

# Waiver of Solicitor-Client Privilege in Commercial Leasing Litigation

Date: March 25, 2026

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The law asserts that client communications with a lawyer are protected by solicitor-client privilege, meaning they are protected from disclosure to third parties, including an opponent in litigation. However, there are a few instances where solicitor-client privilege can be waived.

There are two types of waiver: express waiver and deemed or implied waiver. Express waiver occurs where a client voluntarily conveys their intention to waive privilege. Deemed waiver does not require that the client intends to waive privilege.

In *One York Street Inc. v. 2360083 Ontario Limited*, [2026 ONCA 176](#), the Ontario Court of Appeal considered whether a tenant's conduct in litigation gave rise to a deemed waiver of solicitor-client privilege over legal advice received when deciding whether or not to enter into a commercial lease. Ultimately, the Court found that it was unfair for the tenant to put its understanding of its legal position into issue and simultaneously assert privilege over legal advice it received that would substantiate its position.

## Background

The parties in this action were a landlord and tenant who entered into a commercial lease. Roughly one year after the lease was signed, issues arose with respect to the tenant's payment of rent. The landlord commenced a claim against the tenant for breach of the lease. The tenant counterclaimed and alleged that they had entered into the lease in reliance on misrepresentations by the landlord absent advice from legal counsel. The latter was untrue, as the tenant was advised by legal counsel at the time the lease was being negotiated.

Counsel for the landlord demanded that the tenant produce its communications with counsel in respect of the negotiation and execution of the lease. Subsequently, the tenant amended its defence and counterclaim to remove the allegations that expressly alleged that (1) the tenant did not understand the terms of the lease, and (2) that it had not received legal advice at the time of signing the lease extension.

The landlord brought a motion for production of the lease negotiation file of the tenant's lawyers. The motion was granted. On appeal, the Divisional Court set aside the production order after finding that the motion judge improperly focused on the initial defence that predated the amendments.

The landlord appealed to the Court of Appeal and the central question before the Court remained whether there was a deemed waiver of solicitor-client privilege by the tenant.

#### Why the Court Deemed Waiver of Solicitor-Client Privilege

The Court overturned the Divisional Court decision and restored the motion judge's decision. The Court found that there was a deemed waiver of solicitor-client privilege.

The Court confirmed the test for deemed waiver in the context of litigation:

1. Was the presence or absence of legal advice relevant to the existence or non-existence of a claim or defence?
2. Did the party who received the legal advice make the receipt of it an issue in the claim or defence?

The tenant was represented by legal counsel during the negotiation of the lease who was tasked with ensuring that the tenant understood its legal position under the lease. Though the tenant's amended defence removed express references to not having legal advice, the Court found that even after the amendments, the tenant still alleged that it relied on misrepresentations made by the landlord that affected its understanding of its legal rights under the lease. Specifically, the tenant alleged that it relied on misrepresentations by the landlord about the amount of foot traffic in the shopping centre that were not set out in the lease contract, but which the tenant asserted were "guarantees" by the landlord. In taking this position, the tenant placed reliance in its defence on its understanding of, or state of mind about, its legal position under the lease.

For these reasons, the Court found that fairness dictated that the test for deemed waiver was met and that the tenant needed to produce its files and that of its lawyers with respect to the advice provided during the negotiation of the lease.

#### Practical Takeaways for Clients and their Counsel

Deemed waiver does not occur just because a party has received legal advice on an issue. For deemed waiver to arise, a party must place reliance in its claim or defence on its understanding (or lack thereof) of its legal position about an issue in the litigation. Allegations like the one in this case are commonly encountered in the area of commercial leasing and commercial litigation generally. Parties often allege that their understanding of the meaning of a contract was different than the words used in the contract. Where a party takes such a position, this decision of the Court of Appeal now provides strong authority to argue that privilege has been waived, and any legal advice the party received that might have affected their understanding of the contract or their legal position has been deemed waived. Clients and their counsel must

therefore be cognizant of the fact that if the client is to put their understanding of their legal position in issue, that they are most likely waiving privilege and any communications they had that informed their understanding will be fair game for the other side.

**About the Author**

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