

Competition Tribunal



Tribunal de la Concurrence

Reference: *National Capital News Canada v. Speaker of the House of Commons*, 2007 Comp. Trib. 23

File no.: CT-2007-07

Registry document no.: 0024

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34 as amended;

AND IN THE MATTER of an application by Robert Gilles Gauthier, carrying on business as The National Capital News Canada, pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, for leave to make an application under sections 75 and 77 of the Act.

B E T W E E N :

**Robert Gilles Gauthier, c.o.b. as
The National Capital News Canada**
(applicant)

and

**The Honourable Peter Milliken, M.P.,
Speaker of the House of Commons**
(respondent)



Decided on the basis of the written record

Presiding Judicial Member: Dawson J.

Date of Reasons and Order: July 31, 2007

Reasons and Order signed by: Madam Justice E. Dawson

**REASONS AND ORDER REGARDING APPLICATION FOR LEAVE TO MAKE AN
APPLICATION PURSUANT TO SECTIONS 75 AND 77 OF THE *COMPETITION ACT***

[1] This is what Mr. Gauthier, the applicant, describes to be "a renewed application to the Competition Tribunal pursuant to Section 103.1 [of the *Competition Act*, R.S.C. 1985, c. C-34] seeking leave to make an application under section 75 and under section 77 of the *Competition Act*." Mr. Gauthier's previous application for leave was dismissed by order of the Tribunal dated December 13, 2002.

[2] Mr. Gauthier brings this application as the proprietor of The National Capital News Canada. In his amended, supporting affidavit he swears that his paper, which is no longer in circulation, requires access to sources of information related to the Parliament and Government of Canada other than such "regular material" as is readily available. He asserts that the Speaker of the House of Commons has failed to give him the same access to the Parliamentary precincts as are enjoyed by members of the Parliamentary Press Gallery. The Parliamentary Press Gallery is a private association which has denied full membership to Mr. Gauthier.

[3] I believe that Mr. Gauthier correctly describes this to be a renewed application. As set out below, the application could also be correctly characterized as a request for the reconsideration of the original application because it is based upon the same conduct and actions of the Speaker of the House of Commons and seeks the same relief. In the original application Mr. Gauthier described the substantial effect upon his business in the following terms:

3. The applicant has been substantially affected in his business and is significantly precluded from carrying on business due to his inability to obtain full access to substantial supplies of information and to essential services, (including a listing on the Press Gallery journalist list), that are provided to his competitors by the Speaker of the House of Commons, the Honourable Peter Milliken who controls such access on behalf of the Parliament of Canada.

[4] The relief sought was set out as follows:

10. The order sought, pursuant to Section 75(1), (2) and (3) of the *Competition Act*, Restrictive Trade Practices, Refusal to Deal, is that full access to the Press Gallery facilities and services, including mailbox, listing and other benefits, be provided immediately to the applicant and his employees and associates without further delay without the requirement of becoming a member of a private corporation called Canadian Parliamentary Press Gallery Inc., or being required to meet unfair or arbitrarily restrictive conditions of any other person, group or government official.

[5] In the present application, Mr. Gauthier asserts that:

3. The applicant has been substantially affected in his business and is significantly precluded from carrying on business due to his

inability to obtain full access to substantial supplies of information and to essential services (including a listing on the Press Gallery journalist list), that are provided to his competitors by the Speaker of the House of Commons, the Honourable Peter Milliken who controls such access on behalf of the House of Commons and the Senate of Canada.

[6] The order sought in this renewed section 103.1 application is also identical to that sought in the original proceeding. Again, Mr. Gauthier claims:

10. The order sought, pursuant to Section 75(1), (2) and (3) of the *Competition Act*, Restrictive Trade Practices, Refusal to Deal, is that full access to the Press Gallery facilities and services, including mailbox, listing and other benefits, be provided immediately to the applicant and his employees and associates without further delay without the requirement of becoming a member of a private corporation called Canadian Parliamentary Press Gallery Inc., or being required to meet unfair or arbitrarily restrictive conditions of any other person, group or government official.

[7] As grounds for the renewed request, Mr. Gauthier raises the following:

- (1) The subsequent decision of the Supreme Court of Canada in *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667.
- (2) The "Federal Court case T-653-02 before Mosley J., *Privacy Act* in relation to solicitor-client privilege", rendered after the original order. Such case may be cited as *Gauthier v. Canada (Minister of Justice)*, 2004 FC 655.

[8] The *Competition Tribunal Rules*, SOR/94-290 are silent with respect to the reconsideration of a prior order of the Tribunal. Thus, on the basis cited by Mr. Gauthier for renewing his application and by operation of Rule 72 of the *Competition Tribunal Rules* (the gap rule), the practice and procedure set out in Rule 399(2)(a) of the *Federal Courts Rules*, SOR/98-106 applies.

[9] Rule 399(2)(a) provides:

(2) On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

[10] I begin consideration of the application by noting that the original leave application was dismissed because the Tribunal concluded that it had no reason to believe that the matters complained of by Mr. Gauthier could be subject to any order of the Tribunal. In its reasons for dismissing the application for leave, the Tribunal wrote:

[25] No evidence or information was provided to suggest that any of the facilities or services that the applicant seeks fall outside the scope of Parliamentary privilege. The applicant asserts that the facilities and services which he seeks are provided by the House of Commons, and are financed and controlled by the Speaker who exercises Parliament's power to regulate the admission of strangers to its precincts.

[26] Applying the principles articulated in *New Brunswick Broadcasting*, cited above, to the evidentiary record before me, I am satisfied that the Speaker's alleged refusal to grant to the applicant full access to the Parliamentary Press Gallery facilities and services is an exercise of the parliamentary privilege to control access to the House and its precincts and to regulate the internal affairs of the House. Such privilege also encompass the power to adjudicate and apply those privileges.

[27] A similar conclusion was reached by the Ontario Court (General Division) in *Gauthier v. Canada (Speaker of the House of Commons)* (1994), 25 C.R.R. (2d) 286, where Madam Justice Bell found that the Court did not have jurisdiction to review the Speaker's decision to deny the plaintiff access to the precincts of Parliament.

[28] Just as a court may not examine a particular exercise of these privileges, I conclude that the Tribunal is without jurisdiction to embark upon such examination. The Tribunal is, pursuant to s. 9 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), a court of record and principles of parliamentary privilege are as important and applicable to it as they are to other courts. Therefore the practice complained of could not be the subject of any order of the Tribunal under s. 75 of the Act.

[29] It follows that the Tribunal does not have, and can not have, any basis upon which to believe that the practice complained of by the applicant could be subject to an order. This requirement of s. 103.1(7) of the Act is not met and therefore the application for leave must fail. In view of this conclusion it is unnecessary to consider whether the applicant adduced sufficient evidence to meet the first element of the test for leave.

[11] Mr. Gauthier now argues that since his original leave application was dismissed there have been changes in the law that would result in a different disposition of the leave application.

[12] For the reasons that follow, I respectfully reject that argument.

[13] First, Mr. Gauthier fails to reference the decision of the Federal Court of Appeal rendered in respect of his appeal from the original decision of the Tribunal refusing leave. The Court of Appeal's decision is reported as *Gauthier v. Canada (House of Commons)*, 2004 FCA 27. The reasons of the Court were brief, and were as follows:

[1] NADON J.A. (orally):— We are all of the view that this appeal should be dismissed.

[2] Firstly, we are satisfied that the presiding member of the Competition Tribunal, Madam Justice Dawson, made no error in concluding that by reason of Parliament's privilege to control access to the House of Commons and its precincts, and to regulate its internal affairs, the Competition Tribunal was without jurisdiction to make the order sought by the appellant under s. 75 of the *Competition Act*.

[3] Secondly, we are also satisfied that the issues before us are *res judicata*. Specifically, in *Gauthier v. Canada (Speaker of the House of Commons)* (1994), 25 C.R.R. (2d) 286, the *Ontario Court (General Division)* decided the precise issue before us, i.e. whether the Speaker of the House could deny the appellant access to the facilities of the Press Gallery on the same terms as the members of the Canadian Parliamentary Press Gallery.

[4] For these reasons, this appeal will be dismissed with costs.

[14] It can be seen that the issue of whether the Speaker of the House of Commons could deny access to the requested facilities by Mr. Gauthier was found to be *res judicata*. As such, Mr. Gauthier should not be allowed to re-litigate issues that have previously been decided against him.

[15] Second, to the extent that Mr. Gauthier argues that reconsideration may be sought in any previous case whenever there has been a change in the law, this point was decided in the negative by the Federal Court of Appeal in *Metro Canada Construction Ltd. v. Canada*, 2001 FCA 227. There, Mr. Justice Rothstein, then of that Court, noted that re-opening a previously decided case on the basis of a change in the law would lead to the reconsideration of an indefinite number of previous cases, a result not reconcilable with the rationale for the *res judicata* doctrine.

[16] Third, even if I am wrong in my conclusion with respect to the application of the doctrine of *res judicata* so that the merits of the original decision refusing leave should be reviewed, in my view, for the following reasons, neither the *Vaid* nor the *Gauthier* decisions relied upon by Mr. Gauthier would alter the prior decision of the Tribunal refusing leave to Mr. Gauthier.

[17] With respect to the decision of the Supreme Court of Canada in *Vaid*, the decision dealt with the existence of privilege when dealing with non-legislative employees of Parliament. The decision was ultimately decided on the basis of general administrative law principles (see:

paragraph 6). Notwithstanding, at paragraph 29 of its reasons, relying upon its prior decision in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, the Court confirmed, in *obiter*, that the power to exclude strangers from proceedings was an established category of Parliamentary privilege. As noted above, when refusing leave, the Competition Tribunal relied upon the *New Brunswick Broadcasting* case as it related to the Parliamentary privilege to control access to the House and its precincts and to regulate the internal affairs of the House. *Vaid* did not overrule the case on this point. Once the privilege is established, the Tribunal cannot examine the manner in which the privilege is exercised.

[18] I note that a similar conclusion with respect to the proper interpretation of the *Vaid* decision was reached by my Federal Court colleague Mr. Justice Harrington in *Gauthier (c.o.b. National Capital News Canada) v. Canada (Speaker of the House of Commons)*, 2006 FC 596, at paragraph 19.

[19] With respect to the prior decision of my Federal Court colleague Mr. Justice Mosley relating to Mr. Gauthier, the decision involved a refusal by the Department of Justice to disclose certain documents to Mr. Gauthier under the *Privacy Act*, R.S.C. 1985, c. P-21 and the exemption from disclosure on the basis of solicitor-client privilege. I find nothing in that decision which touches upon this application for leave.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[20] The application for leave is dismissed. In view of these reasons there is no need for me to deal with the prolix nature of Mr. Gauthier's proposed notice of application.

[21] Costs were not sought by the respondent and no costs are awarded.

DATED at Guelph, Ontario, this 31st day of July, 2007.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Eleanor R. Dawson

COUNSEL

For the applicant:

Robert Gilles Gauthier, carrying on business as the National Capital News Canada

Robert Gilles Gauthier

For the respondent:

The Honourable Peter Milliken, M.P., Speaker of the House of Commons

Steven R. Chaplin