Date: 20090122

Files: 466-SC-363

Citation: 2009 PSLRB 5

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DONNA ROUTLIFFE

Applicant

and

SENATE OF CANADA

Respondent

Indexed as
Routliffe v. Senate of Canada

In the matter of a grievance referred to adjudication under section 63 of the *Parliamentary Employment and Staff Relations Act*

REASONS FOR DECISION

Before: Michel Paquette, adjudicator

For the Applicant: Steve Waller

For the Respondent: Brenda Hollingsworth

Heard at Ottawa,
October 27, 2008.

1. Application before the Board

[1] On July 13, 2007, Donna Routliffe ("the applicant") filed a grievance against her alleged termination by the Senate ("the respondent"). The Senate replied to counsel for the applicant on July 31, 2007, indicating that she had retired and arguing that because of her status as an employee of a Member of Parliament, her grievance was not receivable as per paragraph 4(2)(*e*) of the *Parliamentary Employment and Staff Relations Act*. She referred her grievance to adjudication on August 30, 2007.

[2] Private mediation was attempted but with no success. Counsel for the respondent objected to the jurisdiction of an adjudicator appointed by the Public Service Labour Relations Board ("the Board") on November 12, 2007. After discussions with the Board, both parties agreed that it should deal with the preliminary objection first before proceeding on the merits of the grievance.

[3] A hearing was scheduled for October 15, 2008. The respondent started presenting its case. During cross-examination of the respondent's first witness the respondent raised an objection to the information asked by counsel for the appellant. I asked the parties to prepare oral submissions with respect to the objection and to present them when we reconvened on October 27, 2008. The hearing was adjourned.

2. Context

[4] The first witness for the respondent, Suzanne Poulin, acting Director of Human Resources, testified in-chief with respect to the complainant's career at the Senate as well as the Senate's administrative rules concerning human resources. During her cross-examination, the witness was asked to give examples of situations where a Senator had proposed to hire someone but had been overruled by the Senate Standing Committee on Internal Economy, Budgets and Administration ("the Internal Economy Committee"). The witness responded that she could remember two cases from the past two years but, when she was asked to provide names, Ms. Hollingsworth objected on the grounds that the Internal Economy Committee deliberations were protected by parliamentary privilege.

3. Summary of the arguments

A. For the Employer

[5] Ms. Hollingsworth submitted that the question before me was whether the Board had the authority to compel disclosure of *in camera* proceedings of the Senate

Standing Committee on Internal Economy, Budgets and Administration. Counsel for the applicant was trying to identify situations where a request had been referred to the Internal Economy Committee for a decision.

[6] She discussed the origins of parliamentary privilege in Canada and she continued by submitting that if the privilege had been recognized authoritatively the courts could not review its exercise and that if it did not exist or was unclear, then the doctrine of necessity had to be applied to determine its existence and scope. The doctrine requires that the person claiming the privilege show that it is so closely connected to the functions of Parliament that outside interference would undermine its work.

[7] According to Ms Hollingsworth, at least two categories exist that have been recognized by the Supreme Court of Canada: 1) freedom of speech in general and 2) the right of the Senate to control its procedure.

[8] Ms. Hollingsworth argued that both applied in the case at hand; in the alternative, the necessity test would apply because Senators have to be able to speak openly in front of the Committee and it has the right to conduct its hearing *in camera* if it chooses to. Therefore, I do not have the authority to compel disclosure of *in camera* deliberations of the Internal Economy Committee.

[9] Counsel for the respondent referred to the following authorities to support her arguments: *Lavigne v. Ontario (Attorney General)* (2008) 91 O.R. (3d) 728 (S.C.J.)*; New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly),* [1993] 1 S.C.R. 319*; Gagliano v. Canada (Attorney General)* 2005 FC 576*; Canada (House of Commons) v. Vaid,* [2005], 1 S.C.R. 667*;* and referred me to *Bradlaugh v. Gosset (1884),* 12 Q.B.D. 271; *Canada (Attorney General) v. Prince Edward Island (Legislative Assembly),* 2003 PESCTD 6*; Jennings v. Buchanan (New Zealand),* (2004) UKPC 36*; Canada (Deputy Commissioner, Royal Canadian Mounted Police) v. Canada (Commissioner, Royal Canadian Mounted Police),* 2007 FC 564; *Prebble v. Television New Zealand Ltd.,* [1995] 1 A.C. 321*; Hamilton v. Al Fayed* [2000], 2 All ER 224 (H.L.)*; Duke of Newcastle v. Morris* (1870), L.R. 4 H.L. 661; *Fielding v. Thomas* [1896], A.C. 600 (P.C.) *and Goffin v. Donnelly* (1881), 6 Q.B.D. 307.

B. For the applicant

[10] Mr. Waller agreed with Ms. Hollingsworth about the history and the recognized privileges but argued that the necessity test was what identified freedom of speech and the right to control senate procedure as privileges and that it should be applied in the case at hand. He argued that applying the test, I should find that because of the subject-matter, the management of human resources, privilege is not necessary for the proper functioning of the Senate in its investigative function and therefore is not covered by parliamentary privilege. He further argued that I should compel disclosure of the results of the deliberations of the Internal Economy Committee. He also submitted that parliamentary debates can be submitted as evidence when used as facts and are then not covered by privilege.

[11] Counsel for the applicant indicated that there was no line of authority in the case in front of me but referred to the following authorities to support his arguments: *Parliamentary Privileges Act 1987* [Australia]; *Parliament of Canada Act,* R.S.C. 1985, c. P-1; *Office of Government Commerce v. Information Commissioner,* [2008] EWHC 737 (Admin); *Kosmas v. Legislative Council (SA) and Others, [2007]* SAIRC 86; *Adams v. Guardian Newspapers,* [2003] ScotCS 131; *Thompson v. McLean,* [1998] O.J. No. 2070 (Q.L.).

4. Reasons

[12] The question before me is whether I can compel the employer to provide deliberations of a meeting of the Senate Standing Committee on Internal Economy, Budgets and Administration concerning the applicant and other employees of the Senate.

[13] The Internal Economy Committee originates from the *Rules of the Senate of Canada* and is one of twenty standing committees:

> *86. (1) The standing committees shall be as follows:*
>
> . . .
>
> *(g) The Committee on Internal Economy, Budgets and Administration, composed of fifteen members, four of whom shall constitute a quorum, which is authorized*

> *(i) to consider on its own initiative all financial and administrative matters concerning the internal administration of the Senate;*
>
> *(ii) to act, subject to the Senate Administrative Rules, on all financial and administrative matters concerning the internal administration of the Senate; and*
>
> *(iii) to interpret and determine, subject to the Senate Administrative Rules, the propriety of any use of Senate resources.*

[14] The *Senate Administrative Rules* also enables committees to hold an *in camera* meeting:

. . .

> *92. (2) Except as provided in section (3) below, a standing or special committee may decide to hold an in camera meeting to discuss its business only when the agenda deals with any of the following:*
>
> *(a) wages, salaries and other employee benefits;*
>
> *(b) contract negotiations;*
>
> *(c) other labour relations;*
>
> *(d) other personnel matters;*
>
> *(e) consideration of any draft agenda; and or*
>
> *(f) consideration of any draft report of the committee.*

. . .

[15] The Federal Court in *Gagliano* explained the origin and the principles concerning parliamentary privilege at paragraphs 45 to 49:

> *[45] Parliamentary privilege in Canada originates in both the common law and statutes. Prior to Confederation, absent a specific grant from the Parliament of the United Kingdom, the common law principle was well established: privileges that were necessarily incidental to a legislature were deemed to exist (J.P. Maingot,* Parliamentary privilege in Canada, *2nd ed., (Montreal: McGill-Queen's University Press, 1997), at page 16).*
>
> *[46] In* Stockdale v. Hansard *(1839), 112 E.R. 1112 (Q.B.), Lord Denman C.J. stated at page 1169: "If the necessity can be made out, no more need to be said: it is the foundation of*

> *every privilege of Parliament, and justifies all that it requires." The Privy Council affirmed the primacy of this common law principle of necessity in* Kielley v. Carson *(1842), 13 E.R. 225.*
>
> *[47] The enactment of the Canadian Constitution, however, added a further layer to the source of parliamentary privileges in Canada. Section 18 of the* Constitution Act, *1867, as amended in 1875, 38 & 39 Vict., c. 38 (U.K.) [R.S.C., 1985, Appendix II, No. 13], provides:*
>
> ***18.*** *The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by the Act of the Parliament of Canada, but so that any Act of the Parliament defining such privileges, immunities, and 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.*
>
> . . .
>
> *[49] Subsequently, though, in 1868, the Canadian Parliament, by virtue of section 4 of the* Parliament of Canada Act, *expressly incorporated by reference those privileges, immunities and powers in existence in the United Kingdom. Section 4 states:*
>
> *4. The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise*
>
> *(a) such and the like privileges, immunities and powers as at the time of the passing of the* Constitution Act 1867, *were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with that Act; and*
>
> *(b) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.*
>
> . . .

[16] The Supreme Court in *New Brunswick Broadcasting Co.* identified the privileges recognized by the Commons House of Parliament of the United Kingdom at pages 385 and 386:

> *Among the specific privileges which arose in the United Kingdom are the following:*

> *(a) freedom of speech, including immunity from civil proceedings with respect to any matter arising from the carrying out of the duties of a member of the House ;*
>
> *(b) exclusive control over the House's own proceedings;*
>
> *(c) ejection of strangers from the House and its precincts; and*
>
> *(d) control of publication of debates and proceedings in the House.*
>
> . . .
>
> *The right of the House to be the sole judge of the lawfulness of its proceedings, is similarly evident; Erskine May states that this right is "fully established". In settling or departing from its own codes of procedure "the House can 'practically change or practically supersede the law'" (p. 90).*
>
> . . .
>
> *Finally, on the right to control publication of debates and proceedings, Erskine May states (at p. 85):*
>
> > *Closely connected with [the] power [to exclude strangers] is the right of either House to prohibit publication of debates or proceedings. The publication of the debates of either House has in the past repeatedly been declared to be a breach of privilege, and especially false and perverted reports of them….*

[17] Now, is control of its own procedure, exercised in the case at hand by having the Internal Economy Committee going *in camera*, a privilege essential to the functioning of the Senate? I think it is. As the Supreme Court said in *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30:

> . . .
>
> *(In my view, the reference to "dignity" and "efficiency" are also linked to autonomy. A legislative assembly without control over its own procedure would, said Lord Ellenborough C.J. almost two centuries ago, "sink into utter contempt and inefficiency" (Burdett v. Abbot (1811), 14 East 1, 104 E.R. 501, at p. 559). "Inefficiency" would result from the delay and uncertainty would inevitably accompany external intervention. Autonomy is therefore not conferred on Parliamentarians merely as a sign of respect but because*

> *such autonomy from outsiders is necessary to enable Parliament and its members to get their job done.*
>
> . . .

[18] The right of the Senate to control its procedure is a parliamentary privilege, and this includes making rules on the ability of the Internal Economy Committee to hold *in camera* meetings. This conclusion flows from both the jurisprudence and the doctrine of necessity.

[19] Senate procedure gives the Committee authority to hold its deliberations *in camera* and I do not have to power to compel the witness to provide the content of that meeting. I would add that the information that is pertinent to the applicant's case has been provided by the witness and could also be probed through other witnesses that counsel for the applicant intends to call.

[20] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page.)

Order

[21] The objection raised by the respondent is sustained.

January 22, 2009

Michel Paquette,
Board Member