VAID: THE NEED TO CONSIDER THE PARLIAMENTARY AUTHORITIES

A Research Paper submitted to the Senate Standing Committee on Rules, Procedures and the Rights of Parliament

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Leave to Appeal to the Supreme Court of Canada and the purpose of this report

1. On January 31, 2003, lawyers for the House of Commons and the Honourable Gilbert Parent filed a Memorandum of Argument of the Applicants for Leave to Appeal[1] to the Supreme Court of Canada ("Supreme Court"), concerning the decision of the Federal Court of Appeal made November 28, 2002 in which it was determined that the Canadian Human Rights Tribunal could inquire into the management by the Speaker of the staff of the House of Commons, specifically the complaints of discrimination by Mr. Satnam Vaid against Speaker Parent and the House of Commons ("Applicants").[2]

2. As claimed in the *Application*, the decision of the Federal Court of Appeal "departed from virtually all the settled jurisprudence … by holding that the courts and administrative tribunals have jurisdiction not only to determine whether a category of parliamentary privilege exists, but also to review every single exercise of privilege."[3] Such a finding, according to the *Application*, "raises fundamental questions about the separation and independence of the executive, legislative and judicial branches of the Canadian parliamentary [*sic*] system."[4]

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[1] *Memorandum of Argument of the Applicants for Leave to Appeal*, filed January 31, 2003 in the Supreme Court of Canada, court file no. 29564 [*Application*].
[2] *Canada (House of Commons) v. Vaid*, [2003] 1 F.C. 602, 2002 FCA 473 conf'g [2002] 2 F.C. 583, 2001 FCT 1332 [*Vaid*].
[3] *Application, supra* note 1 at para. 3.
[4] *Ibid.* at para. 5.

3. In explaining the importance of the appeal, the *Application* presents four questions that it seeks to place before the Supreme Court for resolution:

   (a) Are judicial and administrative tribunals limited to determining the categories of privilege over which the legislative branch has exclusive jurisdiction, or can they also scrutinize each individual exercise of parliamentary privilege?

   (b) Is the power to appoint and manage staff a category of parliamentary privilege?

   (c) If the power to appoint and manage staff is a category of parliamentary privilege, are claims of discrimination a reduction of the scope of that category, such that courts or the Crown (in this case the Canadian Human Rights Tribunal) can review the Applicant's actions?

   (d) Has Parliament, by enacting the *Parliamentary Employment and Staff Relations Act*, waived its parliamentary privilege over employment matters relating to the categories of employment covered by that Act, such as Mr. Vaid?[5]

4. This report has been prepared at the request of the Standing Committee on Rules, Procedures and the Rights of Parliament. Its purpose is to weigh the position of the House of Commons and the arguments it has raised in asserting privilege. The report will focus on the second question posed by the House of Commons, which was not sufficiently addressed by the Federal Court of Appeal in *Vaid*.[6] This report provides the Senate with an opportunity to enter the judicial debate with a fresh perspective if it so chooses, one that balances the practice of parliamentary privilege and the protection of individual rights.

[5] *Ibid.* at para. 20.
[6] *Vaid*, *supra* note 2.

The House of Commons has the onus of proving the existence of the privilege that it claims. This report will show not only that the onus has not been met, but also that the case for the existence of the claimed privilege cannot be substantiated.

The position of the House of Commons

5. In setting out the arguments objecting to any external oversight of the House of Commons, the *Application* asserts that in issues involving parliamentary privilege "no outside institution can review the House's operations when an allegation of a human rights violation is made. Such an outside review can be very disruptive to the effective functioning of Parliament."[7] Obviously critical to the position taken by the House of Commons is the claim that the appointment and management of staff are in fact a parliamentary privilege and, moreover, that this privilege is necessary. As such, this privilege would have constitutional status that would exempt it from any qualification or limitation under the *Canadian Charter of Rights and Freedoms* or relevant human rights legislation.

6. The claim that staffing of the House of Commons is an inherent parliamentary privilege is based, according to the *Application*, on two basic propositions. The first relies on Standing Order 151 of the House of Commons, in force since 1867, which provides: "The Clerk of the House … has the direction and control over all 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."[8] The second proposition is that Canadian court judgments "have consistently recognised the privilege of legislative assemblies over their employment matters."[9]

[7] *Application*, *supra* note 1 at para. 22.
[8] *Ibid.* at para. 42, citing *Standing Orders of the House of Commons*, S.O. 151.
[9] *Ibid.* at para. 43.

7. These arguments supporting the claim that staffing is a privilege are a reiteration of the ones made in the separate factums filed by the House of Commons[10] and the Speaker of the Legislative Assembly of Ontario[11] before the Federal Court of Appeal. This position is purportedly supported by the necessity test, as all claims to inherent privilege should be in order to be truly considered "parliamentary privilege". The House of Commons believes that the control of employment matters by legislative assemblies is necessary to their proper functioning. If the position presented in the *Application* were accepted, any review of the supposed privilege would be tantamount to interference in its operations of the legislative assembly, thereby denying its independence from the Crown. The House of Commons appears convinced that even if it practised discrimination, the discrimination should not be subject to outside review. As taken directly from the *Legislative Assembly of Ontario Factum*: "It may be that discrimination constitutes a wrongful use of the power to appoint and manage employees, but it is nevertheless about their appointment and management";[12] consequently there is nothing to be done about it.

8. If the position of the House of Commons were to be confirmed by the Supreme Court, it would mean that all legislative assemblies are totally immune from the application of all human rights legislation including the *Charter*. Employees of these assemblies would be without any human rights protection.

Test used by courts to determine the validity of a privilege claim

9. The leading case with respect to inherent parliamentary privilege is *Stockdale v. Hansard*.[13] This U.K. case, decided in 1839, is recognised by the House of Commons and the Speaker of the Legislative Assembly of Ontario as the precedent to be followed

[10] *Memorandum of Fact and Law of the Appellants: The House of Commons and The Honourable Gilbert Parent*, Federal Court of Appeal, court file no. A-1-02 [*House of Commons Factum*]
[11] *Memorandum of Fact and Law of the Intervener: The Speaker of the Legislative Assembly of Ontario*, Federal Court of Appeal, court file no. A-1-02 [*Legislative Assembly of Ontario Factum*].
[12] *Ibid*. at para. 41.
[13] (1839), 9 AD. & E. 1, 112 E.R. 1112 [*Stockdale*].

in all subsequent court judgments.[14] *Stockdale* is the basis of the fundamental Canadian decision, *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*.[15] In *Stockdale*, the Court of Queen's Bench unanimously refused to acknowledge a claim of privilege made by the House of Commons to protect a publisher, Hansard, from defamation liability. The court determined that the alleged privilege was not admitted by the authorities and that it was not necessary to the functioning of the legislative assembly. Necessity is obviously key in determining the validity of a claimed privilege,[16] but it is interesting to note in *Stockdale* that the Attorney-General, acting as counsel for the House of Commons, recognised that the claimed privilege had also to have been exercised for a long period of time and acquiesced in.[17] Patteson J. further qualified the test, stating that it was not sufficient for the Attorney-General to claim as fact the long exercise and acquiescence in the privilege without providing historical proof of its existence, particularly by authorities:

> Now, with respect to the exercise of the power in question, I conceive that such exercise is matter of history, and therefore that the observation of Mr. Attorney-General, that he ought not to be called upon in arguing a demurrer to prove matter of fact, is not well founded. If indeed, the plea had stated that the Commons' House of Parliament had been used to exercise this power, the demurrer would have admitted the exercise, but no such averment appears upon the face of the plea; and the historical fact of the exercise of the power is introduced by the defendants' counsel himself, in order to argue thence that the power must be legal. The onus of shewing that it is so lies upon the defendants; for it is certainly prima facie contrary to common law. 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. [Emphasis added.][18]

10. The judgment in *Stockdale*, therefore, established the two criteria that must be satisfied to validate a claim to inherent privilege: 1) The authorities – conclusive proof that the privilege is acknowledged to exist; and 2) necessity – clear evidence that the privilege is indispensable for the proper and efficient functioning of the legislative assembly. This is the onus that the House of Commons must meet.

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[14] *Application*, s*upra* note 1 at para. 29; *Legislative Assembly of Ontario Factum*, s*upra* note 11 at para. 22.
[15] [1993] 1 S.C.R. 319 [*New Brunswick Broadcasting Co.*].
[16] *Stockdale*, s*upra* note 13 at p. 1169.
[17] *Ibid.* at p. 1145.
[18] *Ibid*. at p. 1189.

11. As applied in Canada, the first criterion in *Stockdale* has two components. Not only must the House of Commons prove that the claimed privilege is recognized in Canadian parliamentary authorities, it must also be admitted by the U.K. authorities. As McLachlin J. (as she then was) explains, writing for the majority, in *New Brunswick Broadcasting Co.*:

> The preamble to the *Constitution Act, 1867* expressly states the intention of the framers of our Constitution that it should be "similar in Principle to that of the United Kingdom". It follows that in ascertaining what constitutional powers our legislative assemblies have we should begin by looking at the powers which historically have been ascribed to the Parliament of the United Kingdom. [19]

Without this substantiation, the House of Commons cannot fully satisfy the overall requirement to prove that the privilege is acknowledged.

The impact of Standing Order 151

12. In the *Application*, the House of Commons refers to Standing Order 151:

> 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.[20]

13. The House of Commons cites this standing order, presumably as evidence that the claimed privilege – control over employment matters by legislative assemblies – is acknowledged to exist. Standing Order 151 has been in force since 1868 and the House of Commons, therefore, implies that the claimed privilege has existed since that time.

14. There is, in fact, no support for the claim that Standing Order 151 is based on a recognized privilege. Standing Order 151 merely identifies the respective roles of the Clerk and the Speaker. The Clerk and the Speaker are employers, their employees are employees, and the Clerk and Speaker have no special "privilege" over these employees

[19] *New Brunswick Broadcasting Co., supra* note 15 at p. 378.
[20] *Application*, *supra* note 1 at para. 42.

other than the power that is conferred on every employer over every employee. It is relevant to note that the Senate has no equivalent rule.

15. In 1705, both Houses of the U.K. Parliament affirmed that no new privilege could be created without their consent.[21] In practical terms, this has meant that any new privilege may only be established by statute.[22] *Stockdale* recognised this reality when the court applied this approach and rejected the resolution of the House of Commons intended to protect Hansard. The court stated that it is not sufficient for the House of Commons alone to determine what parliamentary privilege is, since the House of Commons might, in effect, create whichever parliamentary privilege it wanted without the possibility of an independent review by the courts.[23]

16. The U.K. Parliament once again recognised the above in 1840, following the decision in *Stockdale*, when it adopted the *Parliamentary Papers Act*,[24] granting absolute immunity to papers published by either House. The *Papers Act* was passed by both Houses and assented to by the Crown and it constitutes a clear illustration that a simple order by one of the Houses of Parliament is not sufficient to create a privilege.

17. It is also important to note the U.K. *House of Commons Officers Act 1812* [25]which provided the model for Standing Order 151. The Act, which remained in force until 1978, assigned to the Clerk of the House of Commons and the Sergeant-at-Arms "the power of nomination, appointment, by sale or otherwise, together with the power of suspension and removal of the Clerks, Officers and Messengers or other Persons attendant on the House of Commons in their respective Departments",[26] subject to the approval of the Speaker in cases of dismissal. In no edition of *Erskine May's Treatise*

[21] In 1705, the House of Lords resolved that neither House had power to create any new privilege and when this was communicated to the Commons, that House agreed: 17 Lords Journals 677; 14 Commons Journals 555, 560 [Lords Journals].
[22] *Parliamentary Papers Act 1840*, 3-4 Vict., c. 9 (U.K.) [*Papers Act*]; *Parliamentary Witnesses Oath Act 1871* 34-35 Vict., c. 83 (U.K.).
[23] *Stockdale*, *supra* note 13 at p. 1174.
[24] *Papers Act*, *supra* note 22.
[25] 52 George III, c. 11 (U.K.) [*House of Commons Officers Act*].
[26] *Ibid*.

on The Law, Privileges, Proceedings and Usages of Parliament is it suggested that this legislation bestowed on the House of Commons any kind of privilege.[27] Instead, it simply identified those in the House of Commons who had the responsibility and authority for overseeing its administration. The exercise of this authority necessarily involves certain rights and powers – as do all employer-employee relations – but it did not confer a distinct privilege.

18. Therefore, as dictated by *Stockdale* and as recognised by the U.K. Parliament and *Erskine May*[28], Standing Order 151, which is a resolution passed by only the House of Commons, cannot constitute or establish a parliamentary privilege. Reliance on Standing Order 151 as proof of the existence of an inherent parliamentary privilege in employment matters is clearly inadequate. While a standing order might provide evidence for a privilege, it cannot by itself establish one. The next issue is to determine whether control of parliamentary employment matters is substantiated by the authorities or by the necessity test.

The Parliamentary Authorities:

(a) The U.K.

19. What is striking in any review of the arguments and judgments made thus far in the *Vaid* case is the absence of any thorough examination of the history of the alleged inherent privilege based on the recognised parliamentary authorities of both the U.K. and Canada. The factums filed by the House of Commons and the Speaker of the Legislative Assembly of Ontario at the Federal Court of Appeal as well as the *Application* do not make any reference to the comprehensive U.K. or Canadian parliamentary authorities.

[27] Sir Donald Limon & W.R. McKay, eds., *Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament,* 22nd ed. (London: Butterworths, 1997) [*Erskine May*, 22nd ed.]; as will be seen later, *Erskine May* is the most authoritative text on the U.K. Parliament.
[28] *Ibid*. at p. 81.

20. It is not unreasonable to suppose that if the appointment and management of parliamentary staff were in fact a privilege that is both historically founded and operationally necessary for the proper and efficient functioning of Parliament, it should be possible to find confirmation of this claim in these authorities on parliamentary practice. This confirmation, however, is not to be found in any of the editions of *Erskine May*, the most authoritative text on the U.K. Parliament, or in either Bourinot's *Parliamentary Practice* or *Beauchesne's Rules and Forms of the House of Commons of Canada*, until recently the standard Canadian sources.

21. Erskine May's manual was first published in London in 1844.[29] The most recent edition, the 22nd, was published in 1997.[30] Its original author, Thomas Erskine May, was employed by the House of Commons for 40 years before his appointment as Clerk of the House in 1871. He served as Clerk until 1886 and he was responsible for the first nine editions of his manual. Subsequent editions have been updated and revised under the name of the current Clerk of the House of Commons. No other book on parliamentary practice has ever achieved a standing comparable to *Erskine May*. As an authority, it is virtually biblical.

22. Perhaps the best edition of *Erskine May* was the fourteenth, which appeared in 1946.[31] It was prepared by the then Clerk of the House of Commons, Sir Gilbert Campion, with the assistance of other notable experts in the field of parliamentary procedure. While significant changes and improvements were made to much of the text, the chapters on privilege, in particular, were substantially re-written and augmented. In fact, it is in this edition that the standard definition of privilege first appears:

[29] Erksine May, *A Treatise on the Law, Privileges, Proceedings and Usages of Parliament,* 1st ed. (London: Butterworths, 1844).
[30] *Erskine May*, 22nd ed., *supra* note 26.
[31] Erksine May, *A Treatise on the Law, Privileges, Proceedings and Usages of Parliament,* 14th ed. by Sir Gilbert Campion (London: Butterworths, 1946) [Erskine May, 14th ed.].

> 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.[32]

23. Through all of these editions, however, the treatment of parliamentary privilege has remained almost exclusively focused on the rights and powers of the legislative assembly itself and the immunities of its members. These privileges, immunities and powers include freedom of speech and freedom from arrest in civil matters or from hindrance and molestation. Privilege also includes the power of a legislative assembly to summon witnesses and to reprimand and even arrest and imprison those who disobey its orders or who commit contempt against its authority and dignity.

24. In none of the editions of *Erskine May* is there any support for the claim that employer-employee relations are considered a parliamentary privilege. This is the case despite the history of legislation on the subject of the role and responsibility of senior officers of the U.K House of Commons, as seen above in para. 17, with the *House of Commons Officers Act*.

(b) Canada

25. The description provided in *Erskine May* on parliamentary privilege has been generally followed in the standard Canadian parliamentary authorities including Bourinot's *Parliamentary Procedure and Practice in the Dominion of Canada* and *Beauchesne's Rules and Forms of the House of Commons of Canada*.

[32] *Ibid*. at p. 41.

26. The first edition of John George Bourinot's text appeared in 1884, four years after he had become Clerk of the House of Commons.[33] The book was favourably compared to its U.K. model. Certainly in his exposition of privilege, Bourinot sought to be as comprehensive as Erskine May in explaining the purpose and scope of privilege.

27. Writing why privilege was essential, Bourinot stated:

> It is quite obvious that a legislative assembly would be entirely unable to discharge its functions with efficiency unless it had the power to punish offenders, to impose disciplinary regulations upon its members, to enforce obedience to its commands, and to prevent any interference with its deliberations and proceedings.[34]

28. The remainder of the chapter covers the different privileges and the procedures available for its enforcement. Nowhere in this chapter, however, does he mention the matter of employer-employee relations or treat these relations as a parliamentary privilege.

29. Bourinot also describes the functions of the officers of the House of Commons. By the time the fourth edition appeared in 1916[35], the *Civil Service Act*[36] had been amended so that it now included within its ambit the officers, employees and staff of the Senate, House of Commons and Library of Parliament. The Clerk acquired the rank of deputy minister, "charged with special duties and functions with respect to clerkships of the staff of the house."[37] In the debate on the bill amending the *Civil Service Act* in 1908, the sponsoring Minister explained that the object of including House employees, as well as employees of the Senate and the Library of Parliament, within the Civil Service "was

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[33] John George Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 1st ed. (Montreal: Dawson Brothers, 1884).
[34] *Ibid.* at p. 188.
[35] John George Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 4th ed. Thomas Barnard Flint (Toronto: Canada Law Book, 1916) [Bourinot, 4th ed.].
[36] 7-8 Edward VII, c.15 [*Civil Service Act*].
[37] Bourinot, 4th ed., *supra* note 36 at p. 183.

that as far as salaries, appointments, classifications and promotions were concerned, it would be better to have the employees … under the same rule [as applied in the public service]."[38] At the same time, it was acknowledged that the purpose of the Act was not to infringe in any way the management of its own affairs by the House of Commons.[39] Employees of the House of Commons continued to be covered by the *Civil Service Act* until 1961.

30. Unfortunately, Bourinot's substantial parliamentary manual did not have the same publishing history as Erskine May's. Bourinot himself managed to publish a second edition in 1892,[40] but he died in 1903 while preparing the third edition,[41] a task that was completed the same year by his successor, Thomas Flint, who also edited the fourth and final edition of *Parliamentary Procedure* in 1916.[42]

31. Thereafter, Bourinot's text continued to be consulted as a source for the early precedents of Canadian parliamentary practice, but it was soon displaced as a guide to current practice in favour of either the latest edition of *Erskine May* or the compendium to the Standing Orders of the Canadian House of Commons, entitled *Rules and Forms of the House of Commons of Canada*, first published in 1922 by Arthur Beauchesne.[43] He became Clerk of the House of Commons in 1925 and served until 1949. During that time, he published two further editions of his book, in 1927[44] and 1943.[45] A fourth edition appeared in 1958,[46] shortly before his death.

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[38] *House of Commons Debates* (June 29 1908) at 11547 (Hon. Sydney Arthur Fisher).
[39] *Ibid.* at 11538.
[40] John George Bourinot, *Parliamentary Practice and Procedure in the Dominion of Canada,* 2nd ed. (Montreal, Dawson Brothers, 1892)
[41] John George Bourinot, *Parliamentary Practice and Procedure in the Dominion of Canada,* 3rd ed. Thomas Barnard Flint (Toronto, Canada Law Book, 1903)
[42] Bourinot, 4th ed. *supra* note 35.
[43] Arthur Beauchesne, *Rules and Forms of the House of Commons of Canada,* 1st ed. (Toronto: Canada Law Book, 1922).
[44] Arthur Beauchesne, *Rules and Forms of the House of Commons of Canada,* 2nd ed. (Toronto: Canada Law Book, 1927) [Beauchesne, 2nd ed.].
[45] Arthur Beauchesne, *Rules and Forms of the House of Commons of Canada,* 3rd ed. (Toronto: Canada Law Book, 1943) [Beauchesne, 3rd ed.].
[46] Arthur Beauchesne, *Rules and Forms of the House of Commons of Canada,* 4th ed. (Toronto: Carswell, 1958) [Beauchesne, 4th ed.].

32. Beauchesne's second, third and fourth editions provide an account of the duties of the Clerk accompanied by a statement about privilege as it applies to that position and other officers of the House. The statement in the second edition is different from the version of the third and fourth editions. The second edition claiming to be based on Bourinot seems to limit the privilege as it applies to the Clerk and other officers of the House to activities related to the conduct of parliamentary business.

> The control and management of the officers of the Houses are as completely within the privileges of the Houses as necessary to the conservation of dignity and the efficient conduct of public business, by a legislative body as any regulation of its own proceedings within its own walls. These officers are under the guidance of certain rules and orders of the House which are among the regulation of its proceedings and as essentially matters of privilege as the appointment of committees, the conduct of public business and the procedure of the Houses, generally, including the acts of the Speaker himself in the Chair.[47]

33. In the third and fourth editions, the citation was altered to read:

> The control and management of the officers of the Houses are as completely within the privilege of the Houses as any regulation of its own proceedings within its own walls.[48]

34. The deletion of the phrase "as necessary to the conservation of dignity and the efficient conduct of public business, by a legislative body" broadens significantly the scope of the privilege. Indeed, the deletion of this important phrase expands the privilege beyond anything originally stated. In the second edition, it is clear that privilege over its officers is in relation to the performance of duties with respect to the work of the House and its proceedings. In the third and fourth editions, it would appear that the privilege of the House in the control and management of its officers is no different than its control over its proceedings.

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[47] Beauchesne, 2nd ed., *supra* note 42 at citation 830, p. 243; Bourinot, 4th ed., *supra* note 36 at p. 184.
[48] Beauchesne, 3rd ed., *supra* note 43 at citation 730, pp. 272-273; Beauchesne, 4th ed., *supra* note 46 at citation 446, p. 329.

35. The third and fourth editions also include some statements that were not found in the second edition. They are added to address the authority that the House of Commons then retained over its staff and employees even though they came under the *Civil Service Act*. These editions explain that: "… Neither the Government nor any other authority has the power to deal with the staff of the House of Commons unless specially authorized to do so by statute or resolution of the House."[49]

36. Through the *Civil Service Act*, as Beauchesne further explains, the House has agreed to divest itself:

> …of its authority in the appointment, transfer, promotions, salaries, increases and classifications of its staff … Nevertheless it must not be forgotten that the House of Commons is not a department of Government. The control of its own officers is one of its undoubted privileges. … In passing the Civil Service Act, the House has agreed to use the machinery of the Civil Service Commission for certain fixed purposes but it did not alienate its traditional rights nor renounce its independence.[50]

37. As one apparent consequence, staff of the House is not included in the definition of civil service. Furthermore, section 62 of the *Civil Service Act* exempted Commons officers, clerks and employees from the application of the Act in certain respects including preferential hiring of some sessional employees and the duration of office hours or employment during the parliamentary recess, which might entitle them to extra salary or remuneration.

[49] Beauchesne, 3rd ed., *supra* note 45 at citation 730, p. 273; Beauchesne, 4th ed., *supra* note 46 at citation 446, p. 329.
[50] Beauchesne, 3rd ed., *supra* note 45 at citation 736, p. 276; and with slight changes in the fourth edition: Beauchesne, 4th ed., *supra* note 46 at citation 448, p. 330.

38. In 1978, almost twenty years after the death of Arthur Beauchesne, the then Clerk of the House, Alistair Fraser, together with the assistance of a committee clerk and a university professor, prepared the fifth edition of *Beauchesne*.[51] While this edition retains the standard account of privilege, this fifth edition has a statement about the extension of some privileges to certain officers or servants of the Parliament. In keeping with the position of the 1927 edition, the privilege available to parliamentary officers is defined in relation to the support they provide to the operations of the House. This means that officers can be exempt from civil obligations that keep them from carrying out parliamentary duties. They can be excused from jury duty and from the requirement to appear as a witness in court, though this second privilege is often waived.[52]

39. In the sixth and latest edition of *Beauchesne* that appeared in 1989, an additional reference was made with respect to the office staff of MPs.[53] It explains that parliamentary privilege does not extend to the actions of a member of the staff of a member of the House of Commons.[54] In short, there is nothing in *Beauchesne* that substantiates the sweeping claim of privilege made by the House of Commons. This may explain why the authority is not cited in the *House of Commons Factum* and the *Legislative Assembly of Ontario Factum*.

40. One text that is cited by the House of Commons and also by the courts is *Parliamentary Privilege in Canada* written by Joseph Maingot, Q.C., a former Law Clerk of the House of Commons. The first edition of this work appeared in 1982.[55] A revised second edition was published in 1997.[56]

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[51] Alistair Fraser, G.A. Birch & W.F. Dawson, eds. *Beauchesne's Rules and Forms of the House of Commons of Canada,* 5th ed. (Toronto: Carswell, 1978) [*Beauchesne*, 5th ed.].
[52] *Ibid*. at citation 78, p. 24.
[53] Alistair Fraser, W.F. Dawson & John A. Holtby, eds., *Beauchesne's Rules and Forms of the House of Commons of Canada,* 6th ed. (Toronto: Carswell, 1989) [*Beauchesne*, 6th ed.].
[54] *Ibid*. at citation 110, p. 28.
[55] J.P. Joseph Maingot, Q.C., *Parliamentary Privilege in Canada*, 1st ed. (Toronto: Butterworths, 1982) [Maingot, 1st ed.].
[56] J.P. Joseph Maingot, Q.C., *Parliamentary Privilege in Canada*, 2nd ed. (Ottawa: House of Commons; Montreal: McGill-Queens University Press, 1997) [Maingot, 2nd ed.].

41. In a marked departure from the Canadian authorities, Maingot enumerates various aspects of privilege relating to the "right to regulate internal affairs free from interference" which he seems to treat as a kind of sub-category of "proceedings in Parliament". In the second edition, Maingot is generally careful to provide support for every single one of his points with references to parliamentary authorities, legislation, or jurisprudence. For example, on page 183, the third point on his list: "The right to control publications of its debates and proceedings and those of its committees by prohibiting their publication"[57] is supported by *Halsbury's Laws of England*, 4th edition. The fourth point: "The right to administer that part of the statute law relating to its internal procedure without interference from the courts"[58] is substantiated with a reference to *Bradlaugh v. Gossett*. However, the fifth point on the list: "The right to administer its affairs within the precincts and beyond the debating chamber, such as regulating the sale of intoxicating beverages within the precincts, and appointing and managing its staff"[59] is not fully supported. The first element that Maingot presents – regulating the sale of intoxicating beverages within the precincts – is referenced to *R. v. Graham-Campbell, ex parte Herbert*[60] and *Williamson v. Norris* (which, as will be seen below, arrived at conflicting conclusions regarding whether or not the Licensing Acts should apply to Parliament)[61]. <u>The second example – appointing and managing its staff – is supported by no reference whatsoever</u>. Hence, Maingot does not substantiate in any way his claim that the appointment and management of staff is a privilege.

42. Relying on a broad notion of "internal affairs" as mentioned in a limited number of U.K. courts (examined below) and the idea of independence of the Commons from the Crown, Maingot also states:

[57] *Ibid.* at p. 183.
[58] *Ibid.*
[59] *Ibid.*
[60] [1935] 1 K B 594 [*Ex parte Herbert*].
[61] [1899] 1 Q B 7 [*Williamson v. Norris*].

> With respect to the staff of each House of Parliament, the natural reluctance of the courts to interfere with matters related to the internal affairs of the House would include employee-employer relations in the House where it could be demonstrated that in effect the House was acting collectively in a matter that fell within the area of the internal affairs of the House. In other words, the House of Commons has always remained steadfast in its independence from the Crown (see, for example, the relevant sections of the Parliament of Canada Act). Accordingly, it is a logical step to include its employees as part of its internal management and thus removed from the aegis of both the Crown and the courts. [Emphasis added.][62]

43. What does this really mean? According to Maingot, it would seem that the reluctance of the courts to interfere with the "internal affairs" of the House of Commons is based on a kind of deference. Is this right? Certainly it is not an answer to a question of law. Confronted with a legal issue involving fundamental rights, the courts have an inescapable duty to provide an interpretation or a remedy. The courts cannot rely on "natural reluctance" to avoid that duty. When parliamentary privilege is claimed to secure immunity from the law, as the House is seeking to do in *Vaid*, the courts must address the validity of the claim. That is what *Stockdale* is all about. The court in 1839 challenged the House of Commons, it found that Commons was abusing its authority.

44. If, on the other hand, Maingot is suggesting that the court's reluctance to look into the administrative activities of the House of Commons has resulted in an indirect expansion of a claimed privilege or, in effect, the creation of a new privilege, he is being inconsistent with his own statements that follow the standard parliamentary authorities about how new privileges are established:

> No new privilege may be created by either House. Privileges are beyond the control of either the Crown or any single power other than the Parliament of Canada. Thus, no new privilege may be created by the House of Commons, by the Senate, or by the Crown, because a new "privilege" would be part of the general and public law of Canada, and only Parliament may enact such laws.[63]

[62] Maingot, 2nd ed., *supra* note 56 at p. 184.
[63] *Ibid*. at p. 20.

45. Likewise, in Marleau and Montpetit's *House of Commons Procedure and Practice*, it is stated that: "No one House of Parliament has a right to claim for itself new privileges; new privileges can only be created or old privileges extended by Act of Parliament."[64]

46. Moreover, in his analysis of *New Brunswick Broadcasting Co.*, Maingot recognises that the powers or privileges of a legislative assembly or House of Parliament need to meet McLachlin J.'s test of being historically recognised and necessary. He then proceeds to list the specific privileges that arose in the U.K., including: "(b) exclusive control over the House's proceedings."[65] There is no suggestion that the list includes staff relations, but Maingot does confirm that *New Brunswick Broadcasting Co.* has adopted the test set out in *Stockdale* to determine the validity of a claimed privilege.[66]

Broadening of the term "Proceedings in Parliament"

47. The essence of parliamentary privilege is to allow open and unencumbered debate among parliamentarians in the exercise of their legislative role. Parliament, especially the House of Commons, fought for the recognition of this privilege by the Crown for most of the seventeenth century. That protection was granted in 1689 in the Bill of Rights, article 9 of which confirms "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."[67]

48. The meaning of "proceedings in Parliament" is central to the *Vaid* case. The House of Commons, with the help of Maingot's unsubstantiated statement noted above regarding the appointment and management of staff, suggests that the term "proceedings in Parliament" has a broad meaning that encompasses "internal affairs and procedures", which includes employment matters. By adopting this approach, the House of Commons has strayed from the definition of "proceedings in Parliament" as defined and

[64] Robert Marleau and Camille Montpetit, eds., *House of Commons Procedure and Practice*, (Montreal: Chenelière/McGraw-Hill, 2000), at pp. 52-53 [Marleau and Montpetit].
[65] Maingot, 2nd ed., *supra* note 54 at p. 314.
[66] *Ibid*. at p. 311.
[67] 1 Will. & Mar. (2nd Sess.), c. 2, s. 1 (U.K).

understood in the procedural authorities, both of the U.K and Canada. It is an error that is largely founded in a 1935 U.K. court judgment, which is discussed below.

49. The term "proceedings in Parliament" is not defined in the Bill of Rights nor have the courts, either in the U.K. or in Canada, provided a definition. While courts in the U.K, in considering the scope of parliamentary privilege, have commented on the term in a number of cases, Mr. Pachauri, author of *The Law of Parliamentary Privileges in U.K. and in India*, notes that "[t]he phrase 'proceedings in Parliament' or the words 'speech' or 'debate' have never been construed by courts of law so comprehensively as to bring out what they include and exclude."[68] Nonetheless, in considering the scope of parliamentary privilege, it would seem that some U.K. courts have gone well beyond the objective of article 9:

> In a number of cases over a long period, the courts have enlarged the scope of privilege beyond the scope of this part of the Bill of Rights by the use in their judgments of phrases such as "proceedings in the House and some other things," "what is said or done within the walls of Parliament," "its own internal concerns" and "the internal affairs of the House."[69]

50. As observed by Geoffrey F. Lock, a member of the staff of the U.K. House of Commons (1953-1991), these court decisions have had a substantial impact:

> The effect of these judgments has been the development of the view that matters relating to the staff of the House – even those not involving Members at all – were not subject to the jurisdiction of the courts or tribunals, as they were "internal affairs of the House."[70]

51. Accordingly, the House of Commons refers to some of these judgments, as well as Canadian judgments, in the *Vaid* case to assert the claim that parliamentary privilege includes the power to appoint and manage staff.

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[68] P.S. Pachauri, *The Law of Parliamentary Privileges in U.K. and in India*, (Bombay: N.M. Tripathi Private Ltd., 1971), at p. 54.
[69] Geoffrey F. Lock, "Labour Law, Parliamentary Staff and Parliamentary Privilege", (1983) *Industrial Law Journal*, vol. 12, at p. 29 [Lock].
[70] *Ibid*.

The Jurisprudence from the U.K.

52. As already noted, *Stockdale* involved a lengthy dispute between the House of Commons and the courts over an attempt of the House of Commons to assert a new privilege having the force of law through a simple resolution of that House alone. This resolution ordered the printing of a committee report. The House maintained that it was sufficient to extend the privilege to Hansard, the parliamentary printer, for printing the allegedly defamatory report, however, the court disagreed. In the course of the judgment, several of the Justices made statements that have been used in the *Vaid* case to claim that the House of Commons can regulate its proceedings and internal affairs, most notably the appointment and management of the employees of the House, as a matter of privilege.

53. Intervening in favour of the House of Commons, the Legislative Assembly of Ontario claims that since *Stockdale*, internal affairs and proceedings are privileged. The *Legislative Assembly of Ontario Factum* states:

> It has been clear from *Stockdale v. Hansard* onward that the category of internal affairs and proceedings is privileged. *Stockdale* is the seminal case regarding a House's right to regulate its own proceedings. It dealt with a libel action brought against Hansard, the parliamentary printers, for printing an allegedly defamatory report that had been brought before the House. Several passages from the judgment of the court of Queen's Bench have formed the core in this area since:
>
> > [w]hatever is done within the walls of either assembly must pass without question in any other place. (*per* Lord Denman, at p. 1156)
> >
> > Beyond all dispute it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled; that whatever is done or said in either House should not be liable to examination elsewhere. (*per* Patteson J. at 1191)
> >
> > [T]hat 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. (*per* Coleridge J., at p. 1199)[71]

[71] *Legislative Assembly of Ontario Factum*, *supra* note 11 at para. 22.

54. None of these citations, read in the context of the judgment in *Stockdale*, concern the administrative operations of a House of Parliament in any way. Instead, they all deal with the actions of parliamentarians in the pursuit of their parliamentary responsibilities. More precisely, the citations simply point to the notion of "proceedings" based on article 9 of the Bill of Rights. There is nothing in the judgment of *Stockdale* that addresses the matter of internal affairs or arrangements understood as an administrative function. For example, the first citation, of Lord Denman, touches upon the privilege of freedom of speech:

> Thus the privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For any paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a Court of Justice. [Emphasis added.][72]

55. The second citation equally relates to freedom of speech and privileges of members in the proceedings. In the paragraph following the citation, Patteson J. uses broad terms to describe the nature and the necessity of the privilege but arrives at a narrow definition which relates to certain freedoms enjoyed by members of Parliament:

> Beyond all dispute it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled; that whatever is done or said in either House should not be liable to examination elsewhere; therefore no order of either House can itself be treated as libel, as the Attorney-General supposed it might if this action would lie. No such consequence will follow.
>
> The power claimed is said to be necessary to the due performance both of the legislative and inquisitorial functions of the House. In all the cases and authorities, from the earliest times hitherto, the powers which have been claimed by the House of Commons for itself and its members, in relation to the rest of the community, have been either some privilege properly so called, i.e., an exemption from some duty, burden attendance, or liability to which others are subject, or the power of sending for and examining all persons and things, and the punishing all contempts committed against their authority.

[72] *Stockdale*, *supra* note 13 at p. 1156.

> Both of these powers proceed on the same ground, viz. the necessity that the House of Commons and the members thereof should in no way be obstructed in the performance of their high and important duties, and that, if the House be so obstructed, either collectively, or in the persons of the individual members, the remedy should be in its own hands, and immediate, without the delay of resorting to the ordinary tribunals of the country. Hence liberty of speech within the walls of the House, freedom from arrest, and from some other restraints and duties during the sitting of Parliament, and for a reasonable time before and after its sitting (with the exception of treason, felony, and breach of the peace), which, although the privileges, properly so styled, of the individual members, are yet the privileges of the House. Hence the power of committing for contempt those who obstruct their proceedings, either directly, by attacks upon the body or any of its members, or indirectly, by vilifying or otherwise opposing its lawful authority. Cases have frequently arisen in which the extent and exercise of these privileges and powers have come in question: and I believe that all such cases will be found to range themselves under one of the two heads I have mentioned. But this is, I believe, the first time in which a question has arisen as the power of the House to authorize an act prejudicial to an individual who has neither directly or indirectly obstructed the proceedings of the House, and is in no way amenable to its authority.[73] [Emphasis added.]

56. As for the third citation, the *Legislative Assembly of Ontario Factum* omitted an important qualification found in the passage from which the citation was taken. According to Coleridge J., the reason the House should have exclusive jurisdiction over its proceedings is to protect freedom of speech and debates in Parliament from outside scrutiny:

> Neither have I any difficulty with any of the cases in which the question arises upon any thing said or done in the House. In point of reasoning, it needed not the authoritative declaration of the Bill of Rights to protect the freedom of speech, the debates and proceedings in Parliament, from impeachment or question in any place out of Parliament; and <u>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.</u> [Emphasis added.][74]

57. While they were not referred to, the words of the fourth judge in *Stockdale*, Littledale J., also shed light on the meaning that the court attached to "proceedings in Parliament":

> It is said to allow this to be decided contrary to the Bill of Rights. The Bill of Rights declares that the freedom of speech and debates on proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament. This does not, in my opinion, in the smallest degree infringe upon the Bill of Rights.

[73] *Ibid.* at p. 1191.
[74] *Ibid*. at p. 1199.

> I think this is not such a proceeding in Parliament as the Bill of Rights refers to; it is something out of Parliament. The privileges of Parliament appear to me to be confined to the walls of Parliament, for what is necessary for the transaction of the business there, to protect individual members so as that they may always be able to attend their duties, and to punish persons who are guilty of contempts to the House, or against the orders and proceedings or other matters relating to the House, or to individual members in discharge of their duties to the House, and to such other matters and things as are necessary to carry on their Parliamentary functions; and to print documents for the use of the members.[75]

58. In the *Duke of Newcastle* v. *Morris* (1870) the House of Lords ruled that the 1861 law of bankruptcy, which applied expressly to all debtors, did not exclude Parliament or its members including peers who were then entitled to certain personal privileges.[76] The court determined that parliamentary privilege, being part of the common law, continues to exist unless it is expressly repealed. Where there was a conflict with an acknowledged parliamentary privilege, however, and it was not expressly repealed, such as in this case the freedom from arrest or imprisonment of a peer, the application of the law was limited only by the extent of the relevant privilege. Therefore, the exemption of a peer, in this case the Duke of Newcastle, from arrest or imprisonment related to bankruptcy, as was then possible, is still enjoyed but this privilege does not exempt a peer as a debtor from other liabilities of the bankruptcy law such as the seizure of property.

59. In *Bradlaugh v. Gossett* (1884), the House of Commons passed a motion that authorized the Sergeant-at-Arms of the House to exclude a member, Mr. Bradlaugh, from the House until he would agree not to disturb the proceedings of the House.[77] Mr. Bradlaugh asked the Court of Queen's Bench for an injunction preventing the Sergeant-at-Arms from carrying out the resolution. The court held that it had no jurisdiction over the matter because it related to the internal management of the procedure of the House of Commons. According to Stephen J., it was obvious that the court could not interfere with what might be a measure of internal discipline of one of its members. In his analysis, Stephen J. considered two authorities: Blackstone and the words by each of the judges in *Stockdale*.

[75] *Ibid.* at p. 1182.
[76] [L R] 4 H L 661.

They maintain the principle advanced by Blackstone that matters that arise "…concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere."[78] Stephen J. refers to the words from each of the judges in *Stockdale* to support his decision:

> 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."[79]

60. In the case of *Williamson* v. *Norris* (1899) a divisional court was confronted with an alleged violation of a Licensing Act involving a charge against a barman of the House of Commons.[80] The court posed three questions in considering the case: 1) whether the unlicensed sale of liquor violated the terms of the Act; 2) whether provisions of the statute applied within the Palace of Westminster; and 3) whether the barman was guilty of the offence.[81] In the result, Lord Russell of Killowen C.J. found the barman not guilty of the offence because he was acting as a mere servant, having been appointed by the Kitchen Committee of the House of Commons, and having no knowledge of being an accessory to an illegal sale. Because Lord Russell found the barman not guilty, he did not deal with the assertion that had been made during the trial that the Licensing Acts did not apply to Parliament. Nonetheless he was prepared to state:

> …I am far - very far from being satisfied that no offence has been committed. I am not at all impressed by the argument that because many of the provisions of the Licensing Acts cannot be worked with reference to the House of Commons, therefore the Acts do not apply.[82]

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[77] 29 *Vict*. c. 19 (U.K.).
[78] *Ibid*. at p. 278.
[79] *Ibid*. at pp. 279-280.
[80] *Williamson v. Norris*, *supra* note 61.
[81] *Ibid*. at p. 20.
[82] *Ibid*.

61. Examined in their entirety – and the citations read in context – the four preceding cases demonstrate that when U.K. courts have been presented with legitimate cases of parliamentary privilege, they have recognised its existence. When the legitimacy of the claimed privilege is questionable, however, the courts have been less clear in their judgment and seemed unwilling to extend the privilege as was alluded to but not decided by the court in *Williamson v. Norris*. The effect was that judicial precedents clearly reflected legitimate claims to inherent parliamentary privilege.

62. This changed in 1935 with *Ex parte Herbert*.[83] The facts in this case are similar to those in *Williamson v. Norris*. Mr. Herbert was campaigning to become an M.P. and was advocating a reform of the licensing laws. This was in part aimed at Parliament; Mr. Herbert did not see why it should be exempt from the restrictions imposed on all citizens. He brought the issue before a magistrate whose jurisdiction was challenged in Divisional Court. The court held that the magistrate had no jurisdiction as the Licensing Acts did not apply to Parliament. Given that Mr. Herbert could not afford an appeal, the result in the Divisional Court stood. The impact of this decision is substantial because it marks a change of direction in the jurisprudence on the matter of parliamentary privilege.

It provides support to those who advocate that "proceedings in Parliament" and "internal affairs of the House" do include the administrative operations of the House.

63. In a key passage, Lord Hewart refers to Lord Denman's judgment in *Stockdale* as a confirmation that, in the case before him, the Licensing Acts did not apply to Parliament:

> To pass over other matters, the words of Lord Denman C.J. in Stockdale v. Hansard are sufficient for the present purpose. He said: "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 that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt."

[83] *Ex parte Herbert*, *supra* note 60.

> Here, as it seems to me, the magistrate was entitled to say, on the materials before him, that in matters complained of the House of Commons was acting collectively in a matter which fell within the area of internal affairs of the House, and, that being so, any tribunal might well feel, on the authorities, an invincible reluctance to interfere. To take the opposite course might conceivably be, in proceedings of a somewhat different character from these, after the various stages of those proceedings had been passed, to make the House of Lords the arbiter of the privileges of the House of Commons.[84]

64. In taking a closer look at the passage from which it was taken, it is clear that Lord Denman was not putting Parliament above the law as suggested by Lord Hewart. In fact, Lord Denman was illustrating the absurdity of contending that Parliament was above the law:

> All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt. We freely admit them in all their extent and variety; but, if, on a resolution of guilt voted by themselves, this grand inquest should not accuse but condemn, should mistake their right of initiating a charge for the privilege of passing sentence and awarding execution, will it be denied that their agent would incur the guilt of murder? [Emphasis added.][85]

65. The meaning ascribed by Lord Hewart in *Ex parte Herbert* to Denman C.J.'s position is clearly the opposite of the intended meaning. It is also important to remember that, in contrast to the result in *Ex parte Herbert*, a unanimous bench decided the issue against the House in *Stockdale*. In light of this, it is difficult to see how the selective citation from Lord Denman's decision could properly support the broad view of parliamentary privilege as adopted in *Ex parte Herbert*.

66. The decision of the Divisional Court in *Ex parte Herbert* had, as stated by Lock, "…consequences much wider than the issue tried, and these consequences have endured to this day."[86] According to the late Professor S.A. de Smith, the court took "a remarkably generous view of the scope of the internal affairs of the House of Commons."[87] Lord Hewart's interpretation of parliamentary privilege was quite removed from its original purpose of protecting the freedom of speech of

[84] *Ibid*. at p. 50.
[85] *Stockdale*, *supra* note 13 at p. 1156.
[86] Lock, *supra* note 69 at p. 32.
[87] S.A. de Smith, *Constitutional and Administrative Law* (3rd edition, 1977), at p. 113, cited in Lock, *supra* note 69.

parliamentarians; it exempted Parliament from the general application of the law in matters related to its "internal affairs." Since no case has arisen that has made it possible to overturn *Ex parte Herbert*, the jurisprudence was allowed to further evolve in this direction, thereby erroneously solidifying a broader view of parliamentary privilege.

67. In its 1999 report, the Joint Committee on Parliamentary Privilege discussed the unfortunate impact and repercussions of the *Ex parte Herbert* case in the U.K. In paragraph 250 of the report, it states:

> This decision, which has not escaped criticism, has spawned difficulties and anomalies, mainly but not solely in the field of employment. Statutes treated as not binding upon either House on the basis of this decision have included the Prices and Incomes Act 1966, the Industrial Relations Act 1971, the Health and Safety at Work etc. Act 1974, the Food Safety Act 1990, and the Data Protection Acts 1984 and 1998. Many of these Acts have been applied voluntarily, but the criticism remains that the law-makers are exempt from the laws that they make for everyone else. This criticism is forceful, because these Acts cover activities far removed from core activities of Parliament. 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. [Footnotes omitted.][88]

[88] U.K., H.L. and H.C., "Report of the Joint Committee on Parliamentary Privilege", HL Paper 43-I, HC 214-I, vol. 1 (1998-99) at para. 250 [*Report of the Joint Committee on Parliamentary Privilege*].

"Proceedings in Parliament" as defined by the procedural authorities and other authors

68. However widely some courts might have defined "proceedings in Parliament", the procedural authorities and authors on parliamentary privilege have consistently taken a narrower view of the meaning of this term, restricting it to the activity of parliamentarians in their legislative capacity. This is confirmed by all procedural authorities, in the U.K and Canada, including *Erskine May*, Marleau and Montpetit, and *Beauchesne*. Maingot, in his review of "proceedings in Parliament" also follows this pattern. However, as has already been mentioned, he does not convincingly explain or justify the inconsistency of this assessment with his more generous understanding of the term "internal affairs."

69. According to the 14th edition of *Erskine May*:

> As a result of *Stockdale v. Hansard*, the maxim of the law, found in Coke and Blackstone (and according to the latter, the "original" of the whole of the law and custom of Parliament) – "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," became practically restricted to matters solely concerning the *internal* proceedings of either House.
>
> The judges admitted that, when a matter is a proceeding of the House, beginning and terminating within its own walls, it is obviously outside the jurisdiction of the courts, although there may be an exception for criminal acts insofar as it is possible for crimes to be covered by the term "proceedings in Parliament". But if a proceeding of the House issues in action affecting the rights of persons exercisable outside the House (as, *e.g.*, in the publication of a part of the proceedings of the House, or in the carrying out of an order made by the House) then the person who published or the servant who executed the order will be within the jurisdiction of the courts. If such a person pleads an order of the House as his justification, the courts will inquire whether the order is one which the House is entitled to make, not in order to bring within their jurisdiction the Members who voted for the order, or the Speaker or other officer who signed it, but in order to decide, not only whether the act complained of is duly covered by the order, but also whether the privilege claimed by the House does, as pleaded, justify the act of the person who executed its order. [Footnote and internal reference omitted.][89]

[89] Erskine May, 14th ed., *supra* note 31 at pp. 172-173.

70. The 22nd edition of *Erskine May* provides a more detailed definition of "proceedings":

> The primary meaning of proceedings, as a technical parliamentary term, 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. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking. Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers also may take part in the proceedings of a House, for example, by giving evidence before it or one of its committees, or by securing the presentation of a petition.[90]

71. While recognising the difficulty of providing a comprehensive definition, the *Report of the Joint Committee on Parliamentary Privilege* also endorses the position that "proceedings in Parliament" should be closely related to the work of Parliament and the activities of its members as parliamentarians. The Joint Committee recommended the enactment of a definition similar in scope to the *Australian Parliamentary Privileges Act 1987*:

> (1) For the purposes of article 9 of the Bill of Rights 1698 'proceedings in Parliament' means all words spoken and acts done in the course of, or for the purposes of, or necessarily incidental to, transacting the business of either House of Parliament or of a committee.
>
> (2) Without limiting (1), this includes:
>
> (a) the giving of evidence before a House or a committee or an officer appointed by the House to receive such evidence
> (b) the presentation or submission of a document to a House or a committee or an officer appointed by a House to receive it, once the document is accepted
> (c) the preparation of a document for the purposes of transacting the business of a House or a committee, provided any drafts, notes, advice or the like is not circulated more widely than is reasonable for the purposes of preparation
> (d) the formulation, making or publication of a document by a House or a committee
> (e) the maintenance of any register of the interests of the members of a House and any other register of interests prescribed by resolution of a House.[91]

[90] *Erskine May*, 22nd ed., *supra* note 27 at p. 95.
[91] *Report of the Joint Committee on Parliamentary Privilege*, *supra* note 86 at para. 129.

72. According to Marleau and Montpetit:

> There is no statutory definition of "proceedings in Parliament" in Canada. From the numerous court cases where the law of parliamentary privilege has been applied, it is clear that the courts understand the meaning of the term and see it as part of the law of Canada. However, the courts have been reluctant to extend the immunity deriving from the rule of free speech beyond the context of parliamentary proceedings. In other words, despite the fact that the role of a Member of the House of Commons has evolved considerably since the seventeenth century when the rule was formulated in the Bill of Rights, the courts have, with few exceptions, confined the scope of this immunity to the traditional role of Members as debaters and legislators in Parliament.[92]

73. In fact, McLachlin J., in *New Brunswick Broadcasting Co.* recognised that "[t]he right of the House to be the sole judge of the lawfulness of its proceedings, is similarly evident; Erskine May states that this right is 'fully established'." [Emphasis added.][93]

74. In *Beauchesne's Parliamentary Rules & Forms*, it is stated that:

> §21. Motions, amendments, references to committees, and the three readings of bills come under the term of "proceedings in Parliament". They are the means used to the end that a matter may be considered and disposed of by the House. The word "proceeding" is derived from the verb "to proceed", which means "to advance" or "to carry on a series of actions". Members take part in the proceedings usually by making speeches; however, many proceedings take place without any debate. Speeches are not essential; they either help or hinder a proceeding, but they are not a proceeding. The verbatim report of Members' speeches is in Hansard but this is not an official record of the House proceedings. The official record of proceedings is found in minutes of the sittings which are printed and distributed daily under the title of *Votes and Proceedings* and are published after prorogation under the title of *Journals of the House of Commons*.[94]

75. According to Maingot, it "[m]ust be necessarily incidental to House or committee proceedings":

> 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." However, Parliament has also always been a forum to receive petitions, and the Crown's satisfying the grievances of Members before granting supply eventually led to straightforward requests for information.

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[92] Marleau and Montpetit, *supra* note 64 at p. 74.
[93] *New Brunswick Broadcasting Co.*, *supra* note 15 at para. 131.
[94] *Beauchesne*, 6th ed., *supra* note 53 at pp. 7-8.

> Therefore, the events necessarily incidental to petitions, questions, and notices of motions in Parliament in the seventeenth century and today are all events that are part of "proceedings in Parliament."
>
> Privilege of Parliament is founded on necessity, and is comprised of those rights that are "absolutely necessary for the due execution of its powers." Arguably, necessity should be a basis for any claim that an event was part of a "proceeding in Parliament," i.e. what is claimed to be part of a "proceeding in Parliament" and thus protected should be necessarily incidental to a "proceeding in Parliament." [Footnote omitted.][95]

76. Maingot also points out that: "[a]s a technical parliamentary term, "proceedings" are the events and the steps leading up to some formal action, including a decision, taken by the House in its collective capacity."[96]

77. Finally, in addressing the view of the courts regarding "proceedings in Parliament", Maingot states:

> [The] Member must be exercising functions as a Member in a committee or in the House in the transaction of parliamentary business. Whatever, he says or does in those circumstances is said or done during a "proceeding in Parliament"; in other words, while the Member is functioning as a Member, not in the lobby or in his constituency, but while actually participating in parliamentary business and saying or doing something necessarily incidental to parliamentary business. The speaking or doing must be inextricably tied to some parliamentary business in which the Member is taking part while moving a motion, voting, reducing a motion to writing, handing a petition or a motion or a notice to the Clerk, presenting a report from a committee, or simply speaking in the House or committee.[97]

78. Based on the preceding definitions by the procedural authorities and by Maingot, it is clear that the alleged power of the House of Commons – the appointment and management of staff – is not encompassed in "proceedings in Parliament". What can be drawn from the above citations is that the term has a strict technical meaning related to parliamentary procedure. Evaluated on that basis, the appointment and management of staff are not formal actions taken by the House or processes by which it reaches a decision, as defined by *Erskine May*, nor are they tied to the role of Members as debaters and legislators as suggested by Marleau and Montpetit. They cannot be said to

[95] Maingot, 2nd ed., *supra* note 56 at p. 80.
[96] *Ibid*. at p. 80.
[97] *Ibid*. at p. 82.

be part of the motions, amendments, references to committees, and the three readings of Bills as defined by *Beauchesne*. Finally, the appointment and management of staff are not part of those events necessarily incidental to the enactment of laws nor are they transactions of parliamentary business or events or steps leading to formal action by the House as defined by Maingot. Consequently, the argument that the appointment and management of staff are part of "proceedings in Parliament" must be rejected.

The Necessity Test

79. As a result of *New Brunswick Broadcasting Co.*'s sizeable stature in the limited Canadian jurisprudence on parliamentary privilege, every contention to inherent privilege must be measured against it. At the core of the majority judgment in that case is a thorough look at the necessity test and its implications. McLachlin J. affirms that all claims to inherent privilege must, without exception, be examined according to the principles of the test: "There is no dispute in the case law that necessity is the test".[98] As will be confirmed later, if the "historically recognized constitutional privileges"[99] in contention are found to pass the test of necessity, they will be considered parliamentary privilege.

80. McLachlin J. points out that the necessity test originates in the U.K., where "*Stockdale v. Hansard* is the leading case".[100] She therefore looks to *Stockdale* to lay down the ground rules for the necessity test, as it pertains to parliamentary privilege:

> 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.), 112 E.R. 1112, stated at p. 1169 E.R.: "If 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." 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 inquire into its exercise (at p. 1168 E.R.): [citing *Stockdale v. Hansard*]

[98] *New Brunswick Broadcasting Co.*, *supra* note 15 at para. 121.
[99] *Ibid.* at p. 127.
[100] *Ibid.* at para. 125.

> Where the subject matter falls within [the House of Commons] jurisdiction, no doubt we cannot question their judgment; but we are now enquiring whether the subject matter does fall within the jurisdiction of the House of Commons. It is contended that they can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer: it is perfectly clear that none of these Courts could give themselves jurisdiction by adjudging that they enjoy it.[101]

81. In summary, it is initially up to the courts to determine whether an alleged inherent privilege is "necessary to the legislative body's capacity to function".[102] Only then, if the privilege is found to be necessary to the "proper functioning"[103] of a Canadian legislative body, will it be accepted as parliamentary privilege, and: "courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body".[104] But if the claimed privilege is found to be unnecessary to the "proper functioning" of a legislative body, courts will have full power to examine its exercise.

<u>The necessity test as applied to control of parliamentary employment matters by legislative assemblies</u>

82. The central issue is the following: Is the claimed privilege – control of parliamentary employment matters by legislative assemblies – necessary to their proper functioning? It is up to those who claim the inherent privilege to prove that it is indeed necessary.

83. The *Application* fails to explain how the control of parliamentary employment matters by legislative assemblies is necessary to their proper functioning. The *Application* does contain an argument based on prior jurisprudence, to be examined later, suggesting that *House of Commons v. CLRB* is evidence of an acceptance of this particular privilege.[105] There is also a critique of Létourneau J.'s formulation of the necessity test in the Federal Court of Appeal decision in *Vaid*, but no application of the necessity test to the claimed

[101] *Ibid.* at para. 122.
[102] *Ibid*. at para. 125.
[103] *Ibid*. at para. 126.
[104] *Ibid*. at para. 123.
[105] [1986] 2 F.C. 372 [*CLRB*].

privilege.[106] Once again, it can be noted that in *New Brunswick Broadcasting Co.*, McLachlin J. stated that: "There is no dispute in the case law that necessity is the test."[107] The necessity test cannot therefore be ignored.

84. To suggest that, in order for a legislative assembly to operate properly, it is necessary for the House of Commons to have complete control over the appointment and management of all employees, including the Speaker's chauffeur, without reference to the *Canadian Human Rights Act* is clearly unreasonable. The role and responsibility of a chauffeur is far removed from the core functions of a legislative assembly and its proceedings. The legislative assembly will properly function, whether it has control over the position of chauffeur or not. It is simply not credible to contend, as the House of Commons does, that a legislative assembly has a privilege that entitles it to practice with impunity a broad range of discriminatory actions that are expressly prohibited by the *Canadian Human Rights Act* and that are totally inconsistent with the *Charter*.

85. It is acknowledged by the courts that they have no right to scrutinize the exercise of a particular privilege once the privilege has been recognised. There is no doubt, however, that the courts are fully entitled to judge the validity of a constitutionally recognized claim of inherent privilege applying the necessity test. This is precisely what must be done in the case at hand. When assessed against the test of necessity, the claimed parliamentary privilege – control over employment matters by the legislative assembly – fails to pass by any measure. There is no scrutiny of an exercise of the privilege, as is alleged by the House of Commons, simply the realisation that the claimed privilege is non-existent.

86. A somewhat similar position is held in *Thompson v. McLean*, where Campbell J. states:

> It may be clear that the First Clerk Assistant or the Sergeant-at-Arms or the legislative assistant of a house leader performs duties and enjoys an employment relationship completely within the core of legislative and parliamentary privilege.

[106] *Application*, *supra* note 1 at para. 37.
[107] *New Brunswick Broadcasting Co.*, *supra* note 15 at para. 121.

> It may be that such cases can be determined on the bare pleadings without any evidence. It may not be so clear that a bartender hired to serve drinks or a gardener or a social convener or a caterer works completely within the core of parliamentary privilege essential for the fulfilment of legislative and political functions. 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, excluding supervisors…[108]

87. Campbell J. appears to separate the employees into two groups based on their relationship to the core functions of the legislative assembly. The first group performs tasks that are directly relevant to proceedings, while the second group does not. A parliamentary privilege that would claim control over all employees, regardless of their tasks, as is done in the case at hand, is certainly not necessary to the proper functioning of the legislative bodies, and is therefore of no merit.

The impact of *House of Commons v. CLRB*

88. It is very difficult to conclude that the control of all staff is necessary to the proper functioning of the legislative assembly. Therefore, the argument based on the necessity test – that the control of all employment matters is a parliamentary privilege – is without any substance. In fact, the House of Commons, which bears the onus to prove necessity, does not succeed in making its case. The House of Commons tries to circumvent the question of necessity by looking at previous Canadian jurisprudence and whether it affirms the claimed privilege. This argument is anchored in the *CLRB* case.

[108] [1998] O.J. No. 2070, at para. 40 [*Thompson*].

89. The two citations on which the House of Commons bases its argument in the *Application* are the following. First, Pratte J. states that:

> Now, parliamentarians, rightly or wrongly, consider the right of the House and the Senate to appoint and control their staff as one of their privileges.[109]

90. Second, in concurring reasons, Hugessen J. suggests:

> …it seems to me that one of those [the House's] privileges is precisely that the House shall have the direction and control of its staff just as it does of its officers, the clerk and the Sergeant-at-Arms…[110]

91. The foundations for these claims by the judges lie in Beauchesne and Maingot. Pratte J. made reference to the fourth edition of Beauchesne (published in 1958) which, as seen above, departed from the two earlier editions and broadened significantly the scope of the privilege.[111] The publication of the fifth edition in 1979[112], 17 years after the *Civil Service Act* was amended to exclude parliamentary employees, re-established the scope of the privilege available to parliamentary officers to what it was in the second edition[113], i.e. in relation to the support the officers provide to the operations of the House. In order to have the most recent analysis with regard to parliamentary procedure, Pratte J. should have relied on the fifth and then current edition published seven years before the case rather than on the fourth edition published more than 28 years earlier when the *Civil Service Act* still applied to parliamentary employees.

92. As for Maingot, among the list of various aspects of privilege relating to the House of Commons' right to regulate its internal affairs free from interference, he notes the right to appoint and manage its staff.[114] Because *CLRB* was decided in 1986, the judges consulted the first edition of *Parliamentary Privilege in Canada*, the only one available at that time.

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[109] *CLRB*, *supra* note 105 at para. 20.
[110] *Ibid.* at para. 39.
[111] Beauchesne, 4th ed., *supra* note 46; see para. 30-36 of this text for a detailed analysis of the discrepancies in the different editions of Beauchesne's *Rules and Forms of the House of Commons*.
[112] *Beauchesne*, 5th ed., *supra* note 51.
[113] Beauchesne, 2nd ed., *supra* note 44.

In that edition, Maingot does use a few references to support his claim of privilege, but of all these sources and the arguments that they present have already been treated in this report. Furthermore, in the second edition, as has already been examined, Maingot does not provide any support in claiming the House's right to appoint and manage its staff, be it in the form of parliamentary authorities, legislation, or jurisprudence.

93. Moreover, the comments used by the House of Commons, which vaguely remark that parliamentarians consider the right to appoint and control their staff as one of their privileges, are not central to the conclusions drawn by the judges. The question before the tribunal was whether the House of Commons operated a federal undertaking or a business as defined by Part V of the *Canada Labour Code*.[115] The answer was that it did not, and all three judges came to this conclusion independently of their opinions concerning parliamentary privilege. In this sense, the reflections that pertain to parliamentary privilege are simply *obiter* and it is surprising that these passing comments have been considered authoritative. Finally, for all practical purposes, the *obiter* comments in *CLRB* were overturned by *Vaid*.[116]

94. A few Canadian court decisions have followed the *obiter* of the *CLRB* decision. For example, *Soth v. Ontario (Speaker of the Legislative Assembly)*[117] and *Manitoba Government Employees Assn. v. Legislative Assembly Management Commission*[118] are the two principal cases that make use of these statements. Both judgments were decided in a first instance tribunal. *Thompson*[119], however, a decision that came subsequent to *Soth* and *Manitoba*, clearly contradicted what *Soth* and *Manitoba* held concerning employment matters in a legislative assembly. Campbell J. stated the following:

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[114] Maingot, 1st ed., *supra* note 55 at p. 157.
[115] *CLRB*, *supra* note 103.
[116] *Vaid*, *supra* note 2.
[117] 23 O.R. (3d) 440 [*Soth*].
[118] [1990] M.J. No. 72 [*Manitoba*].
[119] *Thompson*, *supra* note 108.

> It jars a little to apply, to a modern public service employer, the concepts of absolute privilege and absolute immunity asserted in this case by the Office of the Assembly.
>
> It is one thing to say that right of the Legislative Assembly to exclude television cameras is necessary to its parliamentary function and that the courts have no right to interfere.
>
> It is another thing to say that allegations, that the Office maintained an inadequate sexual harassment policy and fired an employee without just cause, come so close to the core political function of the Legislative Assembly that absolute parliamentary privilege prevents the court from even hearing the allegations in a case where the factual nature of the employment relationship is unclear.
>
> If a court is going to say that parliamentary privilege goes that far, it will not be this court at this stage of the proceedings without a trial.[120]

95. Campbell J. further stated that: "it cannot be said that the law in this area is so completely settled by binding authority that the plaintiff should be deprived of an opportunity to test at trial the claim of privilege raised by the Office of the Assembly."[121]

Conclusion

96. Ever since *Stockdale*, the courts have assessed claims to inherent parliamentary privilege on the basis of two criteria: the authorities and necessity. *New Brunswick Broadcasting Co.* confirms this test as it pertains to Canadian parliamentary privilege. The onus is on the House of Commons to prove that the claimed privilege meets the criteria. The position taken by the House of Commons in this case does not meet either.

97. The House of Commons presents several arguments. First, it makes the claim that Standing Order 151 is evidence of an accepted privilege. According to the judgment in *Stockdale*, however, a motion adopted only by the House of Commons cannot constitute privilege. Furthermore, parliamentary tradition in the U.K. has consistently respected this reasoning, in particular with the creation of the *Papers Act*.

[120] *Ibid.* at para. 44-47.
[121] *Ibid.* at para. 50.

98. The House of Commons also bases many of its arguments on the authorities. Yet the House of Commons largely neglects the fact that *Erskine May*, the predominant U.K. source for parliamentary privilege, provides no support for its claim of privilege. Neither do Marleau and Montpetit, who suggest that the courts have, with few exceptions, limited their definition of parliamentary privilege to the role of parliamentarians as debaters and legislators. The House of Commons finds some comfort in *Beauchesne* and Maingot. These publications are exceptions, however. The third and fourth editions of *Beauchesne* diverge from the second, and were subsequently corrected in the fifth and sixth, while Maingot, in his second edition, does not provide any procedural authority to back up his claims of employment matters as a parliamentary privilege.

99. The House of Commons, however, claims that since *Stockdale* the "…category of internal affairs and proceedings is privileged." It suggests that the term "proceedings in Parliament" has a broad meaning that encompasses "internal affairs and procedures" which, in turn, encompasses employment matters. The basis for this assertion, the House argues, is an interpretation made by the courts. It has been demonstrated, however, that the court judgments that have broadened the definition of "proceedings in Parliament" have done so wrongly. In incorrectly enlarging the scope of "proceedings in Parliament", the courts have departed from the objective in article 9 of the Bill of Rights without support from the procedural authorities who do not recognise such a broad interpretation.

100. Finally, the House of Commons argues that control of parliamentary employment matters is necessary to its proper functioning. The House of Commons does not, however, undertake a thorough examination of the necessity test. Instead, it relies mostly on the *obiter* statements given in *CLRB*. When examined, the necessity test defeats the claim of the House of Commons, as control of parliamentary employment matters is not necessary to its proper functioning. Furthermore, the decisions that support the House of Commons' claim are few, and basically flawed.

The comments that they make on employment matters are undermined or overturned by subsequent jurisprudence. The main decision on which the House of Commons bases its argument, *CLRB*, does not base its disposition on the claimed privilege and, in fact, provides little support for the existence of the claimed privilege.

101. If the House of Commons were to succeed, its employees would have no recourse to third party adjudication of discrimination complaints. This is admitted more than once in the *Application*:

> The Applicants' position throughout these proceedings has been that the right 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.[122]
>
> …no outside institution can review the House's operations when an allegation of a human rights violation is made.[123]

102. The Legislative Assembly of Ontario states this even more boldly in the *Legislative Assembly of Ontario Factum*:

> It may be that discrimination constitutes a wrongful use of the power to appoint and manage employees, but it is nevertheless about their appointment and management.[124]

103. Not only are the results unacceptable, but the basis for the claim of inherent privilege is unfounded. There is no privilege over employees, beyond the standard rights and authority that the House of Commons, or any employer, has with respect to its employees. Employers have sufficient control over their employees because they are employers. The law that generally applies to all employers should, therefore, equally apply to the House of Commons. There is no historically recognised authority that substantiates the claimed privilege that seeks to assert parliamentary interests over the individual rights of employees, nor does necessity justify it.

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[122] *Application*, *supra* note 1 at para. 2.
[123] *Ibid.* at para. 22.

104. This Committee asked for an analysis of the procedural arguments presented or implied by the House of Commons in *Vaid*; this report was intended to meet that request. A thorough review of the parliamentary authorities from the U.K. and Canada has been conducted to determine whether the claimed inherent privilege over staffing matters in *Vaid* is acknowledged. The goal was to compare the position of the House of Commons with respect to those authorities. The result of that review is conclusive. No evidence has been found attesting to the existence of the claimed inherent privilege, based either on the authorities, practice, or statute law. Consequently, the first test set out in *Stockdale* and confirmed in *New Brunswick Broadcasting Co.* has not been met. With respect to the second test, the proof of necessity, a survey of jurisprudence was undertaken to understand the position of the courts. As a result of this exercise, and based on the decisions to date in *Vaid*, it appears that the courts will find it difficult to accept the claim that the employment status of the Speaker's chauffeur is necessary to the proper functioning of the House of Commons and that it should be immune from any outside review in these matters. Accordingly, there is little procedural substance to the position taken by the House of Commons and hence, no justification.

[124] *Legislative Assembly of Ontario Factum*, *supra* note 11 at para. 41.