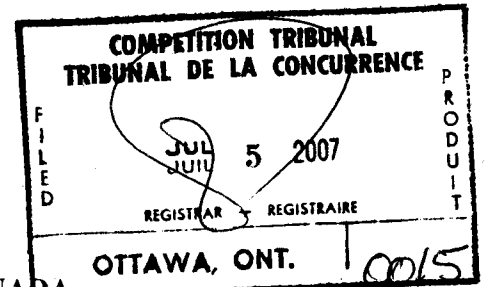


**APPLICATION FOR LEAVE TO MAKE AN APPLICATION**

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

1. The Respondent respectfully opposes the Applicant's Application and Amended Application for Leave to Make an Application.
2. The subject matter of this Application is outside the jurisdiction of the Competition Tribunal as it falls within the Respondent's parliamentary privileges. It is further submitted that the issues raised by the application for leave and the Application itself are *res judicata* in that the issues were decided by the Competition Tribunal in an earlier ruling that was upheld by the Federal Court of Appeal.

3. The Applicant seeks an order under sections 75 and 77 of the *Competition Act* requiring that the Applicant be provided with access to the Parliamentary Press Gallery as media on an equal footing with the members of the Canadian Parliamentary Press Gallery.

4. 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."

5. It is respectfully submitted 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.

6. Even if the House of Commons were not to plead its privileges, judicial notice is to be taken in all courts of the privileges, immunities and powers of the Respondent by virtue of section 5 of the *Parliament of Canada Act*:

The privileges, immunities and powers held, enjoyed and exercised in accordance with section 4 are part of the general and public law of Canada and it is not necessary to plead them but they shall, in all courts in Canada, and by and before all judges, be taken notice of judicially.

*Parliament of Canada Act*, R.S.C. 1985, c. P-1, s. 5.

7. The Respondent's power to exclude strangers from the House of Commons is a well-established category of privilege. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, the Supreme Court of Canada upheld the right

of the Speaker of the House of Assembly of Nova Scotia to prevent the media from filming its proceedings:

In my view, it is reasonable and correct to find that the House of Assembly of Nova Scotia has the constitutional power to exclude strangers from its chamber on the basis of the preamble to the Constitution, historical tradition, and the pragmatic principle that the legislatures must be presumed to possess such constitutional powers as are necessary for their proper functioning. [...]

The issue is—indeed the issue can only be—whether the Assembly has a constitutional power to exclude strangers from its deliberations. If this Court were to rule that the Assembly could not do this, this Court would be taking away a constitutional power possessed by the Assembly. At issue, in other words, is the constitutional "tree" itself, rather than the fruit of the tree. It is therefore no answer to a claim for constitutional privilege to say that it constitutes the mere exercise of a constitutional power.

I conclude that the legislative assembly having acted within its constitutional powers, the Charter does not apply to its conduct.

*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at paras. 109, 150-151, per McLachlin J.

8. The power to exclude strangers was confirmed as an established category of privilege by the Supreme Court of Canada 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 the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts: "Each specific instance of the exercise of a privilege need not be shown to be necessary" (*New Brunswick Broadcasting*, at p. 343 (emphasis added [by Binnie J.])).

"Categories" include [...] the power to exclude strangers from proceedings (*New Brunswick Broadcasting*; *Zündel v. Boudria* (1999), 46 O.R. (3d) 410 (C.A.), at para. 16; *R. v. Behrens*, [2004] O.J. No. 5135 (QL), 2004 ONCJ 327 [...]). Such general categories have historically been considered to be justified by the exigencies of parliamentary work.

*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 at para.29.

9. Since the category of privilege to exclude strangers is established, it is not open to external bodies such as courts or the Competition Tribunal to determine whether in a particular case the exercise of privilege by the Respondent is necessary or appropriate.

10. In this Application, the Applicant relies on the finding of the *Vaid* decision cited above to claim that parliamentary privilege would not preclude the application of the *Competition Act*; however, the *Vaid* decision does not affect the application of the parliamentary privilege at issue. Harrington J. distinguished the privilege at issue in *Vaid* from the privilege at issue with respect to the Applicant's Application when the Federal Court dismissed the Applicant's appeal from the decision of a prothonotary who had refused to register "views" obtained from the Human Rights Committee of the United Nations (on the same substantive issue as raised by the Applicant) as a foreign judgment:

As noted by the Supreme Court in *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, once a claim to privilege is made out, the Courts will not enquire into the merits of its exercise.

47 ... If the claim of privilege were justified, no court or body external to the House of Commons could enquire into the appellant Speaker's reasons for the constructive dismissal of the respondent Vaid. Such outside bodies would have no jurisdiction to do so. Nevertheless the courts are required to determine the scope of the privilege claimed. ...

It was held in *Vaid* that Parliamentary privilege did not extend to dealings with ordinary, non-legislative employees of Parliament. However, the right of the Speaker to invite strangers into the House or to exclude them is well established. If the Courts cannot interfere, neither can the United Nations. [...]

Mr. Gauthier has no legal remedy. Of course, he can continue to try to persuade the Speaker to change his mind. In *A.O. Farms Inc. v. Canada* (2000) 28 Admin. L.R. (3d) 315, [2000] F.C.J. No. 1771 (QL), Mr. Justice Hugessen said "...Government, when it legislates, even wrongly, incompetently, stupidly, or

misguidedly is not liable in damages." The same basic concept of judicial non-interference applies to the manner in which the Speaker exercises the privileges of the House. Mr. Gauthier may think what he likes, but he is not entitled to recourse from this Court.

*Gauthier (c.o.b. National Capital News Canada) v. Canada (Speaker of the House of Commons)*, 2006 FC 596, [2006] F.C.J. No. 757 at paras. 18-20.

11. In finding that the Applicant had "no legal remedy" with respect to the general matter that is similarly at issue in this Application, Harrington J. summarized the history of the Applicant's proceedings as follows:

This case is but another episode in Mr. Gauthier's running battle with the Speaker of the House of Commons and the Parliamentary Press Gallery. It seems the Speaker extends special privileges to members of the press, but leaves the matter of accreditation to the Gallery. Mr. Gauthier was granted temporary membership from time to time, but never full membership. He believes his ability to report the news is hampered because temporary membership only gave him limited privileges. The Gallery consistently denied him full membership in the past. Now he says he would not join them even if they asked, because their standards are lower than his. He wants equal access to Parliament on the same basis as those reporters and publishers who have full membership in the Gallery.

The Speaker of the House has consistently taken the position that the granting of special press access is a Parliamentary privilege and that the manner in which it is exercised is beyond the reach of the Courts. Although not before me, it appears that the Press Gallery will not give Mr. Gauthier full accreditation because he is neither an active journalist nor a publisher. In 1994, Mr. Gauthier sought a declaration from the Ontario Court (General Division) that the denial of access to the precincts of Parliament on the same terms as members of the Press Gallery infringed on his right to freedom of the press as provided in the Charter of Rights and Freedoms. In *Gauthier v. Canada (Speaker of the House of Commons)*, 25 C.R.R. (2d) 286, Justice Bell held that the Speaker's decision to deny him access to the facilities in the House of Commons used by members of the Press Gallery was an exercise of Parliamentary privilege and not subject to the Charter or to judicial review.

He then took action in the Ontario Courts against the Press Gallery. He sought damages and a court order requiring it to admit him as an active member with full privileges. The Press Gallery moved for summary judgment dismissing the action. Justice Chadwick, in *Gauthier v. Canadian Parliamentary Press Gallery*, [1996]

O.J. No. 10 (QL), granted the motion and dismissed the action on the basis that the privileges that Mr. Gauthier sought were privileges administered and controlled by the Speaker of the House of Commons. Undaunted, Mr. Gauthier complained to the Competition Tribunal, [2002] C.C.T.D. No. 38. That claim worked its way up to the Federal Court of Appeal. In *Gauthier (c.o.b. National Capital News Canada) v. Canada (House of Commons)* 2004 FCA 27, [2004] F.C.J. No. 83 (QL), Justice Nadon, speaking for the Court, found the Competition Tribunal was correct 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, it was without jurisdiction. He also held that the issues before the Court were *res judicata* in that they had already been decided against Mr. Gauthier by Justice Bell in 1994, *supra*.

Now Mr. Gauthier is attempting to do indirectly what he has been unable to do directly.

*Gauthier v. Canada (Speaker of the House of Commons)*, *supra* at paras. 4-7.

12. The issue regarding the application of parliamentary privilege to the facts of this Application is *res judicata*, having earlier been decided by the Competition Tribunal and the Federal Court of Appeal. The substantive issues of the jurisdiction of the Competition Tribunal in the context of parliamentary privilege were brought before the Federal Court of Appeal by the Applicant and dismissed there by Nadon J.A. for the following reasons:

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*.

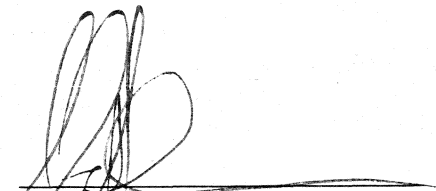
Secondly, we are also satisfied that the issues before us are *res judicata*. Specifically in *Gauthier v. Canada (Speaker of the House of Commons)* (1994), 25 C.R.R. (2d) 286, the Ontario Court (General Division) decided the precise issues before us, i.e. whether the Speaker of the House could deny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

*Gauthier v. Canada (Speaker of the House of Commons)*, 2004 FCA 27, [2004] F.C.J. No. 83 (F.C.A.).

Dismissing an application for judicial review of *National Capital News Canada v Canada (Speaker, House of Commons)* CT-2002-005

13. The Respondent therefore respectfully opposes the Applicant's Application and Amended Application for Leave to Make an Application since the Competition Tribunal lacks jurisdiction due to the Respondent's parliamentary privilege to exclude strangers from and control access to the House of Commons, as well as the fact that the issues are *res judicata*.

June 2, 2007



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