

CANADA / JUDGMENT

British Columbia (Legislative Assembly) v. Illi

2023 BCSC 1671

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2023 BCSC 1671 British Columbia (Legislative Assembly) v. Illi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

British Columbia (Legislative Assembly) v. Illi,

2023 BCSC 1671

Date: 20230922

Docket: S213941

Registry: Victoria

Between:

The Legislative Assembly of British Columbia

Petitioner

And

Edward Illi and the Labour Relations Board

Respondents

Before: The Honourable Justice Elwood

On judicial review from: An order of the British Columbia Labour Relations Board, dated November 5, 2021 (Illi and Legislative Assembly Protective Services Association v. The Legislative Assembly of British Columbia, 2021 BCLRB 176)

Reasons for Judgment

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Place and Dates of Hearing:

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I. INTRODUCTION

- [1] The Sergeant-at-Arms is responsible for the safety and security of the Parliament Buildings and legislative precinct in Victoria to ensure the House, its committees and Members are able to conduct their business without disturbance or interruption.
- [2] Within the Office of the Sergeant-at-Arms, the Legislative Assembly Protective Services is staffed by a number of full and part-time provincial constables (the "Special Constables") whose duties include the safety and security of Members, the Lieutenant-Governor, visiting dignitaries, legislative staff and members of the public when they are within the legislative precinct.
- [3] In this proceeding, the Legislative Assembly of British Columbia (the "Assembly") seeks judicial review of a decision of a reconsideration panel of the Labour Relations Board (the "Board") in which the Board determined that it had jurisdiction under the Labour Relations Code, R.S.B.C. 1996, c. 244 [Code] to hear a union's application to be certified as the bargaining agent for the Special Constables.
- [4] The Assembly asserts a parliamentary privilege to manage the Special Constables free from the application of the Code and the oversight of the Board.
- [5] The Assembly acknowledges that the privilege it asserts is not within an established category of parliamentary privilege. It argues that the privilege arises as a matter of necessity to protect the Assembly and Members in the discharge of their legislative and deliberative functions and their work in holding the government to account.
- [6] For the reasons that follow, I agree with the Board that parliamentary privilege does not preclude the application of the Code to the Special Constables.

II. BACKGROUND

- [7] The Special Constables are employed by the Assembly and managed by the Legislative Assembly Management Committee, established by the Legislative Assembly Management Committee Act, R.S.B.C. 1996, c. 258.
- [8] The Special Constables are appointed as provincial constables by the Minister of Public Safety under s. 9 of the Police Act, R.S.B.C. 1996, c. 367 [Police Act]. They are authorized to carry handguns. They make arrests, conduct investigations, issue warrants or subpoenas and testify in proceedings.
- [9] As part of their duties, the Special Constables enforce the Criminal Code, R.S.C. 1985, c. C-46, the Legislative Precinct Regulation, B.C. Reg. 274/2002, other applicable legislation, Standing Orders of the Legislative Assembly and directions from the Speaker of the House.

- [10] This may include, for example: protecting Members and guests of the House when they are within the legislative precinct; removing protesters from the House for disrupting the proceedings of the Assembly; removing Members from the House or from parliamentary committees where the Speaker or presiding officer has determined that their conduct is disorderly; and generally ensuring safety, security and order throughout the legislative precinct.
- [11] Unlike municipal constables and special municipal constables, discipline matters concerning the Special Constables are not referred to the Police Complaint Commissioner. The Special Provincial Constable Complaints and Discipline Regulation, B.C. Reg. 206/98, issued under the Police Act, establishes an internal process for complaints against the Special Constables whereby complaints are investigated by their supervisor, the Clerk of the House.
- [12] As officers within the meaning of the Police Act, Special Constables are subject to the jurisdiction of the Independent Investigations Office ("IIO") and investigations by the IIO into incidents of death or serious harm that may have been the result of the actions or inactions of a police officer.
- [13] In 2019, the Special Constables formed the Legislative Assembly Protective Services Association (the "Union") and elected the respondent, Edward Illi, as the President of the Union.
- [14] On July 11, 2019, the Union applied to the Board to be certified under s. 18(1) of the Code to represent a bargaining unit composed of the Special Constables. The Assembly objected to the application by asserting parliamentary privilege and arguing that the Board did not have jurisdiction to consider the Union's application for certification.
- [15] The parties held the application for certification in abeyance while the Union and the Assembly attempted to negotiate a collective agreement under a voluntary recognition model. For reasons that are not in evidence on this judicial review, they were not successful in those efforts.
- [16] In a decision issued on December 8, 2020, and indexed at 2020 BCLRB 134, a single panel member of the Board found that parliamentary privilege precluded the application of the Code and the jurisdiction of the Board over the Assembly's management of the Special Constables (the "Original Decision").
- [17] The panel member found a nexus between the role of the Special Constables and the legislative or deliberative functions of the Assembly, such that outside interference with their management would undermine the level of autonomy required to enable the Assembly to do its work: Original Decision at paras. 109 and 112-113.

- [18] The panel member found that a strike may result in a withdrawal of services by the Special Constables, which could potentially affect proceedings of the Assembly in a direct way. The panel member found that s. 72 of the Code, which allows the Board to designate essential service levels in the event of a strike, would put decisions about staffing levels the Assembly deems necessary into the hands of the Board: Original Decision at paras. 110-112.
- [19] In addition, the panel member found that an arbitrator's authority under s. 55 of the Code to impose a first collective agreement would put decisions concerning internal matters such as the staffing levels of Special Constables outside the hands of the Assembly: Original Decision at para. 113.
- [20] The Union sought reconsideration of the Original Decision. The Union subsequently disbanded. Mr. Illi applied for standing to pursue the Union's application for reconsideration.
- [21] The Assembly took the position that Mr. Illi should not be granted standing to pursue the Union's application. It also argued that the matter was moot and the Original Decision was correct in law.
- [22] In a decision issued on November 5, 2021, and indexed at 2021 BCLRB 176, the Board dismissed the preliminary objections by the Assembly and issued a declaration that parliamentary privilege does not preclude the application of the Code to the Special Constables (the "Reconsideration Decision").
- [23] The Board found that the Assembly had not met the test for parliamentary privilege discussed below. The Board found that the application of the Code to the Special Constables would not impede the Assembly in carrying out its constitutional functions. It found that the provisions of the Code, including but not limited to, the essential services provision in s. 72, ensure that the Special Constables' role in protecting the security, safety and order of the legislative precinct would be maintained even in the event of a strike: Reconsideration Decision at paras. 99-101.
- [24] The Assembly seeks judicial review of the Reconsideration Decision on its merits. It does not challenge the Reconsideration Decision on the basis of standing or mootness.

III. ANALYSIS

A. Standard of Review

- [25] The parties agree that the standard of review from the Reconsideration Decision is correctness. In any event, the assessment of parliamentary privilege is a question of central importance to the legal system as a whole, thereby attracting the correctness standard: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 60.

B. Parliamentary Privilege

- [26] Parliamentary privilege recognizes the separation of powers between the legislative, executive and judicial branches of government. Its purpose is to enable the legislative branch and its members to proceed fearlessly and without interference in discharging their constitutional role, that is, enacting legislation and acting as a check on executive power. When it is properly asserted, parliamentary privilege immunizes the decisions and actions of a legislative body from external review by administrative tribunals or courts.
- [27] The test for parliamentary privilege is derived from two decisions of the Supreme Court of Canada: *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, and *Canada (House of Commons) v. Vaid*, 2005 SCC 30. These decisions establish that the party seeking to rely on the immunity from external review bears the burden of establishing that it is either within an established category of parliamentary privilege or else necessary in light of the purposes of parliamentary privilege.
- [28] The nature and effect of parliamentary privilege means that its existence and scope must be closely tethered to its purposes. As explained by Justice Karakatsanis, speaking for the majority of the Supreme Court of Canada in *Chagnon*:
- [25] Yet, while the independence of the legislature is a necessary aspect of our constitutional structure and is wholly part of our law, so are its limits. The inherent nature of parliamentary privilege means that its existence and scope must be strictly anchored to its rationale. Notably, it creates a sphere of decision-making immune from judicial oversight for compliance with the Charter. It may also impede persons who are not members of the legislature from accessing recourses available under ordinary law (*Vaid*, at para. 30). As this Court explained in *Vaid*, "[c]ourts 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".
- [27] Thus, in Canada, the scope of parliamentary privilege is delimited by the purposes it serves (see e.g. *Vaid*, at paras. 41-46). It inheres to the nature and functions of legislative assemblies as a separate branch of government. The reach of inherent privilege extends only so far as is "necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business" (*Vaid*, at para. 41; see also *New Brunswick Broadcasting*, at pp. 381-85). Otherwise, it would unjustifiably trump other parts of the Constitution.
- [Emphasis added.]
- [29] The law requires a "purposive approach" to parliamentary privilege, particularly where the immunity claimed could undermine the Charter rights of people who are not members of the legislative assembly. As explained by Karakatsanis J.:

[28] Where the privilege that is claimed could undermine the Charter rights of people who are not members of the legislative assembly, a purposive approach helps to reconcile parliamentary privilege with the Charter. Neither the Charter nor parliamentary privilege "prevails over the other" (*Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 69). They "enjo[y] the same constitutional weight and status" (Vaid, at para. 34 (emphasis deleted)). Accordingly, when conflicts between the Charter and parliamentary privilege arise, "the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them" (Harvey, at para. 69).

A purposive approach to parliamentary privilege recognizes the Charter implications of parliamentary privilege. It strives to reconcile privilege and the Charter by ensuring that the privilege is only as broad as is necessary for the proper functioning of our constitutional democracy.

[Emphasis added.]

[30] The governing "necessity test" for parliamentary privilege is set out in the decision of the Court in Chagnon:

[29] In order to fall within the scope of parliamentary privilege, the matter at issue must meet the necessity test: it must be "so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body . . . 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" (Vaid, at para. 46).

[30] The necessity test thus demands that the sphere of activity over which parliamentary privilege is claimed be more than merely connected to the legislative assembly's functions. The immunity that is sought from the application of ordinary law must also be necessary to the assembly's constitutional role. In other words, "[i]f 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 para. 29(5)).

[Emphasis added.]

[31] Recognized categories of parliamentary privilege serve as examples meeting the necessity test. Recognized categories include: freedom of speech within the legislative body; control over debates or proceedings; the power to exclude strangers from proceedings; and disciplinary authority over members and non-members who interfere with the discharge of parliamentary duties, including the immunity of members from subpoenas during a parliamentary session: Chagnon at para. 31, citing Vaid at para. 29(10).

[32] The party seeking to rely on the immunity from external review bears the burden of establishing that it is necessary in light of the purposes of parliamentary privilege: Chagnon at para. 32.

- [33] The courts must ensure that the 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": Chagnon at para. 32, citing Vaid at paras. 29(11), 40.

C. Alleged Errors by the Board

- [34] The Assembly argues that, in reaching its conclusion that parliamentary privilege does not preclude the application of the Code to the Special Constables, the Board erred:
- a) In failing to recognize the importance of the work of the Special Constables and the direct connection between their duties and the legislative and deliberative functions of the Assembly.
 - b) In failing to find that outside interference with the management of the Special Constables undermines the level of autonomy required to enable the Assembly and Members to do their work with dignity and efficiency.
 - c) In failing to appreciate that the asserted privilege may be reconciled with the Charter rights of the Special Constables to a meaningful process of collective bargaining through means other than the Code.
- [35] I will address these alleged errors under three headings: the role of the Special Constables; the Board's application of the test for parliamentary privilege; and reconciliation of parliamentary privilege with Charter rights.

D. The Role of the Special Constables

- [36] In its submissions, the Assembly drew a number of factual distinctions between the role of the Special Constables in this case and the role of the employees in Chagnon.
- [37] Chagnon arose out of the dismissal of three security guards employed by the National Assembly of Québec. The security guards were dismissed by the President of the National Assembly for using work cameras to spy on activities in nearby hotel rooms. The union grieved their terminations before a labour arbitrator.
- [38] The President objected to the grievances on the basis that the decision to dismiss the guards was immune from review because it was protected by a parliamentary privilege over the management of employees and the parliamentary privilege to exclude strangers from the National Assembly.
- [39] The arbitrator found that the dismissals were not covered by parliamentary privilege. He found that the security guards did not have the authority to exclude strangers from the National Assembly. If a security issue arose, the arbitrator found, the guards could signal the issue but could not otherwise intervene. Further, the arbitrator found that, unlike other members of the security team, such as police officers and special constables, the security guards did not perform acts that could affect the proceedings of the National Assembly and

were not in direct contact with members of the National Assembly. He concluded that the guards' functions were not closely and directly connected with the National Assembly's constitutional functions: see Chagnon at paras. 6-10.

- [40] Without disturbing these factual findings, the Supreme Court of Canada recognized the important role that the security guards played in protecting the National Assembly. It held, "An assembly cannot function without maintaining its security": Chagnon at para. 38. However, a majority of the Court found this supporting role did not mean decisions about the management of the security guards are protected by parliamentary privilege:
- [39] The tasks performed by the security guards support the National Assembly in fulfilling its constitutional mandate. The arbitrator found that the tasks performed by the security guards include the surveillance of the National Assembly's buildings, controlling access to them, and verifying the identity of people inside them. Thus, the security guards play a key role in protecting the National Assembly from security threats. Additionally, the guards are sometimes stationed in the chamber and help maintain decorum.
- [40] However, many employees support legislative bodies in performing their constitutional functions. Considered broadly, many staff play a role in ensuring that a legislative assembly can fulfil its mandate. But merely demonstrating that a category of employees performs important tasks that promote the ability of the assembly to discharge its functions does not suffice to establish that decisions about their management must be protected by parliamentary privilege.
- [41] In the present case, the Special Constables provide broader services and exercise greater law enforcement powers than the security guards in Chagnon. In addition to protecting the legislative premises from security threats, the Special Constables are responsible for the personal security of Members, including the Premier and Cabinet, as well as the Lieutenant Governor and visiting dignitaries. Unlike security guards, the Special Constables are authorized to remove strangers from the House, and may, under direction from the Speaker, remove Members from the House. Unlike security guards, they have the authority to intervene directly in security incidents and may investigate, arrest or detain suspects.
- [42] In the Original Decision at para. 109, the single member of the Board found a nexus between the duties of the Special Constables and the legislative or deliberative functions of the Assembly that was greater than the role of the security guards in Chagnon.
- [43] In the Reconsideration Decision at para. 61, the Board noted the finding in the Original Decision that the role of the Special Constables was greater than the role of the security guards in Chagnon. However, the Board held, "we find nothing turns on this factual distinction for the purpose of the application of the necessity test in this case".
- [44] The Assembly argues that the factual distinction was critical to the necessity test and the Board's failure to engage in a fuller consideration of the distinction caused its analysis of parliamentary privilege to be flawed from the outset.

- [45] I would not go as far as the Board to say that "nothing turns" on the factual distinctions between this case and Chagnon. I agree with the Assembly that the question of whether parliamentary privilege is properly asserted is a fact-driven exercise. The duties and powers of the Special Constables and the nexus between their role and the proper functioning of the Assembly are important considerations.
- [46] That said, reading the Reconsideration Decision as a whole, the Board did recognize that the Special Constables perform a more direct role in protecting the Assembly. Ultimately, the Board found that the protective functions of the Special Constables are necessary for the constitutional functioning of the Assembly: see, in particular, Reconsideration Decision at para. 100.
- [47] However, the Board also found, correctly in my view, that a close and direct connection between the duties of the Special Constables and the constitutional functions of the Assembly was not enough to meet the necessity test for parliamentary privilege: Reconsideration Decision at para. 61. As stated by the majority in Chagnon:
- [41] The close and direct connection between the tasks performed by the employees and the legislative assembly's constitutional functions is only part of the equation. The necessity test also requires that the immunity that is sought from the executive and judicial branches of government -- here a privilege over the management of the security guards -- be necessary, in 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" (Vaid, at para. 46).
- [Emphasis added.]
- [48] Accordingly, I do not agree with the Assembly's argument that the Board's seeming dismissal of the factual distinctions between this case and Chagnon undermined its entire analysis. Whether the Board was correct in coming to the same conclusion on the facts of this case as the majority did on the facts in Chagnon requires a further consideration of the Board's application of the test for parliamentary privilege.

E. The Board's Application of the Test for Parliamentary Privilege

- [49] The Assembly argues that the Board erred by failing to consider whether the autonomy of the Assembly would be interfered with if the Code applied and the Board was granted oversight over the management of the Special Constables.
- [50] The Assembly properly acknowledges that parliamentary privilege cannot immunize all aspects of the management of a group of employees. As stated by the majority in Chagnon:
- [37] The present case highlights the difficulty with trying to recognize a category of privilege that includes all aspects of the management of a group of employees and decisions with regards to all functions these employees perform (see E. Fox-Decent, "Parliamentary Privilege, Rule of Law and the Charter after the Vaid Case" (2007), 30:3 Can. Parl. Rev. 27, at p. 31). The requirements of the necessity test may be more easily fulfilled where the scope of autonomy

that is claimed pertains to control and oversight over certain functions performed by some parliamentary employees, or certain aspects of their employment relationship. That said, the parties have not framed this case in that way. The President asserts a parliamentary privilege over the management of the security guards as a category of employees. This privilege would immunize not only their dismissals, but all of their employment conditions (from salary to seniority) from review on any grounds.

[Emphasis added.]

- [51] The Assembly argues that the privilege it claims in this case is narrower and picks up on the underlined dicta in the passage above. The Assembly submits that this is a case in which the privilege claimed pertains to the control of some parliamentary employees (the Special Constables) and certain aspects of their employment relationship (the application of the Code and the oversight of the Board).
- [52] The Assembly notes that it does not claim a privilege over every aspect of the management of the Special Constables. It does not seek immunity from the public complaint process under the Special Provincial Constable Complaint Procedure Regulation (although that process is an internal process overseen by the Clerk of the House). It does not seek immunity from independent investigations by the IIO (although that jurisdiction is limited to death or serious injury). Finally, it does not claim immunity from contractual rights in the employment contracts with the Special Constables (although that point must be conceded in any event based on Chief Justice Hinkson's decision in *Turpel-Lafond v. British Columbia*, 2019 BCSC 51).
- [53] Before the Board, the Assembly relied primarily on three aspects of the Code which it argued demonstrate most clearly how oversight by the Board would undermine the autonomy the Assembly requires to do its work: the grant of a right to strike (ss. 57 and 59); the designation of essential services during a lawful strike (s. 72); and the authority of a mediator to recommend the imposition of a first collective agreement (s. 55).
- [54] The right to strike does not exist at common law. If the Code applies, Part 5 sets out a comprehensive scheme to regulate strikes, lockouts and picketing. A strike that does not meet the requirements of Part 5 is unlawful, and the Board has the power to order that employees cease and desist the activity. Other provisions of Part 5 allow the Board to limit the location and extent of lawful strikes and picketing activity.
- [55] Under s. 72 of the Code, the Minister of Labour may determine whether a strike would pose a threat to the health, safety or welfare of the residents of British Columbia. If the Minister determines such a threat exists in the case of a strike by the Special Constables, the Minister may direct the Board to designate essential services. The Board would then, after hearing from the parties, establish what, if any, services provided by the Special Constables are essential. This might include a determination of what services are necessary to protect the Parliament Buildings, Members, staff and public, the number of Special Constables required and the hours of work required to perform these essential services.

- [56] All of these decisions would be made by the Minister and the Board, not the Assembly. Accordingly, the Assembly argued before the Board that s. 72 of the Code would take security and safety decisions out of the hands of the Assembly in the event of a strike and put them in the hands of the Board and the Minister, acting in an executive capacity.
- [57] Section 55 of the Code sets out a process through which the parties can achieve a first collective agreement with the assistance of a mediator. That process may ultimately result in the mediator making recommendations with respect to issues the parties are unable to resolve. If one or both parties do not accept the recommendations, the Board has the authority, among other options under s. 55, to direct the parties to resolve the outstanding issues through binding arbitration.
- [58] Again, these decisions would be made by the Board and an arbitrator, not the Assembly. Accordingly, the Assembly argued that s. 55 could take important decisions such as staffing levels of Special Constables out of the hands of the Assembly and put them in the hands of an arbitrator.
- [59] In this Court, the Assembly raises a broader range of concerns with the Code, including: the restriction on use of replacement workers during a lawful strike (s. 68); restrictions on the services of allies during a lawful strike (s. 65(2)); oversight of employer speech (ss. 6(1), 6(3) (d) and 8); the requirement that disputes over the application and interpretation of a collective agreement be resolved by final and binding arbitration (s. 84(2)); and the powers of the Minister to enter into a place of employment, conduct inspections and compel people to answer questions (ss. 144 and 145).
- [60] However, the Assembly focuses once again on the right to strike and designation of essential services as the examples which most clearly demonstrate how, it says, interference by the Board would undermine the autonomy necessary for the Assembly and Members to do their work.
- [61] The privilege claimed is, in my view, much broader than the Assembly would suggest. While the Assembly emphasizes decisions concerning the safety of Members and the security of the legislative precinct, the scope of the privilege it claims would exclude the entire labour relations regime of the Code.
- [62] The Code provides rights and protections to all employees beyond those cited by the Association as interfering with the autonomy it requires to do its work. For example, the Code includes: the right to be a member of a trade union and participate in its lawful activities, regardless of whether the union is certified as a bargaining agent (s. 4); unfair labour provisions which prohibit employers from interfering with union activity or retaliating against employees for engaging in union activities (s. 6); a requirement that trade unions and employers bargain in good faith (s. 11); and a requirement that every collective agreement contain a provision requiring that the employer have just cause for dismissal (s. 84).

- [63] The Code also gives effect to a number of constitutional rights of employees that have been affirmed by the Supreme Court of Canada. In *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, the Supreme Court of Canada held that s. 2(d) of the Charter protects the right of employees to engage in a meaningful process of collective bargaining. In *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, the Court held that a meaningful process includes employees' rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including a means of recourse should the employer not bargain in good faith. In *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, the Court recognized that a process of collective bargaining cannot be meaningful if employees lack the independence and choice to determine and pursue their collective interests. Most recently, in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, the Court held that the right to strike is an essential part of a meaningful collective bargaining process. It also held that, while legislation that ensures the maintenance of essential services does not necessarily violate the Charter, it must provide either a process by which an external body or a labour arbitrator determines essential services, and not give the employer the unilateral and unreviewable ability to set essential service levels.
- [64] The Board has long recognized that the Code gives effect to Charter-protected associational rights of employees by ensuring access to collective bargaining that is made meaningful by the various rights and protections it provides: *Reconsideration Decision* at para. 80, citing *Cardinal Transportation B.C. Ltd.*, BCLRB No. B344/96.
- [65] In this case, the Board held, correctly in my view, that the parliamentary privilege claimed by the Assembly--a privilege to manage the Special Constables free from the application of the Code--could undermine the Charter rights of people who are not members of the Assembly, giving rise to a need to reconcile the asserted privilege with those competing constitutional interests: *Reconsideration Decision* at paras. 75-79; *Chagnon* at para. 28.
- [66] The Board recognized that applying the Code to the Special Constables would mean that certain managerial decisions by the Assembly as their employer would be subject to Board review and authority under the Code. However, applying the governing test for parliamentary privilege, the Board concluded, correctly in my view, that the exclusion of the Code was not necessary for the Assembly to perform its constitutional functions: *Reconsideration Decision* at paras. 85, 92-93, 100.
- [67] The Board considered, in particular, ss. 55 and 72 of the Code (the authority of a mediator to recommend the imposition of a first collective agreement, and the essential services provision, respectively).
- [68] The Board found that s. 55 is part of a comprehensive scheme for meaningful and effective collective bargaining under the Code that encourages freely negotiated collective agreements. The Board observed that, by enacting s. 55, the Legislature recognized it can be

difficult for parties to negotiate their first collective agreement. The Board found that, while s. 55 may result in some initial terms being decided by an arbitrator, the Code and its jurisprudence allow for consideration of the public interest in the process. The Board has held that a mediator's recommendation, the Board's decision to refer issues to arbitration and an arbitrator's decision on terms all should not in any way place the employer's business in jeopardy. In other words, s. 55 requires consideration of the public interest, which, in this case, would include the safety, security and order of the legislative precinct:
Reconsideration Decision at paras. 82-85.

[69] Turning to s. 72, the Board found that the Code provides a mechanism for protecting the public interest by maintaining essential services "in full measure", including the ability of the Assembly to perform its constitutional functions in the event of a lawful strike by the Special Constables: Reconsideration Decision at para. 92.

[70] The Board noted that it has decades of experience with essential service determinations and ensuring that services vital to the public interest are maintained, notwithstanding employees have the right to strike under the Code. At para. 89 of the Reconsideration Decision, the Board cited Health Employer's Association of BC, BCLRB No. B125/2001, where it held:

[D]espite the tremendous potential for harm, the Board, working with the parties and utilizing both its mediation and adjudication divisions, has ensured that the process has worked. Employees working in health care and their unions have achieved collective agreements. Where strike action has been necessary, the health and safety of the patients and residents has not been jeopardized. (para. 20, emphasis added).

[Emphasis by the Board.]

[71] At para. 90 of the Reconsideration Decision, the Board also cited Bulkley Valley School District, BCLRB No. B147/93, where it held:

No employer or union should be allowed to impose unacceptable harm on the general public in its efforts to win a dispute. As important a value as collective bargaining is in our society, the imposition of limits upon it, is a simple recognition that ultimately there are more important values. (p. 18).

[Emphasis added.]

[72] The Board found that the Code's provisions, including but not limited to s. 72, ensure that the Special Constables' role in protecting the security, safety and order of the legislative precinct, necessary for the constitutional functioning of the Assembly, would be maintained in the event of a lawful strike: Reconsideration Decision at para. 92.

[73] Accordingly, the Board concluded it was not necessary to exclude the Special Constables from the ambit of the Code: Reconsideration Decision at para. 101.

- [74] The Assembly argues that this reasoning assumes both that the Assembly would agree with the Board's decisions and that the Assembly is itself unable to protect the public interest. I disagree.
- [75] What the Board is saying is that the Code provides the Board with powers to protect the public interest with which the Board has decades of experience, including high-conflict labour disputes with the potential to jeopardize public safety and order.
- [76] The point is not that "the Board knows best", but rather that the Code provides time-tested mechanisms for ensuring that the security, safety and order of the legislative precinct is maintained and critical decisions in any labour disputes involving the Special Constables are made in a timely manner.
- [77] The Assembly further argues that the Board's decision reflects an unwarranted intrusion into the autonomy of the Assembly to make these decisions for itself and therefore strikes at the heart of parliamentary privilege. Again, I disagree.
- [78] The Association's focus on protecting a sphere of decision-making autonomy reflects the minority dissenting reasons in Chagnon and not the governing necessity test as set out in the majority decision of the Court.
- [79] On the dissent's view of parliamentary privilege, the necessity test is met once a court finds that the sphere of activity and the category of employees are necessary for the proper functioning of the legislative assembly. On this view, any intrusion into decisions concerning the sphere of activity by the category of employees is itself a breach of the privilege: Chagnon at paras. 141-143, dissent of Côté and Brown JJ.
- [80] The majority did not endorse this view of parliamentary privilege. The majority held that a close and direct connection between the tasks performed by a category of employees and the legislative assembly's constitutional functions "is only part of the equation". The necessity test also requires that 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": Chagnon at para. 41, citing Vaid at para. 46 (emphasis added).
- [81] Of critical importance, the majority found that "management of the guards could be dealt with under ordinary law without impeding the [National] Assembly's security or its ability to legislate and deliberate" and that "[p]ermitting the enforcement of basic employment and labour protections for the security guards would not undermine the independence required for the [National] Assembly to fulfil its mandate with dignity and efficiency": Chagnon at para. 44 (emphasis added).
- [82] In other words, the correct question is not whether the Code would take decisions about safety and security out of the hands of the Assembly, but rather whether subjecting the management of the Special Constables to ordinary law (here, the Code) would hamper the autonomy of the Assembly in the discharge of its constitutional functions.

- [83] In my view, the governing law of parliamentary privilege required the Board to consider whether issues arising in labour relations with the Special Constables can be dealt with under the Code without jeopardizing the Assembly's security or impairing its ability to legislate and deliberate. The Board did just that, and found that allowing the Special Constables access to the Code's provisions for collective bargaining would not undermine the autonomy required for the Assembly to fulfil its constitutional mandate.
- [84] In short, I find that the Board's application of the test for parliamentary privilege was correct.

F. Reconciliation of Parliamentary Privilege with Charter Rights

- [85] The Assembly argues that the Board erred in its approach to the reconciliation of parliamentary privilege and the s. 2(d) Charter rights of the Special Constables.
- [86] First, the Assembly argues that the reconciliation of parliamentary privilege and the constitutional principles of freedom of association is an exercise for the courts and not the Board, because the Board does not have the jurisdiction to apply any scheme other than the Code. I disagree.
- [87] I agree with counsel for the Attorney General that the process of determining the existence and scope of parliamentary privilege requires that it be reconciled with competing constitutional interests, such as the s. 2(d) rights of the Special Constables. It follows that the Board was within its jurisdiction to consider the issue of reconciliation, because the Board was asked by the Assembly to find that parliamentary privilege precluded the application of the Code. A reconciliation of competing constitutional interests was part of the necessity test the Board was bound to apply.
- [88] Second, the Assembly argues that the process of reconciling constitutional imperatives ought to be done only after the Board or a court determines that the privilege precludes the application of the Code. At that stage, the Assembly argues, the onus would shift to the Special Constables to establish that their s. 2(d) rights are breached, in which case, a court would seek to reconcile the competing constitutional interests of the parties. I reject both aspects of this second argument by the Assembly.
- [89] As stated, reconciliation is part of the necessity test for parliamentary privilege. The need for a purposive approach that defines parliamentary privilege as precisely as possible arises "where the privilege that is claimed could [not will] undermine the Charter rights of people who are not members of the legislative assembly": Chagnon at para. 28 (emphasis and comment added). The Assembly does not cite any authority for the proposition that Charter rights are only considered after the necessity analysis is completed.

- [90] Finally, the Assembly argues that, assuming the Board had jurisdiction to consider the issue, the Board was required to reconcile the constitutional rights of the Special Constables with parliamentary privilege by recognizing that there are methods of accessing meaningful collective bargaining other than the Code.
- [91] The Assembly argues that Charter protections can be achieved by a voluntary recognition model, whereby an employer agrees to negotiate with an association and through a negotiated collective agreement that protects s. 2(d) rights without the Code. The Assembly notes that the record in this case shows that it was willing to meet with the Union to engage in collective bargaining under a voluntary recognition model.
- [92] Further, the Assembly argues that s. 2(d) rights can be protected through a legislative model such as the Fire and Police Services Collective Bargaining Act, R.S.B.C. 1996, c. 142, which precludes municipal police officers and firefighters from striking, but gives their associations access to arbitration in the event collective bargaining is unsuccessful. The Association notes that a similar model of labour dispute resolution passed Charter scrutiny by the Supreme Court of Canada in Saskatchewan Federation of Labour.
- [93] Finally, the Assembly argues that the Board's failure to recognize these alternate models to protect s. 2(d) rights undermines its conclusion that parliamentary privilege should be "subordinated" to the Charter rights of the Special Constables.
- [94] In my view, these arguments miss the point of the reconciliation exercise. The question before the Board was not a resolution of conflicting constitutional rights, but rather whether the Assembly had established that the immunity it claimed was necessary in light of the purposes of parliamentary privilege and the potential impact on Charter-protected rights.
- [95] As stated, my view is that the Board correctly considered whether the privilege claimed could undermine the Charter rights of the Special Constables as part of its application of the necessity test. I do not agree with the Assembly that the Board "subordinated" parliamentary privilege to the Charter rights of the Special Constables. Rather, the Board found that the Assembly had not made out its case for a privilege based on the governing law, which required consideration of those rights.
- [96] It is beyond dispute in my view that the privilege claimed could have undermined the Charter rights of the Special Constables. The Code is the only existing statutory scheme by which the Special Constables can access an enforceable process of collective bargaining. The privilege claimed by the Assembly would exclude all of the provisions of the Code, including the duty to negotiate in good faith and the unfair labour practice provisions, regardless of whether the parties agreed to negotiate under a voluntary recognition model.

- [97] The application by the Union for certification under s. 18 of the Code was the means chosen by its members to access a process to bargain collectively for the terms of their employment and exercise their s. 2(d) rights. The Assembly objected to their application on the grounds that parliamentary privilege precluded their access to any of the rights and protections provided by the Code.
- [98] The Board was not persuaded that there is another method by which the Special Constables could access and exercise their Charter-protected right to meaningful collective bargaining. I am not persuaded that the Board erred by taking this factor into consideration in its determination that the Assembly had failed to establish that the immunity it claimed was necessary in light of the purposes of parliamentary privilege.

IV. CONCLUSION

- [99] The Board was correct in its declaration that parliamentary privilege does not preclude the application of the Code to the Special Constables.
- [100] The petition is dismissed.
- [101] I am grateful for the helpful written and oral submissions by all counsel.
- "Elwood J."

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