

FACULTY OF LAW - UNIVERSITY OF ALBERTA

FINAL EXAMINATION - DECEMBER 2010

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 2 questions on 7 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

On September 1, 2005, Mark and Amy were married in Edmonton, where they decided to settle down. On October 15, 2010, they had their first physical altercation. During an oral argument over finances, Mark struck Amy with his open hand, without her consent, on several occasions. The police were called by an anxious neighbour. Mark was charged with assault.

Upon his arrival at the marital home, the investigating officer noted in his notebook (the notes made in his own handwriting at the time of the observations) that Amy seemed distraught, tears ran down her face, her nose was slightly bloodied, and she kept saying "...Mark you have changed, you have changed. You always promised me, it would never come to this."

The investigating officer invited Amy to give a statement at the downtown police headquarters in Edmonton. "It would be more comfortable there" he said. Before the audio recorded statement was taken (the video facilities were all being used and thus were unavailable), Amy was warned that it was a "serious offence" to lie to a police officer. Amy agreed and then gave her version of events. The investigating officer began the statement by stating: "We are here to talk about your husband assaulting you." Amy went on to tell the officer that the relationship between herself and Mark had been suffering lately. Angry words were frequently exchanged, but that their fights had now turned physical, at least on his part. For the first time in her life, she said, she was afraid of her husband, and did not know what he might be capable of. In confidence, and during another marital conversation over finances about seven days earlier, Mark had told Amy that he had been feeling "overwhelmed and out of control."

The audiotaped statement completed, Amy returned home. As was usual, the couple eventually reunited and made up prior to trial. Answer the following questions based upon a criminal trial taking place December 15, 2010, on a charge of assault.

- (A) The Crown issues a subpoena for Amy to testify. She does arrive at court in response thereto, but makes it clear she does not wish to testify. The defence takes the position that she can only be called with their agreement, which they do not offer or provide. Is Amy competent at the instance of the Crown? Compellable? Why or why not? Who decides? **(10 marks)**
- (B) Assume that Amy is compelled to take the stand. On the stand, when asked basics such as "what happened on October 15, 2010?" Amy keeps answering to the Crown: "Nothing. Why do you ask?" As the Crown, you

obviously have a reluctant witness. You have Amy's audio statement, but she will not repeat it on the stand, at least not at the moment. What options do you have? Can the statement be played to her? If the Crown attempted to do this without application, what would the defence objection be? What application could be made by the Crown? Describe the steps. If the application is successful and the statement played to the witness, what series of questions are key to its use as to credibility? What of substantive use (short of *KGB*)? **(10 marks)**

- (C) Let us further assume that despite the audio statement being played for the witness, and although she will acknowledge her own voice, she will not acknowledge the truth thereof. What options are available to the Crown to seek substantive use of the statement? What evidence would you call on the *voire dire*? What arguments would you make as the Crown and the Defence? Could the result be different pre-and -post *Khelawon*? Why? What has changed, if anything? **(10 marks)**
- (D) The Crown asks Amy on the stand about the portion of her statement in which she indicates that "Mark admitted he felt overwhelmed and out of control lately." She says she will not answer the question. Does she have an ability to so refuse, despite her being ruled compellable, and despite the Court granting leave regarding the statement made to police (allowing it to be put to her)? What is the legal principle at play? Resolve. **(5 marks)**
- (E) At trial, the Crown also seeks admission of Mark's diary, found on his person at the time of arrest. It would appear that Mark made notes of his daily life, including dealings with his wife. Prior to police arrival, Mark had apparently wrote about "violating his wife's trust" and "being brutish." These were dated, in handwriting, the same date as the alleged offence. Is the diary passage admissible? Through whom? Is it admissible on its own? Or does it require testimony to be admitted? If so, who might be the possible witnesses in this regard? If a proper witness is found to testify as to the diary, is the diary passage to be admitted substantively (for the proof of the truth of its contents)? Despite the defence claim that it is hearsay? What about the defence claim that the words "are not clearly a confession, they are equivocal, and are therefore inadmissible."? As the trier of law, deal with that assertion, is it a matter of weight or admissibility? **(10 marks)**
- (F) When the investigating officer is called to the stand, he has a general recollection of what occurred, but cannot remember the exact times of response and departure, and cannot remember the exact words uttered by Amy at the time he dealt with her. As the Crown who called this witness, what would you do? What is the applicable application and/or legal principle?

If the application were allowed, would the notes be marked as an exhibit? **(5 marks)**

- (G) The Crown, having Mark's diary in its possession due to seizure at the scene, has reviewed it in its entirety. The Crown concludes from reviewing same that Mark has assaulted Amy many times in the past. From the Crown's reading, Mark has expressly admitted same, in his own handwriting. The Crown, at trial, seeks substantive use of those alleged admissions of other assaults. What is the evidentiary rule at play? Describe same. How might it apply here? Does it matter if Mark takes the stand to testify that he "has never assaulted his wife" and that he "just isn't like that?", that everything on the date in question was "just taken out of context."? Does it matter to admissibility of the other diarized events if Mark takes the stand at all? **(10 marks)**
- (H) Let us assume that Mark has taken the stand in his own defence, following the testimony of his wife, and the investigating police officer, both in the case for the Crown. Mark denies the assault at issue under oath. As the trier of law, what legal instruction do you give to the trier of fact given that the accused has taken the stand and denied the offence? What exact words are required by law? **(5 marks)**
- (I) Assuming the accused takes the stand, the Crown would like to cross-examine him on his prior criminal record for uttering threats (to someone other than his wife; in fact, to a store clerk, five years ago, for refusing the return of merchandise). Is such cross-examination on the prior criminal record of an accused allowed? Regardless of the testimony of the accused? Is leave required? Can the defence do anything to prevent the cross-examination? As the trier of law, what would you rule? What restrictions, if any, on cross-examination on the criminal record would be imposed? What instructions would be given, if any, to the trier of fact, as to how they can use such evidence in reaching verdict? **(5 marks)**

Question #2

A civil trial takes place in Fort McMurray, Alberta, wherein the claimants, a group of residents of Fort McMurray, allegedly directly affected by the effluent from an oil sands operation, claim as against the major corporate player in that region for both intentional tort and negligence. The Plaintiffs claim damage to their personal and real property, as well as to their health.

As part of the Defendant Corporation's production (document discovery), are many emails from various levels of the Defendant's staff, to their corporate superior, and responses thereto. The following is typical of those group of emails:

From: jnowan@sundialcorp.com
To: cbricker@sundialcorp.com
Re: tailing ponds
Date: February 1, 2010

Carl, we are certainly taking a risk here not dealing with an obvious problem. How long until someone is affected thereby? How long can we wait? In my opinion as Chief Health Officer and Environmental Scientist for the corporation, we just can't wait any longer. Let's admit we have a problem, that the ponds have reached dangerous levels, and just take it on the chin.

From: cbricker@sundialcorp.com
To: : jnowan@sundialcorp.com
Re: tailing ponds
Date: February 1, 2010

Noted. Let's give it a little time. The issue is too "hot button" in the press right now. If we take any action, it will be overblown.

Please answer the following:

- (A) The sole Defendant in the civil action is Sundial Corporation. The Defendant seeks admission of the "jnowan" email, and the "cbricker" response thereto, as against the Corporation. What is the evidentiary rule at play? Are the "jnowan" and "cbricker" emails admissible as against the company? What is the general rule? What exception might apply here? **(10 marks)**
- (B) Let's assume the "jnowan" and "cbricker" emails go in for the proof of the truth of their contents. Let's further assume that Julie Nowan ("jnowan") takes the stand and denies that the email expresses any concern for the effects of the effluent on the surrounding community. The defence makes a non-suit application after the close of the Plaintiff's case, arguing: "the only substantive proof of actual wrongdoing or knowledge of wrongdoing is the evidence of Julie Nowan. On the one hand, her email says what it says. On the other hand, she has denied same on the stand. How could a jury find for the Plaintiff in such circumstances?"

Based solely on the concept of a witness apparently saying two different things on the same issue, one in Court under oath, one outside of Court in an email, please advise as to appropriate test for a non-suit application, and provide your ruling on these facts as the trier of law. **(10 marks)**

- (C) Assume the following provision was passed by the legislature of Alberta, and was in place at the time the above facts-in-issue occurred, including trial:

Noxious Effluent Act, R.S.A. 2000, c. -7.1

....

s. 5(1) Where, in an action seeking compensation for damages to property or health as a direct or indirect result of the manufacture of or processing of any product or creation of byproduct, upon proof of the manufacture of, or the creation of a product or byproduct listed in Schedule 1, and upon proof that said product or byproduct is found within five kilometres of a City or Town, it shall be presumed that there has been harm by the manufacture of, or processing of said product or byproduct, to the health or property of any individual member of the surrounding town or City by the person or corporation producing or byproducing said product, unless the person or corporation proves that they took all appropriate steps to avoid such product or byproduct affecting the property and health of the residents of the surrounding Town or City.

Schedule 1

....

- (i) oil sands effluent

Describe this provision passed by the legislature. What is it? Is it permissive or mandatory? Does it require proof of any basic fact(s)? Is it rebuttable? How? On what standard of proof? Please describe its operation, step by step, as a trier of fact would have to apply it. **(10 marks)**

TOTAL MARKS: 100

END OF EXAMINATION