

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)**

BETWEEN:

**HOUSE OF COMMONS and
THE HONOURABLE GILBERT PARENT**

Appellants
(Appellants in the Federal Court of Appeal)

- and -

**SATNAM VAID and
CANADIAN HUMAN RIGHTS COMMISSION**

Respondents
(Respondents in the Federal Court of Appeal)

- and -

**ATTORNEY GENERAL OF CANADA and
ATTORNEY GENERAL OF ONTARIO and
SPEAKER OF THE LEGISLATIVE ASSEMBLY OF ONTARIO and
CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES and
COMMUNICATION, ENERGY AND PAPERWORKERS UNION OF CANADA and
THE HONOURABLE SERGE JOYAL and
THE HONOURABLE MOBINA S.B. JAFFER**

Interveners

**FACTUM OF THE RESPONDENT
CANADIAN HUMAN RIGHTS COMMISSION**

**Philippe Dufresne
Legal Counsel
Canadian Human Rights Commission
344 Slater Street, 9th Floor
Ottawa, Ontario
K1A 1E1**

**Tel: 613-943-9162
Fax: 613-993-3089
philippe.dufresne@chrc-ccdpc.ca**

ORIGINAL TO:

The Registrar
Supreme Court of Canada
Ottawa, Ontario
K1A 0J1

COPIES TO:

Neil Finkelstein

Blake, Cassels & Graydon LLP
Barristers and Solicitors
Box 25, Commerce Court West
Toronto, Ontario M5L 1A9

Tel: 416-863-2266
Fax: 416-863-2653
Solicitors for the Appellants,
House of Common and the
Honourable Gilbert Parent

David Yazbeck

Raven, Allen Cameron & Ballantyne
Barristers and Solicitors
1600-220 Laurier Avenue West
Ottawa, Ontario K1P 5Z9

Tel: 613-567-2902
Fax: 613-567-2921
Solicitors for the Respondent Satnam Vaid

Catherine Beagan Flood

Blake, Cassels & Graydon LLP
Barristers and Solicitors
Box 25, Commerce Court West
Toronto, Ontario M5L 1A9

Tel: 416-863-2269
Fax: 416-863-2653
Counsel for the Intervener
The Speaker of the Legislative
Assembly of Ontario

Brian A. Crane, Q.C.

Gowlings Lafleur Henderson LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, Ontario K1N 8S3

Tel: 613-232-1781
Fax: 613-563-9869
Ottawa Agents for the Appellants

Brian A. Crane, Q.C.

Gowlings Lafleur Henderson LLP
Barristers and Solicitors
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1N 8S3

Tel: 613-232-1781
Fax: 613-563-9869
Ottawa Agents for the Intervener
The Speaker of the Legislative
Assembly of Ontario

Jonathan Batty

Ministry of the Attorney General
Constitutional Law Services
4th Floor, 720 Bay Street
Toronto, Ontario M5G 2K1

Tel: 416-326-4455
Fax: 416-326-4015
Solicitors for the Intervener
the Attorney General of Ontario

Robert E. Houston, Q.C.

Burke Robertson
Barristers & solicitors
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Tel: 613-566-2058
Fax: 613-233-4195
Ottawa Agents for the Intervener
The Attorney General of Ontario

Dale Gibson

Barrister & Solicitor
11018 - 125 Street
Edmonton, Alberta T5M 0M1

Tel: 780-452-9530
Fax: 780-453-5872
Counsel for the Interveners
The Honourable Serge Joyal and
The Honourable Mobina S.B. Jaffer

Peter Engelmann

Engelmann Gottheil
Barristers and Solicitors
30 Metcalfe Street, Suite 500
Ottawa, Ontario K1P 5L4

Tel: 613-235-5327
Fax: 613-235-3041

Solicitors for the Interveners,
Canadian Association of Professional
Employees and the Communications,
Energy and Paperworkers Union of Canada

INDEX

**FACTUM OF THE RESPONDENT
CANADIAN HUMAN RIGHTS COMMISSION**

	Page
INTRODUCTION	1
PART I - FACTS	1
PART II - STATEMENT OF ISSUES	4
PART III - STATEMENT OF ARGUMENT	4
1. The Appellants have not established the existence of a parliamentary privilege over the management of Mr. Vaid's employment	4
1.1 Introduction: the importance and quasi- Constitutional nature of human rights	4
1.2 The onus is on the Appellants to establish the existence of any parliamentary privilege	6
1.3 The Appellants have not established the existence of a privilege over the management of staff generally	7
1.3.1 The Appellants have not established that a privilege over the appointment and management of staff was held, enjoyed and exercised by the British House of Commons in 1867	7
1.3.2 Immunity with respect to the appointment and management of staff is not necessary to the proper functioning, dignity and integrity of a legislative assembly	12
1.4 In the alternative, parliamentary privilege does not apply to the employment of Speaker's chauffeur	15
1.5 The enactment of the PESRA confirms that Parliamentary privilege does not apply to the labour relation matters dealt with by this Act	19

2. Parliamentary privilege does not provide a right to discriminate contrary to the provisions of the CHRA	20
3. The enactment of the PESRA does not oust the Application of the CHRA	24
3.1 The CHRA does not provide for matters similar to those provided under the PESRA	24
3.1.1 The purpose of the two Acts is different	24
3.1.2 The scope of each Act is different	25
3.1.3 The rights provided for under each Act are different	26
3.1.4 The Acts ousted by section 2 of the PESRA are Labour relation statutes such as the CLC	30
3.2 In any event, section 2 is not a sufficiently clear notwithstanding clause to oust the application of the CHRA	32
CONCLUSION	34
PART IV - SUBMISSIONS CONCERNING COSTS	34
PART V - ORDER SOUGHT	35
PART VI - TABLE OF AUTHORITIES	36
PART VII - STATUTES	
Appendix A: CHRA	Tab A
Appendix B: PESRA	Tab B

INTRODUCTION

1. Parliamentary privilege does not apply to the management of parliamentary employees and in the alternative, this privilege does not apply to functions, such as chauffeur to the Speaker, that are far removed from the legislative functions of the House of Commons.
2. The scope of parliamentary privilege does not extend to protect distinctions based on discriminatory grounds, such as race or gender, as those grounds are unrelated to the needs of a legislative body.
3. The *Parliamentary Employment and Staff Relations Act*, R.S. 1985, chap. 33 (the "PESRA") does not oust the applicability of the *Canadian Human Rights Act*, R.S. 1985, chap. H-6 (the "CHRA").

PART I - FACTS

4. The Respondent Satnam Vaid ("Mr. Vaid") is of East Indian Origin. He was employed as chauffeur to the former Speaker, the Honourable Gilbert Parent. On July 10, 1997, he filed two complaints with the respondent Canadian Human Rights Commission (the "Commission"), alleging that the Appellants House of Commons and the Honourable Gilbert Parent (the "Appellants") had discriminated against him on the grounds of race, national or ethnic origin in the course of his employment as chauffeur.

Complaint forms dated July 10, 1997, Exhibit "A" to the Affidavit of Kimberley Lewis sworn 22 May 2001, Appellant's Record, Tab 18A, pp. 247-250

5. On October 2, 2000, the Commission referred the complaints to a panel of the Canadian Human Rights Tribunal (the "Tribunal").

Respondent's Factum

6. The Appellants raised a preliminary objection to the effect that the *CHRA* did not apply to the House of Commons and its members, and that the Tribunal did not have jurisdiction over the Appellants because of parliamentary privilege.

Majority decision of the Canadian Human Rights Tribunal dated April 25, 2001 ("Tribunal majority decision") at para 2, Appellants' Record, Tab 3, p. 5

The Canadian Human Rights Tribunal finds that parliamentary privilege does not apply to Mr Vaid's human rights complaints.

- 10 7. In a divided decision dated April 17, 2001, the Tribunal dismissed the objection and held that parliamentary privilege did not apply to the complaints in issue. In its reasons, the majority stated that race was not a proper ground for privilege and that the employment of the chauffeur to the Speaker was not sufficiently necessary to the core operations of the House of Commons to warrant parliamentary privilege:

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

Tribunal majority decision at para 29, Appellants' Record, Tab 3, p. 11

The Federal Court of Canada finds that parliamentary privilege does not apply in this case.

8. In its decision dated December 4, 2001, the Federal Court - Trial Division, upheld the Tribunal's decision and found that the application of the *CHRA* was not barred by parliamentary privilege.

30 **Decision of the Federal Court - Trial Division dated December 4, 2001, per Tremblay-Lamer J. ("Trial Division decision"), Appellants' Record, Tab 4, pp. 28-59**

Respondent's Factum

9. Applying the necessity test to the claim of parliamentary privilege, the Court held that parliamentary privilege does not extend to human rights violations as this matter does not fall within the necessary sphere of matters without which the dignity and efficiency of a legislative assembly cannot be upheld.

Trial Division decision at paras 69-82, Appellants' Record, Tab 4, pp. 52-56

10. The Court agreed with the Tribunal majority's finding that the *CHRA* applies to the House of Commons, as the employee relations of House of Commons employees fall under federal jurisdiction.

Trial Division decision at paras 83-85, Appellants' Record, Tab 4, pp. 56-57

10

The Federal Court of Appeal confirms that parliamentary privilege does not apply in this case.

11. In a decision dated November 28, 2002 the Federal Court of Appeal upheld the Trial Division decision and found that parliamentary privilege does not apply to bar the application of the *CHRA* to the Appellants.

Decision of the Federal Court of Appeal dated November 28, 2002 ("Court of Appeal decision"), per Létourneau, Linden, Rothstein JJ.A., Appellants' Record, Tab 6, pp. 61-119

20

12. Separate reasons were written by Justice Létourneau (Linden J.A. concurring) and Justice Rothstein, both finding that the Appellants' claim of parliamentary privilege did not meet the test of necessity established by this Honourable Court in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 ("*New Brunswick Broadcasting*"):

With respect, I am of the view that the parliamentary privilege claimed in the present instance finds no application for the following reasons that I shall explain in greater detail. First, the powers claimed in this case are not necessary and, consequently, not within the scope of the privilege as delimited by the doctrine of necessity. (emphasis added)

30

Court of Appeal decision at para 20, per Létourneau J.A, Appellants' Record, Tab 6, p. 70

[...] No evidence or argument has been put forward as to why a right to discriminate, contrary to the provisions of the *CHRA*, is a requirement of Members of Parliament necessary for the dignified and efficient functioning of Parliament.

Court of Appeal decision at para 81, per Rothstein J.A, Appellants' Record, Tab 6, p. 101

PART II - STATEMENT OF ISSUES

13. The issues raised by this appeal are:

10

a. Whether the Appellants have established the existence and necessity of a parliamentary privilege over the management of all parliamentary employees, including those whose functions are far removed from the legislative functions of the House of Commons;

b. Whether the Appellants have established that such a parliamentary privilege over the management of staff would provide a right to discriminate contrary to the quasi-constitutional provisions of the *Canadian Human Rights Act*;

20

c. Whether the *Parliamentary Employment and Staff Relations Act* ousts the applicability of the *Canadian Human Rights Act* despite the absence of a clear notwithstanding clause to that effect.

PART III - STATEMENT OF ARGUMENT

1. The Appellants have not established the existence of a Parliamentary Privilege over the Management of Mr. Vaid's Employment.

1.1 Introduction: the importance and quasi-constitutional nature of human rights.

30

14. The purpose of the Canadian Human Rights Act is to give effect 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 accommodations as

Respondent's Factum

members of society, without being hindered in or prevented from doing so by discriminatory practices based on prohibited grounds.

Canadian Human Rights Act, R.S. 1985, ch. H-6, ("CHRA"), s. 2 [Respondent's Factum, Appendix A - Tab A].

15. This legislation, described as the last protection of the most vulnerable members of society, has been recognized by this Honourable Court as enjoying quasi-constitutional status and embodying fundamental Canadian values.

Insurance Corp. of British Columbia v. Heerspink, [1982] 2 S.C.R. 145 at 157-158 [Book of Authorities of the Respondent ("Respondent's Authorities"), Tab 1].

10 *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 339 [Respondent's Authorities, Tab 2].

16. As noted by the majority of the Federal Court of Appeal in this case, human rights protection for employees is indeed a vital part of what it means to live in a democratic state like Canada.

Court of Appeal decision at para 11, Appellants' Record, Tab 6, p. 66

17. As a corollary to its quasi-constitutional status, the *CHRA* is to be given a large and liberal interpretation in a manner that best ensures that its objects are attained.

C.N. v. Canada (Human Rights Commission), [1987] 1 S.C.R. 114 at 1134 [Respondent's Authorities, Tab 3].

20 *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at 89 [Respondent's Authorities, Tab 4].

18. The issue in this appeal is whether Mr. Vaid is to be denied these quasi-constitutional rights as a result of parliamentary privilege. This raises the delicate issue of the interplay between parliamentary democracy and the rule of law.

- 30 19. For the reasons set out below, it is submitted that parliamentary democracy will not suffer if Mr Vaid is allowed recourse under the *CHRA*. By contrast, denying him his human rights to be free from discrimination may well offend the rule of law and should only be allowed in the clearest case of necessity.

1.2 The onus is on the Appellants to establish the existence of any parliamentary privilege.

20. The Commission acknowledges that Parliamentary privilege is of fundamental importance to our system of parliamentary democracy.

21. However, its impact is to shield activities from any legal or judicial scrutiny and as a result, it has long been recognized that the existence of parliamentary privilege must be carefully scrutinized by courts in order to ensure that the rights of citizens are not denied save in the clearest case of necessity:

10 To prevent abuses cloaked in the guise of privilege from trumping legitimate *Charter* interests, the court 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.

Harvey v. New Brunswick (A.G.), [1996] 2 S.C.R. 876 at 918, para 71 per McLachlin J. (minority) ("*Harvey*") [Book of Authorities of the Appellants ("Appellants' Authorities"), Tab 11].

20 Absolute privilege is a drastic denial of the right of every citizen who believes himself wronged to have access to the Courts for redress and should not be lightly or easily extended.

Re Ouellet (No. 1) (1976), 67 D.L.R. (3d) at 87 (Qc. Sup. Ct.), affirmed 72 D.L.R. (3d) 95 [Respondent's Authorities, Tab 5].

22. Parliamentary privilege is not presumed to exist and the party who seeks to rely on the immunity provided by parliamentary privilege has the clear onus of establishing its existence.

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

The burden 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. (at 1201)

Stockdale v. Hansard (1839), 112 E.R. 1112 (Q.B.) at 1189, 1201 [Appellants' Authorities, Tab 20].

1.3 The Appellants have not established the existence of a privilege over the management of staff generally.

23. In order to establish the existence of a parliamentary privilege over the appointment and management of staff generally, the Appellants must establish the following:

a. Parliamentary privilege over the appointment and management of staff was held, enjoyed and exercised by the Commons House of Parliament in the United Kingdom in 1867; and

10 b. In today's context, such a privilege is necessary to the proper functioning, dignity and integrity of the House of Commons, in other words, the House of Commons cannot function as a legislative body without immunity with respect to the management of its staff.

24. For the reasons set out below, it is submitted that the Appellants have failed to provide evidence and justification for either of these elements.

1.3.1 The Appellants have not established that a privilege over the appointment and management of staff was held, enjoyed and exercised by the British House of Commons in 1867.

20 i) The historical requirement

25. In order for a parliamentary privilege to exist in Canada, such privilege must have been held, enjoyed and exercised by the Commons House of Parliament in the United Kingdom in 1867. This limit flows from the *Constitution Act, 1867* and from section 4 of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1, which provides that:

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

30 (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

Respondent's Factum

Commons House of Parliament of the United Kingdom and by the members thereof, in so far as 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. (emphasis added).

Parliament of Canada Act, R.S.C. 1985, c. P-1 [Appellants' Authorities, Tab 48].

10

Constitution Act, 1867, section 18 (U.K., 30 & 31 Vict., c. 3, as repealed and re-enacted by the *Parliament of Canada Act, 1875*, (U.K.), 38-39 Vict., c. 38, reprinted in R.S.C., App. II, No. 5) [Appellants' Authorities, Tab 45].

26. The first condition for the existence of a parliamentary privilege in Canada is therefore that the privilege was held, enjoyed and exercised by the British House of Commons in 1867.

Ainsworth Lumber v. Canada (A.G.) et al. (2003), 226 D.L.R. (4th) 93 (BCCA) at paras 42-44. Leave to appeal denied, SCC File no. 29842 [Respondent's Authorities, Tab 6].

20

Samson Indian Nation and Band v. Canada, [2003] F.C.J. No 1238 at para 27 (F.C.T.D.) [Respondent's Authorities, Tab 7].

Telezone Inc. v. Canada (Attorney General), [2004] O.J. No. 5, at para 18 [Appellants' Authorities, Tab 22].

27. At paragraphs 32 to 42 of their factum, the Appellants argue that such a privilege existed in the United Kingdom in 1867, based on the following authorities:

30

- a. Article 9 of the *Bill of Rights, 1689*;
- b. The 1935 Decision of the Court of King's Bench in *R. v. Graham-Campbell, ex parte Herbert*, [1935] 1 K.B. 594;
- c. The 1986 Federal Court of Appeal decision in *House of Commons v. C.L.R.B.*, [1986] 2 F.C. 372;
- d. Standing Order 151 of the House of Commons (Canada).

Respondent's Factum

28. For the reasons set out below, it is submitted that these authorities do not establish the existence of a parliamentary privilege over the management of staff held by the United Kingdom House of Commons in 1867.

ii) Article 9 of the *Bill of Rights, 1689*

29. Article 9 of the *Bill of Rights, 1689* provides 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.”

Bill of Rights of 1689 (Eng.), 1 Will & Mar. sess. 2, c. 2, art. 9 [Appellants' Authorities, Vol IV, Tab 56].

30. The Appellants provide no authority in support of the proposition that “Proceedings in Parliament” include the management of staff. Indeed, “Proceedings in Parliament” are generally understood as describing events necessarily incidental to the enactment of laws:

The primary meaning, as a technical parliamentary term, of ‘proceedings’ (which it had at least as early as the seventeenth century) is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision.

C.J. Boulton, CB, ed., *Eskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st ed. (London: Butterworth, 1989) (*Erskine May's*) at 92 [Respondent's Authorities, Tab 19].

Since two of Parliament's constituent elements, the House of Commons and the Senate, were established for the enactment of laws, those events necessarily incidental to the enactment of laws are part of the proceedings in Parliament.

J.P.J. Maingot, Q.C. *Parliamentary Privilege in Canada*, 2d ed. (House of Commons and McGill-Queen's University Press, 1997) at 80 [Respondent's Authorities, Tab 20].

Respondent's Factum

31. Contrary to the Appellants' assertion at paragraph 39 of their factum, the article by Geoffrey Lock entitled "Labour Law, Parliamentary Staff and Parliamentary Privilege" does not acknowledge that article 9 of the *Bill of Rights, 1689* includes the management of staff. The statement cited by the Appellants was made by the Speaker's counsel; not by the author, whose view is as follows:

Staff employment rights are a field very remote from the original purpose of this aspect of privilege -the preservation of M.P.'s freedom of speech, and the exclusion of staff members from the category of 'internal affairs of the House' would not impair the rights which the House actually needs to function. (emphasis added)

10

G.F. Lock, "Labour Law, Parliamentary Staff and Parliamentary Privilege" (1983) 12 *Industrial Law Journal* 28 at 37 [Appellants' Authorities, Tab 41].

iii) *R. v Graham-Campbell, ex parte Herbert*, [1935] 1 K.B. 594

32. While this decision has been criticized for broadening the interpretation of "proceedings in Parliament" to include the sale of liquor by a committee without a licence, it did not in any way recognize a parliamentary privilege over the management of staff. In any event, it is not clear that this decision was in accordance with the earlier authorities and it cannot, on its own, establish the existence of such a privilege in the United Kingdom in 1867.

20

Williamson v. Norris, [1899] 1 Q.B. 7 [Respondent's Authorities, Tab 8].

Bear v. State of Australia, (1981) 48 S.A.I.R. 604 at 621-623 [Respondent's Authorities, Tab 9].

U.K., Joint Committee on Parliamentary Privilege, *First Report* (30 March 1999) at para 250 [Appellants' Authorities, Tab 42].

iv) *House of Commons v C.L.R.B.*, [1986] 2 F.C. 372

30

33. The decision of the Federal Court of Appeal in *House of Commons v. C.L.R.B.*, [1986] 2 F.C. 372 does not stand for the proposition that parliamentary privilege applies to the management of staff. The sole issue in that case was whether the

Respondent's Factum

House of Commons was a federal work, undertaking or business in order to attract the applicability of the *Canada Labour Code*.

House of Commons v. C.L.R.B., [1986] 2 F.C. 372 [Appellants' Authorities, Tab 14].

34. The majority did not confirm the existence of such a privilege but merely indicated that Parliamentarians, rightly or wrongly believe the management of staff to be one of their privilege. With respect to comments made by the minority, these were made in the context of a finding that House of Commons employees are employees of the Crown. This finding was not followed by the majority.

House of Commons v. C.L.R.B., *supra* at 384, 391 [Appellants' Authorities, Tab 14].

35. In any event, these comments were made in *obiter* and cannot be sufficient to establish the existence of a privilege held, enjoyed and exercised in the United Kingdom in 1867.

v) Standing Order 151

36. Standing Order 151 confirms that the Clerk is responsible for the direction and control of officers and clerks employed in the offices. It does not in any way establish the existence of a parliamentary privilege over the management of staff in the United Kingdom, or indeed in Canada, in 1867.

37. In any event, the House of Commons cannot unilaterally create for itself a new privilege by issuing a Standing Order.

Erskine May's, *supra* at 83 [Respondent's Authorities, Tab 19].

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319 ("*New Brunswick Broadcasting*"), *supra* at 383 [Appellants' Authorities, Tab 2].

10

20

30

Respondent's Factum

vi) Conclusion

38. If the management of staff were a privilege that was held, enjoyed and exercised by the British House of Commons since 1867, then it should be possible to find clear confirmation of this privilege in the authorities and doctrine. The Appellant's inability to provide a clear confirmation of this privilege stands for the proposition that it did not exist in the United Kingdom in 1867.

It is remarkable that no mention is made of this alleged power of the House of Commons in any book of authority, or by any text writer. It is no where enumerated among the privileges or powers of the House. (at p. 1189)

10

Stockdale v. Hansard, supra at 1189 [Appellants' Authorities, Tab 20].

1.3.2 Immunity with respect to the appointment and management of staff is not necessary to the proper functioning, dignity and integrity of a legislative assembly.

39. The second criterion for the existence of parliamentary privilege is the test of necessity set out by this Honourable Court in *New Brunswick Broadcasting*. Setting out this requirement, McLachlin J. (as she then was) for the majority held that Canadian legislative bodies could claim as inherent privileges "those rights which are necessary to their capacity to function as legislative bodies" (at 381). The test of necessity was stated as follows:

20

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. (emphasis added)

New Brunswick Broadcasting, supra at 383 [Appellants' Authorities, Tab 2].

See also *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595 [Appellants' Authorities, Tab 1].

30

40. This Honourable Court stressed that history and tradition alone will not suffice to meet the necessity test:

Respondent's Factum

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 proper functioning of our legislative bodies.

New Brunswick Broadcasting, supra at 387 [Appellants' Authorities, Tab 2].

- 10 41. In that case, clear and compelling justification was provided to support the parliamentary privilege to exclude disruptive strangers from the Assembly:

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 properly, 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. (emphasis added)

20 *New Brunswick Broadcasting, supra* at 387 [Appellants' Authorities, Tab 2].

42. In *Harvey v. New Brunswick (A.G.)*, [1996] 2 S.C.R. 876, justification was provided to support the parliamentary privilege to disqualify members on the grounds of corruption:

30 If democracies are to survive, they must insist upon the integrity of those who seek and hold public office. They cannot tolerate corrupt practices within the legislature. Nor can they tolerate electoral fraud. If they do, two consequences are apt to result. First, the functioning of the legislature may be impaired. Second, public confidence in the legislature and the government may be undermined. No democracy can afford either.

Harvey v. New Brunswick (A.G.), [1996] 2 S.C.R. 876 ("*Harvey*") at 913 [Appellants' Authorities, Tab 11].

43. By contrast, the Appellants have provided no evidence or justification for the necessity of a privilege over the management and appointment of staff.

Factum of the Appellants, at paras 56-59

44. It is noteworthy that, with the exception of the hiring of political staff which is dealt with below, the examples of potential complaints given by the Appellants all deal with matters unrelated to the management of staff.

Factum of the Appellants, at para 75

45. In a recent report, the Joint Committee on Parliamentary Privilege of the British House of Lords was of the view that it is not necessary for Parliament to have exclusive jurisdiction over the management of its non-political staff in order to properly function:

10 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 the
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
20 to extreme lengths. (emphasis added) (at para 241)

 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.
It is difficult to see any good reason why claims for breach of contract
relating to catering or building services, for example, should be excluded
from the jurisdiction of the courts, or why a person who sustains
personal injury within the precincts of Parliament should not be able to
30 mount a claim for damages for negligence. (emphasis added) (at para
250).

U.K., Joint Committee on Parliamentary Privilege, *First Report* (30 March 1999) at paras 241, 250 [Appellants' Authorities, Tab 42].

46. The necessity test cannot be met by stating that any judicial review of the activities of the legislative branch is inappropriate. If this were sufficient, then privilege would apply to all matters involving the House of Commons. This would render the necessity test meaningless.

47. It is no more necessary for the Appellants to enjoy an immunity in the management of their staff than it would be for a corporation or a department of government. By contrast, the privilege over the freedom of speech in the Chamber is a specific necessity of a legislative assembly. A department would not benefit from this but a legislature could not function without it. This is what the necessity test requires.

10

But the power of punishing any one for past misconduct as a contempt of its authority [...] is of a very different character, and by no means essentially necessary for the exercise of its functions by the local Legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions. (emphasis added.)

20

Kielley v. Carson (1842) 4 Moo. P.C.C. 63, 13 E.R. 225 at 235 (P.C.) [Appellants' Authorities, Tab 12].

1.4 In the alternative, parliamentary privilege does not apply to the employment of the Speaker's chauffeur.

48. In the alternative, should this Honourable Court find that parliamentary privilege applies to the management of staff, the test of necessity requires that this privilege be circumscribed to the core parliamentary functions of the House of Commons.

30

49. The onus of establishing that a function is included under this privilege rests on the Appellants and they have provided no evidence as to why the House of Commons would be unable to function and to preserve its dignity and integrity

Respondent's Factum

should Mr. Vaid be allowed to have access to courts with respect to his employment rights, let alone his human rights.

50. In *Thompson v. McLean*, (1998) C.C.E.L. (2d) 170 (Ont. Ct. G.D.), the issue was whether parliamentary privilege protected the Office of the Legislative Assembly from a claim of wrongful dismissal and sexual harassment by a former Special Assistant to the Speaker Allen McLean.

Thompson v. McLean, (1998) C.C.E.L. (2d) 170 (Ont. Ct. G.D.) ("*Thompson*") [Respondent's Authorities, Tab 12].

10

51. The Court expressed a marked reluctance to extend a parliamentary privilege to all employment relationships of the Legislative Assembly, stating that "it jars a little to apply to a modern service employer, the concepts of absolute privilege and absolute immunity". The Court added that:

As a practical matter the Speaker is the chief administrative officer of a large branch of the public service with many employees, some of whom perform no political or legislative or parliamentary duties. It is not consistent with modern ideas of employment to say that they are all automatically stripped of the normal protection enjoyed by employees, including access to the courts, without examining the claim of parliamentary privilege carefully in those cases where it may not clearly apply. (emphasis added)

20

Thompson, supra at para 39 [Respondent's Authorities, Tab 12].

52. The Court stated that while some employees, such as the First Clerk Assistant or the Sergeant-at-Arms, enjoyed an employment relationship that came within the core of legislative and parliamentary functions, "[i]t might not be so clear that a bartender hired to serve drinks or a gardener or social convener or a caterer works completely within the core of parliamentary privilege essential for the fulfilment of legislative and political functions" (at para 40). The Court added:

30

To understand that legislative bodies employ a wide range of people whose work appears far from the core of legislative and parliamentary privilege, one need only look at the bargaining unit description certifying

the Public Service Alliance as bargaining agent for a unit of House of Commons employees comprising:

all general service employees of the House of Commons of Canada, providing valet, elevator operation, dispatching, messenger, driving, cleaning and maintenance, warehousing, food preparation and serving services, [...] (emphasis added)

Thompson, supra at para 40 [Respondent's Authorities, Tab 12].

10

53. The Court concluded that because the position of the Special Assistant to the Speaker did not appear on its face to be sufficiently necessary to the core legislative functions of the Assembly, the Court would need to examine the facts to determine the extent of this position's necessity to the core legislative functions of the Assembly in order to rule on whether parliamentary privilege applied to it:

20

In the case of employees whose duties appear on their face to be far removed from actual legislative and parliamentary work, and in cases like Thompson's where the duties may be arguably closer to the line, it may be necessary for a court to examine the facts to determine whether the work and all aspects of the employment relationship are immune from judgment by the court.

Thompson, supra at para 41 [Respondent's Authorities, Tab 12].

54. This functional approach has been followed in the context of judicial immunity.

30

Unless decisions involving individual employees bear directly on the exercise of the judicial function, institutional independence will not be impaired or compromised by requiring adherence to human rights legislation. (at para 29) [...]

For example, a judge may allocate resources and make decisions that influence the career paths of staff members at the courthouse. Decisions of that kind are usually made by a chief judge as the administrator of a budget or the manager of an employer-employee relationship. Those decisions may be no different in kind and quality than decisions made by any other manager of employees and administrators of budgets in most workplaces. Simply put, just because they are made by the judge and affects a staff member at the courthouse does not necessarily mean

Respondent's Factum

that they must be sheltered from review to ensure the continued operation of an effective and efficient judicial system. (emphasis added) (at para 36)

Seniuk et al. v. Saskatchewan Human Rights Commission et al. (2003), 230 D.L.R. (4th) 493 at paras 29, 36 (Sask. Q.B.) [Appellants' Authorities, Tab 28].

Contrast with *Taylor v. Canada (A.-G.)*, [2000] 3 F.C. 298 [Appellants' Authorities, Tab 27] which clearly dealt with a judicial function.

10 55. Following this analysis, it is submitted that if the duties of the Special Assistant to the Speaker, or of a member's political staff were "closer to the line", the duties of the Speaker's chauffeur appear on their face to be far -if not completely- removed from core legislative and parliamentary work. In any event, it is incumbent upon the Appellants to establish the necessity of the privilege claimed and they have provided no evidence to demonstrate the chauffeur's necessity to the core legislative functions of the House of Commons.

20 56. While it may be that the dividing line will not always be clear between the functions that are related to the legislative functions of the House of Commons and those that are not, the necessity test requires that the party asserting the privilege establish its necessity. As a result, any uncertainty or difficulty should lead to a finding that privilege does not apply.

It is for the courts to determine whether necessity sufficient to support a privilege is made out. Lord Denman C.J. in *Stockdale v. Hansard* (1839), 9 Ad. & E. 1 (Q.B.), 1112, stated at p. 1169 E.R.: "If the necessity can be made out, no more need be said: [...] He noted, however, that it is up to the courts to determine whether necessity supports the privilege claimed; if it does, and only if it does, the courts will not enquire into its exercise. (emphasis added)

30 *New Brunswick Broadcasting, supra* at 382-383 [Appellants' Authorities, Tab 2].

1.5 The enactment of the *PESRA* confirms that parliamentary privilege does not apply to the labour relation matters dealt with by this Act.

57. The *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, chap. 33 confirms that parliamentary privilege does not apply to the labour relations matters dealt with by this Act. Section 4(1) of the Act provides that:

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*.

10 *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, chap. 33 ("*PESRA*"), s. 4 [Respondent's Factum, Appendix B].

58. The only way to reconcile the labour relation mechanisms in the with section 4(1) of that Act is to find that parliamentary privilege does not apply to the matters dealt with under Part I of the *PESRA*.

59. Indeed, subsection 4(1) of the *PESRA* is clear and can lead to one of two conclusions. Either:

20 a. Parliamentary privilege does not apply to the labour relation matters provided under the *PESRA* and, as a result, the mechanisms provided for in Part I of the *PESRA* can apply without infringing subsection 4(1) of that Act; or

b. Parliamentary privilege applies to the labour relation matters provided under the *PESRA* and, as a result of subsection 4(1) of the *PESRA*, all the mechanisms provided under Part I of that Act are of no force and effect as they would otherwise abrogate or derogate from the privileges of Parliament.

30 60. Conclusion (b) must be rejected as it would lead to the absurd result that the *PESRA* is inapplicable *ab initio*. This would contradict the principle of

interpretation that legislation is enacted for a purpose and that each feature in a legislative scheme has some function to fulfill.

When seeking the proper interpretation of these provisions, one should ask if Parliament must be taken as intending to give an authority to the investigating forces which could not be put to use.

Lyons v. R., [1984] 2 S.C.R. 633, at 691, per Estey J. [Respondent's Authorities, Tab 13].

- 10 61. For these reasons, the majority of the Federal Court of Appeal was correct in holding that subsection 4(1) of the *PESRA* confirms that parliamentary privilege does not apply to the labour relation matters provided under that Act.

Federal Court of Appeal decision at para 46, Appellants' Record, Tab 6, p. 84

62. To find otherwise would result in the invalidity or inapplicability of most of the provisions of the *PESRA* and cannot have been the intention of Parliament.

2. Parliamentary privilege does not provide a right to discriminate contrary to the provisions of the CHRA.

- 20 63. Privilege is not absolute nor unlimited. When ruling that parliamentary privilege exists, Courts must identify the scope of the privilege, and the grounds on which the privilege can be exercised. A decision which is based on an invalid ground will not be protected by the privilege:

The right of expulsion on these two grounds - discipline and unfit behaviour - is a matter of parliamentary privilege and is not subject to judicial review.

Harvey, supra at 921, para 78 [Appellants' Authorities, Tab 11].

- 30 64. In *New Brunswick Broadcasting*, the majority carefully circumscribed the privilege to the legislature's "right to exclude strangers from its chamber, where it concludes their presence is disruptive of the Assembly's business". By expressly refusing to rule on whether the privilege protected expulsions or exclusions on

other grounds, the Court recognized that even with respect to a matter as central as the legislature's right to control access to its debates, the scope of the parliamentary privilege is not unlimited:

It is not necessary on this appeal to consider the case of an attempt to exclude all members of the public or certain groups of the public, and conduct the business of the House in private, although it may be noted that the English tradition would support the right of the House to debate in private. (emphasis added)

New Brunswick Broadcasting, supra at 388 [Appellants' Authorities, Tab 2].

10

65. Similarly, in *Harvey*, McLachlin J. (as she then was) for the minority circumscribed the privilege to the "power to disqualify members for corruption", and stated that privilege would not extend to protect actions of the legislature based on grounds that are not necessary to their function, such as race or gender. Again, even with respect to a matter as central as the legislature's right to control its membership, the scope of parliamentary privilege is not unlimited:

Expulsion and disqualification from office may, if found to fall within the scope of parliamentary privilege, be beyond the purview of s. 3 [of the Charter]. But s. 3 still operates to prevent citizens from being disqualified from holding office on grounds which fall outside the rules by which Parliament and the legislatures conduct their business; race and gender would be examples of grounds falling 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*." (emphasis added)

20

Harvey, supra at 918, para 70 [Appellants' Authorities, Tab 11].

30

66. Thus, the privilege of excluding members on grounds of corruption or crime will satisfy the necessity test because such limits are necessary for the proper functioning of legislative assemblies. There is no privilege however to exclude members on grounds unrelated to the needs of the legislature, such as race or

gender, because such limits are not necessary to the proper functioning of legislative assemblies.

67. There is no conflict between the decisions of *New Brunswick Broadcasting* and *Harvey* on the issue of parliamentary privilege. Both the majority (per McLachlin J.) in *New Brunswick Broadcasting* and the minority (per McLachlin J.) in *Harvey* state the rule that privilege must be circumscribed in its extent and scope to those subject matters that are necessary to the proper functioning of a legislative assembly. The consistency between the reasons of McLachlin J. in these two cases was recently confirmed by the Ontario Court of Appeal.

10 *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595 at para 29 [Appellants' Authorities, Tab 1].

68. The determination of whether parliamentary privilege applies to a given function (chauffeur), or to distinctions based on grounds (race) that are unrelated and unnecessary to the proper functioning of a legislative assembly does not constitute a review of the *exercise* of the privilege; it constitutes the determination of the existence and *scope* of the privilege.

20 *Telezone Inc. v. Canada (Attorney General)*, [2004 O.J. No. 5 at para 20 (O.C.A.) [Appellants' Authorities, Tab 22].

69. This is consistent with the necessity test which does not recognize unlimited privileges based on irrelevant or improper grounds. It is only within the limited scope of a recognized privilege that the legislative assembly will be given absolute immunity. Hence, following *New Brunswick Broadcasting*, parliamentary privilege allows the Legislature to exclude a stranger who is disrupting its proceedings. If the House makes such a determination, it will not be reviewed by the Courts.

30 *Zundel v. Boudria*, 46 O.R. (3d) 410, [1999] O.J. No. 4244 (C.A.) (Q.L.). [Appellants' Authorities, Tab 23].

70. By contrast, parliamentary privilege would not operate to allow citizens being disqualified from holding office on grounds that fall outside the rules by which Parliament and the legislatures conduct their business, such as race and gender. This reasoning was relied upon by the majority of the Tribunal, the Trial Division and Court of Appeal in this case.

Harvey, supra at 918, para 70 [Appellants' Authorities, Tab 11].

Tribunal majority decision at para 23, Appellants' Record, Tab 3, at p. 10

Trial Division decision at paras 69-81, Appellants' Record, Tab 4, at pp. 56

Court of Appeal decision at paras 42, 79-84, Appellants' Record, Tab 6, at pp 82, 101-103

See also D. Gibson, "Monitoring Arbitrary Government Authority: Charter Scrutiny of Legislative, Executive and Judicial Privilege", (1998), 61 Sask. L. Rev. 297, at paras 46-51 [Respondent's Authorities, Tab 21].

Huet v. Canada (Minister of National Revenue) (1994) 85 F.T.R. 171 (F.C.T.D.) [Respondent's Authorities, Tab 12].

10

20

71. Thus, if parliamentary privilege will not operate to deny persons membership in a legislature on grounds of race, it cannot now be held that parliamentary privilege can operate to deny the Speaker's chauffeur the full benefit of human rights legislation protecting him from discrimination on grounds of race.

72. This approach is consistent with the rule that parliamentary privilege does not provide an immunity for the commission of criminal acts by MPs.

R. v. Bunting (1885), 7 O.R. 524 [Respondent's Authorities, Tab 13].

30

73. If parliamentary privilege does not provide MPs with an immunity from the Criminal Code, an ordinary act of Parliament; *a fortiori* it cannot provide an immunity from the *CHRA*, a quasi constitutional statute representing the fundamental values of Canadians.

3. The enactment of the *PESRA* does not oust the application of the *CHRA*.

3.1 The *CHRA* does not provide for matters similar to those provided under the *PESRA*.

74. The *CHRA* is not ousted by section 2 of the *PESRA* as it does not provide for “matters similar to those provided under this Act”.

PESRA, s. 2 [Respondent's Factum, Appendix B].

10 75. The *CHRA* is a human rights statute which provides for the quasi-constitutional right to be free from discrimination in a variety of fields, including employment.

CHRA [Respondent's Factum, Appendix A].

76. By contrast, the *PESRA* is an ordinary statute which provides mainly for labour relations rights, and, in sections that are not yet in force, for certain minimal employment standards as found in the *Canada Labour Code* (“CLC”).

PESRA [Respondent's Factum, Appendix B].

3.1.1 The purpose of the two Acts is different.

20

77. The difference in the purpose of the two statutes is quite clear. The purpose of the *CHRA* is to “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 [...] without being hindered in or prevented from doing so by discriminatory practices [...]”.

CHRA, s. 2

Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84 at 91-92 [Respondent's Authorities, Tab 4].

78. By contrast, the purpose of Part I of the *PESRA* is "to provide to certain persons employed in Parliamentary service collective bargaining and other rights in respect of their employment." The French version speaks of "certains droits, dont celui de négociation collective, dans le cadre de leur emploi". Moreover, the title of Part I is "Staff Relations", in French "Relations de Travail".

PESRA, s. 5

10 79. Part II is entitled Standard Hours, wages, leave, etc. and would provide for the application of Part III of the Canada Labour Code (including section 247.1 which prohibits sexual harassment, but not harassment based on other prohibited grounds, such as race or religion). It is noteworthy that this Part of the *PESRA* is not yet in force as it requires proclamation (section 89).

80. Part III of the *PESRA* is entitled Occupational Safety and Health and would provide for the application of Part II of the Canada Labour Code (which incorporates the equal wages -and no other- provisions of the *CHRA*). It is noteworthy that this Part of the *PESRA* is not yet in force as it requires proclamation (section 89).

20

3.1.2 The scope of each Act is different.

81. In matters coming within the legislative authority of Parliament, the *CHRA* applies to all individuals, without distinctions or exclusions based on their employment status.

82. By contrast, Part I of the *PESRA* specifically excludes from its application a number of individuals who are part of the staff of various public officials. Furthermore, many of the rights provided under Part I of the *PESRA* do not apply equally to persons in managerial or confidential positions. Such distinctions are antithetical to the protection of human rights.

PESRA ss. 4, 6

3.1.3 The rights provided for under each Act are different.

10

83. While subsection 5 of the *PESRA* speaks of “other rights in respect of their employment”, a review of Part I of the *PESRA* indicates that these do not include the human rights which are provided for and indeed form the core of the *CHRA*. The following table highlights the lack of similarity between the matters provided in each Act.

Respondent's Factum

CHRA	Part I of PESRA
10 The prohibited grounds of discrimination under the CHRA are: <ul style="list-style-type: none">a. race;b. national or ethnic origin;c. colour;d. religion;e. age;f. sex;g. sexual orientation;h. marital status;i. family status;j. disability;k. conviction for which a pardon has been granted. (ss. 2-3)	No equivalent provision.
20 It is a discriminatory practice to refuse to employ or continue to employ any individual, or to differentiate adversely in relation to an employee on a prohibited ground of discrimination . (s. 7)	No equivalent provision.
It is a discriminatory practice to express a limitation, specification or preference based on a prohibited ground of discrimination in a job offer or application. (s. 8)	No equivalent provision.

Respondent's Factum

<p>It is a discriminatory practice for an employee organization on a prohibited ground of discrimination to differentiate adversely between individuals. (s. 9)</p>	<p>No equivalent provision.</p>
<p>It is a discriminatory practice for an employer, employee organization or employer organization to establish or pursue a policy or practice or agreement which differentiates adversely between individuals on a prohibited ground of discrimination. (s. 10)</p>	<p>No equivalent provision.</p>
<p>11. (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value. [...]</p>	<p>No equivalent provision in force.</p>
<p>14. (1) It is a discriminatory practice in matters related to employment to harass an individual on a prohibited ground of discrimination.</p>	<p>No equivalent provision.</p>
<p>No equivalent provision.</p>	<p>No person shall discriminate in employment against a person on the basis of membership in an employee organization or the exercise of any rights under Part I of the PESRA. (6(2)(a)).</p>

10

20

Respondent's Factum

No equivalent provision.	No person shall seek to impose a condition of employment to restrain a person from becoming a member of an employee organization or exercising any rights under Part I of the PESRA (6(2)(b)).
No equivalent provision.	No person shall seek by intimidation to compel an employee (i) to become, refrain from becoming or cease to be, or to continue to be, a member of an employee organization, or (ii) to refrain from exercising any other right under Part I of the PESRA. (6(2)c)).
No equivalent provision.	The Board shall not certify as bargaining agent for a bargaining unit any employee organization that discriminates against any employee because of sex, race, national origin, colour or religion. (27(3))

84. It is clear from this comparison of the two statutes that the *PESRA* is chiefly concerned with labour relations, rather than with human rights. Indeed, the French version of the title of the *PESRA* is simply "Loi sur les relations de travail au Parlement".

85. The *PESRA* does not provide for the right to be free from discrimination based on the prohibited grounds in the *CHRA*. Instead, the *PESRA* prohibits discrimination and intimidation based on:

- a. membership in an employee organization; and
- b. the exercise of the rights under Part I of the *PESRA*.

86. The only reference to human rights in the *PESRA* is found in subsection 27(1) which states that the Board shall not certify as bargaining agent for a bargaining unit any employee organization that discriminates against any employee because of sex, race, national origin, colour or religion. This provision is very narrow and furthermore excludes the following grounds which are included in the *CHRA*:

- a. disability;
- b. sexual orientation;
- c. ethnic origin;
- d. age;
- e. marital status;
- f. family status;
- g. conviction for which a pardon has been granted.

87. Moreover, should an employee organization be found to discriminate on one of the 5 limited grounds, the only remedy provided by the *PESRA* is the non-certification of the employee organization as a bargaining unit or the revocation of such status (section 30(2)). There is no available remedy for an employee who is victim of discrimination by the employee organization as is the case under section 53 of the *CHRA*.

3.1.4 The Acts ousted by section 2 of the *PESRA* are labour relation statutes such as the *CLC*.

88. The *PESRA* was enacted by Parliament following the decision in *House of Commons v. C.L.R.B.*, [1986] 2 F.C. 372, *supra*, which found that the *CLC* did not

apply to employees of the House of Commons, as the House was not a “federal work, undertaking or business”.

89. It is clear from the debates leading to the enactment of *PESRA* that this Act was intended to provide parliamentary employees with collective bargaining rights and other related employment rights.

Mr. Hnatyshym: [...] The purpose of this legislation is to bring the Parliament Hill employees to the equivalent position vis-à-vis matters that are subject to collective bargaining as members of the Public Service, that is the equivalent of the rights now the PSSRA. (emphasis added)

10

House of Commons, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-45, pp. 1:74-1:75 [Respondent's Authorities, Tab 22].

90. The purpose of section 2 of the *PESRA* was not to oust the application of the *CHRA*, but rather to confirm the inapplicability of labour relation statutes such as the *CLC* except insofar as the *PESRA* made them applicable.

Bill C-45 would make the Canada Labour Code inapplicable to parliamentary employees and thus settle through statute the question of the CLRB's jurisdiction. [...]

20

Bill C-45 and Collective Bargaining on Parliament Hill, document prepared by the Research Branch, Library of Parliament, dated 26 November 1985, [Respondent's Authorities, Tab 23].

See also Commons Debates, p. 8267, per Hnatyshyn [Respondent's Authorities, Tab 24].

91. Indeed, the availability of a recourse under the *CHRA* was specifically discussed in the committee hearings dealing with Bill C-45 and responses were given by government representatives to the effect that the *CHRA* was not ousted by the *PESRA*.

30

Ms Copps: Hours of work would not exist in the common law, but unjust dismissal exists in the common law; sexual harassment is protected

under the Canadian Human Rights Act. So other protections currently exist for employees with or without the application of Part III.

Mr Chilton (Program Analyst - Conditions of Work, Employment Relations and Conditions of Work, Department of Labour): Yes. I think probably you are looking more at the method of recourse under Part III. Certain provisions under Part III are creatures of statute, such as severance pay. Some of the provisions under Part III differ in relation to the Canadian Human Rights Act [...]. That provides an alternate route as opposed to making a complaint under the Canadian Human Rights Act. [...]" (emphasis added)

10

Mr Baldwin (Director, Employment Relations and Conditions of Work, Department of Labour): For example, you mentioned sexual harassment. There is a provision for redress through the Canadian human rights legislation. What has been done in [the Canada Labour Code] is that there has been a requirement for an employer to develop and promulgate a policy vis-à-vis sexual harassment, to identify and promulgate a policy statement that closely resembles the definition of sexual harassment that we have provided in the legislation. [...] There is the option to go that route, rather than through the Canadian Human Rights legislation, which might be very much more time consuming and less satisfactory in terms of result, if the employer addresses the problem. (emphasis added)

20

House of Commons, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-45, pp. 6:8-6:9 [Respondent's Authorities, Tab 22].

3.2 In any event, section 2 is not a sufficiently clear notwithstanding clause to oust the application of the CHRA.

30

92. This Honourable Court has confirmed the quasi-constitutional nature of the *CHRA* and has held that in cases of conflict with another statute, the *CHRA* will be paramount and will not be ousted save by a clear and express legislative pronouncement to that effect.

Insurance Corp. of B.C. v. Heerspink, [1982] 2 S.C.R. 145 at 158, [Respondent's Authorities, Tab 1].

Respondent's Factum

See also *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 at 156, [Respondent's Authorities, Tab 14].

93. In order to oust the applicability of the CHRA, a clear legislative statement indicating that an act creates an exception to the CHRA is required.

The rule appears to be that when human rights legislation and other legislation cannot stand together, a subsequent inconsistent enactment, unless clearly stated to create an exception to it, is not to be construed as repealing the subsisting human rights legislation. On the other hand, when the human rights legislation is the subsequent enactment, it does repeal by implication the other inconsistent legislation. (emphasis added) (at 31)

Canada (Attorney General) v. Druken, [1989] 2 F.C. 24 [Respondent's Authorities, Tab 15].

94. Parliament's clear intent to grant jurisdiction to the Commission and the Tribunal in the event of an overlap of available procedures has also been recognized by McGillis J. in *Canada v. Boutilier*, where she made the following comment:

In the event of such a conflict or overlap, Parliament chose to permit the Commission, by virtue of paragraphs 41(1)(a) and 44(2)(a), to determine whether the matter should proceed as a grievance under other legislation such as the *Public Service Staff Relations Act*, or as a complaint under the *Canadian Human Rights Act*. Indeed, the ability of the Commission to make such a determination is consistent with its pivotal role in the management and processing of complaints of discriminatory practices. (emphasis added)

Canada v. Boutilier, [2000] 3 F.C. 27 at para 18 (Appellants' Authorities, Tab 38).

Canadian Broadcasting Corp. v. Paul, [1999] 2 F.C. 3 at 16, [Respondent's Authorities, Tab 16].

Société Radio-Canada v. S.C.R.C., [2002] S.C.F. 1060, 16 July, 2002 [Respondent's Authorities, Tab 17].

Burke v. Canadian Human Rights Commission (1987), 125 N.R. 239 (F.C.A.) [Respondent's Authorities, Tab 18].

95. As a result, Parliament could only have ousted the applicability of the *CHRA* by enacting a section in *PESRA* which stated that the *CHRA* no longer applies to parliamentary employees. Absent such clear language, the *CHRA* is paramount and continues to apply even in situations of concurrent jurisdiction.

CONCLUSION

96. For the reasons stated above, the Commission submits that :

- 10
- a) Parliamentary privilege does not apply to the management of parliamentary employees and in the alternative, this privilege does not apply to functions, such as chauffeur to the Speaker, that are far removed from the legislative functions of the House of Commons.
 - b) The scope of parliamentary privilege does not extend to protect distinctions based on discriminatory grounds, such as race or gender, as those grounds are unrelated to the needs of a legislative body.
 - c) The *Parliamentary Employment and Staff Relations Act* does not oust the applicability of the *Canadian Human Rights Act*.

20

PART IV - SUBMISSIONS CONCERNING COSTS

97. The Commission does not seek costs against the Appellants. In light of the importance of the issues raised in this appeal, the Commission submits that whatever the outcome of this appeal, the Appellants should bear their own costs.

PART V - ORDER SOUGHT

98. For the reasons stated above, this Honourable Court ought to dismiss the Appeal.

The constitutional questions should be answered as follows:

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?

Answer: No

10

ALL OF WHICH IS RESPECTFULLY SUBMITTED

This 16th day of April, 2004.

Philippe Dufresne

20

R. Daniel Pagowski

**Solicitors for the Respondent,
Canadian Human Rights Commission**

PART VI - LIST OF AUTHORITIES TO BE REFERRED TO

CASES

PARAS.

10

20

30

40

<i>Ainsworth Lumber Co. v. Canada (Attorney General)</i> (2003), 226 D.L.R. (4 th) 93	26
<i>Bear v. State of South Australia</i> (1981), 48 S.A.I.R. 605	32
<i>Burke v. Canadian Human Rights Commission</i> (1987), 125 N.R. 239	94
<i>CN v. Canada (Human Rights Commission)</i> , [1987] 1 S.C.R. 1114	17
<i>Canada (Attorney General) v. Druken</i> , [1989] 2 F.C. 24	93
<i>Canada v. Boutilier</i> , [2000] 3 F.C. 27	94
<i>Canadian Broadcasting Corporation v. Leila Paul</i> , [1999] 2 C.F. 3	94
<i>Harvey v. New Brunswick (A.G.)</i> , [1996] 2 S.C.R. 876	21,42,63,65,67
<i>House of Commons v C.L.R.B.</i> , [1986] 2 F.C. 372	27,33,34,88
<i>Huet v. Canada (Minister of National Revenue - M.N.R.)</i> (1994), 85 F.T.R. 171 (F.C.T.D.)	70
<i>Insurance Corp. of B.C. v. Heerspink</i> , [1982] 2 R.C.S. 145	15,92
<i>Kielley v. Carson</i> (1842) 4 Moo. P.C.C. 63, 13 E.R. 225	47
<i>Lyons v. The Queen</i> , [1984] 2 R.C.S. 633	60
<i>New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)</i> , [1993] 1 S.C.R. 319	12,37,39,40,41,56,64,67,69
<i>Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)</i> (2001), 54 O.R. (3d) 595	39,67
<i>Re Ouellet</i> (1976) (No. 1), 67 D.L.R. (3d) 73; <i>Re Ouellet (nos. 1 and 2)</i> (1976), 72 D.L.R. (3d)	21
<i>R. v. Bunting et al</i> (1885), 7 O.R. 524	72

Respondent's Factum

R. v Graham-Campbell, ex parte Herbert, [1935] 1 K.B. 594 27,32

Robichaud v. Canada (Treasury Board), [1987] 2 S.C. 84 17,77

Sansom Indian Nation and Band v. Canada, [2003] F.C.J. No. 1238 26

Seniuk et al. v. Saskatchewan Human Rights Commission et al.
 (2003), 230 D.L.R. (4th) 493 54

10 *Société Radio-Canada c. Syndicat des Communications de Radio-Canada*
 (FCN-CSN) (2002), CF (dossier : T-1219-00) 94

Stockdale v. Hansard (1839), 112 E.R. 1112 22,38

Taylor v. Canada (A.-G.), [2000] 3 F.C. 298 54

Telezone Inc. v. Canada (Attorney General), [2004] O.J. No. 5 26,68

Thompson v. McLean (1998), 37 C.C.E.L. (2d) 170 50,51,52,53

20 *Williamson v. Norris*, [1899] 1 Q B 7 32

Winnipeg School Division no. 1 v. Craton, [1985] 2 S.C.R. 150 92

Zundel v. Boudria, 46 O.R. (3d) 410, [1999] O.J. No. 4244 (C.A.) (Q.L.) 69

Zurich Insurance Co. v. Ontario (C.D.P.), [1992] 2 S.C.R. 321 15

Texts and Articles

30 C.J. Boulton, CB, ed., *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st ed. (London: Butterworth, 1989) 30,37

D. Gibson, "Monitoring Arbitrary Government Authority: Charter Scrutiny of Legislative, Executive and Judicial Privilege", (1998), 61 Sask. L. Rev. 297 70

40 G.F. Lock, "Labour Law, Parliamentary Staff and Parliamentary Privilege" (1983) 12 Industrial Law Journal 28 31

Respondent's Factum

J.P.J. Maingot, Q.C. *Parliamentary Privilege in Canada*, 2d ed.
(House of Commons and McGill-Queen's University Press, 1997) 30

U.K., Joint Committee on Parliamentary Privilege, *First Report*
(30 March 1999) 32,45

House of Commons Debates and related documents

10 Commons Debates, p. 8267, per Hnatyshyn 90

House of Commons, Minutes of Proceedings and Evidence of the
Legislative Committee on Bill C-45 89,91

Bill C-45 and Collective Bargaining on Parliament Hill, document
prepared by the Research Branch, Library of Parliament,
dated 26 November 1985 90

20 **Legislation**

Bill of Rights of 1689 (Eng.), 1 Will & Mar. sess. 2, c. 2, art. 9 27,29

Canadian Human Rights Act, R.S. 1985,
chap. H-6 3,13,14,74-75,77,85-87,90-93,95-96

Constitution Act, 1867, section 18 (U.K., 30 & 31 Vict., c. 3, as repealed
and re-enacted by the *Parliament of Canada Act, 1875*, (U.K.), 38-39 Vict.,
c. 38, reprinted in R.S.C., App. II, No. 5) 25

30 *Parliament of Canada Act*, R.S.C. 1985, c. P-1 25

Parliamentary Employment and Staff Relations Act,
R.S. 1985, chap. 33 3,13,57-62,74,76,78-83-91,95-96