vis-à-vis des autres. Vu la reconnaissance du fait que les privilèges parlementaires sont une expression de la souveraineté de l'Assemblée, le respect de la compétence de cette dernière est d'autant plus nécessaire.

[165] Pour ces motifs, nous sommes d'avis que l'arbitre de grief n'était pas compétent pour entendre l'affaire. Il y aurait lieu d'accueillir le pourvoi et de déclarer les griefs irrecevables.

Pourvoi rejeté avec dépens dans toutes les cours, les juges CÔTÉ et BROWN sont dissidents.

Procureurs de l'appelant : Langlois avocats, Québec; Assemblée nationale du Québec, Québec.

Procureurs de l'intimé : Poudrier Bradet, Québec.

Solicitors for the intervener the Honourable Serge Joyal, P.C.: Serge Joyal, Ottawa; Conway Baxter Wilson, Ottawa.

Solicitors for the intervener the Speaker of the Legislative Assembly of Ontario: Blake, Cassels & Graydon, Toronto.

Procureurs de l'intervenant l'honorable Serge Joyal, c.p. : Serge Joyal, Ottawa; Conway Baxter Wilson, Ottawa.

Procureurs de l'intervenant le président de l'Assemblée législative de l'Ontario : Blake, Cassels & Graydon, Toronto.

TAB 8

**Jacques Chaoulli and
George Zeliotis** *Appellants*

v.

**Attorney General of Quebec and
Attorney General of Canada** *Respondents*

and

**Attorney General of Ontario,
Attorney General of New Brunswick,
Attorney General for Saskatchewan,
Augustin Roy, Senator Michael Kirby,
Senator Marjory Lebreton,
Senator Catherine Callbeck, Senator
Joan Cook, Senator Jane Cordy,
Senator Joyce Fairbairn, Senator Wilbert
Keon, Senator Lucie Pépin, Senator Brenda
Robertson and Senator Douglas Roche,
Canadian Medical Association and Canadian
Orthopaedic Association, Canadian Labour
Congress, Charter Committee on Poverty
Issues and Canadian Health Coalition,
Cambie Surgeries Corp., False Creek
Surgical Centre Inc., Delbrook Surgical
Centre Inc., Okanagan Plastic Surgery
Centre Inc., Specialty MRI Clinics Inc.,
Fraser Valley MRI Ltd., Image One MRI
Clinic Inc., McCallum Surgical Centre Ltd.,
4111044 Canada Inc., South Fraser Surgical
Centre Inc., Victoria Surgery Ltd., Kamloops
Surgery Centre Ltd., Valley Cosmetic Surgery
Associates Inc., Surgical Centres Inc.,
British Columbia Orthopaedic Association
and British Columbia Anesthesiologists
Society** *Interveners*

**INDEXED AS: CHAOULLI v. QUEBEC
(ATTORNEY GENERAL)**

Neutral citation: 2005 SCC 35.

File No.: 29272.

**Jacques Chaoulli et
George Zeliotis** *Appelants*

c.

**Procureur général du Québec et
procureur général du Canada** *Intimés*

et

**Procureur général de l'Ontario,
procureur général du Nouveau-Brunswick,
procureur général de la Saskatchewan,
Augustin Roy, Sénateur Michael Kirby,
Sénatrice Marjory Lebreton, Sénatrice
Catherine Callbeck, Sénatrice Joan Cook,
Sénatrice Jane Cordy, Sénatrice Joyce
Fairbairn, Sénateur Wilbert Keon,
Sénatrice Lucie Pépin, Sénatrice Brenda
Robertson et Sénateur Douglas Roche,
Association médicale canadienne et
Association canadienne d'orthopédie,
Congrès du travail du Canada, Comité de
la Charte et des questions de pauvreté et
Coalition canadienne de la santé,
Cambie Surgeries Corp., False Creek
Surgical Centre Inc., Delbrook Surgical
Centre Inc., Okanagan Plastic Surgery
Centre Inc., Specialty MRI Clinics Inc.,
Fraser Valley MRI Ltd., Image One MRI
Clinic Inc., McCallum Surgical Centre Ltd.,
4111044 Canada Inc., South Fraser Surgical
Centre Inc., Victoria Surgery Ltd., Kamloops
Surgery Centre Ltd., Valley Cosmetic Surgery
Associates Inc., Surgical Centres Inc.,
British Columbia Orthopaedic Association
et British Columbia Anesthesiologists
Society** *Intervenants*

**RÉPERTORIÉ : CHAOULLI c. QUÉBEC
(PROCUREUR GÉNÉRAL)**

Référence neutre : 2005 CSC 35.

N° du greffe : 29272.

(b) payment is conditional upon the hospitalization of a resident; or

(c) payment is dependent upon the length of time the resident is a patient in a facility maintained by an institution contemplated in section 2.

The present challenge does not arise out of an adjudicative context or one involving the administration of justice. Sections 11 and 15 are plainly not adjudicative provisions. Nor are they administrative provisions in the sense of being part of the administrative scheme for the provision of health services, though they do form part of the regulatory health regime. Section 11 is a *civil* prohibition against the making or renewing of a contract for insurance for “insured services” and against the payment under such a contract for “insured services”. Any contract entered into in contravention of s. 11 and s. 15 would be absolutely null and unenforceable because it is contrary to the general interest: art. 1417 of the *Civil Code of Québec*, S.Q. 1991, c. 64. Although small fines may be imposed for the breach of these provisions, we think that regulations providing for such fines, which are wholly incidental to the regulatory purpose, would not create a sufficient nexus with the adjudicative context to ground the application of s. 7 on that basis.

It will likely be a rare case where s. 7 will apply in circumstances entirely unrelated to adjudicative or administrative proceedings. That said, the Court has consistently left open the possibility that s. 7 may apply outside the context of the administration of justice: *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, at paras. 78-80 and 414.

The Court has been moving away from a narrow approach to s. 7, which restricted the scope of the section to legal rights to be interpreted in light of the rights enumerated in ss. 8 to 14: see, e.g., *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (“*Prostitution Reference*”), at pp. 1171-74. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, the majority held that s. 7 can apply outside of the criminal context. Further,

b) l’hospitalisation d’un résident est la condition du paiement; ou

c) le paiement dépend de la durée du séjour d’un résident comme patient dans une installation maintenue par un établissement visé dans l’article 2.

La présente contestation ne découle pas d’un contexte juridictionnel ni d’une situation rattachée à l’administration de la justice. Manifestement, les art. 11 et 15 n’ont pas de caractère juridictionnel. Ils ne représentent pas non plus des dispositions de nature administrative appartenant au régime administratif applicable à la prestation de services de santé, bien qu’ils constituent une partie du régime réglementaire de la santé. L’article 11 constitue une interdiction *civile* de souscrire ou de renouveler un contrat d’assurance pour des « services assurés », et de payer, en vertu d’un tel contrat, pour des « services assurés ». Tout contrat conclu en contravention des art. 11 et 15 serait alors frappé de nullité absolue et inexécutoire parce que contraire à l’intérêt général : art. 1417 du *Code civil du Québec*, L.Q. 1991, ch. 64. Bien que de faibles amendes puissent sanctionner les contraventions à ces dispositions, l’existence d’un règlement prescrivant ces amendes, entièrement liées à l’objectif de réglementation, ne créerait pas avec le contexte juridictionnel un lien suffisant pour fonder l’application de l’art. 7.

En toute probabilité, l’art. 7 s’appliquera rarement dans des circonstances sans rapport avec des procédures décisionnelles ou administratives. Cependant, notre Cour n’a jamais écarté toute possibilité d’application de l’art. 7 en dehors du contexte de l’administration de la justice : *Gosselin c. Québec (Procureur général)*, [2002] 4 R.C.S. 429, 2002 CSC 84, par. 78-80 et 414.

En effet, notre Cour a délaissé progressivement l’interprétation restrictive de l’art. 7, qui en limitait la portée aux garanties juridiques devant être interprétées à la lumière des droits énumérés aux art. 8 à 14 : voir, p. ex., le *Renvoi relatif à l’art. 193 et à l’al. 195.1(1)(c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123 (« *Renvoi sur la prostitution* »), p. 1171-1174. Dans l’arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44, les juges majoritaires ont reconnu

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TAB 9

CITATION: Delta Power Equipment Ltd. v. Kubota Canada Ltd., 2018 ONSC 3595
COURT FILE NO.: CV-18-595918
DATE: 20180607

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Delta Power Equipment Ltd., Plaintiff/Moving Party

AND:

Kubota Canada Ltd., Defendant/Responding Party

BEFORE: H. McArthur J.

COUNSEL: Ian Flett, appearing as counsel for the Plaintiff/Moving Party

John Contini, appearing as counsel for the Defendant/Responding Party

HEARD: June 7, 2018

ENDORSEMENT

H. MCARTHUR J.:

Introduction

[1] Delta Power Equipment Ltd. is a farm equipment dealer with 10 locations in Ontario. Kubota Canada Ltd. is a farm equipment manufacturer. Delta sells Kubota products at three of its dealerships. One of those dealerships is in Sparta, Ontario. Delta and Kubota entered into a dealership agreement with respect to the Sparta location that specified that the agreement would terminate after two-years. The agreement also stipulated that either side could terminate the agreement with 90-days' notice. Kubota gave notice to Delta pursuant to the agreement that it intends to terminate the Sparta dealership agreement. Delta now brings a motion for injunctive relief to enjoin Kubota from terminating the Sparta dealership agreement.

[2] For the reasons that follow, I have determined that the motion for an injunction should be dismissed. Given the need for the parties to have an answer quickly, and since argument took place today, I do not intend to outline the facts. Instead, I will refer to the facts as necessary in my analysis, to which I now turn.

[24] As explained in *RJR-MacDonald* at para. 59, irreparable refers to the *nature* of the harm suffered rather than its magnitude. It encompasses harm that either cannot be quantified in monetary terms or harm that cannot be cured because of the inability to collect damages from the other side. The moving party is required to adduce clear and non-speculative evidence that irreparable harm will be suffered if the injunction is refused: *The Regents of the University of California et al. v. I-Med Pharma Inc.*, 2016 FC 606, at para. 33.

[25] Delta argues that if the injunction is not granted, it will suffer irreparable harm in two ways. First, if the dealership agreement is terminated, customers and potential customers will conclude that Delta “... is going broke”, which will have an adverse impact on Delta’s standing and reputation in the small farming communities it serves. Second, irreparable harm will flow from Delta’s lost costs and the lost opportunity of pursuing a partnership with Kubota, a “project which Delta invested 11 million dollars” in by purchasing the Sparta location. I will address each in turn

[26] First, I am not persuaded by the submission that Delta will suffer irreparable harm to its standing and reputation. Delta makes a bald assertion that its customers will think it is going broke if it loses the right to sell Kubota products at its Sparta location, but does not provide any evidence in support. The assertion is based on speculation. Moreover this claim seems implausible for two reasons. First, Delta does not sell Kubota at seven of its 10 locations. Second, sales of Kubota products only amount to 18% of the total sales at the Sparta location and 1.47% of Delta’s total sales. Given that Delta sells many other brands of farm equipment, it is difficult to accept that its customers would believe it was going bankrupt if it stopped selling Kubota products at the Sparta location.

[27] Second, I am not satisfied that Delta will suffer irreparable harm from lost costs or lost opportunity with Kubota. With respect to lost costs, Delta failed to provide any specifics of lost investments, apart from an \$8,000 sign that had been installed. General claims were made about money invested in preparing the Sparta location with signs, advertising material and custom tools that work only on Kubota machines. Any such costs, however, are easily quantifiable in monetary terms.

[28] With respect to the claim of lost opportunity, when Delta entered into the dealership agreement with Kubota, it knew that Kubota had already taken the position that it did want a long-term commitment with Delta. The claim about lost opportunity for expanding business with Kubota is inconsistent with the lead-up to the agreement.

[29] In any event, any lost business opportunity can be adequately addressed with monetary damages. Josie Sisler, the CEO of Delta, testified that in her opinion, the lost future potential flowing from Kubota terminating the agreement would be about \$1,833,333 million. Thus, if the injunction is not granted, Delta would not suffer irreparable harm as any damages can be addressed monetarily.

4) Does the balance of convenience favour granting of the injunction?

TAB 10



SUPREME COURT OF CANADA

CITATION: Desgagnés Transport Inc. v. Wärtsilä
Canada Inc., 2019 SCC 58

APPEAL HEARD: January 24, 2019
JUDGMENT RENDERED: November 28, 2019
DOCKET: 37873

BETWEEN:

**Desgagnés Transport Inc.,
Desgagnés Transarctik Inc.,
Navigation Desgagnés Inc.,
Lloyds Underwriters and Institute of Lloyds
Underwriters (ILU) Companies Subscribing
to Policy Number B0856 09h0016 and
Aim Insurance (Barbados) SCC**
Appellants

and

**Wärtsilä Canada Inc. and
Wärtsilä Nederland B.V.**
Respondents

- and -

**Attorney General of Ontario and
Attorney General of Quebec**
Intervenors

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,
Rowe and Martin JJ.

JOINT REASONS FOR JUDGMENT: Gascon, Côté and Rowe JJ. (Moldaver, Karakatsanis and
(paras. 1 to 107) Martin JJ. concurring)

JOINT CONCURRING REASONS: Wagner C.J. and Brown J. (Abella J. concurring)
(paras. 108 to 193)

(per Gascon J., concurring in the result); see also *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 765-66; *O’Grady v. Sparling*, [1960] S.C.R. 804, at pp. 811-12; *Hodge v. The Queen* (1883), 9 App. Cas. 117, at p. 130; Régimbald and Newman, at p. 191-94).

[85] In the present case, the sale of marine engine parts for use on a commercial vessel — as a fact situation — presents a double aspect. It can be addressed both from the broad perspective of regulating the sale of goods, which constitutes an exercise of the provincial power over property and civil rights, and from the narrower perspective of the exercise of the federal power over navigation and shipping. Put differently, both the Quebec legislature and Parliament have a “compelling interest” in enacting legal rules over different aspects of the same activity or matter (see *Lafarge*, at para. 4). The two sets of contract rules and principles are thus valid. This means that the *C.C.Q.* can govern this sale of marine engine parts unless an issue of applicability or operability arises.

(2) The Applicability and Operability of the *C.C.Q.* Provisions

[86] In applying constitutional doctrines, the Court has preferred a flexible approach that in many instances allows both orders of government room to act instead of creating “watertight compartments” (see *Rogers*, at paras. 37 (per Wagner and Côté JJ.) and 85 (per Gascon J., concurring in the result); *Canadian Western Bank*, at para. 36; *Reference re Employment Insurance Act (Can.)*, ss.22 and 23, 2005 SCC 56, [2005] 2 S.C.R. 669, at para. 8). This approach to federalism acknowledges that it

would often be impossible for one order of government to fulfill its constitutional mandates without affecting matters that fall within the other order's legislative authority (*Canadian Western Bank*, at para. 29; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 15; *Reference re Assisted Human Reproduction Act*, per McLachlin C.J., at para. 139; Brun, Tremblay and Brouillet, at p. 465).

[87] As with other exclusive powers, the federal power over navigation and shipping is not “watertight” and remains subject to this flexible understanding of the division of powers (*Lafarge*, at paras. 1 and 4). In *Lafarge*, released on the same day as *Canadian Western Bank*, Binnie and LeBel JJ. applied the restatement of the division of powers analysis to resolve a conflict between federal competence over navigation and shipping and a municipal by-law enacted pursuant to provincial competence. As they wrote, a valid provincial enactment will be allowed to have incidental effects on a federal head of power — in this case navigation and shipping — unless either interjurisdictional immunity or federal paramountcy is found to apply:

As discussed in *Canadian Western Bank*, there are circumstances in which the powers of one level of government must be protected against intrusions, even incidental ones, by the other level. This is called interjurisdictional immunity and is an exception to the ordinary rule under which legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. Thus a provincial *Planning Act* relating to pith and substance of “Municipal Institutions in the Province” (*Constitution Act, 1867*, s. 92(8)) and “Property and Civil Rights in the

TAB 11

CITATION: Dilico Anishinabek Family Care v. Her Majesty the Queen (Ontario), 2020 ONSC 892
DIVISIONAL COURT FILE NO.: DC-19-013-JR
DC-19-014-JR
DATE: 20200211

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: DILICO ANISHINABEK FAMILY CARE, Applicant (Moving Party)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, TIKINAGAN CHILD
and FAMILY SERVICES AND CHILDREN'S AID SOCIETY OF THUNDER
BAY, Respondent (Responding Parties)

AND:

NISHNAWBE ASKI NATION, Intervenor

AND:

FORT WILLIAM FIRST NATION, Applicant (Moving Party)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, TIKINAGAN CHILD
AND FAMILY SERVICES AND CHILDREN'S AID SOCIETY OF THUNDER
BAY, Respondents (Responding Parties)

AND:

NISHNAWBE ASKI NATION, Intervenor

BEFORE: Penny J.

COUNSEL: *Katherine Hensel and Kaelan Unrau* for the Applicant Dilico Anishinabek Family
Care

Scott C. Hutchison and David Postel for the Applicant Fort William First Nation

Lisa LaHorey and Kisha Chatterjee for the Respondent Her Majesty the Queen in
Right of Ontario

Susan M. Vella and Catherine Beamish for the Respondent Tikinagan Child and
Family Services

Natalie Posala for the Intervenor Nishnabe Aski Nation

Nicola-Antonio Melchiorre for the Respondent Children's Aid Society of Thunder Bay

HEARD at Thunder Bay: January 29, 2020

REASONS

OVERVIEW

[1] This is a motion for a stay.

[2] These proceedings arise out of a long-standing jurisdictional dispute between two representative Indigenous groups in northwestern Ontario over who should be permitted to provide child and family services in the City and District of Thunder Bay.

[3] In November 2019, the Minister of Children, Community and Social Services issued designations authorizing three children's aid societies to provide the full range of child and family services in Thunder Bay. At the same time, the Minister issued a directive providing that: a) Dilico Anishinabek Family Care will provide services to all Indigenous children and families other than Indigenous children from First Nations affiliated with Tikinagan Child and Family Services; b) Tikinagan will provide services to children and families from Tikinagan-affiliated First Nations; and, c) the Children's Aid Society of Thunder Bay will provide services to non-Indigenous children and families.

[4] Dilico and the Fort William First Nation brought applications for judicial review seeking to set aside the Directive and Designations of the Minister on various constitutional and administrative law grounds. No date has been set for the judicial review hearing, but the current timetable contemplates a possible hearing in May or June 2020.

[5] The applicants' also brought motions for a stay of the Directive and Designations. These motions were heard on January 29, 2020 and dismissed in a brief endorsement on January 30, 2020 with Reasons to follow. These are those Reasons.

[6] There are three elements which must be established by the moving parties in order to succeed on the motions for a stay. The moving parties must establish that:

- (1) there is a serious question to be determined in the judicial review applications concerning the validity (or invalidity) of the Directive and Designations;
- (2) the applicants will suffer irreparable harm if the Directive and Designations are allowed to take effect on January 30, 2020 as intended; and

[30] It is not my role as a motion judge hearing a motion for an interlocutory stay of the Minister's Directive and Designations to resolve these complex issues. The merits of these applications are clearly hotly contested.

[31] Regarding the Fort William application, what can and cannot be proved as to the traditional exercise of child welfare functions, whether a novel or unprecedented rights claim under s. 35 will or will not succeed, whether Fort William's rights claims will require a trial and the scope and content of the duty to consult, and whether that duty was fulfilled in the circumstances of this case, raise complex issues which cannot and should not be resolved at this stage.

[32] Similarly, in connection with the Dilico application, the interpretation and application of the CYFSA to the complicated circumstances raised in this case, the scope of procedural fairness warranted in the circumstances and whether it was provided, and whether the Minister's Directive and Designations were sufficiently justified, also raise complex issues which cannot and should not be resolved at this stage.

[33] The exercise of control over the well-being of their children – in the broadest sense of personal, cultural, ethical and spiritual – is a source of deep and entirely justifiable concern for both First Nations groups and their agencies involved in this dispute. The fact that its form manifests differently – territorial jurisdiction as opposed to personal, cultural or ethnological – does not take away from the absolute validity of this concern for the welfare of their children, particularly in the context of child protection, which animates both sides so deeply.

[34] The applicants have, in my opinion, asserted grounds for judicial review of the Directive and Designations which are not frivolous. There are serious issues which can only be resolved in a full hearing. The applicants have, therefore, satisfied the first aspect of the *RJR MacDonald* test.

Irreparable Harm

[35] Irreparable harm turns on whether a refusal to grant the stay will so adversely affect the applicants (or other relevant interests – primarily, as discussed above, the interests of Indigenous children) that the harm could not be remedied with an award of money damages or other remedial order if the applicants are ultimately successful on the main application. Irreparable harm must be real and substantial. The evidence establishing irreparable harm must be clear and not speculative. Bald allegations or general beliefs or concerns, without factual underpinning establishing a reasonable likelihood of irreparable harm, do not satisfy this requirement.

[36] Fort William asserts that it will suffer irreparable harm unless a stay is granted because the Directive and Designations will interfere with Fort William's asserted right to self-government, causing detriment to the people of Fort William's collective dignity, identity and sense of community. This detriment, or harm, it argues, is not compensable by an award of money damages or other remedial order.

TAB 12

Duffy v. The Senate of Canada et al.
[Indexed as: Duffy v. Canada (Senate)]

Ontario Reports

Court of Appeal for Ontario

Strathy C.J.O., MacPherson and Jamal JJ.A.

August 28, 2020

151 O.R. (3d) 489 | 2020 ONCA 536

Case Summary

Actions — Bars — Parliamentary privilege — Senator suing Senate for damages after his suspension from the Senate for claiming inappropriate expenses — Senate having action dismissed based on established parliamentary privileges regarding discipline, internal administration, parliamentary proceedings and freedom of speech — Motion judge did not err in holding that parliamentary privilege immunized all actions underlying plaintiff's claim against the Senate — Plaintiff's allegations could be adjudicated only by the Senate itself and not by the courts.

Charter of Rights and Freedoms — Remedies — Senator suing Senate for damages after his suspension from the Senate for claiming inappropriate expenses — Senate having action dismissed based on established parliamentary privileges regarding discipline, internal administration, parliamentary proceedings and freedom of speech — Motion judge did not err in not reconciling Senate's parliamentary privilege with the Charter — Where parliamentary privilege applied, Senate and not the courts had competence to adjudicate alleged Charter breach.

Constitutional law — Parliamentary privilege — Senator suing Senate for damages after his suspension from the Senate for claiming inappropriate expenses — Senate having action dismissed based on established parliamentary privileges regarding discipline, internal administration, parliamentary proceedings and freedom of speech — Motion judge did not err in holding that parliamentary privilege immunized all actions underlying plaintiff's claim against the Senate — Plaintiff's allegations could be adjudicated only by the Senate itself and not by the courts.

Courts — Jurisdiction — Senator suing Senate for damages after his suspension from the Senate for claiming inappropriate expenses — Senate having action dismissed based on established parliamentary privileges regarding discipline, internal administration, parliamentary proceedings and freedom of speech — Motion judge did not err in holding that parliamentary privilege immunized all actions underlying plaintiff's claim against the

[116] The motion judge cited caselaw accepting that parliamentary privilege can be waived by Parliament itself, but concluded that because parliamentary privilege is a constitutional principle it requires an express waiver by Parliament and cannot be waived implicitly: at paras. 111-13, citing *Rothmans*, at para. 35 and *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)*, *supra*, at para. 81. The motion judge found "no conduct alleged in the statement of claim that would indicate, clearly and unambiguously, that the Senate waived its privilege": at para. 114.

[117] A rare example of Parliament purporting to expressly waive parliamentary privilege was referred to in *R. v. Connolly* (1891), 22 O.R. 220, [1891] O.J. No. 44 (H.C. (Comm. Pl.)), at pp. 233-34 O.R., where the House of Commons, on a motion of the Minister of Justice, passed a resolution permitting evidence given by witnesses who testified before a parliamentary committee to be used in criminal prosecutions against them: see, also, Maingot, at pp. 109-110; *Rothmans*, at para. 21, footnote 27.

[118] Yet in *Boulerice*, at para. 127, Noël C.J. mooted whether, as a matter of constitutional principle, parliamentary privilege can ever be waived:

Arguably, a privilege which ensures the independence of the House in performing core legislative functions cannot be waived by Parliament as doing so would undermine the very principle on which the Westminster model of Parliament is based.

[119] In *Boulerice*, the Federal Court of Appeal did not resolve this question because it concluded that nothing in the legislation in [page521] the case before it suggested that Parliament intended to waive or abandon any of its privileges: at para. 130.

[120] Support for the issue mooted in *Boulerice* might be found in the remarks of McLachlin J. in *New Brunswick Broadcasting*, at p. 379 S.C.R., when she noted that parliamentary privileges "must be held *absolutely* and constitutionally if they are to be effective" (emphasis added).

[121] On the other hand, it could be argued that because s. 18 of the *Constitution Act, 1867* gives Parliament the legislative authority to "define" the Senate's parliamentary privileges through federal legislation, it could choose to define its privileges more narrowly, such as by waiving its privilege in a particular case.

[122] Even if parliamentary privilege can be waived -- which I believe need not be decided in this case -- I would conclude that because of the institutional and constitutional character of parliamentary privilege, any waiver would require an express statement, either in legislation or possibly in a parliamentary resolution, that clearly and unambiguously waives the privilege.

[123] I agree with the motion judge that Senator Duffy's amended statement of claim pleads no express, clear and unambiguous waiver by the Senate of its parliamentary privilege. I would also find that merely referring the matter to the RCMP for criminal investigation in this case would not meet the required standard for waiver of parliamentary privilege. The Senate should be able to refer matters to the appropriate authorities for criminal investigation without fear that doing so will jeopardize its constitutional independence from the other branches of government.

[124] I would therefore reject Senator Duffy's fifth and final ground of appeal.

F. Conclusion

TAB 13

CITATION: Duffy v. Senate of Canada, 2018 ONSC 7523
COURT FILE NO.: 17-73728
DATE: December 14, 2018

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Senator Michael Dennis Duffy	)	
	)	Lawrence Greenspon and Tina H. Hill for
Plaintiff/Respondent	)	Plaintiff/Respondent
	)	
– and –	)	
	)	
The Senate of Canada	)	Maxime Faille, Guy Regimbald and John J.
	)	Wilson for the Defendant/Moving Party
Defendant/Moving Party	)	
	)	
– and –	)	
	)	
The Attorney General of Canada	)	Robert Frater, Alexander Gay and Sanam
	)	Goudarzi for the Defendant
	)	
	)	HEARD: June 27 and 28, 2018 and October
	)	22, 2018

JUSTICE SALLY GOMERY

Overview

[1] Senator Michael Duffy is suing the Senate of Canada for over \$7 million in damages.

[2] On November 5, 2013, the Senate voted to suspend Senator Duffy based on a report from its standing committee on Internal Economy, Budgets and Administration (the “CIBA”). This CIBA report concluded that he had violated rules on living and travel expenses. Senator Duffy was later criminally charged with breach of trust, fraud and accepting a bribe. On April 21, 2016, after a trial that lasted more than a year, he was acquitted of all charges. Justice Vaillancourt, the judge who heard the criminal trial, concluded that the Prime Minister’s Office (“PMO”) directed one or more senators to interfere with an audit of Senator Duffy’s expenses.

He also concluded that, in making living expense claims, Senator Duffy “committed no prohibited act, violated no Senate rules”, and neither engaged in criminal fraud nor intended to do so.

[3] In his lawsuit, Senator Duffy claims that the CIBA report and the Senate’s decision to suspend him were politically motivated, unconstitutional, procedurally unfair and contrary to his rights under the *Canadian Charter of Rights and Freedoms*¹. Given the judge’s findings when he was acquitted of criminal charges, Senator Duffy argues that actions by various senators and the Senate as a whole were clearly wrong and unlawfully deprived him of salary, allowances and pension contributions. He also says that, since he was acquitted and the suspension was lifted, the Senate has once again unfairly denied him reimbursement for further legitimate expenses. He seeks compensation for the amounts he says he is entitled to as well as compensatory and punitive damages.

[4] This matter is before me now because the Senate says that Senator Duffy’s action should be dismissed. The Senate contends that the lawsuit cannot proceed because the actions that Senator Duffy seeks to challenge fall squarely within the scope of parliamentary privilege. Determining the questions that arise in Senator Duffy’s lawsuit would accordingly require a court to do exactly what parliamentary privilege is designed to prevent.²

[5] Parliamentary privilege is “the necessary immunity that the law provides for members of Parliament ... in order for these legislators to do their legislative work”.³ It is recognized in our Constitution, and is a fundamental aspect of our constitutional democracy. Parliamentary privilege ensures that legislative bodies such as the Senate have the ability to manage their own decisions and core processes without interference from the courts. Each branch of our

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (“*Charter*”).

² Senator Duffy is also suing the Royal Canadian Mounted Police, represented in these proceedings by the Attorney General of Canada. The Attorney General is not taking any position on the motion.

³ J.P. Joseph Maingot, *Parliamentary Privilege in Canada*, 2d ed. (Montreal: McGill-Queen’s Press, 1997) (“Maingot”) at p. 12, cited in *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 at para. 29.

government must show “proper deference for the legitimate sphere of activity of the other”.⁴ Former Chief Justice McLachlin offered this rationale for parliamentary privilege:

The point is not that the legislature is always right. The point is rather that the legislature is in at least as good a position as the courts, and often in a better position, to decide what it requires to function effectively. In these circumstances, a dispute in the courts about the propriety of the legislative body’s decision, with the delays and uncertainties that such disputes inevitably impose on the conduct of legislative business, is unjustified.⁵

[6] In its decisions on parliamentary privilege over the past 25 years, the Supreme Court of Canada has established how a judge should proceed when a legislative body seeks to dismiss a lawsuit on the basis of parliamentary privilege. The judge must first determine if the claim would require a court to review actions or processes that fall within the scope of an established area of privilege. If the judge determines that it would, the action must be dismissed.

[7] For the purpose of a motion like this one, I must assume that all of the factual allegations in Senator Duffy’s statement of claim are true. He makes many allegations about the improper motivations of various senators and the denial of any due process. But the core allegation, what he says entitles him to damages, is that the decisions by the CIBA and the Senate to suspend him and to deny his claims for compensation were unlawful and unfair. I must determine whether these decisions are protected by parliamentary privilege and therefore shielded from any review by this court.

[8] I conclude that they are. The Senate enjoys certain categories of privilege by virtue of the *Constitution Act, 1867*.⁶ Four types of privilege prevent a court from reviewing the actions by the Senate at issue in this case.

[9] First, parliamentary privilege extends to decisions by the Senate to discipline its own members. The privilege clearly applies to decisions about whether a senator should be suspended or expelled. In some cases, a court may review disciplinary decisions with respect to

⁴ *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 (“NB Broadcasting”) at p. 389.

⁵ *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876 (“Harvey”) at p. 922.

⁶ 30 & 31 Vict., c. 3 (U.K.).

employees of a legislative body, if the management of such employees does not fall within the scope of what is necessary to protect the independent functioning of that body. There is however no question that the privilege prevents judicial review of discipline or suspension of a member of the legislature itself.

[10] Second, parliamentary privilege applies to the Senate's management of its internal affairs, including the allocation and use of parliamentary resources. This privilege extends to decisions on the approval of expenses claimed by senators. I find that the privilege applies to decisions by an internal committee of senators, such as the CIBA, with respect to the allocation or withholding of parliamentary resources to a senator.

[11] Third, Parliament has exclusive control over, and privilege with respect to, its own debates and proceedings.

[12] Finally, parliamentary privilege protects freedom of speech in the Senate. Allegations in a statement of claim about what was said in parliament must be struck, because statements in parliament cannot be reviewed by a court. Neither a senator nor a third party can be compelled to testify in court about anything they said or did in the course of Senate proceedings. Transcripts of proceedings, and reports produced by or commissioned for the Senate, can likewise not be produced in court proceedings. The Senate's failure to object to disclosure of some evidence that might have been subject to privilege during Senator Duffy's criminal trial does not mean that it has relinquished its right to invoke privilege in this case.

[13] Senator Duffy contends that the application of parliamentary privilege in this case leaves him without any meaningful remedy. He says that he cannot hope to get justice from the very body that has treated him so badly in the past, and that the courts should not allow *Charter* violations to go unchecked, particularly in circumstances where those violations arise from interference by one branch of government (the PMO) with another (the Senate).

[14] I am however obliged to respect constitutional imperatives. Allowing a court to revisit the Senate's decisions at issue here would interfere with the Senate's ability to function as an independent legislative body, equal to other branches of government. These decisions, as well as the Senate record relevant to them, are protected by parliamentary privilege and are accordingly

immune from judicial review or reconsideration. Since the actions at issue fall within those actions protected by parliamentary privilege, I cannot give any consideration to whether they were wrong or unfair or even contrary to Senator Duffy's *Charter* rights. All of these are determinations that the Senate, and the Senate alone, can make. The Senate's motion to dismiss Senator Duffy's action against it is therefore granted.

Analysis

[15] In my analysis, I will consider five questions:

- (1) What rules apply to this motion to strike?
- (2) What is Senator Duffy alleging in his action against the Senate?
- (3) What is the source and scope of parliamentary privilege in Canada?
- (4) How should I approach the claim of parliamentary privilege in this case?
- (5) Are the Senate's actions at issue in this case subject to its privilege with respect to:
 - a) The administration of its own internal affairs;
 - b) Discipline of its own members;
 - c) Control of its own proceedings; or
 - d) Freedom of speech within parliament?

(1) What rules apply to this motion to strike?

[16] The Senate brings this motion under rules 21 and 25.11 of the Ontario *Rules of Civil Procedure*.⁷

[17] Rules 21 and 25.11 allow a defendant to ask the court to dismiss an action or strike a statement of claim at a preliminary stage of a lawsuit. Under rules 21.01(1)(a) and (b), a judge

⁷ R.R.O. 1990, Reg. 194.

may determine a question of law raised by a pleading and strike out a pleading or grant judgment if it discloses no reasonable cause of action. Under rule 21.01(3)(a), a defendant may seek to stay or dismiss an action on the ground that the court has no jurisdiction over the subject matter of the action. A defendant may also ask the court to stay, dismiss or strike some or all of a pleading on the basis that the action or the pleading is frivolous, vexatious or an abuse of the process of the court (rules 21.01(3)(d) and 25.11).

[18] A judge hearing a motion under these rules must assume that all of the facts pleaded in the statement of claim are true.⁸ Assuming they are true, the judge must then decide whether it is plain and obvious that the claim cannot succeed.⁹ A motion to stay or dismiss a claim or strike a pleading under rules 21.01 or 25.11 can only succeed in the clearest of cases. A claim should not be struck just because it is novel, or because the underlying law is unsettled, or because the plaintiff's odds of success seem slim.¹⁰ If there is any chance that the plaintiff could succeed, the court should allow the lawsuit to proceed.

(2) What is Senator Duffy alleging in his action against the Senate?

[19] Senator Duffy's claim is set out in his amended statement of claim dated September 8, 2017. The central allegations of fact relevant to Senator Duffy's claim against the Senate are as follows:

- In 2009, Senator Duffy was appointed senator for Prince Edward Island (at para. 12). He initially received reassurances from the Prime Minister and from other senators that his expenses were appropriate (at paras. 13, 15, 19 and 20).
- In February 2013, the CIBA engaged Deloitte, an auditing, consulting and financial advisory company, to conduct an independent examination of Senator Duffy's expense and living claims from April 1, 2011 to September 30, 2012 and to determine if they were subject to reimbursement (at paras. 28-29).

⁸ *Operation Dismantle Inc. et al v. The Queen et al*, [1985] 1 S.C.R. 441 at pp. 486-87; *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 ("*Hunt*") at pp. 977-979; *Connor v. Scotia Capital Inc.*, 2018 ONCA 73, [2018] O.J. No. 394 ("*Connor*") at para. 3.

⁹ *Hunt supra* note 9 at pp. 977-978; *Connor supra* note 9 at para. 3.

¹⁰ *Hunt supra* note 9 at p. 979.

- The PMO interfered, for political reasons, with the work of the CIBA and the Deloitte audit (at paras. 22 to 25, and paras. 30 to 40). The PMO directed the CIBA to prevent Senator Duffy from meeting with Deloitte while the audit was underway (at para. 43).
- On May 9, 2013, Deloitte released its report on Senator Duffy's expense claims. The report stated that the applicable Senate regulations and guidelines were unclear and did not allow it to determine Senator Duffy's primary residence. Aside from one small clerical error, Deloitte could not find that any of Senator Duffy's living claims were inappropriate (at paras. 44-45).
- After receiving the Deloitte report, the CIBA presented its own report (the "Twenty-Second Report"). The report recommended that living expenses that had been claimed by Senator Duffy from his date of his appointment were properly claimed and that, going forward, his living and travel expenses be monitored for a period of not less than a year (at para. 46). The Twenty-Second report was adopted by the Senate as a whole (at para. 47).
- On May 29, 2013, the CIBA, on orders from the PMO, released a new politically-motivated report (the "Twenty-Sixth Report"). This report stated that Senator Duffy's living expenses and living allowances should not have been claimed and referred Senator Duffy's repayment of \$90,000 to authorities for investigation (at para. 52).
- On October 17, 2013, Senator Carignan, then Leader of the Government in the Senate, introduced a motion to suspend Senator Duffy for alleged gross negligence in the management of his parliamentary resources (at para. 57).
- On November 5, 2013, the Senate voted in favour of Senator Duffy's suspension (at para. 65). Although Senator Duffy attended at the Senate to defend himself, no fair and public hearing was held prior to the vote (at paras. 64 and 66). He was the only Senator suspended even though a June 4, 2015 report by the Auditor General of Canada found that 30 other Senators, not including Senator Duffy, had incurred expenses inconsistent with applicable Senate rules, policies or guidelines (at para. 67). His suspension was for "purely political motives" (at para. 69).

- During his suspension, Senator Duffy's remuneration, reimbursement for expenses and pension accrual were withheld, and he was denied the right to use any Senate resources or receive any benefit from the Senate (at para. 57).
- On July 17, 2014, Senator Duffy was charged with 31 offences relating to Senate expenses and his receipt of \$90,000 from Nigel Wright, the Prime Minister's former Chief of Staff (at para. 84).
- Senator Duffy's suspension ended on the dissolution of Parliament on August 2, 2015, but the Senate continued to withhold his pay and expenses pending the outcome of his criminal trial (at paras. 72 and 104).
- On April 21, 2016, Senator Duffy was acquitted of criminal charges (at para. 72). In his decision acquitting Senator Duffy on criminal charges, Justice Vaillancourt concluded that, when Senator Duffy designated his primary residence as PEI and claimed living expenses for his residence in the National Capital Region, he "committed no prohibited act, violated no Senate rules and did not in all circumstances commit the *actus reus* of fraud" (at para. 54). He found that senior members of the Senate had acted at the direction of Mr. Wright to, among other things, attempt to influence the outcome of the Deloitte audit (at para. 88). The judge also found that all of Senator Duffy's travel claims were appropriate (at para. 56). The Crown did not appeal Justice Vaillancourt's judgment (at para. 92).
- On July 25, 2016, the Senate deducted \$17,000 from Senator Duffy's salary to recover amounts it alleged he had claimed inappropriately, even though Judge Vaillancourt had found that these claims were valid (at paras. 93-94).
- On August 24, 2016, the CIBA rejected Senator Duffy's request for partial reimbursement of his legal expenses in defending the criminal charges against him, contrary to its own policy on reimbursement of such expenses (at para. 95).
- The Senate has not responded to Senator Duffy's written request made on December 12, 2016 for reimbursement of the salary, pension accrual and living allowance during his suspension (at paras. 96-97).

- Senator Duffy has suffered significant emotional, physical and economic damages as a result of the senate committee investigation, the Deloitte audit, his suspension, the criminal investigation and media coverage of these events (at paras. 98-103).

[20] Based on these allegations, Senator Duffy claims that the Senate is legally liable on the basis of malicious prosecution, misfeasance in public office, unjust enrichment, unconstitutional actions and violations of his rights under sections 7, 11 and 12 of the *Charter*.

[21] There are many allegations of fact in the statement of claim that I have not mentioned. Some describe Senator Duffy's career before he was appointed. Others relate to his claim against the RCMP or allege improper motives and conduct by the PMO and its staff. These allegations colour the narrative presented by Senator Duffy but are not directly relevant to his claim against the Senate.

[22] The amended statement of claim also includes many statements that are not allegations of fact. For example, at paras. 58 to 62, Senator Duffy alleges that his November 2013 suspension was "in effect an expulsion" that created a vacancy in the Senate, and that the withholding of his remuneration was an "unprecedented abuse of power" that was unnecessary for the proper functioning of the Senate. These are arguments, legal conclusions or characterizations as opposed to factual allegations. This is an important distinction since, on a motion under rules 21.01 and 25.11, I must only assume that all facts alleged are true. I am not required to assume that Senator Duffy's legal arguments will succeed, or that he has accurately described the legal impact of various events.

[23] In summary, for the purpose of this motion I must assume that the CIBA's Twenty-Sixth report, which found that Senator Duffy violated internal rules and policies in claiming expenses, was contrary to the Twenty-Second Report and the findings of the Deloitte audit. I must assume that the Twenty-Sixth Report's recommendations, actions taken by various senators in the course of the underlying investigation, and the referral of the legality of the \$90,000 payment to the RCMP, were politically motivated and contrary to the Senate's own rules. I must assume that the motion introduced in the Senate to suspend Senator Duffy, the vote by the Senate to suspend him, and the decision after his suspension to deny him reimbursement of his legal fees and

legitimate expenses, were not based on any actual violation of Senate rules or practices by him, but were again politically motivated. Finally, I must assume that he has suffered damages as a result of these events.

(3) What is the source and scope of parliamentary privilege in Canada?

[24] Parliamentary privilege originated in England in response to attempts by courts and the Crown to interfere with the workings of the legislative branch. In 1689, Parliament enacted the *Bill of Rights, 1689*, immunizing certain parliamentary activities from consideration by the courts.¹¹ It provided that “the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place outside of Parlyament”.¹²

[25] Over time, the concept of parliamentary privilege was expanded to protect not only speech and procedures, but any action within parliament over which it must necessarily have exclusive control, as an independent and coequal branch of government. Parliamentary privilege is accordingly:

the necessary immunity that the law provides for Members of Parliament ... in order for these legislators to do their legislative work. It is also the necessary immunity that the law provides for anyone while taking part in a proceeding in Parliament ... Finally, it is the authority and power of each House of Parliament ... to enforce that immunity.¹³

[26] In 1867, parliamentary privilege in Canada became part of our founding *Constitution Act, 1867*. The preamble to the Canadian Constitution provides that we have a constitution “similar in principle to that of the United Kingdom”. Section 18 states that “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”, subject to the condition that any such legislation cannot confer privileges, immunities or powers exceeding those held, enjoyed and exercised by the UK

¹¹ (UK), 1 Will & Mar Sess. 2, c. 2 (“*Bill of Rights, 1689*”).

¹² *Ibid.*

¹³ Maingot *supra* note 3 at p. 12, cited in *Villeneuve v. Northwest Territories (Legislative Assembly)*, 2008 NWTSC 41, 85 Admin. L.R. (4th) 281.

Parliament and its members in 1867. Section 4 of the *Parliament of Canada Act*¹⁴ confirms that the Senate, and its members, have both the privileges, immunities and powers that the UK parliament and its members had in 1867, and any additional privileges, immunities or powers enacted by the Canadian Parliament, so long as they do not exceed those in the first category.¹⁵

[27] In *Canada (House of Commons) v. Vaid*, Justice Binnie characterized parliamentary privilege in Canada as “the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions”.¹⁶

[28] Parliamentary privilege is an essential feature of our constitutional democracy. In the words of former Chief Justice McLachlin:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.¹⁷

[29] Privilege not only upholds the “dignity and efficiency” of parliament but also protects its autonomy:

A legislative assembly without control over its own procedure would, said Lord Ellenborough C.J. almost two centuries ago, “sink into utter contempt and inefficiency” (*Burdett v. Abbot* (1811), 14 East 1, 104 E.R. 501, at p. 559). “Inefficiency” would result from the delay and uncertainty would inevitably accompany external intervention. Autonomy is therefore not conferred on Parliamentarians merely as a sign of respect but because such autonomy from outsiders is necessary to enable Parliament and its members to get their job done.¹⁸

¹⁴ R.S.C. 1985, c. P-1.

¹⁵ *Ibid.*

¹⁶ *Vaid supra* note 3 at para. 29.

¹⁷ *NB Broadcasting supra* note 4 at p. 389.

¹⁸ *Ibid* at para. 29.

(4) How should I approach the claim of parliamentary privilege in this case?

[30] The underlying principle of parliamentary immunity is that: “[w]hat is said or done within the walls of Parliament cannot be inquired into in a court of law”.¹⁹

[31] In *Vaid*, Justice Binnie set out twelve propositions which respect to parliamentary privilege “accepted both by the courts and by the parliamentary experts”.²⁰ One of these propositions is that certain categories of privilege are well-established. These categories include freedom of speech within Parliament; control by the House of Parliament over debates and proceedings in Parliament, including day to day procedure in the House; and disciplinary authority over members. Justice Binnie held that, if the “existence and scope of a privilege at Westminster is authoritatively established (either by British or Canadian precedent), it ought to be accepted by a Canadian court without the need for further inquiry into its necessity”.²¹

[32] When a party to a court proceeding invokes parliamentary privilege, the court must ask a simple question: does the activity at issue in the proceeding fall within the scope of the privilege? If it does, that is the end of the court’s inquiry.²² If the activity is immunized from review as a result of the privilege, the court has no further role:

Were the courts 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 the legislative body. The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function?²³

[33] This same approach prevails even where a party asking the court to review conduct by a legislature claims that their *Charter* rights have been violated. Parliamentary privilege and the *Charter* both have constitutional status. Courts must attempt, so far as possible, to “reconcile them in such a way as will preserve both meaningful legislative privilege as well as the

¹⁹ *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271 (D.C.) at p. 275.

²⁰ *Vaid supra* note 3 at para. 29.

²¹ *Ibid* at para. 37.

²² *Harvey supra* note 5 at p. 918.

²³ *NB Broadcasting supra* note 4 at p. 384.

fundamental democratic values guaranteed by the *Charter*.²⁴ But the *Charter* does not give to the courts the power to intrude on the sphere of activity exclusive to the parliament.²⁵ An allegation of a breach of a human rights code or the *Charter* does not give courts a pretext for ignoring parliamentary privilege:

If the courts below were correct about a “human rights exception”... any person dealing with the House of Commons could circumvent the jurisdictional immunity conferred by privilege simply by alleging discrimination on grounds contrary to the *Canadian Human Rights Act*. Such a rule would amount to an invitation to an outside body to review the reasons behind the exercise of the privilege in each particular case. This would effectively defeat the autonomy of the legislative assembly which is the *raison d’être* for the doctrine of privilege in the first place.²⁶

[34] If parliamentary privilege applies, the court must defer to the legislature even if the privilege would shield activity that is alleged to violate *Charter* rights.

[35] In *Vaid*, Justice Binnie observed that “the historical foundation of every privilege of Parliament is necessity”, and that a party who seeks to rely on the immunity provided by parliamentary privilege may need to establish its existence:

When the existence of a category (or sphere of activity) for which inherent privilege is claimed (at least at the provincial level) is put in issue, the court must not only look at the historical roots of the claim but also to determine whether the category of inherent privilege continues to be necessary to the functioning of the legislative body today. Parliamentary history, while highly relevant, is not conclusive.²⁷ [Emphasis added.]

[36] The Supreme Court released its decision in *Chagnon v. Syndicat de la fonction publique et parapublique du Québec* after this motion was argued before me.²⁸ Senator Duffy and the Senate made written submissions on the impact of the majority’s analysis on this case. Senator Duffy argues that, based on the majority’s reasons in *Chagnon*, the Senate must prove that the

²⁴ *Harvey supra* note 5 at pp. 910-11 and 917-18.

²⁵ *Ibid* at pp. 910-11.

²⁶ *Vaid supra* note 3 at pp. 700-01.

²⁷ *Ibid* at p. 686.

²⁸ 2018 SCC 39, 40 Admin. L.R. (6th) 1 (“*Chagnon*”).

privileges it invokes continue to be absolutely necessary to its core activities, even if those privileges have been recognized in earlier decisions by Canadian or UK courts.

[37] Counsel for the Senate argues that *Chagnon* does not overturn *Vaid*, which recognized established categories of inherent privilege held by the federal parliament. The Senate argues that the Court's comments on necessity in *Vaid* and *Chagnon* do not apply to these inherent privileges.

[38] I accept the Senate's argument on this point. I do not agree that *Chagnon* stands for the proposition that the necessity of long-held, constitutionally recognized privileges held by the federal parliament must be proved again every time they are invoked.

[39] The issue in *Chagnon* was whether a decision to discipline security guards employed at the Quebec National Assembly was protected by parliamentary privilege. The guards were unionized employees of the provincial government and had the right, pursuant to provincial statute, to grieve their dismissal to an arbitrator. It was in that context that the Supreme Court held that the necessity of a privilege, that would preclude arbitration, had to be established.

[40] The situation in this case is different. Pursuant to the *Constitution Act, 1867* and section 4 of the *Parliament of Canada Act*, the Senate has the same privileges as those held, enjoyed and exercised by the UK parliament in 1867. As stated in *Vaid*, a decision relied on by the majority in *Chagnon*, these categories of privilege are so well-established that their existence cannot be in any doubt.

[41] The concept of necessity is relevant in determining the scope of parliamentary privilege. When privilege is invoked, the court must determine where to draw the line between privileged and non-privileged activity. Where a particular activity within Parliament is not obviously within the scope of a privilege, the body invoking the privilege must show that the scope it advocates only protects activities necessary to its core functions. If however the activity at issue falls squarely within the scope of an established privilege, the court has no further role to play.

[42] It is with these principles in mind that I turn now to the central issue on this motion, that is, whether parliamentary privilege extends to the Senate's actions at issue in this case.

(5) Does parliamentary privilege apply to the conduct at issue in this action?

[43] The Senate argues that the conduct that Senator Duffy is asking the court to review, through his action, are protected by four different kinds of parliamentary privilege:

- a) The Senate's privilege to discipline its own members;
- b) The Senate's privilege to administer its own internal affairs
- c) Privilege over proceedings in Parliament; and
- d) Privilege over freedom of speech.

a) The Senate's privilege to discipline its own members

The scope of the privilege

[44] Courts have long recognized Parliament's exclusive right to discipline its members. As stated over a hundred years ago in the case of *Bradlaugh v. Gossett*:

The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive.²⁹

[45] In *Harvey*, in 1996, the Supreme Court of Canada considered a legal challenge by a member of a provincial legislature who had been expelled after being convicted of an illegal practice under the *Elections Act*.³⁰ He claimed that his expulsion infringed section 3 of the *Charter*.³¹

[46] The Court observed that the history of the prerogative of the legislative body "to maintain the integrity of their processes by disciplining, purging and disqualifying those who abuse them is as old as Parliament itself."³² Legislatures may discipline members for behaviour that, in their view, undermines their fundamental integrity. Disciplinary action may range from light sanctions for minor irregularities and expulsion for serious misconduct:

²⁹ *Bradlaugh supra* note 22 at p. 275.

³⁰ *Canada Elections Act*, S.C. 2000, c. 9.

³¹ Section 3 provides that "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein".

³² *Harvey supra* note 5 at p. 914.

The power of Parliament to expel a member is undoubted. This power has been repeatedly exercised by the English and Colonial Parliaments, either when members have been guilty of a positive crime, or have offended against the laws and regulations of the House or have been guilty of fraudulent or other discreditable acts, which proved that they were unfit to exercise the trust which their constituents had reposed in them, and that they ought not to continue to associate with the other members of the legislature.³³

[47] The Court concluded that the power to disqualify members for corruption “is necessary to the dignity, integrity and efficient functioning of the legislature”.³⁴ As a result, it fell outside the ambit of s. 3 of the *Charter*. In the words of the Court: “It is a matter for the legislature, not the courts, to determine”.³⁵

[48] The Court emphasized that, once it determined that the expulsion was an exercise of parliamentary privilege, it could not second-guess the legislature’s stated rationale for its action, or make any determination about whether the sanction was justified or fair.

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. If the court concludes that it does, no further review lies.³⁶

[49] Since Harvey’s expulsion was subject to parliamentary privilege, he had no ability to challenge it through a judicial proceeding.

[50] The outcome in *Harvey* is consistent with section 33 of the *Constitution Act, 1867*, which gives the Senate the exclusive and non-reviewable power to determine the qualification of a Senator to remain in the Senate:

If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

³³ J.G. Bourinot, in *Parliamentary Procedure and Practice in the Dominion of Canada* (2d ed. 1892), at pp. 193-94, cited in *Harvey supra* note 5 at pp. 920-921.

³⁴ *Harvey supra* note 5 at p. 926.

³⁵ *Harvey supra* note 5 at p. 926.

³⁶ *Ibid* at p. 918.

[51] Section 33 does not refer explicitly to the Senate's power to suspend a senator, but other federal legislation does. As already noted, section 4 of the *Parliament of Canada Act* affirms that the Senate's privileges include not only those privileges common to the UK parliament, but those "defined by an Act of the Parliament". Section 2.9 of the *Members of Parliament Retiring Allowances Act* states that:

If a member is suspended by the Senate or House of Commons, as the case may be, by a majority vote of that House, the member's pensionable service is not to include the period that begins on the day on which the suspension starts and ends on the day fixed by the majority vote of that House for the reinstatement of the member's entitlement to accrue pensionable service.³⁷

[52] Section 1(1) of the *Senate Sessional Allowance (Suspension) Regulations*, enacted pursuant to the *Parliament of Canada Act*, likewise refer to the Senate's power to suspend a senator:

If the Senate suspends a member, there shall be deducted from the member's sessional allowance for the period of suspension the amount otherwise payable after deductions required by any Act of Parliament.³⁸

[53] These provisions recognize not only that the Senate may suspend a member by majority vote, but that it has the power to decide when the suspension begins and ends, which in turn determines pension accrual and payment of a sessional allowance. This is all premised on the inherent privilege of parliament to discipline its members through suspension.

[54] The scope of the parliamentary privilege to discipline has been challenged in cases where the person subject to dismissal, expulsion or suspension is not a member of the legislature, but an employee. In *Vaid*, the former chauffeur to the Speaker of the House of Commons filed discrimination and harassment complaints after his position was eliminated. The Speaker and the House argued that the Canadian Human Rights Commission had no jurisdiction to consider the complaint due to parliamentary privilege.

³⁷ R.S.C. 1985, c. M-5.

³⁸ SOR/98/126.

[55] The Supreme Court accepted this argument. As explained by Justice Binnie, deciding otherwise would require a court to do exactly what the privilege prevents it from doing:

The courts below held that parliamentary privilege does not include the freedom to discriminate on grounds prohibited by the *Canadian Charter of Rights and Freedoms* or the *Canadian Human Rights Act* because such discrimination is not necessary to the *proper* functioning of the Senate or House of Commons. On this view, an allegation of discrimination destroys any privilege that might otherwise immunize the Speaker's conduct from external review.³⁹

[56] He concluded that:

The purpose of privilege is to recognize Parliament's *exclusive* jurisdiction to deal with complaints within its privileged sphere of activity. The proper focus, in my view, is not the grounds on which a particular privilege is exercised, but the prior question of the existence and scope of the privilege asserted by Parliament in the first place.⁴⁰

[57] More recently in *Chagnon*, the Supreme Court held that a decision by the President of the National Assembly of Quebec to dismiss security guards was not protected by parliamentary privilege. The majority concluded that judicial oversight of how security guards are managed and disciplined would not impede the National Assembly's core functions. It also noted that employees of the National Assembly are subject to the same labour relations regime that governs other civil service employees.

Does the privilege apply here?

[58] In *Harvey*, the Supreme Court held that parliamentary privilege extends to decisions by the Senate to discipline its members. This includes decisions about whether a member of a body should be suspended or expelled. Section 33 of the *Constitution Act, 1867*, and federal legislation referencing the Senate's right to suspend its members by majority vote, support the privilege asserted by the Senate in this case.

³⁹ *Vaid supra* note 3 at para. 4.

⁴⁰ *Vaid supra* note 3 at para. 4.

[59] Senator Duffy relies on the Supreme Court of Canada's 1878 decision in *Landers v. Woodworth*.⁴¹ In *Landers*, a member of the Legislative Assembly of Nova Scotia was ordered, by resolution of the Assembly, to apologize for making an unfounded accusation of misconduct against the Provincial Secretary. When Landers refused to apologize, he was forcibly removed from the Assembly. He sued the Speaker and some MLAs for damages and won. The Supreme Court upheld this decision. It held that the Legislative Assembly did not have the power to punish a member for contempt.

[60] *Landers* is distinguishable from this case because the Senate has all of the privileges enjoyed by the UK Parliament, whereas the Legislative Assembly of Nova Scotia does not. One of these powers is indisputably the power to punish a member for contempt. As a result, if Landers had been a senator as opposed to a member of the Legislative Assembly of Nova Scotia, the Assembly's actions in finding him in contempt and physically expelling him could not have been subject to any review by the courts.

[61] Senator Duffy argues that *Chagnon* fundamentally changes how courts should approach a motion like this. I disagree. In *Chagnon*, a majority of the Court reaffirmed that, if the actions at issue in a lawsuit fall within the scope of a privilege recognized as necessary for the core processes of a legislative body, the court cannot allow the action to proceed.

[62] There may be debate about whether disciplining an employee of the Senate, such as a chauffeur (as in *Vaid*) or a security guard (as in *Chagnon*) falls within the scope of privilege. There is however no debate that the disciplining of a Senator, as a member of the federal parliament, falls within the scope of the privilege. Nothing in *Chagnon* or any other case since *Harvey* suggests otherwise. The parliamentary privilege over discipline would be meaningless if it did not extend to decisions over members themselves.

[63] I conclude that the Senate's decision to suspend Senator Duffy was an exercise of parliamentary privilege, and therefore immune to any review by this court. This precludes a

⁴¹ (1878), 2 S.C.R. 158 ("*Landers*").

court from determining whether the suspension was unlawful, unfair or contrary to Senator Duffy's *Charter* rights, or from granting him any damages flowing from his suspension.

b) The Senate's privilege to administer its own internal affairs

The scope of the privilege

[64] In his book *Parliamentary Privilege in Canada*, Joseph Maingot states that "[o]ne of those matters of privilege is the right of the legislative body to control its internal affairs and proceedings free of interference from the Crown or executive, the courts or the public".⁴²

[65] This category of parliamentary privilege was at issue in *Villeneuve v. Northwest Territories (Legislative Assembly)*,⁴³ a case somewhat similar to this one. Villeneuve, a former member of the Legislative Assembly of the Northwest Territories, sought judicial review of a decision to withhold an allowance payable to him by the assembly's board of management. Following an audit, the board had filed a complaint alleging that Villeneuve had misrepresented his place of residence. Villeneuve lost his seat before the complaint could be adjudicated.

[66] The Assembly asked the Northwest Territories Superior Court to dismiss Villeneuve's action, on the basis that the board's decision to withhold the allowance was protected by parliamentary privilege. Justice Charbonneau granted the Assembly's motion to strike.

[67] Justice Charbonneau concluded that the Assembly alone could decide how to allocate internal resources, and had delegated its responsibility for the administration of allowances and benefits to the board. In order for it to be an independent and equal branch of the territorial government, the board's decisions on these issues must be free from interference from the courts:

In my view, decisions that the Board makes about MLAs allowances and benefits are truly internal to the legislature, and it is necessary that those decisions be privileged and free from review by the courts. It is necessary that the legislature, through the Board, be able to make its own decisions about benefits and allowances of its members without outside interference. How members are compensated, and what allowances they receive to enable them

⁴² Maingot *supra* note 3 at p. 277.

⁴³ Villeneuve *supra* note 15.

to do their work as MLAs, are the types of internal matters over which the legislature must have complete control and be free from outside interference, as an independent branch of government.⁴⁴

[68] The Quebec Superior Court reached the same conclusion in *Filion v. Chagnon*.⁴⁵ Filion was a member of the Quebec National Assembly. After he lost his seat, the Assembly withheld some of his transitional allowance on the basis that he had made illegitimate expense claims. Justice Francoeur rejected Filion's action challenging the Assembly's decision. He concluded that, since the decision was made by an internal body with the mandate to manage the Assembly's administrative and financial affairs, it fell within the scope of parliamentary privilege, that is, the Assembly's right to regulate its internal affairs without outside interference. As a result, the decision simply could not be reviewed by the court.⁴⁶

[69] Senator Duffy argues that CIBA's decisions are not immune from judicial review for two reasons. First, he suggests that his criminal prosecution means that the privilege no longer applies. Second, he argues that, based on a recent decision of the Federal Court of Canada, the privilege does not extend to decisions by committees such as CIBA.

[70] Senator Duffy's first argument is based on a decision by the UK House of Lords in *R. v. Chaytor*.⁴⁷ In *Chaytor*, members of the UK Parliament faced criminal charges for false accounting of parliamentary expenses. They sought a dismissal of the criminal charges on the basis that the charges infringed parliamentary privilege. This argument was rejected by the trial judge and that decision was upheld on appeal. The UK courts held that the members' alleged misconduct could be punished by both the parliament and by the criminal courts, because the prosecution did not impeach or question any parliamentary proceeding or freedom. Lord Rodger wrote:

[E]ven though the alleged offences presuppose the existence of the allowances system, nothing in the particulars in the indictments indicates, or even suggests, that the prosecution of the charges would raise any issue as to decisions of the House or of its committees, or of any officers or employees

⁴⁴ *Ibid* at paras. 34-36,

⁴⁵ 2016 QCCS 6146, 2016 CarswellQue 11909 ("*Filion*").

⁴⁶ *Ibid* at para. 22.

⁴⁷ *R. v. Chaytor*, [2010] UKSC 52, [2011] 1 A.C. 684 ("*Chaytor*");

acting on their behalf, as to the system or its operation. ... [There is nothing in the allegations against the appellants which relates in any way to the legislative or deliberative processes of the House of Commons or of its members, however widely construed].⁴⁸

[71] Based on the language in *Chaytor*, Senator Duffy argues that his civil lawsuit for recovery of money is not inconsistent with the Senate's exclusive control over the allocation of internal resources.

[72] Senator Duffy made similar arguments about the impact of *Chaytor* in his criminal trial. He asked Justice Vaillancourt to order the Senate to produce records with respect to the CIBA investigation, based in part on the reasoning in that case. Justice Vaillancourt held that the situation in *Chaytor* was distinguishable from Senator Duffy's situation:

In this case, the Applicant [Senator Duffy] is not seeking the protection of parliamentary privilege to obtain a stay, but rather he is seeking to obtain a document produced by a witness before a subcommittee of the Senate.

It is also of significant [sic] that, in the United Kingdom, Parliament elected to establish an arm's-length body to administer claims in 2009, in the form of the Independent Parliamentary Standards Authority, outside the control of Parliament.

Contrary to the assertion of the Applicant, the Senate has not followed this model.⁴⁹

[73] I agree with Vaillancourt J. that *Chaytor* is distinguishable from this case on the two grounds he mentions. First, the Senate's claim for privilege in this case is not being made to shield senators from allegations of criminal wrongdoing, but rather to protect the Senate's right to regulate its own affairs and procedures, to enforce discipline on members, and to deliberate and examine witnesses. Second, the privilege is asserted with respect to proceedings of the Senate and its wholly internal subcommittee, as opposed to proceedings of an arm's-length body.

[74] I conclude, like Justice Vaillancourt, that *Chaytor* does not assist Senator Duffy.

⁴⁸ *Ibid* at para. 122.

⁴⁹ *Duffy application*, at paras. 111-113.

[75] Senator Duffy’s second argument is based on *Boulerice v. Canada (Attorney General)*.⁵⁰ In *Boulerice*, four members or former members of Parliament sought judicial review of decisions by the Board of Internal Economy, which had ruled that the members had used parliamentary resources and services in contravention of the Board’s by-laws. The Board and the Speaker of the House of Commons brought a motion to strike the applications. They argued that the Board was not a “federal board, commission or other tribunal” under the *Federal Courts Act*, and that its decisions were therefore not subject to judicial review. They also argued that parliamentary privilege shielded the Board from any judicial review.

[76] Justice Gagné rejected the motion to strike, allowing the applications for judicial review to proceed.

[77] Justice Gagné held first that the Board of Internal Economy is a “federal board”. She found that the Board’s jurisdiction and powers were not derived from constitutional privileges, but uniquely from section 52.3 of the *Parliament of Canada Act*. In her view, this put the Board in a fundamentally different position than the Senate. Justice Gagné wrote:

This case does not involve the Senate or the House of Commons, institutions central to our free and democratic system of government... Rather, we are faced with a subsidiary entity charged and empowered to administer the use of resources and services by members. The Board, in all of its delegated powers and functions, is clearly not as fundamental to our notion of free democracy that it attracts the same protections afforded to the Senate and the House of Commons.⁵¹

[78] Justice Gagné noted that, pursuant to section 2(2) of the *Federal Courts Act*, the Commons and its committees are not subject to the jurisdiction of the Federal Court. In her view, however, the Board of Internal Economy did not have the same standing or role as a parliamentary committee:

Committees of the House of Commons – be they standing, legislative, special or subcommittee – are specific parliamentary bodies derived from the conduct of the House, its Standing Orders and parliamentary tradition. ... They are

⁵⁰ 2017 FC 942, 2017 CarswellNat 6051 (“*Boulerice*”).

⁵¹ *Ibid* at paras. 21-22 (citations in para. 22 omitted).

not created by, nor do they take their powers from, an Act of Parliament. They examine policy, engage in law-making and exercise functions at the core of the legislative powers.

The Board, on the other hand, has no such functions. Its only functions are financial and administrative.⁵²

[79] Senator Duffy argues that, like the Board of Internal Economy, the CIBA's only functions are financial and administrative, and that therefore its decisions are not subject to parliamentary privilege. I disagree.

[80] The CIBA is a purely internal parliamentary committee made up of senators appointed by the Leader of the Government in the Senate and the Leader of the Opposition in the Senate.⁵³ In exercising its functions and powers, it is subject to the "rules, direction and control of the Senate".⁵⁴ As an internal committee of the Senate, it falls outside the definition of a "federal board, commission or tribunal" in section 2(2) of the *Federal Courts Act*.⁵⁵

[81] The CIBA has the mandate to act on all financial and administrative matters respecting the Senate, its premises, its services, its staff and the members of the Senate.⁵⁶ This includes the power to make regulations about senators' use of "funds, goods, services and premises made available to them for the carrying out of their parliamentary functions", and "prescribing the terms and conditions of the management of, and accounting for, by senators", of such funds.⁵⁷ The CIBA likewise has the exclusive authority to determine whether a senator has made proper use of the parliamentary resources allocated to them:

The Committee has the exclusive authority to determine whether any previous, current or proposed use by a senator of any funds, goods, services or premises made available to that senator for the carrying out of parliamentary functions is or was proper, given the discharge of the parliamentary functions

⁵² *Ibid* at paras. 26-27.

⁵³ *Parliament of Canada Act* *supra* note 17, s. 19.1(3).

⁵⁴ *Ibid*, s. 19.1(4).

⁵⁵ R.S.C. 1985, c. F-7.

⁵⁶ *Ibid*, s. 19.3.

⁵⁷ *Ibid*, s. 19.5(1).

of senators, including whether any such use is or was proper having regard to the intent and purpose of the regulations made under subsection 19.5(1).⁵⁸

[82] Finally, the CIBA may issue general opinions regarding the proper use of Senate funds, goods, services and premises.⁵⁹

[83] CIBA's exclusive power to allocate – and withhold – parliamentary funds and resources to any given senator is very much at issue in Senator Duffy's lawsuit. That is because its decisions may be critical to a senator's ability to perform their parliamentary functions adequately. In light of this, I conclude that CIBA exercises functions at the core of the Senate's legislative powers.

[84] In her reasons, Justice Gagné, relying on *Chaytor*, concludes that the notion of parallel jurisdiction over allegedly criminal activities also applies in the analysis of the availability of judicial review. I respectfully disagree. What was at issue in *Chaytor* was the ability of a member of parliament to evade criminal prosecution based on a claim of parliamentary privilege. The UK courts rejected this argument because its parliament has never asserted such a privilege on behalf of its members. But parliament has consistently asserted privilege when a party, in the context of legal proceedings, asks the court to review a matter within the scope of parliament's exclusive control.

[85] I conclude that *Boulerice* is distinguishable from this case. To the extent that it is not, I respectfully decline to adopt Gagné J.'s reasoning in that case.

Does the privilege apply here?

[86] In his lawsuit, Senator Duffy alleges that the CIBA has withheld his pension allocation and reimbursement for legitimate expenses. He asks this court to find that these decisions are unlawful.

[87] The Senate has the exclusive power to regulate its internal affairs. This power includes the right to allocate internal resources, as found by the courts in *Villeneuve* and *Filion*. The

⁵⁸ *Ibid*, s. 19.6(1).

⁵⁹ *Ibid*, s. 19.8.

Senate has delegated decisions on allowances and expenses to a wholly internal subcommittee, the CIBA.

[88] Adjudicating Senator Duffy's claim regarding his living allowance, pension and expenses would require the court to overturn decisions that the Senate alone, through the CIBA, has the power to make. The Senate's decisions on Senator Duffy's monetary entitlements are not subject to judicial consideration; they clearly fall within the scope of recognized parliamentary privilege. This precludes any court from determining whether these decisions were unlawful, unfair or contrary to Senator Duffy's *Charter* rights, or from granting him any damages flowing from them.

c) Privilege over parliamentary proceedings

The scope of the privilege

[89] In 1839, in *Stockdale v. Hansard*, the chief justice of the Court of Queen's Bench held that parliament alone must have control over its own proceedings and decide when its internal rules have been violated:

That the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules, or derogation from its dignity, stands upon the clearest grounds of necessity.⁶⁰

[90] Parliament's right to control its own processes has likewise been recognized by Canadian courts. As the Supreme Court of Canada recognized in *NB Broadcasting*, the "right of the House to be the sole judge of the lawfulness of its proceedings is ... evident".⁶¹ Less than a month ago, the court reaffirmed this privilege, stating:

Canadian jurisprudence makes clear that parliamentary privilege protects control over "debates or proceedings in Parliament". The existence of this

⁶⁰ (1839), 9 Ad. & E.1 in *Bradlaugh supra* note 22 at p. 279.

⁶¹ *NB Broadcasting supra* note 4 at p. 386.

privilege generally prevents courts from enforcing procedural constraints on the parliamentary process.⁶²

[91] In *Mikisew*, a majority of the Supreme Court held that the Federal Court could not require the government to consult with First Nations when it was developing new legislation, because the legislative process is shielded from court review.

Does the privilege apply here?

[92] The CIBA investigation and the processes leading to the Senate's decision to suspend Senator Duffy are protected by parliamentary privilege. A court could not conclude that the Senate or one of its bodies failed to provide Senator Duffy with a fair opportunity to present his case, because this would impose procedural constraints on the Senate. This precludes any court from determining whether the investigation or suspension were unlawful, unfair or contrary to Senator Duffy's *Charter* rights, or from granting him any damages flowing from any denial of his procedural rights.

d) Privilege over freedom of speech

The scope of the privilege

[93] The privilege over speech in parliament was formally recognized in article 9 of the 1689 *Bill of Rights* and is therefore a category of privilege referred to in the *Constitution Act, 1867*. In *NB Broadcasting*, the Supreme Court stated that "[t]he need for the right of freedom of speech is so obvious as to require no comment".⁶³

[94] The parliamentary privilege over freedom of speech prevents a member of parliament from being sued for comments made in parliament or from being compelled to testify in court about speeches made in the legislature. The privilege protects not only statements made in

⁶² *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, 20 C.E.L.R. (4th) 1 ("Mikisew") at para. 37. Within this passage, the majority cited *Vaid supra* note 3 at para. 29, point 10; *Maingot supra* note 3 at pp. 166-71; see also *NB Broadcasting supra* note 4 at p. 385; P. W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) (loose-leaf supp.) at s. 1.7; *Bill of Rights of 1689 supra* note .

⁶³ *NB Broadcasting supra* note 4 at p. 385.

Parliament but those made before parliamentary committees. As a result, anything that is said in one of the committees is not actionable in the ordinary courts.⁶⁴

[95] The privilege extends to statements by members of the public who participate in proceedings in Parliament or parliamentary committees. Maingot states:

The *Bill of Rights, 1689* is not restricted to Members; whatever protection is afforded the Member is equally afforded to the non-Member under the same circumstances. Accordingly, witness, petitioner, counsel, and others whose assistance the House considers necessary for conducting its proceedings are protected by the rule of Parliament ... that no evidence given in either House can be used against the witness in any other place without the permission of the House.⁶⁵

[96] As a result:

While taking part in such proceedings, officers of Parliament, Members of Parliament, and the public are immune from being called to account in the courts or elsewhere, save the Houses of Parliament, for any act done or words uttered in the course of participating, however false or malicious the act and however malicious the words might be; and any member of the public prejudicially affected is without redress.⁶⁶

[97] As noted in the passage I have just cited, parliamentary privilege over freedom of speech is absolute. It does not matter if the person who made statements in parliament is alleged to have lied or in fact clearly did so. The only body that can take steps to sanction speech in parliament is parliament itself. In the face of this privilege, a court may not consider any action based on speech in parliament, or admit evidence about speech in parliament.

[98] In *Prebble v. Television New Zealand Ltd.*, the Privy Council stated that the reason for the blanket privilege over speech in parliament is “the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts”.⁶⁷ This point was

⁶⁴ Maingot *supra* note 3 at p. 31, cited in *Ontario v. Rothmans Inc.*, 2014 ONSC 3382, 374 D.L.R. (4th) 175 (“*Rothmans*”) at para. 12.

⁶⁵ *Ibid* at pp. 36-37, cited in *Rothmans supra* note 71 at para. 13 (emphasis added in *Rothmans* omitted).

⁶⁶ *Ibid* at p. 77, cited in *Rothmans supra* note 71 at para. 13.

⁶⁷ *Prebble v. Television New Zealand Ltd.*, [1995] 1 A.C. 321 (P.C.) (“*Prebble*”) at p. 334.

emphasized by Justice Tremblay-Lamer in two decisions on parliamentary privilege over freedom of speech.

[99] In *Gagliano v. Canada (Attorney General)*, a former member of parliament sought judicial review of a decision by the Sponsorship Inquiry to preclude testimony before a parliamentary committee from being used in cross-examination.⁶⁸ The Crown argued successfully that the decision should be upheld, because parliamentary privilege protected the independence of the legislature from both the judiciary and the Crown, including a federal commission of inquiry.

[100] Justice Tremblay-Lamer provided this rationale in dismissing the application for judicial review:

It is my opinion that precluding cross-examination based on evidence presented to a Parliamentary committee is necessary for that committee, primarily because it encourages witnesses to speak openly.

It is also essential to the proper functioning of the committee in its investigative or inquisitorial role. And it forecloses the possibility that a finding of fact by a court or a commission of inquiry will contradict a finding of fact by a Parliamentary committee or Parliament as a whole.⁶⁹

[101] She concluded that questioning the Committee's procedure and decisions would be "contrary to our constitutional structure".⁷⁰

[102] Justice Tremblay-Lamer dealt with the same issue again in a judicial review of the RCMP Commissioner's decision to discipline a member for alleged perjury in her evidence before the House of Commons' Public Accounts Committee.⁷¹ She observed that recognizing Parliament's absolute control over the speech is necessary to preserving its independence:

⁶⁸ (2005) FC 576, [2005] 3 F.C.R. 535 (T.D.) ("*Gagliano*"). The Sponsorship Inquiry was the Commission of Inquiry into the Sponsorship Program and Advertising Activities established in February 2004 to investigate irregularities identified by the Auditor General of Canada.

⁶⁹ *Ibid* at paras. 108-10.

⁷⁰ *Ibid* at paras. 108-10.

⁷¹ *Royal Canadian Mounted Police (Deputy Commissioner) v. Canada (Attorney General)*, 2007 FC 564, [2008] 1 F.C.R. 752 (T.D.) ("*RCMP Commissioner*").

If Parliament has reason to believe that a witness has deliberately misled the House, it is up to Parliament, and Parliament alone, to initiate proceedings and discipline such conduct. Misleading the House is contempt of the House punishable by the House: if a court or another entity was allowed to inquire into whether a member or a witness had misled the House, this could lead to exactly the type of conflict between two spheres of government that the wider principle of parliamentary privilege is designed to avoid. The courts would be trespassing on Parliament's jurisdiction ...⁷²

[103] The privilege not only prevents witnesses from testifying in court with respect to statements they made in parliament, but the production of transcripts of their evidence. In *Lavigne v. Attorney General of Ontario*, a senator was being investigated by a special subcommittee on the use of Senate resources.⁷³ He applied to the Superior Court for an order compelling production of transcripts of witnesses heard by the committee in private. The court dismissed the application on the basis that the transcripts were privileged. Justice Lalonde noted that the right of speech and the right of the Senate to control its debates, including the right to debate in private and to publish its debates, are recognized parliamentary privileges.⁷⁴ He held that:

A decision on my part to require the Senate to produce the transcripts would have the effect of reversing the Senate's decision to asking them to provide the transcripts and would also have the effect of reversing the senators' decision to hold the hearings involving Senator Raymond Lavigne in private. I would then be making public what the Senate did not wish to make public. The Senate can decide to hold its sessions in private; this is a recognized parliamentary privilege and the Senate is not required to establish the necessity for it.⁷⁵

[104] Having found that the activity at issue fell within the scope of the privilege, Justice Lalonde said he could not question whether the Senate had any justification for refusing to provide Senator Lavigne with the transcripts. In his words:

⁷² *RCMP Commissioner* at para. 65, citing *Pepper (Inspector of Taxes) v. Hart*, [1993] A.C. 593 (H.L.); *Hamilton v. Al Fayed (No. 1)*, [2000] 2 All E.R. 224 (H.L.).

⁷³ (2008), 91 O.R. (3d) 728 (S.C.J.) ("*Lavigne*").

⁷⁴ *Ibid* at para. 23.

⁷⁵ *Ibid* at para. 48.

My role is simply to make a finding as to whether or not the claimed parliamentary privilege exists. If I find that there is a parliamentary privilege, as I do in this case, it is not for me to determine how it should be applied in a particular case.⁷⁶

[105] Where a plaintiff makes allegations in a statement of claim that something was said in parliament, the defendant may seek to have that allegation struck, on the ground that parliamentary privilege applies.⁷⁷

The proceedings of a legislative body are absolutely privileged and words spoken in the course of a proceeding in Parliament can neither form the basis of nor support either a civil action or a criminal prosecution.⁷⁸

[106] *Ontario v. Rothmans Inc.* is a good example how a court should approach allegations in a statement of claim that are subject to privilege.⁷⁹ The Ontario government sued various tobacco companies, claiming that they had misrepresented the health risks of smoking. It alleged that some of these misrepresentations had been made to parliamentary committees. The defendant companies applied to strike these allegations, on the basis that any statements to such committees were subject to privilege. Justice Conway granted the motion to strike, rejecting the government's argument that it was inappropriate to do so in the absence of evidence on the context in which the statements were made:

[B]ecause the immunity is absolute, any self-serving motivations of the person participating before the committees would not affect the privilege. Motive is irrelevant to an absolute privilege. In *Roman Corp. v. Hudson's Bay Oil & Gas Co.*, the court struck out a statement of claim noting that it had "no power to inquire into what statements were made in Parliament, why they were made, who made them, what was the motive for making them or anything about them".

Once a person attends and participates in a parliamentary committee proceeding, the absolute privilege applies to his statements made in the course of that proceeding, with the result that the statements cannot be used in a civil

⁷⁶ *Duffy application*, at para. 91.

⁷⁸ *Stopforth v. Goyer* (1978), 20 O.R. (2d) 262 (H.C.J.), rev'd on other grounds (1979), 23 O.R. (2d) 696 (C.A.), at p. 269. See also: *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2004 CanLII 8595 (Ont. S.C.J.), rev'd in part on other grounds (2005), 256 D.L.R. (4th) 407 (Ont. C.A.).

⁷⁹ *Rothmans supra* note 71.

action against him. The surrounding circumstances are simply not relevant. In this case, the Crown had pleaded that the defendants made the Presentations to various House of Commons standing committees and federal legislative committees. That is sufficient to invoke the privilege.⁸⁰

Does the privilege apply here?

[107] The amended statement of claim includes many allegations about statements made before the CIBA and in the Senate generally. For example, Senator Duffy makes allegations about the contents of CIBA reports, and complains that the Twenty-Sixth report is inconsistent both with the Twenty-Second Report and the Deloitte audit. The CIBA reports and the audit report are subject to parliamentary privilege. Following *Rothmans*, any allegations about them must be struck.

[108] Senator Duffy argues that I should not strike these allegations for two reasons. First, he says that the Senate has waived its privilege. Second, he says that he will not necessarily need any privileged evidence to prove his case, and it would be premature to strike the allegations in his statement of claim at this stage of the lawsuit.

(a) Has the Senate waived the privilege?

[109] Senator Duffy argues that the Senate waived its right to invoke parliamentary privilege over freedom of speech when the CIBA referred the issue of Senator Duffy's acceptance of money from Nigel Wright to the RCMP, and when it co-operated with the investigation and prosecution of criminal charges against him. Citing *Rothmans*, he contends that "the waiver of parliamentary privilege is the same as waiving any other kind of privilege".

[110] I do not agree that the decision in *Rothmans* stands for the proposition that parliamentary privilege is the same as other types of privilege. The paragraph cited by Senator Duffy's counsel simply states that:

The parties acknowledge that parliamentary privilege can be waived. However, the privilege belongs to Parliament and therefore it is up to

⁸⁰ *Ibid* at paras. 31-32.

Parliament – not the person who made the statement – to decide whether privilege is to be waived in a particular case.⁸¹

[111] The judge in *Rothmans*, citing *RCMP Commissioner*, concluded that a waiver of parliamentary privilege must be expressly made, and that there was nothing to indicate that the waiver had been made in that case.⁸² As a result, he struck the allegations in the statement of claim with respect to the defendants' representations in the House of Commons.

[112] In his amended statement of claim, Senator Duffy does not explicitly allege that the Senate waived its privilege. The only fact pleaded that might suggest any kind of waiver is the CIBA's referral to the RCMP of his acceptance of money from Mr. Wright. At his criminal trial, Senator Duffy argued that this amounted to an implicit waiver of the Senate's privilege. Justice Vaillancourt ruled against him on this issue. He held that a waiver of parliamentary privilege requires a constitutional enactment using clear and unambiguous language. The fact that the documents at issue had been disclosed or are public is irrelevant.

[113] Senator Duffy argues that I should infer waiver based on the Senate's failure to contest the calling of Senate officials and employees as witnesses at his criminal hearing, and the production of internal Senate documents in that proceeding. He does not however allege this in his statement of claim. Even if he had done so, I would need to find that the Senate's failure to invoke privilege at any given time means that it has lost its ability to do so going forward. Senator Duffy provided no authority for this proposition.

[114] Since parliamentary privilege is a constitutional principle, it cannot be implicitly waived. I find that there is no conduct alleged in the statement of claim that would indicate, clearly and unambiguously, that the Senate waived its privilege.

(b) *Is it premature to strike the allegations?*

[115] Senator Duffy said that I should not assume that, in order to prove his case against the Senate, he would need to call witnesses who had testified before the CIBA, or the senators who

⁸¹ *Ibid* at para. 21.

⁸² *Ibid* at para. 35.

allegedly took steps to interfere with the Deloitte investigation and directed the Twenty-Sixth Report. He suggested that Justice Vaillancourt's findings of fact in his criminal trial would suffice to prove his allegations against the Senate.

[116] I have a great deal of trouble seeing how this could work. But even if I accepted that Senator Duffy did not need to call his fellow senators or Senate representatives to testify, there is no question that he would have to introduce the CIBA reports, and the Deloitte audit report, and records of Senate proceedings, into evidence at trial. These are the very sorts of records that Senator Duffy sought to produce at his criminal trial, and that Justice Vaillancourt concluded were privileged.

[117] In any event, on a motion to strike like this, I must take the pleadings as they are. If I find that the plaintiff has made allegations about statements subject to parliamentary privilege, I must strike them. I cannot wait and see whether the allegations may not turn out to be essential to the plaintiff's case or that evidence could be adduced later on to show that the privilege was waived.

[118] I conclude that many of the allegations in the statement of claim refer to speech protected by parliamentary privilege and so must be struck.

Conclusion

[119] For the reasons set out here, I conclude that Senator Duffy's legal claim against the Senate is based on actions and speech that fall squarely within the scope of established parliamentary privilege. The decision to suspend Senator Duffy is subject to the Senate's privilege to discipline its members. The investigation of his living allowance and claims for reimbursement are protected by the Senate's privilege to manage its internal affairs. The CIBA investigation and the processes leading to the decision to suspend Senator Duffy fall within the Senate's privilege over its proceedings. Parliamentary privilege immunizes all of the decisions and conduct underlying Senator Duffy's claim against the Senate. As a result, this court has no role in judging their lawfulness or fairness.

[120] The allegations in Senator Duffy's statement of claim about statements and reports in the Senate are furthermore subject to the Senate's privilege over freedom of speech. The Senate has not waived this privilege. As a result, all such allegations must be struck. These allegations are fundamental to Senator Duffy's claims of malicious prosecution, misfeasance in public office, unjust enrichment, unconstitutional actions and violations of his *Charter* rights. There would be no point in granting Senator Duffy leave to amend his statement of claim, because there would be no way for him to assert his claim absent reference to privileged speech.

[121] This court, and Senator Duffy, must respect Canada's constitutional framework. The separation and independence of the legislative, executive and judicial branches of our government is a fundamental aspect of that framework. The decisions at issue here are within the exclusive power of the Senate to make. Allowing a court to revisit them, or to compel production of privileged material, would interfere with the Senate's ability to function as an independent legislative body, coequal to other branches of government.

[122] The Senate's motion to dismiss Senator Duffy's action against it is therefore granted.

[123] If the parties cannot agree on costs, the Senate may make written costs submissions within ten days of release of this decision. Senator Duffy may make responding costs submissions within ten days of receipt of the Senate's submissions. Submissions should not exceed three pages in length in addition to a costs outline. Counsel should forward the

submissions to me at my office at 161 Elgin Street. If I do not receive submissions within the deadline set out here, I shall assume that the parties have resolved the issue of costs.

Justice Sally Gomery

Released: December 14, 2018

CITATION: Duffy v. Senate of Canada, 2018 ONSC 7523
COURT FILE NO.: 17-73728
DATE: December 14, 2018

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Senator Michael Dennis Duffy

Plaintiff/Respondent

– and –

The Senate of Canada

Defendant/Moving Party

– and –

The Attorney General of Canada

REASONS FOR JUDGMENT

Justice S. Gomery

Released: 2018-12-14

TAB 14

Date: 20080417

Docket: A-105-08

Citation: 2008 FCA 141

Present: SHARLOW J.A.

BETWEEN:

eBAY CANADA LIMITED AND eBAY CS VANCOUVER INC.

Appellants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on April 14, 2008.

Order delivered at Toronto, Ontario, on April 17, 2008.

REASONS FOR ORDER BY:

SHARLOW J.A.

Date: 20080417

Docket: A-105-08

Citation: 2008 FCA 141

Present: SHARLOW J.A.

BETWEEN:

eBAY CANADA LIMITED AND eBAY CS VANCOUVER INC.

Appellants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER

SHARLOW J.A.

[1] The appellants eBay Canada Limited and eBay Cs Vancouver Inc. (collectively, “eBay Canada”) have appealed the judgment of Justice Hughes dated February 13, 2008 (2008 FC 180).

That judgment authorizes the Minister of National Revenue to require eBay Canada, under subsection 231.2(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), to provide information to the Minister about PowerSellers whose eBay registration indicates a Canadian address. The required information includes the names of the PowerSellers, their contact information, and the amount of their gross annual eBay sales. Before me is a motion by eBay Canada to stay the execution of the

Irreparable Harm

[28] The motion of eBay Canada for a stay of the judgment pending appeal rests primarily on the irreparable harm branch of the *RJR – MacDonald* test. According to *RJR – MacDonald*, irreparable harm is harm that cannot be quantified in monetary terms or that cannot be cured.

[29] It is argued for eBay Canada that the disclosure of the information in issue would necessarily result in irreparable harm to eBay Canada because the disclosure would render eBay Canada's appeal moot or futile. In support of its argument, eBay Canada cites *Bisaillon v. Canada*, (1999) 251 N.R. 225, [2000] 1 C.T.C. 179, 99 D.T.C. 5517 (F.C.A.), *Bining v. Canada*, 2003 FCA 286, and *Rousseau v. Wyndowe*, 2006 FCA 422.

[30] I summarize the *Bisaillon* case as follows. A corporation, Hypnat Ltée, owed taxes of \$230,000. Another corporation, Hypnat Ltée, Courtier, owed Hypnat Ltée a debt of approximately \$1.6 million, which the Minister had attached to secure the tax debt of Hypnat Ltée. The Minister wished to determine whether Hypnat Ltée, Courtier had paid its debt to Hypnat Ltée in contravention of the attachment. Hypnat Ltée was a customer of Laurentian Bank. The Minister served Laurentian Bank with a requirement under subsection 231.2(1) to provide information about Hypnat Ltée, Courtier. Mr. Bisaillon, Hypnat Ltée, and Hypnat Ltée, Courtier (not Laurentian Bank) commenced an application in the Federal Court challenging the validity of the requirement, and sought an interlocutory order staying the requirement pending the determination of its application for judicial review. That motion was dismissed. The applicants appealed to this Court, and moved for an order staying the requirement pending the determination of the appeal. On the

[33] It is argued for eBay Canada that these cases stand for the principle that a person who is required by a court order to disclose information about another person, and seeks a stay of that judgment pending appeal, will always suffer irreparable harm if the stay is not granted. I do not accept that argument. I read these cases as examples of situations in which persons may suffer irreparable harm if they are denied a stay pending appeal of a judgment requiring them to disclose or submit to the disclosure of information about their own affairs to someone whose interest in the information is adverse to their own. In this case, the relevant question is whether eBay Canada would suffer irreparable harm if it is now compelled to provide the Minister with the information the Minister seeks about PowerSellers, and it is later determined that the Minister was not entitled to require eBay Canada to provide that information.

[34] It is argued for eBay Canada that once information about PowerSellers is disclosed to the Minister, it cannot be undisclosed. I agree that the disclosure of information is an act that cannot be reversed. In response to that point, the Minister argues that it is open to eBay Canada to seek, as one of the remedies on appeal, an order that would prevent the Minister from using the disclosed information. The difficulty with that submission is that it is not certain that such an order would be granted if the appeal is successful. And even if such an order is granted, it would be ineffective to the extent that the Minister uses the disclosed information before the disposition of the appeal.

[35] However, the relevant question is whether eBay Canada would suffer irreparable harm from the disclosure, which first requires a determination that there will be some harm. The answer to that

question depends on what the Minister is likely to do with the information if it is disclosed. It would appear that the Minister intends to use the information to retrieve and review the 2004 and 2005 income tax returns of the PowerSellers whose identities are disclosed. I anticipate that the Minister would then make whatever enquiries may be required to determine whether the PowerSellers have unreported income from their eBay sales, and if so he would reassess them accordingly (putting aside for the moment the question that some of the tax returns might be statute barred by the time the Minister is in a position to reassess).

[36] The record contains no evidence that any steps the Minister may take to verify the PowerSellers' compliance with the *Income Tax Act* , or to assess any PowerSellers who may not have complied, will cause any harm to eBay Canada, much less harm that is irreparable.

[37] The record contains some material from which it could be inferred that eBay Canada has contractual obligations to eBay Inc. not to disclose certain confidential information without the consent of eBay Inc. It is not clear that the information sought by the Minister about PowerSellers is confidential information as contemplated in those contracts. Even if the information about PowerSellers is confidential information under those contracts, it is not clear that eBay Canada's obligation not to disclose confidential information would or could be breached by the disclosure of information pursuant to a court order (even a court order that is under appeal). And, even if such a breach would or could result from such a disclosure, there is no evidence that any harm would come to eBay Canada as a result.

TAB 15

CASES DECIDED

ON THE

BRITISH NORTH AMERICA ACT, 1867,

IN

THE PRIVY COUNCIL, THE SUPREME COURT OF
CANADA, AND THE PROVINCIAL COURTS.

COLLECTED AND EDITED BY

JOHN R. CARTWRIGHT, OF OSGOODE HALL, ESQUIRE,

Barrister-at-Law, and Law Clerk to the Legislative Assembly of Ontario.

VOL. II.

STANLEY GRAY

TORONTO:

PRINTED BY C. BLACKETT ROBINSON, 5 JORDAN STREET.

1883.

QUEBEC COURT OF QUEEN'S BENCH—
APPEAL SIDE.

1875*

Feb. 17.

EX PARTE CLEMENT ARTHUR DANSEREAU.

[Reported 19 L. C. Jurist, 210.]

*Legislative Assembly of Quebec—Powers and Privileges of—
33 Vict. c. 5, Q.*

Provincial Legislatures have as incident to their express powers under the B. N. A. Act the right to summon witnesses and to punish persons who disobey such summons, this right being necessary to the proper exercise of their powers of legislation and the control assigned to them in respect of the administration of public affairs.

The provisions of the Act of the Quebec Legislature, 35 Vict. c. 5, regulating this right, are valid.

Ramsay, J., dissenting.

The petitioner (Feb. 13) prayed for the issuing of a writ of *habeas corpus* addressed to Charles Garneau, Serjeant-at-Arms of the Provincial Legislature of Quebec, commanding him to bring the body of the petitioner, and for the setting aside of the warrant of arrest under which the petitioner was arrested, as being illegal.

The writ was ordered to issue, and counsel were heard thereon.

The reasons assigned on behalf of the petitioner were substantially the same as those urged in the case of *Cotte and Duvernay*,† which came before Mr. Justice Ramsay, a Judge of the Court of Queen's Bench, in Chambers, a few days previously.

*Present :—DOSSON, C. J., MONK, TASCHEREAU, RAMSAY and SANBORN, JJ.

†In the above case, *Carter*, Q.C., for the petitioners, submitted the following propositions :

1st. That the House of Assembly of Quebec does not possess the

power of arrest with a view to adjudication on a complaint of contempt committed out of doors.

2nd. That the power of the House of Commons in England was part

1875

EX PARTE
DANSEREAU.

STATEMENT.

The witness *Dansereau* was in the same position as *Cotte* and *Duvernay*, but as the Court was about to sit, the writ in his case was made returnable in term. The Court (Feb. 17) rendered judgment, sustaining the warrant and quashing the writ of *habeas corpus*.

RAMSAY, J. :—

Immediately after the judgment in the cases of *Cotte* and *Duvernay*, rendered by me in Chambers yesterday week, a petition was presented to me for a writ of *habeas corpus* in the present case. It was taken as a matter of course that I would issue the writ and decide it at once; but as the Court was to sit within three days, I availed myself of the power granted by sub-s. 2, s. 22, c. 95, Con. Stat. L. C., and made the writ returnable in term. By this means an opportunity is afforded of obtaining, if not a final decision on a question involving important inter-

of the "*Lex et consuetudo Parliamenti*," and the existence of that power does not warrant the ascribing it to every Legislative Council or Assembly in the colonies, although its legislative powers might be general, and not restricted as are those of the Local Legislature.

3rd. That the power of the House of Commons in England to compel the attendance of witnesses is based upon the fact that it is a Court of Record, which the Legislative Assembly is not.

4th. That the House of Commons in England, although possessing the power of a Court of Record to enforce the attendance of witnesses, did not possess the power of administering an oath to witnesses until in 1871, by Imperial Act 34 and 35 Vict. c. 83, that power was granted, and therefore the Quebec Legislature could not validly pass an Act to confer on committees the power of

examining witnesses under oath—a right which was not granted until 1871 by the Imperial Parliament to the Commons of England.

5th. That the authority of the Local Legislatures is expressly limited by the Union Act to the subjects specially assigned to them, and that they possess no authority or jurisdiction beyond such special designation.

6th. That the legislative authority in matters concerning *the peace, order and good government of Canada*, in relation to all subjects not specially assigned to the Local Legislatures, is conferred upon the House of Commons by the 91st section of the Union Act; and if the power to pass a law giving committees the authority of administering an oath to witnesses was not within the jurisdiction of the House of Commons of Canada, under the Union Act, as established by the disallowance of the Bill passed

ests, at least the opinion of the full Court of Queen's Bench.

I have so recently expressed my opinion on this matter (1)—an opinion which remains substantially unchanged—that I shall confine my remarks to what appears to be new in the arguments of the learned counsel for the Speaker.

And, first, I must express astonishment that one of the learned counsel should have reproduced with deliberation the unsustainable proposition that I had no authority to issue the writ now before the Court. It will strike criminalists as a doctrine somewhat novel that a man detained under a warrant of arrest cannot obtain a writ of *habeas corpus* on production of the warrant, without affidavit. Section 1 of our Habeas Corpus Act (cap. 95, Con. Stat. L. C.) reads as follows:—

1. "All persons committed or detained in any prison

to administer oaths to witnesses on the Pacific Scandal Enquiry, 36 Vict. c. 1, it necessarily follows that the Act of the Quebec Legislature, 33 Vict. c. 5, passed in 1870, transcends even the power vested in the Senate and House of Commons of Canada, and is *ultra vires*.

7th. That the Legislature of Quebec is to be regarded as a body of limited jurisdiction only, having no legislative powers derivable from the common law, but simply those created by statute; and it possesses no inherent powers or judicial functions such as could be assigned to or be exercised by a Court of Record.

8th. That the enquiry instituted by the Legislature of Quebec in the present instance was not incident to the exercise of the legislative authority specially assigned to it by the Union Act, and by reason thereof the appointment of a select com-

mittee to enquire into what is popularly known as the "Land Swap" was beyond its powers as a Legislature, and under the Union Act, sec. 65, could only be validly exercised by the Lieutenant-Governor in Council, under Royal Commission.

9th. That the Legislature of Quebec having only a limited jurisdiction, deriving its efficacy solely from statute, and out of the course of the common law, the warrant of the Speaker, in order to render it valid, ought on its face to disclose by direct averments the facts and circumstances relied upon for the exercise of the jurisdiction claimed; whereas the warrant of the Speaker wholly failed to disclose any authority personal to himself as such Speaker, or in the Legislative Assembly of Quebec, to order the arrest of the petitioner, and is therefore absolutely null and void.

(1) See note *post*, p. 220, *Cotte's Case*.

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within Lower Canada, for any criminal or supposed criminal offence, shall of right be entitled to demand and obtain from the Court of Queen's Bench, or from the Superior Court, or any one of the judges of either of the said courts, the writ of *habeas corpus*, with all the benefit and relief resulting therefrom, at all such times, and in as full, ample, perfect, and beneficial a manner, and to all intents, uses, ends and purposes, as Her Majesty's subjects within the realm of England, committed or detained in any prison within that realm, are there entitled to that writ, and to the benefit arising therefrom, by the common and statute laws thereof."

Section 4 runs thus:—

"And if any person is committed or detained, as aforesaid, for any crime (unless for felony or treason, plainly expressed in the warrant of commitment) in the vacation time, and out of term or sessions, such person (not being convicted or in execution by legal process), or any one on his behalf, may complain to one of the judges of the Court of Queen's Bench, or Superior Court, who upon view of the copy of the warrant or warrants of commitment and detainer, or otherwise, upon oath made that such copy was denied to be given by the person in whose custody the prisoner is detained, *shall*, upon request made in writing by such person, or any one on his behalf, attested and subscribed by two witnesses present at the delivery of the same, award and grant a writ of *habeas corpus*, under the seal of the court of which such judge is a member, directed to the officer or person in whose custody the party so committed or detained is, returnable *immédiatè* before the said judge.

Section 20 is for persons confined by civil process, or restrained of their liberty otherwise. This is to be gathered, not from the rubric, as was presumed at the argument, but from the dispositions of the section which

the rubric, sufficiently for the purpose, enunciates. To have dealt, then, with the application in this case under section 20, I must have supposed that the arrest was on a civil process. As the warrant did not pretend to be of this nature, the supposition would have been most gratuitous, and to have arrived at it I must have had the ingenuity to discover that a warrant of arrest of the Speaker could be a summons.

A summons differs essentially from a warrant in this, that it is not an attachment. The persistence in calling this attachment a summons can have no effect but to lengthen the discussion. A summons may be for a criminal matter, under statute, but an attachment is presumably for criminal matter, and the only exception I know is the attachment on *capias* for debt. If Mr. Dansereau had been committed on a *capias*, I should certainly not have issued the warrant without an affidavit. If, however, the theory of the Speaker's counsel were to prevail, then the more meagre the warrant, the more difficult it would be for a person incarcerated to get out of prison, and the judges would have to presume a civil process behind an attachment almost in blank, unless there was an affidavit of circumstances on the part of the prisoner.

In support of this curious pretension, *Hobhouse's Case* was cited. It is certainly very edifying to have in a case like this, where it is sought to reconcile the public mind to the exercise of arbitrary privileges, the extraordinary and unjustifiable proceedings against Mr. Hobhouse unnecessarily forced on our attention. That seditious person became a minister of the Crown, was created a peer of the realm by Her Majesty, and died covered with honours only a few years ago. It will not, however, be necessary to overthrow the decision in that case in order to meet the argument of the Speaker's counsel, for the case is no way in point.

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In the first place, I may observe that I never said that the Court was obliged to issue the writ. In effect I said what I conceive the statute says: that in process not civil, when the warrant is defective in not setting out a felony or treason plainly, and where it does not appear that the prisoner is in execution of a sentence of a legal court, a judge in vacation and out of term (not the court) must issue the writ on view of a copy of the warrant, or on affidavit that a copy has been refused, under a penalty of £500 sterling. In order to have a *dictum* overruled, it is necessary to set it out in technical and precise language, and not in the loose phrases of conversation. I may further add, that it never was supposed that *Hobhouse's Case* decided the question of the duty of a judge in chambers and out of term. See the *quære* in Hammond's Term Index.

In the second place, the warrant in *Hobhouse's Case* was a commitment in execution by the House of Commons, who, in virtue of their enormous privileges (privileges to which the learned counsel for the Speaker of the Legislative Assembly avows he has no claim), can commit by general warrant. Now, it will be remembered that where there is a commitment in execution, the writ does not issue, of course.

In the third place, our Habeas Corpus Act goes further than the statute of Charles. It applies to bail, as we see by the preamble; our Act, which is more extensive, has no such restriction. Section 4 of our Act refers to common law commitments, as well as to applications in bailable offences; and section 18, which enacts the penalty, applies to all that precedes. I therefore hold that I was right in issuing the writ on view of the warrant, as the statute directs; and I may further intimate that it is a practice to which I intend to adhere so long as the law remains unchanged.

The tone of a remark of one of the learned counsel for the Speaker was sufficient to show the immense importance in a constitutional point of view of the enterprise which we are called upon to sanction. While on the one hand we are told that claim is not laid generally to *all* the powers and privileges possessed by the House of Commons,—that all that is desired is simply to be able to send for persons and papers in order to make enquiries for the purposes of legislation, and that the warrant is simply a summons; on the other hand, we are told, as a matter of congratulation, that since the attachment of Mr. *Dansereau*, the Legislative Assembly has asserted its dignity by an attachment for a libel. We should be deceiving ourselves if we entertained the idea that the real point here is, whether or not the power to compel the attendance of witnesses for the purpose of the proceedings and deliberations of the House, alone exists as a privilege necessary to its being. The form of the warrant before us, and the boast of the Speaker's counsel, are more significant than the formal renunciation of the claim to all the powers, privileges, and immunities of the Commons. If the House can arrogate to itself the right to compel the attendance of witnesses, and can attach for libel on the most general of general warrants, I should be glad to know which of the privileges of the House of Commons it cannot claim as necessary to its existence? Nay more, the subject of the public felicitations of the learned counsel for the Speaker happens to be the exercise of an authority not only not given to the Local Legislature, but exclusively given to the Dominion Parliament; for it is a trial for libel, a clearly defined crime, and it is in excess of the powers exercised by either of the Houses in England. Sir Erskine May says, Vol. 2, p. 276:

“While Parliament continued to wield its power of commitment capriciously and vindictively—not in vin-

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dication of its own just authority, but for the punishment of libels, and other offences cognisable by the law—it was scarcely less dangerous than those arbitrary acts of prerogative which the law had already condemned as repugnant to liberty. Its abuses, however, survived but for a few years after the accession of George III.”

But to take the more plausible pretension put forward for the House of Assembly. They say, “We must have incidentally the powers necessary to our existence; it is necessary to our existence that we should be able to make enquiries, and we cannot make enquiries unless we can compel the attendance of witnesses.” No one contests the first and second of these propositions; but what is said is this, that the right to compel the attendance of witnesses is not essential to making enquiries. People in every-day life make enquiries constantly, yet they have no power to compel their neighbours to come in and give them their advice. The Crown too requires to make enquiries much more urgently than either House of Parliament; but it has no power to this day, in England to compel the attendance of witnesses before its commissioners. Two cases were suggested by counsel, to shew that the power to examine witnesses was essential to the House. One was to prove the preamble of a private bill: and the other, corruption on the part of a member.

If it were necessary to have the power to compel the presence of witnesses in *certain cases*, it does not follow that the House should have the power inherently in *all*; so that, unless it can be shewn that this is one of those cases, the argument would not help the pretension ostensibly put forward. But the preamble to a private bill has never been *proved*, in the strict sense of the word. It is substantiated to the satisfaction of the committee, and that is all. It is only by the Act 21 and 22 Vict. c. 78, that committees in England have the

power to examine witnesses on oath; consequently a committee is not at common law restricted in any way as to the extent of information it should have before it declares the preamble proved. In practice it is hardly possible to conceive the necessity of compelling witnesses to appear, to prove or disprove the preamble of a private bill. The parties interested in a private bill are under a compulsion much more stringent than the most enthusiastic advocate of privilege could devise, to come in and say their say to the committee. I have seen warm debates as to the right to produce evidence on private bills. I remember of no case where it was necessary to compel the attendance of persons. But in any case, if we are to build up the right for the House of Assembly, on any grounds of necessity such as that insisted on, we must say, by parity of reasoning, that the Corporation of Montreal has a similar right on an application to put up a steam engine in a back street.

The other instance, that of a member guilty of corruption, is still less conclusive. It is hardly possible to conceive a case more plainly beyond the jurisdiction of the local Governments than the trial of a member for a crime, such as that of taking a bribe. I have always understood that the House would not take notice, even of a charge of felony, until after conviction, and the seat is vacated by operation of law, because the convict is *mortuus civiliter*. A seat is not vacated for a misdemeanor, except perhaps perjury, no matter how heinous, and the instances we find of the arbitrary expulsion of members (of which there are some) are not of a character to impress one with the opinion that a power to expel is essential to the very existence of each Legislative Chamber.

To take another test: let us suppose that a judge were accused of taking a bribe—would it be thought

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to be a power necessarily inherent in the court to which he belongs to make an enquiry, out of the ordinary course of law, for the purpose of suspending or of expelling him? It is plain that if such a power is essential to a Legislative Chamber, it is also essential to a court; yet no one pretends that courts, with all their privileges, real or pretended, have ever claimed such a right. One, and the most famous case of the expulsion of a member of the House, is that of Wilkes. It ended in all the declarations, orders and resolutions, respecting the Middlesex election, being expunged from the journals as subversive of the rights of the whole body of the electors of the kingdom. (1) This result is a perpetual commentary on the great necessity argument.

Again, it is not sufficient to say that it is necessary because committees in England have the right to send for persons and papers. For, for the hundredth time it must be repeated, it appears that the English right depends not on necessity, but on usage. It is perfectly evident that if the House may compel the attendance of witnesses, it may compel the production of "papers and things." Now let us see how far this leads us. Not only may a man be interrogated by the members of a body not logically trained to decide nice questions of evidence, and consequently totally unfit to limit an enquiry to its just proportions, but it may compel him to produce his private papers, and every moveable in his possession for their inspection. I know one of the learned counsel for the Speaker recoils from the test of his pretensions by extreme cases. The *reductio ad absurdum* is, however, a perfectly legitimate process of reasoning, and applied to the particular point before us it exhibits in relief the monstrous nature of the pretensions put forth by the House of Assembly. If they succeed in maintaining their

(1) May's Const. History, vol. 1, p. 407.

claims, I will not say they have established "an organized chaos," for I am not sure I fully understand the value of these words in the relation in which they have been placed ; but this I will say, that a body of limited and local authority has, in violation of the most clearly expressed intention of its charter, organized for itself an arbitrary system of government totally subversive of individual liberty. It is needless to cite the case of *Anderson v. Dunn*, for it was examined in the case of *Doyle v. Falconer*; and whether *Anderson's Case* was decided rightly or the reverse, it cannot weigh with us, for its authority was rejected by the Privy Council.

I was particularly anxious to avoid any allusion to the well-known circumstances which gave rise to the present proceedings ; for although I am aware that the convenience of the object to be attained will to a great measure absorb public attention to the exclusion of the weightier considerations, and although I by no means undervalue the importance of making the decisions of courts intelligible to those who have not made a special study of law, it struck me that an argument based on a question on which the public mind seems to be disturbed, perhaps more than the occasion requires, might lead to greater misapprehension than a mere technical discussion of the points involved. But the power to abstain from the consideration of the Tanneries enquiry, as an illustration, has slipped from my hands by the frequent allusions that have been made to it. I enter on it, then, but merely as an illustration, and without expressing any opinion, or really having any settled opinion as to the full merits of the question by itself.

It seems, then, that the opinion is prevalent that either by want of due diligence on the part of the Government last summer, or by bad faith on the part of one or more of the Ministers, and want of due

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care and diligence by the others, a bargain excessively injurious to the pecuniary interests of the Province was entered into. Now, it is desired to examine into how far those opinions are true; and it is contended that such an enquiry is absolutely necessary, in order that the House of Assembly may perform its functions. It may fairly be asked of those who advance this argument, wherein this necessity consists? It is evidently, not a political necessity, for the country exercised its jurisdiction, and gave its decision, in no equivocal manner, months before the Legislature met. It cannot be with a view to legislation, for it may be presumed the House does not purpose to enact a law to annul the bargain complained of. The only conceivable question that remains is an executive one, namely, whether the validity of the deeds should be contested, or whether criminal proceedings should be taken against any of the parties accused? Now, for either of these purposes, it would be manifestly unfair and improper to subject witnesses compulsorily to the interrogations of the complaining party.

The impropriety will appear more manifest when it is remembered that it was formally announced, at the opening of the proceedings here, that the committee would not be bound by the legal rules of evidence; in other words, that the committee would disregard in this quasi-criminal investigation those rules which experience has established as the best mode of discovering truth.

It must not be concluded from what I have said, that the House can make no enquiry; all I say is this, that the House requires no arbitrary powers to enquire, and to arrive at a result sufficiently satisfactory for all practical purposes. If men refuse to answer questions under suspicious circumstances, so much the worse for them. Take, for instance, one of the

questions to which, I believe, an answer was refused: "How have you \$17,000 at your credit?" I understand the witness said it had nothing whatever to do with the Tanneries exchange, but he declined to say what transaction it represented. He gave a categorical answer, which does not, perhaps, give all the assurance desirable; and without the exercise of any arbitrary powers, the Committee may be guided in its conclusions by this unexplained reticence. I do not know, of course, nor do I wish to express any opinion as to what conclusion should be arrived at, for I have not read more than the most minute fraction of the evidence, but those whose business it is to know all about the matter will probably not be much embarrassed.

Another species of reasoning was brought into play. It was asserted that the Local Legislatures were not of a subordinate character. If it be necessary to the Speaker's argument to maintain this proposition generally, his case would be in great jeopardy. I readily admit that within the scope of its own functions it is not subordinate, except in so far as its new legislation may be disallowed by the Executive branch of the Dominion Parliament. I do not desire to say unnecessarily what may be offensive to a body of very great position and authority, but since the comparison (proverbially odious) is thrust upon us as an argument, I shall not avoid saying what is evidently true. Its inferior dignity and rank to those of Parliament are marked in every way—by the appointment of its highest branch by the Executive of the Dominion, by its powers being special and not general, by its territorial jurisdiction being less extensive, and, above all, by its legislation being subject to disallowance by the Governor-General.

Again, in referring to the case of the *Speaker of the Legislative Assembly of Victoria v. Glass*, we were told

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that the dignity of the Legislative Assembly of Victoria was not greater than ours. Without having the charter before us we could not decide that question, which, however, is of no importance. Whatever its dignity may be in the abstract, the power to legislate on matters of this sort was specially allowed by its charter, and that is the avowed reason of the judgment of the Privy Council. That case is therefore an authority against the Speaker in the present case.

Mr. *Loranger* seemed by his argument to abandon the extreme pretension that the House could commit for a contempt. But to abandon this is to abandon everything. The warrant in the present case either presumes a contempt, or the pretensions of the Legislative Assembly of Quebec are more enormous than those of the House of Commons; for then, to justify the proceedings, we should have to say that they claimed the right to attach without a cause at all.

This pretension is original. Citing the case of *Burdett v. Abbott* (another case almost as suggestive as the *Hobhouse Case*, of the dangers of allowing individual liberty to be spirited away under the specious guise of convenience), Mr. Justice Badgley said in the *Lacôté Case*: "Yet, if the commitment should not profess to be for a contempt, and the matter appearing in the return as the ground of the commitment could by no reasonable intendment be considered a contempt, and the commitment, therefore, evidently arbitrary, unjust, and contrary to every principle of positive law or natural justice (which, however, may not be anticipated to occur), the court would, it seems, not only be competent, but bound to discharge the party" (1). If this is not an attachment for a contempt, then it is evidently arbitrary, unjust, and contrary to every principle of natural justice. Besides,

(1) 5 L. C. R. p. 132

if it were conceded that this attachment were not, of itself, a commitment, of what use would it be if the House could not commit in the end?

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If, again, we examine the plea of necessity by the light of the three authoritative cases decided in the Privy Council, we find that very serious interruption of the business of the House did not justify a commitment on the ground of necessity.

Once more, if we examine it historically, we find it not only the pretext of oppression all over the globe, but very specially that most successfully combated by our race. Thenoble tale of English history—the beacon—the guide to all those who possess or strive to obtain individual liberty within the law, constantly appealed to even by those who like it least in the abstract—teaches us a lesson, not of resistance to prerogative, but to all arbitrary and undefined powers whatever, no matter how artistically they may be dressed up. I know of no claim of prerogative or privilege which has not come backed by the plea of necessity. It was the defence of Secretary of State warrants general, though hardly so general as the one before us—it was the defence, I dare say, of *lettres de cachet*; it was the origin of the right claimed by members of the English House of Commons to commit as for a contempt any one who should encroach on the fishery of a member of the House. I doubt not the Irish courts thought it was sufficient excuse for the pretension they once put forth, that as every crime was a contempt, they could try and punish criminals on attachment without the intervention of a jury.

To-day we are cajoled with the plea of necessity on one point which perhaps it might not seem very disastrous to concede, save for the evil precedent, and on the eve of this argument a legislator, personally offended, informs us that this argument is a subter-

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fuge. It is not public convenience they seek to further, but to protect their own dignity. So the individual liberties of the people are to be sacrificed to gratify the vanity of the people's representatives, and those accused of crimes affecting a member of the House may be tried, not by their peers, but by those whose feelings of personal dignity are involved in the issue. I have heard it said that the case I refer to, that of a person supposed to be the writer of an article reflecting on a member, has been inopportunately brought up. I think the very reverse. The public should be obliged to the member who has furnished a more extreme case as an example, in order to show the danger lurking under that now before us.

I have entered at some length on this branch of the case, because it covers the only debatable ground. If this warrant cannot be defended on the plea of necessity, it cannot be defended by any text of law. And it appears to me, with increasing force, the more I look at the question, that the assumption of power constructively on the ground of necessity must be restrained to its narrowest limits; and so restraining it, I cannot hold that it is necessary to the existence of every legislative body to have the right to compel the attendance of witnesses generally. And therefore, to borrow from a speech of my learned brother Sanborn on a famous occasion, I would call all such necessities as these entirely "artificial."

The next question, as to whether we can look into the constitutionality of a local law, seems to suffer no difficulty, if an almost unanimous expression of opinion of those best qualified to judge be considered as authoritative for the decision of a practical matter. But one point was made at the arguing, that it would be very inconvenient if every Justice of the Peace had the power

to judge of the constitutionality of a law. But judging the constitutionality of an Act is only giving a judgment on the extent of an Imperial Act, and I do not see that this is more difficult than giving judgment on a Dominion Act. It is as easy to decide whether an enactment is within the B. N. A. Act, as it is to decide whether a man has committed a commercial fraud within any of the recent statutes. A magistrate has to do the one, why should he not do the other? In the speech of my learned brother, to which I have already alluded, I find this statesmanlike exposition of the danger which now menaces the petitioners before us :—

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“ Hon. Mr. SANBORN—If my honourable friend would take that platform, or something like it, I should be happy to give it my best consideration at once; and I should be very glad if they would only give us a small part of it, of which I think they must see the justice—namely, *written guarantees*, so as to assure us that our rights of property shall not be overturned by the Local Parliament; to prevent, for example, a Squatters' Bill being passed at the very first opportunity in the Local Parliament, demolishing all the rights of property. I see my honourable friend opposite (Hon. Mr. Crawford) look melancholy, because he foresees that, when the new Constitution is adopted, twelve months will not pass before that becomes law in Lower Canada, and all protection for proprietors, so far as that is concerned, brought to an end. But this is only one instance significant of what will take place. It is perfectly well known, and none can realize it better than those who have a much greater horror of the progress of popular sentiments than I have, that the tendency in the popular mind is to break down monopolies of every kind, and to go to extremes in dealing with vested rights, even those which are established and founded on substantial

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principles of justice. Now, these rights, at the very least, ought certainly to be confided to the highest legislative authority. I go further, and maintain that guarantees for those rights ought to be placed in the written Constitution, that they ought to be beyond the power of interference by the legislative authority, and that they should be guarded by the judicial decisions of the highest courts in the country. In that case there would be a protection for property, but in this Constitution there is no such protection for property either in Upper or Lower Canada. And here is the point to which I ask the attention of my honourable friends of all parties—a point which I think all of them have been too little concerned about, and which applies just as well to Upper as to Lower Canada. For I say that, if some security is not given to the people in one of those ways for maintaining vested rights and interests of this character, the most disastrous results will arise in every Local Parliament; because, when these Parliaments are constructed, they will necessarily consist of a different class of men from those who now compose the Legislatures of the various Provinces. There will be such inducements to men of the highest order to get elected to the Central Parliament, that the consequence will necessarily and naturally be the result to which I point.”

It is just this sort of danger, so prudently and eloquently foreshadowed the law has, in my view, provided against. But what would the provisions of a written constitution and precise guarantees avail in the face of the paraphernalia of constructive powers, and the construction of “artificial necessities?”

Having then the power, and it being our duty consequently to look into the constitutionality of an Act of the Legislature, we must ask on what is the privilege founded? Reliance is principally placed on sub-s. 1 of s. 92, B. N. A.

Act—the clause giving power to amend the Constitution of the Province, except as regards the office of Lieutenant-Governor. Without entering into any question of what in the abstract may be called a part of the Constitution, the form of the Act clearly shows that it refers to the clauses 58 to 90, which are all under the general rubric, “Provincial Constitutions.” Now, it is very true that a rubric is not an enactment, but it is not less true that a rubric existing in the original Parliament roll may be used in the interpretation of a vague clause, just as the preamble may be used. But what is the general power to alter the Constitution, if it applies to any other matters than those specially called constitutional in the Act? Taken in its widest sense, it would be the power to upset the whole B. N. A. Act; and under this interpretation the Local Legislature, having more extensive powers than the Dominion Parliament (this was gravely advanced at the bar), like the lean kine, may eat up the fat.

These are propositions which best refute themselves even when advanced in support of an arbitrary power in the ascendant, and I might, perhaps, then leave this one to the decision of the impartial; but the statement that the Local Legislatures have in any respect greater powers than the Dominion Parliament, is not only paradoxical—it is fallacious. They have different powers, and among them that of altering their Constitution save as to the Lieutenant-Governor. This power was given to them because, except in the one particular reserved, it was not considered to be of any importance what form the local Governments assumed; but an analogous power could not be given to the general government of a dependency of the empire. It is another proof, if any were needed, not of the importance of the local Government, nor of the magnitude of the

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powers conferred on them; but it is a proof of their relative insignificance.

The last question, and the most important, is the warrant of attachment. I think I have heard this part of the question talked of lightly as a mere matter of form, and consequently of little importance; and so people are deluded by sound. There are forms which are of no importance; but there are forms which are of the most vital importance. It signifies little how your coat is shaped; but it is a matter of moment to the most callous whether he is thrown into prison according to the forms of law for a specified offence, or without any intimation of what he is accused of, on the mere whim of a superior. Therefore it is a deceit to call this a mere matter of form, for the form is substantial. Of such all-absorbing interest is the form here, that I would readily enough admit that I see no great objections in practice to the Legislative House holding powers strictly defined (not defined by a general reference to the exorbitant privileges theoretically claimed by the House of Commons in England, but defined as the powers of this Court are defined); but a general warrant, which is nothing more than an order to the Serjeant-at-Arms to arrest A. or B., without expressing any cause whatever, cannot be justified on necessity by the most obsequious defender of arbitrary power. It is neither more nor less than a *lettre de cachet*. The consequence of granting it is to give the Local Houses, respectively, unlimited authority over the persons and property of Her Majesty's subjects. It is possible that the tyrant may be merciful and good, but he is not less a tyrant, or what the Emperor of Russia called himself to Mme. De Stael, who was complimenting him on the beneficence of his rule--*un heureux accident*. Such an accident, however, is a disagreeable sword impending over our heads, and I

should prefer to diminish by positive law, as much as may be, the dangers attending it.

When the political organization under which we now live was under discussion, the learned Chief Justice who presides over this Court, so entirely to the satisfaction of all those who have business here, used these remarkable words, which I venture to recall to his memory as perfectly applicable to the present case: "I know," he said, "that majorities are naturally aggressive, and how the possession of power engenders despotism, and I can understand how a majority, animated this moment by the best feelings, might in six or nine months be willing to abuse its power and trample on the rights of the minority while acting in good faith, and on what it considered to be its right."

If my words do not carry sufficient weight, let minorities take warning from those I have just quoted; let us beware in time, lest we are organizing despotism. In this fatal session, in which general warrants in their most dangerous form have been resuscitated, we have had an instance of a Bill supported by the presence of a turbulent mob, which invaded the House of Assembly, and by its proceedings reminded one of the action of the Commune. Where then were the boasted powers of the House? These "artificial necessities" had disappeared with the occasion when they might have, had something to recommend them, and we find the chairman censuring the gentlemen in the galleries in a tone rather of apology than of expostulation. *L'Arbitraire* has nothing to recommend it. It is pregnant with evil, and incapable of good. Let majorities take warning; they may become minorities.

For my part, I have no hesitation about the illegality of general warrants. On this question there can be no compromise. My duty to the State, as a subject and as a magistrate, is too clear to be misunder-

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stood. I must resist them morally with all the arguments I can command, materially with all the authority I may possess. I hold that they are unknown to the law, and that the precedents cannot legalize them. As Chief Justice Pratt and the other judges of the Common Pleas said, in giving the death-blow to general warrants issued by the Secretary of State, "no degree of antiquity can give sanction to an usage bad in itself." (1) The power to issue a general warrant is given by no statute to the Commons of England; by section 18, B. N. A. Act, it is refused to the Houses of Parliament of Canada; and it is denied to all persons by many statutes in express terms. (See the Petition of Rights and 16 Charles I. cap. 10.) With one quotation from the greatest of our political writers, I shall conclude. Burke says:

"But if the habit prevails of *going beyond the law*, and superseding this judicature, of carrying offences, real or supposed, into the legislative bodies, who shall establish themselves into *courts of criminal equity* (so the Star Chamber has been called by Lord Bacon,) all the evils of the Star Chamber are revived. A large and liberal construction in ascertaining offences, and a discretionary power in punishing them, is the idea in *criminal equity*; which is, in truth a monster of jurisprudence. It signifies nothing whether a court for this purpose be a Committee of Council, or a House of Commons, or a House of Lords; the liberty of the subject will be equally subverted by it. The true end and purpose of that House of Parliament, which entertains such a jurisdiction, will be destroyed by it."

DORION, C. J. :—

The grounds on which the petitioner relies for demanding his release are—1st. That the warrant

(1) May's Const. Hist., vol. 2, p. 258.

on which he was arrested is general, and does not set out any special reasons for his arrest; 2nd. That the Speaker of the Legislative Assembly of Quebec had no right or power to issue such a warrant; 3rd. That the Act of the Legislature of the Province of Quebec, whereon it is pretended the warrant was issued, is unconstitutional, null and void, being *ultra vires* and beyond the powers of that Legislature to pass. The 4th and last ground is general, and merely states that the proceedings under which the petitioner was arrested are null and void.

On behalf of the Speaker of the Legislative Assembly, it has been contended that the right to arrest for contempt is a privilege which belongs to the Legislative Assembly, and that any action taken to commit for such contempt could not be questioned before courts of justice. We are not, fortunately, without precedents on this point, which has been repeatedly raised before the courts in England, as regards the privileges of the House of Lords and of the House of Commons, and settled by the latest decisions in a way which leaves no doubt that this court has the unquestionable right to examine into the causes of arrest of any party claiming to be illegally held under duress. The case of *Stockdale v. Hansard* (1), and that of the *Sheriff of Middlesex* (2), have, it may be said, definitively settled that point. In this last case Lord Denman, C.J., used most emphatic terms, and in rendering the judgment of the court, said: "I think it necessary to declare that the judgment delivered by this court last *Trinity* term in the case of *Stockdale v. Hansard* (1) appears to me in all respects correct. The court decided there that there was no power in this country above being questioned by law. The House of Commons there attempted to place its privi-

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(1) 9 A. & E. 1.

(2) 11 A. & E. 273, 285.

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lege on the footing of an unquestionable and unlimited power. It was argued against that claim that the *dicta* of learned judges by which it was supported had in many cases been hastily thrown out, and were encountered by others of a contrary tendency from judges not less eminent, and by precedents. I endeavoured to establish that the claim advanced in that case tended to a despotic power which could not be recognised or exist in this country, and that the privilege of publication as there asserted had no legal foundation. To all these positions I, on farther consideration, adhere; all of them I believe in my conscience to be true."

Having therefore the power to enquire into the causes of the detention of the petitioner, we have to consider whether his first objection, that the warrant is general, is a valid one. On this point I am disposed to agree to almost every word said by my learned brother on my right, who differs from the majority of the court as to the objectionable character of such warrants. I cannot better express my own views on this question than by repeating the language used by Lord Lyndhurst in the case of *Van Sandau* (1), when he said: "If this form of order had been used for the first time upon the present occasion, and there were no precedent to appeal to on the subject, I should have come to the conclusion that the order was insufficient." But this form of warrant having repeatedly been recognised as valid both by the courts in England (2), and by our own courts (3), I do not think that it would be right or proper to avoid deciding the important question of privilege which is

(1) 1 De Gex, p. 311.

(2) Case of the Sheriff of Middlesex, 11 A. & E. 273; Gosset v. Howard, 10 Q. B., 359 to 452; Parke, B., Obs.

(3) Ex parte Monk, 1817; Ex parte Tracy, Stuart's Rep. 478; Case of Brodeur, Journals, Leg. Assembly, Canada, 1854; Ex parte Lavoie, 5 L. C. Rep. 99.

raised in this case by adjudging upon a mere question of form and by deciding contrary to previous decisions, although I admit such a warrant to be liable to very grave objections.

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The next question raised is that the Speaker had no authority to sign the warrant; that there was no order from the Legislative Assembly, the terms used being merely that the House moved, without saying that it had adopted a resolution or gave any order. This is a most technical objection, and to which the court is not disposed to give much weight. If the House unanimously moved that a certain thing be done it has certainly resolved that it should be done, and we think there is nothing in this objection (1).

The third and most important question raised is whether the Legislative Assembly had a right to summon a witness at the bar of the House or before a committee, and to commit him for refusal to appear. On the part of the petitioner it has been contended that the Local Parliaments were mere corporations, having no other powers than those expressly conferred upon them, and that they have no power to commit for contempt, nor even that of compelling witnesses to appear before them. They further contend that the Act of the Provincial Parliament of Quebec, 33 Vict. c. 5, giving to each House of Parliament authority to summon witnesses and to punish disobedience, was beyond the power of that Legislature, and that the Legislative Assembly had no such power as that claimed under that Act, which is unconstitutional. On the other side it was contended that we had no right to enquire into the constitutionality of an Act regularly passed and sanctioned, and that by the exercise of the power of disallowance alone could that Act be set aside. We cannot adopt this last view,

(1) Case of the Sheriff of Middlesex.

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and we consider that if an Act be clearly beyond the scope of the authority of the Parliament which passed it, whether that Parliament be the Dominion or a Local Parliament, it is our duty to determine, when the question is properly raised, whether that Act emanates from a proper and competent authority, otherwise we might come to have two Acts upon the same subject and contrary to each other, the one emanating from the Dominion and the other from the Local Parliament, in which case it would be absolutely necessary to determine which of those two Acts was law and emanated from the proper authority.

In their respective sphere the authority of the Dominion and that of Local Parliaments are co-extensive—that is, the one is not inferior nor subordinate to the other. All the powers which were formerly exercised by the several branches of the Legislature of the late Province of Canada have by the Confederation Act been transferred to either the Dominion or the Local Parliaments. I do not see that the power of Colonial Legislatures to summon witnesses in order to conduct the enquiries required for a proper understanding of the several questions affecting legislation or the administration of public affairs was ever challenged. Responsible Government, which has been recognised in the Local as well as in the constitution of the General Government, would be a delusion if that power of enquiry was denied, and the enquiry would be valueless without the power of summoning witnesses. I consider this to be a necessary incident of the powers of Legislatures, and of controlling the administration of public affairs and as such I believe that the House of Assembly had a right to exercise it, as it was exercised under the Constitution of the late Province of Lower Canada in the case of Mr. Monk, who was imprisoned in 1817 for refusing to produce certain

registers and papers before the House or a Committee of the House of Assembly. I cannot find a case where this power of Colonial Legislatures to summon witnesses has been questioned. I do not mean to say that our Local Legislatures are vested with all the privileges appertaining at common law by immemorial usage to the House of Commons in England. It has long been settled that they had not (1), but I merely say that they have a right to exercise such rights and privileges as are mere incidents of the powers specifically vested in them, and, without which they could not properly exercise the duties devolving upon them.

I find that in the United States, in the case of *Ander-son v. Dunn* (2), the Supreme Court decided that the power to commit for contempt others than members of the Legislature, although not expressly given by statute, was a necessary incident of the powers of the Assembly. If as a necessary incident of the exercise of its functions, the Local Legislature had the right to summon witnesses and punish them for contempt in disobeying its orders, it had undoubtedly the authority to regulate a right it possessed without legislation; and therefore the Act of 1870, already mentioned, in so far as it provides for the summoning of witnesses, was within the scope of its authority, whatever may be said of some other portions of the same Act, and upon which it is not necessary to express any opinion in this case.

The majority of the Court is for quashing the writ of *habeas corpus* and for rejecting the petitioner's demand.

[*Translated.*]

TASCHEREAU, J.:—

I cannot conceal from myself the importance of this

(1) *Kielly v. Carson*, 4 Moore P. C. C. 88; *Cuvillier v. Munro*, 4 L. C. R. 146.

(2) 6 Wheaton, 204.

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case, and the necessity of a prompt decision on the part of this tribunal, on account of the public and private interests which are here in question.

Apart from a number of less important questions and objections which are raised against the petition, and the absence of affidavits on the part of the petitioner, which I do not think it my duty to notice, there are two chief questions, besides the one relating to the form of the warrant.

1. Has the Legislative Assembly of the Province of Quebec power to hold enquiries, to compel witnesses to appear before it and to give evidence on oath ?

2. If a witness fails to appear before the Legislative Assembly, has the Assembly the right to cause him to be committed to the custody of the Serjeant-at-Arms, to bring him to its bar, and, as a consequence, can it punish such refractory witness ?

A special enactment gives these powers to this Assembly ; and these powers are besides necessary for the performance of its part in the legislation of the country

The Act 33 Vict. c. 5, ss. 2, 4, 5, 6, 7, 8 and 9, passed in 1870, confers on it these powers. This Act does not admit of any other construction. But the counsel for Mr. *Dansereau* asserts that this Act is unconstitutional, and that the Legislature has exceeded its powers in passing it. The strongest objection that might be made to the Act, at least from the point of view of the present case, is not that of unconstitutionality, but of inutility ; for the Confederation Act, in giving to the Legislature of Quebec the power to make laws for the good of the country, to preserve and protect the immovable property of the Province, to change any part of the Constitution except what relates to the Lieutenant-Governor, by enacting that all the laws in force in the former Province of Lower Canada should be preserved to it in the same

manner as if the Act of Confederation had not been passed—the Act of Confederation, I say, in conferring all these powers on the Legislature of Quebec, has equally and implicitly intended to give it the means of accomplishing all that this Confederation Act allowed it to do and perform. Now, in order to legislate, it is necessary, in the majority of cases, to have an enquiry under oath—it is necessary to prove the fulfilment of conditions and formalities precedent, before granting or taking away charters or privileges, and invading the rights of the people of the country. It must have been foreseen that in the Legislative Assembly serious differences would arise among the members; that the dignity of the Assembly might be outraged, not only by the conduct of its members, but by that of the people outside, which would necessitate prompt and energetic action on the part of the deliberative body which was in session; and yet, on the principle that that Legislative Assembly should have only a limited jurisdiction, it could not enquire into these differences or these libels, and it would to the great injury of the public welfare, be obliged to suffer with patience the injury and shame of a libel without the power of making an investigation in order to expel the guilty member or to punish the person guilty of libel. A charge of shameless and open corruption against one of its members would remain unpunished, if the guilty person could not be reached by an enquiry under oath.

The cases where prompt and energetic action by the Assembly would be required, might be multiplied indefinitely, and yet people would go on repeating that the Legislative Assembly has only a limited power or jurisdiction; but the Act of 1869, 32 Vict. c. 6, allows the examination of witnesses under oath. Independently of that Act and of the Act of 1870, which confer expressly these powers on the branches of the Quebec Legislature

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they possess these powers *ex necessitate rei*, as corollaries of the other powers which the Act of Confederation gives, and no new legislation was necessary to give them. In defining them, the Legislature has virtually done nothing more than confirm and declare what belonged to it already by the usage of at least eighty years, and consequently since its establishment and existence as a Legislature. In 1831, at the time of the debates in the House of Lords in England—on the 13th of April, 1831, in reference to the arrest of the proprietor of the *Times* as guilty of libel, when some of the Lords denied the right of their House to punish by imprisonment a person guilty of libel, Lord Tenterden asserted, on the contrary, that this power was absolutely necessary to the Houses of Parliament in order to discharge their functions with dignity to themselves and advantage to the country. These words from the lips of Lord Tenterden, of whom England has so much reason to be proud as one of her greatest jurists, shew that the power claimed by the Legislative Assembly of Quebec is a power indispensably necessary, and without which it could not really exist.

We find in Story's Commentaries on the Constitution of the United States of America, page 307, the expression of a similar opinion. This author states that this power ought to be allowed to legislative bodies, and he cites the fourth volume of Blackstone's Commentaries, page 286, and ends by saying: "This power has not been disputed in any country, and has its origin in the very nature of every legislative body."

But it will still be said that the Legislative Assembly of Quebec is only one of the branches of a Legislature, with a power or jurisdiction which are limited. I am ready to admit that its powers are not those of the Imperial Legislature, nor even of the Legislature of Canada; but I say that, in its domain and its functions,

it has a power and a superintendence which is exceptional and superior to every other, and that it has duties and obligations to fulfil of such importance that it could not fulfil them lawfully and properly without the powers which the counsel for the petitioner denies to it. It, as much as the House of Lords or the House of Commons, may find itself in circumstances where the exercise of these powers is indispensable, unless it is to renounce its dignity and cease to legislate on the important subjects which are within its province, and which may demand despatch.

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The Act of 1870 seems to me perfectly legal and constitutional. It, like all other Acts, has been enacted in the name of Her Majesty, and assented to, and no doubt it would have been disallowed at the outset, by the competent authority, on the advice of the Minister of Justice, if it had had any semblance of unconstitutionality. So long as this statute is not repealed or declared unconstitutional, I consider it as expressing the law of the Province, and I owe it full and entire obedience.

I might cite the case of *Tracy* and *Duvernay*, who, in 1832, were accused of libelling one of the Legislative Houses in the old Province of Quebec. Their case was argued before the Court of King's Bench at Quebec, on a *habeas corpus*, and among the different reasons advanced by the honourable judges who expressed their opinions we find fully stated those of the necessity of the branches of the Legislature having power to imprison for libel, as a means of protecting their rights and privileges.

The last objection is that the warrant is general and does not define the causes of the arrest of the petitioner. But it will be observed that this warrant is not a final process (*n'est pas en execution*), but is only a summons, effective and rigorous it is true, to appear at the bar of

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the Legislative Assembly, which, in virtue of its power of sending for persons and papers (in virtue of the 33 Vict. c. 5, and at the same time of an inherent right and one indispensable to its existence) takes this accustomed mode of ensuring the presence of an important witness who is not willing to appear otherwise. It is not a final execution, it is a preparatory measure in order to summon him to the bar of the Assembly to answer an accusation.

Hereafter, if it becomes necessary to give an order for final imprisonment, it is probable that the prisoner will be able to plead the generality of the warrant of incarceration. At the present time his objection is premature.

The course followed by the Legislative Assembly is that followed with regard to the proprietor of the *London Times*, which I have already mentioned, and is that indicated in May's *Parliamentary Practice*, page 420. At first a simple command, in general terms, to bring this man before the House was proposed and seconded without objection, and when he had been placed at the bar he was convicted and condemned to imprisonment for contempt; and it was on the second motion that the debates took place, during which Lord Tenterden spoke and delivered a speech from which I have cited an extract above.

This summary procedure is virtually sanctioned by section 9 of 33 Vict. c. 5, which declares that "All breaches of the Act itself may be summarily investigated by the House against which they have been committed, in such manner and form as the House shall consider suitable."

The English precedents are to the same effect, that is to say, upholding a simple warrant without any statement of the reasons.

This is what has been done in the case of the petitioner.

I am therefore of opinion that the writ of *habeas corpus* should be quashed, and that the petitioner should be remitted to the custody of the Serjeant-at-Arms of the Legislative Assembly of the Province of Quebec.

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SANBORN, J.:—

The B. N. A. Act, 1867, was enacted in response to the petition of the late Provinces of Canada, Nova Scotia, and New Brunswick, as stated in the preamble of the Act, "to be federally united into one Dominion, under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom." The powers of legislation and representative government upon the principle of the British Constitution, or, as it has commonly been called, responsible government, were not new to Canada. They had been conceded to Canada, and exercised in their largest sense from the time of the Union Act of 1840, and in a somewhat more restricted sense from the Act of 1791 to 1840. The late Province of Lower Canada was constituted a separate Province by the Act of 1791, with a Governor, a Legislative Council and a Legislative Assembly, and it has never lost its identity. It had a separate body of laws, both as respects statute and common law, in civil matters. No powers that had been conceded were intended to be taken away by the B. N. A. Act of 1867, and none, in fact, were taken away, as it is not the wont of the British Government to withdraw constitutional franchises once conceded.

This Act, according to my understanding of it, distributed powers already existing, to be exercised within their prescribed limits, to different Legislatures constituting one central Legislature and several subordinate ones, all upon the same model, without destroying the autonomy of the Provinces, or breaking the continuity of the prescriptive

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rights and traditions of the respective Provinces. In a certain sense the powers of the Federal Parliament were derived from the Provinces, subject, of course, to the whole being a colonial dependency of the British Crown. The Provinces of Quebec and Ontario are, by the sixth section of the Act, declared to be the same that formerly comprised Upper and Lower Canada.

This recognises their previous existence prior to the Union Act of 1840. All through the Act these Provinces are recognised as having a previous existence and a constitutional history, upon which the new fabric is based. Their laws remain unchanged, and the Constitution is preserved. The officers are the same in name and duties, except as to the office of Lieutenant-Governor, who is placed in the same relation to the Province of Quebec that the Governor-General sustained to the late Province of Canada.

I think it would be a great mistake to ignore the past governmental powers conferred upon, and exercised in, the Province now called Quebec, in determining the nature and privileges of the Legislative Assembly of this Province. The remark is as common as it is erroneous, that the Legislatures of the Provinces are mere large municipal corporations. It is true that every Government is a corporation, but every municipal corporation is not a Government. Consider the powers given exclusively to Provincial Legislatures. They have sole jurisdiction over education, property and civil rights, the administration of justice, and municipal institutions in the Province, subjects which affect vitally the welfare of society. The very court which enables us to determine the matter now under consideration, holds its existence by the will of the Provincial Legislature. No such powers were ever conferred upon mere municipalities in their ordinary sense. They are subjects which in all nations are entrusted to

the highest legislative power. Legislatures make laws; municipal corporations make by-laws. If these legislative powers confided to Provincial Legislatures are not to be exercised in all their amplitude, with the incidents attaching to them, they can be exercised by no other sovereign power, while our present Constitution exists. They have been conceded by the Imperial Parliament, and it claims no further right, as a rule, to legislate upon our local affairs, and the powers given exclusively to the Local Legislature necessarily exclude the jurisdiction of the Federal Legislature. Blackstone says: "By sovereign power is meant the making of laws: for wheresoever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the Government may put on. For it is at any time in the option of the Legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases, by constituting one or a few or many executive magistrates, and all powers of the State must obey the legislative power in the discharge of their several functions, or the Constitution is at an end."

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When I find, after specifying several subjects over which the Local Legislatures have jurisdiction, there is added generally "all matters of a merely local and private nature in the Province," I find no other limit to these powers than the territorial boundary of the Province, and the class of subjects by which their powers are circumscribed. I find it equally difficult to assign any other limit to the power expressly given to amend the Constitution of the Province than that expressed in the Act. They are not permitted to amend the Constitution as respects the office of Lieutenant-Governor. I find in section 65 of the B. N. A. Act, the powers and functions of the Lieutenant-Governor are specially defined. This establishes that, in the view of

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the framers of that Act, the powers and functions of this branch of Parliament form part of the Constitution, and consequently the powers of the other branches are equally a part of the Constitution; and ability to amend the Constitution as respects the House of the Legislature includes power to determine their respective functions and immunities.

The right of disallowance by the Governor-General of local Acts within one year is a check which may be exercised to prevent impolitic laws coming into force. Where this right is not exercised, and there appears nothing *ultra vires* in the legislation, I see no reason why the Act 33 Vict. c. 5, of the Province of Quebec, should not be considered a law of the land. The counsel resisting this petition for enlargement has contended that upon a question of this nature the courts cannot declare a statute of the Provincial Parliament inoperative which has not yet been disallowed. So long as we have no general Court of Appeal, the ordinary courts must decide what is law when a conflict of jurisdiction is claimed to exist.

There is, no doubt, an incongruity in a court's deciding upon the powers of a Legislature to which it owes its existence. That power was contemplated being placed in a Supreme Court created by the Parliament of the Dominion; but so long as no such court has been created, it seems that the ordinary courts are under the necessity of declaring an Act *ultra vires* when they find it to be so. In this instance this is not a practical question, for there does not appear to be any want of jurisdiction in the Provincial Parliament to pass the Act complained of. By the second section of the Provincial Act mentioned, the Legislative Assembly of the Province of Quebec is permitted to command and compel the attendance or production before such House, or any committee thereof,

of such papers and things as it may deem necessary for any of its proceedings or deliberations. This is precisely the power exercised in the case before us. This arrest of Mr. *Dansereau*, by virtue of the power conferred by this Act, is, apart from the question of privilege, an inherent in, and incident to, every legislative body. Such privilege is exercised by one House upon an undefined law based upon the nature and usages of legislative bodies. This is by a statute conferring the right passed by the three branches. I hold that under this statute the Legislative Assembly of the Province of Quebec has a right to compel the attendance of Mr. *Dansereau* before the bar of their House.

Thus holding, it is unnecessary for the purpose of this case to discuss the question of privilege as a common law right. This, however, is not a matter which this Court can dismiss in justice to the subject, without some observations upon the general privileges and powers which the Provincial Legislative Assembly has a right to claim. From what has already been said, it is unnecessary to remark that I consider that the present Legislative Council and Legislative Assembly of Quebec have a right to invoke the usages and precedents of these Houses existing prior to the B. N. A. Act of 1867, from 1791 to the date of that Act. If anything further need be urged than what has been said, there is the notable precedent of the British Parliament, dating their privileges prior to the Commonwealth, and the fact that the Commons, subsequent to the Commonwealth, did not insist upon the right to examine witnesses on oath, as one of their privileges, which was insisted upon by that body during the Commonwealth. (May, p.427.) Whatever powers and immunities attached to the Legislative Assembly of the late Province of Lower Canada and the Legislative Assembly of the late Province of Canada, as neces-

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sarily incident to them in the proper exercise of their functions as legislative bodies, I consider attach to the Legislative Assembly of the present Province of Quebec. In considering the privileges necessarily incident to Colonial Legislatures, we can only apply the Constitution of the Parliament of the United Kingdom, where the analogy obtains. The Senate of the Dominion, or the Legislative Council of the Province, cannot claim the judicial powers of the House of Lords, and yet there are many judicial powers to be exercised in connection with legislation, the depository of which must be somewhere. For example, jurisdiction over divorce is given to the Federal Parliament. It has been thought necessary to assume power to examine witnesses upon oath, and determine the matter judicially, though neither House had greater powers than the Commons House of the United Kingdom. It became a necessary incident to the powers conferred. The Legislative Assembly of our Province has not the mere nude power of legislation. It has, by implication, by usage, and by a Constitution modelled upon the English House of Commons, also an inquisitorial power to make itself acquainted, by means of committees, [with] the needs of the Province, and the evils that exist in society over which it has control, in order to legislate intelligently and administer wisely. The appointment of committees of enquiry for purposes of this nature is incident to the existence and proper working of every legislative body. It is associated with all our ideas of legislation under the British system, and has been exercised without question in all our Parliamentary history as a Province. It has been urged at the bar that this inquisitorial power should be exercised by Royal Commissions, not by Committees of Parliament. Royal Commissions, strictly such, have been asserted by eminent jurists to be unconstitutional, as contrary to

Magna Charta. Lord Coke declares this most emphatically, inasmuch as the King cannot create a court to be administered upon any other rules than the common law. To constitute a court there must be *actor, reus, et judex*. Simple Royal Commissions, without the aid of statutory powers, are far more powerless than Parliamentary Committees. They have no power to compel the attendance of witnesses or the production of papers, or to examine witnesses under oath. Nor can they commit for contempt.

Since, however, the responsibility of Ministers has been better defined, these Commissions, which are now generally statutory, have been found of great use, but not by any means to supplant parliamentary committees. Judicial functions are now assumed by the House of Commons only as incidentally necessary to carry out their powers, notably in case of private bills and matters of election. May says, "The two Houses, in the course of centuries, have appropriated to themselves different kinds of judicature." The Grenville Act, providing a court in the Commons for the trial of contested elections, is said by Mr. Christian to have conferred immortal honour upon its author. The power to compel the attendance of witnesses, and to compel them to give evidence, it must be remarked, is distinct from the power to administer oaths to such witnesses. Where it has been found necessary to get evidence under sanction of an oath, devices have been adopted to have the witnesses sworn before a judge, or at the bar of the Lords and the like. (May, 427 and 408). It has not been considered essential to the discovery of truth, that witnesses giving evidence before the Commons House or a Committee should be sworn. (May, 427.) Any person who refuses to attend, upon the summons of the Legislative Assembly, to give evidence, is obstructing that body in the legitimate execution of its functions.

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I think, without reference to the statute referred to, there must be an inherent right in the Legislative Assembly to compel persons to attend before them and give evidence. This principle, it appears to me, is conceded in the cases of *Kielly v. Carson* and *Doyle v. Falconer*. In the former, Baron Parke said, "We feel no doubt that such Assembly has the right of protecting itself from all impediments to the due course of its proceedings. To the full extent of every measure which it may be really necessary to adopt, to secure free exercise of their legislative functions, they are justified in acting upon the principle of the common law."

This was said with reference to a Legislative Assembly acting under a Crown charter in a minor Province, and assuredly it should apply with much greater force to this Province, which, for many years, has been governed under a statutory Constitution and upon usages conformable to the British Constitution. The cases of *Tracy*, *Monk* and *Duvernay* in our early jurisprudence, and the recent case *ex parte Lavoie*, sanction these privileges as inherent in our Provincial Legislative Council and Legislative Assembly, and I find them recognised in the late cases in the Privy Council; and I see no reason, in this advanced stage of our parliamentary history and progress in all the material interests which give to a nation importance, why these powers should be denied to our Local Legislature. It must be borne in mind that the immemorial privileges of Parliament date back to a period in history when the British Parliament and British nation were very different from what they are now. The state of affairs then may be gathered from a curious contract, cited in Glanvill's Reports, in the time of Edward IV., 1463, in which John Strange, the member for Dunwich, covenants with his electors "that whether

the Parliament held long time or short, or whether it fortune to be prorogued, he will take for his wages only a cade and half-barrel of herrings, to be delivered by Christmas."

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The men of England have been vigilant to prevent anything adverse to the common weal getting the sanction of immemorial usage, and the privileges of Parliament, claimed from this usage, have this usage because of their inherent necessity in the governing power. It was well remarked by one of the counsel for the Legislative Assembly, that if we cannot claim the privileges by immemorial usage, we can and ought to have such as are necessary to maintain the dignity and efficiency of our Legislature from the nature and importance of the powers conferred upon them. This warrant discloses no contempt. It is simply an exercise of the power of the Legislative Assembly to bring Mr. *Danseureau* before that body. If this warrant were issued solely on the ground of privilege, it would be difficult to sanction it in its vague terms, without the purpose being shewn; but by the second and ninth sections of 33 Vict. c. 5, such warrant is permissible, for the House is permitted to bring any person before it, and to adopt such form as it may deem proper. I think the arbitrary form of the order is objectionable, but I cannot say that it is illegal.

With regard to the decision of Mr. Justice Ramsay in the case of *Cotte*, while it evinces great research and is an able opinion from the stand-point from which he views the subject, for the reasons given I am unable to agree with him in the views he has expressed as to the status and powers of our Colonial Legislatures. In his dissent from the majority of the court to-day he has given additional evidence of his research and his familiarity with this subject. He has done me the honour to refer to a speech made by me in

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the late Legislative Council of Canada, when the project of the Constitution to be adopted for the Confederated Provinces was under discussion. The sentiments there expressed, I understand, are cited as apparently inconsistent with the opinion I give now and here. This is not a place for discussion, but of opinion, but I think if my learned brother applies the logical mind which he is known to possess more carefully to the consideration of the sentiments there expressed, he will see no inconsistency between the views there expressed and the opinion now given. The argument then was that of a legislator, deprecating placing large powers in Local Legislatures without guarantees to secure the rights of property. As a fact, the powers were granted without guarantees, and it now only remains loyally to concede to these Legislatures the incidents which are corollary of the large powers conferred. I think the *habeas corpus* should be quashed, and the Serjeant-at-Arms be left to execute his warrant.

MONK, J.:—

I concur in the judgment of the Court, and on the main points in what has fallen from my learned colleagues. Before proceeding to examine the merits of this important case, it may be proper to remark that two technical points of some importance were raised by the opposing counsel at the argument:

1. It was contended by Mr. *Ritchie*, on the part of the Speaker, that the writ of *habeas corpus* had issued improvidently and should be quashed. It was argued that the 20th sec. of cap. 95 (Con. Stat.) would seem to require an affidavit; in fact, a *prima facie* case to be first made out, upon which, and upon which alone, the judge was called upon to exercise his discretion before the writ was allowed to issue. In the present case, this requirement

was not observed; and finally, it was urged that the writ had been erroneously issued on sec. 4 of the same statute.

2. It was, on the other hand, contended by Mr. *Kerr*, on behalf of the petitioner *Dansereau*, that the Speaker's warrant was a general warrant, and did not disclose any offence or delinquency whatever, nor any cause or apparent justification for Mr. *Dansereau's* arrest; and, consequently, that it was absolutely null and void, or, at all events, contrary to law.

These points have received from the Court the serious consideration which they undoubtedly deserve, and after what has been stated by my learned colleagues, I would merely remark on the first of these objections that, as a matter of fact and of regular procedure, the writ in this case did issue on the 20th sec. cap. 95, of the Con. Stat., and not sec. 4 of the same statute. (See *Hobhouse's Case*.) I apprehend that sec. 20 does not require a case to be shewn, by affidavit or otherwise, upon which the discretion of the judges is to be exercised. No such formality was exacted or observed in the present instance, and I doubt whether the mere exhibition of a general warrant, such as was produced in the case under consideration, was precisely what the law contemplated. In instances of this kind, not being of a criminal character, the affidavit of the petitioner, disclosing the chief circumstances of the case, if not of absolute necessity, would have met and answered in a manner more satisfactory, the requirements by the statute, and been more in conformity with the practice which has prevailed in this district—a practice which I regard as in the highest degree proper and judicious—such an affidavit of what was the cause of the arrest, or that there was no legal ground for it. It ought to have rebutted the presumption that the cause of arrest was legal.

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Although I consider it would have been desirable, and certainly more regular, if these formalities had been observed, yet I would not go the length of holding that the writ was improvidently issued, and that it should, therefore, be quashed. I would add, moreover, that notice of the application seems to have been given, that a copy of the warrant was produced before the learned judge, and that no objection appears to have been taken to the issue of the writ on that ground. I would, therefore, overrule this pretension of the counsel for the Speaker.

Upon the second objection, it was urged by Mr. *Kerr* that the warrant being a general warrant, and disclosing no ground or reason for arrest whatever, is irregular, and cannot be maintained by this court. No doubt, it may be said, and it has been ably and strenuously argued by Mr. *Dansereau's* counsel, that the Speaker's warrant should, at least specifically, or in general terms, shew some reason for the petitioner's arrest. Was Mr. *Dansereau* to be taken into custody by the Serjeant-at-Arms, and brought before the bar of the House, for breach of privilege, contempt, or refusing merely to obey the summons of a committee to appear and give evidence? The warrant does not say either in general or specific terms.

Without denying that there is considerable, indeed much, force in this argument, yet I am unable to accede to this view of the matter. I know of no precedent, law or usage which would justify this court in quashing a general warrant issued by the Speaker of the Legislative Assembly in a case like the present. This is, if I am not mistaken, the form of warrant issued by the Speaker of the House of Commons in England in cases similar or analogous to this. (See *Stockdale v. Hansard*; May on the Law, Privileges

and Usages of Parliament, p. 172; the case of the *Sheriff of Middlesex* (1), and the cases there cited; *Burdett v. Abbott* (2), *Howard v. Gosset* (3).) Warrants in this form have been issued by the Provincial Legislature for nearly 100 years, and finally, if the local Act of 33 Vict. c. 5, be part of the law of the land and binding on us, which I hold it is, the 9th section of that statute is decisive, and disposes of the question in terms the most peremptory and explicit

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By that clause the house is constituted the exclusive judge of its own modes and forms of proceeding, and I am not disposed to interfere. In a case of doubt, it is a dangerous and delicate course for a court of law to set aside the preliminary proceedings of the Legislature in a matter such as this. I would merely remark that, technically speaking, a warrant of commitment is something different, on which, if a party be imprisoned for an illegal cause, he can have his remedy. For these reasons I would not set aside the warrant of the Speaker. I would not disregard it and liberate the petitioner on that ground.

These two technical objections (no doubt serious, but, as I apprehend, not fatal objections) having been thus overruled, I come now to consider what are the power, authority and privileges of the House of Assembly of Quebec, as I view them, in cases of the kind submitted for our consideration. We have to determine whether, from necessity as an inherent prerogative, an indispensable incident of their legislative authority, from long and recognised usage, or from positive law, they are or are not such as the house claims in the present case.

My learned colleagues have so fully and so ably expressed their opinion and explained the grounds of our judgment, that it is, perhaps, not necessary for me to

(1) 11 A. & E. 273

(2) 14 East, 1.

(3) 10 Q. B. 359.

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offer any very extended observations on this subject ; but since one of my learned colleagues, dissenting from our decision, has, with great learning and marked ability, extended his critical examination of the questions involved over a wide range of history, jurisprudence and constitutional law, it may be expedient that I should state briefly my reasons for coming to the conclusion that our Local House of Assembly does, beyond all doubt, possess the right to summon any of the Queen's subjects in this Province to appear before it or its committee to give evidence, and for other objects ; and that if these persons disobey, or disregard such summons, the House has the power to compel their appearance before the bar of the Assembly, to be dealt with according to law, and the rules and resolutions of that body.

I shall for the sake of convenience first offer a few remarks upon the powers, privileges and functions which, as it seems to me, at all times since the first granting of a Legislature to the colony, have been, and which now necessarily must be, inherent in that body, independent of any precedent or any usage. It was not contended by the counsel for the Speaker that the Legislative Assembly of Quebec possesses all the powers and privileges of the Imperial House of Commons. It is a legislative body, no doubt, but subordinate to that of the Parliament of Great Britain, and subject to its control, if it chose to exercise it. Therefore, such a pretension would perhaps be inadmissible. I do not consider myself bound, in the present instance, to decide that question ; it is not at all necessary that I should do so. Vague or cogent analogies may exist between the two bodies ; but I do not in any way or in the least degree, rest my opinion on these assumed or apparent analogies. They may be referred to, or even invoked, in order to illustrate matters of history and

parliamentary usage, but not as being of material importance in deciding this case.

For example,—the peculiar powers, laws and usages of the British House of Commons are numerous and extensive, and are now, moreover, pretty well defined—they are, and always have been, I presume, deemed to be inherent, indispensable—in fact, absolutely necessary for the unmolested and efficient exercise of its authority and functions as a legislative body. Upon no other grounds and for no other reasons, could they have existed, or would they have been tolerated by the British people. Whether those powers, laws and privileges, peculiar to the House of Commons, have been the slow growth, the progressive accumulation during the lapse of many centuries arising out of critical emergencies in the development of the British Constitution, or whether they actually originated in the violence and political struggles of the 12th and 13th centuries, are, I presume, questions which I am not called upon to decide and which it is not expedient to discuss on the present occasion. The precise time at which the memory of man is supposed to halt, or to lose its way, need not be determined by us. One thing is clear, and it is notoriously a matter of fact, that these powers and privileges of the Imperial House of Commons are implied in the very existence of that body, and that they result and have resulted from necessity, or as some would say from convenience (pretty much the same thing in matters of this kind); but time, with its varying and contradictory usages and precedents, is not an essential ingredient here, except in so far as it may have developed, and given strength and expansion to certain usages, and to that necessity and convenience or expediency, as my learned colleague on my right, dissenting from the judgment of the Court, has emphatically termed it.

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Among these usages, laws, rules or implied powers of the Imperial Parliament is to be found one which has existed and been exercised by the British House of Commons for ages, and through all the anarchy and violence of many revolutions, and that is the undoubted authority to compel parties, by general warrants, to appear before the bar of the House to answer for neglect or disobedience, or for certain objects not contrary to the laws of the land, but recognised and to be investigated and enforced, perhaps punished, by the laws and custom of Parliament, and which is indispensable for the efficient and responsible exercise of its functions. This has been an ancient and undisputed prerogative, and that is all, in this connection, which as an illustration arises for our consideration in the present instance.

Now, the same kind of necessity and implied authority, in this respect, though in a subordinate degree, appertains to and is vested in the Legislative Assembly of Quebec, as in the Imperial House of Commons. This I think, is beyond controversy, and I am not disposed to ignore or criticize those powers as they are claimed and enforced in England; and unless our law is clear, decisive and peremptory, I will not and cannot impele or overrule their exercise by our own Legislature.

I am unhesitatingly of opinion that this power, authority or prerogative, or whatever it may be termed, or whatever designation it may receive, is absolutely, indispensably necessary here, in order to carry on and accomplish the legislation of the country; and, at the same time, for the purpose of exerting a vigilant supervision over the Executive Government in the execution of the authority confided to it, and in the performance of its duties towards the people, represented by the House of Assembly. It has been found so in England, where the highest political wisdom has been ma-

tured by long experience ; and in fact, in all representative bodies exercising the double functions of legislation, and at the same time called upon to exert a jealous, constitutional control over the executive power of the State, these powers are inherent and essential. And this is more particularly true in regard to legislative bodies framed on the model and vested with the authority of the British House of Commons. A considerable portion of our own legislation, in order to be judicious and well considered, must be preceded by enquiry, and for this purpose Parliament must have the power—the effective power—of making such investigation.

Besides, and further still, not to enumerate a great number and variety of cases, where the Legislature must possess power inherent and indispensable in its very constitution, not only for the purpose of exercising its ordinary functions, but also for the purpose of maintaining its own dignity and the respect of the country,—if it does not possess the power of compelling the attendance of witnesses, and the production of documents and other written testimony, what, under our system of ministerial responsibility to Parliament, is to become of that control and responsibility? Is all this a sham, and an abject delusion? What is to be done with Ministers, as we call them, who may, from culpable carelessness, or from design, have become guilty of some serious delinquency, but cognizable by Parliament only? How are we to deal with Ministries or individual Ministers? How is Parliament to enquire into the management or the mismanagement of the Departments of Government? What, in short, is to be done by Parliament in this respect, if it be declared incompetent to make enquiries, or to compel the attendance of witnesses; if it be helpless, and is forced to act blindfold in all these matters? If this be the case, let the Constitution be

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changed, and let it be declared that our Legislature and our Government constitute and are vested with the powers of a municipality, and no more. But if our Legislature is a British Legislature in the proper sense and meaning of the term, enacting laws for British subjects, though subordinate, and since, as a matter of fact it is so; and if our Government is framed, in so far as circumstances will permit, upon the model of the British Constitution, and inasmuch as it is so, the British Parliament, in conferring on us such a Legislature and such a Constitution, did impliedly and necessarily bestow on them, and vest in them, the power and the adequate authority of accomplishing and completely fulfilling the objects for which they were intended. *Qui veut la fin, veut les moyens*, may be a small maxim, but it is a true and pregnant one, and it is a principle of the common law, that where political or other such bodies are organized and powers granted, all the means and authority necessary for the exercise of their functions are also impliedly conferred, though not expressly mentioned.

A single illustration will, I think, render all this pretty obvious. In 1870, the Local Legislature passed an Act, 33 Vict. c. 5, by which witnesses examined before Select Committees of the House must or could be sworn; their evidence is now given under oath. This statute is a part of the law of the land—its binding force no one, I believe, seriously disputes; but whether they do or no, for us sitting here in this case it is a part of the law of the land, or rather and more especially a law of Parliament. The right of summoning is here implied, and if persons refuse, the power of compelling their attendance is necessary, I presume. If so, they must, I apprehend, be first brought before the House. If the House does not possess this power, the

statute would be a dead letter, and to most practical interests and purposes inoperative.

From all this, therefore, it seems plain to my mind that the House does possess from necessity, and by implied and inherent prerogative, independent of usage or precedent, the powers claimed in the present instance. But if we hesitate in regard to this view of the subject, does there not exist a usage—a jurisprudence, so to speak—in matters relating to the powers of the Local Parliament of Quebec, which must go far to remove all doubt in reference to these powers, as claimed in the present instance? Is there no evidence of an authority, long exercised by our Parliament, and which may, at least, assist us in coming to a safe conclusion in a case like the present? I think we have precedents and decisions of considerable value and importance in this matter; and in invoking these precedents and these decisions, I do so to corroborate the view of the case which I have just presented. They do not, I apprehend, contradict, or in any way invalidate, but they confirm the soundness of the argument based on implied and necessary power; and furnish proof, if such were wanting, of the existence for nearly a century of the law, usage or authority here contended for.

And, first, I would remark that we need not, we cannot go back to the middle ages, exploring and searching for a *lex et consuetudo Parliamenti*. We are not called upon to revert to the times and events beyond which the memory of man runneth not, and knoweth nothing to the contrary. These are pleasing, perhaps instructive speculations, but, according to my view of this case, they lie outside and beyond the enquiries we are called upon to make. In the United States, they date the laws and usages of Congress from the formation of their Constitution, and we may safely, and must from

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necessity, trace ours from the organization of our Government under the British Crown to the present day. Our constitutional retrospect, if I may so express it, is not so extensive, our horizon not so distant; but, at the same time, they are not so hazy or historical as they are in England. We go back scarcely a century, but even within that short period we find the laws, usages and powers of our Parliament constantly and decisively asserted. We have the case of *Mr. Young* in 1793, that of *Mr. Monk* in 1817, those of Messrs. *Tracey* and *Duvernay* in 1832, of *Brodeur* and *Lavoie* in later times. These persons were brought before the bar of the House on general warrants—some for breach of privilege, some for refusing to give evidence and to produce documents, some for libels on the House, and others for delinquencies cognizable by Parliament. In the recent or pending case of the Tanneries Exchange, or Swap, as it is popularly called, witnesses have been summoned and sworn, and reluctantly gave evidence.

There are more and many other instances, not necessary to mention here, in which this inherent and necessary power of Parliament has been repeatedly exercised. Some of these cases were questioned—were brought before judicial authority—but the course and proceedings of Parliament were sustained, or at least have never been overruled. All this looks very much like a *lex et consuetudo Parliamenti*. If they do not establish that, they establish nothing; and in so far as usage is involved to justify these proceedings, we are driven to the conclusion that all the compulsory investigations and enquiries— all the instances of arrest and restraint conducted and enforced for nearly a century, were simply acts of tyranny, usurpation of authority, and, moreover, flagrant violations of law on the part of our Parliament. I should not like so to decide. I have no warrant, no authority for doing so.

It has been repeatedly said, and argued with great earnestness, that there have been three separate, fundamental and distinct breaches in the continuity, so to speak, of our Constitution—one in 1838, one in 1841, and the last in 1867. So likewise, though not in the same form, nor under the same circumstances, have there been disturbances, disruptions—I may say breaches in the British Constitution. Yet antiquarian industry, the legal researches of constitutional lawyers, in pursuit of precedents and parliamentary law, cheerfully travel back over this mutilated Constitution to the 13th century, and even to an earlier period.

Without, however, pursuing this analogy further, or into greater detail, as a matter of fact our Constitution has undergone suspensions, changes, modifications, and withal occasional restorations, and I think it may be safely held that if these parliamentary powers, usages and privileges ever did exist, and since they did exist, they never were, by these vicissitudes in our constitutional history, modified or abrogated; and, inasmuch as the Confederation Act, in this respect at least, has left us where we were—that is, independent, supreme, within our own sphere of legislation—it cannot be said to have interfered with these laws and usages of Parliament such as they existed in 1867.

Thus, then, as I view this part of the case before us, the authority and inherent privileges of the House of Assembly have virtually continued, though occasionally in abeyance, through all the changes of our Constitution, and they exist now in as full force as they did for a long time, and immediately previous to Confederation. I consider myself, therefore, bound by what I regard as an established usage, and I cannot in the face of all this decide that for nearly a century, and up to the present day, the Legislature of this country has, in the instances adverted to,

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and which in part illustrate its history, been acting as a mob, perpetrating illegal acts, and guilty of flagrant tyranny and violations of the law of the land. Such an assumption on my part, in view of the arguments from necessity and usage, above set forth, would not only be inadmissible, but, at the same time, it would be simply a preposterous judgment.

It is unnecessary to refer at length on the present occasion to the decisions of the highest tribunals of England, or to the opinions of eminent judges in their courts, in order to shew that the view here taken as to the inherent authority of Parliament, and the force of parliamentary precedent and usage, even in subordinate Legislatures such as ours, have been fully sustained. None of these cases, it is true, are exactly in point, but the principles there laid down clearly shew that our decision in this case, upholding the power and authority of the Local Legislature, is in entire conformity with what has been there laid down as law.

I have been induced to go more fully into the above considerations than I deem at all necessary in order to dispose of the questions submitted for our consideration, in consequence of the dissent of my honourable and learned colleague on my right, who rests that dissent upon grounds which this court regard as untenable. But it is not essential that these questions should be raised at all. We have a positive law, a statute of the Local Legislature, the 33 Vict. c. 5, which disposes at once of this case. The 2nd and 9th sections of that Act are decisive.

It is and has been, however, argued that that statute is unconstitutional. I do not think so. I am free to admit that, under the rulings of our courts, where a local statute is in palpable and flagrant contradiction to the Confederation Act, or in conflict with an Act of

the Dominion Legislature, the judicial authority of the local tribunals is bound to declare such a law unconstitutional and inoperative. If, however, there exist a doubt, that doubt must be given in favour of the constitutionality of the law, and the statute should be enforced. In this case, I apprehend, there is neither a manifest conflict, nor can a doubt arise. I am clearly of opinion that our Legislature had the power to pass that law. It has not been disallowed—it has been in force for five years, and we are bound by it; and being so bound, we need not appeal to any other authority or laws in order to decide this matter.

Thus, therefore, as it appears to me, upon the three grounds above adverted to—1st, the inherent and necessary powers of our Local Legislature; 2nd, the usage, precedents and decisions, in relation to the powers of our Legislature for nearly one hundred years; and partly under and in virtue of the clear and peremptory authority and requirements of positive laws, the 33 Vict. c. 5, and the statute of the same year which authorizes the administration of oaths to witnesses examined before committees of the House—we are bound to quash this writ of *Habeas corpus*, and to uphold, in so far as this case involves the prerogatives of our Parliament, the authority of the House. My learned colleagues, concurring in the judgment now rendered, have so fully and, I may add, so lucidly enunciated the views of the Court, that any further observations on my part would only weaken their elaborate exposition of the positive law which we regard as decisive of this case.

The judgment is recorded in these words :

"The Court having heard counsel on behalf of the petitioner and of the Speaker of the Legislative Assem-

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bly, and examined the petition, writ of *habeas corpus* and return thereto, doth quash the said writ of *habeas corpus*.”(1)

Writ quashed.

[This note contains the judgment delivered by Mr. Justice Ramsay in Chambers in *Cotté's Case*, referred to at pp. 165, 167 *ante*, and is printed from the report in 20 L. C. Jurist, 210.]

RAMSAY, J. :—

On Friday a petition was presented to me in chambers on the part of Honoré Cotté, setting forth that he had been arrested and was then in custody of the Serjeant-at-Arms of the Legislative Assembly for the Province of Quebec, under authority of a warrant issued by the Speaker of that Assembly, and praying that a writ of *habeas corpus* might issue in order that the legality of his detention might be enquired into.

This petition was accompanied by a copy of the Speaker's warrant, authenticated by the Serjeant-at-Arms. The warrant was to the following effect :—

To the Serjeant-at-Arms attending the Legislative Assembly :—

Whereas the Legislative Assembly have this day ordered that Honoré Cotté, of the city of Montreal, cashier of La Banque Jacques Cartier, be sent for in custody of the Serjeant-at-Arms attending the House.

(1) [In *Landers v. Woodworth* (2 Can. S. C. R. 158), decided in January, 1878, it was held by the Supreme Court of Canada that the Legislative Assembly of the Province of Nova Scotia had, in the absence of express legislation on the subject, no power to remove one of its members for contempt, unless he was actually obstructing the business of the House ; and that a member having been removed from his seat, not because he was obstructing the business of the House, but because he would not make an apology which the House had required him to make, his removal was beyond the legal authority of the Assembly.

In giving judgment, Richards, C.J., said, p. 192 :—“ The Legislatures of Ontario and Quebec seem to have conferred on the House of Assembly in these Provinces extensive powers to enable them effectively to exercise their high functions and discharge the important duties cast on them. It may be necessary still further to extend their powers. The Legislatures of the other Provinces will probably consider it desirable to take the same course, and in that way unmistakably place these tribunals in the position of dignity and power which it is desirable they should possess.”]

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2005 CF 576

The Honourable Alfonso Gagliano (*Applicant*)

L'honorable Alfonso Gagliano (*demandeur*)

v.

c.

The Attorney General of Canada, The House of Commons and Mr. Charles Guité (*Respondents*)

Le procureur général du Canada, la Chambre des communes et M. Charles Guité (*défendeurs*)

and

et

The Commission of Inquiry into the Sponsorship Program and Advertising Activities (*Intervener*)

La Commission d'enquête sur le programme de commandites et les activités publicitaires (*intervenant*)

INDEXED AS: GAGLIANO v. CANADA (ATTORNEY GENERAL) (F.C.)

RÉPERTORIÉ: GAGLIANO c. CANADA (PROCUREUR GÉNÉRAL) (C.F.)

Federal Court, Tremblay-Lamer J.—Montréal, April 12; Ottawa, April 27, 2005.

Cour fédérale, juge Tremblay-Lamer—Montréal, 12 avril; Ottawa, 27 avril 2005.

Constitutional Law — Fundamental Principles — Parliamentary privilege — Judicial review of Gomery Commission decision that parliamentary privilege applying to preclude allegedly inconsistent testimony before parliamentary committee from being used in cross-examination in proceedings of Commission — Decision based on fact Bill of Rights, 1688, Art. 9, codifying freedom of speech in U.K., recognized as parliamentary privilege in U.K. in 1867 — Art. 9 not incorporated into Canadian Constitution, only broad principles that follow from it applying — Application of necessity test described by S.C.C. in New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly) to determine scope of freedom of speech privilege — Right to preclude cross-examination of witnesses before parliamentary committees necessary to Parliament's functioning to encourage witnesses to speak openly, allow exercise of committees' investigative functions, avoid contradictory fact findings — Privilege applicable — Application dismissed.

Droit constitutionnel — Principes fondamentaux — Privilège parlementaire — Contrôle judiciaire de la décision de la Commission Gomery selon laquelle le privilège parlementaire s'applique pour empêcher qu'on se serve d'une déposition prétendument incompatible faite devant un comité parlementaire lors d'un contre-interrogatoire dans le cadre des travaux de la Commission — La décision est fondée sur le fait que l'art. 9 du Bill of Rights, 1688 a codifié le privilège de la «liberté de parole» au R.-U., reconnu en tant que privilège parlementaire au R.-U. en 1867 — L'art. 9 n'a pas été incorporé dans la Constitution canadienne et seuls les grands principes qui en découlent s'appliquent — Application du critère de nécessité décrit par la C.S.C. dans l'arrêt New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative) pour déterminer la portée du privilège de la liberté de parole — Le droit d'empêcher le contre-interrogatoire de témoins qui ont déposé devant des comités parlementaires est nécessaire au fonctionnement du Parlement pour encourager les témoins à parler ouvertement, pour permettre aux comités d'exercer leur fonction d'enquête et pour éviter les conclusions de fait contradictoires — Le privilège est applicable — Demande rejetée.

Inquiries — Commission of Inquiry into the Sponsorship Program and Advertising Activities — Cross-examination of witnesses — Applicant wanting to use allegedly inconsistent testimony of respondent Guité before parliamentary committee in cross-examination in proceedings of Commission — Respondent Guité objecting on basis parliamentary privilege precluding use of that testimony — Commission upholding objection — Applicant arguing denial of cross-examination

Enquêtes — Commission d'enquête sur le programme de commandites et les activités publicitaires — Contre-interrogatoire de témoins — Le demandeur désirait se servir de la déposition prétendument incompatible du défendeur Guité faite devant un comité parlementaire lors d'un contre-interrogatoire dans le cadre des travaux de la Commission — Le défendeur Guité s'y est opposé au motif que le privilège parlementaire empêchait l'utilisation de cette déposition — La

[78] Uncertainty as to the scope of the privilege that is granted to him may accentuate a witness's feeling of vulnerability and prevent him from speaking openly, which would obviously reduce the effectiveness of hearings before parliamentary committees.

[79] It is not easy, of course, to demonstrate such a proposition with certainty (which probably explains the controversy on the matter), since it is obvious that human reactions may vary from one individual to another. I recognize that for some people, complete protection may lull them into a false impression of security.

[80] Despite that, caution urges me to follow the opinion of the highest courts, which have held that it is necessary to extend the privilege to every proceeding: *Prebble*, and *Hamilton v Al Fayed*.

(b) To allow the parliamentary committee to exercise its investigative function

[81] Historically, the cases have acknowledged the need for privileges that allow legislative bodies to investigate. These privileges were clearly recognized in 1867. As Lord Denman stated in *Stockdale v. Hansard*, at page 1156:

The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the grand inquest of the nation. All the privileges than can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt.

[82] This characterization of the principal role of Parliament and the privileges that are needed to fulfill that role was clearly accepted in Canada as well. In *Canada (Attorney General) et al. v. MacPhee et al.* (2003), 221 Nfld. & P.E.I.R. 164 (P.E.I.S.C. (T.D.)), Cheverie J. stated (at paragraphs 23-24, 32):

In the Canadian context, the intervener cites the case of *Dansereau, Ex parte* (1875), 19 L.C.J. 210, reprinted in J.R. Cartwright, *Cases Decided on the British North America Act, 1867*, vol. II (Toronto: Warwick & Sons, 1887) at 165. This case is cited in support of the proposition that legislative assemblies in this country have the right to summon witnesses and have them produce documents; this right is inherent parliamentary privilege; and the power was exercised as far back as the 1800's. I do not intend to quote extensively from

[78] L'incertitude quant à la portée du privilège qui lui est accordé peut accentuer le sentiment de vulnérabilité d'un témoin et l'empêcher de s'exprimer ouvertement, ce qui réduirait évidemment l'efficacité des audiences devant les comités parlementaires.

[79] Bien sûr, une telle proposition est difficile à démontrer avec certitude (ce qui explique probablement la controverse sur le sujet), puisqu'il est évident que les réactions humaines peuvent varier d'un individu à l'autre. Je reconnais que chez certains, une protection complète peut les conduire à une fausse impression de sécurité.

[80] Malgré cela, la prudence m'invite à suivre l'avis des plus hauts tribunaux qui ont conclu à la nécessité d'étendre le privilège à toute instance: *Prebble*, et *Hamilton v Al Fayed*.

b) Préserver la capacité d'enquêter du comité parlementaire

[81] Historiquement, la jurisprudence a reconnu la nécessité des privilèges qui permettent aux organismes législatifs d'enquêter. Ces privilèges étaient clairement reconnus en 1867. Comme l'a déclaré lord Denman dans l'arrêt *Stockdale v. Hansard*, à la page 1156:

[TRADUCTION] La Chambre des communes d'Angleterre ne possède pas plus de pouvoir et de dignité par sa nature législative que par ce qu'elle a en tant que grand enquêteur de la nation. Tous les privilèges qui peuvent être nécessaires à l'exercice énergique des fonctions inhérentes à cette profonde confiance sont concédés sans broncher et sans aucun doute.

[82] Cette qualification du rôle principal du Parlement et des privilèges qui sont nécessaires pour l'accomplir a été clairement acceptée au Canada également. Dans la décision *Canada (Attorney General) et al. v. MacPhee et al.* (2003), 221 Nfld. & P.E.I.R. 164 (C.S. Î.-P.-É. (1^{re} inst.)), le juge Cheverie a déclaré (aux paragraphes 23, 24 et 32):

[TRADUCTION] Dans le contexte canadien, l'intervenant a cité l'arrêt *Dansereau, Ex parte* (1875), 19 L.C.J. 210, reproduit dans le livre de J.R. Cartwright, *Cases Decided on the British North America Act, 1867*, vol. II (Toronto: Warwick & Sons, 1887), à la page 165. Cette affaire est citée à l'appui de la proposition selon laquelle les assemblées législatives de ce pays ont le droit d'assigner des témoins et de leur faire produire des documents; ce droit est inhérent au privilège parlementaire et l'exercice du pouvoir remonte aux

that case, except to refer to page 190 of the case report where the following appears:

“Responsible Government, which has been recognised in the Local as well as in the constitution of the General Government, would be a delusion if that power of enquiry was denied, and the enquiry would be valueless without the power of summoning witnesses. I consider this to be a necessary incident of the powers of Legislatures, and of controlling the administration of public affairs, and as such I believe that the House of Assembly had a right to exercise it.”

The intervenor goes further and refers to **McNab v. Bidwell and Baldwin** (1830), Draper 144 at 156 (K.B.). In that pre-confederation case, the Court of King’s Bench of Upper Canada had the following to say at p. 156:

“It is my opinion that the right of enquiry for the purpose of enabling the legislature to exercise their constitutional functions is necessarily incident to both branches; for I do not see how they could join in making laws for the good government of the King’s subjects without obtaining the information requisite to form a correct opinion of the measures and alterations proper to be adopted. I think this is an inherent right essential to every legislature. And the right of examination implies a right to compel the answering of all such questions as the law of the land will sanction.”

On a review of the authorities cited, I am satisfied the right of the Legislative Assembly of Prince Edward Island to summon witnesses and have them produce documents is necessary for the proper functioning of the assembly, and, therefore, meets the test for recognition as an inherent privilege. It satisfies the test articulated by the Supreme Court of Canada in **New Brunswick Broadcasting**. It is difficult to imagine how the legislative assembly could properly conduct an inquiry within its constitutional jurisdiction without the power to summon witnesses and require the production of records and documents.

...

There is no doubt but that the Committee has the power to issue the summons in question; that it derives that power from the legislative assembly; that the power is rooted in parliamentary privilege; and it is not for this Court to inquire into how that power was exercised.

[83] I agree with these comments. And by extension, in my opinion, the discretionary authority to protect witnesses from cross-examination based on their

années 1800. Je n’ai pas l’intention de citer largement cette affaire, sauf pour faire référence à la page 190 du recueil de jurisprudence où apparaît le passage suivant:

«Un gouvernement responsable, qui a été reconnu sur le plan local de même que dans la constitution du gouvernement général, serait une illusion si ce pouvoir d’enquête était nié et l’enquête n’aurait aucune valeur sans le pouvoir d’assigner des témoins. Je considère que cela est nécessairement accessoire aux pouvoirs des législatures ainsi qu’au contrôle de l’administration des affaires publiques et, de ce fait, je crois que l’Assemblée législative avait le droit de l’exercer.»

L’intervenant fait également référence à l’affaire **McNab v. Bidwell and Baldwin** (1830), Draper 144 à la page 156 (B.R.). Dans cette affaire antérieure à la Confédération, la Cour du Banc du Roi du Haut-Canada disait ce qui suit:

«Je suis d’avis que le droit d’enquête aux fins de permettre à la législature d’exercer ses fonctions constitutionnelles constitue nécessairement un accessoire aux deux chambres, car je ne peux concevoir comment ils pourraient se joindre pour faire des lois pour le bon gouvernement des sujets du Roi sans obtenir les renseignements requis pour se former une opinion correcte relativement aux mesures et aux modifications appropriées à adopter. Je pense qu’il s’agit d’un droit inhérent essentiel à chaque législature. Et le droit d’examen implique celui de contondre à répondre à toutes les questions que les lois du pays sanctionneront.»

Après avoir examiné les autorités citées, je suis convaincu que le droit de l’Assemblée législative de l’Île-du-Prince-Édouard d’assigner des témoins et de leur faire produire des documents est nécessaire au bon fonctionnement de l’Assemblée et que, par conséquent, il remplit le critère pour le reconnaître en tant que privilège inhérent. Il satisfait au critère énoncé par la Cour suprême du Canada dans l’arrêt **New Brunswick Broadcasting**. Il est difficile d’imaginer comment l’Assemblée législative pourrait mener à bien une enquête dans le cadre de sa compétence constitutionnelle sans le pouvoir d’assigner des témoins et d’exiger la production de dossiers et de documents.

[. . .]

Il n’y a aucun doute que le Comité possède le pouvoir de délivrer les assignations en question, que ce pouvoir provient de l’Assemblée législative, que le pouvoir trouve sa source dans le privilège parlementaire et que ce n’est pas le rôle de la Cour d’enquêter sur la manière dont ce pouvoir a été exercé.

[83] Je souscris à ces commentaires. Et, par extension, à mon avis, le pouvoir discrétionnaire de protéger les témoins à l’encontre d’un contre-interrogatoire fondé sur

testimony to Parliament may also be characterized as a privilege that is necessary for the proper functioning of Parliament in matters of investigation or inquisition.

[84] To characterize the power to preclude cross-examination as a privilege of free speech or investigation does not alter the underlying justification: Parliament must be able to provide this protection to witnesses appearing before parliamentary committees for the purpose of discerning the facts and resolving the question or retracing the events under investigation. Stripped of this power to provide such protection to witnesses, Parliament and its committees could not function; hence its necessity.

[85] Furthermore, any assessment by the Court as to whether it is appropriate to provide such protection in this case would in my opinion lead to an examination of how this investigative privilege is exercised, contrary to the fundamental distinction adhered to in *New Brunswick Broadcasting Co.* The Court is empowered to examine the existence and the scope of a power or privilege claimed by Parliament, but not to regulate the exercise thereof. McLachlin J. [at page 390] used an analogy to further explain this fundamental distinction: “the important question is whether we are here treating the fruit of the legislative tree [i.e. the exercise of the power], or the tree itself [i.e. the existence of the power].”

[86] Also, the reasons in support of the resolution precluding cross-examination, adopted by the House of Commons and found in the Fourteenth Report [on privileges, powers and communities of the House of Commons] of the Standing Committee on Procedure and House Affairs [2004], clearly emphasize this: witnesses have been assured that their testimony would be protected by parliamentary privilege and it is in the best interest of Parliament to ensure that this assurance is upheld.

[87] If, at the same time, the House has some reasons to believe that witnesses are not speaking the truth before a committee, despite its efforts to encourage them to express themselves freely, Parliament alone is primarily responsible for initiating proceedings and punishing such deceptive conduct.

le témoignage qu'ils ont fourni au Parlement peut aussi être qualifié comme étant un privilège qui lui est nécessaire pour le bon fonctionnement du Parlement en matière d'investigation ou d'inquisition.

[84] Qualifier le pouvoir d'empêcher un contre-interrogatoire comme un privilège de la liberté de parole ou d'enquête ne modifie pas la justification sous-jacente: le Parlement doit être en mesure d'offrir cette protection aux témoins comparaisant devant les comités parlementaires dans le but de discerner les faits et de régler la question ou retracer les événements sous enquête. Dépouillés de ce pouvoir d'offrir cette protection aux témoins, le Parlement et ses comités ne pourraient pas fonctionner, d'où sa nécessité.

[85] De plus, toute appréciation de la part de la Cour quant à la question de savoir s'il est approprié d'offrir cette protection en l'espèce entraînerait à mon avis un examen de l'exercice de ce privilège d'enquête, contrairement à la distinction fondamentale suivie dans l'arrêt *New Brunswick Broadcasting Co.* La Cour est habilitée à examiner l'existence et la portée d'un pouvoir ou d'un privilège revendiqué par le Parlement, mais non à en réglementer l'exercice. La juge McLachlin [à la page 390] s'est servi d'une analogie pour expliquer davantage cette distinction fondamentale: «la question importante est de savoir si nous traitons du fruit de l'arbre législatif [c'est-à-dire l'exercice du pouvoir] ou de l'arbre lui-même [c'est-à-dire l'existence du pouvoir]».

[86] En outre, les motifs à l'appui de la résolution empêchant le contre-interrogatoire, adoptée par la Chambre des communes et que l'on trouve dans le Quatorzième Rapport [des privilèges, pouvoirs et immunités de la Chambre des communes] du Comité permanent de la procédure et des affaires de la Chambre des communes [2004], soulignent clairement ceci: les témoins ont reçu l'assurance que leur témoignage serait protégé par le privilège du Parlement et il est dans le meilleur intérêt du Parlement de faire en sorte que cette assurance soit maintenue.

[87] Par la même occasion, si la Chambre a des motifs de croire que les témoins n'ont pas dit la vérité devant un comité, malgré ses efforts pour les encourager à s'exprimer librement, le Parlement a seul la responsabilité principale d'intenter des poursuites et de punir ce comportement fallacieux.

TAB 17

Richard James Goodwin *Appellant*

v.

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Respondents*

- and -

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Appellants*

v.

Jamie Allen Chisholm *Respondent*

- and -

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Appellants*

v.

Scott Roberts *Respondent*

- and -

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Appellants*

v.

Carol Marion Beam *Respondent*

- and -

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Appellants*

v.

Richard James Goodwin *Appelant*

c.

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Intimés*

- et -

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Appellants*

c.

Jamie Allen Chisholm *Intimé*

- et -

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Appellants*

c.

Scott Roberts *Intimé*

- et -

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Appellants*

c.

Carol Marion Beam *Intimée*

- et -

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Appellants*

c.

Richard James Goodwin *Respondent*

and

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of Manitoba,
Attorney General for Saskatchewan,
Attorney General of Alberta,
British Columbia Civil Liberties Association,
Insurance Bureau of Canada,
Criminal Trial Lawyers’
Association (Alberta), Criminal Defence
Lawyers Association (Calgary),
Criminal Lawyers’ Association of Ontario,
Alberta Registrar of Motor Vehicle
Services and Mothers Against Drunk
Driving Canada** *Interveners*

**INDEXED AS: GOODWIN v. BRITISH COLUMBIA
(SUPERINTENDENT OF MOTOR VEHICLES)**

2015 SCC 46

File No.: 35864.

2015: May 19; 2015: October 16.

Present: McLachlin C.J. and Cromwell, Moldaver,
Karakatsanis, Wagner, Gascon and Côté JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Constitutional law — Division of powers — Criminal law — Property and civil rights — Highways — Impaired driving — Provincial legislation creating automatic licence suspensions, penalties and remedial programs following roadside analysis using approved screening device — Whether automatic roadside prohibition scheme ultra vires the province as being exclusively within federal government’s criminal law power — Constitution Act, 1867, ss. 91(27), 92(13) — Motor Vehicle Act, R.S.B.C. 1996, c. 318.

Richard James Goodwin *Intimé*

et

**Procureur général du Canada,
procureur général de l’Ontario,
procureure générale du Québec,
procureur général du Manitoba,
procureur général de la Saskatchewan,
procureur général de l’Alberta,
Association des libertés civiles
de la Colombie-Britannique,
Bureau d’assurance du Canada,
Criminal Trial Lawyers’
Association (Alberta), Criminal Defence
Lawyers Association (Calgary),
Criminal Lawyers’ Association of Ontario,
Alberta Registrar of Motor Vehicle
Services et Les mères contre l’alcool au
volant Canada** *Intervenants*

**RÉPERTORIÉ : GOODWIN c. COLOMBIE-BRITANNIQUE
(SUPERINTENDENT OF MOTOR VEHICLES)**

2015 CSC 46

N° du greffe : 35864.

2015 : 19 mai; 2015 : 16 octobre.

Présents : La juge en chef McLachlin et les juges
Cromwell, Moldaver, Karakatsanis, Wagner, Gascon
et Côté.

**EN APPEL DE LA COUR D’APPEL DE LA
COLOMBIE-BRITANNIQUE**

Droit constitutionnel — Partage des compétences — Droit criminel — Propriété et droits civils — Voies publiques — Conduite avec facultés affaiblies — Loi provinciale prévoyant des suspensions automatiques du permis de conduire, des sanctions et des programmes correctifs à la suite d’une analyse faite lors d’un contrôle routier à l’aide d’un appareil de détection approuvé — Le régime d’interdiction automatique de conduire outre-passe-t-il la compétence de la province parce qu’il relève exclusivement de la compétence du gouvernement fédéral en matière de droit criminel? — Loi constitutionnelle de 1867, art. 91(27), 92(13) — Motor Vehicle Act, R.S.B.C. 1996, c. 318.

the purposes of s. 8, it is the ARP scheme that authorizes the seizure of the breath sample, and it is thus subject to *Charter* scrutiny on this basis.

(3) Is the Seizure in the ARP Scheme Reasonable?

[55] As Dickson J. wrote for a unanimous court in *Hunter*, at pp. 159-60, assessing whether the law authorizing a search or seizure is reasonable requires determining

whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

The protection s. 8 provides for an individual's privacy — personal, territorial and informational — is essential not only to human dignity, but also to the functioning of our democratic society. At the same time, s. 8 permits *reasonable* searches and seizures in recognition that the state's legitimate interest in advancing its goals or enforcing its laws will sometimes require a degree of intrusion into the private sphere. The tension articulated in *Hunter* between the competing individual and state interests, and the adequacy of the safeguards provided, remain foundational to this analysis.

[56] Searches or seizures conducted without a warrant — such as the seizure underpinning the ARP scheme — are presumptively unreasonable: *Hunter*, at p. 161. The burden of establishing reasonableness thus rests with the state.

[57] This Court has generally declined to set out a “hard and fast” test of reasonableness: see *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 495. In my view, this flexible approach remains compelling. This Court has nonetheless identified certain considerations that may be helpful in the reasonableness analysis, including “the nature and the purpose

Pour l'application de l'art. 8, c'est le RIAC qui autorise la saisie de l'échantillon d'haleine, et il est donc assujéti à l'examen fondé sur la *Charte* pour ce motif.

(3) La saisie prévue par le RIAC est-elle raisonnable?

[55] Comme l'a écrit le juge Dickson aux p. 159-160 de l'arrêt unanime *Hunter*, pour déterminer si la loi qui autorise une fouille, une perquisition ou une saisie est raisonnable, il faut apprécier

si, dans une situation donnée, le droit du public de ne pas être importuné par le gouvernement doit céder le pas au droit du gouvernement de s'immiscer dans la vie privée des particuliers afin de réaliser ses fins et, notamment, d'assurer l'application de la loi.

La protection que l'art. 8 accorde à la vie privée — personnelle, territoriale et informationnelle — d'un particulier est essentielle non seulement à la dignité humaine, mais aussi au fonctionnement de notre société démocratique. Parallèlement, l'art. 8 permet les fouilles, les perquisitions et les saisies *raisonnables*, reconnaissant que le droit légitime de l'État de réaliser ses fins ou d'appliquer ses lois nécessitera parfois une certaine intrusion dans la sphère privée. Le tiraillement mis en évidence dans *Hunter* entre les intérêts opposés de l'individu et de l'État, et le caractère suffisant des mesures de protection prévues, demeurent fondamentaux pour cette analyse.

[56] Les fouilles, les perquisitions ou les saisies sans mandat — comme la saisie sur laquelle repose le RIAC — sont présumées abusives : *Hunter*, p. 161. Le fardeau d'établir le caractère raisonnable incombe donc à l'État.

[57] La Cour a généralement refusé d'énoncer un critère « absolu » du caractère raisonnable : voir *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, p. 495. À mon sens, cette approche souple demeure avérée. La Cour a néanmoins relevé certaines considérations qui peuvent être utiles dans l'analyse du caractère raisonnable, dont « la nature et

TAB 18

The Attorney General of Canada *Applicant*

v.

Stephen Joseph Harper *Respondent*

INDEXED AS: HARPER v. CANADA (ATTORNEY GENERAL)

Neutral citation: 2000 SCC 57.

File No.: 28210.

2000: November 10.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

MOTION FOR A STAY

Practice — Stay — Federal elections — Spending limits — Plaintiff granted interlocutory injunction against enforcement of third-party spending limits pending decision on his constitutional challenge to legislation — Whether injunction should be stayed.

The respondent sought a declaration that the provisions in the *Canada Elections Act*, S.C. 2000, c. 9, imposing limits on third-party spending on advertising in the course of a federal election campaign are unconstitutional because they unjustifiably limit the right of free expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The issue has gone to trial but judgment has not yet been rendered. An election writ has been issued with a polling date of November 27, 2000. The respondent immediately applied for an interlocutory injunction restraining the enforcement of the third-party spending limits, pending the decision in the action. The same judge who heard the trial granted the injunction, which was upheld by the Court of Appeal. The Attorney General of Canada applies to this Court for leave to appeal from the interlocutory injunction and, in the interim, for a stay of the injunction.

Held (Major J. dissenting): The stay should be granted.

Per McLachlin C.J., L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.: In considering whether an injunction should be granted, and by extension whether an injunction should be stayed

Le procureur général du Canada *Requérant*

c.

Stephen Joseph Harper *Intimé*

RÉPERTORIÉ: HARPER c. CANADA (PROCUREUR GÉNÉRAL)

Référence neutre: 2000 CSC 57.

N° du greffe: 28210.

2000: 10 novembre.

Présents: Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

REQUÊTE EN SURSIS D'EXÉCUTION

Pratique — Sursis d'exécution — Élections fédérales — Plafonnement des dépenses — Obtention par le demandeur d'une injonction interlocutoire interdisant l'application du plafonnement des dépenses des tiers jusqu'à ce qu'il ait été statué sur sa contestation de la constitutionnalité de la loi — Faut-il surseoir à l'exécution de l'injonction?

L'intimé a demandé que les dispositions de la *Loi électorale du Canada*, L.C. 2000, ch. 9, plafonnant les dépenses de publicité qu'un tiers peut engager au cours d'une campagne électorale fédérale soient déclarées inconstitutionnelles parce qu'elles limitent de manière injustifiable le droit à la liberté d'expression garanti par l'al. 2b) de la *Charte canadienne des droits et libertés*. La question a fait l'objet d'un procès, mais jugement n'a pas encore été rendu. Une élection a été déclenchée et la date du scrutin a été fixée au 27 novembre 2000. L'intimé a immédiatement demandé une injonction interlocutoire interdisant le plafonnement des dépenses des tiers jusqu'à ce qu'une décision ait été rendue relativement à l'action. Cette injonction a été accordée par le juge même qui avait présidé le procès, décision qui a été confirmée par la Cour d'appel. Le procureur général du Canada demande à notre Cour de l'autoriser à se pourvoir contre l'injonction interlocutoire et, dans l'intervalle, qu'il soit sursis à l'exécution de l'injonction.

Arrêt (le juge Major est dissident): Le sursis d'exécution est accordé.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel: Pour décider s'il y a lieu d'accorder une injonction et, partant, s'il y a lieu de surseoir à l'exécu-

allowing the injunction to stay in place will in effect give Mr. Harper the ultimate relief he seeks in his action, at least with respect to the current election. The trial judge, however, did not address this factor, nor the case law which addresses it.

R.C.S. 110, le juge Beetz, à la p. 144; *Haig c. Canada*, [1993] 2 R.C.S. 995. Dans la présente affaire, permettre le maintien de l'injonction accorde dans les faits à M. Harper la réparation ultime qu'il sollicite dans l'instance, du moins en ce qui concerne l'élection en cours. Toutefois, le juge de première instance n'a pas abordé ce facteur ni la jurisprudence qui en traite.

8 It may also be noted that, in *Thomson Newspapers Co. v. Canada (Attorney General)*, S.C.C., No. 25593, May 7, 1997 (published in the *Bulletin of Proceedings of the Supreme Court of Canada*, 1997, at p. 882), this Court refused to grant a stay suspending the enforcement of the provisions mandating publication bans on opinion polls set forth in the *Canada Elections Act*, R.S.C., 1985, c. E-2, s. 322.1. In so doing, the Court relied on its previous decision in *Gould*, *supra*. The Court refused the stay even though the ultimate decision found the poll prohibition to be unconstitutional.

On peut aussi noter que, dans le jugement *Thomson Newspapers Co. c. Canada (Procureur général)*, C.S.C., n° 25593, 7 mai 1997 (publié dans le *Bulletin des procédures de la Cour suprême du Canada*, 1997, à la p. 882), notre Cour a refusé de suspendre l'application des dispositions interdisant la publication des résultats de sondage contenues dans la *Loi électorale du Canada*, L.R.C. (1985), ch. E-2, art. 322.1. Ce faisant, la Cour s'est fondée sur l'arrêt *Gould*, précité, qu'elle avait rendu antérieurement. Elle a refusé la suspension et, pourtant, en définitive, l'interdiction relative aux sondages a été jugée inconstitutionnelle.

9 Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 348-49:

Un autre principe énoncé dans la jurisprudence veut que, en décidant de l'opportunité d'accorder une injonction interlocutoire suspendant l'application d'une mesure législative adoptée valablement mais contestée, il n'y ait pas lieu d'exiger la preuve que cette mesure législative sera à l'avantage du public. À ce stade des procédures, elle est présumée l'être. Comme les juges Sopinka et Cory l'ont affirmé dans l'arrêt *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311, aux pp. 348 et 349:

When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

Si la nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law — in this case the spending limits imposed by s. 350 of the Act — is directed to the public good and serves a valid

Il s'ensuit qu'en évaluant la prépondérance des inconvénients le juge saisi de la requête doit tenir pour acquis que la mesure législative — en l'espèce, le plafond des dépenses imposé par l'art. 350 de la Loi — a été adoptée pour le bien du public et

public purpose. This applies to violations of the s. 2(b) right of freedom of expression; indeed, the violation at issue in *RJR — MacDonald* was of s. 2(b). The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

qu'elle sert un objectif d'intérêt général valable. Cela s'applique aux violations du droit à la liberté d'expression garanti par l'al. 2b); d'ailleurs, il était question d'une violation de l'al. 2b) dans l'arrêt *RJR — MacDonald*. La présomption que l'intérêt public demande l'application de la loi joue un grand rôle. Les tribunaux n'ordonneront pas à la légère que les lois que le Parlement ou une législature a dûment adoptées pour le bien du public soient inopérantes avant d'avoir fait l'objet d'un examen constitutionnel complet qui se révèle toujours complexe et difficile. Il s'ensuit que les injonctions interlocutoires interdisant l'application d'une mesure législative dont on conteste la constitutionnalité ne seront délivrées que dans les cas manifestes.

Again, the trial judge appears not to have applied this principle in weighing the benefits of the law against its impact on free expression. Instead of assuming that the legislation has the effect of promoting the public interest as *RJR — MacDonald* directs, the trial judge based his conclusion on the fact that the Government “has not adduced any evidence to illustrate unfairness in any of these elections in Canada caused by third-party spending limits” (para. 33). He went on to repeat that the “Government simply asserts that third-party spending limits, if not controlled, may (and that is notional only) impact adversely on the fairness of elections” (para. 34), and moved directly from this to the conclusion that leaving the spending limits in place “would clearly cause more harm in the public interest than the notional unproven unfairness suggested by the Government” (para. 35). Moreover, the trial judge made no mention of the fact that the law may be seen not only as limiting free expression but as regulating it in order to permit all voices during an election to be heard fairly.

Là encore, le juge de première instance ne paraît pas avoir appliqué ce principe en soupesant les avantages de la mesure législative en fonction de son incidence sur la liberté d'expression. Au lieu de tenir pour acquis que la mesure législative a pour effet de promouvoir l'intérêt public, comme l'arrêt *RJR — MacDonald* l'exige, le juge de première instance a fondé sa conclusion sur le fait que le gouvernement [TRADUCTION] «n'a produit aucun élément de preuve destiné à illustrer l'iniquité que le plafonnement des dépenses des tiers a engendrée dans l'une ou l'autre de ces élections au Canada» (par. 33). Il a ensuite répété que le [TRADUCTION] «gouvernement affirme simplement que, si les dépenses des tiers ne sont pas plafonnées, cela pourrait (mais en théorie seulement) avoir des conséquences préjudiciables sur l'équité des élections» (par. 34), pour ensuite conclure directement que maintenir le plafonnement des dépenses [TRADUCTION] «causerait clairement un préjudice plus grand à l'intérêt public que ne le ferait l'iniquité théorique non établie qu'invoque le gouvernement» (par. 35). De plus, le juge de première instance n'a pas mentionné le fait que la mesure législative peut être perçue non seulement comme limitant la liberté d'expression, mais encore comme la réglementant afin de permettre à toutes et à tous de se faire entendre équitablement pendant une élection.

TAB 19

Fred Harvey *Appellant*

v.

The Attorney General for New Brunswick, the Minister of Municipalities, Culture and Housing, Dennis Cochrane and Hazen Myers *Respondents*

and

The Attorney General of Canada, the Attorney General for Ontario and the Attorney General of Quebec *Interveners*

INDEXED AS: HARVEY v. NEW BRUNSWICK (ATTORNEY GENERAL)

File No.: 23968.

1996: February 19; 1996: August 22.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Constitutional law — Charter of Rights — Right to be qualified for membership in legislature — Member of provincial legislature convicted of illegal practice and expelled from legislature pursuant to provincial elections legislation — Legislation also disqualifying anyone convicted of illegal practice from holding electoral office for five years — Whether disqualifications infringe s. 3 of Charter — If so, whether infringement justified under s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 3 — Elections Act, R.S.N.B. 1973, c. E-3, s. 119(c).

Constitutional law — Charter of Rights — Cruel and unusual treatment or punishment — Member of provincial legislature convicted of illegal practice and expelled from legislature pursuant to provincial elections legislation — Legislation also disqualifying anyone convicted of illegal practice from holding electoral office for five years — Whether disqualifications infringe s. 12 of Charter — Canadian Charter of Rights and Freedoms, s. 12 — Elections Act, R.S.N.B. 1973, c. E-3, s. 119(c).

Fred Harvey *Appellant*

c.

Le procureur général du Nouveau-Brunswick, le ministre des Municipalités, de la Culture et de l'Habitation, Dennis Cochrane et Hazen Myers *Intimés*

et

Le procureur général du Canada, le procureur général de l'Ontario et le procureur général du Québec *Intervenants*

RÉPERTORIÉ: HARVEY c. NOUVEAU-BRUNSWICK (PROCUREUR GÉNÉRAL)

N° du greffe: 23968.

1996: 19 février; 1996: 22 août.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DU NOUVEAU-BRUNSWICK

Droit constitutionnel — Charte des droits — Droit à l'éligibilité aux élections provinciales — Député provincial déclaré coupable d'un acte illicite et expulsé de la législature conformément à la loi électorale provinciale — Loi rendant également quiconque est déclaré coupable d'un acte illicite inhabile à occuper une charge de député pendant une période de cinq ans — Ces inhabilités violent-elles l'art. 3 de la Charte? — Dans l'affirmative, cette violation est-elle justifiée au sens de l'article premier? — Charte canadienne des droits et libertés, art. 1, 3 — Loi électorale, L.R.N.-B. 1973, ch. E-3, art. 119c).

Droit constitutionnel — Charte des droits — Traitements ou peines cruels et inusités — Député provincial déclaré coupable d'un acte illicite et expulsé de la législature conformément à la loi électorale provinciale — Loi rendant également quiconque est déclaré coupable d'un acte illicite inhabile à occuper une charge de député pendant une période de cinq ans — Ces inhabilités violent-elles l'art. 12 de la Charte? — Charte canadienne des droits et libertés, art. 12 — Loi électorale, L.R.N.-B. 1973, ch. E-3, art. 119c).

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 into this category. Viewed from this perspective, s. 3 may be seen as reflecting, in the democratic context, the values enshrined in the equality guarantee of s. 15 of the *Charter*. This approach gives full value to the purpose, the content and the place of s. 3 in the context not only of the *Charter*, but the Constitution as a whole.

lège parlementaire. Mais cet article a encore pour effet d'empêcher que des citoyens deviennent inhabiles à occuper une charge pour des motifs non visés par les règles auxquelles le Parlement et les législatures assujettissent la conduite de leurs affaires; la race et le sexe constitueraient des exemples de motifs qui tombent dans cette catégorie. Sous cet angle, l'art. 3 peut être perçu comme reflétant, dans le contexte démocratique, les valeurs comprises dans la garantie d'égalité figurant à l'art. 15 de la *Charte*. Ce point de vue donne toute leur valeur à l'objet, au contenu et à la place de l'art. 3 dans le contexte non seulement de la *Charte*, mais encore de la Constitution dans son ensemble.

This is not to say that the courts have no role to play in the debate which arises where individual rights are alleged to conflict with parliamentary privilege. Under the British system of parliamentary supremacy, the courts arguably play no role in monitoring the exercise of parliamentary privilege. In Canada, this has been altered by the *Charter's* enunciation of values which may in particular cases conflict with the exercise of such privilege. 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. As this Court made clear in *New Brunswick Broadcasting*, the courts may properly question whether a claimed privilege exists. 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. If the court concludes that it does, no further review lies.

Cela ne signifie pas que les tribunaux n'ont aucun rôle à jouer dans le débat qui survient lorsqu'on allègue l'existence d'un conflit entre des droits individuels et le privilège parlementaire. On peut soutenir que, sous le régime britannique de la suprématie du Parlement, les tribunaux ne jouent aucun rôle dans la surveillance de l'exercice du privilège parlementaire. Au Canada, la situation a changé du fait que la *Charte* énonce des valeurs qui, dans certains cas, peuvent entrer en conflit avec l'exercice de ce privilège. Pour éviter que des abus sous le couvert d'un privilège éclipsent des droits légitimes garantis par la *Charte*, les tribunaux doivent examiner la légitimité d'une revendication de privilège parlementaire. Comme notre Cour l'a précisé dans l'arrêt *New Brunswick Broadcasting*, les tribunaux peuvent, à juste titre, se demander si le privilège revendiqué existe vraiment. Ce rôle de tamisage signifie que, lorsqu'on soutient qu'une personne a été expulsée ou déclarée inéligible pour des motifs non valides, les tribunaux doivent déterminer si la mesure prise est visée par le privilège parlementaire. Si la cour conclut par l'affirmative, aucun autre examen n'est nécessaire.

British jurisprudence distinguishes between privileges asserted by resolution and privileges effected automatically by statute. In respect of privileges asserted by resolution, British courts have developed a doctrine of necessity, enabling them to inquire whether the action taken by resolu-

La jurisprudence britannique distingue les privilèges invoqués par voie de résolution d'avec les privilèges conférés automatiquement par la loi. Dans le cas des privilèges invoqués par voie de résolution, les tribunaux britanniques ont établi un principe de la nécessité, qui leur permet d'exami-

TAB 20

The Attorney General of Quebec *Appellant*

v.

Irwin Toy Limited *Respondent*

and

Gilles Moreau in his capacity as President of the Office de la protection du consommateur
Intervener

and

The Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Saskatchewan, Pathonic Communications Inc., Réseau Pathonic Inc., and the Coalition contre le retour de la publicité destinée aux enfants
Intervenors

INDEXED AS: IRWIN TOY LTD. v. QUEBEC (ATTORNEY GENERAL)

File No.: 20074.

1987: November 19, 20; 1989: April 27.

Present: Dickson C.J. and Beetz, Estey*, McIntyre, Lamer, Wilson and Le Dain* JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Distribution of legislative powers — Commercial advertising — Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age — Whether provincial legislation ultra vires the provincial legislature — Colourable legislation — Impairment of federal undertakings — Conflict with federal legislation — Criminal law — Constitution Act, 1867, ss. 91, 92 — Consumer Protection Act, R.S.Q., c. P-40.1, ss. 248, 249 — Broadcasting Act, R.S.C. 1970, c. B-11, s. 3(c).

Constitutional law — Charter of Rights — Application — Exception where express declaration — Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age — Whether provincial legislation protected from the application of s. 2(b) of the Canadian Charter of Rights and Freedoms by a valid and subsisting override provision — Canadian Charter of Rights and Freedoms,

Le procureur général du Québec *Appellant*

c.

Irwin Toy Limited *Intimée*

a

et

Gilles Moreau en sa qualité de président de l'Office de la protection du consommateur
Intervenant

b

et

Le procureur général de l'Ontario, le procureur général du Nouveau-Brunswick, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan, Pathonic Communications Inc., Réseau Pathonic Inc., et la Coalition contre le retour de la publicité destinée aux enfants
Intervenants

d

RÉPERTORIÉ: IRWIN TOY LTD. c. QUÉBEC (PROCUREUR GÉNÉRAL)

N° du greffe: 20074.

e

1987: 19, 20 novembre; 1989: 27 avril.

Présents: Le juge en chef Dickson et les juges Beetz, Estey*, McIntyre, Lamer, Wilson et Le Dain*.

f

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Partage des pouvoirs législatifs — Publicité commerciale — Loi provinciale interdisant la publicité commerciale destinée à des personnes de moins de treize ans — La loi provinciale est-elle ultra vires de la législature provinciale? — Législation déguisée — Entrave à une entreprise fédérale — Conflit avec la législation fédérale — Droit criminel — Loi constitutionnelle de 1867, art. 91, 92 — Loi sur la protection du consommateur, L.R.Q., chap. P-40.1, art. 248, 249 — Loi sur la radiodiffusion, S.R.C. 1970, chap. B-11, art. 3(c).

g

h

Droit constitutionnel — Charte des droits — Application — Dérogation par déclaration expresse — Loi provinciale interdisant la publicité commerciale destinée à des personnes de moins de treize ans — La loi provinciale est-elle soustraite à l'application de l'art. 2b) de la Charte canadienne des droits et libertés par une disposition dérogatoire valide et en vigueur? — Charte canadienne des droits et libertés, art. 33 — Loi

i

j

* Estey and Le Dain JJ. took no part in the judgment.

* Les juges Estey et Le Dain n'ont pas pris part au jugement.

A corporation guilty of an offence contemplated in the preceding paragraph is liable to a minimum fine five times greater and to a maximum fine ten times greater than those provided for in the preceding paragraph.

Section 215 establishes that ss. 248 and 249 constitute "prohibited practices" within the meaning of the above section:

215. Any practice contemplated in sections 219 to 251 constitutes a prohibited practice for the purposes of this title.

282. Where a corporation is guilty of an offence against this act or any regulation, every director or representative of such corporation who had knowledge of the said offence is deemed to be a party to the offence and is liable to the penalty provided for in section 278 or 279 for a person other than a corporation, unless he establishes to the satisfaction of the court that he did not acquiesce in the commission of such offence.

Imprisonment is clearly one of the penalties envisioned for contravention of, *inter alia*, ss. 248 and 249 of the Act. A corporation is not, for obvious reasons, subject to imprisonment. By virtue of s. 282 of the Act, directors of corporations are deemed to be parties to offences committed by the corporation and are therefore liable to the penalties listed above. It is, therefore, the directors and representatives of corporations who risk, pursuant to the Act, a restriction of liberty of the kind envisioned in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486. In the present case, proceedings are brought only against the company and not against any individuals. In the context of physical restriction to liberty, it would be left to officers of a company whose conduct was impugned pursuant to s. 282 of the Act to raise a s. 7 argument in terms of vagueness or imputation of corporate liability to individuals. This circumstance does not arise in the present case.

In order to put forward a s. 7 argument in a case of this kind where the officers of the corporation are not named as parties to the proceedings, the corporation would have to urge that its own life, liberty or security of the person was being deprived in a manner not in accordance with the principles of fundamental justice. In our opinion, a corporation cannot avail itself of the protection offered by

Une corporation coupable d'une infraction visée à l'alinéa précédent est passible d'une amende minimale cinq fois plus élevée et d'une amende maximale dix fois plus élevée que celles qui sont prévues à l'alinéa précédent.

L'article 215 prévoit que les art. 248 et 249 constituent des «pratiques interdites» au sens de l'article précédent:

215. Constitue une pratique interdite aux fins du présent titre une pratique visée par les articles 219 à 251.

282. Lorsqu'une corporation commet une infraction à la présente loi ou à un règlement, un administrateur ou un représentant de cette corporation qui avait connaissance de l'infraction est réputé être partie à l'infraction et est passible de la peine prévue aux articles 278 ou 279 pour une personne autre qu'une corporation, à moins qu'il n'établisse à la satisfaction du tribunal qu'il n'a pas acquiescé à la commission de cette infraction.

La peine d'emprisonnement est clairement envisagée lorsqu'il y a violation, entre autres, des art. 248 et 249 de la Loi. Il va de soi qu'une société ne peut faire l'objet d'une peine d'emprisonnement. En vertu de l'art. 282 de la Loi, les administrateurs de sociétés sont réputés être parties aux infractions perpétrées par la société et sont donc passibles des peines énumérées ci-dessus. Ce sont donc les administrateurs et les représentants des sociétés qui risquent, selon la loi, de subir une restriction de liberté du genre de celle envisagée dans le *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486. En l'espèce, les poursuites concernent une compagnie et non des individus. Dans le contexte d'une restriction physique à la liberté, il appartiendrait aux dirigeants d'une société dont la conduite est contraire à l'art. 282 de la Loi de soulever en vertu de l'art. 7 des arguments fondés sur l'absence de précision ou sur l'attribution à des individus d'une responsabilité qui revient à la société. Ce n'est pas le cas en l'espèce.

Pour invoquer des arguments fondés sur l'art. 7 dans un cas comme celui-ci, où les dirigeants de la société ne sont pas identifiés comme des parties à l'instance, la société devrait faire valoir qu'on a porté atteinte à sa vie, à sa liberté ou à la sécurité de sa personne d'une manière qui n'est pas conforme aux principes de justice fondamentale. À notre avis, une société ne peut invoquer la protec-

s. 7 of the *Charter*. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition. The only remaining argument is that corporations are protected against deprivations of some sort of "economic liberty".

There are several reasons why we are of the view that this argument can not succeed. It is useful to reproduce s. 7, which reads as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

What is immediately striking about this section is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property—contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the

tion qu'offre l'art. 7 de la *Charte*. Premièrement, nous aurions à établir de quelle manière une société peut être privée du droit «à la vie, à la liberté et à la sécurité de sa personne». Nous avons déjà souligné que c'est un non-sens de dire d'une société qu'elle est condamnée à l'emprisonnement. Affirmer qu'une procédure de faillite et de liquidation fait intervenir l'art. 7, reviendrait à fausser complètement le sens du droit à la vie. Le seul autre argument est de prétendre que les sociétés sont protégées contre la privation d'une sorte de «liberté économique».

Plusieurs raisons nous amènent à rejeter cet argument. Il est utile de citer encore l'art. 7:

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Ce qui frappe immédiatement dans cet article c'est l'inclusion de l'expression «la sécurité de sa personne» par opposition à «propriété». Cela contraste avec la formulation classique libérale qui, par exemple, a été adoptée dans les Cinquième et Quatorzième amendements de la Constitution américaine, qui prévoient que nul ne sera privé [TRADUCTION] «de la vie, de la liberté et de sa propriété sans l'application régulière de la loi». À notre avis, l'exclusion intentionnelle de la propriété de l'art. 7 et son remplacement par la «sécurité de sa personne» a un double effet. Premièrement, cela permet d'en déduire globalement que les droits économiques, généralement désignés par le terme «propriété», ne relèvent pas de la garantie de l'art. 7. Cela ne signifie pas cependant qu'aucun droit comportant un élément économique ne peut être visé par l'expression «sécurité de sa personne». Les tribunaux d'instance inférieure ont conclu que la rubrique des «droits économiques» couvre un vaste éventail d'intérêts qui comprennent tant certains droits reconnus dans diverses conventions internationales—tels la sécurité sociale, l'égalité du salaire pour un travail égal, le droit à une alimentation, un habillement et un logement adéquats—que les droits traditionnels relatifs aux biens et aux contrats. Ce serait agir avec précipitation, à notre avis, que d'exclure tous ces droits alors que nous en

TAB 21

**Karine Lizotte, in her capacity as assistant
syndic of the Chambre de l'assurance
de dommages** *Appellant*

v.

**Aviva Insurance Company of Canada
and Traders General Insurance
Company** *Respondents*

and

**Canadian Bar Association,
Advocates' Society and
Barreau du Québec** *Intervenors*

**INDEXED AS: LIZOTTE v. AVIVA INSURANCE
COMPANY OF CANADA**

2016 SCC 52

File No.: 36373.

2016: March 24; 2016: November 25.

Present: McLachlin C.J. and Abella, Cromwell,
Moldaver, Karakatsanis, Wagner, Gascon, Côté
and Brown JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
QUEBEC**

Law of professions — Ethics — Powers of investigation of syndic — Production of documents — Litigation privilege — Inquiry by syndic of Chambre de l'assurance de dommages into conduct of claims adjuster — Whether statutory provision creating obligation to produce “any . . . document” at request of syndic can be interpreted as abrogating litigation privilege — Act respecting the distribution of financial products and services, CQLR, c. D-9.2, s. 337.

In the course of an inquiry into a claims adjuster, the assistant syndic of the Chambre de l'assurance de dommages (the “syndic”) asked insurer A to send her a complete copy of its claim file with respect to one of its insured. The syndic based this request on s. 337 of the *Act respecting the distribution of financial products and services* (“ADFPS”). In response, the insurer produced a number of documents, but explained that it had withheld some on the basis that they were covered either by

**Karine Lizotte, ès qualités de syndic
adjoint de la Chambre de l'assurance
de dommages** *Appelante*

c.

**Aviva, Compagnie d'assurance du Canada
et Compagnie d'assurance traders
générale** *Intimées*

et

**Association du Barreau canadien,
Advocates' Society et
Barreau du Québec** *Intervenants*

**RÉPERTORIÉ : LIZOTTE c. AVIVA, COMPAGNIE
D'ASSURANCE DU CANADA**

2016 CSC 52

N° du greffe : 36373.

2016 : 24 mars; 2016 : 25 novembre.

Présents : La juge en chef McLachlin et les juges Abella,
Cromwell, Moldaver, Karakatsanis, Wagner, Gascon,
Côté et Brown.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit des professions — Déontologie — Pouvoirs d'enquête du syndic — Production de documents — Privilège relatif au litige — Enquête du syndic de la Chambre de l'assurance de dommages sur la conduite d'un expert en sinistre — Une disposition législative prévoyant l'obligation de fournir « tout document » à la demande du syndic peut-elle être interprétée comme écartant le privilège relatif au litige? — Loi sur la distribution de produits et services financiers, RLRQ, c. D-9.2, art. 337.

Dans le cadre d'une enquête sur un expert en sinistre, la syndique adjointe de la Chambre de l'assurance de dommages (la « syndique ») demande à l'assureur A de lui communiquer une copie complète de son dossier de réclamation relatif à une de ses assurées. La syndique s'appuie à cette fin sur l'art. 337 de la *Loi sur la distribution de produits et services financiers* (« LDPSF »). En réponse, l'assureur transmet plusieurs documents, mais explique en avoir retranché certains au motif que ceux-ci

resolve it, I will have to determine whether litigation privilege may be abrogated using general rather than clear, explicit and unequivocal language and, accordingly, whether s. 337 *ADFPS* can be interpreted as establishing a valid abrogation of the privilege. Before doing so, however, I must first review the characteristics of litigation privilege.

V. Analysis

A. *Characteristics of Litigation Privilege*

[19] Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at pp. 1009-10.

[20] Litigation privilege is a common law rule of English origin: *Lyell v. Kennedy* (No. 2) (1883), 9 App. Cas. 81 (H.L.). It was introduced to Canada, including Quebec, in the 20th century as a privilege linked to solicitor-client privilege, which at the time was considered to be a rule of evidence that was necessary to ensure the proper conduct of trials: A. Cardinal, "Quelques aspects modernes du secret professionnel de l'avocat" (1984), 44 *R. du B.* 237, at pp. 266-67. In an oft-cited case, Jackett P. of the former Exchequer Court of Canada explained the purpose of litigation privilege, once known as the lawyer's brief rule, as follows:

Turning to the "lawyer's brief" rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the

opposer à la syndique le privilège relatif au litige dans ce même contexte. Pour y répondre, il faut déterminer si le privilège relatif au litige peut être abrogé par des termes d'acception générale plutôt que clairs, explicites et non équivoques et, en conséquence, si l'art. 337 *LDPSF* peut être interprété comme abrogeant valablement ce privilège. Avant de m'attarder à cette question, il importe que je cerne d'abord les caractéristiques du privilège relatif au litige.

V. Analyse

A. *Les caractéristiques du privilège relatif au litige*

[19] Le privilège relatif au litige crée une immunité de divulgation pour les documents et communications dont l'objet principal est la préparation d'un litige. Les exemples classiques d'éléments couverts par ce privilège sont le dossier de l'avocat et les communications verbales ou écrites entre un avocat et des tiers, par exemple des témoins ou des experts : J.-C. Royer et S. Lavallée, *La preuve civile* (4^e éd. 2008), p. 1009-1010.

[20] Le privilège relatif au litige est une règle de common law d'origine anglaise : *Lyell c. Kennedy* (No. 2) (1883), 9 App. Cas. 81 (H.L.). Au cours du 20^e siècle, cette règle a été introduite au Canada, y compris au Québec, comme un privilège lié au secret professionnel de l'avocat, alors considéré comme une règle de preuve nécessaire pour la bonne marche des procès : A. Cardinal, « Quelques aspects modernes du secret professionnel de l'avocat » (1984), 44 *R. du B.* 237, p. 266-267. Dans une décision souvent reprise, le Président Jackett, de l'ancienne Cour de l'Échiquier du Canada, a décrit ainsi l'objet du privilège relatif au litige, connu à une certaine époque comme le principe applicable au dossier de l'avocat (« *lawyer's brief rule* ») :

[TRADUCTION] Pour en venir au principe applicable au « dossier de l'avocat », sa raison d'être tient évidemment à ce que, dans notre système judiciaire accusatoire, l'avocat ne doit pas être gêné dans la préparation de la cause de son client par la possibilité que les documents qu'il prépare soient retirés de son dossier et déposés devant le tribunal d'une manière autre que celle qu'il envisage. Les documents qui aideraient à mettre à jour la

solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system. [Emphasis added.]

(*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, at pp. 33-34)

[21] Because of these origins, litigation privilege has sometimes been confused with solicitor-client privilege, both at common law and in Quebec law: Royer and Lavallée, at pp. 1003-4; N. J. Williams, "Discovery of Civil Litigation Trial Preparation in Canada" (1980), 58 *Can. Bar Rev.* 1, at pp. 37-38.

[22] However, since *Blank* was rendered in 2006, it has been settled law that solicitor-client privilege and litigation privilege are distinguishable. In *Blank*, the Court stated that "[t]hey often co-exist and [that] one is sometimes mistakenly called by the other's name, but [that] they are not coterminous in space, time or meaning" (para. 1). It identified the following differences between them:

- The purpose of solicitor-client privilege is to protect a *relationship*, while that of litigation privilege is to ensure the efficacy of the adversarial *process* (para. 27);
- Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);
- Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);
- Litigation privilege applies to non-confidential documents (para. 28, quoting R. J. Sharpe, "Claiming Privilege in the Discovery Process",

vérité s'ils étaient présentés de la façon prévue par l'avocat qui en a dirigé la préparation pourraient fort bien servir à déformer la vérité au préjudice de son client s'ils étaient soumis par une partie aux intérêts opposés qui ne comprend pas ce qui a donné lieu à leur préparation. Si les avocats pouvaient fouiller dans les dossiers les uns des autres au moyen du processus de la communication préalable, la simple préparation des dossiers pour l'instruction se transformerait en une regrettable parodie de notre système actuel. [Je souligne.]

(*Susan Hosiery Ltd. c. Minister of National Revenue*, [1969] 2 R.C. de l'É. 27, p. 33-34)

[21] En raison de ces origines, le privilège relatif au litige a parfois été confondu avec le secret professionnel de l'avocat, tant en common law qu'en droit québécois : Royer et Lavallée, p. 1003-1004; N. J. Williams, « Discovery of Civil Litigation Trial Preparation in Canada » (1980), 58 *R. du B. can.* 1, p. 37-38.

[22] Toutefois, depuis l'arrêt *Blank* rendu en 2006, il est établi que le secret professionnel de l'avocat et le privilège relatif au litige se distinguent. Dans *Blank*, la Cour indique que « [c]es privilèges coexistent souvent et [qu']on utilise parfois à tort le nom de l'un pour désigner l'autre, mais [que] leur portée, leur durée et leur signification ne coïncident pas » (par. 1). La Cour identifie les distinctions suivantes qui existent entre les deux :

- Le secret professionnel de l'avocat vise à préserver une *relation* alors que le privilège relatif au litige vise à assurer l'efficacité du *processus* contradictoire (par. 27);
- Le secret professionnel est permanent, alors que le privilège relatif au litige est temporaire et s'éteint avec le litige (par. 34 et 36);
- Le privilège relatif au litige s'applique à des parties non représentées, alors même qu'il n'y a aucun besoin de protéger l'accès à des services juridiques (par. 32);
- Le privilège relatif au litige couvre des documents non confidentiels (par. 28, citant R. J. Sharpe, « Claiming Privilege in the Discovery

in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65);

- Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).

[23] The Court also stated that litigation privilege, “unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration” (*Blank*, at para. 37). Moreover, the Court confirmed that only those documents whose “dominant purpose” is litigation (and not those for which litigation is a “substantial purpose”) are covered by the privilege (para. 60). It noted that the concept of “related litigation”, which concerns different proceedings that are brought after the litigation that gave rise to the privilege, may extend the privilege’s effect (paras. 38-41).

[24] While it is true that in *Blank*, the Court thus identified clear differences between litigation privilege and solicitor-client privilege, it also recognized that they have some characteristics in common. For instance, it noted that the two privileges “serve a common cause: The secure and effective administration of justice according to law” (para. 31). More specifically, litigation privilege serves that cause by “ensur[ing] the efficacy of the adversarial process” (para. 27) and maintaining a “protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate” (para. 40, quoting Sharpe, at p. 165).

[25] The differences identified in *Blank* between solicitor-client privilege and litigation privilege have been adopted in Quebec law: *Desjardins Assurances générales inc. v. Groupe Ledor inc., mutuelle d’assurances*, 2014 QCCA 1501, at para. 8 (CanLII); *Canada (Procureur général) v. Chambre des notaires du Québec*, 2014 QCCA 552, at para. 47 (CanLII); *Informatique Côté, Coulombe inc. v. Groupe Son X Plus inc.*, 2012 QCCA 2262, at para. 15 (CanLII); *Union canadienne (L’), compagnie d’assurance v. St-Pierre*, 2012 QCCA 433, [2012] R.J.Q. 340, at paras. 23-24; *Imperial Tobacco Canada ltée v. Létourneau*, 2012 QCCA 2260, at paras. 7-8 (CanLII); *Société d’énergie de la Baie James v. Groupe*

Process », dans *Special Lectures of the Law Society of Upper Canada* (1984), 163, p. 164-165);

- Le privilège relatif au litige n’a pas pour cible les communications entre un avocat et son client en tant que telles (par. 27).

[23] La Cour précise également que le privilège relatif au litige, « contrairement au secret professionnel de l’avocat, n’est ni absolu quant à sa portée, ni illimité quant à sa durée » (*Blank*, par. 37). La Cour confirme en outre que seuls les documents dont « l’objet principal » (et non tous les documents dont un « objet important ») est la préparation du litige sont couverts par le privilège (par. 60). Elle note que la notion de « litige connexe », qui concerne un autre litige survenu après celui ayant donné lieu au privilège, peut prolonger l’application de celui-ci (par. 38-41).

[24] S’il est vrai que l’arrêt *Blank* établit ainsi des distinctions claires entre le privilège relatif au litige et le secret professionnel de l’avocat, il leur reconnaît par contre certains traits communs. La Cour rappelle en effet que les deux privilèges « servent une cause commune : l’administration sûre et efficace de la justice conformément au droit » (par. 31). Plus particulièrement, le privilège relatif au litige sert cette cause en « assur[ant] l’efficacité du processus contradictoire » (par. 27) et en maintenant une « zone protégée destinée à faciliter, pour l’avocat, l’enquête et la préparation du dossier en vue de l’instruction contradictoire » (par. 40, citant Sharpe, p. 165).

[25] Les distinctions posées dans l’arrêt *Blank* entre le secret professionnel de l’avocat et le privilège relatif au litige ont été suivies en droit québécois : *Desjardins Assurances générales inc. c. Groupe Ledor inc., mutuelle d’assurances*, 2014 QCCA 1501, par. 8 (CanLII); *Canada (Procureur général) c. Chambre des notaires du Québec*, 2014 QCCA 552, par. 47 (CanLII); *Informatique Côté, Coulombe inc. c. Groupe Son X Plus inc.*, 2012 QCCA 2262, par. 15 (CanLII); *Union canadienne (L’), compagnie d’assurance c. St-Pierre*, 2012 QCCA 433, [2012] R.J.Q. 340, par. 23-24; *Imperial Tobacco Canada ltée c. Létourneau*, 2012 QCCA 2260, par. 7-8 (CanLII); *Société d’énergie de la Baie James c. Groupe Aecon ltée*,

TAB 22

CITATION: Marin v. Office of the Ombudsman, 2017 ONSC 1687
COURT FILE NO.: CV-16-553147
DATE: 20170315

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ANDRÉ MARIN	)	
	)	<i>Michael D. Wright and Elichai Shaffir, for</i>
Plaintiff (Responding Party)	)	the Plaintiff
	)	
– and –	)	
	)	
THE OFFICE OF THE OMBUDSMAN OF	)	<i>Catherine Beagan Flood and Iris Antonios</i>
ONTARIO, THE LEGISLATIVE	)	for the Legislative Assembly of Ontario
ASSEMBLY OF ONTARIO and HER	)	
MAJESTY THE QUEEN IN RIGHT OF	)	<i>Robert W. Little for the Office of the</i>
ONTARIO	)	Ombudsman of Ontario
	)	
Defendants (Moving Parties)	)	
	)	
	)	
	)	HEARD: December 13, 2016

REASONS FOR DECISION

MR. JUSTICE P. J. CAVANAGH

Nature of Motions

[1] The Plaintiff formerly held the office of the Ombudsman of Ontario. He held this office pursuant to the provisions of the *Ombudsman Act*, R.S.O. 1990 1990, c. O.6 (the “Act”).

[2] The Plaintiff commenced this action seeking declaratory relief, damages for wrongful dismissal based upon the alleged breach of an indefinite employment contract, reimbursement of office expenses, damages for negligent misrepresentation, aggravated damages and punitive damages, together with interest and costs.

[3] The Defendant named as The Office of the Ombudsman of Ontario moves to strike out the Plaintiff’s Statement of Claim and for dismissal of the action as against The Office of the Ombudsman of Ontario on the grounds that it discloses no reasonable cause of action and that to allow the action to proceed would amount to an abuse of the court’s process.

to insist that the former Speaker not continue as Speaker during the investigation of the sexual harassment complaint, writing at para. 69:

That allegation strikes directly into the protected core of parliamentary and political privilege. The election of a Speaker to his office and the decision to jettison a Speaker are not administrative or personnel decisions of the Office. They are political decisions made by members of the Legislative Assembly. It is not for the Court to inquire into the political decision, whether a Speaker should continue in office.

This decision in *Thompson* reflects a recognition that decisions involving appointment of parliamentary officers fall within a privileged sphere.

[66] I do not agree that it is premature to decide whether the Assembly has satisfied its onus to prove that the doctrine of parliamentary privilege applies in this case. The statutory scheme is known, and evidence has been tendered by both the Assembly and the Plaintiff concerning the circumstances surrounding the decision not to reappoint the Plaintiff to the office of Ombudsman. In my view, it is unnecessary for the parties to proceed through the discovery process and to trial in order to establish a more complete factual context for the court to decide whether parliamentary privilege applies in this case to deprive the court of jurisdiction. The facts in evidence on this motion are fully sufficient for the court to make this decision. To require the parties to proceed through discovery and trial would, in my view, undermine the fundamental purpose behind provisions such as r. 21.01 which is to remove from the court system at the earliest opportunity those cases that, for any of the stipulated defects, ought not to be permitted to proceed: *Martin v. Ontario*, [2004] O.J. No. 2247 at paras. 44-45.

[67] I also observe that in other cases, the court has decided at a preliminary stage whether it has jurisdiction over the subject matter of an action because of parliamentary privilege: *Martin; Zundel v. Liberal Party of Canada*, [1999] O.J. No. 74, aff'd [1999] O.J. No. 4244 (C.A.); *Guergis v. Novak*, 2012 ONSC 4579.

[68] I conclude that the evidentiary record on this motion is sufficient for me to decide whether the Assembly has met its onus in this case, and this motion is not premature.

[69] The Plaintiff's expressed his second main submission at para. 79 of his factum:

Moreover, when tested against the doctrine of necessity, the Assembly has not demonstrated that the sphere of activity for which privilege is claimed - which includes the circumstances surrounding the termination of the Plaintiff's employment and the Defendants' failure to provide him with common law and statutory notice - "is so closely and directly connected with the fulfilment 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." [Citing *Vaid*, at para. 46]

TAB 23

REPORT OF CASES
DECIDED IN THE
COURT OF KING'S BENCH
OF
UPPER CANADA.

BY
WILLIAM HENRY DRAPER, ESQ.,
BARRISTER AT LAW.

CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM 10 GEO. IV., TO EASTER TERM 1 WM. IV.;
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

SECOND EDITION.

REVISED AND CORRECTED BY THE REPORTER,
WITH THE ADDITION OF NOTES OF VARIOUS CASES BEARING ON
THE DECISIONS REPORTED

TORONTO:
HENRY ROWSELL.
1861.

Entered according to Act of Provincial Legislature, in the year of our Lord One thousand eight hundred and sixty-one, by HENRY ROWSELL, in the Office of the Registrar of the Province of Canada.

J U D G E S
OF
THE COURT OF KING'S BENCH
DURING THE PERIOD OF THESE REPORTS.

THE HON. JOHN BEVERLEY ROBINSON, *Chief Justice.*

„ LEVIUS PETERS SHERWOOD, } *Puisne Judges.*
„ JAMES BUCHANAN MACAULAY, }

Attorney-General.

HENRY JOHN BOULTON, ESQ.

Solicitor-General.

CHRISTOPHER ALEXANDER HAGERMAN, ESQ.

MCNAB V. BIDWELL AND BALDWIN.

The House of Assembly in this province have a constitutional right to call persons before them for the purpose of obtaining information, and if the House adjudge the conduct of such persons, in answering or refusing to answer before a select committee. to be a contempt, they have the right of imprisoning them.

TRESPASS and false imprisonment against the Speaker and another member of the House of Assembly. The Speaker pleaded that he was a member of the House of Assembly in this province, and Speaker of that House at the time when, &c. That the Assembly being then in session it was by them resolved that the present plaintiff, "having refused to answer questions put to him by the select committee appointed to enquire into the Hamilton outrage, and the alleged threatened release of Francis Collins by force, with power to send for persons and papers, and otherwise misdemeaning himself before the said committee, had been guilty of a high contempt and breach of the privileges of the House of Assembly;" and that it was therefore further resolved and ordered by the said Assembly "that the Speaker should issue his warrant, directed to the Sergeant at Arms or his deputy, to apprehend the present plaintiff forthwith, and bring him to the bar of the said House on Monday then next to answer for such contempt and breach of privilege." That the defendant as Speaker did issue his warrant in pursuance of these resolutions, particularly reciting the proceedings of the Assembly on which it was grounded, and requiring the Sergeant at Arms to apprehend the plaintiff forthwith and bring him to the bar of the House of Assembly on a day therein named to answer for such contempt and breach of privilege. That upon this warrant the plaintiff was

apprehended and brought to the bar of the House of Assembly; that the resolutions of the Assembly were there read to him, and he having been heard in his defence before the said House of Assembly respecting his said contempt and breach of privilege, it was by the Assembly resolved and ordered that for his said contempt and breach of privilege he should be committed to the common gaol of the Home District during the pleasure of the House, and that the Speaker should issue his warrant to the Sergeant at Arms or his deputy, and to the sheriff or gaoler of the Home District, requiring the Sergeant at Arms to take the plaintiff to the said gaol, and the sheriff or gaoler to receive him and keep him in custody during the pleasure of the House. That the defendant as Speaker did, while the House was still in session, make his warrant in pursuance of this resolution, which warrant, before being signed by him, was read to and approved by the House—the warrant is then set out, containing a precise recital of the proceedings on which it is founded, and being exactly in accordance with the resolutions of the House. The defendant further states that upon that warrant the plaintiff was apprehended by the Sergeant at Arms and delivered into the custody of the sheriff of the Home District, who received him and detained him during the pleasure of the House of Assembly, from the 16th February to the 3rd March in the same year, in obedience to the resolution, order, and warrant last mentioned, and that during all the time mentioned the parliament was still sitting. The other defendant (Mr. Baldwin) pleaded specially relying on the same facts and privileges, and setting forth that he was a member

of the Assembly, and sitting and acting as such, and in that capacity assented to the resolutions ordering the warrants for the plaintiff's apprehension and commitment for contempt after plaintiff had been heard in his defence at the bar of the House and adjudged guilty of the contempt.

To these pleas the plaintiffs demurred generally.

This case was argued last term at great length, and very ably by the *Attorney-General* for the plaintiff, and *Rolph* for the defendants. The judgment of the court, however, embraces every matter of importance which was raised and discussed, and was this day given.

CHIEF JUSTICE.—As a mere legal question, the point in this case seems to me to be so free from difficulty that it is unnecessary to labour it, and I shall not consider it in its several branches with that minuteness which would be proper if I entertained doubts on the subject. Whether in any particular case that may be under discussion in the House of Assembly it may be expedient or just to dispose of it there, and those opinions may proceed upon considerations which the members of that body and they only can entertain. But whether the Assembly, as a branch of the legislature of this province, have power to commit for a contempt in a case like the present is altogether a different question, and when it comes for decision here it must be decided on strict legal principles, and wholly apart from all other considerations. The justification in this case would have been more strictly formal

if it had given to the legislature of this province, and to that branch of it whose powers are in question, the precise designations assigned by the British statutes which create them. The term "parliament," regarding merely the import of the word, may perhaps be correctly applied in reference to the nature and functions of our legislature, as *it is* certainly applied to councils of far inferior importance, and it is certain that the term has grown into use in this province, and has the direct sanction of many of the acts of our legislature, but it would have been more technically proper I think on such an occasion as the present to have preserved the precise names assigned to our legislature and its several branches in our written constitution—and in calling the resolutions of the Assembly, which is but one branch of the legislature, the resolutions of parliament, as is done in one of the special pleas, there is certainly an inaccuracy which would have been better avoided. The substantial defence, however, is before the court on this general demurrer, and it is upon general principles of the law and constitution that the question has been argued. If in consequence of a similar commitment by the House of Commons an action of trespass against the Speaker and a member of that House were depending in the Court of King's Bench in England, it cannot now be doubted for a moment that it would not and could not be sustained. Many authorities have settled that point conclusively, and whether the right to commit for such a contempt should be questioned upon the return of a *habeas corpus*, or as in the present case in an action of trespass, it is certain that the Court of King's Bench would disclaim the power either to

discharge the prisoner or to examine into the particulars of the alleged contempt with the view of affording the party a remedy by action for his imprisonment. They would decidedly hold that for a contempt offered to the House in session the offending party might be committed by order of the House. I cannot imagine that any distinction would be drawn between a contempt alleged to have been offered to a committee of the House or a contempt offered to the House in a body, and I am convinced that when the House had resolved that refusing to answer questions proposed by a committee was a contempt of the House and a breach of their privileges, the Court of King's Bench would not question the propriety of that decision. It is equally clear that no exception would be considered to lie to the warrant of the commitment on account of the general nature of the charge, "that the party had otherwise misdemeaned himself before the committee." On the contrary, the court would disclaim, as they have always disclaimed, the power of enquiry into the particulars of the contempt—*Ld. Raym.* 1105, 1 *Mod.* 158. They would therefore hold it needless to specify a matter into which they could not examine, and as the charge that the party had "otherwise misdemeaned himself before the committee of the House" might include contempt of a very flagrant description, they would rather think it reasonable to infer that some such contempt had been committed than to presume that the House of Commons had gravely imputed an offence where none existed. The cases in 3 *Wils.* 190, and 14 *Ea.* 1, are most explicit and conclusive upon these points, and the judgment of Mr. *J. Bailey* in the last case shews in

very clear and strong terms how contrary it would be thought in England to reason and to law that under such circumstances as are stated in this record the Speaker, who simply carried into effect the resolution of the House, and much more an individual member who merely voted upon it, should be held responsible as trespassers. It is unnecessary here to reason upon the decisions adverted to or the cases which are cited in them; they establish nothing new with respect to the doctrines of contempt, either as applied to the House of Commons or the courts of justice, but the elaborate judgments of the court, and particularly of Lord *Ellenborough*, in 14 Ea., are so full, and to my mind so satisfactory, that, notwithstanding the apparent danger of entrusting to any tribunal the power which is the subject of discussion in these cases, the arguments proving its necessity seem to me unanswerable in every point of view.

We are then driven to the question, whether there is in the jurisdiction and constitution of this court, or in the nature and powers of the House of Assembly in this province, a sufficient reason for concluding that in a case like the present a control which in England the Court of King's Bench cannot exercise over the acts of the House of Commons, ought to be exercised by this court over the House of Assembly. Perhaps in favour of personal liberty, and considering the right to its enjoyment as a natural right only to be abridged when the authority is manifest, the question ought rather to be reversed, and we should be held first to satisfy ourselves that the power exists to control this natural right. The terms of the question, however, are immaterial,

since the investigation must be the same. In a case then of contempt so clearly and directly alleged on the pleadings and resolved by the House, I cannot see upon what sound principle the power of the Assembly can be denied. If it were admitted that in England the authority of the House of Commons to commit has, when questioned, been sustained by the courts upon the ground of precedent and usage only, still it is material to consider that this usage must have had a beginning, and that in the first instance we must suppose the power to have been assumed and acquiesced in from a conviction that upon principle it might and ought to be exercised. Although the precise era at which the House of Commons began to exist as a separate branch of the great council of the nation is still a disputed point among historians and antiquaries, still a period is assigned by very general consent, which was long subsequent to the regular organisation of the great Common Law Court of the Kingdom, and they must therefore have begun to exercise this power at a time when there was a tribunal to control them, if such control could in the nature of things come within the jurisdiction of that tribunal. But the power of the House of Commons to commit for a contempt has not been taken to rest wholly or even mainly on the ground of precedent and immemorial usage, and upon the imagination, or fiction built upon it, that an act conferring such a power must be presumed to have been passed, though the record can no longer be found. If it did in England rest on this ground exclusively, then it seems to me that in order to vindicate the assumption of such an authority by the Assembly here it would be neces-

sary to rest the argument upon an adoption "of the laws of England as the rule of decision in all matters of controversy relative to property and civil rights," and to reason thus — By the law of England the House of Commons, as one branch of parliament, may commit for contempt; therefore, as we have adopted the law of England, the House of Assembly of Upper Canada, as part of the legislature of Upper Canada, may legally exercise the same powers without reference to the principles upon which such powers are assumed. I am not prepared to say that upon that footing the argument can be maintained, and most of the objections that in this case were very forcibly urged against the existence of the authority have appeared to me to be applicable only upon the supposition that it is endeavoured to be maintained simply upon the fact that we have adopted the laws of England. But the question is to be taken up on broader grounds, and I think upon the most convincing authority. In 14 Ea. Ld. *Ellenborough* expressly declares his opinion, "That independently of any precedents or recognised practice on the subject, such a body as the House of Commons must *a priori* be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be. On this ground it has been, I believe, very generally admitted in argument that the House of Commons must be and is authorised to remove any immediate obstructions of its own proceedings." Then if, *a priori* and independently of precedents, such a body as the House of Commons must be armed with an authority to commit for contempts, and thereby to remove any immediate

obstructions to its proceedings, I think the same power for the same reasons must be admitted to reside in the House of Assembly here; for that Assembly represents all the people in this province; it has, in conjunction with the other branches of the legislature, power to bind the lives, liberties, and estates of all the inhabitants of this country.

Although the legislature of this colony is subordinate to the imperial parliament, it is the supreme power acting in this province; its legislative authority extends to the most important objects, and the instances in which it is restrained are, perhaps, not those of the greatest and most immediate consequence to the welfare of society. If a legislative body with such powers, and established for such purposes, had not also the power of giving effect to their consultations by protecting themselves from insults, and removing obstructions from their proceedings, I am not certain that more injury than good might not be found to result from the constitution conferred upon us, and I cannot satisfy myself upon any reasoning that it is not as important for us as the people of England that our legislature should not be compelled to make laws in the dark, and that they should have power to enquire before they come to decide. When it is considered that this particular branch of the legislature is elective, and that the nature of its functions is such as occasionally and inevitably to raise up against its proceedings much excitement and opposition, and often much prejudice from various causes, it is obvious that it would soon become utterly helpless and contemptible if it had not the power of deterring persons from menace,

defiance, and insult, by the exertion of such authority as is confided in all countries under our constitution to the common courts. If once, then, it be established that they may in such cases commit for contempt, then the law relating to all commitments for contempts necessarily applies, and according to a series of authorities necessarily restrains us from interfering in the present instance.

It has been contended that the contempt which is particularly specified, namely, the refusing to answer certain questions put by a select committee appointed to enquire into the Hamilton outrage, and the alleged threatened release of Francis Collins by ^{an} force, could have been no contempt, inasmuch as the Assembly not having criminal jurisdiction or power to try or to enquire, were exercising functions that did not belong to them. Neither the premises nor the inference can, I think, be admitted. How can we possibly know that the outrage spoken of may not be conceived to have implicated the character of one of their own members so deeply that for the honour of the House it was necessary to relieve him from suspicion or to expel him as unworthy. Again, the outrage and the threatened violence spoken of may have been of a nature so serious as to demand strong legislative measures, and surely it would be a very imperfect constitution that should furnish those who have to act in such emergencies with no authority to acquire the necessary information. There is no occasion for examining here into the means of conducting an impeachment in this province; but suppose for a moment that no such means exist, if the united representatives cannot therefore bring a great public offen-

der to justice in this province, there would seem to be very urgent occasion for their representing to the King or to the imperial parliament the necessity of a remedy from another quarter. In making such representations the assembly could not be said to be arrogating a criminal jurisdiction; and if it be admitted that such representations are within the scope of their functions, which all usage would shew them to be, then there is certainly a rational object for enquiry, and a necessity for a power to punish such contempts as would obstruct its exercise. We cannot divine, and we ought not to presume to conjecture, the specific object of such enquiry, much less can we entertain and act upon the presumption that because such a power might be abused it was therefore in this case intended to abuse it. It is said that courts newly created cannot prescribe, and can therefore have no other power than is expressed in their charter. The courts of Oyer and Terminer and General Quarter Sessions in this province have their power defined by no act of our legislature, and yet I doubt not that upon the principle of reason and necessity they must be allowed powers to preserve and enforce their authority.

Without discussing further the objections that have been or may be raised, I am on the whole of opinion that this action cannot be supported. I do not say that because the British House of Commons has the power, therefore under our adoption of the law of England the same power is vested in the House of Assembly as a body perfectly similar; but I consider the question in this way:—the fact that the House of Commons assumes and exercises the right shews that

it is felt to be necessary in order to enable them to discharge their duties. I think the same necessity exists here, and from principle the same consequence in my opinion must follow such a necessity. It is plain that if upon this record this action could be sustained against one of these defendants no one could venture hereafter to fill the situation of Speaker, and if it could be sustained against the other certainly there would be an end of independent exercise of the will and judgment upon constitutional questions by the members of that body.

Arguments were very ingeniously raised upon the possible abuses that might follow the recognition of the power exercised in this case by the Assembly, and some of them certainly were formidable in appearance at least; but every objection of this nature would equally be against the House of Commons. It is scarcely possible for such objections to be pushed to a greater length than they were by Sergeant *Jephson* in 3 Wils. 190; and they cannot receive a more satisfactory answer than is given to them in the judgments of *Ld. C. J. De Grey* and *Blackstone, J.* The true point of view in which to regard the question is that these powers are required by the House in order to enable them to promote the welfare of their constituents; we are bound to suppose that they will use them with discretion and for good ends; and if we had the power we should have no right to withhold them on the assumption that they desire to pervert the objects of their constitution.

SHERWOOD, J.—(After stating the case.)—Upon these pleadings it becomes necessary to determine the following questions:—

1st. Had the House of Assembly a constitutional right to make the enquiry stated in the defendants' special pleas?

2nd. Had the House of Assembly a lawful right to imprison the plaintiff for refusing to answer the questions put to him by the special committee?

1st. The House of Assembly is a co-ordinate branch of the legislature established in this province by 31st Geo. III., c. 31. The legislature so established are authorised and empowered by that statute "to make laws for the peace, welfare, and good government of this province." It is my opinion that the right of enquiry for the purpose of enabling the legislature to exercise their constitutional functions is necessarily incident to both branches; for I do not see how they could join in making laws for the good government of the King's subjects without obtaining the information requisite to form a correct opinion of the measures and alterations proper to be adopted. I think this is an inherent right essential to every legislature. And the right of examination implies a right to compel the answering of all such questions as the law of the land will sanction. It does not appear by the pleadings what questions the plaintiff in this case refused to answer; but I think it must be presumed they were lawful. Proper respect should be shewn to the proceedings of both Houses, and they should always be considered as acting correctly and agreeably to the rules of law and natural justice, unless the contrary appear beyond a doubt.

2nd. I am of opinion that the enquiry alluded to

was correctly made by the committee, because their acts when received and adopted by the House become the acts of the House itself. This I believe to be conformable to the ordinary course of parliamentary proceedings. As the right of enquiry implies the right of compelling answers, so, it seems to me, it implies the further right of punishing for contumacy or wilful prevarication. If it should at any time evidently appear, in the manner required by law, that the Legislative Council or House of Assembly had committed one of the King's subjects for some matter which could not with the least semblance of truth be considered a breach of privilege according to the established principles of our constitution and the laws of the land, courts of justice would do their duty and grant such relief as the law prescribes. I am of opinion that the House of Assembly had a right to punish the plaintiff for refusing to answer the questions put by the committee, and the only point, therefore, which remains to be discussed is whether they have exercised that right in a lawful manner.

It appears to me that a breach of privilege can in no instance be considered to amount to a higher offence than a misdemeanour, and consequently that it ought to be punished in the same way. There can be no good ground for asserting the existence of right in either House to impose or levy a fine; and the only mode therefore of punishing an individual, not a member of the House, which can lawfully be exercised, is that of imprisonment. Every court, from the highest to the lowest, possesses the power to imprison for contempts offered in the face of the

court. Upon as full a consideration as I have been able to give this case, I am led to the conclusion that judgment should be entered for the defendants. (a)

Per Curiam.—Judgment for defendants.

CALLAGHER V. STROBRIDGE ET AL.

In debt on bond conditioned for the limits, the plaintiff in assessing damages took a verdict for the penalty of the bond. Leave was granted him to amend by the judge's notes—altering the verdict to the endorsement on the *ca. sa.* interest and sheriff's fees as proved. Damages must be assessed in such a case.

DEBT on bond, conditioned for the limits. Breach assigned, that J. G. S. did leave the limits, and judgment by default. The damages were assessed at the last assizes for the Home District, and a verdict was taken for the penalty of the bond, and one shilling damages generally.

Baldwin moved to set aside the verdict for irregularity, alleging that the damages should have been assessed on the breach, and not taken for the penalty.

The *Solicitor-General* moved also for leave to amend the *postea* by the judge's notes. Both these rules came on together. And a question was raised whether it was necessary to assess damages in a case of this kind.

CHIEF JUSTICE.—At the trial the plaintiff proved that the damages on the breach amounted to £52, 19s. 1d. He then took his verdict for his debt, and one shilling damages. I think he has a right to

(a) See *Beaumont v. Barrett*, 1 E. F. Moore 59; *Keilly v. Carson*, 4 Moo. P.C. 63; *Fenton v. Hampton*, 11 Moo. P.C. 347.

amend the *postea* by altering his damages to what he proved. As to the propriety of assessing the damages, I am clear that it is a proper case to be referred to the consideration of a jury.

SHERWOOD, J., concurred in amending the verdict.

MACAULAY, J.—At first I thought it unnecessary to go to the jury, but on looking into the matter I am of a different opinion. When the bond is assigned by the sheriff, I take it for granted the plaintiff may recover the amount endorsed on the *ca. sa.* together with the sheriff's fees and interest, which are matter of uncertainty, and proper for a jury to compute. I have also no doubt but that the court can order the verdict to be amended. The judgment is always entered for the debt, with damages for the detention, and the plaintiff levies at his own peril the actual damage and costs.

Per Curiam.—Leave granted to amend the *postea*.

BELL v. STEWART.

When a demurrer has been argued, and judgment pronounced, the court refused to allow the demurrer to be withdrawn, a trial having been lost, although the plaintiff would have to assess his damages at the next assizes.

JUDGMENT had been given for the plaintiff on a general demurrer to the declaration in this case during this term, and the *Solicitor-General* moved for leave to withdraw the demurrer, which was opposed by *Draper*, on the ground that a trial had been lost, and that a similar motion had been made in this cause and abandoned before the demurrer was argued.

TAB 24

Court of Queen's Bench of Alberta

Citation: Moms Stop the Harm Society v Alberta, 2022 ABQB 24

Date: 20220110
Docket: 2103 11484
Registry: Edmonton

Between:

Moms Stop the Harm Society and Lethbridge Overdose Prevention Society

Plaintiffs/Applicants

- and -

Her Majesty the Queen In Right of Alberta

Defendant/Respondent

**Reasons for Decision
of the
Honourable Mr. Justice R. Paul Belzil**

The Action

[1] On August 13, 2021, Moms Stop the Harm Society (MSTH) and Lethbridge Overdose Prevention Society (LOPS) filed a Statement of Claim against Her Majesty the Queen in Right of Alberta (Alberta), wherein, the Plaintiffs seek an Order declaring portions of a Regulation (the challenged Regulation) pertaining to the consumption of illicit drugs at Supervised Consumption Sites (SCS) to be constitutionally invalid and inoperable and of no force and effect as a result of alleged breaches of the Canadian *Charter of Rights and Freedoms*.

established a violation of rights, and in the absence of a fully formed record. Granting the interim relief risks offending the public interest in the enforcement of legislation. Failing to grant the relief risks a continuing breach of the plaintiff's asserted constitutional rights, which itself is contrary to the public interest. These competing but important interests must be balanced.

[57] The public interest is an important issue in applications of this type and is considered at the balance of convenience stage.

[58] In *RJR- MacDonald Inc. v Canada (Attorney General)* at pages 344, 346 and 347 the following passages succinctly describe the heavy burden faced by private applicants who allege that public authorities are not respecting the public interest and the limited role the *Charter* plays in determining the public interest:

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

[59] In *Harper v Canada (Attorney General)*, at paragraph 9, it was observed that valid legislation is presumed to preserve a public good:

Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and

TAB 25

J.G. Appellant

v.

The Minister of Health and Community Services, the Law Society of New Brunswick, Legal Aid New Brunswick, the Attorney General for New Brunswick and the Minister of Justice *Respondents*

and

The Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Alberta, the Canadian Bar Association, the Charter Committee on Poverty Issues, the Women's Legal Education and Action Fund, the National Association of Women and the Law, the Disabled Women's Network Canada, the Watch Tower Bible and Tract Society of Canada *Interveners*

INDEXED AS: NEW BRUNSWICK (MINISTER OF HEALTH AND COMMUNITY SERVICES) v. G. (J.)

File No.: 26005.

1998: November 9; 1999: September 10.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Major and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Constitutional law — Charter of Rights — Security of person — Minister of Health and Community Services applying to extend order granting him custody of three children — Whether parent's right to security of person engaged in custody proceedings — Canadian Charter of Rights and Freedoms, s. 7.

Constitutional law — Charter of Rights — Fundamental justice — Legal Aid — Minister of Health and Community Services applying to extend order granting

J.G. Appelante

c.

Le ministre de la Santé et des Services communautaires, le Barreau du Nouveau-Brunswick, l'Aide juridique du Nouveau-Brunswick, le procureur général du Nouveau-Brunswick et le ministre de la Justice *Intimés*

et

Le procureur général du Manitoba, le procureur général de la Colombie-Britannique, le procureur général de l'Alberta, l'Association du Barreau canadien, le Comité de la Charte et des questions de pauvreté, le Fonds d'action et d'éducation juridiques pour les femmes, l'Association nationale de la femme et du droit, le Réseau d'action des femmes handicapées et la Watch Tower Bible and Tract Society of Canada *Intervenants*

RÉPERTORIÉ: NOUVEAU-BRUNSWICK (MINISTRE DE LA SANTÉ ET DES SERVICES COMMUNAUTAIRES) c. G. (J.)

N° du greffe: 26005.

1998: 9 novembre; 1999: 10 septembre.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Major et Binnie.

EN APPEL DE LA COUR D'APPEL DU NOUVEAU-BRUNSWICK

Droit constitutionnel — Charte des droits — Sécurité de la personne — Demande présentée par le ministre de la Santé et des Services communautaires en vue d'obtenir la prorogation de l'ordonnance lui conférant la garde de trois enfants — Le droit du parent à la sécurité de sa personne entre-t-il en jeu dans une instance concernant la garde d'enfants? — Charte canadienne des droits et libertés, art. 7.

Droit constitutionnel — Charte des droits — Justice fondamentale — Aide juridique — Demande présentée par le ministre de la Santé et des Services communau-

Not every state action which interferes with the parent-child relationship will restrict a parent's right to security of the person. For example, a parent's security of the person is not restricted when, without more, his or her child is sentenced to jail or conscripted into the army. Nor is it restricted when the child is negligently shot and killed by a police officer: see *Augustus v. Gosset*, [1996] 3 S.C.R. 268.

While the parent may suffer significant stress and anxiety as a result of the interference with the relationship occasioned by these actions, the quality of the "injury" to the parent is distinguishable from that in the present case. In the aforementioned examples, the state is making no pronouncement as to the parent's fitness or parental status, nor is it usurping the parental role or prying into the intimacies of the relationship. In short, the state is not directly interfering with the psychological integrity of the parent *qua* parent. The different effect on the psychological integrity of the parent in the above examples leads me to the conclusion that no constitutional rights of the parent are engaged.

I now turn to the question of whether the right to security of the person extends beyond the criminal law context. In both *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra*, and *B. (R.)*, *supra*, I held that the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system and its administration. In other words, the subject matter of s. 7 is the state's conduct in the course of enforcing and securing compliance with the law, where the state's conduct deprives an individual of his or her right to life, liberty, or security of the person. I hastened to add, however, that s. 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and

Les actes par lesquels l'État s'ingère dans le lien parent-enfant ne restreignent pas tous le droit d'un parent à la sécurité de sa personne. Par exemple, ce droit n'est pas restreint du seul fait que l'enfant est condamné à la prison ou enrôlé dans l'armée par conscription. Pas plus qu'il ne l'est lorsque l'enfant est abattu par négligence par un agent de police: *Augustus c. Gosset*, [1996] 3 R.C.S. 268.

Bien que l'ingérence de l'État puisse constituer une source de tension et d'angoisse importantes pour le parent, la nature du «préjudice» causé au parent par ces actes peut être distinguée de celle qui est visée dans la présente affaire. Dans les exemples susmentionnés, l'État ne se prononce pas sur l'aptitude du père ou de la mère ni sur sa qualité de parent, il n'usurpe pas non plus sur le rôle parental ni ne cherche à s'ingérer dans l'intimité du lien parent-enfant. En résumé, l'État ne porte pas directement atteinte à l'intégrité psychologique du parent en tant que parent. La répercussion différente sur l'intégrité psychologique des parents dans les exemples susmentionnés m'amène à conclure que les droits constitutionnels des parents n'entrent pas en jeu.

Je passe maintenant à la question de savoir si le droit à la sécurité de la personne peut s'appliquer hors du contexte du droit criminel. Tant dans le *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel* que dans l'arrêt *B. (R.)*, précités, j'ai statué que les restrictions à la liberté et à la sécurité de la personne qui font jouer l'art. 7 sont celles qui résultent d'une interaction de l'individu avec le système judiciaire et l'administration de la justice. Autrement dit, l'objet de l'art. 7 est le comportement de l'État en tant qu'il fait observer et appliquer la loi, lorsque ce comportement prive un individu de son droit à la vie, à la liberté ou à la sécurité de la personne. Je m'empresse d'ajouter toutefois, que l'art. 7 n'est pas limité aux affaires purement criminelles ou pénales. Dans le cours de l'administration de la justice, il existe d'autres façons par lesquelles l'État peut priver un individu du droit à la liberté et à la sécurité de la personne garanti à l'art. 7, par exemple l'internement dans

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TAB 26

Arthur Donahoe in his capacity as the
Speaker of the House of
Assembly *Appellant*

v.

Canadian Broadcasting Corporation
Respondent

and

The Honourable Guy Charbonneau,
Speaker of the Senate, the Honourable John
Fraser, Speaker of the House of Commons,
the Honourable David Warner, Speaker of
the Legislative Assembly of the province of
Ontario, the Honourable Jean-Pierre
Saintonge, President of the National
Assembly of Quebec, the Honourable Denis
Rocan, Speaker of the Legislative Assembly
of the province of Manitoba, the Speaker of
the Legislative Assembly of the province of
British Columbia, the Honourable
Edward W. Clark, Speaker of the
Legislative Assembly of the province of
Prince Edward Island, the Honourable
Herman Rolfes, Speaker of the Legislative
Assembly of the province of Saskatchewan,
the Honourable David John Carter, Speaker
of the Legislative Assembly of the province
of Alberta, the Honourable Thomas Lush,
Speaker of the House of Assembly of the
province of Newfoundland, the Speaker of
the Legislative Assembly of the Northwest
Territories, the Speaker of the Legislative
Assembly of the Yukon, the Attorney
General for Ontario, the Attorney General
of British Columbia and the Canadian
Association of Journalists *Interveners*

INDEXED AS: NEW BRUNSWICK BROADCASTING CO. v.
NOVA SCOTIA (SPEAKER OF THE HOUSE OF ASSEMBLY)

File No.: 22457.

Arthur Donahoe en sa qualité de président
de l'Assemblée législative *Appelant*

a
c.

Société Radio-Canada *Intimée*

b
et

L'honorable Guy Charbonneau, président
du Sénat, l'honorable John Fraser,
président de la Chambre des communes,
l'honorable David Warner, président de
l'Assemblée législative de la province
d'Ontario, l'honorable Jean-Pierre
Saintonge, président de l'Assemblée
nationale du Québec, l'honorable Denis
Rocan, orateur de l'Assemblée législative de
la province du Manitoba, le président de
l'Assemblée législative de la province de la
Colombie-Britannique, l'honorable
Edward W. Clark, président de l'Assemblée
législative de la province de l'Île-du-Prince-
Édouard, l'honorable Herman Rolfes,
président de l'Assemblée législative de la
province de la Saskatchewan, l'honorable
David John Carter, président de l'Assemblée
législative de la province d'Alberta,
l'honorable Thomas Lush, président de
l'Assemblée législative de la province de
Terre-Neuve, le président de l'Assemblée
législative des Territoires du Nord-Ouest, le
président de l'Assemblée législative du
Yukon, le procureur général de l'Ontario, le
procureur général de la Colombie-
Britannique et l'Association canadienne des
journalistes *Intervenants*

RÉPERTORIÉ: NEW BRUNSWICK BROADCASTING CO. c.
NOUVELLE-ÉCOSSE (PRÉSIDENT DE L'ASSEMBLÉE
LÉGISLATIVE)

Nº du greffe: 22457.

certain privileges relating to the conduct of their business. It has also long been accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch.

The Parliamentary privilege of the British Parliament at Westminster sprang originally from the authority of Parliament as a court. Over the centuries, Parliament won for itself the right to control its own affairs, independent of the Crown and of the courts. The courts could determine whether a parliamentary privilege existed, but once they determined that it did, the courts had no power to regulate the exercise of that power. One of those privileges, held absolutely and deemed to be constitutional, was the power to exclude strangers from the proceedings of the House.

The privileges attaching to colonial legislatures arose from common law. Modelled on the British Parliament, they were deemed to possess such powers and authority as are necessarily incidental to their proper functioning. These privileges were governed by the principle of necessity rather than by historical incident, and thus may not exactly replicate the powers and privileges found in the United Kingdom.

In *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (21st ed. 1989), privilege is described in the following manner (at pp. 69 and 82):

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus

pour exercer leurs fonctions, les organismes législatifs doivent bénéficier de certains privilèges relativement à la conduite de leurs affaires. Il est également accepté depuis longtemps que, pour être efficaces, ces privilèges doivent être détenus d'une façon absolue et constitutionnelle; la branche législative de notre gouvernement doit jouir d'une certaine autonomie à laquelle même la Couronne et les tribunaux ne peuvent porter atteinte.

Le privilège parlementaire du Parlement britannique à Westminster découlait initialement de la compétence du Parlement en tant que tribunal. Au cours des siècles, le Parlement s'est gagné le droit de contrôler ses propres affaires, indépendamment de la Couronne et des tribunaux. Les tribunaux pouvaient déterminer si un privilège parlementaire existait, mais une fois qu'ils avaient déterminé qu'il existait, ils n'avaient aucun pouvoir d'en réglementer l'exercice. Un de ces privilèges, détenu de façon absolue et réputé constitutionnel, était le pouvoir d'exclure des étrangers des débats de l'assemblée législative.

Les privilèges des législatures coloniales émanaient de la common law. Ces institutions modelées sur le Parlement britannique étaient réputées posséder les pouvoirs et la compétence dont dépend nécessairement leur bon fonctionnement. Ces privilèges étaient régis par le principe de la nécessité plutôt que par un événement historique et pourraient bien de ce fait ne pas reproduire exactement les pouvoirs et privilèges existants au Royaume-Uni.

Dans *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (21^e éd. 1989), le privilège est décrit de la façon suivante (aux pp. 69 et 82):

[TRADUCTION] Le privilège parlementaire est la somme des droits particuliers dont jouissent chaque chambre collectivement en tant que composante de la Haute Cour du Parlement, et les membres de chacune des chambres, pris individuellement, sans lesquels ils ne pourraient s'acquitter de leurs fonctions, et qui excèdent ceux que possèdent d'autres organismes ou particuliers. Ainsi, le privilège, bien qu'il fasse partie de la loi du pays, consti-

privilege, though part of the law of the land, is to a certain extent an exemption from the general law.

... the privileges of Parliament are rights 'absolutely necessary for the due execution of its powers'....^a

The basic character of privilege in Canada is well set out in Professor Dawson's *Government of Canada*, *supra*, at pp. 337-38:^b

Privileges formed in themselves a special body of law and became known collectively as the *lex et consuetudo Parliamenti*. It had no statutory basis whatever; indeed, it sprang originally from the authority of Parliament as a court; and not as a legislative body....^c

The *lex et consuetudo Parliamenti* as known in England, unlike the major part of the common law, has not been transplanted to Canada. The creation of legislative bodies overseas did not endow those bodies with the privileges and powers of the English Parliament, which, as stated above, were primarily judicial in origin. Such creation did imply, however, that these legislatures would need to exercise certain very moderate privileges which were necessary for the maintenance of order and discipline during the performance of their duties. But these were to be protective and not punitive powers, for the latter were again considered to be characteristic of a court rather than of a legislative body.^f

The most recent treatment of these issues in the Canadian setting echoes this thinking. Thus Joseph Maingot in his *Parliamentary Privilege in Canada* (1982) also recognizes that Canadian legislative bodies had, from their inception, those privileges which were necessary for the maintenance of order and discipline during the performance of their duties (at pp. 2-3):^h

From the time that a legislative assembly was first established in Canada in 1758 in Nova Scotia, the law accorded to it and to those taking part in its deliberations all the power considered necessary for a legislature and its members to perform their legislative work. In^j

tue dans une certaine mesure une exemption de l'application des lois générales.

... les privilèges du Parlement sont des droits «absolument nécessaires à l'exercice régulier de ses pouvoirs»....

Le caractère fondamental du privilège au Canada est bien énoncé par le professeur Dawson dans son ouvrage intitulé *The Government of Canada*, *op. cit.*, aux pp. 337 et 338:

[TRADUCTION] Les privilèges formaient en soi un ensemble spécial de règles de droit et sont devenus collectivement connus sous le nom de *lex et consuetudo Parliamenti*. Ils n'avaient aucun fondement juridique; en fait, ils découlaient initialement de la compétence du Parlement en tant que tribunal, et non en tant qu'organisme législatif....^d

La *lex et consuetudo Parliamenti*, connue en Angleterre, n'a pas été, comme la majeure partie de la common law, transplantée au Canada. Les organismes législatifs créés à l'étranger n'étaient pas investis des privilèges et des pouvoirs du Parlement britannique, qui, comme nous l'avons déjà mentionné, étaient principalement d'origine judiciaire. Cette création impliquait toutefois que ces législatures devraient exercer certains privilèges très restreints qui étaient nécessaires au maintien de l'ordre et de la discipline dans l'exercice de leurs fonctions. Toutefois, il devait s'agir de pouvoirs de protéger et non de punir, car ces derniers étaient encore considérés comme l'apanage d'un tribunal plutôt que d'un organisme législatif.^e

Les analyses les plus récentes de ces questions dans le contexte canadien reprennent cette ligne de pensée. Dans son ouvrage intitulé *Le privilège parlementaire au Canada* (1987), Joseph Maingot reconnaît également que les organismes législatifs canadiens bénéficiaient, dès leur création, des privilèges nécessaires au maintien de l'ordre et de la discipline dans l'exercice de leurs fonctions (aux pp. 3 et 4):ⁱ

Dès l'établissement au Canada de la première assemblée législative en Nouvelle-Écosse en 1758, la loi accorda à l'assemblée et à ceux qui prenaient part à ses délibérations, tous les pouvoirs jugés nécessaires pour permettre à l'assemblée et à ses membres de s'acquitter

On this appeal, the Chief Justice, based on his review of the authorities and the character of privilege, accepts that Canadian legislative bodies have, as an inherent privilege, the right to exclude strangers. He states at p. 364: "Given the long-standing acceptance of the power to exclude strangers and to control the internal proceedings of the House as valid categories of privilege founded on necessity, in this country as well as in the United Kingdom . . . ; [the contrary] argument would be difficult to make." I agree.

The fact that this privilege has been upheld for many centuries, abroad and in Canada, is some evidence that it is generally regarded as essential to the proper functioning of a legislature patterned on the British model. However, it behooves us to ask anew: in the Canadian context of 1992, is the right to exclude strangers necessary to the functioning of our legislative bodies?

In my view, this privilege is as necessary to modern Canadian democracy as it has been to democracies here and elsewhere in past centuries. The legislative chamber is at the core of the system of representative government. It is of the highest importance that the debate in that chamber not be disturbed or inhibited in any way. Strangers can, in a variety of ways, interfere with the proper discharge of that business. It follows that the Assembly must have the right, if it is to function effectively, to exclude strangers. The rule that the legislative assembly should have the exclusive right to control the conditions in which that debate takes place is thus of great importance, not only for the autonomy of the legislative body, but to ensure its effective functioning.

But, it is argued, it is not necessary that the right be absolute. The courts should be given the power to monitor the exercise of this power to ensure that only those strangers who are truly disruptive are excluded. In my view, a system of court review, quite apart from the constitutional question of what

Dans le présent pourvoi, le Juge en chef, selon son examen de la jurisprudence et de la nature du privilège, accepte que les organismes législatifs canadiens possèdent, à titre de privilège inhérent, le droit d'exclure des étrangers. Il affirme, à la p. 364: «Cet argument [contraire] serait difficile à avancer étant donné que l'on reconnaît depuis longtemps que les pouvoirs d'exclure les étrangers et de contrôler les débats internes de l'Assemblée constituent des catégories valides de privilèges fondés sur la nécessité, dans notre pays et au Royaume-Uni . . . » Je suis d'accord avec ces propos.

Le fait que ce privilège ait été maintenu pendant plusieurs siècles, tant à l'étranger qu'au Canada, est une preuve qu'il est généralement considéré comme essentiel au bon fonctionnement d'une législature inspirée du modèle britannique. Toutefois, il faut de nouveau nous poser la question suivante: dans le contexte canadien de 1992, le droit d'exclure des étrangers est-il nécessaire au bon fonctionnement de nos organismes législatifs?

À mon avis, ce privilège est tout autant nécessaire pour la démocratie canadienne qu'il l'a été pour les démocraties d'ici et d'ailleurs au cours des siècles passés. L'assemblée législative est l'élément essentiel du système de gouvernement représentatif. Il est de la plus haute importance que les débats qui s'y déroulent ne soient pas perturbés ni paralysés d'aucune façon. Des étrangers peuvent, de diverses façons, entraver la bonne marche des travaux de cette assemblée. L'Assemblée doit donc avoir le droit d'exclure des étrangers si elle veut être en mesure de fonctionner efficacement. La règle selon laquelle l'assemblée législative devrait avoir le droit exclusif de contrôler les conditions dans lesquelles se déroulent ces débats revêt donc une grande importance pour assurer non seulement l'autonomie de l'organisme législatif, mais aussi son fonctionnement efficace.

Toutefois, fait-on valoir, il n'est pas nécessaire que ce droit soit absolu. Les tribunaux devraient pouvoir surveiller l'exercice de ce droit afin d'assurer que seuls les étrangers véritablement gênants soient exclus. À mon avis, un système de contrôle judiciaire créerait ses propres problèmes, indépen-

TAB 27

Her Majesty The Queen *Appellant*

v.

**Criminal Lawyers' Association of Ontario
and Lawrence Greenspon** *Respondents*

and

**Attorney General of Canada,
Attorney General of Quebec,
Attorney General of Manitoba,
Attorney General of British Columbia,
British Columbia Civil Liberties Association,
Advocates' Society and Mental Health
Legal Committee** *Interveners*

**INDEXED AS: ONTARIO v. CRIMINAL LAWYERS'
ASSOCIATION OF ONTARIO**

2013 SCC 43

File No.: 34317.

2012: December 12; 2013: August 1.

Present: McLachlin C.J. and LeBel, Fish, Abella,
Rothstein, Cromwell, Moldaver, Karakatsanis and
Wagner JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO**

*Courts — Jurisdiction — Appointment of amici
curiae — Provincial Attorney General and amici curiae
appointed by trial judges in criminal proceedings
disagreeing on amici's rate of remuneration — Whether
superior and statutory courts have inherent or implied
jurisdiction to determine rate of remuneration of amici
curiae.*

In three cases arising in the context of criminal proceedings in Ontario, trial judges appointed *amici curiae* to assist the accused, who had discharged counsel of their choice. The judges did so in order to maintain the orderly conduct of the trials or to avoid delay in these complex, lengthy proceedings. The cases were not decided under the *Canadian Charter of Rights and Freedoms* and did not proceed on the basis that the

Sa Majesté la Reine *Appelante*

c.

**Criminal Lawyers' Association of Ontario et
Lawrence Greenspon** *Intimés*

et

**Procureur général du Canada,
procureur général du Québec,
procureur général du Manitoba,
procureur général de la
Colombie-Britannique, Association des
libertés civiles de la Colombie-Britannique,
Advocates' Society et Mental Health
Legal Committee** *Intervenants*

**RÉPERTORIÉ : ONTARIO c. CRIMINAL LAWYERS'
ASSOCIATION OF ONTARIO**

2013 CSC 43

N° du greffe : 34317.

2012 : 12 décembre; 2013 : 1^{er} août.

Présents : La juge en chef McLachlin et les juges
LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

*Tribunaux — Compétence — Nomination d'un
amicus curiae — Mésentente entre le procureur général
provincial et des amici curiae nommés par des juges
présidant des procès criminels au sujet du taux de
rémunération des amici — Les cours supérieures et les
tribunaux d'origine législative ont-ils une compétence
inhérente ou tacite pour fixer le taux de la rémunération
des amici curiae?*

Dans trois affaires issues de dossiers criminels ontariens, les juges des procès ont nommé des *amici curiae* pour assister les accusés après que ceux-ci eurent révoqué les avocats dont ils avaient retenu les services. Cette mesure visait à assurer le bon déroulement des procès ou à ne pas retarder des instances longues et complexes. Les juges n'ont pas statué sur le fondement de la *Charte canadienne des droits et libertés*, ni estimé

their independence in safeguarding the values and principles the *Charter* has entrenched in our constitutional order. Thus, the inherent jurisdiction of superior courts provides powers that are essential to the administration of justice and the maintenance of the rule of law and the Constitution. It includes those residual powers required to permit the courts to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner — subject to any statutory provisions. I would add, however, that the powers recognized as part of the courts' inherent jurisdiction are limited by the separation of powers that exists among the various players in our constitutional order and by the particular institutional capacities that have evolved from that separation.

(2) Separation of Powers

[27] This Court has long recognized that our constitutional framework prescribes different roles for the executive, legislative and judicial branches (see *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70). The content of these various constitutional roles has been shaped by the history and evolution of our constitutional order (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 49-52).

[28] Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent

cour supérieure de préserver avec indépendance les valeurs et les principes consacrés par la *Charte* dans notre régime constitutionnel. Cette compétence confère donc les pouvoirs essentiels à l'administration de la justice et au respect de la primauté du droit et de la Constitution. Elle englobe le pouvoir résiduel dont la cour a besoin pour s'acquitter de sa fonction judiciaire qui consiste à administrer la justice d'une manière régulière, ordonnée et efficace, sous réserve de toute disposition législative. J'ajoute cependant que les pouvoirs dont on reconnaît qu'ils font partie de la compétence inhérente sont balisés par la séparation des pouvoirs entre les différents acteurs dans l'ordre constitutionnel et par les attributions institutionnelles particulières qui ont résulté de cette séparation.

(2) La séparation des pouvoirs

[27] La Cour reconnaît depuis longtemps que notre cadre constitutionnel attribue des fonctions différentes à l'exécutif, au législatif et au judiciaire (voir *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455, p. 469-470). La teneur de ces rôles différents a été façonnée par l'histoire et l'évolution de notre ordre constitutionnel (voir *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 49-52).

[28] Au fil de plusieurs siècles de transformation et de conflits, le système anglais est passé d'un régime où la Couronne détenait tous les pouvoirs à un régime où des organes indépendants aux fonctions distinctes les exercent. L'évolution de fonctions exécutive, législative et judiciaire distinctes a permis l'acquisition de certaines compétences essentielles par les diverses institutions appelées à exercer ces fonctions. Le pouvoir législatif fait des choix politiques, adopte des lois et tient les cordons de la bourse de l'État, car lui seul peut autoriser l'affectation de fonds publics. L'exécutif met en œuvre et administre ces choix politiques et ces lois par le recours à une fonction publique compétente. Le judiciaire assure la primauté du droit en interprétant et en appliquant ces lois dans le cadre de renvois et de litiges sur lesquels il statue

and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

[29] All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389).³

[30] Accordingly, the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.

[31] Indeed, even where courts have the jurisdiction to address matters that fall within the constitutional role of the other branches of government, they must give sufficient weight to the constitutional responsibilities of the legislative and executive branches, as in certain cases the other branch will be "better placed to make such decisions within a range of constitutional options" (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 37).

³ The normative force of the separation of powers has been recognized by this Court on multiple occasions since *New Brunswick Broadcasting*. See *R. v. Power*, [1994] 1 S.C.R. 601, at pp. 620-21; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 33-34 and 106-11; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at paras. 104-5; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 21; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 39-41.

de manière indépendante et impartiale, et il défend les libertés fondamentales garanties par la *Charte*.

[29] Les trois pouvoirs ont des attributions institutionnelles distinctes et jouent des rôles à la fois cruciaux et complémentaires dans notre démocratie constitutionnelle. Toutefois, un pouvoir ne peut jouer son rôle lorsqu'un autre empiète indûment sur lui. Dans *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 R.C.S. 319, la juge McLachlin confirme l'importance de respecter les fonctions et les attributions distinctes des pouvoirs de l'État canadien pour ce qui est de notre ordre constitutionnel et elle conclut qu'« il est essentiel que toutes ces composantes jouent le rôle qui leur est propre. Il est également essentiel qu'aucune [. . .] n'outrepasse ses limites et que chacune respecte de façon appropriée le domaine légitime de compétence de l'autre » (p. 389)³.

[30] Par conséquent, la compétence inhérente de la cour doit être limitée au regard de la fonction propre à chacun des pouvoirs distincts, sous peine de rupture de l'équilibre des fonctions et des attributions issu de l'évolution de notre système de gouvernement au fil des siècles.

[31] En effet, même le tribunal doté du pouvoir de connaître de questions qui relèvent constitutionnellement des autres composantes de l'État doit accorder suffisamment d'importance aux attributions constitutionnelles des pouvoirs législatif et exécutif car, dans certains cas, l'autre pouvoir « est mieux placé pour prendre ces décisions dans le cadre des choix constitutionnels possibles » (*Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44, par. 37).

³ Depuis cet arrêt, notre Cour a maintes fois reconnu la force normative de la séparation des pouvoirs. Voir *R. c. Power*, [1994] 1 R.C.S. 601, p. 620-621; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, par. 33-34 et 106-111; *Terre-Neuve (Conseil du Trésor) c. N.A.P.E.*, 2004 CSC 66, [2004] 3 R.C.S. 381, par. 104-105; *Canada (Chambre des communes) c. Vaid*, 2005 CSC 30, [2005] 1 R.C.S. 667, par. 21; *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44, par. 39-41.

TAB 28

Speaker of the Legislative Assembly of Ontario v. Ontario
Human Rights Commission; Freitag, Intervenor

[Indexed as: Ontario (Speaker of the Legislative Assembly)
v. Ontario (Human Rights Commission)]

54 O.R. (3d) 595
[2001] O.J. No. 2180
Docket No. C35182

Court of Appeal for Ontario
Finlayson, Charron and Rosenberg JJ.A.
June 8, 2001

Constitutional law--Parliamentary privilege--Speaker of
Legislative Assembly reciting Lord's Prayer at daily opening
exercise--Complaint made to Human Rights Commission that
recital of prayer a breach of Human Rights Code--Standing
Orders of Legislative Assembly protected by parliamentary
privilege--Human Rights Code, R.S.O. 1990, c. H.19, s. 34(1)
(c)--Constitution Act, 1867, R.S.C. 1985, App. II, No. 5.

Human rights--Jurisdiction of Human Rights Commission
--Parliamentary privilege--Discrimination--Speaker of
Legislative Assembly reciting Lord's Prayer at daily opening
exercise--Complaint made to Human Rights Commission that
recital of prayer a breach of Human Rights Code--Standing
Orders of Legislative Assembly protected by parliamentary
privilege--Human Rights Code, R.S.O. 1990, c. H.19, s. 34(1)
(c)--Constitution Act, 1867, R.S.C. 1985, App. II, No. 5.

HF, who was not a member of the Legislative Assembly, filed a
complaint with the Ontario Human Rights Commission. He
complained that the Speaker of the Assembly's recital of the
Lord's Prayer as a part of the daily opening exercise, which
recital was made pursuant to Standing Order 8(c), constituted a

and Rulings made by the Speaker based on convention, precedent, past practice and parliamentary authorities. Section I of the Standing Orders deals with the Conduct of Business and contains Standing Order 8(c) which states:

The Speaker shall take the chair at the time appointed on every day fixed for the meeting of the House and shall read the Prayers.

(Emphasis added)

[21] The form and content of the prayers has been prescribed by a Special Order promulgated in 1969. One of the two prayers is non-denominational and the complainant Freitag has no objection to it. The other prayer is the "Lord's Prayer" which is associated with the Christian religion. It is the subject of the controversy.

[22] The appellant and the intervenor have presented their arguments in a variety of manners, but the sum and substance of their position is that the Commission, if it chooses to do so, has the right to examine the content of the prayers and to order the Speaker to change or delete them to respond to the intervenor's complaint that the recitation of one of the prayers violates his right to equal treatment. The appellant justifies this position on the basis that even if a prayer is required, a Christian prayer is not. It submits that the courts and the Commission are entitled to make a determination whether the offering of the prayers is a necessary or legal incident of the conduct of the business of the Legislative Assembly.

[23] With respect, the appellant's approach to this issue is wrong. The question is not whether the prayers are necessary, but whether the Standing Orders governing the conduct of the business of the Assembly are necessary. If the Standing Orders are determined to be necessary to the proper functioning of the House -- and they include the prayers -- that is the end of the inquiry. The Standing Orders are protected by parliamentary privilege and neither the courts nor any quasi-judicial body have the right to inquire into their contents or to question whether a particular part of the Standing Orders (including the

recitation of prayers) is necessary or indeed lawful. As McLachlin J. stated in *New Brunswick Broadcasting*, supra, at p. 383 S.C.R.:

The test of necessity is not applied as a standard for judging the content of a claimed privilege, but for the purpose of determining the necessary sphere of exclusive or absolute "parliamentary" or "legislative" jurisdiction. If a matter falls within this 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 questions will instead fall to the exclusive jurisdiction of the legislative body.

(Emphasis added)

[24] McLachlin J. further stated at pp. 384-85 S.C.R.:

Were the courts 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 the legislative body. The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function? A particular exercise of a necessary privilege cannot then be reviewed, unless the deference and the conclusion reached at the initial stage be rendered nugatory.

In summary, it seems clear that, from an historical perspective, Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional. The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege.

TAB 29

**Orphan Well Association and Alberta Energy
Regulator** *Appellants*

v.

**Grant Thornton Limited and ATB Financial
(formerly known as Alberta Treasury
Branches)** *Respondents*

and

**Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Ecojustice Canada Society,
Canadian Association of Petroleum Producers,
Greenpeace Canada,
Action Surface Rights Association,
Canadian Association of Insolvency and
Restructuring Professionals and
Canadian Bankers' Association** *Interveners*

**INDEXED AS: ORPHAN WELL ASSOCIATION v.
GRANT THORNTON LTD.**

2019 SCC 5

File No.: 37627.

2018: February 15; 2019: January 31.

Present: Wagner C.J. and Abella, Moldaver,
Karakatsanis, Gascon, Côté and Brown JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
ALBERTA**

*Constitutional law — Division of powers — Federal
paramountcy — Bankruptcy and insolvency — Environ-
mental law — Oil and gas — Oil and gas companies in
Alberta required by provincial comprehensive licensing re-
gime to assume end-of-life responsibilities with respect to
oil wells, pipelines, and facilities — Provincial regulator
administering licensing regime and enforcing end-of-life
obligations pursuant to statutory powers — Trustee in
bankruptcy of oil and gas company not taking respon-
sibility for company's unproductive oil and gas assets
and seeking to walk away from environmental liabilities*

**Orphan Well Association et Alberta Energy
Regulator** *Appellants*

c.

**Grant Thornton Limited et ATB Financial
(auparavant connue sous le nom d'Alberta
Treasury Branches)** *Intimées*

et

**Procureure générale de l'Ontario,
procureur général de la Colombie-Britannique,
procureur général de la Saskatchewan,
procureur général de l'Alberta,
Ecojustice Canada Society,
Association canadienne des producteurs
pétroliers, Greenpeace Canada,
Action Surface Rights Association,
Association canadienne des professionnels de
l'insolvabilité et de la réorganisation et
Association des banquiers canadiens** *Intervenants*

**RÉPERTORIÉ : ORPHAN WELL ASSOCIATION c.
GRANT THORNTON LTD.**

2019 CSC 5

N° du greffe : 37627.

2018 : 15 février; 2019 : 31 janvier.

Présents : Le juge en chef Wagner et les juges Abella,
Moldaver, Karakatsanis, Gascon, Côté et Brown.

**EN APPEL DE LA COUR D'APPEL DE
L'ALBERTA**

*Droit constitutionnel — Partage des compétences —
Prépondérance fédérale — Faillite et insolvabilité — Droit
de l'environnement — Pétrole et gaz — Sociétés pétrolières
et gazières de l'Alberta tenues par le régime provincial
complet de délivrance de permis d'assumer des respon-
sabilités de fin de vie à l'égard de puits de pétrole, de pi-
pelines et d'installations — Organisme de réglementation
provincial administrant le régime d'octroi de permis et
assurant le respect des obligations de fin de vie en vertu
des pouvoirs que lui confère la loi — Syndic de faillite
d'une société pétrolière et gazière refusant d'assumer la*

the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 3).

[65] Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises “where one enactment says ‘yes’ and the other says ‘no’, such that ‘compliance with one is defiance of the other’” (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does “not entail a direct violation of the federal law’s provisions” (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 73). The party relying on frustration of purpose “must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose” (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 66).

[66] Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. “[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility . . . [i]n the absence of ‘very clear’ statutory language to the contrary” (*Lemare*, at paras. 21 and 27). “It is presumed that Parliament intends its laws to co-exist with provincial laws” (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the

que le Parlement légifère en vertu de sa compétence exclusive en matière de faillite et d’insolvabilité. La loi provinciale devient alors inopérante dans la mesure du conflit (voir *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 3).

[65] Au fil du temps, deux formes distinctes de conflit ont été reconnues. La première est le *conflit d’application*, qui survient lorsqu’il est impossible de se conformer en même temps à une loi fédérale valide et à une loi provinciale valide. Il y a conflit d’application lorsqu’« une loi dit “oui” et l’autre dit “non”, de sorte que “l’observance de l’une entraîne l’inobservance de l’autre” » (*Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419, par. 18, citant *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191). La seconde est l’*entrave à la réalisation d’un objet fédéral*, qui se produit lorsque l’application d’une loi provinciale valide est incompatible avec l’objet d’une loi fédérale. L’effet d’une loi provinciale peut contrecarrer la réalisation de l’objet de la loi fédérale, « sans toutefois entraîner une violation directe de ses dispositions » (*Banque canadienne de l’Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 73). La partie qui invoque l’entrave à la réalisation d’un objet fédéral « doit d’abord établir l’objet de la loi fédérale pertinente et ensuite prouver que la loi provinciale est incompatible avec cet objet » (*Lemare*, par. 26, citant *Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536, par. 66).

[66] Aux deux volets de la prépondérance, la charge de la preuve incombe à la partie qui allègue l’existence du conflit. Il n’est pas facile de s’en acquitter, puisque la doctrine de la prépondérance doit être appliquée avec retenue. Le conflit doit être défini de façon étroite pour que chaque ordre de gouvernement puisse agir aussi librement que possible dans sa sphère de compétence constitutionnelle respective. « [L]es tribunaux doivent donner aux lois provinciale et fédérale une interprétation harmonieuse plutôt qu’une interprétation qui donne lieu à une incompatibilité [. . .] [e]n l’absence d’un texte législatif “clair” à cet effet » (*Lemare*, par. 21 et 27). « On présume que le Parlement a l’intention de faire coexister ses lois avec les lois provinciales » (*Moloney*, par. 27).

TAB 30

IN THE MATTER OF Section 53 of the
Supreme Court Act, R.S.C., 1985, c. S-26;

AND IN THE MATTER OF a Reference by
the Governor in Council concerning certain
questions relating to the secession of Quebec
from Canada, as set out in Order in Council
P.C. 1996-1497, dated the 30th day of
September, 1996

INDEXED AS: REFERENCE RE SECESSION OF QUEBEC

File No.: 25506.

1998: February 16, 17, 18, 19; 1998: August 20.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier,
Cory, McLachlin, Iacobucci, Major, Bastarache and
Binnie JJ.

REFERENCE BY GOVERNOR IN COUNCIL

*Constitutional law — Supreme Court of Canada —
Reference jurisdiction — Whether Supreme Court's re-
ference jurisdiction constitutional — Constitution Act,
1867, s. 101 — Supreme Court Act, R.S.C., 1985,
c. S-26, s. 53.*

*Courts — Supreme Court of Canada — Reference
jurisdiction — Governor in Council referring to
Supreme Court three questions relating to secession of
Quebec from Canada — Whether questions submitted
fall outside scope of reference provision of Supreme
Court Act — Whether questions submitted justiciable —
Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.*

*Constitutional law — Secession of province — Unilat-
eral secession — Whether Quebec can secede unilater-
ally from Canada under Constitution.*

*International law — Secession of province of Cana-
dian federation — Right of self-determination — Effec-
tivity principle — Whether international law gives Que-
bec right to secede unilaterally from Canada.*

Pursuant to s. 53 of the *Supreme Court Act*, the Gov-
ernor in Council referred the following questions to this
Court:

DANS L'AFFAIRE DE l'article 53 de la *Loi
sur la Cour suprême*, L.R.C. (1985),
ch. S-26;

ET DANS L'AFFAIRE D'UN renvoi par le
Gouverneur en conseil au sujet de certaines
questions ayant trait à la sécession du
Québec du reste du Canada formulées dans
le décret C.P. 1996-1497 en date du 30
septembre 1996

RÉPERTORIÉ: RENOI RELATIF À LA SÉCESSION DU QUÉBEC

N° du greffe: 25506.

1998: 16, 17, 18, 19 février; 1998: 20 août.

Présents: Le juge en chef Lamer et les juges L'Heureux-
Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major,
Bastarache et Binnie.

RENOI PAR LE GOUVERNEUR EN CONSEIL

*Droit constitutionnel — Cour suprême du Canada —
Compétence en matière de renvoi — La compétence de
la Cour suprême en matière de renvoi est-elle constitu-
tionnelle? — Loi constitutionnelle de 1867, art. 101 —
Loi sur la Cour suprême, L.R.C. (1985), ch. S-26,
art. 53.*

*Tribunaux — Cour suprême du Canada — Compé-
tence en matière de renvoi — Trois questions relatives à
la sécession du Québec du Canada soumises par le gou-
verneur en conseil à la Cour suprême — Les questions
soumises relèvent-elles de la compétence de la Cour
suprême en matière de renvoi? — Les questions sont-
elles justiciables? — Loi sur la Cour suprême, L.R.C.
(1985), ch. S-26, art. 53.*

*Droit constitutionnel — Sécession d'une province —
Sécession unilatérale — Le Québec peut-il, en vertu de
la Constitution, procéder unilatéralement à la séces-
sion?*

*Droit international — Sécession d'une province de la
fédération canadienne — Droit à l'autodétermination —
Principe de l'effectivité — Le Québec a-t-il, en vertu du
droit international, le droit de procéder unilatéralement
à la sécession?*

Le gouverneur en conseil a soumis à la Cour, en vertu
de l'art. 53 de la *Loi sur la Cour suprême*, les questions
suivantes:

More recently, in *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1047, the majority of this Court held that differences between provinces “are a rational part of the political reality in the federal process”. It was referring to the differential application of federal law in individual provinces, but the point applies more generally. A unanimous Court expressed similar views in *R. v. S. (S.)*, [1990] 2 S.C.R. 254, at pp. 287-88.

Plus récemment dans notre arrêt *Haig c. Canada*, [1993] 2 R.C.S. 995, à la p. 1047, les juges de la majorité ont déclaré que les différences existant entre les provinces «font rationnellement partie de la réalité politique d’un régime fédéral». Cette remarque, qui visait l’application différente du droit fédéral aux diverses provinces, a néanmoins une portée plus générale. La Cour a unanimement exprimé un point de vue semblable dans *R. c. S. (S.)*, [1990] 2 R.C.S. 254, aux pp. 287 et 288.

⁵⁹ The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the *Union Act, 1840* (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

Le principe du fédéralisme facilite la poursuite d’objectifs collectifs par des minorités culturelles ou linguistiques qui constituent la majorité dans une province donnée. C’est le cas au Québec, où la majorité de la population est francophone et qui possède une culture distincte. Ce n’est pas le simple fruit du hasard. La réalité sociale et démographique du Québec explique son existence comme entité politique et a constitué, en fait, une des raisons essentielles de la création d’une structure fédérale pour l’union canadienne en 1867. Tant pour le Canada-Est que pour le Canada-Ouest, l’expérience de l’*Acte d’Union, 1840* (R.-U.), 3-4 Vict., ch. 35, avait été insatisfaisante. La structure fédérale adoptée à l’époque de la Confédération a permis aux Canadiens de langue française de former la majorité numérique de la population de la province du Québec, et d’exercer ainsi les pouvoirs provinciaux considérables que conférait la *Loi constitutionnelle de 1867* de façon à promouvoir leur langue et leur culture. Elle garantissait également une certaine représentation au Parlement fédéral lui-même.

⁶⁰ Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters. All new provinces joining the federation sought to achieve similar objectives, which are no less vigorously pursued by the provinces and territories as we approach the new millennium.

La Nouvelle-Écosse et le Nouveau-Brunswick, qui avaient aussi affirmé leur volonté de préserver leur culture propre et leur autonomie en matière locale, ont bien accueilli également le fédéralisme. Toutes les provinces qui se sont jointes depuis à la fédération cherchaient à atteindre des objectifs similaires qui sont poursuivis non moins vigoureusement par les provinces et les territoires à l’approche du nouveau millénaire.

(c) *Democracy*

c) *La démocratie*

⁶¹ Democracy is a fundamental value in our constitutional law and political culture. While it has

La démocratie est une valeur fondamentale de notre culture juridique et politique. Quoiqu’il ait à

different collectivities and to pursue goals at both a provincial and a federal level.

limites de sa compétence. La fonction du fédéralisme est de permettre aux citoyens de faire partie simultanément de collectivités différentes et de poursuivre des objectifs aussi bien au niveau provincial qu'au niveau fédéral.

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The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law’s claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the “sovereign will” or majority rule alone, to the exclusion of other constitutional values.

L’assentiment des gouvernés est une valeur fondamentale dans notre conception d’une société libre et démocratique. Cependant, la démocratie au vrai sens du terme ne peut exister sans le principe de la primauté du droit. C’est la loi qui crée le cadre dans lequel la «volonté souveraine» doit être déterminée et mise en œuvre. Pour être légitimes, les institutions démocratiques doivent reposer en définitive sur des fondations juridiques. Cela signifie qu’elles doivent permettre la participation du peuple et la responsabilité devant le peuple par l’intermédiaire d’institutions publiques créées en vertu de la Constitution. Il est également vrai cependant qu’un système de gouvernement ne peut survivre par le seul respect du droit. Un système politique doit aussi avoir une légitimité, ce qui exige, dans notre culture politique, une interaction de la primauté du droit et du principe démocratique. Le système doit pouvoir refléter les aspirations de la population. Il y a plus encore. La légitimité de nos lois repose aussi sur un appel aux valeurs morales dont beaucoup sont enchâssées dans notre structure constitutionnelle. Ce serait une grave erreur d’assimiler la légitimité à la seule «volonté souveraine» ou à la seule règle de la majorité, à l’exclusion d’autres valeurs constitutionnelles.

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Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, “resting ultimately on public opinion reached by discussion and the interplay of ideas” (*Saumur v. City of Quebec, supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices.

Enfin, nous devons souligner que le bon fonctionnement d’une démocratie exige un processus permanent de discussion. La Constitution instaure un gouvernement par des assemblées législatives démocratiquement élues et par un exécutif responsable devant elles, [TRADUCTION] «un gouvernement [qui] repose en définitive sur l’expression de l’opinion publique réalisée grâce à la discussion et au jeu des idées» (*Saumur c. City of Quebec*, précité, à la p. 330). Le besoin de constituer des majorités, tant au niveau fédéral qu’au niveau provincial, par sa nature même, entraîne des compromis, des négociations et des délibérations. Nul n’a le monopole de la vérité et notre système repose sur

TAB 31

RJR — MacDonald Inc. *Applicant*

v.

**The Attorney General of
Canada** *Respondent*

and

The Attorney General of Quebec
Mis-en-cause

and

**The Heart and Stroke Foundation of
Canada, the Canadian Cancer Society, the
Canadian Council on Smoking and Health,
and Physicians for a Smoke-Free
Canada** *Interveners on the application for
interlocutory relief*

and between

Imperial Tobacco Ltd. *Applicant*

v.

**The Attorney General of
Canada** *Respondent*

and

The Attorney General of Quebec
Mis-en-cause

and

**The Heart and Stroke Foundation of
Canada, the Canadian Cancer Society, the
Canadian Council on Smoking and Health,
and Physicians for a Smoke-Free
Canada** *Interveners on the application for
interlocutory relief*

RJR — MacDonald Inc. *Requérante*

c.

^a **Le procureur général du Canada** *Intimé*

^b et

Le procureur général du Québec
Mis en cause

^c et

^d **La Fondation des maladies du cœur du
Canada, la Société canadienne du cancer, le
Conseil canadien sur le tabagisme et la
santé, et Médecins pour un Canada sans
fumée** *Intervenants dans la demande de
redressement interlocutoire*

^e et entre

Imperial Tobacco Ltd. *Requérante*

^f c.

^g **Le procureur général du Canada** *Intimé*

et

^h **Le procureur général du Québec**
Mis en cause

et

ⁱ **La Fondation des maladies du cœur du
Canada, la Société canadienne du cancer, le
Conseil canadien sur le tabagisme et la
santé, et Médecins pour un Canada sans
fumée** *Intervenants dans la demande de
redressement interlocutoire*

INDEXED AS: RJR — MACDONALD INC. v. CANADA
(ATTORNEY GENERAL)

File Nos.: 23460, 23490.

1993: October 4; 1994: March 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice — Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed — Leave to appeal granted shortly after applications to stay heard — Whether the applications for relief from compliance with regulations should be granted — Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18 — Tobacco Products Control Regulations, amendment, SOR/93-389 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) — Rules of the Supreme Court of Canada, SOR/83-74, s. 27 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The *Tobacco Products Control Act* regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was *ultra vires* Parliament and that it violates the right to freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The *Tobacco Products Control Regulations, amendment*, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the *Supreme Court Act*, or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposi-

RÉPERTORIÉ: RJR — MACDONALD INC. c. CANADA
(PROCUREUR GÉNÉRAL)

Nos du greffe: 23460, 23490.

a 1993: 4 octobre; 1994: 3 mars.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

DEMANDES DE REDRESSEMENT INTERLOCUTOIRE

Pratique — Demandes interlocutoires visant à surseoir à l'application d'un règlement en attendant la décision finale sur des appels et à en retarder la mise en œuvre si les appels sont rejetés — Autorisations d'appel accordées peu après l'audition des demandes de sursis — Les demandes de dispense de l'application du règlement devraient-elles être accordées? — Loi réglementant les produits du tabac, L.C. 1988, ch. 20, art. 3, 4 à 8, 9, 11 à 16, 17f), 18 — Règlement sur les produits du tabac—Modification, DORS/93-389 — Charte canadienne des droits et libertés, art. 1, 2b), 24(1) — Règles de la Cour suprême du Canada, DORS/83-74, art. 27 — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1.

La *Loi réglementant les produits du tabac* vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur ces produits. Les deux requérantes ont eu gain de cause devant la Cour supérieure du Québec lorsqu'elles ont contesté la constitutionnalité de la Loi au motif qu'elle était *ultra vires* du Parlement et contrevenait à l'al. 2b) de la *Charte canadienne des droits et libertés*. La Cour d'appel a ordonné la suspension du contrôle d'application jusqu'à ce que jugement soit rendu sur la validité de la Loi, mais elle a refusé de suspendre l'application de la Loi pendant une période de 60 jours suivant un jugement déclarant la Loi valide. La Cour d'appel à la majorité a ultérieurement déclaré la loi constitutionnelle.

Le *Règlement sur les produits du tabac — Modification* obligerait les requérantes à engager des dépenses considérables pour modifier leurs emballages, et ces dépenses ne seraient pas recouvrables si la législation était déclarée inconstitutionnelle. Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême* ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*. En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer

The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

La *Charte* protège les libertés et droits fondamentaux. Compte tenu de l'importance des intérêts auxquels, selon la requête, il a été porté atteinte, tout tribunal appelé à se prononcer sur une violation de la *Charte* doit procéder à un examen soigneux de la question. Tel est le cas même lorsque d'autres tribunaux ont conclu qu'il n'y avait pas eu violation de la *Charte*. Par ailleurs, compte tenu du caractère complexe de la plupart des droits garantis par la Constitution, le tribunal saisi d'une requête aura rarement le temps de faire l'analyse approfondie requise du fond de la demande du requérant. Ceci est vrai pour toute demande de redressement interlocutoire, que le procès ait eu lieu ou non. Nous sommes donc pleinement d'accord avec la conclusion du juge Beetz dans l'arrêt *Metropolitan Stores*, à la p. 128: «la formulation dans l'arrêt *American Cyanamid*, savoir celle de l'existence d'une «question sérieuse» suffit dans une affaire constitutionnelle où, comme je l'indique plus loin dans les présents motifs, l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients.»

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

Quels sont les indicateurs d'une «question sérieuse à juger»? Il n'existe pas d'exigences particulières à remplir pour satisfaire à ce critère. Les exigences minimales ne sont pas élevées. Le juge saisi de la requête doit faire un examen préliminaire du fond de l'affaire. La décision sur le fond que rend le juge de première instance relativement à la *Charte* est une indication pertinente, mais pas nécessairement concluante que les questions soulevées en appel constituent des questions sérieuses: voir *Metropolitan Stores*, précité, à la p. 150. De même, l'autorisation d'appel sur le fond qu'une cour d'appel accorde constitue une indication que des questions sérieuses sont soulevées, mais un refus d'autorisation dans un cas qui soulève les mêmes questions n'indique pas automatiquement que les questions de fond ne sont pas sérieuses.

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely

Une fois convaincu qu'une réclamation n'est ni futile ni vexatoire, le juge de la requête devrait examiner les deuxième et troisième critères, même s'il est d'avis que le demandeur sera probablement

This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. *The Balance of Inconvenience and Public Interest Considerations*

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

À plusieurs reprises, notre Cour a accepté le principe que des dommages-intérêts peuvent être accordés relativement à une violation des droits garantis par la *Charte*: (voir par exemple *Mills c. La Reine*, [1986] 1 R.C.S. 863, aux pp. 883, 886, 943 et 971; *Nelles c. Ontario*, [1989] 2 R.C.S. 170, à la p. 196). Toutefois, il n'existe pas encore de théorie juridique relative aux principes susceptibles de régir l'octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte*. Compte tenu de l'incertitude du droit quant à la condamnation à des dommages-intérêts en cas de violation de la *Charte*, il sera dans la plupart des cas impossible pour un juge saisi d'une demande interlocutoire de déterminer si un dédommagement adéquat pourrait être obtenu au procès. En conséquence, jusqu'à ce que le droit soit clarifié en cette matière, on peut supposer que le préjudice financier, même quantifiable, qu'un refus de redressement causera au requérant constitue un préjudice irréparable.

D. *La prépondérance des inconvénients et l'intérêt public*

Dans l'arrêt *Metropolitan Stores*, le juge Beetz décrit, à la p. 129, le troisième critère applicable à une demande de redressement interlocutoire comme un critère qui consiste «à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond». Compte tenu des exigences minimales relativement peu élevées du premier critère et des difficultés d'application du critère du préjudice irréparable dans des cas relevant de la *Charte*, c'est à ce stade que seront décidées de nombreuses procédures interlocutoires.

Il y a de nombreux facteurs à examiner dans l'appréciation de la «prépondérance des inconvénients» et ils varient d'un cas à l'autre. Dans l'arrêt *American Cyanamid*, lord Diplock fait la mise en garde suivante (à la p. 408):

[TRADUCTION] [i]l serait peu sage de tenter ne serait-ce que d'énumérer tous les éléments variés qui pourraient demander à être pris en considération au moment du choix de la décision la plus convenable, encore moins de proposer le poids relatif à accorder à chacun de ces éléments. En la matière, chaque cas est un cas d'espèce.

represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants*, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the

revendication individualisée. La plupart du temps, le requérant peut également affirmer qu'il représente une vision de «l'intérêt public». De même, il se peut que l'intérêt public ne milite pas toujours en faveur de l'application d'une loi existante.

À notre avis, il convient d'autoriser les deux parties à une procédure interlocutoire relevant de la *Charte* à invoquer des considérations d'intérêt public. Chaque partie a droit de faire connaître au tribunal le préjudice qu'elle pourrait subir avant la décision sur le fond. En outre, le requérant ou l'intimé peut faire pencher la balance des inconvénients en sa faveur en démontrant au tribunal que l'intérêt public commande l'octroi ou le refus du redressement demandé. «L'intérêt public» comprend à la fois les intérêts de l'ensemble de la société et les intérêts particuliers de groupes identifiables.

En conséquence, nous sommes d'avis qu'il faut rejeter une méthode d'analyse qui exclut l'examen d'un préjudice non directement subi par une partie à la requête. Telle était la position adoptée par le juge de première instance dans l'affaire *Morgentaler c. Ackroyd* (1983), 150 D.L.R. (3d) 59 (H.C. Ont.). Le juge Linden conclut à la p. 66:

[TRADUCTION] Les requérants fondent principalement leur argumentation sur le préjudice irréparable que risquent de subir leurs patientes éventuelles qui ne pourront obtenir un avortement si la clinique n'est pas autorisée à les faire. Même s'il était établi que *ces femmes* subiraient un préjudice irréparable, une telle preuve n'indiquerait pas que les requérants en l'espèce subiraient un préjudice irréparable, justifiant la cour de délivrer une injonction à leur demande. [En italique dans l'original.]

Lorsqu'un particulier soutient qu'un préjudice est causé à l'intérêt public, ce préjudice doit être prouvé puisqu'on présume ordinairement qu'un particulier poursuit son propre intérêt et non celui de l'ensemble du public. Dans l'examen de la pondération des inconvénients et de l'intérêt public, il n'est pas utile à un requérant de soutenir qu'une autorité gouvernementale donnée ne représente pas l'intérêt public. Il faut plutôt que le

court of the public interest benefits which will flow from the granting of the relief sought.

Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act*, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

(b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub-

requérant convaincre le tribunal des avantages, pour l'intérêt public, qui découleront de l'octroi du redressement demandé.

Cette question de l'atteinte à l'intérêt public invoquée par une autorité publique a été abordée de diverses façons par les tribunaux. D'un côté, on trouve le point de vue exprimé par la Cour d'appel fédérale dans l'arrêt *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791, qui a infirmé la décision de la Division de première instance d'accorder une injonction empêchant des fonctionnaires des pêcheries de mettre en œuvre un plan de pêche adopté en vertu de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14. Parmi d'autres motifs, la cour a souligné celui-ci (à la p. 795):

b) le juge a eu tort de tenir pour acquis que le fait d'accorder l'injonction ne causerait aucun tort aux appelants. Lorsqu'on empêche un organisme public d'exercer les pouvoirs que la loi lui confère, on peut alors affirmer, en présence d'un cas comme celui qui nous occupe, que l'intérêt public, dont cet organisme est le gardien, subit un tort irréparable.

Le juge Beetz a approuvé avec réserve ces remarques dans l'arrêt *Metropolitan Stores* (à la p. 139). Elles ont été appliquées par la Division de première instance de la Cour fédérale dans *Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans)* (1988), 21 F.T.R. 304.

Un point de vue contraire a été exprimé par le juge McQuaid de la Cour d'appel de l'Île-du-Prince-Édouard dans *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, qui, en autorisant un sursis d'exécution d'une ordonnance de la Public Utilities Commission porté en appel, a affirmé, à la p. 164:

[TRADUCTION] Je ne vois aucune circonstance susceptible de causer un inconvénient à la Commission s'il y a un sursis d'exécution en attendant l'appel. En tant qu'organisme de réglementation, la Commission ne possède aucun intérêt acquis quant à l'issue de l'appel. En fait, on peut concevoir qu'elle soit favorable à un appel qui porte tout particulièrement sur sa compétence, car elle se trouve à recevoir des directives claires pour l'avenir

lic interest is equally well served, in the same sense, by any appeal

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General*

relativement à des situations où il aurait pu exister des doutes. De la même manière, un appel sert également bien l'intérêt public . . .

À notre avis, le concept d'inconvénient doit recevoir une interprétation large dans les cas relevant de la *Charte*. Dans le cas d'un organisme public, le fardeau d'établir le préjudice irréparable à l'intérêt public est moins exigeant que pour un particulier en raison, en partie, de la nature même de l'organisme public et, en partie, de l'action qu'on veut faire interdire. On pourra presque toujours satisfaire au critère en établissant simplement que l'organisme a le devoir de favoriser ou de protéger l'intérêt public et en indiquant que c'est dans cette sphère de responsabilité que se situent le texte législatif, le règlement ou l'activité contestés. Si l'on a satisfait à ces exigences minimales, le tribunal devrait, dans la plupart des cas, supposer que l'interdiction de l'action causera un préjudice irréparable à l'intérêt public.

En règle générale, un tribunal ne devrait pas tenter de déterminer si l'interdiction demandée entraînerait un préjudice réel. Le faire amènerait en réalité le tribunal à examiner si le gouvernement gouverne bien, puisque l'on se trouverait implicitement à laisser entendre que l'action gouvernementale n'a pas pour effet de favoriser l'intérêt public et que l'interdiction ne causerait donc aucun préjudice à l'intérêt public. La *Charte* autorise les tribunaux non pas à évaluer l'efficacité des mesures prises par le gouvernement, mais seulement à empêcher celui-ci d'empiéter sur les garanties fondamentales.

L'examen de l'intérêt public peut également être touché par d'autres facteurs. Dans *Metropolitan Stores*, on a fait remarquer que les considérations d'intérêt public ont davantage de poids dans les cas de «suspension» que dans les cas d'«exemption». La raison en est que l'atteinte à l'intérêt public est beaucoup moins probable dans le cas où un groupe restreint et distinct de requérants est exempté de l'application de certaines dispositions d'une loi que dans le cas où l'application de la loi est suspendue dans sa totalité. Voir les affaires *Black c. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital c. Stoffman*

1994 CanLII 117 (SCC)

TAB 32

Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the Sable Offshore Energy Project, ExxonMobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., Pengrowth Corporation and ExxonMobil Canada Properties, as operator of the Sable Offshore Energy Project *Appellants*

v.

Ameron International Corporation, Ameron B.V., Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. *Respondents*

INDEXED AS: SABLE OFFSHORE ENERGY INC. v. AMERON INTERNATIONAL CORP.

2013 SCC 37

File No.: 34678.

2013: March 25; 2013: June 21.

Present: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Civil Procedure — Access to justice — Disclosure — Privilege — Promoting Settlement — Settlement privilege — Scope of protection offered by settlement privilege — Appellants entering into Pierringer Agreements with some defendants to multi-party litigation — Non-settling defendants seeking disclosure of amount of settlements prior to trial — Whether amounts of negotiated settlements protected by settlement privilege.

Sable Offshore Energy Inc. sued a number of defendants who had supplied it with paint intended to prevent corrosion of Sable's offshore structures and onshore facilities. Sable also sued several contractors and applicators who had prepared surfaces and

Sable Offshore Energy Inc., mandataire des détenteurs d'une participation de concessionnaire dans le Projet énergétique extracôtier Sable, ExxonMobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., Pengrowth Corporation et ExxonMobil Canada Properties, exploitante du Projet énergétique extracôtier Sable *Appelantes*

c.

Ameron International Corporation, Ameron B.V., Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. et Serious Business Inc. *Intimées*

RÉPERTORIÉ : SABLE OFFSHORE ENERGY INC. c. AMERON INTERNATIONAL CORP.

2013 CSC 37

N° du greffe : 34678.

2013 : 25 mars; 2013 : 21 juin.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Procédure civile — Accès à la justice — Divulgence — Privilège — Incitation au règlement — Privilège relatif aux règlements — Portée de la protection offerte par le privilège relatif aux règlements — Ententes de type Pierringer conclues entre les appelantes et quelques défenderesses dans un litige faisant intervenir plusieurs parties — Défenderesses non parties aux règlements cherchant à connaître avant le procès les sommes convenues aux règlements — Les sommes négociées aux ententes sont-elles protégées par le privilège relatif aux règlements?

Sable Offshore Energy Inc. a poursuivi plusieurs défenderesses qui lui avaient fourni de la peinture qui devait prévenir la corrosion des installations extracôtières et installations terrestres de traitement du gaz de Sable. Sable a également poursuivi plusieurs entrepreneurs et

. . . the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system. [p. 230]

This observation was cited with approval in *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at p. 259, where L’Heureux-Dubé J. acknowledged that promoting settlement was “sound judicial policy” that “contributes to the effective administration of justice”.

[12] Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found “when the justice of the case requires it” (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), at p. 740).

[13] Settlement negotiations have long been protected by the common law rule that “without prejudice” communications made in the course of such negotiations are inadmissible (see David Vaver, “‘Without Prejudice’ Communications — Their Admissibility and Effect” (1974), 9 *U.B.C. L. Rev.* 85, at p. 88). The settlement privilege created by the “without prejudice” rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:

. . . parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations . . . may be used

[TRADUCTION] . . . en général, les tribunaux préfèrent sans exception les règlements amiables. En d’autres termes, il existe un intérêt public prépondérant à ce que les parties en viennent à un règlement. Il s’agit là d’un principe qui sert généralement les intérêts des parties en ce qu’il leur épargne les frais de l’instruction des questions en litige, tout en réduisant la pression exercée sur un système de tribunaux provinciaux déjà surchargé. [p. 230]

Cette observation a été citée avec approbation dans *Kelvin Energy Ltd. c. Lee*, [1992] 3 R.C.S. 235, p. 259, où la juge L’Heureux-Dubé a reconnu que le fait de favoriser le règlement constituait une « saine politique judiciaire » qui « contribue à l’efficacité de l’administration de la justice ».

[12] Le privilège relatif aux règlements favorise la conclusion de règlements. Comme le confirme l’abondance de la jurisprudence à ce sujet, il s’agit d’un privilège générique. Comme pour les autres privilèges génériques, il bénéficie d’une présomption *prima facie* d’inadmissibilité, mais cette présomption souffre d’exceptions [TRADUCTION] « quand les considérations de justice que pose l’espèce le requièrent » (*Rush & Tompkins Ltd. c. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), p. 740).

[13] Les négociations en vue d’un règlement sont protégées depuis longtemps par la règle de la common law suivant laquelle sont inadmissibles les communications faites [TRADUCTION] « sous toutes réserves » au cours de ces négociations (voir David Vaver, « “Without Prejudice” Communications — Their Admissibility and Effect » (1974), 9 *U.B.C. L. Rev.* 85, p. 88). Le privilège relatif aux règlements qui découle de la règle des communications faites « sous toutes réserves » reposait sur l’idée que les parties seront davantage susceptibles de parvenir à un règlement si elles sont confiantes dès le départ que le contenu de leurs négociations ne sera pas divulgué. Comme l’a expliqué le lord juge Oliver, de la Cour d’appel d’Angleterre, dans *Cutts c. Head*, [1984] 1 All E.R. 597, p. 605 :

[TRADUCTION] . . . il faut encourager dans toute la mesure du possible les parties à résoudre leurs différends sans recourir aux tribunaux, et elles ne doivent pas être dissuadées de le faire parce qu’elles savent que tout ce

to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.

What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

[14] *Rush & Tompkins* confirmed that settlement privilege extends beyond documents and communications expressly designated to be “without prejudice”. In that case, a contractor settled its action against one defendant, the Greater London Council (the GLC), while maintaining it against the other defendant, the Carey contractors. The House of Lords considered whether communications made in the process of negotiating the settlement with the GLC should be admissible in the ongoing litigation with the Carey contractors. Lord Griffiths reached two conclusions of significance for this case. First, although the privilege is often referred to as the rule about “without prejudice” communications, those precise words are not required to invoke the privilege. What matters instead is the intent of the parties to settle the action (p. 739). Any negotiations undertaken with this purpose are inadmissible.

[15] Lord Griffiths’ second relevant conclusion was that although most cases considering the “without prejudice” rule have dealt with the admissibility of communications once negotiations have failed, the rationale of promoting settlement is no less applicable if an agreement is actually reached. Lord Griffiths explained that a plaintiff in *Rush & Tompkins*’ situation would be discouraged from settling with one defendant if any admissions it made during the course of its negotiations were admissible in its claim against the other:

qui se dit au cours des négociations [. . .] peut être utilisé à leur détriment au cours de l’instance. Comme l’a dit le juge Clauson dans *Scott Paper Co c. Drayton Paper Works Ltd* (1927), 44 RPC 151, p. 157, il faut encourager librement et franchement les parties à jouer cartes sur table.

En d’autres termes, les discussions tenues lors des négociations seront plus transparentes et donneront par le fait même de meilleurs résultats si les parties savent que leur contenu ne pourra pas être dévoilé par la suite.

[14] L’arrêt *Rush & Tompkins* confirme que le privilège relatif aux règlements ne vise pas que les documents et communications expressément qualifiés par les mots « sous toutes réserves ». Dans cette affaire, un entrepreneur a réglé à l’amiable l’action qu’il avait intentée contre l’un des défendeurs, le Greater London Council (le GLC), tout en continuant de poursuivre l’autre défendeur, les entrepreneurs Carey. La Chambre des lords s’est demandée si les communications échangées au cours des négociations du règlement intervenu avec le GLC devraient être admissibles en preuve dans la poursuite en cours contre les entrepreneurs Carey. Le lord juge Griffiths a tiré deux conclusions importantes pour la présente affaire. Tout d’abord, bien que le privilège soit souvent appelé la règle des communications faites « sous toutes réserves », point n’est besoin d’employer ces termes exacts pour l’invoquer. Ce qui compte plutôt, c’est l’intention des parties de régler l’action (p. 739). Le contenu de toute négociation entreprise à cette fin est inadmissible en preuve.

[15] Selon la deuxième conclusion pertinente du lord juge Griffiths, même si la plupart des décisions dans lesquelles on a examiné la règle des communications faites « sous toutes réserves » portent sur l’admissibilité en preuve de ces communications après l’échec des négociations, la raison d’être de l’incitation au règlement amiable vaut tout autant si une entente est effectivement intervenue. Le lord juge Griffiths a précisé qu’un demandeur se trouvant dans la situation de *Rush & Tompkins* serait dissuadé de régler à l’amiable avec un défendeur si toutes les admissions qu’il faisait durant les négociations étaient admissibles en preuve dans sa poursuite visant l’autre défendeur :

TAB 33

James Jones *Appellant*

v.

John Smith *Respondent*

and

Southam Inc. *Intervener*

INDEXED AS: SMITH v. JONES

File No.: 26500.

1998: October 8; 1999: March 25.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Privilege — Solicitor-client privilege — Public safety exception — Psychiatrist's report and opinion — Psychiatrist retained by defence counsel to assist in preparing accused's defence — Psychiatrist's report indicating that accused posed continuing danger to society — Accused pleading guilty and defence counsel informing psychiatrist that sentencing judge would not be informed of his concerns about accused — Circumstances and factors to be considered in determining whether solicitor-client privilege should be set aside in interest of protecting public safety.

Courts — Proceedings — Openness — Action on exception to solicitor-client privilege — Court file sealed — Hearing in Supreme Court public but members of press and public subject to publication ban — Supreme Court holding public safety exception to solicitor-client privilege applicable — Publication ban lifted and file unsealed, except parts of affidavit subject to solicitor-client privilege which do not fall within public safety exception.

An accused was charged with aggravated sexual assault on a prostitute. His counsel referred him to a psychiatrist hoping that it would be of assistance in the preparation of the defence or with submissions on

James Jones *Appellant*

c.

John Smith *Intimé*

et

Southam Inc. *Intervenante*

RÉPERTORIÉ: SMITH c. JONES

N° du greffe: 26500.

1998: 8 octobre; 1999: 25 mars.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-
BRITANNIQUE

Privilège — Secret professionnel de l'avocat — Exception relative à la sécurité publique — Rapport et avis d'un psychiatre — Services d'un psychiatre retenus par l'avocat de la défense pour l'aider à préparer la défense de l'accusé — Rapport du psychiatre indiquant que l'accusé constituait un danger permanent pour la société — Accusé ayant plaidé coupable, l'avocat de la défense fait savoir au psychiatre que le juge chargé de la détermination de la peine ne sera pas informé de ses inquiétudes au sujet de l'accusé — Circonstances et facteurs à examiner pour trancher la question de savoir si le secret professionnel de l'avocat doit être écarté dans l'intérêt de la protection de la sécurité publique.

Tribunaux — Procédures — Transparence — Action concernant une exception au privilège du secret professionnel de l'avocat — Dossier de la cour mis sous scellés — Audience publique devant la Cour suprême mais la presse et le public présents sont soumis à une interdiction de publication — Exception au privilège du secret professionnel de l'avocat relative à la sécurité publique jugée applicable par la Cour suprême — Levée des scellés et de l'ordonnance de non-publication, sauf en ce qui concerne les parties de l'affidavit faisant l'objet du secret professionnel de l'avocat qui ne sont pas visées par l'exception relative à la sécurité publique.

L'accusé a été inculpé d'agression sexuelle grave à l'endroit d'une prostituée. Son avocat l'a renvoyé à un psychiatre, espérant que ce serait utile pour la préparation de la défense ou les observations relatives à la peine

B. *Limitations on Solicitor-Client Privilege*

Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege. In certain circumstances, however, other societal values must prevail.

(1) Innocence of the Accused

One exception to solicitor-client privilege was set out in *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.). Martin J.A., speaking for the court, ruled that solicitor-client privilege must yield to the right of accused persons to fully defend themselves. At p. 44 he wrote:

No rule of policy requires the continued existence of the privilege in criminal cases when the person claiming the privilege no longer has any interest to protect, and when maintaining the privilege might screen from the jury information which would assist an accused.

The House of Lords recently considered this issue in *R. v. Derby Magistrates' Court*, [1995] 4 All E.R. 526. It held that solicitor-client privilege was absolute and permanent. It could not be set aside even when to do so would allow an accused to present a full answer and defence to a criminal charge. With great respect, I prefer the reasoning of Martin J.A. Despite the strength and importance of the privilege, it remains subject to certain well-defined and limited exceptions. These exceptions are not foreclosed and may be expanded in the future, for example, to protect national security. However, the question of further exceptions need not be considered in these reasons.

B. *Les limites du privilège du secret professionnel de l'avocat*

De la même façon qu'aucun droit n'est absolu, aucun privilège ne l'est, y compris celui du secret professionnel de l'avocat qui souffre des exceptions bien définies. La décision d'exclure des éléments de preuve qui seraient à la fois pertinents et d'une grande valeur probante parce qu'ils font l'objet du secret professionnel de l'avocat constitue une décision de principe qui est fondée sur l'importance que revêt ce privilège pour notre système judiciaire en général. Dans certains cas, toutefois, d'autres valeurs sociales doivent avoir préséance.

(1) L'innocence de l'accusé

Une exception au secret professionnel de l'avocat a été établie dans l'arrêt *R. c. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 (C.A. Ont.). Le juge Martin, s'exprimant au nom de la cour, a conclu que ce privilège devait s'incliner devant le droit de l'accusé à une défense pleine et entière. Il a écrit, à la p. 44:

[TRADUCTION] Aucune règle de principe n'exige que le secret professionnel de l'avocat continue de s'appliquer dans les affaires criminelles lorsque la personne invoquant ce privilège n'a plus d'intérêt à protéger et que le maintien du privilège pourrait empêcher le jury d'avoir accès à des renseignements favorables à l'accusé.

La Chambre des lords a récemment examiné cette question dans l'affaire *R. c. Derby Magistrates' Court*, [1995] 4 All E.R. 526. Elle a conclu que le secret professionnel de l'avocat était absolu et permanent. Il ne pouvait être écarté même dans les cas où cela permettrait à l'accusé de présenter une défense pleine et entière contre une accusation criminelle. Avec égards, je préfère le raisonnement suivi par le juge Martin. Malgré le poids et l'importance du privilège, il demeure assujéti à certaines exceptions limitées et bien définies. Ces exceptions ne sont pas immuables et pourraient être élargies, par exemple, pour protéger la sécurité nationale. Toutefois, il n'est pas nécessaire d'examiner cette question dans les présents motifs.

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TAB 34

Maucher
THE
PRACTICE AND PRIVILEGES
OF THE
Two Houses
OF
PARLIAMENT:
WITH AN
APPENDIX OF FORMS.

"The Law of Parliament, as determined by regular custom, is incorporated into our Constitution; but not so as to warrant an indefinite uncontrollable assumption of power in any case, least of all in Judicial Procedure, where the form and essence of Justice are inseparable from each other."

Hallam's Middle Ages, v. 3, p. 162.

✓
BY ALPHEUS TODD,

DEPUTY-LIBRARIAN TO THE PROVINCIAL LEGISLATURE OF UPPER CANADA, AND
COMPILER OF "AN INDEX TO THE BRITISH STATUTES"
FOR THE USE OF THE SAME.

Printed by Order of the House of Assembly.

TORONTO:
ROGERS & THOMPSON.
1840.

C H A P. XVI.

On Witnesses.

It is an essential and undisputed privilege of both Houses of Parliament, which they possess in common with every other court, to summon Witnesses before them for examination upon any subject on which they may require information to guide them in their deliberations; but in the House of Commons this evidence may not, as in the Lords, be given upon oath, except before Election Committees, and other cases where it is expressly allowed by act of Parliament.

WITNESSES.
—

Witnesses are not to be produced but where the House has previously instituted an enquiry (a); and all orders for their attendance must necessarily specify the subject upon which they are required to give evidence. When to be produced.

When a person is examined before a Committee, or at the bar of the House, any member wishing to ask him a question must address it to the Speaker or Chairman, who repeats it to the Witness, or says, "you hear the question, answer it." But if the propriety of the question be objected to, the Speaker directs the Witness, Counsel, and Parties, to withdraw; for no motion can be moved, put, or debated, when they are present (c). Sometimes the questions are previously settled in writing, before the Witness enters (b). The questions asked must be entered upon the Journals (d), but the testimony given in answer before the House is never written down; except before a Form of Examination.

(a) 10 Grey, 165; C. J. 3 March, 1779.

(b) 2 Hats. 108.

(c) 2 Hats. 106-7; 8 Grey, 604.

(d) 3 Grey, 81.

Committee, when it must be reported for the information of the House, who are not present to hear it (e).

If Witness is
unable to attend.

When the House has need of the evidence of any person who is incapacitated from attending, an order is made empowering certain members to wait upon him to receive his evidence (f).

Form of Exami-
nation.

A member may, in his place, give information to the House of any thing he knows relative to any matter under hearing at the bar (g).

When a Witness is examined before the House or a Committee of the Whole, the bar must be down. If the Witness be already in the custody of the House, or if he be in prison, he should be brought by the serjeant, with the Mace, who must stand by him during the examination, though the practice in this respect has sometimes differed (h). But when a common Witness is examined, the Mace should remain on the table. When it is off the table, no member can speak, or even suggest questions to the Chair. When it is left on, the members, though they cannot debate, may suggest to the Speaker such questions as arise out of the examination, and appear to them necessary to be put (i).

Speaker only to
put questions.

Select Commit-
tee to examine
Witnesses.

Select Committees are generally empowered by the order appointing them, to send for persons and papers. If a Committee be appointed without this power, they may summon witnesses, but if they refuse to attend, authority must first be obtained from the House, before they can be compelled to come. When such authority has been given, the Chairman may sign an order for the person to appear and give evidence before the Committee. If he then refuse to attend, he may be committed for contempt. This cannot be done by the Committee, but only by the House, after the matter has been reported to them.

Committal for
contempt.

(e) 7 Grey, 52, 334.

(f) C. J. 22 Jan. 1774-5.

(g) 2 Hats. 137.

(h) C. J. v. 61, p. 435.

(i) 2 Hats. 133.

In like manner, a witness guilty of prevarication in giving his evidence, will be punished. Also, any person tampering with a witness, or directly or indirectly attempting to prevent his attendance, will be severely censured by the House, as committing a breach of their collective privileges (*k*). It is not sufficient for any one to plead such an attempt in excuse for non-attendance, or prevarication, for the House will protect every Witness giving an honest evidence (*l*).

Prevarication,
&c. in a witness.

Witness pro-
tected by the
House.

No Witness can be arrested upon any civil suit whilst in attendance for examination, or within a reasonable time necessary for a return to his residence, after his final discharge from attending before the Committee (*m*).*

By a recent order of the House of Commons (*n*) it is required, that in all cases where Witnesses are examined before any Select Committee, there be prefixed to the minutes of the evidence of such Committee, to be reported to the House, the name of any member asking a question.

Report of Evi-
dence.

When either House, or any of its Committees, desire the attendance of a member of the other House, to give evidence, leave must be requested by message; and it is never granted but with this proviso, that the member may attend "if he thinks fit"—(see *ante* p. 309).

Members exa-
mined by the
other House.

The mode of admitting Peers into the House of Commons to give evidence, is as follows:—They are received at the door by the Serjeant, bearing the Mace, and on entering they make three obeisances to the House. They

Admitting Peers
into House of
Commons for
Examination.

(*k*) C. J. 29 Nov. 1710.

(*l*) C. J. 25 Mar. 1833.

(*m*) C. J. 7 Aug. 1835.

(*n*) C. J. 12 Feb. 1836.

* In a recent case—where a Parliamentary Agent, returning from the House of Lords, where he had been attending an appeal, was arrested upon an attachment for the costs of a Chancery suit,—it was held, that he was entitled to his discharge by privilege of Parliament, although he had not returned by the shortest road, and had stopped for refreshment; and that he might apply for that purpose either to the Court, out of which the process had issued, or to that on which he was attending when arrested.—*Att. Gen. v. Skinner's Comp.*; *ex parte Watkins*.—8 Sim. 377; & Cooper. 1.

then sit down, covered, on a chair placed for them within the bar, on the left hand as they enter ; but in speaking, they stand up uncovered, the Serjeant standing by them all the time, with the Mace on his shoulder. After giving their evidence, they withdraw, making the same number of obeisances to the House as on entering, the Serjeant with the Mace accompanying them to the door. The difference between the reception of a Peer and of a Judge

And Judges.

has been, that the Speaker informs the Peer that there is a chair for his Lordship to repose himself "in," and to the Judge the Speaker says, that there is a chair for him to repose himself "upon," i. e. as explained by usage, for the person to rest with his hand upon the back of it (*o*).

When Peers are sitting as a Court of Criminal Judicature, they may *order* the attendance of members of the House of Commons ; unless it be on a case of impeachment, when it must be a *request* (*p*).

Witnesses in custody of the other House.

If either House have occasion for the presence of a person in custody of the other, they ask leave of that House that he may be brought before them (*q*).

The extent of the power of the House of Commons, to compel Witnesses to attend, without asking leave of their superior officer, if they are under authority, is a disputed question, but it would appear from the precedents of former proceedings on this subject, that if they desire to examine a private soldier in the regular army, leave must be first obtained from his commanding officer (*r*) ; this does not seem to extend, however, to officers, whether subaltern or otherwise (*s*).

How far Commons can compel witnesses to attend.

It is unquestionably desirable and right that the House of Commons, being the grand Inquest of the nation,

(*o*) 2 Hats. 142.

(*q*) 3 Hats. 52.

(*r*) C. J. v. 64, pp. 17, 21.

(*p*) 9 Grey, 306, 406.

(*r*) C. J. v. 74, pp. 274, 275.

should possess the power to compel persons to attend, and give evidence before them in all cases where it may be required, but it would seem proper that, when the form of requesting the permission of a member of the Upper House to attend, is observed, the same courtesy should be extended to the immediate Servants and Officers of the King, who is also a branch of the legislature.

~~But when this individual is merely a civil officer in the~~ Government (*r*), or the head of a department not under the immediate control of the Sovereign (*s*) no such permission is necessary, and the House may, if its order be disobeyed, vindicate its authority by force.

(*r*) J. H. of A. U. C. 1st Sess. 13th Parlt. ; 7 Feb. 1837.

(*s*) J. H. of A. for 1828, p. 116, &c.

TAB 35



CANADA

House of Commons Debates

VOLUME 145 • NUMBER 034 • 3rd SESSION • 40th PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Tuesday, April 27, 2010

—

Speaker: The Honourable Peter Milliken

Bourinot, in referring to procedures for notices of motions for production of papers, wrote at pages 337 and 338:

• (1530)

[English]

Consequently, there are frequent cases in which the ministers refuse information, especially at some delicate stage of an investigation or negotiation; and in such instances the house will always acquiesce when sufficient reasons are given for the refusal... But it must be remembered that under all circumstances it is for the house to consider whether the reasons given for refusing the information are sufficient.

[Translation]

Joseph Maingot's *Parliamentary Privilege in Canada*, Second Edition, also supports the need for Parliament to have a voice in these very matters when it states at page 190:

The only limitations, which could only be self-imposed, would be that any inquiry should relate to a subject within the legislative competence of Parliament, particularly where witnesses and documents are required and the penal jurisdiction of Parliament is contemplated. This dovetails with the right of each House of Parliament to summon and compel the attendance of all persons within the limits of their jurisdictions.

[English]

Similarly, in *Erskine May*, 23rd edition, in a discussion of the exclusive cognizance of proceedings at page 102, we find the following:

...underlying the Bill of Rights [1689] is the privilege of both Houses to the exclusive cognizance of their own proceedings. Both Houses retain the right to be sole judge of the lawfulness of their own proceedings, and to settle—or depart from—their own codes of procedure. This is equally the case where the House in question is dealing with a matter which is finally decided by its sole authority, such as an order or resolution, or whether (like a bill) it is the joint concern of both Houses.

In David McGee's *Parliamentary Practice in New Zealand*, second edition, at page 621 he asserts, "The Australian legislation", referring to the Parliamentary Privileges Act, 1987, "in respect of article 9 of the *Bill of Rights*... may be taken to indicate the types of transactions falling within the term 'proceedings of Parliament'"

He then goes on to state that such proceedings to which privilege attaches include "...the presentation of a document to a House or a committee..."

Odgers' *Australian Senate Practice*, 12th edition, at page 51 states clearly:

Parliamentary privilege is not affected by provisions in statutes which prohibit in general terms the disclosure of categories of information...

Statutory provisions of this type do not prevent the disclosure of information covered by the provisions to a House of the Parliament or to a parliamentary committee in the course of a parliamentary inquiry... They... do not prevent committees seeking the information covered by such provisions or persons who have that information providing it to committees.

In light of these various authorities, the Chair must conclude that the House does indeed have the right to ask for the documents listed in the order of December 10, 2009.

With regard to the extent of the right, the Chair would like to address the contention of the Minister of Justice, made on March 31, that the order of the House of December 10 is a breach of the constitutional separation of powers between the executive and the legislature.

Having noted that the three branches of government must respect the legitimate sphere of activity of the others, the minister argued

Speaker's Ruling

that the order of the House was tantamount to an unlawful extension of the House's privileges. This can only be true if one agrees with the notion that the House's power to order the production of documents is not absolute. The question would then be whether this interpretation subjugates the legislature to the executive.

It is the view of the Chair that accepting an unconditional authority of the executive to censor the information provided to Parliament would in fact jeopardize the very separation of powers that is purported to lie at the heart of our parliamentary system and the independence of its constituent parts. Furthermore, it risks diminishing the inherent privileges of the House and its members, which have been earned and must be safeguarded.

As has been noted earlier, procedural authorities are categorical in repeatedly asserting the powers of the House in ordering the production of documents. No exceptions are made for any category of government documents, even those related to national security.

Therefore, the Chair must conclude that it is perfectly within the existing privileges of the House to order production of the documents in question. Bearing in mind that the fundamental role of Parliament is to hold the government to account, as the servant of the House and the protector of its privileges, I cannot agree with the government's interpretation that ordering these documents transgresses the separation of powers and interferes with the spheres of activity of the executive branch.

• (1535)

[Translation]

But what of the House's responsibility regarding the manner in which this right can or ought to be exercised? The authorities cited earlier all make reference to the long-standing practice whereby the House has accepted that not all documents demanded ought to be made available in cases where the Government asserts that this is impossible or inappropriate for reasons of national security, national defence or international relations.

O'Brien and Bosc, at page 979, states: "—it may not be appropriate to insist on the production of papers and records in all cases."

The basis for this statement is a 1991 report by the Standing Committee on Privileges and Elections, which, as recorded on page 95 of the *Journals* of May 29, 1991, pointed out:

The House of Commons recognizes that it should not require the production of documents in all cases; considerations of public policy, including national security, foreign relations, and so forth, enter into the decision as to when it is appropriate to order the production of such documents.

[English]

In his comments on this aspect of the matter before us, the Parliamentary Secretary to the Leader of the Government in the House of Commons referred to my ruling of June 8, 2006, where I stated that national security, when asserted by a minister, was sufficient to set aside a requirement to table documents cited in debate. The examples cited by the parliamentary secretary related strictly to documents that have been cited by a minister in the absence of any other explicit expression of interest by the House in the said documents.

*Speaker's Ruling**[Translation]*

Having reviewed the June 8 ruling, it is clear to the Chair that there is a difference between the practice of the House which allows a minister, on the sole basis of his or her judgment, to refrain from tabling a cited document for reasons of confidentiality and national security, and an order, duly adopted by the House following notice and debate, requiring the tabling of documents.

Another important distinction between the order adopted by the House on December 10, 2009, and the practice respecting notices of motions for the production of papers, referred to by the member for St. John's East on April 12 is that, with respect to such notices, there is an opportunity for a minister or parliamentary secretary to indicate to the House that the notice is acceptable to the government subject to certain reservations, such as confidentiality, or national security.

[English]

Thus the House, prior to the adoption of the motion, is fully aware that some documents will not be produced if the motion is adopted. If the House does not agree, the motion must either be transferred for debate or be put immediately to the House without debate or amendment.

Something similar happened on December 10, 2009. Before the House voted on the motion that became an order to produce documents, the ministers of justice, national defence and foreign affairs all rose in the House to explain the reasons why the documents in question should not be made available. This is in keeping with what Bourinot refers to as the government's responsibility to provide "reasons very cogent" for not producing documents.

Under normal circumstances, reflecting on past history in the House, these assertions by the government might well have been found to be acceptable by the House. In the current circumstances, however, the reasons given by the government were not found to be sufficient. The House debated the matter and voted to adopt an order for the production of documents despite the request of the government.

The reason for this, it seems, has to do with the issue of accommodation and trust. On December 10, 2009, as found on page 7877 of the *Debates*, I stated:

It is unfortunate, if I may make this comment, that arrangements were not made in committee to settle this matter there, where these requests were made and where there might have been some agreement on which documents and which format would be tabled or made available to members. How they were to be produced or however it was to be done, I do not know, but obviously that has not happened.

[Translation]

Several members have made the point that there are numerous ways that the documents in question could have been made available without divulging state secrets and acknowledged that all sides in the House needed to find a way to respect the privileges and rights of members of Parliament to hold the government to account, while at the same time protecting national security.

The government, for its part, has sought to find a solution to the impasse. It has appointed former Supreme Court Justice Frank Iacobucci and given him a mandate to examine the documents and to

recommend to the Minister of Justice and Attorney General what could be safely disclosed to the House.

The government has argued that in mandating this review by Mr. Iacobucci, it was taking steps to comply with the order consistent with its requirements to protect the security of Canada's armed forces and Canada's international obligations.

However, several members have pointed out that Mr. Iacobucci's appointment establishes a separate, parallel process outside of parliamentary oversight, and without parliamentary involvement. Furthermore, and in my view perhaps most significantly, Mr. Iacobucci reports to the Minister of Justice; his client is the government.

● (1540)

[English]

The authorities I have cited are unanimous in the view of the House's privilege to ask for the production of papers and many go on to explain that accommodations are made between those seeking information and those in possession of it to ensure that arrangements are made in the best interests of the public they both serve.

Certainly from the submissions I have heard, it is evident to the Chair that all members take seriously the sensitive nature of these documents and the need to protect the confidential information they contain.

The Chair must conclude that it is within the powers of the House of Commons to ask for the documents sought in the December 10 order it adopted. Now it seems to me that the issue before us is this: Is it possible to put in place a mechanism by which these documents could be made available to the House without compromising the security and confidentiality of the information they contain? In other words, is it possible for the two sides, working together in the best interests of the Canadians they serve, to devise a means where both their concerns are met? Surely that is not too much to hope for.

The member for Toronto Centre has made a suggestion, as recorded on page 615 of the *Debates* of March 18, 2010:

What we believe can be done is not beyond the ability of the House. It is done in many other parliaments. Indeed, there are circumstances under which it has even been done in this House. It is perfectly possible for unredacted documents to be seen by members of Parliament who have been sworn in for the purpose of looking at these documents.

O'Brien and Bosc, at page 980, points to ways of seeking a compromise for members to gain access to otherwise inaccessible material:

Normally, this entails putting measures in place to ensure that the record is kept confidential while it is being consulted: *in camera* review, limited and numbered copies, arrangements for disposing of or destroying the copies after the committee meeting, *et cetera*.

In some jurisdictions, such as the Legislative Council in the Australian state of New South Wales, and I would refer members to *New South Wales Legislative Council Practice* by Lovelock and Evans at page 481, mechanisms have been put in place, which satisfy the confidentiality concerns of the government as well as those of the legislature. Procedures provide for independent arbiters, recognized by both the executive and the legislature, to make determinations on what can be disclosed when a dispute arises over an order for the production of documents.

TAB 36



**A MATTER OF PRIVILEGE:
A DISCUSSION PAPER ON CANADIAN PARLIAMENTARY
PRIVILEGE IN THE 21ST CENTURY**

*Interim report of the
Standing Committee on Rules, Procedures, and the Rights of Parliament*

Chair
The Honourable Vernon White

Deputy Chair
The Honourable David P. Smith, PC.

June 2015

MEMBERSHIP

The Honourable Vernon White, Chair
The Honourable David P. Smith, P.C., Deputy Chair

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The Honourable Yonah Martin
The Honourable Elaine McCoy
The Honourable Paul E. McIntyre
The Honourable David Tkachuk
The Honourable David M. Wells

*Ex officio members

In addition, the Honourable Senators Selma Ataullahjan, Douglas Black, Suzanne Fortin-Duplessis, Nancy Ruth, Richard Neufeld and Pierre Claude Nolin were members of the committee or participated in its work on this report.

Clerk of the Committee: Charles Robert
Analyst from the Library of Parliament: Dara Lithwick

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privilege of freedom of speech. Finally, section 19 contains a general statement on the privileges enjoyed by the House of Assembly:

19. The House of Assembly and the members of the House of Assembly shall hold, enjoy and exercise those and similar privileges, immunities and powers that are now held, enjoyed and exercised by the House of Commons of the Parliament of Canada and by the members of that House of Commons.

While much of the original impetus for the provinces to codify their privileges was in order to establish the “court of record” status of a provincial legislature to ensure that it would have power to address contempts, the approaches taken by the provinces have been quite varied. There can be advantages and disadvantages to attempting to codify privilege. While codification can provide some clarity around how the privileges will be exercised, in order to remain relevant the codified versions of the privileges must be kept up to date to reflect their continuing evolution. On the other hand, by avoiding the expression of one’s understanding of the nature and extent of parliamentary privilege, a legislature risks the possibility of confusion as courts, legislatures, and individuals may interpret the privileges in different ways.

D. Observations of the Rules Committee

Developments in the theory and practice of privilege are evident across the Commonwealth. The United Kingdom has written several major reports and Australia and New Zealand have codified privilege. These actions demonstrate the recognition that privilege needs to be adapted to the current environment and modern expectations to remain effective and relevant. Canada is faced with the same challenges and conditions, but to date, steps to modernize privilege has been led by the courts, not Parliament.

The prominent role being played by the courts is in large measure due to the distinct nature of our rights-based legal system. Canada is unique in the Commonwealth in having a constitutionally entrenched *Charter* of rights and freedoms. When faced with challenges to privilege brought forward in litigation, Canada’s courts have been obliged to respond to resolve apparent conflicts between privilege and individuals’ other constitutional (including *Charter*) rights.

Until now, no body of Parliament anywhere in the country has undertaken an in-depth study of privilege and how it should be adapted to suit contemporary circumstances that includes the *Charter*. However, the need to undertake this study is increasingly clear. Indeed, it can be argued that the existence of the *Charter* effectively imposes the obligation upon Parliament to determine how it should exercise its privileges in a manner consistent with the values enshrined within it. It is a challenge that the Rules Committee of the Senate has decided to embrace.

Using the test set out in the Supreme Court of Canada’s decision in *Vaid* as a starting point, the next part of the discussion paper provides an overview of the elements of parliamentary privilege as well as the Rules Committee’s analysis of how each element may be adapted to contemporary norms. While *Vaid* set out the test to determine the scope or parameters of a privilege, the Committee builds on the values expressed in *Vaid* and founded in the Canadian Constitution to begin to elaborate a framework for the exercise of parliamentary privilege. In the Rules Committee’s opinion it is

authoritative legal basis and justification for Parliament establishing its own procedures to protect witnesses. Because both judgments are founded on the principle of the rule of law, they would be consistent with the contemporary interpretations of parliamentary privilege that is part of the general law and must be applied in a manner consistent with the rule of law and the protection of individual rights.

Indeed, Parliament's contempt powers have remained largely static since Confederation, though the context in which privilege and contempt powers are used have changed dramatically since then.²¹⁹ Parliament now operates in public, with expectations of transparency and accountability to the public. As has been noted by commentators, "the coercive powers of Parliament were developed long before human rights were constitutionally entrenched in the *Charter*." The commentators cite the Supreme Court decision in *Vaid* as evidence that "old assumptions about the powers and privileges in Parliament cannot be taken for granted."²²⁰ As they observe, the "coercive powers [of Parliament] need to be reviewed and immunized against potential challenge. In particular, the power to imprison, when exercised for punitive purposes, is vulnerable to challenge under the *Charter*" [emphasis added].²²¹ It would be worthwhile for Parliament to consider how best to exercise its punitive and disciplinary powers in a way that is consistent with the *Charter* and expectations of procedural fairness.

On a related note, other commentators have observed that "given that privilege originally developed over the centuries as a shield against interference from the Crown, the modern use of privilege as a sword against individual rights may serve to fuel public cynicism and damage Parliament's reputation."²²² Indeed, the authors cite two examples where principles of procedural fairness and natural justice were at odds with the exercise of parliamentary privilege.

The first example involved a resolution adopted by Quebec's National Assembly in 2000 denouncing remarks made by non-member (at the time he was a Parti Québécois candidate in a byelection) Yves Michaud about an ethnic community in the course of a radio interview.²²³ As a non-member Mr. Michaud had no standing or recourse to address the censure motion either within or outside of the National Assembly. In another example, newspaper columnist Jan Wong aroused public debate and controversy when she published an article titled "Get under the desk" in the *Globe and Mail* on 16 September 2006. In the article she drew a link between shootings at the École Polytechnique, Concordia University and Dawson College (all in Montreal), and Quebec's linguistic struggle.²²⁴ A

²¹⁹ Charles Robert and Blair Armitage, "Perjury, Contempt and Privilege: The Coercive Powers of Parliamentary Committees", *supra*, at p. 33.

²²⁰ *Ibid* at p. 34.

²²¹ *Ibid*.

²²² Charles Robert and Vince MacNeil, "Shield or Sword? Parliamentary Privilege, *Charter* Rights and the Rule of Law", *supra*, at p. 22.

²²³ *Ibid* at 23. See Quebec, National Assembly, *Votes and Proceedings*, 14 December 2000, No. 153.

²²⁴ Jan Wong, "Get under the desk", *The Globe and Mail*, 16 September 2006. The paragraph at issue read: "What many outsiders don't realize is how alienating the decades-long linguistic struggle has been in the once-cosmopolitan city. It hasn't just taken a toll on long-time anglophones, it's affected immigrants, too. To be sure, the shootings in all three cases were carried out by mentally disturbed individuals. But what is also true is that in all three cases, the perpetrator was not *pure laine*, the argot for a "pure" francophone. Elsewhere, to talk of racial "purity" is repugnant. Not in Quebec"

TAB 37

Erskine May

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Control of proceedings

Paragraph 11.16

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Both Houses retain the right to be sole judge of the lawfulness of their own proceedings, and to settle—or depart from—their own codes of procedure. This is equally the case where the House in question is dealing with a matter which is finally decided by its sole authority, such as an order or resolution, or where (like a bill) it is the joint concern of both Houses. The principle holds good even where the procedure of a House or the rights of its Members or officers to take part in its proceedings depends on statute.

The fullest recognition has been accorded by the courts to the rights of both Houses to exclusive parliamentary cognizance of their proceedings even in matters prescribed by statute. In the judgment given in the case of *Bradlaugh v Gosset* in 1884, question arose whether Bradlaugh, who had been returned a Member, had qualified himself to sit by making an affirmation instead of taking the oath. Subsequently, following re-election, he was prevented from taking the oath by an order of the House. In the course of his judgment in an action seeking (inter alia) to have the order declared void, Stephen J declared that even if the House of Commons forbade a Member to do what statute required him to do and, in order to enforce the prohibition, excluded him from the House, the court had no power to interfere:

‘the House of Commons is not subject to the control of ... [the] courts in its administration of that part of the statute law which has relation to its own internal proceedings ... Even if that interpretation should be erroneous [the] court has no power to interfere with it, directly or indirectly.’^{1↓}

It has been judicially recognised that Parliament is the master of the application of its own procedures to the business before it. A party before the House of Lords in 1973 argued that the promoters of a private bill had misled Parliament into granting certain rights to them. The House of Lords sitting judicially found that he was not entitled to examine proceedings in Parliament to show that the promoters had caused him loss. It was for Parliament to lay down procedures for considering bills, and to decide if they had been followed or to decide to depart from them. Parliament determined what documentary material or testimony might be required, and the extent to which parliamentary privilege might attach. ‘It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or effectiveness of procedures in the High Court of Parliament, or an inquiry whether in any particular case those procedures were effectively followed’^{2↓} (see also para 16.10).

In 1997, the Northern Ireland High Court rejected an application for leave to apply for judicial review of the Speaker's decision to withdraw certain facilities of the House from Members who had not taken the oath, on the grounds that the decision lay within the realm of internal arrangements of the House with which the courts would not interfere.^{3↓} The European Court of Human Rights ruled inadmissible an application to have the Speaker's decision overturned.^{4↓} The Speaker's decision was later superseded by resolution of the House.^{5↓}

British courts will not review the acts—or omissions—of Members individually in connection with the proceedings of the House. It was decided in the courts in 1894 that no action at

common law lay against a Member of the House of Commons who refused to present to the House a petition forwarded to him by a constituent. 6↓

The Court of Appeal found in 1997 that the House, not the courts, was responsible for the activities of the Parliamentary Commissioner for Standards. 7↓

There have been occasions when the courts have appeared to trespass on matters otherwise recognised as exclusively within parliamentary cognizance. When this has happened, however, later decisions have usually commented on or explained the original judgment, as in the case of *Adam v Ward* before the House of Lords in 1917, which was commented on in *Prebble v Television New Zealand*. 8↓ In 1990, it was held by the High Court that though the appointment of the chairman and members of a committee of the House of Commons formed part of proceedings in Parliament, and so could not be questioned in court, evidence regarding the practice of the House in respect of the registration of Members' interests was capable of being admitted. 9↓ Notice was given of an appeal relating to the court's view of the meaning and scope of 'proceedings in Parliament' (see para 13.12), but the matter was not determined in a higher court, as the parties settled.

In 2007, the European Council agreed a mandate for a new treaty, the Lisbon Treaty, which was signed in December 2007. The Government said that it did not intend to hold a referendum on the Treaty and made no provision for a referendum in the subsequent European Union (Amendment) Bill. In an application for judicial review of the Government's decision to ratify the Lisbon Treaty without a referendum, it was argued that an earlier promise to hold a referendum on the Constitution for Europe involved an implied representation that a referendum would be held in relation to any Treaty having equivalent effect. 10↓

The applicant sought a declaration that the refusal to hold a referendum was in breach of his legitimate expectation and therefore unlawful. The Speaker intervened to argue that it was neither permissible nor appropriate for a court to grant any remedy which would require that particular steps be taken in the House by any of its Members or that Members must vote in a particular way. The applicant's case was reformulated and cut back in an attempt to respond to Parliament's position, but despite that reformulation the judges decided that any judgment which purported to place a duty or obligation on the Prime Minister or the Foreign Secretary to do an act within Parliament in their capacity as Members would plainly trespass impermissibly on the province of Parliament. 11↓ This is distinct from the more recent decision in *Miller*, 12↓ which held that if the Government wished to undertake an action which would result in a change to the regime of law, namely giving notice of intention to withdraw from the EU under Article 50 **TEU**, legislation would be required.

Footnotes

1. *Bradlaugh v Gosset* (1884) 12 QBD 271 at 278–86. See also the observations of Lord Coleridge CJ at 273–74. ↑
2. *British Railways Board v Pickin* [1974] AC 765 at 790 and 1 All ER 609 at 620 per Lord Morris of Borth-y-Gest. See also *Fairfold Properties Ltd v Exmouth Docks* (1990) TLR 660, in which Millett J observed (at 661): ‘Parliament has to be left in unfettered control of its own procedure’. ↑
3. 1997 NI 359. For the Speaker's statement, see [HC Deb \(1997–98\) 294, cc 35–36](#). ↑
4. *McGuinness v United Kingdom* (App No 39511/98) (1999). ↑
5. CJ (2001–02) 274–75. ↑
6. *Chaffers v Goldsmid* [1894] 1 QB 186, esp 187. ↑
7. *R v Parliamentary Commissioner for Standards, ex p Al Fayed* [1998] 1 All ER 93, ↑

[1998] 1 WLR 669. Cf a decision that the rulings of the Parliamentary Commissioner for Administration, being concerned with the proper functioning of the public service outside Parliament, are subject to judicial review, while the Parliamentary Commissioner for Standards is focused on the propriety of the working and the activities of those engaged within Parliament, *R v Parliamentary Commissioner for Administration, ex p Dyer* [1994] 1 All ER 375, [1994] 1 WLR 621.

8. See para 12.1. *Adam v Ward* [1917] AC 309 esp at 319, 322, commented on in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 335, [1994] 3 All ER 407 at 416–17. In a lower court, it was suggested that the House of Commons might have elected not to assert its privileges in *Adam v Ward* (*Television New Zealand Ltd v Prebble* (1993) 3 NZLR 513 at 520–23). There is no evidence to this effect and in any case, since the privilege concerned was enshrined in statute—the Bill of Rights—it is hard to see how, short of legislation, the House could of its sole authority have permitted the court to interfere. The Judicial Committee of the Privy Council ([1995] AC 321 at 336, [1994] 3 All ER 407 at 417) concluded that the questioning in court of the conduct in the House of a member of the New Zealand House of Representatives for the purposes of assessing a defendant newspaper's defence of provocation in a libel action 'should not have been allowed' in *News Media Ownership v Finlay* [1970] NZLR 1089. (Article IX of the Bill of Rights applies in New Zealand, and if it can be given a meaning consistent with the New Zealand Bill of Rights 1990, that meaning is to be preferred to any other.)

9. *Rost v Edwards* [1990] 2 QB 460, commented on in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 337, [1994] 3 All ER 407 at 418. A more limited case of judicial hearing of evidence on matters which might be regarded as within the exclusive view of Parliament was that of the admission of evidence regarding advice given by an Officer of the Commons to a Member of that House concerning its procedure in *Chaffers v Goldsmid* [1894] 1 QB 186. This matter was not subject to any subsequent review. See also *Allason v Haines* (1995) TLR 438.

10. *R (on the application of Wheeler) v (1) Office of the Prime Minister (2) Secretary of State for Foreign and Commonwealth Affairs and Speaker of the House of Commons* [2008] EWHC 1409 (Admin).

11. [2008] EWHC 1409 (Admin), para 49.

12. *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the UK* [2017] UKSC 5, [2017] NI 141, [2017] 1 All ER 593.

TAB 38

HOUSE OF COMMONS PROCEDURE AND PRACTICE, Third Edition, 2017

Chapter 3 Privileges and Immunities

Rights of the House as a Collectivity

As a collectivity, the House of Commons has a certain number of rights which it claims or which have been accorded to it by statute. For example, the House claims the right to institute inquiries into any matter, to require the attendance of witnesses, and to order the production of documents. The *Parliament of Canada Act*²⁶⁰ confers the right to administer oaths to witnesses.

The rights and powers of the House as a collectivity may be categorized as follows:

- ◆ the regulation of its own internal affairs;
- ◆ the authority to maintain the attendance and service of its Members;
- ◆ the power to discipline;
- ◆ the right to institute inquiries and to call witnesses and demand papers;
- ◆ the right to administer oaths to witnesses appearing before it; and
- ◆ the right to publish papers without recourse to the courts relating to the content.

The two most dominant rights or powers are the right of the House to regulate its own internal affairs and the power to discipline.

Regulation of Internal Affairs

The exclusive right of the House of Commons to regulate its own internal affairs refers to its control of its own debates, agenda and proceedings as they relate to its legislative and deliberative functions.²⁶¹ This right was affirmed in 1993 in *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*²⁶² and has since been reaffirmed in a number of important court decisions, including *Canada (House of Commons) v Vaid* in 2005, *Knopf v Canada (House of Commons)* in 2006, and *Association des juristes de l'État c Québec (Procureur général) (Secrétariat du Conseil du Trésor)* in 2009.²⁶³ Indeed, in the *Vaid* decision, the Supreme Court noted that the categories of privilege include:

... control by the Houses of Parliament over 'debates or proceedings in Parliament' (as guaranteed by the Bill of Rights of 1689) including day-to-day procedure in the House, for example the practice of the Ontario legislature to start the day's sitting with the Lord's Prayer...

²⁶⁴

The House of Commons can make and change its own rules and manage its internal affairs without outside interference. Its internal procedures and rules as contained in the *Standing Orders*, special orders or Speakers' rulings are protected by parliamentary privilege and cannot be questioned by the courts or any place outside of Parliament.²⁶⁵ The House of Commons is free from judicial review of its decisions when these are made pursuant

of election to fill the vacancy. Although expulsion was not explicitly referred to in the motion, the House declared his seat vacant.³³¹

On October 31, 2014, the Ontario Court of Justice found Dean Del Mastro (Peterborough) guilty on four charges under the *Canada Elections Act* in connection with the 2008 federal election for wilfully incurring election expenses in excess of the campaign expense limits. The Act provides that, in such circumstances, the Member would no longer be able to sit in the House. A Member raised a question of privilege, claiming that it fell to the House to determine whether Mr. Del Mastro could continue sitting as a Member. The Speaker having found the matter to be a prima facie question of privilege, a motion, and an amendment to it, were debated which, if adopted, would have the effect of expelling Mr. Del Mastro, should his conviction be upheld following appeal. However, the following day, Mr. Del Mastro resigned, and the Speaker ordered the motion to be dropped from the *Order Paper*.³³²

The Rights to Institute Inquiries, to Require the Attendance of Witnesses and to Order the Production of Documents

By virtue of the preamble and section 18 of the *Constitution Act, 1867*, Parliament has the ability to institute its own inquiries, to require the attendance of witnesses and to order the production of documents, rights which are fundamental to its proper functioning. These rights are as old as Parliament itself. *Maingot* states:

*The only limitations, which could only be self-imposed, would be that any inquiry should relate to a subject within the legislative competence of Parliament, particularly where witnesses and documents are required and the penal jurisdiction of Parliament is contemplated. This dovetails with the right of each House of Parliament to summon and compel the attendance of all persons within the limits of their jurisdictions.*³³³

These rights are now exercised for the most part by committees pursuant to powers delegated to them by the House in the *Standing Orders*.³³⁴

Each standing committee has a permanent order of reference which allows its members to conduct inquiries into departmental and policy matters. In addition, the House may refer additional matters to its committees for study. In the course of its study into a particular matter, a committee may wish to hear testimony from public officials, private individuals or representatives of groups, organizations and associations. In the majority of cases, witnesses invited to appear before a committee do so willingly. If a witness declines an invitation to appear, the committee may issue a summons to the witness by adopting a motion to that effect. If the witness still refuses to appear, the committee may report the matter to the House and the House then may order the witness to appear. If the witness disobeys the order, the witness may be declared guilty of contempt.

Committees are not empowered to compel the attendance of the Sovereign, the Governor General, Lieutenant Governors, Members, Senators, officers of another legislature or persons outside of Canada.³³⁵ Should a Member refuse to testify, the committee may report the matter to the House and then the House will decide what action is necessary. While Senators may appear before House committees voluntarily, if a committee wishes to extend a formal invitation to a Senator, the House may adopt a motion for a message to be sent to the Senate requesting that it grant leave for a Senator to appear before the committee.³³⁶

For the purposes of an inquiry, the committee may send for any papers that are relevant to its order of reference. Typically these documents include government reports, statistics, memoranda, agreements and briefs, and they

are, with rare exceptions, provided voluntarily.³³⁷ As stated in a report of the Standing Committee on Privileges and Elections in 1991:

*The power to send for persons, papers and records has been delegated by the House of Commons to its committees in the Standing Orders. It is well established that Parliament has the right to order any and all documents to be laid before it which it believes are necessary for its information. ... The power to call for persons, papers and records is absolute, but it is seldom exercised without consideration of the public interest. The House of Commons recognizes that it should not require the production of documents in all cases; considerations of public policy, including national security, foreign relations, and so forth, enter into the decision as to when it is appropriate to order the production of such documents.*³³⁸

If a committee's request that it be given certain documents is met with resistance or disregarded, the committee may adopt a motion ordering the production of the requested documents.³³⁹ If such an order is ignored, the committee has no means to enforce the order on its own. It may report the matter to the House and recommend that appropriate action be taken.³⁴⁰ It is then a decision of the House whether or not to issue an order for the production of papers. This may be done by the adoption of a motion³⁴¹ or by concurring in the committee's report.³⁴² If an order is issued and disregarded, the disciplinary powers of the House may be invoked. Individuals could be called to the Bar of the House, cited for contempt or otherwise punished. In 1891, a witness before a committee was called to the Bar of the House for refusing to produce documents requested by the committee.³⁴³ In 2004, the House found three companies in contempt of the House for refusing to provide a committee with the documents it had requested.³⁴⁴

In November 2009, the Special Committee on the Canadian Mission in Afghanistan reported to the House that its privileges had been breached by the Government's failure to produce documents requested by the Committee relating to the detention of Afghan soldiers by Canadian Forces in Afghanistan.³⁴⁵ On December 10, 2009, the House, in turn, adopted an Order requiring the production of documents that the Committee had requested; the Government refused, citing national security concerns.³⁴⁶ Questions of privilege were raised based on the House's absolute right to order documents. The Minister of Justice insisted that as the government had a duty to protect information that could jeopardize national security, that right was not without limits.³⁴⁷ On April 27, 2010, Speaker Milliken ruled that it was within the powers of the House to ask for the documents specified in the House Order, and that it did not transgress the separation of powers between the executive and legislative branches of Government. Thus, the Speaker concluded that the Government's failure to comply with the House Order constituted a *prima facie* breach of privilege. However, he gave the parties two weeks to develop a mechanism that would accommodate the Government's concerns over national security and the House's right to receive the documents.³⁴⁸

The Right to Administer Oaths to Witnesses

The right of the House and of its committees to examine witnesses under oath, a right that was not part of the ancient custom of Parliament, has been conferred by legislation and is now contained in the *Parliament of Canada Act*.³⁴⁹ The provisions of the Act allow witnesses to be examined under oath and authorize the Speaker, committee Chairs and anyone appointed by the Speaker to administer an oath or affirmation.

Under normal circumstances, witnesses before House committees are not sworn in. It is generally accepted that witnesses have a duty to speak the truth regardless of whether or not their testimony is given under oath.³⁵⁰ The decision as to the swearing-in of witnesses is left entirely to the discretion of the committee. If a witness refuses

TAB 39

10-1-2013

A Comment on "No Comment": The Sub Judice Rule and the Accountability of Public Officials in the 21st Century

Lorne Sossin
Osgoode Hall Law School

Valerie Crystal
Osgoode Hall Law School

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I agree that members of government, including provincial Attorneys General, and members of the law enforcement community, including senior police officers, must always exercise caution in their comments to the media, because of the danger that their remarks will reflect or appear to reflect authoritative opinions about specific cases before the courts.⁷⁰

The common law *sub judice* rule as a whole appears well accepted as a general statement of principle but enforced by different judges in different settings in different ways. This lack of coherent application is exacerbated by the tendency to blur the *sub judice* rule dealing with prejudice to a hearing with a general caution that public officials should avoid comment on matters before adjudication. This latter concern arises not from the common law rule per se but may be traced instead to the *sub judice* Parliamentary convention, to which we now turn.

3. The *sub judice* parliamentary convention

Unlike the common law *sub judice* doctrine which is enforced through the court's contempt power, the *sub judice* convention as a Parliamentary rule is governed through the Speaker's office. Typically, Parliament is governed by rules which are enforceable by the Speaker and by conventions which guide practice but are not enforceable. Conventions are rules of behaviour that are not enforced by either the courts or the speakers of our legislatures.⁷¹ As Andrew Heard has explained:

Most conventions are unwritten, coming from years of practice – either in doing a certain thing (such as answering questions in the House) or in not doing something (such as Governors General not refusing Bills presented to them for royal assent). However, some conventions have been written down or even have their genesis in a written agreement among political actors.⁷²

The *sub judice* doctrine is unusual in that it appears to be both a rule *and* a convention, which is to say it has been occasionally enforced and occasionally invoked as a binding rule giving rise to no sanction if violated.⁷³ The *sub judice* convention, as defined in the Beauchesne's *Parliamentary Rules & Forms*, states that:

70. *Ibid* at para 49.

71. See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press Canada, 1991).

72. See Andrew Heard, “Constitutional Conventions and Parliament,” online: Canadian Parliamentary Review <<http://www.revparl.ca/english/issue.asp?param=168&art=1143>>.

73. See generally Robert Marleau & Camille Monpetit, *House of Commons Procedure and Practice* (Ottawa: House of Commons, 2000) at 534-536.

TAB 40

Parliamentary Privilege in Canada

Second Edition

J.P. Joseph Maingot, Q.C.

House of Commons
and
McGill-Queen's University Press

law to act in such matters as, for example, under the *Dominion Controverted Elections Act*.⁵⁴

An interesting manifestation of this power of the House occurred in 1965, when it referred an allegation of illegal election practices to the Chief Electoral Officer.⁵⁵

The Senate

As regards the Senate, s. 33 of the *Constitution Act, 1867* provides, "If any question arises respecting the qualification of a senator or a vacancy in the Senate the same shall be heard and determined by the Senate." In other words, s. 31 of the *Constitution Act, 1867*,⁵⁶ which sets out the disqualification of senators, is interpreted by the Senate and not elsewhere.

The right to institute inquiries and to require the attendance of witnesses and the production of documents⁵⁷

The right to institute inquiries is part of the *lex parliamenti*, which is included in the "privileges, immunities, and powers" expressed in s. 4 of the *Parliament of Canada Act* and referred to in s. 18 of the *Constitution Act, 1867*. The only limitations, which could only be self-imposed, would be that any inquiry should relate to a subject within the legislative competence of Parliament, particularly where witnesses and documents are required and the penal jurisdiction of Parliament is contemplated. This dovetails with the right of each House of Parliament to summon and compel the attendance of all persons within the limits of their jurisdiction.⁵⁸

This right has extraordinary implications. It was invoked with impunity in 1689 when the judges in *Jay v. Topham*⁵⁹ were called to the Bar of the House and taken into custody for failing to uphold the plea of the Sergeant-at-Arms that the court had no jurisdiction in the matter. It was also invoked in Newfoundland in 1838 in *Kielley v. Carson*. It also enabled the House of Commons of Canada to require the attendance of a

⁵⁴ *McLeod v. Noble* (1897), 28 O.R. 528; *R. ex rel. Tolfree v. Clark*, [1943] O.R. 501 (C.A.); *R. ex rel. Stubbs v. Steinkopf* (1964), 47 D.L.R. (2d) 105 (Man. Q.B.); *Lamb v. McLeod* (No. 1), [1932] 1 W.W.R. 206; *Re Jackman and Stollery* (1980), 28 O.R. (2d) 641. See also *R. ex rel. Stubbs v. Steinkopf* (1964), 50 W.W.R. 643 (Man. C.A.), *Temple v. Bulmer*, [1943] S.C.R. 265.

⁵⁵ *Debates*, October 24, 1965, p. 9004-5; see *infra*, Chapter 12, text at note 70.

⁵⁶ See Appendix.

⁵⁷ See also Chapter 12.

⁵⁸ Bourinot, 4th ed., p. 70.

⁵⁹ See *infra*, Chapter 13.

lawyer in order to question him about words spoken elsewhere in a judicial proceeding.⁶⁰

A committee is not restricted in the scope of questions it can pose and a witness must answer all questions put to him, subject only to a point of order by a member of the committee that the question should not be permitted, and with an ultimate appeal of the chairman's ruling to the committee.

As part of the "grand inquest of the nation," the committee is free from adherence to rules of evidence such as the hearsay rule, the requirement of relevance, and the rules of natural justice. Rather, it is governed by considerations of public policy. Furthermore, the ordinary courts offer no protection or assistance to a witness.⁶¹ Also, by convention, one House will not summon a Member of the other House to attend its proceedings as a witness or otherwise.

With respect to federal public servants who are witnesses before committees of either House, the theory of the compellability of witnesses to answer questions generally may come in conflict with the principle of ministerial responsibility. By convention, a parliamentary committee will respect Crown privilege when invoked, at least in relation to matters of national and public security.⁶²

In the final analysis, witnesses must rely on the collective common sense of the members of the committee and their good graces.

The right to administer oaths to witnesses

The right to administer oaths was never part of the *lex parliamenti*. It became part of the law of the U.K. in 1871. The right of the Houses of Parliament of Canada to administer oaths to witnesses became part of the law of Canada in 1875 by the U.K. *Parliament of Canada Act*⁶³ when s. 18 of the *Constitution Act, 1867* was amended to provide that the Canadian Parliament could legislate privileges currently held by the U.K. House of Commons rather than privileges that that House held in 1867.

⁶⁰ Case of *Choquette*, *Journals* (1974-75-76), p. 521, 1275-7. *Quaere*: what of the immunity provided for those engaged in court proceedings?

⁶¹ However, if a witness in privilege matters is considered by the court to be "charged" with an offence (*Charter*, s. 11(c)) or if that person's right to liberty or security is impaired (*Charter*, s. 7), the committee's power over that witness may be challenged. (See *infra*, Chapter 14).

⁶² See also Presentation of General Legal Counsel of the House of Commons to the Standing Joint Committee on the Scrutiny of Regulation on the Powers of Parliamentary Committees, on November 17, 1994.

⁶³ 38 & 39 Victoria, c. 38 (U.K.).

TAB 41



HOUSE OF REPRESENTATIVES

First Session, Forty-fourth Parliament, 1993–94

Parliamentary Debates

(HANSARD)

Volume 540

24 May to 16 June 1994

Progress reported.

House resumed.

BUSINESS OF THE HOUSE

Procedure

Rt Hon. DON McKINNON (Leader of the House): I seek the leave of the House for you, Mr Speaker, to take the House back under order of business, to presentation of select committee reports, the reason being that the Privileges Committee is ready to report on the issue that was put before it.

Hon. WINSTON PETERS (Tauranga): I raise a point of order, Mr Speaker. As a point of clarification, I want to know whether the House envisages---if I am right in my suspicion about what is being sought here---that there will be a debate on the matter.

Mr SPEAKER: Yes, there will be a debate. Leave is sought for that purpose. Is there any objection? There appears to be none.

PRIVILEGE---COOK ISLANDS TAX HAVEN: RELEASE OF DOCUMENTS

Report of Privileges Committee

Hon. D A M GRAHAM (Minister of Justice): I am directed to present the report of the Privileges Committee on the question of privilege referred on 31 May 1994 concerning the printing of the documents tabled by the member for Tauranga on 16 March 1994. I move, That this report do lie upon the table.

On the date stated, the matter of privilege of the documents that have been tabled by the honourable member for Tauranga was referred to the Privileges Committee for consideration. The House will recall that a large number of documents were tabled by the honourable member but the decision was not made by the House that those documents at that time be printed. The importance of that is that if documents are tabled, but not printed, they have, at best, qualified privilege, but if the documents are printed by direction of the House, they become official documents and are vested with total privilege.

The decision to defer that consideration for printing of those documents was due to the existence of injunctions prohibiting publication of certain documents, which had been brought in the High Court in a series of actions between European Pacific and various media organisations and others. Thus, the House was faced with the choice of either electing to proceed to print the documents, which might have been in breach of some convention inasmuch as it was no longer respecting the existence of those injunctions, or it could have referred the matter, as it did, to the Privileges Committee for consideration. It is my view that that was the proper course, and the Privileges Committee has endeavoured to deal with the matter as expeditiously as possible.

The issue was really whether or not the House vested with the privileges that it has had the power to order the printing of documents and thus the publication of those documents, notwithstanding the existence of injunctions prohibiting publication that had been issued by the High Court in various actions. In other words, was the House itself in any way subservient to the court or were the privileges of this House to be so extensive as to overcome any injunctions that had been issued?

As a result of the reference, advice was sought from the Solicitor-General, Mr John McGrath, QC, from the Clerk of the House, and from Sir Kenneth Keith, the President of the Law Commission. Each of those gentlemen was good enough not only to file a submission, which is attached to this reporting

back, but they were also good enough to appear before the Privileges Committee earlier this evening, and I believe that it would be fair to say that there was unanimity of view by all three that the privileges of this House, as set out in article 9 of the Bill of Rights 1688, **are sufficiently wide to enable this House to manage its own affairs as it sees fit, notwithstanding any court injunctions or any other court action that may be extant.**

Suffice it to say, however, that although that is the position at law, and as a matter of the privileges of this House, out of comity to the courts, Parliament ought to regard the court decisions with a great deal of circumspection and, similarly, it is expected that the courts and the judiciary will regard the actions of Parliament in a like manner. Therefore when it came to the question of whether this House should take notice of the existence of those injunctions the issue then became whether, in the public interest, publication of the documents was required, or whether, out of comity to the courts, it was not of sufficient public moment to override the existing injunctions.

I should say that the advice we received today indicated that in the case of one of those actions a permanent injunction is now in force, but that permanent injunction was granted by consent of the parties without the learned judge actually determining the issue of public interest. As that matter has now been determined for that purpose, it is unlikely that the judge would be seized of the matter again in the foreseeable future at best. However, other interim injunctions are still in force. They were actions brought in 1992---when and if they reach the trial stage remains to be seen.

On balance, it seemed proper that the public interest in this case was such that the committee was of the view that it would recommend to this House that the documents are printed and, therefore, available for release with the full parliamentary protection that goes with that.

I should add that the committee, although it had no direct evidence in front of it, was aware that it is common knowledge that the allegation by European Pacific, which is the plaintiff in the actions brought in the courts, alleges that the documents referred to were stolen from it and, for the purposes of the inquiry held by the Privileges Committee without determining that issue one way or the other---because we had no way of doing that---we accepted that that may well have been the case and we also accepted that European Pacific, as a result, would, if asked, have objected to the publication of the documents. So we accepted those for the purposes of the argument as a given, and we then had to move to decide whether, notwithstanding those facts, publication was justified.

Having heard the evidence of the witnesses, who, as I said before, were unanimous in their view of not only the privileges of the House but also the effect of the injunctions, it was the view of the committee unanimously that the public interest requires the publication of these documents just as soon as possible. Therefore it is the recommendation of the Privileges Committee that the House does now resolve to print the documents tabled by the honourable member for Tauranga in the House on 16 March 1994.

I make one further comment that an analysis by the Clerk of the House of the documents in the so-called winebox, with the documents referred to in the injunction proceedings---a task that I am led to believe took 10 of the staff some days to do---has resulted in the conclusion that there are some 152 documents that are referred to in the injunction but that are not in the winebox, and it is the recommendation of the committee to the honourable member for Tauranga that if he does have any further documents that relate to the injunction proceedings, he table them as soon as possible so that they can also be printed and released without further delay.

Can I express the thanks of the Privileges Committee to the Clerk of the House for the work that he has done on this issue; to Sir Kenneth Keith, the President of the Law Commission; to Mr McGrath,

TAB 42



NOVA SCOTIA LEGISLATURE

September 16, 2008
Standing Committees
Resources

Meeting topics:

Witnesses: Canadian Coast Guard

HANSARD

NOVA SCOTIA HOUSE OF ASSEMBLY

COMMITTEE

ON

RESOURCES

Tuesday, September 16, 2008

COMMITTEE ROOM 1

Canadian Coast Guard

Printed and Published by Nova Scotia Hansard Reporting Services

RESOURCES COMMITTEE

Mr. John MacDonell (Chairman)

Hon. Barry Barnet

Hon. Karen Casey

Mr. Patrick Dunn

Mr. Sterling Belliveau

Mr. Charles Parker

Mr. Wayne Gaudet

Mr. Leo Glavine

Mr. Harold Theriault

[Hon. Leonard Goucher replaced Hon. Karen Casey]

[Mr. Keith Colwell replaced Mr. Wayne Gaudet]

In Attendance:

Ms. Jana Hodgson

Legislative Committee Clerk

Mr. Gordon Hebb

Chief Legislative Counsel

Mr. Neil Ferguson

Legislative Counsel

WITNESS

Canadian Coast Guard

Ms. Nancy Hurlburt

Assistant Commissioner

In Attendance

Fisheries and Oceans Canada

Mr. George Da Pont

Commissioner, Canadian Coast Guard

Mr. Gary Sidock

Director General, Fleet, Canadian Coast Guard

Mr. Daniel Roussy

Senior Counsel, Department of Justice Canada

Mr. Thomas Donovan

Legal Counsel, Cox & Palmer

Mr. Stephen Bornais

Communications Manager

[Page 1]

HALIFAX, TUESDAY, SEPTEMBER 16, 2008

STANDING COMMITTEE ON RESOURCES

9:00 A.M.

CHAIRMAN

Mr. John MacDonell

MR. CHAIRMAN: I think, if it's okay with the members, I'd like to get started. I think the fact that our presenter was here earlier than us, I don't think there's much point in holding off any longer. I want to say welcome to Assistant Commissioner Nancy Hurlburt, really pleased to have you here today.

The usual format is that the members of the committee will introduce themselves and then the floor is open to you, so we would ask you to introduce yourself for recording purposes, as much as anything else, and you can also introduce the people you have with you. At any point that you want - I'm not sure what you have planned for the presentation, whether you're going to do it all or somebody else is going to share with you but certainly when it comes to answering questions, if you want to refer to somebody else, that would be fine. I think it would only be your legal counsel who couldn't present to the committee but obviously can present to you.

So anyway, we'll start with Mr. Belliveau and we'll come around.

[The committee members introduced themselves.]

MR. CHAIRMAN: The floor is yours.

MS. NANCY HURLBURT: Hello, I'm pleased to be here. I'm Nancy Hurlburt, the Assistant Commissioner for the Maritimes Region of the Canadian Coast Guard. I have with me, to my left, Daniel Roussy, who is our legal counsel from Justice Canada and to my right, Thomas Donovan, who is the legal counsel from Cox & Palmer.

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[Page 2]

With me today - there are a few people with me - we have our communications manager, Stephen Bornais, for the Maritimes Region; the director general of our fleet from headquarters, Gary Sidock; and the commissioner of the Canadian Coast Guard, George Da Pont, from Ottawa.

So I have a few opening comments.

MR. CHAIRMAN: You go right ahead.

MS. NANCY HURLBURT: Now that I see we have a presentation, I could have given you a nice pictorial overview of some of the services we provide, because we're pretty proud of the services we provide at the Canadian Coast Guard. But I didn't prepare for that, so I have just a few opening comments that will only take a few minutes.

As I said, my name is Nancy Hurlburt, Assistant Commissioner for the Maritimes Region of the Canadian Coast Guard. I'm here today pursuant to a warrant issued by this committee on June 20, 2008, regarding the committee's interest in the redeployment of Canadian Coast Guard icebreakers Louis St. Laurent and Terry Fox from Nova Scotia to Newfoundland and Labrador.

The subject of the redeployment has been previously discussed before members of the federal Parliament, particularly the Standing Committee on Fisheries and Oceans and the Senate Committee on National Finance. These proceedings are all matters of public record, maintained by Hansard, and may have already been reviewed by members of this committee.

In addition to the federal committee proceedings, which are a matter of public record, this committee was provided with a package of materials from the Coast Guard on June 30, 2008. This package contained all of the information

relevant to the decision to relocate the icebreakers. This information is also in the public domain. It was provided to this committee in the spirit of co-operation.

It is the view of the Canadian Coast Guard, and I also understand this committee, that I'm not compellable to answer questions from members of the committee that are under federal jurisdiction. The Government of Canada is of the opinion that the subjects previously reviewed by the parliamentary committees, as well as the information contained in the package previously provided to you, generally relate to matters of federal jurisdiction and are therefore not appropriate subject matter for review by this committee.

While members of this committee are free to review the material, I have been instructed not to provide evidence in this regard, pending a judicial determination on the warrant, which is scheduled to be heard on November 12, 2008. I hope you will appreciate that I will only be able to respond to questions that do not fall under federal jurisdiction. I have counsel present, with whom I will consult to determine whether questions posed by the

[Page 3]

members relate to the federal sphere. Further, as a public servant, I cannot offer opinions or views on policy decisions or on federal decision-making processes. So now I welcome your questions.

MR. CHAIRMAN: Well, I sure have one but I guess I would like to refer to the members of the committee first. Mr. Belliveau.

MR. STERLING BELLIVEAU: I definitely have a question but I don't think - I'll definitely try to ask the question. For the record, Mr. Chairman, if I can, I think the decisions that we saw unfold about removing these icebreakers and relocating them to Newfoundland and Labrador, I think a lot of fishermen across Nova Scotia questioned the motivation behind that. I think that many fishermen feel these were moved more for the safety of political MPs in Newfoundland and Labrador than the safety of fishermen across Nova Scotia and the Atlantic Provinces. To me, that's clear.

I think the question, for the record, I would like to know how this decision was ultimately reached. I want to put this on the record for the people that I represent, which is a strong fishing community. I've had the privilege of looking at St. John's, Newfoundland and Labrador, and I've observed that particular area is one of the richest areas where we have a lot of supply vessels that are frequent with the offshore oil and gas. Mr. Chairman, those supply vessels are equipped for firefighting, search and rescue, and I can go into great length. I mean, those particular vessels are frequent to that water so to me, any decision where you're removing two of these search and rescue vessels from the Halifax area, I think - pardon the pun here - it raises some alarm bells for a lot of people in Atlantic Canada, particularly in southwest Nova Scotia.

The point I'm trying to make here is that if you look back, in 1990-91 there was a cod moratorium put in place in Atlantic Canada. The majority of activity in our ground fisheries, I suggest to you, is in southwest Nova Scotia and it's still there today, a very active fishing, it is the most active fishery in the Atlantic Provinces.

I guess I'm just putting this out as a question. If you kind of look at restructuring where these vessels were going to be deployed and knowing that you have probably the most active fishery in Atlantic Canada in southwest Nova Scotia - and I also want to point out, Mr. Chairman, that from Sambro, I can basically throw a rock out this window to where the District 33 lobster fishery starts off of Sambro and goes around to southwest Nova Scotia, Baccaro Point; District 34 lobster starts there and goes around to Digby; and we have the Digby area, District 35, including up to Grand Manan.

[9:15 a.m.]

TAB 43



**Legislative Assembly
of Ontario**

Second Session, 39th Parliament

**Assemblée législative
de l'Ontario**

Deuxième session, 39^e législature

**Official Report
of Debates
(Hansard)**

**Journal
des débats
(Hansard)**

Thursday 20 May 2010

Jeudi 20 mai 2010

Speaker
Honourable Steve Peters

Président
L'honorable Steve Peters

Clerk
Deborah Deller

Greffière
Deborah Deller

of Lagoon City. They are over here in the members' gallery. And just because they have red hats on doesn't mean they're Liberals.

Hon. John Wilkinson: I would like to introduce to the Legislature Amanda Singh, who has joined our office at the ministry. Welcome to Queen's Park.

Mr. Ted McMeekin: I'd like to introduce Jaafar Oleichie, who is the cousin of our page Jacob Alaichi. He's here today, I understand, so we would like to welcome him.

The Speaker (Hon. Steve Peters): I would like to take this opportunity, on behalf of the member from Ottawa-Vanier and page Caroline Robertson, to welcome her father, Hugh Robertson, to the members' gallery today. Welcome to Queen's Park.

On behalf of the leader of the official opposition and member for Niagara West-Glanbrook, I'd like to welcome the grade 9 class from Heritage Christian School who are visiting Queen's Park today. Welcome.

DISCLOSURE OF CONFIDENTIAL INFORMATION

The Speaker (Hon. Steve Peters): On Monday, May 17, the third party House leader, the member for Welland, Mr. Kormos, raised a point of privilege concerning reports in the press about the recruitment process for the position of Ombudsman of Ontario. The member alleges that the leaks to the press of information about this confidential process constitute a contempt of the Legislature, and furthermore that published statements allegedly made about the current Ombudsman of Ontario are libellous and slanderous. The House leader for the official opposition, Mr. Yakubuski, and the government House leader, Ms. Smith, also spoke to the point of privilege.

An important fact in this matter is that the parent acts of the various officers of the Legislature are silent with respect to the method of recruiting officers. The officers are all appointed by the Lieutenant Governor in Council, on address of the assembly, but what is not spelled out is the process for the assembly itself to originate such an address. Therefore, in strictly procedural terms, the address is proposed with notice as a substantive government motion and, upon passage by the assembly, the Lieutenant Governor, on advice of cabinet, is in a position to effect the appointment of the parliamentary officer in a manner consistent with the stated wishes of the Legislative Assembly.

Over time, ways have been found to involve members of this House in the recruitment of various parliamentary officers, and within the last 10 years or so it has been the case that the Speaker has been called upon, through what one might call "the usual channels," to compose a panel of three members, one from each recognized party, and chaired by the Speaker, to perform this task. This informal approach was again put to use on several very recent occasions to deal with pending vacancies in the positions of the Ombudsman, the Integrity Commissioner and the Environmental Commissioner.

I consider it important to recount the general circumstances surrounding these recruitment panels because it confirms that, although a process of some long standing, it is an informal process that comes into being through the negotiations and the co-operation of the parties in this House. Its purpose is to involve the House in the selection of its own officers, to the extent possible, with the intent that the selection panel is able to recommend a candidate for appointment.

The member for Welland in his submissions likened this panel to a legislative committee, and asserted that the breach of confidentiality that he alleges has occurred is subject to the same potential remedies that would be in play in the case of, say, a prematurely released report of a committee of this House. The question for the Speaker, then, is, does this hiring panel have the same status of a committee of this Legislature?

No motion or other formal action of this assembly gave life to the panel. It had no independent authority, as a House-appointed legislative committee would have had, such as those conferred by the Legislative Assembly Act or the standing orders. It was an ad hoc panel of the members of the Legislative Assembly, but it was not a committee of the Legislative Assembly. The difference is substantive. A parliamentary committee is a creature of this House, subservient to the instructions of this House, and able to report only to this House. An unauthorized or premature release of a committee report or in camera proceedings has indeed been found on certain occasions in this Legislature and in others to be a prima facie breach of the privileges of this Legislature.

The status of this panel was informal. While it engaged itself in an important advisory role to the guiding minds and leadership of the House, it was not answerable or accountable to the House per se. Indeed, it might be likened to the parliamentary caucuses or the House leaders' group, each of which consists of members of the House and meets regularly to discuss matters of parliamentary business. These are not direct creations of the House, though, and are not subject to the conventions of parliamentary privilege, as a parliamentary committee indisputably is. Unlike a committee of the House, whose existence and scope of activity is conferred only by the House, no such restrictions attach to the informal bodies I have just mentioned.

That is not to say, however, that the hiring panel's deliberations should have been subject to any less rigorous an observance of confidentiality than should a fully fledged legislative committee. As chair of the panel, I can assure everyone that the existence of press coverage about the panel's activities, regardless of its level of accuracy, is extremely distressing and disappointing.

The panel as a whole had a valid expectation that the confidentiality of its proceedings, discussions and decisions were to be held in confidence. Each member of the panel was justifiably entitled to a similar expectation and had a coexistent and mutual obligation to ensure it. This is not so because of the status of the panel, whether it be

a parliamentary body or not, but because of the nature of the panel's work: a human resources assignment.

1040

From a normative point of view, in this case, privilege is beside the point. Nevertheless, what is before us is a matter of privilege. For the reasons already cited, though, I cannot find that a *prima facie* case has been made out.

Finally, the member for Welland essentially framed his point of privilege within the larger question of contempt and whether a matter of libel or slander is at play in this issue. As I'm sure the member can appreciate, allegations of libel are only that, and it is certainly not to the Speaker to adjudicate them.

It is, however, possible to imagine that an attack or obstruction of a parliamentary officer could give rise to a finding of contempt, in the proper scenario. The member for Welland has furnished the Speaker with numerous press reports to support his point. However, press reports are just that: reported—and sometimes paraphrased—commentary. They do not rise to the level of proved libel, and in the absence of a report or plea made to this House from one of its officers that such an occurrence has interfered with the performance of his or her duties, I cannot find that a *prima facie* case of contempt has been made.

I want to read a paragraph again, though, because I think it is important for all members: "That is not to say, however, that the hiring panel's deliberations should have been subject to any less rigorous an observance of confidentiality than should a fully fledged legislative committee. As chair of the panel, I can assure everyone that the existence of press coverage about the panel's activities, regardless of its level of accuracy, is extremely distressing and disappointing."

I want to thank the member for Welland, the official opposition House leader and the government House leader for their submissions on the matter.

ORAL QUESTIONS

TAXATION

Mr. Frank Klees: To the Acting Premier: Can the Acting Premier tell us how much revenue on gasoline and diesel the McGuinty Liberals will collect from the Premier's new HST tax?

Hon. Leona Dombrowsky: To the Minister of Finance.

Hon. Dwight Duncan: We have detailed, in great detail, the fact that, overall, Ontarians will pay less tax. They will pay less tax because—the member opposite does not want to acknowledge the substantial cuts in personal taxes, the substantial cuts in business taxes, the substantial cuts through the sales tax credit and the substantial increase in the Ontario child benefit.

The member will also see outlined, both in last year's budget and this year's budget, details with respect to our

projection on revenues received from the HST as compared to the PST.

Those are thorough, they're full and they explain to Ontario the importance of creating 600,000 net new jobs over the next 10 years.

The Speaker (Hon. Steve Peters): Supplementary?

Mr. Frank Klees: Since the Minister of Finance doesn't seem to have the answer, Mr. Kevin Gaudet of the Canadian Taxpayers Federation does, and he's here with us today. Just minutes ago, the CTF released its 12th annual gas tax honesty report. Assessing HST on gasoline prices that hover at about a dollar per litre, the report concludes: "For the government it works out to a minimum of \$1.6 billion in extra revenue...."

Based on that information, can the finance minister tell us what the impact of the HST burden will be on the average family in the province of Ontario?

Hon. Dwight Duncan: I reject the work as being partisan and don't accept either the underpinnings of it or its conclusions. Instead of Mr. Gaudet, I prefer to rely on the TD Bank econometrics, I prefer to rely on the Conference Board of Canada, on the Canadian Centre for Policy Alternatives—honest, unbiased and unvarnished opinions that recognize that overall, this tax package will create some 600,000 net new jobs over the next 10 years. It will identify another \$47 billion in capital—

The Speaker (Hon. Steve Peters): Thank you.

Interjections.

The Speaker (Hon. Steve Peters): I recognize that it is a long weekend and a constituency week coming up. I would be very happy to facilitate an early departure for anyone.

Final supplementary.

Mr. Frank Klees: The attempt by the finance minister to characterize the work of the Canadian Taxpayers Federation as partisan will be seen for what it is by the average Ontario family.

The Canadian Taxpayers Federation estimates that a family driving a mid-sized car will pay an average of \$246 a year more for the HST. Families in the GTA, rural Ontario and the north can expect the HST for fuel to cost them as much as \$400 more. In addition, the province of Ontario, as the minister will know, has a huge fleet of vehicles, and every dollar of additional HST on that fleet comes out of where? The average family's payment of their taxes and HST.

I ask the minister once again: How much more is this government prepared to take out of the pockets of hard-working Ontario families?

Hon. Dwight Duncan: Let me re-emphasize: I reject categorically that assertion by the member opposite and by the source he quoted. I prefer to rely on the good work of Mike Harris and Preston Manning with respect to this tax package. I prefer to rely on the support we had from Jim Flaherty, from Lois Brown, from Larry Miller, from Mike Wallace—from all of the federal Conservatives who I think have actually read and taken a balanced look at this issue.

TAB 44



Legislative Assembly
of Ontario

First Session, 40th Parliament

Assemblée législative
de l'Ontario

Première session, 40^e législature

Official Report of Debates (Hansard)

Journal des débats (Hansard)

Thursday 13 September 2012

Jeudi 13 septembre 2012

Speaker
Honourable Dave Levac

Clerk
Deborah Deller

Président
L'honorable Dave Levac

Greffière
Deborah Deller

the mandates and exercise the powers within the limits of their authority. Therefore, when the Standing Committee on Estimates considers the estimates, it does so pursuant to standing orders 59 and 60, and the order of the House referring the estimates to that committee; when it orders production of documents relevant to its mandate, it does so pursuant to standing order 110(b).

The right to order production of documents is fundamental to and necessary for the proper functioning of the assembly. If the House and its committees do not enjoy this right, then the accountability, scrutiny and financial functions of Parliament—which go to the core of our system of responsible government—would be compromised.

At meetings of the Standing Committee on Estimates, the Minister of Energy did not assert that the committee had no right to inquire into the matter before it or that it had no power to send for the documents in question. Rather, the minister indicated that legal and other considerations should militate against the production of all requested documents.

But as Speaker Milliken indicated in the following excerpt from the Afghanistan ruling, page 2,043 of Hansard for April 27, 2010, parliamentary privilege—of which the right to order production of documents is but one category—trumps such considerations:

“Procedural authorities are categorical in repeatedly asserting the powers of the House in ordering the production of documents. No exceptions are made for any category of government documents, even those related to national security.”

Furthermore, pages 978 and 979 of the second edition of the House of Commons Procedure and Practice provides as follows:

“The standing orders do not delimit the power to order the production of papers and records. The result is a broad, absolute power that on the surface appears to be without restriction. There is no limit on the types of papers likely to be requested; the only prerequisite is that the papers exist in hard copy or electronic format—and that they are located in Canada. They can be papers originating from or in the possession of governments, or papers the authors or owners of which are from the private sector or civil society (individuals, associations, organizations, etc.).

1040

“In practice, standing committees may encounter situations where the authors of or officials responsible for papers refuse to provide them or are willing to provide them only after certain parts have been removed. Public servants and ministers may sometimes invoke their obligations under certain legislation to justify their position. Companies may be reluctant to release papers which could jeopardize their industrial security or infringe upon their legal obligations, particularly with regard to the protection of personal information. Others have cited solicitor-client privilege in refusing to allow access to legal papers or notices.

“These types of situations have absolutely no bearing on the power of committees to order the production of

papers and records. No statute or practice diminishes the fullness of that power rooted in House privileges unless there is an explicit legal provision to that effect, or unless the House adopts a specific resolution limiting the power. The House has never set a limit on its power to order the production of papers and records. However, it may not be appropriate to insist on the production of papers and records in all cases.”

In many parliamentary jurisdictions, the House and its committees often accommodate or respect security, legal and public policy considerations; they often accept reasonable excuses for non-production. However, these authorities also indicate that a decision to be selective with respect to production is a decision for the House or the committee.

In the case at hand, the Standing Committee on Estimates made a production order despite the arguments made by the minister. My response to the government House leader’s claim that the committee did not turn its mind to the reasons for non-production proffered by the minister is,

—First, it was not obliged to do so.

—Second, the documents could have been offered to the committee under conditions that would both satisfy the needs of the committee and the minister: for instance, being received in a closed session without public disclosure, or in an acceptably redacted version. The Chair put forward this notion on one occasion, and it was passed by without comment by any member.

—Third, the government House leader in his written submission repeatedly points to what a difference a clear motion would have made to the Minister of Energy’s ability to fully respond to the committee’s request; that is, a motion that explicitly expressed the committee’s request even for documents that are highly commercially sensitive, for which solicitor-client privilege is claimed and/or are subject to litigation privilege. It is claimed that the minister could have and would have complied in that scenario. During the time in question, the minister could have requested the committee to pass just such a motion, making it explicit that it still demanded the requested documents, notwithstanding the minister’s wish to withhold disclosure for reasons stated in his May 30 reply to the committee’s original request. The record does not show that the minister proactively did so.

The Standing Committee on Estimates was unquestionably entitled to request the documents sought from the Minister of Energy, and in the end the minister had an obligation to comply with the committee’s call for those documents. The committee did not accept the minister’s reasons for withholding the document and persisted in its demand during an extended period of time.

I am therefore satisfied that a *prima facie* case of privilege has been established.

However, in the face of all of the submissions, the committee transcripts and its report to the House, it seems possible to me that, but for the lack of frank communication, this matter might have been settled in the estimates committee some time ago. Further, given that

TAB 45



Legislative Assembly
of Ontario

Second Session, 40th Parliament

Assemblée législative
de l'Ontario

Deuxième session, 40^e législature

**Official Report
of Debates
(Hansard)**

**Journal
des débats
(Hansard)**

Tuesday 25 March 2014

Mardi 25 mars 2014

Speaker
Honourable Dave Levac

Clerk
Deborah Deller

Président
L'honorable Dave Levac

Greffière
Deborah Deller

is a principal cellist with the Vancouver Symphony Orchestra, Ari Barnes.

Mr. Kevin Daniel Flynn: I'd like to welcome to Queen's Park today a very strong member of the business community in Oakville, Mr. John Vail.

Mr. Wayne Gates: I'd like to congratulate Jane Oleksiw for being assigned page captain for the day in the Legislature. Jane is a grade 8 student at St. Michael Catholic Elementary School in Virgil, just outside of Niagara-on-the-Lake in the great riding of Niagara Falls. Today I would also like to welcome her parents, who are up there in the gallery, Bob and Tina Oleksiw; their daughter Julia; and Jane's friend Anna Smyth. Thank you very much for coming.

Ms. Peggy Sattler: I would like to welcome to the gallery a group of students, many of them from the University of Toronto, who are engaged in a variety of research projects on post-secondary education for the Higher Education Quality Council of Ontario.

Interjections.

The Speaker (Hon. Dave Levac): We are introducing guests, and it would be nice to make sure that we didn't hear any heckling while we were introducing our guests.

Interjection.

The Speaker (Hon. Dave Levac): And that includes the member from Renfrew.

The member from Beaches–East York.

Mr. Michael Prue: I have six people I would like to introduce today. Ils sont ici à la législature pour écouter les questions : Anne Godbout, Gisèle Rousseau, André Choquet, Verity Crew-Nelson, Danielle Lamothe et Lynda Rinkenbach. Bienvenue à la législature.

Mr. Todd Smith: Point of order.

The Speaker (Hon. Dave Levac): A point of order from the member for Prince Edward–Hastings.

Mr. Todd Smith: I appreciate that. I know that today the Minister of Municipal Affairs is actually going to be officially resigning from the Legislature. We wish her the best of luck—

The Speaker (Hon. Dave Levac): That's not appropriate.

Minister of the Environment.

Hon. James J. Bradley: I would like to welcome the family of page Milana Thibodeau Morris: father, Rod Morris; mother, JoAnne Thibodeau; and sister, Arielle Thibodeau Morris. Please welcome them to the Legislative Assembly.

The Speaker (Hon. Dave Levac): We welcome our guests.

RELEASE OF DOCUMENTS

The Speaker (Hon. Dave Levac): On Thursday, March 20, 2014, the government House leader, having provided the required notice under standing order 21(c), rose on a point of privilege regarding a question posed to the Minister of Finance during oral questions on Tuesday, March 18. The government House leader alleged that the member from Nipissing, while posing his ques-

tion to the Minister of Finance, knowingly "disclosed the contents of a confidential committee document" and, as a result, had committed a contempt of the Legislature.

In making his submission, the government House leader argued that the member for Nipissing disregarded an order of the Standing Committee on Estimates which protected certain documents the committee received from the Ministry of Finance as confidential. The House leader also stated that this potential breach of privilege was raised in the House because the Standing Committee on Estimates "is not currently sitting," and that it was brought forward at the earliest opportunity, given the need to verify the accusation.

The member for Nipissing, in both his written and oral submission on this matter, contended that the information contained in his question was sourced from a set of "redacted documents that were to be made public" by the committee under the same committee order referred to by the government House leader. He also argued that this issue should have been properly raised at the Standing Committee on Estimates and that, in his opinion, it was not raised in a timely manner.

I am not concerned with the time taken to raise this matter and find that it was reasonable in the circumstances, and for the reasons given by the government House leader.

However, after reading and hearing the submissions made on this point of privilege, the Speaker is in the end presented with conflicting opinions, but without the means to reconcile them. This power rests with the Standing Committee on Estimates, which, as the custodian of the documents in question, is best able to decide if the allegation of improper disclosure is correct, and it can bring this matter properly before the House by adopting and presenting a report, if it chooses to do so.

As to the assertion that the Standing Committee on Estimates is not currently sitting, in fact, standing committees are struck for the duration of a Parliament. Although this committee has completed its consideration of last year's estimates, it can meet on a matter as important as members' privileges, and it is the proper starting point if this matter is to be pursued.

The government House leader's point of privilege not having been preceded by these necessary steps, I must find that it has been prematurely brought to the attention of this House.

Interjections.

The Speaker (Hon. Dave Levac): Order, please.

It is now time for oral questions.

ORAL QUESTIONS

FISCAL ACCOUNTABILITY

Mr. Victor Fedeli: My question is for the Premier. There is a disturbing scenario playing out right now. Last October 6, your government failed to deliver the long-

TAB 46



[Legislative Assembly of Ontario \(www.ola.org/en\)](http://www.ola.org/en) » [Legislative business \(www.ola.org/en/legislative-business\)](http://www.ola.org/en/legislative-business) » Standing orders

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(www.ola.org)

Standing Orders of the Legislative Assembly of Ontario

October 2021

Previous Edition — September 2021

The current edition includes amendments to the Standing Orders adopted by the Assembly on October 21, 2021 regarding the duration of Opposition Days based on the commencement time of the Afternoon Routine.

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(www.ola.org) **Standing Orders of the Legislative Assembly of Ontario**

I. CONDUCT OF BUSINESS

Business of House conducted according to Standing Orders

1. (a) The proceedings in the Legislative Assembly of Ontario and in all Committees of the Assembly shall be conducted according to the following Standing Orders.

Purpose

(b) The purpose of these Standing Orders is to ensure that proceedings are conducted in a manner that respects the democratic rights of members,

1. to submit motions, resolutions and bills for the consideration of the Assembly and its Committees, and to have them determined by democratic vote;
2. to debate, speak to, and vote on motions, resolutions and bills;
3. to hold the government accountable for its policies; and
4. collectively, to decide matters submitted to the Assembly or a Committee.

Contingencies unprovided for

(c) In all contingencies not provided for in the Standing Orders the question shall be decided by the Speaker or Chair and, in making the ruling, the Speaker or Chair shall base the decision on the democratic rights of members referred to in clause (b). In doing so the Speaker shall have regard to any applicable usages and precedents of the Legislature and Parliamentary tradition.

Participation of members with disabilities

2. The Speaker may alter the application of any Standing or Special Order or practice of the House, other than those that deal with the number of times or duration of time a member may speak, the timing of proceedings or the time allotted to proceedings, in order to permit the full participation in the proceedings of the House of any member with a disability.

Definitions

3. For the purpose of these Standing Orders,

“Board of Internal Economy” means the Board of Internal Economy established by the Legislative Assembly Act. (“Commission de régie interne”)

Member not to interrupt other member

(b) When a member is speaking, no other member shall interrupt such member, except on a question of order.

Member not to pass between chair and Mace

(c) Members shall take care not to pass between a member who is speaking and the chair, or between the chair and the Mace.

Electronic devices

22. The use of laptops, tablets and smartphones is permitted in the Chamber and committee rooms provided they are operated silently, do not impair decorum and are not used as a telephone, recording device, camera or prop.

V. PRIVILEGE**Privileges**

23. (a) Privileges are the rights enjoyed by the House collectively and by the members of the House individually conferred by the Legislative Assembly Act and other statutes, or by practice, precedent, usage and custom.

Taken up immediately

(b) Once the Speaker finds that a prima facie case of privilege exists, it shall be taken into consideration immediately.

Notice to Speaker

(c) Any member proposing to raise a point of privilege, other than one arising out of proceedings in the Chamber during the course of a Sessional day, shall give to the Speaker a written statement of the point at least 1 hour prior to raising the question in the House.

Discussion

(d) The Speaker may rule that a prima facie case of privilege does not exist on the basis of the written statement referred to in clause (c) and, despite Standing Order 14(c), may do so without allowing discussion from any member. (www.ola.org)

VI. RULES OF DEBATE**Rising to speak in English or French**

24. (a) Every member desiring to speak must rise in his or her place and address the Speaker, in either English or French.

Order of speaking

(b) When 2 or more members rise to speak, the Speaker shall call upon the member who, in the Speaker's opinion, rose first in his or her place.

Members called to order

(c) A member called to order shall sit down, but may afterwards explain. The Speaker shall decide on the case, without debate, and the decision of the Speaker shall be final.

Recognition of independent member

(d) Subject to the Standing Orders and any other Order of the House, nothing prevents the Speaker or Chair of the Committee of the Whole House from recognizing an independent member to speak.

Matters out of order in debate

25. In debate, a member shall be called to order by the Speaker if he or she:

Member speaks twice to question

- (a) Speaks twice to a question, except in explanation of a material part of his or her speech in which he or she may have been misunderstood, in which case the member may not introduce a new matter.

Directs speech to other matters

- (b) Directs his or her speech to matters other than,
 - (i) the question under discussion; or
 - (ii) a motion or amendment he or she intends to move; or
 - (iii) a point of order.

Repetition

- (c) Persists in needless repetition or raises matters that have been decided during the current Session. (www.ola.org)

Reading from Hansard

- (d) In the opinion of the Speaker, refers at length to debates of the current Session, or reads unnecessarily from verbatim reports of the Legislative Debates or any other document.

Anticipation

- (e) Anticipates any matter already on the Orders and Notices Paper for consideration.

Reflects on previous vote

- (f) Reflects upon any previous vote of the House unless it is the member's intention to move that it be rescinded.

Matters sub judice

- (g) Refers to any matter that is the subject of a proceeding,
 - (i) that is pending in a court or before a judge for judicial determination; or
 - (ii) that is before any quasi-judicial body constituted by the House or by or under the authority of an Act of the Legislature, where it is shown to the satisfaction of the Speaker that further reference would create a real and substantial danger of prejudice to the proceeding.

Allegations against member

- (h) Makes allegations against another member.

Imputes false or unavowed motives

- (i) Imputes false or unavowed motives to another member.

Deliberate falsehood

- (j) Charges another member with uttering a deliberate falsehood.

Abusive or insulting language

- (k) Uses abusive or insulting language of a nature likely to create disorder.

(c) Disorder in a Committee of the Whole House can only be censured by the House on receiving a report from the Committee.

May not adjourn

106. A Committee of the Whole House may not adjourn its own meeting or the consideration of any matter to a future date, but this Standing Order shall not affect the application of Standing Order 17.

Report progress

107. A motion may be moved during the proceedings of a Committee of the Whole House that the Chair report progress and ask for leave to meet again, and such question shall be put forthwith and decided without amendment or debate.

Motion for Chair to leave chair

108. (a) A motion that the Chair of a Committee of the Whole House leave the chair is always in order and shall be put forthwith and decided without amendment or debate.

Procedure if carried

(b) If such a motion is carried, further proceedings of a Committee of the Whole House on the matter or bill then under consideration shall be superseded; but the matter or bill may, on motion with notice, be revived and the proceedings shall be resumed at the point where they were interrupted. Such a motion shall not prejudice or in any way affect any other matters or bills referred to the Committee of the Whole House.

Motion defeated

(c) If such a motion is defeated, no other such motion shall be made unless some intermediate proceeding has taken place.

Amendments in Committee of the Whole House

109. It shall be an instruction to the Committee of the Whole House to which bills may be committed that it has the power to make such amendments therein as it thinks fit, if they are relevant to the subject-matter of the bill, but if any such amendments are not within www.ola.org the title of the bill it shall amend the title accordingly and shall report the bill to the House.

Minister occupies front row seat

Staff on floor

110. When the House is meeting in Committee of the Whole House to consider bills, the minister or parliamentary assistant in charge of a bill being considered by the Committee of the Whole House may occupy a seat in the front row of the House and may have up to 3 staff members seated in front of him or her to supply information to the minister or parliamentary assistant as required.

XX. COMMITTEES

Membership appointed

111. Within the first 10 Sessional days following the commencement of a Parliament, the membership of the following Standing Committees shall be appointed, on motion with notice, for the duration of the Parliament:

Standing Committees listed

- (a) Standing Committee on Justice Policy;
- (b) Standing Committee on Social Policy;
- (c) Standing Committee on General Government;
- (d) Standing Committee on Estimates;

(e) Standing Committee on Finance and Economic Affairs which is empowered to consider and report to the House its observations, opinions and recommendations on the fiscal and economic policies of the Province and to which all related documents shall be deemed to have been referred immediately when the said documents are tabled;

(f) Standing Committee on Government Agencies which is empowered to review and report to the House its observations, opinions and recommendations on the operation of all agencies, boards and commissions to which the Lieutenant Governor in Council makes some or all of the appointments, and all corporations to which the Crown in right of Ontario is a majority shareholder, such reviews to be made with a view to reducing possible redundancy and overlapping, improving the accountability of agencies, rationalizing the functions of the agencies, identifying those agencies or parts of agencies which could be subject to sunset provisions, and revising the (www.ola.org) mandates and roles of agencies, and to review the intended appointments of persons to agencies, boards and commissions and of directors to corporations in which the Crown in right of Ontario is a majority shareholder, excluding reappointments and appointments for a term of 1 year or less, according to the following procedures:

1. A minister of the Crown shall lay on the Table a certificate stating that the Lieutenant Governor in Council intends to appoint a person to an agency, board or commission or to the board of directors of a corporation, together with a copy of the position description and a summary of the person's qualifications, which documents shall be deemed to be referred to the Committee.

2. Upon receipt of a certificate as referred to in paragraph 1, the Clerk of the Committee shall distribute to each member of the Sub-committee on Committee Business a list of intended appointees in respect of whom a certificate has been received.

3. The Sub-committee shall meet at its own initiative, at the request of the Committee, or at the request of any member of the Sub-committee, to select from among the intended appointees referred to in paragraph 1 those intended appointees the Committee will review. Each member of the Sub-committee, other than the Chair, may choose one or more of the intended appointees for review from the certificates provided by the Clerk of the Committee.

4. The Sub-committee shall report to the Committee on the intended appointees for review. Upon receiving the report, the Committee shall determine a date for the review of the intended appointees as selected by the members of the Sub-committee. The report shall specify the amount of time allocated for the consideration of each intended appointee and the date on which each will be reviewed. An equal amount of time shall be allocated for review of each member's selections, and where a member of the Sub-committee has selected more than one intended appointee the time available to review that member's selections shall be allocated among his or her selections.

5. Upon notice from the Clerk of the Committee that an intended appointee has been selected for review, the minister shall ensure that the Committee receives a copy of the intended appointee's résumé or biographical information and a description of the responsibilities of the position.

(www.ola.org) 6. A Sub-committee member may choose to defer the consideration of one or more of the intended appointees that the member has chosen until a future meeting of the Committee at which intended appointees are to be reviewed so long as the consideration of the intended appointee has not previously been deferred.

7. In reviewing an intended appointee, the Committee shall not call as a witness any person other than the intended appointee.

8. At the conclusion of the meeting held to review an intended appointment, the Committee shall determine whether or not it concurs in the intended appointment. Any member may request that the Committee defer its determination to the next meeting of the Committee, but in any event no later than 7 calendar days. In its report, the Committee shall state whether or not it concurs in the intended appointments and may state its reasons.

9. Whether or not the House stands adjourned, the Committee shall release its report by depositing it the same day with the Clerk of the House and upon receipt of the report by the Clerk the report shall be deemed to be adopted by the House.

10. A report that the Committee will not review an intended appointee shall be deemed to have been made by the Committee and adopted by the House in any of the following cases:

(a) a report respecting the intended appointee has not been made by the Committee within 30 calendar days following the day on which the minister tables the certificate referred to in paragraph 1,

(b) the Sub-committee does not at its first meeting following the day on which the minister tables the certificate select the intended appointee for review, or

(c) the intended appointee has not been selected for review by the Sub-committee within 14 days following the day on which the minister tabled the certificate.

11. The Committee by unanimous agreement may extend any of the deadlines in paragraph 10.

12. The Clerk of the Committee shall give the minister who tabled the certificate written notification of any decision (www.ola.org) respecting the appointment made by the Committee or the Sub-committee on Committee Business.

13. During any adjournment of the House that exceeds 1 week, the Committee shall meet on such day or days as may be determined by the Sub-committee, but in any event not more than 3 times per month.

(g) Standing Committee on the Legislative Assembly which is empowered to review on its own initiative or at the request of the Speaker or the direction of the House and to report to the House its observations, opinions and recommendations on the Standing Orders of the House and the procedures in the House and its Committees; to advise the Speaker and the Board of Internal Economy, and to report to the House its observations, opinions and recommendations on the administration of the House and the provision of services and facilities to members; and to act as an advisory body to the Speaker and the House on the television broadcast system and to conduct reviews, at least on an annual basis, of the televising of the legislative proceedings and of the guidelines established by the House with respect to the television broadcast system; and to be the Committee which is empowered to review and consider from time to time the Reports of the Ombudsman as they become available; and, as the Committee deems necessary, pursuant to subsection 15 (1) of the Ombudsman Act, to formulate general rules for the guidance of the Ombudsman in the exercise of his or her functions under the Act; and to report thereon to the Legislature and to make such recommendations as the Committee deems appropriate;

(h) Standing Committee on Public Accounts which is empowered to review and report to the House its observations, opinions and recommendations on the Report of the Auditor General and the Public Accounts, which documents shall be deemed to have been permanently referred to the Committee as they become available; and

(i) Standing Committee on Regulations and Private Bills to be the Committee to which all private bills, other than Estate bills or bills providing for the consolidation of a floating debt or renewal of debentures, other than local improvement debentures, of a municipal corporation, shall be referred after first reading; and to be the Committee provided for by section 33 of Part III (Regulations) of the Legislation Act, 2006, and having the terms of reference as set out in that section, namely: to be the Committee to which all regulations stand permanently referred; and to examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power without reference to the merits of the (www.ola.org) policy or objectives to be effected by the regulations or enabling statutes, but in so doing regard shall be had to the following guidelines:

(i) Regulations should not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute;

(ii) Regulations should be in strict accord with the statute conferring of power, particularly concerning personal liberties;

(iii) Regulations should be expressed in precise and unambiguous language;

(iv) Regulations should not have retrospective effect unless clearly authorized by statute;

(v) Regulations should not exclude the jurisdiction of the courts;

(vi) Regulations should not impose a fine, imprisonment or other penalty;

(vii) Regulations should not shift the onus of proof of innocence to a person accused of an offence;

(viii) Regulations should not impose anything in the way of a tax (as distinct from fixing the amount of a licence fee, or the like); and

(ix) General powers should not be used to establish a judicial tribunal or an administrative tribunal,

and the Committee shall from time to time report to the House its observations, opinions and recommendations as required by section 33 of Part III (Regulations) of the Legislation Act, 2006, but before drawing the attention of the House to a regulation or other statutory instrument, the Committee shall afford the ministry or agency concerned an opportunity to furnish orally or in writing to the Committee such explanation as the ministry or agency thinks fit.

Standing Orders observed

Exception

112. In any Standing or Select Committee, the Standing Orders of the House shall be observed so far as may be applicable, except the Standing Orders limiting the number of times of speaking. Unless expressly provided by the Standing Orders or by unanimous consent, (www.ola.org) no member shall speak for more than 20 minutes at a time in any Standing or Select Committee.

TAB 47

Legislative
Assembly
of Ontario



Assemblée
législative
de l'Ontario

Votes and Proceedings

No. 13

Procès-verbaux

Nº 13

1st Session
42nd Parliament

Wednesday
August 1, 2018

1^{re} session
42^e législature

Mercredi
1^{er} août 2018

**9:00 A.M.
PRAYERS**

**9 H
PRIÈRES**

The Speaker addressed the House:-

Le Président s'adresse à la Chambre :-

I beg to inform the House that, pursuant to Standing Order 71(c), the Member for Toronto—Danforth (Mr. Tabuns) and the Member for Scarborough—Guildwood (Ms. Hunter) have filed with the Clerk reasoned amendments to the motion for Second Reading of Bill 5, An Act to amend the City of Toronto Act, 2006, the Municipal Act, 2001 and the Municipal Elections Act, 1996.

The Order for Second Reading of Bill 5 may therefore not be called today.

ORDERS OF THE DAY

ORDRE DU JOUR

Motion regarding government priorities, as follows:

Motion concernant les priorités du gouvernement, comme suit :-

That, in the opinion of this House, the current government is a government for the people with a clear mandate to pursue policies that put more money in people's pockets; create and protect jobs; address the hydro crisis; reduce hospital wait times; and restore accountability and trust in government.

Debate resumed and after some time the House recessed at 10:15 a.m.

Le débat a repris et après quelque temps, à 10 h 15, la Chambre a suspendu la séance.

10:30 A.M.

10 H 30

ORAL QUESTIONS

QUESTIONS ORALES

The House recessed at 11:43 a.m.

À 11 h 43, la Chambre a suspendu la séance.

3:00 P.M.

15 H

MOTIONS

MOTIONS

On motion by Mr. Smith (Bay of Quinte),

Sur la motion de M. Smith (Baie de Quinte),

Ordered, That the following schedule for Committee meetings be established for the 42nd Parliament:

Standing Committee on Estimates may meet on Tuesdays from 9:00 a.m. to 10:15 a.m. and following Routine Proceedings to 6:00 p.m. and Wednesdays, following Routine Proceedings until 6:00 p.m.

Standing Committee on Finance and Economic Affairs may meet on Thursdays from 9:00 a.m. to 10:15 a.m. and from 2:00 p.m. to 6:00 p.m.

Standing Committee on General Government may meet on Mondays from 2:00 p.m. to 6:00 p.m. and Wednesdays from 4:00 p.m. to 6:00 p.m.

Standing Committee on Government Agencies may meet on Tuesdays from 9:00 a.m. to 10:15 a.m.

Standing Committee on Justice Policy may meet on Thursdays from 9:00 a.m. to 10:15 a.m. and from 2:00 p.m. to 6:00 p.m.

Standing Committee on the Legislative Assembly may meet on Wednesdays from 1:00 p.m. to 3:00 p.m.

Standing Committee on Public Accounts may meet on Wednesdays from 9:00 a.m. to 10:15 a.m. and from 12:30 p.m. to 3:00 p.m.

Standing Committee on Regulations and Private Bills may meet on Wednesdays from 9:00 a.m. to 10:15 a.m.

Standing Committee on Social Policy may meet on Mondays from 2:00 p.m. to 6:00 p.m. and Tuesdays from 4:00 p.m. to 6:00 p.m.

On motion by Mr. Smith (Bay of Quinte), Sur la motion de M. Smith (Baie de Quinte),
Ordered, That the following change be made to membership of the following Committee:

On the **Standing Committee on Social Policy**, Mr. Sabawy replaces Mr. Baber.

PETITIONS

Implementing minimum wage (Sessional Paper No. P-4) Mr. Yarde.

Toronto municipal elections (Sessional Paper No. P-18) Ms. Andrew and Ms. Stiles.

Rainbow District School Board (Sessional Paper No. P-21) M^{me} Gélinas.

PÉTITIONS

ORDERS OF THE DAY

Second Reading of Bill 4, An Act respecting the preparation of a climate change plan, providing for the wind down of the cap and trade program and repealing the Climate Change Mitigation and Low-carbon Economy Act, 2016.

Debate resumed and after some time,

With unanimous consent,

On motion by Mr. Walker,

Ordered, That the following changes be made in the Order of Precedence for Private Members' Public Business:-

M^{me} Gélinas assumes ballot item number 68;

Ms. Armstrong assumes ballot item number 8;

Mr. Walker assumes ballot item number 10;

Ms. Surma assumes ballot item number 35;

Ms. Hunter assumes ballot item number 21;

Mr. Gravelle assumes ballot item number 39; and

That the requirement for notice be waived for ballot item numbers 7 through 12.

ORDRE DU JOUR

Deuxième lecture du projet de loi 4, Loi concernant l'élaboration d'un plan sur le changement climatique, prévoyant la liquidation du programme de plafonnement et d'échange et abrogeant la Loi de 2016 sur l'atténuation du changement climatique et une économie sobre en carbone.

Le débat a repris et après quelque temps,

Avec le consentement unanime,

Sur la motion de M. Walker,

Il est ordonné que les changements suivants soient effectués dans l'ordre de priorité affaires d'intérêt public émanant des députés:-

Debate resumed and after some time the
House adjourned at 6:00 p.m.

Le débat a repris et après quelque temps, à 18
h, la Chambre a ajourné ses travaux.

le président

TED ARNOTT

Speaker

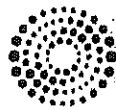
TAB 48

CANADA LAW BOOK

*Injunctions
and
Specific Performance*

LOOSELEAF EDITION

The Honourable
Mr. Justice Robert J. Sharpe
Court of Appeal for Ontario



THOMSON REUTERS®

November 2019

It is often said that an interlocutory injunction should not be granted where it would have the effect of granting the whole relief claimed in the action.³²⁷ However, it has also been said, quite properly it is submitted, that this is not an inflexible rule³²⁸ and, as already noted, there are many instances in which it is quite obvious that, for all practical purposes, the interlocutory order finally disposes of the action.³²⁹ 2.560

Interlocutory injunctive relief will not normally be granted where there is no prospect for a specific remedy being granted at the trial. 2.570 The rationale underlying interlocutory injunctions is the need to protect the plaintiff's ultimate right to an appropriate remedy and it will ordinarily be unnecessary to grant interlocutory relief unless there is at least some prospect of specific relief being granted at trial.³³⁰ The courts have, for example, declined to grant an interlocutory injunction to protect the plaintiff's position in respect

seems to be equally divided as between the parties, the injunction will not be granted"; *Ferguson and Lawson v. Paterson Steamships Ltd.*, [1950] 4 D.L.R. 525, [1950] O.W.N. 546 (H.C.J.). The *status quo* factor may influence the court to grant partial relief, as in *Berkey Photo (Canada) Ltd. v. Ohlig* (1983), 43 O.R. (2d) 518, 2 C.C.E.L. 113 (H.C.J.), where it was sought to enjoin a former director from entering into further relationships with former suppliers, customers and fellow employees. The *status quo* was held to be the existing business relationships at the time of the hearing of the application. A full injunction would have the effect of requiring the defendant to break contracts and the court was loath to do this until a final determination was made at trial. See also *Mitchell v. Mitchell* (1996), 146 Sask. R. 18 (Q.B.). See also *Romandale Farms Ltd. v. Markham (City)* (2018), 76 M.P.L.R. (5th) 346, 291 A.C.W.S. (3d) 852 (Ont. S.C.J.), citing this passage at para. 27.

³²⁷ *Dodd v. Amalgamated Marine Workers' Union* (1923), 93 L.J. Ch. 65 (C.A.); *New Brunswick Telephone Co. Ltd. v. Relph* (1979), 107 D.L.R. (3d) 727 at p. 731, 28 N.B.R. (2d) 596 (C.A.); *Board of Eston-Elrose School Unit No. 33 of Saskatchewan v. Saskatchewan Teachers' Federation* (1970), 14 D.L.R. (3d) 471, 75 W.W.R. 74 (Sask. Q.B.). In *Canada (Attorney General) v. Gould*, [1984] 1 F.C. 1119, 42 C.R. (3d) 78 (T.D.), rev'd F.C. *loc. cit.* p. 1133, 13 D.L.R. (4th) 485 (C.A.), aff'd [1984] 2 S.C.R. 124, D.L.R. *loc. cit.* p. 491n, a prisoner had been granted a mandatory interlocutory injunction to afford him the right to vote on the ground that the statutory exclusion of inmates violated s. 3 of the *Canadian Charter of Rights and Freedoms*. On appeal, this was reversed because the effect of the mandatory interlocutory injunction was to grant the full relief requested before trial. See also *Assn. des Parents ayants droit de Yellowknife c. Territoires du Nord-Ouest (Procureur général)*, [2015] 3 W.W.R. 490, 637 W.A.C. 180 *sub nom. Association des parents ayants droit de Yellowknife v. Northwest Territories (Attorney General)* (N.W.T.C.A.), leave to appeal refused 2015 CarswellNWT 78, 2015 CarswellNWT 79 (S.C.C.), where the court overturned an interlocutory mandatory injunction because it "was not, of course, an interim injunction at all . . . Rather this was a request for pretrial partial summary judgment" and the chambers judge erred by applying the test for an interlocutory injunction rather than summary judgment (at para. 7). The question of interlocutory relief in Charter cases is considered in greater detail later: see, *infra*, 3.1220 to 3.1330.

³²⁸ *Woodford v. Smith*, [1970] 1 W.L.R. 806 (Ch.).

³²⁹ *Supra*, 2.210-2.250.

³³⁰ *Elbaz v. Prince Edward Island* (2012), 1007 A.P.R. 178 at para. 15, 324 Nfld. & P.E.I.R. 178 (P.E.I.S.C.).

of a matter within the jurisdiction of an administrative board or tribunal on the grounds that no final injunction could be granted in such a case by a court.³³¹ However, it is also clear that this principle must be applied flexibly. For example, it is now well established that an injunction to restrain disposition of assets pending trial may be granted.³³² Here, there is no possibility of an injunction being granted at the trial and yet interlocutory relief is seen as appropriate since the same rationale, namely, protecting the plaintiff's position to obtain satisfactory remedial protection at trial, may be applied. Similarly, in cases involving long-term contracts, courts have seen fit to grant interlocutory injunctions although they were dubious that either specific performance or a final injunction would be awarded at the trial.³³³

(9) Other factors

2.580 Lord Diplock concluded his formula in the *American Cyanamid* case by stating, "I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases. *The instant appeal affords one example of this*"³³⁴ (emphasis added).

2.590 Lord Denning M.R. has suggested, almost with tongue in cheek, that the "special factors" qualification provides an escape from Lord Diplock's entire approach.³³⁵ However, it seems clear from the context, and from the application of the "special factors" considera-

³³¹ *Stevenson v. Air Canada* (1982), 132 D.L.R. (3d) 406, 35 O.R. (2d) 68 (Div. Ct.). See further, *infra*, 3.960 to 3.1000.

³³² *Infra*, 2.750 *et seq.*

³³³ See, e.g., *Evans Marshall & Co. v. Bertola S.A.*, [1973] 1 W.L.R. 349 (C.A.), at p. 380. See also cases cited, *infra*, 8.480.

³³⁴ *American Cyanamid*, *supra*, footnote 326, at p. 409.

³³⁵ In *Fellowes & Son v. Fisher*, *supra*, footnote 325, at pp. 132-3, Lord Denning M.R. referred to the exclusion of the *prima facie* case test and commented as follows:

I find it impossible to reconcile this statement with the statements in the House 10 years ago in *J.T. Stratford & Son Ltd. v. Lindley* [1965] A.C. 269. Yet the House did not even mention *J.T. Stratford & Son Ltd. v. Lindley*. I do not like to suggest that this was per incuriam. When I last made so bold as to make such a suggestion in *Broome v. Cassell & Co. Ltd.* [1971] 2 Q.B. 354; [1972] A.C. 1027, it was regarded as a piece of lèse-majesté. The House of Lords never does anything per incuriam. So what are we to do with two statements of principle by the House which are not reconcilable the one with the other?

Where then is the reconciliation to be found? Only in this: the House did say, at p. 409:

"there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

That sentence points the way.

See also *Bryanston Finance Ltd. v. De Vries (No. 2)*, [1976] Ch. 63 (C.A.), at p. 78, per Buckley L.J., for a broad view of the "special factors" consideration.

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CHAPTER 5: CONTROL BY PARLIAMENT OVER ITS AFFAIRS

229. Parliamentary freedom of speech guaranteed by article 9 is one facet of the broader principle that what happens within Parliament is a matter for control by Parliament alone. Such matters will not be reviewed by the courts.^[264] In a recent case the judicial committee of the Privy Council summed up the position:

‘So far as the courts are concerned, they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.’^[265]

This principle is usually known as ‘exclusive cognisance’: cognisance here bears its obsolete legal meaning of jurisdiction, or the right to deal with a matter judicially.^[266]

230. The principle manifests itself as a collection of related rights and immunities. It is perhaps these privileges particularly which must be measured against the test we set ourselves at the outset of our inquiry: is each right and immunity necessary today, in its present form, for the effective functioning of Parliament? does it balance fairly the needs of Parliament with the rights of the individual?

Right of each House to provide for its proper constitution

231. Each House has the right to provide for its proper constitution. The House of Lords alone decides any question relating to the succession to a peerage. The House of Commons may determine whether members of that House are qualified to sit and vote, although the right to determine whether members are duly elected has been transferred by statute almost wholly to the courts. The Commons retain the power to expel by simple resolution, unchallengeable in the courts. It also decides when a writ for a by-election shall be issued. A leading authority summarised the position as follows:

‘... the ordinary civil and criminal jurisdiction of the courts does not extend to determining the rights of members to sit in the House, and the courts equally have nothing to do with questions affecting its membership except in so far as they have been specially

designated by law to act in such matters . . .'.^[267]

This right is an attribute of a sovereign legislature. No change is called for here.

Right to judge lawfulness of own proceedings

232. Both Houses have long claimed, and succeeded in maintaining, the right to be the sole judges of the lawfulness of their own proceedings and to determine, or depart from, their own codes of procedure. Courts of law accept Parliament's claim that they have no right to inquire into the propriety of orders or resolutions of either House relating to their internal procedure or management. Except for purposes of statutory interpretation, the courts do not 'look behind the Act' or consider themselves competent to consider the processes within Parliament preparatory to enactment.^[268] With minor statutory exceptions^[269], the two Houses have a substantial measure of independence in the way in which they organise their business and regulate their internal organisation. Speaking in his judicial capacity in 1974 Lord Morris of Borth-y-Gest stated:

. . . the question of fundamental importance which arises is whether the court should entertain the proposition that an Act of Parliament can so be assailed in the courts that matters should proceed as though the Act or some part of it had never been passed. . . such doctrine would be dangerous and impermissible. It is the function of the courts to administer the laws which Parliament has enacted. In the processes of Parliament there will be much consideration whether a bill should or should not in one form or another become an enactment. When an enactment is passed there is finality, unless and until it is amended or repealed by Parliament. . . it must surely be for Parliament to lay down the procedures which are to be followed before a bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. . .'.^[270]

233. This ancient right remains of fundamental constitutional importance. The exclusive right of the two Houses to make and to vary their own rules of procedure protects the legislative supremacy of Parliament and the exclusive right of the Commons to grant aids and supplies.

Right to institute inquiries and call for witnesses and papers

234. The right to institute inquiries and require the attendance of witnesses and production of documents ('to send for persons, papers, and records') is part of the law and custom of Parliament. At least since Elizabethan times committees have been examining matters where witnesses were required to appear.^[271] Although committee inquiries concentrate on the scrutiny of government, and (in the case of the Commons particularly) on ensuring the proper and effective use of public money, investigations into other matters of public interest have always been an important element of select committee work. Evidence is usually taken in public and broadcast, and transcripts are published.

235. Committees usually work best when they seek evidence by co-operation with witnesses rather than confrontation. However, committees sometimes may need to use the powers given them by the House to require witnesses to attend and answer questions. In these circumstances it is important they should be seen to be fair in the treatment of those who take part in their proceedings. Attendance as a witness before a parliamentary committee can be a daunting experience, particularly for witnesses from outside government circles. Ministers and senior departmental officials are accustomed to committee proceedings, and are able to look after themselves, though even here committees should recognise the importance of fairness and restraint.

236. To other witnesses the procedure is unknown, the setting is imposing, and the environment can seem hostile. The ability to ask questions under parliamentary privilege, uninhibited by rules of evidence or other legal safeguards, carries with it special responsibilities. Special care needs to be exercised when committees question witnesses about conduct which may be the subject of criminal charges. In such cases witnesses should always have the right to legal representation, to know in advance any accusation they will be required to answer, and to see any evidence on which it is based.

237. We **recommend** that all those who participate in committee proceedings should have available to them, in advance, a clear statement of the powers of Parliament and their own rights in regard to them. Each House should prepare and issue to all potential witnesses a guide similar to that issued to all its witnesses by the New Zealand House of Representatives.^[272] An important part of this guide will be a clear statement of the conduct which constitutes contempt of Parliament and, therefore, if the contempt were serious enough, would cause Parliament to invoke its penal powers. The guide will supersede the briefs currently produced by the Commons for witnesses attending departmental select committees.

238. There is a long-standing convention in Parliament that one House does not compel the attendance of a member of the other House before its committees.^[273] The underlying rationale is the desire to avoid conflict between the two Houses. It means that a member of one House, in respect of what he says or does as a member of that House, is not accountable to the other House. The convention is all-embracing and can give rise to anomalies today. For instance, it means that a former minister can be required to attend a Commons committee if he remains a member of the House of Commons or if he leaves Parliament, but not if he is elevated to the House of Lords.

239. It is important that ministers and former ministers elevated to the House of Lords should attend select committees in the other House to answer questions relating to their periods in office. The work of these committees is an essential element of Parliament's scrutiny of the executive. We are not aware of any specific instance where the work of a select committee has been substantially impeded by this rule. Even so, we consider it is preferable that this convention, affecting as it does the relationship between the two Houses, should be examined afresh in the light of today's conditions (when former ministers frequently move from the Commons to the Lords). It would be much better to avoid the possibility of confrontation on this issue. We **recommend** that the procedure committees of the two Houses should investigate and report on the desirability of the convention in modern circumstances.^[274]

Right of each House to administer its internal affairs within its precincts

240. Each House has the right to administer its internal affairs within the parliamentary precincts. The courts have accepted this principle in full measure. In *Bradlaugh v Gosset*^[275] the court declined to intervene when the House of Commons refused to allow a member who was an avowed atheist to take the oath even though he was required to do so by statute.

241. In one important respect this heading of privilege is unsatisfactory. 'Internal affairs' and equivalent phrases are loose and potentially extremely wide in their scope. On one interpretation they embrace, at one edge of the spectrum, the arrangement of parliamentary business and also, at the other extreme, the provision of basic supplies and services such as stationery and cleaning. This latter extreme would be going too far if it were to mean, for example, that a dispute over the supply of photocopy paper or dismissal of a cleaner could not be decided by a court or industrial tribunal in the ordinary way. Here, as elsewhere, the purpose of parliamentary privilege is to ensure that Parliament can discharge its functions as a legislative and deliberative assembly without let or hindrance. This heading of privilege best serves Parliament if not carried to extreme lengths.

Precincts of Parliament not a haven from the law

TAB 50



House of Lords
House of Commons
Joint Committee on
Parliamentary Privilege

Parliamentary Privilege

Report of Session 2013–14

*Report, together with formal minutes and an
appendix*

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The Joint Committee on Parliamentary Privilege

The Joint Committee on Parliamentary Privilege was appointed by the House of Commons on 3 December 2012 and by the House of Lords on 9 January 2013 to consider the Green Paper on Parliamentary Privilege (Cm 8318) and to report to both Houses by 25 April 2013, and subsequently, following an extension (granted on 25 March 2013 by the House of Commons and on 27 March 2013 by the House of Lords), by 28 June 2013.

Membership

HOUSE OF LORDS

Lord Bew (Crossbench)
Lord Brabazon of Tara (Chair) (Conservative)
Lord Davies of Stamford (Labour)
Baroness Healy of Primrose Hill (Labour)
Lord Shutt of Greetland (Liberal Democrat)
Baroness Stedman-Scott (Conservative)

HOUSE OF COMMONS

Sir Menzies Campbell (Liberal Democrat)
Mr William Cash (Conservative)
Thomas Docherty (Labour)
Tristram Hunt (Labour)
Mr Bernard Jenkin (Conservative)
Mrs Eleanor Laing (Conservative)

Powers

The Committee had the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament was prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee had power to agree with the Commons in the appointment of a Chairman.

Publications

The Report of the Committee was published by The Stationery Office by Order of both Houses. All publications of the Committee (including press notices) are on the Internet at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/jcpp/>

Committee staff

The staff of the Committee were Liam Laurence Smyth (Commons Clerk), Christopher Johnson (Lords Clerk), Eve Samson (Commons Clerk), Antony Willott (Lords Clerk), Christine McGrane (Committee Assistant) and David Burrell (Committee Support Assistant).

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Parliamentary Privilege, Journal Office, House of Commons, Palace of Westminster, London SW1A 0AA. The telephone number for general enquiries is 020 7219 6615.

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2 General principles

The need for parliamentary privilege

14. The ancient origins of parliamentary privilege, and the archaic language that is sometimes used in describing it, should not disguise its continuing relevance and value. As we have noted in chapter 1, the work of Parliament is central to our democracy, and its proceedings must be immune from interference by the executive, the courts or anyone else who may wish to impede or influence those proceedings in pursuit of their own ends.

“Exclusive cognisance” and the rule of law

15. The corollary of Parliament’s immunity from outside interference is that those matters subject to parliamentary privilege fall to be regulated by Parliament alone. Parliament enjoys sole jurisdiction—normally described by the archaic term “exclusive cognisance”—over all matters subject to parliamentary privilege. As Sir William Blackstone famously noted in his *Commentaries on the Laws of England*, the maxim underlying the law and custom of Parliament is that “whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere”.²⁶

16. The principle of exclusive cognisance underpins all privilege, including those aspects of privilege which are now based in statute. Thus Article 9 of the Bill of Rights, the most important statutory expression of parliamentary privilege, states 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”. This encapsulated a pre-existing claim to exclusive cognisance over things said or done in Parliament—the preamble to the Bill of Rights notes that King James II had sought to subvert the liberties of the realm “by Prosecutions in the Court of King’s Bench for Matters and Causes cognizable only in Parliament”.

17. A consequence of Parliament’s possession of exclusive cognisance over proceedings in Parliament is that participants, both Members and non-Members, are not legally liable for things said or done in the course of those proceedings; nor are those outside who are adversely affected by things said or done in Parliament able to seek redress through the courts.

18. Thus exclusive cognisance in certain circumstances may over-ride other generally accepted legal rights. It is, in effect, an exception to the general principle of the rule of law. This has been accepted by the courts since at least the case of *Bradlaugh v. Gosset* in 1884, in which the court held that the decision of the House of Commons in resolving not to allow an elected Member, Charles Bradlaugh, to take the oath, and the actions of the Serjeant at Arms in preventing Bradlaugh from entering the House, were subject to the sole jurisdiction of the House—even though Bradlaugh was under a statutory obligation to take the oath in accordance with the Parliamentary Oaths Act 1866.²⁷ In his judgment, Mr

²⁶ Sir William Blackstone, *Commentaries on the Laws of England* (1765), pages 58 to 59

²⁷ *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 24th edition, ed. Sir Malcolm Jack KCB (hereafter *Erskine May*, 24th edition), page 291

recent Liaison Committee report notes the many different functions committees fill.⁶³ Committees have become a key arena in which Parliament fulfils its historical role as the grand inquest of the nation.

59. Most committee inquiries call on willing witnesses, and use the evidence-taking process as a means to explore an issue from a number of points of view. In such instances, there is little trouble in securing evidence. The Clerk of the House of Commons and the Clerk of the Parliaments, put the problem in perspective:

[Clerk of the House of Commons] “In the Commons over the years, we have had thousands and thousands of select committee inquiries and tens of thousands of witnesses in which absolutely no problem has arisen. I do not say that when a select committee finds itself in difficulty, it should not have effective recourse to means of getting out of that difficulty. I would ask the Committee only to put the stated problem in a very broad context.”

[Clerk of the Parliaments] “All I need add is that, in principle, the position is pretty much identical in the Lords, but it has been less of an issue ... on the whole, if witnesses are so unwilling to come that they resist coming, one is not going to get very useful evidence out of them”.⁶⁴

60. There are however occasions when witnesses do not wish to supply material or to appear themselves and a committee considers it cannot do without the material or the witnesses. In these cases, the fact that the power to send the person’s papers and records is not limited has allowed committees to obtain the witnesses or information needed. Committees have used such powers to obtain privileged material,⁶⁵ or to ensure committee advisers could use confidential information to assess the quality of the Financial Services Authority reports into the collapse of RBS and HBOS.⁶⁶ These actions, in turn, have improved the information available to committees, and have provided valuable material for Parliament as a whole. **We consider that it is in the public interest to ensure that committees have the powers they need to function effectively.**

61. The Liaison Committee considered that “at the very least Parliament should set out a clear, and realistic, statement of its powers”⁶⁷. Like that Committee, **we reject the option of doing nothing to clarify Parliament’s penal powers.** While committees have been able to function effectively up until now, the growing, and increasingly public, doubt over each House’s penal powers means there is a real risk that potential witnesses will be tempted to test those powers. The two Houses must be prepared for that eventuality. It will be too late to consider these matters when a crisis arrives.

62. There is therefore a need to address Parliament’s penal powers. The question then arises whether legislation is necessary either to create, or to enforce, powers that might be

63 *Ibid.*, paragraphs 12 to 15

64 Q 219

65 House of Commons Culture, Media and Sport Committee, Formal Minutes, Tuesday 19 January 2010, published on the www.parliament.uk website

66 See House of Commons Treasury Committee correspondence with the Chair of the Financial Services Authority of 13, 15 and 17 December 2010 and 28 March and 11 July 2011, regarding FSA investigation of bank failures, published on the www.parliament.uk website

67 *Select committee effectiveness, resources and powers*, HC 697, paragraph 134