Federal Court  Cour fédérale

Date: 20130422

Docket: T-2096-12

Citation: 2013 FC 402

Ottawa, Ontario, April 22, 2013

PRESENT: The Honourable Sean J. Harrington

BETWEEN:

MR KEVIN PAGE, PARLIAMENTARY BUDGET OFFICER

Applicant

and

MR THOMAS MULCAIR, LEADER OF THE OPPOSITION AND THE ATTORNEY GENERAL OF CANADA

Respondents

THE SPEAKER OF THE SENATE OF CANADA AND THE SPEAKER OF THE HOUSE OF COMMONS

Participants

REASONS FOR JUDGMENT AND JUDGMENT

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. (A.V. Dicey, *Introduction to the Study of the Law of Constitution*, 10th edition, 1964, pages 39-40)

[1] The Parliament of Canada has, by statute, mandated its budget officer to, among other things, "estimate the financial cost of any proposal that relates to a matter over which Parliament has jurisdiction" when requested to do so by any member of the House of Commons or any Senator.

[2] Thomas Mulcair, a Member of the House of Commons, and Leader of Her Majesty's Loyal Opposition, wrote to Kevin Page, the then Parliamentary Budget Officer, to call upon him to analyze whether savings outlined in the 2012 budget were achievable or likely to be achieved; whether and the extent to which a failure to achieve them would result in fiscal consequences in the longer term, and purported savings premised on staff reductions.

[3] Mr. Page responded by saying that questions had been raised as to whether the analyses Mr. Mulcair required fell within his mandate. He stated he would seek a reference from the Federal Court and would only perform the analyses requested should the Court decide he had jurisdiction. In furtherance thereof, Mr. Page referred the following questions of law and jurisdiction to this Court:

> 1. Whether it is within the Parliamentary Budget Officer's jurisdiction, pursuant to *Parliament of Canada Act* RSC 1985, c P-1, s. 79.2, to analyze:
>
>   a. the extent to which the fiscal savings that are outlined in the Government's Budget are achievable or likely to be achieved; and
>
>   b. the extent to which the achievement of the savings there outlined would result in fiscal consequences in the longer term.
>
> 2. Whether it is within the Parliamentary Budget Officer's jurisdiction, pursuant to *Parliament of Canada Act* RSC 1985, c P-1, s.79.3, to request from departments their planned fiscal savings premised on staffing reductions.

[4] Mr. Page submits that the answer to both questions is "yes". He is supported by Mr. Mulcair. The Attorney General of Canada, the Speaker of the Senate and the Speaker of the House of Commons make no submissions as to what the answers to Mr. Page's questions should be. Rather, they say this Court has no jurisdiction to answer them because Parliament has reserved the answer to itself by way of parliamentary privilege or in virtue of the language of the *Parliament of Canada Act*. In the alternative, should I find this Court has jurisdiction to answer the questions, in my discretion I should not do so as there is no justiciable dispute. In any event, the questions are too vague to be answered satisfactorily.

DECISION

[5] Neither on the basis of parliamentary privilege nor on the principles of statutory interpretation has Parliament reserved for itself the right to answer Mr. Page's questions. That task falls upon this Court. However, questions cannot be answered in a factual vacuum. More particularly, Mr. Page has never actually requested data from any department at the instance of Mr. Mulcair. It follows that no refusal to provide data is contained in the record before me. Therefore, the questions are hypothetical and I decline to answer them on the grounds of non-justiciability.

BACKGROUND

[6] In response to the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the Gomery Commission), in 2006 Parliament enacted the *Federal Accountability Act*,

SC 2006, c 9. The full title of the Act is far more telling: *An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability*.

[7] The *Federal Accountability Act* amended the *Parliament of Canada Act* to create the position of Parliamentary Budget Officer. This person, in accordance with s. 79.1(1), is an "officer of the Library of Parliament". Section 78 provides that the Parliamentary Budget Officer, as well as other officers, clerks and servants of the Library, is responsible for the faithful discharge of his or her official duties as defined "subject to this Act" by regulations agreed on by the Speakers of the two Houses of Parliament and concurred in by a joint committee appointed by both Houses. There are no such regulations.

[8] Therefore, the mandate of the Parliamentary Budget Officer, as set out in section 79.2 of the Act, appended hereto, is:

a. to provide independent analysis to the Senate and to the House of Commons about the state of the nation's finances, the estimates of the government and trends in the national economy;
b. when requested by certain committees of the Senate or the House of Commons to undertake research for that Committee into the nation's finances and economy;
c. when requested by any committee that is mandated to consider the estimates of the Government to undertake research for that committee; and

d. when requested by any committee or any member of the House of Commons or the Senate to "estimate the financial cost of any proposal that relates to a matter over which Parliament has jurisdiction."

[9] In order to give effect to that mandate, subject to certain exceptions, section 79.3 appended hereto, the Parliamentary Budget Officer by request to the deputy head of a department, or delegate, is entitled to "…free and timely access to any financial or economic data in the possession of the department that are required for the performance of his or her mandate."

[10] The opposition by the Attorney General and the two Speakers has two facets, one of the highest constitutional principle bolstered by the rules of statutory interpretation: parliamentary privilege, and the other procedural: the provisions of the *Federal Courts Act*, and Rules of Practice pertaining to references by federal boards, commissions or other tribunals to the Federal Court for hearing and determination

PARLIAMENTARY PRIVILEGE

[11] The preamble of the *Constitution Act, 1867*, calls for a constitution "similar in Principle to that of the United Kingdom". Section 18 provides:

18. The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of	**18.** Les privilèges, immunités et pouvoirs que posséderont et exerceront le Sénat et la Chambre des Communes et les membres de ces corps respectifs, seront ceux prescrits de temps à autre par loi du Parlement du Canada; mais de

Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.	manière à ce qu'aucune loi du Parlement du Canada définissant tels privilèges, immunités et pouvoirs ne donnera aucuns privilèges, immunités ou pouvoirs excédant ceux qui, lors de la passation de la présente loi, sont possédés et exercés par la Chambre des Communes du Parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande et par les membres de cette Chambre.

[12] Sections 4 and 5 of the *Parliament of Canada Act*, appended hereto, go on to provide that the Senate and the House of Commons, as well as their members, enjoy and exercise the like privileges, immunities and powers which were held, enjoyed and exercised by the House of Commons, U.K., in 1867, as well as such other privileges, immunities and powers defined by the Canadian Parliament, not exceeding those above, and that such privileges, immunities and powers are part of the general and public law of Canada to be taken notice of judicially.

[13] Since the Constitution of the United Kingdom has not been codified and has not in all instances been reduced to statute, it is no easy task to ascertain with precision the privileges, immunities and powers of the Houses of Parliament as a good part thereof derives from the *lex non scripta*.

[14] I approach this task with two thoughts in back of mind. The first is that the Houses of Parliament are to hold the executive to account. Money bills must be initiated in the House of

Commons. Parliament did not need to enact legislation to create the position of Parliamentary Budget Officer. It could have done so by way of internal management.

[15] The second point is that the Houses may elect to waive their privileges (*R v Connolly*, 1891 OJ No 44, 22 OR 220) or to assert them (*R v Lavigne*, 2010 ONSC 2084, [2010] OJ No 1450, *Gagliano v Canada (Attorney General)*, 2005 FC 576, [2005] FCJ No 683 (QL)).

[16] What then is the privilege being asserted?

[17] The Speakers, who took the lead in this aspect of the case, assert privilege on a number of grounds. They say:

a. if this Court decides the questions, it would be interfering in the internal affairs and business of the Houses and would be in violation of article 9 of the *Bill of Rights, 1689* (UK);
b. the Parliamentary Budget Officer's role, functions and mandate fall within the internal affairs of Parliament and come within the ambit of parliamentary privilege;
c. the fact that the Parliamentary Budget Officer's position was legislated does not clothe this Court with jurisdiction to address what still falls within the exclusive cognisance of Parliament; and
d. they, as neutral parties, do not take any position on the merits of Mr. Page's questions, *i.e.* the scope of the mandate of the Parliamentary Budget Officer.

[18] There are a number of authorities on point from England, from the Privy Council and from Canada. Two Supreme Court of Canada cases of fairly recent vintage are: *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49, [1989] SCJ No 80 (QL), which deals more with the statutory interpretation aspect of this case, and *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667, [2005] SCJ No 28 (QL).

[19] To begin with the latter case, Mr. Vaid, who had been chauffeur to the Speaker of the House of Commons, complained to the Canadian Human Rights Commission that he had been constructively dismissed on discriminatory grounds. Before deciding that his only recourse fell within the grievance procedure established under the *Parliamentary Employment and Staff Relations Act*, Mr. Justice Binnie, speaking for the Court, dealt at some length with parliamentary privilege. He was not making new law when he said at paragraph 4:

> There are few issues as important to our constitutional equilibrium as the relationship between the legislature and the other branches of the State on which the Constitution has conferred powers, namely the executive and the courts.

[20] The issue there was whether the alleged actions of the Speaker, which were not directed towards a member of Parliament or a parliamentary official, but rather against a stranger to the House, someone quite remote from the legislative functions that parliamentary privilege was designed to protect, should be immunized from outside scrutiny. The Court held that the burden was on the Speaker to establish such privilege and that he failed to do so. On administrative law principles, the Court held that the House of Commons was, however, entitled to require Mr. Vaid to utilize the statutory machinery that Parliament had enacted, which was an exclusive method of dispute resolution for employees such as himself.

[21] Reference was made to article 9 of the *Bill of Rights, 1689*, which provides that "freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

[22] At paragraph 29, Mr. Justice Binnie set out twelve non-exhaustive propositions. Parliamentary privilege is the sum of privileges, immunities and powers without which the Houses and their members could not discharge their functions. Privilege includes such immunity as is necessary so that they may do their legislative work.

[23] His fifth point was:

> The historical foundation of every privilege of Parliament is necessity. If a sphere of the legislative body's activity could be left to be dealt with under the ordinary law of the land without interfering with the assembly's ability to fulfill its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist (*Beauchesne's Rules & Forms*, at p. 11; Maingot, at p. 12; *Erskine May*, at p. 75; *Stockdale v. Hansard*, at p. 1169; *New Brunswick Broadcasting*, at pp. 343 and 382).

[24] The citations for his references are as follows:

a. Beauchesne's *Rules & Forms of the House of Commons of Canada* with annotations, comments and procedures, Canada, Parliament, House of Commons, 6th Edition, 1989;

b. J.P. Joseph Maingot's *Parliamentary Privilege in Canada*, 2nd Edition, Montreal, McGill-Queens University Press, 1997;

c. Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd Edition, William McKay, E.D., London, Lexis Nexus, U.K., 2004;

d. *Stockdale v Hansard* (1839), 9 Ad. & E 1, 12 E.R 1112; and

e. *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319

[25] Proof of necessity is required only to establish the existence and scope of a category of privilege. Once established, it is for Parliament, not the courts, to determine whether in a particular case the exercise of the privilege is necessary or appropriate.

[26] Categories of privilege include freedom of speech, control over debates or proceedings in Parliament, the power to exclude strangers from the House and disciplinary authority over members and non-members who interfere with the discharge of parliamentary duties, including immunity of members from subpoena during a parliamentary session.

[27] It was submitted that even if the Speakers agreed with Mr. Page's interpretation of his mandate and his right to access departmental records in furtherance thereof, and notwithstanding the wording of sections 79.2 and 79.3 of the *Parliament of Canada Act*, the Parliamentary Librarian, to whom the Parliamentary Budget Officer reports, or the two Speakers, to whom the Parliamentary Librarian reports, or Parliament itself, could have forbidden him from acting on Mr. Mulcair's request. If that be so, like the majority view in the Federal Court of Appeal in *Vaid*, such privilege would actually diminish the integrity and dignity of the House without improving its ability to fulfil its constitutional mandate. The mandate of the Parliamentary Budget Officer was not only to

provide independent analysis to the Senate and to the House of Commons at large, but also to undertake research at the request of certain standing committees, to undertake research into estimates of the Government at the request of any committee of the Senate or the House of Commons mandated to consider those estimates, and, finally, when requested by any committee of the Senate or House, or any member of either House, to estimate the financial cost of any proposal.

[28] The cascading or tumble-down structure of s. 79.2 is such that Parliament not only intended that the Parliamentary Budget Officer be answerable to it and to its committees, but also to every backbencher irrespective of political stripe. In my view, the purpose of the statute is to shield any given member of either House of Parliament from the will of the majority. However, there are no Charter of Rights and Freedoms or federal/provincial division of legislative powers issues at stake here. If the majority wants to abolish the position of the Parliamentary Budget Officer, or define his or her mandate somewhat differently, so be it! However, it must do so by legislation. Having made that law by statute, it must unmake it by statute. In the meantime, Parliament has no right to ignore its own legislation.

[29] Mr. Page's application to this Court is not in violation of the *Bill of Rights, 1689*, U.K. The application does not infringe upon freedom of speech within Parliament. Only the courts have jurisdiction to answer pure questions of law (*Re: Resolution to Amend the Constitution* [1981] 1 SCR 753). Although, as shall be seen, at least two ministers have expressed in the House of Commons the opinion that Mr. Page has acted beyond his jurisdiction, those comments were made months before Mr. Page applied to this Court, and months before his exchange of letters with Mr. Mulcair. They cannot be taken as an expression of opinion as to the Parliamentary Budget Officer's

jurisdiction under section 79.2(d) of the *Parliament of Canada Act*, as applied to requests by an individual member of the House of Commons. In any event, an expression of opinion on the interpretation of a statute, be it in the House of Commons or not, is not binding on this Court. The interpretation of a statute by a Minister responsible for its implementation is to be reviewed on a standard of correctness unless Parliament has provided otherwise (*Bartlett v Canada (Attorney General)*, 2012 FCA 230, [2012] FCJ No 1181 (QL) at para 46, *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40, [2012] FCJ No 157 (QL) at paras 65-105 and *Sheldon Inwentash & Lynn Factor Charitable Foundation v Canada*, 2012 FCA 136, [2012] FCJ No 555 (QL) at para 23.

[30] The Speakers have not discharged the burden upon them to establish that it is necessary to deny the Parliament Budget Officer access to the courts on the grounds that such access as would render the Houses of Parliament unable to discharge their functions.

[31] I shall now turn to whether this is a matter entirely internal to Parliament, and conclude that it is not.

STATUTORY INTERPRETATION

[32] It is a fundamental principle of the separation of powers among Parliament, the Executive and the Courts, that Parliament cannot oust the superintending power of superior courts when it comes to ordinary citizens. Despite their wording, privative clauses are of limited value and go more to the standard of judicial review, rather than to the right of review. (See for instance *United*

Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd, [1993] 2 SCR 316, [1993] SCJ No 56 (QL), at para 26: "In the presence of a full privative clause, judicial review exists not by reason of the wording of the statute (which is, of course, fully preclusive) but because as a matter of constitutional law judicial review cannot be ousted completely (...)" and *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, [2008] SCJ No 9 (QL) at para 31.)

[33] However, in addition to, or perhaps as part of, parliamentary privilege, as the two are not really watertight compartments, Parliament has greater power when it comes to restricting remedies of its own members or its officers. In *Bradlaugh v Gossett* (1884), 12 QBD 271, the United Kingdom's House of Commons resolved that Mr. Bradlaugh, who had been elected, should not be permitted to take the oath prescribed by statute for members of Parliament and that he be excluded, by force if necessary, from the House. The legal question was whether the House could forbid a member to do what the *Parliamentary Oaths Act* required him to do, *i.e.* to take an oath.

[34] The Speakers rely particularly upon the following passage from the concurring reasons of Mr. Justice Stephen at page 278:

> In my opinion, we have no such power. I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable.

[35] The matter came before the court on demurrer, *i.e.* a motion to strike. At page 280, he went on to say:

> But it would be indecent and improper to make the further supposition that the House of Commons deliberately and

> intentionally defies and breaks the statute-law. The more decent and I may add the more natural and probable supposition is, that, for reasons which are not before us, and of which we are therefore unable to judge, the House of Commons considers that there is no inconsistency between the Act and the resolution.

[36] To put in context the passage relied on, consider also what Mr. Justice Stephen had to say at page 284:

> It is certainly true that a resolution of the House of Commons cannot alter the law. If it were ever necessary to do so, this Court would assert this doctrine to the full extent to which it was asserted in *Stockdale v. Hansard*. [9 Ad. & E. 1]

And at page 286:

> Some of these rights are to be exercised out of parliament, others within the walls of the House of Commons. Those which are to be exercised out of Parliament are under the protection of this Court, which, as has been shewn in many cases, will apply proper remedies if they are in any way invaded, and will in so doing be bound, not by resolutions of either House of Parliament, but by its own judgment as to the law of the land, of which the privileges of Parliament form part.

[37] Thus, *Bradlaugh* dealt with matters completely internal to the House. This case deals with the right of the Parliamentary Budget Officer to obtain information neither from parliamentarians nor from officers of parliament, but rather from the members of the third branch of government, the Executive. To follow in Mr. Justice Stephen's footsteps, the rights Mr. Page asserts he is entitled to exercise are to be exercised outside Parliament and, therefore, are under the protection of this Court.

[38] I think the same point holds true in *Temple v Bulmer*, [1943] SCR 265. Mr. Temple had applied to the Supreme Court of Ontario for an order in the nature of a prerogative writ of *mandamus* directing the clerk to issue a writ for the election of a member for a district to fill a

vacancy created by the death of the sitting member. It was held that the issue of *mandamus* would constitute an intrusion upon the privileges of the legislative assembly. The duties which fell upon the Clerk were imposed upon him in his capacity as an officer under the control of and answerable to the Legislative Assembly.

[39] The decision in *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, above, supports the proposition that if the language is sufficiently tight, Parliament can deny a governor-in-council appointee access to the courts. In that case, Petro-Canada, a Crown corporation and an agent of Her Majesty, acquired Petrofina. The Auditor General sought to ascertain whether due regard to economy had been demonstrated and value for money achieved. He was denied access to information even though section 13(1) of his enabling statute, the *Auditor General Act*, provided that he was entitled to free access to information that related to the fulfillment of his responsibilities. Certain recourses were set out in the Act. The governor-in-council could order production of the information, which although requested was refused. He also had the remedy of an annual report to the House of Commons on whether he had received all the information required. The Parliamentary Budget Officer has neither of these statutory recourses, at least explicitly.

[40] Chief Justice Dickson, speaking for the Court, held that the Auditor General did not, in the circumstances of that case, have a judicially enforceable right of access to information. The case turned on the concept of justiciability and the doctrine of alternative remedies, including political remedies.

[41] At page 84 of the decision, he asked:

> […]does the Auditor General have recourse to the courts, as an alternative remedy, in the event of the denial by Parliament, responsible Ministers, and the Governor in Council to make available to him all of the documentation he may seek in what he regards as the discharge of his responsibilities in auditing the accounts of Canada?

[42] After dealing at length with with *Terrasses Zarolega Inc v Québec (Régie des installations olympiques)*, [1981] 1 SCR 94, and *Harelkin v University of Regina*, [1979] 2 SCR 561, he said at page 95:

> It would, I think, be an overstatement to suggest that the courts are simply implementing Parliament's own decision on justiciability when they determine that remedies are implicitly ousted by means of the presence of adequate alternative remedies, whether found in the statute creating the legal right at issue, or not. Albeit with the assistance of the wording and scheme of the Act in which the alternative remedy is found, both the fact that ouster needs to be implied and the fact that an evaluation of adequacy is called for suggest that the alternative remedies bar to discretionary judicial relief entails, in reality, a decision by the courts on the appropriateness of their intervention, and less a clear statement of intention by Parliament. By not unambiguously highlighting the exclusivity of the statutory remedy, Parliament leaves it to the judiciary to define its role in relation to that remedy. I agree with the following conclusion of Peter Cane in *An Introduction to Administrative Law* (1986), at p. 190, as regards what he calls the constitutional function of administrative law rules on ouster of remedies:
>
> > The rules about implied exclusion of review tend to raise questions about the suitability of the judicial process as opposed to the other avenues open for the control of administrative misconduct. In other words, these rules tend to rest on ideas of justiciability and the proper scope of judicial review.

[43] He was of the view that the political remedy of that case, *i.e.* a report to Parliament, was an adequate alternative remedy as the Auditor General was acting on Parliament's behalf, carrying out a quintessentially parliamentary function. At page 103, he concluded:

> Where Parliament has indicated in the *Auditor General Act* that it wishes its own servant to report to it on denials of access to information needed to carry out his functions on Parliament's behalf, it would not be appropriate for this Court to consider granting remedies for such denials, if they, in fact, exist.

[44] It seems to me that this case is different in that the Parliamentary Budget Officer would not be acting on Parliament's behalf but on behalf of an individual member of the House of Commons. Parliament did not expressly legislate his recourses in the event that a deputy minister, or delegate, refused to provide information, and this is not a case where a political remedy is adequate, as Parliament cannot be taken to unmake its own law, except by legislation.

[45] Time and time again, the Supreme Court has interpreted statutes by relying upon the following passage from Elmer Driedger's *Construction of Statutes*, 2nd Edition, 1983:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See for instance *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, [1998] SCJ No 2 (QL) and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559, [2002] SCJ No 43 (QL).

[46] It seems to me that by establishing the position of a Parliamentary Budget Officer and enshrining his or her mandate in legislation, Parliament intended that independent, *i.e.* independent from Government, financial analysis should be available to any member of Parliament, given the

possibility that the Government of the day may be a majority government with strong party discipline.

[47] That was the mischief Parliament addressed and dealt with. If the legislation infringed upon parliamentary privilege, and I say it did not, then such privilege was legislatively waived.

JUSTICIABILITY

[48] Section 18.3(1) of the *Federal Courts Act* was invoked by Mr. Page. It provides:

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.	18.3 (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

[49] The Federal Court was established pursuant to section 101 of the *Constitution Act* which permits Parliament to establish courts for the better administration of the Laws of Canada. Although the *Parliament of Canada Act* is obviously a Law of Canada, it is submitted that it is not a Law of Canada over which this Court has jurisdiction. Reliance is placed upon the decision of Chief Justice Iacobucci of the Federal Court of Appeal, as he then was, in *Southam Inc v Canada (Attorney General)*, [1990] 3 FC 465, [1990] FCJ No 712 (QL). He was of the view that the *Parliament of Canada Act* did not arise from the general legislative jurisdiction of the Federal Parliament under section 91 of the *Constitution Act*, but rather under section 18, referred to above. He concluded the Federal Court was without jurisdiction. I do not consider that case applicable. It dealt with a matter

purely internal to Parliament, *i.e.* the right to deny strangers access to Senate Committee Hearings, and was decided before *Vaid*. Furthermore, for the reasons stated above, this is not a case which deals with matters purely internal to Parliament.

[50] Then, the Attorney General, who took the lead in this part of the opposition to Mr. Page's application, submitted that the Parliamentary Budget Officer was not a federal board, commission or tribunal. Quite apart from that objection, he added that there was nothing to determine. It is not necessary to rule on the first point, as I agree that there is nothing in the record before me to determine, which brings the matter to an end.

[51] During oral argument, I suggested that Mr. Page should have acted on his own interpretation of his statutory mandate and called upon deputy ministers to provide the information requested. Had they refused to do so, then what would have been at issue in this Court would have been a decision of a federal deputy minister. Such individuals are, without question, federal boards, commissions or tribunals.

[52] Mr. Page may have had reason to believe requests would have been refused because in the past some departments had not provided information, because two standing committees had declined to exercise their rights under section 79.2 of the Act, and because at least two ministers speaking in Parliament offered the opinion that he had overstepped his bounds. However, from the record before me, the context of those statements is not clear. An argument can be made that he had indeed overstepped his bounds. As set out in the *Report on the Operations of the Parliamentary Budget Officer within the Library of Parliament*, the *Report of the Standing Joint Committee on the*

Library of Parliament, June 2009, it was said that although Mr. Page was an officer of the Library of Parliament, he refused to attend library meetings, and would not tell the Parliamentary Librarian how many cases he was dealing with.

[53] The reason Mr. Page did not act on his own convictions appears to be that he wanted to avoid the impression he was seeking coercive measures, and because he wished to be seen as neutral. A declaration might be considered as a form of coercion as the Government is expected to follow it. I think the determination of a reference comes to the same thing.

[54] The leading case in this area is *LeBar v Canada*, [1989] 1 FC 603, [1988] FCJ No 940 (QL), in which Mr. Justice MacGuigan of the Federal Court of Appeal reviewed the fundamental principles of the declaratory judgment, starting with the seminal decision in *Dyson v Attorney General*, [1911] 1 KB 410. He stated the following at paragraph 11 of his decision:

> In my opinion, the necessity for the Government and its officials to obey the law is the fundamental aspect of the principle of the rule of law, which is now enshrined in our Constitution by the preamble to the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982 c. 11 (U.K.)]. This aspect was noted by A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., E.C.S. Wade, 1959, pages 193, 202-203, and was authoritatively established by the Supreme Court in its *per curiam* decision in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at page 748: [1]
>
> > The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.

[55] Decisions of this Court which rule upon the jurisdiction of federal boards or tribunals include *Lawson v Accusearch Inc.*, 2007 FC 125, [2007] FCJ No 164 (QL) and *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 918, [2009] FCJ No 1096 (QL).

[56] Although counsel for Mr. Mulcair submits I should answer the questions, he accepts that Mr. Page could have proceeded by way of declaration or *mandamus*.

[57] I dislike dismissing applications on procedural grounds, but there are times when it is necessary to do so. This is one of those cases, as there is no live controversy.

[58] I have more than once invoked rule 3 of the *Federal Courts Rules*, which provides that the Rules are to be interpreted and applied to secure the just, most expeditious and least expensive determination of every proceeding on its merits. As Mr. Justice Pigeon said in *Hamel v Brunelle*, [1977] 1 SCR 147, at page 156: "…que la procédure reste la servante de la justice et n'en devienne jamais la maîtresse." / "…that procedure be the servant of justice not its mistress." However, there are limits.

[59] Moreover, this is not a case of a defect in the form of pleadings, which could be cured. If it were, as Lord Denning M.R. said in *Letang v. Cooper*, [1964] 2 All E.R. 929 at p. 932:

> I must decline, therefore, to go back to the old forms of action in order to construe this statute. I know that in the last century MAITLAND said "the forms of action we have buried but they still rule us from their graves." But we have in this Century shaken off their trammels. These forms of action have served their day. They did at one time form a guide to substantive rights; but they do so no longer. Lord Atkin told us what to do about them:

> "When these ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge is to pass through them undeterred. See *United Australia, Ltd. v. Barclays Bank Ltd.* [1940] 4 All E.R. 20 at p. 37"

[60] Had, for instance, a deputy minister refused Mr. Page information on the grounds that his jurisdiction was limited to the analysis of money proposed to be spent, as opposed to the analysis of alleged savings in comparison with the previous budget, I would have been pleased to answer the question. However, given the studious refusal of the respondents in opposition to Mr. Page to take any position, there is simply no live controversy to be ruled upon. Under rule 322 of the *Federal Courts Rules*, it was upon Mr. Page to establish the record on which he intended to rely. As his material shows, in response to general requests on his part, and not at the instance of Mr. Mulcair, some departments provided information while others did not. Some may have had valid excuse.

[61] In order to avoid the issue of mootness, there must be a live controversy both when the proceeding is commenced, and also at the time the Court is called upon to make a decision. As a matter of general policy, a court may decline to hear a case which raises merely hypothetical or abstract questions. The leading case is *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, [1989] SCJ No 14 (QL). In that case, there had been a concrete legal dispute but it had disappeared by the time the appeal was heard. The Court resolves legal disputes based on the adversary system. In this case, the dispute relates to whether Mr. Page has access to the courts, not to the scope of his legislative mandate.

[62] Much of the argument before me was made on a hypothetical basis. Suppose Mr. Page had interpreted his mandate such that he considered he was unable to accede to Mr. Mulcair's request.

What would Mr. Mulcair's recourses have been? That is a matter for another day. Suppose Mr. Page had done what I think he should have done, *i.e.* actually demanded information from deputy ministers? Suppose they refused to provide information? He had a number of remedies, such as complaining to the Parliamentary Librarian, perhaps complaining to the two Speakers and the Joint Committee, and perhaps to Parliament as a whole. What I am saying is that in addition to such remedies, ultimately he would have had recourse to this Court. There may or may not be a sequence to these alternative remedies, and the Court, in its discretion, may refuse to hear an application if other adequate alternative remedies have not been exhausted (*Reda v Canada (Attorney General)*, 2012 FC 79, 404 FTR 85, [2012] FCJ No 82 (QL) and *Forget v Canada (Attorney General)*, 2012 FC 212, 405 FTR 246, [2012] FCJ No 226 (QL)).

CONCLUSION

[63] Mr. Page's application shall be dismissed, not on the grounds of parliamentary privilege, not on the grounds of statutory interpretation, but on the grounds of non-justiciability. There shall be no order as to costs.

JUDGMENT

FOR REASONS GIVEN;

THIS COURT ORDERS AND ADJUDGES that this application is dismissed, without costs.

"Sean Harrington"
Judge

APPENDIX

PARLIAMENT OF CANADA ACT
RSC, 1985, c P-1

4. The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise

(*a*) such and the like privileges, immunities and powers as, at the time of the passing of the *Constitution Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with that Act; and

(*b*) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

5. 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.

79.2 The mandate of the Parliamentary Budget Officer is to

(a) provide independent analysis to the Senate and to the House of Commons about the state of the nation's finances, the estimates of the government and trends in the national economy;

(b) when requested to do so by any of the following committees, undertake research for that committee into the nation's finances and economy:

LOI SUR LE PARLEMENT DU CANADA
LRC (1985), ch P-1

4. Les privilèges, immunités et pouvoirs du Sénat et de la Chambre des communes, ainsi que de leurs membres, sont les suivants :

a) d'une part, ceux que possédaient, à l'adoption de la *Loi constitutionnelle de 1867*, la Chambre des communes du Parlement du Royaume-Uni ainsi que ses membres, dans la mesure de leur compatibilité avec cette loi;

b) d'autre part, ceux que définissent les lois du Parlement du Canada, sous réserve qu'ils n'excèdent pas ceux que possédaient, à l'adoption de ces lois, la Chambre des communes du Parlement du Royaume-Uni et ses membres.

5. Ces privilèges, immunités et pouvoirs sont partie intégrante du droit général et public du Canada et n'ont pas à être démontrés, étant admis d'office devant les tribunaux et juges du Canada.

79.2 Le directeur parlementaire du budget a pour mandat :

a) de fournir au Sénat et à la Chambre des communes, de façon indépendante, des analyses de la situation financière du pays, des prévisions budgétaires du gouvernement et des tendances de l'économie nationale;

b) à la demande de l'un ou l'autre des comités ci-après, de faire des recherches en ce qui touche les finances et l'économie du pays :

(i) the Standing Committee on National Finance of the Senate or, in the event that there is not a Standing Committee on National Finance, the appropriate committee of the Senate,

(i) le Comité permanent des finances nationales du Sénat ou, à défaut, le comité compétent du Sénat,

(ii) the Standing Committee on Finance of the House of Commons or, in the event that there is not a Standing Committee on Finance, the appropriate committee of the House of Commons, or

(ii) le Comité permanent des finances de la Chambre des communes ou, à défaut, le comité compétent de la Chambre des communes,

(iii) the Standing Committee on Public Accounts of the House of Commons or, in the event that there is not a Standing Committee on Public Accounts, the appropriate committee of the House of Commons;

(iii) le Comité permanent des comptes publics de la Chambre des communes ou, à défaut, le comité compétent de la Chambre des communes;

(c) when requested to do so by a committee of the Senate or of the House of Commons, or a committee of both Houses, that is mandated to consider the estimates of the government, undertake research for that committee into those estimates; and

c) à la demande de tout comité parlementaire à qui a été confié le mandat d'examiner les prévisions budgétaires du gouvernement, de faire des recherches en ce qui touche ces prévisions;

(d) when requested to do so by a member of either House or by a committee of the Senate or of the House of Commons, or a committee of both Houses, estimate the financial cost of any proposal that relates to a matter over which Parliament has jurisdiction.

d) à la demande de tout comité parlementaire ou de tout membre de l'une ou l'autre chambre du Parlement, d'évaluer le coût financier de toute mesure proposée relevant des domaines de compétence du Parlement.

79.3 (1) Except as provided by any other Act of Parliament that expressly refers to this subsection, the Parliamentary Budget Officer is entitled, by request made to the deputy head of a department within the meaning of any of paragraphs (a), (a.1) and (d) of the definition "department" in section 2 of the Financial Administration Act, or to any other person designated by that deputy head for the purpose of this section, to free and timely access to any financial or economic data in the possession of the department that are required for the

79.3 (1) Sous réserve des dispositions de toute autre loi fédérale renvoyant expressément au présent paragraphe, le directeur parlementaire du budget a le droit, sur demande faite à l'administrateur général d'un ministère, au sens des alinéas a), a.1) ou d) de la définition de « ministère » à l'article 2 de la Loi sur la gestion des finances publiques, ou à toute personne désignée par cet administrateur général pour l'application du présent article, de prendre connaissance, gratuitement et en temps opportun, de toutes données financières

performance of his or her mandate.

ou économiques qui sont en la possession de ce ministère et qui sont nécessaires à l'exercice de son mandat.

(2) Subsection (1) does not apply in respect of any financial or economic data

(2) Le paragraphe (1) ne s'applique pas aux données financières ou économiques qui, selon le cas :

(a) that are information the disclosure of which is restricted under section 19 of the Access to Information Act or any provision set out in Schedule II to that Act; or

a) sont des renseignements dont la communication est restreinte en vertu de l'article 19 de la Loi sur l'accès à l'information ou d'une disposition figurant à l'annexe II de cette loi;

(b) that are contained in a confidence of the Queen's Privy Council for Canada described in subsection 69(1) of that Act, unless the data are also contained in any other record, within the meaning of section 3 of that Act, and are not information referred to in paragraph (a).

b) sont contenues dans les documents confidentiels du Conseil privé de la Reine pour le Canada visés au paragraphe 69(1) de cette loi, sauf si elles sont également contenues dans tout autre document au sens de l'article 3 de cette loi et ne sont pas des renseignements visés à l'alinéa a).

FEDERAL COURT

SOLICITORS OF RECORD

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