Court File No. 14-30299

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

- and -

MICHAEL DUFFY

- and –

**THE GLOBE AND MAIL INC., CTV, A DIVISION OF BELL MEDIA INC.
POSTMEDIA NETWORK INC. and
CANADIAN JOURNALISTS FOR FREE EXPRESSION**

Proposed Interveners

FACTUM OF THE PROPOSED INTERVENERS, THE GLOBE AND MAIL INC., CTV, A DIVISION OF BELL MEDIA INC, POSTMEDIA NETWORK INC. and CANADIAN JOURNALISTS FOR FREE EXPRESSION

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PART I - INTRODUCTION

1. The Defendant Michael Duffy has sought the disclosure of certain documents in the possession or control of the Senate of Canada. The Senate has refused this request claiming parliamentary privilege over the documents under the following categories:

(a) Freedom of Speech;

(b) exclusive cognizance of and control over debates and proceedings;

(c) control by the Houses of Parliament over their internal affairs; and

(d) disciplinary authority over its members.

2. The proposed Interveners, The Globe and Mail Inc., CTV, a division of Bell Media Inc., Postmedia Network Inc. and Canadian Journalists for Free Expression, seek leave to intervene on the question of the existence, scope and purpose of parliamentary privileges.

3. In one sense, parliamentary privileges belong only to the houses of Parliament and legislative assemblies and their respective members; but in a more fundamental sense they belong to all Canadians. These unique powers, privileges and immunities exist so that the elected (and appointed) representatives of the Canadian public have the freedom they require to properly carry out their public legislative and deliberative functions. At their core, parliamentary privileges are intended to foster freedom of expression, open and transparent debate, respect for the rule of law, and the dignity of the public institutions that govern us all.

4. The Interveners do not take a position with respect to the Defendant's application. They seek to advance the argument that the scope of any parliamentary privilege, including those asserted by the Senate in this case, must be delineated in a manner that strictly reflects the core legislative and deliberative functions of legislators, as representatives of and holding duties to the broader public. In the Interveners' submission, this exercise must take into account the importance of freedom of expression and openness, and the public interest in and right to transparent and accountable public institutions to a constitutional democracy.

5. The Interveners respectfully submit that their arguments, which are set out below, represent a useful contribution to the court's determination of the Senate's claim of privilege, an analysis that must evolve with and reflect the modern values and expectations of Canadians.

PART II - LEAVE TO INTERVENE

6. The Globe and Mail Inc., carrying on business as *The Globe and Mail,* began publishing (as *The Globe*) in 1844. It is one of Canada's oldest and most trusted sources for news and investigative reporting and has won numerous National Newspaper Awards.

7. CTV, a division of Bell Media Inc. ("CTV") is a Canadian English language broadcast television network. It is Canada's largest privately owned network and has been Canada's most-watched television network for the past thirteen years.

8. Postmedia Network Inc. ("Postmedia") is the largest publisher by circulation of paid English-language daily newspapers in Canada, representing some of the country's oldest, best known and award-winning media brands, including the *National Post*, *The Vancouver Sun*, *Edmonton Journal*, *Calgary Herald*, *Ottawa Citizen* and *Montreal Gazette.*

9. *The Globe and Mail*, CTV and Postmedia frequently initiate and intervene in legal cases at all level of Canadian courts.

10. Canadian Journalists for Free Expression ("CJFE") is an organization whose core purpose is to defend the rights of journalists and to contribute to the development of media freedom around the world. CJFE has approximately 400 members across Canada, including journalists, students, teachers, lawyers and others who believe in the right to free expression.

11. Pursuant to this court's jurisdiction to control its own process, the Interveners bring this application for leave to intervene solely for the purpose of assisting the court in its

determination of the contours of the claim of parliamentary privilege in the Defendant's application for disclosure of certain documents in the possession or control of the Senate.[1]

12. In deciding whether to grant intervener status, this court must first characterize the subject matter of the nature of the proceeding and, second, determine what interest the proposed intervener has in the proceedings. An additional consideration is whether the involvement of the intervener will result in the delay in the trial or prolixity in the proceedings.[2]

13. In interpreting the broad discretion for intervention pursuant to the *Criminal Proceedings Rules for the Superior Court of Justice,* courts have noted the factors for consideration include the nature of the case, the issues which arise, the likelihood of the applicant making a useful contribution and the potential prejudice to the parties.[3] It is submitted that these can also be guiding factors in the within application.

14. The Interveners acknowledge that applications for intervention in a criminal trial are granted "cautiously and sparingly". However, it is submitted that the significant public interest in this case and its surrounding context, and the unique nature and public importance of the legal questions that arise from the Defendant's application, support the media's intervention.

15. The application brought by Mr. Duffy raises a very important question about the interpretation and application of parliamentary privilege. As will be shown below, the

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[1] *R. v. Chemama*, 2008 ONCJ 140, 2008 CarswellOnt 1696; *R. v. Dolomont*, 2008 ONCJ 201, 2008 CarswellOnt 2348.
[2] *R. v. Dolomont*, *supra* at paras. 6-8.
[3] *R. v. National Post*, 2002 CanLII 21497 (ON SC).

Interveners' arguments will focus on the importance of the public interest in freedom of expression and openness, and in the accountability and transparency of public institutions when determining the existence, scope and purpose of parliamentary privileges. The Interveners do not take a position with respect to the Defendant's application for production. Accordingly, the narrow focus of the Interveners' proposed arguments, which are set out below, will not result in any delay or prejudice to the Defendant's trial.

16. With respect to the more significant consideration of the likelihood of the Interveners making a useful contribution to the determination of the issues before the court, and their direct interest in the subject matter, factors that are intertwined, the Interveners submit that this application raises matters of significant public interest on which it can provide particular insight.

17. The Interveners ask the court to take judicial notice of the role they play in disseminating authoritative news and comment in Canada and abroad to the public. In decisions of the Supreme Court of Canada, and of the United States, the media have been described as "surrogates of the public".[4] Freedom of expression and freedom of the press are of fundamental importance in a democratic society and, in Canada, are entrenched in the *Charter*. The press plays a crucial role in holding public institutions to account and must be free to comment and report on their activities and functions. Members of the public have a right to receive information pertaining to public institutions.[5] Freedom of expression,

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[4] *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, per Wilson J. at 1359-1360, citing former SCOTUS Chief Justice Burger.

[5] These principles have been established and discussed in many decisions at all levels of court in Canada, most often in the context of the application of the open court principle. For example, see *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326.

accountability and transparency, it will be argued below, are values that should factor prominently when determining the contours of any claim of parliamentary privilege.

18. The media and the public have a clear interest in the Duffy trial and in the Senate expenses issue generally. The media broke numerous stories on the Senate expenses issue and they continue to investigate and report on the story. In recent interviews with the media, including with CTV, the Speaker of the Senate has explicitly stated that the Senate must show the Canadian public that it is accountable and transparent.[6] The media plays a clear role in connecting the Senate with the public it serves and represents.

19. The position taken by the Senate to the Defendant's request for disclosure requires the adjudication and delineation of a unique privilege that requires consideration of interests and rights beyond those of the Defendant. How this broader public interest, which the media represents, should factor into the necessity test that governs the existence and scope of parliamentary privilege is discussed below.

PART III - THE SCOPE AND PURPOSE OF PARLIAMENTARY PRIVILEGE

Overview

20. The Interveners submit that a closer examination of the *purpose* of parliamentary privilege will assist in determining the importance of the broader public interest to the evolving analysis of parliamentary privilege in the 21st century.

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[6] Interview between Speaker of the Senate, the Honourable Leo Housakos and CTV's Robert Fife, May 10, 2015, Factum of the Applicant Michael Duffy, para. 14.

21. Parliamentary privilege is a fundamental principle common to all countries based on the Westminster system. Members of Parliament and Senators[7] are responsible for the enactment of the legislation by which Canada is governed. As noted by the English Court of Appeal (Criminal Division), "[p]roperly understood, the privileges of Parliament are the privileges of the nation, and the bedrock of our constitutional democracy."[8]

22. The privileges, immunities and powers the houses of Parliament and their respective members possess are those that are necessary for legislators to do their legislative work,[9] those "without which they could not discharge their functions".[10] Necessity is determined with reference to "the dignity and efficiency of the House."[11]

23. The parliamentary privilege of the British Parliament at Westminster was hard won by its members over centuries of unwarranted and intrusive interference by the monarch and his or her courts: "…in the United Kingdom privilege evolved from a history of conflict between the Houses of Parliament, the Crown and the courts. In essence, it was a struggle for independence as between the different branches of government."[12]

24. Though the context today is quite different from that of 15th, 16th and 17th century Britain, respect for the constitutional separation of powers remains fundamental to Canada's system of government.[13] That said, the contours of parliamentary privilege, and the necessity test used to delineate them, ought to keep pace with and reflect modern Canadian society and

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[7] And legislators in provincial and territorial legislative assemblies.
[8] *R v Chaytor*, [2010] EWCA Crim 1910 at para 5 (emphasis added).
[9] *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 29, proposition #4 ["*Vaid*"].
[10] *Vaid, supra* at para 29, proposition #2.
[11] *Vaid, supra* at para 29, proposition #7.
[12] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 per Lamer CJ at 344 ["*New Brunswick Broadcasting*"].
[13] *Vaid, supra* at para 21.

its values. "Parliament, originally a semi-private institution, is now the centre of public democratic life."[14] With the enlargement of the power of the state, including through legislation passed by Parliament; increased scrutiny of the exercise of that power by the public; and the advent of the *Charter* and its constitutional guarantee of the fundamental rights and freedoms of the individual, the modern Canadian public expect that those in power are transparent and accountable.

25. The introduction to a discussion paper authored by the Senate's Subcommittee on Parliamentary Privilege published earlier this year described the modern context, and reality, of parliamentary privilege well:

> No longer are concerns about privilege centred on the relationship between Parliament and the Crown. Rather, in the late 20th and now in the 21st century discourse about parliamentary privilege should function in a rights-based system exemplified here in Canada by the *Canadian Charter of Rights and Freedoms*, and where the public expects increased transparency and accountability for the decisions made by parliamentarians.[15]

26. The work of legislators, in the discharge of their duties to the public, depends on their ability to debate and deliberate openly and freely. The unique powers and immunities of legislative bodies and their members exist to foster openness and freedom of speech in that important work. They exist to ensure that these bodies are able to carry out their legislative and deliberative functions "unimpeded by any external body or institution, including the courts."[16]

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[14] Senate, Subcommittee on Parliamentary Privilege of the Standing Committee on Rules, Procedures, and the Rights of Parliament, *A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century* (January 2015) at 79 (Chair: The Honourable George Furey) ["2015 Senate Subcommittee Discussion Paper"].
[15] 2015 Senate Subcommittee Discussion Paper at 1.
[16] *Vaid*, *supra* at para 20.

27. However, these rights and immunities do not exist to make the houses of Parliament "enclaves shielded from the ordinary law of the land;"[17] or unaccountable to the public they serve. Their scope must therefore be delineated in a manner that strictly reflects the core legislative and deliberative functions of legislators, as representatives of and holding duties to the broader public. In the Interveners' submission, this exercise – by necessity – must take full account of the Canadian public's interest in and right to transparent and accountable public institutions.

Freedom of Speech

28. Both historically and today, the main purpose of parliamentary privilege is to foster freedom of speech through an absolute immunity from prosecution for anything a legislator says in a legislative proceeding. In the modern context, there is also an expectation that proceedings in Parliament will be open to the public and that legislators, like all public officeholders, will be accountable to those they serve. In general, secrecy over the proceedings and activities of any legislative body is inconsistent with parliamentary privilege and contrary to the public interest.

29. As a deliberative body, Parliament's lifeblood is free and open debate. Parliamentary privilege exists to ensure this freedom and openness.

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[17] *Vaid*, *supra* at para 29, proposition #1.

30. While the parliamentary privilege of freedom of speech was not codified until 1689, it was asserted by Westminster at least as early as 1523.[18] Article 9 of the UK *Bill of Rights* of 1689 provides:

> The Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.[19]

31. Clearly, the freedom of legislators to speak their minds is at the very core of parliamentary privilege. This reflects the fact that freedom of speech in parliamentary proceedings is at the core of the legislative and deliberative function of a legislative body.[20]

32. As Binnie J. noted in *Vaid* there have been variations in the extent of privilege asserted by houses of Parliament over time, including to areas or activities that clearly go beyond what should be a proper assertion of immunity.[21] However, Binnie J. also cited, with reference to a leading Canadian authority, a ruling of the Speaker of the Canadian House of Commons that described privilege in the following terms:

> On a number of occasions I have defined what I consider to be parliamentary privilege. Privilege is what sets Hon. Members apart from other citizens giving them rights which the public does not possess. I suggest that we should be careful in construing any particular circumstance which might add to the privileges which have been recognized over the years and perhaps over the centuries as belonging to members of the House of Commons. <u>In my view, parliamentary privilege does not go much beyond the right of free speech in the House of Commons and the right of a Member to discharge his duties in the House as a member of the House of Commons</u>. [Emphasis added.] (*House of Commons Debates*, vol. V, 3rd Sess., 28th Parl., April 29, 1971, at p. 5338)[22]

33. The *primary* object of parliamentary privilege is to protect freedom of speech in the houses of Parliament. A member (or witness) participating in a debate or committee hearing

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[18] *Vaid*, *supra* at para 21.
[19] *Bill of Rights*, 1 Will. & Mar., sess. 2, c. 2
[20] 2015 Senate Subcommittee Discussion Paper at 40.
[21] *Vaid*, *supra* at paras 22-23.
[22] *Vaid*, *supra* at para 23 citing *Beauchesne's Rules & Forms of the House of Commons of Canada* (6th ed. 1989) at pp 11-12.

cannot be sued or prosecuted in the civil or criminal courts for what he or she says in the course of parliamentary proceedings. This freedom of speech provides immunity from prosecution in order to ensure that legislators are absolutely free to discuss what they choose in the manner they choose as they conduct their legislative and deliberative functions.

34. It is evident from the origin and history of parliamentary privilege, and from the very text of Article 9, that privilege attaches to "proceedings in Parliament." But what are "proceedings in Parliament"? Citing *Erskine May* (19th ed. 1976), at p. 89, Binnie J. noted that,

> not "*everything that is said or done within the Chamber during the transaction of business forms part of proceedings in Parliament*. Particular words or acts may be entirely unrelated to any business which is in course of transaction, or is in a more general sense before the House as having been ordered to come before it in due course"[23]

35. According to the Supreme Court of Canada, in determining the existence and scope of parliamentary privilege, "the purposive connection between necessity and the legislative function"[24] is to be emphasized.

> In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.[25]

36. The Interveners submit that "proceedings in Parliament" and true legislative and deliberative functions, by definition, will (or should) be open and public. In contemporary Canadian society, Parliament is "the centre of public democratic life."[26] These public

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[23] *Vaid*, *supra* at para 43 citing *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (19th ed. 1976) at p 89 (emphasis by Binnie J.).
[24] *Vaid*, *supra* at para 44.
[25] *Vaid*, *supra* at para 46 (emphasis added).
[26] 2015 Senate Subcommittee Discussion Paper at 79.

proceedings are also privileged and protected by parliamentary immunity by virtue of the privilege of freedom of speech.

37. In contrast, many purely administrative functions performed by administrative staff of a legislative body are likely not to be public. The products of these functions may be outside of public view in the normal course of the Senate's business, but they are not privileged and therefore not beyond the reach of the courts.

38. Secrecy and confidentiality are contrary to the entire purpose of parliamentary privilege, especially in the 21st century. Proceedings in Parliament should be open and communicated to the public; the immunity afforded by the privilege of freedom of speech is meant to ensure that this is the case:

> Parliamentary freedom of speech would be of little value if what is said in Parliament by members, ministers and witnesses could not be freely communicated outside Parliament. There is an important public interest in the public knowing what is being debated and done in Parliament.[27]

39. This, in combination with the clear expectation of Canadians that those who govern them will be transparent and accountable – especially in respect of their use of public funds – should mean that any claim of privilege that would keep information about public institutions and public officeholders from the view of the public will be rejected unless proof of necessity is clearly and unambiguously made out.

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[27] 2015 Senate Subcommittee Discussion Paper at 6, quoting the very influential report of the UK Joint Committee on Parliamentary Privilege, *Parliamentary Privilege – First Report – Volume 1*, 9 April 1999 at para 341.

Exclusive Cognizance and Internal Affairs

40. In addition to fostering free speech, openness and transparency in the conduct of proceedings in Parliament – the lifeblood of a legislative and deliberative body – parliamentary privilege also grants legislative bodies special powers and rights of control over its proceedings. This power – and the immunity from external review that runs with it – is defined by the degree of autonomy necessary to ensure that the house's legislative and deliberative functions can proceed in an efficient manner, unimpeded by external bodies. Binnie J. gave an apt example of the purpose of these powers over "internal affairs":

> It would be intolerable, for example, if a member of the House of Commons who was overlooked by the Speaker at question period could invoke the investigatory powers of the Canadian Human Rights Commission with a complaint that the Speaker's choice of another member of the House discriminated on some ground prohibited by the *Canadian Human Rights Act*, or to seek a ruling from the ordinary courts that the Speaker's choice violated the member's guarantee of free speech under the *Charter*. These are truly matters "internal to the House" to be resolved by its own procedures. Quite apart from the potential interference by outsiders in the direction of the House, such external intervention would inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business and on that account would be unacceptable even if, in the end, the Speaker's rulings were vindicated as entirely proper.[28]

41. However, if it is to mean anything at all, control – or exclusive cognizance – over the "internal affairs" of a house of Parliament must also be defined according to the directness of the connection of those "affairs" to the core legislative and deliberative function of the assembly. Reference to a general privilege over "internal affairs" returns us to the question of what properly constitutes "proceedings in Parliament".

42. In *Vaid*, Binnie J. held that an assertion of privilege over "internal affairs" was problematic because, if interpreted narrowly, it simply refers to control over a house of Parliament's "own agenda and proceedings," and, if read broadly, "it would duplicate most of

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[28] *Vaid*, *supra* at para 20.

the matters recognized independently as privileges."[29] For that reason, the court rejected an articulation of privilege over "internal affairs" without any qualification. (Of course, the neither did the Supreme Court recognize the existence or necessity of a somewhat less generalized but still overly wide privilege over "management of employees.")

43. In its recent discussion paper, the Senate Subcommittee on Parliamentary Privilege appears to have been convinced by Binnie J.'s analysis when it stated that "immunity over internal affairs should be perhaps limited to control over elements of proceedings in Parliament, and that Parliament is not a 'statute-free zone'."[30]

44. One of the more specific privileges that comes under exclusive cognizance over internal affairs is a legislative body's disciplinary authority over its members. This authority gives legislative bodies the right and power to discipline members (and others) for breaches of privilege and contempt of Parliament and immunizes its disciplinary decisions in respect of those matters from judicial review. The discussion paper of the Senate Subcommittee on Parliamentary Privilege provides a useful description of Parliament's disciplinary powers:

> Although generally considered as an aspect of exclusive cognizance, the disciplinary powers of Parliament are often given separate treatment. These powers are typically exercised against members and non-members to deal with contempts against Parliament, or acts that interfere with Parliament's operations. …
>
> (…)
>
> Parliament's power to decide what constitutes contempt is generally recognized as being within the purview [of] Parliament's exclusive power. It is essential for Parliament to have the power to sanction contempts to enable it to discharge its responsibilities. Its power to discipline its members is generally unquestioned, and is manifest in many ways. The Speaker requires this power to control proceedings in Parliament. A range of penalties are available for breaches of the different bodies of rules in place in either chamber. Remedies may include

[29] *Vaid*, *supra* at paras 50-51.
[30] 2015 Senate Subcommittee Discussion Paper at 54 (emphasis added).

> suspension, or loss of speaking privileges or loss of financial benefits for failure to attend [to] chamber business. These would fall unquestionably within the privilege of exclusive cognizance.
>
> The disciplinary powers of Parliament have two main purposes: to *compel*, for example witnesses who may not be willing to cooperate in a hearing, and to *sanction* those who have not complied with the orders of a committee or a house of Parliament.[31]

45. But when analyzing the scope of particular parliamentary privileges, and the sphere of activities over which a legislative body has exclusive cognizance, it is important to distinguish between powers and immunities. As Binnie J. explained in *Vaid*:

> [56] The appellants can show that historically both the House of Commons in Britain and in Canada had the *power* to hire and fire employees, but this is not proof of the necessity that such hiring and firing be *immunized* from judicial review by the doctrine of parliamentary privilege. Both s. 18 of the *Constitution Act, 1867* and s. 4 of the *Parliament of Canada Act* differentiate among the "privileges, immunities and powers" of Parliament.[32]

46. Binnie J. also emphasized a particular passage from the seminal case of *Stockdale v Hansard*, when explaining that courts are not bound by unilateral assertions of privilege and that in the UK "courts exercise due diligence when examining a claim of parliamentary privilege that would immunize the exercise by either House of Parliament of a power that affects the rights of non-Parliamentarians"[33]:

> All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences.[34]

47. A house of Parliament may have control over a particular set of internal documents, but this does not mean that its disclosure is immunized against or precluded by privilege. In

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[31] 2015 Senate Subcommittee Discussion Paper at 57-59.
[32] *Vaid*, *supra* at para 56 (emphasis in original). Senators Joyal and Jaffer, interveners in *Vaid* also seem to have emphasized the distinction between powers and immunities; see para 58.
[33] In this case, Mr. Duffy is, of course, a Parliamentarian. However, the court is not adjudicating his parliamentary rights or privileges, but his criminal liability, which obviously is outside the parliamentary sphere.
[34] *Vaid*, *supra* at para 39, citing *Stockdale v Hansard* (1839), 112 ER 1112 (Eng QB) at 1192 (emphasis by Binnie J.)

order for immunity to obtain over a particular class of documents, the claimant of privilege must prove that this is necessary; that is, it must prove that it would not be able to discharge its legislative and deliberative functions without the immunity from disclosure – both its existence and scope – that it has asserted.

48. As noted above, Binnie J. explained why a Speaker's decision to call on one Member of Parliament at question period instead of another should be immunized from judicial review: in that case, "external intervention would inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business."[35]

49. In the modern Canadian context, especially where the privilege claimed affects the rights of individuals and/or matters not entirely "internal to the House," the necessity test used to define the scope of the privilege claimed must take into account *Charter* rights and values, the rule of law, and the public interest in the transparency and accountability of our public institutions. Any articulation of the sphere of activity over which a claim of privilege is asserted must involve a balancing and reconciling of the relative importance of the rights, interests and expectations of the public with the relative necessity to the proper functioning of the legislative body of the powers and/or immunities being asserted.

50. In *Harvey v New Brunswick*, McLachlin J. (as she then was) expanded on her analysis of the relationship between the *Charter* and parliamentary privilege in her judgment in *New Brunswick Broadcasting*:

> [69] Because parliamentary privilege enjoys constitutional status it is not "subject to" the *Charter*, as are ordinary laws. Both parliamentary privilege and the *Charter* constitute

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[35] *Vaid*, *supra* at para 20.

> essential parts of the Constitution of Canada. Neither prevails over the other. While parliamentary privilege and immunity from improper judicial interference in parliamentary processes must be maintained, so must the fundamental democratic guarantees of the *Charter*. Where apparent conflicts between different constitutional principles arise, the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them.[36]

51. It follows from this purposive approach to reconciling *Charter* rights and values with parliamentary privilege both that *Charter* rights should be read as being consistent with established parliamentary privileges and that the scope of asserted parliamentary privileges should be delineated in a way that is consistent with the guarantees of the *Charter*. The courts may not interfere with the exercise of an established privilege – including on grounds that the particular exercise is alleged to have infringed a *Charter* right – but "[t]o prevent abuses in the guise of privilege from trumping legitimate *Charter* interests, the courts must inquire into the legitimacy of a claim of parliamentary privilege."[37] This inquiry must take account of the constitutional guarantees and values entrenched in the *Charter*.

52. The Interveners submit that the following questions should be asked when determining the necessity component in this case: How important is the disclosure of the class of documents being sought to Mr. Duffy's rights in his criminal trial and to the public's rights to information about Senators' expense claims and the oversight of those claims by the administration of the Senate of Canada? How necessary to the Senate's ability to carry out its legislative and deliberative functions, and to fulfil its duties to the public, is the confidentiality of internally prepared audit documents relating to Senators' expense claims?

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[36] *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876 at para 69.
[37] *Ibid* at para 71.

Expense Claims and Audit Reports

53. The question of parliamentary privilege is before the court in the context of criminal allegations relating to expenses claimed by and paid to Senator Duffy. That police investigations have occurred and criminal proceedings are in full swing, all apparently with the cooperation of the Senate and its officials, is a reflection of the fact that the submission of expense claims forms by Senators and the payment of those claims by the Senate Administration do not come within the ambit of "proceedings in Parliament" and, therefore, are outside the scope of parliamentary privilege.

54. This fact was judicially determined by the UK Supreme Court in 2010 in the context of that country's parliamentary "expenses scandal." The court – sitting as a panel of nine justices – unanimously held that the immunities provided by Article 9 of the *Bill of Rights* and by Parliament's exclusive cognizance over its internal affairs do not cover MPs' expense claims. Parliamentary privilege does not preclude the prosecution of legislators in the criminal courts for submitting allegedly false expense claims.[38]

55. The question is: Does an "Internal Audit Report" apparently relating to every serving Senator and prepared by a member of the Senate's administrative staff, a certified auditor, come within a sphere of activity that is "so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account" that it should be beyond the reach of this court and of the public?

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[38] *R v Chaytor*, [2010] UKSC 52 ["*Chaytor*"].

56. It was held by the UK Supreme Court that judicial inquiry into and review of the administration and implementation of the system governing expense claims does not offend any constitutional principle:

> Scrutiny of claims [for allowances and expenses] will have no adverse impact on the core or essential business of Parliament, it will not inhibit debate or freedom of speech. Indeed it will not inhibit any of the varied activities in which Members of Parliament indulge that bear in one way or another on their parliamentary duties. The only thing that it will inhibit is the making of dishonest claims.[39]

> Thus precedent, the views of Parliament and policy all point in the same direction. Submitting claims for allowances and expenses does not form part of, nor is it incidental to, the core or essential business of Parliament, which consists of collective deliberation and decision making. The submission of claims is an activity which is an incident of the administration of Parliament; it is not part of the proceedings in Parliament.[40]

57. In coming to its determination, the court in *Chaytor* reviewed many authorities as well as statements made and reports by Parliamentarians and officials of Parliament, including the following partial excerpt of the advice provided to the Speaker of the House of Commons by the Clerk:

> In order to make the case that privilege applies to claims it would be necessary to establish that they are indeed transactions of business of the House or one of its Committees. Although I accept that the ACA scheme arises from Resolutions of the House, the proposition that all actions or claims under it are proceedings, seems to me to be unsustainable. The house agrees to many things by Resolution – for example to build a new building – but that does not mean that all activities in connection with its erection are "proceedings". Proceedings must imply, in the words of the Joint Committee on Parliamentary Privilege, "formal collegiate activities of Parliament" – rather than merely the consequences of decisions that either House has taken.[41]

58. It is important to note that whether a parliamentary committee is involved in a given activity is not determinative of whether or not the activity constitutes a "proceeding" covered by privilege:

> The question was asked rhetorically of what the position would be if Members had to go before the Estimate Committee, or even the House, to ask for their expenses. It was submitted

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[39] *Chaytor*, *supra* at para 48.
[40] *Chaytor*, *supra* at para 62.
[41] *Chaytor*, *supra* at para 58.

> on behalf of the defendants that in that event their claims would constitute proceedings in Parliament and be protected by privilege, and that the same was true of claims made to the Fees Office as that office was acting on behalf of the House in receiving and considering the claim forms. The answer is that the submission and consideration of allowances and expenses claims is essentially a matter of administration, properly to be performed by officials, and that it would be absurd for this exercise to be performed by a committee or by the House.[42]

59. It may be that a court is precluded from ordering amendments to the rules pertaining to expense claims that have been adopted by the legislative assembly: the internal process by which the rules are designed and enacted may be a privileged sphere of activity. But how legislators and administrative staff conduct themselves under the rules in place is not covered by parliamentary privilege. Such conduct does not constitute a "proceeding in Parliament" and nor is it a matter within the exclusive cognizance of Parliament because it is not sufficiently linked to the legislative body's legislative and deliberative functions.

60. As was held by the UK Supreme Court:

> 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.[43]

Senate of Canada's Assertion of Privilege

61. What is protected by parliamentary privilege is the use of the courts to attack any decision or proceeding forming part of the core of a legislative body's function in our society. For example, the court could not quash or amend any Senate committee or subcommittee reports relating to a member's expense claims, or overturn any decision by the Senate that a member was in contempt. This could only be done through the Senate's internal procedures, exclusive of any interference by the courts.

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[42] *Chaytor*, *supra* at para 60.
[43] *Chaytor*, *supra* at para 92.

62. Neither can anyone sue Senate committee members for defamation in the course of any proceeding in Parliament. On the other hand, if a member thought that her/his right to speak at a committee meeting had been infringed by a member of a committee, it could be raised as a point of privilege according to the Senate's internal procedures.

63. The privilege of freedom of speech prohibits the "impeachment" or "questioning" of speech made in proceedings in Parliament. Speech in parliamentary debates and proceedings is "referred to" in Canadian courts every day, usually as an aid to a court's interpretation of statutory provisions. This speech is clearly privileged and protected by Article 9 of the *Bill of Rights*, but because it is used as evidence of the intention of Parliament in the court's interpretation of statutes, and not, for example, to inquire into the motives of a member of a parliamentary committee in the context of a defamation action, there is no prohibition on its use in judicial proceedings in the modern age.

64. Therefore, a court may determine that a transcript of a parliamentary proceeding is admissible as evidence for a defined purpose, but prevent its use to impeach or question the testimony of a witness or the comments of a member included in that transcript.[44]

65. The question before the court is whether the Senate has met its onus to show that the disclosure of administrative staff-prepared audit reports relating to Senators' entitlement and

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[44] Reference to speech made in parliamentary proceedings has been more controversial in overseas jurisdictions. In 1993, the House of Lords unanimously held that speech in Parliament could be referenced in court to aid statutory interpretation, overturning a longstanding prohibition on any reference whatsoever (see *Pepper (Inspector of Taxes) v Hart*, [1992] UKHL 3. The Senate Subcommittee on Parliamentary Privilege found that there is "no evidence to substantiate the fear expressed in other overseas jurisdictions that the use of parliamentary proceedings by the courts for purposes that clearly do not attempt to assess directly the character or value of the remarks might exert a 'chilling effect' that would inhibit the privilege of freedom of speech." (2015 Senate Subcommittee Discussion Paper at 51. The Subcommittee also observed that Canadian parliamentarians "take pride in how their statements or publications may be used by the courts.")

claims to expenses is so inconsistent with its sovereignty as a legislative and deliberative assembly that it offends the constitutional separation of powers.

66. The separation of powers requires that each of the Senate and the court respect the legitimate sphere of activity of the other:

> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all parts play their proper role. It is equally fundamental that no one of them over step its bounds, that each show proper deference for the legitimate sphere of activity of the other.[45]

67. The Interveners do not take a position as to the outcome of Mr. Duffy's application for disclosure should be in this case. However, further to their submission that the determination of the scope of parliamentary privilege must take account of the broader public interest, they raise the following points about the evidence tendered by the Senate.

68. Based on the record before the court, the Senate has identified three rights in its articulation of the scope of the privilege it is claiming.

69. First, it claims a right to decide to hold Senate proceedings *in camera*. However, it does not appear to be clear that there is evidence on the record that any such decision was taken in respect of any identifiable proceedings. Nor is it clear how any decision to hold a proceeding *in camera,* if there was one, links to the documents being sought.

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[45] *New Brunswick Broadcasting, supra*, per McLachlin J. at 389.

70. The Senate also claims that the scope of the privilege asserted includes "control over documents in its possession." This articulation appears to be similar to the general assertion of privilege over "the management of employees" in *Vaid*.

71. Finally, the Senate asserts that the scope of the privilege it claims includes "the protection of members and officers from giving evidence about a parliamentary proceeding." Again, this claim of privilege is broadly stated and its relevance does not appear to have been explained with reference to any evidence. In order to substantively address the necessity test, the Senate must indicate the proceeding over which it is claiming privilege and how the privilege claimed relates to the documents being sought.

72. Apart from *Vaid*, to this point the only judicial decision raised by the Senate is that of the Ontario Superior Court of Justice in the criminal prosecution of Senator Raymond Lavigne. The particular decision cited by the Senate is that of R Smith J. from 2010.[46] Justice Smith determined that transcripts of an *in camera* subcommittee meeting that Mr. Lavigne attended were protected by parliamentary privilege.

73. As stated above, there would not appear to be any evidence before the court that any Senate committee or subcommittee determined at any point to go *in camera* or, more importantly, <u>how any such decision might relate to the documents being sought</u>.

74. Further, a more complete history of Mr. Lavigne's request for disclosure of the Senate transcripts informs the context of Justice Smith's decision. In 2008, Mr. Lavigne sought disclosure of the same transcripts before Lalonde J. A review of that decision shows that Mr.

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[46] *R v Lavigne*, 2010 ONSC 2084.

Lavigne sought the transcripts of the Senate subcommittee's meetings for the purpose of cross-examining witnesses on the testimony they gave before the subcommittee. Mr. Lavigne argued that the privilege of freedom of speech did not apply "because the witnesses cannot face any legal consequences."[47] Justice Lalonde agreed with the Senate's submission that "what is said before a House of Commons or Senate Committee is privileged and cannot be used to discredit a witness."[48]

75. It is incumbent on the Senate to delineate and prove the necessity of the scope of the privilege it is asserting over the documents Mr. Duffy is seeking. While it is true that, once established, a court may not inquire into the exercise of a particular parliamentary privilege, *Vaid* tells us that the scope of the privilege asserted must not be overstated or defined too widely. The particular facts and circumstances are crucial to any determination of the scope of an assertion of parliamentary privilege and the scope asserted must be limited to that which is necessary for the legislative body to carry out its legislative and deliberative functions.

Conclusion

76. The Interveners submit that the determination of the scope of an asserted parliamentary privilege through the necessity test must take into account the public's interest in and right to transparent and accountable public institutions. Legislative bodies are not "enclaves shielded from the ordinary law of the land" and courts must ensure that the scope of parliamentary privileges only includes the powers and immunities absolutely necessary for the execution of an assembly's legislative and deliberative functions. This analysis must give full

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[47] *Lavigne v Ontario (Attorney General)* (2008), 91 OR (3d) 728 at para 40.
[48] *Ibid* at para 55.

appreciation to the rights, freedoms and expectations of individuals and the public that legislative bodies exist to serve.

77. While the *Charter* does not apply to the exercise of an established parliamentary privilege, *Charter* rights and values must inform the adjudication of the scope of parliamentary privilege. Freedom of expression and freedom of the press, including the public's right to information about government, are fundamental to Canada's functioning as a free and democratic society. (In the particular circumstances of this assertion of parliamentary privilege, Mr. Duffy obviously has certain other fundamental *Charter* rights to consider as well.)

78. In addition, in the 21st century it must be recognized that the original circumstances in which parliamentary privilege developed are in the past and are largely irrelevant to the analysis today. It is no longer the case that Parliament's privileges are used to shield against intrusions by a meddling monarch. Instead, more often than not, the claim of privilege pits a legislative body against an individual and/or the public at large.

79. Proceedings in Parliament should be open and transparent. Parliamentary privilege exists to foster freedom of speech and openness. Parliament is at the centre of public democratic life. Modern Canadians expect that their elected (and, in the case of the Senate, appointed) representatives conduct their public duties in full public view. They expect transparency and accountability from those who govern them.

80. The current Clerk of the Senate, Charles Robert, has studied and written extensively about parliamentary privilege in Canada in recent years. His views align very well with the

position advocated by the Interveners. For example, Mr. Robert exhorts Canadian parliamentarians to carefully evaluate the effect claims of privilege might have both on the rights and perception of the public:

> Conventional wisdom once held that vagueness and obscurity served the interests of protecting and maximizing privilege. That strategy, which was largely successful before the advent of the *Charter*, has now exhausted its usefulness. In the modern context, it can only serve to undermine the maintenance and protection of privileges necessary to the independent functioning of the legislative branch of the state….It is essential that parliamentarians come to grips with the fact that in modern times privilege is rarely claimed as a shield against attacks by the executive or by the judiciary acting as a proxy for the executive. In reality, and in public perception, privilege has become a sword, with the practical effect of denying, or at least interfering with, the rights and freedoms guaranteed to individuals by the Constitution.[49]

81. Mr. Robert has also argued very articulately and persuasively that, in the 21st century, the necessity test must take account both of *Charter* values, like freedom of expression and the right to due process, and the public's expectation of accountability and transparency:

> The necessity test will also have to account for modern public expectations. On the one hand, citizens are faced with parliamentary privileges that are poorly understood and that stem from a time when a group of representatives of a largely agrarian society attempted to wrest control of the reins of the state from an hereditary monarch. On the other hand, citizens are imbued with fundamental constitutional rights, such as freedom of speech, the right to due process and equality rights, which were adopted by democratically elected federal and provincial leaders following consultation with the public. When faced with a conflict between these two values, it is hardly surprising that there might be popular consternation if these essential rights were to be subordinated to privilege.
>
> Future litigation with regard to the validity of privilege must also bear in mind the changed expectations of the public with regard to those who govern them. …The increasing expectation of accountability on the part of the public has changed not only the traditional view of the role of the legislature but also of the role of privilege. …
>
> (…)
>
> To this end, it should be recognised that the inquiry into the contemporary necessity of a given privilege must take into account certain values that are fundamental to the Canadian constitutional order. This is not to suggest that one part of the Constitution may be used to trump another, a result that the Supreme Court of Canada's jurisprudence precludes. Instead, this approach would recognise that certain constitutional values, including some which may

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[49] Charles Robert & Vince MacNeil, "Shield or Sword? Parliamentary Privilege, *Charter* Rights and the Rule of Law" (2007) 75 The Table 17 at 37.

> inform the various rights guaranteed under the Charter, underlie privilege and have a role to play in defining its scope.[50]

82. The Interveners submit that the words of Mr. Robert should be heeded by courts – and by legislative assemblies – across Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2015.

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[50] Charles Robert & David Taylor, "Then and Now: Necessity, The *Charter* and Parliamentary Privilege in the Provincial Legislative Assemblies of Canada" (2012) 80 The Table 17 at 41-42.

SCHEDULE "A"
LIST OF AUTHORITIES

Case Law

1. *R. v. Chemama*, 2008 ONCJ 140, 2008 CarswellOnt 1696

2. *R. v. Dolomont*, 2008 ONCJ 201, 2008 CarswellOnt 2348

3. *R. v. National Post*, 2002 CanLII 21497 (ON SC)

4. *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326

5. *R v Chaytor*, [2010] EWCA Crim 1910

6. *Canada (House of Commons) v Vaid*, 2005 SCC 30

7. *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319

8. *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876

9. *R v Chaytor*, [2010] UKSC 52

10. *Pepper (Inspector of Taxes) v Hart*, [1992] UKHL 3

11. *R v Lavigne*, 2010 ONSC 2084

12. *Lavigne v Ontario (Attorney General)* (2008), 91 OR (3d) 728

Parliamentary Materials

13. Senate, Subcommittee on Parliamentary Privilege of the Standing Committee on Rules, Procedures, and the Rights of Parliament, *A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century* (January 2015) at 79 (Chair: The Honourable George Furey)

Secondary Materials

14. Charles Robert & Vince MacNeil, "Shield or Sword? Parliamentary Privilege, *Charter* Rights and the Rule of Law" (2007) 75 The Table 17

15. Charles Robert & David Taylor, "Then and Now: Necessity, The *Charter* and Parliamentary Privilege in the Provincial Legislative Assemblies of Canada" (2012) 80 The Table 17

Court File No: 14-30299

ONTARIO COURT OF JUSTICE

BETWEEN

HER MAJESTY THE QUEEN

—and—

MICHAEL DUFFY

—and—

THE GLOBE AND MAIL INC., CTV, A DIVISION OF BELL MEDIA INC., POSTMEDIA NETWORK INC., and CANADIAN JOURNALISTS FOR FREE EXPRESSION (Proposed Interveners)

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