RICHARD GORDON QC OPENING ADDRESS

Thank you. I am greatly honoured by this invitation. I hope that I can assist the Committee in its important continuing work on the issues surrounding the modernisation of parliamentary privilege in Canada.

Like your earlier witness, Maxime St-Hilaire, my observations in this opening presentation will be general in nature.

I want to make three opening points.

First, many of the questions that you are raising in relation to the desirability of modernising parliamentary privilege in Canada are similar to those now being asked in the United Kingdom. This is unsurprising given the historical parallels between the doctrine in the two jurisdictions and the concomitant fact that the basic framework is the same in both territories.

Secondly, however, there is a fundamental difference between Canada and the United Kingdom. In Canada you have an entrenched constitution with specific provisions that fall to be interpreted and applied by the courts. In the United Kingdom we do not have an entrenched constitution because of the principle of parliamentary sovereignty as adumbrated by the great Victorian jurist A.V. Dicey. That principle has the effect that parliament may make and unmake any law whatsoever. The consequence is that because nothing is permanent and can be repealed at any time, nothing is entrenched. This fundamental difference between the United Kingdom and Canada has, I suggest, material repercussions on the scope for modernising parliamentary privilege.

Thirdly, the rationale for parliamentary privilege is no longer what it was. In its origin, parliamentary privilege was a safeguard against royal incursion. One may call it a protective need for privilege. It should be remembered that for many years Parliament and the Crown were at odds with one another. They were mutual antagonists rather than co-partners. Today, all that has changed. Today, parliament has no adversary. The Crown’s power is almost exclusively symbolic; indeed, it has handed over almost all its ancient prerogatives to the executive. It is, I believe, a distortion of language to suggest that either the courts or the executive are adversaries of parliament in the common understanding of that word. Any tensions that may surface from time to time between the institutions of state are not struggles in the original sense of an absolutist bid for supremacy. They are, rather, the tensions that can surface when members of a family, disagreeing with one another, may express their views in often trenchant terms. That is the very opposite of a threat to freedom of expression.

These three points, when aggregated, raise the following essential questions. One: what is the rationale for any remaining doctrine of parliamentary privilege? Two: is the current regime compatible with that rationale and if, as I suggest not, what reforms are desirable? Three (possibly the most important question of all): how is reform best effected and what are the impediments to necessary reform taking place?

I will approach these questions in turn. First, therefore, what is the rationale for any remaining doctrine of parliamentary privilege?

Your 2015 report on parliamentary privilege contains an excellent outline of the origins of the doctrine in both the United Kingdom and in Canada. What emerges from that with startling clarity is that in the seventeenth century free speech in parliament was at the centre of the political demands being asserted by parliament against the monarch. At a most simplistic level one can view the civil war of the mid-seventeenth century as an assertion of parliamentary privilege against encroachment by the monarchy. Eventually, statutory expression was given to freedom of speech in parliament by Article IX of the Bill of Rights.

As already foreshadowed, the position is no longer the same. And if the position is no longer the same it is surely incumbent on those claiming the privilege to justify its continuation in any form. As it happens, the continuation of some set of privileges or immunities for those undertaking the work of government is not hard to justify. True it is that parliament no longer faces an adversary claiming superior or even co-extensive power. But in the complex societies of today there remain conflicts of interest in which the freedom of expression of parliamentarians is of fundamental importance.

The context in which modern freedom of expression in Parliament is needed is, though, rather different to that in which it was needed in the seventeenth century. Freedom of expression is no longer a bulwark against attempted tyranny. It is, rather, a necessary adjunct to much of the functions undertaken in parliament.

No doubt numerous examples could be given. The work of select committees in the United Kingdom is one with which I am most familiar. I will give one anonymous but, nonetheless, not wholly imaginary situation. Take a statute which prevents taxpayer information from being disclosed. Can the Inland Revenue use that statute before a select committee to refuse to divulge that information in circumstances where the committee in question is undertaking an investigation into whether the Revenue is entering into ‘soft’ deals with corporate taxpayers? If the committee may receive such information may it not need to publish that information in a public report when publishing its findings in the public interest?

This is a different use of the concept of freedom of expression from that it in which it originally arose. There is, of course, a similarity in that in both the seventeenth and twenty first centuries parliament’s work would be obstructed if parliamentary privilege did not exist. But the contexts are existentially different.

So, my answer to the first question is that the rationale for a continuing use of parliamentary privilege as a constitutional doctrine can be justified only the footing that it should exist where it is needed to enable parliament to undertake governmental functions in the public interest. I will call that a functional test of privilege.

The second question (is the current regime compatible with that rationale and if, as I suggest not, what reforms are desirable?) is more difficult. It seems to me, and I detect this in some of the analysis in your 2015 paper, that the content of parliamentary privilege and, in particular, that of freedom of expression within parliament should, in modern times, be adjusted so as to accommodate third party interests more than it currently does if one is applying a functional as opposed to a protective test of privilege.

It should be borne in mind that, at its inception, the notion of independent third party interests coming up against the interests of parliament simply did not exist. The development of fundamental rights has emerged only gradually. Very little thought has, thus far, been focused on the potential for conflict between the rights and obligations of third party individuals and other bodies on the one hand and, on the other, the duties of parliament going about its daily work.

The guiding principles, in my view, for approaching the task of reforming parliamentary privilege to take account of modern conditions (specifically third party interests) are that: (i) the scope of the privilege should be clear, (ii) terms should be clearly defined and (iii) different situations may need to be approached differently. These factors strongly suggest that parliamentary privilege ought to be codified as it is in some other jurisdictions; most notably Australia.

In the United Kingdom, at least, terms are not clearly defined and the scope of privilege is not always clear. Nor are different situations treated differently. Privilege is usually treated as a monolithic construct deriving from the exhortation in Article IX of the Bill of Rights that *‘freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament’.*

None of the terms in Article IX are defined and so it has fallen to the courts and learned commentators to seek to elicit meaning from the statutory text; in particular the phrase *‘proceedings in Parliament’* has no clear definitional content. If the definitional content is unclear so, too, is the ambit and consequences of privilege. When – if ever - may a witness appearing before a select committee refuse to appear or to answer questions? When, by not appearing or answering questions does a witness commit a contempt of Parliament? Perhaps most fundamentally, what is a select committee’s powers in the face of what that committee perceives to be a contempt?

These and other questions bedevil not merely efforts to understand the scope and application of privilege; they also mean that the relationship between parliamentary privilege and fundamental rights (as well as EU law) in the United Kingdom has never been settled to subjected to consistent principle. Quite apart from the fundamental rights of persons appearing before Parliament (whether members or non-members) there are parties outside Parliament whose rights may well be affected by statements made in committee and relayed to the public via video-link or in published reports.

I understand that similar problems arise in Canada although you have at least made a start by codifying privilege in most of your provinces.

So, my answer to the second question I have raised is that, in my view, parliamentary privilege requires considerable modification in order to accommodate the completely different circumstances in which it now falls to be applied. Its potential for damage is considerable in the modern world. As to what reforms there should be, I think that these should be approached in the light of the three principles I have suggested.

Particular care should be taken in any codification of privilege that allows fundamental rights or other provisions of law to be otherwise unlawfully interfered with. I can (at least in theory) see that there may be circumstances in which the task of parliament would be rendered more difficult by not permitting it to override such rights in the public interest. However, I would argue that where it is necessary to override a right in the public interest that is itself usually factored into the concept of lawful interference with rights.

Most appositely, perhaps, in order to accommodate fundamental rights parliament may itself (either by internal rules or discrete legislation) have to introduce additional procedural protections to those currently existing so as to ensure that those whose rights may be detrimentally affected are afforded maximum protection.

The last question I have suggested is how may reform be best effected and what are the impediments to necessary reform taking place? There are only two ways. Reform through the courts and reform through legislation (whether statutory and/or through the internal mechanisms of parliament).

In my view it is something of an oxymoron to point to the common law as a source for reform. The common law is reactive to cases being brought. The common law is piecemeal. The common law is fact-specific and largely retrospective in its practical operation to the case in question. To say this is not to imply that the courts do not have a significant role to play in how parliamentary privilege is applied. Plainly, they do; not least because where there is a collision between asserted parliamentary privilege and fundamental rights it will, in the absence of clear statutory prescription, fall to the courts to say whether privilege should trump rights or vice versa.

But it cannot, logically, fall to the courts to undertake the detailed work of comprehensively reforming parliamentary privilege. That is, and can only be, the task of the legislator.

Ideally, therefore, I would like to see a major codification of parliamentary privilege that accommodated, within its sweep, both the role of parliament itself by conferring a remit for the scope of internal rules and the courts by laying down a statutory template for how fundamental rights should be addressed factored in to the application of parliamentary privilege.

There is, though, a real challenge here. Legislating to reform parliamentary privilege may be strongly resisted by parliamentarians. We are enjoined to render unto Caesar the things that are Caesar’s and unto God the things that are God’s. In that vein it would seem to follow that where legal issues arise in respect of the lawful application of parliamentary privilege it must be for the judges to decide whether parliamentary privilege has been applied correctly.

But at present the application as opposed to the formulation of parliamentary privilege is a matter within the exclusive cognizance of parliament. Were that not the case, the courts would be contravening Article IX of the Bill of rights by questioning proceedings in parliament.

Yet if privilege is successfully to be reformed it will, as I have suggested, have to accommodate fair procedures and respect fundamental rights. Due process and other fundamental rights are legal rather than constitutional issues. Following reform (if effective reform is to take place) they cannot (as has been the case) simply be shrugged off as forming a different part of the constitution or consigned to the dustbin of non-justiciability.

The respective remits of the courts and parliament and their relationship with each other will have to change fundamentally if there is to be effective reform of parliamentary privilege.

That will be no easy matter. I wish the Committee well in the difficult tasks that lie ahead of it.