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The Law of Privilege in Canada Robert W. Hubbard and Katie Doherty Release No. 2, May 2026

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 2 (Informer Privilege), 11 (Solicitor-Client Privilege) and 12 (Litigation Privilege).

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Highlights

Solicitor-Client Privilege—Waiver—Implied Waiver—State of Mind—In *Pacific Sands Beach Resort Ltd. V. Co-Operators General Insurance Co.*, the court determined that the defendant impliedly waived solicitor/client privilege over the subject matter of the disclosure “when it chose to selectively waive privilege over the [...] documents that were previously claimed to be privileged”. The court did not draw a hard and fast rule that such disclosure would be required in every case. However, the court was satisfied that the circumstances of this case required further disclosure to the plaintiffs. The court noted, “it would be unfair to permit the defendants to pick and choose which documents to potentially put before the court to defend against the claims while claiming privilege in respect of other related communications that might be relevant to these proceedings”. The Court further agreed with the plaintiff that the defendant had implicitly waived privilege by advancing a state of mind defence or by relying on legal advice to justify their conduct: *Pacific Sands Beach Resort Ltd. v. Co-Operators General Insurance Co.*, 2025 BCSC 858, 2025 CarswellBC 1362 (B.C. S.C.).

Solicitor-Client Privilege—Privilege in Particular Circumstances—Use of Disclosure Containing Solicitor-Client Privileged Documentation Obtained by Search Warrant—It is not uncommon for potentially privileged or privileged materials to be discovered during the course of the execution of a search warrant. For example, copies of correspondence may be uncovered in either physical or digital form during the search of any number of locations. What are investigators to do when they encounter such a situation? There is no one uniform answer. The first thing to remember in such a situation is that it does not fall to investigators to determine what, if any, privilege applies to a document: *R. v. Lavallee, Rackel & Heintz*, 2002 SCC 61, 2002 CarswellAlta 1818, 2002 CarswellAlta 1819 (S.C.C.). Where an investigator or prosecutor forms the view that there is potentially privileged information, it flows that steps should be taken to segregate the material pending a further determination. For instance, identified documents or electronic devices may be sealed and lodged with the court pending a further determination: *R. v. Romspen Investment Corporation*, 2025 ONSC 348, 2025 CarswellOnt 5530 (Ont. S.C.J.). Once the potentially privileged material has been segregated and/or lodged with the Court, different procedures may be utilized to determine what, if any, privilege actually attaches to the seized material.