

FACULTY OF LAW - UNIVERSITY OF ALBERTA
DEFERRED FINAL EXAMINATION #2- AUGUST 2011

LAW 453:X5 EVIDENCE (BEAVER)

- Time Allotted: Three Hours (3)
- Code Number: DO NOT ENTER YOUR NAME ON ANY ANSWER SHEETS OR BOOKLETS. A list will be circulated and your name is to be entered opposite a number on that sheet. That number will be your code number FOR THIS EXAMINATION ONLY and should be entered on the Examination Booklets in the space provided for surname. This provides for anonymity during marking.
- Special Instructions:
1. This examination paper contains 1 question on 6 pages. Check to ensure it is complete before starting.
 2. Answer ALL questions and parts of questions. Read all instructions in questions.
 3. Apportion your time intelligently. This examination is graded out of 100 marks. Each mark represents, roughly, one point to be made.
 4. Cite appropriate case and statutory authority.
 5. This is a CLOSED BOOK examination. No notes, statutes or other material will be allowed in the examination room except what is provided to you (Alberta Evidence Act and Canada Evidence Act).
 6. Adhere to the time limitation imposed on this examination strictly. Failure to stop writing at the end of the examination may lead to a deduction of grades or a failure to accept the examination.
 7. Do not leave the examination room during the last 15 minutes of the examination period.
 8. Cellphones, pagers, beepers, laptops and related equipment must be turned off and stowed. An exception

for laptops will be where you have been granted permission to write your exam on a laptop.

For Students who are writing examination by computer,

9. For those writing on laptops, please go on to the next screen for each alphabetical portion of each question.
10. This examination will be graded anonymously. Your code number has been pre-loaded in your ExamSoft document. **DO NOT ENTER YOUR NAME OR NUMBER ON THE PINK SHEET.** If you change to writing the exam by hand then write your ExamSoft number on your answer booklet and indicate that you wrote your exam by hand.

Please enter your answers to each question in the appropriately numbered window provided in your ExamSoft document. For sub-parts of questions, note on your answers which sub-part, (a) or (b), that you are answering. As well, separate each of the sub-parts with a couple of blank lines. Disregard any windows that are provided in excess of the number required to complete your examination.

You are required to close your examination file when time is called by the invigilator. In any event, at the end of the time allocated for this exam, the computer system will automatically shut down. Upon reboot proceed through the exam up-load process. You **MUST** check with the IT person to ensure that your examination file has properly uploaded before leaving. (Note: Uploads are automatically recorded online by the ExamSoft system. The IT staff can determine whether your upload has succeeded by performing an online check.)

TOTAL MARKS: 100 MARKS

Question #1

"Mistrial Ruled in Clemens' Case" as reported on espn.com July 15, 2011

WASHINGTON -- One minute Roger Clemens was on trial for his freedom. Then, on just the second day of testimony, it was suddenly all over and the former baseball star was outside signing autographs for fans.

Almost as soon as it began, Clemens' perjury trial ended Thursday -- in a mistrial the judge blamed on prosecutors and said a "first-year law student" would have known to avoid.

U.S. District Judge Reggie Walton called a halt to the trial under way after prosecutors showed jurors evidence that he had ruled out -- videotaped revelations that a teammate had said he'd told his wife Clemens confessed to using a drug.

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The unraveling of the current case began as prosecutors were showing jurors a video of Clemens' 2008 testimony before Congress. He is accused of lying under oath during that testimony when he said he never used performance-enhancing drugs during his 24-season career.

Clemens' former teammate and close friend, Andy Pettitte, had told committee investigators that Clemens confessed in 1999 or 2000 that he used human growth hormone. Clemens has said Pettitte "misremembers" or "misheard" their conversation.

Prosecutors had wanted to call Laura Pettitte as a witness to back up her husband's account because she says her husband told her about the conversation the day it happened. But Walton had said Laura Pettitte's statement wasn't admissible since it didn't involve direct knowledge of what Clemens said.

In the video prosecutors showed the jury, Rep. Elijah Cummings, D-Md., referred to Pettitte's conversation with his wife during the questioning of Clemens. Walton quickly cut off the tape and called attorneys to the bench for a private conversation for several minutes. The video remained frozen on the screen in front of jurors with a transcript of what was being said on the bottom.

Cummings had been quoting from Laura Pettitte's affidavit to the committee. "I, Laura Pettitte, do depose and state, in 1999 or 2000, Andy told me he had a conversation with Roger Clemens in which Roger admitted to him using human growth hormones," the text on the screen read.

The judge eventually told the jurors to leave while he discussed the issue with attorneys in open court. Hardin asked for a mistrial, while prosecutors suggested the

problem could be fixed with an instruction to the jury to disregard the evidence. Walton responded that they could never know what impact the evidence would have during the jury's deliberations.

"I don't see how I un-ring the bell," he said.

"Government counsel should have been more cautious," Walton said, raising his voice and noting that the case had already cost a lot of taxpayer money.

"I think that a first-year law student would know that you can't bolster the credibility of one witness with clearly inadmissible evidence," Walton said.

He said it was the second time that prosecutors had gone against his orders. The other occurred during opening arguments Wednesday when assistant U.S. attorney Steven Durham said Pettitte and two other of Clemens' New York teammates, Chuck Knoblauch and Mike Stanton, had used human growth hormone.

Walton said in pre-trial hearings that such testimony could lead jurors to consider Clemens guilty by association. Clemens' defense attorney objected when Durham made the statement Wednesday and Walton told jurors to disregard Durham's comments about other players.

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Based on the above, and assuming the trial takes place in Alberta, please answer the following:

- (A) In Clemens' trial for perjury, outlined above, we are told that prosecutors played a video statement of Clemens made under oath before Congress concerning doping in baseball. What is the basis for admissibility of this videotape in Clemens' trial? First of all, to be marked as Exhibit, does it require authentication? By whom? Secondly, is authentication sufficient for substantive admissibility? Or is more required for the video to be admissible for the proof of the truth of its contents? On what evidential rule is this video admissible, or not? **(15 marks)**
- (B) We are told by the above news story that Andy Pettitte, former teammate, told Committee investigators that Clemens admitted to doping. As the prosecutor in Clemens' case, discuss how this evidence can be admitted before the jury hearing Clemens' case. Can an investigator who heard this statement be called to testify as to what Andy Pettitte said? Is an Affidavit from Pettitte admissible? How can Andy Pettitte's statements be made substantively admissible? **(5 marks)**
- (C) Why does the trial judge disapprove of the proposed evidence of Laura Pettitte, Andy's wife? Why is her evidence that: "Andy told me he had a

conversation with Roger Clemens in which Roger admitted to him using human growth hormones” objectionable? Would it make a difference if the prosecution was not calling the statement for the proof of the truth of its contents? Can you imagine or put forward another admissible purpose? Is it admissible given that Clemens has suggested that the “conversation had been misheard or misremembered”? Is it relevant to that assertion? Discuss. **(10 marks)**

- (D) As set out above, the prosecution wishes to call evidence that other of Roger Clemens’ teammates were also taking performance enhancing drugs in their locker room. Why has this evidence been ruled inadmissible? The judge has referred to “guilt by association” but that is not legal terminology. Again, assuming the trial is heard here, what is the proper objection to such evidence? What is the applicable rule? Discuss and apply. **(10 marks)**
- (E) Let us assume that defence counsel, at the beginning of the trial, admitted the following facts: that Clemens gave certain testimony at the House Committee hearings; and that it was contrary to evidence he later gave at another hearing under oath. The trial judge, in turn, instructed the jury that these facts were deemed proven. Defence counsel, without any new facts coming to his attention, then decided this was a poor tactical move, particularly with the prosecutors bumbling their way through the trial. Defence counsel wishes to withdraw his admissions on behalf of Clemens. Can he? What is the applicable test? Apply. If defence counsel were to be allowed to withdraw these admissions, what if any remedies would be available to the prosecution? **(10 marks)**
- (F) The prosecution, during the course of its’ case, asked the Court to “take judicial notice of the rampant use of performance enhancing drugs in baseball, and in all sports for that matter, during the time that Clemens was in baseball.” Is this an application to the trier of law or trier of fact? What is the test? Apply. **(10 marks)**
- (G) Let us assume that the trial continued, the videotape of Clemens mentioned above was admitted, and that Clemens took the stand and denied that he had taken performance enhancing drugs, and denied every telling anybody he had, including Pettitte. The jury now has three different versions, all attributed to Clemens: his House Committee testimony, his alleged statements to Pettitte, and Clemens’ testimony. As the trier of law, how do you instruct the trier of fact to proceed to find their facts? Is it a matter of deciding which version of Clemens is true? Instruct the trier of fact. In particular, if the trier of fact were to find that Clemens DID make the alleged admission to Pettitte (denied by Clemens on the stand), would this go to their substantive findings? Or is it simply a matter adding to (or subtracting from) Clemens’ credibility? What is the rule on prior inconsistent statements, and how would it apply here? **(10 marks)**

- (H) Further assume that during the trial, the prosecutors call evidence of the presence of a notorious doctor in Clemens' dressing room before certain key games where Clemens was pitching. The doctor was later indicted, tried, and found guilty, of unlawfully prescribing steroids to athletes (other than Clemens). The doctor did not take the stand, just an employee of Clemens' ball club who had the job of cleaning up the dressing room, and so was usually always there before and after the games. This employee describes "something being passed between the two of them" but that is as far as he could go. The employee was just not close enough. What type of evidence is this? Instruct the jury as the trier of law. How can they use such evidence? Is there any special instruction to go along with such evidence? Is the instruction mandatory? What is it? **(10 marks)**
- (I) During the trial, the prosecution also seeks to qualify a statistician and oddsmaker on "the unlikelihood that Clemens could obtain such Hall of Fame pitching statistics without the use of performance enhancing drugs." During the qualification *voire dire*, it comes out that the proposed witness has no medical training, but does have an encyclopaedic knowledge of baseball stats - particularly those of pitchers. The "expert" has analyzed pitching stats since the beginnings of the major leagues, and proposed to demonstrate that only after the advent of the use of steroids in baseball, was there a marked decline in Earned Run Average, as well as a dramatic increase in pitching speed, the number of strikeouts, and more interestingly, the amount of innings the pitchers now lasted (up to one and a half innings more than the pre-steroid era). Finally, the expert, who has looked at Clemens' numbers over his career, noted that prior to the alleged steroid use, Clemens was a great pitcher, but nothing compared to what he achieved after the time period in which it is believed Clemens starting his steroid binge. At the end of the *voire dire*, the defence counsel said to the trier of law: "where do I begin? This evidence is irrelevant, prejudicial, and this expert should never be qualified." What does defence counsel mean? Elaborate on the expected defence argument. **(10 marks)**
- (J) It is commonly reported that steroid use has several side effects: back acne, as well as impotence. The prosecution subpoenas and calls Clemens' wife to the stand (they were married twenty years ago). The defence objects: "She can't be called." The prosecutor responds: "we are not planning to ask her about marital communications, just what she saw on his back, and whether their sex life suffered after the alleged doping." Who has it right here? Who is confusing issues and legal principles? Discuss and resolve. **(10 marks)**