Date: 20230928

File: 466-SC-00411

Citation: 2023 FPSLREB 89

Federal Public Sector Labour Relations and Employment Board Act and *Parliamentary Employment and Staff Relations Act*

Before an adjudicator

BETWEEN

DARSHAN SINGH

Grievor

and

SENATE OF CANADA

Employer

Indexed as
Singh v. Senate of Canada

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

Before: Edith Bramwell, adjudicator

For the Grievor: Paul Champ and Bijon Roy, counsel

For the Employer: George G. Vuicic and Nigel McKechnie, counsel

Motion decided on the basis of written submissions, filed March 17, April 6 and 20, and June 9 and 21, 2023.

REASONS FOR PRODUCTION ORDER

I. Motion to produce documents

[1] The grievor, Darshan Singh, grieved his termination of employment from the Senate of Canada ("the Senate"). On March 17, 2023, he submitted a notice of motion seeking an order that the Senate produce certain email communications between senators, pursuant to s. 66.1 of the *Parliamentary Employment and Staff Relations Act* (R.S.C., 1985, c. 33 (2nd Supp.); *PESRA*). In his submissions, the grievor noted that the Senate had refused the production of the requested documents on the basis that they are subject to parliamentary privilege.

[2] In its submissions of April 6, 2023, the Senate takes the position that these email communications were parliamentary deliberations and were part of the business of the Senate and therefore are subject to parliamentary privilege. Under the two-step test used to determine whether parliamentary privilege is applicable, the Senate claims that at the first step, the existence of the privilege claimed for the emails has been authoritatively established by legislation and by British or Canadian precedent. Therefore, according to the Senate, no further inquiry into the necessity of the privilege is required at the second step.

[3] On July 5, 2023, I determined that the Senate had not established its claim of parliamentary privilege. It did not demonstrate that the privilege over the emails has been authoritatively established, and the Senate did not present an argument with respect to the necessity of the privilege claimed. As such, the Senate was ordered to produce the emails requested by no later than July 14, 2023.

[4] I further indicated to the parties that more detailed reasons for the order would follow. These are the detailed written reasons for the production order of July 5, 2023.

II. Background

[5] On November 24, 2015, the grievor raised several concerns about his employment, including allegations of racial discrimination. On or about November 25, 2015, the grievor's allegations were brought to the attention of Senator Leo Housakos, who investigated the allegations. At that time, Senator Housakos was Speaker of the Senate and Chairman of the Senate Standing Committee on Internal Economy, Budgets and Administration (CIBA). Senator Housakos was also Chairman of the CIBA

Subcommittee on Agenda and Procedure ("the Subcommittee"). The CIBA's mandate includes the power to act on all financial and administrative matters relating to the Senate and its staff.

[6] Senator Housakos concluded that the grievor's allegations were without merit. He consulted the other members of the Subcommittee at the time, who were Senator George J. Furey and Senator David Wells. Together, on November 30, 2015, they decided that the grievor's employment would be terminated. The grievor's employment was then terminated on December 3, 2015.

[7] In the adjudication of his grievance, the grievor requests the production of all emails by or to Senators Housakos, Furey, and Wells respecting or referring to the grievor from November 25, 2015, to December 3, 2015. The grievor maintains that these records are directly relevant to the decision to terminate his employment and therefore are relevant to the adjudication of his grievance.

[8] The Senate has acknowledged the existence of emails responsive to the grievor's request, which are as follows:

- an email from Senator Wells to Senator Housakos, dated November 30, 2015, at 11:17 a.m.; and
- an email from Senator Furey to Senator Housakos, dated November 30, 2015, at 1:55 p.m.

[9] The Senate does not contest the arguable relevance of these emails. The Senate has not produced the emails because it states that they constitute a confidential exchange in a non-public setting between the members of the Subcommittee directly related to a matter over which the CIBA had authority and that was referred to the Subcommittee by its chairman. Therefore, according to the Senate, the emails are an extension of the CIBA proceedings and are subject to parliamentary privilege.

III. Summary of the submissions

A. The grievor's motion

[10] In his March 17, 2023, submission in support of his motion, the grievor acknowledges that records of Senate proceedings or documents given as part of those proceedings may be subject to parliamentary privilege. However, although parliamentary privilege may apply to records relating to the employment of certain

parliamentary office holders, correspondence such as the emails pertaining to the termination of employees (including managerial employees) is not privileged.

[11] The emails relate to the termination of the grievor's employment as an employee in the Senate administration, rather than as a public-office holder, and, as such, do not properly come within the scope of established or necessary parliamentary privileges. Although the courts have consistently emphasized that administrative matters involving parliamentarians are internal to the legislature and must enjoy the protection of privilege, the grievor's employment cannot be framed in the same way.

[12] The grievor characterizes the Senate's argument as being such that **any** emails exchanged between members of the Subcommittee would effectively be automatically subject to parliamentary privilege, regardless of their subject matter. The grievor notes that multiple cases have distinguished the proceedings and documents related to parliamentarians from those involving employees and that the broad category of privilege over parliamentary proceedings and the administration of internal affairs does not presumptively extend to include all staff-relations matters involving parliamentary employees.

[13] In *Canada (House of Commons) v. Vaid*, 2005 SCC 30, the Supreme Court of Canada rejected a claim of broad privilege over "internal affairs" and held that the "management of employees" was not definitively established as a category of privilege. Thus, the emails in question are not within the scope of an established category of privilege, and any claimed privilege over these emails does not meet the necessity test. As the director of the Human Resources Directorate of the Senate's Administration, the grievor was not directly connected to the legislative and deliberative functions of the Senate.

[14] The grievor notes that the powers conferred by s. 66.1 of the *PESRA* expressly include the power, found at s. 20(f) of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), to compel, at any stage of a proceeding, any person to produce the documents and things that may be relevant to the proceeding. Managerial positions fall within the *PESRA*'s scope, which implies that privilege was not considered by the legislators to be necessary in relation to employment-related matters for these positions.

B. The Senate's response

[15] According to the Senate, the main body of parliamentary privileges are legislated privileges rather than inherent privileges. The CIBA exercises functions at the core of the Senate's legislative powers. The Senate argues in its April 6, 2023, submissions that the source of the Senate's parliamentary privilege over the emails at issue is set out in s. 18 of the *Constitution Act, 1867* (30 & 31 Victoria, c 3 (U.K.)), and in s. 4 of the *Parliament of Canada Act* (R.S.C., 1985, c. P-1; *PCA*), which provides as follows:

4 *The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise*	***4*** *Les privilèges, immunités et pouvoirs du Sénat et de la Chambre des communes, ainsi que de leurs membres, sont les suivants :*
(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*	***a)*** *d'une part, ceux que possédaient, à l'adoption de la* Loi constitutionnelle de 1867, *la Chambre des communes du Parlement du Royaume-Uni ainsi que ses membres, dans la mesure de leur compatibilité avec cette loi;*
(b) *such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.*	***b)*** *d'autre part, ceux que définissent les lois du Parlement du Canada, sous réserve qu'ils n'excèdent pas ceux que possédaient, à l'adoption de ces lois, la Chambre des communes du Parlement du Royaume-Uni et ses membres.*

[16] The CIBA has a statutory mandate under ss. 19.1 to 19.9 of the *PCA*. Section 19.3 of the *PCA* confirms the scope of the CIBA's functions as follows:

19.3 *Subject to subsection 19.1(4), the Committee may act on all financial and administrative matters respecting*	***19.3*** *Sous réserve du paragraphe 19.1(4), le comité peut s'occuper des questions financières et administratives intéressant :*
(a) *the Senate, its premises, its services and its staff; and*	***a)*** *le Sénat, ses locaux, ses services et son personnel;*
(b) *the members of the Senate.*	***b)*** *les sénateurs.*

[17] The CIBA is a Senate committee that exercises functions at the core of the Senate's legislative powers, including administrative matters involving staff. The emails at issue in this case were exchanged between the members of the Subcommittee to formalize their discussions about the termination of the grievor's employment. They were deliberations among senators about Senate business, were an extension of CIBA proceedings, and thus are protected by parliamentary privilege. Parliamentary privilege over parliamentary proceedings has been authoritatively established in decisions such as *Duffy v. Canada (Senate)*, 2020 ONCA 536. Further, parliamentary proceedings encompass events and steps closely related to formal actions taken by a legislative body or one if its committees, such as the decision to terminate the grievor's employment. As such, no further inquiry is required to determine the necessity of the claim at step two of the analysis. The emails can be disclosed only with the Senate's consent.

C. The grievor's reply

[18] In his April 20, 2023, reply submissions, the grievor stresses that the *PCA* does not deem all CIBA business as proceedings in Parliament, in contrast to the legislative provisions relating to the equivalent committee in the House of Commons: the Board of Internal Economy. Employment-related matters lie outside the category of privilege relating to proceedings in Parliament. The existence of that category of privilege is determined by the nature of the matter at issue and not by the identity of the person or body engaging in the matter. The grievor notes that the Senate's position is not, in his opinion, consistent with the Senate's published views.

D. Further submissions

[19] Following the receipt of the submissions noted earlier, I offered the parties the opportunity to provide further submissions and additional particulars on the following Senate assertions, made in its submissions of April 6, 2023:

- The CIBA represents the Senate as employer, including for the purpose of grievance adjudication, under the *PESRA*.
- The Subcommittee has the power to make "certain decisions" on behalf of the CIBA.
- The emails are related to a matter over which the CIBA had "authority" and that was "referred" to the Subcommittee by the CIBA's chairman.

- The Subcommittee made the decision to terminate the grievor's employment.
- The grievor was then informed by letter that he was dismissed without cause.

[20] The Senate was also invited to provide further particulars with respect to the following:

- How the decision to terminate the grievor's employment and the emails at issue are an extension of Senate proceedings, including the connection between the functions of the CIBA under s. 19.3 of the *PCA* and the CIBA's authority to terminate the grievor.
- The nature of the referral of the matters at issue in this grievance to the Subcommittee.
- The Subcommittee's authority to terminate the grievor and the manner in which the termination decision was ultimately communicated and captured in the termination letter, including who provided the termination letter to the grievor.

[21] In response, the Senate provided further detail about the application of the *Rules of the Senate*, the *Senate Administrative Rules* and the authority of the CIBA. It confirmed that the CIBA represents the Senate as employer.

[22] The Senate further clarified that the Subcommittee's power to make "certain decisions" can be classified into two categories: 1) where the matter is an emergency, and 2) where the CIBA is unable to meet to deal with and resolve immediate administrative problems.

[23] Sections 19.1(5) and (6) of the *PCA* provide as follows:

19.1 (5) *Where the Chairman of the Committee deems that there is an emergency, the Committee's Sub-committee on Agenda and Procedure may exercise any power of the Committee under this Act.*	***19.1 (5)*** *Le Sous-comité du programme et de la procédure peut, si le président du comité estime qu'il y a urgence, exercer les pouvoirs dont le comité est investi en vertu de la présente loi.*
(6) *The Chairman of the Committee shall report to the Committee any decision made under subsection (5) at the meeting of the Committee immediately following the decision.*	***(6)*** *Le président du comité fait rapport, à la réunion suivante du comité, de toute décision prise en vertu du paragraphe (5).*

[24] Further, following a motion adopted in the Senate in November 2013, the Subcommittee has also been empowered to make decisions on behalf of the CIBA with respect to its agenda and to schedule meetings. In addition, if the full CIBA is unable to meet, the Subcommittee is authorized to deal with and resolve immediate administrative problems, but it must report its decisions at the first meeting of the CIBA after that.

[25] It was pursuant to these authorities that the Subcommittee acted in relation to the grievor's employment. When the grievor raised concerns with his employment, including allegations of racial discrimination, these concerns were brought to the attention of Senator Housakos, then the chairman of the CIBA, who then seized himself and the other members of the Subcommittee of the matter. The Senate further confirmed that the emails in question deal solely with the matter of the grievor's employment. They were sent in the context of the Subcommittee's decision-making process.

[26] Relying on Erskine May's *Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, the Senate argues that some communications are so closely related to some matter pending that although they do not take place in the committee room, they form part of the business of the House and therefore are considered proceedings. The Senate gave the following examples of the types of communications that therefore are subject to privilege over parliamentary proceedings:

- briefing notes that are prepared for members of a committee in connection with a matter pending before that committee;
- draft remarks to be delivered before the Senate or a committee; and
- a draft bill.

[27] The Senate notes that the CIBA is a select committee established by the Senate itself and that this necessarily means that its proceedings are proceedings in Parliament. No further statutory confirmation is required such as was necessary in the instance of the House of Commons committee cited by the grievor. In this respect, the Senate notes that s. 52.2(2) of the *PCA* was enacted after the termination of the grievor's employment; therefore, it would be inappropriate to allow the grievor to rely on this section in his arguments.

[28] In his further submissions, the grievor agreed that the CIBA represents the Senate as employer. He noted that the Subcommittee is authorized to act on the CIBA's behalf only in limited circumstances and under strict conditions involving emergency or matters of great urgency, as deemed by the chairman. Nothing in the record establishes that the grievor's situation at the time immediately before his termination was deemed an emergency, or constituted either an emergency or an urgent administrative problem. Therefore, the Senate has not established that the subject matter of the emails was duly referred and delegated to the Subcommittee. In the absence of particulars establishing the referral of the grievor's situation to the Subcommittee or its authority, it is the grievor's view that the termination decision and related emails are not Senate proceedings.

IV. Analysis

[29] There is no dispute that the emails at issue are arguably relevant to the decision to terminate the grievor's employment; nor is it disputed that the CIBA represents the Senate as employer for the purposes of the *PESRA*. The definition of "employer" at s. 3 of the *PESRA* includes "… the Senate as represented by such committee or person as the Senate by its rules or orders designates for the purposes of this Part …". Section 19.3 of the *PCA* provides that the CIBA is responsible for financial and administrative matters respecting the Senate, its premises, its services, and its staff.

[30] There is also no dispute that parliamentary proceedings are a recognized category of parliamentary privilege. The Senate claims that any Subcommittee actions are an extension of CIBA proceedings and therefore fall under the established category of parliamentary proceedings. The grievor acknowledges that certain CIBA matters are privileged as parliamentary proceedings but does not concede that the scope of this privilege includes the emails in question. As such, the dispute in this matter centres on whether the scope of the established privilege for parliamentary proceedings extends to the emails in which the Subcommittee members discussed the grievor's concerns about his employment and his termination.

[31] In their submissions, both parties directed my attention to the decisions in *Vaid*; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39; *Canada (Board of Internal Economy) v. Boulerice*, 2019 FCA 33; and *Duffy*, which set out the two-step test to determine whether parliamentary privilege applies.

[32] As the first step in this test, the party claiming parliamentary privilege has the onus of showing that the existence and scope of the claimed category of privilege has been authoritatively established, based on Canadian or British precedent (see *Vaid*, at para. 39; and s. 4 of the *PCA*). In *Chagnon*, the Supreme Court of Canada underscored the importance of taking a purposive approach to questions of parliamentary privilege (see paragraph 2). It noted that "[t]he inherent nature of parliamentary privilege means that its existence and scope must be strictly anchored to its rationale" (see *Chagnon*, at para. 25). That rationale is based on the autonomy needed for the legislative branch of government to perform its constitutional functions (see *Chagnon*, at para. 1). Similarly, in *Vaid*, the Supreme Court of Canada indicated that an established category is one whose existence and scope has already been accepted as necessary in order to protect the dignity and efficiency of the House (see paragraph 29(7)). The existence and scope of a claimed category of privilege can be shown in several ways (see *Boulerice*, at para. 61).

[33] If the existence and scope of the claimed privilege have been authoritatively established, the privilege must be accepted, without further inquiry into the necessity of the privilege or the merits of its exercise in the particular case (see *Vaid*, at para. 37; and *Duffy*, at para. 33).

[34] Where the establishment and scope of the privilege is not authoritatively established, as a second step, the claim is tested against the doctrine of necessity. The party seeking to rely on parliamentary privilege must then show the following (from *Vaid*, at para. 46):

> *46 … 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*** *… 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.*
>
> [Emphasis added]

[35] As conceded by the grievor, an established category of parliamentary privilege will attach to many, and perhaps most, matters within the CIBA's statutorily defined ambit. What must be determined is whether the scope of that privilege includes the emails related to the grievor's employment as a *PESRA*-governed employee.

[36] The Senate asserts that the communications in question were parliamentary proceedings, which is an established category of parliamentary privilege. By implication, the Senate asserts that the scope of the established privilege extends to the emails in question. I will first address the Senate's argument that parliamentary privilege over the emails is expressly set out by statute, such that they are parliamentary proceedings. Next, I will examine the issue of whether the Senate has otherwise established that the scope of privilege over parliamentary proceedings can extend to the emails in question. For the reasons that follow, I find that neither claim is supported in this case.

A. Parliamentary privilege over the emails is not expressly set out by statute

[37] The Senate argues that the main body of federal parliamentary privileges are legislated and that the source of the Senate's parliamentary privilege over the emails in issue is expressly set out in the *PCA*.

[38] The Senate asserts that Senator Housakos, then the chairman of the CIBA, seized himself and the other members of the Subcommittee of the matter of the grievor's employment concerns. Even if I accept that assertion, there is nothing in the *PCA* or in the facts pled by the Senate that expressly ties the emails to the Subcommittee's mandate within the Senate. The Senate did not provide particulars about how the matter of the grievor's employment concerns, brought to Senator Housakos' attention on or about November 25, 2015, constituted, or were deemed to be, an emergency, pursuant to s. 19.1(5) of the *PCA*, or about how there was otherwise an immediate administrative problem to resolve such that the full CIBA was unable to meet. At the same time, the Senate also did not explain how the Subcommittee's subsequent decision to terminate the grievor's employment, made on November 30, 2015, and communicated to the grievor on December 3, 2015, constituted an emergency or an immediate administrative problem, such that it fell within its authority.

[39] The grievor's termination letter, reproduced in *Singh v. Senate of Canada*, 2021 FPSLREB 2 at para. 1, makes no mention of the CIBA or the Subcommittee. Nor does it suggest any emergency or immediate administrative problem. Among other things, the letter outlines events going back to January 2015, as follows:

…

> *The reason for this decision is the breakdown in the confidence and trust which are essential to the viability of your employment relationship. The Senate's loss of your confidence and trust in you are primarily the result of your attitude and behavior towards the Chief Corporate Services Officer, to whom you have reported since January 2015.*
>
> …
>
> *… Although the problem has been highlighted recently by your initiative in seeking to have the HR Directorate removed from the CCSO's authority, the Senate's review has revealed that the issues relating to your attitude and behavior have been long- standing. Indeed, it appears that the problems began around the time the CCSO' investigation into the establishment of your terms and conditions of employment with the Senate, which ultimately led to discipline being imposed upon you.*
>
> …
>
> *In anticipation of the possibility that you may believe or claim that the termination of your employment was in response to concerns of discrimination that you recently expressed regarding the CCSO, I assure you that it is not the case. The Senate's decision is the result of an assessment of the entire history of your behavior and attitude since the spring of 2015, and of the cumulative effect of your actions.*
>
> …
>
> [*Sic* throughout]

[40] The grievor was terminated on December 3, 2015. The CIBA's next meeting was on December 10, 2015. Again, no account was provided to indicate any emergency or immediate administrative problem between these two dates to explain why the Subcommittee took the steps that it did in relation to the termination of the grievor's employment or to understand why the full CIBA was unable to meet. Further, as the grievor pointed out, nothing in the published record of the CIBA meeting on December 10, 2015, indicates that the reporting obligations in s. 19.1(6) of the *PCA* or pursuant to the November 2013 motion adopted by the Senate were met with respect to the Subcommittee's actions.

[41] Otherwise, the only other reference to some sort of immunity in the CIBA's statutory mandate under ss. 19.1 to 19.9 of the *PCA* is at s. 19.2(2), where it states that a member of the CIBA cannot be held personally liable for the actions of the CIBA. This does not apply in the circumstances of this case.

[42] In *Duffy*, the Court of Appeal for Ontario recognized that the CIBA's work as a Senate committee falls under proceedings in Parliament. The issue in that case was whether parliamentary privilege deprived the courts of jurisdiction to adjudicate a civil claim for damages brought by Senator Michael Duffy against the Senate. Senator Duffy was suspended from the Senate for allegedly claiming inappropriate expenses as a senator and then accepting funds from the Prime Minister's chief of staff to reimburse the Senate for those expenses. Among other things, he claimed that individual senators interfered with the Senate's investigation into his expenses for improper and purely political purposes, leading to the Senate's decision to suspend him.

[43] On the issue of the Senate's parliamentary privilege over parliamentary proceedings, the Court of Appeal for Ontario determined that the Senate's privilege over such proceedings encompasses the CIBA's work in discharging its statutory mandate within the Senate to act on "all financial and administrative matters" (see s. 19.3 of the *PCA*). In that case, the parliamentary proceedings included "… the CIBA's internal investigations about senators' use of parliamentary funds in acting as senators, any report made by the CIBA based on those investigations, and the Senate's decisions on whether or how to respond" (see *Duffy*, at para. 59). Unlike in *Duffy*, the question in this case is not about the CIBA's mandate within the Senate with respect to a parliamentarian but about the mandate of Subcommittee members with respect to a Senate employee whose employment falls under the *PESRA* legislative regime. The Senate has been unable to connect the emails at issue to the discharge of the Subcommittee's mandate within the Senate.

[44] In *Boulerice*, the Federal Court of Appeal examined certain decisions by the Board of Internal Economy of the House of Commons with respect to expenses necessary to allow parliamentarians to discharge their parliamentary functions. It found that such decisions came within the established category of proceedings in Parliament (see *Boulerice*, at paras. 104 to 111). The Board of Internal Economy's functions are found at s. 52.3 of the *PCA* and are similar to those of the CIBA. Section 52.2(2) further specifies that in carrying out those functions, the proceedings of the Board of Internal Economy are proceedings in Parliament. While the Federal Court of Appeal found that s. 52.2(2) supported the finding that proceedings in Parliament were an established category of parliamentary privilege whose scope encompassed the facts of that case, it also found that s. 52.2(2) did not apply to everything the Board of Internal Economy does, as follows (see *Boulerice*, at para. 115):

> *[115] I agree that subsection 52.2(2) cannot apply to everything the Board might do, particularly as it relates to matters that do not involve Parliamentarians. For instance, matters pertaining to the salaries or pensions payable to House staff or their conduct* [citation references omitted] *or contractual dealings with third party suppliers of goods and services are not likely to be viewed as coming within the category of privilege relating to proceedings in Parliament. But it is difficult to see why this provision would not be given its full force and effect when dealing with matters wholly internal to the House involving the use of money paid to its Members to allow them to perform their parliamentary functions.*

[45] As the Federal Court of Appeal outlined in *Boulerice*, the Senate does not take the position that any emails exchanged between members of the Subcommittee are subject to parliamentary privilege, regardless of their context or subject matter. However, it does take the position that parliamentary privilege applies to such emails to the extent that they closely relate to Senate business. But, in line with the purposive approach to delimiting the scope of parliamentary privilege, to be related to Senate business, the Senate had to do more than merely associate the Subcommittee member's emails with the mandate of the CIBA. It had to authoritatively establish that the Subcommittee members' emails flowed from a legislative mandate within the Senate, such that either 1) the scope of the privilege extended to the emails based on the autonomy needed for the CIBA or its Subcommittee to perform its constitutional functions, or 2) that it has been authoritatively established that the scope of privilege over parliamentary proceedings necessarily includes the emails, to protect the dignity and efficiency of the Senate.

[46] For those reasons, the Senate has not established that the Subcommittee's emails were parliamentary proceedings, that they can properly be characterized as an extension of CIBA proceedings, or that parliamentary privilege over the emails is expressly set out in the *PCA*.

B. The Senate has not established the scope of the claimed privilege

[47] Again, the existence and scope of parliamentary privilege must be strictly anchored in its rationale. My role in the context of the Senate's claim is not only to determine whether a category of parliamentary privilege exists. If I find that an established category of privilege exists, I must also delimit its scope (see *Vaid*, at paras. 37 and 39; and *Chagnon*, at paras. 25, 27, and 32).

[48] The onus is on the party claiming the privilege to demonstrate both its existence and its scope. Apart from its arguments based on the *PCA*, the Senate did not present any judicial precedents from Canada or the United Kingdom or any other authorities that recognize that the scope of privilege over proceedings in Parliament covers the emails at issue.

[49] In my view, in taking the position that parliamentary privilege applies to the emails to the extent that they closely relate to Senate business, the Senate's claim is similar to the one made in *Vaid*, which was that the hiring and firing of employees are internal affairs that may not be questioned or reviewed by any tribunal or court. Unlike in *Vaid*, there is no argument in this case pertaining to the nature of the grievor's work; nor is there a claim of parliamentary privilege over the management of employees (which was specifically rejected in *Vaid*, at paras. 62, 75, 76, and 101; and in *Chagnon*, at paras. 35 and 36). The Senate does not assert that the grievor's position as the director of the Human Resources Directorate of the Senate's Administration related to the legislative or deliberative functions of the Senate or its role in holding the government accountable.

[50] Rather, the Senate's position is focused on the Subcommittee's mandate and the fact that the Senators who sent the emails in question were Subcommittee members. This is the basis of the Senate's claim that the emails come within the scope of privilege over proceedings in Parliament. However, as the Supreme Court of Canada pointed out as follows at paragraph 43 of *Vaid*, the privilege for proceedings in Parliament has its limits:

> *43 While much latitude is left to each House of Parliament, such a purposive approach to the definition of privilege implies important limits. There is general recognition, for example, that privilege attaches to "proceedings in Parliament". Nevertheless, as stated in* Erskine May *(19th ed. 1976), at p. 89, not "**everything that is said or done within the Chamber during the transaction of business forms part of proceedings in Parliament**. Particular words or acts may be entirely unrelated to any business which is in course of transaction, or is in a more general sense before the House as having been ordered to come before it in due course" (emphasis added). (This passage was referred to with approval in* Re Clark.*) Thus in* R. v. Bunting *(1885), 7 O.R. 524, for example, the Queen's Bench Division held that a conspiracy to bring about a change in the government by bribing members of the provincial legislature was not in any way connected with a proceeding in Parliament and, therefore, the court had jurisdiction to try the offence.* Erskine

> May *(23rd ed.) refers to an opinion of "the Privileges Committee in 1815 that the re-arrest of Lord Cochrane (a Member of the Commons) in the Chamber (the House not sitting) was not a breach of privilege. Particular words or acts may be entirely unrelated to any business being transacted or ordered to come before the House in due course" (p. 116).*
>
> [Emphasis in the original]

[51] In line with the last part of this quote, the Senate has not established that the emails at issue or the resulting action of terminating the grievor were related to any business being transacted or ordered to come before the CIBA in its constitutionally mandated, legislative role. The emails certainly do not resemble any of the examples that the Senate gave of the types of communications that are subject to privilege as proceedings in Parliament, such as briefing notes, draft remarks, or a draft bill. Apart from being said or done within the Senate or by Senators, there is nothing connecting the emails to the performance of any legislative or deliberative functions of the Senate, or its role in holding the government accountable.

[52] In its April 6, 2023, arguments, the Senate defines proceedings as follows: "As a technical parliamentary term, 'proceedings' are the events and steps leading up to some formal action, **including a decision, taken by the House in its collective capacity**" [emphasis added].

[53] The Senate goes on to note that the "formal action" in this case was the decision to terminate the grievor's employment. However, nothing before me indicates that the decision to terminate the grievor's employment was made by the Senate or the CIBA in its collective capacity. As noted earlier in this decision, the matter was never referred to or back to the CIBA, despite Senator Housakos' joint capacity as the chairman of both the CIBA and its Subcommittee.

[54] The Senate has attempted, in its arguments, to distinguish the "termination decision", which it argues is not privileged, from the emails of the Subcommittee members that led to that decision. The Senate argues on this basis that it is not seeking the broad immunity for which the House of Commons argued unsuccessfully in *Vaid*. This argument is not persuasive and cannot be reconciled with the findings in *Vaid* and *Chagnon*. Extending the scope of the privilege for parliamentary proceedings to any discussion among members of a committee whose purview includes "… the Senate, its premises, its services **and its staff** …" [emphasis added] would effectively

recognize the power to "hire, manage and dismiss" as a constitutionally entrenched parliamentary privilege. This argument was specifically rejected in *Vaid* (see paragraphs 52 and 56) and would affect the operation of the *PESRA*.

[55] As was noted as follows in the concurring reasons of Mr. Justice Rowe in *Chagnon*, at para. 59:

> *[59] … When a legislative body subjects an aspect of privilege to the operation of statute, it is the provisions of the statute that govern. While the relevant statutory provisions remain operative, a legislative body cannot reassert privilege so as to do an end-run around an enactment whose very purpose is to govern the legislature's operations.…*

[56] Parliamentary privilege cannot seek to undo the laws that Parliament itself has enacted (see *Vaid*, at paras. 63 to 69). Again, there is no general immunity or parliamentary privilege that has been recognized with respect to the management of all employees. The scope of the parliamentary privilege in *Boulerice* and *Duffy* encompassed the circumstances of those whose work relates to the legislative or deliberative functions of Parliament or its role in holding the government accountable but did not extend further.

[57] Due diligence is to be exercised when examining a claim of parliamentary privilege where it affects the rights of non-parliamentarians (see *Vaid*, at para. 39; and *Boulerice*, at para. 115). This is particularly true given that a claim of privilege should not "… immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees …" (see *Vaid*, at para. 29(11)).

[58] The rights affected in this instance, as in *Vaid* and *Chagnon*, are the employment rights of an individual who is not a parliamentarian or public-office holder. The grievor's former role was administrative; it was not connected to the constitutional functions of the Senate. Further, the allegations considered by the Senate and raised by the grievor in his grievance include claims of discrimination. As indicated in *Vaid*, at para. 81, "… the *Canadian Human Rights Act* is a quasi-constitutional document and … any exemption from its provisions must be clearly stated." Parliament itself has established a legislatively mandated process for the resolution of such grievances through the *PESRA*. As noted in *Chagnon*, quoting Charles Robert in "Falling Short: How a Decision of the Northwest Territories Court of

Appeal Allowed a Claim to Privilege to Trump Statute Law", "… it seems unreasonable to invoke privilege to disable, and render meaningless, a law which the Assembly itself adopted relating to its administrative operations" (see paragraph 66).

[59] Finally, the Senate's arguments include the claim that the emails constituted a confidential exchange in a non-public setting and that since these discussions did not take place in public, their disclosure would constitute a breach of parliamentary privilege. Again, no authority was provided for this broad claim to parliamentary privilege. In fact, such a claim would seemingly go against some of the examples provided by the Supreme Court of Canada in *Vaid*, at paras. 29(1), 51, and 61, such as these:

> *29 …*
>
> *1. … Privilege "does not embrace and protect activities of* individuals*, whether members or non-members, simply because they take place within the precincts of Parliament" (U.K., Joint Committee on Parliamentary Privilege, vol. 1,* Report and Proceedings of the Committee *(1999) ("British Joint Committee Report"), at para. 242 (emphasis in original)).*
>
> …
>
> *51 On the other hand, if the term "internal affairs" were interpreted broadly as suggested by some of the interveners, it would duplicate most of the matters recognized independently as privileges, including the right to exclude strangers from the House (*New Brunswick Broadcasting*), the discipline of members (*Harvey*) and matters of day-to-day procedure in the House itself (*Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission*) (the "Lord's Prayer" case). The danger of dealing with a claim of privilege at too high a level of generality was also noted in the British Joint Committee Report:*
>
> > *"Internal affairs" and equivalent phrases are loose and potentially extremely wide in their scope.… [It] would be going too far if it were to mean, for example, that a dispute over the … dismissal of a cleaner could not be decided by a court or industrial tribunal in the ordinary way. [para. 241] ….*
>
> …
>
> *61 We were not referred to any judicial authority in the U.K. on this point, and the British Joint Committee Report does not support the existence of a compendious privilege over "management of employees". On the contrary, the Joint Committee of Parliamentarians at Westminster writes:*
>
> > *The Palace of Westminster is a large building; it requires considerable maintenance; it provides an extensive range of*

> *services for members; it employs and caters for a large number of staff and visitors. These services require staff and supplies and contractors.* ***For the most part, and rightly so, these services are not treated as protected by privilege.*** *[Emphasis added; para. 246.]*
>
> …
>
> ***It follows that management functions relating to the provision of services in either House are only exceptionally subject to privilege.*** *[Emphasis added; para. 248.] ….*
>
> [Emphasis in the original]

[60] In sum, I find that the Senate has not advanced any authorities that have accepted that the scope of parliamentary privilege over proceedings in Parliament extends to emails exchanged between Senators pertaining to the termination of a Senate employee even when the senators are members of the CIBA or its Subcommittee. The Senate has not satisfied the first step of the test for determining whether parliamentary privilege applies.

C. The Senate did not argue that the privilege was necessary

[61] As outlined earlier in this decision, where the establishment and scope of the privilege is not authoritatively established, as a second step, the claim is tested against the doctrine of necessity. Despite its onus, the Senate brought no argument about the claimed privilege being necessary.

[62] In *Chagnon*, at para. 30, the Supreme Court of Canada indicated that "[t]he 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." Rather, according to the majority, "[t]he *immunity* that is sought from the application of ordinary law must also be necessary to the assembly's constitutional role." Aside from claiming that the emails were connected to the Subcommittee, and therefore to an extension of the CIBA, the Senate did not even attempt to explain how privilege attached to the emails as necessary to the Senate's constitutional role. In other words, as stated as follows in *Chagnon*, at para. 30, quoting from *Vaid*, at para. 29(5):

> *[30] … "[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" ….*

[63] On the point of necessity, I find the following comments of Mr. Justice Binnie, writing for the Court in *Vaid*, helpful in the context of this case:

> …
>
> *75 I have no doubt that privilege attaches to the House's relations with* some *of its employees, but the appellants have insisted on the broadest possible coverage without leading any evidence to justify such a sweeping immunity, or a lesser immunity, or indeed any evidence of necessity at all. We are required to make a pragmatic assessment but we have been given no evidence on which a privilege of more modest scope could be delineated.…*
>
> …

[64] In this case, the Senate did not show that the existence and scope of its claimed category of parliamentary privilege has been authoritatively established and did not argue that the privilege is necessary. As such, I conclude that the Senate has not established that parliamentary privilege applies to the emails at issue.

[65] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[66] The grievor's motion to produce documents is granted.

[67] In accordance with the terms of my order of July 5, 2023, the Senate shall produce the following documents to the grievor:

- the email from Senator David Wells to Senator Leo Housakos, dated November 30, 2015, at 11:17 a.m.; and
- the email from Senator George J. Furey to Senator Leo Housakos, dated November 30, 2015, at 1:55 p.m.

September 28, 2023.

Edith Bramwell,
adjudicator