SPEAKING NOTES
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# PARLIAMENTARY PRIVILEGE – PROTECTING THE EFFECTIVE FUNCTIONING OF DEMOCRACIES

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Honourable Speakers and Presiding Officers,
Distinguished Guests,
Ladies and Gentlemen:

The Senate of Canada experienced major difficulties in 2013. It began innocuously enough with questions about the living or other expense allowances claimed by some senators. Four situations were identified as problematic, each somewhat different in nature. External auditors were engaged to review these matters, which were subsequently referred to the Royal Canadian Mounted Police, our national police force. Charges have not been laid, but the investigation is on-going. Needless to say, this has been a difficult period for the institution, for its members, and for those working to support us.

This context provides a useful backdrop to our examination of today's topic. During the summer – winter here in the southern hemisphere – while the Senate was adjourned, an order from the court was received seeking the production of a wide range of documents, including administrative material, expense reports, emails, schedules and draft reports. After careful consideration of the issues involved, the Clerk of the Senate was instructed to release all requested documents to assist the RCMP with its investigation.

The following paragraphs from my July 5, 2013 letter to the Clerk constitute a helpful starting point:

> The responsibility and duty of the Speaker of the Senate and all senators to preserve the privileges of the Senate is clear in the *Rules of the Senate*, parliamentary precedents, jurisprudence and the procedural literature.

> My review of the matter confirms my initial reaction that parliamentary privilege is not to be used as a shield in criminal matters.
>
> Given the fact that the RCMP is engaged in a criminal investigation and that the Senate was informed on May 23, 2013 of our commitment to cooperate with the investigation during the course of their work, I find that your office should produce the documents being requested.

Among the many documents requested by the RCMP were copies of all drafts of a report presented to the Senate by the Standing Committee on Internal Economy, Budgets and Administration. In forwarding the documents to police authorities, the Clerk noted that some of them formed part of the proceedings of parliament.

When the Senate reconvened in mid-October, a document was tabled indicating what had been done. The senators were aware of the reasons, and there was no attempt to challenge the decision by raising a question of privilege. There has been no push-back in the Senate about this action. The institution and its members accepted the need to cooperate with the police to ensure that the law was respected and, if there was wrongdoing, that Parliament's rights were not misused by providing a leaf behind which wrongdoers could hide.

This very concrete situation involving the competing need to assist in the proper enforcement of the law, on the one hand, and to ensure that Parliament's rights are respected, on the other, provides a good example of how traditional views about privilege need to adapt, and are evolving to meet the public's expectations for Parliament and parliamentarians in the 21st century. It is not good enough to insist on privilege if it does not contribute to supporting our obligations to be transparent and accountable to our citizens.

The basic premise is that privilege should not be used to thwart transparency and accountability. This is the new paradigm. Parliament should not remain fixated on the shibboleth of protecting itself from the interference of the citizenry, of the Crown, and of the courts that the Crown once controlled. That mindset reflects a situation that has never been a part of Canada's political reality.

While Parliament does need privilege, it should be narrowly focussed on supporting its core functions, which are, broadly, the following:

a) to legislate,
b) to vote supply,
c) to hold the government to account,
d) to represent the people and – especially in the case of Chambers with a regional vocation such as the Canadian Senate – the regions of the country, and
e) to contribute, generally, to dialogue on public affairs by providing a venue in which affairs can be raised, and policies discussed and developed.

The Supreme Court of Canada in 2005 made a ruling in the Vaid case that contains key elements of a useful approach to understanding the nature, scope and purpose of privilege in the 21st century. The court enunciated several propositions. These include:

a) the modern basis of all privilege is necessity,
b) necessity must be understood in the contemporary context – so both privilege and necessity must be relevant to the modern work of Parliament, and
c) Parliament is not a statute-free zone.

From these guiding propositions, it is clear that parliamentary privilege needs to be re-purposed so that it truly facilitates the work of Parliament, by maintaining the trust and confidence of the public in our institution. This is the proper role of privilege in the 21st century.

Attempting to assert identical rights to those in late-17th century England, with secret sittings of Parliament, no responsible government, and great royal influence over the courts, is inappropriate. At that time privilege was asserted in a wide range of instances and there is no doubt that it was abused.

In the modern world privilege is not and should not be a shield to protect wrongdoing. Parliament and parliamentarians are operating within a modern context where the law must be respected. Parliamentarians have certain duties and rights that are exercised for the people, the regions, and the nation. Parliament is *not*, unlike the case in Stuart and Georgian England, a small clique that represents little more than itself.

It is with this background and general perspective that our broad topic of "Parliamentary privilege – protecting the effective functioning of democracies" is

being approached today. The organizers posed three broad questions that I propose to deal with *seriatim*. The questions are:

a) What is the purpose of parliamentary privilege in the 21st century?
b) What are the foundations of privilege – is legislation required, and what is the scope and extent of privilege and how does it relate to freedom of speech?
c) Can natural justice be guaranteed in privilege committees? What is the role of such committees as well as the role of the Speaker?

<u>What is the purpose of parliamentary privilege in the 21st century?</u>

The standard definition of parliamentary privilege is familiar to all of us. It first appeared in the 14th edition of Erskine May published in 1946. This definition has remained a part of this magisterial work and has been incorporated into most other parliamentary authorities in all parts of the Commonwealth including New Zealand, Australia and Canada. Briefly, parliamentary privilege is "the sum of the peculiar rights enjoyed by each House collectively … and by Members of each House individually, without which they could not discharge their functions."

Control over proceedings and the power to punish for contempt are identified as collective privileges whereas such privileges as freedom of speech and immunity from court attendance as a witness are considered individual privileges. It is also stated that these privileges "exceed those possessed by other bodies or individuals" and that "though part of the law of the land, [it] is to a certain extent an exemption from the general law." With respect to the distinction between the collective and individual aspects of privilege, Erskine May notes that "it is only as a means to the effective discharge of the functions of the House that individual privileges are enjoyed by its Members."

There is no doubt that parliamentary privilege is valued for protecting the proper, unimpeded functioning of Parliament. This has been true from the very beginning. Its origins date to the earliest days of Parliament in medieval England. However, it is from the time of the 17th century following the Civil War and the Restoration of 1660 and concluding with the Glorious Revolution of 1688 that privilege was finally and indisputably asserted by a triumphant Parliament that had secured its supremacy in its struggles with the Crown. The enduring outcome of Parliament's triumph is the Bill of Rights. Article 9 of the Bill of Rights declared that "freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Through this

provision, Parliament claimed not only free speech but also absolute control over its proceedings, and total freedom and immunity from any external interference or review. This declaration of privilege by the British Parliament at Westminster has been part of the long heritage shared by the Parliaments and Legislatures established over the history of the former Empire and current Commonwealth.

In Canada, the privileges of the Westminster House of Commons were conferred on our federal Parliament through section 18 of the *Constitution Act, 1867*. Both the Senate and the House of Commons and their members possess the full range of these undefined privileges subject to some requirements relating to quorum, voting and language. Canadian provincial legislatures soon acquired the same range of privileges through statutes after the courts confirmed their right to legislate privilege under the authority provided by section 92, which allows the provinces to amend their constitutions. Territorial legislatures have also provided for their privileges by legislation without objection from the federal government.

The legislation implementing the authority of section 18 refrained from precisely defining parliamentary privilege. The Act adopted in May 1868, and now part of the *Parliament of Canada Act*, simply repeated section 18 and stated that the Canadian Parliament possessed the privileges, powers and immunities of the Westminster House of Commons existing as of 1867. From the outset, Canada's constitutional environment and the established practices and conventions governing the relationship between the different branches of government moderated the character and enforcement of these parliamentary privileges. As to Article 9, without having been directly enacted into Canadian law, it provided useful principles and terminology to understand privilege, but its literal meaning has been applied more sparingly in Canada than in Britain. For example, today's parliamentarians are not exercised by the fact that the courts frequently cite parliamentary proceedings to assist in interpreting the law. To the contrary, it is a point of pride that the deliberations of the Senate and its committees have been explicitly noted by the Supreme Court in some of its judgements.

Since the incorporation of the *Charter of Rights and Freedoms* into the Constitution in 1982, some of these privileges have been challenged through the courts. Notable are three important cases decided by the Supreme Court based on the *Charter* seeking to clarify the balance between parliamentary privilege and other constitutional rights. There is also a growing body of case law from the lower courts on privilege, some of which is inconsistent and confusing.

This reality suggests that the purpose of privilege in the 21st century depends, in part, on context.

Canada is an open democratic and diverse society with regular free elections and a dynamic press – including print, radio, television and on-line. There is great, and growing, public demand for accountability and transparency for actions by all institutions and individuals involved in the public sector.

In this environment, a focus on privilege as a "protector" of Parliament is not helpful since it should rather be understood as a supporter of Parliament's actions. It is my submission to you that there are five principal functions that are core to a modern Parliament. First, there is a duty to hold government to account. Second, legislation is passed and, as a third related point, funds are provided for the operation of the government and the legislative framework already established. Fourth, recommendations are provided as well as input on policy options. Finally, parliamentarians espouse the interests of their regions and provide assistance and advocacy for individuals and groups that need assistance.

Privilege should support Parliament's basic functions, while respecting its duty to be transparent and accountable. Parliament is not a small clique, but an open forum that is avidly followed. Legislators want to interact dynamically with the public, more now than ever before. This leads to the proposition that privilege should be understood in a narrow, more circumscribed, way. While this may be quite different from the more activist approach taken in some jurisdictions, it has guided my own response, and that of the Senate of Canada, in concrete situations where we have been faced with the need to apply privilege in concrete circumstances, such as those outlined earlier.

Fundamentally, we try to engage actively with the public. We want people to know what we're doing and to give their input. In this environment, it would be inappropriate to attempt to use privilege as a shield to protect parliamentarians from the public or individuals. Criticism must be accepted, even if it is sometimes nasty or unjustified, and parliamentarians must hold themselves to the highest standards that would be expected from any member of our society.

In the 21st century, privilege must be understood in a narrowly circumscribed way. A sweeping rule that pretends to govern all cases is probably not realistic. When dealing with specific incidents and cases, the preferred model is to err in favour of greater openness and greater accountability. Parliament holds the executive to account, but parliamentarians must also understand that they are

accountable to the public. Privilege only comes into play when it is required to support the basic core responsibilities of a Parliament, and then only to the narrowest degree required to support that work. This approach marks a return to the classical definition from Erskine May enunciated at the outset of these remarks, recognizing that privilege can only be properly invoked when it is genuinely required for the performance of parliamentary duties.

What are the foundations of privilege – is legislation required, and what is the scope and extent of privilege and how does it relate to freedom of speech?

Outlining a few of the key elements of Canada's system of governance may be of assistance, since they will provide the framework for much of this response. Canada is a federal state with a partially-written constitution. Since 1982 Canada has benefited from a *Charter of Rights* guaranteeing basic protections for groups and individuals that cannot be violated, although there is an override provision which permits the federal Parliament or provincial legislatures to enact legislation specifically stating that it will operate notwithstanding the *Charter*. This provision is only valid for five years and, in practice, is rarely used.

The federal nature of the country and the constitutional guarantee of rights have given the courts a strong role when it comes to constitutional issues. Ours is a system of constitutional supremacy, not pure parliamentary supremacy as it would be understood in the United Kingdom or here in New Zealand.

There has never really been an undue focus on privilege in Canada's Parliament. This has occurred despite the fact, or perhaps because of it, that there is no legislation beyond the provisions in the *Parliament of Canada Act* mentioned earlier. There has been relatively little study of the issue by parliamentarians.

Our approach is therefore different from that in other Commonwealth countries. In Britain, for example, there would be concern about the use of parliamentary Debates in the courts to understand Parliament's intent. In Canada we actually take pride in this, although it could certainly raise concerns relating to the Bill of Rights. Canadian parliamentarians do not see the use of Debates by the courts as a negative or as having a "chilling effect" on discussions.

This is not meant to be a criticism of our Parliament in its attitude towards privilege; the reality is that this has not cost us anything. Vigorous debate does occur in Parliament, its role is respected, and any attempt to limit our work as a deliberative assembly would be strongly resisted.

Since the *Charter* took effect there have been three Supreme Court decisions touching on privilege: Donahoe, Harvey and Vaid. In the opening portion of these remarks broad conclusions from the most recent of the three decisions, the Vaid case, were summarized. That decision on necessity, as understood in a contemporary context, is the proper basis for privilege.

In Canada there has to date been no need to enact comprehensive legislation on privilege, as was done in Australia. If we do follow that path at some point in the future, it would likely be stimulated by a wish to provide greater clarity, transparency and accountability with respect to privilege and its meaning in the 21st century.

Can natural justice be guaranteed in privilege committees? What is the role of such committees as well as the role of the Speaker?

Natural justice refers to the common law doctrine, enforceable by the courts, requiring decision makers to give persons adversely affected by their decisions a fair opportunity to present their position and argue their point of view before a decision is actually made.

In considering this issue we must recognize that Parliaments are, inherently, political bodies animated, in many respects, by partisan considerations. Our primary tool is open debate conducted to bring forward the views the government, the opposition and other groups, whether independent members or third parties.

Extensive debate is our tool, whereby interlocutors set out their own positions, test and probe those of other participants, and try to convince everyone present that the path being advocated is the best option. It is important to bear in mind that there is a common goal, namely the public good, although there are certainly differences of opinion as to how best to reach that goal.

The Canadian Senate has recently taken actions which some have seen as trampling upon the natural rights of a few of its members. On November 5, 2013 the Senate took the unprecedented step of suspending three senators involved in the alleged misuse of Senate expense allowances, referred to earlier. The suspensions will last until the end of the present session or until the order is lifted.

These suspensions occurred by means of a simple motion in the Senate moved after due notice. The motion stated that “in order to protect the dignity and

reputation of the Senate and public trust and confidence in Parliament", the Senate order a suspension of the three senators "for sufficient cause, considering [their] gross negligence in the management of [their] parliamentary resources."

Natural justice has its place in the courts, where there are neutral established processes to support the goal of identifying the truth. Natural justice may seem desirable, but it is not necessarily an idea that can be slotted into the parliamentary environment without profoundly transforming such bodies. It may not even be desirable.

Parliaments function with the public good as the primary goal, and the definition of that term is diverse and fluid. Fairness is certainly an important consideration, but it is clearly secondary. A system in which one body – the house or its delegated body, a committee – is, in the final analysis, the investigator, prosecutor, judge and jury is not one into which natural justice can readily be fitted.

Allowing representation by legal counsel and encouraging extensive and free debate are appropriate when we are dealing with issues of privilege where accusations have been levelled against individuals. However, fully meeting the criteria of natural justice is not really possible in such a forum, nor should we aspire to do so. Transparency and openness in proceedings, and careful and deliberate action without undue haste will help ensure that, if an abuse does occur, it is revealed and corrected. The court of public opinion will then judge Parliament and hold its members to account.

## Conclusions

Let me conclude briefly with a few comments on key issues raised in the consideration of privilege in the modern setting. First, privilege should not be allowed to damage the public's trust of its representatives. That trust is the lifeblood of a healthy democracy. Public cynicism throughout the world is already at disturbingly high levels, and Parliaments must seriously question whether they wish to make exaggerated claims that risk increasing it. That does not serve members; it does not serve the institution; and it does not serve the public interest.

Second, claims of privilege should only be made after careful consideration and when really required to support Parliament's work in furthering the public good. Those who use inflated claims of privilege to try to protect themselves from the public or from criticism risk finding themselves on the wrong side of history.

Finally, and most fundamentally, the promotion of transparency, openness and informed debate is, in and of itself, a good thing. Privilege should not be used as a mechanism by which to impose limitations or to curtail these essential elements of a vigorous democracy.