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McWILLIAMS' CANADIAN CRIMINAL EVIDENCE

Fifth Edition

Mr. Justice S. Casey Hill, David M. Tanovich and Louis P. Strezos

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McWilliams' Canadian Criminal Evidence, Fifth Edition, is the most comprehensive source in Canada for the law of criminal evidence. The authors trace the developments of the law of criminal evidence and identify the key elements of a modern principled approach. The work features analyses from judicial, academic and practitioner's perspectives and includes contributions from both Canadian and international experts.

What's New in this Update:

- **Criminal evidence — The Law of Privilege — Case-by-Case Privilege — Application to Various Settings — Other Claims of Case-by-Case Privilege**. Qualified privilege may apply to some comments but not others, despite forming part of the same communication. The respondent lawyer posted an email to the Ontario Trial Lawyers Association member Listserv notifying other counsel about what she believed to be evidence that the appellant, a physician who prepared executive summaries of specialists' reports from medical assessments on behalf of insurers, had misrepresented medical expert opinions to the arbitrator about her client's entitlement to catastrophic

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impairment designation. The respondent also stated that in an earlier, different proceeding, the appellant had altered another doctor's opinion, the insinuation being that twice the appellant had misrepresented other medical experts' opinions. The respondent's email was leaked to an advocacy organization and to the media. The appellant became aware of the email, did not receive a retraction, and then commenced a defamation lawsuit against the respondent. The respondent defended the comments as true or protected by privilege. The respondent successfully defended the action under s. 137.1 of the *Courts of Justice Act*, preventing proceedings that limit freedom of expression on public interest matters. The Court of Appeal agreed with the motion judge that the email content related to matters of importance to the proper administration of justice and was directed to an exclusive group of individuals with a vital interest in ensuring the honesty and integrity of the arbitration process, thereby falling within the term "public interest" in s. 137.1(3) of the *Courts of Justice Act*. However, the accusation about changing another doctor's opinion in a case two years earlier arguably fell outside of the privilege because the accusation was made maliciously or with reckless disregard for the truth, or because it was not appropriate to the legitimate purpose of the occasion attracting privilege. Importantly, the respondent took no steps to verify her recollection of the earlier events before making those comments, and it turned out that the other doctor had changed her own report. As a result, a reasonable trier could conclude that the respondent went beyond the occasion of qualified privilege and that the defence would not succeed at trial. *Platnick v. Bent*, 2018 ONCA 687.

- **Criminal Evidence — Similar Acts and Other Discreditable Conduct: The Similar Fact Rule — The Principled Approach — What is the Probative Value of the Evidence? — The Special Case of Using Similar Act Evidence to Prove Identity — Preliminary Inquiries When Identity is at Issue.** In *R. v. MacCormack*, 177 C.C.C. (3d) 346 (Ont. C.A.), the court held that co-mingling of the issue of similarity and linkage to the accused was not a reversible error, as it is sometimes difficult to draw a bright line between similarities in the manner in which an act is committed and an accused's link to that act. Bright line rules are thus hard to delineate. In *R. v. S.C.*,, the Court of Appeal for Ontario observed:

> . . . in *Woodcock*, Cronk J.A. acknowledged that the distinction between linkage evidence and similarity is blurred and that in certain circumstances the evidence connecting the accused to the acts may inform the analysis of similarity. This was confirmed by Watt J.A. in MacCormack, at para. 81:
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> > The rule against considering both evidence of the manner in which allegedly similar acts were committed and evidence of an accused's involvement in the acts and determining whether the similarity requirement has been met is a general prohibition, not an unyielding or invariable rule that brooks no exception: Arp at para. 49; *Woodcock* at paras. 79-80. Sometimes, it is difficult to draw a bright line between similarities in the manner in which an act is committed and an accused's involvement in that act. To apply a test of whether the objective improbability that an accused's involvement in the alleged acts is the product of coincidence without any regard to the evidence connecting the accused and the acts seems unduly antiseptic.

R. v. S.C., (2018), 361 C.C.C. (3d) 419 (Ont. C.A.).