ESSENTIALS OF
CANADIAN LAW

THE LAW OF EVIDENCE

Fourth Edition

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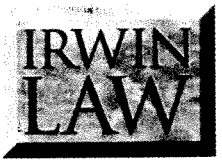

CHAPTER 7

PRIVILEGE

1. GENERAL PRINCIPLES

Privilege, as a rule of evidence, arises at trial and belongs to a "witness." The witness, although required to take the stand, by virtue of privilege can refuse to answer certain questions or refuse to produce certain documents. In *Descôteaux v. Mierzwinski*, the Supreme Court of Canada recognized that a "privilege" or a "right to confidentiality" was a "substantive rule" giving a person protection from disclosure of communications outside the trial setting.[1] *Descôteaux v. Mierzwinski* concerned solicitor-client communications, but there is little reason why this "substantive rule" should not apply to all privileges, providing protection for confidential communications inside and outside the courtroom.

Privilege, unlike other rules of exclusion, is not designed to facilitate the truth-finding process. In fact, privilege is inimical to the search for truth in that it leads to the loss of otherwise relevant and reliable evidence. It is for this reason that the finding of a privilege is to be exceptional. Dean Wigmore provided these words of caution:

> It follows, on the one hand, that *all privileges of exemption from this duty are exceptional*, and are therefore to be discountenanced ... judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend

1 (1982), 70 C.C.C. (2d) 385 (S.C.C.).