

LAW 309: EVIDENCE LAW
Spring 2012
Instructor: Colleen Smith

COURSE OUTLINE: Winter 2012

This outline is a *guide only*, and may be adjusted once the pace at which we go through these readings has been established.

I will sometimes give guidance before a class as to which sections of the readings should be focused upon and which can be skimmed. If I do not give instructions, presume that I want you to read the whole section carefully. You may be examined on any part of the required readings listed in this Course Outline, posted on Moodle or on any part of the lectures.

Abbreviations

- CB: “Casebook” refers to Stewart et al, *Evidence: A Canadian Casebook*, *Evidence: A Canadian Casebook*, 3d ed, (Toronto: Emond Montgomery, 2011).
- Pack: refers to the coursepack. There is a required course pack for this course. It is for sale through the CDC and is also On Reserve in the library. It is an excerpt from Chapter 6 of the following book (which is also on reserve):
Binder, David A. & Paul Bergman *Fact investigation: From Hypothesis to Proof* (St. Paul, Minnesota: West Publishing Co, 1984).
- Moodle: The material referred to is posted on the Moodle site for the course.
- CEA: *Canada Evidence Act*. The CEA is posted on the Moodle site. It is also published in the back of the Martin’s and Tremeer’s *Criminal Code*.
- BCEA: *British Columbia Evidence Act*. The BCEA is posted on the Moodle site.
- CCC: *Criminal Code of Canada*. A link to the CCC is posted on the Moodle site.
- Charter: The Canadian Charter of Rights and Freedoms is posted on the Moodle site. It is also published in the back of the Martin’s and Tremeer’s *Criminal Code*.
- BC Rules *British Columbia Rules of Court*. A link to the Rules is posted on the Moodle site.

A. INTRODUCTION

Class 1: Th Jan 05 Introduction to the Course & the Law of Evidence

B. FUNDAMENTALS

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.

Class 2: Tu Jan 10 Evidence: Sources, Objectives, and Trial Context

Readings:

- CB 3–19

Topics & Cases:

- Objectives of Evidence Law
- Sources of Evidence Law
- Forms of Evidence: Testimonial, Real, Demonstrative, Sworn Statements, Unsworn Statements & Documentary Evidence
- Introduction to the Trial Process
- R. v. Galloway (Fictional Case Study)

Class 3: Th Jan 12 Burdens, Quantum of Proof and Presumptions

Readings:

- CB 797-801; 805-821; 824-827
- *BC Rules* R. 9-6 and R. 12-5 (4)–(7)

Topics & Cases:

- *R. v. Lifchus*
- *R. v. Morin*
- *R. v. W.D.* (note on CB 820)
- *R. v. J.H.S.* (note on CB 820-21)
- Summary Judgment R. 9-6
- No Evidence & Insufficient Evidence Applications R. 12-5 (4) – (7)
- Constitutional Litigation

Class 4: Tu Jan 17 Admissibility, Relevance, Materiality, and Probative Value, Pt. 1

Readings: **CHECK MOODLE**

- CB 87-95
- Pack 3 - 29

Topics & Cases:

- Direct Evidence
- Circumstantial Evidence including Opportunity, Motive, Capacity & Means
- Relevance, materiality & probative value: *R v. Watson*
- Discretion to Exclude: Case to be Added, Check Moodle

Class 5: Th Jan 19 Admissibility, Relevance, Materiality, and Probative Value, Pt. 2

Readings: **CHECK MOODLE**

C. MEANS OF PROOF I: WITNESSES

In general, evidence must be given or identified by the oral testimony of a witness. In this section we will first look at the mechanics of getting the evidence before the Court. We will then explore the means by which credibility is enhanced and impeached, as well as some special issues relating to the assessment of credibility.

Class 6: Tu Jan 24 Competence, Compellability Capacity & the Oath

Readings:

- CB 21-35; 58-62; 68-76
- CEA ss. 4; 13–16.1
- BCEA ss. 5; 20–21; 6–7
- Charter ss. 11(c); 11(d); 13

Topics & Cases:

- Spousal Incompetence: *R. v. Salituro*, *R. v. Hawkins*
- Oath or Affirmation & Capacity to Testify: *R. v. Marquard*
- Accused Protection against Compelled Self-Incrimination: *R. v. Noble*

Class 7: Th Jan 26 Examination of Witnesses

Readings:

- CB 76-79; 319-323; 79-83
- Moodle Demeanor as a Guide to Credibility
R. v. E.M.W., *R. v. Stanton*, *R. v. Rose*
R. v. Wilks, *R. v. Bengert No. 2*
R. v. T.L.P., *R. v. Cook*

Topics & Cases:

Introduction to Credibility & Reliability

- Assessing Credibility & Reliability
- Demeanor as a Guide to Credibility (Moodle)
 - *R. v. Norman*
 - *R. v. Jeng*
 - *R. v. T.E.*
 - *R. v. Davis*

Introduction to Direct Examination, CB 76-79

- Form of Questioning in Direct Examination
 - *R. v. EMW*
 - *R. v. Stanton*
 - *R. v. Rose*
- Refreshing Memory & Past Recollection Recorded
 - *R. v. Wilks*

- *Bengert No. 2*

Introduction to Cross Examination, CB 79-83

- Form of Questions in Cross Examination
- The Rule in *Brown & Dunn*
- Foundation for Questioning: *R. v. Lyttle*

Order of Witnesses & Court Calling Witnesses

- *R. v. TLP*
- *R. v. Cook*

Class 8: Tu Jan 31 Witness Credibility

Readings:

- CB 323-334; 341-343; 344-353; 358-374
- CCC s. 715.1
- CEA ss. 9 - 12
- BCEA ss. 13 - 16

Topics & Cases:

Limits on Supporting Credibility

- Rule against Oath Helping
- Expert Evidence, CB 323-29,
 - *R. v. Kyselka*
 - *R. v. Marquard*
- Good reputation for veracity, CB 329-332
 - *R. v. Clarke* (pt. 1) **(SKIM)**
- Prior consistent statement, CB 333-34 & 341-43
 - Prior Identification Evidence
 - Rebutting Allegation of Recent Fabrication: *R. v. Ellard, R. v. Stirling*
 - Narrative Exception: *R. v. Dinardo* (note on CB 342-343)
 - s. 715.1 video statement

Impeaching Credibility of Other Party's Witness

- Prior Inconsistent Statements CB 353
 - CEA s. 10 & 11, BCEA 13 & 14
- Impeaching Credibility on Prior Convictions CB 358-374
 - *Corbett v. The Queen* (Going to try to edit further – Check Moodle)
 - CEA s. 12, BCEA s. 15
- Bias
- Expert Evidence of Unreliability CB 344-348
 - *Toohey v. Metropolitan Police Commissioner* **(SKIM)**
- Witness Reputation CB 348-353
 - *R. v. Clarke* (pt. 2) **(SKIM)**

Class 9: Th Feb 02 Other Witness Examination Issues

Readings: **CHECK MOODLE**

- CB 353-358; 375-378; 381; 383-392; 338-340
- Moodle *R. v. Khela, R. v. Ellard*

Topics & Cases:

Impeaching Credibility of your Own Witness CB 353-358

- CEA s. 9, BCEA s. 16

Collateral Facts Rule CB 375-378, 381

- *R. v. Melnichuk*
- *A.G. v. Hitchcock* (note on CB 376)

Corroboration & “Unsavoury” Witnesses, CB 383-392

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

Accused as Witness

- Recent fabrication & the accused: CB 338-340
 - *R. v. Girdi*
- Questions regarding Motives of Accused & Witnesses
 - *R. v. Ellard*
- Failure to Testify
- Character / discreditable conduct
- Voluntariness of Prior statements must be proven in Crown’s case
- Criminal record

Re-Examination & Reply

D. 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.

Class 10: Tu Feb 07 Hearsay: What is it? What’s wrong with it?

Readings:

- CB 129-137; 139-147; 149-150

Topics & Cases:

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

Class 11: Th Feb 09 Introduction to the Traditional Exceptions & the Principled Approach to Hearsay

Readings:

- CB 202-223; 231-260
- Moodle *R. v. Sunfield*

Topics & Cases:

- Introduction to the Traditional Exceptions
 - *R. v. Sunfield*
- The Principled Approach CB 202-223, 231-260
 - *R. v. Khan*
 - *R. v. Smith*
 - *R. v. B.(K.G.) [called KGB]*
 - *R. v. Starr*
 - *R. v. Mapara* (in note on CB 244)
 - *R. v. Khelawon*

Class 12: Tu Feb 21

Hearsay Exceptions I: Res Gestae, Statements Against Interest; Statements of Bodily & Mental Condition; Statements of Intention

Readings:

- Moodle *R. v. Demeter*
- CB 154-163; 168-171; 179-181; 185-192

Topics & Cases:

- Res Gestae or Spontaneous Utterances, CB 154-163
 - *R. v. Clark*
- Statements Against Interest, Moodle, CB 168-171
 - *R. v. Demeter* (Moodle)
 - *R. v. Pelletier; Lucier v. The Queen*
- Statements of Bodily & Mental Condition, CB 179-181
 - *Youlden v. London Guarantee and Accident Co.*
- Statement of Intention, CB 181 (intro para), 185-192
 - *R. v. P.(R.)*

Class 13: Th Feb 23

Hearsay Exceptions II: Business Records; Party Admissions, Prior Judicial Proceedings; Co-Conspirator's Exception

Readings: **CHECK MOODLE FOR READING UPDATES**

- CB 172-176; 192-194
- CEA ss. 29 - 30
- BCEA ss. 34 & 42
- CCC s. 715
- BC Rules R12-5(54)

Topics & Cases:

- Party Admissions, CB 192-193
- Business Records, CB 193-94
 - CEA s. 30 & 29
 - BCEA s. 42 & 34
- Prior Judicial Proceedings, CB 172-176
 - CCC s. 715 (**SKIM**)

- *R. v. Potvin* (**SKIM**)
- BC Rule 12-5(54) (**SKIM**)
- Co-Conspirator's Exception
- Adoptive Admissions

E. 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).

Class 14: Tu Feb 28 Lay & Expert Opinion

Readings:

- CB 261-291
- Moodle *R. v. Trochym*
- CCC s. 657.3
- CEA s. 7, s. 8
- BCEA s. 10 – 12, s. 45
- *BC Rules* Part 11, esp. Rules 11-2, 11-6 and 11-7

Topics & Cases:

- General Exclusionary Rule
- Lay Opinions
 - *R. v. Graat*
 - Handwriting comparison, *CEA* s. 8 & *BCEA* s. 45 (**SKIM**)
- Expert Opinions
 - *R. v. Mohan*
 - *R. v. Lavallee*
 - *R. v. Trochym*
 - Ultimate Issue Rule
 - Limited to 5 experts unless obtain leave of court, *CEA* s. 7
 - CCC 657.3 (**SKIM**)
 - *BCEA*, s. 10 – 12 (**SKIM**)
 - *BC Rules*, Part 11, esp. rules 11-2, 11-6 and 11-7 (**SKIM**)

F. MEANS OF PROOF II: REAL & DEMONSTRATIVE EVIDENCE; PROOF WITHOUT EVIDENCE

We will commence our last class by looking at some of the challenges presented by documentary evidence. We will conclude by looking at those instances in which the need for proof is dispensed with in a trial.

Class 15: Th Mar 01 (1) Real & Demonstrative Evidence (2) Proof without Evidence

Readings: **CHECK MOODLE -- READINGS TO BE ADDED**

- CB 753-758
- CCC s. 652, 655

Topics & Cases:

Real & Demonstrative Evidence

- Getting Real Evidence before the Court
- Photographs & Videotapes
- Diagrams, sketches, models, re-enactments, simulations & summaries

The Challenges of Documentary Evidence:

- Hearsay, Authentication & the Best Evidence Rule

Formal Admissions

- CCC s. 655

Views

- CCC s. 652

Judicial Notice: CB 753-758

G. CATCH UP, CHECK-IN OR REVIEW

Before turning to character evidence, we will take a class to tie up any loose ends and take stock of where we've come and what we've covered in the course thus far. We will also check-in and see how groups are doing with their group projects.

Class 16: Tu Mar 06 Catch up, Check-in or Review

Readings: None

H. EVIDENCE OF CHARACTER & DISPOSITION

At last we turn to the important issue of the character of the accused and other witnesses. The rules of evidence are very careful about the admission of character evidence. While at times assisting the fact-finding process, character evidence can often distort and distract. Given these concerns, we will see how the rules vary depending upon the circumstances in which it is being tendered.

Class 17: Th Mar 08 Character Evidence I

Readings:

- CB 395-405; 412-436
- CCC s. 666

Cases & Topics:

Introduction to Character Evidence CB 395-396

The Character of the Accused

- Putting Character in Issue CB 396-402
 - *R. v. McNamara et al. (No. 1)*
- Proving Accused Character through reputation evidence
 - *R. v. Rowton* (note in text)
 - *R. v. Levasseur*
 - *R. v. Profit* (SCC only) CB 412
- Proving Accused's Character through Specific Acts

- *R. v. McNamara et al. (No. 1)* – redux
- Proving Accused Character through Psychiatric Disposition Evidence
 - *R. v. Robertson*
 - *R. v. Mohan*

Character of Third Parties (Alternate Perpetrators):

- *R. v. McMillan*

Character of the Deceased:

- *R. v. Scopelliti*

Class 18: Tu Mar 13 Character Evidence II

Readings: **CHECK MOODLE FOR UPDATE**

- CB 436-442; 456-482
- CCC s. 276 and 277
- Moodle *R. v. Darrach*

Topics & Cases:

Similar Fact Evidence

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

Character of Complainant

- *R. v. Darrach*
- CCC s. 276 & 277

I. 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.

Class 19: Th Mar 15 Privileges: Class Privileges

Readings:

- CB 613-635; 647-657; 658

Topics & Cases:

- Overview & General Principles
- Solicitor-Client, CB 613-35
 - Requirements: *Pritchard v. Ontario (Human Rights Commission)*
 - Public Safety: *Smith v. Jones*
- Litigation Privilege, CB 647-657
 - *Blank v. Canada (Minister of Justice)*
- Dispute Settlement, CB 658

Class 20: Tu Mar 20 Privileges II: Case-by-case Privilege and other Means of Protecting Privacy

Presentations Due at Class Start

Readings:

- CB 692-709; 720-723

Topics & Cases:

- Other Confidential Relationships & Case-by-Case Privilege, CB 692-709
 - Test in *Slavutych v. Baker*
 - Religious: *R. v. Gruenke*
 - Psychiatric counseling Records: *M.A. v. Ryan*
 - Reporter: *R. v. National Post* (in note CB 708)
- Protecting Privacy without Privilege
 - *R. v. O'Connor* (CB 709 introductory note only)
 - *R. v. Mills* (note CB 720-722)
- Undertaking of Confidentiality in Discovery
 - Introductory note only CB 723

J. CLASS PRESENTATIONS

Class 21: Th Mar 21 Day 1 of Group Presentations

Class 22: Tu Mar 27 Day 2 of Group Presentations

K. STATEMENTS BY THE ACCUSED AND THE EXCLUSION OF EVIDENCE

We will start by looking at the much-heralded but little-understood privilege against self-incrimination. From there, our attention returns to the important common law principles regarding the handling of statements made by the accused and the right to silence under the Charter. We will then turn to a close consideration of the key exclusionary rule found in the Charter – section 24(2). Section 24(2) has undergone tremendous change in the last few years and raises interesting and difficult questions of law and policy.

Class 23: Th Mar 29 Improperly Obtained Evidence and the Privilege Against Self-Incrimination, Part 1

Readings: **CHECK MOODLE**

- CB 596-612; 508-532;
- Charter ss. 7, 13
- CEA s. 5
- BCEA s. 4
- Moodle *R. v. Chambers; R. v. Rothman; R. v. Spencer*

Topics & Cases:

Privilege against Self-incrimination CB 596-612

- CEA s. 5
- BCEA s. 4
- Charter s. 13 & 7
- *R. v. Henry*
- *R. v. Chambers*

The Common Law Confession Rule CB 508-532

- Person in Authority
 - *R. v. Rothman* (read edited version on Moodle)
- The Voir Dire CB 508
- Fear of Prejudice or Hope of Advantage CB 508-510
- Operating Mind CB 510-514
 - *Ward v. The Queen*
 - Note on *R. v. Whittle*
- Oppression CB 515-517
 - *R. v. Serack*
- The Confessions Rule Today CB 517-532
 - *R. v. Oickle*
 - *R. v. Spencer* (focus on highlighted portions)

Class 24: Tu Mar 03

Improperly Obtained Evidence and the Privilege Against Self-Incrimination, Part 2

Readings: **CHECK MOODLE**

- CB 539-562; 568-584
- Charter s. 7, 13
- Moodle *R. v. Turcotte, R. v. Singh*

Topics & Cases:

Right to Silence

- *R. v. Turcotte*
- *R. v. Singh* (focus on highlighted portions)

Exclusion pursuant to s. 24(2) of the Charter

- Prerequisites to a *Charter* application CB 539-545
- "Obtained in a manner" CB 545-562
- Bringing the Administration of Justice into Disrepute CB 568-584
 - *R. v. Grant*

L. REVIEW

Class 25: Th Mar 05

Review Class

Friday, April 13, 2011

Tentative Exam Date