2021 BCLRB 176
(Leave for Reconsideration of 2020 BCLRB 134)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

EDWARD ILLI

(the "Applicant")

-and-

LEGISLATIVE ASSEMBLY PROTECTIVE SERVICES ASSOCIATION

("LAPSA")

-and-

LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA

(the "Employer" or the "Legislative Assembly")

PANEL:	Jacquie de Aguayo, Chair Jennifer Glougie, Associate Chair J. Najeeb Hassan, Vice-Chair and Registrar
APPEARANCES:	Steven Rogers and Rebecca Kantwerg, for the Applicant Marcia McNeil, for the Employer
CASE NO.:	2020-001117
DATE OF DECISION:	November 5, 2021

DECISION OF THE BOARD

I. OVERVIEW

1 The Applicant has filed an application (the "Application") under Sections 140, 141, and 143 of the *Labour Relations Code* (the "Code") for review of 2020 BCLRB 134 (the "Original Decision"). The Original Decision finds that parliamentary privilege precludes the application of the Code to the Employer's Special Provincial Constables ("SPCs"). On that basis, it dismisses LAPSA's application to be certified to represent a bargaining unit of the Employer's SPCs who work at the Legislative Assembly.

2 LAPSA filed a timely application under Section 141 for leave and reconsideration of the Original Decision (the "LAPSA Application"). However, LAPSA subsequently dissolved and has not pursued its application.

3 The Applicant was an SPC in LAPSA's proposed bargaining unit and the president of LAPSA. Shortly before the Original Decision was issued, the Employer terminated the Applicant's employment as an SPC, alleging cause. The Applicant has filed an unfair labour practice complaint (the "ULP Complaint") under the Code regarding the termination, alleging anti-union animus and a lack of proper cause. The Employer seeks dismissal of the ULP Complaint on several grounds, including that parliamentary privilege precludes the application of the Code to the Employer's SPCs, as found in the Original Decision.

4 We are deciding the Application, not the ULP Complaint. The Employer raises several preliminary objections to the Application, including mootness, standing, and timeliness. If the Board allows the Application to proceed on its merits, the Employer submits the Original Decision was correct in finding that parliamentary privilege precludes the application of the Code to the Employer's SPCs.

5 We begin by addressing the Employer's preliminary objections to the Application. In light of our finding on those issues, we go on to address the Application on its merits.

II. PRELIMINARY OBJECTIONS

1. Parties' positions

6 The Employer submits the Application should be dismissed for mootness. The Original Decision dismisses LAPSA's application for certification. LAPSA subsequently dissolved, and therefore cannot be certified. Accordingly, the Employer submits there is no practical utility in reconsidering the Original Decision.

7 The Board's general policy is to decline to adjudicate moot or academic matters, absent exceptional circumstances. The Employer says no exceptional circumstances exist here. It says the Original Decision only applies to the Employer and its SPCs and is therefore "confined to its particular facts and has no general application".

8 The Employer further submits the Applicant is not a "party affected" by the Original Decision within the meaning of Section 141 of the Code and, therefore, does not have standing to seek leave and reconsideration of the Original Decision. Alternatively, if he is a "party affected" within the meaning of Section 141 of the Code, the Employer submits he has not offered a compelling explanation for why he should be granted an extension of time under Section 140(l) to apply for reconsideration.

9 The Employer submits that, to the extent the Applicant relies on his ULP Complaint to justify his request for standing to seek leave and reconsideration of the Original Decision, the Board does not have jurisdiction to hear the ULP Complaint in any event because his termination "arises out of a *Police Act* proceeding over which the Board does not have jurisdiction".

10 The Applicant submits reconsideration of the Original Decision is not a moot matter. He says the issue of whether parliamentary privilege precludes the application of the Code to the SPCs will be a live issue before the original panel of the Board assigned to hear and decide his ULP Complaint. He submits the Board should not wait for reconsideration of that decision, but instead take this opportunity to reconsider the Original Decision and make a final decision on whether parliamentary privilege precludes the application of the Code to the Employer's SPCs. The Applicant submits this panel does not have to address the Employer's objection to his ULP Complaint based on the *Police Act* to address the Application.

11 With respect to his standing to bring the Application, the Applicant submits he meets the test for interested party standing because, as an employee in the bargaining unit which LAPSA sought to represent, he was directly affected in a legally material way by the Original Decision's dismissal of LAPSA's application for certification. The Applicant submits he is also directly affected in a legally material way by the Original Decision's finding on parliamentary privilege, because the Employer relies on parliamentary privilege as found in the Original Decision to argue the Board cannot hear his ULP Complaint.

12 The Applicant submits, in the alternative, that if he does not have standing as of right as an interested party, the Board should exercise its discretion to grant him standing to pursue leave and reconsideration of the Original Decision. He submits the Original Decision raises important constitutional and jurisdictional issues as it denies "meaningful collective bargaining" under the Code to SPCs.

13 With respect to the timeliness of the Application, the Applicant submits he was aware that LAPSA had filed a timely application for leave and reconsideration of the Original Decision, and so he did not file a Section 141 application at that time. Because LAPSA subsequently dissolved and is not pursuing its application, the Applicant now seeks either standing in the LAPSA Application under Section 140(n), or alternatively an extension of time under Section 140(l) to file his own Section 141 application on the same terms. In either case, he adopts the LAPSA Application "in its entirety".

2. Ruling on preliminary objections

14 We accept that, because LAPSA has dissolved, it cannot be certified even if the Original Decision is reversed on reconsideration. However, this fact does not lead us to conclude the Application should be dismissed as moot. The Original Decision dismissed LAPSA's application for certification on the basis that parliamentary privilege precludes the application of the Code to the Employer's SPCs. This conclusion has broader implications under the Code for this group of employees and is not limited to the particular matter before the original panel, LAPSA's application for certification.

15 If the Original Decision stands, without being addressed on reconsideration, it would mean not only that LAPSA's application for certification must be dismissed, but also that the Employer's SPCs are precluded from accessing any of the labour relations rights and protections provided to employees by the Code. They would be precluded, for example, from any future attempt to access collective bargaining rights under the Code. They would also be precluded from making any application for relief from conduct alleged to be in contravention of the Code, such as the Applicant's ULP Complaint.

16 Accordingly, even if LAPSA's application for certification is a moot matter, we would nonetheless exercise our discretion to reconsider the correctness of the Original Decision's conclusion on parliamentary privilege. Here, the union representing the employees dissolved after filing a timely application for leave and reconsideration. Given the unique circumstances of this case, we find the broader implications of the Original Decision's conclusion constitute exceptional circumstances and justify expending the resources to reconsider the correctness of the Original Decision's conclusion that parliamentary privilege precludes the application of the Code to the Employer's SPCs.

17 In addition to its mootness objection, the Employer argues the Applicant does not have standing as an interested party to bring the Application. The Employer adds that, even if the Applicant has standing, or the Board has discretionary authority under the Code to grant him standing, the Board should not do so because the Application is untimely and the Applicant has not presented compelling reasons for granting an extension of time.

18 We find it unnecessary to decide whether the Applicant has standing in LAPSA's Application as of right, because we would exercise our discretion to grant the Applicant standing to seek reconsideration of the Original Decision by way of the Application in any event, for the following reasons:

- The Application allows the Board to reconsider the Original Decision's conclusion on parliamentary privilege, which has broader implications beyond the dismissal of LAPSA's application for certification. In particular, the conclusion has implications for the Applicant's ULP Complaint, where the Employer again argues that parliamentary privilege precludes the application of the Code. The Applicant clearly has standing to address that argument in respect to the ULP Complaint.

- While we recognize the Applicant could address that argument in the Board proceeding regarding the ULP Complaint, proceeding in that way would result in two separate rulings on the issue by two original panels. We find it is more efficient and expeditious, and thus consistent with our duties under Section 2 of the Code, to grant the Applicant standing to argue the issue by way of the Application, thereby allowing a reconsideration panel of the Board to make a final decision on the issue.

- We find this is appropriate notwithstanding the Employer's objection to the ULP Complaint based on the *Police Act*. The *Police Act* objection is separate from the parliamentary privilege objection, and it can be addressed by the original panel assigned to hear the ULP Complaint.

- We further find that, because the Applicant relies on LAPSA's Application "in its entirety", the Employer had timely notice of an application and the arguments for leave and reconsideration of the Original Decision. At our request, the parties have provided their submissions on the merits of those arguments, and we find they provide an appropriate basis to make a final decision on the issue.

- We find it was reasonable that the Applicant, being aware that LAPSA was filing a timely Section 141 application, did not file an application for reconsideration and did not seek standing in that application at the time. Accordingly, in the exceptional circumstances of this case, and to the extent it is necessary, we grant the Applicant an extension of time under Section 140(l) to seek leave and reconsideration of the Original Decision through the Application (on the same basis as the LAPSA Application) and standing under Section 140(n) for that same purpose.

19 Finally, and in any event, the Board has the authority under Section 143 to give a declaratory opinion on a matter arising under the Code, where it considers it appropriate to do so. For the same reasons set out above, we find it is appropriate to exercise our discretion under Section 143 of the Code to give a declaratory opinion on the issue of whether parliamentary privilege precludes the application of the Code to the Employer's SPCs.

III. PARTIES' POSITIONS ON THE MERITS

20 We have considered all the parties' submissions on the merits of the Application. However, we have only summarized those arguments which we find necessary to our decision.

21 The Applicant submits the Original Decision errs in concluding that parliamentary privilege precludes the application of the Code to the Employer's SPCs. The Applicant relies on the Supreme Court of Canada's description of parliamentary privilege in *Canada (House of Commons) v. Vaid*, 2005 SCC 30 ("*Vaid*") and *Chagnon v. Syndicat de la fonction publique et parapublique du Quebec*, 2018 SCC 39 ("*Chagnon*"), and the necessity test set out and applied in those decisions.

22 The Applicant says the original panel found the necessity test was met in this case for two reasons: first, the potential for lawful strikes by SPCs under the Code and the fact that the Board would be called upon to set essential service levels for SPCs in that event; and second, the potential that a first collective agreement might be imposed on the parties under the Code (Original Decision, paras. 110-115). The Applicant further submits the original panel should not have found the entire Code was inapplicable because of these concerns about the potential impact of certain provisions of the Code. He submits this is overbroad, noting that in *Chagnon* the Court stated the necessity test is "stringent" (para. 42) and that the scope of parliamentary privilege should not be interpreted more broadly than necessary.

23 The Applicant submits that, in *Chagnon*, the Court made clear that rights under the *Charter of Rights and Freedoms* (the "*Charter*"), such as the Section 2(d) right to meaningfully associate in the pursuit of collective workplace goals, have equivalent constitutional status to parliamentary privilege, and one does not prevail over the other. He notes the Court stated that the proper approach therefore "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": *Chagnon* at para. 28.

24 The Applicant notes that in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*MPAO*"), the Court recognized that Section 2(d) of the *Charter* protects the meaningful pursuit of workplace goals by workers, and that restrictions which make meaningful pursuit of those goals impossible constitute "a limit on the exercise of freedom of association" (para. 75).

25 The Applicant submits Section 2(d) of the *Charter* "is engaged where the Legislative Assembly seeks to assert privilege to avoid certification by its employees", and the original panel failed to consider the impact on the SPCs' *Charter* right to meaningful collective bargaining in deciding that parliamentary privilege precludes them from applying for certification under the Code. The Applicant submits these arguments were made to the original panel but are not addressed in the Original Decision.

26 The Employer submits the original panel was correct in concluding that "management of [the Employer's SPCs] free from the application of the Code and the jurisdiction of the Board is so closely and directly connected with the fulfilment by the Legislative 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" (Original Decision, para. 115). The Employer submits the original panel correctly applied

the two-step approach for determining parliamentary privilege, including the second step necessity test. The Employer submits:

> The preliminary objection of the Employer was premised on the inherent conflict arising if the Union was certified under the *Code*. As confirmed by the Original Panel, the resultant right to strike afforded the SPCs, and the Board's authority to determine essential service levels and to impose a collective agreement together undermined the autonomy necessary for the Legislature to do its work.

27 The Employer endorses the analysis in paragraphs 110-115 of the Original Decision with respect to why the right to strike, the determination of essential service levels, and the potential for the imposition of a first collective agreement meet the necessity test with respect to the application of the Code to its SPCs. The Employer notes that it does not claim privilege over all aspects of the management of labour relations with its SPCs. It "recognizes the application of the Special Provincial Constables Complaint Procedure Regulations to the SPCs" and states that these regulations "certainly address some aspects of the management of labour relations with SPCs" (para. 92).

28 The Employer submits that if the Code applies to the SPCs, they would have the right to strike, and the Board "would have jurisdiction to determine essential service levels, and to regulate and manage strikes and to impose a first collective agreement on the parties". The Employer submits that this would constitute interference with the exercise of the Employer's jurisdiction over matters which fall within the scope of its parliamentary privilege on the necessity test. The Employer submits that since these matters fall within the scope of its parliamentary privilege, the Board has no jurisdiction to consider *Charter* arguments with respect to them: *Vaid* at para. 4.

29 The Employer notes that once parliamentary privilege is established, it immunizes the Legislative Assembly from the application of both the *Charter* and ordinary law (such as the Code) to matters within the scope of its privilege. With respect to the claim that excluding the SPCs from the application of the Code contravenes their Section 2(d) *Charter* right to meaningful collective bargaining, the Employer submits "the provisions of the Code are not the only means by which the SPCs could seek to meaningfully bargain". In *MPAO*, the Court found Section 2(d) of the *Charter* "does not mandate a particular model of labour relations" and the government could have explored "other collective bargaining processes that could better address the specific context in which members of the RCMP discharge their duties" (para. 137).

30 The Employer submits the Legislature is not bound to enact any specific scheme to grant the SPCs bargaining rights, and the Board has no authority to adopt or impose a bargaining scheme unique to the SPCs. The Employer submits that "[r]econciling the constitutional principles of parliamentary privilege and the freedom of association is not the role of the Board". Rather, it says, the Board's only role is "to exclusively determine whether it has jurisdiction to apply the Code to the SPCs".

31 The Employer submits the original panel "correctly held that due to the unique duties and responsibilities of the SPCs employed by the Legislative Assembly and their necessary role in ensuring that the Legislative Assembly and its members are able to fulfill their legislative and deliberative duties, parliamentary privilege precludes the application of the Code to the SPCs".

32 In final reply, the Applicant notes the Original Decision finds the Board's ability to set essential service levels in the event of a lawful strike means the Code cannot apply to the SPCs because the Board, rather than the Employer, would be deciding staffing levels (para. 111). The Applicant submits this means the original panel found the determination of staffing levels is protected by parliamentary privilege.

33 The Applicant further notes the Original Decision finds the "Board's authority to impose a first collective agreement potentially puts decisions concerning internal matters such as the SPCs' specific work duties outside the hands of the Legislative Assembly" (para. 113). The Applicant submits this means the original panel found the negotiation of work duties and the terms and conditions of SPCs' work fall within the scope of parliamentary privilege. The Applicant submits the original panel's decision with respect to the scope of parliamentary privilege is overbroad.

34 The Applicant submits the Employer's position that parliamentary privilege does not exclude review under the *Police Act* of its decisions to discipline or dismiss SPCs is consistent with the finding in *Chagnon* that "it is not necessary to a legislative assembly's ability to perform its constitutional functions that the scope of its privilege to exclude strangers be drawn so broadly as to include the decision to dismiss employees who implement this privilege" (para. 56). Despite this, the Applicant submits the Original Decision nevertheless concludes that parliamentary privilege applies with respect to the Employer's "management of members of the Association free from the application of the Code and the jurisdiction of the Board" because it is "so closely" intertwined with the Legislative Assembly's functions as a deliberative body (para. 115). The Applicant submits, therefore, that the approach to parliamentary privilege by the original panel was overly broad and inconsistent with *Chagnon*.

35 With respect to the Employer's argument that the SPCs do not need access to the Code to exercise their Section 2(d) *Charter* right to meaningful collective bargaining, the Applicant submits that if, as the Employer asserts and the original panel found, parliamentary privilege protects the Employer's ability to direct, schedule, and assign the SPCs' work, then "any collective bargaining scheme that includes any of these features cannot exist for the special provincial constables". The Applicant submits there is no other structure of collective bargaining available to the SPCs beside the Code.

IV. ANALYSIS AND DECISION

36 An application under Section 141 of the Code must meet the Board's established test for granting leave for reconsideration: *Brinco Coal Mining Corporation*, BLCRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93). It must raise a serious question as to the correctness or fairness of an original decision. We find the Applicant's submissions raise a serious question as to the correctness of the Original Decision's conclusion that parliamentary privilege precludes the application of the Code to the SPCs. Accordingly, leave for reconsideration of that determination is granted.

1. The Law on Parliamentary Privilege

37 There is no dispute that *Vaid* and *Chagnon* are the leading authorities on parliamentary privilege. *Chagnon* adopts many passages from *Vaid*, and begins with the following overview of parliamentary privilege:

> Legislative bodies in Canada have inherent parliamentary privileges which flow from their nature and function in a Westminster model of parliamentary democracy. By shielding some areas of legislative activity from external review, parliamentary privilege helps preserve the separation of powers. It grants the legislative branch of government the autonomy it requires to perform its constitutional functions. Parliamentary privilege also plays an important role in our democratic tradition because it ensures that elected representatives have the freedom to vigorously debate laws and to hold the executive to account.
>
> However, inherent privileges are limited to those which are necessary for legislative bodies to fulfil their constitutional functions. The inherent nature of parliamentary privilege means that its existence and scope must be strictly anchored to its rationale. Because courts cannot review the exercise of parliamentary privilege, even on *Canadian Charter of Rights and Freedoms* grounds, they must ensure that the protection provided by privilege does not exceed the purpose of this doctrine. This case illustrates the importance of taking a purposive approach when assessing parliamentary privilege claims. (paras. 1-2)

38 The issue in *Chagnon* was whether the dismissals of three security guards employed by the National Assembly of Quebec were immune from external review by a grievance arbitrator due to parliamentary privilege (para. 3). The majority reviewed the development and purposes of parliamentary privilege (paras. 20-24), noting that it is "an important part of the public law of Canada" and that the "insulation from external review that privilege provides is a key component of our constitutional structure and the law that governs it" (para. 24).

39 However, the majority added that "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" and "its existence and scope must be strictly anchored to its rationale" (para. 25). This is because parliamentary privilege "creates a sphere of decision-making immune from judicial oversight for compliance with the *Charter*" and "may also impede persons who are not members of the legislature from accessing recourses available under ordinary law" (para. 25). Accordingly, courts are "apt to look more closely at cases in which claims to privilege have an impact on persons outside the legislative assembly than at those which involve matters entirely internal to the legislature" (para. 25).

40 The majority further stated that the "reach" of parliamentary 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'… Otherwise, it would unjustifiably trump other parts of the Constitution" (para. 27).

41 Specifically, where the claim of parliamentary privilege "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*" (para. 28). The *Charter* and parliamentary privilege "enjoy the same constitutional weight and status", and the "proper approach" is not to resolve any conflict "by subordinating one principle to the other, but rather to attempt to reconcile them" (para. 28). The majority added:

> 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. (para. 28)

42 The majority then noted that 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)" (para. 29). The majority added:

> 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 fulfil its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist" (*Vaid*, at para. 29(5)). (para. 30, emphasis in original)

43 The majority further explained that the party “seeking to rely on the immunity from external review conferred by parliamentary privilege bears the burden of establishing its necessity”, and that it must “demonstrate that the scope of the protection it claims is necessary in light of the purposes of parliamentary privilege” (para. 32).

44 On the question of whether the President of the National Assembly had established that immunizing the decision to dismiss the security guards from external review was necessary in light of the purposes of parliamentary privilege, the majority noted that the security guards “play a key role in ensuring security” and “are involved in 80 to 90 percent of the Assembly’s security work” (para. 33).

45 However, the majority held that, even if a parliamentary privilege over the management of employees exists (which it did not decide), “the management of the security guards – including their dismissals – would fall beyond the scope of any such privilege” (para. 36). While “the tasks performed by the guards are important… subjecting their management to ordinary law would not hamper the autonomy which the National Assembly requires to discharge its constitutional mandate” (para. 36). In that regard, the majority noted that the President “asserts a parliamentary privilege over the management of the security guards as a category of employees” and that this privilege “would immunize not only their dismissals, but all of their employment conditions (from salary to seniority) from review on any grounds” (para. 37).

46 The majority accepted that the “security of the National Assembly is undoubtedly important”, that an assembly “cannot function without maintaining its security”, and that secure legislative precincts “support an assembly in discharging its constitutional functions” (para. 38). The majority further accepted that the “tasks performed by the security guards support the National Assembly in fulfilling its constitutional mandate”, including by playing a “key role” in protecting it from threats and by helping maintain decorum in the chamber (para. 39). The majority then stated:

> 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.
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> 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).

> The necessity test is stringent because, as discussed above, parliamentary privilege has the potential to shield parliamentary decision-making from judicial oversight, including for *Charter* compliance. Here, the privilege sought affects employees who are not members of the National Assembly. Further, the privilege claimed by the appellant may undermine the right of the security guards to meaningfully associate in the pursuit of collective workplace goals, guaranteed under s. 2(d) of the *Charter* (*Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 67). It is thus particularly important to keep the purposes underlying privilege in mind in assessing whether the necessity test is met. The sphere of immunity that is sought must be necessary for the legislative body to have sufficient independence from the other branches of government in order to perform its constitutional functions.
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> In short, the question we must answer in this case is this: is the management of the security guards "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)? In other words, does the National Assembly require unreviewable authority over the management of security guards in order to maintain its "<u>sovereignty</u> as a legislative and deliberative assembly" (*Vaid*, at para. 72 (emphasis added), citing the British Joint Committee Report (1999), at para. 247)? (paras. 40-43)

47 The majority found the President "failed to establish the necessity of the immunity it claims, that is, a parliamentary privilege over the management of the security guards" (para. 44). While the guards "perform some important tasks that are connected to the constitutional functions of the National Assembly" and "contribute to the security of the Assembly and to maintaining order and decorum in the part of the Assembly's chamber that is accessible to the public during question period…immunity from outside scrutiny in the general management of the security guards is not such that, without it, the Assembly could not discharge its functions (*Vaid*, at para. 72)" (para. 44). The "management of the guards could be dealt with under ordinary law without impeding the Assembly's security or its ability to legislate and deliberate (*Vaid*, at para. 29(5))" (para. 44). Permitting "the enforcement of basic employment and labour protections for the security guards would not undermine the independence required for the Assembly to fulfil its mandate with dignity and efficiency" (para. 44).

48 The majority decided that the "question of necessity can, therefore, be addressed without looking to the *ARNA* [*Act relating to the National Assembly*]" (para. 46). It held that "even if a privilege over the management of some parliamentary employees exists, the management of the security guards would fall outside its scope" (para. 51). The majority added: "Despite the important functions performed by the security guards, the President has not shown that it requires the unreviewable authority to dismiss this

category of employees in order for the Assembly to be able to fulfil its constitutional duties with efficiency and dignity" (para. 51).

49 The majority also rejected the President's assertion that "the security guards' dismissals are also subject to the parliamentary privilege to exclude strangers" (para. 52). The majority accepted the existence of this privilege but added that it had to "apply the necessity test to determine whether its scope includes the dismissals of employees who implement it on the President's behalf" (para. 55). That is, the question was "whether the dismissals of employees who implement this privilege on the President's behalf must be immune from external review for the Assembly to be able to discharge its legislative mandate (see *Vaid*, at para. 56)" (para. 55).

50 The majority concluded that "it is not necessary to a legislative assembly's ability to perform its constitutional functions that the scope of its privilege to exclude strangers be drawn so broadly as to include the decision to dismiss employees who implement this privilege" (para. 56). It found that this "unnecessary sphere of immunity would impact persons who are not members of the legislative assembly, and undermine their access to the labour regime negotiated in accordance with their s. 2(d) *Charter* rights" (para. 56). It added that the President "has not shown that the application of general labour law to employees who implement this privilege would jeopardize the autonomy, dignity, and efficiency required for the fulfilment of the Assembly's legislative mandate (see *Vaid*, at para. 29(5))" (para. 56). While external review by a grievance arbitrator would "delay the finality of these decisions", this would not "impede the Assembly's legislative activities" (para. 56). Accordingly, the majority concluded that the "privilege to exclude strangers does not protect the decision to dismiss employees who exercise this privilege from review" (para. 57).

2. Application of the Law

51 Having summarized the law of parliamentary privilege as described and applied in *Chagnon*, we now turn to its application in the present case.

52 There is no dispute that, as the party asserting parliamentary privilege, the Employer "bears the burden of establishing its necessity" (*Chagnon* at para. 32). The Employer says the original panel correctly described the scope of the parliamentary privilege it asserts as "the management of [its SPC employees] free from the application of the Code and the jurisdiction of the Board" (Original Decision, para. 98).

53 The Employer adds that it is not claiming privilege over every aspect of its management of its SPC employees. It states that it accepts the *Special Provincial Constables Complaint Procedures Regulation* (the "SPCCP Regulation") applies to its SPC employees, and it acknowledges that the SPCCP Regulation "certainly address[es] some aspects of the management of labour relations with SPCs".

54 Thus, the Employer does not take the position that parliamentary privilege immunizes it from the application of all ordinary law which affects its management of its SPC employees. In its view, some ordinary law that affects its management of its SPC

employees – the SPCCP Regulation – applies. It takes the position, however, that another ordinary law which would affect its management of its SPC employees – the Code – is precluded by parliamentary privilege. It submits the original panel was correct to accept this position, for the reasons set out in the Original Decision.

55 Accordingly, we will begin by reviewing the reasons set out in the Original Decision for concluding that parliamentary privilege precludes the application of the Code to the SPCs. The question is whether the original panel's analysis is consistent with the law on parliamentary privilege and whether the conclusion it reached is correct.

56 The original panel found, and the Employer does not dispute, that the Employer's asserted privilege to manage its SPC employees "free from the application of the Code and the jurisdiction of the Board" is not a privilege that has already been "authoritatively established" (Original Decision, para. 98). The Employer further does not dispute that accordingly, the question is whether the asserted privilege is "supported under the necessity test" (para. 99).

57 As described by the majority in *Chagnon* (para. 30), the necessity test requires not only that the sphere of activity at issue be connected with the Legislative Assembly's constitutional functions as a deliberative and legislative body, but also that the immunity sought from the application of the ordinary law at issue be necessary. As the majority in *Chagnon* stated, quoting a passage from *Vaid*, "[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 fulfil its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist" (para. 30).

58 Accordingly, in the present case, if the Legislative Assembly's employment of its SPC employees could be subject to the Code without interfering with its constitutional functions of deliberating and legislating, then the claim of immunity due to parliamentary privilege would be rejected as unnecessary (i.e., would not meet the necessity test).

59 In *Chagnon*, the Court considered the duties performed by the National Assembly's security guards, and found that, because they exercised the National Assembly's established parliamentary privilege to exclude strangers and they provided the security and maintenance of peace and order necessary for the National Assembly's constitutional functions of deliberating and legislating, there was a connection to the National Assembly's constitutional functions (paras. 38-39).

60 Similarly, in the present case, the original panel considered the duties performed by the Legislative Assembly's SPCs, and found they were such that there was a connection or "nexus between the role of the SPCs and the legislative or deliberative functions of the Legislative Assembly" (Original Decision, para. 109).

61 While the original panel then states that the role of the SPCs is "greater than the role of the security guards in *Chagnon*", we find nothing turns on this factual distinction for the purpose of the application of the necessity test in this case. We note the security guards in *Chagnon*, while responsible for 80 to 90 percent of the security duties at the

Assembly, were not special provincial constables, such as the SPCs in this case. However, in both cases, the employees' duties and role were found to be such that there was a connection to the constitutional functions of the assembly. That finding alone, however, is not enough to meet the necessity test. The original panel then correctly stated: "as was made clear in *Chagnon*, I must also consider whether the asserted privilege of managing the SPCs' employment free from the Code is necessary" (para. 109).

62 The Original Decision begins its analysis of this part of the necessity test by stating that a "strike may result in a withdrawal of services by the SPCs, which would potentially affect the functioning of the proceedings of the Legislative Assembly in a direct way", adding that the Legislative Assembly "cannot conduct its duties if the Precinct is not safe and orderly, or if it is unable to uphold its procedural integrity and attend to the internal matters for which the SPCs are required" (para. 110). The Original Decision then goes on to find that "Section 72 of the Code does not resolve this issue" (para. 111).

63 Section 72 of the Code allows the Board to make orders that ensure essential services are maintained during a lawful withdrawal of services (strike) under the Code. In our view, the reference to Section 72 in the Original Decision (para. 111) makes clear the original panel did not find the necessity test was met because applying the Code to the Employer's SPCs could give them the ability to engage in an unregulated withdrawal of services which would potentially affect the functioning of the Legislative Assembly. We note that such a finding would be in error, in any event, because strike activity is highly regulated under the Code, including by way of Section 72, as set out more fully below.

64 Rather, the Original Decision finds the necessity test is met because, even if SPCs were subject to the Section 72 requirement to maintain essential services, this would not be an acceptable situation because it "puts decisions about what service levels the Legislative Assembly requires to operate into the hands of" the Board, rather than the Employer, during a lawful strike under the Code (para. 112). The Original Decision similarly says that the Board's authority [under Section 55 of the Code] to impose a first collective agreement potentially puts decisions concerning internal matters such as the SPCs' terms and conditions of employment outside the hands of the Legislative Assembly (para. 113).

65 The Original Decision thus concludes that "decisions about how the Legislative Assembly uses the SPCs in order to fulfill its function would be determined by [the Board]" rather than the Employer, and this circumstance "undermines the level of autonomy required to enable the Legislative Assembly and its members to do their work with dignity and efficiency" (para. 113). On this basis, the Original Decision concludes the necessity test is met and parliamentary privilege precludes the application of the Code to the Employer's SPCs.

66 In essence, the Original Decision finds parliamentary privilege precludes applying the Code to the Employer's SPCs because it would make the Employer's management of the SPCs as employees subject to Code requirements and Board review. For example, under Section 72, the Board, not the Employer, would decide what staffing levels of SPCs are required to maintain essential services in the event of a lawful strike. Under the first collective agreement provisions in Section 55, if the parties are unable to conclude a first collective agreement with a Board mediator's assistance, the Board can direct that the dispute be resolved by way of binding arbitration. Such a direction could result in an arbitrator imposing collective agreement provisions that have the effect of limiting the Employer's managerial discretion.

67 On this view of parliamentary privilege, as set out in the Original Decision, the necessity test is met where applying ordinary labour and employment law subjects a legislative assembly's management of its employees whose duties and role are connected to its constitutional functions (like the security guards in *Chagnon* and the SPCs in the present case), to tribunal, arbitral, or court review. We find the approach in the Original Decision reflects the reasons of the dissenting judges in *Chagnon*, who framed the issue as follows: "To preserve the integrity of the privileges of the Assembly and its members, the President [of the National Assembly] must be able to manage the employees who exercise these privileges without having his or her decisions called into question" (para. 141, emphasis added). The dissenting judges added:

> Once the courts have found that the sphere of activity and the category of employees are necessary to the proper functioning of the Assembly, the inquiry ends, since the privilege has been established. There is thus no need to consider, as [the majority] does, whether grievance arbitration – a procedure for reviewing a decision that unquestionably concerns the exercise of privilege – may interfere with the proper functioning of the Assembly: para. 4. This is a serious jurisdictional error that distorts the test laid down in *Vaid*. (para. 143, emphasis added)

68 As this passage from the dissenting reasons in *Chagnon* indicates, the majority took a different view of what is required to meet the necessity test for parliamentary privilege. The majority reasons state that finding the duties performed by a category of employees of a legislative assembly is necessary to the proper functioning of the Assembly does not end the inquiry; it is only "part of the equation" (para. 41). Where that finding is made, the question then becomes: would the application of the ordinary labour relations and employment law in issue (here, the Code) to those employees in question (here, the SPCs) interfere with the assembly's ability to perform its constitutional functions? If not, then the necessity test for the application of parliamentary privilege is not met.

69 The fact that applying the Code to the SPCs would make the Legislative Assembly's management of those employees subject to Board review and jurisdiction under the Code is not sufficient to establish the necessity test is met in this case, for the reasons identified by the majority in *Chagnon*.

70 As the dissenting judges in *Chagnon* noted (at para. 143), the grievance arbitrator in that case had the jurisdiction to revisit and overrule the National Assembly's decision to dismiss the security guards for alleged cause. Nonetheless, the majority found it was not necessary to the proper constitutional functioning of the Assembly that its employment relationship with its security guards be free from such ordinary labour and employment law and jurisdiction.

71 In reaching its conclusion, the majority in *Chagnon* noted that the security guards were not expressly excluded by the *ARNA* from the labour and employment law and jurisdiction which would otherwise apply to them. However, the majority stated that "question of necessity can…be addressed without looking to the *ARNA*" (para. 46). That is, the majority's decision did not turn on any finding that the National Assembly had statutorily waived or reduced its ability to assert parliamentary privilege over the management of its security guards. The majority's conclusion was based on an application of the law of parliamentary privilege.

72 In that regard, the majority in *Chagnon* noted that "*Vaid* itself does not establish the existence of any form of privilege over the management of employees" (para. 35) and "*Vaid* did not determine whether a parliamentary privilege over the management of some employees exists" (para. 36). It added:

> … As in *Vaid*, we do not need to decide whether this privilege exists, as <u>the management of security guards – including their dismissals – would fall beyond the scope of any such privilege</u>. As we will explain, the tasks performed by the guards are important, but subjecting their management to ordinary law would not hamper the autonomy which the National Assembly requires to discharge its constitutional mandate. (para. 36, emphasis added)

73 In reaching this conclusion, the majority in *Chagnon* noted that the claim of privilege over the management of the security guards would "immunize not only dismissals, but all of their employment conditions (from salary to seniority) from review on any grounds" (para. 37). The majority acknowledged the importance of the work performed by the security guards in ensuring the National Assembly could perform its constitutionally mandated functions. However, it found that the "management of the guards could be dealt with under ordinary law without impeding the Assembly's security or its ability to legislate and deliberate" and that "[p]ermitting the enforcement of basic employment and labour relations protections for the security guards would not undermine the independence required for the Assembly to fulfil its mandate with dignity and efficiency" (para. 44).

74 Thus, *Chagnon* makes clear that a parliamentary privilege over the management of employees has not been definitively established, and at most it would apply to some employees of a legislative assembly, not to all employees. Furthermore, it does not necessarily apply because the employees in question perform duties which support or facilitate the constitutional functioning of the assembly or which give effect to an established privilege of the assembly such as to exclude strangers. Even in those circumstances (which applied in *Chagnon*), if the management of the employees in

question could be made subject to the ordinary law in question without impeding the assembly's "ability to legislate and deliberate" (para. 44), then parliamentary privilege would not preclude the application of that law to those employees.

75 In reaching its conclusion on the facts before it in *Chagnon*, the majority noted that the claim of parliamentary privilege in that case "may undermine the right of the security guards to meaningfully associate in the pursuit of collective workplace goals, guaranteed under s. 2(d) of the *Charter*" (para. 42). In those circumstances, the correct approach was not to subordinate the employees' *Charter*-protected rights to the assembly's claim of parliamentary privilege, but to attempt to reconcile the two.

76 In the present case, the Applicant submits that the Employer's claim that parliamentary privilege precludes the application of the Code to the SPCs affects their *Charter*-protected rights to meaningful collective bargaining. The Applicant submits that the original panel failed to attempt to reconcile those rights, instead subordinating them to the Employer's claim of parliamentary privilege.

77 The Employer submits the *Charter*-protected right to meaningful collective bargaining does not necessarily mean that a group of employees must have access to Code, if there is another method by which they could access that right. However, the Employer acknowledges there is no other statutory regime by which the SPCs could access meaningful collective bargaining. As the Union notes, the Supreme Court of Canada, in *Dunmore v. Ontario (Attorney General)* 2001 SCC 94, recognized that the exclusion of employees from a statutory labour relations regime may mean they are not able to exercise *Charter*-protected associational rights. In our view, it is not established that there is another method besides the Code by which the SPCs can access and exercise their *Charter*-protected right to meaningful collective bargaining.

78 Where the privilege 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*. Both enjoy the same constitutional weight and status, and one does not prevail over the other. Accordingly, when conflicts between the *Charter* and parliamentary privilege applies, the Board must not subordinate one to the other but must attempt to reconcile them: *Chagnon*. In the circumstances of this case, we find the Employer's claim of parliamentary privilege conflicts with the employees' *Charter*-protected right to meaningful collective bargaining, and accordingly the approach we take should attempt to reconcile the two.

79 In undertaking this exercise, we note the Employer raised its objection of parliamentary privilege to an application for certification under Section 18 of the Code. Applications for certification are the primary way employees access meaningful collective bargaining rights by way of the Code. They are also the method by which employees exercise their freedom to choose whether to be represented by a trade union, which is a "fundamental premise" of the Code: *Forano Limited*, BCLRB No. 2/74.

80 The Board has long recognized that the Code gives effect to *Charter*-protected associational right of employees by ensuring access to collective bargaining that is made meaningful by the various rights and protections the Code provides. As explained in *Cardinal Transportation B.C. Ltd*, BLCRB No. B344/96 (Reconsideration of BCLRB Nos. B463/94 and B232/95):

> The Code is a comprehensive legislative scheme regulating labour relations. A fundamental purpose of the Code is to guarantee freedom of association in the workplace by ensuring access to collective bargaining. This is expressly set out in Section 2(1)(a) [now 2(c)], which provides that one of the fundamental purposes of the Code is "to encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees". This purpose is reflected in Section 4, which guarantees all employees the right to be a member of a trade union and to participate in its lawful activities. It is given effect by Part 3 of the Code which provides for the certification of trade unions to represent employees in collective bargaining, as well as for the termination of those bargaining rights by the free choice of employees.
>
> The unfair labour practice provisions set out in Sections 6 and 9 are intended to ensure that the right of "freely chosen" trade union representation for the purpose of collective bargaining is meaningful. It has been recognized at least since the drafting of *The National Labour Relations Act*, Chapter 372, 49 Stat. 449 (1935) (the "*Wagner Act*") in 1935 that employees are economically dependent upon their employers, and are thereby unusually vulnerable to any attempt by employers to influence or interfere with their choice in collective representation. The unfair labour practice provisions of the Code, and the equivalent provisions in other labour legislation in North America, are intended to protect the right to bargain collectively; i.e., the right to freedom of association in the workplace. Such provisions are one of three essential components of all legislation modeled on the *Wagner Act* (including all labour legislation in Canada): certifications, unfair labour practices and the duty to bargain in good faith. (paras 185-186) (emphasis added)

81 When the right to meaningful collective bargaining is accessed under the Code, the Board's role is to encourage "the practice and procedures of collective bargaining" (Section 2(c)) through the various mechanisms available in the Code. These include the unfair labour practice provisions, the Section 11 requirement to bargain in good faith, and the provisions of Part 4 of the Code, "Collective Bargaining Procedures". All of these Code provisions and processes are designed to assist the parties to achieve a freely negotiated collective agreement – that is, a collective agreement which reflects the terms the parties have negotiated and agreed to.

82 The legislature has recognized, however, that it can be difficult for parties to negotiate their first collective agreement. Section 55 of the Code sets out a process through which the parties can achieve that agreement with the assistance of a mediator. That process can ultimately result in the mediator making recommendations with respect to issues that the parties have been unable to resolve, and if one or both parties do not accept the recommendations, the Board has the authority, among other options under Section 55, to direct the parties to resolve any outstanding issues through binding arbitration. Under Section 55 of the Code, a recommendation for binding arbitration and an arbitrator's ultimate decision establishing terms and conditions of employment for a first collective agreement, is made having regard to the law and policy of the Code as set out in *Yarrow Lodge*, BCLRB No. B444/93. This process is subject to a number of considerations that inform our approach to the application of the necessity test for parliamentary privilege in the present case. For example, as a matter of public policy, under Section 55 of the Code, a mediator's recommendations, a decision by the Board to refer outstanding issues to binding arbitration, and what terms and conditions an arbitrator may decide to include in a first collective agreement should not in any way place an employer's business in jeopardy: Section 2, *Yarrow Lodge*.

83 Section 55 is one part of a comprehensive scheme for meaningful and effective collective bargaining under the Code. It is consistent with Section 2 and the rest of the provisions of the Code, which encourage freely negotiated collective agreements. That is so whether a first collective agreement is achieved by the bargaining efforts of the parties on their own, or with the assistance of the mediator and the Board under Section 55. The possible "imposition" of a collective agreement as a result of a direction under Section 55(6), and the involvement of the Board in that process is well-established, as set out in *Yarrow Lodge*. That process is not qualitatively different from the Board's authority under other provisions of the Code to make orders and impose requirements on employees, unions, and employers.

84 For example, Section 84 of the Code imposes a "just and reasonable cause" requirement and a grievance arbitration process into all collective agreements. Under the unfair labour practice and remedial powers provision in the Code, the Board can review an employer's decision to dismiss an employee for cause, and can require the employer to reinstate the employee. This is the essentially the same power that the majority in *Chagnon* found did not meet the necessity test.

85 In our view, the power of the Board under Section 55 of the Code to direct the parties to a binding arbitration process under which a first collective agreement may be imposed, like the Board's other Code powers, would undoubtedly affect the Legislative Assembly's management of the SPCs as their employees. However, we find the exclusion of the Code provisions is not necessary for the Legislative Assembly's ability to perform its constitutional functions.

86 Under the Code, a collective withdrawal of services or "strike" by unionized employees is unlawful, except to the extent that the provisions in Part 5 of the Code, "Strikes, Lockouts and Picketing", permit it. If a strike occurs which does not meet the stringent requirements set out in the Code, it is unlawful and the Board has the power to

order that the employees cease and desist from striking. Such orders can be filed and enforced in court. Other Code provisions regulate the way in which lawful strike activity is executed. For example, the Board can limit the location and extent of lawful striking and picketing activity so as to minimize the effect on other employers and in light of the public interest.

87 As we have already noted, the Board can further regulate lawful strikes under Part 6 (Sections 72 and 73) of the Code, "Essential Services", which allows for the imposition of essential service orders that restrict the ability of employees who would otherwise be in a lawful strike position to withdraw their services. Under Section 72 of the Code, the Board identifies those facilities, productions, and services necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia. Where the Board issues an essential services order, the services must be maintained "in full measure" and must not restrict or limit the service: Section 72(8) of the Code.

88 As explained in *Health Employers' Association of BC*, BCLRB No. B73/96, the Code's essential services provisions allow for a limited expression of the right to strike (which has since been found to be a constitutionally protected right, as discussed below):

> This Province, along with other jurisdictions, has long ago determined that employees of government and public institutions should have access to meaningful collective bargaining with respect to the terms and conditions of their employment. One result of this policy decision is the tension created between the efforts of employees striving to advance their interests to a successful conclusion through collective bargaining means, including work disruption, the efforts of institutions to resist a strike, and the maintenance of essential services to protect the health, public safety and welfare of citizens during the course of such collective bargaining. In some jurisdictions the collective bargaining process for public servants and employees of public institutions has been limited by a total restriction on the right to strike and mandatory interest arbitration, while in others, legislatures have opted for the policy of a "controlled strike". In British Columbia, the legislature selected the latter option. (para. 2)

89 As further stated in *Health Employers' Association of BC*, BCLRB No. B125/2001 (Leave for Reconsideration of BCLRB No. B118/2001), the Board has decades of experience with essential service determinations and has ensured that services vital to the public interest have been maintained notwithstanding employees have the right to strike under the Code:

> The Board's mandate in this area is not an easy one to fulfill, but it is one that has been in place for some 25 years. A number of strikes have occurred in health care since the essential services provisions were first enacted. The Board has been

> responsible for ensuring essential services have been in place not only in each dispute where there has been actual strike activity, but also for each round of collective bargaining where the potential of strike activity has not been realized. Given the potential risks, it is a challenging and difficult task. Nevertheless, despite 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)

90 Another 20 years have passed since these observations were made in 2001, and the Board has continued to be responsible for ensuring that essential services have been in place, and the process has continued to work, not only in the complex and vital area of health care services, but also in a wide range of other employment contexts. Throughout, the Board has taken a broad and purposive approach to the provision, as described in *Bulkley Valley School District*, BLCRB No. B147/93, where the Board noted that, while collective bargaining including the right to strike or lockout is a public good, essential service legislation imposes a critical limitation on that right:

> 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)

91 Thus, in setting essential service levels, the Board is not concerned only with collective bargaining. As required by Section 2 of the Code, the Board also exercises its powers and performs its duties under the Code in a manner that "(g) ensures that the public interest is protected during labour disputes".

92 In our view, therefore, the Code provides a mechanism for protecting the public interest by maintaining essential services "in full measure", including with respect to the ability of the Legislative Assembly to fulfil its constitutional functions, in the event of a lawful strike by the SPCs. Applying the Code to the SPCs would affect the Legislative Assembly's management of them as employees and make it subject to Board review. However, we find that, weighing the conflicting constitutional rights at issue in this case, they can be reconciled on the basis that applying the Code to the SPCs does not impede the Legislative Assembly from carrying out its constitutional functions, including in the event of a strike.

93 We appreciate that making the Code applicable to the Employer's SPCs would affect its management of them in a variety of significant ways. However, in deciding whether the impact of the Code on the Employer's management of the SPCs is such that the necessity test for parliamentary privilege is met, we note that in *Chagnon* the majority emphasized not only that the test is stringent, but also that where parliamentary

privilege conflicts with constitutionally protected *Charter* rights, such as the right to meaningful collective bargaining, parliamentary privilege does not take precedence. Rather an attempt must be made to reconcile the two. In our view, the original panel erred in failing to take into account, or alternatively to give appropriate consideration to, the constitutionally protected *Charter* rights at issue in this case.

94 In *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 ("*SFL*"), the majority noted that in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, Section 2(d) of the *Charter* was found to protect "the right of employees to engage in a meaningful process of collective bargaining", and that right was further enlarged and elucidated in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 and in *MPAO*. The majority in *SFL* decided that "the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations" and the "right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right" (para. 3). The majority added that this applies to public sector employees, even those that provide essential services (para. 4).

95 In *SFL*, the majority stated that the right to strike is "constitutionally protected because of its crucial role in a meaningful process of collective bargaining" (para. 51), going on to explain this statement (paras. 52-72). The majority then turned to consider the constitutionality, under Section 1 of the *Charter*, of certain essential service legislation, which "prevents designated employees from engaging in *any* work stoppage as part of the bargaining process" (para. 78, emphasis in original). The majority concluded the legislation did not meet the Section 1 test:

> … The *unilateral* authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses, justify the trial judge's conclusion that the *PSESA* impairs the s. 2(d) rights more than is necessary. (para. 81, emphasis in original)

96 The majority in *SFL* concluded:

> Given the breadth of essential services that the employer is entitled to designate unilaterally without an independent review process, and the absence of an adequate, impartial and effective alternative mechanism for resolving collective bargaining impasses, there can be little doubt that the trial judge was right to conclude that the scheme was not minimally impairing. Quite simply, it impairs the s. 2(d) rights of designated employees much more widely and deeply than is necessary to achieve its objective of ensuring the continued delivery of essential services.
>
> The *Public Service Essential Services Act* is therefore unconstitutional. (paras. 96-97)

97 Thus, the conclusion in *SFL* was not that all essential service legislation which restricts the right to strike is unconstitutional. Rather, it was that such legislation which gave the employer the unilateral and unreviewable ability to set essential service levels in the event of a lawful strike was unconstitutional. The decision finds both that the right to strike is constitutionally protected and that the right is infringed in a way that cannot be justified under Section 1 of the *Charter* where all power to set staffing levels lies unilaterally in the hands of the employer and is not subject to review. We acknowledge that the Court in *SFL* was not addressing an argument regarding parliamentary privilege and *Chagnon* does not directly address the right to strike in assessing the scope of the parliamentary privilege asserted in that case.

98 However, in the present case, we find the *SFL* decision is useful in light of the admonition in *Chagnon* that, where parliamentary privilege conflicts with *Charter* protected rights, parliamentary privilege is not to be given greater weight; rather, the two are to be reconciled wherever possible.

99 Here, the Employer argues, and the Original Decision holds, that the necessity test is met because the Employer must have an absolute and unreviewable power to set essential service staffing levels for SPCs in the event of a lawful strike, as well as over all other matters to do with the Employer's management of those employees that would be affected by applying the Code. However, we find this view does not appropriately reconcile the constitutionally protected principles at issue.

100 Applying the Code to the Legislative Assembly's SPC employees would mean its managerial decisions as their employer are subject to Board review and authority under the Code. In our view, this fact alone does not meet the necessity test for parliamentary privilege. Applying the Code to the SPCs would not impede the Legislative Assembly in carrying out its constitutional functions. The Code's provisions, including but not limited to Section 72, ensure that the SPCs' role in protecting the security, safety, and orderliness of the Precinct, necessary for the constitutional functioning of the Legislative Assembly, would be maintained even in the event of a lawful strike.

101 It is therefore not necessary to exclude the Employer's management of its SPC employees from the ambit of the Code. We find the constitutional principles at issue in this case can be reconciled without denying these employees access to meaningful collective bargaining, and other constitutionally protected associational rights, under the Code. While the Board's authority over labour relations and employment matters under the Code is broader than the authority of a labour arbitrator, we find the facts of this case do not show that applying the Code to the SPCs would conflict with the Legislative Assembly's ability to perform its constitutional functions. Accordingly, we find the Employer has not met its burden of establishing its claim that parliamentary privilege precludes the application of the Code to its SPC employees.

V. CONCLUSION

102 For the reasons given, the Application is allowed, and the Original Decision is set aside. The only remedy that we find appropriate in the circumstances is a declaration that parliamentary privilege does not preclude the application of the Code to the Employer's SPC employees.

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