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Attachments:

1. Course Outline (4 pages)

THIS EXAMINATION CONSISTS OF 5 PAGES (INCLUDING THIS TITLE PAGE)
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – FALL 2018

LAW 476
Evidence

Bruce Elwood

TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS

This is a closed book examination, but students may bring to the examination:

- 1. Up to 10 letter-sized (8.5 x 11") pages of notes.**
- 2. Copies of the *Canada Evidence Act* and the *BC Evidence Act*.**

These materials may be loose, stapled or in a binder.

THIS EXAMINATION CONSISTS OF 3 QUESTIONS.

ANSWER ALL 3 QUESTIONS.

Marks**50** **Question 1 (recommended time: 1 hour and 30 minutes)**

Clyde was a drug dealer. He sold heroin.

Brian is a successful business person. He owns a company that imports products from around the world. Brian also smuggles heroin into the country and sells it into the drug trade.

Through an intermediary, Brian arranged a sale of heroin to Clyde. The transaction was to take place in a parking lot near a shopping centre. A simple exchange: money for drugs; drugs for money. Or so Brian thought. Clyde had different ideas: no money for drugs; take the drugs and run.

Brian and Clyde made their separate ways to the appointed place of sale. They parked next to one another in the parking lot. As the transaction began, Clyde grabbed the duffle bag from Brian's hand and ran with the bag into a forest beside the parking lot.

Once in the forest, Clyde called 9-1-1. "Someone is trying to kill me" he said between gasps for air. The 9-1-1 operator thought Clyde sounded in distress, and told him to wait where he was for a police squad car to arrive.

Sgt. David of the Vancouver Police Department responded to the call. By the time Sgt. David arrived, Brian had left and Clyde had re-emerged from the forest and put the duffle bag in the trunk of his car.

Sgt. David took a statement from Clyde in the parking lot. He did not place Clyde under oath, warn him about the importance of telling the truth to the police or record the statement.

Clyde provided Sgt. David with Brian's full name and address. He said that Brian was a violent drug dealer, and that what had happened in the parking lot must have been a case of mistaken identity, because he couldn't think of any reason why Brian would want to kill him.

As he was speaking to Sgt. David, Clyde received a text message on his phone which said: "I'm gonna get U." Clyde showed this text to Sgt. David. He said it was from Brian.

Sgt. David made notes of what Clyde told him; however, he told Clyde there was not enough information to lay any charges against Brian.

After he gave the statement to Sgt. David, Clyde drove to a campground outside the city where he set up a tent, planning to lie low for a while.

The next morning, Stephen was walking his dog in the campground and heard a scuffle. As Stephen approached one of the campsites, he saw a man on the ground in obvious pain. The man held up a phone, pointed to a car driving away and then lost consciousness.

Clyde was taken to the hospital suffering from a stab wound. He later died of his injuries.

Marks

Acting on the information that Clyde had provided to Sgt. David, the police arrested Brian and charged him with murder.

The police retrieved Clyde's car from the campground and found a tracking device attached to the undercarriage. They also found an empty duffle bag in the trunk of the car.

Police investigators examined the phone that was found in Clyde's hand. The phone's number ended with the digits 7100. The phone had on it an app for following tracking devices.

Investigators determined that the 7100 phone had sent the text message "I'm gonna get U" to Clyde while Clyde was talking to Sgt. David. The 7100 phone also had on it several text messages to various numbers with various weights and prices.

The investigators learned that the 7100 phone was registered to someone named Zang with a billing address that was a postal box. The police were unable to locate Zang.

In a *Charter*-compliant search of Brian's home, the police found a metric scale and six duffle bags of the same style as the bag found in Clyde's car. On the metric scale, police found trace amounts of fentanyl.

Brian has refused to say anything to the police.

The Crown has delivered a report by Susan to the defence with the required notice. Susan is an expert on global position systems ("GPS") in tracking devices and cell phones. Susan has worked for various police forces for over 20 years, and trained investigators on the use of phone records in drug investigations. She is currently a consultant to the Vancouver Police Department.

In her report, Susan explained that a person with the tracking app on the 7100 phone would have been able to track Clyde's car from the parking lot to the campground. She further explained that, by using its GPS data, she was able to locate the 7100 phone at the parking lot and at the campground at the time of the stabbing.

Susan also wrote in her report that:

- drug dealers often register their phones in someone else's name;
- based on her review of the usage pattern revealed by records she obtained from Telus, the 7100 phone was used by a drug dealer; and
- fentanyl is an opioid that dealers mix with heroin to make it more addictive which has caused many deaths from overdose.

It is anticipated that the principal issue at trial will be identity.

You are a new Crown counsel. You are asked by senior counsel to provide an analysis of the issues that may arise with respect to the admissibility of the evidence the Crown may lead as part of its case against Brian.

Marks**15 Question 2 (recommended time: 30 minutes)**

Helen was just finishing up her Christmas shopping and walking back to her car when she saw two men struggling over what looked like a gym bag. She saw one man run with the bag into some trees beside the parking lot. She then watched as the second man briefly chased after the first, then returned to the cars, placed something underneath one of the cars and drove off. Helen got a good look at this second man in the parking lot lights.

Helen responded to a request by the police for information from the public about anything suspicious that occurred at the parking lot on the evening in question.

Sgt. David showed Helen a number of photographs of people from a security camera at the campground where Clyde was stabbed. Helen identified in one of those photographs the man she saw in the parking lot.

Crown counsel intends to call Sgt. David to testify that Helen identified Brian from the security camera photographs, and asks you to provide your analysis of the admissibility of his evidence in each of following scenarios:

- a. Helen testifies and identifies Brian in the courtroom as the man she saw in the parking lot and in the security camera photographs;**
- b. Helen testifies and is unable to identify Brian in the courtroom; however, she confirms that she identified the man she saw in the parking lot in the security camera photographs when they were shown to her by the police;**
- c. Helen testifies that Brian is not the person she saw in the parking lot and denies she ever identified Brian in any photographs; and**
- d. Helen does not testify.**

Marks**35 Question 3 (recommended time: 1 hour)**

At trial, Brian testified that he did not meet with Clyde at the parking lot, nor was he at the campground where Clyde was stabbed. Brian testified that he was at home all day on the day of the stabbing. Brian further testified that the only cell phone he uses has a number ending with 8833.

In cross-examination, Crown counsel put to Brian a criminal conviction for selling marijuana, and suggested to him that drug dealing is a violent business. Brian acknowledged that he occasionally sold marijuana as a young man, but maintained that he had left the business years ago and was non-violent by nature.

Crown counsel suggested to Brian that Brian used more than one cell phone, which Brian denied. Crown counsel challenged this statement as a lie.

Brian next tendered his phone bills from Telus and called Roger, a Telus employee, to authenticate the phone bills and explain how they are created. Crown counsel objected to the admissibility of the phone bills. The trial judge ruled that they were admissible for the non-hearsay purpose of establishing that the 8833 phone was registered in Brian's name and showed no record of any text messages to Clyde's phone.

Crown counsel sought to cross-examine Roger on whether drug dealers typically have at least two phones: a "family and friends" phone which they use for "clean conversations" and at least one other phone for drug transactions. The trial judge disallowed this line of questioning.

Brian also called a woman named Jane to testify on his behalf. Jane testified that she knew Brian from their work together with a number of non-profit organizations. Over objections from Crown counsel, which the trial judge overruled, Jane also testified that:

- employees at these non-profit organizations have told her that Brian is generous with his time and money in support of their charitable objectives; and
- Brian told her on a number of occasions prior to his arrest that he only uses one phone.

The Crown sought to lead rebuttal evidence from a witness named Mark who would have testified that Brian cut him with a knife over a dispute about money that Brian claimed Mark owed him. The trial judge would not allow this evidence.

In brief oral reasons for judgment, the trial judge dismissed the case against Brian.

In her reasons, the trial judge noted that the campground where Clyde was staying has no cell phone coverage. Accordingly, the judge held, she did not place any weight on the Crown's theory that Brian followed Clyde to the campground using a GPS tracking device to take back the drugs he stole.

Provide your analysis for senior Crown counsel as to whether the trial judge committed any error of law relating to the admissibility of evidence.

***** END OF EXAMINATION *****

COURSE OUTLINE

Law 476 Evidence – Fall 2018

	Topic(s)	Cases
1A	Foundational principles <ul style="list-style-type: none"> • Relevance • Exclusionary rules • Judicial discretion • The burden of proof • The standard of proof 	<i>R. v. Morris</i> , [1983], 2 S.C.R. 190 <i>R. v. Seaboyer</i> , [1991] 2 S.C.R. 577 <i>R. v. Lifchus</i> , [1997] 3 S.C.R. 320 <i>F.H. v. McDougall</i> , [2008] 3 S.C.R. 41
1B	Types of Evidence <ul style="list-style-type: none"> • Testimony • Real evidence • Video and photos • Documents • Admissions • Judicial notice 	<i>R. v. Find</i> , [2001] 1 S.C.R. 863 <i>R. v. Spence</i> , [2005] S.C.R. 458
2	Hearsay (I) <ul style="list-style-type: none"> • Exclusionary rule • Identifying hearsay • Non-hearsay purposes • Permitted hearsay 	<i>R. v. Khelawon</i> , [2006] 2 S.C.R. 787, para. 34 – 41 only <i>R. v. Bradshaw</i> , 2017 SCC 35, para. 18 - 24 only <i>R v. Baldree</i> , [2013] S.C.R. 520
3	Hearsay (II) <p>Traditional exceptions</p> <ul style="list-style-type: none"> • Dying declarations • <i>Res gestae</i> • Statements of bodily & mental condition 	<i>R. Starr</i> , [2000] 2 S.C.R. 144

	<ul style="list-style-type: none"> • Statements of intention • Statements against pecuniary interest • Statement against penal interest • Ancient documents • Public documents • Evidence of reputation • Learned treatises • Prior testimony • Admissions • Common law business records exception <p>Statutory exceptions</p> <ul style="list-style-type: none"> • Business records 	<p><i>R. v. Wilcox</i> (2001), 152 C.C.C. (3d) 157</p> <p><i>Canada Evidence Act</i>, s. 30 <i>B.C. Evidence Act</i>, ss. 42</p>
4	<p>Hearsay (III)</p> <p>Principled approach: previously recognized exceptions</p> <ul style="list-style-type: none"> • Hospital records • Child's disclosure of sexual abuse • Prior inconsistent statements • Testimony at a preliminary inquiry <p>Principled approach: necessity and reliability</p> <p>Summary / Hearsay analysis flowchart</p>	<p><i>Ares v. Venner</i>, [1970] S.C.R. 608 <i>R. v. Khan</i>, [1990] 2 S.C.R. 531</p> <p><i>R. v. B. (K.G.)</i>, [1993] 1 S.C.R. 740</p> <p><i>R. v. Hawkins</i>, [1996] 3 S.C.R. 1043, para. 1-2, 16, 52-97</p> <p><i>R. v. Khelawon</i>, supra., para. 42-66, 101-109 <i>R. v. Youvarajah</i>, [2013] 2 S.C.R. 720 <i>R. v. Bradshaw</i>, supra., para. 26-95</p>
5A	Self-serving evidence	

	<ul style="list-style-type: none"> • Exclusionary rule • Exception to rebut recent fabrication • Other exceptions 	<i>R. v. Stirling</i> , [2008] 1 S.C.R. 272
5B	<p>Confessions</p> <ul style="list-style-type: none"> • Principle against self-incrimination • Right to silence • Common law confessions rule 	<i>R. v. Piché</i> , [1971] S.C.R. 23 <i>R. v. Oickle</i> , [2000] 2 S.C.R. 3
6A	<p><i>Charter</i> issues</p> <ul style="list-style-type: none"> • Section 7 • Section 24(2) 	<i>R. v. Singh</i> , [2007] 3 S.C.R. 405 <i>R. v. Grant</i> , [2009] 2 S.C.R. 353
6B	Mr. Big confessions	<i>R. v. Hart</i> , [2014] 2 S.C.R. 544
7A	<p>Character evidence</p> <ul style="list-style-type: none"> • Exclusionary Rule • Good character • Bad character 	<i>R. v. F.F.B.</i> , [1997] 1 S.C.R. 697
7B	<p>Similar fact evidence</p> <ul style="list-style-type: none"> • Exclusionary rule • Exception 	<i>R. v. Arp</i> , [1998] 3 S.C.R. 339 <i>R. v. Handy</i> , [2002] 2 S.C.R. 908
8A	<p>Opinion Evidence</p> <ul style="list-style-type: none"> • Exclusionary rule • Lay opinion 	<i>R. v. Graat</i> , [1982] 2 S.C.R. 819

8B	<p>Expert evidence</p> <ul style="list-style-type: none"> • Criteria for admission • Cost-benefit analysis • Duty to the court 	<p><i>R. v. Mohan</i>, [1994] 2 S.C.R. 9 <i>White Burgess Langille Inman v. Abbott and Haliburton Co.</i>, [2015] 2 S.C.R. 182</p>
9	<p>Privilege (I)</p> <ul style="list-style-type: none"> • Class privilege vs. case-by-case privilege • Wigmore criteria • Confidential relationships • Solicitor-client (legal advice) • Litigation privilege 	<p><i>Slavutych v. Baker.</i>, [1976] 1 S.C.R. 254 <i>R. v. Gruenke</i>, [1991] 3 S.C.R. 263 <i>M. (A.) v. Ryan</i>, [1997] 1 S.C.R. 157</p> <p><i>Canada v. Solosky</i>, [1980] 1 S.C.R. 821 <i>British Columbia (Attorney General) v. Lee</i>, 2017 BCCA 219, para. 1-6, 30-51 only</p> <p><i>Blank v. Canada (Minister of Justice)</i>, [2006] 2 S.C.R. 319 <i>Lizotte v Aviva Insurance Company of Canada</i>, [2016] 2 S.C.R. 521</p>
10	<p>Privilege (II)</p> <ul style="list-style-type: none"> • Settlement Discussions • Informant identity • Waiver of privilege 	<p><i>Sable Offshore Energy Inc. v. Ameron International Corp.</i>, 2013 SCC 37</p> <p><i>R. v. Durham Regional Crime Stoppers Inc.</i>, [2017] 2 S.C.R. 157</p> <p><i>British Columbia (Attorney General) v. Lee</i>, supra., para. 1-6, 52-61</p>