Canadian Human Rights Tribunal

CANADA

Tribunal canadien des droits de la personne

BETWEEN:

KEITH DREAVER, NORMA FAIRBAIRN,
SUSAN GINGELL, PAMELA IRVINE,
JOHN MELENCHUK, RICHARD ROSS,
AILSA WATKINSON,
HARLAN WEIDENHAMMER,
CARMAN WILLET

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

JIM PANKIW

Respondent

RULING

PANEL: Grant Sinclair, Chairperson
Athanasios D. Hadjis, Member
Michel Doucet, Member

2005 CHRT 28
2005/07/21

[1] The Complainants, nine in number, filed complaints on various dates in 2003, with the Canadian Human Rights Commission. The respondent, Jim Pankiw, was a Member of Parliament. He was defeated in the 2004 federal general election.

[2] During his time as an M.P., the respondent authored and distributed a brochure called the householder to his constituents in the riding of Saskatoon–Humbolt. The householder is printed and paid for under the auspices of the House of Commons. Each MP is entitled to send up to four householders per year.

[3] The complainants allege that in October 2003, the respondent distributed a householder that contained discriminatory comments about Aboriginal people contravening ss. 5, 12 and 14 of the *Canadian Human Rights Act*. The Commission has referred the complaints to the Canadian Human Rights Tribunal ("Tribunal") for hearing.

[4] The respondent brought a motion for an order that the Tribunal lacks the constitutional jurisdiction to hear the complaints.

I. EXCLUSIVE JURISDICTION OF THE BOARD OF INTERNAL ECONOMY OF THE HOUSE OF COMMONS.

A. "Proper" Use of House Resources

[5] Householders are printed using the resources of the House of Commons. Funding for householders is provided by the Board of Internal Economy of the House of Commons. The Board exists pursuant to ss. 50 and following of the *Parliament of Canada Act* ("*PCA*"). Members of the Board include government and opposition Members of the House of Commons. It is chaired by the Speaker of the House. The Board's functions are to act on all financial and administrative matters in respect of the House of Commons, its premises, services and staff, as well as its Members.

[6] The respondent contends that the Board holds the exclusive authority to oversee householders, including their content.

[7] Under s. 52.6 (1) of the *PCA*, the Board has the exclusive authority to determine whether the use of funds, goods, services or premises made available to a Member for the carrying out of *parliamentary functions*, is *proper*. The respondent asserts that maintaining a relationship with constituents constitutes one of the parliamentary functions of a Member. Since the publication of householders better enable Members to pursue these relationships, these communications must logically also constitute a parliamentary function.

[8] The respondent maintains that if the Board has exclusive jurisdiction over this parliamentary function, then no other court or statutory body, including the Tribunal, has the authority to make any determination over the same subject matter. The respondent's contention in this regard is quite bold. The Supreme Court of Canada recently re-affirmed, in *Canada (House of Commons) v. Vaid* 2005 SCC 30 at para. 81, that the *CHRA* is a quasi-constitutional document and any exemption from its provisions must be clearly stated.

[9] Does such a clear statement appear in the *PCA*? In our opinion, it does not. The source for the respondent's assertion regarding the Board's exclusivity is found in s. 52.6 (1) of the *PCA*, which sets out the following:

52.6(1) The Board has the *exclusive authority* to determine whether any previous, current or proposed use by a member of the House of Commons of any funds, goods services or premises made available to that member for the carrying out of *parliamentary functions* is or was proper, given the discharge of the parliamentary functions of members of the House of Commons, including whether any such use is or was *proper* having regard to the intent and purpose of the by-laws made under subsection 52.5(1).

52.6 (1) Le bureau a *compétence exclusive* pour statuer, compte tenu de la nature de leurs fonctions, sur *la régularité* de l'utilisation - passée, présente ou prévue - par les députés de fonds, de biens, de services ou de locaux mis à leur disposition dans le cadre de leur *fonctions parlementaires*, et notamment sur *la régularité* de pareille utilisation au regard de l'esprit et de l'objet des règlements administratifs pris aux termes du paragraphe 52.5(1).

[10] On its face, there is no direct reference to the non-application of the *CHRA* or the ousting of the Tribunal's jurisdiction. The respondent submits, however, that the Board's exclusive jurisdiction over the "proper" use of House resources by a Member encompasses the content of any material published with those resources. This submission is founded on an interpretation of the English version of s. 52.6 (1), where the term "proper" is used. According to the *Oxford English Dictionary* "proper" is defined as "fit", "suitable", "right", "in conformity with the demands of society", "decent", and "respectable". Thus, argues the respondent, the Board has the exclusive authority to determine if a householder, including its content, has exceeded these bounds of "proper" use, in the parliamentary context.

[11] By using the term "proper", did Parliament really intend to endow the Board with the authority to determine the fitness, decency, conformity with demands of society, or respectability of householders? A reading of the French version of s. 52.6 (1) suggests otherwise. The word "proper" is rendered as "régularité". *Le Nouveau Petit Robert*, defines "régularité" as "conformité aux règles", or in accordance with the rules. The Commission submits that this term is more closely associated with notions of administrative regularity, and we agree. Such a reading is consistent with the direction given in s. 52.6(1) that the Board should, in determining whether the use of House resources was proper, have regard to the "intent and purpose of the by-laws made under subsection 52.5 (1)". The printing of householders is specifically addressed in the Members' Offices By-Law, No. 301. It is obvious from a reading of the by-laws that their intent and purpose is to regulate the administration of House resources (e.g. purchasing office equipment, printing stationery, leasing office space, remunerating staff, etc.). The by-laws do not contain provisions touching upon human rights principles, nor, for that matter, "decent" or "respectable" conduct, to use the definition of "proper" suggested by the respondent.

[12] The same conclusion was reached by the Ontario Court of Appeal in *Ontario v. Bernier*, (1994) 70 O.A.C. 400, and the Quebec Court of Appeal in *R. v. Fontaine*, [1995] A.Q. No. 295 (QL). At issue in both cases was whether s. 52.6 (1) ousted the jurisdiction of the courts to hear a case involving charges that a Member had used the funds allocated to him by the Board in a manner that contravened the *Criminal Code*. Both courts found otherwise, holding that s. 52.6 (1) only gives the Board authority to determine if a Member of the House of Commons used these

resources in a manner consistent with the by-laws. Significantly, the term “by-laws” of the English text of ss. 52.5 and 52.6 is rendered as “règlements administratifs” in the French version.

[13] As Mme Justice Arbour commented at paragraph 4 of the *Bernier* decision, Parliament established the Board to exclusively manage the internal workings of the House of Commons. In so doing, Parliament did not express an intention to remove from the courts their jurisdiction to apply the *Criminal Code* to Members. In our opinion, the same conclusion can be drawn with respect to the authority of the Tribunal to determine if there has been a violation of the *CHRA*. Parliament has not shown an intention to exclude Members, and particularly their householders, from the application of the *CHRA*.

B. Parliamentary Privilege or Immunity

[14] Nor does it appear to us that the *PSA*, and s. 52.6 in particular, extends the scope of any privilege or immunity from which Members may benefit. Parliamentary privilege provides Members with an absolute immunity from civil or criminal prosecution when speaking in the House of Commons or engaged in a proceeding in Parliament (see J.P.J. Maingot, *Parliamentary Privilege in Canada*, 2d ed). Over the years, the assertion of parliamentary privilege has varied in its scope and extent. But as the Supreme Court of Canada noted in *Vaid* (at para. 23), a narrower concept of privilege has developed in more recent times. The Court referred to a 1971 ruling of the Speaker of the House, who stated that parliamentary privilege “does not go much beyond the right of free speech in the House of Commons and the right of a Member to discharge his duties in the House as a member of the House of Commons”.

[15] The respondent agrees that the immunity attached to parliamentary privilege does not extend to statements or publications made by Members outside of the House or parliamentary proceedings. Thus, members of legislatures are not immune from criminal prosecution from statements made to the press outside the Chambers of Parliament (see *Re: Ouellet (Nos. 1 and 2)* [1976] C.A. 788), nor from liability in defamation actions for answers given to a reporter outside a legislature (see *Ward v. Clark*, 2000 BCSC 979). It follows that there is no immunity from the application of the *CHRA*.

II. THE *CHRA* DOES NOT APPLY TO THE RESPONDENT

[16] The respondent further submits that the *CHRA* does not apply to him because he lacks the "federal" quality that would make him subject to the federal legislative scheme. He is neither engaged in a federal work, undertaking or business, nor is he a part of the Federal Crown or the Government of Canada. The only factor that brings him within the federal sphere of activity is that in communicating with his constituents through a householder, he is carrying out his parliamentary functions as a member of the House of Commons. His argument is premised on his contention that the legislative authority over a member of the House of Commons is limited to the *PCA*.

[17] The purpose and scope of the *CHRA* is articulated in s. 2, and is not as limitative as the respondent suggests in his submissions. The provision states that the purpose of the *CHRA* is to give effect, "within the purview of matters coming within the legislative authority of Parliament", to the principles of equal opportunity elaborated therein.

[18] In our opinion, the statutory language of the *CHRA* is broad enough to also encompass statements made by Members in householders published and paid for by the House of Commons, pursuant to an act of Parliament, the *PCA*. Since Parliament enacted this legislative framework, which ultimately regulates householders, it is plain that the publication and content of householders must also necessarily fall within the purview of matters coming within Parliament's legislative authority.

III. SEPARATION OF POWERS BETWEEN THE LEGISLATIVE AND EXECUTIVE BRANCHES

[19] The respondent submits that the Tribunal is an administrative tribunal established under the *CHRA* and the respondent contends that as such, it is not constitutionally distinct from the executive. To allow it to examine and decide upon the content of a Parliamentarian's communications would undermine the constitutionally enshrined separation of powers.

[20] As was noted the Supreme Court of Canada in *Re Alberta Legislation* [1938] S.C.R. 100 at p. 133, the *Constitution Act, 1867* contemplates a parliament working under the influence of public opinion and public discussion. The institution derives its efficacy from free public discussion of affairs and from the "freeist and fullest analysis and examination from every point of view of political proposals". The Court added that this principle was "signally true" in respect of the "discharge by members of Parliament of their duty to the electors". The respondent contends that the expression of political views by a member of the House of Commons is political speech and should be subject only to review by the electorate through the democratic process. No outsider, particularly an agent of the executive branch of the State, should be able to interfere with this free and unfettered debate and exchange of ideas in the legislature.

[21] The respondent argued that the Government should not have any say or control over the free speech of a member of the House, particularly of the Opposition, such as the respondent. Allowing the review of contents of householders and other forms of Members' political speech would limit their ability to fully express their views. This, in turn, would have a chilling effect on the free and public debate of various opinions. It would also result in denying the electorate their Member's real point of view by preventing access to the full and frank information required to make a completely informed decision.

[22] In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para. 32, the Supreme Court of Canada noted that while administrative tribunals "span the constitutional divide" between the judiciary and the executive and may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. It is noteworthy, however, that this case related to the degree of institutional independence required of a licensing board, which the Court characterized as "first and foremost a licensing body" that did not approach the constitutional role of the courts (at para. 33).

[23] More recently, in the case of *Bell v. Canadian Telephone Employees Association*, 2003 SCC 36, the Supreme Court addressed the issue of the institutional independence of the Canadian Human Rights Tribunal. The Court described the Tribunal as follows:

> The main function of the Canadian Human Rights Tribunal is adjudicative. It conducts formal hearings into complaints that have been referred to it by the Commission. It has many of the powers of a court. It is empowered to find facts, to interpret and apply the law to the facts before it, and to award appropriate remedies. Moreover, its hearings have much the same structure as a formal trial before a court. The parties before the Tribunal lead evidence, call and cross-examine witnesses, and make submissions on how the law should be applied to the facts. The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints: the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission.

[24] The Supreme Court arrived at the conclusion that this tribunal possesses a "high degree of independence from the executive branch". In our opinion, given this finding by the Supreme Court, to treat the Tribunal as an arm of "the Government" for the purposes of this case is highly questionable.

[25] The principle of the separation of power between the three branches – executive, legislative and judicial – has its roots in the preamble to the *Constitution Act, 1867*, which calls for a "constitution similar in Principle to that of the United Kingdom". As the Supreme Court stated in *Vaid*, at paragraph 21, each of the branches of the State is "vouchsafed a measure of autonomy from the others". Parliamentary privilege is one of the ways in which this principle is respected. In *Vaid*, the Supreme Court affirmed the need for the House's legislative activities to proceed unimpeded by any external body or institution, including the courts. As an example, the Court indicated that it would be "intolerable" if a Member who was overlooked by the Speaker at question period could file a human rights complaint alleging he had been discriminated against, or seek a ruling from the ordinary courts claiming that his guarantee of free speech under the *Charter of Rights and Freedoms* had been violated (*Vaid*, para. 20). These are truly matters "internal to the House" to be resolved by its own procedures.

[26] The respondent referred us to Federal Court of Appeal decision in *Taylor v. Canada (Attorney General)* [2000] 3 F.C. 298, a case in which a human rights complaint under the *CHRA* had been filed against a judge of the Ontario Court, General Division. The judge had allegedly ordered the complainant, who was seated in his courtroom, to remove a headdress that he wore as part of his religious practice. The Federal Court of Appeal held that the principle of judicial immunity applies so as to prevent such proceedings against judges from being brought before the Commission and ultimately, the Tribunal. The principle of judicial immunity exists to ensure that judges can perform their duty with complete independence and free from fear. The respondent submits that just as the independence of the judicial branch must be protected, so must that of the legislative branch. The Tribunal therefore lacks the authority to interfere with either.

[27] However, one must consider the *Taylor* case in its factual context. The Federal Court of Appeal noted that orders for the control of order or decorum in the court room during the course of a trial fall within the inherent jurisdiction of the court. The judge had engaged in a purely judicial act to which judicial immunity attached.

[28] There is no doubt that statements made by a Member in the House of Commons constitute an inherently legislative function that is subject to the immunity associated with parliamentary privilege. No outside authority may interfere with this activity either. But as we have already stated, parliamentary privilege does not attach to statements in householders that are distributed to constituents. In our opinion, this situation is not analogous to the example given by the Supreme Court in *Vaid* or the fact situation in *Taylor*.

[29] The present case can also be distinguished from *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595 (C.A.Ont.). A human rights complaint was filed with the Ontario Human Rights Commission in which it was alleged that the daily recital of the Lord's Prayer by the Speaker of the Ontario Legislature was in breach of the *Ontario Human Rights Code*. The respondent referred to paragraph 19, where the Court of Appeal of Ontario stated that the Ontario Human Rights Commission is simply an "emanation of the Crown and is subject, at the very least, to the same restrictions respecting the Legislature as are the judiciary and executive". The issue for the Court was whether the daily

recital of the Lord's prayer was a matter inherently related to the conduct of proceedings within the legislature. The Court found this to be the case and therefore the *Code* did not apply because of parliamentary immunity.

[30] Finally, we would also note that although the Supreme Court, in *Re: Alberta Legislation*, emphasized the importance in our democracy of maintaining free public opinion and discussion, these rights are not absolute. The Court recognized that these values are subject to legal limits, such as the provisions of the *Criminal Code* and the common law. The *Charter* and the *CHRA* equally impose legal limits on free public opinion and discussion.

[31] For all these reasons, the Respondent's motion is dismissed.

"*Signed by*"
J. Grant Sinclair, Chairperson

"*Signed by*"
Athanasios D. Hadjis, Member

"*Signed by*"
Michel Doucet, Member

OTTAWA, Ontario
July 21, 2005

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE:	T969/8904
STYLE OF CAUSE:	K. Dreaver, N. Fairbairn, S. Gingell, P. Irvine, J. Melenchuk, R. Ross, A. Watkinson, H. Weidenhammer and C. Willet v. J. Pankiw
DATE AND PLACE OF HEARING:	March 2, 2005 Ottawa, Ontario Saskatoon, Saskatchewan Calgary, Alberta (via videoconference)
RULING OF THE TRIBUNAL DATED:	July 21, 2005

APPEARANCES:

Ailsa Watkinson, John Melenchuk Richard Ross, Pamela Irvine Norma Fairbairn, Susan Gingell	On their own behalf
Philippe Dufresne	For the Canadian Human Rights Commission
Steven Chaplin	For the Respondent