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CIVIL EVIDENCE HANDBOOK

Gordon D. Cudmore
Release No. 5, May 2022

Publisher's Special Release Note 2021

The pages in this work were reissued in July 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 July 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 Civil Evidence Handbook is a succinct reference to evidentiary matters. It includes the Evidence Acts from all common law provinces as well as the Canada Evidence Act and a concordance to these Acts. The topics covered are: Admissibility • Relevance • Burden of Proof • Presumptions • Judicial Notice • Competence and Compellability • Pleadings • Interpreters • Examination-in-Chief • Impeaching Your Own Witness • Cross-Examination • Re-Examination • Reply Evidence • Experts (Opinion Evidence) • Parole Evidence Rule • Hearsay • Exceptions to the Hearsay Rule • Documentary Evidence • Demonstrative Evidence.

This release contains updates to Chapters 6 (Competence and Compellability).

Highlights

- **Competence and Compellability – Privilege – Settlement or “Without Prejudice” Privilege – Generally** — Plaintiff brought a wrongful dismissal action. Employer offered to reinstate plaintiff and extend his working notice by 11 months, which he rejected. At the time the offer was made by employer’s legal counsel, plaintiff had already retained his own legal counsel. The communication was between counsel, it was in response to a demand letter from plaintiff’s counsel, it was for the purpose of furthering possible settlement, and confidentiality and privilege could be inferred. The offer of an additional 11 months’ working notice was subject to settlement privilege and ought not to have been disclosed. It was struck from the record and could not be relied on by employer as evidence of plaintiff’s failure to mitigate: *Kitchen v. Brandt Tractor Ltd.*, 2021 NBBR 64, 2021 NBQB 64, 2021 CarswellNB 214, 2021 CarswellNB 215, 2021 C.L.L.C. 210-037 (N.B. Q.B.), affirmed *Brandt Tractor Ltd., a body corporate v. Kitchen*, 2021 NBCA 54, 2021 CarswellNB 593, 2021 CarswellNB 594, 2022 C.L.L.C. 210-020 (N.B. C.A.).
- **Competence and Compellability – Privilege – Settlement or “Without Prejudice” Privilege – Proceedings to Enforce or Interpret the Agreement** — In *Idea Notion Development Inc. v. CTO Boost Inc.*, the defendant asserted there was no enforceable agreement to settle because its offer was conditional upon defendant being satisfied that the amounts invoiced by plaintiff were correct and because defendant’s offer did not deal with all the terms essential to a settlement. The motion judge was entitled to consider “without prejudice” documents to the extent those documents were relevant to the existence of the alleged agreement to settle. The “without prejudice” communications fell squarely within the exception to the exclusionary rule described in *Bombardier inc. c. Union Carbide Canada inc.*, 2014 SCC 35, 2014 CarswellQue 3600 (S.C.C.). *Idea Notion Development Inc. v. CTO Boost Inc.*, 2022 ONCA 14, 2022 CarswellOnt 191 (Ont. C.A.).
- **Competence and Compellability – Privilege – Absolute Privilege Respecting Court Proceedings; Statutory Privilege – Absolute Privilege Respecting Court Proceedings** — Plaintiff accountant commenced a claim alleging mistreatment in an employment relationship and constructive dismissal. Any claims arising from the report that proposed defendant submitted to Chartered Professional Accountants of British Columbia were protected by absolute privilege and plaintiff’s application to add her as a defendant was dismissed: *Andreasen v. Malahat Nation*, 2022 BCSC 363, 2022 CarswellBC 573 (B.C. S.C.).

ProView Developments

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