

# University of Victoria LAW 309: THE LAW OF EVIDENCE

Professor Lee Seshagiri

## Course Syllabus Fall 2009

NOTE: The dates listed in this syllabus are a *guide only*, and may be (will be!) adjusted once the pace at which we go through these readings has been established.

"CB" means "Casebook" and refers to Stewart, et al. *Evidence: A Canadian Casebook*, 2<sup>nd</sup> ed. (Toronto: Emond Montgomery, 2006).

"CEA" means the *Canada Evidence Act*

"WEB" means that the document is posted on the course website.

"CC" means the *Criminal Code*.

Other cited material is available on the course website: [www.law.uvic.ca/lseshagiri/309](http://www.law.uvic.ca/lseshagiri/309).

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Note on Introductory Materials, Competence and Compellability, and the Overarching Rule of Evidence: *In this first section of the course, we will cover the basics of evidence, setting the foundation for the topics to come. You will be introduced to the context of Canadian common law evidence, the trial process, basic issues regarding witnesses, and the central principles governing the admissibility of evidence.*

### Wednesday, Sept. 9 **Intro to Evidence: Sources, Objectives, and Trial Context**

Readings: CB preface (p. v); 3-17; 987-994  
WEB *F.H. v. McDougall* (Edited. Skim paras. 26-38, focus on paras. 39-49)

#### Cases Covered in Readings

- *R. v. Lifchus*
- *F.H. v. McDougall*

### Monday, Sept. 14 **Witnesses: Competency and Compellability**

Readings: CB 19-27; 33-34; 44; 59-66  
Supp S1-S2.  
Web *R. v. Couture* (Only read paras. 1-2, 37-50 and the first line of para. 105. We may

return to this case later in the context of  
hearsay evidence.)  
*CEA* ss. 4; 13–16.1

Cases Covered in Readings

- *R. v. Salituro*
- *R. v. Couture*
- *R. v. Marquard*

Wednesday, Sept. 16 **Relevance, Materiality, and Probative Value**

Readings: CB 85–93, including problems.

Cases Covered in Readings

- *R. v. Watson*

Note: Please work through and be ready to discuss the three relevance problems listed at the end of *R. v. Watson*.

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*Note on Character: Having just looked at basic principles of admissibility, we will now turn to study a topic in which you will see all of these concepts – relevance, materiality, and the probative value v. potential for prejudice test – at play: the important issue of the character of the accused and other witnesses.*

Monday, Sept. 21 **Intro to Character: The Character of the Accused in Issue**

Readings: CB 411–422; 431–434; 441–447  
CC s. 666

Cases Covered in Readings

- *R. v. McNamara et al. (No. 1)*
- Note on *R. v. Rowton*
- *R. v. Levasseur*
- *R. v. McNamara et al. (No. 1)* – redux
- *R. v. Mohan*

Wednesday, Sept. 23 **Character of the Accused Cont'd: Similar Fact Evidence**

Readings: CB 465–472; 495–523  
Web Edited version of *Mahalingan*

Cases Covered in Readings:

- *Makin v. A-G for New South Wales*
- *R. v. Smith*
- *R. v. Straffen*
- Note on *R. v. Arp*
- *R. v. Handy*
- *R. v. Mahalingan*

Monday, Sept. 28 **Class Cancelled**

Wednesday, Sept. 30 **Character of Third Parties, Victims and Complainants**

Readings: CB 453–465  
CC s. 276 and 277  
WEB *R. v. Darrach*

Cases Covered in Readings:

- *R. v. McMillan*
- *R. v. Scopelliti*
- *R. v. Darrach*

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*Note on Credibility:* Unlike character, the credibility of witnesses, including the accused, is always at issue. These sections will explore the means by which credibility is enhanced and impeached, as well as some special issues relating to the assessment of credibility.

Friday, Oct. 29 **(Mandatory) Film Class – Introduction to Credibility**

Come and enjoy a screening of Akira Kurosawa's classic 1950 film *Rashomon*. Light Refreshments provided!

Monday, Oct. 5 **Introduction to Credibility and Supporting Credibility**

Readings: CB 327–338; 341–344; 351–352  
SP 74–81  
CC s. 275

Cases Covered in Readings:

- *R. v. Kyselka et al.*
- *R. v. Marquard*
- *R. v. Giraldi*
- *R. v. Stirling*
- *R. v. Dinardo*

Wednesday, Oct. 7 **Impeaching Credibility**

Readings: CB 352–362; 369–394  
CEA ss. 10–12

Cases Covered in Readings:

- *Toohey v. Metropolitan Police Commissioner*
- *R. v. Clarke*
- *Corbett v. The Queen*
- *R. v. Lyttle*
- *A.G. v. Hitchcock*

Monday, Oct. 12 **CLASS CANCELLED – THANKSGIVING!**

Wednesday, Oct. 14 **Other Credibility Issues: Impeaching your own Witness, Children and “Unsavoury Witnesses”**

Readings: CB 363–364; 366–368; 399–408  
CEA s. 9

Cases Covered in Readings:

- *R. v. Vetrovec*
- *R. v. Khela*

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*Note on the Review Class: we will take this class to tie up any loose ends and then pause and take stock of where we’ve come and what we’ve covered in the course thus far. The class will be based around problems (not unlike those that might end up on an exam!) that we will work on in groups and then discuss as a class.*

Monday, Oct. 19      **Review & Problem Session**

Readings:      Review problems (handed out).

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*Note on Hearsay: So far, we have looked at questions about the witness herself as a source of evidence. With hearsay, we now turn to the central rule relating to what witnesses can and cannot say on the stand. We will consider the nature and “dangers” of hearsay, the modern approach to evaluating the admissibility of hearsay and some “categorical exceptions” to the hearsay exclusion rule, exceptions that remain of interest and relevance.*

Wednesday, Oct. 21    **What is Hearsay and Why Don’t We Like It?**

Readings:      CB      131–147; 153–154

Cases Covered in Readings:

- *Subramaniam v. Public Prosecutor*
- *R. v. Wildman*
- *Wright v. Tatham*
- *R. v. Wysochan*

Monday, Oct. 26      **The Principled Approach to Hearsay**

Readings:      CB      208–237; *Starr*: (246-252; 258-263)

Cases Covered in Readings:

- *R. v. Khan*
- *R. v. Smith*
- *R. v. B.(K.G.)* [called *KGB*]
- *R. v. Starr* [NOTE – this may be changed – TBD]

Wednesday, Oct. 28    **Hearsay Exceptions I: *Prior Inconsistent Statements; Prior Judicial Proceedings; Business Records; Party Admissions***

Readings:      CB      173–182; 196–197; (review *KGB*)  
                         SP      3–25  
                         CC      715  
                         WEB    *B.C. Rules of Court*, rule 40(4) (course site)  
                         CEA      29,30

Cases Covered in Readings:

- *R. v. Khelawon* – review of principled approach and adjustment of Starr.
- *Return to KGB – Re: prior inconsistent statements*
- *R. v. Potvin*

Monday, Nov. 2

**Hearsay Exceptions II: Spontaneous Declarations; Physical and Mental State, Statements Against Interest; Dying Declarations**

Readings: CB 162–164; 170–173; 189–196; *Handout*

Cases Covered in Readings:

- *R. v. Clark*
- *R. v. Pelletier*
- *Lucier v. The Queen*

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Note on Opinion Evidence: This is another topic concerned with the limits of the testimony that a witness can give. We will look at both lay opinion and the increasingly important issue of the use of expert opinion evidence (and scientific evidence, more generally).

Wednesday, Nov. 4 **Opinion Evidence**

Readings: CB 271–299  
SP 45–73

Cases Covered in Readings:

- *R. v. Graat*
- *R. v. Mohan*
- *R. v. Lavallee*
- *R. v. Trochym*

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Note on Aboriginal Oral History Evidence: Having covered the fundamentals of admissibility, and in particular hearsay and opinion, we will now turn to consider the way in which the laws of evidence intersect with and impact upon a particular issue of social justice in Canada: Aboriginal rights and title. This class will make particularly

*manifest the way in which the laws of evidence are but one culturally-specific way of seeing the world.*

Monday, Nov. 9      **Evidence, Aboriginal Law, and The Challenge of Oral History**

Readings:      TBA

- Guest Speaker

Wednesday, Nov. 11    **CLASS CANCELLED – REMEMBRANCE DAY**

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*Note on Privileges: Turning now to the question of privileges – rules preventing the disclosure of certain information in judicial proceedings – we have arrived solidly in the domain of extrinsic exclusionary rules. We will look at the law and policy that, based on the context of communication, afford certain information the quite exceptional protection of legal privilege. We will also look at the much heralded but little-understood privilege against self-incrimination.*

Monday, Nov. 16      **Privileges I: Some Class Privileges: Matrimonial, Solicitor-Client, Litigation.**

Readings:      CB      751–785; 832–833  
                         SP      132-142

Cases Covered in Readings:

- *Pritchard v. Ontario (Human Rights Commission)*
- *Smith v. Jones*
- *R. v. Brown*
- *Blank v. Canada (Minister of Justice)*

Wednesday, Nov. 18    **Privileges II: Case-by-case Privilege and other Means of Protecting Privacy**

Readings:      CB      835–838; 843–881

Cases Covered in Readings:

- *Slavutych v. Baker*

- *R. v. Gruenke*
- *M.A. v. Ryan*
- *R. v. O'Connor*
- *R. v. Mills*

Monday, Nov. 23      **Public Interest Immunity; the Privilege Against Self-Incrimination**

Readings:      CB      817–832; 881-886;  
                          CEA      37, 38 and 39

Cases Covered in Readings:

- *Babcock v. Canada (Attorney General)*
- *R. v. Dubois*

*Note on the Confession Rule and the Right to Silence: In this section, we will examine the special issues that arise when the accused “speaks”. We will look at pre-trial conduct as a source of evidence against the accused, as well as at the fraught question of statements of the accused made to persons in authority and agents of the state.*

Wednesday, Nov. 25      **Statements by the Accused and the Exclusion of Evidence**

Readings:      CB      527; 556-569; 580–595  
                          SP      92-107

Cases Covered in Readings:

- *R. v. Hodgson*
- *Wells/Grandinetti (note)*
- *R. v. Oickle*
- *R. v. Spencer*

Monday, Nov. 30      **The Right to Silence under s. 7 of the Charter**

Readings:      SP      82-91; 108-131

Cases Covered in Readings:

