

# EVIDENCE 476 / 507<sup>1</sup>

## COURSE OUTLINE – SUMMER 2022

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### Required Materials

Text: Stuart et al., *Evidence: Principles and Problems*, 13<sup>th</sup> Edition, Carswell (prior editions cannot be used)

Supplemental Case Book (E-mailed)

Canada Evidence Act: <http://canlii.ca/t/7vf5>

### Recommended Materials

Paciocco and Stuesser, *The Law of Evidence*

McWilliams, *Canadian Criminal Evidence*

### Introduction to Course

Evidence is the means by which parties attempt to prove or disprove the facts in issue in a proceeding. Evidentiary rulings are a critical part of trials, and in many instances determine the outcome. Errors and mistakes on issues of evidence have profound impacts, including wrongful convictions and perpetrators not being brought to justice. The central objective of the rules of evidence is to facilitate a reliable search for the truth. However, the rules of evidence also engage other objectives, such as protecting privacy rights, preserving certain societal relationships, and deterring state misconduct. The rules of evidence are largely based on determining:

- whether or not the evidence will assist the search for the truth; and,
- the circumstances in which another value must take precedence over the search for the truth.

### This Term's Learning Objectives

The main concepts we will consider over the semester are:

- the sources of the rules of evidence;
- whether the law of evidence should be based on broad principles or strict rules;

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<sup>1</sup> This Course Outline is an approximation of the materials we will be covering, as certain alterations or editing of the Outline may occur during the course. We will generally be covering two lectures worth of material for each day of the summer course.

- how to categorize evidence and the significance of those categories;
- the tests for determining the admissibility of various forms of evidence;
- whether evidence can be admissible for some purposes and not others;
- whether some forms of evidence require special instructions to the trier of fact;
- the areas of evidence which have a higher probability of error; and,
- how to lead and challenge evidence in a courtroom.

### **Teaching Methods**

Most classes will involve a lecture for at least part of the class, but students will be regularly encouraged to participate in class discussions. Those discussions will not only focus on the content of the readings and materials, but also on a critical analysis of the subject matter. Students should think about whether the cases and rules we study are just, and if not, what alternatives should be considered. We will also regularly consider how broader societal issues such as access to justice and bias impact evidentiary rulings.

Many of our readings will be from the course text, but we will also read supplemental cases for purposes such to cover a recent development in the law or to summarize the law in a complex area. We will also use class exercises during semester to practice applying rules of evidence to fact scenarios. (see attached)

### **Evaluation**

476: 100%, 3 Hour Open Book Exam. Students can use their own notes and course materials but not notes from other students or non-course materials.

507: 80% 3 Hour Open Book Exam and 20% paper assignment. For exam students can use their own notes and course materials but not notes from other students or non-course materials.

### **E-Mails Re Course Material**

Should be in reasonable proximity to the relevant lecture. No e-mails regarding course materials after the last lecture.

### **Recording of Lectures**

I will be recording lectures which will be available on a website after each class. I will start with providing general access to these lectures, but if class attendance becomes poor I will provide access to taped lectures only to those who provide a reasonable excuse for missing a lecture. Also please be aware that there can be technical issues which can result in a lecture not being recorded.

## **Reactions to Course Material**

Some of you may have strong reactions to certain cases and materials we are covering for various reasons. If you ever have such a reaction and wish to leave the classroom, please feel free to do so. I will later meet with you, at a time convenient to you, to ensure that you have the necessary legal information from the material you missed. Further, if there are certain cases or material coming up in the outline which will make it difficult for you to attend a certain class, just let me know and we can arrange to meet at a later time to ensure you have the legal information from the class. Finally, please do feel free to meet with Anna Kline or Kaila Mickelson to assist in dealing with any strong emotional reactions you are having to any of the material from this class or any other classes.

## **Lecture 1**

### **Introduction to Evidence**

- A Qualified Search for the Truth: pp. 3-8; *R. v. Noel*

PBS Frontline Documentary “Death By Fire” found at <http://www.pbs.org/wgbh/pages/frontline/death-by-fire/>

## **Lectures 2-4**

### **Critical Contexts for Determining Evidentiary Issues**

- The Adversarial System of Trial: pp. 1-3, 12-15
- Disclosure: pp. 3-4; *R. v. Latimer*
- Judicial Notice: *Kelly v. Kelly*; pp. 778-783

### **The Probative Prejudicial Balance All Evidence Must Meet**

- pp. 175-177; pp. 234-238; *R. v. Arp*; *R. v. L.B.*; *R. v. Cuadra*; *Cudjoe*; *R. v. D.R.*

## **Lectures 4-5**

### **Types of Evidence**

- Direct / Circumstantial: *R. v. Dhillon*; pp. 83-89; *R. v. Ali*
- Real Evidence: Objects, Photos, Videos, Documents: pp. 791-802; *Lowe v. Jenkinson*; *R. v. Penney*; pp. 811-821; *R. v. C.(B.)*

## **Lectures 5-6**

### **Extrinsic Misconduct Evidence: Bad Character of the Accused**

- Evidence of Habit and Similar Acts: pp. 211-218, *R. v. Dent*

## **Lectures 7-8**

### **Bad Character of the Witness**

- Character of Witnesses: *Canada Evidence Act (CEA)*, Section 12; *R. v. M.C.*; *R. v. Gill*; pp. 1012-1017; *R. v. Cullen*
- Opening the Door to Bad Character: *R. v. Sipes (supplement, p. 135)*; *R. v. Badgerow*
- The *Vetrovec* Witness: *R. v. Murrin*; pp. 1066-1072; *R. v. Paterson (supplement, p. 163)*

## **Lecture 9**

**Post Offence Conduct:** *White v. The Queen*; *R. v. Peavoy*; *R. v. S.B.C.*

## **Lecture 10**

**Identification Evidence:** *R. v. Gonsalves*; *R. v. Paterson (supplement, p. 181)*; p. 1038; *R. v. Hay*; pp. 129-131

## **Lectures 11-12**

### **Opinion Evidence**

- **Statutory Rules:** pp. 661-663
- **Common Knowledge:** pp. 570-575
- **General Rules for Experts:** 581-595
- **Expertise:** *R. v. Robertson*
- **Necessity:** 648-652
- **Scope and Ultimate Issue:** *R. v. Boswell*; pp. 612-615; *R. v. Lucas*

## **Lectures 13-14**

### **Witnesses**

#### **Ability to Testify**

- Competence, Oaths, and Compellability of Witnesses: *CEA*, Sections 13-16.1

#### **Weighing Evidence:**

- Credibility and Reliability: *R. v. Parent*; *R. v. Paterson (supplement, p. 228)*

#### **Direct Examination**

- Leading Questions: pp. 910-918
- Refreshing a Witness's Memory: pp. 918-925; *R v. Richardson*

## **Lecture 15-16**

**Cross-Examination:** *CEA*, Section 10; pp. 931-936, 951-958

**Re-Examination:** *R. v. Sipes (supplement p. 241)*

**Collateral Facts / Rebuttal Evidence:** *R. v. Krause*, 961-963

## **Lectures 17-18**

### **Statement Evidence**

- Prior Inconsistent Statements and Prior Consistent Statements: pp. 1033-1040; *R. v. Murray*
- Attacking Credibility of Own Witness: *CEA*, Section 9(1) and 9(2); pp. 929-931; 981-983, *R. v. C.L.S.*; *R. v. Milgaard*; *R. v. Cassibo*; *R. v. Malik*

## **Lectures 19-20**

### **Hearsay**

- What is Hearsay: pp. 363-368
- Non Hearsay Uses: *R. v. Baltzer*, *Ratten v. The Queen*

## **Traditional Hearsay Exceptions**

- Declarations Against Interest, Dying Declarations, Declarations in Course of Duty: pp. 452-462
- Spontaneous Declarations: 488-490
- Oral History in Aboriginal Title Cases: pp. 39-43

**The Principled Approach:** pp. 376-391, 393-414; *R. v. Mcgenn*

## **Statutory Exceptions**

- Business Records: *CEA*, Section 30; *R. v. Wilcox*
- Prior Testimony

## **Lectures 21-22**

### **Admissions and Confessions**

**Formal Admissions:** pp. 755-759

### **Informal Admissions**

- Probative Value: pp. 432-434; 188-190
- Voluntariness Rule: 502-516; *R. v. C.T.*
- Revisiting Probative Value: 532-552

## **Lecture 23**

### **Exclusion of Evidence Under *the Charter***

- Section 24(2) of the *Charter*: *R. v. Grant*

## **Lectures 24-25**

### **Privilege Against Self-Incrimination**

- Police Custody: pp. 519- 524
- Out of Custody: pp. 891-897
- Witnesses: pp. 878-885
- Statutory Obligations: pp. 887-890; *Application Under Section 83.28 of the Criminal Code*

## **Privilege Based on Confidential Relationships**

- Class Privilege - Solicitor-Client: pp. 670-676; Spousal, Section 4, *CEA*
- Other Confidential Relationships: pp. 666-670
- Exceptions: *R. v. Brown*; pp. 705-707

## **HARRIS EVIDENCE**

### **FACTUAL OUTLINE RE SIMILAR FACT**

John Roper is charged with assault of Fred Banks for an incident which occurred on November 15, 2019. Fred Banks' anticipated testimony at the trial is as follows:

On November 15, 2019, I was playing softball in a recreational league. I was pitching, and I was striking out most of the other team's players. John Roper was on the other team, and I struck him out three times. Roper is their best hitter, and he seemed to be getting more and more frustrated each time he stuck out. He came up to bat a fourth time, and just as I struck him out again, I saw Roper deliberately throw his bat at me. It hit me in the head and now I have a major concussion. As I was lying on the ground in great pain, Roper ran up to me and said this was all an accident and asked me please to not make a big deal of it because he really had a lot of stress in his life at this time.

The Crown wishes to call Alice Granger as a similar fact witness. Granger's anticipated testimony at trial is as follows:

Fred Banks and I are both volunteers at a community garden. On November 17, 2019 Banks came to the garden with a black eye, and I asked him what happened. He told me that he was hit by a bat which John Roper threw at him. I told Banks that I used to work with Roper at a technology firm. During a December, 2018 holiday party Roper had quite a few drinks and was becoming rude to others. Later that evening, the firm announced the "top employee of the year" and I received the award. Roper seemed upset at my award, and then became really angry when I also won the "most creative employee" award. An hour later, I left the party and was going to my car. Suddenly Roper appeared and he started screaming that he should have won the awards. He then slammed into me and my award trophies were knocked out of my hands. Roper said to me that he slipped on some ice in the parking lot. There was some ice, but it seemed all too convenient that his "slip" caused me to drop my awards. Roper then suddenly started weeping and said that nobody in the company appreciated all his work and that he was worried about his future there.

**Does the similar fact evidence have sufficient similarities to the charged evidence to be admitted?**

## **HARRIS EVIDENCE**

### **FACTUAL OUTLINE RE EXPERT EVIDENCE**

In a murder case, the Crown theory is that the accused killed the victim as revenge for the victim killing his character in the on-line game “Planet Massacre 2: The Violent End”. There is evidence that in the time period of the killing, the accused and the victim were playing this online game for 10-15 hours a day. They were jointly conducting various missions on the on-line game when the victim suddenly had his character kill the accused’s character. The position of the accused is that he was playing the on-line game with the victim, but that he had nothing to do with the victim’s murder.

The Crown wishes to call Dr. Peters who has a doctorate in computer science and has done some research in the area of video game addiction. The Crown wishes to lead evidence from Dr. Peters that some persons can get irrationally attached to their characters in video games and can become extremely distraught if their character is “killed” in a game. He has published a study on the on-line game, “Planet Massacre 2”: The Violent End”, and states that this type of game has a number of features which may cause a person to be particularly attached to their character. He says that given that the accused was playing this game for 10-15 hours a day, he was likely very attached to his character.

Dr. Peters will further testify that, based on two recent journal articles, there is a growing link between persons who play violent video games for many hours a day and persons who become involved in violent activity themselves.

Consider:

- 1. Attacks that could be made on the admissibility of the expert evidence;**
- 2. How the Crown might respond to such attacks; and,**
- 3. Whether the opinion could be edited in any manners in order to increase its chances of being admissible.**

## **HARRIS EVIDENCE**

### **FACTUAL OUTLINE RE HEARSAY**

The accused, Jack Spinner, is charged with fraud in relation to his play at a No Limit Texas Hold'em tournament. The tournament was covered live by a television station which used the format of showing the viewer the cards of each player. The Crown is alleging that Spinner was wearing a small earpiece which permitted him to gain information about the hands of other players. Spinner won the tournament, and won most of the hands he played at the final table. Further, as was described by the tournament commentators, he had a number of "spectacular lay-downs" at the final table, including one instance where Spinner had pocket kings, but threw those cards away to another player who had pocket aces and had made a large initial bet.

Billy Springs played in the tournament and sat beside Spinner at the final table. Springs placed second in the tournament, and received one fifth of the prize money provided to the first place winner. Springs and Spinner are both active on the tournament circuit, and Springs has placed second to Spinner on a number of occasions.

Directly after the tournament, there was a reception put on by a tournament sponsor. Springs had a number of drinks, and then approached a gaming reporter for RoyalFlush magazine, Jenna Sears, who was at the reception. Springs told Sears that during the play at the final table, he noticed that there was a tiny earpiece in Spinner's ear. He stated that at one point he put his ear very close to Spinner's ear, and that he heard a voice stating "fold this hand", and that Spinner then threw away his cards. Sears told Springs that it might be important to document what he had happened, so she video recorded him providing this information on her i-phone.

When tournament officials were cleaning up after the reception, they found a small earpiece on the floor underneath the chair where Spinner was sitting at the card table. The earpiece was forensically tested, and it is found to have a fingerprint from Spinner on it. Springs died in a car accident a month after the tournament.

**What submissions could the Crown use to attempt to get Springs' statement to Sears entered for the truth of its contents?**

**What submissions could the defence make to oppose the admissibility of the statement?**