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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 10 (The Privilege Against Self-Incrimination) and 11 (Solicitor-Client Privilege).

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Highlights

Solicitor-Client Privilege—Exceptions to Solicitor-Client Privilege—Innocence at Stake More Stringent than Right to Make Full Answer and Defence Exception—In *R. v. McClure*, the Supreme Court of Canada considered whether solicitor-client privilege could ever yield where an accused person needed privileged communications to defend against a criminal charge. The Court held that solicitor-client privilege is extremely important and should be protected as close to absolutely as possible. However, it recognized a narrow exception where an accused's innocence is genuinely at stake. The Court established a stringent test. First, the accused must show that the information sought is unavailable from any other source and that the accused is otherwise unable to raise a reasonable doubt. If that threshold is met, the court then considers whether there is an evidentiary basis that the privileged communication could raise a reasonable doubt. If so, the court may review the communication to determine whether it is likely to raise a reasonable doubt. Only in rare circumstances will the privilege give way. *R. v. McClure*, 2001 SCC 14, 2001 CarswellOnt 496 (S.C.C.).

Solicitor-Client Privilege—Does Solicitor-Client Privilege Protect Communications and Documents in the Context of Access to Information Requests?—Freedom of Expression, Freedom of Information and Solicitor-Client Privilege—*R. v. Fox* is a significant Supreme Court of Canada decision on solicitor-client privilege in the context of wiretap authorizations and electronic surveillance. Police were conducting a Saskatchewan drug trafficking investigation and had obtained a wiretap authorization for A.Y.'s phone. During the investigation, K.G. was arrested and exercised her right to counsel by calling Ms. Fox, a criminal defence lawyer. Shortly afterward, Ms. Fox called A.Y. That call was automatically recorded under the wiretap authorization and was also live-monitored. Two officers heard Ms. Fox identify herself with a law firm name. Knowing she was a criminal defence lawyer, they recognized the possible engagement of solicitor-client privilege and stopped listening about 20 seconds into the call. The call was classified as privileged shortly afterward. However, a civilian monitor continued listening for several more minutes, despite the privilege concern. A court later ruled that the first portion of the call was not privileged and could be accessed by police, while the later portion was privileged and could not be accessed without further court order. The non-privileged portion revealed information suggesting that Ms. Fox had warned A.Y. about K.G.'s arrest, surveillance, and the likely execution of search warrants. Ms. Fox was charged with attempting to obstruct justice. The Supreme Court held that the civilian monitor's continued listening breached s. 8 of the *Charte*r. Although the breach was inadvertent rather than intentional, the majority emphasized that accidental intrusions into solicitor-client communications can still be very

serious. This was especially so because the wiretap authorization contained terms designed to prevent this very kind of intrusion. *R. v. Fox*, 2026 SCC 4, 2026 CarswellSask 60 (S.C.C.).

Solicitor-Client Privilege—Exceptions to Solicitor-Client Privilege—Procedure for Determining Innocence at Stake Exception—The Supreme Court of Canada's decision in *R. v. Fox* addresses solicitor-client privilege in the context of intercepted communications and the criminal prosecution of a lawyer. The author discusses the Court's confirmation that solicitor-client privilege remains a near-absolute protection of fundamental importance to the administration of justice. The decision reinforces that even accidental intrusions into solicitor-client communications may seriously undermine public confidence in the justice system. The update also adds detailed treatment of the Court's conclusion that a lawyer who is criminally charged may, like any other accused person, invoke the innocence at stake exception to solicitor-client privilege. The Court held that the *McClure* framework can be adapted where the accused is a lawyer seeking access to privileged communications with their own client for the purpose of making full answer and defence. The update further highlights the Court's s. 24(2) analysis. The majority excluded the non-privileged portion of the intercepted call, emphasizing the seriousness of the breach, the need for rigorous protection of solicitor-client communications during wiretap investigations, and the systemic importance of meaningful remedial action where privilege may have been breached. *R. v. Fox*, 2026 SCC 4, 2026 CarswellSask 60 (S.C.C.).