

Publisher's Note

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Previous release was 2018-2

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“Witnesses

The release updates the following chapters: 1 (Foundational Principles in the Law of Evidence), 2 (Relevance and Admissibility), 3 (Types of Proof), 5 (Competence and Compellability), 6 (Witness Testimony: Evidentiary Rules), and 17 (Privilege). Chapter 15 has been removed and the discussion of privilege has been moved to Chapter 17. A new Chapter 15 will be issued in 2019.

Highlights

Privilege — Settlement Privilege — Statements made without Prejudice — Components of the Privilege — Communication Made in Effort to Settle — In *Singh v. Progressive Conservative Party of Ontario*, a party attempted to rely upon statements made during a settlement meeting by contending that the opposing party had no real interest in settling, as there was no “hint of compromise” in the discussions that had taken place. The Ontario Divisional Court disagreed, holding that this was not an absolute requirement of the privilege. Determination of the willingness to compromise depends on the context of the communications and particularly how they arose: *Singh v. Progressive Conservative Party of Ontario*, 2018 ONSC 203 (Div. Ct.).

Privilege — Informer Privilege — Scope of Privilege — In *R. v. Durham Regional Crime Stoppers Inc.*, the Court considered a situation where the Crown sought to adduce that an anonymous tip to a local Crime Stoppers tip line had been provided by the accused for the purpose of diverting attention away from himself. The Supreme Court in discussing the informer privilege noted that privilege should not exist in circumstances that would allow people to subvert the law and to shield their identity behind a near absolute form of legal protection. This would constitute an abuse of a

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privilege that is designed to assist the police in their investigative work and the enforcement of the criminal law. In short, it would turn the principle on its head: *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45.

Privilege — Common Law Privilege — Application of the Principles — Nature of Relationship — In *Guthrie v. St. Joseph Print Group Inc.*, the defendant employer in a wrongful dismissal dispute sought to claim privilege over emails exchanged with the company’s human resources department. The defendant argued that in order to operate effectively, management had to be able to communicate confidentially with human resource departments to solicit advice and ensure it was acting properly. The Court disagreed. Human resource departments normally had the role of assisting both employees and management, and it was not clear that “the relationship between human resources and management is one that the community would say ought to be sedulously fostered”: *Guthrie v. St. Joseph Print Group Inc.*, 2018 ONSC 1411.

Privilege — Legal Advice Privilege — Communication made in the Course of Seeking Legal Advice — Acting in a Legal Role — It follows that in some circumstances, communications of one sort to or from a person qualified as a lawyer will be privileged, while others will not be. Advice given by lawyers on matters outside the solicitor-client relationship is not protected and may be severed. As is the case with other components of the privilege, communications should not be ordered disclosed if they may reveal information that should be protected: *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219.

Privilege — Less Commonly Used Class Privileges Involving Confidential Information — Journalist — Source Privilege — Statutory Protection: *Canada Evidence Act* — In 2017, after studying the matter and recognizing the drawbacks of leaving matters to be addressed on a case-by-case basis under the common law privilege, Parliament enacted the *Journalistic Sources Protection Act*, S.C. 2017, c. 22, a piece of legislation with two purposes: (1) creating stronger protections for the relationship between journalists and their sources, and (2) providing a clearer framework for how claims of this sort should be resolved.