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LAW REFORM
INSTITUTE

COMPETENCE AND COMMUNICATION IN THE *ALBERTA EVIDENCE ACT*

REPORT FOR DISCUSSION

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Invitation to Comment

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This Report for Discussion by the Alberta Law Reform Institute (ALRI) considers evidence rules affecting certain witnesses. It proposes reforms that would facilitate the admission of evidence from children, adults with cognitive impairment, and people who use alternate means of communication.

The purpose of issuing a Report for Discussion is to allow interested persons the opportunity to consider these proposals and to make their views known to ALRI. You may respond to one, a few or all of the issues raised. Any comments sent to us will be considered when the ALRI Board makes final recommendations.

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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.

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Several counsel and staff contributed to this Report for Discussion. Initial research on children's evidence was carried out by former counsel, Shannon Brochu. Debra Hathaway contributed initial research on communication. Laura Buckingham conducted additional research and wrote the report, with the editorial advice of Sandra Petersson. Barry Chung and Jenny Koziar prepared the report for publication.

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 about competence has not kept pace with modern knowledge 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. This Report for Discussion contains preliminary recommendations for updating Alberta legislation to address these issues.

Competence of Child Witnesses

Section 19 of the *Alberta Evidence Act* [AEA] establishes special rules regarding the admissibility of children's evidence. Before a child's evidence may be received by the court, the court must hold a competency inquiry. If the child is able to understand the nature of an oath, then the child is permitted to give evidence. If the child does not understand the nature of an oath, the court must determine whether the child possesses sufficient intelligence and understands the duty of speaking the truth. Unsworn children's evidence requires corroboration in order to be considered by the trier of fact.

Significant reform surrounding the admissibility of children's evidence has occurred both federally and in other provinces. Multiple law reform agencies (including ALRI) have recommended changes to the approach to children's evidence, and substantial reform has also taken place in other common law jurisdictions. Despite this, the AEA provisions governing children's evidence have remained essentially unchanged since 1910.

The AEA approach to children's evidence is based on the notion that children are inherently unreliable witnesses. However, modern psychological research has undermined these traditional assumptions. It is now widely accepted that many children are capable of providing appropriate and helpful information to a court, particularly if the court and counsel are aware of children's linguistic and cognitive development and treat them appropriately.

Competence of Specific Adult Witnesses

In contrast, and despite the express regulation of children's competence, the AEA does not contain provisions regarding competence of adult witnesses. Adult witnesses are presumed competent unless their competence is challenged. If a competency inquiry is required with respect to an adult witness, the common law applies. If an adult is shown to be incapable of understanding the nature of an oath, the adult will be barred from giving evidence. It would be preferable to have a comprehensive set of rules

regarding competence of all witnesses in order to promote consistency and avoid arbitrary distinctions between children and adults.

Determining Competence of Witnesses Generally

This report recommends that there should be a presumption in the AEA that a person of any age is competent to give evidence. Such a presumption would simplify the admission of evidence as no competency inquiry would be required unless the competence of the witness was disputed. Further, the presumption of competence should be rebutted only if the proposed witness is unable to understand and respond to questions. This lower threshold increases what evidence is admissible, leaving weight as a matter to be determined by the trier of fact.

Special Rules for Children's Evidence

With respect to children's evidence, this report recommends that a child should be required to promise to tell the truth before giving evidence. In most circumstances, a promise to tell the truth will be an appropriate formality for a child. Legislation should not go so far as to prohibit a child from swearing an oath.

The current requirement for corroboration of children's unsworn evidence should be abolished. Such a requirement is based on old stereotypes that have largely been discredited. Further, requiring corroboration may exclude potentially relevant evidence, and is inconsistent with the approach used in other Canadian jurisdictions. It is also difficult to justify as it is not required in criminal matters, where the rules are usually more stringent. Similarly, there is no need for a special warning to the trier of fact regarding the danger of relying on children's evidence. As the common law rule requiring such a warning is obsolete, there is no need for an express provision in the AEA abolishing a special warning requirement.

Finally, to ensure consistency with other Canadian jurisdictions, the rules for children's evidence should apply to proposed witnesses under the age of 14.

Special Rules for Specific Adult Witnesses

An adult who is not capable of understanding the nature of an oath or affirmation should be permitted to give unsworn evidence. In such a case, the witness should be required to promise to tell the truth.

Communication Disabilities

An issue ancillary to witness competence is the witness's ability to communicate evidence. This report recommends that the AEA should ensure that witnesses who face communication barriers are able to give evidence.

Current legislation leaves a gap. Some witnesses who communicate more effectively by means other than speaking are not guaranteed the option to use those means. This report recommends that a witness with a disability affecting communication should be allowed to communicate evidence in any manner that is intelligible, and that the means of communication should not affect the determination of competence. These provisions should apply to both child and adult witnesses.

Recommendations

Table of Abbreviations

LEGISLATION

AEA	*Alberta Evidence Act,* RSA 2000, c A-18
CEA	*Canada Evidence Act,* RSC 1985, c C-5
BC Act	*Evidence Act,* RSBC 1996, c 124
CCP	*Code of Civil Procedure,* CQLR, c C-25
CCP (2015)	*Code of Civil Procedure*, CQLR, c C-25.01
Manitoba Act	*Manitoba Evidence Act*, CCSM, c E150
New Brunswick Act	*Evidence Act*, RSNB 1973, c E-11
Newfoundland Act	*Evidence Act*, RSNL 1990, c E-16
Nova Scotia Act	*Evidence Act*, RSNS 1989, c 154
Nunavut Act	*Evidence Act*, RSNWT (Nu) 1988, c E-8
NWT Act	*Evidence Act*, RSNWT 1988, c E-8
Ontario Act	*Evidence Act*, RSO 1990, c E-23
Saskatchewan Act	*Evidence Act*, SS 2006, c E-11.2
Uniform Act	*Uniform Child Evidence Act*, online: Uniform Law Conference of Canada <www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/649-child-evidence>
Yukon Act	*Evidence Act*, RSY 2002, c 78

LAW REFORM PUBLICATIONS

Ontario Report	Ontario Law Reform Commission, *Report on Child Witnesses* (1991)
Federal Report	Law Reform Commission of Canada, *Report on Evidence* (1975)

CHAPTER 1

Introduction

[1] The *Alberta Evidence Act* [AEA] establishes special rules for child witnesses. Section 19 of the AEA 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.

[2] 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 presumption that a child's evidence should be heard and does not require corroboration.[2]

[3] Section 19 of the AEA has remained essentially unchanged since the first version of the *Alberta Evidence Act* was adopted in 1910. Despite its longevity, it has been relatively obscure. It is rarely cited by Alberta courts. There are almost no reported decisions considering it.

[4] ALRI (then the Institute of Law Research and Reform) previously considered this provision in its 1982 *Report 37B - Evidence and Related Subjects: Specific Proposals for Alberta Legislation*. At the time, ALRI recommended "that the

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

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

proposed Alberta Evidence Act not preclude a court from accepting the uncorroborated evidence of an unsworn child."[3] The recommendation was not implemented.

[5] Several other 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.

[6] In contrast to the provisions on children's evidence, the AEA does not modify the common law about competence of adult witnesses. An adult who is incapable of understanding the nature of an oath is barred from giving evidence, even if they would have the ability to give unsworn evidence.

[7] This report begins with a brief summary of the history of children's evidence provisions in Canada and elsewhere. It then considers two main areas for reform of rules about children's evidence. First, this report discusses how a child's competence to give evidence should be established. Second, it considers whether any special rules should apply to children's evidence. The final section discusses two related issues: determining the competence of adults, and ensuring means of communication is not confused with competence.

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[3] Institute of Law Research and Reform (Alberta), *Evidence and Related Subjects: Specific Proposals for Alberta Legislation*, Report 37B (1982) at 8.

CHAPTER 2

History of Children's Evidence Rules

A. Common Law and Early Reforms

[8] At common law, all witnesses had to take an oath. A child or adult whose competence was in question could be sworn if they understood "the nature and consequences of an oath."[4] If the proposed witness could not demonstrate the necessary knowledge, the evidence could not be received.

[9] In the late nineteenth and early twentieth century, many jurisdictions adopted legislation relaxing the common law rule. Children were permitted to give unsworn evidence, but any such evidence had to be corroborated. 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. The Alberta provision on children's evidence dates back to 1910, when the first version of the AEA was adopted. Similar provisions are still in effect in New Brunswick, Nova Scotia, Yukon, the Northwest Territories, and Nunavut.[5]

[10] Although the statutory rules reflected a more "enlightened" view about children's capabilities, children's evidence continued to be treated with suspicion. A court could not rely upon a child's unsworn evidence if it was uncorroborated. Further, in *R v Kendall*, the Supreme Court recognized a rule that a trial judge must warn a jury about the danger of relying on a child's evidence.[6] The warning was required regardless of whether the child's evidence was sworn or unsworn.

[11] Over the years, authorities suggested many different reasons why children's evidence should be treated with special care. The stated reasons included: [7]

- children cannot remember as well as adults do;

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[4] *R v Brasier* (1779), 1 Leach 199, 168 ER 202.

[5] *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, 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].

[6] *R v Kendall*, [1962] SCR 469 [*Kendall*].

[7] See generally Ontario Law Reform Commission, *Report on Child Witnesses* (1991) at 3 and 8 [Ontario Report].

- children do not have adequate cognitive skills to record, understand, or accurately describe what they see and hear;
- children have a greater tendency to lie than adults do;
- children have difficulty differentiating fact or reality from fantasy;
- children have no sense of a moral obligation to speak the truth;
- children are highly suggestible and easily misled.

[12] Basically, the rule was justified by the notion that children are inherently unreliable witnesses.

B. Psychological Research

[13] In the late twentieth century, a number of psychologists began to examine the assumptions that justified treating children as unreliable witnesses. There is now a large body of literature about children's memories, their understanding of truth, and their reliability in recounting events.[8]

[14] It can be difficult to generalize from individual psychological studies, for several reasons. First, experimental conditions are often significantly different from real-life situations where children might be called to give evidence. For example, researchers cannot expose children to traumatic events. Second, different studies examining similar issues sometimes contradict each other, so it can be misleading to rely on a single study in isolation. Third, psychological studies attempt to provide statistical information about populations in general. The information may be of limited use to a court required to make a determination about a specific individual. For example, psychological research may indicate if most children are capable of lying, but cannot determine whether a particular child will lie in court.

[15] Nonetheless, psychological research has undermined some of the old assumptions about children's evidence. A few conclusions seem to be well-supported:[9]

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

[9] See generally Ontario Report at 7-18; Stephen J Ceci & Maggie Bruck, "Suggestibility of the Child Witness: A Historical Review and Synthesis" (1993) 113 Psychological Bulletin 403.

a. Children are capable of remembering large amounts of information, especially about events that are important to them.

b. Children can provide a great deal of accurate information about events, especially if the questioning is sensitive to their linguistic and cognitive development. 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.

c. From a very young age, children often have an understanding of differences between truth and lies, and between reality and fantasy. Their ability to articulate the differences is not an accurate measure of their understanding, as they are limited by their linguistic ability.

d. While children sometimes lie, it is not clear that they lie more often than adults. Children lie for many of the same reasons adults do.

e. Both children and adults are suggestible. Children may give inaccurate information if they are asked misleading or confusing questions, or if they are encouraged or threatened to answer in a particular way. Questioning can be designed to minimize these distortions.

[16] It is now widely accepted that many children are capable of providing appropriate and helpful information to a court, particularly if the court and counsel are aware of their linguistic and cognitive development and treat them appropriately.

C. Law Reform and Legislation

1. CANADA

[17] There have been several waves of law reform about children's evidence in Canada. Existing legislation in the common law provinces can be grouped into four models, each dating to a particular time.

[18] The first model, including section 19 of the AEA, dates to the late nineteenth and early twentieth century. The second model, currently represented by legislation in British Columbia, Saskatchewan, and Manitoba, dates to reforms from the 1980s and early 1990s. The third model, represented by legislation in

Ontario and Newfoundland, as well as the Uniform Law Conference of Canada's *Uniform Child Evidence Act* [Uniform Act], dates to the 1990s.[10] The final model is unique to the current version of the CEA, and dates to amendments adopted in 2005.

[19] The first model, which modified the common law rule, was widely adopted in Canada through most of the twentieth century. Law reform agencies began to question this model in the late twentieth century.

[20] In 1975, the Law Reform Commission of Canada's *Report on Evidence* included recommendations about children's evidence.[11] The Commission recommended abolishing all rules about competence to give evidence, including rules applying to children. It also recommended replacing the oath with a single, secular promise to tell the truth. The Commission's recommendations were not adopted.

[21] In the early 1980s, the Committee on Sexual Offences Against Children and Youths carried out a wide-ranging project inquiring into sexual abuse of children in Canada. In its final report (known as the Badgley Report), the Committee devoted two chapters to children's evidence and corroboration. The Committee recommended abolishing special rules about competence of child witnesses and abolishing the requirement for corroboration of a child's unsworn evidence.[12] The Committee wrote: "The cogency of a given child's testimony would be a matter of weight to be determined by the trier of fact, not a matter of admissibility or presumed unreliability…"[13]

[22] Following the Badgley Report, Parliament amended the CEA.[14] It abolished the requirement for corroboration of a child's unsworn evidence and revised wording about competence to testify. It also extended the special rules to adults with cognitive impairment, for the first time permitting adults who were incapable of understanding the nature of an oath to give unsworn evidence. This version of the CEA is the basis for the second model, as several provinces

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[10] *Uniform Child Evidence Act*, online: Uniform Law Conference of Canada <www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/649-child-evidence> [Uniform Act].

[11] Law Reform Commission of Canada, *Report on Evidence* (1975) [Federal Report].

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

[13] Badgley Report, note 12, at 382.

[14] *Act to Amend the Criminal Code and the Canada Evidence Act*, SC 1987, c 24. Around the same time, Parliament also amended the *Criminal Code* to remove requirements for corroboration relating to sexual offences.

amended their evidence statutes to mirror the CEA provision. British Columbia, Saskatchewan, and Manitoba still have provisions based on this version of the CEA.[15]

[23] The Ontario Law Reform Commission independently studied issues around children's evidence. In 1991, it issued its *Report on Child Witnesses*. The Commission made a number of recommendations, including:

a. the test of competency should not be based on understanding an oath;

b. children should testify upon a simple promise to tell the truth;

c. there should be a presumption that all witnesses, including children, are competent to give evidence;

d. the distinction between sworn and unsworn testimony should be abolished;

e. the requirement for corroboration of unsworn testimony should be abolished; and

f. the rule in *Kendall* (requiring a specific warning about the testimony of children) should be abolished.

[24] Many of the Ontario Law Reform Commission's recommendations were adopted in Ontario's *Evidence Act*.[16]

[25] The Uniform Law Conference of Canada also considered issues around children's evidence in 1992 and 1993. In 1993, it recommended adoption of the Uniform Act. Although the Uniform Act is not identical to the Ontario Act, there is significant overlap. They represent the third model.

[26] Newfoundland and Labrador has adopted legislation based on the Uniform Act.[17] To date, no other Canadian jurisdiction has followed the Uniform Act.

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[15] *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]. The British Columbia provision is reproduced in the Appendix to this report.

[16] *Evidence Act*, RSO 1990, c E-23, ss 18, 18.1, 18.2 [Ontario Act]. The provisions are reproduced in the Appendix to this report. Although the Ontario Law Reform Commission recommended that children should not take an oath, the Ontario Act permits a child to testify under oath, under a promise to tell the truth, or with no formality, depending on the child's understanding.

[17] *Evidence Act*, RSNL 1990, c E-16, ss 18, 18.1 [Newfoundland Act]. The provisions are reproduced in the Appendix.

[27] In 2005, the CEA was amended again to introduce an entirely new section about children's evidence.[18] Section 16.1 of the CEA has a number of unique features:

a. 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;"

b. 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; and

c. a prohibition on child witnesses taking an oath or making an affirmation. All witnesses under fourteen years of age must promise to tell the truth.

[28] The current CEA represents a fourth model. To date, the federal jurisdiction is the only one with this model.

[29] The current version of the CEA is fairly consistent with 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.[19]

[30] Quebec has no special provisions on children's evidence. The *Code of Civil Procedure* has provisions about competence and the oath, which apply to all witnesses.[20] A new *Code of Civil Procedure* has been passed by the National Assembly and is expected to come into force in 2015. The new *Code of Civil Procedure* does not significantly depart from the current rules about competence and the oath.[21]

2. OTHER COMMON LAW JURISDICTIONS

[31] Since the 1980s, a number of international common law jurisdictions have also reformed rules about children's evidence. Law reform agencies have

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[18] CEA, s 16.1. The provision is reproduced in the Appendix.

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

[20] *Code of Civil Procedure*, CQLR c C-25, arts 295, 299 [CCP].

[21] *Code of Civil Procedure*, CQLR, c C-25.01, arts 276, 277 [CCP (2015)].

published many documents considering children's evidence.[22] In general, law reform agencies have noted that the traditional suspicion of children's evidence is not justified.

[32] Most law reform agencies have recommended reforming or abolishing tests of competence based on understanding an oath. Some jurisdictions, including England,[23] New Zealand,[24] and many Australian jurisdictions,[25] now have legislation establishing a presumption that a child is competent to give evidence. In New Zealand, the presumption is intended to be irrebuttable.[26] Ireland continues to require a competency inquiry before a child gives evidence.[27]

[33] Many law reform agencies have criticized standards of competence requiring a child to demonstrate understanding the difference between truth and lies. Legislation in Scotland prohibits a court from considering whether a witness understands a duty to give truthful evidence or the difference between truth and lies.[28] A number of other jurisdictions now have a test for competence requiring only a basic ability to communicate. The precise formulation varies, but generally witnesses are competent to give evidence if they can understand questions and provide answers that can be understood.[29]

[34] Law reform agencies are nearly unanimous in rejecting the requirement for corroboration of children's unsworn evidence.[30] The requirement for

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[22] See Australian Law Reform Commission, *Evidence*, Report 38 (1987); Law Reform Commission of Victoria, *Sexual Offences Against Children*, Report 18 (1988); Scottish Law Commission, *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses*, Report 125 (1990); Law Reform Commission (Ireland), *Report on Child Sexual Abuse* (1990); Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses*, Project 87 (1992); Law Commission (New Zealand), *The Evidence of Children and Other Vulnerable Witnesses*, Discussion Paper (1996). Many of these reports include useful recommendations about matters beyond the scope of this report, such as making courtrooms less intimidating to children, the use of screens, closed circuit television, or recordings when children give evidence, facilitating the admission of children's out of court statements, etc.

[23] *Youth Justice and Criminal Evidence Act 1999* (UK), c 23, s 53.

[24] *Evidence Act 2006* (NZ), 2006/69, s 71.

[25] *Evidence Act 1995* (Cth), s 13; *Evidence Act 1995* (NSW), s 13; *Evidence (National Uniform Legislation) Act 2011* (NT), s 13; *Evidence Act 1977* (Qld), s 9; *Evidence Act 2001* (Tas), s 13; *Evidence Act 2008* (Vic), s 13.

[26] Law Commission (New Zealand), *The Evidence of Children and Other Vulnerable Witnesses*, Discussion Paper (1996) at para 17.

[27] *Criminal Evidence Act* (Ireland), Number 12/1992, s 27(1).

[28] *Vulnerable Witnesses (Scotland) Act 2004*, ASP 2004, c 3, s 24.

[29] *Youth Justice and Criminal Evidence Act* 1999 (UK), c 23, s 53; *Criminal Evidence Act* (Ireland), Number 12/1992, s 27; *Evidence Act 1995* (Cth), s 13; *Evidence Act 1995* (NSW), s 13; *Evidence (National Uniform Legislation) Act 2011* (NT), s 13; *Evidence Act 2001* (Tas), s 13; *Evidence Act 2008* (Vic), s 13.

[30] Federal Report at 87; Badgley Report, note 12, at 382; Australian Law Reform Commission, *Evidence*, Report 38 (1987); Law Reform Commission of Victoria, *Sexual Offences Against Children*, Report 18 (1988) at

Continued

corroboration of children's evidence has been abolished for criminal matters in England[31] and Ireland.[32] It has also been abolished in all Australian jurisdictions.[33] (It appears that New Zealand never had legislation requiring that the unsworn evidence of a child be corroborated.[34]) Only the Scottish Law Commission recommended retaining the requirement due to a unique feature of Scottish law that requires corroboration of all material facts justifying a conviction.[35]

[35] There are mixed approaches to the oath. In Ireland and many Australian jurisdictions, a child may take an oath or make an affirmation if the court permits.[36] The court must assess the child's competence to take an oath or make an affirmation. In England and New Zealand, no child may take an oath or make an affirmation.[37]

[36] Where a child testifies unsworn, some jurisdictions require that the court warn or instruct the child about the importance of telling the truth,[38] some also require that the child promise to tell the truth,[39] and some require no particular formality.[40]

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paras 236-42; Law Reform Commission (Ireland), *Report on Child Sexual Abuse* (1990) at para 5.28; Ontario Report, at 42-43; Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses*, Project 87 (1991) at paras 2.40-2.52.

[31] *Criminal Justice Act 1988* (UK), 1988, c 33 s 34(1).

[32] *Criminal Evidence Act* (Ireland), Number 12/1992, s 28.

[33] See Australian Law Reform Commission, *Uniform Evidence Law*, Report 102 (2005) at para 18.58.

[34] See *Evidence Act 1908* (NZ), 1908/56.

[35] Scottish Law Commission, *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses*, Report 125 (1990) at para 3.3. There was a similar requirement of corroboration for civil matters in Scotland; every material fact had to be corroborated in order to be proven. The requirement for corroboration in civil matters was abolished by statute, following a recommendation of the Scottish Law Commission: see Scottish Law Commission, *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings*, Report 100 (1986) at paras 2.1-2.10; *Civil Evidence (Scotland) Act 1988* (UK), 1988, c 32, s 1.

[36] *Criminal Evidence Act* (Ireland), Number 12/1992, s 27; *Evidence Act 1995* (Cth), s 13; *Evidence Act 1995* (NSW), s 13; *Evidence (National Uniform Legislation) Act 2011* (NT), s 13; *Evidence Act 2001* (Tas), s 13; *Evidence Act 2008* (Vic), s 13.

[37] *Youth Justice and Criminal Evidence Act 1999* (UK), c 23, ss 55, 56; *Evidence Act 2006* (NZ), 2006/69, s 77.

[38] *Evidence Act 1995* (Cth), s 13; *Evidence Act 1995* (NSW), s 13; *Evidence (National Uniform Legislation) Act 2011* (NT) s 13; *Evidence Act 2001* (Tas), s 13; *Evidence Act 2008* (Vic), s 13. It appears that Scotland has the same requirements, but they are established by case law rather than legislation: see Scottish Law Commission, *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses*, Report 125 (1990) at para 3.6.

[39] *Evidence Act 2006* (NZ), 2006/69, s 77.

[40] *Youth Justice and Criminal Evidence Act* 1999 (UK), c 23, s 56; *Criminal Evidence Act* (Ireland), Number 12/1992, s 27.

CHAPTER 3

How Should a Child's Competence to Give Evidence Be Established?

A. The Current Test for Establishing Competence to Give Evidence

[37] 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.[41] Nor does the AEA say anything about the conduct of a competency inquiry. Some guidelines can be found in case law. 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.[42]

[38] At common law, the test for competence was whether the child understood the nature of an oath.[43] A child who did not understand the nature of an oath could not be sworn, and so could not give evidence. For a child, section 19 of the AEA establishes a competency test with 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. [44]

1. UNDERSTANDS THE NATURE OF AN OATH

[39] 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

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[41] *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.

[42] *R v RGF* (1997), 200 AR 8 at para 26 (CA). The case was decided under the CEA.

[43] James C Robb & Lynda J Kordyban, "The Child Witness: Reconciling the Irreconcilable" (1989), 27 Alta L Rev 327 at 329.

[44] The court must also determine whether the proposed witness is "a child of tender years." Age is discussed later in this report.

conclusions.[45] 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.[46]

[40] 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.[47] For example, in *R v RJB* (a 2000 case applying the CEA) the trial judge's questions to a twelve year old included the following exchange:[48]

> 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 a oath?
> A: No.
>
> Q: Do you think anything would happen to you?
> A: No.

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[45] 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).

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

[47] 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 [Bala et al]. 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:

> 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 (at para 42, McLachlin J [citation omitted]).

[48] *R v RJB*, 2000 ABCA 103 at para 18.

Such questions are intrusive and may cause confusion or distress.[49] They are likely to elicit a great deal of personal information, most of which will be irrelevant. It is doubtful whether the answers provide any meaningful insight into the reliability of the child's evidence.

[41] 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-taking may be prejudiced. 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

[42] 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."[50]

[43] 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:[51]

> 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.

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

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[49] See Bala et al, note 47, at 416-22. See also Alberta Law Reform Institute, *Oaths and Affirmations*, Final Report 105 (2014). ALRI noted that requiring an adult witness to justify an objection to swearing an oath is unduly intrusive, potentially unsettling to a witness at a an already stressful moment, and may infringe sections 2(a) and 15 of the *Canadian Charter of Rights and Freedoms*.

[50] James C Robb & Lynda J Kordyban, "The Child Witness: Reconciling the Irreconcilable" (1989), 27 Alta LR 327 at 332.

[51] *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?"[52]

[45] Unfortunately, many children have difficulty answering such questions. These questions require a level of abstract thinking beyond the capabilities of most young children.[53] 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".[54] 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:[55]

> 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.

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[52] *R v Easton* (May 1994), Perth County 18949 (Ont Ct Gen Div), quoted in Bala et al, note 47, 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, 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?" (at paras 36-37).

[53] See generally John Philippe Schuman, Nicholas Bala & Kang Lee, "Developmentally Appropriate Questions for Child Witnesses" (1999), 25 Queens LJ 251 [Schuman et al].

[54] Thomas D Lyon and Karen J Saywitz, "Young Maltreated Children's Competence to Take the Oath" (1999) 3 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 L & Human Behavior 253.

[55] *R v MAM*, 2001 BCCA 6 at para 39.

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

[46] Asking a child developmentally appropriate questions requires some expertise.[56] It is not clear that most lawyers or judges are well-trained in questioning children.

[47] 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.[57]

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

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[56] Schuman et al, note 53.

[57] 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 L & Human Behavior 411.

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

[49] 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 fairly basic. In general, a child need only appear to understand questions and answer them appropriately.[58]

[50] 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.

[51] 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.

B. Options for Establishing Competence to Give Evidence

[52] There are several options for determining whether a child is competent to give evidence.

1. MANDATORY COMPETENCY INQUIRIES

[53] A majority of Canadian jurisdictions still require a competency inquiry every time a party proposes to call a child witness.[59]

[54] It should be noted that in all of these jurisdictions, legislation requires a court to determine whether a proposed child witness understands the nature of an oath. The court must determine not only whether the child's evidence may be admitted at all, but also whether the child may be sworn. In many cases, the competency inquiry will focus on the latter issue. If the distinction between

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[58] James C Robb & Lynda J Kordyban, "The Child Witness: Reconciling the Irreconcilable" (1989), 27 Alta L Rev 327 at 332; *R v Khan* (1988), 27 OAC 142 at para 19.

[59] 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. While a competency inquiry is mandatory, the party not presenting the witness may admit that a child witness is competent. In that case, the inquiry may be very brief: *R v Fong* (1994), 157 AR 73 (CA).

sworn and unsworn evidence were eliminated (as discussed below), the competency inquiry would lose much of its purpose.

[55] A competency inquiry may also serve as "an introductory phase of questioning."[60] Some writers recommend beginning an interview with a child by asking questions about an event unrelated to the matter in issue. A series of questions about the child's last birthday party, for instance, allows the child to become comfortable in the surroundings and practice giving complete answers. It also allows an assessment of the child's development and ability to answer questions.[61]

[56] Some have argued that mandatory competency inquiries discriminate against children, by perpetuating the view that children are inherently unreliable.[62]

2. PRESUMPTION OF COMPETENCE

[57] An alternative approach that has been adopted in several Canadian jurisdictions is a presumption of competence. This approach has been adopted in the CEA, in the Ontario Act, and in Quebec's new CCP (expected to come into force in 2015). It is also implicit in the Uniform Act and the Newfoundland Act. The Uniform Act provides for an inquiry when necessary, indicating that an inquiry is not required in every case. In each jurisdiction, the presumption of competence is rebuttable.

[58] In this approach, children and adults are generally treated alike. The process does not draw special attention to children's evidence or suggest that it should be treated with special caution in every case. If there is a concern about a proposed witness's ability to give evidence, the court is able to conduct an inquiry to determine whether the evidence should be admitted.

[59] The strength of the presumption varies under different legislation.

[60] In Newfoundland and Labrador (following the Uniform Act), an inquiry is held "[w]hen it is necessary to establish whether a child is competent to give evidence."[63]

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[60] Schuman et al, note 53, at 280.

[61] Schuman et al, note 53, at 280-83; *Brief on Bill C-2*, note 19, at 27.

[62] *R v Marquard*, [1993] 4 SCR 223 at 262 [*Marquard*], L'Heureux-Dube J, dissenting; Ontario Report, at 41.

[63] Newfoundland Act, s 18(2).

[61] In Ontario, an inquiry occurs "[w]hen a person's competence is challenged."[64]

[62] The CEA has the strongest presumption in favour of admitting a child's evidence. Under the CEA, "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." An inquiry is held only if the court is satisfied that there is such an issue.[65]

[63] A rebuttable presumption of competence would simplify the admission of evidence in many cases. If a witness's competence is undisputed, the court could hear the witness without spending time on an inquiry. Inquiries would be reserved for situations raising real concerns.

3. ELIMINATE COMPETENCY INQUIRIES WITH AN ABSOLUTE PRESUMPTION OF COMPETENCE

[64] In its 1975 *Report on Evidence*, the Law Reform Commission of Canada proposed eliminating all rules about competency. All evidence would be admissible without need for a competency inquiry. The court would determine the weight to give a witness's evidence after hearing the evidence, taking into account any characteristics of the witness or the evidence that might affect reliability. The approach would apply equally to children and adult witnesses with cognitive impairment. The Commission wrote:[66]

> There are no special rules of competency in the Code with respect to children. The frailties inherent in the testimony of immature witnesses should affect the weight of the evidence rather than its admissibility.
>
> ...
>
> Because of the impossibility of stating and applying a standard of mental immaturity that renders a witness incompetent to testify, it seems preferable simply to let the trier of fact take into account any such incapacity in assessing the weight to be given to the testimony.

[65] The Badgley Report included a similar recommendation.[67]

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[64] Ontario Act, s 18(2).

[65] CEA, ss 16.1(4), 16.1(5).

[66] Federal Report at 87-88.

[67] Badgley Report, note 12, at 372.

[66] The proposal, although radical, seems workable. Eliminating competency inquiries might streamline proceedings involving child witnesses. It seems unlikely that it would lead to an onslaught of truly incapable witnesses, as parties control the calling of witnesses. One would expect parties would only call witnesses who can communicate some relevant evidence. It would be senseless, for example, to call a newborn as a witness. A survey conducted by the Child Witness Project found that "the youngest children appearing in court were about four years old."[68] In the rare case that a witness proves unable to give any coherent evidence, the court would have discretion to intervene and disqualify the witness.[69]

[67] The Commission's proposal was not adopted. No Canadian jurisdiction has followed the Commission's recommendation to eliminate all competency inquiries, although New Zealand has adopted this approach. If it were adopted in Alberta, it would be unique in Canada.

4. CRITERIA FOR COMPETENCE OR REBUTTING A PRESUMPTION OF COMPETENCE

[68] If a competency inquiry is required, there must be a test for competence. Similarly, if there is a rebuttable presumption of competence, there must be a test for rebutting the presumption. Legislation in other Canadian jurisdictions establishes various criteria for competence. Depending on the jurisdiction, a court may be required to determine one or more of the following:

a. Whether the child understands the nature of an oath or affirmation;[70]

b. Whether the child understands the duty of speaking the truth;[71]

c. Whether the child understands what it means to tell the truth;[72]

d. Whether the child is possessed of sufficient intelligence to justify the reception of the evidence;[73]

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[68] Bala et al, note 47, at 414.

[69] See Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *Sopinka & Bryant: The Law of Evidence in Canada*, 3d ed (Markham, Ont: LexisNexis Canada, 2009) at para 13.11; Ontario Report, at 40-41.

[70] AEA, s 19; BC Act, s 5; Saskatchewan Act, s 12; Manitoba Act, s 24; Ontario Act, s 18.1; New Brunswick Act, s 24; Nova Scotia Act, s 63; Yukon Act, s 23; NWT Act, s 25; Nunavut Act, s 25.

[71] AEA, s 19; New Brunswick Act, s 24; Nova Scotia Act, s 63; Yukon Act, s 23; NWT Act, s 25; Nunavut Act, s 25.

[72] Ontario Act, s 18.1; Newfoundland Act, s 18.

[73] AEA, s 19; New Brunswick Act, s 24; Nova Scotia Act, s 63; Yukon Act, s 23; NWT Act, s 25; Nunavut Act, s 25.

e. Whether the child is in a fit state to report the facts;[74]

f. Whether the child has sufficient appreciation of the facts;[75]

g. Whether the child's evidence is sufficiently reliable; [76]

h. Whether the child is able to relate the facts witnessed;[77]

i. Whether the child is able to communicate the evidence;[78]and

j. Whether the child is able to understand and respond to questions.[79]

[69] Most of these criteria leave a court with significant discretion about whether to admit a child's evidence. Some have received little or no judicial consideration.[80] For example, there are no reported cases interpreting the phrase "sufficiently reliable" as it appears in the Ontario Act, section 18.1(3) or the Newfoundland Act, section 18(3). Without cases illustrating the application of particular criteria, it is difficult to predict their effect.

[70] The current version of the CEA sets the lowest threshold for a child's competence. There is a single requirement: the child must be "able to understand and respond to questions." The wording appears to be a direct response to judicial interpretation of the phrase "able to communicate the evidence," which was a requirement for the admission of a child's evidence under the previous version of the CEA. In *Marquard*, the Supreme Court interpreted ability to communicate the evidence as including certain cognitive abilities. Justice McLachlin (writing for a majority of the Court), wrote:[81]

> The phrase 'communicate the evidence' indicates more than mere verbal ability. The reference to 'the evidence' indicates the ability to testify about the matters before the court. It is necessary to explore in a general way whether the witness is capable of perceiving events, remembering events and communicating events to the court.

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[74] Art 295 CCP.

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

[76] Ontario Act, s 18.1; Newfoundland Act, s 18.

[77] Art 276 CCP (2015).

[78] BC Act, s 5; Saskatchewan Act, s 12; Manitoba Act, s 24; Ontario Act, s 18.1.

[79] CEA, s 16.1(5).

[80] 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.

[81] *Marquard,* note 62, at 236.

Although the CEA at the time established a presumption of competence, a court would usually need to conduct a brief competency inquiry to determine whether a child met the criteria discussed in *Marquard*.

[71] The CEA also leaves the least room for discretion. The ability to understand and respond to questions should be relatively simple to determine in most cases by direct observation of the proposed witness.

[72] The CEA specifically prohibits asking children questions about their "understanding of the nature of the promise to tell the truth" in a competency inquiry.[82] It would be improper to ask a child to define concepts like "truth", "lie" or "promise" before deciding whether to admit the child's evidence.

[73] By setting a low threshold for competence, the CEA ensures that children's evidence will usually be admissible. The trier of fact determines the weight to give the evidence, after hearing the evidence and observing the witness.

[74] It would be possible to establish different or additional criteria for competence. Any new criteria would make Alberta's test unique in Canada.

5. CONDUCT OF COMPETENCY INQUIRIES

[75] Only two Canadian jurisdictions have legislation about the conduct of a competency inquiry.

[76] The Ontario Act sets out who may question a proposed witness. It provides that "the judge, justice or other presiding officer shall examine the person," but that "the person may be examined by counsel instead" if examination by the judge would affect the person's ability to give evidence.[83]

[77] The CEA limits the content of questions. Section 16.1(7) prohibits questions about the child's "understanding of the nature of the promise to tell the truth."[84]

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[82] CEA, s 16.1(7). The legislation does not prohibit counsel from asking a child questions about concepts like "truth", "lie", and "promise" once the child is permitted to testify. Answers to these questions may affect the weight a court gives to the child's evidence, but cannot be used to determine whether the child's evidence is admissible: *R v JZS*, 2008 BCCA 401 at para 23, aff'd 2010 SCC 1.

[83] Ontario Act, ss 18(2), 18(3).

[84] CEA, s 16.1(7).

[78] It would be possible to include provisions about the conduct of competency inquiries in any new legislation, but there is no obvious need for reform.

RECOMMENDATION 1

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

RECOMMENDATION 2

The presumption of competence should be rebutted only if the proposed witness is unable to understand and respond to questions.

[79] This approach is consistent with the CEA. It would harmonize the approach to determining a child's competence in all proceedings in Alberta, regardless of whether proceedings are under federal or provincial legislation.

[80] These recommendations would also affect adults whose competence is questioned. The application to adults is discussed in Chapter 5.

[81] **We welcome any comments that you may have in support of or in opposition to these recommendations or additional options for reform.**

CHAPTER 4

What Special Rules Should Apply to Children's Evidence?

[83] Section 19 of the AEA presumes that a child who understands the nature of an oath will take an oath. It does not expressly address whether a child may make an affirmation, nor does it prescribe any particular formality for a child who gives evidence unsworn.[85]

[84] Under the AEA, the oath currently serves many purposes. It has ceremonial and symbolic importance. It affects admissibility of evidence. It also determines whether a child's evidence must be corroborated. If a child takes an oath, the evidence is equivalent to an adult's evidence. Unsworn evidence, in contrast, cannot be relied upon unless corroborated.

[85] Currently, special rules for children's evidence apply only to unsworn evidence. This section discusses whether children should give evidence under oath or affirmation. It also discusses whether any other special rules should apply to children's evidence.

A. Should a Child Promise to Tell the Truth?

[86] Many jurisdictions require that a child who testifies unsworn must promise to tell the truth.[86] The CEA prohibits a child from taking an oath or making an affirmation, but requires that all child witnesses promise to tell the truth.[87]

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[85] In proceedings governed by the *Youth Justice Act*, RSA 2000, c Y-1, there is an additional requirement that a judge must instruct a child witness about the duty of speaking the truth (s 31). The requirement applies whether the child testifies sworn or unsworn. There is a similar requirement in the federal *Youth Criminal Justice Act*, SC 2002, c 1, s 151. There are no reported cases considering whether the instructions are a condition of the admissibility of the child's evidence. The instructions are required in addition to the usual requirements that apply in all proceedings.

[86] BC Act, s 5; Saskatchewan Act, s 12; Manitoba Act, s 24; Ontario Act, s 18.1; Newfoundland Act, s 18.1. The Law Reform Commission of Canada recommended that all witnesses, regardless of age, should make a secular promise to tell the truth: Federal Report at 87. If Alberta adopted a promise to tell the truth, it might affect other legislation. Section 108 of the *Child, Youth and Family Enhancement Act* permits a court to "compel the attendance of any person and require the person to give evidence on oath", RSA 2000, c C-12, s 108. Proceedings under this act involve the wellbeing of children, so it is foreseeable that a child could be a witness. Also, rules 5.17 and 5.22 of the *Alberta Rules of Court* provide for questioning "under oath": *Alberta Rules of Court*, Alta Reg 124/2010, vol 1, rr 5.17, 5.22.

[87] CEA, ss 16.1(2), 16.1(6). The Newfoundland Act also contemplates only a promise to tell the truth.

[87] There is some psychological research suggesting that a promise to tell the truth promotes truth telling in children.[88] The Child Witness Project relied on this research when recommending that the CEA require a child witness to promise to tell the truth.[89] While the research is helpful, it is difficult to know if experimental conditions are mirrored in actual courtrooms.

[88] The writers of the *Brief on Bill C-2* said the most than can be said about the effect of a promise: "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."[90]

[89] 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.[91] Appellate courts 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 not admissible.[92] If the AEA were to require a child to promise to tell the truth, it would be helpful to consider whether the promise is a condition of admissibility, or whether a failure to promise is a curable irregularity.

[90] If a promise is required, it should be understandable to a child. No Canadian jurisdiction has legislation specifying the form of promise for a child witness.

[91] Without guidance, it may be difficult for judges to choose wording that is developmentally appropriate. For example, some research shows that children understand "I will" at an early age, but take longer to understand "I promise".[93] Lyon therefore recommends a promise that contains both "I promise" and "I

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[88] Victoria Talwar et al, "Children's Conceptual Knowledge of Lying and its Relation to Their Actual Behaviors: Implications for Court Competence Examinations" (2002) 26 Law and Human Behavior 395; Thomas D Lyon, "Child Witnesses and the Oath: Empirical Evidence" (2000) 73 S Cal L Rev 1017 at 1067-71.

[89] *Brief on Bill C-2*, note 19, at 22-24.

[90] *Brief on Bill C-2*, note 19, at 28.

[91] 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 where a judge asked a fourteen year old witness to promise to tell the truth, instead of having the witness take an oath or make an affirmation.

[92] *R v CWG* (1994), 88 CCC (3d) 240 (BCCA); *R v Wilson* (1995), 139 NSR (2d) 61 (CA); *R v RJB,* 2000 ABCA 103. In *R v Peterson* (1996), 27 OR (3d) 739 (CA), however, the Court held that the absence of an explicit promise to tell the truth was a curable procedural error.

[93] Thomas D Lyon, "Child Witnesses and the Oath: Empirical Evidence" (2000) 73 S Cal L Rev 1017 at 1057-63.

will" (such as "I promise that I will tell the truth") as one that is likely to be understood by children of most ages.[94]

[92] ALRI recently recommended that the AEA should include non-mandatory, permissive forms of oath and affirmation.[95] If child witnesses are required to promise to tell the truth, the AEA should also include a permissive, non-mandatory form of promise. The form "I promise that I will tell the truth" would be appropriate.

RECOMMENDATION 3

A child should be required to promise to tell the truth before giving evidence.

RECOMMENDATION 4

The *Alberta Evidence Act* should include a permissive, non-mandatory form of promise.

[93] **We welcome any comments that you may have in support of or in opposition to these recommendations or additional options for reform.**

B. Should There Be a Prohibition on a Child Taking an Oath?

[94] The CEA now specifically prohibits a person under fourteen from taking an oath or making an affirmation.[96]

[95] In Quebec, all witnesses are required to take an oath. If a person is competent to give evidence, they must testify under oath.[97] The test for competence does not require understanding of an oath.[98] The oath itself is secular, akin to an affirmation.

[96] In all other Canadian jurisdictions, including Alberta, a child who understands the nature of an oath may take an oath.

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[94] Thomas D Lyon, "Child Witnesses and the Oath: Empirical Evidence" (2000) 73 S Cal L Rev 1017 at 1063.

[95] Alberta Law Reform Institute, *Oaths and Affirmations*, Final Report 105 (2014) at at para 80.

[96] CEA, s 16.1(2).

[97] Art 299 CCP; art 277 CCP (2015).

[98] Under the current CCP, all persons are competent unless they are "not in a fit state to report the facts of which they had knowledge": art 295 CCP. Under the new CCP (2015), all persons are competent unless they are "unable to relate the facts they have witnessed": art 276 CCP (2015).

[97] There are strong arguments both for and against a prohibition on taking an oath or making an affirmation.

[98] On the one hand, there are practical benefits to treating all children the same. If all children were required to make a simple promise, the competency inquiry could be streamlined or eliminated. Under the current legislation, a court must decide whether to permit a child to take an oath. An inquiry into the child's understanding of an oath is required in every case, even if there is otherwise no dispute about the child's competence to give evidence. If the distinction between sworn and unsworn evidence were abolished, a major reason for the inquiry would disappear. It seems inefficient to retain the inquiry if its only purpose is to determine the formality required before a child witness gives evidence.

[99] As discussed above, a competency inquiry to determine whether a child understands the nature of an oath can be unnecessarily intrusive and mostly irrelevant to the weighing of the evidence.

[100] Treating all children the same also ensures consistency in liability for perjury. A conviction for perjury requires a false statement under oath or affirmation.[99] The CEA's prohibition on taking an oath or making an affirmation means that no child under fourteen may be liable for perjury.[100]

[101] On the other hand, a prohibition on taking an oath may impair a child's dignity. It draws a distinction based solely on age, without taking into account the individual capabilities of a particular child. Courts have often found children under fourteen, sometimes as young as seven or less, competent to take an oath.[101] A blanket prohibition based on age may underrate the actual competence of many children and may promote the view that all children under fourteen are inferior witnesses.

[102] A prohibition on taking an oath may also be perceived as affecting the religious freedom of a child. ALRI recently recommended that the option of

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[99] *Criminal Code*, RSC 1985, c C-46, s 131 [*Criminal Code*].

[100] The *Criminal Code* establishes the separate offence of giving contradictory testimony, which might apply to a witness who gives unsworn evidence. Section 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 99, s 118.

[101] See e.g. *R v CBM*, 2004 ABCA 81.

taking a religious oath should be retained for adult witnesses, recognizing that the oath is meaningful to some and that our institutions should accommodate diversity.[102] A prohibition risks barring a child from a practice that has religious significance.

[103] In most circumstances, a promise to tell the truth will be an appropriate formality for a child witness. An absolute prohibition on taking an oath may go too far, however. In the rare circumstance that a child expresses a wish to take an oath, a court should have flexibility to accommodate. ALRI believes that this flexibility can be preserved by leaving the legislation silent on this issue.

[104] Under the AEA, a witness has a right to take an oath "administered in a form and with any ceremonies that the person may declare to be binding."[103] If a child is permitted to take an oath, the child must have the right to choose the appropriate form of oath.

RECOMMENDATION 5

There should be no prohibition on a child taking an oath.

[105] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

C. Should a Child's Unsworn Evidence Require Corroboration?

[106] Alberta is one of five jurisdictions in Canada that retains the requirement for corroboration of a child's unsworn evidence. The other jurisdictions that still require corroboration are Nova Scotia, Yukon, the Northwest Territories, and Nunavut.[104] The requirement for corroboration of children's evidence has been repealed in all other Canadian jurisdictions. As discussed above, it has also been repealed in many foreign common law jurisdictions and most law reform agencies have recommended its abolition.

[107] 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

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[102] Alberta Law Reform Institute, *Oaths and Affirmations*, Final Report 105 (2014) at para 58.

[103] AEA, s 14(1).

[104] Nova Scotia Act, s 63(2); Yukon Act, s 17; NWT Act, s 19; Nunavut Act, s 19.

person based only on the uncorroborated evidence of an accomplice. Other requirements for corroboration were codified in statute, such as provisions in the *Criminal Code* prohibiting convictions for certain offences (including many sexual offences) based on the uncorroborated evidence of one witness.

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

[109] 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.[105]

[110] The Supreme Court of Canada came to the same conclusion in *R v Vetrovec*.[106] *Vetrovec* essentially abolished all common law rules of evidence requiring corroboration, replacing them with a "common sense" approach to weighing evidence.

[111] *Vetrovec* did not affect statutory requirements for corroboration, but many 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.

[112] 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.[107] 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.[108]

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[105] See Federal Report.

[106] *R v Vetrovec*, [1982] 1 SCR 811 [*Vetrovec*].

[107] AEA, s 10.

[108] AEA, ss 11, 12.

> **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.

Continued

[113] There are several reasons to eliminate the requirement for corroboration of children's unsworn evidence:

a. The requirement is based on old stereotypes about the reliability of children. Those stereotypes have largely been discredited. There is little reason to believe that children's evidence is inherently less reliable than that of adults. The different treatment of children's evidence cannot be justified based on current knowledge about children.

b. The requirement reflects beliefs about oath-taking that many may consider outdated. Corroboration is required only for evidence that is unsworn. If a child takes an oath, the evidence need not be corroborated. The rule is based on the belief that the oath confers reliability.

c. The requirement excludes potentially relevant evidence if it 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. No significant concerns have emerged about unjust outcomes in criminal matters due to lack of corroboration. It is difficult to justify a more stringent requirement for civil matters, provincial offences, or other matters within provincial jurisdiction. The authors of *Sopinka & Bryant: The Law of Evidence in Canada* point out the inconsistency:[109]

> 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.

d. The requirement may complicate decision making, as a court must determine whether a child's evidence is corroborated. The court may

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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.

[109] Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *Sopinka & Bryant: The Law of Evidence in Canada*, 3d ed (Markham, Ont: LexisNexis Canada, 2009) at para 17.60.

need to consider what kinds of evidence are corroborative. In *Vetrovec*, Justice Dickson observed that the law of corroboration was overly technical, complex, and difficult to apply.[110] The search for corroboration may increase the complexity of fact-finding, without providing an obvious benefit.

e. 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.

f. 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.

g. 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.

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

[115] Of the jurisdictions that have abolished the requirement for corroboration, some simply repealed the statutory provision requiring corroboration. The equivalent of subsection 19(2) was deleted from the New Brunswick Act, leaving the remaining provisions about children's evidence intact. In British Columbia, Saskatchewan, and Manitoba, the old provisions were replaced with new ones that omitted the requirement for corroboration.

[116] Ontario and Newfoundland and Labrador took a different approach. Both have express provisions stating that evidence given by a child need not be corroborated. This approach is also the one recommended by the ULCC. The Uniform Act includes an express provision in subsection 3(1):

> **3**(1) Evidence given by a child need not be corroborated.

[117] The CEA does not explicitly state that corroboration is not required, but subsection 16.1(8) excludes any special treatment of children's evidence. It states:

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[110] *Vetrovec,* note 106, at 824-26.

> 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.

Among other things, this provision rules out any requirement of corroboration applying only to children's evidence or to unsworn evidence.

[118] There are three possible approaches to abolishing the requirement for corroboration of a child's unsworn evidence:

a. The requirement could be abolished by repealing section 19(2) of the AEA;

b. Alberta could adopt a provision consistent with subsection 3(1) of the Uniform Act, explicitly stating that the unsworn evidence of a child need not be corroborated; or

c. Alberta could adopt a provision similar to subsection 16.1(8) of the CEA, directing that the unsworn evidence of a child is to be treated as equivalent to evidence given under oath.

[119] The most straightforward approach would be repealing section 19(2) of the AEA. Repealing this section would abolish the rule, so there is no particular need for a provision negating the requirement for corroboration.

> **RECOMMENDATION 6**
>
> The requirement for corroboration of a child's unsworn evidence should be abolished. There is no need for an express provision stating that the unsworn evidence of a child need not be corroborated.

[120] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

D. Should a Child's Evidence Attract a Special Warning?

[121] In the past, courts were required to give special instructions about children's evidence.

[122] 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.[111] The rule applied regardless of whether the child's evidence was sworn or unsworn.

[123] It is doubtful whether the rule in *Kendall* applies to any matters today. It is clearly obsolete in criminal matters. In *Vetrovec*, the Supreme Court of Canada indicated that common law rules requiring corroboration of the testimony of particular witnesses were not useful and should be rejected. The Court recognized that a special warning might be required about the testimony of a potentially unreliable witness, but rejected identifying such witnesses by general categories. Rather, a court is to consider the particular characteristics and circumstances of each witness to determine whether a warning is appropriate.[112] In *Marquard*, the Court made clear that the principle applies to the evidence of children. Justice McLachlin, writing for the majority, stated: "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."[113]

[124] As recently as 2013, the Alberta Court of Appeal considered an appeal in which the appellant submitted a trial judge should have given the jury a special warning about relying on the evidence of children. The Court rejected the argument, noting that warnings are not required based on categories or generalities, including the category of being a child.[114]

[125] If any rule requiring a special warning remains, there would be strong justification to abolish it. Most of the reasons to abolish the requirement for corroboration would apply equally to a requirement for a special warning.

[126] Ontario legislation expressly abolishes any requirement for a special warning about children's evidence. Section 18.2(2) of the Ontario Act reads:

> **18.2** (2) It is not necessary to instruct the trier of fact that it is unsafe to rely on the uncorroborated evidence of a person under the age of 14.

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[111] *Kendall*, note 6.

[112] *Vetrovec*, note 106, at 830-32.

[113] *Marquard*, note 62, 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, and that each witness must be treated as an individual:

> 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. 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.

[114] *R v Innerebner*, 2013 ABCA 9 at paras 39-43.

[127] The Ontario provision resembles subsection 3(2) of the Uniform Act, which reads:

> **3** (2) The judge is not required to instruct the jury that it is dangerous to rely on the uncorroborated evidence of a child.

[128] The Newfoundland Act also abolishes the warning, but the wording departs from the Uniform Act. Section 18.1 of the Newfoundland Act includes the following provisions:

> **18.1** (2) The judge shall not instruct the jury that it is unsafe to rely on the uncorroborated evidence of a child.
>
> (3) Subsection (2) does not affect the judge's discretion to comment on the evidence.

The Newfoundland Act provision is unique in its mandatory language. While the Ontario Act and the Uniform Act would permit a warning, the Newfoundland Act directs that "The judge shall not" give such a warning.

[129] Section 16.1(8) of the CEA, which requires that a child's unsworn evidence be treated as equivalent to evidence given under oath, appears to preclude any special warning about children's evidence as such, without specifically mentioning warnings.

[130] There are several options for reform of the law relating to warnings about the evidence of children:

a. Alberta legislation could remain silent, leaving warnings about the evidence of children to be governed by common law;

b. Alberta could adopt a provision similar to subsection 16.1(8) of the CEA, directing that the unsworn evidence of a child is to be treated as equivalent to evidence given under oath;

c. Alberta could adopt a provision consistent with subsection 3(2) of the Uniform Act, explicitly stating that a judge is not required to give a warning about the uncorroborated evidence of a child; or

d. Alberta could adopt legislation similar to that in Newfoundland and Labrador, explicitly stating that a judge shall not give a warning about the uncorroborated evidence of a child.

[131] The requirement for a warning is obsolete, so there should be no need to expressly abolish it. Further, adopting a new provision that limits or prohibits

such a warning may inappropriately restrict a trial judge's discretion to comment on the evidence. There is no particular need for an express provision.

RECOMMENDATION 7

There is no need for an express provision abolishing any requirement to warn the trier of fact about relying on the evidence of a child.

[132] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

E. At What Age Should a Witness Be Treated as an Adult for the Purpose of Giving Evidence?

[133] The term "child of tender years" is not defined in the AEA or the *Interpretation Act*. The term does not appear in other Alberta legislation, and there is no consistent judicial definition of the term. In the context of children's evidence, courts seem to have generally accepted that a person aged fourteen or more should be presumed competent.[115]

[134] In many Canadian jurisdictions, the presumption of competence at age fourteen is now expressly stated in legislation.[116] The Uniform Act would define "child" as "a person under the age of fourteen years."[117]

[135] Any rules about children's evidence should clearly state who is considered to be a child. The term "child of tender years" is unclear. It would be preferable to replace it with a specific age.

[136] Any age limit is somewhat arbitrary, as maturation is a gradual process and children develop at different rates.

[137] 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."[118] The

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[115] 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).

[116] The exception is the Newfoundland Act. It refers to a "child", which is not defined in the *Evidence Act* or the *Interpretation Act*: Newfoundland Act, s 18; *Interpretation Act*, RSNL 1990, c I-19.

[117] Uniform Act, s 1(a).

[118] *Brief on Bill C-2*, note 19, at 29.

writers noted that courts usually find children twelve and over understand the nature of an oath, and permit them to take 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.[119] Some international jurisdictions have set the dividing line at twelve.[120]

[138] If the dividing line were set at twelve, however, Alberta would be out of step with other Canadian jurisdictions.

[139] Setting the dividing line at fourteen would be consistent with Canadian common law and with legislation in other Canadian jurisdictions. In particular, it would be consistent with the CEA.

RECOMMENDATION 8

The rules for children's evidence should apply to proposed witnesses under the age of 14.

[140] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

[119] *Criminal Code*, note 99, s 13.

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

CHAPTER 5

How Should an Adult's Competence to Give Evidence Be Established?

[141] 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.[121] If a proposed witness has or appears to have a cognitive impairment, the issue of competence may arise.

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

[143] As the AEA is silent on competence of adult witnesses, the common law still 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 take an oath or make an affirmation, and the adult's evidence may not be received. There is no Alberta legislation permitting an adult to give unsworn evidence.

A. Legislation in Other Canadian Jurisdictions

[144] Some Canadian jurisdictions have legislation that applies when an adult's competence is challenged.

[145] The Ontario Act appears to codify the common law. It provides for a competency inquiry for an adult, but only a person under the age of 14 may give unsworn evidence.[122]

[146] In British Columbia, Saskatchewan, and Manitoba, adults whose competence is challenged and all children under fourteen are treated alike. A court must conduct a competency inquiry in either case, and may permit the person to testify unsworn.[123]

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[121] See e.g. *R v DAI*, 2012 SCC 5.

[122] Ontario Act, ss 18(2), 18.1.

[123] BC Act, s 5; Saskatchewan Act, s 12; Manitoba Act, s 24.

[147] Quebec also has a single approach for both types of witness, although in Quebec all witnesses must swear or affirm before giving evidence.[124]

[148] The CEA has separate provisions for children and adults whose competence is challenged. If an adult's competence is challenged, an inquiry must be held to determine whether the witness may testify under oath, unsworn, or at all. The court determines whether the proposed witness understands the nature of an oath or affirmation and whether the proposed witness is able to communicate the evidence. The court may find an adult competent to take an oath or make an affirmation, may permit an adult to give unsworn evidence, or may find an adult incompetent to give evidence.[125] In contrast, a child's evidence shall be received if the child is able to understand and respond to questions, but a child is not permitted to take an oath or make an affirmation.[126]

B. Establishing Competence

[149] If a proposed witness can convey relevant information, there should be a means to admit the evidence. Under current Alberta law, the requirement to understand the nature of an oath imposes a barrier that prevents some adults from giving evidence. A proposed witness who is incapable of understanding the nature of an oath is not permitted to give evidence, regardless of their other abilities. Legislation modifying the common law would facilitate the admission of relevant evidence.

[150] A single test for competence would promote consistency and avoid arbitrary distinctions between adults and children. Separate tests for adults and children would be likely to create confusion, without any obvious benefit. The current version of the CEA, with different approaches for determining the competence of adults and children, has led to some problems with interpretation. In *DAI*, the Supreme Court divided partly on the extent to which section 16 (which applies to adults) and section 16.1 (which applies to children) of the CEA establish different requirements for competence. Chief Justice McLachlin, writing for the majority, asked rhetorically: "When it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental

[124] Arts 276, 277 CCP (2015). The CCP refers to swearing an oath, but the oath is secular in nature, more like an affirmation.

[125] CEA, s 16.

[126] CEA, s 16.1(2).

capacity of a six-year-old, and a six-year-old with the mental capacity of a six-year-old?"[127] A single test for both would address this point.

[151] A presumption of competence, rebutted only if the proposed witness is unable to understand and respond to questions, would work for adults as for children. The standard is objective and fairly easy to determine in a short inquiry. It will usually permit the trier of fact to consider all relevant information, weighing it in context of the witness's characteristics and the other evidence.

[152] Recommendations 1 and 2 would establish a test of competence applying to adults and children alike. For ease of reference, these recommendations are repeated here:

> **RECOMMENDATION 1**
>
> There should be a presumption that a person of any age is competent to give evidence.

> **RECOMMENDATION 2**
>
> The presumption of competence should be rebutted only if the proposed witness is unable to understand and respond to questions.

C. Unsworn Evidence of an Adult

[153] If the test for competence no longer requires understanding the nature of an oath or affirmation, there should be some provision for an adult to give unsworn evidence.

[154] As much as possible, rules about unsworn evidence should be consistent regardless of whether the witness is an adult or a child.

[155] An adult who does not understand the nature of an oath or affirmation should be permitted to give evidence upon a promise to tell the truth. A promise may promote truthfulness, is unlikely to do any harm, is consistent with the CEA, and would be consistent with the procedure ALRI proposes for child witnesses. On occasion, a court may need to conduct a competency inquiry to determine whether an adult with a cognitive impairment may take an oath or

[127] *R v DAI*, 2012 SCC 5 at para 52.

make an affirmation, even if it is obvious that the proposed witness is competent to give evidence.

[156] There should be no requirements for corroboration or warnings when an adult gives unsworn evidence, although a trial judge would retain discretion to comment on the evidence.

RECOMMENDATION 9

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.

[157] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

D. Witnesses with Communication Disabilities

[158] The introduction of a new test for competence should facilitate the introduction of relevant evidence. It should not add new barriers. It is important to ensure that a test for competence based on ability to understand and respond to questions does not exclude evidence from witnesses who have mental capacity but may face challenges communicating verbally.

[159] There are various reasons that a person may have difficulty communicating verbally. Reasons may include deafness, physical conditions (such as neck cancer or Amyotrophic Lateral Sclerosis), speech impediments, brain injuries or conditions (including stroke or brain tumour), or mental disabilities.[128]

[160] Section 14 of the *Canadian Charter of Rights and Freedoms* assists in limited circumstances. It 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.[129]

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

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

[161] Section 20 of the AEA goes farther to ensure those with communication disabilities may be witnesses. It 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.

[162] 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.[130] The CEA, the Saskatchewan Act, and Quebec's CCP also have provisions about witnesses who have difficulty communicating.[131]

[163] 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.

[164] 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. He was permitted to give evidence by writing his answers to questions.[132]

[165] 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.[133]

[166] It would be 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. This section should complement the test for competence, to ensure that a witness may demonstrate the ability to understand and respond to questions using any means of communication that is intelligible.

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[130] BC Act, s 17; Manitoba Act, s 26; Yukon Act, s 24; NWT Act, s 26; Nunavut Act, s 26.

[131] CEA, s 6; Saskatchewan Act, s 13; art 296 CCP; art 299 CCP (2015).

[132] *R v Rudolph*, 2012 SKQB 167.

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

[167] The *Adult Guardianship and Trusteeship Act* provides a useful example of legislation that facilitates communication. Section 2 states principles for interpretation and application of the act, including a principle about means of communication:[134]

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

[168] The wording of the CEA and the Saskatchewan Act have been updated. Section 13 of the Saskatchewan Act reads:[135]

> 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.

The CEA is similar.[136]

[169] Updated wording in the AEA should permit the use of any means of communication that allows a witness to understand and respond to questions and should ensure that means of communication has no impact on the assessment of competence.

> **RECOMMENDATION 10**
>
> A witness with a disability affecting communication should be allowed to communicate evidence in any manner that is intelligible.

[170] This recommendation would apply to all witnesses, adult and child alike.

[171] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

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

[135] Saskatchewan Act, s 13.

[136] CEA, s 6.

Deadline for comments on the issues raised in this document is December 1, 2015

Please respond to the online survey at
http://bit.ly/AEA_survey

APPENDIX A

Selected Provisions from Other Canadian Jurisdictions

A. *Canada Evidence Act*

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.

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.

B. British Columbia *Evidence Act*

(representative of legislation in BC, Saskatchewan, and Manitoba):

5 (1) If a proposed witness in a proceeding is a person under 14 years of age or a person whose mental capacity is challenged, the judge, justice or other presiding officer must, before permitting the person to give evidence, conduct an inquiry to determine whether

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

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

(2) Subject to section 20 (3), a person referred to in subsection (1) of this section who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence must 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 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 must not testify.

(5) A party who challenges the mental capacity of a proposed witness who has reached 14 years of age has the burden of satisfying the judge, justice or other presiding officer that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

C. Ontario *Evidence Act*

18. (1) A person of any age is presumed to be competent to give evidence.

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

(3) However, if the judge, justice or other presiding officer is of the opinion that the person's ability to give evidence might be adversely affected if he or she examined the person, the person may be examined by counsel instead.

18.1 (1) When the competence of a proposed witness who is a person under the age of 14 is challenged, the court may admit the person's evidence if the person is able to communicate the evidence, understands the nature of an oath or solemn affirmation and testifies under oath or solemn affirmation.

(2) The court may admit the person's evidence, if the person is able to communicate the evidence, even though the person does not understand the nature of an oath or solemn affirmation, if the person understands what it means to tell the truth and promises to tell the truth.

(3) If the court is of the opinion that the person's evidence is sufficiently reliable, the court has discretion to admit it, if the person is able to communicate the evidence, even if the person understands neither the nature of an oath or solemn affirmation nor what it means to tell the truth.

18.2 (1) Evidence given by a person under the age of 14 need not be corroborated.

(2) It is not necessary to instruct the trier of fact that it is unsafe to rely on the uncorroborated evidence of a person under the age of 14.

D. Newfoundland *Evidence Act*

18. (1) A child's evidence is admissible if,

(a) he or she promises to tell the truth; and

(b) the court is of the opinion that the child understands what it means to tell the truth and is able to communicate the evidence.

(2) When it is necessary to establish whether a child is competent to give evidence, the court may conduct an inquiry to determine whether, in its opinion, the child understands what it means to tell the truth and is able to communicate the evidence.

(3) If a child does not promise to tell the truth, or if the court is of the opinion that the child does not understand what it means to tell the truth, his or her evidence may still be admitted if the court is of the opinion that it is sufficiently reliable.

18.1 (1) Evidence given by a child need not be corroborated.

(2) The judge shall not instruct the jury that it is unsafe to rely on the uncorroborated evidence of a child.

(3) Subsection (2) does not affect the judge's discretion to comment on the evidence.