Parliamentary Privilege, Rule of Law and the Charter after the Vaid Case

by Evan Fox-Decent

Parliamentary privilege immunises certain activities of legislative bodies and their members from the ordinary law and judicial scrutiny. It seems to place these activities beyond both the ideals and the institutional framework of the rule of law, with potentially serious consequences such as a victim of discrimination having no recourse if the discrimination arose from an action covered by privilege. This paper looks at a recent case and argues that the rule of law and parliamentary privilege, properly understood, support rather than oppose one another. Specifically, legislative actors are entitled to interpret constitutional norms, at the moment they seek to assert privilege. It argues that judges are not the exclusive guardians of the rule of law, and that legislative offices such as the Speaker of the House have a legitimate role to play in upholding it. The author concludes that there is, however, a need for a rationale that confirms the legitimacy of the House's authority to settle disputes between its members within the realm of privilege, while leaving the Court with a principled basis to intervene when the facts so warrant.

Satnam Vaid worked as a chauffeur to three successive Speakers of the House of Commons between 1984 and 1995. He was terminated in January 1995, but successfully grieved the termination pursuant to the *Parliamentary Employees Staff Relations Act* (PESRA) and was reinstated in August of that same year. Upon his return, Mr. Vaid was told that his position had been designated "bilingual imperative." Lacking French, Mr. Vaid was sent for French language training. In April 1997, Mr. Vaid advised the Speaker that he wished to resume his former duties, but was advised by the Speaker's office that due to a re-organisation his position would become surplus effective May 29, 1997.

Mr. Vaid filed two complaints with the Canadian Human Rights Commission in July 1997, alleging separately that the Speaker and the House of Commons had discriminated against him on the basis of race, colour and ethnic or national origin. He also alleged workplace harassment.

The Speaker and the House challenged the jurisdiction of the Canadian Human Rights Tribunal ("CHRT") on grounds of parliamentary privilege. A majority of the CHRT ruled in Mr. Vaid's favour, and the Speaker and the House sought judicial review. The Federal Court-Trial Division refused their application, and this refusal was subsequently upheld by a unanimous Federal Court of Appeal. The Supreme Court heard an appeal by the Speaker and the House, and unanimously overturned the lower courts. Writing for the full Court, Justice Binnie found that the CHRA did apply to employees of the House, that the appellants had failed to establish the privilege they asserted, but that on the facts of this case the proper forum for the dispute was the regime established by PESRA rather than the CHRT.

Strictly speaking, the Court's extensive reasons concerning privilege are *obiter dicta* because the Court did not uphold the asserted privilege and therefore its ultimate decision was not based on a successful plea of privi-

Evan Fox-Decent is a professor in the Faculty of Law at McGill University. *This is a revised and abridged version of a paper presented at the 2006 Law and Government Parliament Conference in Ottawa. The paper was originally published in the Canadian Journal of Administrative Law and Practice, July 2007. It is reprinted by permission of Thomson Carswell, a division of Thomson Canada Limited.*

lege. Nonetheless, 56 of the 80 paragraphs under the heading "Analysis" deal explicitly with the immunising doctrine, and they essentially reaffirm and elaborate upon the majority judgments in the prior leading case, *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*.

While I will argue that the analytical framework courts should use to test a claim of privilege is still based on the majority judgments in *New Brunswick Broadcasting*, and differs slightly from the framework proposed in *Vaid*, the Court's unanimity in *Vaid* suggests that generally this more recent case is now the leading Canadian authority on parliamentary privilege.

Justice Binnie spent considerable time discussing the constitutional foundation of privilege. The principle has its roots in the preamble of the *Constitution Act, 1867*. The preamble calls for "a Constitution similar in principle to that of the United Kingdom." In addition, s. 18 of the *Constitution Act, 1867* (as amended in 1875) provides:

> 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 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.

Section 4 of the *Parliament of Canada Act* defines the relevant privileges, immunities and powers as those "(a)…held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof" and "(b)…as are defined by Act of the Parliament of Canada, not exceeding those… held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof."

The legal basis for federal parliamentary privilege, therefore, has constitutional and statutory dimensions, but its specific content must be derived from (and is limited by) the privileges of the U.K. Commons. Justice Binnie interprets the relevant passage from the preamble of the *Constitution Act, 1867* to imply a "fundamental constitutional separation of powers" in which "each of the branches of the State is vouchsafed a measure of autonomy from the others." He finds that parliamentary privilege is part of the Constitution, as a necessary incident of the separation of powers, and therefore the *Charter* cannot prevail over privilege because "parliamentary privilege enjoys the *same* weight and status as the *Charter* itself."

In *New Brunswick Broadcasting* the Court had upheld the authority of a provincial legislature to invoke parliamentary privilege to prevent the media from filming and televising debates from the press gallery. The freedom of the press guaranteed by s. 2(b) of the *Charter* could not trump the Speaker's privileged order to exclude "strangers" from the legislative assembly. However, the *Constitution Act, 1867* does not contain a provision similar to s. 18 that supplies to provincial legislatures an explicit basis for privilege. Thus, the Court in *New Brunswick Broadcasting* had to rely on privileges "inherent" to the creation and function of a provincial legislature which, due to the preamble of the *Constitution Act, 1867*, must be similar in principle to the U.K. Parliament. In *Vaid* the Court confirmed that "the immunity from external review flowing from the doctrine of privilege is conferred by the nature of the function (the Westminster model of parliamentary democracy), not the source of the legal rule (i.e., inherent privilege versus legislated privilege)." Therefore, even if privilege is prescribed by legislation, such legislation is not the source of the constitutional status that privilege enjoys. This status flows from the constitutional purpose of legislative bodies – from their deliberative and law-making role – and from the autonomy such bodies are deemed to require in order to ensure the integrity and effectiveness of the separation of powers. Consequently, the Court held that the *Charter* cannot prevail over parliamentary privilege even if privilege is grounded in ordinary legislation such as s. 4 of the *Parliament of Canada Act*.

The Rationale and Test for Parliamentary Privilege

Justice Binnie begins his analysis in *Vaid* with praise for the reluctance of Parliament and the courts to intervene in the other's domain:

> It is a wise principle that the courts and Parliament strive to respect each other's role in the conduct of public affairs. Parliament, for its part, refrains from commenting on matters before the courts under the *sub judice* rule. The courts, for their part, are careful not to interfere with the workings of Parliament.

He reaffirms the "wise principle" a few paragraphs later, and says that in "resolving conflicts over the scope of an asserted privilege it is important that both Parliament and the courts respect 'the legitimate sphere of the other.'" Curial respect for the legitimate sphere of Parliament manifests itself through respect for parliamentary privilege, which itself "is defined by the degree of autonomy necessary to perform Parliament's constitutional function." However, "legislative bodies…do not constitute enclaves shielded from the ordinary law of the

land," and so the party who seeks to rely on privilege bears the onus of establishing its existence and scope.

The Court held that the existence and scope of an asserted privilege is determined through the application of a two-step test. The first step is to establish whether "the existence and scope of the claimed privilege have been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster." Once the existence and scope of a category is established, "Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts." Established categories of privilege include freedom of speech,[1] control by the Houses of Parliament over "debates and proceedings in Parliament" as guaranteed by the U.K. Bill of Rights of 1689 (including day-to-day procedure in the House),[2] the power to exclude strangers (i.e., the public) from proceedings,[3] and disciplinary authority over members and non-members who interfere with the discharge of parliamentary duties.[4]

If the existence and scope of the asserted privilege has not been authoritatively established, the second step of the test requires the assembly or member seeking immunity to show that

> the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.

This is the Court's fullest elaboration of the "doctrine of necessity," the doctrine the Court refers to elsewhere as "the historical foundation of every privilege of Parliament." Justice Binnie cites with approval Maingot's necessity-based definition of parliamentary privilege as "the necessary immunity that the law provides for Members of Parliament, and for the members of the legislatures of each of the ten provinces and two territories, in order for these legislators to do their legislative work." Hence, on review, the existence and scope of an asserted privilege is determined by a test of necessity which itself is grounded explicitly in the separation of powers; i.e., in immunity from judicial review where such immunity is deemed necessary for 'legislators to do their legislative work.'

To summarise, *Vaid* appears to say that for an assertion of privilege to succeed on review the party asserting the privilege must show either that the existence and scope of the asserted privilege has been authoritatively established, or that the type of privilege sought is necessary for the assembly or its members to be able to deliberate and legislate 'with dignity and efficiency.' If the existence and scope of an asserted privilege is successfully established on either branch of the two-part test, the courts will not review particular exercises of it.

However, in *New Brunswick Broadcasting* the majority found that the power to exclude strangers from a legislative assembly was an authoritatively established category of privilege, but then proceeded further to the argument of principle (the second branch of the test in *Vaid*) concerning whether the claim of privilege passed the test of necessity. The majority concluded that it did, and then refused to review the Speaker's decision to exclude the media from the assembly, notwithstanding plausible grounds to believe that the media's use of handheld cameras in the press gallery would not interfere with the assembly's proceedings.

We shall turn to the merits of this analytical framework below, but for now the point to note is that even where the existence and scope of a privilege can be established through reference to past authorities, the Court will still review whether such a privilege can pass the test of necessity today. Assuming that the application of the test of necessity by the majority in *New Brunswick Broadcasting* was not frivolous window-dressing, the implication is that if the Speaker's assertion of privilege had failed the test of necessity, then that assertion would have been rejected, despite the support it enjoyed on the basis of past authorities. In *Vaid* the Court did not have to address this issue squarely because the Court denied that the alleged privilege could be sustained either by reference to past authorities or by reference to the test of necessity. Taking into account the Court's approach in *New Brunswick Broadcasting* and the *obiter dicta* status of the reasons dealing with privilege in *Vaid*, the more precise characterisation of the test for privilege is that reference to past authorities can strengthen a claim to privilege, but the claim must be able to pass the test of necessity today.

On the surface, this approach to review of privilege may appear balanced and deferential, and at least a partial victory for those sceptical of judicial activism: the courts review legality through review of the existence and scope of an asserted privilege, but the legislature is free to determine the merits of whether or not to exercise privilege within the scope of the prescribed categories. However, as we shall see, drawing a distinction between determinations of existence and scope, on the one hand, and particular exercises of privilege, on the other, is fraught with the same difficulty that has attended efforts elsewhere in public law to hive off categorically review of legality (or jurisdiction) from review of the merits (or "simple" errors of law).

The Court has made it clear that judicial scrutiny will be more intense where immunity is sought in relation to the exercise of powers which invade the rights of non-Parliamentarians. But it is not clear how a court, working within the analytical framework set out above, could intensify review in such situations. Even if there really is a qualitative difference between review of the existence and scope of privilege (review of legality) and review of the propriety of a particular exercise (review of the merits), it is difficult to imagine how courts could review more intensely cases involving non-Parliamentarians without taking into account the effects on such parties of actual exercises of privilege. After all, it is presumably these very effects that warrant more intensive review. The suggestion that review should be more intense in such situations acknowledges from the outset, albeit implicitly, the fragility of the distinction between review of legality and review of the merits.

In *Vaid*, Justice Binnie found that "management of employees" was the proper characterisation of the broad privilege the Speaker and the House were invoking, and that the relevant Canadian and British authorities did not establish that privilege immunises them in the conduct of all labour relations with all employees. Similarly, at step two of the inquiry the Court found that the asserted privilege could not be supported as a matter of principle under the doctrine of necessity because the management of some employees, such as Mr. Vaid, had little or no bearing on the autonomy and immunity necessary for Parliament to fulfill its constitutional mandate.

Mr. Vaid's case ultimately fell to be determined by ordinary principles of statutory interpretation from administrative law. While Justice Binnie found that the CHRA applied to House employees, on the facts presented he determined that Mr. Vaid's case was an employment matter with a possible human rights dimension, rather than a human rights case *per se* in an employment setting. He ordered the case to be resolved pursuant to the PESRA rather than before the CHRT, but noted that the PESRA adjudicator has authority to consider human rights issues such as discrimination and harassment.

Reconsidering the Category-based Approach

Justice Binnie considered and explicitly rejected the view of the Federal Court of Appeal that on review the party seeking to establish privilege must show both its existence and exercise to be necessary. He sought to base his decision on the distinction referred to above between review of legality and review of the merits. In his view, review of legality can be limited in principle to review of the existence and scope of a category of privilege, whereas review of an exercise of privilege is off limits because this would involve judgment of the merits of invoking privilege. The authority to make such judgments, according to him, belongs exclusively to the House and its members. As we shall see, the problem with this method is that judges reviewing the scope of an asserted privilege will have to engage in just the type of review they would undertake were they to review a particular exercise of privilege.

In *Vaid* it was easy for the Court to say that a privilege immunising the Speaker and the House in every aspect of their "management of employees" was too broad in scope to pass the test of necessity. But to say that an asserted privilege is too broad in scope is just to say that there are some types of exercises of power that will not receive immunity because they are too far removed from the legislature's discharge of its constitutional duties, and therefore claims to privilege based on such exercises of power will fail the privilege-determining test of necessity. In other words, determination of the appropriate scope of a putative privilege requires consideration of the *types* of exercises of privilege that may or may not pass the test of necessity. Review of a particular exercise of privilege is different only in as much as a particular *instance* of a type of an exercise of privilege is under consideration. However, given that all instances of the same type are necessarily similar in the relevant respects, enquiry into whether an instance of a certain type of privilege will pass review presupposes an enquiry into whether the type itself is of a kind that can attract privilege and therefore withstand review. While I will argue below that factual differences attending distinct exercises of privilege can have legal significance, the argument here suggests that enquiry into whether a particular exercise of privilege passes the test of necessity is in principle similar to an enquiry into the scope of a category of privilege. The underlying reason the enquiries are similar is that scope refers to just the set of possible exercises of privilege which fall within the scope's parameters.

Justice Binnie seems to be aware of this problem, for he says that the "distinction between defining the scope of a privilege, which is the function of the courts, and judging the appropriateness of its exercise, which is a matter for the legislative assembly, may sometimes be difficult to draw in practice, but can nevertheless be illustrated on the facts of this case." The issue of scope that illustrates the distinction, he claims, "is whether the privilege extends to the ranks of service employees (such as catering staff) who support MPs in a general way, but play no role in the discharge of the constitutional functions." Once the scope of the privilege is resolved, "it will be for the House to deal with categories of employees who are cov-

ered by the privilege, and the courts will not enquire into its *exercise* in a particular case." Presumably, someone like the Speaker's Executive Assistant ("EA") would fall within the scope of the category "management of employees," and so the EA's employment relationship with the Speaker would be covered by privilege. As a consequence, the Speaker would be free to terminate the EA for any reason (including discriminatory reasons), and could then exercise privilege to insulate his action from review by the CHRT and the courts.

This justification of the distinction between defining the scope of privilege and judging the appropriateness of its exercise, however, presupposes without argument that the scope of the relevant category is definable exclusively in terms of the office held by a particular employee. There is no reason to think that the specification of scope must adhere to such limits. While one *can* define the scope of the relevant privilege to include, for example, "management of the Speaker's EA," one can just as easily define the scope of the privilege in the following terms: "management of the Speaker's EA consistent with respect for human rights." As a matter of principle, there is no reason to think that requiring the Speaker to respect the human rights of the EA would unduly infringe on the Speaker's ability to do his or her job.

Again, Justice Binnie appears to be aware that, apart from the requirements of necessity, there are no *a priori* constraints on how one may specify the scope of an asserted privilege, and so he offers an instrumental and pragmatic argument to defend the distinction between defining the scope of a privilege and judging the propriety of its exercise. It is worth quoting his argument at length because it reveals the sense in which his approach renders the privilege-holder less accountable to both judicial and public scrutiny.

> If the courts below were correct about a "human rights exception", for example, any person dealing with the House of Commons could circumvent the jurisdictional immunity conferred by privilege simply by alleging discrimination on grounds contrary to the *Canadian Human Rights Act*. Such a rule would amount to an invitation to an outside body to review the reasons behind the exercise of the privilege in each particular case. This would effectively defeat the autonomy of the legislative assembly which is the *raison d'être* for the doctrine of privilege in the first place.
>
> On the other hand, the respondents' preliminary objection that the appellants have overstated the scope of their privilege…goes to the scope of activity covered by the privilege, and…is a preliminary issue properly cognizable by the courts.

I think that it is far from clear that a mere allegation of discrimination would necessarily circumvent the jurisdictional immunity conferred by privilege, and to affirm without more that it would simply begs the question against those who contend that there is no immunity so far as discriminatory practices are concerned. Here and in the introduction to his analysis it seems that Justice Binnie's main concern is that review of particular exercises of privilege would threaten the House's ability to conduct its business. However, he is fully prepared to admit that individuals can unilaterally seek review of the scope of privilege, and as argued above, review of scope involves an enquiry similar in nature to review of a privilege's exercise: both modes of enquiry require a court to ask after the reasons for or against recognising a particular type of privilege. Furthermore, frivolous and vexatious claims that allege human rights abuses can be struck on a preliminary motion, possibly with costs assessed against the complainant. As a practical matter, preliminary motions of this kind generally could be dealt with at least as expeditiously as preliminary motions concerning the scope of an asserted privilege.

In neither *Vaid* nor *New Brunswick Broadcasting* does the Court offer any evidence to support its empirical claim that permitting review of exercises of privilege would open floodgates to litigation that would threaten the ability of legislative assemblies to do their work. Prior to *Vaid* there clearly was doubt over whether courts could review actual exercises of privilege if human rights issues were at stake; the majority judgment of the Federal Court of Appeal affirmed the possibility of such review. Yet despite the possibility of complainants calling on courts to review exercises of privilege – the open floodgates feared by the Supreme Court – a pernicious flood of litigation never materialised. Put simply, the Court's empirical argument against review of exercises of privilege is based on speculation, and the absence of a backlog of litigation on parliamentary privilege is evidence that the Court's speculation is unfounded.

Nonetheless, one might think that challenges to privilege would arise less frequently if such challenges were limited to the existence and scope of privilege, since eliminating review of its exercise does appear to eliminate one ground of review. Justice Binnie offers no argument to support the idea that challengers of privilege will be less able or less willing to challenge privilege on the basis of its existence and scope rather than on the basis of its exercise. It is unlikely that such an argument could succeed. The decision to lodge a complaint against a legislative body or its members is made unilaterally by the complainant, and so long as some avenue for complaint remains available, judges will have little control

over the quantity of cases that come before them. And, if a particular exercise of privilege is suspect because it seems to fail the test of necessity, then a lawyer will always be able to argue that the asserted privilege does not have the requisite scope; i.e., that the asserted privilege does not cover the type of case of which the particular exercise of privilege is but one instance.

If the Court were really to take its floodgates argument seriously, it should say that no review of matters decided by the Speaker and the House is permissible. Instead, the Court is driven to the implausible floodgates argument because it cannot bring itself to oust judicial review altogether, and because it understands both parliamentary privilege and its review authority exclusively in terms of a formal separation of powers in which human rights and other fundamental values play no role in delimiting the purposes for which privilege can be invoked. At the same time, the Court recognises the fragility of the scope/exercise distinction, and so the Court falls back on the floodgates argument in an effort to prevent the distinction from collapsing.

Privilege and the Rule of Law

The foundational case on improper purposes and the rule of law in Canadian jurisprudence is *Roncarelli* v. *Duplessis*.[5] *Roncarelli* stands for the proposition that public powers must not be used for improper purposes nor exercised on the basis of irrelevant considerations. But, it is only upon the actual exercise of a privilege that one can determine whether it is being relied on in a manner consistent with its necessity-based purpose, and whether in fact such a purpose requires invoking privilege. Thus, although enquiry into the scope of a privilege is in an important sense similar to enquiry into its actual exercise (both concern review of a candidate type of privilege), only the latter permits a court to consider whether an otherwise permissible exercise of privilege has been invoked for improper purposes or on the basis of irrelevant considerations. In other words, only review of an actual exercise of privilege lets a court bring parliamentary privilege within the ambit of the rule of law principle from *Roncarelli.* Given the Court's recognition that legislative bodies in Canada 'do not constitute enclaves shielded from the ordinary law of the land,' the better approach to parliamentary privilege is one that renders it consistent with the Court's own understanding of the rule of law.

Subjecting actual exercises of privilege to review would require the privilege-holder to give reasons to justify her reliance on privilege, and this giving of reasons can only further the accountability of legislative officials who seek to escape the reach of ordinary law through privilege. David Dyzenhaus has argued that the culture of law is best thought of as a culture of public justification.[6] From the point of view of accountability, one of the worrisome aspects of Justice Binnie's judgment is that he condemns the prospect of a reviewing body scrutinising the reasons behind the exercise of privilege. Suppose again that the Speaker dismissed his or her EA, and that the scope of the category "management of employees" extends to cover the Speaker's relationship with the EA. Suppose as well that the EA comes into possession of email from the Speaker clearly demonstrating that the dismissal was motivated by racist and discriminatory factors. Justice Binnie's approach would not require the Speaker to explain the email or give reasons at all for the dismissal.

Justice Binnie says that requiring reasons in this context and subjecting them to judicial scrutiny would 'effectively defeat the autonomy of the legislative assembly which is the *raison d'être* for the doctrine of privilege in the first place.' However, if review of human rights complaints before the CHRT and the courts really did become too burdensome, Parliament could explicitly legislate itself out of the scope of CHRA, as well as enact other immunities to insulate its members. In this sense, Parliament has the last word, but compelling Parliament to state explicitly its intention to exempt itself from the CHRA and judicial review of human rights issues would force the government to defend publicly this measure, and would thereby render Parliament's internal legal order more transparent and therefore more accountable to its electorate. Judges might then consider the extent to which human rights inform unwritten constitutional principles that let them review allegations of human rights violations in the face of clear statutory language. But the main point here is that requiring Parliament to use clear legislation in this context would be a victory for the rule of law and accountability in the sense that our elected representatives would have to own up and take public responsibility for deliberately resisting the application of human rights norms to them.

Given widespread public support for human rights, it is perhaps unlikely that Parliament would legislate itself out of the CHRA for the sake of protecting the Speaker or a Member of Parliament from the scrutiny of either the CHRT or the courts. If this is so, then the approach I am recommending for review of privilege may appear too interventionist, for it seems to leave the courts with the *de facto* last word, and it would appear to expand the grounds of review to include exercises of privilege and the reasons that could be offered for such exercises.

One reply to this objection is simply to stand on principle and insist that the lack of popular support for legisla-

tion that would exempt Parliamentarians from human rights regimes is evidence that such legislation would be bad policy, and in any event Parliament is still free to adopt it if Parliament so chooses. The reply is too quick, however, because it still does not address the concern of placing too much interpretive authority over parliamentary privilege in the hands of judges.

A better reply turns on further consideration of the consequences of the jurisdictional approach used by the Supreme Court to segregate review of the existence and scope of a privilege from review of its exercise. As we have seen, Justice Binnie equates this approach with an unwillingness to examine the reasons offered to defend an exercise of privilege. However, since minimal judicial craft is required for judges to review a particular exercise of privilege under the guise of a review of scope, the real difference in practice between the two contending approaches to review is that Justice Binnie's alone resists taking account of all the reasons offered, or that could be offered, to defend an assertion of privilege on grounds of necessity. Consider again the majority opinions of the Court in *New Brunswick Broadcasting* that the Speaker of the Nova Scotia House of Assembly has an absolute right to prevent the media from filming and televising its proceedings.

Justice McLachlin asked whether it was really necessary that the right to exclude strangers be absolute, and answered the question in revealing terms:

> In my view, a system of court review of the power to exclude strangers, quite apart from the constitutional question of what right the courts have to interfere in the internal process of another branch of government, would bring its own problems. The ruling of the Assembly would not be final. The Assembly would find itself caught up in legal proceedings and appeals about what is disruptive and not disruptive. This in itself might impair the proper functioning of the chamber. This lends support to the venerable and accepted proposition that it is necessary to the proper functioning of a legislative assembly modeled on the Parliamentary system of the United Kingdom that the Assembly possess the absolute right to exclude strangers from its proceedings, when it deems them to be disruptive of its efficacious operation.

Much as Justice Binnie does in *Vaid*, Justice McLachlin deploys the floodgates argument to deny courts authority to review whether a particular exercise of privilege meets the test of necessity, which in this case would have required the Speaker to show that filming and televising legislative proceedings in the manner proposed would have been disruptive. Instead of dealing with the merits of this substantive issue, she asserts the floodgates argument for the sake of recognising an absolute and unreviewable jurisdiction to exclude strangers. The reasons for and against the propriety of non-invasive media coverage of legislative proceedings – including those advanced by the Speaker – are necessarily neglected because they are wholly irrelevant to a jurisdictional separation of powers argument cast in absolute and categorical terms.

A jurisdictional approach to review that eschews reason-giving does not constitute deference. Rather, it conveys indifference to the idea that legislative assemblies and their members should be treated as full participants in the ongoing construction of a legal order based on public justification, as well as indifference to the possibility that they can and should give reasons if they seek to invoke privilege to immunise themselves from the reach of the ordinary law. The Supreme Court has said that deference is best understood as respect for the reasons given, or which could be given, to justify exercises of public power. The approach taken in *New Brunswick Broadcasting*, and reaffirmed in *Vaid*, is an unfortunate retreat from this conception of deference.

Furthermore, where strangers are involved the jurisdictional approach undermines the role of the courts and other adjudicative bodies as independent and impartial third-parties who have a constitutional duty to determine the merits of a claim to privilege in the context of a dispute before them. Privilege is an assertion of immunity against the ordinary law of the land as applied by independent and impartial institutions, usually the courts or administrative agencies, boards or tribunals. The institutional context in which privilege is asserted, therefore, is not simply the asserter of privilege versus the stranger. The context is the asserter of privilege versus the stranger before an independent and impartial body called upon to determine whether there is a special justification for granting to the privilege-seeker immunity from the ordinary law. Necessity can supply the justification, but implicit within the idea that necessity can justify some assertions of privilege is the corollary that a lack of necessity entails a failure to establish privilege. Taking these considerations into account, a reviewing court would make two mistakes were it to affirm the existence and scope of an asserted privilege where the facts in a particular case suggest that the actual exercise of the affirmed privilege fails the test of necessity. First, the court would misinterpret the scope of the privilege because it would fail to delimit its scope to exclusively those types of exercises of privilege that necessity warrants. Second, the court would abdicate its constitutional responsibility to ensure that no party (in this case, the asserter of privilege) is allowed to be judge and party of the same cause without a special justification, one which is necessarily lacking given the court's first mistake. These are the ma-

jor errors the majority judges committed in *New Brunswick Broadcasting*.

The second mistake reveals one of the two fundamental legal principles that are in tension with one another in cases of parliamentary privilege: no person should be judge and party of the same cause. The other fundamental principle, as set out implicitly in the test of necessity, is that democratic legal order requires the existence of an autonomous law-making body able to deliberate and make law without outside interference. In the event of a genuine conflict between these two principles, but only in the event of a genuine conflict, parliamentary privilege is paramount because the first principle of any legal order is that some laws must exist, and in the Westminster tradition this entails that the legislative branch of the state must have autonomy to deliberate and make law. In *Reference re Manitoba Language Rights*, the Supreme Court held that the rule of law "requires the creation and maintenance of an actual order of positive laws." Cast in this light, parliamentary privilege can be seen as an aspect of the rule of law. Arguably, it is the rule of law that ultimately provides the conceptual framework in which parliamentary privilege is given a limited priority so as to reconcile it with other legal principles inherent to the rule of law, such as the prohibition on the same person being judge and party of the same cause.

We can now see that the justification in favour of judges reviewing exercises of privilege when strangers are involved does not turn on any special status judges might be thought to enjoy as guardians of the rule of law. Judges or other independent and impartial adjudicative bodies, such as the CHRT, must review exercises of privilege in these cases simply because a failure to do so would threaten to make the Speaker or the House judge and party of the same cause in the absence of a special justification. *Mutatis mutandis*, the argument pressed here would apply with equal force to a judge who made racist remarks in the course of a trial to the obvious prejudice of one of the parties. In such a case, we would not expect this same judge to determine whether his remarks constituted bias. We would expect the judge to recuse himself, and we would expect an independent Judicial Council to take steps to discipline the judge. In *New Brunswick Broadcasting* Justice McLachlin wrote that "there is no more cause for a court to review the Speaker's decision to exclude the media than there would be for the legislature to review the decision of a court to exclude activities in the courtroom which it deems to interfere with the business of the court." The answer to this argument is that we would not expect the legislature to review such a decision of a court because the legislature does not have adjudicative and constitutional authority to review abuses of public power. But if a judge excluded individuals from the courtroom for apparently racist or discriminatory reasons, we would expect an external authority (possibly a Judicial Council or an appellate court) to review that decision.

The Legitimacy of Parliamentary Privilege and Agency Determinations

Vaid is a somewhat unfortunate case on which to develop a theory of parliamentary privilege because privilege was not established, and because the case involved a claim to privilege which, had it been established, would have made the Speaker judge and party of the same cause. Furthermore, the claim to privilege itself was only tenuously connected to the main justification of privilege based on allowing members to speak freely in order to deliberate, legislate, and hold the government to account. None of what I have argued for above should be interpreted to cast doubt on the legitimacy of the Speaker's authority to govern Parliamentarians for the sake of order and decorum in Parliament. Through Standing Orders and a wide range of other rules and procedures, our legislative assemblies have developed a sophisticated legal regime indigenous to them. Justice Binnie is right to say that courts are well advised to refrain generally from reviewing the inner workings of Parliament, for the rules and procedures developed therein are best known to the Speaker and others within the House who steward their administration.

However, ever since Justice Dickson laid the foundation for curial deference in his landmark judgment in *CUPE* v. *New Brunswick Liquor Corp.*, the Court has been reluctant to review agency decisions using categorical approaches that were sometimes put in terms of "collateral" or "preliminary" questions that went to agency jurisdiction. Part of the Court's reluctance stems from the fact that there is no satisfactory method for distinguishing "simple" errors of law (such as putative errors in the interpretation of a provision of an enabling statute) from jurisdictional errors.[7] If a court finds that an agency has erred in its interpretation of its enabling statute, it is all too easy for a court to then conclude that the agency's decision must be struck down for lack of jurisdiction because the decision is based on the agency errantly assuming a power not conferred on it by statute. As we have seen in *New Brunswick Broadcasting* and *Vaid*, problems also attend the attempt to insulate review of jurisdictional matters from review of the merits through a revived preliminary questions doctrine that seeks to define the scope of privilege in the abstract.

In the wake of *CUPE*, the Court developed a "pragmatic and functional" approach that looks to a series of

contextual factors to determine the appropriate standard of review applicable to agency decisions (correctness, reasonableness *simpliciter*, or patent unreasonableness). Given the Supreme Court's stated recognition of the legitimacy of the legislature's authority to govern its inner workings, and the difficulties that attend the jurisdictional approach to review of parliamentary privilege, the Court should consider using the pragmatic and functional approach to determine the standard of review of a decision to invoke privilege. Using the pragmatic and functional approach would permit a reviewing court to take account of significant contextual factors such as whether the assertion of privilege implicates human rights issues or the rights of non-members. Generally, where no such issues are involved and the matter involves a conflict between members of an assembly, or between members and the Speaker, the Court should adopt the deferential standard of patent unreasonableness. If strangers are involved and *Charter* or human rights are at stake, then usually a less deferential standard would be warranted.

The pragmatic and functional approach should also be used when a reviewing court is called upon to scrutinise the decision of an administrative agency that has ruled on a question of privilege, such as the CHRT. In *Vaid*, only the Federal Court Trial Division Judge, Tremblay-Lamer, applied the pragmatic and functional approach to review the decision of the CHRT. This approach was abandoned by the Federal Court of Appeal and the Supreme Court, presumably because the issue was deemed to be one of jurisdiction, and so the standard of review would almost certainly have been determined to be correctness had the appellate courts used the pragmatic and functional approach. Correctness is the most searching standard according to which an agency's decision will stand only if it coincides with the final determination of the reviewing court. The Supreme Court's resurrection of the preliminary questions doctrine and its abandonment of the pragmatic and functional approach – both in relation to the Speaker's assertion of privilege and in relation to the CHRT's review of that assertion – is a cause for concern. It seems that the Court is unwilling to consider possible grounds for deference because it comprehends an assertion of parliamentary privilege in exclusively jurisdictional terms, rather than in terms of which institution is best placed to determine the merits of the substantive issue (e.g., whether non-invasive media coverage of legislative proceedings fetters the legislature's ability to do its work). This conclusion is reinforced by the fact that at the different levels of judicial review in *Vaid*, only Judge Tremblay-Lamer discussed the reasons given by the CHRT.

The better approach in cases involving review of an administrative agency's rejection of an assertion of privilege would be for reviewing courts at all levels to begin with the reasons given by the agency, since the agency is likely to have field-sensitive knowledge of its own jurisdiction. As a corollary, the agency will have a valuable perspective to offer on the sorts of claims that might successfully oust its jurisdiction, even if it has not dealt with an assertion of parliamentary privilege before. It is ultimately through the public exchange of reasons that all parties can participate with the Court in the development of a legal culture that reflects a shared commitment to the rule of law, one which gives pride of place to transparency and public justification, and therefore, to accountability.

Notes

1. See *Stopforth v. Goyer* (1979), 23 O.R. (2d) 696 (C.A.), at 700; *Re Clark and Attorney-General of Canada* (1977), 17 O.R. (2d) 593 (H.C.); U.K. *Bill of Rights* of 1689, art. 9; *Prebble* v. *Television New Zealand Ltd.*, [1995] 1 A.C. 321 (P.C.); *Hamilton* v. *Al Fayed*, [2000] 2 All E.R. 224 (H.L.).
2. *Ontario (Speaker of the Legislative Assembly)* v. *Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595 at para. 23.
3. *New Brunswick Broadcasting*, [1993] S.C.R. 319; *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) ["*Behrens*"].
4. *Harvey* v. *New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Tafler* v. *British Columbia (Commissioner of Conflict of Interest)* (1998), 161 D.L.R. (4th) 511 (B.C.C.A.), at paras. 15-18; *Morin* v. *Crawford* (1999), 29 C.P.C. (4th) 362 (N.W.T.S.C.); *Payson v. Hubert* (1904), 34 S.C.R. 400, at p. 413; *Behrens*, *supra* note 3; Telezone Inc. v. *Canada (Attorney General)* (2004), 69 O.R. (3d) 161; *Ainsworth Lumber Co.* v. *Canada (Attorney General)* (2003), 226 D.L.R. (4th) 93, 2003 BCCA 239; *Samson Indian Nation and Band* v. *Canada*, [2004] 1 F.C.R. 556, 2003 FC 975.
5. [1959] S.C.R. 121 ["*Roncarelli*"].
6. D. Dyzenhaus, "The Legitimacy of Legality" (1996) 46 *University of Toronto Law Journal* 129 at 162. Dyzenhaus gives credit for this idea to Etienne Mureinik: E. Mureinik, "Emerging from Emergency: Human Rights in South Africa" (1994) 92 *Michigan Law Review* 1977
7. In *CUPE*, the case turned on the interpretation of the term "employee" in the *Public Service Labour Relations Act*, RSNB 1973, c. P-25. Limerick JA of the Nova Scotia Court of Appeal found that the Board had to arrive at a correct interpretation of "employee" (i.e., the judge's interpretation of the term) as a preliminary matter or it would fail to have jurisdiction to decide the case. While not abandoning entirely the language of jurisdiction, Justice Dickson condemned this approach.