

Carleton University**Department of Law and Legal Studies****COURSE OUTLINE**

COURSE: LAWS 3903 A – Selected Legal Topics: Evidence**TERM:** Fall 2022**PREREQUISITES:** 1.0 credit in LAWS at the 2000 level**CLASS:** Thursday 6:00 – 9:00 pm
Southam Hall 520
In-Person Section**INSTRUCTOR:** Stephen J. Donoghue**OFFICE HOURS:** By Appointment at Loeb B442**CONTACT:** Email: stephendonoghue@cunet.carleton.caTel: (613) 239-1086

COURSE DESCRIPTION

The law of evidence is one of the most important, yet challenging, areas of the law. Because it is so central to the introduction of information into a courtroom, a solid knowledge of its rules and principles are essential for any lawyer, judge, police officer, or other justice system participant who appears in court. This course introduces students to evidence law and frames it as a process, beginning with the collection of information, and ending with the establishment of fact. The course will focus primarily on criminal law proceedings as the rules of evidence are most vigorously applied and developed in the criminal law context. Topics canvassed include: disclosure, third party records applications, relevance and materiality, hearsay, confessions, character evidence, opinion evidence, exclusion of evidence, privilege, use immunity, the exclusionary discretion, witness competency, examination in chief, cross examination, real evidence, objections, judicial notice, admissions, standards of proof, weighing information, corroboration, presumptions, and evidence in specific court proceedings.

COURSE OBJECTIVES

- 1) To demystify the legal concept of “evidence”;
- 2) To provide a framework to better understand evidence;
- 3) To introduce students to the rules of evidence; and
- 4) To discuss and critically assess the rules of evidence.

TEACHING METHOD

Primarily a lecture style with class discussions.

REQUIRED TEXTS

- Paciocco, D., Paciocco, P., and Stuesser, L., *The Law of Evidence, 8th Edition* (Toronto, Ont.: Irwin Law Inc., 2020)
 - Available at the Carleton bookstore.

SUPPLEMENTARY TEXTS

- Criminal Code of Canada
- Casebook

METHOD OF EVALUATION

Standing in a course is determined by the course instructor subject to the approval of the Department and of the Faculty Dean. This means that grades submitted by the instructor may be subject to revision. No grades are final until they have been approved by the Department and the Dean.

The final grade for the course will be based on the following components:

1. **Assignment #1 – Discussion Question Exercise (20%)**
 - Students are to select one of the discussion questions listed on the Assignment Handout – Assignment #1.
 - Please explain why you selected this question and then answer the question by providing responses for both sides of the issue.
 - The discussion question exercise will be graded according to four factors:
 - (a) The explanation provided for selecting the question (/7),
 - (b) Style of presentation (/3),
 - (c) The answer provided for one side of the issue (/5), and
 - (d) The answer provided for the opposing view (/5).
2. **Assignment #2 – Discussion Question Drafting Exercise (20%)**
 - Students are to draft one discussion question. The question should identify an issue in the law of evidence which legitimately has two points of view. Students should explain the reason why they drafted their question.
 - Students must also answer their question. Answers for both sides of the issue should be provided.
 - The discussion question exercise will be graded according to four factors:
 - (a) The explanation provided for selecting the question (/7),
 - (b) Style of presentation (/3),
 - (c) The answer provided for one side of the issue (/5), and
 - (d) The answer provided for the opposing view (/5).

3. **Participation (10%)**
 - Student grades will incorporate recognition of attendance at class and contributions to class discussions.
 - Although this is a lecture style class, student participation is still an important element of the learning process.
4. **Final Exam (50%)**
 - 2-hour opened book examination
(Held during the formal examination period – December 10-22, 2022).
 - Exam will be based on assigned readings, class lectures, and class discussions from throughout the full term.
 - Exam will represent a combination of multiple choice, short answer, and long answer questions.

All components must be completed in order to earn a passing grade.

LATE PENALTIES AND REQUESTS FOR EXTENSIONS

The granting of extensions is determined by the instructor who will confirm whether an extension is granted and the length of the extension. Please be advised that extensions will generally not be granted. In those extraordinary cases where an extension is granted, the student may first be required to provide additional information to justify the extension, and a penalty may be applied to the grade.

SCHEDULE

<u>Class Date</u>	<u>Evidence Topic</u>
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Part I – Introduction

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| 1. September 8 | <p>a) Introduction to the Course</p> <ul style="list-style-type: none"> • Review of the course outline with elaboration on the course objectives, expectations, and method of evaluation. • Introduction to the Case Study for the course. • <u>Handouts</u>: Course Outline, Case Study, Assignment Handout <p>b) Introduction to Evidence</p> <ul style="list-style-type: none"> • A brief overview of evidence and the law of evidence. • <u>Topics</u>: what is evidence?, direct vs. circumstantial evidence, admissibility vs. weight, philosophies of evidence, law of evidence trends, role of the Crown, role of defence counsel • <u>Text</u>: Paciocco et al: chapter 1 – pages 1-31 |
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c) **Discussion Questions**

- Relating to the introduction to evidence.

Part II – Collecting Information

2. September 15 a) **Collecting Information**

- A review of the methods available to counsel to gather information at the outset of a case to best direct the progress of the matter.
- Topics: sources of information, disclosure, third party records applications, alibi notice, lost evidence
- Text: Paciocco et al: chapter 6 – pages 353-371
- Key Cases: *Stinchcombe*, *O'Connor*

b) **Discussion Questions**

- Relating to the collection of information.

Part III – Assessing Information

3. September 22 a) **The Basic Rule: Relevance and Materiality**

- Information must be relevant to a material issue in a case to be admissible in court.
- Topics: the basic rule, materiality, relevance, narrative
- Text: Paciocco et al: chapter 2 – pages 32-43, 56-58

b) **Presumptively Inadmissible Information**

- Hearsay, Confessions, Character Evidence, Opinion Evidence

i) **Hearsay**

- Statements made outside of court can sometimes be problematic when one party seeks to tender them at trial for the truth of their contents.
- Topics: what is hearsay?, out of court statement, truth of its content, framework for hearsay, traditional exceptions to the hearsay rule, prior inconsistent statements, prior testimony, admissions by opposing party litigants, co-conspirators exception, declarations against interest, dying declarations, business records, *res gestae* statements, the principled approach, necessity, reliability
- Text: Paciocco et al: chapter 4 – pages 135-232
- Key Cases: *Khan*, *Smith*, *Starr*, *Khelawon*

ii) **Confessions**

- Statements made by accused persons admitting to crimes have shown to be problematic in some situations depending on the circumstances surrounding the making of the statement.
- Topics: voluntariness of accused statements, youth statements, Mr. Big operations, confessions to civilian witnesses, pre-trial silence
- Text: Paciocco et al: chapter 7 – pages 419-448
- Key Cases: *Oickle*

4. September 29 b) **Presumptively Inadmissible Information (con'd)**

iii) **Character Evidence**

- The personality, nature, or integrity of a witness is not always an accurate or fair predictor of the person's conduct or indicator of the person's credibility and reliability.
- Topics: character evidence introduced, character of the accused, bad character, criminal record, similar fact evidence, good character, character of others, co-accused, Scopelliti application, reputation evidence, alternate suspect, sexual history, civil cases
- Text: Paciocco et al: chapter 3 – pages 63-134; chapter 11 – pages 624-627; chapter 10 – pages 615-619, 606-607
- Key Cases: *Corbett, Handy, B(L)*

iv) **Opinion Evidence**

- The view or belief someone holds about a factual matter is often unimportant, unless the person is well positioned to comment on a matter of ordinary experience, or the person hold special expertise.
- Topics: opinion evidence generally, lay person opinions, identity, expert witnesses, rule against oath helping
- Text: Paciocco et al: chapter 5 – pages 233-286; chapter 12 – pages 679-682
- Key Cases: *Graat, Mohan, White Burgess*

5. October 6 c) **Exclusion of Evidence**

➤ Section 24(2) of the *Charter*, Privilege, Use Immunity, Exclusionary Discretion

i) Section 24(2) of the *Charter*

- Where an accused person's substantive *Charter* rights are infringement by a state actor, courts may remedy the situation by disregarding information from its consideration.
- Topics: wording of section 24(2), the technical components, obtained in a manner, bring the administration of justice into disrepute
- Text: Paciocco et al: chapter 8 – pages 469-513
- Key Cases: *Grant*

ii) Privilege

- Some communications conducted in confidence are protected from being considered by a court.
- Topics: the nature of privilege, solicitor-client privilege, litigation privilege, settlement negotiation privilege, informer privilege, spousal privilege, case-by-case privilege, public interest immunity
- Text: Paciocco et al: chapter 6 – pages 287-349, 371-381
- Key Cases: *Smith v. Jones*

iii) Use Immunity

- Where someone testifies in one court proceeding, his or her testimony typically cannot be used against him or her in another court proceeding.
- Topics: section 13 of the *Charter*, perjury and similar cases, derivative use immunity
- Text: Paciocco et al: chapter 7 – pages 387-401

iv) Exclusionary Discretion

- Trial judges have a residual authority to disregard information, which does not ordinary warrant exclusion, where considering the information would be unfair.
- Topics: nature of the discretion, probative value, prejudicial effect, balancing
- Text: Paciocco et al: chapter 2 – pages 47-55

d) Trial Strategy

- Sometimes strategic considerations will influence decisions regarding how to best approach information.
- Topics: theory of the case, allowing inadmissible information, tactical burden to present information, tough choices, notice requirements
- Text: Paciocco et al: chapter 1 – pages 26-28; chapter 12 – pages 689-691

6. October 13
- e) **Demonstration**
- Demonstration of a pre-trial motion.
 - Handouts: Case Study
- f) **Discussion Questions**
- Relating to the assessing of information.
- g) **Discussion Question Exercise Due Date**
- Please submit your discussion question exercise (Assignment #1) to the professor before the end of class.

Part IV – Presenting Information

7. October 20
- a) **Witnesses (Viva Voce Testimony)**
- People with information to offer regarding a case often share that information with the court by answering questions from lawyers.
 - Topics: oral evidence generally, competency, witnesses 14+ years old, child witnesses, examination in chief, technique, leading questions, refreshing memory, qualifying a police officer's notes, testimonial aides, prior consistent statements, adverse witnesses, re-examination, cross examination, scope and purpose, technique, limitations on cross examination, the collateral fact rule, impeachment, the rule in *Browne v. Dunn*, incomplete cross examination
 - Text: Paciocco et al: chapter 9 – pages 519-554, 583-591; chapter 11 – pages 627-645, 648-669; chapter 4 – pages 173-180; chapter 10 – pages 598-615, 619-623
 - Key Cases: *Milgaard*, *B(KG)*
- b) **Real Evidence**
- Material things can be tendered at trial.

- Topics: general principles, what is real evidence?, authentication, continuity, undue prejudice, marking exhibits, types of real evidence, photographs and videotapes, documents, electronic documents, demonstrative evidence, views
- Text: Paciocco et al: chapter 9 – pages 554-573

c) **Objections**

- Where counsel disapprove of information being tendered at court, they can oppose its introduction by objecting.
- Topics: objections, when to object
- Text: Paciocco et al: chapter 1 – pages 26-28

d) **Judicial Notice**

- Some facts are so commonly known or easily verified that courts can accept them without evidence being tendered.
- Topics: judicial notice, three kinds of facts
- Text: Paciocco et al: chapter 9 – pages 573-583

e) **Admissions**

- Parties can agree to facts mutually presented to the court.
- Topics: admissions, common admissions
- Text: Paciocco et al: chapter 4 – pages 191-196

October 27 **Fall Break** (no class)

8. November 3 g) **Evidence Game**

- Class review of material covered to date.

h) **Discussion Questions**

- Relating to the presenting of information.

i) **Return of Discussion Question Exercise**

- Graded exercises will be returned to the students.

9. November 10 a) **Standards of Proof**

- The degree of certainty required for facts to be accepted by a court can vary depending on circumstances.
- Topics: burden of proof, reasonable doubt, balance of probabilities, *prima facie* case, air of reality, reasonable grounds, reasonable suspicion
- Text: Paciocco et al: chapter 12 – pages 683-691, 697-704
- Key Cases: *Lifchus*

b) **Establishing Facts**

- Judges make findings of fact from the evidence before them for consideration.
- Topics: weighing information, the golden rule, credibility and reliability, witness demeanor, children's testimony, corroboration, corroboration rules, corroboration where not legally required, Vetrovec warnings, presumptions, presumptions of law, presumptions of fact
- Text: Paciocco et al: chapter 10 – pages 592-596; chapter 2 – pages 44-46; chapter 12 – pages 670-678, 691-697

c) **Discussion Question Drafting Exercise Due Date**

- Please submit your discussion question drafting exercise (Assignment #2) to the professor before the end of class.

10. November 17 d) **Specific Proceedings**

- The rules of evidence can vary depending on the nature of the court proceeding.
- Topics: trial, standard of proof for evidence, trial procedure, blended trial, jury trial, the test in *W(D)*, bail hearing, the nature of bail hearings, onus, grounds for detention, relevant information, credible or trustworthy information, examination of the accused, preliminary hearing, test for committal to stand trial, reception of credible and trustworthy statements, sentencing, what is sentencing?, establishing a factual basis for sentencing, admissibility of evidence, materials for sentencing, burden of proof, the offender's right to speak, appeals, standard of review, fresh evidence, enforcement on appeal
- Text: Paciocco et al: chapter 2 – pages 58-62; chapter 1 – pages 22-26, 28-31; chapter 12 – pages 683-689, 698-700
- Key Cases: *W(D)*, *USA v. Sheppard*

11. November 24 e) **Discussion Questions**

- Relating to the judging of information.

Part VI – Review

12. December 1
- a) **Case Study**
 - Class discussion of evidence issues raised by the facts sets out in the case study.
 - Handouts: Case Study
 - b) **Discussion Questions**
 - Relating to any topic covered during the course.
13. December 8
- c) **Professor Evaluation**
 - Students will be provided an opportunity during class to complete the professor evaluation if necessary.
 - d) **Return of Discussion Question Drafting Exercise**
 - Graded exercises will be returned to the students.
 - e) **Discussion of the Exam**
 - Brief overview of the format for the final exam.
 - Answer student questions regarding the format, content, or expectations for the final exam.
 - f) **Sentencing Game**
 - Class review of material covered throughout the year.
 - g) **Review of the Course**
 - Review of the subject material covered during the full course of the academic year.
 - Answer student questions concerning any topic covered during the full academic year.

Please find a full list of important academic dates on the calendar website: <http://calendar.carleton.ca/academicyear/>.

DEPARTMENT POLICIES AND REGULATIONS

Please review the following webpage to ensure that your practices meet our Department's expectations, particularly regarding standard departmental protocols and academic integrity requirements: <https://carleton.ca/law/student-experience-resources/>.

PLAGIARISM

Plagiarism is presenting, whether intentional or not, the ideas, expression of ideas or work of others as one's own. Plagiarism includes reproducing or paraphrasing portions of someone else's published or unpublished material, regardless of the source, and presenting these as one's own without proper citation or reference to the original source. Examples of sources from which the ideas, expressions of ideas or works of others may be drawn from include but are not limited to: books, articles, papers, literary compositions and phrases, performance compositions, chemical compounds, art works, laboratory reports, research results, calculations and the results of calculations, diagrams, constructions, computer reports, computer code/software, and material on the Internet. Plagiarism is a serious offence. More information on the University's Academic Integrity Policy can be found at: <https://carleton.ca/registrar/academic-integrity/>.

ACADEMIC ACCOMMODATIONS

You may need special arrangements to meet your academic obligations during the term. For an accommodation request the processes are as follows:
(<https://students.carleton.ca/course-outline/>).

Pregnancy Obligation: Please write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details, visit the Department of Equity and Inclusive Communities (EIC): <https://carleton.ca/equity/>.

Religious Obligation: Write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details, visit the Department of Equity and Inclusive Communities (EIC): <https://carleton.ca/equity/>.

Academic Accommodations for Students with Disabilities: The Paul Menton Centre for Students with Disabilities (PMC) provides services to students with Learning Disabilities (LD), psychiatric/mental health disabilities, Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorders (ASD), chronic medical conditions, and impairments in mobility, hearing, and vision. If you have a disability requiring academic accommodations in this course, please contact PMC at 613-520-6608 or pmc@carleton.ca for a formal evaluation. If you are already registered with the PMC, contact your PMC coordinator to send me your Letter of Accommodation at the beginning of the term, and no later than two weeks before the first in-class scheduled test or exam requiring accommodation (if applicable). After requesting accommodation from PMC, meet with me to ensure accommodation arrangements are made. Please consult the PMC website for the deadline to request accommodations for the formally-scheduled exam (if applicable).

Survivors of Sexual Violence: As a community, Carleton University is committed to maintaining a positive learning, working, and living environment where sexual violence will not be tolerated, and survivors are supported through academic accommodations as per Carleton's Sexual Violence Policy. For more information about the services available at the university and to obtain information about sexual violence and/or support, visit: <https://carleton.ca/equity/sexual-assault-support-services>.

Accommodation for Student Activities: Carleton University recognizes the substantial benefits, both to the individual student and for the university, that result from a student participating in activities beyond the classroom experience. Reasonable accommodation must be provided to students who compete or perform at the national or international level. Please contact your instructor with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. Read more here: <https://carleton.ca/senate/wp-content/uploads/Accommodation-for-Student-Activities-1.pdf>.

For more information on academic accommodation, please visit: <https://students.carleton.ca/services/accommodation/>.

COVID Update

It is important to remember that COVID is still present in Ottawa. The situation can change at any time and the risks of new variants and outbreaks are very real. There are [a number of actions you can take](#) to lower your risk and the risk you pose to those around you including being vaccinated, wearing a mask, staying home when you're sick, washing your hands and maintaining proper respiratory and cough etiquette.

Feeling sick? Remaining vigilant and not attending work or school when sick or with symptoms is critically important. If you feel ill or exhibit COVID-19 symptoms do not come to class or campus. If you feel ill or exhibit symptoms while on campus or in class, please leave campus immediately. In all situations, you must follow Carleton's [symptom reporting protocols](#).

Masks: Carleton has paused the [COVID-19 Mask Policy](#), but continues to strongly recommend masking when indoors, particularly if physical distancing cannot be maintained. It may become necessary to quickly reinstate the mask requirement if pandemic circumstances were to change.

Vaccines: Further, while proof of vaccination is no longer required as of May 1 to attend campus or in-person activity, it may become necessary for the University to bring back proof of vaccination requirements on short notice if the situation and public health advice changes. Students are strongly encouraged to get a full course of vaccination, including booster doses as soon as they are eligible, and submit their booster dose information in [cuScreen](#) as soon as possible. Please note that Carleton cannot guarantee that it will be

able to offer virtual or hybrid learning options for those who are unable to attend the campus.

All members of the Carleton community are required to follow requirements and guidelines regarding health and safety which may change from time to time. For the most recent information about Carleton's COVID-19 response and health and safety requirements please see the [University's COVID-19 website](#) and review the [Frequently Asked Questions \(FAQs\)](#). Should you have additional questions after reviewing, please contact covidinfo@carleton.ca.