

**FACULTY OF LAW - UNIVERSITY OF ALBERTA**

**DEFERRED FINAL EXAMINATION - JUNE 2011**

**LAW 453:X5 EVIDENCE (BEAVER)**

Time Allotted: Two (2) Hours and Thirty Minutes (30)

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

Dr. Ashby, an Edmonton pediatrician, saw both female and male patients in his medical practice for over thirty years. In 2010, two male patients came forward to the police, indicating that they had been touched inappropriately by the Dr. during their various checkups as children. The two male patients are now adults. While they are not related, they did grow up in the same area. It was upon them running into each other as adults that they compared experiences, decided that the same thing had happened to both of them, and together decided to come forward.

The police laid two charges of sexual assault, one naming each complainant. The matter is to proceed to trial in Edmonton Alberta in 2011.

The two male patients tell a somewhat similar story. They both describe how for a portion of each checkup, their parents would be with them. The Dr. would then ask the parents to step outside into the waiting room, and then he would start touching them in their groin area. There would be a grab, and a pull. Both describe it as very painful. In addition, they both describe a face on the Dr. of "pure pleasure." There was one difference, the first patient describing that the lights would always be turned off during this portion of the examination, the other insisting the lights were on.

Following the arrest of the Dr., all media outlets reported on the story. The story brought one more complainant forward. A female with a similar story about the Dr.

The Crown decided not to lay a charge regarding the female, but proposes to call the female complainant as "similar fact" in the Dr.'s trial.

Based on the above, please answer the following:

- (A) In the criminal trial, the Crown seeks admission of the medical notes of each patient as written by the Dr. at or around the time of the complainant children's appointments. The Crown asserts that these are "admissions" of the Dr. and that upon "some proof" that the accused wrote them, they should be admissible for the proof of the truth of their contents. Defence counsel replies: "Look at them My Lord, they are clearly not admissions of anything." Who is right? Crown? Defence? Are the notes admissible? For what purpose? **(10 marks)**
- (B) Alternatively, the Crown suggests that the medical notes are admissible as "business records." The Defence objects, stating that: "The Crown has given me no notice, therefore he cannot use the Canada Evidence Act provisions." The Crown replies: "I am reliant on the common law." What does the Crown

mean? Is he right? Should Defence counsel's objection be upheld? Are the notes admissible on this basis? If so, for what purpose? If the Crown is right, what evidence, if any, need be called as a foundation for admissibility? **(10 marks)**

- (C) During trial, the Crown seeks to call the third, female, complainant as "similar fact." As the Crown, please make arguments as to the basis for admissibility of this evidence. What is the test? How do these facts meet the test? As Defence counsel, please argue as to why the test is or is not met in these circumstances. Finally, as the trier of law, rule on the issue of admissibility of the female complainant's evidence. Admissible? Inadmissible? Why? If admissible, for what purpose? And, as the trier of law, what would you instruct the trier of fact as to this evidence if admissible? Do they have to believe it to rely on it? How do they utilize it with respect to the other evidence and the two charged counts? What, if anything, would they be warned against? **(20 marks)**
- (D) For the purposes of this question, let us assume that the female complainant's evidence was ruled inadmissible. We have now come to the end of the trial. Both counsel have made their arguments to the jury. The trier of law is now preparing to address the jury with final instructions. The trier of law asks of defence counsel the following: "There are two counts. The question I have is this. Is the jury allowed to resolve doubt on one count by reference to evidence on the other count? On what basis is evidence on one count available to the trier of fact for the other count? What do they have to find first? Do they have to believe the first complainant witness on count #1 beyond a reasonable doubt before being able to use that evidence for count #2? Or are they simply barred from interchanging evidence on counts?" As defence counsel, what is your response? **(10 marks)**
- (E) Before jury instruction, the trier of law also has a question for the Crown: "I have heard that while not related, these two male complainants were childhood acquaintances who then reunited as adults, spoke of the events, and then made a joint complaint to the police. What I am to do with that fact? Defence counsel seems to have suggested in cross-examination that the two "colluded." Is collusion a matter of weight or admissibility? If admissibility, how would that work here?" As Crown counsel, please reply and educate the trier of law as to the applicable law on his question. **(10 marks)**
- (F) A further question from the trier of law prior to instructing the jury: "Defence counsel has raised some points in evidence over the complainants' memories. Defence points to a lack of memory of dates and times, whether they were in school at the time or not. Am I to tell the jury that they are to test

the credibility of the witness as they are in the box today? Or as a child at the time of perception? Also, does the jury need to concern themselves with searching for corroboration as a matter of law or fact?" Please answer His Lordship's questions. **(10 marks)**

- (G) The jury is instructed and they retire to deliberate. They come back with a question: "We are struggling with credibility. Are we allowed to use our belief in the testimony of each complainant to reject that of the accused in each instance? In other words, if we believe them (the complainants), does it not follow that we must disbelieve the accused?" The trier of law turns to counsel and asks: "Well counsel, what should I tell them?" Please advise the trier of law. **(10 marks)**
- (H) Assume for the purposes of this question that the female complainant's evidence was ruled admissible by the trier of law. In response, defence called an expert in psychology. According to the defence, the psychologist would testify that: "It is extremely rare for a paedophile to have proclivities to both male and female victims."

During the qualification voir dire, the following is a portion of the exchange between the proposed expert and the Crown on cross-examination:

THE CROWN: When you say rare, what type of numbers are we talking?

EXPERT WITNESS: We have an expectation that it's rare, but we do not have any numbers. I, personally, have never seen it.

THE CROWN: Have you published on this issue?

EXPERT WITNESS: I have.

THE CROWN: Well I have read your published article, it would appear that it was heavily criticized by others in your profession?

EXPERT WITNESS: You could say that.

THE CROWN: And you would admit, won't you, that most in your profession disagree with you?

EXPERT WITNESS: In history, it happens to all great thinkers.

....

As the trier of law, please rule on whether the expert witness can provide his opinion to the Court. What are the considerations? How do they apply to these facts? **(10 marks)**

- (l) Assume there was a conviction by the jury on both counts. The complainants now pursue a civil suit against the Dr. for damages for his tortious behavior. What assistance, if any, can be made of the criminal conviction in civil court? If the criminal conviction is entered in the civil matter, does it determine the issues of fact? In other words, does the civil trier of fact have to accept the criminal verdict? Please advise as to the law. What evidential enactment is at play? Did it repeat the common law or change it? Can civil judgments be admitted in criminal cases? In the same or a different way? **(10 marks)**

TOTAL MARKS: 100  
END OF EXAMINATION