

FACULTY OF LAW - UNIVERSITY OF ALBERTA

DEFERRED EXAMINATION - 2010

LAW 453:X1 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 6 questions on 5 pages. Check to ensure it is complete before starting.
 2. Answer ALL questions and parts of questions. Read all instructions in questions.
 3. Questions are of equal value. 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.
 9. For those writing on laptops, please go on to the next screen for each alphabetical portion of each question.

TOTAL MARKS: 100 MARKS

1. (A) Please describe the differences between spousal incompetence and spousal privilege. **(6 marks)**

(B) Is a spouse competent in the following trial situations? Please explain why or why not.
 - (i) civil trial, Provincial Court of Alberta, proposed witness spouse is legally married to Plaintiff and called by the Defendant;
 - (ii) criminal trial, accused charged with assault of child of the marriage, proposed witness spouse is married to accused and called by the accused;
 - (iii) criminal trial, adult accused charged with murder of his father, proposed witness spouse is married to accused and called by the Crown. **(6 marks)**

2. A motor vehicle speeds down Jasper Avenue in Edmonton, heading westbound. As it approaches a pedestrian crossing, a visibly frightened, yet never identified, passerby puts his hand up and yells, "stop, you are driving too fast, you are going to hit him." Moments later, the vehicle strikes a pedestrian in a crosswalk, killing them instantly. In a criminal trial for dangerous driving causing death, the Crown seeks to call the utterance of the still unknown passerby through another witness who happened to hear the passerby's words and see the passerby, but did not see the accident itself, nor the moments before. This proposed witness also will testify that she heard the unmistakable sounds of a motor vehicle accelerating, the screech of brakes, and the thud of impact. Is this evidence admissible? What is the applicable rule? Apply. What if the passerby was known to the police prior to trial, and known to be in poor health. In the several months before trial, however, no attempt was made to preserve their evidence. Does this affect your answer on admissibility? Why or why not? **(12 marks)**

3. A law student is accused of cheating on an exam by hacking into his professor's computer network prior to the exam and finding and copying the file with the exam questions. During his trial for cheating on an examination, contrary to the Criminal Code, please comment on the admissibility of: a piece of paper found in his locker with the professor's computer password handwritten thereon.

Questions:

- (A) Describe the process of authentication of this piece of evidence. Who can be called to testify to same? **(4 marks)**

- (B) If authenticated, what Exhibit does it become? 1? A? **(2 marks)**

- (C) If marked as A, is it seen by the trier of fact? Why or why not? **(2 marks)**

- (D) Does the authenticating witness need to be able to identify the handwriting? Can another witness? **(3 marks)**
- (E) If the handwriting is not identified by any witness, is the Exhibit still admissible? Can the trier of fact make its own comparison to a known sample? **(3 marks)**
- (F) Is the piece of paper admissible for the proof of the truth of its contents? Does it have to be relevant and carry any potential weight? Why or why not? **(3 marks)**
- (G) What type of evidence is this? Direct or circumstantial? Does the classification matter to any rule of admissibility or special rule of weight for the trier of fact? **(3 marks)**
4. A sworn witness in a criminal trial in Edmonton, Alberta, makes a statement under examination in chief that is in contradiction of an earlier written statement of the same witness, to the knowledge of opposing counsel. Opposing counsel is in possession of a copy of same. Opposing counsel rises to cross-examine. Please answer the following:
- (A) What is the general rule with respect to cross-examination on prior inconsistent statements? Generally admissible? Inadmissible? Does the cross-examination require leave of the Court? Does the trier of law first have to determine that the alleged prior inconsistent statement is, in fact, inconsistent, before the cross-examination thereon proceeds? Who decides inconsistency? Trier of law or fact? **(5 marks)**
- (B) On said cross-examination, must the statement be identified to the witness in any way prior to the cross-examination thereon proceeding? Is the witness entitled to see a copy when they answer questions thereon? Does the statement itself, once it has been referred to, become an Exhibit at trial? What if the witness cannot or will not identify same? Is that the end of the cross-examination? **(5 marks)**
- (C) If the witness acknowledges it is their statement, is that all that is required? If that is all that happens, what use can the trier of fact make thereof? What further question would you ask as cross-examining counsel? Why? Would it change the use that could be made of the statement? Explain. **(5 marks)**
5. At a civil trial in Edmonton, Alberta, a key fact in issue is the depth of a swimming pool, as well as the height of a diving board associated thereto. The case is one of alleged negligence of a homeowner, in having built and maintained for the use of their guests, a swimming pool arguably too shallow for diving, particularly given the

height of the diving board. According to the expert for the injured Plaintiff, combined they are a "recipe for injury and disaster." The Defendants expert disagrees. They are quite safe in his opinion, and certainly well within appropriate standards and regulations.

It becomes patently obvious during the testimony of both expert witnesses, that neither measured either the depth of the pool, nor height of the diving board. Both acknowledge on cross examination that their opinions could change based on the actual measurements. No measurements could be taken at the time of trial, as the homeowner had bulldozed the pool after the accident, as it reminded them of a terrible incident.

The trial judge has a few suggestions of his own:

- (A) He suggests that the trier of fact can rely on the bold black lettering on the sides of the pool, shown in photographs thereof, indicating "5 feet" and "6 feet" depths. Is this suggestion legally sound? Why? Why not? **(5 marks)**
- (B) He suggests that he can "eyeball" both the depth and height by looking at the pictures himself as the trier of fact. Is this suggestion legally sound? Why? Why not? Would this suggestion be more, or less, acceptable, if his suggestion was as the trier of law, that he would "eyeball" the depth and height, and so advise the jury in a jury trial? **(5 marks)**
- (C) It turns out that the pool and diving board come from a pre-made package, that come along with the specifications written in an accompanying booklet. The booklet, produced in England, indicates that the depth of the pool is 1/100 of a furlong. Mystified as to how many feet in a furlong, the judge looks for suggestions. Do you have any? **(5 marks)**

6. Please answer the following:

- (A) "General reputation witnesses are restricted to giving their own opinion as to the veracity of the accused person.." True? False? Why? **(5 marks)**
- (B) "Any fact admitted before a Court by counsel is binding, and cannot be revisited by the trier of fact." True? False? Why? **(5 marks)**
- (C) "As witnesses, children do not swear oaths, they promise to tell the truth." True? False? Why? **(5 marks)**
- (D) "The difference between being allowed, as an adult witness, to take an oath, as opposed to merely promising to tell the truth, is an understanding of the spiritual significance of the oath." True? False? Why? **(5 marks)**

- (E) In the absence of direct evidence of a dead body, the common law was ready to presume death after seven years of unexplained absence. What type of presumption was this? Fact or law? Mandatory or permissive? Does it require proof of a basic fact? What fact? On what standard of proof? Is the presumption conclusive? Or rebuttable? Again, on what standard of proof? Does the presumption operate at the level of the trier of law or fact? **(6 marks)**

TOTAL MARKS: 100
END OF EXAMINATION