

**FACULTY OF LAW
FINAL EXAMINATION - DECEMBER, 2006**

LAW 453:A2 (2006) EVIDENCE (BEAVER)

Time Allotted: THREE (3) Hours

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 7 questions on 5 pages. Check to ensure it is complete before starting.
 2. Answer ALL questions noting alternatives where offered.
 3. Questions are not of equal value. Apportion your time accordingly.
 4. This is a CLOSED BOOK examination. No notes, statutes or other material will be allowed in the examination room.
 5. Cell phones, pagers, beepers and related equipment are strictly forbidden. These items must be turned off and stowed. Except by permission of the instructor, which will not routinely be given, lap top computers are not allowed in examinations.
 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. To avoid disturbing your classmates, please do not leave the examination room during the last 15 minutes of the examination period.

TOTAL MARKS: 100 MARKS

1. From the Edmonton Journal, November 25, 2006:

Former Spy Blamed Putin for Poisoning

London

In a chilling accusation dictated and signed just hours before he lapsed into a coma and died, a former KGB agent fingered Russian President Vladimir Putin as the man ultimately responsible for his death after a suspected poisoning shrouded in mystery.

Putin denied the allegation as medical experts and criminal investigators tried to unravel a case that has perplexed them for three weeks.

British officials announced Friday that a "major dose" of Polonium-210, a hard-to-detect radioactive substance, had been found in the urine of the former agent, Alexander Litvinenko. Scotland Yard said it also found traces of the substance in Litvinenko's London home, at a sushi bar where he ate with a colleague and at a hotel where he met two Russian men on the day he fell ill.

Standing before a cluster of cameras and reporters Friday outside London's University College Hospital where Litvinenko, 43, was pronounced dead Thursday evening, his close friend Alexander Goldfarb read the former spy's final statement:

"You have shown yourself to have no respect for life, liberty or any civilized value. You have shown yourself to be unworthy of your office, to be unworthy of the trust of civilized men and women."

"You may succeed in silencing one man, but the howl of protest from around the world, Mr. Putin, will reverberate in your ears for the rest of your life."

...

The former spy's father, Walter Litvinenko, a medical doctor, was at his son's side at the time of death and later spoke to reporters outside the hospital.

"It was an excruciating death, and he took it like a real man", said the elder Litvinenko, tears flowing. "He never lost his human dignity."

The strange tale began Nov. 1 when Litvinenko met for tea with two Russian men at a London hotel. One of them, a former KGB agent named Andrei Lugovoi, has since offered to assist in the investigation.

Later that day, Litvinenko met with an Italian investigator, who apparently showed him documents related to the Oct. 7 murder of Russian journalist Anna Politkovskaya, an outspoken Putin critic. That evening Litvinenko fell ill and checked into a London hospital. Ten days later, he told the British Broadcasting Corp's Russian service that he had been poisoned after receiving information on the Politkovskaya case.

On Nov. 17, as his condition deteriorated, he was transferred to University College Hospital.

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As hope faded, his final words, whispered to Andrei Nekrasov, a friend and filmmaker, were, "The bastards got me, but they won't get everybody," according to a report in the Times of London. He then lapsed into a coma.

Assuming for this question that Canada had jurisdiction in this case to try Mr. Putin for murder, his criminal trial takes place in Edmonton in 2006. Please answer the following:

- (a) At trial, the Crown calls a circumstantial case against Mr. Putin. As part of its case, the Crown wants to place the deceased Litvinenko with the two Russian spies earlier on the day it is expected he was poisoned, trying to build a case that two envoys at the Russian President's command came for a planned visit with homicide in mind. To put Litvinenko with the two Russians (whom no one has seen again) the Crown calls Litvinenko's father to testify that prior to leaving his London home that day his son said:

Litvinenko Sr.: Where are you going?

Litvinenko Jr.: To the Russian Tea House in Trafalgar Square.

Litvinenko Sr.: Why?

Litvinenko Jr.: To see two agents from the old country. They have something to show me.

The defence objects that calling this through the father is hearsay. Is it? If it hearsay, speak to a possible exception. If admissible, for what purpose would it be placed before the trier of fact? For the proof of the truth of its contents? **(10 marks)**

- (b) Litvinenko Sr., in his testimony, has trouble recalling the exact details of the conversation noted above, but indicates to the examiner in chief that he did take notes, in his own handwriting, after his son's death when it came to his

attention that the conversation might become important. There were no additions or deletions to his notes. Can the witness refer to his notes? What would you argue as the opponent? If he is allowed to refer to his notes, do the notes become an exhibit for the trier of fact to peruse? Where not marked as an exhibit, is the opponent counsel nevertheless entitled to review same? **(10 marks)**

- (c) The Crown now would like to call the allegations made by the deceased as to the identity of his killer. Comment first on the admissibility of the statement alleged by Goldfarb. Admissible through Goldfarb? In for the proof of the truth of its contents? What, if any, is the relevant exception? What, if anything, are the problems with this statement? Now deal with the evidence of Nekrasov as to the alleged dying words of his friend Litvinenko. Analyze the admissibility of same. Admissible for the proof of their contents? What would you argue as the opponent regarding their admissibility? **(20 marks)**

- (d) The questioning of Litvinenko Sr. begins as follows:

Q. You live in London?

A. Yes.

Q. You are a medical doctor?

A. Yes.

Q. As such, are you bound to follow a Code of Ethics?

A. Yes.

Q. And do they allow you to intentionally lie to a Court of Law?

Defence counsel: Objection.

What is the objection here? Is there anything that could be added to these facts to change the outcome as to admissibility? **(5 marks)**

- (e) The defence wishes to call the wife of Litvinenko, Helena. Due to illness, she remained in Russia while Litvinenko moved to London. They have lived apart for several years now. The defence expects to call her to indicate that her husband has many enemies with the motive and ability to kill him, both inside the KGB and outside. Helena's illness, unfortunately, has caused dementia, and she drifts in and out of lucidity. First deal with the admissibility of her evidence in terms of relevance. Is it relevant? Next, deal with the allegation of the opponent that Helena is non-competent or compellable for two different reasons. Why would the opponent so argue? As the trier of law, please resolve these arguments and rule as to whether Helena can take the stand and swear an oath. Who has the onus to establish non-competence or compellability in these circumstances? What criteria are to be applied? If ruled competent, is there any type of question Helena can refuse to answer while on the stand? Why? **(15 marks)**

2. The *Dairy Industry Act*, R.S.A. 2000, c. D-2, s. 38 reads as follows:

38 In a prosecution of an offence under this Act,

1(b) a package containing a dairy product that bears

(i) a name and address purporting to be the name and address of the person by whom it was packed, or

(ii) a registered number purporting to be the registered number of the dairy plant where it was processed

is proof, in the absence of evidence to the contrary, that the dairy product was packed and that the package was marked by the person whose name and address appears on the package or by the person operating the dairy plant whose registered number appears on the package.

As the trier of law hearing prosecutions under this Act, please characterize this statutory assistance to proof for the trier of fact. Is it mandatory? Permissive? A presumption of fact or law? Must the trier of fact apply the presumption? Rebuttable? On what standard of proof? Does it require proof of a basic fact? How does it operate?(**10 marks**)

3. A motor vehicle accident occurs. An accident reconstructionist team responds. Constable Jones takes the measurements as to skid marks, and calls them out to his partner Constable Peeters who repeats and confirms them before recording same. As a result of the measurements, a civilian reconstructionist, Bob Roberts, calculates that one of the two vehicles was travelling well beyond the specified speed limit. Please describe in detail how to call this evidence as the proponent. Please address what needs to occur for the testimony of Mr. Roberts to be admissible, both in terms of foundation and opinion. (**10 marks**)
4. "An admission is only admissible against the party who utters it, no exceptions." Agree or disagree? Why? (**5 marks**)
5. "Where authenticated, documents are invariably admissible for the proof of the truth of their contents." Agree or disagree? Why? (**5marks**)
6. Why is the trier of fact present for some *voir dire*s and not others? Which are they present and absent for? Why? (**5 marks**)
7. "No similar act without similar fact." Do you agree or disagree? (**5 marks**)

TOTAL 100 MARKS

END OF EXAMINATION