OATHS AND AFFIRMATIONS

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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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The main legal research and analysis for this project were conducted by Debra Hathaway, Counsel, who also wrote the report. Other legal research was contributed by Karen McDougall, Consultant and Shannon Brochu, Counsel. Student assistance was provided by Kathryn Griffin. Ilze Hobin prepared the report for publication.

The electronic survey of the judiciary and court clerks of the Court of Queen's Bench and Provincial Court of Alberta and of the legal profession was jointly written by Debra Hathaway, Counsel, Sandra Petersson, Research Manager and Peter Lown QC, Director. Barry Chung provided the technological support needed for the creation, distribution and data analysis of the electronic survey.

For their generous assistance in facilitating the distribution of our electronic survey, ALRI would like to extend special thanks to the Chief Justice of the Court of Queen's Bench, the Chief Judge of the Provincial Court of Alberta, Alberta Justice Court Services and the Canadian Bar Association Alberta Branch. ALRI is grateful as well to all the justices, judges, court clerks and members of the legal profession who took the time to respond to the survey, providing us with the benefit of their experience and opinions. This valuable feedback greatly aided ALRI in assessing the need for reform in Alberta.

Summary

In our legal system, a witness or a deponent of an affidavit must promise to tell the truth before giving evidence. The *Alberta Evidence Act* (AEA) makes swearing a religious oath the automatic requirement of first resort. Every witness or deponent is asked to swear. Only if someone personally takes the initiative to actively object to swearing an oath may that person possibly make a secular affirmation instead. But the judge or official administering the procedure must first make an inquiry and be satisfied that the objection to swearing an oath is justified on certain specified grounds.

Historically, this "object-and-justify" model was the standard statutory approach used by Canadian provinces and territories, American and Australian states, and the United Kingdom and New Zealand. Today, however, the majority of those jurisdictions have discontinued this approach and now largely use the "free choice" model instead. In the free choice model, a witness or deponent is simply asked by the judge or official administering the procedure whether they want to swear an oath or affirm. There are no preconditions. People do not need to object to taking an oath first and do not need to justify which choice is made. Both options are treated equally.

The Alberta Law Reform Institute (ALRI) recommends that the AEA be amended to adopt the free choice model as well. There are some indications that the current object-and-justify model may cause a certain level of difficulty, stress or confusion both for those who administer it and those who swear or affirm. As well, it is not good for Alberta to be so legally out of step with other jurisdictions on this matter. Society has changed and in our increasingly pluralistic and secular society, it seems inappropriate to maintain a legal hierarchy which gives greater status to swearing than affirming. Such a legal hierarchy may also infringe equality rights or the right to freedom of conscience and religion guaranteed by the *Charter*.

Before recommending the free choice model, ALRI considered whether swearing a religious oath should be abolished in our jurisdiction in favour of requiring a witness or deponent to make a secular affirmation only. The Report explores both sides of this issue in the context of concerns about privacy, prejudice, redundancy, the role of secularism, ease of administration and promoting truthfulness.

ALRI sees merit in both sides of the debate but one consideration stands out above all others. Canada is a multicultural country which bases its social policy on accommodating diversity in many areas.

Such respect for diversity does not weaken our institutions or laws but on the contrary, strengthens both immeasurably. If for no other reason than this, swearing a religious oath should remain an option in court-related matters for witnesses and deponents who want to do so when promising to tell the truth.

ALRI makes various proposals about how to implement a free choice model in Alberta. The Report's main recommendations are summarized as follows.

Given the wide range of potential oaths due to religious diversity, clearly no universal mandatory form of oath can or should be legislated in the AEA. A witness or deponent must continue to have the right to choose whichever form of oath is appropriate for them. While some jurisdictions enact a mandatory form of affirmation, the AEA currently does not and ALRI recommends that this continue to be the case. In addition to guaranteeing the most flexible approach, it maintains symmetry in the treatment of oaths and affirmations.

While a mandatory form of oath and affirmation should not be enacted, ALRI does recommend that the AEA provide a suggested or permissive form of generic oath and affirmation as an instructive example. A draft provision is contained in the Report.

The AEA should enact two statutory exceptions to the free choice model. A court will be able to direct that a person *must* affirm in either of two circumstances:

(1) the witness or deponent does not choose between an oath or affirmation, or

(2) it is not reasonably practicable, in the opinion of the presiding officer, for the witness or deponent to take an oath in the form or manner appropriate to their religious or other beliefs. This exception is designed to deal with any obscure or unusual oath requests which would be difficult for a court to administer. It is based on similar provisions in the British Columbia, United Kingdom and Australian statutes.

Implementing a free choice model in Alberta will improve the administration of oaths and affirmations, respect the pluralism of our modern society and bring our province into line with current majority practice in other jurisdictions. It will help to reduce uncertainty and enhance the administration of justice.

Recommendations

Table of Abbreviations

LEGISLATION

AEA	*Alberta Evidence Act*, RSA 2000, c A-18
BC Act	*Evidence Act*, RSBC 1996, c 124
CEA	*Canada Evidence Act*, RSC 1985, c C-5
Cth Act	*Evidence Act 1995* (Cth)
OOA	*Oaths of Office Act*, RSA 2000, c O-1
Uniform Act	*Uniform Evidence Act 1982*, online: Uniform Law Conference of Canada <www.ulcc.ca/en/uniform-actsa/evidence-act/394-evidence-act>

LAW REFORM PUBLICATIONS

Australia Interim Report	The Law Reform Commission (Australia), *Evidence*, vol 1, Interim Report 26 (1985)
Canada Report	Law Reform Commission of Canada, *Report on Evidence* (1975)
Ontario Report	Ontario Law Reform Commission, *Report on the Law of Evidence* (1976)
Task Force ULCC Report	"First Report of the Federal/Provincial Task Force on Uniform Rules of Evidence" in Uniform Law Conference of Canada, *Proceedings of the Sixtieth Annual Meeting* (August, 1978) 283-347
Victorian Report	Victorian Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community*, Report 195 of Session 1999-2002 (2002)

CHAPTER 1

Introduction

A. Oaths and Affirmations in Alberta

1. THE *ALBERTA EVIDENCE ACT*

[1] In our legal system, an oath or affirmation is a prerequisite to giving oral or written evidence by a competent person. The witness or deponent of an affidavit must promise to tell the truth. A promise made by oath is generally religious in nature, while a promise made by affirmation is secular.

[2] The *Alberta Evidence Act* [AEA] states that it governs oaths and affirmations administered for purposes of legal proceedings, appointments to an office or employment, or when used on any other occasion.[1] As provincial legislation, the AEA applies to civil matters, provincial offence proceedings and appointments within Alberta jurisdiction, not to equivalent areas governed by federal jurisdiction such as criminal law.

[3] The AEA provides that a person is bound by an oath "if it has been administered in a form and with any ceremonies that the person may declare to be binding."[2] So the Act is clear that it need not be a specifically Judeo-Christian oath that is sworn, although a couple of statutory examples are provided of Judeo-Christian oaths and ceremonies which may be used if desired.[3] Case law confirms that a witness can swear by whatever religious ceremony is binding on their own conscience.[4] The Act is also clear that swearing an oath is valid even if the person does not have any religious belief.[5]

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[1] *Alberta Evidence Act*, RSA 2000, c A-18, s 14(1) [AEA]. The AEA's broad application means it also applies to oaths and affirmations unconnected to court proceedings as such, as when an affidavit of execution is sworn or affirmed concerning a transfer of land under the *Land Titles Act*, RSA 2000, c L-4. Appendix A to this Report contains all the AEA's relevant provisions concerning oaths and affirmations.

[2] AEA, s 14(1).

[3] AEA, ss 15-16.

[4] See, for example, *R v Tuck* (1912), 4 Alta LR 388 (CA).

[5] AEA, s 14(2).

[4] The AEA makes swearing an oath the automatic requirement of first resort. Every witness or deponent is asked to swear. Only if a witness or deponent personally takes the initiative *to actively object* to swearing an oath may that person possibly make a secular affirmation instead. When an objection is made, the judge or person administering the procedure must make an inquiry and be satisfied that the person's objection to swearing an oath is based on conscientious scruples, religious belief or lack of binding effect on the person's conscience.[6] To make a secular affirmation, therefore, a person must actively object to taking a religiously-based oath, reveal the state of their religious beliefs or lack thereof, and justify why they should instead be allowed to affirm.

[5] Historically, this "object-and-justify" model was the standard statutory approach used throughout Canada, the United Kingdom, Australia, New Zealand and the United States. However, as will be seen in Chapter 2, its use today has been increasingly discarded in these jurisdictions in favour of the "free choice" model. In that model, a witness or deponent is simply asked whether they want to swear an oath or affirm. There are no preconditions. People do not need to object to taking an oath first and do not need to justify which choice is made. Both options are treated equally.

2. THE *OATHS OF OFFICE ACT*

[6] As noted, the AEA applies to oaths and affirmations administered for provincial appointments to an office or employment. However, certain of its general provisions are superseded by the specific provisions of the Alberta *Oaths of Office Act* [OOA] concerning oaths of allegiance, official oaths and judicial oaths.[7] It is noteworthy that, for such oaths, the OOA does not duplicate the object-and-justify model for affirmations but simply provides that the person "may make a solemn affirmation or declaration instead of taking the oath."[8] There are no preconditions nor any need to justify the desire to affirm. In other words, the free choice model is in place under this Act. Alberta law is therefore inconsistent

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[6] AEA, s 17(1).

[7] *Oaths of Office Act*, RSA 2000, c O-1 [OOA]. This Act is reproduced in Appendix B to this Report.

[8] OOA, s 4(1).

between the two statutes which govern oaths and affirmations in this province.

B. ALRI's Previous Work in This Area

[7] The free choice model for oaths and affirmations in Canadian evidence law was first proposed by the Uniform Law Conference of Canada in its *Uniform Evidence Act*.[9] In a 1982 report, ALRI recommended in principle that the Uniform Act be adopted at the federal and provincial levels, although with an additional review of the proposed criminal evidence provisions.[10]

[8] In a separate companion report, ALRI reviewed the Uniform Act specifically in regard to how it should be implemented in Alberta. In doing so, ALRI fully endorsed adopting the free choice model for oaths and affirmations.[11] ALRI also recommended that a separate *Oaths, Affirmations and Witnesses Act* be enacted to contain this provision and all related provisions from the current Alberta Act, as the Uniform Act did not address every aspect needed for this area. Specifically, Recommendation No. 18 provided that:[12]

> We recommend that the proposed Oaths, Affirmations and Witnesses Act:
>
> (a) give witnesses and deponents a free choice between oath and solemn affirmation, but not invalidate testimony or an affidavit for failure to offer it formally,
>
> (b) provide that a person is bound by an oath which he declares binding, and that lack of religious belief does not invalidate an oath,
>
> (c) provide that if an oath or solemn affirmation is administered in prescribed form it is binding, and
>
> (d) provide for the verification of facts by solemn declaration.

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[9] *Uniform Evidence Act 1982*, s 95, online: Uniform Law Conference of Canada <www.ulcc.ca/en/uniform-actsa/evidence-act/394-evidence-act> [Uniform Act].

[10] Institute of Law Research and Reform (Alberta), *The Uniform Evidence Act 1981: A Basis for Uniform Evidence Legislation*, Final Report 37A (1982) at paras 3.9, 3.27, 3.30-3.52.

[11] Institute of Law Research and Reform (Alberta), *Evidence and Related Subjects: Specific Proposals for Alberta Legislation*, Final Report 37B (1982) at paras 3.2-3.5.

[12] Institute of Law Research and Reform (Alberta), *Evidence and Related Subjects: Specific Proposals for Alberta Legislation*, Final Report 37B, 1982) at para 3.6.

[9] This recommendation and report were not implemented by the Alberta government and so remain outstanding.

C. The Issue for Reform

[10] ALRI has chosen to revisit this area for a number of reasons. The current project was suggested by a Judge of the Provincial Court of Alberta who expressed concern that requiring a witness to elect between swearing and affirming can be confusing and overwhelming to some people. It publicly singles out those who do not wish to swear on the Bible. He also felt that this practice can be distracting and unsettling to non-Christians and to those who are new to the English language precisely at a moment when they are already engaged in unfamiliar and stressful court proceedings. The judge advocated replacing this procedure with a secular, plain language, universal promise to tell the truth.

[11] Prior to proceeding with this project, ALRI did a preliminary electronic survey of court clerks, trial judges and justices of the Provincial Court of Alberta and the Court of Queen's Bench, as well as the legal profession, to see whether such difficulties are commonly perceived both to exist and to cause additional stress for some witnesses or deponents.[13]

[12] The results seem to indicate that affirmation is a regularly chosen option. Of our 325 respondents, 22% said they always or frequently observed people wanting to affirm instead of swearing and another 50% said affirming is occasionally chosen. When the object-and-justify procedure is used, 21% of the 172 respondents who answered said that witnesses always or frequently appear confused, frustrated or unsettled by the process. Another 22% said they observed these reactions occasionally. The main reason for these difficulties (in the subjective opinion of the 130 respondents who answered this question) seems to be lack of understanding about the differences between swearing and affirming (39%), with language difficulties coming second (15%) and reluctance to publicly identify themselves as non-religious or as a member

[13] The survey was conducted in three stages during the period of December 5, 2013 to January 15, 2014. It was conducted as an online, non-scientific survey and was distributed by email or e-bulletin. Cumulatively, there were 325 responses (173 from court clerks, 86 from the judiciary and 66 from the legal profession) although not every respondent chose to answer every question. The survey results are not statistically valid but are nevertheless informative.

of another religion coming third (6%). Approximately another 25% of those respondents thought all these reasons existed occasionally.

[13] Of the 152 judicial and legal profession respondents, only 34 were willing to indicate their subjective opinion about whether such confusion, frustration or unsettledness on the part of witnesses affected their ability to give evidence or affected the credibility or reliability of that evidence. However, almost 95% of those respondents who did answer said these effects happened rarely or never.

[14] The survey answers from nearly 300 respondents also show that the object-and-justify procedure is not uniformly used by those administering the oath and affirmation process. In a trial involving charges under the federal *Criminal Code*, the free choice model is quite rightly used by virtue of the applicability of the *Canada Evidence Act* [CEA].[14] However, the free choice model also seems to be used in other situations. Many respondents identified it as the usual procedure. Other respondents noted that objections to the oath are often taken at face value without further inquiry or justification being sought. Respondents' comments indicated a discomfort with quizzing people about their beliefs in order to justify administering an affirmation. Others are unsure what factors should be held to satisfy the justification requirement.

[15] As well as being increasingly out-of-step with other jurisdictions in Canada and elsewhere, the survey results indicate that the object-and-justify procedure of the AEA appears to be causing at least some level of difficulties within the province. ALRI believes it is time to re-examine this area with a view to reforming the procedure for administering oaths and affirmations in Alberta.

D. Framework of the Project

[16] Apart from the initial electronic survey just discussed, this project did not employ further consultative measures such as a Project Advisory Committee, Report for Discussion or preliminary recommendations. The project has proceeded directly to a Final Report.

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[14] *Canada Evidence Act*, RSC 1985, c C-5, ss 14-15 [CEA].

[17] The reasons for this are as follows. ALRI wanted to give Alberta Justice our recommendations in this area as soon as possible before the new *Notaries and Commissioners Act* and regulations come into effect.[15] This way Alberta Justice can have the option of quickly implementing our recommendations and introducing these changes in the same information and education package directed to the relevant user groups. A Project Advisory Committee was not assembled because the ALRI Board is already composed of a varied cross-section of barristers, solicitors, academics, judges and justices who have significant experience in this area.

E. Outline of this Report

[18] The introductory Chapter 1 discusses the current law in Alberta. The law and reform initiatives of other jurisdictions are found in Chapter 2. Chapter 3 explores the options for reform and whether the oath should be abolished. Chapter 4 makes recommendations concerning the drafting and policy issues which would accompany implementation of a free choice system.

[15] *Notaries and Commissioners Act*, SA 2013 c N-5.5 (unproclaimed). The regulations are currently being drafted.

CHAPTER 2

Law and Reform in Other Jurisdictions

A. Canada

[19] Apart from Alberta, the traditional object-and-justify model is now used only in Prince Edward Island and Yukon.[16] British Columbia, Manitoba, Northwest Territories, Nova Scotia, Nunavut, Ontario, Saskatchewan and the federal government have all amended their statutes and moved to the free choice model proposed in 1982 by the ULCC's Uniform Act.[17]

[20] Two other provinces seem to use a "simply-object" model. In Newfoundland-Labrador, a person "who objects to taking an oath may instead make a solemn affirmation."[18] The statute does not require any grounds, justification or obligation to satisfy the person administering the procedure. Yet it appears that an oath is still the automatic starting point of the process, to which an objection must be taken before the option of an affirmation arises. In New Brunswick, there remains a precondition that a witness or deponent must object to taking an oath "on grounds of conscientious motives" but once an objection is made, the person has an absolute right to affirm.[19] The New Brunswick Act no longer requires, as it once did, that the person administering the procedure must be satisfied as to the "sincerity of such objection".[20] It is arguable that, by deleting any need to prove justification, the Acts of Newfoundland-Labrador and New Brunswick do ultimately provide a free choice, albeit by a rather circuitous route.

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[16] *Evidence Act*, RSPEI 1988, c E-11, s 13; *Evidence Act*, RSY 2002, c 78, s 21.

[17] *Evidence Act*, RSBC 1996, c 124, s 20 [BC Act]; *The Manitoba Evidence Act*, CCSM c E150, s 16; *Evidence Act*, RSNWT 1988, c E-8, s 23; *Evidence Act*, RSNS 1989, c 154, s 62; *Evidence Act*, RSNWT 1988, c E-8, s 23, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28; *Evidence Act*, RSO 1990, c E.23, s 17; *The Evidence Act*, SS 2006, c E-11.2, s 25; CEA, ss 14-15; Uniform Act, s 95. For our readers' reference, Appendix C to this Report contains all the legislative provisions concerning oaths and affirmations from British Columbia, Manitoba, Ontario, the CEA and the Uniform Act.

[18] *Oaths Act*, RSNL 1990, c O-1, s 3.

[19] *Evidence Act*, RSNB 1973, c E-11, s 14.

[20] *Evidence Act*, RSNB 1973, c E-11, s 14 as it read prior to its amendment by *An Act Respecting Compliance of Acts of the Legislature with the Canadian Charter of Rights and Freedoms*, SNB 1983, c 4, s 6(2).

[21] As a civil law jurisdiction, Quebec provides for a secular affirmation alone. While the *Code of Civil Procedure* mixes the language of swearing and affirming, the definition of "oath" makes it clear that only a secular affirmation is established for matters under Quebec law.[21] For criminal matters dealt with under the federal *Criminal Code*, swearing a religious oath would still be available in Quebec courts as part of the free choice procedure under the governing CEA.

[22] No Canadian common law jurisdiction has abolished oath-taking. In the 1970s, both the Law Reform Commission of Canada and the Ontario Law Reform Commission recommended abolishing the oath in favour of a secular affirmation alone but these recommendations were never implemented.[22] Some more recent legal publications also argue that it is time to abolish oath-taking in Canada.[23] Other legal writers firmly advocate retention of a religious oath as a valid choice for witnesses and deponents.[24]

B. United Kingdom, Australia and New Zealand

[23] In the United Kingdom, an oath remains the automatic requirement of first resort in judicial proceedings. However, if a person objects to swearing an oath, they "shall be permitted" to make a solemn affirmation instead.[25] The person does not need to justify the objection to the satisfaction of the judge or person administering the procedure. In other

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[21] CCP, arts 4(i) and 299. The secular affirmation is continued under the new Code which was recently enacted in Bill 28, *An Act to establish the new Code of Civil Procedure*, 1st Sess, 40th Leg, Quebec, 2013, s 277 (assented to 21 February 2014 and will come into force on proclamation sometime in the autumn of 2015).

[22] Law Reform Commission of Canada, *Report on Evidence* (1975) at 36, 86-87 (Commissioner La Forest dissented) [Canada Report]; Ontario Law Reform Commission, *Report on the Law of Evidence* (1976) at 113-131 [Ontario Report].

[23] Linda S Abrams & Kevin P McGuinness, *Canadian Civil Procedure Law*, 2d ed (Markham, Ont: LexisNexis Canada, 2010) at para 16.113; Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *The Law of Evidence in Canada*, 3d ed (Markham, Ont: LexisNexis Canada, 2009) at para 13.25; Jakob de Villiers QC, "Oath or Affirmation? Or Neither?" (2009) 67 Advocate 199; A. Peter Nasmith, "High Time for One Secular 'Oath'" (1990) 24 Gazette 230.

[24] Michael FW Bennett, "No Time to Swear?" (1997) 19 Adv Q 444; Michael Bennett, "The Right of the Oath" (1995) 17 Adv Q 40; Myron Gochnauer, "Oaths, Witnesses and Modern Law" (1991) 4 Can JL & Jur 67.

[25] *Oaths Act 1978* (UK), c 19, s 5(1). In fact, under s 5(2), a person who objects to a Judeo-Christian oath and wants to swear using another religious ceremony can be obliged to affirm if "it is not reasonably practicable without inconvenience or delay to administer an oath in the manner appropriate to his religious belief".

words, a simply-object procedure is in place. Law reform agencies over the years have occasionally flirted with the idea of abolishing oaths but nothing has ever come of it.[26]

[24] In Australia, the free choice model is now the main statutory approach.[27] This extensively-adopted reform has resulted from the work of several law reform agencies and their reports promoting uniformity of this approach.[28] Only Queensland still has an object-and-justify provision, although its law reform agency has recommended adoption of the free choice model as well.[29]

[25] New Zealand also uses the free choice model. A person is "entitled as of right" to make an affirmation instead of an oath.[30]

[26] Nowhere in Australia or New Zealand has the oath been abolished. In the 1980s, a majority of members of the Northern Territory Law Reform Committee recommended abolishing the oath in favour of a secular affirmation.[31] The Committee reiterated its recommendation in a subsequent 2008 report.[32] However, the government instead implemented

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[26] In 1972, a divided English Criminal Law Revision Committee generally supported the idea of abolition but decided not to formally recommend it: Criminal Law Revision Committee (England), *Evidence (General)*, Report 11 (1972) at paras 274-281. The Scottish Law Commission first recommended abolition and then later reversed itself to be consistent with the intervening recommendations of another government committee: Scottish Law Commission, *Draft Evidence Code (First Part)*, Memorandum 8 (1968) at 66-70; *The Law of Evidence*, Memorandum 46 (1980) at paras 6.02-6.10.

[27] *Evidence Act 2011* (ACT), s 23; *Evidence Act 1995* (Cth), s 23 [Cth Act]; *Evidence Act 1995* (NSW), s 23; *Oaths, Affidavits and Declarations Act 2010* (NT), s 5; *Evidence Act 1929* (SA), s 6; *Evidence Act 2001* (Tas), s 23; *Evidence Act 2008* (Vic), s 23; *Oaths, Affidavits and Statutory Declarations Act 2005* (WA), s 5. Appendix C to this Report reproduces the relevant provisions of the Cth Act as an example of the uniform Australian free choice model.

[28] New South Wales Law Reform Commission, *Oaths and Affirmations*, Discussion Paper (1980) at paras 1.1-1.37; The Law Reform Commission (Australia), *Evidence*, vol 1, Interim Report 26 (1985) at paras 560-583 [Australia Interim Report]; The Law Reform Commission (Australia), *Evidence*, Report 38 (1987) at paras 85-86; Victorian Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community*, Report 195 of Session 1999-2002 (2002) at 228-231 [Victorian Report].

[29] *Oaths Act 1867* (Qld), s 17; Queensland Law Reform Commission, *The Oaths Act*, Report 38 (1989) at 95-98.

[30] *Oaths and Declarations Act 1957* (NZ), s 4. On review of this area, New Zealand's law reform agency declined to recommend abolition of the oath and chose to affirm the continuing use of the free choice model: Law Commission (New Zealand), *Evidence*, vol 1, Report 55 (1999) at paras 359-360.

[31] Northern Territory Law Reform Committee, *Report on The Oaths Act and amendment thereof in connection with Oaths and Affirmations by Witnesses in Court Proceedings*, Report 10 (1983) at 7-11.

[32] Northern Territory Law Reform Committee, *Report on The Oaths Act*, Report 32 (2008) at 9-13.

the free choice model. Currently, the South Australian Law Reform Institute is examining whether to retain or abolish the oath in its free choice system.[33]

C. United States

[27] The object-and-justify model is also waning in the United States. Both the *Federal Rules of Evidence* and the *Uniform Rules of Evidence Act* use the free choice model.[34] The Uniform Rules have been adopted by 38 states.[35] In addition, other states like California also provide a free choice between an oath and affirmation.[36] American free choice statutes typically do not prescribe a particular form or wording for oaths or affirmations. When form is mentioned at all, it is merely to emphasize its desired effect, not to prescribe its precise wording. For example, rule 603 of the *Federal Rules of Evidence* simply states: "Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience."

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[33] South Australian Law Reform Institute, *Nothing but the truth: Witness oaths and affirmations*, Issues Paper 3 (2013).

[34] *Federal Rules of Evidence*, r 603 (2013), online: <www.law.cornell.edu/rules/fre/rule_603>; *Uniform Rules of Evidence Act*, r 603 (2005), online: Legal Information Institute <www.law.cornell.edu/uniform/evidence>.

[35] Legal Information Institute, online: <www.law.cornell.edu/uniform/evidence>.

[36] 6 Cal Evid Code, § 710, online: Official California Legislative Information <www.leginfo.ca.gov/cgi-bin/calawquery?codesection=evid&codebody=&hits=20>.

CHAPTER 3

Options for Reform

A. Is Reform Needed?

[28] As noted in Chapter 1, ALRI has already recommended replacing the object-and-justify procedure currently mandated for administering oaths and affirmations in Alberta. There are many compelling reasons underlying the necessity for reform of the present model:

- **Improving the administration of justice:** As also noted in Chapter 1, it appears that the object-and-justify procedure causes some difficulty, stress or confusion both for those who administer it and those who swear or affirm. If a new and different procedure can help to reduce such problems, the administration of justice will be improved.
- **Society has changed:** In an increasingly pluralistic and secular society, it is inappropriate to make swearing a religious oath the automatic first option in promising to tell the truth. This reason for reform is not about the veracity or value of religion. It is about whether it is wise or necessary to maintain a legal hierarchy between two equally valid choices.
- **Alberta is out of step:** As shown in Chapter 2, Alberta is now seriously out of step on this issue with the rest of Canada, not to mention Australia, New Zealand and the United States.
- **Alberta law is internally inconsistent:** As noted in Chapter 1, the AEA requires use of the object-and-justify procedure for swearing or affirming, while the OOA offers a free choice. Such internal inconsistency is not a desirable characteristic for provincial law.
- **Charter concerns:** While no case law has directly considered or decided whether the object-and-justify model infringes the *Charter* under section 2(a) (freedom of conscience and religion) or section 15 (equality rights), there are general concerns that it may indeed be so. Concerning the free choice model, courts in two Manitoba cases have held that this model definitely does

> not infringe the *Charter*.[37] Statements in those judgments note that the Manitoba government amended its statute in 1987 to replace the object-and-justify model precisely because of its concerns that such a model may not comply with the *Charter*. It is also noteworthy that in 1983 when New Brunswick switched to the free choice model, its amending statute was explicitly entitled *An Act Respecting Compliance of Acts of the Legislature with the Canadian Charter of Rights and Freedoms*.[38]

[29] In summary, it is time to modernize and simplify the administration of oaths and affirmations.

RECOMMENDATION 1

The current object-and-justify procedure governing the administration of oaths and affirmations in the *Alberta Evidence Act* should be repealed and replaced.

B. What Should Replace the Object-and-Justify Procedure?

[30] In ALRI's opinion, the following reform options exist as a replacement procedure:

1. Adoption of the free choice model so that a person can choose either to swear an oath or to affirm without needing to justify either choice; or
2. Abolition of the oath in favour of requiring a person to make a secular affirmation alone.

[31] Part C will explore these options in the context of the central issue of whether the oath should be abolished or retained. If the oath is retained, Alberta should move to a free choice procedure between swearing and affirming. If the oath is abolished, Alberta should mandate the use of a secular affirmation alone.

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[37] *R v Anderson*, [2001] 7 WWR 582 (MB Prov Ct); *R v Robinson* (2004), 181 Man R (2d) 75 (Prov Ct), aff'd 2005 MBQB 50, leave to appeal refused 2005 MBCA 69.

[38] *An Act Respecting Compliance of Acts of the Legislature with the Canadian Charter of Rights and Freedoms*, SNB 1983, c 4, s 6(2).

[32] ALRI considered some other models but rejects them as not being viable. The simply-object model is rejected because it maintains the religious oath as the automatic starting point of the process, even though an absolute right to affirm arises once an objection is made. This hierarchy of choice means, in ALRI's opinion, that the AEA would continue to be vulnerable to a *Charter* challenge. For that reason alone, there is no point in implementing this model. Moreover, even though the circuitous route of the simply-object model does eventually lead to a right to choose, it is better simply to offer a free choice directly.

[33] Nor is it a viable option to consider switching the hierarchical approach so that an affirmation would be the automatic starting point in the process, with a right to swear an oath if the person objects to affirming. This approach would risk continued *Charter* vulnerability as well.

[34] ALRI also considered but rejects the option of abolishing both oaths and affirmations in favour of a pure judicial caution. A judicial caution is a warning or caution given orally by the judge or person administering the process. The witness or deponent is advised that they are legally obliged to tell the truth and that failure to do so carries serious legal consequences on conviction for perjury. In this model, the person neither swears nor affirms but simply listens to the oral caution advising them of the law. They do not have to say anything for the process to be effective.

[35] Typically, when a law reform agency recommends abolishing the oath, it recommends that it be replaced with an affirmation given by the witness or deponent. The witness must either personally say the entire affirmation or, alternatively, simply say "yes" or "I do" when a question such as "Do you promise to tell the truth?" is posed to them by the judge or person administering the process. The Law Reform Commission of Canada, the Ontario Law Reform Commission and the Northern Territory Law Reform Committee all recommended this option.[39] Affirming is a well-known and understood procedure within our legal tradition. The same cannot be said about judicial cautions. That model is quite foreign to

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[39] Canada Report at 86-87; Ontario Report at 129; Northern Territory Law Reform Committee, *Report on The Oaths Act*, Report 32 (2008) at 9, aff'g Northern Territory Law Reform Committee, *Report on The Oaths Act and amendment thereof in connection with Oaths and Affirmations by Witnesses in Court Proceedings*, Report 10 (1983) at 7-11. As previously noted, none of these reports were implemented.

our common law tradition and is also not used in many civil law traditions.

[36] An additional reason why a judicial caution is simply not a viable option in Alberta concerns the ability to prosecute for perjury. Under the *Criminal Code*, a key element of the offence of perjury is that the false statement be made "under oath or solemn affirmation".[40] In ALRI's opinion, a pure judicial caution would not satisfy this element. The current statutory language presupposes that a witness has personally given a promise or undertaking to tell the truth. Amendment of the *Criminal Code* would therefore appear to be necessary in order to maintain a successful prosecution for perjury where a judicial caution is used. Making such an amendment is not, of course, within the constitutional jurisdiction of the Alberta legislature. The Canadian Parliament would have to agree to do so.

C. Should the Oath be Abolished or Retained?

[37] There are several standard arguments for and against the use of oaths in our judicial system. Considerable conceptual overlap exists among these arguments. In this Part, we present both sides of this issue grouped under common areas of concern.

1. PRIVACY

[38] Many who favour abolition of the oath argue that it amounts to an unacceptable invasion of privacy when a person who wishes to affirm is forced first to publicly decline to take an oath.[41] Even in a free choice model, making a choice between swearing and affirming is likely to involve revealing a person's religion, religious beliefs or lack thereof. So abolishing the oath is the only way to truly solve this privacy concern.

[39] Those who favour retention of the oath usually argue that this is not an especially serious invasion of privacy and point out that "[w]itnesses on the stand must daily reveal far more sensitive matters."[42]

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[40] *Criminal Code*, RSC 1985, c C-46, s 131(1).

[41] Canada Report at 87.

[42] Canada Report at 87 (Commissioner La Forest's dissent).

2. PREJUDICE

[40] Among proponents of abolition of the oath, a concern closely related to their concern about privacy involves the fear that a negative inference may be drawn either from identifying the witness's religion or from the witness's choice to affirm instead of swearing. What if a biased or sceptical judge assumes the witness's testimony is less reliable or persuasive because of that factor? Does this fear cause witnesses to choose the oath simply "because they do not wish to call attention to themselves or because they fear that the impact of their evidence will be weakened if they depart from the customary oath"?[43] This concern appears to be greatest where an object-and-justify procedure is used. When the statute requires a witness to state a religious objection to the oath before being allowed to affirm, "[t]he implication is that the Legislature prefers the oath to the affirmation. The person who wishes to affirm is in the invidious position of asking for 'special treatment'."[44]

[41] Advocates of retaining the oath seriously doubt whether this concern poses any real danger in today's modern, secular and more tolerant society.[45] But even if lingering prejudice remains, they argue that abolishing the oath would not solve the problem of cultural or religious bias anyway. Anyone who is wrongly inclined to be biased for such inappropriate reasons could draw just as many negative inferences from a witness's name, clothing, appearance, accent or other identifying indicator.[46]

[42] Like many of the fears or concerns in this debate, there is little or no empirical evidence to measure objectively whether this concern is a problem in reality or not. Its potential effect is largely a matter of conjecture.[47] As noted in Chapter 1, ALRI's own preliminary survey of the legal profession and judiciary indicates both a reluctance to speculate on

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[43] Criminal Law Revision Committee (England), *Evidence (General)*, Report 11 (1972) at para 280.

[44] "First Report of the Federal/Provincial Task Force on Uniform Rules of Evidence" in Uniform Law Conference of Canada, *Proceedings of the Sixtieth Annual Meeting* (August, 1978) 283 at 325 [Task Force ULCC Report].

[45] New South Wales Law Reform Commission, *Oaths and Affirmations*, Discussion Paper (1980) at paras 1.22-1.23; Canada Report at 87 (Commissioner La Forest's dissent).

[46] Victorian Report at 239.

[47] Queensland Law Reform Commission, *The Oaths Act*, Report 38 (1989) at 90.

this concern's effect and also the view that negative inferences are not drawn.

[43] Some who see this concern as a persuasive reason to abolish the oath acknowledge that its effect may also be overcome by adopting a free choice model which makes it clear that oaths and affirmations are legal equals.[48] Of course, this assumes that where the law itself draws no distinction, neither will anyone else. However, this issue can arise even where a free choice model exists. For example, a court in the recent British Columbia case of *R v TRJ* was asked to draw a negative inference from an accused's choice to affirm rather than swear.[49]

[44] In that case, the accused was a religious Muslim. The Crown argued that the court should draw a negative inference about the accused's truthfulness because of his choice to affirm rather than swear. The trial judge was sceptical but nevertheless did say that the accused's choice to affirm was a factor to be considered in assessing his evidence. The judge found against the accused's credibility and convicted him. The British Columbia Court of Appeal noted that the CEA provides that an affirmation has the same force and effect as an oath, held that the trial judge's approach constituted a legal error and ordered a new trial.

3. PROMOTING TRUTHFULNESS

[45] Another argument in favour of abolishing oaths essentially asserts that, in our modern secular society, a religious oath is often just an empty ritual or anachronism for many people. The oath "is taken automatically by witnesses without thought as to its significance."[50] It is also clear that "[t]he oath has not prevented an enormous amount of perjury in the courts."[51] So if swearing an oath does not ensure truthfulness anyway, why bother retaining it?

[46] Against this view, proponents of retaining the oath make the point that "though much perjury may be committed despite the oath, that is not the issue. The issue is whether abolition of the oath would increase

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[48] The Law Reform Commission (Australia), *Evidence*, Report 38 (1987) at para 86.

[49] *R v TRJ*, 2013 BCCA 449.

[50] Victorian Report at 202.

[51] Criminal Law Revision Committee (England), *Evidence (General)*, Report 11 (1972) at para 280.

perjury, and for some witnesses it might."[52] They often cite as support Commissioner La Forest's dissent in the Canada Report:[53]

> I am convinced that a substantial number of people are more likely to tell the truth, at least the whole truth, if they take the oath. To those who take the oath seriously (and this covers a great many people) the certain demands of conscience are more likely to elicit the exact truth than the highly uncertain threat of a prosecution for perjury.

[47] Over the years, an inordinate amount of ink has been spilled debating this issue. The problem is that all the viewpoints are simply subjective opinions and are ultimately unprovable one way or the other. Who truly knows what the role or value of religion and oaths play in people's lives? Only the person swearing an oath can know that and of course, such knowledge applies only to themselves.

[48] Law reform agencies often recommend retaining the oath to recognize the possibility that it may induce some witnesses to be more truthful and accurate than they might otherwise be if they simply affirmed.[54] In a pluralistic society, there is value in accommodating a diversity of motivations. As noted by the Victorian Parliament Law Reform Committee:[55]

> [M]any people with strongly held religious beliefs would find it incongruous and may even feel affronted if they did not have the opportunity to make an oath in accordance with their religious beliefs. In the Committee's view removing the opportunity to do so would be in conflict with the fundamental principle of respecting and, where possible, actively accommodating the diversity in the Victorian community.

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[52] New South Wales Law Reform Commission, *Oaths and Affirmations*, Discussion Paper (1980) at para 1.13.

[53] Canada Report at 87.

[54] See, for example, Australia Interim Report at para 565; Task Force ULCC Report at 324-325.

[55] Victorian Report at 238.

4. REDUNDANCY

[49] The Ontario Law Reform Commission noted that:[56]

> Authoritative decisions of the courts have declared the "nature of an oath" in Canadian law to be a "moral obligation to speak the truth" attended with sanctions. If this is generally true for an oath taken by a witness, it must be equally true that the nature of an oath taken on other occasions is a moral obligation to abide by the terms of the oath. This, in fact, is the express obligation imposed today on those who are permitted to affirm.

[50] In other words, if an oath and affirmation are equivalent in law, isn't it redundant to use both? Wouldn't it be sufficient to simply have everyone affirm? If a person is sincerely religious, then surely their sense of morality would be equally engaged when making a solemn affirmation. A religious oath should not engage their consciences more. Upstanding people who are going to tell the truth will do so whether they swear or affirm. Those who are going to lie will do so regardless as well.

[51] This redundancy argument can be framed as follows:[57]

> [T]he only function of the oath is to motivate witnesses to speak the truth. At the present time, the solemn, public and formal affirmation carries out this function just as effectively as the oath for those witnesses who affirm. If the affirmation is just as effective as the oath, both are no longer required.

[52] While this concern about redundancy bolsters the argument for abolishing the oath, it is countered by the same considerations expressed about the promotion of truthfulness. Those who favour retention of the oath argue that the value of accommodating diversity in a pluralistic society outweighs any concern about technical redundancy.

5. ROLE OF SECULARISM

[53] Advocates of abolition of the oath argue that, as a state institution, courts are and must be secular in nature. Court procedure should not be mixed with religion which is solely a private affair. The legal obligation to tell the truth in court proceedings is a requirement that is separate from

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[56] Ontario Report at 129.

[57] Task Force ULCC Report at 324.

anyone's religion or faith.[58] This is another reason why all witnesses and deponents should simply use a secular affirmation and the oath should be discontinued.

[54] The alternate view, however, argues that witnesses are complex people who often have both secular and spiritual identities which cannot be so easily separated or compartmentalized.[59] They bring their whole selves to court and may feel more bound by an oath than by an affirmation. For that reason, oaths should be retained as an option.

6. EASE OF ADMINISTRATION

[55] This argument for abolishing the oath is based on pure pragmatism. In a society with many diverse religions, it can be difficult and impractical to determine the proper ceremonies for each one and to carry them out at a moment's notice during the daily administration of justice.[60] As noted by the Federal/Provincial Task Force on Uniform Rules of Evidence:[61]

> [T]he oath can be more cumbersome than the affirmation. If a witness adheres to a religious doctrine which prescribes an unusual form of oath, which the court is unable to provide, or, if the judge must inquire about the witness's religious beliefs and about the form of oath which will bind the witness's conscience, the proceedings will be delayed and the private religious beliefs of the witness will be publicly revealed. Thus, the oath can be impractical. As between the oath and the affirmation, the affirmation is secular, applies to all witnesses and causes no administrative problems.

[56] Proponents of retaining the oath assert, however, that the task of providing for alternate religious oaths is often not as onerous as feared because many do not require the use of a specific, or indeed, any religious text or special accoutrements.[62] Moreover, a statutory mechanism can be enacted to deal with any truly obscure or unusual oath requests which would be difficult to administer. For example, Australia provides an

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[58] Victorian Report at 237.

[59] Victorian Report at 214.

[60] Ontario Report at 121.

[61] Task Force ULCC Report at 324.

[62] Victorian Report at 238.

exception to the free choice model for just this purpose. A court can direct that a person must affirm if "it is not reasonably practicable for the person to take an appropriate oath."[63] In Canadian jurisdictions having a free choice model, however, only the British Columbia statute contains such a provision. It states:[64]

> If, in the opinion of the presiding officer, it is not reasonably practicable without inconvenience or delay to administer an oath to a person in the form or manner appropriate to the person's religious beliefs, the person must, despite any other enactment or law, make a solemn affirmation in the prescribed form.

[57] Note that this provision adds the qualifiers of "inconvenience or delay" to the concept of "reasonably practicable." This is based on similar wording used in the United Kingdom.[65]

D. Recommendations for Reform

[58] ALRI sees merit in both sides of this debate. But ultimately, one consideration stands out above all others. Canada is a multicultural country which bases its social policy on accommodating diversity in many areas. Such respect for diversity does not weaken our institutions or laws but on the contrary, strengthens both immeasurably. If for no other reason than this, swearing a religious oath should remain an option in court-related matters for witnesses and deponents who want to do so when promising to tell the truth.

RECOMMENDATION 2

The ability to swear a religious oath when promising to tell the truth pursuant to the *Alberta Evidence Act* should be retained.

[59] However, as already noted in Recommendation 1, Alberta's current legal hierarchy between oaths and affirmations must be ended for all the reasons discussed at the beginning of this Chapter. Since the oath is being

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[63] Cth Act, s 23(3)(b). Virtually every jurisdiction in Australia has this provision or a similarly worded one.

[64] BC Act, s 20(3).

[65] *Oaths Act 1978* (UK), c 19, s 5(2).

retained as a procedural option, a witness or deponent must be able to choose either to swear or to affirm at their discretion, without any need for objection or justification. Establishing a free choice model will bring Alberta into line with the accepted practice in much of the rest of Canada, Australia, New Zealand and the United States. It will also bring the AEA into greater compliance with the *Charter*.

RECOMMENDATION 3

A free choice model should be enacted in the *Alberta Evidence Act* so that a witness or deponent can simply choose either to swear an oath or to affirm without any need for objection or justification.

[60] Chapter 4 will explore the various issues and concerns surrounding the implementation of a free choice model.

CHAPTER 4

Implementing a Free Choice Model

A. Reforming the *Alberta Evidence Act*

[61] Implementing a free choice model requires resolving a few issues before amendment of the current AEA provisions (reproduced in Appendix A to this Report).

1. EXPRESSING THE FREE CHOICE PROVISION

[62] The current object-and-justify provision in section 17(1) of the AEA should be repealed, along with section 17(3) which supports it. Section 17(2) creates the legal equality of oaths and affirmations and its substance should be retained. However, its current wording is predicated on the oath's hierarchical primacy and so must be reworded. A revised provision should state in the most direct and basic terms possible that oaths and affirmations are equally valid.

[63] There is no standard or uniform provision used in Canadian statutes for expressing the free choice model. Every free choice jurisdiction has a different way of enshrining a person's right to choose between swearing and affirming, although the CEA model is duplicated by Saskatchewan so those two statutes are uniform. No one follows the wording of the ULCC's Uniform Act. Another format is also found in the uniform Australian model which is largely simple and straightforward.[66] Appendix C to this Report reproduces a selection of free choice legislative models from various sources.

[64] Rather than endorsing any particular template, ALRI simply recommends that, whatever wording is chosen by the government to implement the free choice model, the resulting provision should clearly show that there is complete equality of choice between oaths and affirmations. One choice should not be presented as superior or preferable to another.

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[66] See, for example, Cth Act, ss 21-24 (contained in Appendix C).

RECOMMENDATION 4

The free choice statutory provision should clearly show that there is complete equality of choice between oaths and affirmations, without presenting one choice as superior or preferable to the other. It should state in the most direct and basic terms possible that oaths and affirmations are equally valid.

[65] ALRI debated whether the statute should continue to use "affirm" and "affirmation" to express the concept of a secular promise to tell the truth. That legal terminology is not always well understood by witnesses or deponents. However, as discussed in Chapter 3, the *Criminal Code* uses precisely that terminology to create the offence of perjury. Rather than jeopardizing the ability to prosecute, ALRI recommends retaining that terminology in the AEA as well.

RECOMMENDATION 5

The *Alberta Evidence Act* should continue to use "affirm" and "affirmation" as its statutory terminology when referring to a secular promise to tell the truth.

2. FORM OF THE OATH AND AFFIRMATION

a. Mandatory form?

[66] Given the diverse range of potential oaths, clearly no universal mandatory form of oath can or should be enacted. Indeed, no Canadian legislation attempts to do so. As discussed in Chapter 1, section 14(1) of the AEA makes it clear that any form of oath will bind a witness or deponent "if it has been administered in a form and with any ceremonies that the person may declare to be binding." So the witness or deponent has the right to use whatever oath is appropriate for them. This right should continue under a free choice model.

[67] The AEA should also retain section 14(2). This common legislative provision specifies that an oath's validity is unaffected by lack of religious belief. It prevents opponents from seeking to "go behind" the oath to try to discount evidence by attacking the orthodoxy of the witness.

RECOMMENDATION 6

The *Alberta Evidence Act* should not enact a mandatory form of oath. The Act should continue to provide that the person swearing the oath has the right to choose whatever oath and ceremonies are appropriate for them. The Act should also continue to provide that an oath's validity is unaffected by lack of religious belief.

[68] As for an affirmation, clearly it should involve some kind of solemn secular promise to tell the truth. Some Canadian and other jurisdictions using the free choice model do enact a mandatory form of affirmation, probably to ensure consistency of administration and because, unlike oaths, "one size fits all." The alternative is to let each court or commissioner for oaths craft their own according to permissive guidelines or personal preference. As noted in Chapter 2, the American model does this simply by providing that an oath or affirmation must be "in a form designed to impress [the] duty [to testify truthfully] on the witness's conscience."[67]

[69] In Canada, the Uniform Act, Ontario, Newfoundland and Nova Scotia do not enact the form of affirmation. Of the other free choice jurisdictions, British Columbia, Manitoba, Saskatchewan and the CEA do enact a mandatory form of affirmation. So does Quebec which uses only a secular affirmation.

[70] In Australia, the uniform model specifies a certain form for both oaths and affirmations but goes on to provide that using a "similar form" will also suffice. So there is flexibility built into the Australian model to address situations where strict compliance does not occur.

[71] The AEA does not currently enact a mandatory form of affirmation. ALRI recommends that this continue to be the case. In addition to guaranteeing the most flexible approach, it maintains symmetry in the treatment of oaths and affirmations.

RECOMMENDATION 7

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

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[67] *Federal Rules of Evidence*, r 603 (2013), online: Legal Information Institute <www.law.cornell.edu/rules/fre/rule_603>.

b. Non-mandatory form?

[72] While a mandatory form of oath should not be enacted, ALRI does recommend that the AEA provide a suggested or permissive form of generic oath as an instructive example. Currently, sections 15 and 16 are permissive, non-mandatory provisions addressing the use of the Bible and the Scottish form of the Christian oath. Such religion-specific permissive provisions are now quite rare in Canadian jurisdictions which use the free choice model. Only Ontario and Manitoba still make passing reference to the Bible.[68] Only British Columbia still refers to the Scottish oath.[69]

[73] In a multicultural society such as ours, a statute should not privilege one religion or culture above others, even for the purpose of permissively illustrating how to swear a particular kind of oath. Therefore, sections 15 and 16 in their current form should be repealed. This will not affect the ability of people to swear on the Bible or use the Scottish oath if that is the specific form of oath they choose.

[74] ALRI recommends, however, that the Act's new permissive form of generic oath be modeled on section 15's basic language and procedure for oath-taking but be stated more generally.

[75] As with oaths, it would be helpful for the Act to contain a non-mandatory, permissive form of generic affirmation as an instructive example. It should be in the same basic terms as the Act's permissive form of oath, with necessary modifications to reflect its secular nature.

[76] ALRI notes that the two Canadian law reform agencies which recommended abolition of the oath and its replacement by a secular affirmation also recommended that the wording of the affirmation include an explicit reference to prosecution for lying. The Law Reform Commission of Canada suggested the following wording:[70]

> I promise to tell the truth. I am aware that if I tell a lie or wilfully mislead the court I am liable to be prosecuted.

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[68] *Evidence Act*, RSO 1990, c E.23, s 16; *The Manitoba Evidence Act*, CCSM c E150, s 14.

[69] BC Act, s 22.

[70] Canada Report at 36.

The Ontario Law Reform Commission's version reads:[71]

> I solemnly affirm that I will tell the truth, the whole truth, and nothing but the truth, well knowing that it is a serious offence to give false evidence with intent to mislead the court.

[77] However, among the free choice affirmations currently legislated in Canada, no such references to prosecution are made. While the legal system does rely on the criminal offence of perjury to deter lying and induce truthfulness, legislators apparently see little value in emphasizing it in the formal wording of an affirmation. [72] As noted by the Federal/Provincial Task Force on Uniform Rules of Evidence: "[t]he reference to prosecution will not deter a witness who intends to mislead the court and will not make proof of perjury any easier for the Crown."[73]

[78] The Northern Territory Law Reform Committee also rejected such an approach, whether contained in an affirmation's wording or in a warning given by the court or person administering the affirmation:[74]

> In our view, this is not necessary, and may even create an atmosphere of suspicion and fear in some naïve, sensitive or nervous witnesses. ... [I]t is always open to cross-examining counsel to remind the witness, in forcible terms, of the penalties of perjury; and there are times when the court itself might warn that persistence in a particular assertion might be perilous. But to warn the witness, before he has given any evidence, that he had better not tell lies, seems somewhat insulting to a person who has just promised to tell the truth. Furthermore, it does not appear, over the centuries when the formal oath was the only process permitted, that the courts felt it necessary to give such a warning. Nor does it appear that this failure to warn was ever considered a defect in any subsequent prosecution for perjury.

[79] ALRI agrees that no explicit reference to the law of perjury is needed and so has not included one in the suggested permissive form.

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[71] Ontario Report at 130.

[72] Law Reform Commission of British Columbia, *Report on Extra-Judicial Use of Sworn Statements*, Report 27 (1976) at 24; British Columbia Law Institute, *Report on Unnecessary Requirements for Sworn Statements*, Report 42 (2006) at 15.

[73] Task Force ULCC Report at 325.

[74] Northern Territory Law Reform Committee, *Report on The Oaths Act*, Report 32 (2008) at 9-10.

[80] Therefore, using existing section 15's basic terminology and procedure, ALRI recommends a non-mandatory form of generic oath and affirmation in the following form:

> Administration of oath or affirmation
>
> 15(1) An oath may be administered in the form and manner following:
>
> Using any ceremonies that the person taking the oath declares to be binding, the officer administering the oath shall say: "Do you swear that the evidence you give will be the truth, the whole truth and nothing but the truth, so help you God?", to which the person being sworn shall say "I do" or give their assent to it in a manner satisfactory to the court or to the officer administering the oath.
>
> (2) An affirmation may be administered in the form and manner following:
>
> The officer administering the affirmation shall say: "Do you solemnly affirm that the evidence you give will be the truth, the whole truth and nothing but the truth?", to which the person being affirmed shall say "I do" or give their assent to it in a manner satisfactory to the court or to the officer administering the affirmation.

[81] Section 18 of the AEA currently provides a non-mandatory form for use when making a statutory declaration. This provision should continue without change.

RECOMMENDATION 8

The *Alberta Evidence Act* should contain a non-mandatory, permissive form of generic oath as an instructive example. It should be modeled on the Act's current suggested language for oath-taking but be stated more generally. The Act should no longer refer to Judeo-Christian texts or the Scottish oath.

RECOMMENDATION 9

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

3. SHOULD THERE BE ANY STATUTORY EXCEPTIONS TO THE FREE CHOICE MODEL?

[82] The uniform Australian model contains two statutory exceptions to free choice. A court can direct that a person *must* affirm in either of two circumstances:[75]

> (a) the person refuses to choose whether to take an oath or make an affirmation; or
>
> (b) it is not reasonably practicable for the person to take an appropriate oath.

[83] No Canadian free choice jurisdiction creates a statutory exception for the situation in clause (a) where a witness refuses to choose between swearing and affirming. In Canada, a defiant refusal would probably be dealt with by a contempt of court ruling. Even under the Australian provision, it is easy to imagine that a person who deliberately refuses to choose would equally refuse to affirm when directed and so would probably also need to be ultimately dealt with by a contempt finding.

[84] As noted in Chapter 3, the second exception in clause (b) is designed to deal with any obscure or unusual oath requests which would be difficult for a court to administer. In Canadian jurisdictions having a free choice model, only the British Columbia statute enacts a similar exception. The BC Act states:[76]

> If, in the opinion of the presiding officer, it is not reasonably practicable without inconvenience or delay to administer an oath to a person in the form or manner appropriate to the person's religious beliefs, the person must, despite any other enactment or law, make a solemn affirmation in the prescribed form.

[85] Note that the British Columbia provision adds the qualifiers of "inconvenience or delay" to the concept of "reasonably practicable." This is based on similar wording used in the United Kingdom.[77]

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[75] Cth Act, s 23(3)(a)-(b). Virtually every jurisdiction in Australia has this provision or a similarly worded one.

[76] BC Act, s 20(3).

[77] *Oaths Act 1978* (UK), c 19, s 5(2).

[86] ALRI thinks it would be wise to enact statutory exceptions to the free choice model which deal with both scenarios. However, ALRI would modify the Australian approach in two ways.

[87] In the first exception, ALRI can envisage situations where a witness or deponent is unable to choose between swearing and affirming for reasons other than trying to be a defiant contrarian who deliberately refuses to choose. Perhaps the person is genuinely confused by which option to pick or is unable to understand the technical difference between the two choices. Therefore, broader and less judgmental statutory language should be used to express clause (a). The Act should speak of a person who "does not choose" between swearing and affirming, rather than one who "refuses to choose."

[88] In the second exception, ALRI would not include the additional British Columbia qualifiers of "inconvenience or delay" in clause (b). Those factors are already encompassed within the concept of "reasonably practicable." However, ALRI does recommend that clause (b) should specify that the exception applies where the presiding officer is of the opinion that it is not reasonably practicable to administer the chosen oath. In other words, assessment of this factor should be solely within the presiding officer's discretion.

RECOMMENDATION 10

The *Alberta Evidence Act* should provide two exceptions to the free choice model. Notwithstanding anything in the Act, a presiding officer may direct that a witness or deponent must affirm if:

(a) the witness or deponent does not choose between an oath and affirmation, or

(b) it is not reasonably practicable, in the opinion of the presiding officer, for the witness or deponent to take an oath in the form or manner appropriate to their religious or other beliefs.

4. SECTIONS 19 AND 20

[89] Section 19 of the AEA concerns unsworn evidence of a child of tender years and the necessity for corroboration. Section 20 addresses receipt of evidence from a witness who is unable to speak. Although these sections are included under the Act's general heading of "Oaths and

Affirmations," they actually raise completely different substantive issues than the provisions involving oaths and affirmations. They concern the substantive law of evidence rather than the preliminary procedural requirements governing how a witness or deponent should promise to give truthful evidence.

[90] ALRI has decided to address the important but different evidentiary issues raised by section 19 in a future Report. The current Report will be restricted solely to procedural issues concerning oaths and affirmations.

B. Reforming the *Oaths of Office Act*

[91] As discussed in Chapter 1, the AEA applies to oaths and affirmations administered on provincial appointment to an office or employment. However, certain of the AEA's general provisions are superseded by the specific provisions of the OOA concerning oaths of allegiance, official oaths and judicial oaths. As well as enacting mandatory forms for such oaths, the OOA departs from the AEA's current object-and-justify model to create a free choice model in section 4. The alternate wording to be used for affirmations is also stated in section 4. (The OOA is reproduced in Appendix B to this Report).

[92] Unfortunately, section 4 contains some problematic terminology. Section 4(1) and 4(2) both refer to a "solemn affirmation or declaration" which is an inconsistent use of terminology with the AEA. It is sufficient and more accurate to refer only to a "solemn affirmation." Moreover, in section 4(2)'s prescribed form of affirmation, the word "swear" is erroneously included, which causes confusion when administering an affirmation.

[93] However, when the AEA is amended to create a free choice model for all oaths and affirmations, section 4 of the OOA will then become legally superfluous and can be repealed. The forms of oath in the OOA should also simply be amended at that time to directly reflect the "swear/affirm" option and to indicate omission of "So help me God" for affirmations.

[94] Just to make it perfectly clear to all readers that the AEA's free choice model applies to these oaths and affirmations, the government may

wish to highlight that connection in the OOA by referencing the governing legislation.

RECOMMENDATION 11

When the *Alberta Evidence Act* is amended to adopt a free choice model, section 4 of the *Oaths of Office Act* should be repealed. The forms of oath in the *Oaths of Office Act* should be amended to directly reflect the correct alternate wording for affirmations.

C. Conclusion

[95] Implementing a free choice model in Alberta will improve the administration of oaths and affirmations in this jurisdiction. It will respect the pluralism of our modern society, remove inconsistencies within Alberta law and bring our province into line with current majority practice in Canada, Australia, New Zealand and the United States. All this will help to reduce uncertainty and enhance the administration of justice.

JS PEACOCK QC (Chair)

ND BANKES

PL BRYDEN

AS de VILLARS QC

MT DUCKETT QC

JT EAMON QC

HON CD GARDNER

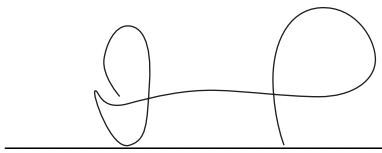
WH HURLBURT QC

AL KIRKER QC

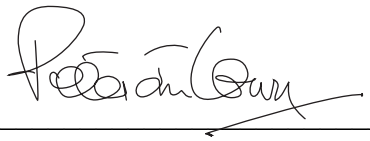
PJM LOWN QC (Director)

HON AD MACLEOD

ND STEED QC



CHAIR



DIRECTOR

APPENDIX A

Alberta Evidence Act, RSA 2000, c A-18 (excerpts)

Definitions

1 In this Act,

(a) "action" includes

(i) an issue, matter, arbitration, reference, investigation or inquiry,

(ii) a prosecution for an offence committed against an Act of the Legislature or in force in Alberta, or against a bylaw or regulation made under the authority of any such Act, and

(iii) any other proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of Alberta;

(b) "court" includes a judge, arbitrator, umpire, commissioner, judge of the Provincial Court, justice of the peace or other officer or person having by law or by the consent of parties authority to hear, receive and examine evidence;

(c) "witness" includes a person

(i) who in the course of an action is questioned orally under Part 5 of the *Alberta Rules of Court* or is cross-examined on an affidavit made by the person,

(ii) who makes answer by affidavit on any interrogatories, or

(iii) who makes an affidavit of records under Part 5 of the *Alberta Rules of Court*.

RSA 2000 cA-18 s1;2008 c32 s5;2009 c53 s16

Oaths and Affirmations

Form, etc., of oath

14(1) When an oath may lawfully be administered to a person

(a) as a witness or as a deponent in an action,

(b) on appointment to an office or employment, or

(c) on any occasion whatever,

that person is bound by the oath administered if it has been administered in a form and with any ceremonies that the person may declare to be binding.

(2) When an oath is duly administered and taken, the fact that the person to whom it was administered has at the time of taking the oath no religious belief does not for any purpose affect the validity of the oath.

RSA 1980 cA-21 s15

Administration of oath

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

> The person taking the oath shall hold the Bible or New Testament, or Old Testament in the case of an adherent of the Jewish religion, in the person's uplifted hand and the officer administering the oath shall say: "You swear that the evidence you give as touching the matters in question in this action or matter shall be the truth, the whole truth and nothing but the truth. So help you God", to which the person being sworn shall say "I do" or give his or her assent to it in a manner satisfactory to the court or to the officer administering the oath.

(2) Without in any way limiting or restricting the manner in which an oath may be administered, the oath may be taken or sworn on any one of the 4 Gospels.

RSA 1980 cA-21 s16

Scottish oath

16 If a person to whom an oath is to be administered desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland the person shall be permitted to do so, and the oath shall be administered to the person in that form and manner without further question.

RSA 1980 cA-21 s17

Affirmation, etc., instead of oath

17(1) If, in an action or on an occasion when an oath is required or permitted, a person called as a witness, or required or desiring to give evidence or to make an affidavit or deposition, objects to taking an oath or is objected to as incompetent to take an oath, if the presiding judge or the person qualified to take affidavits or

depositions is satisfied that the witness or deponent objects to being sworn

(a) from conscientious scruples,

(b) on the ground of the religious belief of the witness or deponent, or

(c) on the ground that the taking of an oath would have no binding effect on the conscience of the witness or deponent

the witness or deponent may make an affirmation and declaration instead of taking an oath.

(2) The affirmation and declaration of that person is of the same force and effect as if that person had taken an oath in the usual form.

(3) When the evidence is in the form of an affidavit or written deposition, the person before whom it is taken shall certify that the deponent satisfied the person that the deponent was a person entitled to affirm.

RSA 1980 cA-21 s18

Statutory declaration

18 Any person authorized by law to administer oaths or to take affidavits in any matter may receive the solemn declaration of any person making it before the authorized person, in the following form, in attestation of the execution of any writing, deed or instrument or of the truth of any fact or of any account rendered in writing:

I, _____, solemnly declare that *(state the fact or facts declared to),* and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

Declared before me at _____ this __ day of ____ , 20__.

RSA 1980 cA-21 s19

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.

RSA 1980 cA-21 s20

Evidence of mute person

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

RSA 1980 cA-21 s21

APPENDIX B

Oaths of Office Act, RSA 2000, c O-1

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Oath of allegiance

1(1) When by a statute of Alberta a person is required to take an oath of allegiance it shall be taken in the following form:

> I, _____ , swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors, according to law.
>
> So help me God.

(2) Where the name of Her Majesty Queen Elizabeth the Second is expressed in the form, the name of the Sovereign at the time that the oath is taken shall be substituted therefor if different.

RSA 1980 cO 1 s1

Official oath

2 When by a statute of Alberta a person is required to take an official oath on

(a) being appointed to an office other than that of judge or justice of the peace, or

(b) being admitted to a profession or calling,

the oath shall be taken in the following form:

> I, _____ , swear that I will diligently, faithfully and to the best of my ability execute according to law the office of _____.
>
> So help me God.

RSA 1980 cO 1 s2

Judicial oath

3 When by a statute of Alberta a person is required to take a judicial oath on being appointed as a judge or as a justice of the peace, the oath shall be taken in the following form:

> I, _____ , swear that I will honestly and faithfully and to the best of my ability exercise the powers and duties of a _____ _____.
>
> So help me God.

RSA 1980 cO 1 s3

Affirmation or declaration

4(1) A person who is required by a statute of Alberta to take an oath prescribed by this Act may make a solemn affirmation or declaration instead of taking the oath.

(2) When on the administering of an oath prescribed by this Act the person about to take the oath is permitted by law to make a solemn affirmation or declaration instead of taking an oath, the person may make a solemn affirmation in the prescribed form of the oath, substituting the words "solemnly swear and truly declare and affirm" for the word "swear", and omitting the words "So help me God".

RSA 1980 cO 1 s4;1990 c29 s19

APPENDIX C

Selected Free Choice Statutes from Other Sources

British Columbia

Evidence Act, RSBC 1996, c 124 (excerpts)

Affirmation or oath

20 (1) In this section, **"presiding officer"** includes,

(a) in a proceeding in which evidence is taken, the judge, and

(b) in any other case, a person having by law the authority to administer an oath.

(2) For all purposes for which an oath is required by law, a person may, instead of taking an oath, make a solemn affirmation in the prescribed form.

(3) If, in the opinion of the presiding officer, it is not reasonably practicable without inconvenience or delay to administer an oath to a person in the form or manner appropriate to the person's religious beliefs, the person must, despite any other enactment or law, make a solemn affirmation in the prescribed form.

(4) A solemn affirmation in the prescribed form has the same force and effect as an oath.

(5) The Lieutenant Governor in Council may prescribe the form of a solemn affirmation and may prescribe different forms for different purposes.

Validity of oath not affected by absence or difference of religious belief

21 If a person has taken an oath, the following facts do not affect the validity of that oath:

(a) the person had, at the time, no religious belief;

(b) the form of oath customary for persons of his or her religious belief differs from the oath taken.

Oath may be administered with uplifted hand

22 If a person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland,

(a) the person must be permitted to do so, and

(b) the oath must be administered to the person in that form and manner without further question.

Power to administer oaths

23 Every court and judge, and every person having by law or consent of parties authority to hear and receive evidence, may administer an oath to every witness who is legally called to give evidence before that court, judge or person.

Affirmation Regulation, BC Reg 396/89

Prescribed form

1 The prescribed form of solemn affirmation for the purposes of section 20 of the *Evidence Act* is as follows:

"I solemnly promise, affirm and declare that the evidence given by me to the court [or as the case may be] shall be the truth, the whole truth and nothing but the truth."

Alternate form

2 Where the form prescribed in section 1 is not used, the prescribed form of solemn affirmation is the use of "I solemnly promise", "I solemnly affirm", "I solemnly declare" or words to like effect in place of "I swear", "I make oath" or words to like effect in an oath. [en. B.C. Reg. 314/91.]

Canada

Canada Evidence Act, RSC 1985, c C-5 (excerpts)

OATHS AND SOLEMN AFFIRMATIONS

Who may administer oaths

13. Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before that court, judge or person.

R.S., c. E-10, s. 13.

Solemn affirmation by witness instead of oath

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

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

Effect

(2) Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath.

R.S., 1985, c. C-5, s. 14; 1994, c. 44, s. 87.

Solemn affirmation by deponent

15. (1) Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, does not wish to take an oath, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit the person to make a solemn affirmation in the words following, namely, "I, …… , do solemnly affirm, etc.", and that solemn affirmation has the same force and effect as if that person had taken an oath.

Effect

(2) Any witness whose evidence is admitted or who makes a solemn affirmation under this section or section 14 is liable to indictment and punishment for perjury in all respects as if he had been sworn.

R.S., 1985, c. C-5, s. 15; 1994, c. 44, s. 88.

Manitoba

The Manitoba Evidence Act, CCSM c E150, ss 12-18

OATHS AND AFFIRMATIONS

Who may administer oath

12(1) Every court may administer an oath or affirmation to every witness who is called to give evidence before it.

Court officer may administer oath

12(2) Every officer of the court may administer an oath or affirmation to every witness who is called to give evidence before the court.

Who may administer oaths and affirmations

13 Where by an Act or regulation evidence is authorized or required to be taken under oath or on affirmation by a person, or an oath or affirmation is authorized or directed to be made or taken, the oath or affirmation may be administered, and the certificate of its having been made or taken may be given, by the person mentioned in the Act or regulation, or by a person authorized to swear affidavits under this Act, having authority and jurisdiction within the district where the oath or affirmation is administered.

R.S.M. 1987 Supp., c. 4, s. 9.

Mode of administering oath

14 An oath may be administered to any person while that person holds in his hand a copy of the Old or New Testament, without requiring him to kiss it.

Form of oath in giving evidence

15(1) Where a person is about to give evidence, the oath shall be in the following form:

> I/You, A.B., swear that the evidence to be given by me/you shall be the truth, the whole truth and nothing but the truth. So help me/you God.

Alternate form of oath

15(2) Where a person objects to being sworn in that manner or declares that the oath so administered is not binding upon his

conscience, it may be administered in such manner and form, and with such ceremonies, as he declares to be binding.

Affirmation of witness instead of oath

16(1) A person who is about to give evidence shall be permitted to make a solemn affirmation or declaration instead of taking an oath, and upon the person making such a solemn affirmation or declaration the evidence shall be taken and has the same effect as if taken under oath.

Form of affirmation

16(2) Where a person is about to give evidence on affirmation or declaration, it shall be in the following form:

> I/You, A.B., solemnly affirm (or declare) that the evidence to be given by me/you shall be the truth, the whole truth and nothing but the truth.

R.S.M. 1987 Supp., c. 4, s. 9.

Effect of affirming

17 Any witness, who being permitted to affirm, gives evidence or who makes an affirmation or declaration as permitted by this Act, is liable to be charged and punished for perjury in all respects as if he had been sworn.

Validity of oath, no religious belief

18 Where an oath has been duly administered and taken, the fact that the person to whom it was administered had, at the time of taking the oath, no religious belief does not, for any purpose, affect the validity of the oath, or the liability of that person to be charged and punished for perjury.

Ontario

Evidence Act, RSO 1990, c E.23, ss 16 -17

Mode of administering oath

16. Where an oath may be lawfully taken, it may be administered to a person while such person holds in his or her hand a copy of the Old or New Testament without requiring him or her to kiss the same, or, when the person objects to being sworn in this manner or declares that the oath so administered is not binding upon the person's conscience, then in such manner and form and with such ceremonies as he or she declares to be binding. R.S.O. 1990, c. E.23, s. 16.

Affirmation in lieu of oath

17. (1) A person may, instead of taking an oath, make an affirmation or declaration that is of the same force and effect as if the person had taken an oath in the usual form. 2009, c. 33, Sched. 2, s. 32 (2).

Certifying affirmation

(2) Where the evidence is in the form of an affidavit or written deposition, the person before whom it is taken shall certify that the deponent satisfied him or her that the deponent was a person entitled to affirm. R.S.O. 1990, c. E.23, s. 17 (2).

Uniform Law Conference of Canada

Uniform Evidence Act, 1982 (excerpts)

Oath or solemn affirmation

95. Every witness shall be required, before giving evidence, to identify himself and to take an oath or make a solemn affirmation in the form and manner provided by the law that governs the proceeding.

Witness whose capacity is in question

96. (1) Where a proposed witness is a person of seven or more but under fourteen years of age or is a person whose mental capacity is challenged, the court, before permitting that person to give evidence, shall conduct an inquiry to determine whether, in its opinion, that person understands the nature of an oath or a solemn affirmation and is sufficiently intelligent to justify the reception of his evidence.

Burden as to capacity of witness

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

Where witness does not qualify

97. A person under seven years of age or a person who cannot give evidence under section 96 shall be permitted to give evidence on promising to tell the truth if, in the opinion of the court after it has conducted an inquiry, that person understands that he should tell the truth and is sufficiently intelligent to justify the reception of his evidence.

Evidence to be under oath or solemn affirmation

98. An accused shall not testify or make a statement at a trial or inquiry preliminary without taking an oath, making a solemn affirmation or promising to tell the truth under section 97, as the ease may be.

(Note - The reference to a preliminary inquiry is for inclusion in the federal Act only.)

Uniform Australian Model

Evidence Act 1995 (Cth) (excerpts)

Division 2—Oaths and affirmations

21 Sworn evidence of witnesses to be on oath or affirmation

(1) A witness in a proceeding must either take an oath, or make an affirmation, before giving evidence.

(2) Subsection (1) does not apply to a person who gives unsworn evidence under section 13.

(3) A person who is called merely to produce a document or thing to the court need not take an oath or make an affirmation before doing so.

(4) The witness is to take the oath, or make the affirmation, in accordance with the appropriate form in the Schedule or in a similar form.

(5) Such an affirmation has the same effect for all purposes as an oath.

22 Interpreters to act on oath or affirmation

(1) A person must either take an oath, or make an affirmation, before acting as an interpreter in a proceeding.

(2) The person is to take the oath, or make the affirmation, in accordance with the appropriate form in the Schedule or in a similar form.

(3) Such an affirmation has the same effect for all purposes as an oath.

23 Choice of oath or affirmation

(1) A person who is to be a witness or act as an interpreter in a proceeding may choose whether to take an oath or make an affirmation.

(2) The court is to inform the person that he or she has this choice.

(3) The court may direct a person who is to be a witness to make an affirmation if:

(a) the person refuses to choose whether to take an oath or make an affirmation; or

(b) it is not reasonably practicable for the person to take an appropriate oath.

24 Requirements for oaths

(1) It is not necessary that a religious text be used in taking an oath.

(2) An oath is effective for the purposes of this Division even if the person who took it:

(a) did not have a religious belief of a particular kind; or

(b) did not understand the nature and consequences of the oath

Schedule—Oaths and Affirmations

Subsections 21(4) and 22(2)

Oaths by witnesses

I swear (or the person taking the oath may promise) by Almighty God (or the person may name a god recognised by his or her religion) that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Oaths by interpreters

I swear (or the person taking the oath may promise) by Almighty God (or the person may name a god recognised by his or her religion) that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

Affirmations by witnesses

I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Affirmations by interpreters

I solemnly and sincerely declare and affirm that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.