

FACULTY OF LAW - UNIVERSITY OF ALBERTA

FINAL EXAMINATION - DECEMBER 2009

LAW 453:X1 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 4 questions on 9 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. The following article was published in the Edmonton Journal newspaper on November 14, 2009:

"An Alberta private investigator and two actors testified Friday about a video re-enactment of a foot chase and shooting the night RCMP Const. Christopher Worden was killed.

George Siemens said defence lawyers contacted him in September to simulate "as closely as possible" the chase between Emrah Bulatci and Worden two years ago in Hay River, N.W.T.

A former RCMP officer, Siemens said the purpose was to evaluate the evidence given by another witness at the first-degree-murder trial.

That witness, a teenage girl whose name is under a publication ban, testified in Northwest Territories Supreme Court that she saw Bulatci grab his gun and shoot Worden several times after falling to the ground, according to local media reports. The girl said she saw flashes coming from the muzzle of the gun.

Siemens told court he stood at the same spot where the young witness said she was standing when she saw the shooting. He had instructed the actors to replicate the movements the young witness described.

He testified he could see the actors briefly during the chase and could not see them when they entered the wooded area where Worden was shot.

Court saw the video Siemens made of the re-enactment. The video was very dark, since it was shot around 5 a.m. on Oct. 6 of this year.

Under cross-examination by Crown prosecutor John MacFarlane, Siemens admitted his view of the wooded area was blocked by a new building that was not there when Worden was killed. Court has previously heard that Worden's last radio contact with RCMP dispatch operators was at 5:30 a.m. on Oct. 6, 2007.

MacFarlane also asked Siemens to confirm the actors did not use guns in the re-enactment, so there were no flashes. Siemens agreed.

The testimony comes after Bulatci spent several hours on the stand Thursday recounting his version of the shooting. Bulatci has admitted he killed the officer but maintains he did not intend to do so. He tried to plead guilty to manslaughter on the first day of his trial, but Crown prosecutors rejected the plea.

Worden was responding to a call when he met Bulatci, who was dealing drugs at a house in Hay River.

Bulatci, 25, said he ran because he didn't want Worden to discover the illegal handgun he had tucked in his jacket. He said he fired twice at Worden to slow him down. The first two shots hit Worden in the leg and pelvic areas. Bulatci maintained his .40-calibre handgun went off twice accidentally during a struggle with the Constable. Those shots hit Worden in the neck and chest.

Lawyers finished presenting evidence Friday and the jury will be back in court Tuesday to hear closing arguments."

Please answer the following:

- (A) As the trier of law, please rule on the admissibility of the above-described re-enactment. Characterize this evidence by type. What is the applicable test? Apply same and resolve. Also comment with respect to its probative value as contrasted to any prejudicial value. **(10 MARKS)**

2. The following article was published in the Edmonton Journal newspaper on November 18, 2009:

"A man accused of sexually assaulting a woman in her own apartment testified on Tuesday she invited him into her suite and said they engaged in consensual sexual acts.

The woman, now 27, testified for almost two hours Monday at the trial of Philip Allan Skulnec, 30, who faces seven charges in connection with the alleged attack.

The woman's identity is protected under a publication ban.

She testified Monday she stepped into the elevator of her downtown apartment

building around 1 a.m. on Dec. 1, 2007, and met a man who did not get off at the floor for which he had pressed the button.

She said she was scared and rushed off the elevator, but the man cornered her in the stairwell, brandished a large knife, and forced her into her apartment.

But Skulnec testified on Tuesday there was no knife, and said the woman invited him into her apartment and her bedroom, where they had a conversation of a sexual nature.

"I've never once in my life carried a weapon," Skulnec told the court.

The woman testified she was raped, molested and sodomized for more than five hours.

She said at one point her attacker laid her on her bed, bound her wrists and feet with cords, covered her head with a shirt, and shoved socks in her mouth.

Skulnec testified the woman asked if he had ever tried bondage and nodded and smiled when he asked if she wanted him to tie her up. He said he changed his mind after he tied her up.

"It didn't feel right," Skulnec said.

He said he untied her hands and used a kitchen knife to cut a cellphone charger's cord that he had wrapped around her ankles.

He testified she never once said no or told him to stop.

The woman said her attacker told her to inhale a white powder he had spread on the bathroom counter.

She said she let him do what he wanted because she was terrified.

"He forced his way into my apartment. He threatened me. I was scared," she said. Skulnec told court the white powder was cocaine and said the woman willingly ingested it.

"She gently pushed my hand away, plugged one nostril and sniffed it up," Skulnec said.

The woman said she convinced him she had to go to class when her alarm sounded at 6:30 a.m.

She eventually went with a friend to the University of Alberta Hospital to be examined by a nurse who urged her to go to police, she said.

The woman said she suffered no long-term physical injuries.

According to an agreed statement of facts, the woman provided enough information to police for investigators to make a drawing of the suspect.

After canvassing the woman's building, two people identified the man in the drawing as Skulnec, a tenant in the same building.

Skulnec's DNA was later found to match semen detected on a vaginal swab taken from the woman during her examination at the hospital.

Skulnec is charged with kidnapping, unlawful confinement, sexual assault causing bodily harm, sexual assault with a weapon, administering a noxious substance, uttering threats and possessing a dangerous weapon.

The trial continues today.”

Further assume for the purposes of this question that the accused has a criminal record including:

1985-09-29 (Edmonton, Alberta)	Sexual Assault	3 years
1989-02-18 (Fort Saskatchewan, Alberta)	Theft Under	\$500 fine
1998-05-21 (Edmonton, Alberta)	Impaired Operation	\$600 fine and 1 year driving prohibition
2000-01-12 (Edmonton, Alberta)	Possession of a Weapon	30 days and 10 year weapons prohibition

Please answer the following:

- (A) On cross-examination, is the Crown entitled as of right to put the accused's criminal record to him? Is there any way for the defence to prevent this? If

the cross-examination is allowed, what, if any, are the limitations thereof? As the trier of law, would you edit this criminal record in any way? Is it legally permissible to do so? What are the permissible uses of the record for the trier of fact, what are they told they can and cannot do? **(10 MARKS)**

(B) As the trier of law, please make a ruling as to whether or not the accused has placed his character in issue. Given your ruling, please advise whether the Crown is now allowed to go further in its cross-examination of the accused than in answer (A). Why and in what way? Again, would there be any limiting instruction left for the jury? **(10 MARKS)**

(C) The trier of law, in the charge to the jury, noted the obvious when he said: "You have heard two diametrically opposed stories in the testimonies of the complainant and the accused. Yours is a difficult task. It will be hard to choose one over the other, but that is what you must do. Who is most believable? Whose story rings true?" Please comment on the trier of law's charge to the jury in this criminal case and make any appropriate adjustments. **(10 MARKS)**

3. From Rolling Stone magazine, 12/5/08:

"Coldplay, no strangers to plagiarism accusations, are now being sued by guitar virtuoso Joe Satriani, as the guitarist is accusing the band of ripping off his 2004 track "If I Could Fly" for their own Grammy-nominated hit "Viva La Vida." Satriani filed a copyright infringement suit against the band in Los Angeles yesterday, accusing Coldplay of stealing "substantial original portions." The Satch is seeking a jury trial, damages and "any and all profits attributable to the alleged copyright infringement." And considering the album and the single were among the biggest sellers this year, not to mention the centerpiece of an Apple iTunes campaign, Satriani stands to make a sizeable profit if the jury agrees with him. However, Satriani's lawyers will have to prove Coldplay somehow heard "If I Could Fly," which may be a difficult task. That being said, the hook to "Viva" is almost exactly the same as the guitar lick in "If I Could Fly," as evidenced by the 50-second mark in the video below. Coldplay's management has not yet commented on the case."

Please answer the following:

(A) In the trial for copyright infringement, the Plaintiff wishes to prove the similarities between the two songs. Given the facts as stated in the article above, would it be open to the Plaintiff to call expert evidence on the similarity between the two? Why or why not? What is the test for admissibility of expert evidence? Which portions of the test are passed? Which, if any,

fail? Would it matter to admissibility if the proposed expert were a professional rock musician with no formal training, as opposed to a doctorate in music who does not play any of the instruments involved in the two recordings? Which expert, if admissible, would be worthy of more weight to the trier of fact? **(10 MARKS)**

- (B) Coldplay defends the suit indicating in its pleadings: "Copying is denied. Any similarity is purely coincidental and happenstance." If the Plaintiff also had evidence to call which they felt proved that Coldplay had also claimed to have "inadvertently" recorded songs with refrains similar to Led Zeppelin's "Stairway to Heaven" and the Rolling Stones' "Brown Sugar", would such evidence be admissible? For a substantive purpose or pure credibility? Does the Defendant have to put its character in issue first? If such evidence is left to the trier of fact, what are they told of permissible uses? Impermissible ones? **(10 MARKS)**
- (C) The author of the above article apparently feels that the difficulty for the Plaintiff will lay in proving that the Defendant band had heard the Plaintiff's song. In the absence of direct evidence of same, what type of evidence would you consider calling as counsel for the Plaintiff? Is such evidence, by its nature, worthy of less weight? Is there a mandatory instruction concerning same for the trier of fact? If there is an application for a non-suit by the Defendant at the end of the Plaintiff's case based on a lack of direct evidence of the Defendant band having heard the Plaintiff's song, what are the relevant considerations for the trier of law in deciding such an application? **(10 MARKS)**
- (D) The evidence called at trial indicates that Chris Martin, the leader of the Defendant band, wrote most of the music for the song at issue. Plaintiff's counsel is aware that Chris Martin's wife, Gwyneth Paltrow, with whom Martin still resides, is very angry at Mr. Martin due to recent tabloid articles linking him romantically to another actress, a friend of Paltrow's. Paltrow is apparently willing to give evidence that Chris Martin owns a copy of Satriani's album in which the song at issue appears, and has for years owned same. If this trial were to take place in Alberta, would Paltrow be a compellable witness at the instance of the Plaintiff despite the apparent legal marriage? If she is allowed to testify, as the Defendant's counsel, what areas do you wish to explore on cross-examination? **(10 MARKS)**

4. Griffin and Harris were charged with first degree murder following the shooting death of Denis Poirier on February 2, 2003.

The identity of Poirier's killer was the sole issue at trial. Williams, the girlfriend of Poirier, was the only witness who provided direct evidence of the shooter's identity. She testified that she saw him round the corner of Atwater Avenue and Workman Street, approach Poirier, and fire a weapon three times in his direction, twice after Poirier had gone down. Williams was able to identify the shooter as Griffin.

A second eyewitness to the shooting was unable to identify the shooter from police photos, nor could he identify Griffin as the assailant in court.

The victim and the two accused, Griffin and Harris, were all heavily involved in the drug trade. The Crown's theory was that the shooting was retribution for Poirier's failure to repay a large drug-related debt, and that Griffin was the shooter while Harris acted as the lookout. In support of its theory, the Crown led evidence that in the weeks leading up to the killing, Poirier was afraid for his safety and had gone into hiding. During this time, Griffin, at times accompanied by Harris, searched for Poirier with increasing urgency. Apart from the direct evidence of Williams and the second eyewitness Lavoie, the Crown's case against Griffin was based on circumstantial evidence. The case against Harris was entirely circumstantial.

Around January 19, 2003, Griffin's efforts to track down Poirier intensified. Four men drove first to Poirier's residence. Griffin and Harris got out and looked for Poirier but he was not there. They next went to the Clarion Hotel. Griffin and Harris entered the hotel.

That same evening, January 22, 2003, Poirier met with his girlfriend Williams at the bar of the Clarion Hotel. Poirier left the bar at regular intervals throughout the evening to make phone calls and check his messages, and he grew increasingly stressed as the evening went on. Around 11 p.m., Poirier suggested that Williams depart, and as she was leaving he said to her, "[i]f anything happens to me, it's your cousin's family". A first cousin of Williams had a child with a first cousin of Griffin, and Williams immediately understood that Poirier was referring to Griffin. Poirier did not explain to Williams why he feared for his safety but she understood he was afraid of Griffin. About ten days later, Poirier was gunned down in the street.

Please answer the following:

- (A) Is the statement made by the deceased to Williams, his girlfriend, namely "if anything happens to me ...", admissible at the instance of the Crown? Analyze same. For what purpose would it be proffered and for what purpose, if any, would it be admissible? What evidentiary rule does it arguably violate? What exception(s) may apply? For what other reasons could it be admitted or excluded? **(10 MARKS)**
- (B) To the facts now add the additional information that while Griffin admitted by way

of voluntary confession his involvement in the death of Poirier, Harris did not. During Griffin's confession, made on the day of arrest, he implicates Harris as being the "lookout." Please discuss the admissibility of the statements of Griffin in this joint trial as against, firstly, Griffin himself, and then Harris. If Griffin takes the stand and denies involvement, is his earlier confession determinative of his guilt? Regardless of whether Griffin takes the stand, what evidential use can be made of Griffin's confession as against Harris? What would the trier of fact be told/warned? **(10 MARKS)**

TOTAL MARKS: 100
END OF EXAMINATION