SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Ayre*, 2019 NSSC 356

Date: 20191126
Docket: *S.PH.* No. 488780
Registry: Port Hawkesbury

Between:

Her Majesty the Queen

Appellant

v.

Tyler Justin Ayre

Respondent

Restriction on Publication: s. 486.4(1)
Name of Complainant and Accused

Judge: The Honourable Justice Robin Gogan

Heard: November 7, 2019, in Port Hawkesbury, Nova Scotia

Counsel: Nicole S. Campbell, for the Appellant
Robert M. Sutherland, for the Respondent

By the Court:

INTRODUCTION

[1] This is a Summary Conviction Appeal brought by the Crown. The central issue is the competency of a young witness to testify at trial.

[2] On May 9, 2019, Tyler Justin Ayre was tried in the Provincial Court of Nova Scotia that between August 1, 2017 and August 31st, 2017, at or near Port Hawkesbury he did:

> **Count One**
>
> Commit a sexual assault on E.I. contrary to Section 271 of the *Criminal Code*;
>
> **Count Two**
>
> For a sexual purpose touch E.I., a person under the age of sixteen years directly with a part of his body to wit his tongue contrary to Section 151 of the *Criminal Code*.

[3] On May 10, 2019, Ayre was acquitted on both counts. The disposition flowed entirely from the trial judge's conclusion that the child had not promised to tell the truth before giving evidence.

DECISION UNDER REVIEW

[4] The charges against Ayre involved the complaint of a person under the age of fourteen years. The complainant was four years old at the time of the alleged offences, and six as she testified at trial. The Crown sought to have the complainant's video recorded statement to police admitted into evidence under s. 715.1 of the *Criminal Code*. The complainant testified during the *voir dire*. In an oral decision following the *voir dire,* the trial judge admitted the statement:

> Digby, J.P.C.
>
> This is a application by the Crown to receive the videotape which I've just watched as part of the evidence in chief of E.I. pursuant to s. 715.1 of the Criminal Code. The only issue raised by the Defence is with respect to the question of whether or not the videotaped statement was taken within a reasonable time. I rule that the Crown has met the onus upon a balance of probabilities with respect to all of the other conditions that must be met for the reception of a videotaped statement.

[5] E.I. testified during the trial proper and was cross-examined. The defence called evidence including the accused. The accused denied the allegations. Both Crown and defence provided submissions. The trial concluded in one day. The following day, the judge rendered an oral decision which focused on non-compliance with s. 16.1(6) of the *Canada Evidence Act* :

> The complainant in this case was six years of age when she testified yesterday, as I mentioned, four when the actual incident took place. Under the provisions of section 16.1(6) of the *Canada Evidence Act,* the witness is required to promise to

tell the truth before their evidence can be received. That section has been interpreted by the Ontario Court of Appeal in the case of her ***Majesty the Queen v. C.C.F.***, a decision released April 23, 2014. The exact wording of that section states:

> The Court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

In that particular case, the witness was asked "Do you know what it is, the difference between the truth and not telling the truth?" Witness answered, "Yup." The Court, "Okay, and it is important to me that you tell me the truth because I have to make decisions. I want to make sure people are telling the truth. Okay?" Witness said, "Okay." The case goes on to say the trial judge did not explicitly ask the witness to promise to tell the truth, in the following paragraph, the Court went on to say, "No particular words are required to comply with section 16.1(6) of the *Evidence Act* so long as a witness is clearly committed to tell the truth." After the trial judge brought home to the complainant the importance of telling the truth, she said "Okay". Neither counsel raised any objection to the reception of the complainant's evidence on the basis that she had not committed to tell the truth. The trial judge recorded in his reasons that she had promised to tell the truth and stated in his reasons the complainant appeared to understand the serious and solemn nature of what she was involved with, namely a criminal trial. In the following paragraph, the Court stated:

> The exchange between the trial judge and the complainant was sufficient to comply with section 16.1(6) of the *Evidence Act* because the complainant committed to tell the truth, in court.

Last night, in reviewing the evidence, notes and briefs, it came to my attention that at no time was the complainant asked whether or not she would promise to tell the truth. Not having been asked that question, she never answered it. She was asked whether she understood the difference between the truth and a lie, using colors as a means of illustrating that. She answered those questions appropriately, indicating that she knew the difference between a truth and a lie. She was never asked the next question, do you promise to tell the truth? So we have no response from her on that point.

There is a question that was asked of her, in her oral evidence given in Court, as to whether or not she had told the truth in her statement. She answered, that, "yes", she had told the truth. The difficulty with all of her evidence, including the statement which I just reference, is that none of it met the criteria under section 16.1(6). It is, in effect, equivalent to an adult giving evidence without either affirming to tell the truth, or swearing to tell the truth. The case law is that that evidence is of no weight or value, it is as if it was never given.

> This is a very unfortunate situation in that I feel that I have to disregard the evidence of the young complainant, both the oral evidence given in court and the evidence given in the statement to police, because it was not adopted in Court by a statement that was either preceded by or followed by any indication that she had committed to tell the truth in her oral evidence.
>
> I have to say that I found the young complainant to be alert, attentive, articulate and appropriate in answering questions that were put to her, once the questions were put to her in a form in which she could understand what the question was. I want to be clear the Court's position, in not considering her evidence, because of the failure to meet the criteria under section 16.1(6), in no way reflects on the quality of her evidence that she gave yesterday.
>
> The end result is, without her evidence, in my view, there is insufficient evidence to enter a conviction, as a result Mr. Ayre is entitled under the law to the presumption of innocence until the evidence meets the burden of discharging the presumption of innocence to a standard of proof beyond a reasonable doubt. That has not happened in this case. One might suggest, while you can rely on the evidence given in the recorded statement, because she promised to tell the truth. Aside from my comments, with respect to that, which I have already made, it puts the accused in a position that all of the questions asked on cross-examination, in order to exercise his right to full answer and defence, would not be before the Court. Frankly, that is an entirely unacceptable situation. The end result, Mr. Ayre, although there is no real decision on the merits based on all of the testimony for the reasons I have given, you are acquitted.

[6] The record reflects that the issue of compliance with s. 16.1(6) arose for the first time after all the evidence had been heard, cases closed, and final submissions made. The trial judge identified the issue in the course of preparing his decision and summarily disposed of the charges after concluding that the non-compliance with s. 16.1(1) was fatal to the admissibility of the complainant's evidence. Trial counsel were not notified of the issue and not invited to provide submissions.

POSITIONS OF THE PARTIES

[7] On appeal, the Crown says that the trial judge erred in failing to comply with s. 16.1 (6) of the *Canada Evidence Act* and compounded that error by entering an acquittal instead of directing a mistrial. It seeks a new trial. The respondent says that the appeal should be dismissed. In the absence of a promise to tell the truth, the trial judge was correct to disregard the evidence of the child and acquit the accused. It characterized the matter as a failed prosecution and took the view that it was the responsibility of the Crown to ensure compliance with s. 16.1(6).

[8] Both parties to the appeal relied upon the authorities submitted by the Crown. The parties agree that: (1) the issue of non-compliance with s. 16.1(6) did not arise at any point prior to the final decision; and (2) counsel were not invited to make submissions on what turned out to be the central issue to the disposition of the matter.

STANDARD OF REVIEW

[9] This is an appeal under Part XXVII, and s. 813 of the *Criminal Code*. The Crown proceeded summarily before the provincial court and the charges against the accused were dismissed. By virtue of s. 822, the powers of the court of appeal at s. 686(4) apply to this appeal. The grounds of appeal are found at s. 830(1).

[10] There is no dispute about the standard of review. This is a Crown appeal. It raises questions of law. The trial judge was required to decide correctly: ***Housen v. Nikolaisen***, 2002 SCC 33 (at paras. 26-37), ***R. v. D.A.I.*** 2012 SCC 5, and ***R. v. S.T.P.***, 2009 NSCA 86.

ISSUE

[11] The Crown raised two issues on appeal: (a) Did the trial judge err in failing to satisfy himself that the witness made a commitment to tell the truth pursuant to s. 16.1(6) of the *Canada Evidence Act*? and (b) Did the trial judge err in entering an acquittal rather than declaring a mistrial? During oral arguments, a third issue arose – did the trial judge err in not providing notice of the issue to counsel and an opportunity to be heard?

ANALYSIS

The Requirement for Competency – The Canada Evidence Act

[12] At the heart of this appeal is s. 16.1 of the *Canada Evidence Act* which deals with the competency of a witness under fourteen years of age. Section 16 begins with a statutory presumption of competency followed by mandatory provisions:

> 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 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.
>
> (Emphasis added)

[13] In the present case, there is no challenge to the capacity of the young witness. Rather, the focus is on compliance with the requirement to promise to tell the truth. This is an issue of competency, not capacity or admissibility. As succinctly put by former Chief Justice McLachlin in ***R. v. D.A.I.***, 2012 SCC 5, at paras. 15-19:

A. Testimonial Competence: A Threshold Requirement

[15] 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.

[16] 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 the 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 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.

[17] The second issue 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 a 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 trial fairness.

[18] 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 demeanor, 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 establishes all the elements of the offence beyond a reasonable doubt, there can be no conviction.

[19] 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 in 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.

[14] The reasons of McLachlin, C.J. in ***R. v. D.A.I.***, *supra,* make it clear that previous authorities requiring a complex inquiry, or an abstract understanding of the obligation to tell the truth should be rejected.

The Competency Assessment of Children – A Brief Review

[15] At this point, it may be useful to conduct a brief review of the development of the law on this point. This will serve to place the issue in context and highlight authorities that now require scrutiny or disposal.

[16] Historically, at common law, the unsworn evidence of a child could not be received. Before permitting a child to testify, the court had to be satisfied that the child understood the significance of an oath, and be sworn. This was a significant barrier to the reception of relevant and probative evidence from children.

[17] Remedies came in various and evolving statutory provisions all of which sought to strike a balance between making justice more available to child victims and ensuring a fair trial for the accused. The first significant reforms to the *Canada Evidence Act* came in 1988. That earlier version of the *Act* provided that a

child under the age of fourteen could testify following an inquiry "to determine if the person understands the nature of the oath or solemn affirmation". If this inquiry revealed the child was unable to understand the nature of the oath, they could testify if they were " able to communicate the evidence" and "on a promise to tell the truth" (s. 16(3)).

[18] Much of the authority on the competence of children to testify flows from the 1988 amendment and the inquiry it imposed upon the court. The judicial response produced a myriad of interpretations and compliance issues. Appeal outcomes ranged from a standard of strict compliance to forgiveness for technical or procedural irregularities.

[19] In ***R. v. S. (J.J.)*** (1991), 104 N.S.R. (2d) 385 (S.C.A.D.), the Nova Scotia Supreme Court Appeal Division considered the predecessor provision of the *Canada Evidence Act*. In that case, a youth was charged with threatening to kill a schoolmate and the trial judge permitted the complainant to testify without obtaining a promise to tell the truth. The accused was convicted and appealed. The appeal was allowed. Freeman, J.A. concluded:

> [9] It is open to speculation whether he would have made the promise and given the same evidence. But it would be wrong in principle for this Court to make that assumption. He might or might not have been willing to promise. Having given the promise his testimony may not have been the same.

> [10] A promise under s. 16(3) of the **Canada Evidence Act** is a prerequisite to receiving unsworn testimony in evidence. The evidence was wrongly admitted. See: **R. v. R.R.D**. (1989), 72 Sask. R. 142; 47 C.C.C. (3d) 97 (C.A.).
>
> [11] The appellant was convicted on his own testimony. But the only reason for him to testify was the evidence before the court, all of it inadmissible. We do not consider this an appropriate case for the application of the curative provisions of s. 686 of the **Criminal Code**.
>
> [12] The appeal is allowed and the conviction is quashed.

[20] Shortly after its decision in ***R. v. S. (J.J.)***, *supra*, the Appeal Division allowed another appeal involving non-compliance in ***R. v. P.M.F.*** (1992) 115 N.S.R. (2d) 38. This time the Crown appealed an acquittal after the trial judge refused to allow a six year old to testify. Jones, J.A. concluded:

> [7] While it may have been apparent to the learned trial judge that the victim did not understand the nature of the oath, the questioning failed to disclose whether the child was able to communicate the evidence and understood the necessity of speaking the truth. The Crown argues that the evidence in this regard was positive. With respect after carefully reviewing the record it is our view that the examination under s. 16 was not complete nor is it clear that the trial judge applied the appropriate standard under s. 16 …
>
> [8] As the evidence of the victim may have been crucial to the Crown's case we see no alternative but to allow the appeal, set aside the acquittal and order a new trial.

[21] In ***R. v. Wilson*** (1995), 139 NSR (2d) 61, an accused was committed to stand trial following a preliminary inquiry. The only evidence at the inquiry came from a nine year old boy who had not promised to tell the truth. The oversight was

recognized after the conclusion of the Crown's evidence. The preliminary inquiry judge raised the issue with the parties and concluded that requirements of the *Canada Evidence Act* had been met. The accused applied for certiorari to quash the committal. The issue before the reviewing court was the nature and effect of the error made by the provincial court judge in failing to elicit a promise to tell the truth. The fact that an error had occurred was conceded. The application was dismissed by Gruchy, J. who adopted the reasons of Watt, J. (as he then was) in ***R. v. Gray*** (1991), 1991 CanLII 7130 (ONSC). The accused appealed.

[22] On appeal, the issue was framed as whether or not a person who has not been qualified by oath, affirmation, or promise under s. 16(3) can be a witness and give evidence in a proceeding under the *Criminal Code*. Freeman, J.A., writing for the majority, concluded that there must be compliance with s. 16(3). Non-compliant testimony is not evidence. Justice Freeman explained the history and purpose behind the 1988 amendments to the *Canada Evidence Act* and his rationale:

> [17] Under these provisions, the present law is that the ability to communicate the evidence is a paramount consideration, but it is not the only one. Before the evidence can be received, the child must promise to tell the truth. This is a statutory requirement standing in the place of the oath. Its purpose is clear in light of what Parliament was seeking to achieve.
>
> [18] In theory the oath depended for its effectiveness on a belief in a system of rewards and punishments after death. While it can no longer be assumed that

every witness subscribes to such a belief, the oath, like a solemn affirmation, remains a formal public commitment binding one's conscience to tell the truth. However reliable it may be in individual cases, it remains a core concept of the law of evidence.

[19] Parliament departed from this standard with the obvious intention of making justice more accessible for child victims. This was achieved at the price of safeguards formerly enjoyed by accused persons. Under s. 16 prior to the trade-off for the oath or affirmation by those of tender years was the assessment of the intelligence and understanding of the duty to tell the truth, and the requirement for corroboration.

[20] The 1988 amendment of s. 16 traded off those safeguards for what remains: a promise to tell the truth by children unable to understand the nature of an oath or affirmation but who are found capable of communicating the evidence.

[21] In my view this is the minimum safeguard for the accused which Parliament has been prepared to condone in the interest of providing children greater access to the courts. It is a substantive rule of law, the threshold which must be crossed before the testimony of a child who does not understand an oath or affirmation can be received in evidence. Parliament did not assume that the evidence of a child who gave such a promise would be the same if the promise were not given; there is no basis for the courts to make such an assumption. Without a promise, or an undertaking tantamount to a promise, the evidence is not before the court. The standard to be met is correctness, not reasonableness.

…

[24] No strict form of words is required for a promise to meet the requirements of s. 16(3), but there must be an undertaking to tell the truth – see *R. v. Barsoum* (1991), 13 W.C.B. (2d) 382 (N.W.T.C.A.) …

[25] A simple failure by the presiding judge to call for a promise is not a valid excuse for accepting evidence of a quality below the minimum statutory standard. Regardless of any prejudice to the accused, it is not a harmless error because it would tend to bring the administration of justice into disrepute. It might best be described as a serious irregularity.

[26] In my view, having reviewed A.D.'s testimony, there was nothing in A.D.s responses to Judge Bremner's questions that can be construed as an undertaking to be truthful. A.D. should not have been allowed to testify without promising to tell the truth – therefore his testimony was not before Judge Bremner as evidence and there was no basis for inferring such an undertaking.

[23] There was a strident dissent in ***Wilson*** written by Chipman, J.A. who took a different view of the non-compliance with s. 16(3):

> [37] The error made by Judge Bremner was one relating to procedure of admissibility. It was a technical error. He overlooked that the witness was not asked to promise to tell the truth before he testified. The transcript reveals that both counsel for the Crown and the appellant must have overlooked this as they did not draw the requirements of the section to Judge Bremner's attention. At the conclusion of the evidence, Judge Bremner himself picked up on the error and asked both counsel for their views. Understandably, neither had the relevant case law available and were not able to be of much assistance. Neither contended that the validity of the proceedings were at stake …

[24] Justice Chipman adopted the reasoning of Justice Watt in ***Gray*** and concluded that non-compliance with s. 16(3) was a " procedural error and not one of substance". Relying on the reasons of the Ontario Court of Appeal in ***R. v. K.F. (1990)*** 1990 CanLII 10976 (ONCA), Justice Chipman would have applied the curative provision of s. 686(1)(b)(iv) of the *Criminal Code* had the same error occurred at trial. In ***R. v. K.F.***, *supra*, Lacourciere, J.A. framed the assessment;

> We are satisfied that the failure to conduct the mandatory inquiry under s. 16 is a procedural error of the second category that can be remedied by the application of the curative provision as long as the accused's right to a fair trial is not prejudiced. We are not to be taken as holding that the curative provision can be successfully invoked in every case of failure to conduct the mandatory inquiry. Courts will have to decide on a case by case basis when it is proper to invoke the provision…
>
> In this case, having regard to all the circumstances and particularly in view of the fact that the complainant was 13 years of age, had been sworn at the preliminary inquiry, had no trouble communicating his evidence and that counsel had no questions on the procedure of the oath and appeared to be content that the witness

> understood the oath, we are satisfied that the appellant has suffered no prejudice by reason of the failure of the court to conduct an inquiry. Accordingly, we would not give effect to this ground of appeal.

[25] In subsequent years, the law remained unsettled on the issue (***R. v. C.W.G.*** 1994 CanLII 8743 (BCCA)). In ***R. v. Peterson***, (1996) 106 C.C.C. (3d) 64 (Ont. C.A.), the accused was charged with a variety sexual offences involving several very young complainants. At trial, one of them was not asked for a promise to tell the truth. The accused testified and denied all the allegations. Relying on ***R. v. Cloutier*** (1988), 1988 CanLII 199 (ONCA), distinguishing ***R. v. D. (R. R.)*** (1989), 1989 CanLII 4534 (SKCA), and referencing ***R. v. Wilson***, *supra*, Osbourne, J.A. concluded that this was a procedural error to which the curative provisions of the *Criminal Code* applied. However caution was required:

> In my view, it is important, in circumstances such as exist here, to determine whether the failure to obtain a specific promise to tell the truth from Kristine H. prejudiced the appellant. The underlying purpose of the process by which potential witnesses under 14 are screened through the s. 16 inquiry has been satisfied. I do not think that this obvious oversight prejudiced the appellant. It seems to me therefore, that to the extent that there was an error because of the absence of an explicit promise to tell the truth from the complainant Kristine H., the provisions of s. 686(1)(b)(iv) should be applied.

[26] In ***R. v. Peterson***, *supra*, the appeal from conviction was dismissed. Leave to appeal to the Supreme Court of Canada was refused at 109 C.C.C. (3d) vi.

[27] The Alberta Court of Appeal in ***R. v. R. J. B.***, 2000 ABCA 103 refused to apply the curative provisions and allowed the appeal. In that case, one of the complainants did not promise to tell the truth. The trial proceeded and convictions were entered. Compliance with s. 16(3) was the issue on appeal. A careful review of the trial transcript revealed that the witness had not made a commitment to tell the truth. What was required was that the witness understand the obligation to tell the truth in giving his or her evidence. This had not been demonstrated. The result was that a crucial witness had testified without a promise to tell the truth. There was prejudice to the accused that should not be cured with reference to s. 686(1)(b)(iv). The outcome of this case later received negative consideration by the Supreme Court of Canada in ***R. v. D.A.I.***, *supra*.

[28] The current provisions governing the evidence witnesses under fourteen years came into force on January 2, 2006, pursuant to Bill C-2, *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act*, 1st Sess., 38th Parl., 2004, enacted S.C. 2005, c. 32. The new s. 16.1 reversed the previous presumption against testimonial competence and prohibited a capacity inquiry unless the applicant demonstrated an issue. These amendments survived constitutional scrutiny. In ***R. v. J.Z.S***, 2008 BCCA 401, at

paras. 54-55, D. Smith, J. noted the shift in focus from admissibility to reliability and said:

> [54] … I am satisfied that s. 16.1 reflects the procedural and evidentiary evolution of our criminal justice system, in order to facilitate the testimony of children as a necessary step in its truth seeking goal.
>
> [55] While enhancing the receipt of probative and relevant evidence, s. 16.1 does not restrict the traditional safeguards for ensuring an accused's right to a fair trial: the opportunity for the accused to see and cross-examine a child witness, to call evidence, to be presumed innocent until proven guilty, and to have the Crown prove the alleged offence beyond a reasonable doubt. Equally significant, the provision maintains the residual discretion with the trial judge to permit a pre-testimonial inquiry if it can be established that there is an issue as to the ability of the child witness to understand and respond to questions.

[29] In ***R. v. D.A.I.*** , *supra*, Chief Justice McLachlin took the opportunity to clarify competency requirements under the new regime. In that case, the central question was the trial judge's interpretation of the new provisions for adults with mental disabilities. As part of the analysis, the court disapproved of previous authorities requiring children to demonstrate an understanding of the duty to speak the truth. These authorities included ***R. v. P.M.F.,*** *supra*, and ***R. v. R.R.D.,*** *supra*, the latter decision relied upon by our Appeal Division in ***R. v. S. (J.J.)***, *supra*, which in turn was relied upon by the majority in ***R. v. Wilson***, *supra*.

[30] In ***R. v. D.A.I.,*** *supra*, it was held that a plain reading of s. 16.1 required the ability to respond to questions and a promise to tell the truth. The focus is on "the

concrete acts of communicating and promising". A simple promise, in this context "serves a practical, prophylactic purpose" aimed at grounding "the seriousness of the situation" and the "importance of being careful and correct". The majority of the Supreme Court of Canada concluded that the trial judge had made a fundamental error of law in interpreting and applying the provisions of the *Canada Evidence Act* when the evidence of the complainant was excluded. The exclusion of the evidence resulted in an acquittal subsequently affirmed by the Ontario Court of Appeal at 2010 ONCA 133. In the view of MacLachlin, C.J., the error of the trial judge, "vitiates the ruling that K.B. could not be allowed to testify … I would therefore set aside the acquittal and order a new trial."

[31] Subsequently, in ***R. v. C.C.F.***, 2014 ONCA 327, the Ontario Court of Appeal dealt with an appellant convicted of sexual offences on the strength of the evidence given by a seven year old complainant. There had been an exchange between the complainant and the trial judge but no explicit promise to tell the truth. The question was whether the trial judge had complied with s. 16.1(6). The appeal was dismissed with the following conclusion:

> [4] The trial judge did not explicitly ask the witness to promise to tell the truth.
>
> [5] No particular words are required to comply with s. 16.1(6) of the *Evidence Act*, so long as the witness has clearly committed to tell the truth. After the trial judge brought home to the complainant the importance of telling the truth, she

> said "O.K." neither counsel raised any objection to the reception of the complainant's evidence on the basis that she had not committed to tell the truth. The trial judge recorded in his reasons that she had promised to tell the truth and stated in his reasons that the complainant "appeared to understand the serious and solemn nature of what she was involved with, namely a criminal trial."
>
> [6] The exchange between the trial judge and the complainant was sufficient to comply with s. 16(6) of the *Evidence Act*, because the complainant committed to tell the truth in court.

Summary of Current Principles

[32] The historical review can be distilled as follows: (1) the responsibility of ensuring compliance with s. 16.1 rests with the trial judge; (2) in the absence of a capacity issue, what is required is a focus on communicating and promising; (3) Crown counsel may ask questions and provide an evidentiary basis for the assessment but that does not relieve the trial judge of the obligation to comply with s. 16.1; (4) counsel may inquire as to whether the trial judge is satisfied under s. 16.1 but the failure to do so does not change the duty on the court to assess competency; (5) no particular words are required for the promise but there must be a commitment to the truth; (6) an inquiry into an understanding of the "duty to speak the truth" is now forbidden; and (7) failure to properly interpret and apply s. 16.1 is a fundamental error of law.

Disposition of the Present Appeal

[33] Returning to the present case, a review of the record reveals what appears to be an oversight in relation to the requirements of s. 16.1. There was no capacity issue raised by the defence. And the record reveals that the trial judge was satisfied that the complainant was able to communicate. The issue arises solely in relation to the required promise.

[34] The general requirements of s. 16.1 were clearly in the mind of counsel. But the competency assessment was complicated by the Crown application to admit the child's out of court video statement under s. 715.1(1) of the *Criminal Code*. The young complainant had given a video statement to police on November 29, 2017. At the beginning of the statement, an exchange took place with the interviewing police officer:

> Officer: Yeah. So, E.I., can I ask you a question?
>
> E.I.: Yeah.
>
> Officer: Do you know what the difference between a truth and a lie is?
>
> E.I.: No.
>
> Officer: Okay. Do you know what a truth is?
>
> E.I.: No. Yes.
>
> Officer: Okay. Tell me a truth. What's … what does the truth mean to you?
>
> E.I. I don't know.
>
> Officer: Okay. Can you give me an example of the truth?

E.I.: Can I ask you a question?

Officer: Yeah.

E.I.: So this was a long time ago right?

Officer: Okay.

E.I.: And its … I need me and you to talk about it because it was pretty bad.

Officer: Okay. So we can talk about that in one second. Okay?

E.I.: Okay.

Officer: But can you tell me what a truth is?

E.I.: I don't know.

Officer: Okay, So if I said to you that your boots were purple is that the truth or is that a lie?

E.I.: Truth.

Officer: The truth. If I said that this couch was green …

E.I.: Mm-mmm.

Officer: That's a?

E.I.: Lie.

Officer: A lie. Okay? So all we want to talk about today is the truth. Okay?

E.I: Okay.

[35] On the s. 715.1 *voir dire*, the complainant testified and was asked to distinguish between a truth and a lie in a similar fashion. She answered correctly.

She then watched the video statement after which the Crown asked further questions:

> Crown: So, E.I., do you remember taping that video?
>
> E.I.: Yeah.
>
> Crown: Yes?
>
> E.I.: Yeah.
>
> Crown: And do you remember how many people were in the room with you during that video?
>
> E.I.: Three.
>
> Crown: Three, Okay. And do you remember that we talked about the truth and a lie?
>
> E.I. Yeah.
>
> Crown: Well, is everything in that video true, the truth?
>
> E.I.: Yes.

[36] Following some additional evidence and counsel's submissions, the video statement was admitted into evidence. No issue is taken with that decision on this appeal. It is worth noting that s. 715.1 of the *Criminal Code* prescribes a process for the admissibility of a video statement provided that the young witness testifies and adopts the previous statement. The process of adoption requires that the witness recalls giving the statement and confirms her attempt to be truthful in doing so. Before admitting the statement under s. 715.1, a trial judge must be

satisfied that the preconditions to adoption have been met notwithstanding the consent of counsel (***R. v. P.W.M.***, 2018 PECA 24). In the present case, the trial judge found that the preconditions were established and admitted the statement into evidence. Presumably, this included being satisfied that the complainant committed to tell the truth in her statement.

[37] The complainant then testified during the trial. She was not asked any further questions about truth or lies. She was not asked if she would promise to tell the truth. Although she confirmed telling the truth in her statement, there was no prospective promise. Nevertheless, the trial continued, the defence offered evidence, and concluded the same day it started. It was only as the trial judge prepared a final decision that the issue of non-compliance arose. It was the trial judge's conclusion, without hearing from counsel, that the complainant's evidence was inadmissible. The acquittals followed.

[38] This was not a failed prosecution as proposed by the Respondent. The obligation to ensure the witness is competent to testify rests with the court. It is the responsibility of the trial judge to ensure compliance with s. 16.1. Having reviewed the record, it is clear that there was no promise made by the complainant as she testified at trial and was cross-examined. This was an oversight. There was no objection from counsel who proceeded as if there was no compliance issue.

However, I find the failure to secure compliance with the now simplified requirements of s. 16.1 is an error of law.

[39] Further, I am of the view that the trial judge compounded the error by not raising the issue with counsel and inviting submissions. An issue of this kind arose in ***R. v. Al-Fartossy***, 2007 ABCA 427. In allowing the appeal, Martin, J.A. concluded:

> [25] Here the parties addressed what were considered to be relevant issues in both their evidence and submissions. The trial judge raised a separate ground that could not reasonably have been anticipated by either party based upon the factual record. While it may be that the trial judge was correct in her conclusion, it should only have been reached on a full record with the benefit of thoughtful submissions from the parties. Failure to provide the parties opportunity to present full submissions is, by itself, an error of law. In the words of this court in ***Fraser v. Fraser*** (1994), 1994 ABCA 275 (CanLII), 157 A.R. 98 at para 10: "A fundamental procedural error such as the failure to afford counsel an opportunity to present argument is fatal to the proceedings and must result in a new trial." See also the comments of Haddad J.A. in ***R. v. Jahn*** (1982), 1982 ABCA 97 (CanLII), 35 A.R. 583 at para 23, 19 Alta. L.R. (2d) 193 (C.A.): "The general rule … is that a court is not at liberty to pronounce judgment until counsel have been afforded the opportunity to present argument. This stems from the fundamental principle that a litigant ought not to be deprived of his right to have his case fully heard."

[40] See also ***R. v. Steeves***, 2011 NBCA 88 and ***R. v. Pinchak***, 2010 ABQB 747.

[41] In my view, it was fatal to the proceedings that the trial judge did not alert counsel to the new and fundamental issue and allow them an opportunity to be heard.

[42] Given the foregoing conclusions, I find it unnecessary to examine the trial judge's choice of remedy.

CONCLUSION

[43] The appeal is allowed. The matter shall be returned to the Provincial Court for a new trial.

[44] Order accordingly.

Gogan, J.