Supreme Court of Canada rules human rights body cannot investigate complaint of parliamentary employee

Date : September 1, 2005

In an important decision successfully argued by Jacques Emond of our firm, the Supreme Court of Canada has considered the limitations of Parliament's immunity from the application of laws that apply to Canadians. The case, *Canada (House of Commons) v. Vaid and Canadian Human Rights Commission* (May 20, 2005) dealt with whether the Canadian Human Rights Commission had jurisdiction to hear a complaint filed by the chauffeur of the Speaker of the House of Commons. The challenge to the Tribunal's jurisdiction was based on a claim of parliamentary privilege in connection with the resolution of disputes with support staff and on the fact that the *Parliamentary Employment and Staff Relations Act* (*PESRA*) provides a special labour relations regime for such employees. The Court rejected the claim of privilege, but held that the *PESRA* ousted the jurisdiction of the Commission to hold its inquiry.

Vaid had worked as a chauffeur to Speakers of the House of Commons between 1984 and 1994. He had been discharged in 1995 but was reinstated after successfully grieving under the *PESRA*. In 1997, he was told that, because of reorganization, his former position would be made surplus. He then filed two complaints with the Commission, alleging that the Speaker and the House of Commons had discriminated against him on the basis of his race, colour and national or ethnic origin. He also complained of workplace harassment and refusal to continue employment.

The Speaker and the House challenged the Commission's jurisdiction to hear the complaint, but lost in both the Federal Court and the Federal Court of Appeal. The case then went to the Supreme Court of Canada.

NECESSITY: THE FOUNDATION OF PRIVILEGE

Turning first to the issue of whether the Commission was barred from acting by parliamentary privilege, the Court noted that legislative bodies created under the Constitution "do not constitute enclaves shielded from the ordinary law of the land", but that parliamentary privilege functions to provide the "necessary immunity" for legislators to do their work. The test of what is "necessary" relates to that which the dignity, efficiency and autonomy of the House require. The role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers or employees that exceeds the necessary scope of the category of privilege being asserted.

In determining whether the claim of privilege should succeed, courts should take a two-step approach: they should first consider whether the existence and scope of the claimed privilege have been authoritatively established in relation to the Parliament of Canada or the House of Commons

at Westminster. If the category of privilege has not been authoritatively established, they should then test the claim against the doctrine of necessity, which is the foundation of parliamentary privilege:

> "In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency."

NO PRIVILEGE FOR EMPLOYEE MANAGEMENT

In this case, the category of privilege being asserted by the Speaker and the House was identified as "management of employees". Applying the first step of the analysis, the Court held that, while there was some British authority for the proposition that privilege exists with respect to those persons whose employment is connected to the exercise by the House of its legislative and deliberative functions, there was no Canadian or British authority to immunize the House's labour relations with *all* of its employees.

Nor did the claim succeed on the basis of the necessity test. The issue was whether the management of *all* employees was so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative and deliberative assembly. In other words, would outside scrutiny of the management of all service employee relations hinder Parliament from carrying out its functions? The Court held it would not, and that Vaid's case could proceed under the applicable legislative regime:

> "I have no doubt that privilege attaches to the House's relations with *some* of its employees, but the appellants have insisted on the broadest possible coverage without leading any evidence to justify such a sweeping immunity, or a lesser immunity, or indeed any evidence of necessity at all. We are required to make a pragmatic assessment but we have been given no evidence on which a privilege of more modest scope could be delineated.
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> The appellants having failed to establish the privilege in the broad and all-inclusive terms asserted, the respondents are entitled to have the appeal disposed of according to the ordinary employment and human rights law that Parliament has enacted with respect to

employees within federal legislative jurisdiction."

CHRA APPLIES TO PARLIAMENTARY EMPLOYEES, BUT *PESRA* OUSTS COMMISSION'S JURISDICTION

The Court then rejected the House and Speaker's assertion that the *Canadian Human Rights Act* (*CHRA*) did not apply to parliamentary employees. There was nothing in the language of the Act to support an intention that it apply to every federal employer except Parliament. Because the *CHRA* is quasi-constitutional legislation, any exemption from its provisions must be clearly stated.

However, that did not end the matter. Noting that *PESRA*'s system of redress for employee grievances runs parallel to the enforcement machinery provided under the *CHRA*, the Court held that the language of the *PESRA* manifested a parliamentary intention to oust the dispute resolution machinery of the Canadian Human Rights Commission. It based its conclusion on the following factors:

- The *PESRA* applied to employees in Vaid's position.
- It applied to the subject matter of Vaid's grievance.
- *PESRA* adjudicators had the remedial powers necessary to deal with Vaid's complaints, including those of discrimination and harassment.
- The *PESRA* prevails over other legislation dealing with similar matters.

The Court acknowledged that Vaid's issues could fall under both the *PESRA* and the *CHRA*, but held that section 2 of the *PESRA*, which states that "except as provided in this Act, nothing in any other Act of Parliament that provides for matters similar to those provided for under this Act ... shall apply" was sufficient to bar Vaid from using the mechanisms provided under the *CHRA*, despite the fact that the *PESRA* was not in essence a human rights statute:

> "It is true … that *PESRA* is essentially a collective bargaining statute rather than a human rights statute. The substantive human rights norms set out in the *Canadian Human Rights Act* are not set out in *PESRA*. Nevertheless, *PESRA* permits employees who complain of discrimination to file a grievance and to obtain substantive relief. I do not suggest that all potential claims to relief under the *Canadian Human Rights Act* would be barred by s. 2 of *PESRA*, but in the present type of dispute, there is clearly a measure of duplication in the two statutory regimes and the purpose of s. 2 is to avoid such duplication. Parliament has determined that grievances of employees covered by *PESRA* are to be dealt with under *PESRA*. A grievance that raises a human rights issue is nevertheless a grievance for purposes of employment or labour relations."

Accordingly, the Court allowed the appeal, holding that Vaid's complaint should have proceeded by way of a *PESRA* grievance.

In Our View

The Court was careful to point out that other human rights issues raised by Parliamentary employees, such as allegations of systemic discrimination, could potentially be dealt with under the *CHRA*, but not cases such as Vaid's. Conversely, there could also be cases in which a more limited category of privilege involving certain parliamentary employees would be upheld, in which circumstances even the *PESRA* would not apply.

By confining Vaid's recourse to the *PESRA* mechanisms, the Court has continued along the "exclusive jurisdiction" path first mapped in *Weber v. Ontario Hydro* (see "Supreme Court of Canada extends *Weber* approach to "run-of-the-mill" non-arbitrable disputes under *PSSRA*" on our What's New page). However, such cases have usually involved barring access to the courts if an alternate dispute resolution regime is available. In this case, the Court prohibited Vaid from using the dispute resolution mechanisms, not of the court but of the Canadian Human Rights Commission. This may mark a new phase in the tendency of courts to restrict the choice of venues in which employee litigants may pursue their claims.

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