

# **LAW 309: The Law of Evidence**

**Fall 2010**

**Professor Benjamin Berger**

Location: Room 158  
Times: Tuesday and Thursday, 8:30 a.m. to 10:20 a.m.  
Unit Value: 2 units

## **CONTACT INFORMATION:**

Office: 238  
Office Hours: Any time  
Office Phone: 721-8163  
Email: [bberger@uvic.ca](mailto:bberger@uvic.ca)

## **REQUIRED TEXTS:**

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

- Available for purchase at the University bookstore.
- This 2<sup>nd</sup> edition has now been used for a number of terms, so there should be some used copies floating around from last semester.

Web Supplement to the casebook.

- Inevitably, a number of important decisions have been rendered since the date of publication of our casebook.
- The editors have supplied an electronic update, which can be found under “course materials” on our course website.

Course website:

- We are using a “moodle” site for our course. Visit [moodle.uvic.ca](http://moodle.uvic.ca) and sign in using your netlink id and password.
- A number of additional readings will be made available through the moodle site.
- Classes and readings are arranged there for your convenience. Overheads and handouts will be posted under each class, as needed.
- There is a calendar on this site – it contains all of the relevant dates for our course, including cancelled classes.
- Resources, such as links to statutes, etc, can be found on this page as well.

## **RECOMMENDED TEXTS:**

Paciocco and Steusser, *The Law of Evidence*, 5<sup>th</sup> ed. (Toronto: Irwin Law, 2008).

- This is a very helpful textbook and I have ordered a number of copies for those of you who may wish to purchase one. It is also available on reserve in the library.

## **DESCRIPTION:**

This course is an introduction to the law of evidence. The focus in the course is on the following topics:

1. Understanding the law of evidence as law's particular "way of knowing".
2. The way that the laws of evidence work in trial practice, as well as the historical, social, political, and legal context in which they operate.
3. The relationship between the laws of evidence and social justice, in particular the impact of the law of evidence on gender issues and Aboriginal justice.
4. The substantive law of evidence, including basic concepts such as relevance and admissibility, exclusionary rules based on unreliability and prejudicial effects, exclusionary rules based on policy rationales, and other aspects of proof.
5. The effect of the *Canadian Charter of Rights and Freedoms* upon the law of evidence.

## **OBJECTIVES:**

The Law of Evidence is a complex and rapidly changing area of law. As such, this course cannot be comprehensive in its scope, or in its treatment of any particular evidentiary issue. Instead, the objective of this course is to provoke interest in and engagement with this fascinating and critically important area of law and to provide students with a solid foundation in the Canadian law of evidence. In particular, students will:

1. become familiar with the rules and principles governing the adversarial trial process and the admissibility of evidence;
2. begin to appreciate law's very particular epistemology;
3. understand and assess various theories and perspectives on the purposes and functions of the law of evidence and on the competing interests that it serves;
4. appreciate the way in which the law of evidence is both *shaped by* context (historical, political, etc.) and *impacts upon* social context (esp. Aboriginal and gender issues);
5. gain an appreciation for the impact of the *Canadian Charter of Rights and Freedoms* upon the law of evidence.

## **METHODOLOGY:**

Both lecture and discussion methods will be used. **Students are expected to:**

1. Have read the assigned materials prior to class;
2. Be able to *identify* and state the *issues* presented by the assigned materials; and
3. Participate in class discussion of the assigned materials and any exercises relating to the assigned materials. The purpose of the discussion is to develop an understanding of the issues presented by the materials; to develop the student's ability to analyze, synthesize, and present legal material; and to enable the instructor to gain a sense of the student's understanding of the materials and achievement of the objectives referred to above.

**CLASSROOM CLIMATE:**

Strongly anchored as it is in the trial of criminal offences, the law of evidence raises cases, facts and issues of an extremely serious, and very often troubling, nature. These issues and their complexity are part of what makes this area of enormous interest, but are also felt very personally by many, including the despairingly high percentage of us who have been affected by crime or the criminal justice system in some way. In order to achieve the kind of community of searching and spirited free inquiry crucial to a university setting, an inclusive, respectful, and diverse classroom environment is crucial to our work in this course. To ensure that all class members feel welcomed and equally able to contribute to class discussions, while vigorously exploring and explaining our views, both I as instructor and you as students must endeavor to be respectful in our language, our examples, and the manner in which we conduct our discussions and group work. We have both an ethical and legal obligation to support this kind of environment.

For your reference, you may wish to consult the University's Discrimination and Harassment Policy ([http://www.uvic.ca/shared/shared\\_usecc/docs/policies/GV0205\\_1150\\_.pdf](http://www.uvic.ca/shared/shared_usecc/docs/policies/GV0205_1150_.pdf)). The University of Victoria and the Faculty of Law are committed to promoting, providing and protecting a positive, supportive and safe learning and working environment for all its members. I expect all aspects of this class to be conducted with this commitment firmly in mind.

If you have any concerns about the climate of the class, please feel free to contact me or the Associate Dean.

**EVALUATION:**

1. Final Examination..... [100% or 60%]
  - Currently scheduled for Friday, December 10<sup>th</sup>.
  - If a student chooses to write the optional paper, the final examination will be worth 60% of the final mark.
2. Optional Written Assignment..... [40%]
  - Due by e-mail to the instructor by 9:30 a.m., Friday, November 26<sup>th</sup>.
  - Students who opt for the written assignment will write the same final exam as the students who do not. This exam will, however, be worth only 60% of the final grade.

The final examination will be a limited open book format (i.e. students may bring in the required text, any relevant statutes, and any instructor handouts and student-prepared notes, but nothing else), sit-down exam.

### ***The Optional Written Assignment***

Students have the **option** of writing a research paper on a question related to the law of evidence. The topic must be discussed with, and approved by, the professor. Although it is *strongly* recommended that students discuss a potential paper with the professor as early in the term as possible, if a student decides to write the optional written assignment, this decision must be communicated to the professor by no later than Thursday, September 30<sup>th</sup>. That is, if a student does not communicate the decision to write this optional assignment by this date, the final exam will count for 100% of the student's final grade.

Once you have “opted in” for the optional written assignment, in the absence of extraordinary circumstances, **you are not permitted to “opt out”**. Students who find themselves facing extenuating circumstances should speak with the professor or the Associate Dean as soon as these circumstances present.

**Rationale:** This assignment offers you an opportunity to investigate and analyze an issue in the law of evidence that is of particular interest to you and to engage with the scholarly study of the law of evidence. In addition to offering this opportunity, this assignment might be appealing to those who feel that their writing skills are superior to their exam-taking skills and therefore wish to substantially shift grading weight away from the final exam; those students who want to have a substantial piece of writing in their dossier for the purposes of law firm and clerkship applications; and those students with an academic interest in the law.

The paper must be at least 6000 and a maximum of 7500 words, including footnotes. ***I encourage the submission of double-sided assignments in order to reduce the consumption of paper.***

The paper is due at **9:30 a.m. on Friday, November 26<sup>th</sup>** by e-mail to the instructor at [bberger@uvic.ca](mailto:bberger@uvic.ca). A late penalty of one letter grade per day (or any part thereof) (e.g. B+ to a B) will be assessed unless the student has received **permission in advance** from the professor to hand the written assignment in late. Such permission will only be given in extraordinary circumstances.

A research paper in the “A-range” will be characterized by clear and sophisticated writing style and a sharp identification, keen appreciation, and incisive analysis of the issues at play. The assignment will carefully consider the social and/or policy context in which the case or issue is situated and will demonstrate a critical understanding of the principles and theories underlying the issue. The assignment will engage well with both the relevant jurisprudence and secondary literature.

### ***The Calculation of Grades***

The Law Faculty uses the following marking scheme to determine your final letter grade. The “narrative description” column reflects a rough general consensus among faculty members in regard to assessing student performance. I adopt this description in my grading for this course:

Letter Grade	Grade Point Value	Percentage Value	Narrative Description	
A+	9	90-100%	Exceptional	Grades in this range are normally achieved by a minority of students. These grades indicate a student who is self-initiating, exceeds expectation, and has an insightful grasp of subject matter.
A	8	85-89%	Outstanding	
A-	7	80-84%	Excellent	
B+	6	75-79%	Very Good	Grades in this range are normally achieved by the largest number of students. These grades indicate a good grasp of subject matter or excellent grasp in one area balanced with satisfactory grasp in the other area.
B	5	70-74%	Good	
B-	4	65-69%	Solid	
C+	3	60-64%	Satisfactory	These grades indicate a satisfactory performance and knowledge of subject matter.
C	2	55-59%	Minimally Satisfactory	
D	1	50-54%	Marginal	A student receiving this grade demonstrates a superficial grasp of subject matter.
F	0	49 and below	Unsatisfactory	

**OTHER IMPORTANT NOTES:**

***Regulations:***

Students will wish to visit the Associate Dean's page at <http://law.uvic.ca/current/associatedean.php> to familiarize themselves with policies and guidelines specific to the Faculty of Law.

Students should obtain and review all regulations and policies contained in the University of Victoria Calendar, 2010-2011 ("U Vic Calendar", available online at <http://web.uvic.ca/calendar2010/>), both generally and specifically for the Faculty of Law.

The Undergraduate Academic Regulations (2010-2011) of the UVic Calendar (<http://web.uvic.ca/calendar2010/FACS/UnIn/UARe/index.html>) set out the University's expectations about attendance and assignments. The Faculty of Law's Academic Regulations

can also be found at [http://law.uvic.ca/current/academic\\_regs.php#academic](http://law.uvic.ca/current/academic_regs.php#academic)

***Academic Integrity:***

As part of the academic community of both the Faculty of Law and the University as a whole, academic integrity is centrally important in the work of faculty and students. Please consult the University Calendar for policies respecting paraphrasing, plagiarism, and cheating. **It is your responsibility to familiarize yourself with the university policy on academic integrity. If, after reviewing this policy, you have any concerns or questions, or require clarification, do not hesitate to drop by my office or to send me an e-mail.**

The policy on academic integrity can be found on the web at the following address:

<http://web.uvic.ca/calendar2010/FACS/UnIn/UARe/PoAcI.html>

***Accommodation, Health Concerns, and Counseling Services***

If any issues arise during the course of the term that may affect your ability to complete course requirements or meet deadlines, it is your responsibility to contact me and/or the Associate Dean as soon as reasonably possible to discuss available supports and possible accommodation.

I would like you to be aware of the services offered by UVic Counselling Services (<http://www.coun.uvic.ca/>) as well as UVic Health services (<http://health.uvic.ca/>).

***Accommodation for Students with a Disability:***

There are support systems, resources, and forms of accommodation available to students with a disability. If you wish to access any of these supports, resources or accommodations, I encourage you to contact the Associate Dean or the Resource Centre for Students with a Disability (<http://rcsd.uvic.ca/>) and I would be more than happy to work with you to ensure your success in this course.

***Accommodation of Religious Observances:***

The University of Victoria and the Faculty of Law have policies guaranteeing accommodation for those students who are unable to participate in a class or an aspect of the course owing to a religious holiday or observance (<http://web.uvic.ca/calendar2010/GI/GUPo.html>). If you will be missing a class, know that you will be unable to complete an assignment or exam, or otherwise require accommodation on account of a religious holiday or observance, please speak with me (or the Associate Dean) and we will be pleased to work out some satisfactory form of accommodation.