Federal Court of Appeal | Cour d'appel fédérale

Date: 20190220

Docket: A-332-17

Citation: 2019 FCA 33

CORAM: **NOËL C.J.**
STRATAS J.A.
LASKIN J.A.

BETWEEN:

BOARD OF INTERNAL ECONOMY AND SPEAKER OF THE HOUSE OF COMMONS

Appellants

and

BOULERICE ET AL. AND ATTORNEY GENERAL OF CANADA

Respondents

and

MAURICE VELLACOTT and THE SENATE OF CANADA

Interveners

Heard at Ottawa, Ontario, on November 14, 2018.

Judgment delivered at Ottawa, Ontario, on February 20, 2019.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: STRATAS J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal brought by the House of Commons management body, the Board of Internal Economy (also referred to as the Board), and the Speaker of the House of Commons (together, the appellants) from a decision of the Federal Court (2017 FC 942) *per* Gagné J. as she then was (the judge) dismissing their motions to strike four judicial review applications brought by Alexandre Boulerice and others (the respondents). The motions to strike were based on the contention that the decisions being challenged by the applications are covered by parliamentary privilege, and, as such, are immunized from judicial review and that the Board is not a "federal board, commission or other tribunal" under the *Federal Courts Act*, R.S.C., 1985, c. F-7 [*Federal Courts Act*].

[2] The respondents – 66 in T-304-15; 55 in T-1935-14 and 23 in T-1539-14 and T-1526-14 – were sitting New Democratic Party (NDP) Members of Parliament when their judicial review applications were launched in July and September 2014. They contend that four decisions made by the Board of Internal Economy, holding that they misused parliamentary funds and requiring them to repay the amounts improperly used, were arbitrary, contrary to parliamentary rules, politically motivated and made in bad faith.

[3] The intervener, Maurice Vellacott (Mr. Vellacott), is a former Conservative Party Member of Parliament. He was granted intervener status to provide context concerning his own judicial review application (presently in abeyance) challenging a decision of the Board. In his

case, the Board held that he claimed *per diem* and related expenses in circumstances when none were payable given that his primary place of residence was in the National Capital Region rather than in Saskatchewan.

[4] The intervener, the Senate, supports the position of the appellants. It is concerned that the decision dismissing the motions to strike could affect rights and powers exercised by the Standing Senate Committee on Internal Economy, Budgets and Administration (the Senate Committee on Internal Economy), the management body of the Senate. This committee is governed by the same statute and operates essentially the same way as the Board of Internal Economy.

[5] In dismissing the appellants' motions to strike, the judge found both that the Federal Court had jurisdiction to review decisions made by the Board like those of any other "federal board" acting pursuant to an Act of Parliament (section 2 of the *Federal Courts Act*) and that the decisions in issue were not covered by parliamentary privilege.

[6] For the reasons that follow, I am of the view that the judge erred in coming to these conclusions. Had she followed the principled approach set out by the Supreme Court in *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 [*Vaid*], which precludes the courts from inquiring into the necessity of a legislated privilege when it is shown to come within an established category, she would have had to conclude that the decisions in issue are covered by parliamentary privilege and, therefore, cannot be judicially reviewed.

BACKGROUND

[7] The Board of Internal Economy, like the Senate Committee on Internal Economy, draws its powers from the *Parliament of Canada Act*, R.S.C. 1985, c. P-1 [the PCA]. Section 4 provides both the House of Commons and the Senate with the same privileges, immunities and powers, while section 5 declares those privileges to be part of the general and public law of Canada. Sections 19.1 and 50 acknowledge respectively the establishment of the Senate Committee on Internal Economy and the creation of the Board. Pursuant to section 52.3, the Board acts "on all financial and administrative matters respecting the House of Commons, its premises, its services and its staff; and the members of the House of Commons." The Senate Committee on Internal Economy plays the same role and exercises the same powers for the Senate. This is best illustrated by the comparative table produced by the appellants (Appellants' compendium, Tab 44) which has been appended to these reasons as Appendix "A".

[8] From the time of Confederation to the enactment of the PCA and the creation of the Board in 1985, the House of Commons and the Senate enjoyed the privileges held by the United Kingdom House of Commons at the time of Confederation pursuant to section 1 of *An Act to define the privileges, immunities and powers of the Senate and House of Commons, and to give summary protection to persons employed in the publication of Parliamentary Papers*, S.C. 1868 (31 Vict.), c. 23. During this same period, the internal management of the House of Commons was the responsibility of the Commissioners of Internal Economy appointed by the Governor in Council under sections 1 and 2 of an *Act respecting the internal Economy of the House of Commons and for other purposes*, S.C. 1868 (31 Vict.), c. 27. Under this Act, only Members of

the House who were also Members of the Queen's Privy Council for Canada could be appointed as Commissioners. Practically speaking, this meant that the Commissioners were drawn from among the Ministers of the Crown.

[9] The Board was created in 1985 in response to recommendations made by a Special Committee of the House. Among the recommendations were that Members of the House become more involved in the management of the House and that the new Board better reflect the composition of the House.

[10] Members of the recognized parties of the House of Commons now constitute the Board. The Board is composed of the Speaker, two Members of the Queen's Privy Council for Canada appointed by the Governor in Council, the Leader of the Opposition or the Leader's nominee, and "other members" of the House of Commons who may be appointed from time to time to represent the opposition and governing parties (subsection 50(2) of the PCA). As a practical matter, under the rules, members of the governing party may hold the majority when matters come to be decided by the Board (subparagraph 50(2)(*b*)(ii) of the PCA). This reflects the manner in which the House operates when it legislates (section 49 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*]).

[11] The Board sets out its rules on various matters including the use of parliamentary funds by way of by-Laws (subsection 52.5(1) of the PCA). It has exclusive authority to decide whether a member's use of parliamentary funds was proper (subsection 52.6(2) of the PCA). It can investigate matters and may as a result make a direction, or a by-Law, refuse a request for funds,

or act as it sees fit (section 10 of the *Rules of Practice and Procedure of the Board of Internal Economy*); various coercive measures may be used to impose compliance (section 19 of the *Members By-Law*).

[12] The Board of Internal Economy, acting through the Speaker, reports to the House and its minutes are tabled in the House. Members of the House may ask questions of a member of the Board designated by the Board during Question Period (subsections 37(2) and (3) and section 148 of the *House of Commons Standing Orders*).

[13] The Board has the capacity of a natural person and may enter into contracts and other arrangements with third parties (section 52.2 of the PCA). In order to provide continuity, members of the Board remain in office when Parliament is dissolved (section 53 of the PCA).

[14] In doing its work, the Board is supported by the House Administration (section 2 of the *Governance and Administration By-Law*). The House Administration is composed of the Clerk of the House of Commons and its employees, who are not Members of the House (sections 6 and 7 of the *Governance and Administration By-Law*). While powers of the Board may be delegated to the Clerk of the House of Commons and its employees, they remain subordinate to the Board (section 2 of the *Governance and Administration By-Law*).

THE CONTESTED DECISIONS

[15] Four decisions are challenged in the underlying judicial review applications. At the time they were made the Conservative Party was the governing party. According to the minutes of the

Board, three Conservatives, two members of the NDP, one Liberal and the Speaker were present when these decisions were made. The two NDP members voted in dissent.

[16] The first two decisions dealt with inappropriate mailings. The first held that certain mailings contravened the *Members By-Law* (presumably subsection 4(3), paragraph 29(1)(*e*), and section 30) because they were made for political purposes. The second required that the related expenses be reimbursed by the Members who failed to adhere by this limitation.

[17] In the third decision, the Board determined that some NDP members inappropriately used parliamentary funds for expenses related to employment, telecommunications and travel. According to the Board, funds from the budget for Members' offices were used to supplement the NDP's National Caucus Research Budget. These budgets are for different purposes: the former is for Members of the House individually to discharge their parliamentary functions at specified locations – *i.e.*, on Parliament Hill or in their constituencies – whereas the latter is for recognized parties to use for research offices (sections 24, 56 and 67 of the *Members By-Law*). No funds may be transferred between these budgets (*Ibidem*, section 70).

[18] The Board's fourth decision required the repayment of some $2.7 million by the Members whose budgets were misused.

[19] In the applications for judicial review relating to the mailings, the respondents acknowledge that the decisions were rendered on the basis that the mailings "were in contravention of the Board's By-Laws [because] they were performed for the benefit of a

political party" (Applications for judicial review, Appeal Book, vol. III, pp. 853 and 861). However, they maintain that the decisions are "unreasonable and incorrect," "contrary to the principles of natural justice," and "contrary to the rule of law," (*Ibidem*).

[20] The applications directed at the decisions relating to the use of individual Member's budgets to supplement the NDP's National Caucus Research Offices budget are based on the following grounds (Applications for judicial review, Appeal Book, vol. III, pp. 870 and 880):

- The decision[s] [are] unreasonable, arbitrary and incorrect;
- The decision[s] [are] contrary to the principles of natural justice and of fairness;
- The decision[s] [are] contrary to the rule of law;
- The decision[s] [are], in fact, an example of political bias and [were] made in bad faith;
- The decision[s] [are] absurd in the light of modern technologies that enable people to work everywhere;
- There is no legal basis for [these] decision[s] in Canadian law or in parliamentary rules;
- The decision[s] [are] illegal since members of Parliament are entitled by law to exercise their parliamentary functions "wherever" and in so doing, are entitled to make use of parliamentary resources to accomplish parliamentary functions.

THE FEDERAL COURT DECISION

[21] In dismissing the appellants' motion to strike, the judge addressed two issues: whether decisions of the Board are subject to judicial review under the *Federal Courts Act*, and whether decisions of the Board relating to the use of resources by members are immunized from review

by parliamentary privilege. Although these issues were addressed separately, she acknowledged that the answer to both questions "ought to be somewhat aligned" (Reasons, para. 10).

[22] Regarding the first issue, the judge concluded that the Board was not excluded from the Federal Courts' jurisdiction under subsection 2(2) of the *Federal Courts Act*. Drawing a distinction between the Senate Committee on Internal Economy and the Board, the judge held that the former draws its powers from section 18 of the *Constitution Act, 1867*, but the Board does not (Reasons, paras. 19 and 20). As well, the judge noted that in addition to not being "as fundamental to our notion of democracy" as the Senate Committee on Internal Economy, the Board is a "subsidiary entity" (Reasons, para. 22). She also described the Board as different from regular committees, which originate not in statute but in Standing Orders of the House and parliamentary tradition, and exercise functions related to the legislative process (Reasons, paras. 27 and 28).

[23] In reaching her conclusion on the first issue, the judge found that the Board's powers set out in the PCA are derived from an Act of Parliament, not from section 18 of the *Constitution Act, 1867*. Identifying section 52.3 of the PCA as the source of the powers exercised by the Board in this instance, she held that the Board's decisions were made under a power conferred by an Act of Parliament. Therefore, they fell within the Federal Court's jurisdiction under sections 18 and 18.1 of the *Federal Courts Act*.

[24] In disposing of the second issue – parliamentary privilege – the judge concluded that the appellants failed to demonstrate that immunizing the Board's decisions from judicial review was necessary in order to protect the dignity and efficiency of the House (Reasons, para. 50).

[25] In reaching this conclusion, the judge first considered the category of parliamentary privilege related to proceedings in Parliament. She cited the Supreme Court's statement in *Vaid* that "not everything that is said or done within the Chamber during the transaction of business forms part of proceedings in Parliament" (Reasons, para. 38). In her view, this category of parliamentary privilege was primarily aimed at protecting freedom of speech in the House of Commons. Relying on the decision of the Supreme Court of the United Kingdom in *R. v. Chaytor*, [2010] UKSC 52, [2011] A.C. 684 [*Chaytor*], she held that dealing with expense claims was not part of proceedings in Parliament (Reasons, paras. 36 to 41).

[26] Turning to the category of parliamentary privilege relating to internal affairs, she emphasized that this category should not be defined too broadly, as it could then encompass all the activities of Parliament (Reasons, para. 43). Instead, in her view, the appellants had to show that the "specific decisions of the Board on the use of resources and services by [M]embers of Parliament are necessary for upholding the dignity and efficiency of the House of Commons, and its capacity to function as a legislative body" (Reasons, para. 46). Because the appellants failed to demonstrate this, the judge concluded that the parliamentary privilege relating to internal affairs did not apply to immunize the Board's decisions from judicial review.

[27] The judge's reasons can also be read as holding that whatever privileges Parliament might have had in the past, they have since been abrogated or waived. Although she recognized that the Senate Committee on Internal Economy continues to hold the privileges which it had, this ceased to be the case insofar as the Board is concerned when regard is had to the provisions of the PCA and related amendments to the *Federal Courts Act* (Reasons, paras. 19, 21, 22, 24 and 30).

THE PARTIES' POSITIONS

[28] Shortly before the hearing of the appeal, the Supreme Court released two decisions which bear on the issue of parliamentary privilege: *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 [*Chagnon*] and *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, 426 D.L.R. (4th) 647 [*Mikisew*]. The parties and interveners were invited to supplement their memoranda of fact and law by filing supplementary written submissions addressing these decisions. The following description of the parties' positions encompasses all of their submissions.

- *The appellants*

[29] The appellants argue that the parliamentary privileges held by the Board and the Senate Committee on Internal Economy are defined by the PCA but that their source is the Constitution of Canada. As these two bodies perform identical functions and both report to and are integral to their respective Houses, they should not be treated differently (Memorandum of the appellants, paras. 45 to 47).

[30] More generally, the appellants argue that the judge mischaracterized the role of the Board within the House. In this respect, they point to the history of the internal management of the House before the creation of the Board. Prior to 1985, managing the resources of the House was unequivocally integral to Parliament (Memorandum of the appellants, paras. 8 to 10). According to the appellants, the enactment of the PCA and the creation of the Board in 1985 did not alter this state of affairs.

[31] The appellants further argue that the parliamentary privilege being claimed is traceable to two established categories and that the judge committed a series of legal errors in failing to recognize this. A third category – discipline – was argued during the course of the hearing.

[32] Regarding the category of proceedings in Parliament, the appellants contend that the judge erred in restricting its scope to freedom of speech within the House (Memorandum of the appellants, para. 66). The appellants highlight the fact that her conclusion conflicts with the recently enacted subsection 52.2(2) of the PCA, which expressly provides that "proceedings of the Board are proceedings in Parliament." Further, the appellants argue that Parliament correctly expressed the scope of the parliamentary privilege in enacting this provision. Relying on *Vaid, R. v. Parliamentary Commissioner for Standards ex p. Al-Fayed*, [1998] 1 W.L.R. 669, pages 7-8 and *Re McGuinness's Application*, [1997] NI 359, pages 7-9, the appellants submit that what constitutes a proceeding in Parliament is "determined by the nature of the decision and function of the decision-maker or entity" (Memorandum of the appellants, para. 67). In this respect, the appellants highlight that the Board is composed of Members of Parliament who supervise the use of parliamentary resources which are essential and inextricably tied to their duties and

responsibilities as Members of Parliament (Memorandum of the appellants, para. 68). According to the appellants, the judge misconstrued the decision of the Supreme Court of the United Kingdom in *Chaytor* by holding that the administrative and financial management functions in issue here are not protected by the recognized category of parliamentary privilege relating to proceedings in Parliament.

[33] Regarding internal affairs, the appellants argue that the decisions of the Supreme Court of the Northwest Territories in *Villeneuve v. Legislative Assembly*, 2008 NWTSC 41, [2008] 10 W.W.R 704 [*Villeneuve*] and of the Superior Court of Québec in *Filion c. Chagnon*, 2016 QCCS 6146 [*Filion 2016*] confirm that the internal management of parliamentary resources comes within this established category (Memorandum of the appellants, para. 77). In this regard, the appellants contend that the judge, at paragraph 45 of her reasons, erred in distinguishing these decisions on the basis that, in contrast, the matter in issue here does not concern the administration of allowances and benefits. In the alternative, should this Court conclude that the claimed privilege was not authoritatively established, the appellants submit that the test of necessity has been met (Memorandum of the appellants, paras. 81 to 88).

[34] The appellants also refer to the recent decisions of the Supreme Court in *Chagnon* and *Mikisew*, and argue that, although not determinative, both support their position that parliamentary privilege applies (Written submissions of the appellants, paras. 1 to 4).

- *The respondents*

[35] The respondents essentially adopt the reasons of the judge. They submit that the appellants mischaracterize the Board when they describe it as an integral component of the House and misapply the doctrine of parliamentary privilege, especially the test that the privilege must be shown to be necessary for the autonomy and dignity of the House.

[36] According to the respondents, the Board is an entity independent from the House, and the Board's functions are administrative, not legislative (Memorandum of the respondents, paras. 22 and 36). Relying on *Mikisew*, they argue that the Board's decisions would be covered by parliamentary privilege and, thus, immunized from judicial review only if they were part of the legislative process, which is described by the Supreme Court as "the development, passage, and enactment of legislation" (Written submissions of the respondents, paras. 10 and 16). The respondents suggest that House committees would fall within that definition (Memorandum of the respondents, paras. 10 to 13). However, they submit that contrary to House committees, which derive their powers and responsibilities from the Standing Orders of the House of Commons, the Board acts pursuant to the PCA (Memorandum of the respondents, para. 38). Because of this distinction, the respondents argue that the judge correctly ruled that the Board acted under statutory powers and was therefore subject to judicial review.

[37] Regarding new subsection 52.2(2) of the PCA, the respondents argue that it was introduced because of a recent change in the Board's procedures that allowed the Board to have open meetings (Memorandum of the respondents, para. 16). Although the subsection was

enacted "[f]or greater certainty", the respondents argue that it is a legislative recognition that proceedings of the Board were not proceedings in Parliament when the decisions in issue were rendered (Memorandum of the respondents, para. 17).

[38] Finally, the respondents argue that in order to succeed, the appellants had to show that the privilege is necessary (Written submissions of the respondents, para. 27). They view *Chagnon* as requiring that necessity be addressed whenever a parliamentary privilege is claimed (Written submissions of the respondents, para. 4). This is consistent, they submit, with the fact that "parliamentary privilege is a concept which is becoming narrower in our times both in Canada and in most other democratic jurisdictions" (Memorandum of the respondents, para. 75). Relying on *Chaytor* and *Vaid*, they contend that necessity has not been demonstrated in this case and that the scope of the category was overstated (Memorandum of the respondents, para. 62).

- *Mr. Vellacott*

[39] Mr. Vellacott, in his capacity as intervener, takes the position that the two issues addressed by the judge merge into one. He submits that subsections 2(1) and 2(2) of the *Federal Courts Act* are appropriately read as statutory parallels to the common law of judicial review and parliamentary privilege (Memorandum of Mr. Vellacott, paras. 38 and 39). In his words, "judicial review jurisdiction ends where parliamentary privilege begins" (Memorandum of Mr. Vellacott, para. 45).

[40] Mr. Vellacott argues, citing *Chaytor*, that the management of House resources is not generally the subject of a parliamentary privilege. In his view, a distinction must be made

between resolutions and orders that set allowable expenses and the implementation of such resolutions and orders by way of decisions (Memorandum of Mr. Vellacott, paras. 65 to 68). As evidence of the willingness of the courts in Canada to assume jurisdiction over the latter, counsel for Mr. Vellacott pointed to the decision of the Québec Superior Court in *Filion c. Chagnon*, 2013 QCCS 446 [*Filion 2013*].

[41] Responding to the appellants' argument that the addition of subsection 52.2(2) to the PCA in 2017 establishes unequivocally that actions taken by the Board are proceedings in Parliament, Mr. Vellacott submits that identifying a parliamentary privilege and determining its scope is the role of the court and not that of Parliament (Memorandum of Mr. Vellacott, para. 69). In this regard, statutory law, which includes subsection 52.2(2) of the PCA, is presumed not to change the common law and therefore cannot be interpreted to extend the scope of the constitutional privilege (Memorandum of Mr. Vellacott, para. 70).

[42] Finally, Mr. Vellacott alleges that Parliament can only benefit from parliamentary privileges established in the United Kingdom after 1867 if it "enacts a law dealing with a privilege at some point after 1867, which has not happened" (Memorandum of Mr. Vellacott, para. 83). Therefore, he submits that Board decisions that apply By-Laws regarding expenses are not part of any historical privilege as the House of Commons of the United Kingdom "did not provide its House Members with expenses, or indeed even salaries, until 1911" (Memorandum of Mr. Vellacott, para. 84).

- *The Senate of Canada*

[43] The Senate intervenes only on the issue of parliamentary privilege, pointing out that neither the Senate nor the Senate Committee on Internal Economy is a "federal board, commission or other tribunal" within the meaning of section 2 of the *Federal Courts Act* (Memorandum of the Senate, para. 16).

[44] The Senate takes issue with the judge's reliance on *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, 100 D.L.R. (4th) 212 [*New Brunswick Broadcasting*] to hold that necessity for the parliamentary privilege had to be assessed in this case. It points out that a distinction in law exists as between legislated privileges adopted pursuant to section 18 of the *Constitution Act, 1867* and section 4 of the PCA on the one hand, and inherent privileges that, when established under the test of necessity, enure to all legislative assemblies on the other (Memorandum of the Senate, para. 22). It relies upon *Vaid* at paragraph 37:

> Nevertheless, the framers of the *Constitution Act, 1867* thought it right to use Westminster as the benchmark for parliamentary privilege in Canada, and if the existence and scope of a privilege at Westminster is authoritatively established (either by British or Canadian precedent), it ought to be accepted by a Canadian court without the need for further inquiry into its necessity. This result contrasts with the situation in the provinces where legislated privilege, without any underpinning similar to s. 18 of the *Constitution Act, 1867*, would likely have to meet the necessity test (*Harvey*, at para. 73). (Emphasis added by the intervener, the Senate)

[45] According to the Senate, both the category of parliamentary privilege relating to proceedings in Parliament and the category relating to internal affairs apply in this case. Insofar as the latter is concerned, the Senate argues that the judge distinguished *Villeneuve* and *Filion*

2016 on "over-corrected" and "excessively narrow" grounds (Memorandum of the Senate, para. 27).

[46] Finally, the Senate submits that "[t]here can be few matters that speak more directly to the independence of a legislative body than protection from judicial (or executive) interference with that body's *own* decisions regarding the use and allocation of its *own* resources by its *own* members. A contrary conclusion would…signal a radical upending of the constitutional separation of powers." (Memorandum of the Senate, para. 30, emphasis in the original).

ANALYSIS AND DECISION

[47] The two issues addressed by the judge are inexorably linked: the jurisdiction of the Federal Court over the Board turns on whether it was acting pursuant to a power "conferred by or under an Act of Parliament" (section 2 of the *Federal Courts Act*), and this cannot be the case if the challenged decisions are protected by a parliamentary privilege originating in the *Constitution Act, 1867*. As the outcome of this case turns on whether parliamentary privilege applies, that is where the analysis should begin.

[48] The question whether the claimed privilege exists and whether the Board was acting within its scope is one of law. Therefore, it must be correctly decided (*Chagnon*, para. 17; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[49] The judge offered three reasons for holding that the Board's decisions are not protected by parliamentary privilege:

- In contrast to the Senate Committee of Internal Economy, the Board draws its powers from an Act of Parliament rather than the Constitution (Reasons, paras. 20 and 26).

- According to *Chaytor*, dealings with expense claims do not qualify as proceedings in Parliament (Reasons, paras. 36 to 41).

- Immunizing from judicial review decisions made by the Board concerning the management of Parliament's internal affairs has not been shown to be necessary to preserve the dignity and efficiency of the House of Commons (Reasons, paras. 42 to 46 and 50).

[50] All of these conclusions were in error.

[51] As to the first reason offered by the judge, the functions performed by the Board are exactly the same as those performed by the Senate Committee on Internal Economy. Both are based on parliamentary privileges legislated in accordance with section 18 of the *Constitution Act, 1867*, and are constitutional in nature because they are an essential aspect of these legislative bodies' autonomous functions. The fact that the privilege of the House of Commons and the Senate over their internal financial affairs were continued by legislative enactments, initially by section 1 of the *Act to define the privileges, immunities and powers of the Senate and the House* in 1868 and later by section 4 of the PCA, does not alter the constitutional origin of the power being exercised (*Southam Inc. v. Canada (Attorney General)*, [1990] 3 F.C. 465 at 479-480, 73 D.L.R. (4th) 289 (C.A.) [*Southam*]).

[52] The rejection of the claimed privilege relying on *Chaytor* was also in error. *Chaytor* deals with individuals who were charged with false accounting in submitting expense claims while they were Members of the House of Commons or House of Lords. They claimed that their actions were covered by parliamentary privilege and that therefore they could not be prosecuted for their deeds (*Chaytor*, para. 1). The issue was not whether the expenses were incurred for a parliamentary purpose but rather whether the claimed expenses were incurred at all (*Chaytor*, para. 8). In holding that the appellants were not protected by parliamentary privilege, Lord Phillips – one of the three Justices who wrote and whose reasons, together with those of Lord Rodger, were endorsed by the majority – drew a distinction between decisions involving the implementation of existing rules and those involving the rules themselves. In his view, only the latter would be protected by privilege because in the United Kingdom, privilege over the former had been waived (*Chaytor*, para. 92):

> …If an applicant sought to attack by judicial review the scheme under which allowances and expenses are paid the court would no doubt refuse the application on the ground that this was a matter for the House. Examination of the manner in which the scheme is being implemented is not, however, a matter exclusively for Parliament.

[53] As will be seen, there is no basis for holding that such a waiver has taken place in Canada. For now, I note that the respondents have attacked the scheme adopted by Parliament in at least two respects – *i.e.*, by taking the position that they are entitled to payment of mailing costs without denying that these were incurred for political purposes and by asserting that modern technology has done away with the requirement that reimbursable office expenses be incurred in specific locations as the rules presently require (Applications for judicial review, Appeal Book, vol. III, pp. 853, 861, 870 and 880).

[54] Lastly, the judge's conclusion that immunizing decisions relating to internal affairs from review by the courts had not been shown to be necessary in order to preserve the dignity and efficiency of the House disregards a fundamental aspect of *Vaid*. *Vaid* holds that when a legislated privilege at the federal level is shown to come within a recognized category of parliamentary privilege, a court must accept that necessity has been established (*Vaid*, paras. 29(9) and 37).

[55] The respondents have placed great reliance on the injustice which they say will result if judicial review of the Board's decisions is not permitted. They allege a number of improprieties including bad faith. However serious these allegations are, they have no bearing on the question whether the privilege has been shown to exist or not. If it does, it lies within the exclusive competence of Parliament to determine whether its rules have been complied with (*Vaid,* para. 30).

[56] *Vaid* is the leading case on the issue of parliamentary privilege in this country. Unlike almost every case in this area of law, it has the distinction of being unanimous and has been repeatedly cited by courts and commentators in Canada, the United Kingdom and other countries with a Westminster-style constitution. As here, the parliamentary privilege in issue in *Vaid* was a legislated privilege. According to *Vaid* (at para. 39):

> […] the first step a Canadian court is required to take in determining whether or not a privilege exists within the meaning of the *Parliament of Canada Act* is to ascertain whether the existence and scope of the claimed privilege have been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster (*Ainsworth Lumber*, at para. 44).

[57] As this passage indicates, legislated parliamentary privileges can originate from our own Parliament or from the United Kingdom. This is because of the combined effect of section 18 of the *Constitution Act, 1867*, as it was amended in 1875, and section 4 of the PCA. Section 18 of the *Constitution Act, 1867*, as amended, provides:

18. The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.	**18.** Les privilèges, immunités et pouvoirs que posséderont et exerceront le Sénat et la Chambre des Communes et les membres de ces corps respectifs, seront ceux prescrits de temps à autre par loi du Parlement du Canada; mais de manière à ce qu'aucune loi du Parlement du Canada définissant tels privilèges, immunités et pouvoirs ne donnera aucuns privilèges, immunités ou pouvoirs excédant ceux qui, lors de la passation de la présente loi, sont possédés et exercés par la Chambre des Communes du Parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande et par les membres de cette Chambre.

I note that the use of the words “de la présente loi” in the French text is obviously in error when regard is had to the words “of such Act” in the English text which, being a United Kingdom statute, is the only official version.

Section 4 of the PCA provides in turn:

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	**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

of the United Kingdom and by the members thereof, in so far as is consistent with that Act; and	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.

[58] Legislated parliamentary privileges can extend to any enjoyed by the United Kingdom House of Commons and its Members at the time of the enactment of those privileges into Canadian law and paragraph 4(*b*) of the PCA authorizes Parliament to further define them by way of legislation (*Vaid*, para. 33; see also *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, 137 D.L.R. (4th) 142 [*Harvey*], para. 66).

[59] In contrast, inherent parliamentary privileges derive their constitutional status "from the very nature of the institution" and from the founding colonies' desire expressed in the preamble of the *Constitution Act, 1867* to adopt "a Constitution similar in Principle to that of the United Kingdom […]" (*New Brunswick Broadcasting*, p. 351).

[60] Necessity for the protection of the dignity and efficiency of the House is the historical foundation for all parliamentary privileges (*Vaid*, para. 29(5)). However, at the federal level, once a legislated parliamentary privilege is shown to come within an established category, necessity need not be proven again (*Vaid*, para. 29(9)):

> Proof of necessity is required only to establish the existence and scope of a category of privilege. Once the category (or sphere of activity) [for a claimed privilege] is established, it is for Parliament, not the courts, to determine whether

> in a particular case the exercise of the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts: "Each specific instance of the exercise of a privilege need not be shown to be necessary" (*New Brunswick Broadcasting*, at p. 343 […] (Emphasis in the original removed).

[61] An established category is one whose existence and scope has been accepted as necessary in order to protect the dignity and efficiency of the House (*Vaid*, para. 29(6)). This demonstration can rest on judicial precedents from Canada, the United Kingdom and other Westminster democracies, on historical acquiescence or acceptance of the category relied upon by those affected by the parliamentary privilege (*Vaid*, paras. 29(8) and 37) and, I would add, because of the notable reliance placed on them by the courts in such matters, doctrinal opinions by recognized expositors of the law of parliamentary privilege.

[62] The parliamentary privilege claimed by the appellants is the exclusive right of the House to oversee and decide matters pursuant to internal rules governing the use made of funds and resources provided to Members of the House for the purpose of allowing them to perform their parliamentary functions.

[63] The issue is whether the privilege so described has been authoritatively established. A legislated privilege is authoritatively established if it is recognized as such in its own right or if it comes within the scope of an established category (*Vaid*, para. 39).

[64] In their memorandum, the appellants submitted that the privilege claimed in this case came within two established categories, proceedings in Parliament and internal affairs. The

privilege relating to proceedings in Parliament is associated with the right of free speech in the Senate or the House of Commons, the right of members to discharge their duties as Senators or Members of the House of Commons which extends to legislative and deliberative functions, and the work involved in holding government to account (*Vaid*, para. 41). The other category, internal affairs, is based on the recognition in the United Kingdom at the time of Confederation that the autonomy of the Houses of Parliament required that their members have exclusive control over their own affairs. During the hearing of the appeal, counsel for the appellants added a third category, the exclusive right of the House to impose discipline in order to maintain the integrity of its internal processes.

[65] The confines within which these categories operate are not easily ascertained and the analysis is made more difficult by the fact that they often overlap. Although Parliament's sovereignty when engaged in its legislative duties is undoubted (*Vaid*, para. 45), not "everything that is said or done within the Chamber […] forms part of proceedings in Parliament" (*Vaid*, para. 43, quoting David Lidderdale, ed., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 19th ed. (London: Butterworths, 1976), at p. 89). On the flip side, there may be activities with which courts ought not to interfere even though they take place outside the House (*Harvey*, para. 67). Whatever the category, the activity sought to be protected must be so closely connected with what takes place in the House that allowing outside interference would demean its dignity and efficiency.

[66] In my view, the claimed privilege fits within the scope of the three established categories asserted by the appellants. The feature to keep in mind as we address each of these categories is

that we are dealing with decisions pertaining to funds and resources provided to Members of the House in order to allow them to carry out their parliamentary functions, which include representing constituents, researching matters relevant to legislation, deliberating, legislating and holding the government to account.

- *Internal affairs*

[67] *Vaid* deals with a legislated privilege which was said to come within the category relating to "internal affairs". During the course of the hearing in the Supreme Court, the narrower category described as "the management of House employees" was acknowledged to be more precise and appropriate having regard to the privilege claimed (*Vaid*, para. 50).

[68] In *Vaid*, the claimed privilege had the effect of thwarting the rights of the chauffeur of the Speaker of the House of Commons under the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 4 [*Human Rights Act*]. As was emphasized (at para. 40), the chauffeur was a "stranger to the House", an ordinary employee and not a Member of Parliament. Although the management of some House employees appeared to be a well-established category in the United Kingdom (*Vaid*, para. 62), the Court questioned whether the scope of that category extends to employees such as Mr. Vaid. In this respect, the Court quoted with approval the opinion expressed in the *British Joint Committee Report* to the effect that (*Vaid*, para. 51):

> [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]

[69] Emphasizing the need for Parliament not to overreach in matters involving persons who are not Members of the House, the Supreme Court held that the claimed privilege had not been shown to come within an established category (*Vaid*, para. 70). Thus, in *Vaid*, an inquiry into whether the claimed privilege was necessary in order to preserve the dignity and efficiency of the House had to be made. After considering the matter, the Court held that this necessity had not been demonstrated.

[70] More recently in *Chagnon*, the Supreme Court, citing *Vaid*, again emphasized the need to scrutinize a claimed privilege when it impacts on persons who are not members of the legislative assembly (*Chagnon*, paras. 25 and 42). At issue in *Chagnon* was the Québec National Assembly's right to manage its employees, specifically, the exclusive right claimed by the President of the National Assembly – who plays the same role as the Speaker in other jurisdictions – to dismiss security guards acting within the Assembly for improper behaviour. The majority, after applying the necessity test, held that it had not been shown to be necessary in order to preserve the dignity and efficiency of the National Assembly to prevent security guards from exercising their labour law rights in contesting their dismissal.

[71] According to the respondents and Mr. Vellacott, *Chagnon* modifies the state of the law in that it requires that a necessity analysis be conducted whenever a privilege is claimed, be it legislated or inherent (Written submissions of the respondents, para. 4; and written submissions of Mr. Vellacott, para. 5, footnote 1). I do not believe that to be the case.

[72] First, as noted in *Chagnon*, provincial legislative assemblies have inherent parliamentary privileges and the majority reached its decision on the basis that this was the nature of the privilege claimed in that case (*Chagnon*, paras. 1, 2 to 18, 23 and 27). *Vaid* makes it clear that when dealing with such privileges at the provincial level, courts must ensure that "the category of inherent privilege continues to be necessary to the functioning of the legislative body today" (*Vaid*, para. 29(6) citing *New Brunswick Broadcasting*, emphasis in the original). The majority in *Chagnon* accepted this proposition (*Chagnon*, para. 26).

[73] Second, the majority in *Chagnon* found that the parliamentary privilege claimed in that case did not fit within any established category. As a result, necessity had to be examined regardless of the inherent nature of the privilege. Specifically, the majority pointed out that although the decision in *Vaid* was rendered on the assumption that there existed in the United Kingdom an established category of parliamentary privilege which gives the House exclusive control over "some of its employees", the conclusion ultimately reached in *Vaid* was that the existence of this category had not been established because the Court was unable to identify any employee to whom the privilege had been applied (*Vaid*, para. 101). The Court in *Chagnon* further observed that as of the time of the judgment in *Chagnon*, "[…] U.K. courts [had] not yet recognized the management of any parliamentary employees to be protected by privilege […]" (at para. 35). Thus, no established category had been shown to exist (*Chagnon*, paras. 36 and 37).

[74] As a result, *Chagnon* does not displace the orthodoxy in *Vaid* that when a legislated parliamentary privilege is shown to fit within an established category, necessity cannot be revisited.

[75] The important point which both *Vaid* and *Chagnon* emphasize is that parliamentary privileges which take away the rights of non-parliamentarians will be scrutinized and reduced to their essential expression. However, the present matter involves only parliamentarians. We are dealing with the right of the House to oversee rules governing the use of public funds made available to its Members in order to allow them to discharge their parliamentary functions, and to impose compliance. These activities involve Parliamentarians acting as Parliamentarians governing Parliamentarians concerning parliamentary functions and obligations. As observed in *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112 (Q.B.) in a passage quoted in *Vaid* at paragraph 39, the "jealousy" with which a parliamentary privilege is viewed by the courts when it impacts on the rights of strangers to the House turns to "tenderness" when dealing with matters that are entirely internal to the House. This conciliatory approach is consistent with the respect which the courts and Parliament owe one another in the conduct of public duties (*Vaid*, para. 20).

[76] That the courts will be more circumspect when dealing with matters wholly internal to the House has not been lost on Parliamentarians when regard is had to the treatment they have given to their financial affairs over time. The House has regulated and overseen the use of parliamentary funds by its Members for more than 150 years and I was unable to detect, among the abundance of cases which have been placed before us, any instance before this one where sitting Parliamentarians – or sitting Members of the provincial or territorial assemblies – have resorted to the courts in order to settle internal disputes pertaining to the use which they make of parliamentary funds. While former Members have sought judicial intervention on a number of occasions, the judicial review applications before us appear to be the first where sitting Members of the House have tried to implicate the courts in this type of dispute. This type of unequivocal

acquiescence underscores that Parliamentarians have understood throughout that judicial intervention in such matters would undermine the dignity and efficiency of the House (*Vaid*, para. 29(8)).

[77] There are five relatively recent decisions that touch upon a legislative assembly's role in overseeing the use made by its Members of funds provided to them for the purpose of allowing them to perform their legislative functions: *Chaytor*, *Filion 2013*, *Filion 2016*, *Villeneuve* and *Duffy v. Senate of Canada*, 2018 ONSC 7523. The last – a decision of the Ontario Superior Court of Justice upholding the parliamentary privilege claimed by the Senate over its internal affairs – was released after the hearing and is being appealed. I will therefore refrain from commenting on this decision.

[78] *Chaytor* is the most recent of the other four. Before turning to it, it is important to point out that courts in the United Kingdom do not recognize internal affairs as a category of parliamentary privilege *per se*. Rather, internal affairs, including financial matters internal to the House, will be covered by parliamentary privilege if they can be shown to come within the "exclusive cognisance of Parliament." (*Chaytor*, para. 13). This phrase embraces article 9 of the *Bill of Rights* of 1689, but is broader (*Chaytor*, paras. 30 and 51). In the words of Lord Phillips, "exclusive cognisance refers not simply to Parliament but to the exclusive right of each House to manage its own affairs without interference […] from outside Parliament." (*Chaytor*, para. 63).

[79] As alluded to earlier, Lord Phillips in *Chaytor* came to the conclusion that decisions involving the scheme governing the use of parliamentary funds were within the exclusive

cognisance of Parliament, but that any parliamentary privilege that might have applied to decisions which merely apply existing rules had been waived. Because decisions authorizing the payment of expense claims upon these being certified as having been incurred came within this last description, the privilege failed (*Chaytor*, paras. 89 to 93).

[80] Lord Rodger, whose reasons were equally adopted by the other Justices, disposed of the matter on an entirely different basis. The only issue from his perspective was whether the matter for which the appellants were being prosecuted was within the exclusive jurisdiction of Parliament. If not, there was no basis on which the appellants could claim to have a right to stop the prosecution on the ground of parliamentary privilege (*Chaytor*, para. 104). In the course of his reasons, Lord Rodger considered whether the system of allowances, and the steps available to the appellants under it, were covered by parliamentary privilege (*Chaytor*, para. 120):

> […] a system of allowances can rightly be seen as providing a necessary support to Members in carrying out all their parliamentary activities, including their core activities. It is therefore quite possible that the rules of the system would have fallen within the area for which the House would claim exclusive cognizance. And it may be that the same could have been said of decisions by the Fees Office and, on appeal, by the supervising Committees, as to a particular claim by a Member for payment of an allowance. A challenge to any of these matters in the ordinary courts by a Member or by anyone else might well have called into question decisions taken by Committees of the House, or on their behalf, on a matter which was intended to be under the exclusive control and cognizance of the House and its Committees. (Emphasis added)

[81] Because the exact nature of the privilege claimed would only become apparent as the criminal proceedings unfolded, Lord Rodger concluded his reasons with the following *caveat* (*Chaytor*, para. 126):

> […] If the trial goes ahead, it may turn out that, contrary to expectations, some issue arises which is said to touch on the core activities of MPs or of the House itself. If that were actually so, the proceedings might be trespassing on an area for

> which the House would claim exclusive cognizance and to which article 9 would apply. […]

[82] It can be seen that Lord Rodger's decision is not based on the waiver pronounced by Lord Phillips. The view that he expressed is that any decision pertaining to allowances which impacts on the core activities of the House or its Members, is covered by privilege and that the criminal trial would reveal if this was the nature of the privilege being claimed.

[83] Because the reasoning of both Lord Phillips and Lord Rodger was endorsed by the majority without qualification, it is impossible to say which of the two approaches was adopted. The most that can be said based on *Chaytor* is that in the United Kingdom, matters concerning allowances paid to Members of the House in the performance of their functions are covered by parliamentary privilege if the decision being challenged impacts on the core activities of the House or its Members, but that this privilege may have been waived in part with respect to decisions that merely apply existing rules. I will come back to this later in discussing the waiver issue as it arises in this case.

[84] *Villeneuve* is a 2008 decision dealing with the parliamentary privilege claimed by the Legislative Assembly of the Northwest Territories and its Board of Management which was said to come within the established category relating to internal affairs. The case was argued on the basis that the parliamentary privilege being asserted had been legislated pursuant to the *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22. Before considering this decision more fully, a brief summary of the facts is necessary.

[85] While a Member of the Legislative Assembly (MLA), Mr. Villeneuve swore a declaration indicating that he resided outside Yellowknife, and additional allowances were paid to him on that basis. He was audited and as a result, a complaint was filed alleging that he may have made a false declaration. In the meantime, an election was held and Mr. Villeneuve lost his seat. After considering its options, the Board of Management, whose functions are analogous to those of the Board in the present case (*Villeneuve*, para. 4), concluded that Mr. Villeneuve had received allowances to which he was not entitled and ordered repayment by way of set off.

[86] Mr. Villeneuve sought judicial review of this decision. In response, the Assembly and the Board moved to strike the application on the basis that the decision was covered by parliamentary privilege because it fell within two established categories: the Assembly's inherent power to discipline its Members and the Assembly's exclusive power to regulate its internal affairs.

[87] In a thorough decision, which the judge in this case distinguished on doubtful grounds (Reasons, para. 45), Charbonneau J. accepted that the two claimed categories had been historically recognized (*Villeneuve*, paras. 23 and 24). Of concern to her, however, was the fact that Mr. Villeneuve was no longer a MLA when the decision to withhold his allowance was made (*Villeneuve*, paras. 25 and 26). After referring to *Vaid*, and noting that courts are apt to look more closely at cases where a parliamentary privilege impacts on the rights of persons outside the legislature, she accepted Mr. Villeneuve's argument that it had not been established that the scope of the two categories in issue extended to persons in Mr. Villeneuve's position (*Villeneuve*, para. 26).

[88] Applying *Vaid*, she therefore held that necessity had to be demonstrated. She began by considering whether the parliamentary privilege relating to internal affairs had been shown to be necessary (*Villeneuve*, para. 32). After finding that "[h]ow members are compensated, and what allowances they receive to enable them to do their work as MLAs, are the types of internal matters over which the legislature must have complete control and be free from outside interference, as an independent branch of government" (*Villeneuve*, para. 34), she queried whether this remained the case when dealing with a person who is no longer a MLA.

[89] She concluded her analysis as follows (*Villeneuve*, para. 39):

> I find that the administration of allowances and benefits that MLAs are entitled to receive during their tenure is a matter that is purely internal to the legislature. The legislature has, through the *Act*, delegated this responsibility to the Board. I find that the fundamentally internal character of those decisions does not change even though some may be made after the recipient of the allowance or benefit is no longer a MLA. So long as the decision relates to allowances and benefits connected to the person's tenure as a MLA, the Board's decisions require the same protection as those the Board makes about benefits and allowances of persons who are MLAs. (Emphasis added)

[90] *Filion 2016* deals with a proceeding brought by a former Member of the Québec National Assembly. He was claiming the payment of a transitional allowance being withheld by the Office of the National Assembly – an entity again analogous to the Board in the present case – pending the repayment by Mr. Filion of funds found to have been put to fraudulent use while he was a Member of the National Assembly. In an earlier decision, *Filion 2013*, the Superior Court of Québec allowed a prior claim by Mr. Filion for the payment of part of an allowance which the Office had also refused to pay. Although counsel for Mr. Vellacott places reliance on this last decision, I take nothing from it as the decision does not address parliamentary privilege seemingly because none were claimed.

[91] In *Filion 2016*, Mr. Filion challenged, among other things, a decision made by the Office under a provision of *An Act respecting the National Assembly*, C.Q.L.R., c. A-23.1 [*National Assembly Act*], whereby it refused to pay an indemnity to which he would otherwise have been entitled, on the ground that he acted in bad faith or committed a "faute lourde". The President of the National Assembly sought to have Mr. Filion's claim dismissed on the ground that the decision being attacked was protected by the exclusive right of the National Assembly to regulate its own internal affairs without outside interference as provided by sections 9 and 42 of the *National Assembly Act* (*Filion 2016*, para. 23). The Québec Superior Court agreed and dismissed Mr. Filion's claim on that ground.

[92] The decision upholding the parliamentary privilege adopts key passages of the reasons given by the Supreme Court of the Northwest Territories in *Villeneuve* (*Filion 2016*, para. 25). The conclusion reads (*Filion 2016*, para. 26):

> [TRANSLATION] In this respect, decisions regarding allowances and benefits to which members are entitled come within the privilege of a legislative assembly to manage its internal affairs without outside interference, which includes [matters dealt with pursuant to] provisions of the [National Assembly Act] dealing with legal costs, judicial, assistance and indemnification (sections 85.1 to 85.4) which give the Office authority to make decisions upon an application being submitted.

[93] I agree with *Villeneuve* and with the application of that decision in *Filion 2016*. In both instances, the courts appropriately observed that the respective Assemblies must have control over the resources needed in order to perform their legislative functions if they are to operate as independent branches of government. This is consistent with *Chaytor* and, until the present proceedings were brought, with the historical recognition by sitting Members of the House and

legislatures throughout the country that such matters are decided internally by the Members themselves and nowhere else.

[94] The unanimous case law on point and this historical acquiescence lead to the conclusion that the privilege claimed here – *i.e.*, the House's exclusive right to oversee and decide matters pursuant to internal rules governing the use made of funds and resources provided to Members of the House for the purpose of allowing them to perform their parliamentary functions – comes within the established category relating to internal affairs.

- *Discipline*

[95] The leading case on the established category described as discipline is *Harvey* (*Vaid*, para. 29(10)). At issue in that case was whether the New Brunswick legislature had the constitutionally protected right to enact and give effect to a five-year disqualification for Members of the Assembly who breach the *Elections Act*, R.S.N.B. 1973, c. E-3, even though the impugned behaviour – inciting a minor to vote in an election – had taken place outside the Assembly. It was accepted that the right to expel a member for misconduct in the Assembly itself was a privilege in its own right, but the right to enact and impose a five-year disqualification was said to be beyond the scope of any established privilege.

[96] McLachlin J. (as she then was) in a concurring decision endorsed by L'Heureux-Dubé J., disagreed. In reasons which address the question by reference to both the legislature of New Brunswick and Parliament, she held that the right to enact limitations and disqualify a Member from sitting in the legislature and standing for office came within the long-established

"prerogative of Parliament and legislative assemblies to maintain the integrity of their processes by disciplining, purging and disqualifying those who abuse them […]" (*Harvey*, para. 64). McLachlin J. went on to identify the source of this prerogative (*Harvey*, para. 68):

> The power of Parliament and the legislatures to regulate their procedures both inside and outside the legislative chamber arises from the *Constitution Act, 1867*. The preamble to the *Constitution Act, 1867* affirms a parliamentary system of government, incorporating into the Canadian Constitution the right of Parliament and the legislatures to regulate their own affairs. The preamble also incorporates the notion of the separation of powers, inherent in British parliamentary democracy, which precludes the courts from trenching on the internal affairs of the other branches of government. […]

[97] In the course of examining this power, McLachlin J. questioned why necessity should not be assessed in all cases, observing that there was "little to justify a distinction between privilege claimed by resolution and privilege claimed by legislation" (*Harvey*, para. 73). Without pronouncing on the matter, she proceeded on the basis that necessity had been established in the matter before her because the preservation of the dignity and the efficient operations of the legislature required that it be able to regulate membership in the Assembly and impose limits and qualifications, without judicial interference (*Harvey*, paras. 76 to 88).

[98] Although the Supreme Court in *Vaid* rejected McLachlin J.'s suggestion that necessity should be revisited in all cases (*Vaid*, para. 32), the Court fully endorsed her reasons for upholding the parliamentary privilege (*Vaid*, para. 31).

[99] The category recognized in *Harvey* is the exclusive right of the House to regulate the conduct of Members in matters internal to the House and maintain the integrity of its processes by imposing discipline on Members, both as punishment for misbehaviour and as a means of

ensuring compliance with its internal rules (*Harvey*, para. 78). Allowing the courts to oversee the exercise of these rights would imperil the dignity and efficiency of the House and give rise to an unjustified intrusion into the conduct of legislative business (*Harvey*, para. 79).

[100] Aside from being cited with approval in *Vaid*, *Harvey* has been adopted by the B.C. Court of Appeal in *Tafler v. British Columbia (Commissioner of Conflict of Interest)* (1998), 161 D.L.R. (4th) 511, 49 B.C.L.R. (3d) 328 (C.A.) [*Tafler*]. *Tafler* has been repeatedly applied by other courts as authority for upholding the legislature's exclusive right to set standards of conduct, monitor compliance with these standards, and to impose discipline: see, *e.g.*, *Morin v. Crawford*, 14 Admin L.R. (3d) 287, 1999 N.W.T.J. No. 5 (S.C.) [*Morin*], at para. 65; *McIver v. Alberta (Ethics Commissioner)*, 2018 ABQB 240, 423 D.L.R. (4th) 551 [*McIver*] at para. 44.

[101] The regulated activities in issue here concern the use of public funds provided to Members so that they can perform their parliamentary functions. For instance, Members are prohibited from using these funds to finance activities relating to their private interests or those of a member of their immediate family (para. 4(3)(*a*), *Members By-Law*). At issue between the parties are decisions of the Board holding that parliamentary funds were used for political purposes rather than parliamentary functions and requiring that they be repaid. A failure to abide by decisions of this kind can give rise to enforcement measures which can extend to the freezing a member's pay, so long as the non-compliance continues.

[102] Decisions by Members of the House about the resources to be made available to them to perform their parliamentary functions and issues related to the conduct of Members in the use

that they make of these resources are integral to the House's independence and ability to control its internal affairs. In my view, the decisions made by the Board in this case come within the House's exclusive right to regulate its own affairs and ensure the integrity of its own processes the same way and to the same extent as were the decisions to create and impose the disqualification in *Harvey* and the ethical and conflict of interest rules in *Tafler*, *Morin* and *McIver*.

[103] I therefore conclude that the privilege claimed here can also come within the category of parliamentary privilege established in *Harvey* and applied in these other cases.

- *"Proceedings in Parliament"*

[104] Proceedings in Parliament is a term that has at its origin the right of free speech in the House as embodied by article 9 of the U.K. *Bill of Rights* 1689. It encompasses the right to legislate, deliberate and generally hold the government to account. Among the matters which come within this category is for example, a point of order about how the House should proceed on a given matter or rules about procedure and conduct in the House. As noted earlier, not everything that is done in the House forms part of proceedings in Parliament (*Vaid*, para. 43), but the converse is also true. The category can extend to matters which take place outside the House if they are "so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative and deliberative assembly" (*Vaid*, at para. 44, quoting the *British Joint Committee Report*).

[105] In my view, this connection is present here. Though this seems obvious, it is worth repeating that proceedings in Parliament cannot take place without Parliamentarians having at minimum a venue in which to assemble and the resources needed in order to deliberate and legislate. The exercise of the House's prerogative to access moneys for that purpose precedes Confederation (J.G. Bourinot, *Parliamentary Procedure and Practice*, 4th ed. (Toronto: Common Law Book Company, 1916) at pp. 196-199) (footnotes omitted):

> The commissioners of internal economy of the House of Commons is a statutory body having definite powers and responsibilities with reference to the expenditures of that body. Formerly, certain expenses of the legislative assembly of Canada were regulated by a committee of contingencies, appointed at the opening of each session. On its report the salaries and other contingent expenses were provided for. The Committee was re-appointed in 1867-8, and made several reports, which were acted upon, but during the same session, the premier (Sir John MacDonald) brought in a bill respecting the internal economy of the House of Commons, which was unanimously passed.

[106] The enactment of *An Act respecting the Internal Economy of the House of Commons, and for other purposes* in 1868 [the *1868 Act*] – which incorporates *An Act related to the Indemnity to Members and the Salaries of the Speakers, of both Houses of Parliament*, S.C. 1867 (31 Vict.), c. 3 – was the first legislative expression by Parliament as to what was needed in material terms in order to allow Members of Parliament to discharge their legislative functions. The *1868 Act* provided the Commissioners of Internal Economy – all Members of the House of Commons and the Queen's Privy Council for Canada – with the power to "order" that moneys be transferred to them by the Minister of Finance and paid out in accordance with their "direction" for that purpose. The amounts contemplated at the time included "salaries, allowances and contingent expenses of the House", "stationery" and "printing services". Also provided was an allocation of ten cents per mile based on the distance between a member's place of residence and the place at which the session is held. Notably, the Commissioners had the power to direct the payment of

expenses to Members of Parliament which would also include the power to direct that a payment not be made.

[107] No one takes issue with the fact that these amounts and allocations represent the class of expenditures which were necessary in order to allow Parliamentarians to carry out their legislative functions in the world of 1867.

[108] Over time, the resources considered necessary for Members of the House to carry out their legislative functions evolved. In establishing the Board of Internal Economy in 1985, Parliament reaffirmed the House of Commons' exclusive authority over the management of parliamentary resources and oversight of their use by Members. Although the Board operates under a more detailed set of rules, its mission is the same as that of the original Commissioners.

[109] At issue in the present case is the use of large volume mailings to constituents which, according to the Board of Internal Economy, were made for political purposes and employment, telecommunication and travel expenses allegedly used in satellite offices outside of "parliamentary office[s] or […] constituency office[s]" (Board minutes of August 12, 2011, Appeal Book, vol. III, p. 826). None of these expenses were provided for under the *1868 Act* except perhaps those relating to travel. However, it seems clear that they all come within the class of expenses provided for under the *1868 Act – i.e.*, expenses which in their day are necessary in order to allow Parliamentarians to discharge their parliamentary functions. No one challenged this view.

[110] It is not difficult to see why. For instance, how could Members of Parliament vote responsibly on proposed legislation or ask relevant questions in holding the government accountable without having the staff and the resources allowing them to be properly informed or represent their constituents in the House without having access to the means by which they can communicate and report? In short, proceedings in Parliament cannot take place without Parliamentarians having the means by which they can discharge their parliamentary functions.

[111] I do not believe that one needs to go any further to show that when deciding matters of the type in issue here, proceedings before the Board are so directly and closely connected to proceedings in Parliament as to warrant being treated the same way.

[112] In reaching this conclusion, we are further assisted by subsection 52.2(2) of the PCA which expresses Parliament's view of the matter. Subsection 52.2(2) was enacted shortly before the hearing of the motion to strike before the Federal Court. Its exact words are: "For greater certainty, the proceedings before the Board are proceedings in Parliament." Before this enactment, subsection 52.2(2) read: "Where a member of the Board participates in the exercise of the powers or the carrying out of the functions of the Board, the member shall not be held personally liable for the actions of the Board." The judge did not refer to this new provision in her reasons, and it is not clear that it was brought to her attention.

[113] Before us, counsel for the appellants argued that subsection 52.2(2) makes it clear that the decisions in issue come within the established category described as proceedings in Parliament. As this is a binding law, the validity of which has not been constitutionally challenged, counsel

submits that it brings the present matter squarely within the established category relating to proceedings in Parliament.

[114] Both the respondents and Mr. Vellacott take the position that subsection 52.2(2) cannot have such a far-reaching application. They stress that this provision cannot extend to everything the Board might do. They point out that subsection 52.2(2) was enacted in conjunction with other provisions that made meetings of the Board more accessible to the public, and that its sole purpose was to ensure that members who sit on the Board would continue to benefit from the immunity which protects the Members of the House when performing parliamentary functions.

[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 (Memorandum of the respondents, para. 18, citing *Vaid* and *Chagnon*) 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.

[116] Although the enactment of subsection 52.2(2) appears to have been prompted by Parliament's decision to make proceedings before the Board more accessible to the public, a development which had potential ramifications for members' immunity, the provision is not so

limited. When regard is had to its wording, it reflects Parliament's intent that, within their proper scope, proceedings before the Board be treated as proceedings in Parliament.

[117] This makes good sense. In many respects, the Board is an extension of the House. It performs functions which would otherwise be performed by the House itself. The actions taken when acting in that capacity are in a very real sense taken by the House itself. The decisions in issue, insofar as they delineate the means and resources which must be made available to Parliamentarians in order to allow them to perform their core parliamentary functions, can properly be viewed as proceedings in Parliament.

[118] It follows that proceedings in Parliament is yet another established category within which the claimed parliamentary privilege can be shown to fit.

- *Mr. Vellacott's distinct argument*

[119] Before closing on the issue of parliamentary privilege, I wish to address a distinct argument made by Mr. Vellacott. Specifically, Mr. Vellacott does not challenge the Board's exclusive right to formulate the rules and standards for what constitutes appropriate parliamentary expenses (Written submission of Mr. Vellacott, para. 8, footnote 2). However, he submits that the application of those rules by way of decisions should be considered separately and argues that it has not been shown that immunizing these decisions from judicial review is necessary in order to preserve the dignity and efficiency of the House.

[120] In my view, the House's exclusive right to regulate and oversee the use of parliamentary funds by Parliamentarians brings with it the exclusive right to decide how these rules are to be applied. Indeed, the way in which a parliamentary rule is applied in a given case is an exercise of the House's time-honoured right to regulate its own affairs. This is what McLachlin J. explained in *New Brunswick Broadcasting* while addressing the Nova Scotia House of Assembly's exclusive right to regulate its internal proceedings by keeping cameras out of the Assembly (*New Brunswick Broadcasting*, p. 384):

> As noted above, *Stockdale v. Hansard* is the leading case. The court there rejected the argument that the courts will take cognizance of questions involving privilege only where the question was "incidentally" rather than "directly" before them. It was held that the courts were bound to decide an issue of privilege, however it arose, but that this decision must be subject to the recognition of an exclusive parliamentary jurisdiction. The parameters of this jurisdiction are set by what is necessary to the legislative body's capacity to function. So defined, the principle of necessity will encompass not only certain claimed privileges, but also the power to determine, adjudicate upon and apply those privileges. Were the courts to examine the content of particular exercises of valid privilege, and hold some of these exercises invalid, they would trump the exclusive jurisdiction of the legislative body, after having admitted that the privilege in issue falls within the exclusive jurisdiction of the legislative body. The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function? A particular exercise of a necessary privilege cannot then be reviewed, unless the deference and the conclusion reached at the initial stage be rendered nugatory. (Emphasis added)

[121] Likewise, allowing necessity to be revisited on the basis proposed by Mr. Vellacott, would trump the House's exclusive right to regulate the use of parliamentary funds by Members of the House, and would involve the Court in a review of the exercise of the parliamentary privilege, a matter beyond the reach of the courts (See *Vaid*, para. 29(9)).

[122] I therefore conclude that because the claimed privilege can be shown to come within one or more established categories, it was not open to the judge to inquire into its necessity.

- *Necessity*

[123] Although not necessary in order to dispose of the appeal, I believe it useful to say a few words about the judge's assessment of necessity in this case (Reasons, paras. 44, 46 and 50). It appears to me that allowing courts to oversee decisions regarding the allocation and use made of parliamentary resources in the context of judicial reviews would seriously challenge the dignity and efficiency of the House.

[124] First, looking at the matter from the angle of discipline, we need only refer to the opinion of McLachlin J. in *Harvey* according to which the dignity and efficiency of the House would be imperiled if courts were allowed to oversee the limits and qualifications which Parliamentarians impose on themselves in the exercise of parliamentary functions.

[125] Considering the matter from the perspective of internal affairs, it belongs to Parliamentarians to decide for themselves what they need and how to allocate funds and resources in order to carry out their parliamentary functions. In my view, allowing courts to have the last word over the handling of these affairs would intrude on the autonomy of the House and demean its constitutional role. It would also severely undermine the effectiveness of the internal processes put in place by the House in order to deal with such matters. I note in this respect that there are presently 338 members who file on average 70,000 claims every year. Of these, some 4,300 are altered before payment (*Third Report of the Standing Committee on Procedure and House Affairs*, 2013, Appeal Book, vol. II, pp. 416 to 430, at p. 422). These being inherently contentious money matters, one can readily see how judicial review of such decisions would

quickly become a prime area of activity for lawyers and the courts, to the detriment of the effective operation of the House. I therefore agree with the conclusion reached in *Villeneuve* that allowing the courts to intervene in such matters would demean the dignity and efficiency of the House.

[126] Finally, allowing the courts to opine on what Parliamentarians need in order to perform their core parliamentary functions would also impact on the dignity and efficiency of the House by demeaning the role of Parliamentarians.

- *Has the privilege been waived or abrogated?*

[127] A preliminary question of interest could have arisen as to whether the privilege in issue here can be waived by Parliament. Arguably, a privilege which ensures the independence of the House in performing core legislative functions cannot be waived by Parliament as doing so would undermine the very principle on which the Westminster model of Parliament is based. However, we need not confront this question because whatever the answer, no waiver can be found in this case.

[128] The arguments in support of the view that Parliament waived or abrogated the House's exclusive right to control its internal financial affairs are based on: (1) the use of the word "Board" in the PCA to describe the new entity which assumed responsibility over its financial affairs in 1985, a word which is the same as that used in the *Federal Courts Act* to describe federal bodies that are subject to judicial review before those courts; (2) subsection 50(1) of the PCA which establishes the Board by the words "[t]here shall be a Board of Internal Economy of

the House of Commons […]" in contrast with subsection 19.1(1) which provides that the Senate Committee on Internal Economy is established "by the Senate under its rules"; (3) section 52.2 of the PCA which provides that "[i]n exercising the powers […] conferred upon it pursuant to this Act", the Board may enter into contracts, memoranda of understanding, etc. (Reasons, para. 30); and (4) the fact that the "[f]or greater certainty" provision found in subsection 2(2) of the *Federal Courts Act* as enacted by S.C. 1990, c. 8 on the heels of the Trial Division decision in *Southam* ([1989] 3 F.C. 147, 27 F.T.R. 139), expressly excludes "the Senate, the House of Commons" and "any Committee or member of either House" from judicial review before the Federal Courts, but not the Board.

[129] In the French text of section 2 of the *Federal Courts Act*, the word "office" is used as the French equivalent for the word "board" whereas in the French text of the PCA, the word "bureau" is used. Given this, the choice of the word "board/bureau" to designate this entity cannot be seen as an indication that Parliament intended to align the Board with other federal boards so as to make it subject to judicial review under the *Federal Courts Act*. Had this been the intent, the word "office" would also have been used in the French text of the PCA.

[130] Moreover, nothing in the recommendations which led to the creation of the Board in 1985 suggests that a jurisdictional change was in the making or that any of the parliamentary privileges previously enjoyed by the Commissioners of Internal Affairs were being abandoned. The *Report of the Special Committee on Reform of the House of Commons* which was tabled in the House in 1985 and led to the first incarnation of the present day Board of Internal Economy explains that the Board was established in order to encourage members to become more involved

in the management of the House through broader and better representation in the composition of the Board. No allusion is made to any change regarding the House's long established independent control over its internal financial affairs, something which would necessarily have been at the forefront of this document had such a fundamental change been contemplated (*First Report of the McGrath Committee*, Appeal Book, vol. I, Tab 7A, pp. 155-156, Exhibit "A" to the Gagnon Affidavit). As well, none of the changes brought to the PCA from that moment on points towards the abandonment of any existing parliamentary privilege. In the *Second Report of the Special Committee of the Review of the Parliament of Canada Act* tabled in 1990, it is acknowledged that while members are not above the law, they deserve assurance that their rights will not be jeopardized or sacrificed. The same report goes on to reaffirm the principles that are consistent with the law of parliamentary privilege (*Second Report of the Danis Committee*, Appeal Book, vol. I, Tab 7C, pp. 182-183, Exhibit "C" to the Gagnon Affidavit).

[131] The other instances where the privileges of the House were alluded to in Committee reports also signal a continued desire to maintain the privileges in place (*Third Report of the Standing Committee on Procedure and House Affairs*, presented December 3, 2013, at pp. 8 and 15, Appeal Book, vol. II, Tab M). The sole mention of a change that could have impacted on these privileges is found in the dissenting opinion of the NDP in this last report presented in 2013 which proposes that the body charged with overseeing the use of parliamentary funds be "independent of MPs" (*Ibidem*, at p. 433). This proposal was not accepted by the majority.

[132] Therefore, there is no basis for the suggestion that Parliament, in giving effect to the transition from the Commissioners of Internal Economy to the Board of Internal Economy in

1985, abandoned the privileges which the House held, exercised and enjoyed since Confederation. If anything, the reports tabled in the House at that time and since point in the other direction.

[133] This should be contrasted with the situation in the United Kingdom as it was described by Lord Phillips in *Chaytor*. In the course of his reasons, he noted that (*Chaytor*, para. 68):

> [i]f Parliament accepts that a statute applies within an area that previously fell within its exclusive cognisance, then Parliament will, in effect, have waived any claim to privilege.

He then referred to the *Joint Committee on Parliamentary Privilege Report* (U.K., House of Lords, House of Commons, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege: Report of Session 1998-99* (April 9, 1999), vol. I), which, according to Lord Phillips, recognized that in assessing the scope of Parliament's right to administer its internal affairs, a distinction had to be made between decisions involving the scheme put in place by Parliament in overseeing the use of parliamentary funds which are privileged, and decisions implementing this scheme, which are not (*Chaytor*, paras. 72, 73 and 74). Pointing to this acknowledgement by the Joint Committee, Lord Phillips agreed that this was a proper distinction to make (*Chaytor*, para. 89) and held that the parliamentary privilege previously held over decisions implementing the scheme, in contrast with those which put into question the scheme itself, had been waived (*Chaytor*, para. 93; see also para. 131, *per* Lord Clarke).

[134] No such waiver can be inferred in Canada from the numerous Committee Reports which have been placed before us. None suggests any form of waiver by Parliament of the House's

privilege over decisions regarding the appropriate use of parliamentary funds by Members of the House in the performance of their parliamentary functions.

[135] The fact that the Senate Committee on Internal Economy was established "by the Senate under its rules" (section 19.1 of the PCA) whereas the Board was brought into existence by words which do not refer to Parliament or the House (subsection 50(1) of the PCA) cannot be viewed as an indication that privileges were continued only insofar as the Senate Committee on Internal Economy is concerned. This is because the privileges available to both the Senate Committee and the Board are those defined by section 4 of the PCA pursuant to the authority conferred by section 18 of the *Constitution Act, 1867*, so that nothing turns on the distinct language used by Parliament in establishing the Committee and creating the Board.

[136] I also note that in all other respects, the Senate Committee on Internal Economy and the Board operate the same way. Both are empowered by the same statute, are composed of members of the respective Houses, report to the Senate or the House as the case may be; and exercise identical powers (See Appendix "A"). Although the judge suggests that there are meaningful differences between the two, I am unable to detect what these might be aside from the name by which they are called.

[137] The judge's reliance on section 52.2 of the PCA which gives the Board the capacity of a natural person "[i]n exercising the powers and carrying out the functions conferred upon it pursuant to this Act" (Reasons, para. 30) is also problematic. I first observe that the Senate Committee on Internal Economy also exercises the powers "conferred upon it pursuant to this

Act" (section 19.2 of the PCA). More importantly, legislated privileges will always be defined by legislation so that the fact that a power is exercised pursuant to a statute cannot be determinative. As was explained in *Southam* at page 479:

> […] the words "conferred by or under an Act of the Parliament of Canada" in s. 2 [of the *Federal Courts Act*] mean that the Act of Parliament has to be the source of the jurisdiction or powers which are being conferred. The privileges, immunities and powers of the Senate are *conferred* by the Constitution, not by a statute, although the latter defines or elaborates upon the privileges, immunities and powers. Such a statute then is the manifestation of Senate privileges but it is not its source; the source is s. 18 of the *Constitution Act, 1867.*

The last sentence should be read in light of the true source of parliamentary privileges which, in Canada as in the United Kingdom, continues to be the nature of the function being exercised by the Houses of Parliament in a Westminster model of parliamentary democracy (*Vaid*, at para. 34).

[138] The Trial Division decision under appeal in *Southam* had held that the Federal Court had jurisdiction over decisions of the Senate Committee on Internal Economy regardless of the source of the power being exercised, "so long as the power to define [had] been put into statutory form" (*Southam*, para. 27). This conclusion was reached even though the right being exercised in that case was clearly traceable to a privilege – *i.e.*, the right of a Senate Committee on Internal Economy to hold *in camera* sessions while investigating the improper use of Senate funds by a Senator (*Southam*, para. 3). As was said on appeal, it matters not that the parliamentary privilege is defined by a statute; the question to be asked in each case is whether the claimed privilege was legislated under the authority conferred by section 18 of the *Constitution Act, 1867* (*Southam*, para. 28). If so, this brings the matter to an end.

[139] Finally, it is true that subsection 2(2) of the *Federal Courts Act* specifically excludes from the jurisdiction of the Federal Courts the House of Commons, the Senate and their committees. Notably, the Board is not mentioned. However, nothing turns on this because when acting pursuant to a constitutionally protected parliamentary privilege, the Board is not exercising a right which has at its source an Act of Parliament and must therefore be treated the same way as the excluded entities. While not stated in express terms, this is the jurisdictional divide which was drawn by subsection 2(2) when it came into force in 1990 when regard is had to the context which brought about its enactment.

[140] Therefore, I conclude that House's exclusive right to regulate, oversee and decide issues regarding the use made of parliamentary funds by Parliamentarians was not waived or abrogated by the creation of the Board, the enactment of the PCA in 1985, or by any other enactment since then.

- *Disposition*

[141] Had the judge followed the analytical approach set out in *Vaid*, she would have been bound to hold that the Court was without jurisdiction to hear the underlying judicial review applications because the privilege claimed before her was authoritatively established.

[142] I would therefore allow the appeal with costs here and below, and giving the judgment which the Federal Court ought to have given, I would strike the four consolidated applications for judicial review on the basis that the Court does not have the jurisdiction to hear them.

"Marc Noël"
Chief Justice

"I agree
David Stratas J.A."

"I agree
J.B. Laskin J.A."

APPENDIX "A"

Comparative Table: Standing Committee on Internal Economy, Budgets and Administration and House of Commons Board of Internal Economy

Issues	Senate Standing Committee on Internal Economy, Budgets and Administration ("COIE")	House of Commons Board of Internal Economy ("BOIE")
Definition	**POCA[1], 19.1(1)** In this section and sections 19.2 to 19.9, *Committee* means the Standing Senate Committee on Internal Economy, Budgets and Administration established by the Senate under its rules.	**POCA, 50(1)** There shall be a Board of Internal Economy of the House of Commons, in this section and sections 51 to 53 referred to as "the Board", over which the Speaker of the House of Commons shall preside.
Capacity	**POCA, 19.2(1)** In exercising the powers and carrying out the functions conferred upon it pursuant to this Act, the Committee has the capacity of a natural person and may (a) enter into contracts, memoranda of understanding or other arrangements in the name of the Senate or in the name of the Committee; and (b) do all such things as are necessary or incidental to the exercising of its powers or the carrying out of its functions.	**POCA, 52.2(1)** In exercising the powers and carrying out the functions conferred upon it pursuant to this Act, the Board has the capacity of a natural person and may (a) enter into contracts, memoranda of understanding or other arrangements in the name of the House of Commons or in the name of the Board; and (b) do all such things as are necessary or incidental to the exercising of its powers or the carrying out of its functions.
Immunity/ Proceedings	**POCA, 19.2(2)** Where a member of the Committee participates in the exercise of the powers or the carrying out of the functions of the Committee, the member shall not be held personally liable for the	**POCA, 52.2(2)** For greater certainty, the proceedings of the Board are proceedings in Parliament.

[1] *Parliament of Canada Act*.

Issues	Senate Standing Committee on Internal Economy, Budgets and Administration ("COIE")	House of Commons Board of Internal Economy ("BOIE")
	actions of the Committee.	
Function	**POCA, 19.3** Subject to subsection 19.1(4), the Committee may act on all financial and administrative matters respecting (a) the Senate, its premises, its services and its staff; and (b) the members of the Senate.	**POCA, 52.3** The Board shall act on all financial and administrative matters respecting (a) the House of Commons, its premises, its services and its staff; and (b) the members of the House of Commons.
Main Estimate	**POCA, 19.4** Prior to each fiscal year the Committee shall cause to be prepared an estimate of the sums that will be required to be provided by Parliament for the payment of the charges and expenses of the Senate and of the members thereof during the fiscal year.	**POCA, 52.4(1)** Prior to each fiscal year the Board shall cause to be prepared an estimate of the sums that will be required to be provided by Parliament for the payment of the charges and expenses of the House of Commons and of the members thereof during the fiscal year.
Regulations and By-laws	**POCA, 19.5(1)** The Committee may make regulations (a) governing the use by senators of funds, goods, services and premises made available to them for the carrying out of their parliamentary functions; (b) prescribing the terms and conditions of the management of, and accounting for, by senators, of funds referred to in paragraph (a); and (c) respecting all such things as are	**POCA, 52.5(1)** The Board may make by-laws […] (b) governing the use by members of the House of Commons of funds, goods, services and premises made available to them for the carrying out of their parliamentary functions; (c) prescribing the terms and conditions of the management of, and accounting for, by members of the House of Commons, of funds referred to in paragraph (b) and

Issues	Senate Standing Committee on Internal Economy, Budgets and Administration ("COIE")	House of Commons Board of Internal Economy ("BOIE")
	necessary or incidental to the exercise of its powers and the carrying out of its functions. **(2)** The Chairman of the Committee shall table before the Senate the regulations made under this section on any of the first thirty days after the making thereof.	section 54; and (d) respecting all such things as are necessary or incidental to the exercise of its powers and the carrying out of its functions. […] **(2)** The Speaker shall table before the House of Commons the by-laws made under this section on any of the first thirty days after the making thereof.
Exclusive Authority	**POCA, 19.6(1)** The Committee has the exclusive authority to determine whether any previous, current or proposed use by a senator of any funds, goods, services or premises made available to that senator for the carrying out of parliamentary functions is or was proper, given the discharge of the parliamentary functions of senators, including whether any such use is or was proper having regard to the intent and purpose of the regulations made under subsection 19.5(1). **(2)** Any senator may apply to the Committee for an opinion with respect to any use by that senator of any funds, goods, services or premises referred to in subsection (1).	**POCA, 52.6(1)** The Board has the exclusive authority to determine whether any previous, current or proposed use by a member of the House of Commons of any funds, goods, services or premises made available to that member for the carrying out of parliamentary functions is or was proper, given the discharge of the parliamentary functions of members of the House of Commons, including whether any such use is or was proper having regard to the intent and purpose of the by-laws made under subsection 52.5(1).
General Opinions	**POCA, 19.8** In addition to issuing opinions under section 19.6, the	**POCA, 52.8** In addition to issuing opinions under section 52.6, the

Issues	Senate Standing Committee on Internal Economy, Budgets and Administration ("COIE")	House of Commons Board of Internal Economy ("BOIE")
	Committee may issue general opinions regarding the proper use of funds, goods, services and premises within the intent and purpose of the regulations made under subsection 19.5(1).	Board may issue general opinions regarding the proper use of funds, goods, services and premises within the intent and purpose of the by-laws made under subsection 52.5(1).
Opinions	**POCA, 19.9(1)** The Committee may include in its opinions any comments that the Committee considers relevant. **(2)** Subject to subsection (3), the Committee may publish, in whole or in part, its opinions for the guidance of senators. **(3)** Subject to subsection (4), the Committee shall take the necessary measures to assure the privacy of any senator who applies for an opinion and shall notify the senator of its opinion. **(4)** For the purposes of subsection 19.7(1), the Committee may, if it considers it appropriate to do so, make any of its opinions, including opinions issued under section 19.6, available to the peace officer.	**POCA, 52.9 (1)** The Board may include in its opinions any comments that the Board considers relevant. **(2)** Subject to subsection (3), the Board may publish, in whole or in part, its opinions for the guidance of members of the House of Commons. **(3)** Subject to subsection (4), the Board shall take the necessary measures to assure the privacy of any member of the House of Commons who applies for an opinion and shall notify the member of its opinion. **(4)** For the purposes of subsection 52.7(1), the Board may, if it considers it appropriate to do so, make any of its opinions, including opinions issued under section 52.6, available to the peace officer.
Reporting	***Rules of the Senate*, Rule 12-22(2)** Except as otherwise provided, a committee report shall be presented or tabled in the Senate by the chair or by a Senator designated by the	***Standing Orders of the House of Commons*, Standing Order 148(1)** The Speaker shall, within ten days after the opening of each session, lay upon the Table of the House a

Issues	Senate Standing Committee on Internal Economy, Budgets and Administration ("COIE")	House of Commons Board of Internal Economy ("BOIE")
	chair.	report of the proceedings for the preceding session of the Board of Internal Economy.
In case of dissolution	**POCA, 19.1(2)** During a period of prorogation or dissolution of Parliament and until the members of a successor Committee are appointed by the Senate, the Committee continues to exist for the purposes of this Act and, subject to subsection (3), every member of the Committee, while still a senator, remains a member of the Committee as if there had been no prorogation or dissolution.	**POCA, 53** On a dissolution of Parliament, every member of the Board and the Speaker and Deputy Speaker shall be deemed to remain in office as such, as if there had been no dissolution, until their replacement.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-332-17
STYLE OF CAUSE:	BOARD OF INTERNAL ECONOMY AND SPEAKER OF THE HOUSE OF COMMONS v. BOULERICE ET AL. AND ATTORNEY GENERAL OF CANADA AND MAURICE VELLACOTT AND THE SENATE OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 14, 2018
REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	STRATAS J.A. LASKIN J.A.
DATED:	FEBRUARY 20, 2019

APPEARANCES:

Guy Pratte Nadia Effendi	FOR THE APPELLANTS, BOARD OF INTERNAL ECONOMY AND SPEAKER OF THE HOUSE OF COMMONS
James R.K. Duggan, Ad. E. Julius H. Grey, Ad. E. Alexander Duggan Geneviève Gray	FOR THE RESPONDENTS
Nicholas McHaffie Jessica Rutledge	FOR THE INTERVENER, MAURICE VELLACOTT

Guy Regimbald John J. Wilson	FOR THE INTERVENER, THE SENATE OF CANADA

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP Toronto, Ontario	FOR THE APPELLANTS, BOARD OF INTERNAL ECONOMY AND SPEAKER OF THE HOUSE OF COMMONS
Duggan, avocats-lawyers Montréal, Quebec Grey Casgrain, s.e.n.c. Montréal, Quebec	FOR THE RESPONDENTS
Stikeman Elliott LLP Ottawa, Ontario	FOR THE INTERVENER, MAURICE VELLACOTT
Gowling WLG (Canada) LLP Ottawa, Ontario	FOR THE INTERVENER, THE SENATE OF CANADA