



Parliamentary Book Shelf

Parliamentary Privilege in Canada (Second Edition) by J.P. Joseph Maingot, Q.C., published by House of Commons and McGill-Queen's University Press, 1997, pp. xxiv, 404

Privilege does not really fit into the traditional definition of parliamentary procedure since it involves legal rights, but there is no doubt that without it, the heritage of parliamentary government with which we in Canada have been blessed would never have been established. Neither the application nor the theory of privilege has remained static since the publication in 1982 of Mr. Maingot's first edition so this updated version is most welcome.

In the United Kingdom, the *Parliamentary Corporate Bodies Act*, which allows Parliament to sue and be sued, was adopted in 1992. In that same year, the House of Lords sitting in its judicial capacity relaxed the rule excluding parliamentary material from the courts in the case of *Pepper v. Hart*. In 1995, the prestigious Commons Committee on Privileges was remodelled as the Committee on Standards and Privileges and in 1996 the effect of article IX of the Bill of Rights of 1689 was altered by the adoption of section 13 of the *Defamation Act*. All aspects of parliamentary privilege are now subject to review by a Special Joint Committee on Parliamentary Privilege struck in 1997. Its report is expected in the coming months. In Australia, the *Parliamentary Privileges Act* was adopted in 1987 which, among other subjects, legally de-

fines what is covered by the Bill of Rights' article IX and protected from the courts.

In Canada, there have also been important developments. In 1991, an amendment to the *Parliament of Canada Act* was adopted giving the Internal Economies of both Houses exclusive authority to determine whether any use of funds by members was proper. In 1998, the Quebec National Assembly passed a bill entitling a member or a former member to the payment of defence and judicial costs arising out of proceedings brought against them in the performance of their duties. Important jurisprudence was created; for example, the 1985 *Reference Re Language Rights in Manitoba* in which the courts held that all of Manitoba's laws after 1870 were invalid because of the failure to use the French language in records, journals and enactments; and *MacLean v. the Attorney General of Nova Scotia* (1987) where the courts ruled that the legislature may remove, suspend or expel a member with immunity. Privilege has also been the subject of two graduate Canadian university theses: Peter Bernhardt's *The Contempt Power of the House of Commons* (1990) and L.M. Lum's *Parliamentary Privilege in Canada* (1992).

However, it was the enactment of the *Canadian Charter of Rights and Freedoms* in 1982 specifying in section 32(1)(a) that it applies to Parliament and provincial legislatures, and the subsequent 1993 Supreme court decision *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of*

the House of Assembly) which prompted this second edition. As Mr. Maingot notes, the judgment was the first time in almost a century that the Supreme Court dealt with the issue of parliamentary privilege and the first time that the court had before it a question concerning the Charter and parliamentary privilege.

N.B. Broadcasting v. Nova Scotia is tremendously significant and Mr. Maingot devotes an entirely new chapter analyzing the decision and speculating on other possible impacts of the Charter on privilege. The decision created a new typology of privileges: those that are constitutionally inherent and those that are not. As to what is a "constitutionally inherent" privilege, the court provided a multi-variable test: an overview of history, necessity, pragmatism and deference to other constitutional reality. If the privilege is constitutionally inherent, the court will not intervene through the Charter since one part of the Constitution cannot abrogate another part. The judgment also had to deal with the constitutional status of both the courts and parliament. Because of the preamble to the Constitution, both are independent of each other. Notwithstanding this, the court declared it will decide the extent and scope of privilege and what category of privilege it falls into.

N.B. Broadcasting confirmed that "internal proceedings" such as determining the manner by which proceedings should be broadcast, were the exclusive jurisdiction of legislative bodies. However, Mr. Maingot feels that other traditional

privileges may not escape the Charter's reach. Freedom of expression, guaranteed under section 2, may protect a person alleged to have slandered a Member of Parliament. In accordance with section 11(a), a person summoned to appear before a House committee on a matter concerning privilege may henceforth have to be informed of the specific charge. More importantly, Parliament's penal power without which one U.K. chief justice said the House "would sink into utter contempt and inefficiency" may not be "constitutionally inherent" and may infringe section 7, the right to life, liberty and security, and section 8, the right to be secure against unreasonable search and seizure.

N.B. Broadcasting (1993) stands with *Kielley v. Carson* (1842) as the two most important case law decisions affecting parliamentary privilege in Canada. *Kielley v. Carson* decided that the pre-Confederation colonial assemblies had only such powers as were reasonably necessary for the proper exercise of its functions as a local legislature. Unlike the U.K. House of Commons, they did not have the power to arrest for contempts which took place outside the assembly. It should be noted that *Kielley v. Carson* did not come as a surprise, at least to the Upper Canadians. As early as 1815, British law officers had advised that colonial and British privileges were not co-equal. One wonders however if those law officers were not affected by political winds as there was a clear determination by gov-

ernment officials that privilege in British North America was not to develop into as radical a claim as it had in Royal America and so aptly described by Mary Peterson Clarke in *Parliamentary Privilege in the American Colonies* (New Haven: Yale University Press, 1942). Justice McLaughlin who wrote the majority decision in *N.B. Broadcasting* noted that the constitutional roots of privilege go back to the *Constitution Act 1867's* preamble wherein there is an expressed interest to erect "a Constitution similar in Principle to that of United Kingdom". Ironically this same reasoning was used by colonial politicians to define the scope of their privileges. To justify their claim, they pointed to the first speech from the Throne ever given in Upper Canada on September 17, 1792 (in a tiny backwoods building near Niagara Falls) in which Lieutenant Governor John Graves Simcoe declared "I have summoned you together under the authority of an Act of Parliament of Great Britain passed in the last year, which has established the British Constitution and all the forms which secure and maintain it in this distant country". What is most significant about pre-Confederation privilege was that its political dimension was more potent than its legal one. It is fair to ask, notwithstanding *N.B. Broadcasting*, if that still will not remain true today.

Parliamentary Privilege in Canada is a wonderful book tracing interesting themes such as the impact of federalism on privilege, how court

decisions have for the most part strengthened privilege, and how narrow are the legitimate claims of privilege (although paradoxically Parliament remains exempt from local liquor laws and visitors to the precincts on days the House is sitting are immune from service of any process). The typographical errors noted in this journal's review of the first edition (Autumn, 1983) have been corrected. Twenty-seven new references have been added to the bibliography and the table of cases, made much more user-friendly with better spacing and indentation, has been increased from 168 to 199. Unlike the first edition, the English and French versions of the book have been published simultaneously. There is also an improved index. There may be however a slight misunderstanding on U.K. procedure for papers described on page 70. A.J. Hastings of the British House of Commons has pointed out that the only Command Papers the House continuously orders to be printed are the Estimates, the annual Financial Statement and certain other financial documents - all the others are printed on the authority of the Crown. *Parliamentary Privilege in Canada* is an important contribution to the literature on Parliaments throughout the world and Mr. Maingot is to be congratulated.

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