

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* D.A.I., 2012 SCC 5, [2012] 1 S.C.R. 149 | **Date:** 20120210  **Docket:** 33657 |

**Between:**

**Her Majesty The Queen**

Appellant

and

**D.A.I.**

Respondent

- and -

**Women’s Legal Education and Action Fund, DisAbled**

**Women’s Network Canada, Criminal Lawyers’ Association**

**(Ontario) and Council of Canadians with Disabilities**

Interveners

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 90)  **Dissenting Reasons:**  (paras. 91 to 152) | McLachlin C.J. (Deschamps, Abella, Charron, Rothstein and Cromwell JJ. concurring)  Binnie J. (LeBel and Fish JJ. concurring) |

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**Indexed as: R. *v.* D.A.I.**

2012 SCC 5

File No.:  33657.

2011:  May 17; 2012:  February 10.

Present:  McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for ontario

*Criminal law — Evidence — Testimonial competence — Adults with mental disabilities — Whether adult witnesses with mental disabilities must demonstrate understanding of nature of obligation to tell truth in order to be deemed competent to testify — Whether finding of testimonial competence without demonstration of understanding of obligation to tell truth breaches accused’s right to fair trial — Canada Evidence Act, R.S.C. 1985, c. C‑5, s. 16.*

The Crown alleges that the complainant, a 26‑year‑old woman with the mental age of a three‑ to six‑year‑old, was repeatedly sexually assaulted by her mother’s partner during the four years that he lived in the home. It sought to call the complainant to testify about the alleged assaults. After a *voir dire* to determine the complainant’s capacity to testify, the trial judge found that she had failed to show that she understood the duty to speak the truth. In a separate *voir dire*, the trial judge also excluded out‑of‑court statements made by the complainant to the police and her teacher on the grounds that the statements were unreliable and would compromise the accused’s right to a fair trial. While the remainder of the evidence raised some serious suspicions about the accused’s conduct, the case collapsed and the accused was acquitted. The Ontario Court of Appeal affirmed this result.

*Held* (Binnie, LeBel and Fish JJ. dissenting): The appeal should be allowed, the acquittal set aside and a new trial ordered.

*Per* McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ.: The question in issue is whether the trial judge correctly interpreted the requirements of s. 16 of the *Canada Evidence Act* for the testimonial competence of persons of 14 years of age or older (adults) with mental disabilities. Section 16(3) imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth. It is unnecessary and indeed undesirable to conduct abstract inquiries into whether the witness understands the difference between truth and falsity, the obligation to give true evidence in court, and what makes a promise binding. The plain words of s. 16(3) focus on the concrete acts of communicating and promising. Judges should not add other elements to the dual requirements imposed by s. 16(3). This approach does not transform the promise into an empty gesture. Adults with mental disabilities may have a practical understanding of the difference between the truth and a lie and know they should tell the truth without being able to explain what telling the truth means in abstract terms. When such a witness promises to tell the truth, the seriousness of the occasion and the need to say what really happened is reinforced.

Insofar as the authorities suggest that s. 16(3) requires an abstract understanding of the obligation to tell the truth, they should be rejected. That requirement was based on a version of s. 16 that explicitly required that the witness “understands the duty of speaking the truth”. Although Parliament deleted that requirement in 1987, courts continued to require proof that child witnesses understood the duty to tell the truth. Parliament responded by enacting s. 16.1(7), which expressly forbade such inquiries of child witnesses. However, the existence of the s. 16.1(7) ban does not require us to infer that mentally disabled adults are to be questioned on the obligation to tell the truth. First, because s. 16(3) only required a promise to tell the truth, Parliament had no need to ban such questioning of adult witnesses with mental disabilities. Second, s. 16(3) required only a promise to tell the truth, so there was no need for Parliament to enact a similar provision with respect to s. 16(3). Third, the enactment of s. 16.1(7) did not imply that the earlier judicial interpretation of s. 16(3) as it applied to children had been endorsed for adult witnesses. No inference as to the meaning of s. 16(3) flows from the mere adoption of s. 16.1(7) with respect to children, and the re‑enactment of s. 16(3) does not imply that Parliament accepted the judicial interpretation that prevailed at the time of the re‑enactment. Fourth, the fact that s. 16 does not have a provision equivalent to s. 16.1(7) does not mean that adult witnesses with mental disabilities must demonstrate an understanding of the nature of the duty to speak the truth — s. 16(3) sets two requirements for the competence of adults with mental disabilities, and nothing further need be imported. Fifth, there is no need to prove that, unless it can be shown that adult witnesses with mental disabilities are the same as, or like, child witnesses, they must be subjected to an inquiry into their understanding of the nature of the obligation to tell the truth before they can be held competent to testify.

The underlying policy concerns — bringing the abusers to justice, ensuring fair trials and preventing wrongful convictions — also support allowing adults with mental disabilities to testify. With respect to the first concern, rejecting the evidence of alleged victims on the ground that they cannot explain the nature of the obligation to tell the truth in philosophical terms would exclude reliable and relevant evidence, immunize an entire category of offenders from criminal responsibility for their acts, and further marginalize the already vulnerable victims of sexual predators. With respect to the second, allowing an adult witness with mental disabilities to testify when the witness can communicate the evidence and promises to tell the truth does not render a trial unfair. Generally, the reliability threshold is met by establishing that the witness has the capacity to understand and answer the questions put to her and by bringing home the need to tell the truth by securing an oath, affirmation or promise. There is no guarantee that any witness will tell the truth — the trial process seeks a basic indication of reliability. That, along with the rules governing admissibility and weight of the evidence work to ensure that a verdict of guilty is based on accurate and credible evidence and that the accused has a fair trial.

When applying s. 16(3) in the context of the *Canada Evidence Act*, eight considerations are appropriate. First, the *voir dire* on the competence of a proposed witness is an independent inquiry: it may not be combined with a *voir dire* on other issues. Second, the *voir dire* should be brief, but not hasty. It is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. Third, the primary source of evidence for a witness’s competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner. Fourth, persons familiar with the proposed witness in her everyday situation understand her best. They may be called as fact witnesses to provide evidence on her development. Fifth, expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness. Sixth, the trial judge must make two inquiries during the *voir dire* on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence? Seventh, the second inquiry into the witness’s ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to ask if she can differentiate between true and false everyday factual statements. Finally, the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only.

In the instant case, the trial judge erred in failing to consider the second part of the test under s. 16. This error of law led him to rule the complainant incompetent. This error cannot be rectified by comments made by the trial judge at other points in the trial or by the doctrine of deference.

*Per* Binnie, LeBel and Fish JJ. (dissenting): The majority judgment unacceptably dilutes the protection Parliament intended to provide to accused persons by turning Parliament’s direction permitting a person “whose mental capacity is challenged” to testify only “on promising to tell the truth” into an empty formality — a mere mouthing of the words “I promise” without any inquiry as to whether the promise has any significance to the potential witness

Section 16 mandates a single inquiry which presents the trial judge dealing with a witness whose mental capacity is challenged with three options. Section 16(2) provides that, if the challenged witness is able to communicate the evidence and understands the nature of an oath or a solemn declaration in terms of ordinary, everyday social conduct, he or she shall testify under oath or solemn affirmation. If the challenged witness is able to communicate the evidence but does not understand the nature of an oath or a solemn affirmation, s. 16(3) provides that he or she may provide unsworn testimony on promising to tell the truth. If the challenged witness does not satisfy either criterion, s. 16(4) provides that the individual with a mental disability shall not testify.

There is agreement with the majority that promising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose. It cannot be correct, however, that it is out of bounds for a trial judge to try to determine — in concrete everyday terms — whether there is in reality such a prophylactic effect in the case of a particular witness whose mental capacity has been challenged. If such a witness is so disabled as not to understand the seriousness of the situation and the importance of being careful and correct, there is no prophylactic effect, and the fair trial interests of the accused under s. 16, as enacted in 1987, are unfairly prejudiced.

In 2005, when Parliament amended the *Canada Evidence Act* to prohibit asking child witnesses “any questions regarding their understanding of the nature of the promise to tell the truth” (s. 16.1(7)), the empirical evidence before Parliament related exclusively to children. No such empirical studies were carried out with respect to adults with mental disabilities. In their case, no “don’t ask” provision was proposed, let alone adopted.

There is agreement with the majority that the words “on promising to tell the truth” in s. 16(3) must bear the same meaning as “to promise to tell the truth” in s. 16.1(6). That being the case, the majority must read the s. 16.1(7) “don’t ask” rule applicable only to children into s. 16(3) applicable only to mentally challenged adults in order to read down the words “promising to tell the truth” in s. 16(3), and thus treat adults with mental disabilities as equivalent for the purposes of s. 16 to children without mental disabilities. The fact that psychiatrists speak of persons with mental disabilities in terms of mental ages does not mean that an adult with mental age of six is on the same footing as a six‑year‑old child with no mental disability whatsoever — a six‑year‑old with the mental capacity of a six‑year‑old does not suffer from a mental disability. No evidence was led to suggest equivalence and judicial notice cannot be taken of alleged “facts” that are neither notorious nor easily verifiable from undisputed sources.

On a competency *voir dire* where the mental capacity of an adult is challenged, and the adult is herself called as a proposed witness, the court may admit evidence from fact witnesses personally familiar with the complainant’s verbal and cognitive abilities and limitations to help the court gain a better understanding of the person’s capacity. These witnesses would not be in a position to express an expert opinion, but could testify about their direct personal observations of the proposed witness. Such evidence might, if the trial judge considered it helpful, better enable the judge or jury to appreciate her responses (or non‑responses) in the witness box. However, ultimately, the judge must reach his or her own considered opinion about the mental capacity of the proposed witness prior to admitting the testimony.

In this case, the trial judge had serious concerns about the complainant’s ability to communicate the evidence. The complainant’s answers to a series of simple and concrete questions left him fully satisfied that she did not understand what a promise to tell the truth involves. Much turned on the significance of the complainant’s repeated “I don’t know” answers. Clearly, it was an important advantage for the trial judge to watch the questions and answers unfold and to assess whether the complainant was actually able to “compute” her responses to what she was being asked. There was no allegation of bad faith, but she may nevertheless have been mistaken in her perception or recollection of events and the crucible of cross‑examination was useless because there was no secure method of testing her credibility. Her inability to deal with simple questions would mean her evidence would be effectively immune to challenge by the defence, thereby prejudicing the interest of society as well as the accused in a fair trial. Sitting on appeal from this determination, and not having had the advantage of observing and questioning the complainant, there is no valid basis for this Court to reverse the trial judge’s assessment of her mental capacity.

The trial judge’s conclusion that the complainant lacked the ability to perceive, recall and communicate events and to understand the difference between truth and falsehood set up, but did not predetermine, his conclusion that her testimony lacked sufficient reliability. It was neither surprising nor an error however that the trial judge’s reasoning on the threshold reliability in his hearsay ruling was quite similar to his reasoning on the s. 16 *voir dire*, and given his advantage in seeing and hearing the complainant, his exclusion of her out‑of‑court statements should equally be upheld by this Court.

**Cases Cited**

By McLachlin C.J.

**Disapproved:** *R. v. Farley* (1995), 23 O.R. (3d) 445; *R. v. P.M.F.* (1992), 115 N.S.R. (2d) 38; *R. v. McGovern* (1993), 82 C.C.C. (3d) 301; *R. v. S.M.S.* (1995), 160 N.B.R. (2d) 182; *R. v. Ferguson* (1996), 112 C.C.C. (3d) 342; *R. v. Parrott* (1999), 175 Nfld. & P.E.I.R. 89; *R. v. A. (K.)* (1999), 137 C.C.C. (3d) 554; *R. v. R.J.B.*, 2000 ABCA 103, 255 A.R. 301; *R. v. Brouillard*, 2006 QCCA 1263, 44 C.R. (6th) 218; *R. v. E.E.D.*, 2007 SKCA 99, 304 Sask. R. 192; **distinguished:** *R. v. Khan* (1988), 42 C.C.C. (3d) 197; *R. v. Rockey*, [1996] 3 S.C.R. 829; **referred to:** *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Brasier* (1779), 1 Leach 199, 168 E.R. 202; *R. v. Bannerman* (1966), 48 C.R. 110; *Attorney General of Quebec v. Carrières Ste‑Thérèse Ltée*, [1985] 1 S.C.R. 831; *R. v. Caron* (1994), 72 O.A.C. 287; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

By Binnie J. (dissenting)

*R. v. Rockey*, [1996] 3 S.C.R. 829; *R. v. Khan*, [1990] 2 S.C.R. 531, aff’g (1988), 42 C.C.C. (3d) 197; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Marquard*, [1993] 4 S.C.R. 223; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Parrott*, 2001 SCC 3, [2001] 1 S.C.R. 178; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787.

**Statutes and Regulations Cited**

*Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24, s. 18.

*Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, ss. 26, 27.

*Canada Evidence Act*, R.S.C. 1985, c. C‑5, ss. 16 [rep. & sub. 1987, c. 24, s. 18; am. 2005, c. 32, s. 26], 16.1 [ad. 2005, c. 32, s. 27].

*Canada Evidence Act, 1893*, S.C. 1893, c. 31, s. 25.

*Canadian Charter of Rights and Freedoms*.

*Interpretation Act*, R.S.C. 1985, c. I‑21, s. 45.

**Authors Cited**

Bala, Nicholas, et al. “Brief on Bill C-2: Recognizing the Capacities & Needs of Children as Witnesses in Canada’s Criminal Justice System”, submitted by the Child Witness Project to the House of Commons Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, March 2005.

Canada. House of Commons. *Evidence of the Standing Committee on Justice and Human Rights*, No. 77, 2nd Sess., 37th Parl., October 29, 2003, at 17:20 (online: www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1137489&Mode=1&Parl=37&Ses=2&Language=E).

Canada. House of Commons. *Evidence of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, No. 26, 1st Sess., 38th Parl., March 24, 2005, p. 7 (online: www.parl.gc.ca/content/hoc/Committee/381/JUST/Evidence/EV1718347/JUSTEV26-E.PDF).

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C‑15*, No. 1, 2nd Sess., 33rd Parl., November 27, 1986, pp. 21, 24 and 33.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C‑15*, No. 2, 2nd Sess., 33rd Parl., December 4, 1986, pp. 26‑27.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C‑15*, No. 3, 2nd Sess., 33rd Parl., December 11, 1986, p. 7.

Canada. Senate. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 17, 1st Sess., 38th Parl., June 23, 2005, p. 19.

Canada. Senate. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 18, 1st Sess., 38th Parl., July 7, 2005, pp. 105‑6.

Côté, Pierre‑André, in collaboration with Stéphane Beaulac and Mathieu Devinat. *The Interpretation of Legislation in Canada*, 4th ed. Toronto: Carswell, 2011.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, MacPherson and Armstrong JJ.A.), 2010 ONCA 133, 260 O.A.C. 96, 252 C.C.C. (3d) 178, 73 C.R. (6th) 50, [2010] O.J. No. 665 (QL), 2010 CarswellOnt 880, affirming a decision of McKinnon J., 2008 CanLII 21725, [2008] O.J. No. 1823 (QL), 2008 CarswellOnt 2637. Appeal allowed, Binnie, LeBel and Fish JJ. dissenting.

*Jamie C. Klukach* and *John Semenoff*, for the appellant.

*Howard L. Krongold* and *Leonardo Russomanno*, for the respondent.

*Joanna L. Birenbaum*, for the interveners the Women’s Legal Education and Action Fund and the DisAbled Women’s Network Canada.

*Joseph Di Luca* and *Erin Dann*, for the intervener the Criminal Lawyers’ Association (Ontario).

*David M. Wright* and *Helga D. Van Iderstine*, for the intervener the Council of Canadians with Disabilities.

The judgment of McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

1. The Chief Justice — Sexual assault is an evil. Too frequently, its victims are the vulnerable in our society — children and the mentally handicapped. Yet rules of evidence and criminal procedure, based on the norm of the average witness, may make it difficult for these victims to testify in courts of law. The challenge for the law is to permit the truth to be told, while protecting the right of the accused to a fair trial and guarding against wrongful conviction.
2. Parliament has addressed this challenge by a series of amendments to the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that modify the normal rules of testimonial capacity for children and adults with mental disabilities. This Court has considered the provisions relating to children on a number of occasions. This appeal involves the provisions relating to adults with mental disabilities.
3. At the heart of this case is a young woman, K.B., aged 26, with the mental age of a three- to six-year-old. The Crown alleges that she was repeatedly sexually assaulted by her mother’s partner at the time, D.A.I. The prosecution sought to call the young woman to testify about the alleged assaults. It also sought to adduce evidence through her school teacher and a police officer of what she told them.
4. The trial judge excluded this evidence, on the ground that K.B. was not competent to testify in a court of law (A.R., vol. I, at p. 2). As a result, the case collapsed and D.A.I. was acquitted (2008 CanLII 21725 (Ont. S.C.J.)). The Ontario Court of Appeal affirmed the acquittal (2010 ONCA 133, 260 O.A.C. 96).
5. I respectfully disagree. In my view, the trial judge made a fundamental error of law in interpreting and applying the provisions of the *Canada Evidence Act* governing the testimonial competence of adult witnesses with mental disabilities. This error of law vitiates the trial judge’s ruling that K.B. could not be allowed to testify. Subsequent evidence on other matters cannot overcome this fatal defect. I would therefore set aside the acquittal of D.A.I. and order a new trial.

I. Factual Background

1. The complainant, K.B., was 22 at trial and 19 at the time of the alleged assault, but possessed the mental age of a three- to six-year-old. She lived with her mother and her mother’s partner, D.A.I., as well as her sister. During the four years he was in the home, D.A.I. developed a close relationship with K.B.
2. Sometime after D.A.I. separated from K.B.’s mother and left the home, K.B. told her special education teacher about a “game” that she and D.A.I. used to play together which involved D.A.I. touching her. She later repeated this statement to the police. K.B., through bodily gestures, described the game as involving touching her breasts and vagina. In her statement to the police, she indicated that D.A.I. had touched her vagina, buttocks and breasts beneath her pajamas, and that this had happened many times.
3. At the preliminary inquiry, K.B. was ruled competent to testify on the basis that she was able to communicate the evidence. Her videotaped statement to the police was admitted as her examination-in-chief and she was cross-examined.
4. The issue of K.B.’s testimonial capacity was raised at trial, and the trial judge held a *voir dire* to determine whether she could be allowed to testify. K.B. and Dr. K., the defence’s expert witness, were the only ones to testify during the *voir dire* on competence. The Crown’s examination of K.B. demonstrated that she understood the difference between telling the truth and lying in concrete situations. However, the trial judge went beyond this to question K.B. on her understanding of the nature of truth and falsity, of moral and religious duties, and of the legal consequences of lying in court. K.B. was unable to respond adequately to these more abstract questions, to which she frequently answered “I don’t know” (A.R., vol. I, at pp. 117-19). Dr. K., a psychiatrist, testified for the defence. Dr. K’s opinion was formed without personal contact with K.B. It was based on school and medical records, as well as on K.B.’s behaviour in her videotaped statement and during the *voir dire*. Dr. K. expressed the view that K.B. had “serious difficulty in differentiating the concept of truth and lie”, noted her low tolerance for frustration, and said, “I don’t think she ha[d] the ability to think what you’re asking and come up with an answer” (*ibid.*, at pp. 159 and 161).
5. At the end of the *voir dire* on competence, the trial judge refused to hear from K.B.’s teacher of six years, Ms. W., and ruled that K.B. was incompetent to testify. K.B. was held incompetent because she had “not satisfied the prerequisite that she understands the duty to speak to the truth”, which the trial judge took to be required by s. 16(3) of the *Canada* *Evidence Act*: “She cannot communicate what truth involves or what a lie involves, or what consequences result from truth or lies” (*ibid.*, at p. 3).
6. A second *voir dire* was held to decide on the Crown’s application for admitting K.B.’s out-of-court statements to the police and to her teacher, Ms. W. The teacher testified that K.B. would not intentionally lie, but that her ability to understand was more developed than her ability to express herself: “This causes a lot of frustration for [K.B.], she frequently responds to questions by saying ‘I don’t know’” (*ibid.*, at p. 176; see also pp. 184-85). Also, evidence was led corroborating K.B.’s allegations. A family friend testified that, while he was in D.A.I.’s room for another purpose, he found a Polaroid photo of K.B. with her breasts exposed and another photo of two unidentified people having sex. D.A.I.’s explanation of the first photo was that K.B. had flashed him while he was taking a photo of her. K.B.’s sister also testified that she had found such photos. However, she did not report it to her mother and the photos were not available at trial. K.B.’s sister also said she once saw D.A.I. touch K.B.’s breasts while she was lying on her bed.
7. The *voir dire* on hearsay admissibility was concluded by the trial judge’s dismissal of the Crown’s application. The trial judge rejected K.B.’s out-of-court statements to Ms. W. and to the police, holding that K.B.’s hearsay evidence was inadmissible because it was “unreliable, and its admission would seriously compromise the accused’s right to a fair trial” (2008 CanLII 21726 (Ont. S.C.J.), at para. 57).
8. At trial, the judge concluded that while the remainder of the evidence raised “some serious suspicions” about D.A.I.’s conduct, it was too scant to support a conviction (para. 11). The case essentially collapsed because of the trial judge’s ruling that K.B. was not competent to testify.
9. The question we must decide is whether the trial judge correctly interpreted the requirements of the *Canada Evidence Act* for the testimonial competence of persons of 14 years of age or older (adults) with mental disabilities. If he applied too high a standard, his decision to preclude K.B. from testifying must be set aside and the case remitted for a new trial.

II. Legal Analysis

A. *Testimonial Competence: A Threshold Requirement*

1. Before turning to s. 16(3) of the *Canada Evidence Act*,it is important to distinguish between three different concepts that are sometimes confused: (1) the witness’s competence to testify; (2) the admissibility of his or her evidence; and (3) the weight of the witness’s testimony. The evidentiary rules governing all three concepts share a common purpose: ensuring that convictions are based on solid evidence and that the accused has a fair trial. However, each concept plays a distinct role in achieving this goal.
2. The first concept, and the one most relevant to this appeal, is the principle of competence to testify. Competence addresses the question of whether a proposed witness has the capacity to provide evidence in a court of law. The purpose of this principle is to exclude at the outset worthless testimony, on the ground that the witness lacks the basic capacity to communicate evidence to the court. Competence is a threshold requirement. As a matter of course, witnesses are presumed to possess the basic “capacity” to testify. However, in the case of children or adults with mental disabilities, the party challenging the competence of a witness may be called on to show that there is an issue as to the capacity of the proposed witness.
3. The second concept is admissibility. The rules of admissibility determine what evidence given by a competent witness may be received into the record of the court. Evidence may be inadmissible for various reasons. Only evidence that is relevant to the case may be considered by the judge or jury. Evidence may also be inadmissible if it falls under an exclusionary rule, for example the confessions rule or the rule against hearsay evidence. Among the purposes of the rules of admissibility are improving the accuracy of fact finding, respecting policy considerations, and ensuring the fairness of the trial.
4. The third concept — the responsibility of the trier of fact to decide what evidence, if any, to accept — is based on the assumption that the witness is competent and the rules of admissibility have been properly applied. Fulfillment of these requirements does not establish that the evidence should be accepted. It is the task of the judge or jury to weigh the probative value of each witness’s evidence on the basis of factors such as demeanour, internal consistency, and consistency with other evidence, and to thus determine whether the witness’s evidence should be accepted in whole, in part, or not at all. Unless the trier of fact is satisfied that the prosecution has established all elements of the offence beyond a reasonable doubt, there can be no conviction.
5. Together, the rules governing competence, admissibility and weight of the evidence work to ensure that a verdict of guilty is based on accurate and credible evidence and that the accused person has a fair trial. The point for our purposes is a simple one: the requirement of competence is only the first step in the evidentiary process. It is the initial threshold for receiving evidence. It seeks a minimal requirement — a basic ability to provide truthful evidence. A finding of competence is not a guarantee that the witness’s evidence will be admissible or accepted by the trier of fact.

B. *The Requirements for Competence of Adult Witnesses With Mental Disabilities: Section 16 of the Canada Evidence Act*

1. Against this background, I come to the provision at issue in this case, s. 16(3) of the *Canada Evidence Act*, which governs the capacity to testify of adults with mental disabilities. Section 16 provides:

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

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

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

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

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

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

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

1. Section 16(1) sets out what a judge must do when a challenge is raised. First, the judge must determine “whether the person understands the nature of an oath or a solemn declaration” and “whether the person is able to communicate the evidence” (s. 16(1)). If these requirements are met, the witness testifies under oath or affirmation, as other witnesses do (s. 16(2)). If these requirements are not met, the judge moves on to s. 16(3). Section 16(3) provides that “[a] person . . . who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may . . . testify on promising to tell the truth.”
2. In brief, s. 16(1) provides that an adult witness whose competence to testify is challenged should testify under oath or affirmation, if the witness “understands the nature of an oath or a solemn affirmation” and can “communicate the evidence”. Here K.B. did not meet the first requirement. The inquiry therefore moved to s. 16(3), which states that if an adult witness cannot take the oath or affirm under s. 16(1), then she must be permitted to testify *if she is “able to communicate the evidence” and promises to tell the truth.*
3. On its face, s. 16 says that in a case such as this where the witness cannot take the oath or affirm, the judge has only one further issue to consider — whether the witness can communicate the evidence. If the answer to that question is yes, the judge must then ask the witness whether she promises to tell the truth. If she does, she is competent to testify. It is not necessary to inquire into whether the witness understands the duty to tell the truth.
4. The respondent argues, however, that the plain words of s. 16(3) do not suffice. They must be supplemented, he says, by the requirement that an adult witness with mental disabilities who cannot take an oath or affirm must not only be able to communicate the evidence and promise to tell the truth, but must also *understand the nature of a promise to tell the truth*.
5. I cannot accept this submission. The words of an Act are to be interpreted in their entire context: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. The wording of s. 16(3), its history, its internal logic and its statutory context all point to the conclusion that s. 16(3) should be read as it stands, without reading in a further requirement that the witness demonstrate an understanding of the nature of the obligation to tell the truth. All that is required is that the witness be able to communicate the evidence and in fact promise to tell the truth.
6. First, as already mentioned, this interpretation goes beyond the words used by Parliament. To insist that the witness demonstrate understanding of the nature of the obligation to tell the truth is to import a requirement into the section that Parliament did not place there. The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision. Where ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 44. However, Parliament has clearly stated the requirements for finding adult witnesses with mental disabilities to be competent. Section 16 shows no ambiguity.
7. Second, the history of s. 16 supports the view that Parliament intended to remove barriers that had prevented adults with mental disabilities from testifying prior to the 1987 amendments (S.C. 1987, c. 24). The amendments altered the common law rule, by virtue of which only witnesses under oath could testify. To take the oath or affirm, a witness must have an understanding of the duty to tell the truth: *R. v. Brasier* (1779), 1 Leach 199, 168 E.R. 202. Adults with mental disabilities might not be able to do this. To remove this barrier, Parliament provided an alternative basis for competence for this class of individuals. Section 16(1) of the 1987 provision continued to maintain the oath or affirmation as the first option for adults with mental disabilities, but s. 16(3) provided for competence based simply on the ability to communicate the evidence and a promise to tell the truth.
8. This history suggests that Parliament intended to eliminate an understanding of the abstract nature of the oath or solemn affirmation as a prerequisite for testimonial capacity. Failure to show that the witness *could demonstrate an understanding of the obligation to tell the truth* was no longer the end of the matter. Provided the witness (1) was able to *communicate the evidence*, and (2) promised to tell the truth, she should be allowed to testify.
9. The drafters of s. 16(3) did not intend this provision to require an abstract understanding of the duty to tell the truth (see Appendix A). The original text of Bill C-15, which adopted the 1987 amendments, was changed by the Legislative Committee on Bill C-15 precisely to avoid that interpretation. The version of s. 16(3) first put before Parliament allowed testimony on promising to tell the truth if the witness was “sufficiently intelligent that the reception of the evidence is justified”. A discussion was held on the meaning of “sufficient intelligence”, after which the Committee concluded that all that was needed for a witness to be sufficiently intelligent was to understand the moral difference between telling the truth and lying. The Committee, fearing that this would open the door to abstract inquiries, ultimately replaced “sufficient intelligence” by “able to communicate the evidence”. The deliberations that followed emphasized the practical ability to communicate the evidence. There was no suggestion that ability to communicate the evidence accompanied by a promise to tell the truth implicitly imposed a requirement that the witness demonstrate a more abstract understanding of the duty to tell the truth.
10. The historic background against which s. 16(3) was enacted explains why Parliament might have wished in 1987 to lower the requirements of testimonial competence for adults with mental disabilities, who are nonetheless capable of communicating the evidence. While adults with mental disabilities received little consideration in the pre-1987 case law, the inappropriateness of questioning children on abstract understandings of the truth had been noted and criticized. In *R. v. Bannerman* (1966), 48 C.R. 110 (Man. C.A.), Dickson J. *ad hoc* (as he then was) rejected the practice of examining child witnesses on their religious beliefs and the philosophical meaning of truth. Meanwhile, awareness of the sexual abuse of children and adults with mental disabilities was growing. To rule out the evidence of children and adults with mental disabilities at the stage of competence — the effect of the requirement of an abstract understanding of the nature of the obligation to tell the truth — meant their stories would never be told and their cases never prosecuted. These concerns explain why Parliament moved to simplify the competence test for adult witnesses with mental disabilities.
11. Third, and flowing from this history, the internal logic of s. 16 negates the suggestion that “promising to tell the truth” in s. 16(3) must be read as implying an understanding of the obligation to tell the truth. Two procedures are provided by s. 16. The preferred option is testimony under oath or affirmation (s. 16(1)), and the alternative procedure is testimony on a promise to tell the truth (s. 16(3)). If the witness is required under s. 16(3) to demonstrate that she understands the obligation to tell the truth, s. 16(3) adds little, if anything, to s. 16(1). In both cases, the witness is required to articulate abstract concepts of the nature of truth and the nature of the obligation to tell the truth in court. The result is essentially to render s. 16(3) a dead letter and to negate the dual structure of the provision. This runs against the principle of statutory interpretation that Parliament does not speak in vain: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.
12. Fourth, s. 16(4) indicates that ability to communicate the evidence is the only quality that an adult with mental disabilities must possess in order to testify under s. 16(3). Section 16(4) provides that the proposed witness is unable to testify if she neither understands the nature of an oath or solemn affirmation nor is able to communicate the evidence. It follows that the witness is competent to testify if she is able to communicate the evidence; she may testify on promising to tell the truth under s. 16(3). The qualities envisaged in s. 16 as basis for testimonial competence are mentioned in s. 16(4). Imposing an additional qualitative requirement to understand the nature of a promise to tell the truth would flout the utility of s. 16(4).
13. Fifth, the legislative context speaks against reading s. 16(3) as requiring that an adult witness with mental disabilities understand the nature of the obligation to tell the truth. If this requirement is added to s. 16(3), the result is a different standard for the competence of adults with mental disabilities under s. 16(3) and children under s. 16.1 (enacted in 2005 (S.C. 2005, c. 32) pursuant to the “Brief on Bill C-2: Recognizing the Capacities & Needs of Children as Witnesses in Canada’s Criminal Justice System” (Child Witness Project, March 2005) (the “Bala Report”)). As will be discussed more fully below, s. 16(3) governing the competence of adults with mental disabilities, and ss. 16.1(3), (5) and (6) governing the competence of children, set forth essentially the same requirements. Broadly speaking, both condition testimonial capacity on: (1) the ability to communicate or answer questions; and (2) a promise to tell the truth. While it was open to Parliament to enact different requirements for children and adults with the minds of children, consistency of Parliamentary intent should be assumed, absent contrary indications. No explanation has been offered as to why Parliament would consider a promise to tell the truth a meaningful procedure for children, but an empty gesture for adults with mental disabilities.
14. The foregoing reasons make a strong case that s. 16(3) should be read as requiring only two requirements for competence of an adult with mental disabilities: (1) ability to communicate the evidence; and (2) a promise to tell the truth. However, two arguments have been raised in opposition to this interpretation: first, without a further requirement of an understanding of the obligation to tell the truth, a promise to tell the truth is an “empty gesture”; second, Parliament’s failure in 2005 to extend to adults with mental disabilities the s. 16.1(7) prohibition on the questioning of children means that it intended this questioning to continue for adults. I will examine each argument in turn.
15. The first argument is that unless an adult witness with mental disabilities is required to demonstrate that she understands the nature of the obligation to tell the truth, the promise is an “empty gesture”. However, this submission’s shortcoming is that it departs from the plain words of s. 16(3), on the basis of an assumption that is unsupported by any evidence and contrary to Parliament’s intent. Imposing an additional qualitative condition for competence that is not provided in the text of s. 16(3) would demand compelling demonstration that a promise to tell the truth cannot amount to a meaningful procedure for adults with mental disabilities. No such demonstration has been made. On the contrary, common sense suggests that the act of promising to tell the truth may be useful, even in the absence of the witness’s ability to explain what telling the truth means in abstract terms.
16. Promising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose. A witness who is able to communicate the evidence, as required by s. 16(3), is necessarily able to relate events. This in turn implies an understanding of what really happened — i.e. the truth — as opposed to fantasy. When such a witness promises to tell the truth, this reinforces the seriousness of the occasion and the need to do so. In dealing with the evidence of children in s. 16.1, Parliament held that a promise to tell the truth was all that is required of a child capable of responding to questions. Parliament did not think a child’s promise, without more, is an empty gesture. Why should it be otherwise for an adult with the mental ability of a child?
17. The second argument raised in support of the proposition that “promising to tell the truth” in s. 16(3) implies a requirement that the witness must show that she understands the nature of the obligation to tell the truth is that Parliament has not enacted a ban on questioning adult witnesses with mental disabilities on the nature of the obligation to tell the truth, as it did for child witnesses in 2005 in s. 16.1(7). To understand this argument, we must briefly trace the history of s. 16.1.
18. In 2005, following the Bala Report, Parliament once more modified the *Canada Evidence Act*’s provisions on testimonial competence, but this time only with respect to children. The central focus of the 2005 legislation relating to the *Canada Evidence Act* was the competence of *child* witnesses, with the aim of altering the restrictive gloss the case law had placed on the previous provisions relating to the capacity of children to testify. Chief among this case law was *R. v. Khan* (1988), 42 C.C.C. (3d) 197 (Ont. C.A.), which insisted that a child understand the nature of the obligation to tell the truth before the child could testify. Section 16.1, in unequivocal language, rejected this requirement. It stated:

**16.1** (1) [Person under fourteen years of age] A person under fourteen years of age is presumed to have the capacity to testify.

(2) [No oath or solemn affirmation] A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) [Evidence shall be received] The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

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

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

(6) [Promise to tell truth] The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) [Understanding of promise] No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

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

1. Section 16.1, like s. 16(3) governing adult witnesses with mental disabilities, imposed two preconditions for the testimony of children: (1) that the child be able to understand and respond to questions (s. 16.1(5)); and (2) that the child promise to tell the truth (s. 16.1(6)). But, taking direct aim at *Khan*’sinsistence that children be questioned on their understanding of the nature of the obligation to tell the truth, s. 16.1(7) went on to state explicitly that children not “*be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court*”.
2. The argument is that if Parliament had intended adult witnesses with mental disabilities to be competent to testify simply on the basis of the ability to communicate and the making of a promise, it would have enacted a ban on questioning them on their understanding of the nature of the obligation to tell the truth, as it did for child witnesses under s. 16.1(7). The absence of such a provision, it is said, requires us to draw the inference that Parliament intended that *adult* witnesses with mental disabilities *must* be questioned on the obligation to tell the truth.
3. First, this argument overlooks the fact that Parliament’s concern in enacting the 2005 amendment to the *Canada Evidence Act* was exclusively with children. The changes arose out of the Bala Report on the problems associated with prosecuting crimes against children. The Parliamentary debates on s. 16.1 attest to the fact that the focus of the 2005 amendment was on children, and only children.
4. Moreover, it is apparent from the Parliamentary works on Bill C-2 that s. 16.1(7) was intended to confirm the existing formal requirement of a promise alone, and not to modify the law: see Appendix B. The record of the standing House of Commons committee which studied Bill C-2 contains a discussion between Joe Comartin and Professor Nicholas Bala, during a debate on the phrasing of s. 16.1(7), which revealed that the original intent of s. 16(3) was to allow children and adults with mental disabilities to testify by merely promising to tell the truth, once they were held to be able to communicate the evidence:

**[Prof. Nicholas Bala:]** . . . the concern I have arises out of the fact that the present legislation has been interpreted very narrowly by judges. When you actually go back through the transcripts — I was actually a witness in 1988, when the provisions came into effect — I think it was thought by people, well, we don’t have to be very explicit here, because the judges will get this right.

Obviously, on many issues we do have to trust our judiciary, but on certain issues I think it’s important to give them as much direction as possible. My concern is that some judge might read this — and we have quite a lot of case law about this — and say, okay, I can't ask you about your understanding of the nature of the promise, but what about asking you questions about truth-telling? Parliament specifically said in subsection 16.1(6) that you’ll be required to promise to tell the truth. We can’t ask about the nature of the promise, but can we ask you about “truth” and “lie”? [Emphasis added; p. 7.]

(House of Commons, *Evidence of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, No. 26, 1st Sess., 38th Parl., March 24, 2005)

1. This view was confirmed by Ms. Catherine Kane, Director of the Policy Centre for Victim Issues of the Department of Justice Canada, during her opening statement to the Standing Senate Committee on Legal and Constitutional Affairs:

**[Ms. Catherine Kane:]** . . . These amendments were made in 1988 with the purpose of trying to more readily permit children’s evidence to be received. However, as the cases have interpreted this provision, we have not seen that ready acceptance of children’s evidence.

If these two criteria are met, the child gives evidence under an oath or an affirmation. However, if the child does not understand the nature of the oath or the affirmation but has the ability to communicate the evidence, the evidence is received on a promise to tell the truth. That is the current law. While it may appear quite sensible on its face, the interpretations and practise of these provisions do not reflect Parliament’s intention in amending the Evidence in an effort to permit children’s evidence to be admitted more readily.

As interpreted by the courts, section 16 requires that before the child is permitted to testify, the child be subjected to an inquiry as to his or her understanding of the obligation to tell the truth, the concept of a promise, and an ability to communicate. [Emphasis added; pp. 105-6.]

(Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 18, 1st Sess., 38th Parl., July 7, 2005)

Therefore, it cannot be inferred that Parliament’s failure to extend the express ban on questioning in s. 16.1(7) to adult witnesses shows an intent to permit such questioning of adult witnesses with mental disabilities.

1. Second, as already mentioned, the wording of s. 16(3) governing the competence of adult witnesses had since 1987 required only a promise to tell the truth. There was no need for Parliament to add a provision on questioning an adult witness’s understanding of the nature of the obligation to tell the truth in s. 16(3). The fact that Parliament did so 18 years later for children’s evidence under s. 16.1(7) reflects concern with the fact that courts in children’s cases, such as *Khan*, were continuing to engage in this type of questioning, instead of accepting a simple promise to tell the truth. It does not evince an intention that Parliament intended the words “promising to tell the truth” to have different meanings in ss. 16(3) and 16.1(6).
2. Third, the argument that the enactment of s. 16.1(7) for children but not for adults endorsed as applicable to adult witnesses the earlier judicial interpretation of the provisions relating to children does not take into account s. 45 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, which provides:

**45.** (1) [Repeal does not imply enactment was in force] The repeal of an enactment in whole or in part shall not be deemed to be or to involve a declaration that the enactment was previously in force or was considered by Parliament or other body or person by whom the enactment was enacted to have been previously in force.

(2) [Amendment does not imply change in law] The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

(3) [Repeal does not declare previous law] The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

(4) [Judicial construction not adopted] A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.

1. Section 45(3) of the *Interpretation Act* provides that the amendment of an enactment (in this case the adoption of s. 16.1(7)) shall not be deemed to involve any declaration as to the meaning of the previous law (in this case s. 16(3)). Therefore, no inference as to the meaning of s. 16(3) flows from the mere adoption of s. 16.1(7) with respect to children.
2. Additionally, s. 45(4) of the *Interpretation Act* states that the re-enactment of a provision (in this case, s. 16 with respect to adults with mental disabilities) is not sufficient to infer that Parliament adopted the provision’s judicial interpretation which prevailed at the time of the re-enactment. It follows that the fact that s. 16 was re-enacted for adults with mental disabilities in 2005 does not, alone, imply that Parliament intended to countenance the judicial interpretation of this section which required understanding the obligation to tell the truth.
3. Fourth, the argument that the absence of the equivalent of s. 16.1(7) in s. 16(3) means that adult witnesses with mental disabilities must demonstrate an understanding of the nature of the duty to speak the truth is logically flawed. The argument rests on the premise that s. 16(3), unless amended, requires an inquiry into the witness’s understanding of the obligation to tell the truth. On this basis, it asserts that, unless the ban on questioning in s. 16.1(7) dealing with children is read into s. 16(3), such questioning must be conducted. Thus, my colleague Binnie J. states that “[t]he Crown invites us, in effect, to apply the ‘don’t ask’ rule governing children to adults whose mental capacity is challenged” (para. 127).
4. The fallacy in this argument is the starting assumption that s. 16(3) requires importing a “don’t ask” rule. As explained earlier, it does not. Section 16(3) sets two requirements for the competence of adults with mental disabilities: the ability to communicate the evidence and a promise to tell the truth. It is self-sufficient. Nothing further need be imported.
5. Fifth, and following from the previous point, the argument relies on the assumption that unless it can be shown that adult witnesses with mental disabilities are the same as, or like, child witnesses, adult witnesses with mental disabilities must be treated differently, and subjected to an inquiry into their understanding of the nature of the obligation to tell the truth before they can be held competent to testify.  Thus Binnie J. states that before s. 16(3) can be read as importing the “don’t ask” rule, it is for the Crown to establish that there is no difference between children and adults with mental disabilities on the test of what reasonable people would accept. He opines that an assertion of equivalency is “pure assertion on a key issue” (para. 130).
6. There are several answers to this “equivalency” argument.  First, like the previous argument, it rests on the mistaken assumption that the Crown asks us to import a “don’t ask” rule into s. 16(3).  The plain words of s. 16(3) do not require an understanding of the obligation to tell the truth, and it is for the party seeking to depart from the text of s. 16(3) to demonstrate that adults with mental disabilities should be treated differently from children. Second, the argument suffers from inconsistency.  It claims that the equivalency of the vulnerabilities of these two groups of witnesses is “pure assertion on a key issue”, but at the same time claims that the previous judge-made law for children (*Khan*)should apply to adult witnesses with mental disabilities.  Third, one may question how equivalency, were it needed, should be established: Is the proper approach to competence what reasonable people would conclude, or judicial opinion informed by assessment of the situation and expert opinion?
7. The final and most compelling answer to the equivalency argument 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 of a six-year-old? Parliament, by applying essentially the same test to both under s. 16(3) and s. 16.1(3) and (6) of the *Canada Evidence Act*, implicitly finds no difference. In my view, judges should not import one.
8. I conclude that s. 16(3) of the *Canada Evidence Act*, properly interpreted, establishes two requirements for an adult with mental disabilities to take the stand: the ability to communicate the evidence and a promise to tell the truth. A further requirement that the witness demonstrate that she understands the nature of the obligation to tell the truth should not be read into the provision.

C. *The Jurisprudence*

1. I have concluded that s. 16(3), on its plain words and in its context, reveals only two requirements for an adult with mental disabilities to have the capacity to testify: (1) that the witness be able to communicate the evidence, and (2) that the person promise to tell the truth. It is necessary next to consider whether the jurisprudence requires a different result. My colleague Binnie J. argues that the cases, and in particular *Khan*, require that “promising to tell the truth” in s. 16(3) must be read as impliedly importing an additional requirement — an understanding of the nature of the obligation engaged by the promise. With respect, I cannot agree.
2. It is necessary at the outset to describe what *Khan* decided. *Khan* was concerned with the predecessor of s. 16, which was first enacted in 1893 (S.C. 1893, c. 31, s. 25) and dealt only with children. The provision required that the proposed witness “understan[d] the duty of speaking the truth”. This phrase was deleted when the provision was amended in 1987. Explaining the statutory requirement that the witness must “understan[d] the duty of speaking the truth” in *Khan*, Robins J.A. stated:

To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so. [Emphasis added; p. 206.]

1. This oft-cited statement of the law proved difficult to apply. The first sentence suggests that the threshold for testimonial competence is low, based on truth telling in “everyday social conduct”. This suggests that the judge need only be satisfied that the witness understands the difference between truth and falsehood in relation to everyday matters and activities — not in some abstract metaphysical sense. The second sentence in this passage from *Khan*, specifically the phrases “knows that it is wrong to lie” and “understands the necessity to tell the truth” (emphases added), move beyond everyday social conduct into more abstract, philosophical realms. In *obiter*, Robins J.A. opined that the same test should be applied to the post-1987 section, on the grounds that without the requirement that the witness understand what a promise is and the importance of keeping it, the promise would be an “empty gesture”.
2. In *R. v. Farley* (1995), 23 O.R. (3d) 445, the Ontario Court of Appeal adopted this *obiter dictum* and applied it to the post-1987 version of s. 16(3), the provision applicable in this case. Other provincial courts of appeal followed suit: *R. v. P.M.F.* (1992), 115 N.S.R. (2d) 38; *R. v. McGovern* (1993), 82 C.C.C. (3d) 301 (Man.); *R. v. S.M.S.* (1995), 160 N.B.R. (2d) 182. In *R. v. Rockey*, [1996] 3 S.C.R. 829, a minority of this Court, *per* McLachlin J., held that a child was incompetent to testify on the basis of his inability to *communicate* the evidence, referring to *Farley* with approval; the question of whether s. 16(3) incorporated the *Khan* test was not at issue in that case. Appellate courts continue to require demonstration of an understanding of the duty to speak the truth under s. 16(3): *R. v. Ferguson* (1996), 112 C.C.C. (3d) 342 (B.C.); *R. v. Parrott* (1999), 175 Nfld. & P.E.I.R. 89 (Nfld.); *R. v. A. (K.)* (1999), 137 C.C.C. (3d) 554 (Ont.); *R. v. R.J.B.*, 2000 ABCA 103, 255 A.R. 301; *R. v. Brouillard*, 2006 QCCA 1263, 44 C.R. (6th) 218; *R. v. E.E.D.*, 2007 SKCA 99, 304 Sask. R. 192. In the case at bar, the Ontario Court of Appeal affirmed that view, upholding the trial judge’s insistence on the understanding of the duty to speak the truth not merely in “everyday social conduct”, but on an understanding of the duty *abstracted* from everyday situations.
3. This is the first case in which this Court has been squarely called upon to interpret s. 16(3) of the *Canada Evidence Act* and confront the legacy of the *obiter dicta* in *Khan*. In my view, the test proposed in *Khan* is unhelpful and inapplicable, insofar as it is read as requiring or condoning an abstract inquiry into the nature of the obligation to tell the truth.
4. First and foremost, *Khan* was concerned with a substantially different pre-1987 version of s. 16, which was adopted in 1893 and which explicitly required that the proposed witness “understands the duty of speaking the truth”. The current provision requires only that the witness be able to communicate the evidence and promise to tell the truth. It speaks only of two practical, less abstract, requirements — the ability to communicate the evidence and a promise to tell the truth. In short, *Khan* imposed a requirement to demonstrate understanding of the nature of the obligation to tell the truth, based on the phrase “understands the duty of speaking the truth”. That phrase has been removed from the current s. 16(3). It follows that *Khan* simply does not apply to this case, and that the *obiter dictum* in *Khan* suggesting that it does should be rejected. In 1987, Parliament deleted the requirement of understanding the nature of the duty to tell the truth. Judges should not bring it back in.
5. Second, the *Khan* test, as already noted, is ambivalent. It first suggests that all that is required is an understanding of the duty to speak the truth “in terms of ordinary everyday social conduct” (p. 206). However, it then goes on to illustrate this test in terms abstracted from everyday social conduct. In my view, the former approach is preferable.
6. This lower threshold recognizes that witnesses of limited mental ability, whether by reason of age or disability, understand and articulate events in the concrete terms of the world around them. The capacity to abstract from the concrete and draw generalizations about conduct unrelated to concrete situations typically develops at a later, more advanced stage of mental development. A child or adult with mental disabilities may be able to distinguish between what is true and false or right and wrong in a particular situation, yet lack the ability to articulate in general language the reasons for this understanding. To insist on the articulation of the nature of the obligation to tell the truth, abstracted from particular situations, may result in the witness’s evidence being excluded, even though it is reliable.
7. Third, as discussed above, Parliament’s response to *Khan*’s insistence on an understanding of the duty to speak the truth in abstract terms and the metaphysical questioning this insistence gave rise to, was to expressly forbid such inquiries in the case of children by enacting s. 16.1(7) in 2005. Why then, one may ask, should courts struggle to read a contrary purpose into the plain language of s. 16, which requires only a concrete inquiry into whether the proposed witness can communicate the evidence and a promise to tell the truth?
8. I conclude that, insofar as the authorities suggest that “promising to tell the truth” in s. 16(3) should be read as requiring an abstract inquiry into an understanding of the obligation to tell the truth, they should be rejected. All that is required is that the witness be able to communicate the evidence and promise to tell the truth.

D. *Policy Considerations*

1. I have concluded that s. 16(3) imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth. It is unnecessary and indeed undesirable to conduct an abstract inquiry into whether the witness generally understands the difference between truth and falsity and the obligation to give true evidence in court. Mentally limited people may well understand the difference between the truth and a lie and know they should tell the truth, without being able to articulate in general terms the nature of truth or why and how it fastens on the conscience in a court of law. Section 16(3), in assessing the witness’s capacity, focuses on the concrete acts of communicating and promising. The witness is not required to explain the difference between the truth and a lie, or what makes a promise binding. I have argued that this result follows from the plain words of s. 16 of the *Canada Evidence Act*, and that judges should not by implication add other elements to the dual requirements of an ability to communicate evidence and a promise to tell the truth imposed by s. 16(3).
2. The discussion of the proper interpretation of s. 16(3) of the *Canada Evidence Act* would not be complete, however, without addressing the policy concerns underlying the issue. Two potentially conflicting policies are in play. The first is the social need to bring to justice those who sexually abuse people of limited mental capacity — a vulnerable group all too easily exploited. The second is to ensure a fair trial for the accused and to prevent wrongful convictions.
3. The first policy consideration is self-evident and requires little amplification. Those with mental disabilities are easy prey for sexual abusers. In the past, mentally challenged victims of sexual offences have been frequently precluded from testifying, not on the ground that they could not relate what happened, but on the ground that they lacked the capacity to articulate in abstract terms the difference between the truth and a lie and the nature of the obligation imposed by promising to tell the truth. As discussed earlier, such witnesses may well be capable of telling the truth and in fact understanding that when they do promise, they should tell the truth. To reject this evidence on the ground that they cannot explain the nature of the obligation to tell the truth in philosophical terms that even those possessed of normal intelligence may find challenging is to exclude reliable and relevant evidence and make it impossible to bring to justice those charged with crimes against the mentally disabled.
4. The inability to prosecute such crimes and see justice done, whatever the outcome, may be devastating to the family of the alleged victim, and to the victim herself. But the harm does not stop there. To set the bar too high for the testimonial competence of adults with mental disabilities is to permit violators to sexually abuse them with near impunity. It is to jeopardize one of the fundamental desiderata of the rule of law: that the law be enforceable. It is also to effectively immunize an entire category of offenders from criminal responsibility for their acts and to further marginalize the already vulnerable victims of sexual predators. Without a realistic prospect of prosecution, they become fair game for those inclined to abuse.
5. What then of the policy considerations on the other side of the equation? Here again, the starting point is clear. The *Canadian Charter of Rights and Freedoms* guarantees a fair trial to everyone charged with a crime. This right cannot be abridged; an unfair trial can never be condoned.
6. It is neither necessary nor wise to enter on the vast subject of what constitutes a fair trial. One searches in vain for exhaustive definitions in the jurisprudence. Rather, the approach taken in the jurisprudence is to ask whether particular rules or occurrences render a trial unfair. It is from that perspective that we must approach this issue in this case.
7. The question is this: Does allowing an adult witness with mental disabilities to testify when the witness can communicate the evidence and promises to tell the truth render a trial unfair? In my view, the answer to this question is no.
8. The common law, upon which our current rules of evidence are founded, recognized a variety of rules governing the capacity to testify in different circumstances. The golden thread uniting these varying and different rules is the principle that the evidence must meet a minimal threshold or reliability as a condition of being heard by a judge or jury. Generally speaking, this threshold of reliability is met by establishing that the witness has the capacity to understand and answer the questions put to her, and by bringing home to the witness the need to tell the truth by securing an oath, affirmation or promise. There is no guarantee that any witness — even those of normal intelligence who can take the oath or affirm — will in fact tell the truth, all the truth, or nothing but the truth. What the trial process seeks is merely a basic indication of reliability.
9. Many cases, including *Khan*, have warned against setting the threshold for the testimonial competence too high for adults with mental disabilities: *R. v. Caron* (1994), 72 O.A.C. 287; *Farley*; *Parrott*. This reflects the fact that such witnesses may be capable of giving useful, relevant and reliable evidence. It also reflects the fact that allowing the witness to testify is only the first step in the process. The witness’s evidence will be tested by cross-examination. The trier of fact will observe the witness’s demeanour and the way she answers the questions. The result may be that the trier of fact does not accept the witness’s evidence, accepts only part of her evidence, or reduces the weight accorded to her evidence. This is a task that judges and juries perform routinely in a myriad of cases involving witnesses of unchallenged as well as challenged mental ability.
10. The requirement that the witness be able to communicate the evidence and promise to tell the truth satisfies the low threshold for competence in cases such as this. Once the witness is allowed to testify, the ultimate protection of the accused’s right to a fair trial lies in the rules governing admissibility of evidence and in the judge’s or jury’s duty to carefully assess and weigh the evidence presented. Together, these additional safeguards offer ample protection against the risk of wrongful conviction.

E. *Summary of the Section 16(3) Test*

1. To recap, s. 16(3) of the *Canada Evidence Act* imposes two conditions for the testimonial competence of adults with mental disabilities:

(1) the witness must be able to communicate the evidence; and

(2) the witness must promise to tell the truth.

Inquiries into the witness’s understanding of the nature of the obligation this promise imposes are neither necessary nor appropriate. It is appropriate to question the witness on her ability to tell the truth in concrete factual circumstances, in order to determine if she can communicate the evidence. It is also appropriate to ask the witness whether she in fact promises to tell the truth. However, s. 16(3) does not require that an adult with mental disabilities demonstrate an understanding of the nature of the truth *in abstracto*, or an appreciation of the moral and religious concepts associated with truth telling.

1. The following observations may be useful when applying s. 16(3) in the context of s. 16 of the *Canada Evidence Act*.
2. First, the *voir dire* on the competence of a proposed witness is an independent inquiry: it may not be combined with a *voir dire* on other issues, such as the admissibility of the proposed witness’s out-of-court statements.
3. Second, although the *voir dire* should be brief, it is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. A witness should not be found incompetent too hastily.
4. Third, the primary source of evidence for a witness’s competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner.
5. Fourth, the members of the proposed witness’s surrounding who are personally familiar with her are those who best understand her everyday situation. They may be called as fact witnesses to provide evidence on her development.
6. Fifth, expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness.
7. Sixth, the trial judge must make two inquiries during the *voir dire* on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence?
8. Seventh, the second inquiry into the witness’s ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to ask if she can differentiate between true and false everyday factual statements.
9. Finally, the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only.

III. Application

1. During the *voir dire* on K.B.’s testimonial capacity, the Crown posed a line of questions going to whether she could tell the difference between true and false factual statements in concrete circumstances. These were relevant to K.B.’s basic ability to communicate the evidence:

**MR. SEMENOFF:**

**Q.** How old are you now, [K.B.]?

**A.** I’m 22, you know that.

**Q.** 22? When’s your birthday?

**A.** [Birth date].

**Q.** [Birth date]. Are you going to school now or are you done with school?

**A.** I’m not done in school yet.

**Q.** What school do you go to, [K.B.]?

**A.** [Name of school].

**Q.** How long -- do you know how long you’ve been going to [name of school]?

**A.** I don’t know.

**Q.** Did you go to any school before you went to [name of school]?

**A.** From [name of previous school].

**Q.** From [name of previous school]. Okay. Did you have a teacher from that school, a Ms. [W.]?

**A.** Ms. [R.].

**Q.** Oh, [R.]. Okay. And I call her Ms. [W.], do you know what her name is, is it [R.] or is it Ms. [W.]?

**A.** [R.].

**Q.** Okay.

. . .

**Q.** [K.B.], if I were to tell you that the room that we’re in that the walls in the room are black[,] would that be a truth or a lie, [K.B.]?

**A.** A lie.

**Q.** Why would it be a lie?

**A.** It’s different colours in here.

**Q.** There are different colours in here. What colour are the walls?

**A.** Purple.

**Q.** Purple. Okay. If I were to tell you that the gown that I’m wearing that that is black, would that be a truth or a lie?

**A.** The truth.

**Q.** And why is that?

**A.** I don’t know.

**Q.** You don’t know. Is it a good thing or a bad thing to tell the truth?

**A.** Good thing.

**Q.** Is it a good thing or a bad thing to tell a lie?

**A.** Bad thing.

(A.R., vol. I, at pp. 111-13)

However, the trial judge went on to question K.B. on her understanding of the meaning of truth, religious concepts, and the consequences of lying.

**[THE COURT:]**

**[Q.]** Do you go to church, [K.B.]?

**A.** No.

**Q.** No. Have you ever been taught about God or anything like that?

**A.** No.

**Q.** No? All right. What happens if you steal something?

**A.** I don’t know.

**Q.** You don’t know. If you steal something and no one sees it, will anything happen to you? Nothing will happen. Why won’t anything happen?

**A.** I don’t know.

**Q.** You don’t know. Tell me what you think about the truth.

**A.** I don’t know.

**Q.** You don’t know. All right. Is it important to tell the truth?

**A.**  I don’t know.

**Q.** You don’t know. Tell me what a promise is when you make a --

**A.** I don’t know.

**Q.** -- promise. What’s a promise?

**A.** I don’t know.

**Q.** You don’t know what a promise is. Okay. Have you ever been in court before?

**A.** Once.

**Q.** Once? And do you think it’s an important thing to be in court?

**A.** I don’t know.

**Q.** You don’t know. All right. Do you know what an oath is, to take an oath?

**A.** I don’t know.

**Q.** No. Do you have any idea what it means to tell the truth?

**A.** I don’t know.

**Q.** You don’t know. If you tell a lie does anything happen to you? Nothing happens.

**A.** No.

. . .

**[THE COURT:]**

**[Q.]** Do you know why you’re here today?

**A.** I don’t know. To talk about [D.A.I.].

**Q.** Yes, and do you think that’s really important?

**A.** Maybe yeah.

**Q.** Maybe yeah? Remember earlier I was asking you about a promise?

**A.** No.

**Q.** Have you ever made a promise to anybody?

**A.** I don’t know.

**Q.** That you promised you’ll be good, did you ever say that? Have you ever heard that expression “I promise to be good, mommy”?

**A.** Okay.

**Q.** All right. So do you know what a promise is, that you’re going to do something the right way? Do you understand that?

**A.** Okay.

**Q.** Can you tell me whether you understand that, [K.B.]?

**A.** I don’t know.

**Q.** Does anything happen if you break a promise?

**A.** I don’t know.

**Q.** You told me you don’t go to church, right?

**A.** Right.

**Q.** And no one has ever told you about God; is that correct? No one has ever told you about God?

**A.** No.

**Q.** Has anyone ever told you that if you tell big lies you’ll go to jail?

**A.** Right.

**Q.** If you tell big lies will you go to jail?

**A.** No.

(*Ibid.*, at pp. 117-19 and 155-56)

1. As these passages demonstrate, the trial judge was not satisfied with the Crown’s questions on K.B.’s ability to recount events and distinguish between telling the truth and lying in concrete, real-life situations. He went on to question her on the nature of truth, religious obligations and the consequences of failing to tell the truth. Because K.B. was unable to satisfactorily answer these more abstract questions, he ruled that she could not be allowed to promise to tell the truth and refused to allow her to testify.
2. This ruling was based on an erroneous interpretation of s. 16(3), which the trial judge read as requiring an understanding of the duty to speak the truth. Hence, K.B. was precluded from testifying on promising to tell the truth. The trial judge summed up his conclusions as follows:

Having questioned [K.B.] at length I am fully satisfied that [K.B.] has not satisfied the prerequisite that she understands the duty to speak to the truth. She cannot communicate what truth involves or what a lie involves, or what consequences result from truth or lies, and in such circumstances, quite independent of the evidence of [Dr. K.], I am not satisfied that she can be permitted to testify under a promise to tell the truth. [Emphasis added; *ibid.*, at p. 3.]

1. The fatal error of the trial judge is that he did not consider the second part of the test under s. 16. He failed to inquire into whether K.B. had the ability to communicate the evidence under s. 16(3), insisting instead on an understanding of the duty to speak the truth that is not prescribed by s. 16(3). This error, an error of law, led him to rule K.B. incompetent and hence to the total exclusion of her evidence from the trial. This fundamental error vitiated the trial.
2. This fundamental flaw in the trial cannot be rectified by comments made by the trial judge at other points in the trial or by the doctrine of deference. My colleague Binnie J. suggests that the trial judge’s comments during the *voir dire* and hearing on hearsay admissibility (paras. 136, 138 and 139) support his conclusion on the earlier *voir dire* that K.B. was not competent to testify under s. 16(3). However, it is difficult to see how subsequent comments in the course of dealing with other issues could rehabilitate the trial judge’s erroneous application of the requirements for competence under s. 16. The *voir dire* on competence and the *voir dire* on the admissibility of hearsay evidence were two different inquiries. The evidence of Ms. W., on which the trial judge relied in making the comments regarding hearsay, was not before the trial judge when he ruled K.B. incompetent to testify. Moreover, the threshold of reliability for hearsay evidence differs from the threshold ability to communicate the evidence for competence; a ruling on testimonial capacity cannot be subsequently justified by comments in a ruling on hearsay admissibility. Had the competence hearing been properly conducted, this might have changed the balance of the trial, including the hearing (if any) on hearsay admissibility. The trial judge’s fundamental error in the s. 16 inquiry on competence cannot be corrected by speculation based on comments made in a different inquiry.
3. Nor does the ruling that K.B. was incompetent, based as it was on a misstatement of the legal test under s. 16(3), attract deference. This amounted to an error of law, to be judged on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26-37. The defect in the trial judge’s ruling cannot, in my view, be cured.
4. I would allow the appeal, set aside the acquittal, and direct a new trial.

The reasons of Binnie, LeBel and Fish JJ. were delivered by

1. Binnie J. (dissenting) — I agree with the Chief Justice that, in this case, “[t]wo potentially conflicting policies are in play”, the first being to “bring to justice” those accused of sexual abuse and the second being “to ensure a fair trial for the accused and to prevent wrongful convictions” (para. 65). In my view, by turning Parliament’s direction permitting a person “whose mental capacity is challenged” to testify only “on promising to tell the truth” into an empty formality ― a mere mouthing of the words “I promise” without any inquiry as to whether the promise has any significance to the potential witness ― the majority judgment unacceptably dilutes the protection Parliament intended to provide to accused persons.
2. I prefer the contrary interpretation of s. 16(3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, expressed by our Chief Justice herself in her concurring judgment in *R. v. Rockey*, [1996] 3 S.C.R. 829, where, as McLachlin J., drawing a distinction between “the ability to communicate the evidence and the ability to promise to tell the truth” (para. 25), wrote:

The only inference that can be drawn from this evidence is that while [the potential witness] Ryan understood the difference between what is “so” and “not so”, he had no conception of any moral obligation to say what is “right” or “so” in giving evidence or otherwise. In these circumstances, no judge could reasonably have concluded that Ryan was able to promise to tell the truth. [Emphasis added; para. 27.]

McLachlin J.’s views on the requirements of s. 16(3) were not disagreed with by the majority, and indeed on this point she simply reflected the Court’s earlier unanimous opinion in *R. v. Khan*, [1990] 2 S.C.R. 531, at pp. 537-38.

1. The majority judgment in the present case repudiates the earlier jurisprudence and the balanced approach it achieved. It entirely eliminates any inquiry into whether the potential witness has any “conception of any moral obligation to say what is ‘right’”.
2. I agree with the Chief Justice that “allowing the witness to testify is only the first step in the process” (para. 72). More particularly, my colleague continues:

The witness’s evidence will be tested by cross-examination. The trier of fact will observe the witness’s demeanour and the way she answers the questions. [*Ibid*.]

In this case, the exchanges between the challenged witness, K.B., and the trial judge, demonstrated the futility of any such cross-examination. The trial judge noted that K.B. “did not ‘compute’ questions before giving answers, that she was not processing the information being communicated to her, and that she had serious problems relating to her ability to communicate and to recollect” (2008 CanLII 21726 (Ont. S.C.J.) (the “hearsay decision”), at para. 7). As a practical matter, it is not possible to cross-examine such a witness meaningfully. The trial judge concluded correctly on this point that “there is no secure method of testing K.B.’s credibility” (para. 56). The result of the majority judgment in this case is to create unfair prejudice to the accused.

1. What is fundamental, as was emphasized here by the Ontario Court of Appeal, is that the trial judge had the opportunity to observe the witness’s demeanour and the way she answers the questions (McLachlin C.J., at para. 72). We do not have that advantage. The trial judge concluded, based on his direct observation, that, in light of the severity of her mental disability, K.B.’s evidence could not be relied upon for the truth-seeking purposes of a criminal trial and it ought to be altogether excluded. In a judge-alone trial, it goes without saying, where the trial judge found that K.B.’s testimony did not meet even a threshold of admissibility, he would not — had the evidence been admitted — have accepted it as the basis for a proper conviction. An acquittal was inevitable.
2. In the result, despite all the talk in our cases of the need to “defer” to trial judges on their assessment of mental capacity, a deference which, in my opinion, is manifestly appropriate, the majority judgment shows no deference to the views of the trial judge whatsoever and orders a new trial. I am unable to agree. I therefore dissent.

I. Judicial History

A. *Ontario Superior Court of Justice, 2008 CanLII 21726 (the “Hearsay Decision”)*

1. The Chief Justice has set out the substance of the trial judge’s ruling. I should add that he found numerous contradictions in K.B.’s testimony. For example, K.B. testified that she had told her mother about D.A.I. touching her, but her mother contradicted this (para. 38). With respect to the out-of-court statements, the trial judge expressed serious concerns about the truth of the statements based on K.B.’s “serious problems in communicating her evidence, her incapacity to answer relatively simple questions surrounding the allegations, her confusion with respect to whether or not she spoke to her mother” (para. 53 (emphasis added)). He also noted the testimony of K.B.’s teacher that K.B.’s mother had told her that she viewed K.B.’s story with “disbelief” (para. 54). Given the close relationship between K.B. and the respondent D.A.I., the trial judge found that “[w]hat may have been innocent in intent has the potential to be misinterpreted” (para. 55).
2. The trial judge concluded:

I am convinced that to admit K.B.’s statement for its truth would effectively deprive the court of any reliable method of testing its truth. It is clear from the short cross-examination undertaken . . . at the preliminary inquiry, there is no secure method of testing K.B.’s credibility. . . . What the Crown purports to be confirmatory evidence is either ambiguous or itself unreliable. [Emphasis added; para. 56.]

B. *Ontario Court of Appeal, 2010 ONCA 133, 260 O.A.C. 96 (Doherty, MacPherson and Armstrong JJ.A.)*

1. Doherty and MacPherson JJ.A. applied a “very deferential” standard of review to the trial judge’s assessment under s. 16, noting that the trial judge heard not only what the proposed witness said, but also how it was said (paras. 20-21). In their view, Parliament chose to create a new testimonial competence test for children but to limit it so as only to apply to children under 14 (para. 41). For whatever reason, Parliament intended to treat children and adults with a mental disability differently when it comes to testimonial competence (para. 43).
2. The Court of Appeal also held that the trial judge had correctly rejected the confirmatory evidence tendered by the Crown, namely K.B.’s sister’s evidence and the photograph found in the respondent’s bedroom (para. 50). He had carefully considered the sister’s testimony, but decided that it was unreliable. The trial judge had also found that the respondent’s explanation that K.B. flashed him when he took the photograph could have been true. Doherty and MacPherson JJ.A., speaking for a unanimous Court of Appeal, held that both of these conclusions were open to the trial judge (*ibid*.). The appeal was accordingly dismissed.

II. Analysis

1. The substantial issue in this appeal concerns the correctness of the trial judge’s approach to assessment of the testimonial capacity of the complainant, K.B. The admissibility of her evidence turns on the interpretation of the rules established by Parliament in s. 16 of the *Canada Evidence Act*, which delineates the circumstances in which a proposed witness “of fourteen years of age or older whose mental capacity is challenged” may or may not testify.
2. A trial judge is faced with three options. If the challenged witness is “able to communicate the evidence” and “understands the nature of an oath or a solemn affirmation”, the person “shall testify under oath or solemn affirmation” (s. 16(2)). A person who satisfies the first criterion (“able to communicate the evidence”) but not the second (i.e. does not understand “the nature of an oath or a solemn affirmation”) may provide unsworn testimony “on promising to tell the truth” (s. 16(3)). A person who does not satisfy either criterion “shall not testify” (s. 16(4)).
3. The few questions posed by the trial judge touching on religion in this case were relevant to the first option of having K.B. testify under oath or affirmation which, as the Chief Justice recognizes, is the “preferred option” (para. 31). If the trial judge had found that K.B. understood the nature of the oath, he would have been obliged to have her testimony given under oath. It was proper for the trial judge to test K.B.’s ability to satisfy this standard rather than assuming, on account of her mental disability, that she would fail the s. 16(1) test.
4. As to the second option (unsworn evidence), it is clear that Parliament did not consider an ability to communicate the evidence to be the sole and sufficient condition of admissibility. A person giving unsworn testimony must nevertheless promise to tell the truth, and this additional requirement is not, in my view, an empty formality but is intended to bolster the court’s effort to establish the true facts and to protect the legitimate interest of the accused to a fair trial.
5. I agree with the Chief Justice that “[p]romising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose” (para. 36). I do not agree with my colleague, however, that it is out of bounds for a trial judge to try to determine — in concrete everyday terms — whether there is in reality such a “prophylactic” effect in the case of a particular witness whose mental capacity has been challenged. If such a witness is so disabled as not to understand “the seriousness of the situation and the importance of being careful and correct”, there is no prophylactic effect, and the fair trial interests of the accused are unfairly prejudiced.

A.*The Khan Test*

1. It is, of course, true that an inability to deal with concepts (“oaths”, “solemn affirmations” and “promises”) does not mean that a person suffering from a mental disability is by that fact unable to relate the factual events that he or she encountered. Many individuals whose mental capacity is not open to challenge may have difficulty giving a correct explanation of these concepts.
2. In an effort to solve this dilemma, this Court in *Khan* adopted the approach formulated by Robins J.A. in *Khan* when it was before the Ontario Court of Appeal ((1988), 42 C.C.C. (3d) 197, at p. 206):

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

This approach (adopted at a time before the *Canada Evidence Act* introduced its present distinction between children and adults with challenged mental capacity) gives meaningful content to the statutory language while recognizing that the “simple line of questioning” is to be factual, not metaphysical.

1. It is true, as the Chief Justice points out, that *Khan* was decided under an earlier version of s. 16 which referred expressly to “the duty of speaking the truth”. However, as both *Khan* and McLachlin J. in *Rockey* were at pains to point out, those words were not interpreted as contemplating an abstract inquiry. In *Rockey*, decided at a time when s. 16(3) read the same as it does now, McLachlin J. insisted on a determination of “the ability to promise to tell the truth” (para. 25 (emphasis added)), but not as the mere physical ability of a potential witness to say the words. In that case, the child witness was not called to testify and the issue was whether his out-of-court statements could nevertheless be admitted against the accused under the principled hearsay exception. To do so required a demonstration of necessity and reliability. McLachlin J. held that “necessity” was established. In her view, the child was incompetent to testify under s. 16(3) because, not only was it “unrealistic to conclude that Ryan could have communicated his evidence in any useful sense either in the courtroom or in a smaller room via closed circuit television”, but, as stated, because “no judge could reasonably have concluded that Ryan was able to promise to tell the truth” (paras. 26-27). Although Parliament had by that time eliminated the words “duty of speaking the truth” from s. 16(3), McLachlin J. nevertheless concluded that the words “on promising to tell the truth” incorporated the understanding in practical terms of a “moral obligation to say what is ‘right’” (para. 27).
2. In the result, the child was held under s. 16(3) to be incompetent to testify. The necessity for the hearsay evidence was therefore established. His out-of-court evidence was admitted and the accused was convicted.
3. There is nothing in McLachlin J.’s reasons in *Rockey* to suggest that the “ability to promise to tell the truth” is to be ascertained on a “don’t ask” basis, i.e. not to endeavour to determine whether the potential witness has any sense of what it means in simple concrete terms to promise to tell the truth. On the contrary, McLachlin J. rested her conclusion on the evidence heard by the trial judge concerning the ability of the potential witness to explain events and to understand the difference in practical terms between telling the truth and lying.
4. Nor was it suggested in *Rockey* that, by insisting on “the ability” to make the promise, McLachlin J. was reading extraneous words into the statute, which is now the cornerstone of the majority judgment in this case. The making of a promise is not just a physical act. The question is whether the potential witness recognizes a sense of obligation, however articulated or unarticulated, to stick to the truth. This interpretation was consistent with the Parliamentary record which, as we will see, demonstrates a legislative intention under s. 16(3) that a trial judge be satisfied that a witness — as a condition precedent to testimonial capacity — understands the difference in practical everyday terms between telling the truth and not telling the truth.
5. Of course, there are witnesses who suffer no mental disability and who recognize perfectly well that they are undertaking an obligation to tell the truth but nevertheless do not do so. That is a different problem. Their mental capacity is not in issue. In their case, the courts rely on cross-examination and other techniques to ferret out the truth. In the case of K.B., there was no allegation whatsoever of bad faith, but she may nevertheless have been mistaken in her perception or recollection of events, and the crucible of cross-examination was considered by the trial judge to be useless because, as stated, he found that “there is no secure method of testing K.B.’s credibility” (hearsay decision, at para. 56).
6. The *Khan* test specifically framed the inquiry as being into “ordinary everyday social conduct” (C.A., at p. 206). At no point did this Court in *Khan* or McLachlin J. in *Rockey* require that the potential witness be able to *articulate* or even understand in the abstract concepts such as oaths, affirmations or promises. Leaving aside McLachlin J.’s reference to a “moral obligation” in *Rockey* — which, if anything, proposed a more strict test for admissibility than the Court’s judgment in *Khan* — if it appears to the trial judge that the potential witness whose mental capacity is challenged has demonstrated an understanding of a promise to tell the truth in terms of ordinary, everyday social conduct, the witness has met the test for giving unsworn testimony. The same would be true in my view of a witness who understands the seriousness of the situation and “the importance of being careful and correct”, to use the Chief Justice’s words in this case (para. 36). However, even this approach could not be satisfied by K.B. according to the trial judge who was uniquely placed to observe her demeanour.
7. I respectfully disagree with the Chief Justice’s characterization of *Khan* as insisting “on an understanding of the duty to speak the truth in abstract terms and the metaphysical questioning this insistence gave rise to” (para. 62). The *Khan* test, in my view, did just the opposite. In that case, Robins J.A. found that the trial judge had erroneously applied the standards applicable to a child giving sworn testimony to a situation in which only the unsworn testimony of a child was sought and to which less onerous standards were applicable. Robins J.A. underscored the difference between the two standards in no uncertain terms:

An appreciation of the assumption of “a moral obligation” or “getting a hold on the conscience of the witness” or . . . an “appreciation of the solemnity of the occasion” or an awareness of an added duty to tell the truth over and above the ordinary duty to do so are all matters involving abstract concepts which are not material to a determination of whether a child’s unsworn evidence may be received. A child need not comprehend “what it is to tell the truth in court” or to appreciate “what happens when you tell a lie in the courtroom” before he or she can give unsworn evidence. [Emphasis added; emphasis in original deleted; pp. 205-6.]

Therefore, I have no disagreement with the Chief Justice insofar as she affirms the existing law that the judge’s inquiry should not ask the potential witness to “articulate abstract concepts” (para. 31) or tell what “the truth means in abstract terms” (para. 35) or venture into “abstract, philosophical realms” (para. 56) or conduct “an abstract inquiry into the nature of the obligation to tell the truth” (para. 58). Nor did *Khan*, or McLachlin J. in *Rockey*, in my view, “insist on the articulation of the nature of the obligation to tell the truth, abstracted from particular situations” (para. 61). On the contrary, it seems to me that *Khan* affirms — not denies — that “[i]t is unnecessary and indeed undesirable to conduct an abstract inquiry” (para. 64). At no point does *Khan* require an explanation of “the nature of the obligation to tell the truth in philosophical terms” (para. 66). The reasons of McLachlin J. in the later case of *Rockey* expressed no disagreement with the *Khan* approach. It is the present majority opinion that effects a marked departure from the existing jurisprudence.

B. *An Issue of Statutory Interpretation*

1. The bottom line of the majority judgment in this case is that s. 16(3) precludes a court from conducting an inquiry into whether (as McLachlin J. in *Rockey* put it) the proposed witness has “the ability to promise to tell the truth” (para. 25). This is based, it is said, on “[t]he first and cardinal principle of statutory interpretation [which] is that one must look to the plain words of the provision. Where ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity . . . . Section 16 shows no ambiguity” (McLachlin C.J., at para. 26).
2. A more contextual approach to statutory interpretation has been emphasized by our Court on numerous occasions in recent years, as set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting Professor Driedger:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

1. Leaving aside for the moment the amendments relating to children in s. 16.1 added by the 2005 amendments, the relevant “three options” for persons with mental disability are set out in s. 16(1) to (4) as follows:

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

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

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

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

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

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

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

1. Section 16 mandates only one “inquiry” by the trial judge in dealing with a witness “whose mental capacity is challenged”. Section 16(3) is simply part of a single evaluation in which the trial judge considers the gamut from permitting the challenged witness to testify under oath to not being able to testify at all.
2. As to whether the expression “promising to tell the truth” means more than the mere verbal ability to mouth the words I refer to what McLachlin J. herself said in *R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 236: “The phrase ‘communicate the evidence’ indicates more than mere verbal ability.” Equally, it seems to me, the requirement that a witness promise to tell the truth requires more than “mere verbal ability” to say the words. The trial judge is required to ascertain whether the witness possesses not only the “mere verbal ability” but understands “in ordinary, everyday terms” the difference between truth and fiction and the importance of sticking to the former in his or her testimony.
3. In the initial version of s. 16 proposed by the government, there appeared a requirement that a child be “of sufficient intelligence” to testify. This was deleted. The Chief Justice suggests that the record of the Legislative Committee on Bill C-15 shows that “sufficient intelligence” was essentially understood as the ability to appreciate the moral difference between telling the truth and lying (para. 29). I disagree. As I read the legislative record, the term “sufficient intelligence” was dropped from the draft bill because in the Committee’s view it potentially risked being interpreted as requiring judges to evaluate a child witness’s IQ rather than his or her capacity to communicate and understand the difference between truth and lies. The Parliamentarians were assured that s. 16(3), without the words “sufficient intelligence”, still required that “the child understands the difference between telling the truth and lying”, as demonstrated in the following exchange:

**[The Hon. Mary] Collins:** Yes. However, if we leave in the “sufficient intelligence”, and with the interpretation that has been given, I still feel that is going to be a potential barrier.

**Mr. Pink:** It may be that the committee is going to have to decide on words other than “sufficient intelligence”. What is the purpose of the query in the first place? Does it not really boil down to determining truth or falsehood? Is that not what it is all about?

**[The Hon. Mary] Collins:** I would think so. Yes. So if the child understands the difference between telling the truth and lying, that would seem to me to be all you would really need to find out.

**Mr. Pink:** I agree.

**[The Hon. Mary] Collins:** Thank you. [Emphasis added; p. 27.]

(House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 2, 2nd Sess., 33rd Parl., December 4, 1986)

1. This seems as clear a demonstration as one could ask for from the Parliamentary record that it was intended under s. 16(3) that the trial judge be satisfied that the witness “understands the difference between telling the truth and lying” (emphasis added). Nothing in the legislative record of the 1987 amendments suggests that the mere verbal ability to mouth the words of a promise would be sufficient.
2. As to the “object of the Act”, it seems clear that Parliament, in making the amendments to s. 16 in 1987 (S.C. 1987, c. 24), was attempting to strike a balance between access to justice and the rights of an accused in enacting s. 16 (*ibid*., No. 1, November 27, 1986, at pp. 21, 24 and 33). A promise to tell the truth affords some protection to an accused, but not if “the promise” is reduced to an empty formality (or, to use McLachlin J.’s phrase in *Marquard*, to a “mere verbal ability” (p. 236)), which is the unfortunate result of the majority judgment in this case.

C. *The Proper Interpretation of Section 16(3) Was Not Altered by the 2005 Amendments Related to the Evidence of Children Under 14 Years Old*

1. In 2005, Parliament amended the *Canada Evidence Act* with respect to the unsworn evidence of children based in part on the report of the Child Witness Project at Queen’s University. I agree with the Chief Justice that “Parliament’s concern in enacting the 2005 amendment to the *Canada Evidence Act* was exclusively with children. The changes arose out of the Bala Report on the problems associated with prosecuting crimes against children. The Parliamentary debates on s. 16.1 attest to the fact that the focus of the 2005 amendment was on children, and only children” (para. 41 (emphasis added)).
2. The 2005 amendments provide as follows (S.C. 2005, c. 32):

**16.1** (1) [Person under fourteen years of age] A person under fourteen years of age is presumed to have the capacity to testify.

(2) [No oath or solemn affirmation] A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) [Evidence shall be received] The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

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

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

(6) [Promise to tell truth] The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) [Understanding of promise]No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

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

1. The Crown acknowledges that there are “obvious distinctions” between Parliament’s test for adults with limited mental capacity under s. 16 and children under 14 years of age under s. 16.1 (A.F., at para. 57). For adults, s. 16(3) retains the more expansive test developed in the jurisprudence regarding the ability to communicate the evidence: see *Marquard*. A child need only be able “to understand and respond to questions” (s. 16.1(5)). Section 16(1) retains the potential for a challenged adult to testify under oath, whereas s. 16.1(2) provides that a child witness shall *not* take an oath or make a solemn affirmation. The child, as in the case of the challenged adult, must promise to tell the truth (s. 16.1(6)), but s. 16.1(7) specifically prohibits asking children “any questions regarding their understanding of the nature of the promise to tell the truth”. The Crown contends that research shows “that regardless of an inability to define these abstract concepts, the making of a promise to tell the truth by a child makes it more likely that a child will tell the truth” (A.F., at para. 79 (emphasis added)).
2. I agree with the Chief Justice that the words “on promising to tell the truth” in s. 16(3) and s. 16.1(6) should receive the same interpretation. It is for that very reason that, in my view, Parliament felt it necessary in 2005 to introduce the s. 16.1(7) “don’t ask” rule. Otherwise, the “simple line of questioning” to determine whether the potential witness understands “the seriousness of the situation and the importance of being careful and correct” would continue to apply to children under the 2005 amendments as well as to adults whose mental capacity is challenged. The point, however, is that s. 16.1(6), unlike s. 16(3), must be read together with s. 16.1(7) (the “don’t ask” rule), and s. 16.1(7) was limited to children because the empirical research related to “children, and only children”. Thus, the witness from the Department of Justice told the Parliamentary Committee:

Professor Bala’s research seems to highlight that there’s significance in giving that promise because children understand what a promise is all about. [Emphasis added; 17:20.]

(House of Commons, *Evidence of the Standing Committee on Justice and Human Rights*, No. 77, 2ndSess., 37thParl., October 29, 2003)

Senator Landon Pearson emphasized the empirical foundation of the “don’t ask” rule:

I want to put on the record the degree to which this provision of the bill is based on a considerable body of research on the capacity of children to understand that when they say “I promise to tell the truth,” that they know what they are doing. [Emphasis added; p. 19.]

(Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 17, 1stSess., 38thParl., June 23, 2005)

No such empirical studies were carried out with respect to adults with mental disabilities. In their case, there was no “don’t ask” equivalent to s. 16.1(7) even proposed, let alone adopted. As the Chief Justice emphasizes, the 2005 amendments deal with “children, and only children” (para. 41).

1. The Crown invites us, in effect, to apply the “don’t ask” rule governing children to adults whose mental capacity is challenged, despite evidence of legislative intent to the contrary. It does so on the basis that both are members of a “vulnerable group” (A.F., at para. 58) and should be treated as equivalent. That is a policy argument for Parliament, not a change to be brought about by judicial amendment.
2. The Chief Justice endorses a version of this equivalence argument in posing a rhetorical question:

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 of a six-year-old? [para. 52]

In my view, the difference is that a six-year-old with the mental capacity of a six-year-old does not suffer from a mental disability. The fact that psychiatrists speak of persons with mental disabilities calibrated in terms of mental ages is a useful way of describing the relative extent and severity of a person’s disability, but it does not mean that a 22-year-old woman with a severe mental disability is on the same footing as a six-year-old child with no mental disability whatsoever, and of course the empirical evidence before Parliament in 2005 did not suggest otherwise.

1. The rhetorical question posed by the Chief Justice seeks to reverse the onus of proof. It *presumes* without proof the fact of equivalence and demands a rebuttal, but it was for the government to persuade Parliament, if it could, that there is no relevant difference between an adult with a severe mental disability and a child with no mental disability. It made no effort to do so because there was no evidence on which such an argument *could* have been made.
2. No evidence was led in these proceedings to suggest equivalence and we cannot take judicial notice of alleged “facts” that are neither notorious nor easily verifiable from undisputed sources: *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 53. While greater latitude is allowed in the judicial notice of legislative facts (as opposed to adjudicative facts), it would still be necessary for the Crown to show that its assertion of equivalence of children and adults with a mental disability in this respect “would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the ‘fact’ to the disposition of the controversy” (*ibid.*, at para. 65 (emphasis deleted)). The Crown’s assertion of equivalence is pure assertion on a key issue, and mere assertion does not meet the *Spence* standard.
3. Section 16(3) *does* *not* require an inquiry into the proposed witness’s understanding of the abstract “nature of the obligation to tell the truth”. The argument about abstract concepts was rejected in *Khan* and by McLachlin J. in *Rockey*, and there is no need for the majority to resurrect it at this point for the sole purpose of rejecting it yet again. That is not a point of disagreement between us and should not be portrayed as such. Section 16(3) requires only the “ability to promise to tell the truth” (quoting *Rockey*) in terms of ordinary, everyday social conduct.
4. It is the majority, not the minority here, that must resort to extraneous language not found in s. 16(3) to achieve the result it seeks. As stated, I agree with the Chief Justice that the words “on promising to tell the truth” in s. 16(3) must bear the same meaning as “to promise to tell the truth” in s. 16.1(6). That being the case, the majority must read the s. 16.1(7) “don’t ask” rule applicable only to children into s. 16(3) applicable only to mentally challenged adults in order to read down the words “promising to tell the truth” in s. 16(3), and thus rob the words of s. 16(3) of their ordinary meaning, in my opinion.
5. The Chief Justice refers to s. 45 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, for the proposition that no inference as to the meaning of s. 16(3) flows from the adoption of s. 16.1(7) with respect to children (para. 46). Professor P.-A. Côté puts the point somewhat differently:

The provisions [s. 45] do not, for example, prevent interpreting the act of amendment as an expression of the legislature’s opinion; they simply eliminate an *a priori* presumption (“shall not be deemed”). The context, or even the formulation (in the form of a preamble, for example), of an amendment is quite capable of marking a clear desire to change the state of the law.

(P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 569)

In any event, this is not the foundation of the respondent’s argument. He relies on s. 16(3) as it was enacted in 1987. He does not rely, nor does he need to rely, on the 2005 amendments which, as the majority concedes, apply only to children.

D. *Was the Section 16(3) Test Misapplied in This Case?*

1. The Crown contends that, even if the *Khan* test is affirmed, it was not applied properly in this case. Firstly, the trial judge should have sought assistance from individuals apart from Dr. K., a forensic psychiatrist called by the defence, whose evidence was, in any event, put aside by the trial judge as unnecessary. The trial judge did not hear from K.B.’s teacher or other support workers who were familiar with K.B.’s strengths and weaknesses for purposes of the s. 16 inquiry. The Crown argues that they could have assisted the court to pose questions in a way that K.B. was capable of dealing with. To do so could have disclosed K.B.’s true capacity to deal with concrete facts without the distraction of conceptual issues, which, as the *voir dire* confirmed, K.B. could not handle. Secondly, the Crown says that the trial judge, having chosen to proceed without such assistance, misdirected his questions to metaphysical issues which could not and did not provide the basis for a fair determination of K.B.’s mental capacity.
2. I approach the trial judge’s assessment of K.B. on the basis of “the ability to communicate the evidence and the ability to promise to tell the truth” (*Rockey*, at para. 25).

(1) The Ability to Communicate the Evidence

1. The trial judge clearly had serious concerns about this first branch of the test. He reminded K.B.’s teacher, Ms. W., of testimony she had given at the preliminary inquiry, in which Ms. W. had said the following:

If the purpose of her testifying is to determine the truth of what happened, her capacity to express her recollections could be severely limited. So the court may be asking her to do something that she can’t do, and her failure to do that may skew her knowledge of what happened. In other words, the outcome — there’s a potential for the outcome to not get at the truth, because of . . . her incapacity to express that. [Emphasis added; hearsay decision, at para. 4.]

This evidence, given earlier at the preliminary inquiry, was properly considered by the trial judge at the subsequent competency hearing.

1. Moreover, during the competency *voir dire* itself, Dr. K., observing K.B.’s low tolerance for frustration, testified, “I don’t think she has the ability to think what you’re asking and come up with an answer” (A.R., vol. I, at p. 161). The expert also stated, as noted by the trial judge, and echoing the words in *Rockey*, that K.B. “had serious problems relating to her ability to communicate and to recollect” (hearsay decision, at para. 7 (emphasis added)). She could not adequately communicate evidence because, by reason of her mental disability, she was simply unable to “compute” what she was being asked.
2. The accuracy of the trial judge’s assessment of the extent of K.B.’s mental disability was corroborated and confirmed at subsequent stages of the trial. In the course of her testimony at the hearsay *voir dire*, for example, Ms. W., K.B.’s teacher, referred to a statement K.B. had made to an educational assistant, claiming that she, K.B., had spent the weekend at the respondent’s house (which was not true). Ms. W. said that if K.B. were asked what she had done that weekend, and replied “[D.A.I.]’s place”, this might have meant that she had been *thinking about* D.A.I. and *wanted* to go to his place, not that she had gone there at all (A.R., vol. II, at pp. 25 and 27; see also p. 7). Communication of wishful thinking is not communication of evidence.
3. Further, the trial judge, in rejecting K.B.’s out-of-court statements, adverted to the earlier observations that K.B. had “serious problems in communicating her evidence, her incapacity to answer relatively simple questions surrounding the allegations, her confusion with respect to whether or not she spoke to her mother” (hearsay decision, at para. 53 (emphasis added)).
4. While it is true that the trial judge emphasized the second branch of the test (the ability to promise to tell the truth), his concerns about K.B.’s ability to communicate the evidence are plain and obvious and were in themselves sufficient to conclude that she lacked the capacity to testify by reason of her severe mental disability.

(2) The Ability to Promise to Tell the Truth

1. As noted by the Chief Justice, this was the principal ground for the rejection of K.B.’s evidence. However, I believe, as did Doherty and MacPherson JJ.A., for a unanimous Court of Appeal, that this conclusion was certainly open to the trial judge on the evidence.
2. At the competency hearing, Dr. K. counselled the trial judge that “when you ask about truth, honesty, lie, these are difficult concepts for anybody” (A.R., vol. I, at p. 137). The inquiry, he said, could better be pursued by asking K.B. what she had for breakfast or “other areas in her life, day to day events, and see whether she can understand what is true and what is lie” (p. 140). Such questions would yield an answer that could be verified one way or another (p. 145) and, according to Dr. K., could assist to “see whether she has any ability to discriminate between what is real or just come up with an answer kind of thing” (p. 137).
3. Armed with this guidance, the trial judge embarked on a second round of questions to ascertain K.B.’s capacity. He asked K.B. a series of simple and concrete questions about her family, school, breakfast routine, and so on. He then posed the following questions to K.B. and received the following responses (*ibid.*, at pp. 155-56):

**[THE** **COURT:]**

**Q.** You don’t know. Do you know why you’re here today?

**A.** I don’t know. To talk about [D.A.I.].

**Q.** Yes, and do you think that’s really important?

**A.** Maybe yeah.

**Q.** Maybe yeah? Remember earlier I was asking you about a promise?

**A.** No.

**Q.** Have you ever made a promise to anybody?

**A.** I don’t know.

**Q.** That you promised you’ll be good, did you ever say that? Have you ever heard that expression “I promise to be good, mommy”?

**A.** Okay.

**Q.** All right. So do you know what a promise is, that you’re going to do something the right way? Do you understand that?

**A.** Okay.

**Q.** Can you tell me whether you understand that, [K.B.]?

**A.** I don’t know.

**Q.** Does anything happen if you break a promise?

**A.** I don’t know.

**Q.** You told me you don’t go to church, right?

**A.** Right.

**Q.** And no one has ever told you about God; is that correct? No one has ever told you about God?

**A.** No.

**Q.** Has anyone ever told you that if you tell big lies you’ll go to jail?

**A.** Right.

**Q.** If you tell big lies will you go to jail?

**A.** No.

**Q.** No?

**THE COURT:** Those are all the questions I’m going to pursue at this point.

The Crown also posed a second set of questions (*ibid.*, at pp. 156-58):

**Q.** We asked you the last time if you knew the difference between a truth and a lie, do you remember that, [K.B.]?

**A.** Yeah.

**Q.** Okay. We talked about the room and the colour of the room?

**A.** Sometimes.

**Q.** Okay.

Do you think it’s important to tell the truth or do you think it matter (*sic*)?

**A.** Does it matter?

**Q**. It matters?

**A.** Does it matter?

**Q.** Does it matter. Do you understand when I say “matter”, do you understand what that means?

**A.** I don’t know.

. . .

**Q.** Okay. We talked about the room. If I were to say to you that you had eggs for breakfast would that be a truth or a lie?

**A.** I don’t know.

**Q.** You don’t know? How about lunch, if I said you had eggs for lunch, ---

**A.** Yuk.

**Q.** --- would that be a truth or a lie?

**A.** I don’t know.

**Q.** You don’t know? Okay.

**A.** It’s getting hard.

**Q.** It’s getting hard?

**A.** Yeah.

**Q.** Why is it getting hard?

**A.** I don’t know why.

**Q.** You don’t know. Okay.

**MR. SEMENOFF:** Thank you.

At the conclusion of K.B.’s testimony, the trial judge ruled her unsworn testimony to be inadmissible. He explained:

What I’m saying is I wouldn’t have to hear from [Dr. K.]. I’ve heard from him but it doesn’t in any way add or detract or anything from the opinion I’ve come to, having watched and questioned this witness, which is my obligation.

In other words, I suppose what I’m saying to you is I’m fully satisfied that this witness does not understand what a promise to tell the truth involves, has no concept of that. None. Zero. Then that’s what this inquiry is about. [*Ibid.*, at p. 165]

Contrary to the majority opinion, I do not read the trial judge’s assessment as based on K.B.’s inability to articulate concepts. It was based on her inability ― by virtue of her mental disability ― to “understand what a promise to tell the truth involves”. The trial judge made the sort of practical inquiry in everyday terms that *Khan* required.

1. This was a borderline case. The Crown complains that some of the questions were too abstract, while the question about going to church was beside the point once it became clear that K.B. would give testimony unsworn or not at all. The trial judge could certainly have proceeded further with pointed and concrete factual questions to get at the degree of K.B.’s disability but he saw and heard K.B. and clearly he believed that he had heard enough. Sitting on appeal with nothing but a bare transcript in front of us, in my opinion, we are not in a position to say that his appreciation of K.B.’s capacity was wrong.

(3) Conclusion on the Competency Issue

1. Much of the dispute in this case turned on the significance of K.B.’s “I don’t know” answers. Clearly, it was an important advantage for the trial judge to watch the questions and answers unfold and to assess whether K.B. was actually able to “compute” her responses to what she was being asked ― a condition precedent, surely, to any ability to test her evidence by cross-examination. The trial judge observed K.B.’s demeanour as she struggled with the attempted dialogue. The trial judge was responsible for protecting the fair trial interests of the accused, as well as society’s interest in the prosecution of crimes. The inability of K.B. to deal with simple questions would mean that her evidence — however erroneous it might be, and however much (to pick up on her teacher’s observation) it might be the product of K.B.’s wishful thinking — would be effectively immune to challenge by the defence, thereby prejudicing the interest of society as well as the accused in a fair trial.
2. The teacher, Ms. W., thought that a skilled questioner who possessed direct personal knowledge of K.B. might be able to help K.B. overcome these limitations. On this view, a judge would need to rely on the teacher’s guidance not only to formulate the questions, but also to interpret K.B.’s responses. Generally speaking, of course, only an expert witness can put opinions before the court and, even then, only when the trial judge would be unable to determine the issue in question properly without expert assistance: *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Parrott*, 2001 SCC 3, [2001] 1 S.C.R. 178. At the end of the day, it has to be the judge or jury ― not the lay witness ― to assess the witness’s testimony.
3. In *Parrott*, the complainant was a mature woman who was said to possess the mental development equivalent in some respects to that of a three- or four-year-old child. The Crown declined to call the complainant herself on the basis that a court appearance might cause her trauma or other adverse effects, and instead called expert witnesses to lay the foundation for the admission of her earlier out-of-court statements. In this context, we held that the experts could not be substituted for calling the complainant herself, but that

[i]f she had been called and it became evident that the trial judge required expert assistance to draw appropriate inferences from what he had heard her say (or not say), or if either the defence or the Crown had wished to pursue the issue of requiring an oath or solemn affirmation, expert evidence might then have become admissible to assist the judge. [para. 52]

1. I think we should go further in this case and hold that on a competency *voir dire* where the mental capacity of an adult is challenged and the adult is herself called as a proposed witness, the court may also admit evidence from *fact* witnesses personally familiar with the proposed witness’s verbal and cognitive abilities and limitations to help the court gain a better understanding of the person’s capacity. These witnesses, unlike Dr. K., would not be in a position to express an opinion, but could testify about their direct personal observations of the proposed witness. Such evidence might, if the trial judge considered it helpful, better enable the judge or jury to appreciate her responses (or non-responses) in the witness box.
2. Ultimately, however, it is the judge who must reach his or her own considered opinion about the level of mental capacity of the proposed witness. Where, as in this case, the judge, after hearing from the proposed witness, considers the calling of additional fact witnesses to be unnecessary, I do not think we are in a position to second-guess that procedural conclusion.
3. Accordingly, I would reject the Crown’s appeal with respect to the trial judge’s ruling that the unsworn evidence of K.B. is inadmissible. In his view, the quality of the proposed evidence did not meet the s. 16(3) threshold. Sitting on appeal from this determination, and not having had the advantage of observing and questioning K.B., I see no valid basis for reversing that evidentiary ruling.

E. *Admissibility of Out-of-Court Statements*

1. The Crown contends that the trial judge erred by effectively deciding that K.B.’s testimonial incompetence predetermined the unreliability of her hearsay statements. The admissibility analysis in a hearsay *voir dire* is to be focused on whether the hearsay dangers have been overcome: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 71. These hearsay dangers include the inability to inquire into the declarant’s perception, memory and credibility. The trial judge’s conclusion in the competency hearing that K.B. lacked the ability to perceive, recall and communicate events and to understand the difference between truth and falsehood set up, but did not predetermine, the trial judge’s conclusion that K.B.’s testimony lacked sufficient reliability. I agree with Doherty and MacPherson JJ.A., that “it is not surprising, and it is not an error, that the trial judge’s reasoning on the issue of the threshold reliability in his hearsay ruling was quite similar to his reasoning on the *CEA* s. 16 voir dire” (para. 48). I would therefore not give effect to this ground of appeal.

III. Disposition

1. I would dismiss the appeal.

**APPENDIX A**

Until 1987, s. 16 of the *Canada Evidence Act* provided:

**16.** (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, 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 upon such evidence alone, and it must be corroborated by some other material evidence.

The origin of this provision, at stake in *Khan*, can be traced back to s. 25 of the *Canada Evidence Act, 1893*, S.C. 1893, c. 31. This was the first instance in Canadian history that Parliament legislated on the testimonial competence of children. At the time however, and until 1987, no statutory provision addressed the capacity to testify of adults with mental disabilities. Section 25 of the 1893 *Canada Evidence Act* provided:

**25.** In any legal proceeding where a child of tender years is tendered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

On October 29, 1986, Minister of Justice Ramon Hnatyshyn presented the House of Commons with Bill C-15, *An Act to amend the Criminal Code and the Canada Evidence Act*. During the first reading of Bill C-15, cl. 17 proposed to repeal s. 16 of the *Canada Evidence Act* and to replace it with a new provision:

**17.** Section 16 of the said Act is repealed and the following substituted therefor:

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

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

(*b*) whether the person is sufficiently intelligent that the reception of the evidence is justified.

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

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is sufficiently intelligent that the reception of the evidence is justified may testify on promising to tell the truth.

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

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

A crucial amendment, for present purposes, was made to the original text of Bill C-15 by the *ad hoc* Legislative Committee on Bill C-15. This amendment replaced the requirement to be “sufficiently intelligent” initially provided in Mr. Hnatyshyn’s proposal with the criterion that the proposed witness be “able to communicate the evidence”.

What is striking from the lengthy works of the Legislative Committee on Bill C-15 is the focus on the “ability to communicate the evidence” as the sole qualitative requirement for the competence of children or adults with mental disabilities who do not understand the nature of an oath. There is nothing in the record of the Committee which suggests that a “promise to tell the truth” also imposed an understanding of the nature of such a promise.

In fact, the requirement to be “sufficiently intelligent” in the original draft was understood by the Committee as requiring an understanding of the moral difference between telling the truth and lying. On December 4, 1986, the Committee held a discussion on the meaning of “sufficient intelligence”. It came to the conclusion that all that was needed for a witness to be sufficiently intelligent was to understand the moral difference between telling the truth and lying:

**Mr. Nicholson:** Well, that is the first test. I think the section Mrs. Collins referred to, proposed subsection 16(3) of our proposed section 16, says that if the person does not understand the nature of an oath, well it is fine, because it often happens that the children may not know the concept of God and hell and all that sort of thing. I have seen it happen in a trial, but if the person testifies on the promise of telling the truth then let the judge after that just decide how much weight he or she will place on that evidence without making the other determination of “sufficient intelligence”.

**Mr. Pink:** Under section 16 of the Canada Evidence Act it says:

. . .

Now, it has been my experience in determining the so-called “sufficient intelligence” — that is, when the judge goes through the series of questions he normally does about how far is he in school, how is he doing in school, and things of that sort, and he knows where he lives, he knows the difference between speaking the truth and speaking a falsity and things of that sort, then the judge concludes he is of sufficient intelligence, we will accept his evidence, but because he does not understand the nature of an oath, it will be unsworn evidence, that is all.

**Mr. Nicholson:** Do you think that is still a necessary element?

**Mr. Pink:** Absolutely.

**Mr. Nicholson:** Do you think it is important to have this, that we cannot just eliminate it and have the judge decide the weight that he gives to the evidence, which is basically what we do with adults?

**Mr. Pink:** I personally feel that before a child’s evidence is received, he must understand the difference between telling the truth and a falsity; he has to know that before his evidence can be received.

. . .

**Mrs. Collins:** How do you deal with the problem of a mentally retarded child? We know that sometimes those children are the victims or are easily the victims of sexual abuse. Also, how do you deal then with children of very, very tender years, who we also know can be victimized by sexual abuse, three-year-olds?

**Mr. Pink:** First of all, I do not think you will ever see a three-year-old giving evidence. I have seen cases where mentally retarded children have in fact given evidence, because the judge was satisfied, after querying him, that he knew the difference between telling the truth or a falsehood. He knew it was right to tell the truth, he knew it was wrong to tell a lie. He did not understand the nature of an oath and all that, so his evidence was not sworn.

**Mrs. Collins:** Yes. However, if we leave in the “sufficient intelligence”, and with the interpretation that has been given, I still feel that is going to be a potential barrier.

**Mr. Pink:** It may be that the committee is going to have to decide on words other than “sufficient intelligence”. What is the purpose of the query in the first place? Does it not really boil down to determining truth or falsehood? Is that not what it is all about?

**Mrs. Collins:** I would think so. Yes. So if the child understands the difference between telling the truth and lying, that would seem to me to be all you would really need to find out.

**Mr. Pink:** I agree. [Emphasis added; pp. 26-27.]

(House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 2, 2nd Sess., 33rd Parl., December 4, 1986)

One week later, on December 11, 1986, the Legislative Committee on Bill C-15 heard evidence from Professor Nicholas Bala, then Director of the Canadian Council on Children and Youth. Professor Bala expressed his fears about the “sufficient intelligence” requirement for testimonial capacity as understood by the Committee, and he proposed replacing it with the ability to communicate criterion:

**Dr. Nick Bala** . . .

Our concern is that standard of sufficient intelligence. A layperson or indeed even a lawyer not familiar with the case law might think well, of course, you are not going to want to hear from a child not sufficiently intelligent enough to testify. But when one starts looking at the case law and when one realizes that the concept of “sufficient intelligence” is one which appears in the present section 16 of the Canada Evidence Act, one realizes it therefore will be brought to the courts with all the precedents decided and all the traditions decided. That will make it very difficult for children to testify; in particular children under 10 may well be considered, for example, to be of average intelligence, but not of sufficient intelligence to testify.

Therefore we would submit that there should be another test, and the test we have suggested in our brief is a test of ability to communicate; that is to say the judge should be satisfied the child is able to communicate, and if the child seems able to communicate the case should be left to the trier of the fact, the jury or the judge. Obviously a prosecutor who is calling a child as a witness is not going to do that unless the prosecutor is satisfied the child has something to say of value and some recollection of the events, and is not going to be wasting everybody’s time.

(*Ibid.*, No. 3, 2nd Sess., 33rd Parl., December 11, 1986, p. 7)

The debates that followed in the Committee supported the view that it was not prudent to condition testimonial capacity on sufficiency of intelligence, which was conceived as including an understanding of the difference between truth and falsity. As a result, the Committee modified the proposed amendment to s. 16 of the *Canada Evidence Act* in order to replace the requirement of sufficient intelligence for ability to communicate the evidence, as was originally suggested by Professor Bala.

As such, s. 18 of the *Act to amend the Criminal Code and the Canada Evidence Act*,S.C. 1987, c. 24, provided the following:

**18.** Section 16 of the said Act is repealed and the following substituted therefor:

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

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

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

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

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

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

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

The amendment to Bill C-15 shows that Parliament did not intend children and adults with mental disabilities to be questioned on their understanding of the difference between truth and falsehood in order to testify.

Additionally, the fact that the legislative debates emphasized that ability to communicate was the qualitative condition for testimonial capacity under s. 16(3), and that no mention was made that promising to tell the truth required understanding of a promise to tell the truth, demonstrate the intent of Parliament that a mere promise would suffice.

**APPENDIX B**

The second important amendment to s. 16 of the *Canada Evidence Act* began in 2004, when Minister of Justice Irwin Cotler presented the House of Commons with Bill C-2. In 2005, Parliament adopted the *Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32. Sections 26 and 27 provided:

**26. The portion of subsection 16(1) of the *Canada Evidence Act* before paragraph (*a*) is replaced by the following:**

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

**27. The Act is amended by adding the following after section 16:**

**16.1** (1) A person under fourteen years of age is presumed to have the capacity to testify.

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

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

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

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

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

A reading of the works of the two standing committees which studied Bill C‑2 shows that Parliament did not intend the prohibition of questions to children on whether they understand the duty to tell the truth under s. 16.1(7) to change the law. On the contrary, s. 16.1(7) was seen as reaffirming the requirement of s. 16(3) that the ability to communicate the evidence was the sole qualitative condition for capacity and that a mere promise to tell the truth would suffice.

During a debate on the phrasing of s. 16.1(7), held in the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, a discussion between Joe Comartin and Professor Nicholas Bala revealed the perception that s. 16(3) had been misinterpreted by courts. The original intent of the provision was to allow challenged witnesses to testify by merely promising to tell the truth, once they were held to be able to communicate the evidence. This discussion, which occurred on March 24, 2005, shows that s. 16.1(7) was aimed at clarifying the state of the law:

**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Professor Bala, to start, I read your material in the paper around the changes you want to proposed subsection 16.1(7), but I don’t understand, quite frankly, how you would change it. Proposed subsection 16.1(6) provides, as you’re promoting strongly, that no oath be issued, that they simply be required to promise to tell the truth.

So I don’t know exactly how you want (7) amended, from its current proposal.

**Prof. Nicholas Bala:** The concern I have about proposed subsection 16.1(7) is that it says no child shall be asked any questions regarding their understanding of the nature “of the promise” for the purpose of determining whether their evidence shall be received by the court, and I would submit to you that it should be “of the promise to tell the truth”.

It’s a relatively small change, but again, the concern I have arises out of the fact that the present legislation has been interpreted very narrowly by judges. When you actually go back through the transcripts — I was actually a witness in 1988, when the provisions came into effect — I think it was thought by people, well, we don't have to be very explicit here, because the judges will get this right.

Obviously, on many issues we do have to trust our judiciary, but on certain issues I think it’s important to give them as much direction as possible. My concern is that some judge might read this — and we have quite a lot of case law about this — and say, okay, I can’t ask you about your understanding of the nature of the promise, but what about asking you questions about truth-telling? Parliament specifically said in subsection 16.1(6) that you’ll be required to promise to tell the truth. We can’t ask about the nature of the promise, but can we ask you about “truth” and “lie”?

Some judges will continue to interpret it that way. In some ways, it’s a very small amendment, but I assume it’s consistent with your actual intent. My concern, as I say, has been based on how some of these previous provisions have been interpreted. [Emphasis added; p. 7.]

(House of Commons, *Evidence of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, No. 26, 1st Sess., 38th Parl., March 24, 2005)

This perception was also shared, at the time, by the Department of Justice. Ms. Catherine Kane, Director of the Policy Centre for Victim Issues of Justice Canada, testified that s. 16 was originally intended by Parliament to allow witnesses to give evidence without inquiring into their comprehension of the duty to tell the truth. During her opening statement before the Standing Senate Committee on Legal and Constitutional Affairs, on July 7, 2005, Ms. Kane explained how the initial purpose of s. 16 had been misinterpreted by courts:

**Ms. Catherine Kane** . . .

The other part concerns the amendments to the Canada Evidence Act with respect to children. Under the current law, the Canada Evidence Act treats children under 14 in the same way as it treats other people whose mental capacity is challenged. There is a current section 16 that requires the judge to conduct a two-part inquiry whether they are dealing with a person who has some mental disabilities or whether they are dealing with a child under 14. The two-part inquiry requires the judge to first determine, in the case of a child, whether the child understands the nature of an oath or the nature of a solemn affirmation and, second, to determine if the child is able to communicate the evidence. These amendments were made in 1988 with the purpose of trying to more readily permit children’s evidence to be received. However, as the cases have interpreted this provision, we have not seen that ready acceptance of children’s evidence.

If these two criteria are met, the child gives evidence under an oath or an affirmation. However, if the child does not understand the nature of the oath or the affirmation but has the ability to communicate the evidence, the evidence is received on a promise to tell the truth. That is the current law. While it may appear quite sensible on its face, the interpretations and practise of these provisions do not reflect Parliament’s intention in amending the [e]vidence in an effort to permit children’s evidence to be admitted more readily.

As interpreted by the courts, section 16 requires that before the child is permitted to testify, the child be subjected to an inquiry as to his or her understanding of the obligation to tell the truth, the concept of a promise, and an ability to communicate. [Emphasis added; pp. 105-6.]

(Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 18, 1st Sess., 38th Parl., July 7, 2005)

*Appeal allowed,* Binnie*,* LeBel *and* Fish JJ*. dissenting.*

Solicitor for the appellant:  Attorney General of Ontario, Toronto.

Solicitors for the respondent:  Webber Schroeder Goldstein Abergel, Ottawa.

Solicitor for the interveners the Women’s Legal Education and Action Fund and the DisAbled Women’s Network Canada:  Women’s Legal Education and Action Fund, Toronto.

Solicitors for the intervener the Criminal Lawyers’ Association (Ontario):  Di Luca Copeland Davies, Toronto.

Solicitors for the intervener the Council of Canadians with Disabilities:  Aikins, MacAulay & Thorvaldson, Winnipeg.