File no. CT-2007-07

APPLICATION FOR LEAVE TO MAKE AN APPLICATION

Competition Tribunal

BETWEEN:

ROBERT GILLES GAUTHIER
cob as THE NATIONAL CAPITAL NEWS CANADA

Applicant

- AND -

THE HONOURABLE PETER MILLIKEN, M.P.
SPEAKER OF THE HOUSE OF COMMONS

Respondent

REPLY OF THE APPLICANT TO THE REPLY OF THE RESPONDENT TO THE APPLICANT'S APPLICATION FOR LEAVE TO MAKE AN APPLICATION AND AMENDED APPLICATION FOR LEAVE TO MAKE AN APPLICATION

1. The Applicant respectfully submits comments and clarification and, in some instances, opposes certain statements in the Reply of the Respondent.

2. The power granted to the Speaker by parliamentary privilege is not disputed by the Applicant, and journalists, as a result of this power of the Speaker to admit strangers to the precincts of Parliament, including the press gallery and its resources, has been exercised by the Speakers for some 100 years. That individual journalists, however, have been

singled out for exclusion is not consistent with the proper exercise of parliamentary privilege when it infringes on other laws of Canada, in particular, provisions 75 and 77 of the Competition Act. The Applicant challenges the *res judicata* advanced by the Respondent on the grounds that the earlier decision in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of Assembly)* is not relevant here because it dealt with access for a group of journalists, not individuals within such a group, and therefore is not relevant as a precedent in this case. Also, since the earlier decision of the Competition Tribunal, in addition to the submissions herein of the Applicant, the *Vaid* and *Gauthier (Privacy)* cases have raised sufficient concerns to warrant revisiting the issue of the arbitrary and discretionary limits to various forms of privileges e.g. parliamentary, solicitor-client, doctor-patient, given the social imperatives and evolution of laws, in particular, in this case, sections 75 and 77 of the Competition Act and the guarantee of equitable and fair competition in Canada.

3. This is true. The Applicant seeks an order under sections 75 and 77 requiring that the Applicant be provided with fair and competitive access to the press facilities of the House of Commons on an equal footing with the members of the privately-owned Canadian Parliamentary Press Gallery Inc. without the prior condition of membership in this Corporation, some of the by-laws of which corporation infringe on fundamental rights guaranteed in the Canadian Constitution and on some of the provisions of the Competition Act.

4. The Respondent states, “The Applicant’s Amended Affidavit refers to the parliamentary privilege at issue as the ‘privilege that protects the need for the House of Commons to operate.” The Applicant does not question the need for such powers to protect the proper functioning of Parliament but the unnecessary limitations resulting on the rights of the Applicant to fair competition because of the arbitrary and discriminatory misuse by the Speaker, acting on behalf of the House of Commons, who has already authorized access for journalists to the precincts of Parliament, in particular, to

those benefits provided by the House of Commons for the media. The Speaker oversteps the powers provided by parliamentary privilege in singling out individuals, in particular the Applicant, without cause for exclusion to the substantial competitive advantages provided by the media resources provided by the House of Commons to other members of the media who are provided access to the House of Commons press gallery resources.

5. The Respondent is correct in “that the parliamentary privilege that governs this Application is the right and power of the Respondent to exclude strangers from and control access to the House of Commons; this privilege is in support of the right and power of the House of Commons to regulate its own internal affairs.” This parliamentary privilege is the right and power of the Respondent not only to exclude strangers but also to grant access to strangers. In this instance, the Respondent Speaker of the House of Commons has, and for some 100 years, granted such access to first, individual journalists, later to the association of journalists including its members, and later to the corporation of journalists including its members. That access to the House of Commons press gallery has been granted by the Speaker to journalists has been established as a precedent. The question is does such parliamentary privilege provide, in its requirement for the need to protect the operation of the House of Commons, a selective or arbitrary infringement of provisions of the Competition Act, in particular, sections 75 and 77, against journalists who are not members of a private corporation, Canadian Parliamentary Press Gallery Inc., and/or, based on a non-appealable or otherwise alleged discriminatory action of a Speaker of the House of Commons, without cause and without due process before a Court of Competent Jurisdiction in Canada?

6. The Respondent has presented a hypothetical argument unfounded that the Parliament of Canada Act provides unquestionable powers to the Speaker of the House of Commons to the arbitrary exercise of parliamentary privilege

without limitations on infringements of the provisions sections 75 and 77 of the Competition Act that protect the rights of individual businesspersons to fair competition in Canada.

7. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly},* the Supreme Court of Canada upheld the right of the House of Assembly of Nova Scotia to prevent the media from filming its proceedings. In so ruling, the Court found in favour of excluding (a group of) strangers. This did not suggest that had the group been granted access, that the Speaker would have had the power to arbitrarily exclude any one individual within such a group. *New Brunswick Broadcasting Co. v. Nova Scotia* is not representative of the present arbitrary exclusion of the Applicant from access to the press gallery by the Respondent while others of the same profession have access, clearly, a violation of sections 75 and 77 of the Competition Act by the Respondent.

8. As stated in *Canada (House of Commons) v. Vaid*, “Proof of necessity is required only to establish the existence and scope of a category of privilege. Once the category (or sphere of activity) is established, it is for Parliament, not the courts, to determine whether in a particular case the exercise of privilege is necessary or appropriate. In other words, within categories of privileges, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts.” In its own words, the House of Commons, supported by the Supreme Court decision in *Vaid*, has ruled that the category of journalists will be granted access by the Speaker to the precincts of Parliament including access to the facilities and services provided by the House of Commons for the media. Such access is henceforth to be granted for all interested journalists. The arbitrary and selective exclusion, his being a member of this approved category, to such access to the Applicant by the House of Commons is therefore in violation of sections 75 and 77 of the Competition Act.

9. The category of privilege to include journalists and grant access to the precincts to these strangers having been established by the Speaker in providing access to the members of the Canadian Parliamentary Press Gallery Inc., it is henceforth open to external bodies such as courts and the Competition Tribunal to determine whether the arbitrary exclusion, without cause or public hearing, of one individual within such an approved category is “necessary or appropriate” and if it is a violation of sections 75 and 77 of the Competition Act.

10. The Respondent refers to Harrington J. wrongly asserting that the United Nations decisions do not supercede Canadian law. Further, “the courts,” according to Harrington J., once a claim to privilege is made out, “are required to determine the scope of the privilege claimed.” The House of Commons has authorized journalists as a group to have access to the press gallery on the basis of parliamentary privilege. The scope, in this circumstance, does not also provide the use of parliamentary privilege to then make an exception in the case of the Applicant. Harrington J. then adds, clearly without basis in any law, that “If the Courts cannot interferfe, neither can the United Nations …,” which is at variance with the terms of the International Covenant on Civil and Political Rights and the Treaty of Vienna which state that domestic laws cannot be used as a justification to fail to comply with rulings of international treaties. Harrington J. continues in the same editorial fashion, “Mr. Gauthier may think what he likes, but he is not entitled to recourse from this Court.” The Canadian Constitution states that a Canadian has the right to a hearing before a Court of Competent Jurisdiction in Canada. Since 1982, no such procedure has as yet been provided to the Applicant.

11. The Respondent relies on the incomplete comments of “Harrington J. summarized the history of the Applicant’s proceedings.” The frivolously incomplete chronology and description of events by Harrington J. of this 25-year illegal revoking of the fundamental rights of the Applicant by the Speaker without cause and without due process as “but

another episode in Mr. Gauthier's running battle with the Speaker of the House of Commons and the Parliamentary Press Gallery," seriously misrepresents the evolution and unfolding of events. The fact is that Chadwick J. in the Ontario Court ruled that the private corporation Canadian Parliamentary Press Gallery Inc. does not control access to the precincts of Parliament and therefore the Applicant's claim, contrary to the misinformation provided by Harrington J., is against the Speaker, not the "Parliamentary Press Gallery." Contrary to the assertions of Harrington J., no special powers have been transferred from the Speaker of the House of Commons to the private corporation, Canadian Parliamentary Press Gallery Inc. (Parliamentary Legal Counsel, Pelletier in his letter to the Applicant in 1989.) The Applicant is under no obligation in law to seek or obtain authorization from his competitors in the privately owned Canadian Parliamentary Press Gallery Inc. as a prior condition to enjoy the protection of sections 75 and 77 of the Competition Act. If the Speaker is going to provide commercial advantages and benefits to journalists and their employers, and has already determined that such a category of persons enjoys access to the press gallery as a result of the application of parliamentary privilege, then the Applicant is equally entitled to these benefits and privileges as are enjoyed by members of the CPPGInc. The Applicant, notwithstanding the unfounded opinions of Harrington J. is entitled to these commercial benefits without the requirement of being a member of the CPPGInc. as confirmed by the United Nations. Harrington J. is over-stepping his judicial authority in his cavalier observation, "Now,, Mr. Gauthier is attempting to do indirectly what he has been unable to do directly." The Applicant has never acted in any manner other than to follow the procedures of the Rules of Civil Procedures and the Rules of the Federal Court and the provisions of the Canadian Constitution. If there are any failures along the way, it is with the Canadian legal system that allows legal counsel employed by the Government of Canada and the Parliament of Canada to cause protracted delays and to fail to comply with the laws of Canada on the unwarranted abusive invoking of parliamentary privilege

without grounds. Access has been granted to journalists to the House of Commons media facilities and it is clearly illegal to arbitrarily exclude a journalist on the pretext of parliamentary privilege. That's the Law. It is now for the Competition Tribunal to determine whether such a process violates sections 75 and 77 of the Competition Act and if so, to order the Respondent to cease and desist and provide the Applicant with the protection of the Competition Act as is enjoyed by the journalists in the Canadian Palriamentary Press Gallery Inc., and such protection without the requirement of membership in this privately owned corporation, notwithstanding the musings of Harrington J.

12. The scope of parliamentary privilege has been established traditionally by the granting by the Speakers of the House of Commons to the category known as journalists access to the facilities and services provided by the House of Commons for the media, referred to as the press gallery. Earlier challenges to arbitrary, exclusions based on parliamentary privilege failed on the grounds of parliamentary privilege being interpreted as absolute. However, in *Vaid* and *Gauthier (Privacy),* the Courts ruled that there may be instances where parliamentary privilege does not apply. In light of these new rulings, the *res judicata* principle is inappropriate in this case. The Applicant does not disagree with the ruling of Dawson J. in the earlier hearing before the Competition Tribunal, given the difficulties created by the lack of cooperation of the Speaker(s), Fraser, Parent and currently Milliken, and the difficulties in grappling with the recalcitrance of the Speaker to provide an Appeal Hearing of the complaint pursuant to the Procedure tabled in the House of Commons by the Deputy Speaker (Milliken) in 1999. Nonetheless, with or without the cooperation of the Speaker, the Courts are gradually finding that the various privileges, such as client-solicitor, doctor-patient, parliamentary may not have unlimited application, and as suggested in *Vaid* and *Gauthier (Privacy)*, perhaps this test case will provide the necessary debate that will establish the delineation, if any, between privileges of public officials and their responsibilities

to adhere to the law, in this case, sections 75 and 77 of the Competition Act.

13. The Applicant opposes the Respondent's Reply opposing the Applicant's Application for Leave to Make an Application since the Respondent has traditionally exercised his parliamentary privilege to provide access to all journalists to the parliamentary press gallery, the House of Commons media services and all other related press benefits, and therefore cannot exercise the same parliamentary privilege in a contrary method to arbitrarily exclude individual journalists without cause and without due process or appeal hearing in violation of sections 75 and 77 of the Competition Act. In light of recent cases dealing with the scope of various privileges and the ongoing rapid evolution and changes in social, political, judicial, information and commercial (competitive) conditions and procedures, perhaps earlier precedents may require revisiting and adjustments and revisions with regards to the relevance of earlier rulings and questionable *res judicata* in relation to this Application by the Applicant pursuant to sections 75 and 77 of the Competition Act.

DATED at Ottawa, Ontario,
this 12th **day of July, 2007.**

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