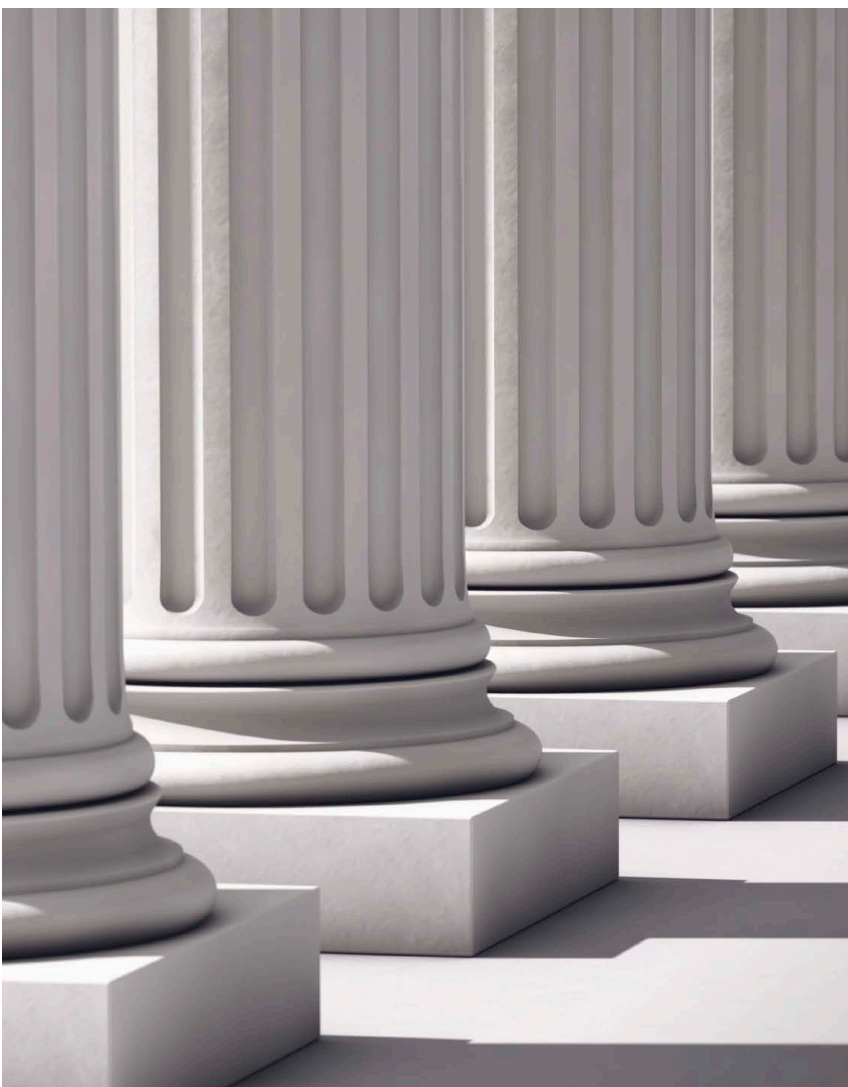




ALBERTA
LAW REFORM
INSTITUTE



ALBERTA LAW REFORM INSTITUTE
**COMPETENCE AND COMMUNICATION
IN THE ALBERTA EVIDENCE ACT**



FINAL REPORT

111

JAN 2018





COMPETENCE AND COMMUNICATION IN THE ALBERTA EVIDENCE ACT

FINAL ||| **111**
REPORT

JANUARY 2018

ISSN 0834-9037

ISBN 978-1-896078-72-4

ALRI claims copyright © in this work. ALRI encourages the availability, dissemination and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following conditions:

- (1) You must acknowledge the source of this work,
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of ALRI.

Table of Contents

Alberta Law Reform Institute	i
Acknowledgments	iii
Summary	v
Recommendations.....	vii
Table of Abbreviations	ix
CHAPTER 1 Introduction	1
A. Background	1
B. Outline of the Project and Consultation Process	2
1. Scope of the project.....	2
2. Consultation process	3
3. Themes emerging from consultation	4
a. Recognition of individual difference.....	4
b. Reliability.....	4
c. Consistency.....	5
C. Guiding Principles.....	5
D. Outline of This Report.....	6
CHAPTER 2 The Need for Reform.....	9
A. Introduction.....	9
B. History.....	9
1. The importance of the oath at common law	9
2. Children’s evidence.....	10
3. Psychological research	11
4. Reform of the <i>Canada Evidence Act</i>	12
C. Establishing a Child’s Competence to Give Evidence	14
1. Understands the nature of an oath.....	14
2. Understands the duty of speaking the truth.....	16
3. Of sufficient intelligence to justify the reception of the evidence.....	18
4. Inconsistency with the <i>Canada Evidence Act</i>	19
D. Establishing an Adult’s Competence to Give Evidence	19
E. Corroboration	20
F. Witnesses with Communication Disabilities	23
CHAPTER 3 Establishing Competence to Give Evidence	27
A. Approaches to Establishing Competence	27
1. Options.....	27
a. Mandatory competency inquiries	27
b. Rebuttable presumption of competence	28
c. Absolute presumption of competence	28
2. Consultation results	29
B. Should There Be a Rebuttable Presumption That a Child is Competent to Give Evidence?.....	29
C. Approaches to Criteria for Competence	30
1. Options.....	30
2. Consultation results	32

D.	When Should the Presumption of Competence Be Rebutted?.....	32
1.	For child witnesses.....	32
2.	For adults with cognitive impairment.....	33
E.	Competence to Give Evidence by Affidavit and at Questioning.....	34
1.	Competence to give evidence by affidavit.....	34
2.	Competence to give evidence at questioning.....	35
CHAPTER 4	Formalities Before Giving Evidence	37
A.	Approaches to Formalities	37
1.	Options.....	37
a.	No formality.....	37
b.	Judicial caution	38
c.	Oath	38
d.	Affirmation.....	38
e.	Promise	39
2.	Consultation results	39
B.	Importance of a Commitment to Tell the Truth.....	40
C.	Should a Child Be Permitted to Swear an Oath?	40
D.	Should the Secular Formality Be an Affirmation or a Promise?	41
1.	Is there a difference between an affirmation and a promise to tell the truth?.....	42
a.	Form	42
b.	Admissibility	43
c.	Corroboration and weight.....	45
d.	Perjury	45
2.	One secular formality.....	46
E.	Should a Child Be Asked to Choose Between Oath and Affirmation?.	47
1.	The free choice model for adults	47
2.	An exception to the free choice model	47
F.	At What Age is a Witness Considered a Child?	49
1.	Options.....	49
2.	Consultation results	50
3.	Should the age limit remain at fourteen?.....	50
G.	Should There Be a Simple Form of Affirmation?	51
H.	What Approach to Formalities Accommodates Adults with Cognitive Impairment?.....	53
I.	Formalities for Giving Evidence Out of Court	54
1.	Affidavits	55
2.	Evidence at questioning or before a tribunal	55
CHAPTER 5	Weighing Children's Evidence.....	57
A.	Introduction.....	57
B.	Should a Child's Evidence Require Corroboration?.....	57
C.	Should There Be a Warning About a Child's Evidence?	58
CHAPTER 6	Witnesses with Communication Disabilities.....	61

Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

ALRI Board Members

Hon Judge CD Gardner (Chair)
 MT Duckett QC (Vice Chair)
 DR Cranston QC
 Hon Justice JT Eamon
 AL Kirker QC
 J Koshan
 PD Paton
 S Petersson
 KA Platten QC
 RJ Wood

Appointment Type

Member at Large
 Member at Large
 Law Society of Alberta
 Member at Large
 Member at Large
 University of Calgary, Faculty of Law
 University of Alberta, Provost
 Executive Director
 Member at Large
 University of Alberta, Faculty of Law

ALRI Staff Members

L Buckingham	Counsel
C Burgess	Operations Manager
B Chung	Communications Associate
DW Hathaway	Counsel
J Koziar	Executive Assistant
K MacKenzie	Counsel
R Mitchell	Counsel
S Petersson	Executive Director
G Tremblay-McCaig	Counsel

ALRI reports are available to view or download from our website at:

www.alri.ualberta.ca

The preferred method of contact for the Alberta Law Reform Institute is email at:

lawreform@ualberta.ca

402 Law Centre
 University of Alberta
 Edmonton AB T6G 2H5

Phone: (780) 492-5291
 Fax: (780) 492-1790
 Twitter: @ablawreform

Acknowledgments

ALRI extends thanks to all who provided comments on the Report for Discussion or who responded to the survey. We also thank the members of the following Canadian Bar Association sections for hosting presentations and providing feedback on proposals:

Children's Law and Child Welfare (South)
Elder Law (North)
Civil Litigation (North)

Laura Buckingham, legal counsel, carried out the consultation and additional research for this report. Debra Hathaway, legal counsel, provided advice and insight on evidence law and law reform process. Ashley Hathorn, summer researcher, provided proofreading, footnote checking and wrote the summary. The report was prepared for publication by Jenny Koziar.

Summary

On occasion, a court must determine whether a proposed witness is competent to give evidence. The question arises with child witnesses and may also arise for adults with cognitive impairment. Alberta legislation reflects outdated assumptions about children's abilities and fails to address adults with cognitive impairment. It also has a gap affecting witnesses who use alternative means of communication. Other Canadian jurisdictions have already reformed legislation to address these issues.

The Alberta Law Reform Institute (ALRI) recommends reform to facilitate the reception of evidence from children, adults with cognitive impairment, and witnesses who use alternative means of communication. These reforms will bring Alberta's legislation up-to-date and bring it into better alignment with the equivalent federal legislation. The report discusses the effect these reforms would have on evidence by affidavit, at questioning, before a tribunal, or before a court.

Establishing Competence to Give Evidence

There are several issues with the existing rules about establishing competence to give evidence. While adults are presumed to be competent witnesses, the *Alberta Evidence Act* [AEA] requires that a court hold an inquiry to determine whether a child may give evidence. This requirement is based on an unjustified stereotype that children are unreliable witnesses. In an inquiry, the AEA requires a court to consider whether a child understands the nature of an oath. A similar test applies if an adult's competence is challenged. A test focusing on an oath, which has religious origins, is inappropriate in a multicultural society.

ALRI recommends eliminating the mandatory competency inquiry for a child and replacing it with a rebuttable presumption that every witness, regardless of age, is presumed competent to give evidence. The presumption of competence should be rebutted only if a proposed witness is unable to understand and respond to questions.

Formalities Before Giving Evidence

ALRI considered whether a child should swear an oath, make an affirmation, or make a promise to tell the truth before giving evidence.

During consultation, a question arose about whether there is a difference between an affirmation and a promise to tell the truth. This report considers the form and effects of both. It concludes that the difference, if any, between an affirmation and a promise to tell the truth is insufficiently clear. There is

little reason to complicate Alberta law by introducing a promise to tell the truth. An affirmation should be the only secular formality in Alberta law.

ALRI has previously recommended that adults should have a free choice between swearing an oath and making an affirmation, but research suggests the free choice model is not well suited to the needs of children. ALRI therefore recommends an exception to the free choice model, allowing a court to direct a child to make an affirmation. This rule would apply to a child under the age of 14. Legislation should not go so far as to prohibit a child from swearing an oath, as the benefits of such a prohibition do not outweigh the potential impairment of religious freedom.

ALRI recommends adding a suggested simple form of affirmation, suitable for a child, to the AEA. The report includes a proposed form.

Weighing Evidence

ALRI recommends abolishing the current requirement for corroboration of a child's unsworn evidence. Similarly, Alberta legislation should not require nor limit any warning to the trier of fact about relying on the evidence of a child.

Communication Disabilities

Some witnesses may have difficulty giving evidence verbally. This report recommends addressing a gap in legislation to ensure that witnesses can use their preferred means of communication to give evidence. Means of communication should not affect the determination of competence.

Recommendations

RECOMMENDATION 1

There should be a presumption that a child of any age is competent to give evidence..... 30

RECOMMENDATION 2

The presumption of competence to give evidence should be rebutted only if a child is unable to understand and respond to questions..... 33

RECOMMENDATION 3

The presumption of competence to give evidence should be rebutted only if an adult is unable to understand and respond to questions. 33

RECOMMENDATION 4

There should be no prohibition against a child swearing an oath. 41

RECOMMENDATION 5

A presiding officer should be able to direct that a child make an affirmation before giving evidence..... 49

RECOMMENDATION 6

Special rules for children's evidence should apply to children under the age of 14..... 51

RECOMMENDATION 7

The *Alberta Evidence Act* should include a non-mandatory, permissive form of simple affirmation as an instructive example. 53

RECOMMENDATION 8

There should be no prohibition against an adult with cognitive impairment swearing an oath. 54

RECOMMENDATION 9

If an adult with cognitive impairment does not choose between an oath and an affirmation, a presiding officer should be able to direct that the adult make an affirmation before giving evidence. 54

RECOMMENDATION 10

The requirement for corroboration of a child's unsworn evidence should be abolished..... 58

RECOMMENDATION 11

Alberta legislation should neither require nor limit any warning to the trier of fact about relying on the evidence of a child. 59

RECOMMENDATION 12

A witness with a disability affecting communication should be entitled to communicate evidence in any manner that is intelligible..... 62

Table of Abbreviations

LEGISLATION

AEA	<i>Alberta Evidence Act</i> , RSA 2000, c A-18
CEA	<i>Canada Evidence Act</i> , RSC 1985, c C-5

LAW REFORM PUBLICATIONS

2014 Report	Alberta Law Reform Institute, <i>Oaths and Affirmations</i> , Final Report 105 (2014), online: < https://www.alri.ualberta.ca/docs/FR_105.pdf >.
-------------	---

CHAPTER 1

Introduction

A. Background

[1] Sections 19 and 20 of the *Alberta Evidence Act* [AEA] establish rules for certain witnesses with special circumstances.

[2] Section 19 of the AEA establishes rules for child witnesses. It states:¹

Evidence of child

19(1) In a legal proceeding where a child of tender years is offered as a witness and the child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of the child may be received though not given on oath if, in the opinion of the judge, justice or other presiding officer, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

(2) No case shall be decided on the evidence unless the evidence is corroborated by other material evidence.

A court must determine whether a child will give evidence and, if so, whether the child's evidence will be under oath or unsworn. Although unsworn evidence is admissible, a court may not rely on it unless it is corroborated.

[3] Section 20 of the AEA provides that a witness who cannot speak may give evidence by other means. It states:²

20 A witness who is unable to speak may give evidence in any manner by which the witness can make it intelligible.

[4] The AEA applies to civil matters in Alberta. It also applies to proceedings under provincial legislation, including the *Child, Youth and Family Enhancement Act* and the *Family Law Act*, among others. It does not apply to proceedings within federal jurisdiction, including (most notably) criminal matters and proceedings under the *Divorce Act*. The *Canada Evidence Act* [CEA] applies to those proceedings. In contrast to the AEA, the CEA establishes a strong

¹ *Alberta Evidence Act*, RSA 2000, c A-18, s 19 [AEA].

² AEA, s 20.

presumption that a child's evidence should be heard and does not require corroboration.³

[5] Sections 19 and 20 of the AEA have remained essentially unchanged since the first version of the Act was adopted in 1910. Despite their longevity, they have been relatively obscure. They are rarely cited by Alberta courts. There are almost no reported decisions considering them.

[6] ALRI (then the Institute of Law Research and Reform) previously considered Section 19 in its 1982 report *Evidence and Related Subjects: Specific Proposals for Alberta Legislation*. At the time, ALRI recommended "that the proposed Alberta Evidence Act not preclude a court from accepting the uncorroborated evidence of an unsworn child."⁴ The recommendation was not implemented.

[7] Several Canadian jurisdictions have updated provisions about children's evidence to reflect more modern views about children. In particular, the approach to children's evidence under the CEA is now markedly different from the AEA. Some jurisdictions have also introduced provisions about competence of adult witnesses and updated provisions about witnesses with communication disabilities.

B. Outline of the Project and Consultation Process

[8] ALRI recently completed a project on oaths and affirmations, which proposed amendments to parts of the AEA.⁵ In the course of that project, ALRI identified issues with sections 19 and 20 of the AEA. As the issues were outside the scope of the original project, ALRI initiated the current project.

1. SCOPE OF THE PROJECT

[9] The scope of this project is quite narrow. The recommendations in this report are intended to clarify the process when witnesses give evidence in proceedings.

³ *Canada Evidence Act*, RSC 1985, c C-5, s 16.1 [CEA].

⁴ Institute of Law Research and Reform (Alberta), *Evidence and Related Subjects: Specific Proposals for Alberta Legislation*, Report 37B (1982) at 8, online: <<https://www.alri.ualberta.ca/docs/fr037b.pdf>>.

⁵ See Alberta Law Reform Institute, *Oaths and Affirmations*, Final Report 105 (2014), online: <https://www.alri.ualberta.ca/docs/FR_105.pdf> [2014 Report].

[10] It is not always necessary for a child to give evidence in proceedings. Even in a case that affects a child's interests, a court may consider the child's views without receiving evidence directly from the child. In many cases, relevant evidence can be introduced in other ways.⁶ Even if a party proposes that a child give evidence, a court may refuse to receive the evidence if necessary to protect the child.⁷

[11] Similarly, in a case affecting the interests of an adult with cognitive impairment, a court may receive evidence about the person without necessarily hearing evidence directly from the person.

[12] The recommendations in this report are not intended to limit the ways to receive information about a child or an adult with cognitive impairment, or to affect a court's powers to protect them. In many cases, options that do not require the person to give evidence will be the most appropriate. The recommendations in this report would facilitate admission of evidence in cases where it is necessary and appropriate.

2. CONSULTATION PROCESS

[13] In September 2015, ALRI published *Competence and Communication in the Alberta Evidence Act*, Report for Discussion 27. The Report for Discussion proposed ten preliminary recommendations.⁸

[14] In conjunction with the Report for Discussion, ALRI created an online survey to gather feedback on the preliminary recommendations. There were thirteen questions. Each question asked whether respondents agreed or disagreed with a proposal from the Report for Discussion. There was also a text box below each question to allow respondents to provide additional comments. Eight people completed the survey.

[15] ALRI also attended Canadian Bar Association section meetings to discuss the preliminary recommendations. ALRI made presentations at the Children's Law and Child Welfare (South) section and the Elder Law section (North). Section members' comments and insights were noted.

⁶ For example, a court may receive hearsay evidence about a child's statements or expert evidence from a professional who has assessed the child. In some cases, a judge may interview a child outside the courtroom.

⁷ See *MES v DAS*, 2001 ABQB 1015; *Hartley v Del Pero*, 2017 ABQB 1 at paras 34-50.

⁸ Alberta Law Reform Institute, *Competence and Communication in the Alberta Evidence Act*, Report for Discussion 27 (2015) at ix, online: <<https://www.alri.ualberta.ca/docs/rfd027.pdf>>.

[16] All responses were carefully considered during the preparation of this final report.

3. THEMES EMERGING FROM CONSULTATION

[17] Respondents' comments revealed some common values and concerns. They can be grouped into three themes.

a. Recognition of individual difference

[18] The first theme is recognition of individual difference. Many respondents noted that, even within groups sharing common characteristics, individual abilities vary.

[19] Children are not all alike. Age matters a great deal. A twelve-year-old child is quite different than a four-year-old child. Even within age groups, however, children have different characteristics and abilities.

[20] Similarly, adults with cognitive impairment are not all alike. Two individuals with the same diagnosis may nonetheless experience a condition quite differently. Not only are individuals different, but a single individual may experience changes in abilities and performance. For example, one respondent mentioned that symptoms of dementia may vary from day to day, so competence is not static.

[21] Recognition of individual difference invokes a constitutional principle that must be respected in legislation. Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees every individual equal protection and equal benefit of the law.⁹ This guarantee does not require identical treatment. Rather, laws should recognize the dignity of each individual and avoid stereotyping based on irrelevant personal characteristics.¹⁰

b. Reliability

[22] The second theme is reliability. Many respondents were concerned that evidence should be reliable.

⁹ *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

¹⁰ See generally *R v Kapp*, 2008 SCC 41 at paras 14-25.

[23] This general concern appeared in comments about a range of specific issues. It was evident in comments indicating that children are particularly suggestible, that children or adults with cognitive impairment may not understand the legal process or the importance of telling the truth, and that it is important for witnesses to understand the nature of an oath or the concept of perjury.

[24] Reliability is obviously important. Courts require reliable evidence to make just decisions. Unfortunately, there is no way to guarantee that all evidence will be reliable. Rather, there are strategies at different levels to filter out unreliable evidence and promote the use of reliable evidence. At one level, certain kinds of evidence may be excluded because they are presumed to be insufficiently reliable. At another level, admissible evidence is tested by cross-examination. At a third level, the trier of fact assesses and weighs all evidence, and determines what evidence to accept. These strategies apply to any evidence, from any witness.

c. Consistency

[25] The final theme is consistency. Several respondents suggested evidence legislation should be consistent with other legal rules.

[26] There are many kinds of consistency. It may be within a single statute, between different statutes in the same jurisdiction, between jurisdictions, or between provisions of a statute and the common law, policies, or other legal rules. Specific examples raised during consultation illustrate the range. Respondents mentioned consistency between the AEA and the CEA, between rules for adult witnesses and child witnesses, between the AEA and other Alberta legislation (for example, respondents specifically mentioned the *Child, Youth and Family Enhancement Act*), and between the AEA and other legal rules (for example, respondents specifically mentioned determination of testamentary capacity and policies for legal representation of children and youth).

C. Guiding Principles

[27] Building on the themes from consultation, ALRI has identified principles to guide its final recommendations.

[28] There are four principles specific to this project.

- First, the law should facilitate the reception of relevant evidence. The starting point of evidence law is that relevant evidence should be admitted. Exclusions must be justified.¹¹
- Second, the law should not unduly restrict the trier of fact. A trier of fact is best placed to assess evidence and weigh it in its own context.
- Third, the law should not draw arbitrary distinctions based on age or other personal characteristics.
- Fourth, the law should provide flexibility to accommodate individuals' particular abilities or needs.

[29] There are several general principles that apply to any law reform project. Laws should be clear and produce predictable results. They should promote efficiency, allowing parties to focus on the core issues in question and avoid spending disproportionate time and resources on peripheral issues. Where possible, legal rules should be consistent with each other.

[30] Recognizing that there are many kinds of consistency, ALRI has set priorities for this project. We have first sought consistency between our recommendations in this report and in our 2014 Report to ensure reforms to the AEA are internally coherent. Consistency between the AEA and the CEA is also desirable. Alberta courts must apply both the AEA and the CEA, depending on the type of matter. Consistency with practice under the CEA would simplify application.

D. Outline of This Report

[31] Chapter 1 of this report describes the current law and the outline of this project.

[32] Chapter 2 describes the need for reform, summarizing the issues with the current law in Alberta.

[33] Chapters 3, 4, 5, and 6 make recommendations for reform. Chapter 3 discusses how to establish competence to give evidence. Chapter 4 discusses

¹¹ See *R v Seaboyer*, [1991] 2 SCR 577 at 609:

... everything which is probative should be received, unless its exclusion can be justified on some other ground. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial.

formalities before giving evidence. Specifically, it addresses whether children or adults with cognitive impairment should swear an oath, make an affirmation, or make a promise before giving evidence. Chapter 5 addresses rules specific to weighing children's evidence. Chapter 6 discusses how witnesses with communication disabilities should be accommodated.

CHAPTER 2

The Need for Reform

A. Introduction

[34] There are several problems with sections 19 and 20 of the AEA. In brief, they are:

- The process to establish a child's competence to give evidence is difficult to apply, vague, and overly intrusive.
- The law about an adult's competence focuses on understanding the nature of an oath, which is not a good measure of ability to give evidence.
- A child's unsworn evidence cannot be relied upon unless corroborated. The requirement for corroboration is out of step both with the law of evidence in other Canadian jurisdictions and with current knowledge about children.
- There is a legislative gap affecting witnesses with communication disabilities so that some may not be permitted to give evidence by their preferred means of communication.

B. History

[35] Section 19 of the AEA is a product of its time. It reflects beliefs about swearing an oath and ideas about children from more than a hundred years ago.

1. THE IMPORTANCE OF THE OATH AT COMMON LAW

[36] At common law, all witnesses were required to swear an oath. In early times, the oath was specifically Christian. Eventually, English courts came to accept other forms of oath.¹² The English Parliament also adopted legislation that

¹² See *Omychund v Barker* (1744), 1 Atk 21, 26 ER 15 (CA), where the Court of Appeal held several Hindu witnesses' evidence was admissible after they swore a Hindu form of oath.

permitted witnesses whose religion forbade them from swearing an oath to make an affirmation instead.¹³

[37] The oath was central to both admissibility and reliability. It was presumed that nearly all adults shared the belief that lying under oath would have severe spiritual consequences. The oath gave assurance that the witness would tell the truth. If a witness would not swear an oath, or had no religious belief, the witness's evidence was inadmissible.

2. CHILDREN'S EVIDENCE

[38] Historically, children's evidence was treated with suspicion. Many different reasons were given for treating children's evidence with special care, including that children cannot understand what they see and hear, that they have poor memories, that they are highly suggestible and easily misled, that they have difficulty distinguishing fact from fantasy, that they are naturally immoral, and that they are likely to lie.¹⁴

[39] At common law, a child's evidence was admissible only if the child understood "the nature and consequences of an oath".¹⁵ There was no presumption that a child was competent to give evidence; the court had to be satisfied that the child understood the spiritual consequences of lying under oath. If so, the child's oath would give assurance that the child would tell the truth. A child who did not understand the nature and consequences of an oath would not be permitted to swear an oath, and so could not give evidence.

[40] In the late nineteenth and early twentieth century, many jurisdictions adopted legislation relaxing the common law rule as it applied to children. In 1893, a provision about children's evidence was included in the CEA. This provision served as a model for other Canadian jurisdictions, including Alberta.¹⁶

¹³ *An Act that the Solemn Affirmation & Declaration of the People called Quakers shall be accepted instead of an Oath in the usual Forme* (UK), 7 & 8 Will III, c 34.

¹⁴ See generally Gail S. Goodman, "Children's Testimony in Historical Perspective" (1984) 40:2 *Journal of Social Issues* 9; Ontario Law Reform Commission, *Report on Child Witnesses* (1991) at 3, 8 [Ontario Report].

¹⁵ *R v Brasier* (1779), 1 Leach 199, 168 ER 202; James C Robb & Lynda J Kordyban, "The Child Witness: Reconciling the Irreconcilable" (1989) 27:3 *Alta L Rev* 327 at 329.

¹⁶ *The Alberta Evidence Act*, SA 1910 (2nd Sess), c 3, s 17. Similar provisions are still in effect in New Brunswick, Nova Scotia, Yukon, the Northwest Territories, and Nunavut: *Evidence Act*, RSNB 1973, c E-11, s 24 [New Brunswick Act]; *Evidence Act*, RSNS 1989, c 154, s 63 [Nova Scotia Act]; *Evidence Act*, RSY 2002,

[41] Under this legislation, a child who did not understand the nature of an oath could give unsworn evidence, but it had to be corroborated. Correspondingly, a child who understood the nature of an oath was permitted to swear an oath, and the court could rely on sworn evidence without corroboration.

[42] The legislation was more flexible than the common law rule, but still reflected the view that children's evidence was unreliable. A child's unsworn evidence was not equal to sworn evidence, as a court could not rely on it without corroboration. The continuing suspicion of children's evidence was also evident in *R v Kendall*, in which the Supreme Court recognized a rule that a trial judge must warn a jury about the danger of relying on a child's evidence.¹⁷ The warning was required regardless of whether the child's evidence was sworn or unsworn.

3. PSYCHOLOGICAL RESEARCH

[43] Psychological research has now shown that many of the old assumptions about children are unfounded. In the late twentieth century, a number of psychologists began to examine the assumptions that justified treating children as unreliable witnesses. There is a large body of literature about children's memories, their understanding of truth, and their reliability in recounting events.¹⁸ It is widely accepted that children are capable of providing accurate information, remembering events, distinguishing fact from fantasy, and being truthful.¹⁹

[44] Research supports one old assumption about children. Suggestibility is a particular concern for children. All people may occasionally have their memory

c 78, ss 17, 23 [Yukon Act]; *Evidence Act*, RSNWT 1988, c E-8, ss 19, 25 [NWT Act]; *Evidence Act*, RSNWT (Nu) 1988, c E-8, ss 19, 25 [Nunavut Act].

¹⁷ *R v Kendall*, [1962] SCR 469.

¹⁸ Two helpful overviews of the literature are found in the Ontario Report, note 14 at 7- 8 and Stephen J Ceci & Maggie Bruck, "Suggestibility of the Child Witness: A Historical Review and Synthesis" (1993) 113:3 *Psychological Bulletin* 403.

¹⁹ For an overview of research on children's memories, see Carole Peterson, "Children's Long-Term Memory for Autobiographical Events" (2002) 22 *Developmental Review* 370. For research on children's ability to distinguish truth from lies, see e.g. Jeffrey J Haugaard et al, "Children's Definitions of the Truth and Their Competency as Witnesses in Legal Proceedings" (1991) 15:3 *L & Human Behavior* 253; Thomas D Lyon & Karen J Saywitz, "Young Maltreated Children's Competence to Take the Oath" (1999) 3:1 *Applied Developmental Science* 16. For research on children's lying, see e.g. Marcus Choi Tye et al, "The Willingness of Children to Lie and the Assessment of Credibility in an Ecologically Relevant Laboratory Setting" (1999) 3:2 *Applied Developmental Science* 92; Victoria Talwar et al, "Children's Lie-Telling to Conceal a Parent's Transgression: Legal Implications" (2004) 28:4 *L & Human Behavior* 411.

influenced by information from other sources, but children have particular difficulty distinguishing their own memories from other information. If a child is exposed to inaccurate information about an event, the child may confuse that information with the things they actually witnessed or experienced. A child's memory may be affected by misleading or confusing questions, or by interview techniques that encourage the child to answer in a particular way. Although both adults and children are suggestible, psychological research indicates that children tend to be more suggestible than adults, and young children tend to be more suggestible than older children.²⁰ Those who interview children should be properly trained and use appropriate interview techniques to avoid suggestion.

[45] It is also true that children's linguistic and cognitive development may affect their ability to give evidence, but there are strategies that can help. If courts and lawyers are informed about child development, it is often possible to accommodate children's needs and abilities.²¹ For example, a child who has not mastered counting cannot accurately answer a question about how many times something happened, but may be able to say whether it was once or a lot of times.

4. REFORM OF THE CANADA EVIDENCE ACT

[46] While the AEA has remained unchanged since 1910, the CEA has been amended several times.

[47] In 1987, following recommendations from the Committee on Sexual Offences Against Children and Youths,²² Parliament abolished the requirement for corroboration of a child's unsworn evidence.²³ It also extended the same rules to adults with cognitive impairment, for the first time allowing adults who were incapable of understanding the nature of an oath to give evidence.

²⁰ For overviews of research on suggestibility, see Stephen J Ceci & Maggie Bruck, "Suggestibility of the Child Witness: A Historical Review and Synthesis" (1993) 113:3 *Psychological Bulletin* 403; Amye R Warren & Dorothy F Marsil, "Why Children's Suggestibility Remains a Serious Concern" (2002) 65:1 *Law & Contemp Probs* 127.

²¹ John Philippe Schuman, Prof Nicholas Bala & Prof Kang Lee, "Developmentally Appropriate Questions for Child Witnesses" (1999) 25 *Queen's LJ* 251.

²² Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children*, Report, Vol 1 (1984) at 372-73, 382 [Badgley Report].

²³ *Act to Amend the Criminal Code and the Canada Evidence Act*, SC 1987, c 24. Several years earlier, Parliament had amended the *Criminal Code* to remove requirements for corroboration relating to sexual offences: *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, SC 1980-81-82, c 125, s 19.

[48] In 2005, the CEA was amended again to introduce an entirely new section about children’s evidence.²⁴ The new section reflects recommendations made by members of the Child Witness Project, a research group based at Queen’s University in the late 1990s and early 2000s. Members of the group conducted a number of studies. In 2005, they presented a brief to Parliament summarizing many of their conclusions and recommendations.²⁵

[49] Section 16.1 of the CEA has a number of unique features:

- a strong presumption that a child is competent to give evidence. The presumption can be rebutted only if the proposed witness is unable “to understand and respond to questions;”²⁶
- a prohibition on asking a proposed witness questions about “their understanding of the nature of the promise to tell the truth” in any competency inquiry;²⁷ and
- a prohibition on child witnesses swearing an oath or making an affirmation. All witnesses under fourteen years of age must promise to tell the truth.

[50] To date, the CEA is the only Canadian legislation with these features. Some other Canadian jurisdictions reformed rules about children’s evidence in the 1980s and 1990s, but none have yet adopted reforms like those in the CEA.²⁸

²⁴ CEA, s 16.1. It reads:

- 16.1 (1)** A person under fourteen years of age is presumed to have the capacity to testify.
- (2)** A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
- (3)** The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.
- (4)** A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.
- (5)** If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.
- (6)** The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.
- (7)** No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
- (8)** For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

²⁵ Child Witness Project at Queen’s University by Prof Nicholas Bala, *Brief on Bill C-2: Recognizing the Capacities and Needs of Children as Witnesses in Canada’s Criminal Justice System* (2005).

²⁶ CEA, s 16.1(4).

²⁷ CEA, s 16.1(7).

C. Establishing a Child's Competence to Give Evidence

[51] Section 19 of the AEA presumes that a child is incompetent to give evidence. Before a child is allowed to give evidence, a court must conduct an inquiry to determine whether the child is competent. The requirement for an inquiry is not clearly spelled out in section 19 of the AEA, but case law establishes that a court must conduct an inquiry in all cases.²⁹

[52] The test for competence in section 19 of the AEA has several elements. Before a child may give evidence, the court must determine whether the child understands the nature of an oath. If the child does not understand the nature of an oath, the court must then determine whether the child “is possessed of sufficient intelligence to justify the reception of the evidence” and “understands the duty of speaking the truth.” Each element poses difficulties.³⁰

1. UNDERSTANDS THE NATURE OF AN OATH

[53] The nature of an oath is, to say the least, difficult to define. When courts have considered the nature of an oath, they have often reached different conclusions.³¹ Traditionally, an oath had religious significance. In recent decades, some courts have held that a child may understand the nature of an oath without a specific religious belief.³²

²⁸ British Columbia, Saskatchewan, and Manitoba have provisions based on the 1987 reforms to the CEA: see *Evidence Act*, RSBC 1996, c 124, s 5 [BC Act]; *Evidence Act*, SS 2006, c E-11.2, s 12 [Saskatchewan Act]; *Manitoba Evidence Act*, CCSM, c E150, s 24 [Manitoba Act]. Ontario has provisions based in part on recommendations by the Ontario Law Reform Commission: Ontario Report, note 14; *Evidence Act*, RSO 1990, c E-23, ss 18-18.2 [Ontario Act]. Newfoundland and Labrador's provisions are based on the Uniform Act recommended by the Uniform Law Conference of Canada in 1993: *Uniform Child Evidence Act*, online: Uniform Law Conference of Canada <www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/649-child-evidence>; *Evidence Act*, RSNL 1990, c E-16, ss 18-18.1 [Newfoundland Act]. To date, no other Canadian jurisdiction has enacted legislation based on the Uniform Act.

²⁹ *Sankey v The King*, [1927] SCR 436. There is some case law suggesting that a competency inquiry should be held before a child gives evidence at questioning: *Strehlke v Camenzind* (1980), 27 AR 257 (QB). If the child's competence is not established before questioning, a court may refuse to admit the evidence at trial. Case law also provides some guidance about the conduct of a competency inquiry. For example, in *R v RGF* the Alberta Court of Appeal confirmed that a trial judge will usually question the child, but may permit counsel who called the witness to participate. The Court also held that the judge should hear submissions from both counsel before ruling on competence: *R v RGF* (1997), 200 AR 8 at para 26 (CA).

³⁰ The court must also determine whether the proposed witness is “a child of tender years.” Age is discussed later in this report.

³¹ See e.g. *R v Bannerman* (1966), 55 WWR 257 (Man CA); *R v Budin* (1981), 32 OR (2d) 1 (CA); *R v Fletcher* (1982), 1 CCC (3d) 370 (Ont CA).

³² See e.g. *R v Fletcher* (1982), 1 CCC (3d) 370 (Ont CA); *R v Connors* (1986), 71 AR 78 (CA).

[54] Even in relatively recent years, judges have often asked children questions about religious belief or practice when assessing understanding of the nature of an oath.³³ For example, in *R v RJB* the trial judge's questions to a twelve year old included the following exchange:³⁴

Q: Okay. Can you -- [S], have you ever attended church or Sunday school?

A: Kind of. Sometimes.

Q: Kind of. Sometimes. Do you remember the name of the church or Sunday school?

A: No.

Q: Okay. How often? How many times do you think you might have gone to church?

A: Four or five times.

Q: Okay. Do you believe in God? I mean, do you know what God is in relation to the church?

A: Yeah.

Q: Do you know what taking an oath means?

A: No.

Q: What will happen is, if you take an oath, that you will be asked to tell the truth, so help you God. Do you know whether -- what would happen if you didn't tell the truth after you had taken an oath?

A: No.

Q: Do you think anything would happen to you?

A: No.

Such questions are intrusive and may cause confusion or distress.³⁵ They are likely to elicit a great deal of personal information, most of which will be

³³ See Nicholas Bala et al, "A Legal and Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses" (2000) 38 Osgoode Hall LJ 409 at 416–22. The practice continued despite a majority of the Supreme Court expressing its disapproval of asking children such questions in *R v F(WJ)*, [1999] 3 SCR 569 at para 42:

Not only did [children] have to take the oath, but also, unlike adults, they were subjected to grilling on whether they understood its religious implications....The law, in recent decades, has come to realize that this approach was wrong. In *R. v. Bannerman* ... Dickson J. *ad hoc*, as he then was, pointed out the absurdity of subjecting children to examination on whether they understood the religious consequences of the oath [citation omitted].

³⁴ *R v RJB*, 2000 ABCA 103 at para 18. As the case was a criminal matter, the inquiry was conducted under the CEA. At the time, the CEA required the court to conduct an inquiry before permitting a witness under fourteen years old to give evidence. The court was required to determine whether the witness understood the nature of an oath or a solemn affirmation.

³⁵ See Nicholas Bala et al, "A Legal and Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses" (2000) 38 Osgoode Hall LJ 409 at 416–22. See also 2014 Report at

irrelevant. It is doubtful whether the answers provide any meaningful insight into the reliability of the child's evidence.

[55] A rule requiring a child to demonstrate understanding of "the nature of an oath" is problematic. The rule risks excluding children who do not provide the "right" answers to questions about religion. Those with no religious belief or those whose religion does not include beliefs about oath-swearing may be disadvantaged by such a rule. Regardless of whether the oath is considered religious or secular, it may be difficult for a child to articulate a clear definition. It seems unfair to require a child to define a concept that courts often struggle to define.

2. UNDERSTANDS THE DUTY OF SPEAKING THE TRUTH

[56] The difference between understanding the nature of an oath and understanding the duty to speak the truth is somewhat unclear. The distinction seems to be a fine one, lying either in the religious nature of an oath or in appreciation of "the solemnity of the occasion."³⁶

[57] It seems the duty to speak the truth implies an obligation that is less significant than an oath. In *R v Khan*, the Ontario Court of Appeal considered how a court should assess a child's understanding of the duty to speak the truth:³⁷

To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so.

[58] Courts have often followed the line of questioning suggested in *Khan*, asking questions such as: "Can you tell me whether you know the difference

paras 10–15, 28–29. ALRI noted that requiring an adult witness to justify an objection to swearing an oath is unduly intrusive, potentially unsettling to a witness at an already stressful moment, and may infringe sections 2(a) and 15 of the *Charter*.

³⁶ James C Robb & Lynda J Kordyban, "The Child Witness: Reconciling the Irreconcilable" (1989) 27:3 *Alta L Rev* 327 at 332.

³⁷ *R v Khan* (1988), 27 OAC 142 at para 18 (CA), *aff'd* [1990] 2 SCR 531.

between the truth and a lie?”, “Why is it wrong to tell a lie?”, and “What happens if you tell a lie?”³⁸

[59] Unfortunately, many children have difficulty answering such questions. These questions require a level of abstract thinking beyond the capabilities of most young children.³⁹ Some research indicates that children who can accurately identify truth and lies (demonstrating understanding of the difference) nonetheless often have difficulty defining the words “truth” and “lie”.⁴⁰ The following passage, from a competency inquiry for a five year old girl, shows that the child was obviously confused by many of the questions:⁴¹

Q: Is it important for you to tell me the truth about what [M.] did?

A: Yeah.

Q: And what about if you were to tell me any lies about – about [M.]?

A: I don't know what you mean.

Q: Well, if you talk to me and tell me things about [M.] are you going to tell me the truth or are you going to tell me lies?

A: The truth.

Q: Are you going to tell me any make believe stories or any lies?

A: No.

Q: Why not?

A: I don't know what you mean.

Q: Okay. Well, why – you tell me that you're going to tell me the truth about [M.], you're not going to tell me any lies.

A: Yeah.

Q: Why – why aren't you going to tell me any lies?

³⁸ *R v Easton* (May 1994), Perth County 18949 (Ont Ct Gen Div), quoted in Nicholas Bala et al, “A Legal and Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses” (2000) 38:3 Osgoode Hall LJ 409 at 426-27. These were some of the questions the court asked a six year old in a competency inquiry. See also *R v Wilson*, 2001 BCCA 391 at paras 36-37, where a six year old was asked questions including: “Do you know what to tell the truth is?”, “Do you know what it is to tell a lie?”, “Do you know what happens when you tell a lie?”, and “Do you know why it is wrong to not tell the truth?”

³⁹ See generally John Philippe Schuman, Prof Nicholas Bala & Prof Kang Lee, “Developmentally Appropriate Questions for Child Witnesses” (1999) 25 Queen’s LJ 251.

⁴⁰ Thomas D Lyon & Karen J Saywitz, “Young Maltreated Children’s Competence to Take the Oath” (1999) 3:1 Applied Developmental Science 16 at 17, 26; see also Jeffrey J Haugaard et al, “Children’s Definitions of the Truth and Their Competency as Witnesses in Legal Proceedings” (1991) 15:3 L & Human Behavior 253.

⁴¹ *R v MAM*, 2001 BCCA 6 at para 39.

A: I don't know what you mean.

Q: Why should I believe that you won't tell me lies?

A: I still don't know what you mean.

Q: Okay. What don't you understand?

A: Lots of things.

Q: If you were to tell me lies about [M.] what might happen?

A: I don't know.

Q: If you were to – when you talk to your parents do you tell the truth or do you tell lies?

A: The truth.

Q: Do you always tell the truth?

A: Yeah.

Q: Do you maybe sometimes tell lies?

A: No, I don't tell lies.

Q: Why not?

A: I don't know what you mean.

[60] Asking a child developmentally appropriate questions requires some expertise.⁴² Lawyers and judges may have difficulty asking questions children will understand, especially about abstract concepts like the truth. Further, some psychological research indicates that the ability to define words like “truth” and “lie” is not a good predictor of whether a child will tell the truth.⁴³

[61] The test is inherently difficult to apply, and unlikely to provide meaningful information about whether the child is likely to tell the truth.

3. OF SUFFICIENT INTELLIGENCE TO JUSTIFY THE RECEPTION OF THE EVIDENCE

[62] The final element – whether the child “is possessed of sufficient intelligence to justify the reception of the evidence” – appears to cause the least difficulty in practice. Courts have generally accepted that this requirement is

⁴² John Philippe Schuman, Prof Nicholas Bala & Prof Kang Lee, “Developmentally Appropriate Questions for Child Witnesses” (1999) 25 Queen’s LJ 251.

⁴³ Victoria Talwar et al, “Children’s Conceptual Knowledge of Lying and its Relation to Their Actual Behaviors: Implications for Court Competence Examinations” (2002) 26 L & Human Behavior 395; Victoria Talwar et al, “Children’s Lie-Telling to Conceal a Parent’s Transgression: Legal Implications” (2004) 28:4 L & Human Behavior 411.

fairly basic. In general, a child need only appear to understand questions and answer them appropriately.⁴⁴

[63] For a child to testify unsworn, the court must find that both the “sufficient intelligence” and “duty of speaking of truth” elements are established. The second appears to overshadow the first, as a child who can answer difficult questions about the duty of speaking the truth will have demonstrated intelligence.

[64] On its own, the “sufficient intelligence” element is somewhat vague. It provides little guidance to a court, so a decision about whether a child “is possessed of sufficient intelligence to justify the reception of the evidence” is essentially discretionary.

4. INCONSISTENCY WITH THE CANADA EVIDENCE ACT

[65] The test for competence under section 19 of the AEA is not only difficult to apply, but is also seriously out of step with the CEA. Alberta courts are far more likely to have experience with the CEA provisions for child witnesses – which apply to criminal matters and other proceedings under federal legislation – than the AEA provisions. Consistent rules would be desirable.

[66] Under the CEA, a child is presumed to be competent to give evidence. An inquiry is not required unless the court is satisfied that there is an issue as to competence. The test for competence is low, requiring only that the proposed witness is able to understand and respond to questions. An inquiry will rarely be required in proceedings to which the CEA applies.

D. Establishing an Adult’s Competence to Give Evidence

[67] Adults are presumed to be competent to give evidence. The presumption is not absolute, so a party may challenge the competence of a proposed witness.⁴⁵ If a proposed witness has or appears to have a cognitive impairment, the issue of competence may arise.

[68] There is no Alberta legislation about competence of adults to give evidence. Section 19 of the AEA applies only to children.

⁴⁴ James C Robb & Lynda J Korodyban, “The Child Witness: Reconciling the Irreconcilable” (1989) 27:3 *Alta L Rev* 327 at 332; *R v Khan* (1988), 27 OAC 142 at para 19 (CA), *aff’d* [1990] 2 SCR 531.

⁴⁵ See e.g. *R v DAL*, 2012 SCC 5.

[69] As the AEA is silent on competence of adult witnesses, the common law applies when an adult's competence is in question. The court must determine whether the proposed witness understands the nature and consequences of an oath. If not, the adult may not swear an oath or make an affirmation, and the adult's evidence may not be received.

[70] The common law requirement to understand the nature of an oath imposes a barrier that prevents some adults from giving evidence, regardless of their other abilities. The common law rules are also inconsistent with the CEA. The CEA has provisions permitting an adult who does not understand the nature of an oath to give unsworn evidence, provided the witness is able to communicate the evidence.⁴⁶

[71] If a proposed witness can convey relevant information, there should be a means to admit the evidence. Legislation modifying the common law would facilitate the admission of relevant evidence.

E. Corroboration

[72] Section 19(2) of the AEA allows a court to rely on a child's unsworn evidence only if it is corroborated by other evidence.

[73] Historically, corroboration was considered an important safeguard against miscarriages of justice. Corroboration was required in a variety of circumstances. Some requirements for corroboration were found at common law, such as the rule requiring a trial judge to warn a jury that it would be dangerous to convict a person based only on the uncorroborated evidence of an accomplice. Other requirements for corroboration were codified in statute, such as provisions in the

⁴⁶ CEA, s 16. The section reads:

16 (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

- (a) whether the person understands the nature of an oath or a solemn affirmation; and
- (b) whether the person is able to communicate the evidence.

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

Criminal Code prohibiting convictions for certain offences (including many sexual offences) based on the uncorroborated evidence of one witness.⁴⁷

[74] In the late twentieth century, laws requiring corroboration were criticized and many were abolished.

[75] In 1975, the Law Reform Commission of Canada noted that the law of corroboration was complex and unwieldy. It recommended that rules of evidence requiring corroboration be abolished.⁴⁸

[76] The Supreme Court of Canada came to the same conclusion in *R v Vetrovec*.⁴⁹ *Vetrovec* essentially abolished all common law rules of evidence requiring corroboration, replacing them with a “common sense” approach to weighing evidence.

[77] *Vetrovec* did not affect statutory requirements for corroboration, but most have been repealed. Parliament abolished many of the requirements for corroboration in the *Criminal Code* prior to *Vetrovec*. The *Criminal Code* now has only a handful of rare offences (treason and perjury being the most notable) that require corroboration.⁵⁰

[78] Alberta is one of five jurisdictions in Canada that retains the requirement for corroboration of a child’s unsworn evidence.⁵¹ All other Canadian jurisdictions have repealed the requirement.

[79] In Alberta, the AEA sets out three statutory requirements for corroboration, other than the requirement for children’s unsworn evidence. In each case, corroboration is a safeguard against self-interested evidence. Section 10 requires corroboration of the plaintiff’s evidence in an action for breach of promise of marriage.⁵² Sections 11 and 12 require corroboration when an interested party gives evidence about events involving a person who cannot testify because of death or mental incapacity.⁵³

⁴⁷ See e.g. *Criminal Code*, RSC 1970, c C-34, s 139(1).

⁴⁸ Law Reform Commission of Canada, *Report on Evidence* (1975) at 87.

⁴⁹ *R v Vetrovec*, [1982] 1 SCR 811.

⁵⁰ *Criminal Code*, RSC 1985, c C-46, ss 47(3), 133 [*Criminal Code*].

⁵¹ The other jurisdictions that still require corroboration are Nova Scotia, Yukon, the Northwest Territories, and Nunavut: Nova Scotia Act, note 16, s 63(2); Yukon Act, note 16, s 17; NWT Act, note 16, s 19; Nunavut Act, note 16, s 19.

⁵² AEA, s 10.

⁵³ AEA, ss 11–12.

[80] A child witness should not be in the same category as a self-interested witness. The current rule essentially presumes that a child will lie. This presumption is not supported by psychological research.

[81] There are several reasons to abolish the requirement for corroboration of a child's unsworn evidence:

- The requirement excludes potentially relevant evidence that cannot be corroborated. There is little reason to believe the exclusion of such evidence produces more just results. The requirement for corroboration has long since been abolished for criminal matters, where an accused's liberty is at stake and where all elements must be proven beyond a reasonable doubt. It is difficult to justify a more stringent requirement for civil matters, provincial offences, or other matters within provincial jurisdiction.⁵⁴
- The requirement may complicate decision making, as a court must determine whether a child's evidence is corroborated. In *Vetrovec*, Justice Dickson observed that the law of corroboration was overly technical, complex, and difficult to apply.⁵⁵ The search for corroboration increases the complexity of fact-finding, without providing an obvious benefit.
- The requirement is based on old stereotypes about the reliability of children. Those stereotypes have largely been discredited. A rule

Evidence in action by heir, etc.

11 In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on that party's own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

Evidence in action by lunatic, etc.

12 In an action by or against a lunatic so found or by or against an inmate of a mental health facility, or a person who from unsoundness of mind is incapable of giving evidence, an opposed or interested party shall not obtain a verdict, judgment or decision on that party's own evidence unless that party's evidence is corroborated by other material evidence.

ALRI notes that the use of the word "lunatic" in section 12 is archaic. It would be desirable to update this section to use appropriate respectful language.

⁵⁴ The authors of *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* neatly point out the inconsistency:

It seems anomalous that the uncorroborated evidence of a child is sufficient in order to convict a person for a serious criminal offence, but such testimony is insufficient to support a civil judgment in some provinces. On these grounds, an argument could be made to do away with corroboration for children's evidence completely.

(The Honourable Mr Justice Sidney N Lederman, The Honourable Mr Justice Alan W Bryant & The Honourable Madam Justice Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed (Markham, Ont: LexisNexis Canada, 2014) at para 17.64 [footnotes omitted]).

⁵⁵ *R v Vetrovec*, [1982] 1 SCR 811 at 824-26.

presuming children's evidence is unreliable cannot be justified based on current knowledge.

- The requirement impairs the dignity of children, by suggesting that their evidence is less reliable, less trustworthy, or less likely to be true than that of adults.
- The requirement reflects beliefs about oath-swearing that many may consider outdated. Under section 19 of the AEA, corroboration is required only for evidence that is unsworn. If a child takes an oath, the evidence need not be corroborated. The rule presumes that the oath confers reliability.
- There is inconsistency between different proceedings, depending on whether federal or provincial legislation applies. For example, a court could rely on uncorroborated evidence from a child in proceedings under the *Divorce Act*, but not in proceedings under the *Family Law Act*. The difference is potentially confusing and difficult to justify.
- Alberta is out of step with the majority of other Canadian jurisdictions, which have abolished the requirement for corroboration. Many foreign jurisdictions have also abolished it.⁵⁶

[82] There is no obvious reason to retain the requirement for corroboration.

F. Witnesses with Communication Disabilities

[83] Section 20 of the AEA provides that a witness who cannot speak may still give evidence.

20 A witness who is unable to speak may give evidence in any manner by which the witness can make it intelligible.

⁵⁶ The requirement for corroboration of children's evidence has been abolished for criminal matters in England and Ireland: *Criminal Justice Act 1988* (UK), c 33, s 34(1); *Criminal Evidence Act* (Ireland), Number 12/1992, s 28. It has also been abolished in all Australian jurisdictions: see Australian Law Reform Commission, *Uniform Evidence Law*, Report 102 (2005) at para 18.58. Most law reform agencies who have studied the issue—in Canada and elsewhere—have recommended abolition of the requirement for corroboration: Law Reform Commission of Canada, *Report on Evidence* (1975) at 87; Badgley Report, note 22 at 382; Ontario Report, note 14 at 42-43; Australian Law Reform Commission, *Evidence*, Report 38 (1987); Law Reform Commission of Victoria, *Sexual Offences Against Children*, Report 18 (1988) at paras 236-42; Law Reform Commission (Ireland), *Report on Child Sexual Abuse* (1990) at para 5.28; Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses*, Project 87 (1991) at paras 2.40-2.52

[84] This provision has been part of the AEA since the first version of the act was adopted in 1910. Equivalent provisions are found in the evidence acts of British Columbia, Manitoba, Yukon, the Northwest Territories, and Nunavut.⁵⁷ Quebec's *Code of Civil Procedure* [CCP] has a similar provision.⁵⁸

[85] The CEA and the Saskatchewan Act have more inclusive provisions about witnesses who have difficulty speaking.⁵⁹

[86] Section 20 of the AEA works in conjunction with section 14 of the *Charter*. Section 14 guarantees an interpreter to a party or witness who is deaf, as well as one who does not speak or understand the language of the proceedings.⁶⁰

[87] There are nonetheless some gaps not covered by section 14 of the *Charter* and section 20 of the AEA. Section 14 of the *Charter* does not assist a person who is not deaf or who communicates by a means other than an interpreter. Section 20 of the AEA applies only to those who are "unable to speak". It would not necessarily apply to a person who has some ability to speak but can communicate more effectively by other means.

[88] There are various reasons that a person may have difficulty communicating verbally. Deafness is one possible reason, but reasons also include physical conditions (such as neck cancer or amyotrophic lateral sclerosis), speech impediments, brain injuries or conditions (including stroke or brain tumour), or mental disabilities.⁶¹

[89] People with communication disabilities may use various methods or technologies to communicate, such as speech generating devices, writing, letter boards, pictures, gestures and body language, or others.⁶²

[90] The gap in legislation is not just theoretical. On occasion, circumstances arise that demonstrate the need for a broader provision. In *R v Rudolph*, for example, a witness had a severe stutter that made it difficult to speak in public.⁶³

⁵⁷ BC Act, note 28, s 17; Manitoba Act, note 28, s 26; Yukon Act, note 16, s 24; NWT Act, note 16, s 26; Nunavut Act, note 16, s 26.

⁵⁸ *Code of Civil Procedure*, CQLR, c C-25.01, art 299 [CCP].

⁵⁹ CEA, s 6; Saskatchewan Act, note 28, s 13.

⁶⁰ *Charter*, note 9, s 14 reads:

14 A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

⁶¹ See generally Communication Disabilities Access Canada, online: < www.cdacanada.com/>.

⁶² Communication Disabilities Access Canada, online: < www.cdacanada.com/>.

⁶³ *R v Rudolph*, 2012 SKQB 167.

Fortunately, as it was a criminal matter, the CEA applied. Section 6 of the CEA applies to a witness who “has difficulty communicating by reason of a physical disability,” not just those who are unable to speak.⁶⁴ The witness was permitted to give evidence by writing his answers to questions. This solution might not have been available under the AEA.

[91] It is desirable to update the language of section 20 of the AEA to ensure that it permits the use of communication methods or technologies whenever appropriate to assist a witness and the court.

⁶⁴ CEA, s 6.

CHAPTER 3

Establishing Competence to Give Evidence

A. Approaches to Establishing Competence

[92] Currently, Alberta courts must apply different approaches to determining a witness's competence to give evidence. The required approach depends on whether the proceeding is within federal or provincial jurisdiction and the witness's age.

[93] Under either the CEA or AEA, there is a presumption that an adult is competent to give evidence. An inquiry is required only if there is a challenge to the witness's competence, as might occur for an adult with cognitive impairment.

[94] If the AEA applies to the proceeding, and the proposed witness is a child, an inquiry is mandatory. If the CEA applies, there is a presumption that a child is competent to give evidence. An inquiry will rarely be necessary.

[95] A more consistent approach to determining competence is desirable.

1. OPTIONS

[96] There are three approaches to establishing whether a witness is competent to give evidence: mandatory competency inquiries, a rebuttable presumption of competence, and an absolute presumption of competence. The three options are described briefly below.

a. Mandatory competency inquiries

[97] A mandatory competency inquiry essentially presumes that a proposed witness is incompetent until proven otherwise. An inquiry must be held in every case to determine whether the witness may give evidence.

[98] The AEA currently has a mandatory competency inquiry for any child witness. Similar requirements exist in other Canadian jurisdictions.⁶⁵ The inquiry

⁶⁵ New Brunswick, Nova Scotia, Yukon, the Northwest Territories, and Nunavut have legislation similar to section 19 of the AEA, applying to "a child of tender years." British Columbia, Saskatchewan, and Manitoba require a court to conduct an inquiry any time a proposed witness is under 14 years of age, or if an adult's competence is challenged. While a competency inquiry is mandatory, the party not presenting the witness may admit that a witness is competent. In that case, the inquiry may be very brief: *R v Fong* (1994), 157 AR 73 (CA).

is necessary not only to determine whether the child is competent to give evidence, but also whether the child may swear an oath.

b. Rebuttable presumption of competence

[99] A rebuttable presumption of competence allows a witness to give evidence unless there is a concern about competence. If there is a concern, the court may conduct an inquiry. The trigger for an inquiry may vary. An inquiry may be triggered only by a party's challenge, or it may require first convincing a court that there is an issue.⁶⁶

[100] There is a rebuttable presumption of competence for adult witnesses in Alberta. The CEA extends the presumption of competence to all witnesses. Several other Canadian jurisdictions have legislation to the same effect.⁶⁷

c. Absolute presumption of competence

[101] An absolute presumption of competence allows any proposed witness to give evidence. The court does not have a gate-keeping function, although it would retain power to intervene if a witness proves unable to give any useful evidence.⁶⁸ This approach was recommended by the Law Reform Commission of

⁶⁶ Compare CEA, ss 16(1), 16.1(4)-16.1(5). For a child witness, CEA, ss 16.1(4)-16.1(5) apply. An inquiry occurs only if the court is satisfied there is an issue:

16.1 (4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

For an adult witness, CEA, s 16(1) applies. An inquiry occurs whenever an adult's competence is challenged:

16 (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(a) whether the person understands the nature of an oath or a solemn affirmation; and

(b) whether the person is able to communicate the evidence.

See also Ontario Act, note 28, s 18(2), which requires an inquiry whenever a potential witness's competence is challenged:

18 (2) When a person's competence is challenged, the judge, justice or other presiding officer shall examine the person.

⁶⁷ CEA, s 16.1; Newfoundland Act, note 28, s 18(2); Ontario Act, note 28, s 18(2); Art 276 CCP, note 58.

⁶⁸ See The Honourable Mr Justice Sidney N Lederman, The Honourable Mr Justice Alan W Bryant & The Honourable Madam Justice Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed (Markham, Ont: LexisNexis Canada, 2014) at 40-41.

Canada in its 1975 *Report on Evidence*, and in the Badgley Report, but has not been adopted in any Canadian jurisdiction.⁶⁹

2. CONSULTATION RESULTS

[102] Most respondents in consultation supported a rebuttable presumption that an adult is competent. Some expressed hesitation about a presumption of competence for children, mostly expressing concern about reliability of children's evidence.

B. Should There Be a Rebuttable Presumption That a Child is Competent to Give Evidence?

[103] ALRI has concluded that the principles identified for this project require a rebuttable presumption that a child of any age is competent to give evidence. A presumption of competence facilitates the admission of relevant evidence, promotes efficiency, and is consistent with the CEA. As there is already a rebuttable presumption of competence for adult witnesses, this recommendation establishes a consistent approach for all witnesses and avoids arbitrary distinctions based on age. The alternative, limiting the presumption to adult witnesses, would promote the unjustified stereotype that children are unreliable witnesses. A presumption that is rebuttable, rather than absolute, preserves flexibility to address individual differences.

[104] Two additional points reinforce our conclusion. First, parties take initiative in calling of witnesses, subject to the court's ability to protect a vulnerable witness. It is reasonable to expect that parties will call only witnesses whom they anticipate can communicate relevant evidence. It would be senseless, for example, to call a pre-verbal toddler as a witness. A survey conducted by the Child Witness Project found that "the youngest children appearing in court were about four years old."⁷⁰ With a presumption of competence, a party's decision to call a witness will generally be respected, unless the court determines giving evidence would not be in a vulnerable witness's best interests.

⁶⁹ Law Reform Commission of Canada, *Report on Evidence* (1975) at 87-88; Badgley Report, note 22 at 372. New Zealand has adopted an absolute presumption of competence: *Evidence Act 2006* (NZ), 2006/69, s 71; see also Law Commission (New Zealand), *Evidence*, Report 55 (1999) vol 1 at paras 329-34.

⁷⁰ Nicholas Bala et al, "A Legal and Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses" (2000) 38 Osgoode Hall LJ 409 at 414.

[105] Second, admissibility and weight are separate issues. A presumption of competence affects only admissibility. Once evidence is admitted, reliability must still be tested, and the trier of fact must determine whether to accept the evidence. When a child can communicate relevant evidence, any concerns about reliability are best addressed when weighing the evidence in the full context.

RECOMMENDATION 1

There should be a presumption that a child of any age is competent to give evidence.

C. Approaches to Criteria for Competence

[106] A rebuttable presumption should have criteria to determine when it is rebutted.

1. OPTIONS

[107] Legislation in Canadian jurisdictions establishes various criteria for competence. Depending on the jurisdiction, a court may be required to determine one or more of the following:

- Whether the proposed witness understands the nature of an oath or affirmation;⁷¹
- Whether the proposed witness understands the duty of speaking the truth;⁷²
- Whether the proposed witness understands what it means to tell the truth;⁷³
- Whether the proposed witness is possessed of sufficient intelligence to justify the reception of the evidence;⁷⁴

⁷¹ AEA, s 19; CEA, s 16; BC Act, note 28, s 5; Saskatchewan Act, note 28, s 12; Manitoba Act, note 28, s 24; Ontario Act, note 28, s 18.1; New Brunswick Act, note 16, s 24; Nova Scotia Act, note 16, s 63; Yukon Act, note 16, s 23; NWT Act, note 16, s 25; Nunavut Act, note 16, s 25.

⁷² AEA, s 19; New Brunswick Act, note 16, s 24; Nova Scotia Act, note 16, s 63; Yukon Act, note 16, s 23; NWT Act, note 16, s 25; Nunavut Act, note 16, s 25.

⁷³ Ontario Act, note 28, s 18.1; Newfoundland Act, note 28, s 18.

⁷⁴ AEA, s 19; New Brunswick Act, note 16, s 24; Nova Scotia Act, note 16, s 63; Yukon Act, note 16, s 23; NWT Act, note 16, s 25; Nunavut Act, note 16, s 25.

- Whether the proposed witness is in a fit state to report the facts;⁷⁵
- Whether the proposed witness has sufficient appreciation of the facts;⁷⁶
- Whether the proposed witness's evidence is sufficiently reliable;⁷⁷
- Whether the proposed witness is able to relate the facts witnessed;⁷⁸
- Whether the proposed witness is able to communicate the evidence;⁷⁹
and
- Whether the proposed witness is able to understand and respond to questions.⁸⁰

[108] Most of these criteria test abilities other than the proposed witness's ability to convey relevant information. Criteria focusing on understanding the meaning of an oath or the truth test knowledge of abstract concepts, not the ability to convey information. Criteria focusing on the appreciation of the facts or reliability require the court to assess the evidence itself, rather than the proposed witness's ability.

[109] Further, most of these criteria leave a court with significant discretion about whether to admit a proposed witness's evidence. Some have received little or no judicial consideration.⁸¹ For example, there are no reported cases interpreting the phrase "sufficiently reliable" in the Ontario Act or the Newfoundland Act.⁸² Without cases illustrating the application of particular criteria, it is difficult to predict their effect.

⁷⁵ *Code of Civil Procedure*, CQLR, c C-25, art 295. This test is no longer in force in Quebec, as the new Code of Civil Procedure, which came into effect in 2016, has a different test.

⁷⁶ *PEI Child Protection Act*, RSPEI 1988, c C-5.1, s 35(2).

⁷⁷ Ontario Act, note 28, s 18.1; Newfoundland Act, note 28, s 18.

⁷⁸ Art 276 CCP, note 58.

⁷⁹ BC Act, note 28, s 5; Saskatchewan Act, note 28, s 12; Manitoba Act, note 28, s 24; Ontario Act, note 28, s 18.1.

⁸⁰ CEA, s 16.1(5).

⁸¹ The vast majority of cases considering children's evidence arise from criminal proceedings. The CEA is frequently considered, but provisions unique to provincial evidence statutes are unlikely to have received judicial consideration.

⁸² Ontario Act, note 28, s 18.1; Newfoundland Act, note 28, s 18.

2. CONSULTATION RESULTS

[110] In consultation, ALRI sought feedback on the final option: the presumption would be rebutted only if the proposed witness is unable to understand and respond to questions. This option focuses on ability to communicate and is the most objective. Most respondents supported ALRI's proposal for adult witnesses.

[111] Reactions were mixed for child witnesses, but concern seemed to focus on the proposed presumption of competence rather than the test for rebutting it. Some respondents sought criteria that would admit useful evidence and exclude irrelevant or unhelpful evidence. For example, one respondent suggested it would be necessary to know whether a proposed witness gives correct answers to questions.

D. When Should the Presumption of Competence Be Rebutted?

1. FOR CHILD WITNESSES

[112] ALRI has concluded that the presumption of competence should be rebutted only if it is established that a child is unable to understand and respond to questions. Considering the principles identified for this project, we determined that this test is the best of the existing ones, and it is unlikely that a new test would be substantially better.

[113] A test based on ability to understand and respond to questions is the most objective test, easiest to apply, and most likely to produce predictable results. Most importantly, it is the least likely to exclude relevant evidence. It would be impossible to devise a test that would admit only relevant and reliable evidence, and exclude only irrelevant or unreliable evidence. Such a test is also redundant, because evidence is tested once it is admitted. Ultimately, the trier of fact decides whether to rely on each piece of evidence. The trier of fact cannot test or weigh evidence that is excluded, so in borderline cases, it is better to admit potentially relevant evidence than exclude it.

[114] This test has the additional advantage of being consistent with section 16.1 of the CEA, which applies to children. The test appears to function well in proceedings to which the CEA applies, so it can be expected to work as well in the AEA.

RECOMMENDATION 2

The presumption of competence to give evidence should be rebutted only if a child is unable to understand and respond to questions.

2. FOR ADULTS WITH COGNITIVE IMPAIRMENT

[115] Although adults are currently presumed competent to give evidence, the existing test for rebutting the presumption is problematic. If an adult's competence to give evidence is in question, as may happen for an adult with cognitive impairment, the court must determine whether the proposed witness understands the nature and consequences of an oath. If not, the adult may not give evidence.

[116] The existing test should be replaced. An adult's competence to give evidence should not depend on being able to understand and explain an abstract religious concept.

[117] ALRI has concluded that the test for rebutting the presumption of competence should be the same for adults with cognitive impairment as for children: the presumption of competence should be rebutted only if an adult is unable to understand and respond to questions.

[118] A test that is the same for all witnesses is consistent with the principles identified for this project. It avoids arbitrary distinctions and instead focuses on an individual's abilities. A test based on ability to understand and respond to questions is appropriate for all witnesses. We have concluded that it is the best available test, as it is the most objective, easiest to apply, most predictable, and least likely to exclude relevant evidence. These considerations apply whether the witness is an adult or a child.

RECOMMENDATION 3

The presumption of competence to give evidence should be rebutted only if an adult is unable to understand and respond to questions.

[119] As discussed in Chapter 6, the test for competence should not depend on means of communication. A person who can understand and respond to questions by any means would be competent to give evidence. If the person is unable to understand and respond to questions by any means, because of their

early developmental stage or cognitive impairment, the presumption would be rebutted.

E. Competence to Give Evidence by Affidavit and at Questioning

[120] The AEA applies to evidence given by affidavit or at questioning.⁸³ The recommendations in this report would apply when it is necessary to establish a person's competence to give evidence by affidavit or at questioning.

1. COMPETENCE TO GIVE EVIDENCE BY AFFIDAVIT

[121] It may occasionally be necessary or appropriate for a child or person with cognitive impairment to give evidence by affidavit. For example, the *Family Law Act* and the *Child, Youth and Family Enhancement Act* permit a child to make or respond to certain applications.⁸⁴ The child is required to make a supporting affidavit, often in a prescribed form.⁸⁵

[122] The effect of the recommendations in this report is that a child, or an adult with cognitive impairment, would be presumed competent to give evidence by affidavit. If the deponent's competence was later challenged, the person before whom the affidavit was made might be required to give evidence about how they determined the deponent's competence. The person before whom the affidavit is made would need only to determine that the deponent is able to understand and respond to questions. In most cases, it should be easy to do so by having a simple conversation.

⁸³ AEA, s 1(c) defines "witness" as including a person "who in the course of an action is questioned orally under Part 5 of the *Alberta Rules of Court* ...". AEA, s 2 states:

2 This Act extends and applies to evidence offered or taken

...

(c) by affidavits,

...

by or before a court in an action.

⁸⁴ See e.g. *Family Law Act*, RSA 2000, c F-4.5, ss 9, 23(2), 50; *Child, Youth and Family Enhancement Act* RSA 2000, c C-12, ss 31(4), 32, 34(8), 49, 56.2.

⁸⁵ The *Alberta Rules of Court* and the *Court Rules and Forms Regulation* under the *Child, Youth and Family Enhancement Act* RSA 2000, c C-12 both include a number of forms that contemplate a child making an affidavit: *Alberta Rules of Court*, Alta Reg 124/2010, Forms FL-35, FL-45, FL-46, FL-55, FL-57, FL-59, FL-60, FL-61; *Court Rules and Forms Regulation*, Alta Reg 39/2002, Forms 4, 6, 15, 26, 38.

2. COMPETENCE TO GIVE EVIDENCE AT QUESTIONING

[123] There are restrictions on questioning a child and certain adults. A child or an adult who lacks capacity must have a litigation representative for civil litigation. An adverse party is entitled to question the litigation representative. The person represented by the litigation representative may be questioned only if two conditions are met: the proposed witness must be competent to give evidence, and the court must give permission.⁸⁶

[124] The recommendations in this report will simplify the first condition.⁸⁷ The proposed witness will be presumed competent to give evidence, and the presumption will be rebutted only if the proposed witness is unable to understand and respond to questions. It should be fairly easy in most cases for the parties to agree or for the court to determine whether the presumption of competence is rebutted. It may not be necessary to hold an inquiry before questioning, as the person's ability to understand and respond to questions would be apparent at questioning and from a transcript.

[125] The recommendations in this report would not affect the second condition. A party wishing to question a person represented by a litigation representative would have to seek permission from the court. The court may consider all relevant circumstances, and has power to protect a child, or an adult with cognitive impairment, if necessary.

⁸⁶ *Alberta Rules of Court*, Alta Reg 124/2010, r 5.17(c)(ii).

⁸⁷ Under the current law, a court would likely have to hold a competency inquiry before a child could give evidence at questioning. If competence to swear an oath or give unsworn evidence was not established before questioning, a court could refuse to admit evidence from questioning at trial: see *Strehlke v Camenzind* (1980), 27 AR 257 (QB).

CHAPTER 4

Formalities Before Giving Evidence

A. Approaches to Formalities

[126] Before giving evidence, most witnesses swear an oath or make an affirmation. There are exceptions for children and for some adults with cognitive impairment. When an exception applies, Alberta courts must administer different formalities depending on the witness's age, and whether the proceeding is within federal or provincial jurisdiction, and the witness's age.

[127] Under Alberta law, an adult must give evidence under oath or affirmation. In a proceeding within provincial jurisdiction, it is not possible for an adult to give evidence without swearing an oath or making an affirmation.

[128] If the CEA applies, an adult may give evidence under oath or affirmation. There is an exception for an adult who does not understand the nature of an oath or affirmation. An adult who does not understand the nature of an oath or affirmation must promise to tell the truth before giving evidence.

[129] If the AEA applies, a child witness may give evidence under oath (if the court determines the child understands the nature of an oath) or with no formality. The AEA does not contemplate a child making an affirmation.

[130] Under the CEA, a child may only give evidence upon a promise to tell the truth. The CEA prohibits a child from swearing an oath or making an affirmation.

[131] A more consistent approach to formalities is desirable.

1. OPTIONS

[132] There are a number of possible approaches to formalities.

a. No formality

[133] The first approach is no formality at all. This approach is available when a child gives unsworn evidence under section 19 of the AEA. Section 19 does not prescribe any particular formality for a child who gives evidence unsworn.

b. Judicial caution

[134] A second approach is for a judge or official to deliver a judicial caution. In this approach, the judge or official informs the witness of the obligation to tell the truth, and may specifically explain the consequences of perjury. In a pure judicial caution, the witness only listens to the caution. The witness does not have to say or do anything before giving evidence. The pure judicial caution is not used in the Canadian legal system.⁸⁸

c. Oath

[135] The third approach is for the witness to swear an oath. The oath is the traditional formality in common law. Historically, the oath was a Christian ceremony but forms of oath from other religious or cultural traditions have long been accepted.⁸⁹ Alberta law does not prescribe a particular form of oath.⁹⁰

d. Affirmation

[136] The fourth approach is for the witness to make an affirmation.⁹¹ An affirmation is a secular alternative to the oath, originally developed for witnesses whose religion forbade them from swearing an oath. An affirmation is equivalent to an oath for all purposes, including admissibility and perjury.⁹² Alberta law does not prescribe a particular form of affirmation, nor is there any legislative definition of “affirmation” in Alberta. An affirmation is defined by what it is not: it is not an oath.⁹³

⁸⁸ Legislation requires a kind of judicial caution in youth court proceedings. A judge must instruct a child witness about the duty of speaking the truth: *Youth Justice Act*, RSA 2000, c Y-1, s 31; *Youth Criminal Justice Act*, SC 2002, c 1, s 151. The requirement applies to sworn or unsworn evidence. As the requirement is in addition to an oath, affirmation, or promise, it is not a pure judicial caution.

⁸⁹ *Omychund v Barker* (1744), 1 Atk 21, 26 ER 15 (CA); AEA, ss 14-16.

⁹⁰ ALRI recently recommended that the AEA “should continue to provide that the person swearing the oath has the right to choose whatever oath and ceremonies are appropriate for them”: 2014 Report at paras 66-67.

⁹¹ Some legislation refers to “a solemn affirmation” (see e.g. CEA, ss 14 - 16.1; *Interpretation Act*, RSA 2000, c I-8, s 28(1)(II)) or “an affirmation and declaration” (see e.g. AEA, s 17). In this report, the word affirmation should be understood to mean the same thing as a solemn affirmation, an affirmation and declaration, or any similar term meaning a secular commitment to tell the truth that is equivalent to an oath for all purposes.

⁹² AEA, s 17(2) states “The affirmation and declaration of that person is of the same force and effect as if that person had taken an oath in the usual form.” See also *Interpretation Act*, RSA 2000, c I-8, s 28(1)(II).

⁹³ See e.g. Daphne A Dukelow, *The Dictionary of Canadian Law*, 4th ed (Toronto: Carswell, 2011) *sub verbo*. “affirmation”: “A solemn declaration with no oath ...”; Bryan A. Garner ed, *Black’s Law Dictionary*, 10th ed (Thomson Reuters: St Paul, Minnesota, 2014) *sub verbo* “affirmation”: “A solemn pledge equivalent to an oath but without reference to a supreme being or to swearing; a solemn declaration made under penalty of perjury, but without an oath.”

e. Promise

[137] The last approach is for the witness to make a promise to tell the truth. A promise is a relatively recent creation of statute. It first appeared in Canadian legislation in the late 1980s. The CEA requires that a witness who gives unsworn evidence must promise to tell the truth.⁹⁴ A number of provinces have a similar requirement.⁹⁵

2. CONSULTATION RESULTS

[138] In consultation, ALRI sought feedback on a proposal to introduce a mandatory promise to tell the truth. A child would be required to promise to tell the truth before giving evidence. The requirement would also apply to an adult who is competent to give evidence but not capable of understanding the nature of an oath or affirmation.

[139] Most respondents to the survey supported the idea that a witness who gives unsworn evidence should promise to tell the truth. We received several comments to the effect that a commitment to tell the truth cannot do any harm, and may do some good.

[140] We also sought feedback on whether the AEA should go as far as the CEA, and prohibit a child from swearing an oath. ALRI's preliminary recommendation was that the AEA should not specifically prohibit a child from swearing an oath. Nearly all respondents agreed that children should not be prohibited from swearing an oath.

[141] A new issue arose in consultation. The issue is whether a promise to tell the truth is a form of affirmation. This issue required further analysis, which is discussed further below, under heading D.

⁹⁴ CEA, ss 16(3), 16.1(6).

⁹⁵ BC Act, note 28, s 5; Saskatchewan Act, note 28, s 12; Manitoba Act, note 28, s 24; Ontario Act, note 28, s 18.1; Newfoundland Act, note 28, s 18.1. Under the CEA, and in BC, Saskatchewan, and Manitoba, any witness who does not understand the nature of an oath or affirmation, whether a child or adult, may give evidence upon a promise to tell the truth. In Ontario and Newfoundland, only a child may give evidence upon a promise to tell the truth.

B. Importance of a Commitment to Tell the Truth

[142] It is desirable to have a witness make a formal commitment to tell the truth before giving evidence. There is some psychological research suggesting that a promise to tell the truth promotes truth-telling in children.⁹⁶ It is difficult to know if experimental conditions are mirrored in actual courtrooms, but as the writers of the Child Witness Project's *Brief on Bill C-2* said: "While having a child promise to tell the truth provides no guarantee of the honesty of the witness, it does no harm, and may do some good."⁹⁷

[143] Having all witnesses make a formal commitment to tell the truth is consistent with the principle that the law should not draw arbitrary distinctions based on age or other personal characteristics. Competent adult witnesses must make a formal commitment to tell the truth, either by oath or affirmation. There is no compelling reason why children or adults with cognitive impairment should not also make a commitment to tell the truth.

[144] The options of no formality and pure judicial caution should be rejected, as they do not require a witness to make a formal commitment to tell the truth. As such, they would treat some witnesses differently.

[145] The remaining options are therefore oath, affirmation, and promise.

C. Should a Child Be Permitted to Swear an Oath?

[146] The CEA specifically prohibits a person under fourteen from swearing an oath.⁹⁸ ALRI considered arguments for and against a similar prohibition in the AEA.

[147] On the one hand, there are practical benefits to treating all children the same. A prohibition on swearing an oath would be consistent with the CEA. It would also eliminate any need for an inquiry into a child's understanding of the oath, with the likelihood of intrusive questions about religion.

[148] On the other hand, a prohibition on swearing an oath risks impairing the religious freedom of a child. ALRI recently considered whether the oath should

⁹⁶ Victoria Talwar et al, "Children's Conceptual Knowledge" (2002) 26:4 L & Human Behavior 395; Thomas D Lyon, "Child Witnesses and the Oath: Empirical Evidence" (2000) 73 S Cal L Rev 1017 at 1067-71.

⁹⁷ Child Witness Project at Queen's University by Prof Nicholas Bala, *Brief on Bill C-2: Recognizing the Capacities and Needs of Children as Witnesses in Canada's Criminal Justice System* (2005) at 28.

⁹⁸ CEA, s 16.1(2).

be abolished, requiring all witnesses and deponents to make a secular commitment to tell the truth. ALRI recommended that the option of swearing a religious oath should be retained for adult witnesses, recognizing that the oath is meaningful to some and that our institutions should accommodate diversity.⁹⁹ The same principles apply to children.

[149] ALRI has concluded the benefits of a prohibition on a child swearing an oath do not outweigh the potential impairment of religious freedom. In this area, consistency with the CEA is not the best policy.

[150] If a child expresses a wish to swear an oath, a court should be able to accommodate. We do not recommend any legislated restrictions on when a child may swear an oath. In particular, legislation should not require a court to inquire into the child's understanding of the oath. Courts should have flexibility to accommodate a child's beliefs without asking intrusive questions.

[151] Under the AEA, a witness has a right to swear an oath "administered in a form and with any ceremonies that the person may declare to be binding."¹⁰⁰ If a child is permitted to swear an oath, the child must have the right to choose the appropriate form of oath.

RECOMMENDATION 4

There should be no prohibition against a child swearing an oath.

[152] We expect it will be rare for a child to express a wish to swear an oath. While religious freedom is an important consideration, in many cases the more pressing issue will be accommodation of a child's particular abilities or needs.

D. Should the Secular Formality Be an Affirmation or a Promise?

[153] The two options for a secular alternative to an oath are an affirmation or a promise to tell the truth.

[154] In the Report for Discussion, ALRI proposed that certain witnesses should be required to make a promise to tell the truth instead of swearing an oath or making an affirmation. During consultation, we realized there were unresolved

⁹⁹ 2014 Report at para 58.

¹⁰⁰ AEA, s 14(1).

questions about the difference between an affirmation and a promise to tell the truth.

1. IS THERE A DIFFERENCE BETWEEN AN AFFIRMATION AND A PROMISE TO TELL THE TRUTH?

[155] The CEA does not clearly state the difference between an affirmation and a promise to tell the truth, although it implies that there is a difference.¹⁰¹ The CEA prohibits a witness under fourteen from making an affirmation, while requiring that the witness promise to tell the truth. Several provincial evidence statutes also imply there is a difference without stating what it is.¹⁰²

[156] In the Canadian legal system, oaths and affirmations are not merely ceremonial. They have important legal effects. The most important effects are on admissibility, the weighing of evidence, and liability for perjury.

[157] There has been some judicial interpretation of the promise required by the CEA. As the legislation is unclear, several specific issues have had to be litigated. Although most cases suggest there is little difference between the form and effects of an affirmation and a promise to tell the truth, some ambiguity remains.

a. Form

[158] An affirmation is a promise or solemn declaration that is not an oath. The CEA has a prescribed form of affirmation.¹⁰³ The AEA does not.

[159] In Alberta, which has no mandatory form of affirmation, words such as “I promise I will tell the truth” would be a valid form of affirmation.

[160] No Canadian jurisdiction has legislation specifying the form of promise for a child witness.

[161] Under the CEA, courts have sometimes held a witness may make a valid affirmation using words like “I promise”, rather than the prescribed “I solemnly affirm.” In *R v Jim*, when a sixteen year old witness was asked to make an

¹⁰¹ CEA, ss 16(3), 16.1(6).

¹⁰² BC Act, note 28, s 5; Saskatchewan Act, note 28, s 12; Manitoba Act, note 28, s 24; Ontario Act, note 28, s 18.1; Newfoundland Act, note 28, s 18.1.

¹⁰³ CEA, s 14 states:

14(1) A person may, instead of taking an oath, make the following solemn affirmation:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

affirmation, she said she did not understand the question.¹⁰⁴ The trial judge explained that an affirmation was a “promise to the court that whatever you are going to tell me is going to be the truth.” The judge then asked the witness “So do you promise that you will tell me the truth?” The witness made the promise. The British Columbia Court of Appeal held that this exchange was a valid form of affirmation. In *R v Hanna*, a ten year old witness was asked “Do you solemnly affirm that the evidence you shall give shall be the truth, the whole truth, and nothing but the truth. Do you promise to tell the truth Daniel?”¹⁰⁵ The British Columbia Court of Appeal held it was a defective form of affirmation, but as there was no prejudice to the accused the defective affirmation was a curable irregularity. In *R v Nitsiza*, the Supreme Court of the Northwest Territories assumed without deciding that a positive answer to “Do you promise to tell the truth in this proceeding?” might be a form of affirmation under the CEA.¹⁰⁶ The only reported decision to the contrary is *R v Shaw*, in which two adult witnesses were asked if they promised to tell the truth.¹⁰⁷ The Ontario Superior Court of Justice held the witnesses had not made an affirmation so their evidence was inadmissible.

[162] It is difficult to distinguish a promise from an affirmation when they can both be made with the same words.

b. Admissibility

[163] Formalities determine whether evidence is admissible. A competent adult must swear an oath or make an affirmation before giving evidence. If not, the witness’s evidence is inadmissible.

[164] The CEA does not address the effect of a promise on admissibility. It requires children and some adults to promise to tell the truth before giving

¹⁰⁴ *R v Jim*, 2006 BCCA 573. As the witness was older than fourteen, she was considered an adult for the purpose of giving evidence.

¹⁰⁵ *R v Hanna* (1993), 80 CCC (3d) 289 (BCCA). The case predates the 2005 amendments to the CEA. At the time, the CEA required a child who understood the nature of an oath or affirmation to give evidence under oath or affirmation. The trial judge had determined that the witness should make an affirmation.

¹⁰⁶ *R v Nitsiza*, 2001 NWTSC 34, [2001] 7 WWR 608. Although the court assumed the words might be a valid form of affirmation, it held that a preliminary inquiry judge had erred in administering the formality. As the witness was older than fourteen, she was considered an adult for the purpose of giving evidence. She could not make a promise to tell the truth. The preliminary inquiry judge should have asked the witness whether she chose to swear an oath or make an affirmation, but failed to do so.

¹⁰⁷ *R v Shaw*, 2016 ONSC 658. Unfortunately, the reported decision does not provide the exact wording of the promise.

evidence, but it is not clear from the legislation whether the failure to make a promise would make the witness's evidence inadmissible.

[165] Case law has not fully resolved the issue. Since the CEA has been implemented, there have been a number of cases where a judge has apparently overlooked the requirement to have a child witness promise to tell the truth.¹⁰⁸ Appellate courts, including the Alberta Court of Appeal, have generally held that the promise functions like an oath or affirmation; if the child does not promise to tell the truth, the child's evidence is inadmissible.¹⁰⁹ In at least one case, however, the Ontario Court of Appeal came to the opposite conclusion. It held that the absence of an explicit promise to tell the truth was a curable procedural error.¹¹⁰

[166] The issue of admissibility might also arise in proceedings outside court. Many statutes and regulations require or permit evidence given outside court — such as in questioning or before statutory tribunals — to be under oath.¹¹¹ There are more than 80 Alberta statutes and regulations that refer to evidence under oath. The *Interpretation Act* makes it clear a witness may give evidence under affirmation, even if the legislation refers only to an oath. The *Interpretation Act* says nothing about the effect of a promise.¹¹²

[167] If a promise were introduced to the AEA, it would be helpful if the legislation addressed whether a promise is essential to admissibility, and whether evidence given under a promise to tell the truth is admissible in all proceedings.¹¹³

¹⁰⁸ See e.g. *R v CWG* (1994), 88 CCC (3d) 240 (BCCA); *R v Wilson* (1995), 139 NSR (2d) 61 (CA); *R v Peterson* (1996), 27 OR (3d) 739 (CA); *R v RJB*, 2000 ABCA 103. See also *R v Nitsiza*, 2001 NWTSC 34, [2001] 7 WWR 608, where a judge asked a fourteen year old witness to promise to tell the truth, instead of having the witness swear an oath or make an affirmation.

¹⁰⁹ *R v CWG* (1994), 88 CCC (3d) 240 (BCCA); *R v Wilson* (1995), 139 NSR (2d) 61 (CA); *R v RJB*, 2000 ABCA 103.

¹¹⁰ *R v Peterson* (1996), 27 OR (3d) 739 (CA).

¹¹¹ See e.g. *Alberta Rules of Court*, Alta Reg 124/2010, r 5.22 (“...questioning may be conducted (a) orally, under oath, or (b) by written questions, answered under oath, ...”); *Child, Youth and Family Enhancement Act*, s 108(3) (“the evidence of each witness in a Court proceeding under this Act shall be taken under oath ...”); *Arbitration Act*, RSA 2000, c A-43, s 29(4) (“An arbitral tribunal shall require witnesses to testify under oath, affirmation or declaration.”)

¹¹² *Interpretation Act*, RSA 2000, c I-8, s 28(1)(II) states:

“oath” or “affidavit” includes a solemn affirmation or solemn declaration whenever the context applies to any person by whom a solemn affirmation or declaration may be made instead of an oath; and in similar cases the expression “sworn” includes the expression “affirmed” or “declared”.

The federal *Interpretation Act*, RSC 1985, c I-21, s 35(1) has a definition of “oath” similar to the one in the *Interpretation Act*, RSA 2000, c I-8. It also says nothing about the effect of a promise.

¹¹³ Of the Canadian jurisdictions that require child witnesses to promise to tell the truth, none have clarified the effect of a promise in legislation.

c. Corroboration and weight

[168] In Alberta, formalities affect whether a court can rely on a child's evidence. Under section 19 of the AEA, if a child swears an oath, the child's evidence is treated like any other sworn evidence. If a child does not swear an oath, the child's evidence cannot be relied upon unless corroborated.

[169] The requirement for corroboration of a child's unsworn evidence was removed from the CEA in the late 1980s.¹¹⁴ After this amendment, there was some uncertainty about whether unsworn evidence should be given less weight than evidence given under oath or affirmation. In *R v Demerchant*, the New Brunswick Court of Appeal suggested that a jury might treat a child's sworn evidence as more reliable than unsworn evidence.¹¹⁵ In *R v McGovern*, however, the Manitoba Court of Appeal held that "the weight which should be given to a young witness's evidence is not affected by the form of the witness's commitment to tell the truth."¹¹⁶

[170] The most recent reforms to the CEA addressed this issue by including a provision requiring equivalence between sworn evidence and a child's unsworn evidence. Subsection 16.1(8) reads:¹¹⁷

16.1(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

[171] It is now clear under the CEA that a promise has the same effect as an affirmation for determining weight. If a promise were introduced to the AEA, a similar provision would be helpful.

d. Perjury

[172] One potential difference between an affirmation and a promise to tell the truth is liability for perjury. A conviction for perjury requires a false statement under oath or affirmation.¹¹⁸ A witness who lies after making an affirmation could be convicted of perjury. The CEA's prohibition on a child swearing an oath

¹¹⁴ The requirement for corroboration has also been abolished in BC, Saskatchewan, Manitoba, Ontario, New Brunswick, and Newfoundland and Labrador.

¹¹⁵ *R v Demerchant* (1991), 116 NBR (2d) 247 (CA).

¹¹⁶ *R v McGovern* (1993), 88 Man R (2d) 18 (CA).

¹¹⁷ CEA, s 16.1(8).

¹¹⁸ *Criminal Code*, note 50, s 131.

or making an affirmation may mean that no child under fourteen may be liable for perjury.¹¹⁹

[173] Although it may be a difference, liability for perjury is not by itself a compelling reason to require a promise to tell the truth instead of an affirmation. Twelve is the age of criminal responsibility in Canada, and thus the age at which a witness could be convicted of perjury.¹²⁰ Children who are fourteen or older give evidence under oath or affirmation. The CEA prohibition therefore potentially protects only those children between the ages of twelve and fourteen. Prosecutions for perjury are rare and are a matter for prosecutorial discretion. It seems unlikely that the promise is required just to protect a fairly narrow subset of children from liability for perjury.

2. ONE SECULAR FORMALITY

[174] Upon reflection, ALRI has concluded that the difference, if any, between an affirmation and a promise to tell the truth is insufficiently clear.

[175] Under the CEA, a promise is essentially equivalent to an affirmation. The only significant difference appears to be in potential liability for perjury.

[176] Introducing a promise into the AEA could introduce uncertainty. It might lead to new disputes about the form or effect of a promise, which would almost certainly be an unnecessary distraction from the core issues between the parties. The alternative would be to clarify the effect of a promise in legislation. This approach would likely include prescribed forms of affirmation and promise, and provisions stating that a promise is equivalent to an affirmation for purposes of admissibility and weight.

[177] If there is little difference between an affirmation and a promise, why have two secular formalities? The implied distinction in the CEA appears to be a historical artifact. When sworn and unsworn evidence were weighed differently, an affirmation had different effects than a promise. That difference is now

¹¹⁹ It is possible that children under fourteen may be liable for the separate offence of giving contradictory testimony. *Criminal Code*, note 50, s 136(1) defines the offence as follows: “Every one who, being a witness in a judicial proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence ...”. Evidence is defined as “an assertion of fact, opinion, belief or knowledge ...” and witness is defined as “a person who gives evidence orally under oath or by affidavit in a judicial proceeding, whether or not he is competent to be a witness, and includes a child of tender years who gives evidence but does not give it under oath ...”: *Criminal Code*, note 50, s 118 [emphasis added].

¹²⁰ *Criminal Code*, note 50, s 13.

abolished. The only remaining practical difference may be that a promise protects certain children from liability for perjury. We are not convinced that this difference is sufficient reason to introduce a new secular formality into the AEA. Requiring children to promise to tell the truth, instead of making an affirmation, draws a distinction based on age. There is little justification for the distinction.

[178] ALRI has concluded that there should be one secular formality in Alberta law: an affirmation. A child who does not swear an oath should make an affirmation.

E. Should a Child Be Asked to Choose Between Oath and Affirmation?

1. THE FREE CHOICE MODEL FOR ADULTS

[179] The AEA currently requires most adults to swear an oath before giving evidence. Only those who object to swearing an oath may make an affirmation.

[180] ALRI recently recommended that adult witnesses and deponents should have a free choice between swearing an oath and making an affirmation.¹²¹ Adult witnesses would be asked whether they prefer to swear an oath or make an affirmation and the appropriate formality would be administered.

2. AN EXCEPTION TO THE FREE CHOICE MODEL

[181] Treating children exactly like adults presents its own set of problems.

[182] The free choice model is not well suited to the needs of children. Asking a young child to choose between swearing an oath and making an affirmation is likely to confuse the child. The concepts of oath and affirmation are difficult and abstract ones. Several studies have shown that young children are unlikely to know or understand the word “oath”, and one study showed some teenagers did not recognize the word.¹²² Even for adults, the difference between oath and affirmation may be confusing. In a survey conducted for ALRI’s project on oaths

¹²¹ 2014 Report at paras 58–60.

¹²² Karen Saywitz, Carol Jaenicke & Lorinda Camparo, “Children’s Knowledge of Legal Terminology” (1990) 14:6 L & Human Behavior 523; Rhona H Flin, Yvonne Stevenson & Graham M Davies, “Children’s Knowledge of Court Proceedings” (1989) 80 British J of Psychology 285; Emma Crawford & Ray Bull, “Teenagers’ Difficulties with Key Words Regarding the Criminal Court Process” (2006) 12:6 Psychology, Crime & L 653.

and affirmations, many respondents had observed witnesses appear to be confused, frustrated, or unsettled when required to “object-and-justify” before making an affirmation. The most common reason was that the witness appeared to have difficulty understanding the difference between swearing and affirming.¹²³ Giving evidence may be a stressful, confusing, or difficult experience for a child. A confusing and possibly unsettling question is a poor way to begin the experience.

[183] The CEA avoids the problems of the free choice model by imposing a default formality. Under the CEA, all children under fourteen are required to promise to tell the truth.¹²⁴ A child is never offered the choice of oath or affirmation.

[184] While ALRI has concluded a child should be permitted to swear an oath, we expect it will be rare for a child to indicate a preference. There should be a default procedure that does not require every child to make a choice.

[185] ALRI has already recognized the need for certain exceptions to the free choice model.¹²⁵ In its 2014 Report, ALRI recommended that:

The *Alberta Evidence Act* should provide two exceptions to the free choice model. Notwithstanding anything in the Act, a presiding officer may direct that a witness or deponent must affirm if: (a) the witness or deponent does not choose between an oath and affirmation, or (b) it is not reasonably practicable, in the opinion of the presiding officer, for the witness or deponent to take an oath in the form or manner appropriate to their religious or other beliefs.

[186] A similar exception for children would avoid the problem of the free choice model without eliminating the option to swear an oath. A permissive provision, instead of a mandatory one, would preserve flexibility to

¹²³ ALRI surveyed justices of the Court of Queen’s Bench, judges of the Provincial Court of Alberta, court clerks, and lawyers about their observations. One question asked, “How often have you observed witnesses or deponents who appear to be confused, frustrated or unsettled by the “object-and-justify” procedure?” Of the 172 respondents who answered the question, 21 per cent answered “always” or “often” and 22 per cent answered “occasionally”. Respondents were also asked their subjective opinion of the reason for the confusion, frustration or unsettledness. Of the 130 respondents who answered the question, 39 per cent agreed that the reason was “always” or “often” that “The difference between swearing and affirming seemed difficult for the witness or deponent to understand.” A further 25 per cent agreed that it was “occasionally” the reason. For further discussion of the survey, see 2014 Report at paras 11–14.

¹²⁴ The CEA does not have a single formality for adults with cognitive impairment. If an adult’s competence is challenged, the court is required to conduct an inquiry to determine whether the adult may give evidence, and if so, whether the adult may swear an oath or make an affirmation, or must instead promise to tell the truth.

¹²⁵ See 2014 Report at paras 82–88.

accommodate individuals. In most cases, a court could simply direct a child to make an affirmation, without requiring the child to choose between oath and affirmation. If a child expresses a wish to swear an oath, however, the court would be able to accommodate.

[187] Allowing a court to direct a child to make an affirmation is generally consistent with the guiding principles for this project. The rule would produce predictable results in most cases. It would be efficient, as there generally would be no need for an inquiry or other preliminary procedure to determine the appropriate formality. Although this approach draws a distinction based on age or cognitive ability, the distinction is not arbitrary. It accommodates the needs and abilities of children.

RECOMMENDATION 5

A presiding officer should be able to direct that a child make an affirmation before giving evidence.

F. At What Age is a Witness Considered a Child?

[188] ALRI's recommendations would mean the only special rule for a child witness would be that the court could direct a child to affirm.

[189] The AEA should clearly state who is considered to be a child for the purpose of this rule. The AEA currently uses the term "child of tender years", which is unclear.¹²⁶ Case law resolves the issue; in the context of children's evidence, courts have generally accepted that a person aged fourteen or more should be presumed competent.¹²⁷ It would be simpler, however, if the age limit were stated in the AEA.

1. OPTIONS

[190] We acknowledge that any age limit is arbitrary, as maturation is a gradual process and children develop at different rates.

¹²⁶ AEA, s 19(1).

¹²⁷ See *R v Armstrong* (1959), 29 WWR 141 at 141 (BCCA); *R v Horsburgh* (1965), [1966] 1 OR 739 at 746 (CA), rev'd on other grounds, [1967] SCR 746; *R v Bannerman* (1966), 55 WWR 257 (Man CA) at 285; *R v Dyer* (1971), [1972] 2 WWR 1 at 2, 10, 18-19 (BCCA).

[191] In most Canadian jurisdictions, special rules apply to witnesses under fourteen years old. In some jurisdictions, including Alberta, the age limit is found in case law. In other jurisdictions, it is stated in legislation.¹²⁸

[192] Some have suggested that twelve would be the appropriate dividing line. In the Child Witness Project's *Brief on Bill C-2*, the writers stated children twelve and over are "cognitively ready for understanding and taking an oath."¹²⁹ The writers noted that courts usually find that children twelve and over understand the nature of an oath, and permit them to swear an oath or make an affirmation. Twelve is the age of criminal responsibility in Canada, and thus the age at which a witness could be convicted of perjury or giving contradictory evidence.¹³⁰ Some international jurisdictions have set the dividing line at twelve.¹³¹

2. CONSULTATION RESULTS

[193] In general, most respondents supported treating a witness who is fourteen or older as an adult.

[194] Some respondents pointed out that twelve would promote consistency with other rules. For example, under the *Child, Youth and Family Enhancement Act*, certain rights are available to children who are twelve years of age or older.¹³² Twelve is also a threshold age for certain aspects of the Legal Representation for Children and Youth program of the Office of the Child and Youth Advocate of Alberta.

3. SHOULD THE AGE LIMIT REMAIN AT FOURTEEN?

[195] ALRI has concluded that the dividing line should remain at fourteen. Despite good reasons to set the dividing line at twelve, in this case consistency with the CEA should prevail. Alberta courts must apply both the AEA and the CEA, depending on the type of matter. Different age limits would introduce an unnecessary source of confusion. In a situation where either choice would be

¹²⁸ CEA, s 16.1; BC Act, note 28, s 5(1); Ontario Act, note 28, s 18(1). See also *Uniform Child Evidence Act*, s 1(a), online: Uniform Law Conference of Canada <www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/649-child-evidence>.

¹²⁹ Child Witness Project at Queen's University by Prof Nicholas Bala, *Brief on Bill C-2: Recognizing the Capacities and Needs of Children as Witnesses in Canada's Criminal Justice System* (2005) at 29.

¹³⁰ *Criminal Code*, note 50, s 13.

¹³¹ See e.g. *Evidence Act 2006 (NZ)*, 2006/69, s 77.

¹³² *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12.

valid, Alberta should stay in step with all other Canadian jurisdictions and particularly the CEA.

RECOMMENDATION 6

Special rules for children's evidence should apply to children under the age of 14.

G. Should There Be a Simple Form of Affirmation?

[196] As noted above, there is no prescribed form of affirmation in the AEA. Although ALRI recommends affirmation be the only secular formality in Alberta law, the form of affirmation may be adapted for a child witness.

[197] The form of affirmation should be understandable to the witness. Without guidance, it may be difficult for judges to choose wording that is developmentally appropriate for a child.

[198] In its 2014 Report, ALRI recommended against enacting a mandatory form of affirmation, and also recommended that the AEA should include non-mandatory, permissive forms of oath and affirmation as examples only. Recommendation 7 in the 2014 Report was:¹³³

The *Alberta Evidence Act* should not enact a mandatory form of affirmation.

[199] Recommendation 9 in the 2014 Report was:¹³⁴

The *Alberta Evidence Act* should also contain a non mandatory, permissive form of generic affirmation as an instructive example. It should be stated in the same basic terms as the Act's permissive form of oath, with necessary modifications to reflect the affirmation's secular nature.

[200] It would be helpful to add an example of a simple form of affirmation to the AEA. A non-mandatory, permissive example would help courts, and others who administer oaths and affirmations, to accommodate the needs of children. It would promote a consistent practice, while maintaining flexibility. A non-mandatory example would of course be subject to any directions by the court or presiding officer.

¹³³ 2014 Report at para 80.

¹³⁴ 2014 Report at para 156.

[201] A simple form of affirmation should be understandable to a child. It should use plain language and avoid complex constructions. Some research shows that children understand “I will” at an early age, but take longer to understand “I promise”.¹³⁵ Thomas Lyon, an American psychologist and law professor, suggests that most children would understand a commitment that included both “I promise” and “I will” (such as “I promise that I will tell the truth”).¹³⁶

[202] In consultation, all respondents approved of the wording “I promise that I will tell the truth.” We recommend this wording as a suitable example of a simple form of affirmation.

[203] Adding a simple form of affirmation should not unintentionally limit the available forms of affirmation. Although legislation should indicate that the simple form of affirmation is appropriate for a child, it should leave open the possibility of using the form for any witness. For example, a simple form of affirmation may be appropriate for a witness who is not a native speaker of English.

[204] In the 2014 Report, ALRI recommended the AEA include non-mandatory forms of generic oath and affirmation in the following form:

Administration of oath or affirmation

15(1) An oath may be administered in the form and manner following:

Using any ceremonies that the person taking the oath declares to be binding, the officer administering the oath shall say: “Do you swear that the evidence you give will be the truth, the whole truth and nothing but the truth, so help you God?”, to which the person being sworn shall say “I do” or give their assent to it in a manner satisfactory to the court or to the officer administering the oath.

(2) An affirmation may be administered in the form and manner following:

The officer administering the affirmation shall say: “Do you solemnly affirm that the evidence you give will be the truth, the whole truth and nothing but the truth?”, to which the person being affirmed shall say “I do” or give their assent to it in a manner satisfactory to the court or to the officer administering the affirmation.

¹³⁵ Thomas D Lyon, “Child Witnesses and the Oath: Empirical Evidence” (2000) 73 S Cal L Rev 1017 at 1057-63.

¹³⁶ Thomas D Lyon, “Child Witnesses and the Oath: Empirical Evidence” (2000) 73 S Cal L Rev 1017 at 1063.

[205] ALRI recommends adding a non-mandatory form of simple affirmation in the following form:

(3) If the person making an affirmation is under fourteen years of age, or in any other circumstance, an affirmation may be administered in the form and manner following:

The officer administering the affirmation shall say: “Do you promise that you will tell the truth?”, to which the person being affirmed shall say “I do” or give their assent to it in a manner satisfactory to the court or to the officer administering the affirmation.

[206] Despite differences in legislation, this wording would promote consistency of practice between the AEA and the CEA. The AEA would require an affirmation, while the CEA requires a promise to tell the truth. In practice, however, the words and procedures would be the same. Regardless of whether the AEA or CEA applied in a proceeding, a child could meet the prerequisite to give evidence by saying “I promise that I will tell the truth”, or words to that effect.

RECOMMENDATION 7

The *Alberta Evidence Act* should include a non-mandatory, permissive form of simple affirmation as an instructive example.

H. What Approach to Formalities Accommodates Adults with Cognitive Impairment?

[207] In the Report for Discussion, ALRI’s preliminary recommendation was that an adult who is competent to give evidence but is not capable of understanding the nature of an oath or affirmation should be required to promise to tell the truth before giving evidence.

[208] We have had to reconsider our preliminary recommendation in light of our conclusion that an affirmation should be the only secular formality in Alberta law.

[209] It is difficult to develop general rules for adults with cognitive impairment, as each individual has their own unique needs and abilities. In this context, it is particularly important to provide flexibility to accommodate individuals.

[210] Upon review, ALRI has concluded that our other recommendations provide a framework with appropriate flexibility. No special provisions are required for adults with cognitive impairment.

[211] As with a child, a prohibition on swearing an oath risks impairing the religious freedom of an adult with cognitive impairment. Some adults with cognitive impairment may find an oath meaningful, even if they have difficulty expressing the meaning. Legislation should allow a court to accommodate without asking difficult or intrusive questions.

RECOMMENDATION 8

There should be no prohibition against an adult with cognitive impairment swearing an oath.

[212] An exception to the free choice model might be required for some adults with cognitive impairment, but not necessarily all. Some will be able to answer whether they wish to swear an oath or make an affirmation. Others may find the question confusing and be unable to answer. It is likely impossible to develop a rule that would accurately divide one from the other before asking the question.

[213] Fortunately, ALRI's recommendations in the 2014 Report address the issue of a witness who does not – or cannot – choose between oath and affirmation. ALRI recommended an exception to the free choice model, allowing a court to direct a witness to make an affirmation if the witness does not choose between an oath and affirmation. If a witness with cognitive impairment is unable to choose, this exception would apply.

RECOMMENDATION 9

If an adult with cognitive impairment does not choose between an oath and an affirmation, a presiding officer should be able to direct that the adult make an affirmation before giving evidence.

[214] A simple form of affirmation would be available for an adult with cognitive impairment. There would be a suggested form, with flexibility to use any form that is appropriate.

I. Formalities for Giving Evidence Out of Court

[215] The recommendations above would not require special or unusual procedures for affidavits, at questioning, or before tribunals.

1. AFFIDAVITS

[216] Under the CEA, the promise to tell the truth requires special procedures for affidavits. The person before whom the affidavit is made should ask if the deponent promises to tell the truth and then alter the preamble and jurat of the affidavit accordingly.¹³⁷ It is not clear what the consequences of an error would be, and whether an affidavit sworn or affirmed in error would be admissible.

[217] In contrast, the recommendations in this report would not require special procedures for making an affidavit. A child would generally make an affirmation when making an affidavit. An adult with cognitive impairment should be offered the choice of oath or affirmation, but if the deponent does not choose the person before whom the affidavit is made could administer an affirmation. Standard forms of preamble and jurat would be appropriate. Existing prescribed forms of affidavit in Alberta legislation (including some that specifically contemplate a child deponent) could be used without alteration.

2. EVIDENCE AT QUESTIONING OR BEFORE A TRIBUNAL

[218] The recommendations in this report would clarify how a child should give evidence in questioning or before a tribunal. The *Alberta Rules of Court* state that questioning is to be under oath.¹³⁸ Many statutes and regulations require or permit a witness in proceedings before various tribunals to give evidence under oath.¹³⁹ An affirmation is equivalent to an oath for all purposes.¹⁴⁰

[219] The recommendations in this report would require all witnesses to make an oath or affirmation. In either case, it would be clear that the evidence is admissible.

¹³⁷ See JP Boyd, "Thoughts on Drawing Children's Affidavits", online: Courthouse Libraries BC <www.courthouselibrary.ca/training/stream/the-stream-jp-boyd-guest-blogger/2012/10/19/JP_Boyd_Thoughts_on_drawing_children_s_affidavits.aspx>.

¹³⁸ *Alberta Rules of Court*, Alta Reg 124/2010, r 22.

¹³⁹ See e.g. *Arbitration Act*, RSA 2000, c A-43, s 29(4) ("An arbitral tribunal shall require witnesses to testify under oath, affirmation or declaration."); *Public Inquiries Act*, RSA 2000, c P-39, s 4 ("The commissioner or commissioners have the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing..."); *Teaching Profession Act*, RSA 2000, c T-2, s 36(2) ("A witness may be examined under oath on anything relevant to the hearing before a hearing committee ...")

¹⁴⁰ *Interpretation Act*, RSA 2000, c I-8, s 28(1)(II).

CHAPTER 5

Weighing Children's Evidence

A. Introduction

[220] In the past, a general suspicion of children's evidence was reflected in rules about weighing evidence. Under section 19 of the AEA, a child's unsworn evidence cannot be relied upon unless corroborated. There was also a common law rule requiring a trial judge to warn a jury about the danger of relying on the evidence of a child. These rules should be obsolete.

B. Should a Child's Evidence Require Corroboration?

[221] The effect of the recommendations in this report is that a child witness would either make an affirmation or swear an oath. There would be no unsworn evidence, so the requirement for corroboration would be unnecessary.

[222] The reasons to abolish the requirement for corroboration have been discussed in detail in Chapter 2.

[223] In consultation, most respondents supported abolishing the requirement for corroboration. A small number of respondents believed corroboration is necessary because children's evidence may be unreliable and should be "fact checked."

[224] ALRI has concluded the requirement for corroboration of a child's unsworn evidence should be abolished.

[225] Abolishing the requirement for corroboration is consistent with the guiding principles ALRI identified for this project. Abolishing the requirement for corroboration would facilitate the admission of relevant evidence, reduce restrictions on the trier of fact, and eliminate an arbitrary distinction based on age and oath-swearing, without affecting accommodation of individual's particular abilities or needs. It would eliminate a source of uncertainty, as corroboration is a concept that is difficult to define or apply. The search for corroboration can easily become an issue in its own right, requiring additional complexity, time, and resources while distracting from the real issues in dispute. Abolishing the requirement for corroboration would also make the AEA consistent with the CEA and rules in other jurisdictions.

[226] As discussed above, the trier of fact must assess evidence and weigh it in the full context. As Justice McLachlin, as she then was, wrote in *R v W(R)*, “Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate.”¹⁴¹ The trier of fact is best placed to make that assessment.

RECOMMENDATION 10

The requirement for corroboration of a child’s unsworn evidence should be abolished.

C. Should There Be a Warning About a Child’s Evidence?

[227] In the past, courts were required to give special instructions about a child’s evidence. In *Kendall*, the Supreme Court of Canada recognized a rule that a trial judge should warn a jury about the danger of relying on the evidence of a child.¹⁴² The rule applied regardless of whether the child’s evidence was sworn or unsworn.

[228] It is doubtful whether the rule in *Kendall* applies to any matters today. It is clearly obsolete in criminal matters.¹⁴³ In *R v Marquard*, the Court made clear that *Vetrovec*’s individualized approach to warnings applies to the evidence of children. The majority wrote: “With children as with adults, there can be no fixed and precise formula to be followed in warning a jury about potential problems with a witness’s evidence.”¹⁴⁴

[229] As recently as 2013, the Alberta Court of Appeal considered an appeal in which the appellant submitted that a trial judge should have given the jury a special warning about relying on the evidence of children. The Court rejected the

¹⁴¹ *R v W(R)*, [1992] 2 SCR 122 at 134.

¹⁴² *R v Kendall*, [1962] SCR 469.

¹⁴³ *R v Vetrovec*, [1982] 1 SCR 811 at 830-32.

¹⁴⁴ *R v Marquard*, [1993] 4 SCR 223 at 238. See also *R v W(R)*, [1992] 2 SCR 122 at 134, where the Court held that it would be an error to automatically discount the evidence of a child:

It is neither desirable nor possible to state hard and fast rules as to when a witness’s evidence should be assessed by reference to “adult” or “child” standards – to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law’s approach to children’s evidence have been designed to dispel.

argument, noting that warnings are not required based on categories or generalities, including the category of being a child.¹⁴⁵

[230] Currently, a judge has discretion to comment on evidence. If there are reasons to treat a particular witness's evidence with caution, the judge may give a warning tailored to the circumstances.

[231] In consultation, most respondents supported leaving warnings to the discretion of the judge. A few respondents indicated that a warning is an important safeguard against accepting unreliable testimony. Implicit in some of the comments was an impression that judges and juries are not always well-informed about children's cognitive and linguistic development. A warning might offer a brief education to assist in weighing a child's evidence.

[232] While ALRI acknowledges that education about children's cognitive and linguistic abilities would be valuable, a mandatory warning is inappropriate. A warning required only because of the witness's age or because the witness has cognitive impairment would limit the trial judge's discretion to instruct a jury and would limit flexibility to respond to individual situations. A mandatory warning cannot accommodate each specific circumstance and is more likely to perpetuate stereotyping than to educate. It would also be inconsistent with the CEA and legislation from other jurisdictions. In any case, warnings would be rare in proceedings to which the AEA applies. The majority of jury trials with child witnesses would be criminal matters, to which the CEA applies.

[233] The AEA should not restrict a judge's discretion to comment on the evidence, including giving a warning to a jury when appropriate. There is no need to expressly abolish the requirement for a warning, as it is obsolete. Adopting a new provision that limits or prohibits such a warning would restrict discretion. The AEA should remain silent about warnings. Any guidelines can be appropriately developed through judicial decisions.

RECOMMENDATION 11

Alberta legislation should neither require nor limit any warning to the trier of fact about relying on the evidence of a child.

¹⁴⁵ *R v Innerebner*, 2013 ABCA 9 at paras 39–43.

CHAPTER 6

Witnesses with Communication Disabilities

[234] As discussed in Chapter 2, there is a gap in current legislation. Provisions permitting the use of alternate means of communication contemplate only witnesses who are deaf or who are unable to speak. There is no guarantee that witnesses with other disabilities affecting communication will be permitted to give evidence by their preferred means of communication.

[235] There was general support among consultation respondents for updating section 20 of the AEA, to ensure that it permits the use of communication methods or technologies whenever appropriate to assist a witness and the court. All respondents to the survey agreed that a witness with a disability affecting communication should be allowed to communicate evidence in any manner that is intelligible.

[236] The updated provision should complement the new test for competence. Witnesses should not be excluded from giving evidence just because they face challenges communicating verbally. A person should be able to give evidence if they can understand and respond to questions by any means.

[237] The CEA and the Saskatchewan Act are examples of one approach to a provision about communication. Section 13 of the Saskatchewan Act reads:¹⁴⁶

13(1) If a witness has difficulty communicating evidence because of a mental or physical disability, the court may permit the witness to testify by any means that enables the evidence to be intelligible.

(2) The court may conduct an inquiry to determine if the means by which a witness may be permitted to testify pursuant to subsection (1) is necessary and reliable.

[238] The *Adult Guardianship and Trusteeship Act* takes another approach. It includes a provision that states:¹⁴⁷

2 (b) an adult is entitled to communicate by any means that enables the adult to be understood, and the means by which an adult communicates is not relevant to a

¹⁴⁶ Saskatchewan Act, note 28, s 13. CEA, s 6 is similar but wordier, with separate subsections for physical and mental disability.

¹⁴⁷ *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 2(b).

determination of whether the adult has the capacity to make a decision.

This provision not only permits the use of alternate means of communication, but recognizes that the choice should belong to the individual. It also ensures that a person's means of communication has no impact on the assessment of competence.

[239] ALRI recommends a provision modeled on the one in the *Adult Guardianship and Trusteeship Act*. The provision should not only state that a witness is entitled to give evidence by any means that enables the witness to be understood, but should also state that the witness may use the preferred means of communication in any inquiry into their competence to give evidence, and that means of communication is not relevant to the determination of competence.

[240] This provision should apply to all witnesses, adult and child alike.

[241] This provision would apply to evidence given by affidavit or at questioning.

RECOMMENDATION 12

A witness with a disability affecting communication should be entitled to communicate evidence in any manner that is intelligible.

HON CD GARDNER (Chair)

MT DUCKETT QC (Vice Chair)

DR CRANSTON QC

HON JT EAMON

AL KIRKER QC

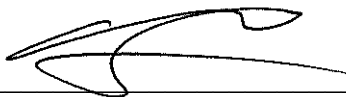
J KOSHAN

PD PATON


S PETERSSON

KA PLATTEN QC

RJ WOOD



CHAIR



DIRECTOR



Web: alri.ualberta.ca

Phone: 780.492.5291

Email: lawreform@ualberta.ca

Follow us on Twitter! @ablawreform
