Court File No: 652/23

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

SARAH JAMA

Applicant

- and -

THE SPEAKER for and on behalf of THE LEGISLATIVE ASSEMBLY OF ONTARIO, THE LEGISLATIVE ASSEMBLY OF ONTARIO, THE HONOURABLE TED ARNOTT in his capacity as SPEAKER of the LEGISLATIVE ASSEMBLY of ONTARIO, THE HONOURABLE PAUL CALANDRA, THE ATTORNEY GENERAL OF ONTARIO, and HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondents

APPLICATION UNDER section 6(2) of the *Judicial Review Procedure Act*, RSO 1990, c J1

FACTUM OF THE INTERVENER
THE CANADIAN CIVIL LIBERTIES ASSOCIATION

(motion to strike returnable February 22, 2024)

February 14, 2024

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I. OVERVIEW

1. The respondents to this application seek an order striking out the amended notice of application on various grounds, including that the operation of parliamentary privilege precludes the applicant from obtaining the relief she seeks.

2. The Canadian Civil Liberties Association intervenes as a friend of the Court, not to endorse the expression made by the applicant, but to support the role of the Court in preserving the democratic process. The focus of its submissions on this motion is the Court's role in defining the scope and limits of the categories of parliamentary privilege.

3. Significant consequences flow from the courts' lack of jurisdiction to review the exercise of a parliamentary privilege. It is accordingly important that the courts take care in defining the contours of the spheres of activity not subject to review. In the matter at bar, the consequences to third parties that flow from the impugned actions include the effective disenfranchisement of the applicant's constituents, who are left without a meaningful voice in the Legislature.

4. The historical development of parliamentary privilege in Canada has been characterized by respect for the autonomy of legislative assemblies, with the extraordinary immunity arising therefrom properly limited by a requirement that it be justified by its necessity to the effective functioning of the assembly. The foundational principles of democracy, legislative autonomy, and the separation of powers are advanced when the courts ensure that the categories of privilege are justified in this way.

II. FACTS

5. The CCLA accepts the facts pleaded in the amended notice of application as true for the purposes of this motion.

III. ISSUES AND THE LAW

6. The issue on this motion is whether it is plain and obvious that the application has no reasonable prospect of success. One of the questions raised on the motion is whether the operation of parliamentary privilege ousts this Court's jurisdiction to hear the application.

1. The privilege must be necessary to the functioning of the Legislature

7. A party claiming the protection of parliamentary privilege bears the onus of establishing that a category of that privilege immunizes their conduct from the ordinary law.

> *Canada (House of Commons) v Vaid*, 2005 SCC 30 at ¶5 ["***Vaid***"]

8. Where the existence of a category of privilege is in issue in relation to a *provincial* legislative assembly, the Supreme Court has directed the courts to "not only look at the historical roots of the claim but also to determine whether the category of inherent privilege continues to be necessary to the functioning of the legislative body today". The Court of Appeal confirmed in *Duffy v Canada (Senate)* ("*Duffy*") that a legislated parliamentary privilege "would likely" also have to meet the necessity test at the provincial level.

> *Vaid* at ¶¶29(6), 37 [emphasis in original]
> 2020 ONCA 536 at ¶102 ["***Duffy***"]

9. The holding in *Duffy* is not dispositive of the issue of necessity in every case, including the matter at bar. The courts' role in defining the limits of the categories of privilege is not displaced.

10. The legislated categories of privilege in Ontario do not precisely address all potential privileges, including the privilege claimed in this case. Canadian courts have not accepted legislated or inherent categories of privilege framed in broad, sweeping, or vague terms.

11. The Supreme Court has expressed concern about the "great elasticity" of the description of the category of control over "internal affairs", which is one of the categories raised in this case. In

rejecting a broad interpretation of this category, the Court noted that it would render numerous recognized privileges redundant or meaningless. The Court observed that the English Parliament's Joint Committee on Parliamentary Privilege, whose reasoning it endorsed, adopted a more restrictive interpretation of "internal affairs":

> … the privilege of each House to administer its own internal affairs in its precincts applies only to activities directly and closely related to proceedings in Parliament.
>
> *Vaid* at ¶¶45, 50

12. In *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* ("*New Brunswick Broadcasting*"), Chief Justice Lamer held that "[t]he content **and extent** of parliamentary privileges have evolved with reference to their necessity". In the provincial context, the requirement that a party relying on a category of privilege establish its continuing necessity means the extent of the categories of privilege continues to evolve.

> [1993] 1 SCR 319 at 343 ["***New Brunswick Broadcasting***"] [emphasis added]

13. One of the questions for this Court is whether there is a category of privilege which extends so far as to insulate the censuring and silencing of members of a legislative assembly for political expression, outside the precincts of the assembly, that does not affect the assembly's legislative or deliberative functions. Acceptance of a provincial legislative assembly's authority to censure or exclude members has always been based on the necessity for "the integrity of, and public confidence in, its processes", and subject to clearly defined rules.

> *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876 at ¶67 ["***Harvey***"]

2. The scope of the privilege must be defined with adequate precision

14. The Court must define the scope of the category of parliamentary privilege at issue with an adequate level of precision to ensure that it is necessary, and not open to abuse. An overbroad definition of a category of parliamentary privilege has significant potential to undermine the

purposes of parliamentary privilege.

15. The Supreme Court has explained that the courts are to "ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege." Where "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."

Vaid at ¶29(5), (11)

16. The use of elastic, nebulous terms, such as "internal affairs", in defining a category of privilege can lead to extreme and unjustified results. As noted above, the Supreme Court expressly rejected the use of the terms "internal affairs" in *Canada (House of Commons) v Vaid* ("*Vaid*"):

> At the hearing of this appeal, the appellants identified the claimed privilege as "management of employees". I agree that this is a more appropriate category than one of the other terms suggested, "internal affairs". The latter is a term of great elasticity. If interpreted precisely it refers "especially to [the House's] control of its own agenda and proceedings" […].
>
> On the other hand, if the term "internal affairs" were interpreted broadly as suggested by some of the interveners, it would duplicate most of the matters recognized independently as privileges […]. The danger of dealing with a claim of privilege at too high a level of generality was also noted in the British Joint Committee Report:
>
> > "Internal affairs" and equivalent phrases are loose and potentially extremely wide in their scope. . . . [It] would be going too far if it were to mean, for example, that a dispute over the . . . dismissal of a cleaner could not be decided by a court or industrial tribunal in the ordinary way. [para. 241] […]
>
> I conclude that British authority does not establish that the House of Commons at Westminster is immunized by privilege in the conduct of *all* labour relations with *all* employees irrespective of whether those categories of employees have any connection (or nexus) with its legislative or deliberative functions, or its role in holding the government accountable.
>
> *Vaid* at ¶¶50–51, 70

17. The Supreme Court has further cautioned that, "while privilege is said to extend to the 'internal affairs' of the House, '[t]his heading of privilege best serves Parliament if not carried to extreme lengths'". The Court approved of guidance from the British Joint Committee Report:

> The dividing line between privileged and non-privileged activities of each House is not easy to define. Perhaps the nearest approach to a definition is that the areas in which the courts ought not to intervene extend beyond proceedings in Parliament, but the privileged areas must be so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative and deliberative assembly.
>
> *Vaid* at ¶¶44, 66 [emphasis in original]

18. This purposive approach to the definition of privilege "implies important limits". This is because "a finding that a particular area of parliamentary activity is covered by privilege has very significant legal consequences for non-members who claim to be injured by parliamentary conduct". In this case, the applicant's constituents are left without meaningful representation and a voice in the Assembly.

> *Vaid* at ¶¶30, 43

3. The asserted privilege does not exist

19. There is no category of parliamentary privilege that immunizes the Legislative Assembly of Ontario's decision to censure and refuse to recognize a member because of political expression outside its precincts. Such conduct has not been shown to impair the legislative process. On the contrary, denying the applicant's constituents a voice in the Legislature undermines the democratic function of the Legislative Assembly. The privilege is not necessary, and is ripe for abuse.

20. While the Legislative Assembly's decision undoubtedly engages its "internal affairs" broadly defined, this is not the end of the inquiry. The proper scope of this category of privilege must depend on whether the action is in fact grounded in a threat to a legislative body's function or autonomy. A provincial legislative assembly's immunity from judicial review does not extend so

far as to protect it where it seeks to exclude or silence a member for political expression unconnected to the functioning of the assembly, with no "connection (or nexus) with its legislative or deliberative functions, or its role in holding the government accountable".

Vaid at ¶70

21. In *Landers v Woodsworth* ("*Landers*"), the Supreme Court held that the category of privilege that protects a provincial assembly's ability to discipline members does not extend to actions that do not "necessarily interfere or interrupt the business of" the assembly. The Legislative Assembly of Nova Scotia had passed a resolution requiring a member to apologize where he had made allegations against the Provincial Secretary that the House subsequently determined to be unfounded and, when he refused to apologize, declared him to be in contempt and excluded him from the House. The Chief Justice observed that there was no basis for such a privilege:

> What right had they to require him to make this apology? **Was it necessary to do so in order to go on with the public business?** He had made the charge several days before that, so that the offence, if it were an offence at all, had been committed in a way apparently not interfering with the proper action of that body; so there would be no pretence that he was to apologize for that. […]
>
> **It cannot be pretended, that on his removal from the House on the 28th of April, he was then obstructing their deliberations** by the charge he had made on the 16th of April, twelve days before, and they do not, in any way, by their resolutions so assert. If he was removed as a punishment for his contempt in not obeying the order of the House as to making the apology dictated, the decided cases show they had not the power to punish for such a contempt, though in the face of the House, as his refusal did not necessarily interfere with or interrupt the business of the House; or, if it did, the interruption arose from the act of the House, and not of the plaintiff.
>
> 2 SCR 158 at 198–199 ["***Landers***"] [emphasis added]

22. Justice Ritchie similarly rejected the existence of such a privilege:

> I think a series of authorities, binding on this Court, clearly establish that the House of Assembly of *Nova Scotia* has no power to punish for any offence not an immediate obstruction to the due course of its proceedings and the proper exercise of its functions, such power not being an essential attribute, nor essentially necessary, for the exercise of its functions by a local legislature, and not belonging to it as a necessary or legal incident […].

Landers at 201–202

23. The Court's reasoning in *Landers* was endorsed more recently by Chief Justice Lamer, in *New Brunswick Broadcasting*.

New Brunswick Broadcasting at 346–347

24. The question that the Supreme Court addressed in *Landers* is essential to preventing abuse of the privilege in a manner that may undermine a legislative assembly's functions rather than protect them. It is a defining feature of the privilege in Canada that has distinguished it from the historical absolutism that existed in England before the nineteenth century. The latter was described in the English case of *Stockdale v Hansard* (1839), 112 ER 1112, as extending to "killing Lord Galway's rabbits and fishing in Mr. Jolliffe's pond."

Vaid at ¶23

25. In Canada, the scope of parliamentary privilege is constrained by necessity. The Supreme Court has observed that necessity is the historical foundation of every privilege, but the historical recognition of a category of privilege is not sufficient to justify its continued acceptance:

> The fact that this privilege has been upheld for many centuries, abroad and in Canada, is some evidence that it is generally regarded as essential to the proper functioning of a legislature patterned on the British model. However, it behooves us to ask anew: in the Canadian context of 1992, is the right to exclude strangers necessary to the functioning of our legislative bodies?
>
> *New Brunswick Broadcasting* at 387 [emphasis added]

26. The doctrine of necessity is what reconciles the decision in *Landers* with those in *Harvey* and *Duffy*. All three cases concerned actions of an assembly or the Senate against its members. In *Landers*, the censure and exclusion of the member was unrelated to the legislative or deliberative functions of the Legislative Assembly of Nova Scotia, and was therefore not privileged.

27. In *Harvey*, a provincial legislative assembly had disqualified from office a member

convicted of an illegal practice under the provincial elections legislation. Justice McLachlin explained that "[t]he history of the prerogative of Parliament and legislative assemblies to maintain the integrity of their processes by disciplining, purging and disqualifying those who abuse them is as old as Parliament itself".

Harvey at ¶64

28. Allegations of corruption in relation to Senator Duffy's duties and role as a senator affected the functioning of the Senate. In both cases, the foundation of the privilege was necessary to the proper functioning and dignity of the assembly.

29. The case at bar invokes the reasoning in *Landers*. The privilege does not extend to matters extraneous to the proper functioning of the Legislative Assembly. Moreover, the extension of the privilege to political expression outside the Assembly, unrelated to its legislative process, may undermine the democratic function of the Assembly. The right of the applicant's constituents to a voice in the Legislature is integral to the Legislature's role in holding the government accountable.

30. This interest of the applicant's constituents is an appropriate consideration. The Supreme Court noted in *Vaid* that courts "are apt to look more closely at cases in which claims to privilege have an impact on persons outside the legislative assembly than at those which involve matters entirely internal to the legislature".

Vaid at ¶29

31. Democratic rights, like parliamentary privilege, have constitutional importance. Justice McLachlin explained in *Harvey* that they can be reconciled by acknowledging the limits that the doctrine of necessity places on the scope of privilege:

> While parliamentary privilege and immunity from improper judicial interference in parliamentary processes must be maintained, so must the fundamental democratic guarantees of the Charter. Where apparent conflicts between different

> constitutional principles arise, the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them.
>
> […] Expulsions and disqualification from office may, if found to fall within the scope of parliamentary privilege, be beyond the purview of s. 3. But s. 3 still operates to prevent citizens from being disqualified from holding office on grounds which fall outside the rules by which Parliament and the legislatures conduct their business; race and gender would be examples of grounds falling into this category. Viewed from this perspective, s. 3 may be seen as reflecting, in the democratic context, the values enshrined in the equality guarantee of s. 15 of the *Charter*. This approach gives full value to the purpose, the content and the place of s. 3 in the context not only of the *Charter*, but the Constitution as a whole.
>
> *Harvey* at ¶¶69, 70

32. In *Reference re Secession of Quebec*, the Supreme Court recognized the importance of citizens' participation in the political process through election of representatives to their political institutions:

> To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people.
>
> [1998] 2 SCR 217 at ¶67 [emphasis added]

33. The measures taken against the applicant affect foundational democratic rights of her constituents. Where such measures do not fall within a sphere in which immunity is necessary for the proper functioning of a legislative assembly, they are not protected by parliamentary privilege. Where they may undermine those democratic functions, they are anathema:

> The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours. […]
>
> The *Canada Elections Act*, […] and the *Senate* and *House of Commons Act*, are examples of enactments which make specific statutory provision for ensuring the exercise of this right of public debate and public discussion. Implicit in all such legislation is the right of candidates for Parliament or for a Legislature, and of citizens generally, to explain, criticize, debate and discuss in the freest possible

> manner such matters as the qualifications, the policies, and the political, economic and social principles advocated by such candidates or by the political parties or groups of which they may be members.
>
> *Switzman v Elbling and AG of Quebec*, [1957] SCR 285 at 326–327

34. Parliamentary privilege in Canada must be justified by its necessity to an assembly's "legislative or deliberative functions, or its role in holding the government accountable." Where actions have no connection to these functions, or may even undermine them, the courts will find no privilege.

> *Vaid* at ¶70

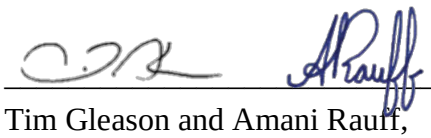
35. The CCLA makes no comment on the merits of the actions taken by the Legislature in this case. Its submissions are confined to the authority of the Court to review those actions.

IV. ORDER SOUGHT

36. The CCLA takes no position on the orders sought in the application, or on the motion to strike the amended notice of application. It does not seek costs and respectfully requests that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 14, 2024



Tim Gleason and Amani Rauff,
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SCHEDULE "A"

AUTHORITIES

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1. *Canada (House of Commons) v Vaid*, 2005 SCC 30
2. *Duffy v Canada (Senate)*, 2020 ONCA 536
3. *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319
4. *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876
5. *Landers v Woodsworth*, 2 SCR 158
6. *Reference re Secession of Quebec*, [1998] 2 SCR 217
7. *Reference Re Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100, appeal dismissed 1938 CanLII 251 (UK JCPC)
8. *Switzman v Elbling and AG of Quebec*, [1957] SCR 285

SCHEDULE "B"

RELEVANT STATUTES

N/A

SARAH JAMA - and - Applicant	**THE SPEAKER for and on behalf of THE LEGISLATIVE ASSEMBLY OF ONTARIO, *et al.*** Respondents	Court File No: 652/23

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Proceeding commenced at TORONTO

FACTUM OF THE INTERVENER THE CANADIAN CIVIL LIBERTIES ASSOCIATION

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