February 8, 2018

So Help Me God: ALRI Recommends Changes to Make the *Alberta Evidence Act* More Inclusive

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Report Commented On: Alberta Law Reform Institute, *Competence and Communication in the Alberta Evidence Act*, Final Report 111

It might not be surprising that the first version of the *Alberta Evidence Act*, adopted in 1910, required judges to investigate the religious beliefs of certain witnesses. What is surprising is that more than a century later, these requirements are still in force in Alberta. Under Alberta law, children, adults with cognitive impairment, and anyone who wishes to make an affirmation instead of swearing an oath may be questioned about their religious beliefs before they are allowed to give evidence.

The Alberta Law Reform Institute believes that these requirements are outdated and inappropriate. ALRI has recently published two reports proposing reforms to the relevant parts of the Alberta Evidence Act, RSA 2000, c A-18. In 2014, ALRI published *Oaths and Affirmations*, Final Report 105. Report 105 proposed reforms that would allow adult witnesses to choose whether to swear an oath or make an affirmation without having to justify their choice. This week, ALRI published *Competence and Communication in the Alberta Evidence Act*, Final Report 111. Report 111 complements Report 105, proposing reforms to facilitate admission of evidence from children, adults with cognitive impairment, and witnesses with disabilities affecting communication.

Oaths and Affirmations

Oaths are one of the most ancient parts of our legal system. At common law, all witnesses had to swear an oath before giving evidence. In early days, the oath was explicitly Christian. Courts presumed that Christians shared the belief that lying under oath would have spiritual consequences, so an oath provided some assurance that a witness would tell the truth. Before the mid-eighteenth century, some English judges believed only Christians should be permitted to give evidence. Eventually English courts accepted evidence from witnesses who were not Christian and recognized other forms of oath. Today, Alberta law is flexible about the form of the oath, although the examples in the *Alberta Evidence Act* are still explicitly Judeo-Christian (see ss 14(1), 15, 16).

Affirmations were created in the late seventeenth century by an English statute. Certain Christians, notably Quakers, had religious objections to swearing an oath. The statute allowed them to give evidence without taking an oath, by allowing them to make an affirmation instead. In Alberta law, an affirmation has the same legal effect as an oath.

When thinking of oaths or affirmations, the first image that comes to mind may be a person in the witness stand in a courtroom, about to give evidence in a trial. But oaths and affirmations are also administered every day in less dramatic circumstances. Many kinds of legal practice require witnesses to make affidavits (a written statement made under oath or affirmation). In civil litigation, for example, affidavits are required to prove that documents have been properly served, to exchange written records, and to provide evidence for applications. In family law, affidavits are required to apply for divorce, parenting time, support, or other relief. A single real estate transaction often requires multiple affidavits. In my research for Report 111, I identified at least 140 Alberta statutes and regulations that require or permit a person to make an affidavit.

The *Alberta Evidence Act* applies to civil matters in Alberta and proceedings under provincial legislation, including provincial offence proceedings, child welfare matters, and many family law matters. Whenever someone gives evidence or makes an affidavit in these matters, the rules in the *Alberta Evidence Act* must be followed.

Whenever Alberta law requires or permits a person to give evidence or make an affidavit, there is a burden on a person who wishes to make an affirmation. Under section 17 of the Alberta Evidence Act, a person who wishes to make an affirmation must object to swearing an oath and explain the reason. They may be required to discuss their religious beliefs in order to satisfy the person administering the affirmation that they meet the requirements in section 17. ALRI's research showed this requirement is often ignored, but when it is followed it often seems to confuse, frustrate, or unsettle the witness.

In Report 105, ALRI recommended Alberta law should provide a free choice between oath and affirmation. Adult witnesses should be able to simply choose whether to swear an oath or make an affirmation, without being asked to justify their choice. Report 105 also recommends updating the examples of oaths in the *Alberta Evidence Act*, to remove references to specific religious texts. With these changes, Alberta law would better reflect the religious diversity of Albertans.

Child Witnesses and "the Nature of an Oath"

It is rare for children to give evidence in civil matters or proceedings under provincial legislation, but it`sometimes happens. In family or child welfare matters, for example, courts are required to consider a child's views. Children who are 12 or older are entitled to make certain applications or participate in certain proceedings. Usually a child's views can communicated through another witness's evidence, in an expert report, or by a lawyer representing the child. On occasion, however, a child may give evidence. A child who makes an application may be required to make an affidavit (and there are court forms that contemplate a child making an affidavit: see e.g. Alberta Rules of Court, Alta Reg 124/2010, Schedule A, Form FL-35 or Court Rules and Forms Regulation, Alta Reg 39/2002, Form 26). Rarely, a child may give oral evidence in court: see e.g. Re DN, 2017 ABPC 169 (CanLII) at paras 110-11.

It is more common for children to give evidence in criminal matters. Federal legislation—the *Canada Evidence Act*, RSC 1985, c C-5—applies to criminal matters and other proceedings under federal jurisdiction. The provisions of the *Canada Evidence Act* dealing with children's

evidence were last updated about ten years ago, with the benefit of up-to-date multidisciplinary research. (For a brief explanation of the changes, see Nicholas Bala, "Children Witnesses in the Criminal Courts: Recognizing Competence and Assessing Credibility".)

Compared to the *Canada Evidence Act*, the rules about child witnesses in the *Alberta Evidence Act* are archaic. Before a child gives evidence, section 19 of the Alberta Evidence Act requires a court to determine whether a child understands "the nature of an oath". If so, the child may give evidence under oath. In practice, this requirement means courts may feel obligated to inquire into children's religious beliefs. It can lead to exchanges like this one (from *R v RJB*, 2000 ABCA 103 (CanLII) at para 18):

> Q: Okay. Can you -- [S], have you ever attended church or Sunday school?
> A: Kind of. Sometimes.
>
> Q: Kind of. Sometimes. Do you remember the name of the church or Sunday school?
> A: No.
>
> Q: Okay. How often? How many times do you think you might have gone to church?
> A: Four or five times.
>
> Q: Okay. Do you believe in God? I mean, do you know what God is in relation to the church?
> A: Yeah.
>
> Q: Do you know what taking an oath means?
> A: No.
>
> Q: What will happen is, if you take an oath, that you will be asked to tell the truth, so help you God. Do you know whether -- what would happen if you didn't tell the truth after you had taken a oath?
> A: No.
>
> Q: Do you think anything would happen to you?
> A: No.

If a child does not understand the nature of an oath, the court must determine whether the child "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth". If so, the child may give evidence without swearing an oath or making an affirmation. A child's unsworn evidence is treated as suspect, however. A court may not rely on a child's unsworn evidence unless it is corroborated by other evidence.

A similar test is used to determine whether an adult with cognitive impairment may give evidence. There is no Alberta legislation about whether an adult with cognitive impairment may give evidence, so courts must apply a common-law test. The common-law test is harsher than the legislated test for determining a child's competence to give evidence. If an adult's competence to

give evidence is challenged, the court must determine whether the adult understands "the nature and consequences of an oath". If so, the adult may give evidence under oath. If not, the adult's evidence may not be received. There is no option for an adult to give unsworn evidence. These tests were adopted before developmental psychology became a field of study. Psychological research can now provide a lot of insight into the capabilities of children.

Section 19 presumes that religious belief is the best assurance that a child will tell the truth. This presumption is problematic. Obviously, it is likely to discriminate based on religion. Further, an approach that requires a child to define an oath fails to take into account modern knowledge about cognitive and linguistic development. For example, studies have found that young children, and even many teenagers, are unfamiliar with the word "oath" (see Karen Saywitz, Carol Jaenicke & Lorinda Camparo, "Children's Knowledge of Legal Terminology" (1990) 14:6 L & Human Behavior 523; Rhona H Flin, Yvonne Stevenson & Graham M Davies, "Children's Knowledge of Court Proceedings" (1989) 80 British J of Psychology 285; Emma Crawford & Ray Bull, "Teenagers' Difficulties with Key Words Regarding the Criminal Court Process" (2006) 12:6 Psychology, Crime & L 653). Even if children know the word, they may not know all the meanings. Many children have been taught not to "swear", and may be shocked to have an adult ask them "to swear an oath".

There are similar problems with asking a child about the duty of speaking the truth. Research shows that many children are capable of identifying truth or lies, and understand that they should tell the truth. Defining the truth or explaining why they should tell the truth, however, requires a level of abstract thinking that is often beyond their capabilities (see e.g. Thomas D Lyon & Karen J Saywitz, "Young Maltreated Children's Competence to Take the Oath" (1999) 3:1 Applied Developmental Science 16; Jeffrey J Haugaard et al, "Children's Definitions of the Truth and Their Competency as Witnesses in Legal Proceedings" (1991) 15:3 Law and Human Behavior 253).

In Report 111, ALRI proposes new rules for children giving evidence in civil matters or proceedings under provincial legislation. ALRI recommends a new approach to determine whether a witness is competent to give evidence. The new approach would focus on a witness's ability to communicate, rather than their beliefs. Report 111 includes other recommendations to eliminate the distinction between sworn and unsworn evidence and abolish the requirement for corroboration of a child's unsworn evidence. It recommends that the *Alberta Evidence Act* include a plain-language form of affirmation, which would be appropriate for a child (or others, like English language learners). It discusses the effects these reforms would have on giving evidence by affidavit, at questioning, before a tribunal, and in court.

Report 111 also addresses a gap in section 20 of the *Alberta Evidence Act*. Section 20 allows a witness to use a non-verbal means of communication, but the section only applies to a "witness who is unable to speak". Report 111 recommends extending the provision, so that it can apply to any witness who would benefit from an alternate means of communication.

Together, the recommendations in Report 105 and Report 111 would make it easier for all witnesses to give evidence. They would streamline procedures while respecting religious diversity, bringing the *Alberta Evidence Act* out of the last century and into the current one.

This post may be cited as: Laura Buckingham "So Help Me God: ALRI Recommends Changes to Make the *Alberta Evidence Act* More Inclusive" (8 February, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/02/Blog_LB_ALRI.pdf

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