



# Recent Publications and Documents

## PARLIAMENTARY PRIVILEGE IN CANADA, by J. P. Joseph Maingot, Butterworths, Toronto, 1982, 290 p.

The publication of *Parliamentary Privilege in Canada* by Joseph Maingot, is an important and long awaited event for those interested in matters related to that much used and abused parliamentary word, "privilege". Well entitled to his claim of authority, Mr. Maingot was for many years Law Clerk and Parliamentary Counsel to the House of Commons. He is now a member of the Law Reform Commission of Canada.

For parliamentarians "privilege" can be equated with "freedom" — freedom to go to Parliament and to speak without fear of being answerable to the courts for words spoken in the House. This book traces the history of privilege in Great Britain and Canada. It is amply footnoted and contains full tables of contents and tables of cases cited in the text as well as a useful summary of conclusions at the end of each chapter. The subject is a complex one and the book shows why legitimate questions of privilege rarely arise in Canada.

The constitutional basis for privilege in the Parliament of Canada is Section 18 of the British North America Act (now the *Constitution Act 1867*). This gave Parliament "The Privileges, immunities and powers . . . as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities and powers, shall not confer any privileges, immunities or powers, exceeding those at the passing of such Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof".

Mr. Maingot draws careful attention to differences which apply in the Canadian Parliament, the provinces, and the territories. These differences raise some serious

issues for members of all Houses. Should privilege be provided equally for all legislatures? Should Canada restrict sanctions for those in contempt of Parliament to imprisonment or reprimands. Is it reasonable that because the United Kingdom House does not impose fines, the Canadian House should be prohibited from fining those guilty of contempt? In short, would it not be reasonable to enshrine the rights of Parliaments, Legislatures, and perhaps even municipal bodies, in a Charter of Parliamentary Rights?

As with other parliamentary texts, the examination of cases can be entertaining. In 1794 the Journal of the Legislature of Lower Canada records the committal to the custody of the Sargeant-at-Arms of a litigant who caused a member of the Legislature to be arrested in civil process. The Assembly also committed the Bailiff and Sheriff to the custody of the Sargeant-at-Arms, all of whom apologized to the House. It was an unusual case because Mr. Speaker Panet was also held in contempt by the House for having been a lawyer for the plaintiff who attempted to obtain the arrest of the Member!

In the Canadian House of Commons, members often use questions of privilege as a vehicle to raise a grievance or to express an opinion. When genuine privilege is discussed, it tends to be limited to the context of freedom of speech within Parliament, the ability of members to go freely about their parliamentary duties, or cases of possible contempt of the House. As is seen throughout this book, there has been a constant acceptance by parliamentary bodies that the courts have a right to interpret the degree to which members' words spoken in Parliament are protected from action in the courts. The author demonstrates that a member speaking in a debate is not subject to legal action for words spoken in debate; however, a private conversation between two members in the Chamber is subject to legal action. Documents ordered published by the House are

protected, but householder mailings are not protected. The discussion of privilege is an important one. The wise member will avoid the pitfall of obliging reporters by repeating charges outside the House which have been under the protection of privilege in the Chamber.

This book stands alone in Canada. It is more exhaustive than Beauchesne and Bourinot. It is regrettable, however, that a number of technical flaws have cast a small shadow on the authority of the text. The book was first quoted during the House of Commons Committee investigation into a matter of privilege concerning the *Montreal Gazette* and the Hon. Bryce Mackasey, MP. A quotation at page 213 from Abraham and Hawtrey's *Parliamentary Dictionary*, reads as follows: "to constitute a breach of privilege a statement reflecting on the conduct of a member in his capacity as a member need not be true, but it must tend to lower the House in the eyes of the public". Unfortunately, Maingot's citation of the quotation is incorrect, probably through a typographical error and should read "need not be untrue". The Report of the Committee on Privileges and Elections containing this quotation at page 24:9 repeats the incorrect quotation when in fact, the member citing it and pointing out the error, read from the correct text of the Abraham and Hawtrey edition. Normally one would not be overly concerned about these matters; however, a number of footnotes are also incorrect. On page 213, a citation is listed as being from the 19th edition of May on page 125. It should read 145. On page 160, footnote 40, the constituency of Montmagny-L'Islet is incorrectly listed as *let*. These typographical errors in an important work undermine its authority and detract from the reputation of the publisher.

Nevertheless, *Parliamentary Privilege in Canada* will still be a useful addition to the libraries of members of parliament and legislative assemblies. It will also be an invaluable tool in the offices of lawyers contemplating lawsuits against members. It

may even bring about an amendment to the Constitution to protect all Canadian legislators, and give all Houses equal authority over their affairs.

**John Holtby**

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**LAWMAKING BY THE PEOPLE: REFERENDUMS AND PLEBISCITES IN CANADA** by J. Patrick Boyer, Butterworths, Toronto, 1982, 304 p.

This is the second in a series of five books by J. Patrick Boyer on the subject of Canadian election law. In addition to the book which is the subject of this review, this series is designed to breakdown the subject of elections into its legal framework, financing, federal and provincial election laws, and finally local and municipal elections in Canada.

*Lawmaking by The People* deals in a comprehensive manner with the law of referendums and plebiscites by reviewing

the legislation presently in force in the central government and the provinces as well as the Yukon and Northwest Territories.

For purposes of discussion the book may be divided into two distinct parts. The first four chapters deal with the theory of the referendum and plebiscite. The author has chosen to deal with this topic from an historical vantage point. While it is interesting to have this information compiled into one volume, it is unfortunate that there are few original thoughts or conclusions presented in this section.

For example, the final chapter of this "theory section" entitled "Advantages and Disadvantages of Referendums and Plebiscites" contains a one and a half page conclusion which is void of any value judgement on the effectiveness or propriety of referendums. Instead the author sums up by stating: "In the last resort, a plebiscite or referendum can give an aura of authenticity and a form of legal sanction to an otherwise informal and perhaps suspect opinion poll."

The second part of the book is composed of thirteen chapters each one dealing specifically and separately with the legislation covering plebiscites and referendums put in place by the central government, each province, and the two territor-

ies. The explanation of the operation of the legislation is clear and concise. If the particular government in question has had a history of the usage of either of these two devices, the chapter begins with this historical viewpoint. For example, the chapter dealing with the federal government commences with an analysis of the voting under the *Canadian Temperance Act* and the *Dominion Plebiscite Act, 1942*. These chapters are well organized and indexed, containing an excellent explanation of the subject legislation. They form the strongest part of the book but again there is very little critical analysis presented.

In conclusion, the positive aspects of this book for the legal profession and those involved in the mechanics of organizing referendums and plebiscites outweigh the negative ones. It is unfortunate that the author, after having completed this comprehensive study had not seen fit to provide a concluding chapter, presenting a comparative study of the legislation and a critical evaluation of the relative methods utilized.

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