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The Law of Privilege in Canada

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The Law of Privilege in Canada is a comprehensive guide to privilege and confidentiality. It includes chapters on each type of privilege with “key points”, case law and commentary as well as a table of cases, relevant legislation, and an index.

What's New in this Update:

The authors have updated the commentary and case law in chapters 11 (Solicitor-Client Privilege), 12 (Litigation Privilege) and 13 (Press Privilege).

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Highlights

Solicitor-Client Privilege — Balancing of Solicitor-Client Privilege with the Charter of Rights and Freedoms and the Open Court Principle; Honour of the Crown Does Not Trump Privilege — Sealing orders to protect solicitor-client privilege

— In various litigation circumstances, a party may need to file materials that may otherwise be covered by solicitor-client privilege. Examples of such scenarios include Motions to approve settlements of claims made by or against a minor or a person under disability. In *S.E.C. (Litigation guardian of) v. M.P.*, the Court of Appeal for Ontario heard two appeals regarding motions to seal the materials filed on two applications to approve settlements pursuant to Rule 7.09 of the Rules of Civil Procedure. The sealing orders were sought on three grounds, including to protect the injured parties' right to solicitor-client privilege. In evaluating the applicants' claim that the requested sealing orders should have issued because the Sherman test was satisfied, the Court of Appeal considered the potential for solicitor-client privilege to serve as an important public interest that could ground the issuance of a discretionary sealing order per the Sherman test. The Court of Appeal answered this question conclusively. It is clear that as a general principle, solicitor-client privilege constitutes an important public interest under the Sherman test but the applicants had failed to show that the protection of that privilege was at serious risk because of the open court principle in the context of the Rule 7.08 motions. The Court concluded concerns that a r. 7.08 motion may in practice require counsel to appraise the strengths and weaknesses of a given case, and in so doing, disclose privileged communications with their client, it did not lead the Court to conclude that r. 7.08 motion records should be presumptively sealed. The Court opined that counsel must be guided by the concern regarding disclosure of privileged information so as to minimize the disclosure of privileged information: *S.E.C. (Litigation guardian of) v. M.P.*, 2023 ONCA 821.

Press Privilege — Refusal to Reveal Sources and Contempt — Generally

— In *R. v. Densmore*, the Court considered a third-party records application brought by a criminal accused for the production of certain records related to the complainant held by a newspaper — the Hamilton Spectator. The requested records included all notes, statements and correspondence between a journalist with the newspaper and the complainant and/or other witnesses. The newspaper published a story regarding a sexual assault allegation. After the publication of the story a woman reached out to the journalist and advised she had also been assaulted by the same accused. The journalist also interviewed two additional sources who the first source had confided in at the time of the alleged assault. The Journalist then wrote a follow up article outlining the additional allegation. One of the issues for the Court to determine was the applicable legal

regime to assess the request for production under. One of the issues for the Court to determine was the applicable legal regime to assess the request for production under. The Court concluded that the JSPA CEA regime was the proper scheme to go through to consider the application. Ultimately, the Court concluded that the newspaper established a basis for the JSPA's protection to apply in this case. Accordingly, the journalist's documents were privileged: *R. v. Densmore*, 2024 ONSC 6620.