

FACULTY OF LAW - UNIVERSITY OF ALBERTA

FINAL EXAMINATION - APRIL 2011

LAW 453:X5 EVIDENCE (BEAVER)

Time Allotted: Three (3) Hours Fifteen Minutes (15)

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 5 questions on 12 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

The Edmonton Journal recently (March 29, 2011) reported as follows:

"Twitchell Laptop Diary Describes Man's Killing"

A 42-page document that prosecutors describe as a diary that chronicles Mark Twitchell's alleged murder of Johnny Altinger and the disposal of his remains was read into the court record on Monday.

"I don't remember the exact place and time it was that I decided to become a serial killer but I remember the sensation that hit me when I committed to the decision," the document's author wrote on the first page.

"It was a rush of pure euphoria."

Const. Michael Roszko, a computer forensic examiner, testified he found the deleted temporary file buried deep on Twitchell's Toshiba laptop in October 2008.

He quickly zeroed in on the words "serial killer" that appeared in the file.

It took almost three hours for Roszko to read the document, titled Skconfessions, for the jury and the packed courtroom. It contained detailed, graphic and disturbing passages.

The author of the document describes himself as a cool, detail-oriented killer who has decided to record his first attempts at killing. The document describes a failed attack on one man who fought back, and a second attack on another man who was killed and dismembered, his remains dumped down a storm sewer.

Prosecutors say that second man was Johnny Altinger. They allege Twitchell wrote the document, which they claim is a diary of his "truly lived experiences."

But could the document be a piece of fiction, written by a fledgling filmmaker who had already shot a low-budget horror movie and had a particular fascination with science fiction?

That question will be central to Twitchell's first-degree murder trial, prosecutors have said.

"I would use online dating to rope in my victims," the author of Skconfessions wrote, going on to detail how he created dating profiles for women on the Internet to lure men to his "lair" -a rented, double garage located in the south side of the city.

The writer claims he planned things carefully to ensure he would go undetected - from downloading an IP address blocker, so no one could trace his activities on dating websites, to finding victims who would be easy to manipulate.

The author wrote about purchasing a hockey mask painted with gold streaks to conceal his identity. He wrote about buying a hunter's game processing kit to dispose of his victim's bodies, and disposable coveralls to protect himself from mess. He described preparing a "kill room," using plastic sheeting to protect the walls of the garage.

Then, the author wrote about his first attack.

"My head was rushed with adrenalin, my stomach had a half second flutter of butterflies before my resolve strengthened and I stood there, ominous in the dark prepared to strike."

The author described how a man who had come to the garage expecting a date fought back against his masked attacker, despite the stun baton. The author described how he punched the man several times in the side of the head. But the man only backed off when the attacker reached for his fake gun, told him to get on the floor, and covered his eyes with duct tape.

"It was then that I told him that if he did what I told him to do, that I would let him live," the document states.

But the would-be victim eventually escaped.

A man who prosecutors claim was the victim of that attack is expected to testify during the trial.

Prosecutors have said the personal details described in the document will prove Twitchell was the author. In SKconfessions, the author is married to a woman named Tess, while court had previously heard Twitchell was married to a woman named Jess.

The author of the document described himself as an independent filmmaker who

was familiar with psychological thrillers. Court has previously heard that Twitchell shot a short horror movie on a shoestring budget about two weeks before Altinger went missing in 2008.

After his failed attack, the writer decided to look for another man to kill. When another date was established, he again waited for the man to arrive, expecting a date with a beautiful woman.

"My kill room was still set up perfectly from the last time, plastic sheeting hanging from the walls, on the floor, and of course around my glorious table, duct tape sealing the seams to create a bubble to work within," the author wrote.

The document then detailed who the author bashed the man on the head with a metal pipe then stabbed him. Over the course of two pages, the author wrote about dismembering his victim's body before taking down the plastic sheeting in the garage and trying to clean up blood with paper towels and ammonia.

Assuming a first-degree murder trial taking place in Edmonton, Alberta, please address the following questions:

- (a) Assume that Mark Twitchell is only charged with the first degree murder of the second individual. The Crown, though, wishes to call evidence from the first man who was allegedly attacked but managed to escape.

The defence objects. What would the objection be?

The Crown suggests a manner in which this evidence would be admissible notwithstanding their agreeing to the validity of the defence objection. What would their suggestion be?

As the trier of law, analyze the admissibility of the evidence of the first man attacked, the one who managed to escape. Would the trier of fact be allowed to hear it? What is the relevant evidential test and principle? Would there be any particular warning from the trier of law to the trier of fact concerning the manner in which they could use that evidence? **(10 marks)**

- (b) Dealing with the document entitled "SKConfessions", please describe the process of authentication. Who would authenticate this document and how? Would the *content* of the document then be substantively admissible (for the truth of its contents) or only in for the fact it was said? On what evidential rule or basis?

For the document to be used substantively against the accused Twitchell, on what standard of proof would the *trier of law* have to be satisfied (to some level) that this

was the *accused's* diary or document, as opposed to that of someone else? Is that the same or a different standard than what the *trier of fact* would have to find or be satisfied of when dealing with their ultimate fact finding? **(10 marks)**

- (C) If the accused Twitchell were to take the stand and while accepting that "SKConfessions" was his creation, denies the truthfulness thereof, thus providing a different version of events, as the trier of law, please instruct the trier of fact on how they can deal with this issue in their ultimate fact finding. Is it a choice of one version over the other? Is there any legal test they should know about? Is the trier of fact bound to accept the accused's denial in any circumstance? **(5 marks)**

Question #2

The Edmonton Journal (March 22, 2011) recently reported:

"Son-in-laws eyes said it all, murder trial told"

The soft spoken mother of former Edmontonian Nancy Cooper testified Monday about the strife in her daughter's marriage during the last months of her life and her encounter with Brad Cooper at a memorial service.

In sometimes emotional testimony, Donna Rentz recounted standing amid Nancy Cooper's friends at a church memorial service and seeing her son-in-law come to the scene with a police car trailing him.

Brad Cooper, 37, is accused of strangling his wife in July 2008, and then dumping her body in an unfinished subdivision several kilometres from their home

Rentz testified she thought it odd that Brad Cooper - father of two of her grandchildren and a son-in-law she had loved - would not even look at her.

Rentz said she walked over to Cooper and hugged him. She was troubled, though, after looking under the brim of the Cisco ball cap he often wore. "I looked into Brad's eyes and I knew, I knew in my heart, that he had murdered my daughter," Rentz testified.

Rentz's testimony came in the ninth day of a murder trial that is expected to last a month. For much of the day, prosecutors introduced forensic evidence through law enforcement officers who responded to a report on July 14, 2008, of a barely clad body found near a drainage ditch several kilometres from the Cooper home in the Raleigh suburb of Cary.

Brad and Nancy Cooper met in 1999 when they both worked for IBM in Canada. Cisco had twice recruited Brad Cooper to come work in Raleigh. In 2000, the couple moved up their marriage plans so she could join him in the U.S. and they moved to Cary.

But by December 2001, Nancy Cooper had confided in her mother that she might have made a mistake getting married. She was lonely in North Carolina. Her husband worked long hours and she did not have a work visa. Early on, her main mode of transportation when he had the car was in-line skates. But the couple stayed together.

By August 2004, they had their first daughter. The second girl was born in July 2006.

But late in 2007, Nancy Cooper again was confiding in her parents about troubles with her husband. Brad Cooper was working a lot, she said, and not as involved with family life as his wife had hoped.

Nancy Cooper told her parents that Heather MeTour, a friend, confided in her about her affair with Brad Cooper. The two were in a graduate business program together. Brad Cooper, for months, denied the liaison. But in January 2008, Nancy Cooper told her parents he acknowledged having a one-night encounter.

Later, Rentz said, Nancy Cooper told them he said in a counselling session that the affair had been going on for nearly two years and he loved MeTour.

Brad Cooper's defence team has said there was only one sexual encounter between their client and MeTour. They contend he called her the next day, told her the encounter was a mistake and would not happen again.

Prosecutors contend that Brad Cooper killed his wife in their home in the early morning hours of July 12, 2008, as their marital and financial troubles deepened.

Cooper maintains his innocence. His defence contends he was the victim of a rush to judgment by police .

Rentz is expected return to the stand Tuesday.

Assuming a first degree murder trial taking place in Edmonton, Alberta, please answer the following:

- (a) The mother-in-law, Rentz testified that she thought it was odd that Cooper would not look at her at the funeral. Then, that after she hugged him, she "looked into his eyes and knew it was he" that had murdered her daughter.

As the defence counsel, do you have any objection to either piece of evidence/testimony? Describe.

As Crown counsel, any response? Are either admissible? Please articulate the admissible purpose you are proposing, and any legal test to be applied.

As the trier of law, please rule on the admissibility of these two proposed pieces of evidence. Are either admissible? Why or why not? If admissible, any instructions to the trier of fact as to permissible and impermissible use? **(10 marks)**

- (b) The Crown also purports to call through the mother-in-law, Rentz, statements allegedly uttered by her daughter, now deceased, during the currency of the marriage. These appear above and are such as: she maybe had made a mistake getting married, there was an affair, and that the marriage was troubled etc.

As defence counsel, any objection? Please articulate same.

As Crown counsel, any exception to be advanced if the defence's basic objection is upheld?

As the trier of law, please rule on the objection advanced, as well as any exception suggested by the Crown. Is this evidence admissible or inadmissible? On what basis? What is the relevant evidentiary test? If admissible, any limiting instruction to the trier of fact? **(10 marks)**

Question #3

"One scholar of the law of evidence stated that a trier of law's rulings on admissibility can change depending on the evidence called or the questions asked by the opponent." Do you agree or disagree? Why or why not? Please provide examples. **(10 marks)**

Question #4

Michael Ignatieff, Stephen Harper, Gilles Duceppe, and Jack Layton were recently in Ottawa for a "leader's debate." During their down time awaiting the debate, they decided to visit a local casino and play some Texas Hold'em (poker).

The casino has a surveillance system where casino security can watch all their games of chance. The video is recorded and kept. Whether a particular camera is being monitored by an actual person at any given time, is really up to the security personnel who decide which to watch at what time in their control room.

In the first hand of their poker game, each Federal leader was dealt a good hand. Two Kings for Ignatieff, two Jacks for Layton, two Queens for Duceppe, and two Aces for Harper. Quite naturally, each player felt they held the best hand.

The first three community cards were dealt and were inconsequential. A seven, a two, and a ten, all different suits.

Each player coyly checked, thereby making no bet.

The fourth community card, a three, resulted in Harper betting \$50, each subsequent player matching his bet. No raises.

The fifth community card, an eight, provided the possibility of a straight, but given the suits, no flush.

Harper's hand was best. He checked, hoping one of the other leaders would sense the opportunity to seize power at the poker table. Ignatieff went "all-in", a poker term meaning that he wagered all his available chips on the table.

A problem that the casino had been having in poker games was that while their video system took pictures of every game, there was no sound. If a player verbalized "all-in", as Ignatieff did, nothing may be seen on the camera, particularly if no chips were moved. This led to a rule whereby the dealer was required by the casino to throw out, on the table, a pink card with black lettering stating "all-in", clearly visible to a camera as well as the players, whenever a player wagered all his chips.

Upon Ignatieff's "all-in" verbal indication, the dealer threw the pink card in front of Ignatieff. Again, this was visible to all the players, the dealer, and the camera. On the video recording, later viewed, Ignatieff was seen to look at the pink card thrown in his direction, and then looked back to the other players. There was no other

visible reaction and his lips did not move, apparently indicating that he said nothing at or around that time.

Next to act was Layton who folded, as did Duceppe. This left Harper and Ignatieff. Harper called, pushing all of his remaining chips in. Harper triumphantly turned over his Aces. Ignatieff threw his cards face down, indicating he had lost. Ignatieff then stated: "well, at least I only lost the blinds (\$2) and the \$50." Both Harper and the dealer replied: "no, you went all-in." This was flatly denied by Ignatieff.

Harper left the casino after that hand with the blinds (\$2 each player) and the \$50 of each player. The casino was unwilling to intervene and enforce Ignatieff's alleged "all-in" bet.

Harper filed a small-claims civil suit the next day, naming only Ignatieff as the Defendant, seeking the remainder of the alleged "all-in" bet.

The civil trial takes place in Ottawa, but subject to all rules of evidence in place in Alberta.

Please answer the following:

- (a) Harper's counsel wishes to call, as evidence, the video recording of the poker hand. It turns out that the video was never watched as the hand occurred, but was retrieved from the system at counsel's request.

Describe the authentication process of this tape from a sometimes "unmanned" video recording system. Who are your possible authenticators? Do you need someone from the Casino as an absolute requirement? **(5 marks)**

- (b) The video was shown at trial, and entered into evidence.

At the end of trial, Harper's counsel argued: "the video tape evidence demonstrates that the Defendant has acknowledged that he was all-in." What does counsel mean by this argument? How did the Defendant make such an admission if he never said anything?

Counsel for the Defendant answers: "if you are referring to the pink card tossed by the dealer, that is the dealer's assertion of what happened. I note that the dealer was not called."

Who is correct in law? **(10 marks)**

- (C) When Ignatieff's counsel called him to the stand to testify, his examination-in-chief began as follows:

COUNSEL: State your name please.

WITNESS: Michael Ignatieff.

COUNSEL: Occupation?

WITNESS: Leader of the Liberal Party of Canada.

COUNSEL: And before that?

WITNESS: Professor at Harvard University.

COUNSEL: Regarding your job with the Liberal Party, is this the same liberal party that has been around since Confederation? The same once lead by the great Pierre Trudeau?

WITNESS: One in the same.

COUNSEL: Is the job one that requires a lot of trust in you, by your people, by the voter?

WITNESS: Trust is vital. If I didn't have it, I would not be in this position.

OPPOSING COUNSEL: Objection.

....

What objection is properly made here? How should it be resolved? **(5 marks)**

- (d) Counsel for the Defendant proposes to call, with notice to the Plaintiff, an "expert" in Texas Hold'em, the renowned Texas poker player, Doyle Brunson. It is proposed that he will testify that: "an all-in is signalled by pushing one's chips close to the center of the table, and no other way he knows of."

The Plaintiff counsel objects saying: "everyone knows the rules of poker, we don't need one of the Defendant's fellow Americans to tell us what we already know."

Plaintiff counsel continues: "and further, it will become clear in the qualification *voire dire* that this proposed expert has no formal qualifications whatsoever in terms of education. All he has are tournament wins shown by the bracelet-trophies he wears."

As the trier of law, please rule on the admissibility of this evidence. Admissible? Inadmissible? What is the test? **(10 marks)**

- (e) It turns out that after the leader's debate, and just after the tv cameras stopped rolling, Michael Ignatieff said to one of the reporters covering the debate: "You should have seen Harper's face when I refused to turn over my (poker chip) stacks. Even though I was all-in. Priceless."

Assume the Defendant took the stand and denied he had been all-in. Assume further that when the words allegedly spoken to the tv reporter were put to Michael Ignatieff on cross-examination by Plaintiff's counsel, he admitted saying them. No further questions were asked on the subject.

What is the legal effect of the Defendant's admission he said those words? Is his admission proof that he did go "all-in?" Or do the words have an additional or entirely other use? **(5 marks)**

Question #5

The Tobacco Reduction Act, S.A. 2005, c. T-3.8, s. 8.3 reads as follows:

Evidence

8.3 In a prosecution under this Act, the court trying the case may, in the absence of evidence to the contrary, infer that the product smoked was a tobacco product from the fact that a witness describes it by a name that is commonly used to describe a tobacco product.

Please classify this apparent presumption. Is it one of law or fact? Is it conclusive or rebuttable? If rebuttable, on what standard of proof? Does it require proof of a basic fact?

Describe its operation. What is the role of the trier of law? What is the role of the trier of fact? What happens if the presumption is spent? **(10 marks)**

TOTAL MARKS: 100
END OF EXAMINATION