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Canada's Empirically-Based Child Competency Test and its Principled Approach to Hearsay

Nicholas Bala*

I. INTRODUCTION: THE VALUE OF A COMPARATIVE PERSPECTIVE

For those interested in law reform or a better understanding of the value and limitations of their own legal regime, there is great utility in considering the approaches taken in other jurisdictions to common legal and social problems. This paper offers a comparative perspective on some of the controversies surrounding the treatment of child witnesses, focusing on two areas in which Canadian law has undergone substantial reform and significantly differs from United States law: (1) legislation governing the competence of children to testify; and (2) the common law rules governing the admission of hearsay evidence, especially concerning children's out-of-court statements regarding abuse.

As in the United States, over the past three decades there have been dramatic changes in Canada in the understanding of child abuse, as well as great increases in the number of reported cases of both historic and contemporary child abuse cases, especially child sexual abuse. There have also been very substantial changes in how the justice system treats children. Until the 1980s, Canadian law was premised on the view that child witnesses were inherently unreliable, and very little effort

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was made to accommodate these witnesses in the courts.¹ In the 1980s, the justice system began to respond to the growing understanding of the nature and extent of child abuse, and to the growing body of psychological research on the reliability of child witnesses.² As a result, judges and legislators have introduced many substantive, evidentiary, and procedural reforms, which have resulted in many more successful prosecutions in cases in which children are witnesses.³

This article discusses two areas of major reform in the laws concerning children and other vulnerable witnesses in Canada. The first is the amendment of the legislation governing the competence of witnesses to testify, and the second is changes in the common law rules governing hearsay. In both of these areas, developments in social science research have had an important role in shaping law reform. Similar to lawmakers in the United States, lawmakers in Canada have struggled with balancing the need to expand the scope for admission of evidence through child witnesses and to facilitate the search for the truth in the justice system against protection of the rights of the accused. However, in these two areas, the Canadian law may have reached a preferable balance; a balance that more faithfully reflects the growing body of research on child development and the capacities of children without sacrificing the rights of the accused. Of course, in each country this balancing occurs in the context of its own constitutional framework. Still, Canadian legislators and judges have taken a more accommodative approach to child witnesses, which makes the justice system more responsive to children's needs and capacities.

II. THE CANADIAN CONTEXT

A. *Constitutional & Legal Contexts*

For the purposes of this comparative study, it is worth providing American readers with a very brief introduction to Canada's legal system. Canada is a federal country, but unlike the United States, where the primary responsibility for the enactment criminal laws is a state responsibility, the Parliament

1. See *infra* Part II(b) of this article.
2. See *id.*
3. See *infra* Parts III and IV of this article.

of Canada has the jurisdiction to enact all laws governing substantive criminal offenses, as well the procedural and evidentiary rules governing criminal trials.⁴ The use of jury trials is much less common in Canada than the United States and criminal jury trials are restricted to cases where the sentence could be five years or longer.⁵ In general, Canadian sentencing policies are less punitive than in the United States. In fact, in some cases, the prosecution (known as “the Crown” in Canada) may decide to seek a sentence of less than five years just to spare a child victim the prospect of testifying in a jury trial. Additionally, it is not uncommon for a defendant to waive his right to a jury trial, even in more serious sexual offenses cases where the accused faces a long sentence. Thus, in practice jury trials are relatively rare. However, as in the United States, the rules of evidence for criminal cases are, at least in theory, premised on the use of a jury.

Canada only introduced a constitutionally entrenched Charter of Rights (“Charter”) in 1982.⁶ The Canadian Charter recognizes similar fundamental rights as in the United States Constitution,⁷ such as freedom of religion and the right to equal protection of the law. One exception is that the Charter has no equivalent to the Second Amendment right to bear arms.⁸ Additionally, some of the provisions of the Canadian constitutional guarantees have different wording from their corresponding American provisions. And, even in situations where there is nearly identical language, the Canadian courts may interpret that language differently.⁹

4. Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, app. II, no. 11, s. 91(27) (Can.).

5. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act, 1982, c. 11, s. 11(f) (U.K.).

6. Id.

7. See NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 1 (2d ed. 2010) (providing an introduction to comparative legal studies).

8. See *R. v. Hasselwander*, [1993] 2 S.C.R. 398, 414 (Can.). For a series of articles comparing the Canadian and American constitutions, see Symposium, *Comparative United States/Canadian Constitutional Law*, 55 LAW AND CONTEMP. PROBS. 1 (1992).

9. Robert Harvie & Hamar Foster, *Ties That Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law Under the Charter*, 28 OSGOODE HALL L.J. 729, 742–44, 778 (1990); Robert Harvie & Hamar Foster, *Different Drummers, Different Drums: The*

Nonetheless, Canadian courts regularly cite American precedents when dealing with constitutional issues, and American courts likewise, have cited to Canadian cases on certain issues, notably those related to same-sex marriages.¹⁰

Additionally, at the time of arrest, the police in Canada are constitutionally obliged to afford similar rights to the arrestee as those arrested in the United States. For example, in Canada there are also restrictions on search, detention, and police interrogation, as well as provisions that a detained person has the right to counsel and the right to seek bail.¹¹ The criminal trial process in Canada also has a constitutionally guaranteed set of rights and protections, including the right against self-incrimination.¹² Finally, of significance for this paper, while every person charged with an offense in Canada has to be “presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal,”¹³ the Canadian Charter does not have an explicit “confrontation clause.” Thus, while the accused person in Canada is granted very similar rights as the accused person in the United States, in Canada, the accused does not have a constitutional guarantee to confront the witnesses against him, including child witnesses.¹⁴

Before turning to the specific legal issues that are the primary subject of this paper, I offer a brief overview of the developments over the past three decades in the understanding and awareness of child abuse, and the corresponding changes in the Canadian criminal justice system regarding the treatment of children. These developments are broadly similar in both the United States and Canada, as well as in many other jurisdictions throughout the

Supreme Court Of Canada, American Jurisprudence and the Continuing Revision of Criminal Law Under the Charter, 24 OTTAWA L. REV. 39, 39–40, 67–69 (1992) (arguing that, on balance, a defendant has a more extensive set of constitutionally protected rights in Canada than in the USA).

10. See, e.g., *Rosen v. R.*, [1980] 1 S.C.R. 961, 968 (Can.) (discussing the similarities and differences of the protection against coerced confessions under the Due Process Clause of the U.S. Constitution and the Due Process Clause in the Canadian Bill of Rights); *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (discussing Canada’s approach to same-sex relationships).

11. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, ss. 8–11 (U.K.).

12. *Id.* s. 13.

13. *Id.* s. 11(d).

14. See U.S. CONST. amend. VI.

world.¹⁵

B. Changing Understandings of Child Abuse & Reforming Child Witness Laws

The historic English common law that is the basis of the criminal law in both the United States and Canada was premised on the belief that children are inherently untrustworthy witnesses and are prone to making false allegations of sexual abuse. Thus, the rules about child witnesses were based on the prevailing social and legal myths of the late nineteenth century that children were inherently unreliable witnesses and that sexual abuse of children was a rare occurrence.¹⁶ These laws were also based on the opinions of early psychological researchers about the unreliability of children; however, these views have since been totally discredited as being based on biased clinical observations.¹⁷

In 1893, around the time when the first child protection agencies were being established to help child victims of abuse or abandonment, Canada enacted its first legislation concerning child witnesses, permitting children to give “unsworn testimony,” allowing a child to testify without giving an oath to promise to tell the truth.¹⁸ However, children could only give unsworn testimony if they demonstrated their understanding of the “duty to speak the truth,” and additionally, such unsworn testimony required corroboration in order to convict the accused. Further, as late as 1967, the Supreme Court of Canada cautioned that the common

15. See generally John E. B. Myers, *A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*, 28 PAC. L.J. 169 (1996).

16. See, e.g., 1 JOHN H. WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* §§ 505–509 (1904); 3 JOHN H. WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* §§ 1821, 1832 (1904).

17. Carol Smart, *A History of Ambivalence and Conflict in the Discursive Construction of the ‘Child Victim’ of Sexual Abuse*, 8 SOC. LEG. STUD. 391, 391, 399, 406 (1999).

18. Canada Evidence Act, S.C. 1893, c. 31, s. 25 (Can.). In the 1908 consolidation of the Act, this became Chapter 145, Section 16. See *Id.* at c. 145, s. 16. In Canada, the federal Parliament has jurisdiction for the enactment of criminal laws—substantive, procedural and evidentiary, while the provinces have responsibility for the “administration of justice.” *The Judicial Structure*, DEPARTMENT OF JUSTICE (Dec. 23, 2013, 6:16 PM), <http://www.justice.gc.ca/eng/csj-sjc/just/07.html>.

law required jurors to be warned of the “inherent frailties” of a child’s testimony even if the child was a sworn witness.¹⁹ Until the end of the twentieth century, no efforts were made in Canada to modify court processes to facilitate children’s testimony. Because of this social and legal environment, relatively few reports of child abuse were made to the police or healthcare professionals, reinforcing the notion that child abuse was rare.

Around the same time, the women’s movement of the 1970s helped support adult survivors of childhood abuse, initially mainly female victims, to feel comfortable enough to come forward with first-person accounts of their experiences.²⁰ Encouraged by media reports and a growing professional sensitivity, by the 1980s larger numbers of adult survivors began to overcome their feelings of fear, guilt, and shame to disclose what had occurred to them in childhood. In Canada, the 1984 release of the *Badgley Committee Report* substantially increased awareness of child sexual abuse.²¹ This government-commissioned report documented the extent of child sexual abuse in Canada, revealed major failings in the responses to abuse, and made many recommendations for legal and social reforms.²²

By the late 1980s, the Canadian public was being shocked by detailed disclosures from adult survivors about child abuse in schools, juvenile institutions, churches and sporting organizations across the country. Many of the cases involved some of society’s most vulnerable children, those without parents to protect them, placed by the state in child welfare institutions or in the since-closed residential schools for Aboriginal children.²³ Many children in these institutions were victims of abuse at the hands of teachers and supervisors, many of whom were ministers, priests

19. *R. v. Horsburgh*, [1967] S.C.R. 746, 765, 778 (Can.).

20. See JOHN E.B. MYERS, *LEGAL ISSUES IN CHILD ABUSE AND NEGLECT PRACTICE* 29 (2d ed. 1998) (discussing how feminist movements, specifically the unprecedented numbers of women enrolling in law schools, contributed to unveiling issues in child sexual abuse).

21. *SEXUAL OFFENCES AGAINST CHILDREN IN CANADA: SUMMARY OF THE REPORT OF THE COMMITTEE ON SEXUAL OFFENSES AGAINST CHILDREN AND YOUTHS 1* (1984).

22. *Id.*

23. See LAW COMMISSION OF CANADA, *RESTORING DIGNITY: RESPONDING TO CHILD ABUSE IN CANADIAN INSTITUTIONS* 12–13, 30 (2000).

or nuns.²⁴ There was also growing awareness that child sexual abuse is often perpetrated by family members, close family friends or trusted community figures, such as priests, coaches and teachers.²⁵

As disclosures of abuse became more common, concerns about the inappropriateness of distrusting children's evidence in the court system prompted new psychological research into the reliability of child witnesses.²⁶ This research revealed that, when questioned in an appropriate way, children can be reliable witnesses and that even young children can distinguish fantasy from reality.²⁷ With the growing awareness of the realities of abuse, a more receptive environment for disclosures of abuse by children developed, and children were encouraged to report abuse. As a result, reports of abuse by children increased dramatically, and the justice system had to deal with many children being brought forward as witnesses. It became clear that fundamental legal reforms were required in order to permit children to testify properly. Canada's Parliament responded to the drastic increase in reports by enacting substantial reforms. The first major statutory reforms came into force in 1988,²⁸ with further significant legislative changes in 1993²⁹ and 2006.³⁰ Discussed *infra* in further detail, these statutory reforms provided for better accommodation child witnesses, for example, allowing for the use of closed circuit television, as well as a change in the test for establishing the competence of child witnesses. These statutory

24. *See id.* There have been a number of deeply disturbing public inquiries into child abuse in children's institutions and schools in Canada. *Id.* at 1.

25. *Id.*

26. *See* John E.B. Myers, Karen J. Saywitz & Gail S. Goodman, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 10–11, 13 (1996).

27. *Id.*

28. *See* Nicholas Bala, *Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System*, 15 QUEEN'S L.J. 3, 3–4 (1990) (discussing the 1988 amendments).

29. Young Offenders Act, S.C. 1993, c. 45, paras. 7, 9 (Can.).

30. Canada Evidence Act, R.S.C. 1985, c. C-5, as amended by S.C. 2005, c. 32, s. 27 (Can.); *see also* Nicholas Bala et al., *Bill C-2: A New Law for Canada's Child Witnesses*, 32 CRIM. REP. (6th) 48 (2005) (discussing the 2005 amendments), available at http://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/Exhibits/Nicolas_Bala/pdf/Bill_C-2.pdf.

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reforms also allowed for admission of video-recorded evidence of statements of children.

At the same time that the above-mentioned legislative reforms were being enacted, the courts also changed the common law evidentiary rules applicable to child witnesses. Among the changes, the courts reformed the hearsay rule and rules governing such matters as the admissibility of the accused's prior history of abuse, known as the "similar fact rule."³¹ Canadian courts also came to recognize that children can be reliable witnesses, and that it is unfair and inappropriate to have general rules discounting their evidence. Thus, in 1988, the Canadian Parliament abrogated the statutory rule that the unsworn testimony of a child needed to be corroborated,³² though some judges continued to apply the common law warning rule, advising juries about the "inherent frailty" of the testimony of children, whether sworn or unsworn.³³ Subsequently, the Canadian Supreme Court revisited the issue in 1992 in *R. v W.(R.)*, rejecting "the stereotypical but suspect" views about child witnesses, and abolishing the common law warning rule.³⁴ Justice McLachlin observed:

The law affecting the evidence of children has undergone changes in recent years. The first is removal of the notion, found at common law and codified in [repealed] legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution . . . The repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case. But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children's evidence is always less reliable than the evidence of adults.³⁵

31. See, e.g., *R. v Handy*, [2002] 2 S.C.R. 908 (Can.).

32. Criminal Code, S.C. 1993, c. 45, para. 9 (Can.).

33. See, e.g., *R. v. Hanna* (1993), 80 CCC 3d 289, para. 62 (Can. B.C.C.A.)

34. *R. v. W. (R.)*, [1992] 2 S.C.R. 122, 132-33 (Can.).

35. *Id.*

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[Justice McLachlin] also alluded to the growing body of psychological literature on the reliability and perceptions of children:

The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection . . . Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate.³⁶

The Supreme Court jurisprudence reflects a recognition that children can be as reliable as adults when recalling an incident, even though they may not be able to describe events in as much detail as adults and may be unable to answer some kinds of questions that adults can. Despite their reliability, however, there is no presumption in favor of a child's testimony. Rather, a child's testimony is to be individually assessed in the context of all of the other evidence. Furthermore, although there is no legal requirement for corroboration, and it is possible to obtain a conviction solely on the basis of the testimony of a young child (or even on hearsay evidence from a young child who is not competent to be a witness), it is clearly helpful to the Crown's case to have some form of independent evidence to 'support' the child's testimony. This could be medical testimony, 'similar fact evidence' (evidence of other acts of abuse by the accused), or other evidence.

Unfortunately in the 1980s, at the same time that genuine cases of abuse—both contemporary and historic—were being reported and victims began to receive support, in Canada (and other countries), there were also a relatively small number of allegations reported to the police that later proved to be unfounded. These cases typically were the result of the

36. *Id.* at 133–34.

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inappropriate actions by undertrained police investigators, therapists, or child welfare staff. While there have been no documented cases in Canada of individuals being imprisoned as a result of false allegations of child abuse, there were a number of cases of clearly unfounded allegations that went to trial in both the criminal and family justice systems. The most infamous Canadian case of unfounded allegations occurred in 1992 in Martensville, Saskatchewan, as a result of overzealous, inadequately trained police investigators engaging in inappropriate questioning to “encourage” young children to “disclose” suspected abuse.³⁷ More than a dozen adults, including part of the small town’s police force, were charged of abusing several young children at a daycare center, though many of these charges were eventually cleared.³⁸ Although relatively small in number, cases of unfounded allegations impose immense burdens on those falsely accused of abuse.³⁹ The Martensville accusations demonstrated the need for careful investigations by properly trained investigators, a fair trial process that allows accusations to be properly tested, and an overall reminder that there should still be certain restraints on witnesses.

III: WITNESS COMPETENCE TO TESTIFY: *CANADA EVIDENCE ACT*
SECTION 16.1

A. *Common Law and Early Statutory Reforms*

For centuries, the common law competency inquiry (or *voir dire*) was a critical, initial barrier that prevented many children from testifying. At common law, a child was only permitted to testify if the child could be sworn, which required the child to demonstrate an understanding of the “nature and consequences”

37. FRANN HARRIS, *MARTENSVILLE: TRUTH OR JUSTICE: THE STORY OF THE MARTENSVILLE DAYCARE TRIALS* (1998); see also *R. v. Sterling* (1995), 102 C.C.C. 3d 481 (Sask. C.A.).

38. See generally HARRIS, *supra* note 37.

39. See Nicholas Bala et al., *Sexual Abuse Allegations and Parental Separation: Smokescreen or Fire?*, 13 J. FAM. STUD. 26, 28, 40. (2007). One situation in which there is a persistently relatively high rate of unfounded allegations of child sexual abuse is in the context of parental separation; relatively of these cases result in criminal charges, but they pose major challenges and costs for parents in the family and child protection courts. *Id.* at 26.

of an oath: children were required to express knowledge of the fact that they would be committing a sin and “burn in the fires of hell” if they lied under oath.⁴⁰ Since many younger children lacked the religious education, abstract thinking and communication ability to answer questions to demonstrate that they understood the nature of an oath, this rule often effectively precluded younger children in the United States, Canada, and England from testifying about their victimization. This rule was based on the assumption that children who could not explain the meaning of the oath were less likely to tell the truth, and hence should not be permitted to testify.⁴¹

However, around the beginning of the twentieth century, legislation was enacted in many common law jurisdictions to allow children to testify even if they could not answer questions about the oath, but their testimony may be discounted. For instance, the 1893 *Canada Evidence Act* (“Evidence Act”) allowed a child to testify if the judge was satisfied that the child understood the “duty to speak the truth;” nevertheless, corroboration of unsworn testimony of a child was required to convict a person.⁴² Further, the inquiries under the 1893 Evidence Act into the question of whether a child understood the “duty to speak the truth” were often confusing and intimidating, and sometimes resulted in children who were capable of giving important evidence being prevented from testifying. Although case law eventually established that a child only had to appreciate the “social consequences” of promising, and not the spiritual consequences of the oath, to be permitted to testify,⁴³ a study of Canadian practices in the late 1990s revealed that many judges continued to ask children questions about their understanding of an oath,

40. *R. v. Brasier*, (1779) 168 Eng. Rep. 202 (K.B.).

41. Nicholas Bala et al., *The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform*, 18 INT’L J. CHILD. RTS. 53, 54 (2010).

42. *Canada Evidence Act*, S.C. 1893, c. 31, s. 25 (Can.). In the 1908 consolidation of the Act and thereafter, this became Section 16.

43. *R. v. Fletcher* (1982), 1 C.C.C. 3d 370, 380 (Ont. C.A.), *leave to appeal to S.C.C. refused*, [1983] 48 N.R. 319 (S.C.C.). In *R. v. F. (W.J.)*, Justice McLachlin commented on the “absurdity of subjecting children to examination on whether they understood the religious consequences of the oath.” [1999] 3 S.C.R. 569, 591 (Can.).

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including questions about their religious beliefs and observance.⁴⁴ Significantly, the unsworn testimony of a child required corroboration, which was often absent in cases where children were testifying about private victimization, as abuse typically occurs in private.

Recognizing the ineffectiveness of the 1893 version of the Act, in 1988 the Canadian Parliament amended the law to abolish the requirement for corroboration of “unsworn evidence.”⁴⁵ The amendments also provided that children who did not understand the nature of an oath could testify upon “promising to tell the truth,”⁴⁶ if they had the “ability to communicate.”⁴⁷ However, despite the amendments, judges continued to have an inquiry into children’s understanding of such concepts as “truth,” “lie,” and “promise” before children could testify,⁴⁸ based on the assumption that if children could not explain these concepts, their promise would not have significance and they would be less likely to tell the truth. Inevitably, young children, who think in concrete terms, had difficulty answering questions about these abstract concepts, and the competence inquiries tended to be longer and more confusing for them.⁴⁹

While the 1988 Evidence Act reforms were significant, fundamental problems for child witnesses still existed. Research raised serious questions about the need to preclude children from testifying on the basis that they could not answer questions articulating the need for honesty, when adults are never precluded from testifying on this basis or even asked questions about it. For instance, a survey of judicial attitudes in the late 1990s revealed that many judges had discomfort with the competency process, in particular about the intrusive nature of the questions asked of children.⁵⁰ In another study, Canadian judges reported that they believed that children were significantly

44. Nicholas Bala et al., *A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses*, 38 *OSGOODE HALL L.J.* 409, 411 (2000).

45. Canada Evidence Act, S.C. 1987, c. 24, s. 18 (Can.).

46. *Id.*

47. *Id.*

48. *See, e.g.*, R. v. Marquard, [1993] 4 S.C.R. 223, 224–225 (Can.).

49. *See* Nicholas Bala et al., *R. v. M. (M.A.): Failing to Appreciate the Testimonial Capacity of Children*, 40 *CRIM. REP.* (5th) 93 (2001).

50. HARRIS, *supra* note 26, at 422.

more likely to be *honest* than adult witnesses, though recognizing that children, especially younger children, may be more prone to making errors due to poor memory or suggestibility.⁵¹

B. *Psychological Research and the 2006 Reforms*

There is now a growing body of psychological research about the potential of a child to lie and an adult's ability to detect when children are lying.⁵² Commonly, children begin to lie starting around age three.⁵³ Almost as soon as they start to lie, children learn that it is morally wrong to do so. There is no evidence that younger children, in general, are more likely to lie than older children or adults, though they lie about different things. Further, a series of laboratory studies about the start of the millennium carried out by the author of this paper and his collaborators in Canada,⁵⁴ and by American researchers like Tom Lyon,⁵⁵ raised fundamental questions about the competency inquiry. Researchers have found no evidence to support the assumption that children's ability to correctly answer cognitive questions about the meaning of "truth," "lie," and "promise" is related to whether or not they will actually lie or tell the truth. However, this research suggested that having a child "promise to tell the truth" before answering questions, even if the child could not correctly answer abstract questions about the meaning of the concepts involved, significantly increased the likelihood that a

51. Nicholas Bala et al., *Judicial Assessment of the Credibility of Child Witnesses*, 42 ALTA L. REV. 995, 996–97 (2005).

52. See, e.g., ALDERT VRIJ, DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES 7 (2d ed. 2008); AMINA MEMON, ALDERT VRIJ & RAY BULL, PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY 42 (2d ed. 2003).

53. Angela D. Evans & Kang Lee, *Emergence of Lying in Very Young Children*, 49 DEVELOPMENTAL PSYCHOL. 1958, 1958 (2013).

54. See Victoria Talwar et al., *Children's Conceptual Knowledge of Lying and its Relation to Their Actual Behaviors: Implications for Court Competence Examinations*, 26 L. & HUM. BEHAV. 395, 395 (2002). See also Nicholas Bala et al., *The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform*, 18 INT'L J. CHILD. RTS. 53, 53–54 (2002) (discussing the psychological research in fuller detail).

55. See, e.g., Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children's Competence to Take the Oath*, 3 APPLIED DEV. SCI. 16, 16 (1999); Thomas D. Lyon et al., *Reducing Maltreated Children's Reluctance to Answer Hypothetical Oath-taking Competency Questions*, 25 L. & HUM. BEHAV., 81, 81 (2001).

child would tell the truth.⁵⁶

For ethical reasons, none of these laboratory-based studies involved questions about the abuse of children, but the results of these studies are consistent with child development theory and research, which recognizes that young children have a great deal of difficulty in correctly answering abstract questions about the meaning of a complex concept like the “promise to tell the truth.”⁵⁷ It is, however, clear from these studies that young children have a good understanding of the social importance of truth-telling and of promising, well before they can answer questions about the concepts.⁵⁸ Children (and often adults) may be able to understand and correctly use words without being able to define them. For both adults and children, the process of promising or swearing an oath is intended to impress on the witness and others in the court the social significance of the occasion; the oath or promise is a manifestation of a commitment to tell the truth. Accordingly, while having a child promise to tell the truth provides no guarantee of the honesty of the child, it may do some good and certainly does no harm.

In 2005, shortly after these studies were undertaken and the results published, a Canadian Parliamentary Committee considered new legislation to govern child witnesses in criminal cases. The author of this paper testified at the hearings about this psychological research⁵⁹ and, subsequently, the Committee introduced a new version of the Act, the Canada Evidence Act Section 16.1. This version, which came into force in January 2006, provides that there is a presumption that children are competent to testify.⁶⁰ While children are required to “promise to tell the truth” before being permitted to testify, Section 16.1(7) of the Evidence Act specifies that no child shall be “asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence

56. See *supra* notes 54, 55.

57. See *id.*

58. See *id.*

59. *Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, 38th PARL., 1st Sess., No. 26 (Mar. 24, 2005) (statement of Nicholas Bala), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1718347&Language=E&Mode=1&Parl=38&Ses=1>.

60. Canada Evidence Act, R.S.C. 1985, c. C-5 s. 16 (Can.).

shall be received by the court.”⁶¹ A party who challenges the competence of a child to testify bears the onus of proving to the court that there is a genuine issue about the child’s ability to communicate in court. In this case, if there is an inquiry, the sole test for competence is whether the child is “able to understand and respond to questions.”⁶²

Under the test of the “ability to understand and respond to questions,” the focus of the inquiry is on the child’s basic cognitive and language abilities. This test is similar to the part of the inquiry under the 1988 provisions that focused on the child’s capacity to meaningfully communicate evidence in court. As required by the Supreme Court in applying that test in *R. v. Marquard*,⁶³ there now needs to be only relatively brief questioning to establish whether the child has the capacity to remember past events and answer questions about those events. The judge has a duty to ensure that the questions posed to the child during this inquiry and later in the proceedings are appropriate to the child’s stage of development, with age-appropriate vocabulary and sentence structure.⁶⁴

The 2006 provisions simplified and shortened the process for qualifying children giving evidence in criminal cases. A survey of Canadian judges about their experiences with the 2006 reforms revealed that 96% of the respondents agreed that the reform of the competency provision was “useful.”⁶⁵ Judges reported that in a

61. *Id.*

62. *Id.*

63. [1993] 4 S.C.R. 223, paras. 236–37 (Can.).

64. See John Philippe Schuman et al., *Developmentally Appropriate Questions for Child Witnesses*, 25 QUEEN’S L.J. 251, 296–97 (1999). L’Heureux-Dubé J., advised:

the trial judge has a responsibility to ensure that the child understands the question being asked and that the evidence given by the child is clear and unambiguous. *To accomplish this end, the trial judge may be required to clarify and rephrase questions asked by counsel and to ask subsequent questions to the child to clarify the child’s responses . . . the judge should provide a suitable atmosphere to ease the tension so that the child is relaxed and calm.*

R. v. L. (D.O.), [1993] 4 S.C.R. 419, 471 (Can.) (emphasis added).

65. NICHOLAS BALA, JOANNE PAETSCH, LORNE BERTRAND & MEAGHAN THOMAS, TESTIMONIAL SUPPORT PROVISIONS FOR CHILDREN AND VULNERABLE ADULTS (BILL C-2): CASE LAW REVIEW & PERCEPTIONS OF THE JUDICIARY 48, 61 (2011), available at http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/rr10_vic3/rr10_vic3.pdf. The survey was completed by thirty-four judges in four

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significant portion of cases a child witness is accepted by the defense as competent without inquiry, often based on a video recording of a police interview with the child, disclosed to the defense before the hearing.⁶⁶ Judges reported that there is a competency inquiry in about four-fifths of cases with the youngest age group (three to five years), which falls to about one quarter with the older age group (ten to thirteen years).⁶⁷ The average time spent on a competency inquiry is now twelve minutes.⁶⁸ In even the youngest age group (three to five years), almost one-half of the judges reported that they had never found a child incompetent under the new provision, although a few judges reported that a small number of children in all age groups were found incompetent because they could not meaningfully communicate in court about past events.⁶⁹

C. Upholding the Constitutionality of C.E.A. Section 16.1

In a number of decisions rendered soon after Section 16.1 of the *Canada Evidence Act* came into force in 2006, trial courts upheld its constitutionality. The trial courts concluded that the provision is consistent with an accused person's rights to a fair trial and "in accordance with the principles of fundamental justice."⁷⁰ Subsequently, in 2008, the British Columbia Court of Appeal rendered the first appellate decision on this provision in *R. v. J.S.*⁷¹

The Court of Appeal concluded that the provision reflects the procedural and evidentiary evolution of Canada's criminal justice system, facilitating the testimony of children as a necessary step in its "truth-seeking goal," and is constitutionally valid. Justice

jurisdictions. Responses to the survey were collected between November 26, 2007 and January 15, 2008. Judges in the following courts were surveyed: Alberta Queen's Bench and Provincial Court; British Columbia Provincial Court; Nova Scotia Supreme Court and Provincial Court; and Yukon Territorial Court. The survey was distributed electronically and the response rate is not known, but was likely in the range of 10%–20%. *Id.* at viii, 13.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See, e.g., R. v. Persaud*, [2007] O.J. 432 (Can. Ont. Sup. Ct.); *R. v. J.F.* [2006] A.J. 972 (Can. A.B. Prov. Ct.).

71. [2008] B.C.C.A. 401 (Can.), *aff'g, R. v. J.S.*, [2007] B.C.J. 1374 (S.C.).

D.M. Smith wrote:

I do not accept the . . . argument that if a moral obligation to tell the truth is not established, the testimony of the witness should be inadmissible. Parliament . . . has decided that a promise to tell the truth is sufficient to engage the child witness's moral obligation to tell the truth. Section 16.1 . . . discards the imposition of rigid pre-testimonial requirements which often prevented a child from testifying because of their inability to articulate an understanding of abstract concepts that many adults have difficulty explaining. It reflects the [research] findings . . . that the accuracy of a child's evidence is of paramount importance, not the ability of a child to articulate abstract concepts.⁷²

The Supreme Court of Canada granted leave to appeal in *R. v. J.S.*,⁷³ but in an unusual procedure, the Court dismissed the appeal from the Bench after hearing from the defendant without even hearing from the respondent Crown.⁷⁴ The Supreme Court simply upheld the decision of the British Columbia Court of Appeal but provided no reasons and gave no direct indication of its views about children and vulnerable witnesses, or the importance of social science research for determining the constitutional validity of the law. Interestingly, however, two years later, the Supreme Court rendered an important decision regarding mentally disabled adults' competency to testify, which showed that the Court is receptive to this type of social science research, as well as willing to recognize the capacity of vulnerable adults to relate stories of their victimization.

D. *Competency of Intellectually Disabled Adults: R. v. D.A.I.*

While the amendments to the Evidence Act that came into effect in 2006 changed the process for allowing children under fourteen years of age to testify, for witnesses fourteen years or older, the previous legislative provisions remained in effect;⁷⁵ therefore, those fourteen years and older were presumed

72. *Id.* para. 52–53.

73. *R. v. J.Z.S.*, [2008] S.C.C.A. 542, 542 (Can.).

74. *R. v. J.Z.S.*, [2010] S.C.R. 3, 3 (Can.).

75. Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16.

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competent to testify. The legislation specifies that if the mental competence of a witness is challenged, there shall be “an inquiry” into their understanding of the “nature of an oath.” If the witness does not demonstrate an understanding of the nature of the oath, but is “able to communicate the evidence,” the witness may testify “on promising to tell the truth.” This provision does not explicitly require an inquiry into the understanding of a mentally disabled adult or adolescent witness of the “promise to tell the truth.” However, unlike with those under fourteen years of age, there was no statutory prohibition on the asking of such questions, and pre-2006 jurisprudence indicated that witnesses should be asked such questions. The fact that this provision had not been changed by the 2006 amendments meant that mentally disabled adults, who are disproportionately victims of abuse, were often unable to testify about their victimization. However, in its 2012 decision in *R. v. D.A.I.*, the Supreme Court of Canada held that this provision should not be interpreted so as to require an inquiry into whether a developmentally challenged person understands the meaning of a promise to tell the truth.⁷⁶ The Court effectively required the same competence standard for mentally disabled adults as Parliament provided for children.

The *D.A.I.* case began when a nineteen-year-old developmentally-delayed woman who had the cognitive capabilities of a three- to six-year-old child was the alleged victim of sexual assault.⁷⁷ The accused, who had been the live-in boyfriend of the victim’s mother, was charged with sexual assault.⁷⁸ Using the traditional approach to Section 16(3) of the *Canada Evidence Act*, the trial judge determined that the complainant was not competent to testify, as she could not “communicate what truth involves or what a lie involves.”⁷⁹ Accordingly, the judge found that she did not demonstrate an understanding of the “duty to speak the truth.”⁸⁰ That is, because she was unable to answer abstract, cognitive questions about the nature of the duty to speak the truth, she was not permitted to testify about what she remembered of the events in question. As

76. See *R. v. D.A.I.*, [2012] S.C.R. 149, para. 64 (Can.).

77. *R. v. D.A.I.*, [2008] O.J. No. 1823, para. 2 (Ont. S.C.).

78. *Id.*

79. *Id.*

80. *D.A.I.*, [2012] S.C.R. 149 at para. 10.

the alleged victim was not permitted to testify, the accused was acquitted, a decision affirmed by the Ontario Court of Appeal.⁸¹

However, in its January 2012 decision in *R. v. D.A.I.*, the Supreme Court reversed the trial and appeal decisions, and ordered a new trial.⁸² Writing for a six to three majority, Chief Justice McLachlin held that if a witness whose mental capacity is challenged is unable to answer questions about the meaning of the “nature of the oath,” the judge should only consider whether the witness can communicate evidence about past events.⁸³ If the answer to that question is yes, the judge should then simply ask the witness whether she promises to tell the truth.⁸⁴ If she does, she is competent to testify.⁸⁵ It is not necessary or appropriate to inquire whether the witness understands the duty to tell the truth.⁸⁶ While noting that the 2006 reforms only specifically prohibited asking of children questions about their understanding of the concepts of promise, truth, and lie, the Court concluded that Parliament’s failure to extend this protection to mentally disabled adult witnesses did not mean that Parliament intended this questioning to continue for mentally disabled adults or older adolescents.⁸⁷

In coming to this conclusion, the Court considered the social science research, which had established that the ability of children to correctly answer cognitive questions about the “duty to speak the truth” is not related to whether or not they actually will tell the truth. The Court held that there is an “equivalency” between the tests for assessing the competence of children and mentally disabled adults.⁸⁸ Chief Justice McLachlin wrote:

[The] final and most compelling . . . argument [in favor of equivalency] is simply this: when it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental capacity of a six-year-old, and a six-year-old with the mental capacity

81. *R. v. D.A.I.*, 2010 CanLII C48807, para. 51 (Can. Ont. C.A.).

82. [2012] S.C.R. 149, para. 1 (Can.).

83. *Id.* para. 28.

84. *Id.*

85. *Id.*

86. *Id.* para. 29.

87. *Id.* para. 30.

88. *Id.* para. 48.

of a six-year-old? Parliament, by applying essentially the same test to both . . . implicitly finds no difference. In my view, judges should not import one.⁸⁹

Thus, *R. v. D.A.I.* significantly extended the range of cases in which mentally disabled adults can testify about their victimization, and increased protection available to this vulnerable population.

However, there are significant practical and ethical constraints which make it much more difficult to perform research with cognitively impaired adults than children. While there is a significant body of research about children as witnesses, their competence, suggestibility, credibility and so on, there is no research on cognitively disabled adults. In *D.A.I.*, the Supreme Court assumed that social science research establishing that the inability of children to answer questions about the significance of truth telling to whether they will actually tell the truth is also applicable to cognitively impaired adults. In this context, applying social science research about children to cognitively impaired adults seems sound. There may, however, be other situations where applying research about children to cognitively impaired adults may be more problematic.

E. *Comparing Canadian & American Standards for Child Competence*

In most American proceedings, the applicable standard for assessing the competence of witnesses is established under Rule 601 of the Federal Rules of Evidence or similar state provisions: a witness must be able to “observe, recollect, communicate, and appreciate the necessity of telling the truth.”⁹⁰ This test allows for questioning of the child about the meaning of a promise to tell the truth and the duty to tell the truth in court. Therefore, in the United States, there continues to be cases where children have been ruled incompetent because they cannot give satisfactory answers to cognitive questions about the duty to tell the truth.⁹¹

89. *Id.* at para. 52.

90. *See, e.g.*, *State v. Lynch*, 854 A.2d 1022, 1029 (R.I. 2004) (interpreting Rule 601 of the Rhode Island Rules of Evidence).

91. Angela D. Evans & Thomas D. Lyon, *Assessing Children’s Competency to Take the Oath in Court: The Influence of Question Type on Children’s Accuracy*, 36 L. & HUM. BEHAV. 195, 195 (2012).

In some cases, it is possible that prosecutors may decide to not call young children, or even abandon prosecutions, because of concerns about the inability of the child to satisfy the competency standard, even though the child may be able to effectively describe his or her victimization.

As discussed above, in Canada the requirement that children and other vulnerable witnesses must answer abstract questions to demonstrate an understanding of the “duty to speak the truth” has been abolished.⁹² This is consistent with social science research establishing that, at least for children, the ability to answer this type of cognitive question is not related to actual truth-telling behavior. To the extent that children and other witnesses are still being precluded from testifying by this type of questioning, American law should be changed. In this area, the Canadian model of legislative reform is worthy of serious study in the United States.

The inquiry required by the former *Canada Evidence Act* and still permitted in many American states is upsetting to children, a waste of court time, and does nothing to promote the search for the truth. Some children who could give honest, reliable evidence may be prevented from testifying, resulting in miscarriages of justice. The present Canadian provision, focusing on a child witness’s ability to understand and answer questions, creates a much more meaningful test to use to determine whether a child is competent to testify.

Further, as discussed in the next section of this paper, in some cases a child may simply not be able to testify in court; in these cases, Canada’s reformed hearsay laws have helped prevent miscarriages of justice.

IV: COMMON LAW REFORMS TO CANADA’S HEARSAY LAWS

A. *The Principled Approach: Reliability and Necessity*

Not infrequently in child abuse cases, the initial disclosures of abuse by the child to a parent, doctor or investigator are graphic and highly revealing, and can be important evidence of the child’s victimization. These disclosures are closest in time to the alleged

92. See *R. v. Fletcher* [1982], 1 C.C.C. 3d 370, 380 (Ont. C.A.), *leave to appeal to S.C.C. refused*, [1983] 48 N.R. 319 (S.C.C.).

events, and are less likely to be affected by suggestive questions. Especially for younger children, statements given soon after the events in question may be more complete and detailed than evidence given at trial months after the events. Historically, however, these statements were usually excluded as hearsay evidence.⁹³ Although the general rules about the exclusion of hearsay promote a fair and more focused trial, they can be problematic when applied to cases involving young children who are victims of abuse, and there are statutory and common law exceptions to hearsay rules in both Canada and the United States for child victims.

Until the late 1980s, Canadian courts held that hearsay evidence was inadmissible unless it could fit within one of the traditional “hearsay exceptions.”⁹⁴ Few of the exceptions were relevant to a typical child abuse case. However, the Supreme Court of Canada has expanded the scope for the admission of children’s disclosures of abuse.

In its 1990 decision in *R. v. Khan*, a child sexual abuse case, the Supreme Court of Canada significantly changed the common law rule about admitting hearsay evidence, allowing its admission if it is established at a *voir dire* that the evidence is “reliable” and its admission is “necessary.”⁹⁵ Under this “principled” approach, hearsay evidence is presumptively inadmissible, and the onus is on the Crown to establish the statement’s admissibility as reliable and necessary.⁹⁶ In *Khan*, the Supreme Court ruled that a mother could testify about a statement made to her by her then three-year-old daughter about fifteen minutes after an alleged sexual assault by the child’s doctor during a medical examination, even though the child was ruled incompetent to testify at the trial and these statements were hearsay.⁹⁷ The Supreme Court accepted

93. The definitions of hearsay in Canada resemble those in the United States. See *R. v. Evans*, [1993] 3 S.C.R. 653, 661–62 (Can.) (“An out-of-court statement which is admitted for the truth of its contents is hearsay. An out-of-court statement offered simply as proof that the statement was made is not hearsay, and is admissible as long as it has some probative value.”).

94. See, e.g., *R. v. O’Brien*, [1978] 1 S.C.R. 591, 591 (Can.) (holding that hearsay statements are inadmissible unless they fall under an exception to the hearsay rule).

95. *R. v. Khan*, [1990] 2 S.C.R. 531, 542 (Can.).

96. *Id.*

97. *Id.* at 531.

that the statement was admissible, establishing a broad and principled approach to the admissibility of this type of hearsay statement, rather than the traditional specific exception approach.⁹⁸ Justice McLachlin observed that there is a “need for increased flexibility in the interpretation of the hearsay rule to permit the admission in evidence of statements made by children to others about sexual abuse.”⁹⁹ She ruled that hearsay statements are admissible if they meet the test of “necessity and reliability”:

Necessity for these purposes must be interpreted as “reasonably necessary.” The inadmissibility of the child’s evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve . . . The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encounters) should be always regarded as reliable.¹⁰⁰

Since *Khan*, a significant body of jurisprudence has developed on the admissibility of children’s out-of-court statements in criminal trials. This type of hearsay evidence is now admitted not just for the purposes of supporting the credibility of a child who testifies, but also for the “truth of its contents.”¹⁰¹

Moreover, Canadian courts are now prepared to convict on the basis of a child’s hearsay statements about abuse, even if the child does not testify. For example, in its 1993 decision, *R. v. J.P.*, the Quebec Court of Appeal applied *Khan* to uphold the conviction of a man charged with sexually abusing his daughter, two years old at

98. *Id.*

99. *Id.* at 543.

100. *Id.* at 546.

101. *Id.* at 546 (citing *Ares v. Venner*, [1970] S.C.R. 608 (Can.)).

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the time of the alleged offense and 3.5 years at the time of the trial.¹⁰² The child was not called as a witness, but her mother testified about her disclosures of abuse.¹⁰³ The Court held that given the child's young age, the "necessity" requirement was satisfied without the Crown adducing expert or other evidence about her incapacity to testify.¹⁰⁴ The "reliability" was established by the fact that so young a child would not normally fabricate a story showing knowledge of sexual activity unless she were abused. The allegations were corroborated by medical evidence, but the hearsay statement was critical to link the accused with the abuse.¹⁰⁵

Since *Khan*, the Supreme Court has ruled that "necessity" means "reasonably necessary" and "must be given a flexible definition, capable of encompassing diverse situations."¹⁰⁶ Necessity is established if the child has been called as a witness and determined by the court to be not competent to testify under the standard of the *Canada Evidence Act*. However, it is not essential that the judge hear from the child to establish incapacity, and in cases of children who were three years of age, judges have taken "judicial notice" of the fact that they are too young to testify.¹⁰⁷ However, with children age four or older, it is not sufficient for the Crown merely to decide not to call the child as a witness; rather, the "necessity" should be established during *voir dire*. Necessity as a result of testimonial incompetence might, for example, be established by testimony from a psychologist who has interviewed the child and can testify that the child does not have sufficient ability to understand and respond to questions about the alleged events in court. Necessity may also be established if it is shown the child will suffer emotional trauma from testifying. In considering the issue of "emotional trauma" as a ground for "necessity," Justice McLachlin stated in *R. v. Rockey* that the test is not one of proving actual psychological injury from

102. *R. v. J.P.* [1992], 74 CCC 3d 276 (Can. Qc. C.A.), *aff'd*, *R. v. J.P.*, [1993] 1 S.C.R. 469, 469 (Can.).

103. *Id.*

104. *Id.*

105. *Id.*

106. *R. v. Smith*, [1992] 2 S.C.R. 915, 934 (Can.).

107. *See R. v. Peterson*, [1996] S.C.C.A 202 (Can.), *denying the leave to appeal*, [1996] 27 O.R. 3d 739, 739 (C.A.). *See also R v. F. (R.G.)*, [1997] A.J. 409 (C.A.).

testifying:

Mere discomfort is insufficient to establish necessity. But where there is evidence, as here, that an already traumatized child might be further traumatized by being questioned by strange men in a strange situation, that suffices. The Court is not required to wait for proof of actual harm to the child.¹⁰⁸

Additionally, when assessing the issues of emotional trauma and ability to communicate, the judge should take account of whether the child is testifying from behind a screen or by closed circuit television, as legislation permits in Canada.¹⁰⁹

The Supreme Court of Canada further displayed sensitivity to child witnesses in applying the concept of “necessity” in its 1999 decision of *R. v. F. (W.J.)*.¹¹⁰ The child was five years old at the time of the alleged sexual assaults, and 6.5 years when called as a witness.¹¹¹ At the competence inquiry, she had considerable difficulty in communicating her evidence.¹¹² To over one hundred questions during the competence inquiry, the child gave no response, or only nodded or shook her head, or gave a hand gesture response.¹¹³ The trial judge ruled her competent to testify.¹¹⁴ When asked simple questions about her family or school, the child only answered in single words or simple phrases. She became totally silent when asked questions about the alleged assault.¹¹⁵ The child was excused from the witness stand and the Crown then tried to have the child’s out-of-court statements to various persons admitted.¹¹⁶ The trial judge ruled that “necessity” had not been established since there was no expert evidence to establish that the child was “unable” to testify. The Crown presented no further evidence and the case against the accused was dismissed.¹¹⁷

108. [1996] 3 S.C.R. 829, 846 (Can.).

109. Criminal Code, R.S.C. 1988, c. C-46, s. 486.2 (Can.).

110. [1999] 3 S.C.R. 569 (Can.).

111. *Id.* para. 18.

112. *Id.* para. 20.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* para. 23.

117. *Id.* para. 25.

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In ordering a new trial, the majority of the Supreme Court ruled that the trial judge erred in not admitting the hearsay evidence.¹¹⁸ Justice McLachlin recognized that the child was “paralyzed by the court proceedings.”¹¹⁹ The child was emotionally overwhelmed by being in an unfamiliar room with “imposing and intimidating strangers” and being asked questions about “upsetting and highly personal events.” In this setting, some children will “find themselves unable to respond [to questions] in any meaningful way.”¹²⁰ Testimony from a mental health professional to explain the child’s inability to testify may be desirable, but it is not essential. The Supreme Court accepted that where it is “self-evident or evident from the proceedings” that a child cannot give her “evidence in a meaningful way” the necessity for admission of a child’s out-of-court statements is established.¹²¹

In order for a child’s hearsay statement to be admitted, it must also be found to be “reliable.” Reliability for the purpose of admissibility is decided on the balance of probabilities at the time that the Crown seeks to have the statement admitted, but the ultimate assessment of guilt (and reliability of a hearsay statement of a child that abuse occurred) must be established “beyond a reasonable doubt” after an assessment of all of the evidence.¹²² The test of reliability is a “threshold” test that establishes “a circumstantial guarantee of trustworthiness;” to be admissible it is not necessary to establish “ultimate or certain reliability,” which can only be determined at the end of the trial.¹²³ The reliability requirement is aimed at identifying those cases where the concerns arising from the inability to test the evidence are sufficiently addressed to justify receiving the evidence as an exception to the general exclusionary hearsay rule. The reliability requirement will usually be met by showing either that there is no real concern about whether the statement is true because of the circumstances in which it was made or because, despite being hearsay, its truth and accuracy can

118. *Id.* para. 51.

119. *Id.* para. 50.

120. *Id.* para. 43.

121. *Id.* para. 41.

122. *R. v. Khelowan*, [2006] 2 S.C.R. 787, para. 57 (Can.).

123. *Id.* para. 90 (quoting *R. v. Hawkins*, [1996] 3 S.C.R. 1043, para 75 (Can.)).

nonetheless be sufficiently tested by means other than contemporaneous cross-examination. These two principal ways of satisfying the reliability requirement are not mutually exclusive categories and they assist in identifying the factors that need to be considered on the admissibility inquiry.¹²⁴

An explicit hearsay statement of a young child about sexual abuse is generally considered sufficiently reliable to be admitted into evidence, because young children do not ordinarily have knowledge about sexual matters and thus are unlikely to fabricate allegations on their own.¹²⁵ However, there are examples of where a child's hearsay statements are not reliable. If, for example, there is evidence that a girl engaged in sexual activities with an older brother and that she tended to lie to deny that such activity took place between them, the child's statement to her foster mother about alleged sexual abuse by her father would be just "as consistent with the hypothesis that she was protecting" her brother as with her having been sexually abused by her father, and hence the statement is unreliable hearsay and inadmissible.¹²⁶

B. Video-Recorded Police Interviews: The Code Section 715.1 and the Common Law

Today in Canada, one of the most commonly admitted types of children's hearsay evidence is a video-recording of an investigative police interview with a child. If the child testifies, the admission of the recording is governed by statute, but if the child does not testify, the common law hearsay approach of *Khan* is applied. Unlike in the United States, there is no distinction between "testimonial" and "non-testimonial hearsay," though Canadian courts are also concerned about issues of reliability and fairness to the accused when deciding whether to admit hearsay evidence.

The practice of police video-recording of statements of child witnesses is now universal in Canada. The practice started originally in the 1980s for the purpose of reducing the need to subject the child to repeated interviews, by allowing the video-recording to be shared with investigators from different agencies

124. *Khelowan*, [2006] S.C.R. at para. 57.

125. *R. v. Khan*, [1990] 2 S.C.R. 531, 542 (Can.).

126. *R. v. D.R.*, [1996] 2 S.C.R. 291, 310 (Can.).

as well as with therapists. Repeated interviewing is potentially traumatic, and may affect the reliability of a child's memory.¹²⁷ The enactment of Section 715.1 of the Criminal Code in 1988 has encouraged the practice of recording the interviews. This provision allows for the admission in evidence of video-recordings of interviews with children under the age of eighteen in regard to sexual offenses, provided that (1) the recording is made within a "reasonable time" of the events in question and (2) the child testifies and "adopts" the contents of the recording while on the stand.¹²⁸ Further, dramatic improvements in the quality and accessibility of recording equipment, and reductions in cost and complexity of its use, have made recording of all types of police interviews with suspects, accused persons and witnesses a standard police practice.

The constitutional validity of Section 715.1 of the Criminal Code has been upheld in a number cases. In one of these decisions in 1993, *R v. D.O.L.*, the Supreme Court of Canada through Chief Justice Lamer, observed:

By allowing for the videotaping of evidence under certain express conditions, section 715.1 not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.¹²⁹

The rights of the accused are adequately protected because, under this provision, the child must (1) be a witness, (2) "adopt" the contents of the video-record while testifying, and (3) be available for cross-examination about its contents.¹³⁰

In another decision from 1997, *R. v. F. (C.C.)*, the Supreme Court of Canada considered psychological research on children's memories (although the Court did not refer to any specific studies and instead used judicial notice to summarize this knowledge).¹³¹

127. Laura Melnyk, Angela M. Crossman, & Matthew H. Scullin, *The Suggestibility of Children's Memory*, in 1 HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR EVENTS 401, 405 (Michael P. Toglia et al. eds., 2007).

128. Criminal Code, R.S.C. 1988, c. C-46, s. 715.1 (Can.).

129. [1993] 4 S.C.R. 419, 421 (Can.).

130. *Id.*

131. *R. v. F. (C.C.)*, [1997] 3 S.C.R. 1183, para. 19 (Can.).

Justice Cory stated that a video recording “will almost inevitably reflect a more accurate recollection of the events than will testimony given later at a trial.”¹³² He ruled that a child who was testifying had “adopted” the videotape if she “recalled giving the statement and testified that she was then attempting to be honest and truthful.”¹³³ It is not necessary for the child to have a recollection of the events while testifying; it is sufficient for her to recollect having made the videotaped statement.¹³⁴ At the trial level in this case, the six-year-old children had some recollection of the acts of sexual abuse committed by her father, but there were some inconsistencies between the videotape and her trial testimony.¹³⁵ The trial judge admitted the videotape and convicted the accused.¹³⁶ In upholding the conviction, Justice Cory accepted that these were “minor inconsistencies regarding peripheral details” and commented:

Obviously a contradicted videotape may well be given less weight in the final determination of the issues. However, the fact that the video is contradicted in cross-examination does not necessarily mean that the video is wrong or unreliable. The trial judge may still conclude . . . that the inconsistencies are insignificant and find the video more reliable than the evidence elicited at trial . . . Although the trier of fact must be wary of any evidence which has been contradicted, this is a matter which goes to [its] weight . . . and not to its admissibility.¹³⁷

Thus, judges have accepted that if there are inconsistencies between what a young child says on a video recording made shortly after the events in question and what is said at trial many months, and even years after the events in question, the video may be regarded as “more reliable.”¹³⁸ However, if the child on the stand has no real recollection of the events in question and there is a lack of corroborating evidence, it may be appropriate to

132. *Id.* at para. 19.

133. *Id.* at para. 36.

134. *Id.* at para. 4.

135. *Id.* at para. 5.

136. *Id.* at paras. 1–2.

137. *Id.* at paras. 47–48.

138. *R. v. Vanderwerff*, [2006] A.J. No. 620 (Alta. Q.B.).

acquit the accused, despite the existence of a video-recording of the child that implicates him.¹³⁹ Further, video recordings may even benefit the accused. If the child has been subject to inappropriate, suggestive questions during the video-recorded interview, this may be captured on the recording and available to protect an accused from unreliable allegations.

To better understand how video-recording accommodates child witnesses, an explanation of the process may help: It is common practice for a child to be shown the video-record by the prosecutor prior to the child taking the witness stand in order to prepare the child for testifying. The video is usually shown again at the start of examination-in-chief, and the child is asked to “adopt” the contents. If the child acknowledges the truth of the statement in examination-in-chief, but then in cross-examination makes inconsistent statements or partially recants, courts have generally relied on Section 715.1 of the Criminal Code to rule the statement admissible for the truth of its contents. For example, in *R. v. B.G.B.*, Justice Dunnet observed, “the test for ‘adoption’ is not stringent.”¹⁴⁰ The judge upheld a conviction where a five-year-old child adopted his statement during examination-in-chief, but during cross-examination made some statements inconsistent and contradictory to the statements on the video.¹⁴¹

In cases where the child is not competent to testify or might be traumatized by the process of testifying, a video-recording of a police interview will not be admissible under Section 715.1 of the Code as the child cannot “adopt” it. However, it may be admissible under the *Khan* test of “necessity” and “reliability.”¹⁴²

Further, in cases involving children who have recanted their allegations, it has been accepted that the critical question is the “reliability” of the prior statement. There may be sufficient assurance of “threshold reliability” arising from the circumstances that the statement may be admissible even if not made under oath or promise to tell the truth.¹⁴³ This approach to admissibility of a

139. *R. v. C.L.P.*, [2006] B.C.P.C. 401, para. 22 (Can.).

140. 2005 CanLII 46743, para. 19 (Can. Ont. S.C.). *See also* *R. v. J.R.*, 2006 CanLII 31304 (Can. Ont. S.C.).

141. *B.G.B.*, 2005 CanLII 46743 at para. 19.

142. *R. v. Collura*, 1996 CanLII 8336, para. 8 (Can. B.C.C.A.).

143. When witnesses at trial are recanting their previous statements to the police, the Canadian courts generally impose a ‘*KGB* requirement.’ The ‘*KGB* requirement’ for the admission of previous inconsistent statements and

video-recording of a police interview with a recanting child is illustrated by the 2007 decision of the Ontario Court of Appeal in *R. v. R. (T.)*.¹⁴⁴ During the trial of that case, a twelve-year-old girl testified and recanted the allegations of sexual abuse that she had made against her father in a video-recorded police interviews.¹⁴⁵ Consequently, she had not adopted the contents of the video-recording under Section 715.1 of the Code. However, the trial judge held that the video-recorded statement met the reliability standard for admissibility under the common law test of *R. v. Khan*.¹⁴⁶ The Court reasoned that the circumstances surrounding the recording of the statement suggested that the child understood the importance of telling the truth, and did so even though the statement was not made under oath.¹⁴⁷ In addition, the defense's ability to cross-examine the child at trial was another factor that favored the admission of the hearsay evidence. Thus, the Court of Appeals held that the evidence suggesting that the recantation might be true did not render the video-recorded statement inadmissible under *Khan*, but related to the "ultimate assessment of the actual probative value of the evidence."¹⁴⁸ Therefore, the recording was admissible for the truth of its contents and could be the basis for a conviction, of course, assessed in the context of all of the evidence.

C. Comparing the American and Canadian Approaches to Child's Hearsay

The "principled approach" of *Khan* and the Canadian courts to hearsay has resulted in a significant expansion of the scope for the admission of children's disclosures and first reports of abuse,

their use for establishing the truth of their contents (and not merely impeaching the credibility of the witness) was established by the Supreme Court of Canada in *R v. B. (K.G.)*, [1993] 1 S.C.R. 740, 742 (Can.). If the previous statement is to be admitted for the truth of its contents; the previous statement will only be admissible if the police conducting the interview had the witness make the statement under oath or a promise to tell the truth, and provided an explicit warning of the possibility of the legal consequences of making a false statement. *Id.*

144. [2007], 85 O.R. 3d 481 (Can. Ont. C.A.).

145. *Id.* para. 1.

146. [1990] 2 S.C.R. 531, 542 (Can.).

147. *Id.*

148. *T. (R.)*, 85 O.R. 3d at para. 21.

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allowing the trier of fact, whether a judge or a jury, to consider “reliable” information to facilitate the search for the truth. This approach is similar to that of the United States Supreme Court in its 1980 decision in *Ohio v. Roberts*, with its focus on “indicia of reliability.”¹⁴⁹ The general *Roberts* approach was, of course, abrogated in 2007 by *Crawford v. Washington*,¹⁵⁰ with its distinction between testimonial and non-testimonial hearsay in the Court’s interpretation of the Confrontation Clause. The *Crawford* decision has potentially significant implications for the admissibility of children’s hearsay statements, and in particular, on investigative interviews with police, doctors, and child protection workers. To date, there have been conflicting appellate decisions on the applicability of *Crawford* to the statements of children to police and other investigators. The Supreme Court of the United States has yet to rule on this issue, though a number of scholars have argued that there should be a more flexible approach to the admission of children’s hearsay disclosures of abuse;¹⁵¹ such an approach would facilitate the search for the truth without jeopardizing the right to a fair trial, and would recognize the special vulnerability of children.

While the Canadian Charter does not have a “confrontation clause,” it does guarantee the right to a “fair trial.” One would hope that in applying *Crawford* and the Confrontation Clause to statements of children, the U.S. Supreme Court will follow a similar approach as adopted in Canada, allowing the trier of fact to have access to reliable statements of children. The fact that the statements are admitted is distinct from the ultimate question of guilt of the defendant, which must be proven beyond reasonable a doubt. To deny the trier of fact the opportunity to consider such evidence may deny access to what is often the best evidence available of what occurred.

V. CONCLUSION: REFORMING THE CRIMINAL JUSTICE SYSTEM

The criminal justice system is not only concerned with

149. *Ohio v. Roberts*, 448 U.S. 56, 66–68 (1980).

150. *Crawford v. Washington*, 541 U.S. 36, 67–68 (2004).

151. See, e.g., Robert P. Mosteller, *Confrontation in Children’s Cases: The Dimensions of Limited Coverage*, 20 J.L. & POL’Y 393, 394–95 (2012); see also Thomas D. Lyon & Julia A. Dente, *Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1199 (2012).

ascertaining the truth but also with fairness, due process, and the protection of the constitutional rights of the accused. Further, while most disclosures of child abuse are true, there continue to be a relatively small number of unfounded allegations. For example, a child may be mistaken about what occurred, may have identified the wrong perpetrator, or may have been induced by inappropriate questioning into making a false allegation; more rarely, children may fabricate allegations on their own.¹⁵² The state has the burden to prove the defendant's guilt beyond a reasonable doubt by a fair process and, inevitably, there will be some true allegations of child abuse that cannot be proven in court.

The role of the criminal justice system, starting with the police investigation and ending in court, is to balance the rights of the accused with the desire to ascertain the truth and protect victims. Over the past three decades, there has been a substantial increase in understanding the capacities and needs of child witnesses and victims of child abuse, which have led to dramatic improvements in the treatment of child victims in the criminal justice systems of both Canada and the United States. Legal changes have both reflected and contributed to a better understanding of the nature and effects of child abuse. Both countries now deal more effectively with child abuse, and report a decline in levels of abuse, especially child sexual abuse.¹⁵³

There is, however, a continuing need to further reform the justice system to find a better balance between the rights of the accused and the interests of children and society. Further improvements will require consideration of experiences in other countries,¹⁵⁴ as well as more empirical research about the experiences of children in court and the long-term effects of the involvement of the justice system.

152. Nicholas M.C. Bala et al., *Sexual Abuse Allegations and Parental Separation: Smokescreen or Fire?* 13 J. FAM. STUD. 1, 1 (2007).

153. See, e.g., *Child Abuse Is on the Decline – Now What?*, NATIONAL CHILDREN'S ADVOCACY CENTRE, <http://www.nationalcac.org/ncac-blog/child-abuse-is-on-the-decline-now-what.html> (last visited Jan. 26, 2014); but see Delphine Collin-Vézina et al., *Is Child Abuse Declining in Canada? An Analysis of Child Welfare Data*, 34 CHILD ABUSE & NEGLECT 807 (2010).

154. England has undertaken a number of reforms, and proposed others, that are worthy of careful study in Canada and the USA. See, e.g., Matthew Hall, *Giving Evidence at Age 4: Just Means to Just Ends?*, 39 FAM. L. 608, 608–11 (2009).