



Windsor Law

University of Windsor

2023 Fall Term | Professor Tanovich

## EVIDENCE SYLLABUS (LAWG-5850-1)

### 1. DESCRIPTION

The law of evidence is procedural in nature. It is aimed at control and regulation in an effort to fairly promote the search for truth. Those it controls through rules of admissibility and proof include the fact-finder, the lawyers and witnesses. The law of evidence consists of many rules and exceptions to the rules. As a result, the general guiding principles often get lost in a mass of cases and statutory provisions. In an effort to promote learning, the course is organized around the general principles and their application in various contexts.

The goal of the course is to briefly summarize the leading principles in lectures and then to critically explore the principles in context through case studies, problems and other class exercises. The course is organized into four parts. The first part will examine the location of evidence law: adversarial adjudication, the purpose of evidence law and its theoretical foundations. The second part will introduce you to the structural elements of the law of evidence including: burdens of proof, relevance, inductive reasoning, exclusionary discretion, limiting instructions, and exclusionary rules (character, sexual history evidence, hearsay, confessions, opinion evidence and privilege). The third part will examine how evidence is led including formal admissions, judicial notice, real evidence and witnesses. The fourth part will explore the basic rules governing fact-finding including assessing direct and circumstantial evidence.



## 2. LEARNING OUTCOMES

By the end of this course, a student should be able to:

- Identify the purpose of the law of evidence and how that purpose informs which evidence we admit and how we use it in the relevant system of adjudication;
- Identify the basic foundational elements of the common law approach to the law of evidence;
- Reason persuasively in the context of fact-finding;
- Effectively identify admissibility issues with respect to evidence;
- Effectively identify and critically assess the basic principles and rules governing the proof of matters and evaluation of evidence in adjudicative proceedings;
- Provide some theoretical and social context to the rules;
- Identify how systemic issues such as gender and racial bias & wrongful convictions are relevant to thinking about evidence law & how evidence law can respond to address these issues; and
- Apply the law to new facts

Many of the cases we will read in class involve sexual violence or sexual assault offences, often by men against women. As part of the course, we will spend time thinking about how evidence law can better respond to, and enhance, the fair adjudication of sexual assault cases. It is normal for students to have strong and sometimes conflicting feelings or reactions on this particular topic. **Respectful participation is a requirement of this course, agreement with others' viewpoints is not.** In light of this, the course discussions may be understandably difficult for any student for any variety of reasons. If you or someone you know find the readings or class discussions to be disruptive to your well-being, please consider making use of the available supports on and off-campus. This link provides more information about those resources: <http://www.uwindsor.ca/sexual-assault/>.

## 3. ANTI-INDIGENOUS & ANTI-BLACK RACISM

Anti-Indigenous and anti-Black racism is a serious systemic problem in all adjudicative processes in Canada. This problem is particularly acute in the criminal justice system. While racism towards all racialized groups is a serious systemic problem, our focus is on Black and Indigenous communities because it is these communities who have been and, continue to be, disproportionately over and under-policed; disproportionately killed or seriously injured by the police; disproportionately denied bail or released with stricter conditions; disproportionately imprisoned; and, disproportionately the victims of wrongful convictions.

With respect to anti-Indigenous racism, the Supreme Court of Canada acknowledged in [\*R v Barton\*](#) 2019 SCC 33 that:

[1] We live in a time where myths, stereotypes, and sexual violence against

women – particularly Indigenous women and sex workers – are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. While serious efforts are being made by a range of actors to address and remedy these failings both within the criminal justice system and throughout Canadian society more broadly, this case attests to the fact that more needs to be done. Put simply, we can – and *must* – do better. ...

[198] Trials do not take place in a historical, cultural, or social vacuum. Indigenous persons have suffered a long history of colonialism, the effects of which continue to be felt. There is no denying that Indigenous people – and in particular Indigenous women, girls, and sex workers – have endured serious injustices, including high rates of sexual violence against women. The ongoing work of the National Inquiry into Missing and Murdered Indigenous Women and Girls is just one reminder of that painful reality (see Interim Report, *Our Women and Girls Are Sacred* (2017)).

[199] Furthermore, this Court has acknowledged on several occasions the detrimental effects of widespread racism against Indigenous people within our criminal justice system ... For example, in *Williams*, this Court recognized that Indigenous people are the target of hurtful biases, stereotypes, and assumptions, including stereotypes about credibility, worthiness, and criminal propensity, to name just a few (para. 28). Moreover, in *Ewert*, this Court stressed that “discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system, including the prison system” (para. 57). In short, when it comes to truth and reconciliation from a criminal justice system perspective, much-needed work remains to be done.

With respect to anti-Black racism, the Ontario Court of Appeal in [R v Theriault](#) 2021 ONCA 517 observed that:

[143] The existence of anti-Black racism in Canadian society is beyond reasonable dispute and is properly the subject matter of judicial notice. It is well recognized that criminal justice institutions do not treat racialized groups equally: Robin T. Fitzgerald and Peter J. Carrington, “Disproportionate Minority Contact in Canada: Police and Visible Minority Youth” (2011) 53 *Can. J. Crimin. & Crim. Just.* 449, at p. 450; *R. v. Le*, [2019 SCC 34](#), 375 C.C.C. (3d) 431. This reality may inform the conduct of any racialized person when interacting with the police, regardless of whether they are the accused or the complainant.

...

[146] In my view, it is incumbent on trial judges to consider relevant social context, such as systemic racism, when making credibility assessments. The trial judge did not err in doing so, and his findings are entitled to considerable deference on appeal.

Similarly, in [R v Morris](#) 2021 ONCA 680, the same Court held:

[1] It is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society, and in particular in the Greater Toronto Area. That reality is reflected in many social institutions, most notably the criminal justice system. It is equally clear that anti-Black racism can have a profound and insidious impact on those who must endure it on a daily basis ... Anti-Black racism must be acknowledged, confronted, mitigated and, ultimately, erased. This appeal requires the court to consider how trial judges should take evidence of anti-Black racism into account on sentencing.

These are powerful exhortations from our highest courts that cannot be ignored by judges, Crown Attorneys, defence counsel and law students in criminal law and evidence courses. One of the themes of this course will be an exploration of how anti-Indigenous and anti-Black racism manifests itself in the application of the rules of evidence and what steps can be taken to address it.

It needs to be said that it is disruptive and painful to talk about racism especially for our Indigenous and Black students. In addition, there is always a danger that in talking about these issues with respect to criminal (in)justice, that we will be triggering and furthering some of the harmful and untrue stereotypes that impose significant burdens on these communities. That said, change requires acknowledgment, understanding, a commitment to take action and to devise creative solutions. The key is to ensure that the instruction and discussion is done in a sensitive and thoughtful manner. I make that commitment to my Indigenous and Black students. If you or someone you know finds these discussions disruptive to your (their) well-being, please consider making use of the available supports at the law school (see #4).

#### 4. MENTAL HEALTH RESOURCES

“From time to time, students face obstacles that can affect academic performance. If you experience difficulties and need help, it is important to reach out to someone.” A full list of on- and off-campus resources is available at: <http://www.uwindsor.ca/wellness>.

For a list of the resources available at the law school see: <https://www.uwindsor.ca/law/1148/wellness>.

5. **SEXUAL VIOLENCE PREVENTION & SUPPORT RESOURCES**

The University of Windsor values dignity, respect and equality for all individuals and strives to foster an atmosphere of healthy attitudes and behaviours towards sexuality, sex and gender. The University is committed to maintaining a healthy and safe learning, living, social, recreational and working environment. The University's sexual misconduct policy can be found here: <https://www.uwindsor.ca/sexual-assault/301/university-policies>. If you wish to speak confidentially about an incident of sexual violence, please contact the Office of Sexual Violence Prevention, Resistance, and Support by email at [svsupport@uwindsor.ca](mailto:svsupport@uwindsor.ca). Dusty or Anne will be happy to follow-up to discuss the supports and information that will be most helpful to you. Please note, you do *not* have to formally report your experience in order to receive support, resources, and guidance. If you would like to consider filing a formal complaint with the University or have questions about policies and procedures regarding sexual misconduct, Dusty and Anne can also provide this information and assist with the process.

6. **RELEVANT ACADEMIC AND ACCOMMODATION POLICIES**

All relevant academic and accommodation policies for the law school can be accessed here: <https://www.uwindsor.ca/law/student-resources/41/forms-and-policies>.

7. **CLASSES**

**Date:** Tues/Thurs  
**Time:** 10:30-12:20 pm  
**Location:** Moot Court

All class power-points will be posted on Brightspace before or immediately after class - <https://brightspace.uwindsor.ca/d2l/home/143510>.

8. **RECORDING CLASS**

I will not be recording classes. However, all students may record lectures, provided that the recording is for their own personal study use. Recordings are intended to permit lecture content review to enhance understanding of the topics presented. Recordings are not a substitute for attending class and, of course, you cannot record a class for personal use if you are not in class to conduct the recording. To assist students in recording class, I will be using a microphone.

Regulations and limits surrounding recording of lectures are covered in the fair dealings section of the Federal *Copyright Act*. The *Copyright Act* and copyright law protect lectures by University lecturers. It is therefore stressed that the material recorded still belongs to the instructor and can only be used for personal study in the course in question. Student who record lectures may not share, distribute, email or otherwise communicate or

disseminate these materials. If a student shares or disseminates a recorded lecture in any way (including transcription), thereby breaching copyright legislation, the student will be subject to University misconduct policies, at a minimum, and may be subject to other legal action including disclosure of the misconduct to the Law Society of Ontario as part of the “good character” requirement. The University has implemented a new policy on recording guest lectures and student presentations as well as limits that may be placed on what is recorded: see <https://tinyurl.com/wgfenjn>.

## 9. TEXTS

Stuart, Tanovich & Dufraimont, *Evidence: Principles and Problems* (13<sup>th</sup> edition) (Toronto: Thomson Carswell, 2021) (CB)

*Canada Evidence Act*

<http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-5/latest/rsc-1985-c-c-5.html>

*Ontario Evidence Act*

<http://www.canlii.org/en/on/laws/stat/rso-1990-c-e23/latest/rso-1990-c-e23.html>

## 10. EVALUATION

### (i) Quizzes (30%) (Week of October 16 & November 20)

There will be two true/false on-line quizzes (Brightspace). Each will consist of 15 questions. They will be available for 5 days (Mon (9:00 am) – Fri (3:00 pm)). The first quiz will be the middle of October and the second quiz will be the middle to end of November. Given that I am giving students a week to write the exam, I expect that students will not make any record of the questions or communicate their content to other students. By taking the exam, you will be committing to keeping the questions confidential.

### (ii) Written Judgment (15%) (Due November 30)

Students must choose a piece of Crown or defence evidence from *The Staircase* and assess its admissibility under Canadian law. The length of the judgment cannot exceed 5 double-spaced pages. It should clearly identify the piece of evidence at issue; its relationship to the case; the admissibility issue(s) it raises; the arguments of the Crown and defence; and the relevant law. It should also contain a well-reasoned conclusion (application of the law to the facts). Judgment will be graded on the basis of clarity, accuracy and persuasiveness.

### (iii) Final Exam (55%) (December Exam Period) (TBD)

The final exam will be a three hour modified closed-book exam. The only things you can bring into the exam are the casebook; printed provincial and federal Evidence Acts; the power-point slides printed one slide to a page. The back page can be blank and used for notes. You will not be able to access your computer or internet during the exam. The exam will consist of a series of hypothetical problems. There will be no true/false or multiple choice questions. A practice bank of questions will be posted in early October along with

the model answers to assist in your preparation for the exam. There will also be 5 practice true/false quizzes posted on Brightspace throughout the term.

#### 11. STUDENT EVALUATION OF TEACHING

A new survey instrument known as Student Perceptions of Teaching (SPT) will replace the old Student Evaluation of Teaching (SET) survey effective in the Fall 2024 semester. In accordance with Senate Bylaws 54, and 55, you will be provided with 15 minutes to complete the STPs online at the beginning of one regular class session within the last 2 weeks of scheduled classes.

#### 12. OFFICE HOURS

My office is on the second floor (#2310). Office hours will be by appointment although I will be in my office most days and students should feel free to drop by with questions. Extended online office hours will be offered before the quizzes and final exam. To book an appointment, please contact my Assistant – TBD.

My contact information: [tanovich@uwindsor.ca](mailto:tanovich@uwindsor.ca) (e-mail); @dtanovich (twitter) <https://www.uwindsor.ca/law/tanovich/> (website); extension 2966 (phone)

#### 13. OUR WORKING CASE



Throughout the course, we will examine a number of issues relating to the admissibility of evidence that arises in the NetFlix Documentary “The Staircase”

<https://www.netflix.com/ca/>. The relevant portions of the documentary are identified in the Syllabus, others will be identified in class. All references to Episodes relate to this documentary.

14. CLASS AND READING SCHEDULE

PART I - INTRODUCTION	READINGS	DATE
<p>1. The Course</p> <p>2. What is the Law of Evidence?</p>	<p>Syllabus</p> <p>CB 1-3; 32-38</p> <p><b>Episode 1 of the Staircase (0:00-12:00) (Introduction)</b></p> <p><b>Episode 8 (21:00-22:11) (legal vs factual truth)</b></p> <p><b>Episode 1 - 12:30-14:20; 17:40-19:40) (Defence/Prosecution Views of Case)</b></p> <p><b>Episode 4 - 33:53-43:11 (Opening Statements)</b></p> <p><b>Qs/</b></p> <p>1. What are the theories of the case?</p> <p>2. What evidence is/ may be available to support those theories?</p>	<p><b>September 5</b></p> <p><b>(Class #1)</b></p>
<p>3. Evidence Theory</p>	<p>CB 3-32; 39-43</p> <p><b>Episode 4 (30:11-31:30) (what is a trial all about?)</b></p> <p><b>Episode 7 (37:00- end) &amp; 8 (0-4:55) (defence discovery of blow poke)</b></p> <p><b>Qs/</b></p> <p>1. In Canada, would a defence lawyer have to turn over the blow poke?</p>	<p><b>September 7</b></p> <p><b>(Class #2)</b></p>



PART II - STRUCTURAL ELEMENTS OF THE LAW OF EVIDENCE	READINGS	DATE
<b>1. Burdens</b>		
Allocation	CB 45-57	<b>September 12 (Class #3)</b>
Measure of Evidential Burden - (i) Civil Cases (ii) Criminal Cases	(i) CB 123-135 (ii) CB 135-143 <b>Problem (page 128)</b>	
Measure of Persuasive Burden - (i) Criminal Cases (ii) Civil Cases	(i) CB 65-68; 80-83; 118-119 (ii) CB 57-65	
<b>2. Relevance</b>	CB 145-154; 219-227 (character evidence & motive) <b>Episode 2 (0:00-15:00)</b> <b>Episode 6 (4:11-18:00 (motive &amp; Peterson's sexual orientation))</b> <b>Qs/</b> 1. Is the evidence of Peterson's bisexuality, contact with a male sex worker, pornography relevant? How? <b>Problems #1,4 (pages 205-206)</b>	<b>September 14 (Class #4)</b>
<b>3. Inductive Reasoning</b>	CB 83-100; 154-164; 350--354 <b>Episode 5 (00:53-4:10) (the 911 call)</b> <b>Problems #7-8 (page 207)</b>	<b>September 19 (Class #5)</b>
<b>4. Exclusionary Discretion -</b> (i) Criminal Cases - Common Law (ii) Civil Cases	(i) CB 164-190 (ii) CB 191-194 <i>R v King</i> 2022 ONCA 665 at paras 132-202 (posted on Brightspace) <b>Episode 8 (14:30-17:15) (prosecution closing to jury on sexual orientation evidence)</b> <b>Qs/</b> 1. How would you rule on the character evidence? What is its probative value? Prejudicial effect? <b>Problems#1, 6, 8 (pages 205-207)</b>	<b>September 21 (Class #6)</b>
<b>5. Judicial Instructions</b>	CB 91 (excerpt from <i>R v White</i> ); 170 (excerpt from <i>R v Corbett</i> ); 323-326 (excerpt from <i>R v Barton</i> ); <i>R v Chouhan</i> (SCC) (posted on Brightspace)	<b>September 26 (Class #7)</b>

<b>6. Exclusionary Canons</b>		
<b>Character Evidence</b>	CB 218-219; 227-228	<b>September 28 (Class #8)</b>
Nature Of (i) Criminal Cases (ii) Civil Cases	(i) CB 231-247 (ii) CB 228-231 <b>Problems #2-4 (pages 247-248)</b>	
Purpose - <u>Bad Character</u> - (i) Similar Fact Evidence & Third Parties	(i) CB 248-294 <b>Episode 3 &amp; Episode 4 (7:27-16:47) (death of Liz Ratliff) Qs/ 1. Would the evidence of the death of Liz Ratliff be admissible in Canada? 2. Why is it important for these motions to be decided before trial? Problems #2, 4-5 (pages 282-283; 288)</b>	<b>October 3/5 (Classes #9-10)</b>
Purpose - <u>Bad Character</u> - (i) <i>Rebuttal Evidence</i> (ii) <i>Relevant to Material Fact</i> (iii) <i>Assessing Credibility</i>	(i) CB 242-245; 292-294 (ii) CB 217-219 (iii) CB 171-177	<b>October 10 (Class #11)</b>
<b>Sexual Activity Evidence</b>	CB 296-349	<b>October 12 (Class #12)</b>
<b>Hearsay</b>		<b>October 17 (Class #13)</b>
Identification		
Principled Approach	CB 363-419; 421-428 Class time will be used to take up 3 hearsay problems: <b>(a)</b> Police statement of MW ( <i>R v S(J)</i> ) (hand-out) <b>(b)</b> Police statement of Skupien ( <i>R v Khelawon</i> ) (hand-out) <b>(c)</b> Phone call in <i>R v Baldree</i> (page 417) To prepare for class the following checklist should be used: <b>1.</b> Is the evidence hearsay? <b>2.</b> If yes, is it admissible under the principled approach (is it necessary? Is there threshold reliability (either substantive or procedural reliability)?	

	In thinking about #2 - identify and organize all of the relevant factors you would highlight as the Crown or defence.	
<b>Starting to Prepare for the Exam</b>	Practice Bank (posted on Brightspace) Part A (1-3; 8-9; 11; 13-14; 17; 21-23; 29-31) Part B (4; 7; 9-10; 12; 17; 19) Part C (4; 6; 8; 11-13; 16-19; 22; 24; 25-27; 28-29; 31-34; 37)	<b>Practice Quiz #1</b> Posted on Brightspace
<b>Voluntary Confessions Rule</b>	CB 432-440; 493-516; 561-569 <b>Making a Murderer (2018) (Episode 2) (4:39-16:10)</b> <b>Problems #1-5 (pages 558-561)</b>	<b>October 19 (Class #14)</b>
<b>Opinion Evidence</b>		<b>October 24/26 (Classes #15-16)</b>
Lay Opinion Evidence	CB 569-578	
Expert Opinion Evidence	CB 578-615; 638-648 <b>Episode 5 (23:21-35:38; 39:00-45:40) (blood splatter &amp; cause of death) Qs/</b> <b>2. Would the cause of death evidence of Deborah Radisch or the blood splatter evidence of Duane Deaver be admissible in Canada?</b> <b>Problems (should the SCC over-rule the ratios in <i>R v McIntosh</i> (page 629); <i>R v Osmar</i> &amp; <i>R v Pearce</i> (pages 652, 655))</b>	

<b>PART III - MECHANICS OF PROOF</b>	<b>READINGS</b>	<b>DATE</b>
<b>1. Judicial Notice</b>	CB 762-790 <b>Problems #1-2; 4-5 (pages 790-791)</b>	<b>October 31 (Class #17)</b>
<b>2. Real Evidence</b>	CB 791-834 <b>Episode 5 (12:35-17:00) (photographs)</b> <b>Episode 7 (24:26-27:70) (animation)</b> <b>Episode 7 (33:10-37:00) (view)</b>	<b>November 2 (Class #18)</b>
<b>3. Witnesses</b>		
<b>Competence</b>	CB 834-841; 863-874	<b>November 14 (Class #19)</b>
<b>Compellability</b>	CB 874-886; 897-910 <b>Episode 2 (13:03-25:11) (calling the client)</b>	
<b>Special Measures: Children</b>	CB 841-862	<b><u>Practice Quiz#2 &amp; #3</u></b> (Posted on Brightspace)
<b>Direct Examination</b>	CB 910-927 <b>Problems #1-4 (pages 927-929)</b>	<b>November 16 (Class #20)</b>
<b>Cross-Examination</b>	CB 931-943; 951-968	
<b>Impeachment</b>	CB 969-971; 990-1023 <b>Episode 6 (2:18-2:55) (Zamperini on state of sister's marriage to Peterson)</b> <b>Episode 6 (35:30-39:12) (Berner)</b>	<b>November 21 (Class #21)</b>
<b>Bolstering Credibility/Rehabilitation</b>	CB 1030-1051; 1061-1063 <i>R v Gerrard</i> 2022 SCC 13 (posted on Brightspace)	<b>November 23 (Class #22)</b>  <b><u>Practice Quiz#4</u></b> (posted on Brightspace)

<b>PART IV - FACT-FINDING</b>	<b>READINGS</b>	<b>DATE</b>
<b>1. Direct Evidence</b>		
<b>Assessing Credibility</b> - (i) Demeanour Evidence (ii) Other Relevant Considerations (iii) Applying <i>WD</i>	(i) CB 1023-1030; 1052-1060 (ii) See above under Character Evidence, Children, Impeachment, Rehabilitation (iii) CB 68-80	<b>November 28/30 (Classes #23-24)</b>
<b>Identification Evidence</b>	CB 100-109	
<b>2. Circumstantial Evidence</b>	CB 109-118 <b>Episode 8 (17:20-27:04)</b> <b>Qs/</b> <b>(a)</b> Would you convict Peterson if you were on the jury? Why or why not? <b>(b)</b> Do you think the failure of Peterson to testify made a difference?	
<b>3. Corroboration</b>	CB 1063-1081	<b><u>Practice Quiz#5</u></b> (posted on Brightspace)