

**Write Your Exam Code Here:** \_\_\_\_\_

Return this exam question paper to your invigilator at the end of the exam before you leave the classroom.

**Attachment:**

Course Outline (5 pages)

THIS EXAMINATION CONSISTS OF **7 PAGES** (INCLUDING THIS TITLE PAGE)  
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA  
FACULTY OF LAW

FINAL EXAMINATION – FALL 2019

LAW 476  
Evidence

Bruce Elwood

TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS

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**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 1 QUESTION  
WITH 3 PARTS: A, B AND C.**

**ANSWER ALL 3 PARTS.**

Marks**Overview and Assignment**

Michael Smith and his wife Kathleen Smith lived in a large house in Vancouver. Michael was the author of several successful books about his experience as a combat soldier in Afghanistan. He was also active in Vancouver politics and an outspoken critic of the Vancouver Police Department. Kathleen was an executive with the Vancouver office of Microsoft.

A young woman of university age named Margret lived with the Smiths. Margret was raised by the Smiths after her parents died.

In the early morning hours of Saturday, December 9, 2017, Michael called 911 and reported that he found his wife lying at the bottom of a staircase. When paramedics arrived, they found a man kneeling by a woman lying in a pool of blood. The woman was dead.

Police officers arriving at the scene became suspicious of the circumstances of the death because of a large amount of blood on the floor and on the walls of the staircase. The police obtained a warrant to search the home. They did not find a murder weapon or any other evidence of foul play.

An autopsy report identified the most significant injuries to the deceased as a number of lacerations on the top and back of her head, two of which went through to the skull and caused a large amount of bleeding.

Kathleen's sister, Candace Zamper, was outspoken about the case in the media. She gave a number of interviews in which she said she never trusted Michael.

The Crown ultimately proceeded on the theory that Michael beat his wife with a fire-place tool known as a blow poke, pushed her down the stairs and then removed the bloody blow poke from the property by the time the police arrived.

The case was tried by a judge and jury. The Accused did not testify. After a lengthy trial and several days of deliberations, the jury found the Accused guilty of first degree murder. He was sentenced to life in prison.

Michael Smith is appealing from his conviction. The focus of the appeal is on the admission of evidence. Michael is also arguing that he received ineffective assistance of counsel because his lawyer failed to object to inadmissible evidence.

You are a clerk for the senior justice on the panel that will hear the appeal. Your judge has asked you to prepare a memorandum on the evidentiary issues she will need to decide.

**Provide your analysis of the following evidence and whether the trial judge committed any error of law or defence counsel overlooked any meritorious objection relating to the admissibility of the evidence. Include in your analysis the arguments that both sides may raise on appeal. Remember to consider the evidence in the context of the case as whole.**

Marks**30 A. Evidence Seized By the Police**

The Crown's pre-trial disclosure included evidence from a laptop computer that was seized during a search of the Smith family home, and copies of text messages that the police obtained during a search of a cell phone.

The Accused brought a pre-trial application to exclude this evidence on the basis it was obtained in breach of his right under s. 8 of the *Charter of Rights and Freedoms* to be free from unreasonable search and seizure.

The police obtained a search warrant for the search of the home based on the following affidavit by Sergeant Borden of the Vancouver Police Department:

“I attended at the Smith residence in response to a 911 call in the early morning hours of December 9, 2017. On route to the residence, I was informed by the first responders that there was evidence of violence at the scene. Upon entering the home, I observed a male person with blood all over his person, and a female person lying at the base of a staircase. I was informed by the paramedics on scene that the female was dead. I saw a large amount of blood on the deceased and on the stairs, floor and walls where she was lying. The blood was dry, from which I concluded that the victim had been dead for some time. Based on this information, I believe the residence to be a crime scene.”

The search warrant authorized the police to search for weapons and traces of blood elsewhere in the house. The police conducted an extensive search of the interior and exterior of the house. No weapon was found, nor was any sign of forced entry. The police did not find any trace of blood in the house beyond the staircase and entrance foyer, or any indication that someone with a bloody weapon had carried it out of the house.

While searching the house, Sergeant Borden noticed a laptop computer in a home office. In an affidavit, Borden deposed that he took possession of the computer for safekeeping because he was concerned material evidence could be lost, and that he intended to obtain a search warrant for the computer, but forgot. A search of the laptop computer yielded the following:

- Several incomplete short stories.
- Internet searches for the benefits provided to Microsoft employees.
- Frequent visits to an on-line gambling site.
- Images of men and visits to male dating sites.
- E-mail correspondence with a man who identified himself as a male escort.

On the application by the defence to exclude the evidence seized from the computer, the trial judge found a “technical” breach of s. 8 of the *Charter* on the basis the seizure exceeded the scope of the authority under the warrant. (You may assume this finding was correct.) The trial judge went on to decline to exclude the evidence under s. 24(2) of the *Charter*.

At trial, the trial judge admitted the evidence seized from the computer without further objection from the defence.

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The evidence from the cell phone was obtained as follows. After searching the house, the police asked the Accused to attend at the police station for an interview. The Accused arrived with his lawyer, Grant Taylor. Sergeant Borden provided the Accused with a proper *Charter* warning. The Accused declined to make a statement or to answer questions about Kathleen's death.

Sergeant Borden asked the Accused if the police could examine his cell phone. The Accused asked why. Borden replied that the police could use the location memory on the phone to confirm that the Accused did not leave the house on the night of Kathleen's death, and thereby rule out the possibility that he had removed a weapon from the scene.

After conferring with his lawyer, the Accused agreed. Borden took possession of the phone and obtained a search warrant to search its contents. A search of the phone yielded the following:

- Ten text messages from various unidentified numbers asking about money, to which the Accused had responded "wait" or "soon".
- Two unopened text messages dated December 9, 2017, threatening harm to the Accused if the sender was not paid immediately.
- Text messages to and from Kathleen in which the Accused and Kathleen discussed the need for a new roof on the family home.

On the application to exclude the evidence the police seized from the phone, the trial judge found that the search complied with s. 8 of the *Charter*. (You may assume this finding was correct, and need not consider s. 24(2) of the *Charter* with respect to the evidence seized from the phone.)

At trial, the trial judge admitted the text messages from the phone into evidence without further objection from the defence.

**40 B. The Crown's Evidence at Trial**

The Crown called Sergeant Borden as its first witness. Borden described for the jury the scene when he arrived at the Smith residence:

- The Accused was pacing back and forth in the entrance foyer of the house, covered in blood;
- Paramedics were attending to the body of a woman at the bottom of a staircase, lying on her back in a pool of blood.
- There were several blood-soaked towels under the woman's head and near her body, some pine needles scattered on the stairs, and blood splattered and smeared on the walls of the staircase.
- The body had a significant amount of blood on the bottom of the feet, which Borden testified was consistent, in his experience, with standing upright in blood at some point.

Borden took a large number of photographs of the scene, including pictures of the Accused, the body and the staircase. On the witness stand, Crown counsel asked Borden

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to identify some of these photographs. The trial judge admitted those photographs into evidence without objection from the defence.

The Crown next tendered an expert report by Ian Deaver, a crime scene investigator. Deaver holds a certificate in Forensic Investigation from BCIT. He has been a police officer for more than 20 years. He has attended on more than 400 crime scenes, 50 of which were homicides. He has taken numerous courses for police officers on crime scene investigation. He is currently assigned to the Homicide Unit of the VPD.

Deaver prepared a report on his opinion of the significance of the blood splatters found in the staircase. Deaver based his opinion on his experience, measurements and calculations he did at the scene, and a series of tests he performed and videotaped at a test facility. The Crown delivered Deaver's expert report to the defence with proper notice prior to the trial.

Deaver concluded that, in his opinion, the blood splatters in the staircase were the result of blood cast off of a long-handled blunt instrument being swung in a confined space. Deaver explained that he selected blood stains on the walls of the staircase, and using strings and estimating angles, identified precise points of origin away from the stairs and the walls, determined the velocity of the blood particles through the air and, from these calculations, concluded that blows had been struck to the victim's head with a long-handled blunt object while she was standing at the top of the stairs.

Deaver's testing included simulations done in a mock-up of the staircase, built to scale, in which he inflicted numerous blows to a watermelon injected with blood. In 40 simulations, he produced many variations in the pattern of blood splatter. Deaver selected the simulation he considered most representative as the basis for his report.

Under cross-examination on a *voir dire* to determine the admissibility of his opinion, Deaver acknowledged that there is an element of subjectivity to determining a point of origin from blood splatter analysis. Deaver further acknowledged that he had not attempted to control for all possible variables in conducting his tests, and that he did not test alternative theories for what may have caused the blood stains, but rather to confirm his opinion.

The defence called John Smith, an experienced FBI investigator to testify on the *voir dire*. (Since he was testifying on the *voir dire* only, you need not analyse the admissibility of Smith's evidence.) Smith testified that, in his 30 years of crime scene investigation, he had never known an investigator to accurately determine the precise point of origin from an analysis of blood splatter.

The trial judge qualified Deaver as an expert and admitted his report into evidence, stating that "the issues the defence has raised go to weight, not admissibility".

The Crown next called Kathleen's sister, Candace Zamper, as a witness. Zamper testified that she gave Kathleen a blow poke as a present a number of years ago. She testified that she saw the blow poke at the Smith residence when she visited for Thanksgiving in 2017.

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Crown counsel asked Zamper if she trusted the Accused. Defence counsel objected, and the trial judge sustained the objection. Crown counsel then asked Zamper whether she had reason not to trust the Accused. She answered that she had spoken to the soldiers with whom the Accused had served in Afghanistan, and they told her that the Accused always managed somehow to avoid combat assignments.

Zamper also gave evidence about the death of a woman named Elizabeth Jones in 2003. At the time, Zamper, the Smiths and Jones were all stationed with the Canadian military in Germany. Zamper and Jones taught at a school on the base. Jones' husband was killed on a deployment. Zamper testified that the Accused became close friends with Jones after her husband died, and Zamper suspected that they had an affair.

Zamper testified that, in December 2003, Jones was found dead in her residence by her nanny, Grace Kelly, and that, in her will, Jones designated the Accused as the legal guardian for her daughter, Margret, and left him a sum of money for Margret's care.

After Kathleen died, Zamper travelled back to Germany and met with the former nanny. The nanny, Kelly, agreed to testify at the trial in Vancouver. Kelly testified as follows:

- She found Jones at the bottom of a flight of stairs early on a Saturday morning following a holiday party on the base;
- Jones had a number of lacerations on the top of her head;
- There was a large amount of blood on the stairs and splattered and smeared on the walls of the staircase; and
- German police and doctors responded to the scene and determined that Ms. Jones died of natural causes.

**30 C. Evidence of the Defence**

The defence tendered a report by Dr. Ian Green, a professor of pathology at the School of Medicine at the University of British Columbia. The defence provided Dr. Green's report to the Crown with proper notice prior to the trial.

Dr. Green holds a degree in medicine, with specialities in pathology and neurology. In his lengthy and distinguished career, Dr. Green has examined over 5,000 deaths. He is the author of an authoritative textbook entitled *Forensic Neuropathology*.

Dr. Green examined Kathleen's body. He also reviewed the autopsy reports of every death in British Columbia since 1990 due to blunt force trauma to the head from beatings. Dr. Green testified that, in not one of the 57 reports he reviewed, did the deceased present with the unique pattern of lacerations on Kathleen's head.

In Dr. Green's opinion, the complex lacerations found on Kathleen's head were not consistent with the type of lacerations that would be caused by a beating with a long-handled instrument like a blow poke.

Dr. Green wrote in his report that the two deep lacerations in Kathleen's scalp appeared to be a pair, with each laceration having "the appearance of a trident with three limbs converging to a point at roughly 30 degrees from each other and a fourth limb converging to the same point at nearly 180 degrees from the center limb of the other

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three limbs." He concluded from these observations that "the injuries are consistent with an attack by an owl".

Following a *voir dire*, the trial judge ruled that Dr. Green's report was inadmissible.

The defence called Helen Porter as its next witness. Porter is an executive at Microsoft. She testified that Kathleen, who was a friend, seemed stressed during a company holiday party on the evening of her death. Porter explained that Microsoft was down-sizing its Vancouver office at the time.

Defence counsel asked Porter whether Kathleen had a reputation amongst her colleagues at Microsoft for excessive alcohol consumption at company functions. Crown counsel objected that the question was irrelevant and called for hearsay and character evidence. The trial judge sustained the objection on all three grounds.

In cross-examination, Crown counsel asked Porter why Kathleen was stressed about the talk of lay-offs at Microsoft. Porter testified that Kathleen told her that Michael had not published a book in years and seemed to be spending a lot of money lately, and that Kathleen was concerned, if she was laid off, the family could not afford to pay for needed repairs to their home.

The defence called Margret to the stand as its last witness. To the surprise of everyone in the court room, defence counsel Taylor produced a blow poke and asked Margret if this was the blow poke Zamper had given to Kathleen. Margret answered that it was. Crown counsel jumped to his feet and demanded to know how Taylor came into possession of the blow poke. Taylor objected.

After excusing the jury, the trial judge directed Taylor to take the stand and answer questions about how he came into possession of the blow poke. Taylor testified that he found the blow poke in the basement of the Smith house while preparing his questions for Margret. The trial judge ruled that "the circumstances in which defence counsel came into possession of the blow poke do not fall within any privilege".

Taylor then withdrew from the trial to consult with a practice advisor at the Law Society. The trial judge directed that the trial continue.

Representing himself, the Accused handed the blow poke to the jury and asked them "Does this blow poke look like it was used to kill a woman?" Crown counsel objected. The trial judge sustained the objection, and instructed the jury to disregard the blow poke and the question from the Accused.

Dejected, the Accused closed his case.

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

## Evidence 476 – Course Outline Fall 2019

Week	Topic(s)	Readings
1 Sept 5	Introduction and overview	
2A Sept 12	Foundational principles <ul style="list-style-type: none"> <li>• Relevance</li> <li>• Exclusionary rules</li> <li>• Judicial discretion</li> <li>• The burden of proof</li> <li>• The standard of proof</li> </ul>	<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
2B	Types of Evidence <ul style="list-style-type: none"> <li>• Testimony</li> <li>• Real evidence</li> <li>• Video and photos</li> <li>• Documents</li> <li>• Admissions</li> <li>• Judicial notice</li> </ul>	<i>R. v. Find</i> , [2001] 1 S.C.R. 863 <i>R. v. Spence</i> , [2005] S.C.R. 458
3 Sep 19	Hearsay (I) <ul style="list-style-type: none"> <li>• Exclusionary rule</li> <li>• Identifying hearsay</li> </ul>	<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



	<ul style="list-style-type: none"> <li>• Non-hearsay purposes</li> <li>• Permitted hearsay</li> </ul>	<i>R v. Baldree</i> , [2013] S.C.R. 520
4 Sept 26	<p>Hearsay (II)</p> <p>Relationship between the traditional exceptions and the principled approach</p> <p>Traditional exceptions</p> <ul style="list-style-type: none"> <li>• Dying declarations</li> <li>• <i>Res gestae</i></li> <li>• Statements of bodily &amp; mental condition</li> <li>• Statements of intention</li> <li>• Statements against pecuniary interest</li> <li>• Statement against penal interest</li> <li>• Ancient documents</li> <li>• Public documents</li> <li>• Evidence of reputation</li> <li>• Learned treatises</li> <li>• Prior testimony</li> <li>• Admissions</li> <li>• Common law business records exception</li> </ul> <p>Statutory exceptions</p> <ul style="list-style-type: none"> <li>• Business records</li> </ul>	<p><i>R. Starr</i>, [2000] 2 S.C.R. 144</p> <p><i>R. v. Starr</i>, supra.</p> <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>

<p>5</p> <p>Oct 3</p>	<p>Hearsay (III)</p> <p>Principled approach: previously recognized exceptions</p> <ul style="list-style-type: none"> <li>• Hospital records</li> <li>• Child's disclosure of sexual abuse</li> <li>• Prior inconsistent statements</li> <li>• Testimony at a preliminary inquiry</li> </ul> <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>
<p>6A</p> <p>Oct 10</p>	<p>Self-serving evidence</p> <ul style="list-style-type: none"> <li>• Exclusionary rule</li> <li>• Exception to rebut recent fabrication</li> <li>• Other exceptions</li> </ul>	<p><i>R. v. Stirling</i>, [2008] 1 S.C.R. 272</p>
<p>6B</p>	<p>Confessions</p> <ul style="list-style-type: none"> <li>• Principle against self-incrimination</li> <li>• Right to silence</li> </ul>	<p><i>R. v. Piché</i>, [1971] S.C.R. 23 <i>R. v. Oickle</i>, [2000] 2 S.C.R. 3</p>

	<ul style="list-style-type: none"> <li>• Common law confessions rule</li> </ul>	
7A Oct 17 <b>6:00 start</b>	<p><i>Charter</i> issues</p> <ul style="list-style-type: none"> <li>• Section 7</li> <li>• Section 24(2)</li> </ul>	<p><i>R. v. Singh</i>, [2007] 3 S.C.R. 405 <i>R. v. Grant</i>, [2009] 2 S.C.R. 353</p>
7B	Mr. Big confessions	<i>R. v. Hart</i> , [2014] 2 S.C.R. 544
8A Oct 24	<p>Character evidence</p> <ul style="list-style-type: none"> <li>• Exclusionary Rule</li> <li>• Good character</li> <li>• Bad character</li> </ul>	<i>R. v. F.F.B.</i> , [1997] 1 S.C.R. 697
8B	<p>Similar fact evidence</p> <ul style="list-style-type: none"> <li>• Exclusionary rule</li> <li>• Exception</li> </ul>	<p><i>R. v. Arp</i>, [1998] 3 S.C.R. 339 <i>R. v. Handy</i>, [2002] 2 S.C.R. 908</p>
9A Oct 31 <b>6:00 start</b>	<p>Opinion Evidence</p> <ul style="list-style-type: none"> <li>• Exclusionary rule</li> <li>• Lay opinion</li> </ul>	<i>R. v. Graat</i> , [1982] 2 S.C.R. 819
9B	<p>Expert evidence</p> <ul style="list-style-type: none"> <li>• Criteria for admission</li> <li>• Cost-benefit analysis</li> </ul>	<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>

	<ul style="list-style-type: none"> <li>• Duty to the court</li> </ul>	
Nov 7	<b>Fall Term Break</b>	
10 Nov 14 <b>6:00 start</b>	<p>Privilege (I)</p> <ul style="list-style-type: none"> <li>• Class privilege vs. case-by-case privilege</li> <li>• Wigmore criteria</li> <li>• Confidential relationships</li> <li>• Solicitor-client (legal advice)</li> <li>• Litigation privilege</li> </ul>	<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>
11 Nov 21	<p>Privilege (II)</p> <ul style="list-style-type: none"> <li>• Settlement Discussions</li> <li>• Informant identity</li> <li>• Waiver of privilege</li> </ul>	<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>