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The Law of Privilege in Canada Robert W. Hubbard, Justice Susan Magotiaux, Justice Suzanne M. Duncan and Katie Doherty Release No. 4, September 2021

Publisher's Special Release Note 2021

The pages in this work were reissued in September 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the September 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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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 chapter 11 Solicitor-Client Privilege and chapter 12 - Litigation Privilege.

Highlights

Solicitor-Client Privilege—Waiver—Inadvertent Disclosure— The distinction between the actions of the client and the actions of the lawyer was clear in the case of *0678786 B.C. Ltd. v. Bennett Jones LLP*, where the ‘client’ was a law firm. The law firm, Voorheis, met with a lawyer from Bennett Jones to discuss the possibility of a class action against The Cash Store. The lawyer for Bennett Jones made notes of this discussion, in which Voorheis was the client and holder of the privilege. In the end, the class action was never pursued. The Cash Store became insolvent and CCAA proceedings were commenced. Voorheis was retained to make claims against some of the Third Party Lenders. McCann corporations, clients of Bennett Jones, retained the firm in a claim against The Cash Store for breach of the Broker Agreement between McCann and The Cash Store. McCann also retained Bennett Jones to act for them in the CCAA proceedings. Bennett Jones did not disclose its prior involvement with Voorheis related to The Cash Store, and Voorheis did not object to the involvement of Bennett Jones in the CCAA proceedings. McCann was unhappy with the representation it received from Bennett Jones and sued them for negligence. When Bennett Jones sent their files related to McCann to their new lawyers, Poole Lawyer, the boxes contained a copy of the privileged notes from the earlier meeting between Bennett Jones and Voorheis about the potential class action against The Cash Store. When Bennett Jones realized the privileged notes had been disclosed, it immediately brought an application for their return, a destruction of all copies, and an order that Poole Lawyers withdraw from the file. The issue was whether this was an inadvertent disclosure, and whether privilege was waived. The Court of Appeal noted that only the client can waive privilege, and there was no indication that the client, Voorheis had any knowledge of what was done with the notes. The disclosure was clearly inadvertent and that in itself was not a waiver. Further, the failure of Voorheis to object to Bennett Jones acting for McCann in the CCAA proceedings was insufficient to constitute waiver of privi-

lege over the notes. Finally, the Court of Appeal held that when law firms are clients they are entitled to the same protection of privilege as any other client. The privilege over the notes was upheld. *0678786 B.C. Ltd. v. Bennett Jones LLP* 2021 ABCA 62, *0678786 BC Ltd. v. Bennett Jones LLP*, 2021 ABCA 62, 2021 CarswellAlta 339 (Alta. C.A.).

Litigation Privilege— Summary of the Litigation Privilege— The Supreme Court of Canada described litigation privilege in *Lizotte v. Aviva Insurance Company of Canada*:

Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer’s file and oral or written communications between a lawyer and third parties, such as witnesses or experts.

Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52, *Lizotte c. Aviva Cie d’assurance du Canada* (2016), 404 D.L.R. (4th) 389, [2016] 2 S.C.R. 521, 62 C.C.L.I. (5th) 31, 272 A.C.W.S. (3d) 331, 2016 CSC 52, 2016 SCC 52, 2016 CarswellQue 10692, 2016 CarswellQue 10693, [2016] S.C.J. No. 52 (S.C.C.).

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