LAW OF PARLIAMENTARY PRIVILEGE

INQUIRY—DEBATE ADJOURNED

Hon. Anne C. Cools rose pursuant to notice of Thursday, November 24, 1994:

> That she will call the attention of the Senate to the Law of Parliamentary Privilege, including its definitions, its exercise and extent, its historical and constitutional development, and its current status in Canada.

She said: Honourable Senators, it is my intention today, in speaking to this inquiry, to present to senators a brief historical survey and definition of the law of parliamentary privilege. In the words of Sir Erskine May, in his famous work *Parliamentary Practice*:

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.

The law of parliamentary privilege is that body of law comprising the ancient and undoubted rights of Parliament; laws developed to serve the rights of the population. They are representative laws which ensure that Parliament is able to perform its representative duties and functions, thus providing its citizens with good representation in governance. The law of parliamentary privilege developed in concert with representative government and its consequent responsible government. While the law is indeed ancient and its history complex, it is a living part of the daily work of Parliament.

The law of privilege belongs to the Senate corporately, that is, to Parliament collectively, and is enjoyed by senators individually. As part of the *lex et consuetudo parliamenti*, the laws of privilege are a part of the general and public law of the land.

In 1967, the Select Committee on Parliamentary Privilege of the House of Commons of the United Kingdom reported in part as follows:

> Insofar as the House claims and Members enjoy those rights and immunities which are grouped under the general description of "privileges," they are claimed and enjoyed...on behalf of the citizens whom they represent.

Viscount Kilmuir, the Lord Chancellor of the House of Lords of the United Kingdom, stated:

> At no time has privilege been accorded as an end itself; it has never been, and is not now, designed to benefit M.P.s personally.

The history of privilege is long and tortuous in the constitutional history of the United Kingdom and in Canada, and has been a matter that hurried many to an early death. Modern privilege is immediately and directly traced to the House of Commons Protestation of 1621 which held that:

> ...The Commons now assembled in Parliament...do make this protestation following: that the liberties, franchises, privileges, and jurisdictions of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England...
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> ...and that every member of the said House hath like freedom from all impeachment, imprisonment, and molestation (other than by censure of the House itself) for or concerning any speaking, reasoning, or declaring of any matter or matters touching the Parliament, or Parliament business...

This protestation began the fierce constitutional struggles of the seventeenth century. These constitutional struggles, between the Stuarts and the United Kingdom House of Commons for the privileges and the powers of the House of Commons, were bloody. These issues were mostly settled in the Bill of Rights of 1689, which declared statutorily the law of privilege. Article 9 of the Bill of Rights reads:

> That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.

Accommodation between the Rex and the Lex had been attained.

In pre-Confederation Canada, however, the constitutional conflicts continued. The colonial assemblies fought for the same privileges as the House of Commons of the United Kingdom. It was, honourable senators, a contentious struggle. One legal opinion, by barristers W. Garrow and S. Shepherd to the Hon. Earl Bathurst, the Colonial Secretary, in 1815, determined in part as follows:

> In answer to the second question, "Whether the Assembly is entitled to all the Privileges to which the House of Commons of the imperial Parliament are entitled under their own peculiar Law, the Lex Parliamentaria..." We beg to report, that we think they are not so entitled.

The struggle continued. The benchmark case was in 1842 in Newfoundland. *Kielley v. Carson* defined the limits of pre-Confederation legislatures in respect of privilege. The issue was whether the power to commit for contempt is incidental to every local legislature. The Supreme Court of Newfoundland found in favour of the Newfoundland assembly. However, in the appeal to the Judiciary Committee of the Privy Council, Chief Baron Parke disagreed and found that:

> The House of Assembly of Newfoundland is a Local Legislature with every power reasonably necessary for the proper exercise of their functions and duties; but they have not, what they erroneously supposed themselves to possess, the same exclusive privileges which the ancient law of England has annexed to the House of Parliament.

An interesting note about this case is that the Newfoundland assembly, by Speaker's Warrant, sent its Sergeant-at-Arms to arrest the judge and the sheriff who had offended the privileges of the legislative assembly.

At Confederation in 1867, the Fathers of Confederation and Lord Carnarvon, the then Colonial Secretary, settled conclusively