You Can't Know What You Don't Know That You Don't Know: The Dilemma of Communication Disabilities and *Charter* Rights

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This article argues that people with communication disabilities are not always afforded equal protection and benefit of the law in criminal proceedings. People with communication disabilities are more likely to have their Charter *rights violated in the course of criminal procedures. Communication intermediaries are professionals who are able to identify and work with individuals that have these disabilities. These specialized speech-language pathologists are trained specifically to work in the justice system and to facilitate two-way dialogue between parties who communicate in different ways. This article argues that it is the responsibility of justice professionals and law enforcement to learn about the ways that communication intermediaries can help fortify the* Charter *rights of individuals encountering the criminal legal system, with particular attention on individuals accused of criminal offences. By doing so, we will bring our system one step closer to offering equal justice for all.*

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† Ashley Rees is a recent graduate of the Juris Doctor program at the University of Manitoba and is currently articling in criminal defence. Ashley holds a special interest in disability rights and, at the time of writing, noted the following regarding themself: "I write this as a law student living with disabilities, some of which falls within the forthcoming definition of communication disabilities. My lived experience of navigating legal environments while living with a brain that processes information in its own autistic way, positions me uniquely to give testimony in my own language of what it is like to exist in these spaces. While these moments of commentary will be few, it seems necessary to qualify given that one of the guiding principles of disability discourse is 'nothing said about us without us.'"

Les personnes ayant des troubles de la communication ne jouissent pas toujours de l'égalité en matière de protection et de bénéfice de la loi dans les procédures pénales, et elles sont plus susceptibles que les autres de subir une atteinte à leurs droits garantis par la Charte *au cours de telles procédures. Par ailleurs, les intermédiaires en communication sont des professionnels capables d'identifier les personnes ayant un trouble de la communication et d'intervenir auprès d'elles. Il s'agit d'orthophonistes formés et spécialisés pour travailler au sein du système judiciaire et pour faciliter les échanges entre des parties dont les modes de communication diffèrent. Il incombe donc aux professionnels de la justice et des forces de l'ordre d'apprendre de quelles façons les intermédiaires en communication peuvent contribuer à protéger les droits garantis par la* Charte *des personnes confrontées au système judiciaire pénal, notamment de celles qui sont accusées d'infractions criminelles. Ce faisant, nous nous rapprocherons de l'objectif de rendre notre système judiciaire accessible et équitable pour tous.*

I. Introduction

The purpose of this article is to examine how peoples' rights guaranteed by the *Canadian Charter of Rights and Freedoms* ("*Charter*") would be better respected and protected within Canada's criminal legal system through increased utilization of Communication Intermediaries ("CIs"). This article will argue that the lack of acknowledgement of the prevalence of communication disabilities amongst the population of people who have been accused of crimes leads to the systematic infringement on the *Charter* rights of those same people. The capacity of an accused person living with a communication disability to communicate with their accusers, from their first interview with authorities, all the way to the conclusion of a trial, could have a significant impact on their eventual liberty. With section 7 and 15 *Charter* rights in play, this is a major issue that demands attention in Canadian law. This is being addressed with professionals called Communication Intermediaries. Historically, however, this resource has most often been engaged for the benefit of a witness or complainant.[1] Specifically, while taking the rights of an accused into account, this article argues that all parties participating in the criminal process have a duty to actively protect the section 10 and 11 *Charter* rights of people with communication disabilities when they are accused of criminal offences.

Contemplating the ways in which CIs have been used in various Canadian jurisdictions, this article will present suggestions to use the available resources to enhance the current work being done in Canada. The eventual goal is to ensure that every person accused of a criminal offence in Canada is provided with their constitutionally required accommodations. Justice cannot exist in the absence of truth, and if people are not provided the tools that would allow them to comprehend the truth and reality of their circumstances during their proceedings, then there exists a significant barrier to achieving justice.

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[1] Joanna Birenbaum & Barbara Collier, "Communication Intermediaries in Justice Services: Access to Justice for Ontarians who have Communication Disabilities" (September 2017) at 21, online (pdf): <cdacanada.com> [perma.cc/P97T-KW7S].

This article sets out to communicate that systemic change is required if Canada truly believes that every person deserves the right to life, liberty and security of the person, even if that person has a disability. The facts, research and personal testimony discussed within will explain how CIs are poised and ready to help make that change. CIs hold the knowledge and skillset necessary to assess and accommodate the needs of people who have communication disabilities. Ultimately, this article will suggest that on a regular basis, certain disabilities are not readily recognized and not equitably accommodated in Canada's criminal legal system at present.

In 2017, Communication Disabilities Access Canada ("CDAC") released a thorough informative report addressing access to justice for those with communication disabilities in Ontario.[2] Along with a comprehensive introduction to different types of support that can be provided by CIs, the report provides information about the ways these professionals are currently woven into Ontario's legal system. Therefore, *Communication Intermediaries in Justice Services: Access to Justice for Ontarians who have Communication Disabilities* ("*CDAC Report*") has been a vital and valuable resource for this article and will be referenced frequently.

The *CDAC Report* estimates that approximately 165,000 people in Ontario live with a communication disability.[3] Compared to Canada's 2016 Census data, which indicates a population of 13,448,494, that means, according to CDAC, a little more than 1% of the province's population is at risk of encountering "serious and often insurmountable barriers when they attempt to access the justice system."[4] However, multiple sources will demonstrate that the 1% who have a disability of this kind are significantly more likely to encounter the criminal legal system, as an accused, complainant, or both.[5] Extrapolating from and building upon the data

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2 *Ibid*.

3 *Ibid* at 16.

4 *Ibid* at 11; Statistics Canada, *Ontario [Province] and Canada [Country], (table), Census Profile*2016 Census. Statistics Canada Catalogue no 98-316-X2016001 Ottawa. Released November 29, 2017. <www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/index.cfm?Lang=E> accessed July 2, 2024), [perma.cc/EVC4-P7TV].

5 See Deepa Singal et al, "Screening and Assessment of FASD in a Youth Justice System: Comparing Different Methodologies" in Ian Binnie, Sterling Clarren & Egon Jonsson, eds, *Ethical and Legal Perspectives in Fetal Alcohol Spectrum Disorders (FASD)* (Cham: Springer International Publishing, 2018) 95; Nguyen Xuan Thanh & Egon Jonsson, "Total Cost of FASD Including the Economics of FASD Associated with Crimes" in Ian Binnie, Sterling Clarren & Egon Jonsson, eds, *Ethical and Legal Perspectives in Fetal Alcohol Spectrum Disorders (FASD)* (Cham: Springer International Publishing, 2018) 49; *Ibid* at 3.

presented in the *CDAC Report*, this article next looks to a variety of statistics that have been collected throughout Canada in relation to the prevalence of communication disabilities within incarcerated populations. This section of the article will also speak to the challenges of collecting this data, relating to the nature of identifying what are sometimes called "invisible disabilities", as well as how the classification of "communication disability" fits within the Canadian discourse about disability rights.

The next section of the article argues that people with communication disabilities accused of crimes do not equally enjoy the benefits of the rights granted in sections 10, 11 and 14 of the *Charter*, being that these are rights that specifically refer to *the communication of information* surrounding criminal investigations and legal proceedings. As the primary focus of the *CDAC Report* was on how CIs serve witnesses and complainants, CDAC outlines issues related to sections 7, 14 and 15 of the *Charter*.[6] This article will expand on those *Charter* arguments, specifically with a lens on the rights of those who have been accused of offences. Accordingly, as section 10 rights are triggered "on arrest or detention",[7] this article challenges whether the rights within section 10 are routinely acknowledged for this specific group of accused persons. There have been decades of legal arguments to determine what is meant by the word "informed", but this article argues that the common law currently applies section 10 unequally between persons with and without communication disabilities.

At present, the common law also leads to the short discussion of section 11 *Charter* rights, specifically 11(d). This sub-section requires that any person charged with an offence "to be presumed innocent until proven guilty according to law in a fair and public hearing",[8] colloquially known as one's "right to a fair trial". The investigation in this section surrounds how the word "fairness" has been defined and purportedly provided in the context of accused persons with disabilities.

A case will then be made that section 14 (translation rights) ought to be extended to include access to CIs for those who need them during criminal proceedings. Although CIs do not consider themselves to be translators, the *CDAC Report* argues their role in the courtroom is essentially analogous: ". . . someone who can assist the individual to understand the questions being

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6 Birenbaum & Collier, *supra* note 1 at 29–35.

7 *Canadian Charter of Rights and Freedoms*, s 10, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

8 *Ibid*, s 11.

asked and convey them into language the complainant can comprehend and respond to."[9] This article will use case law to substantiate the argument that, regardless of how we define the role of a translator, the core purpose of section 14 is to ensure that parties understand one another in legal proceedings. Therefore, if there are resources available to increase the likelihood of mutual understanding, they ought to be used.

Finally, this article will argue that doing everything reasonably possible to allow a person to have their story genuinely understood before, during and after criminal proceedings is a fundamental principle of the justice system. When section 7 of the *Charter* says "everyone", it ought to mean everyone. Further to that, the unique vulnerability of people with communication disabilities has been well documented. For people who belong to multiple equity-seeking groups, each diversity checkbox they tick amplifies their societal struggles exponentially, so we must accommodate accordingly. It stands to reason that people who frequently misunderstand others and are frequently misunderstood by others are more likely to find themselves in all kinds of trouble. Statistics support that this trouble can have such consequences as incarceration.[10] It is therefore our constitutional duty to provide all people who have communication disabilities with accommodations when facing an adversarial system. Accordingly, systematic change is required so that being born with, or acquiring a communication disability, does not increase the probability of a person completely losing their liberty.

Once communication disabilities have been defined, and the impact they have on an accused person's rights has been outlined, this article will introduce the profession of specialized speech pathologists, CIs. CIs are not completely unknown to the legal system. So, before diving into all the ways that CIs *could* be utilized, this article will examine how they *are* being utilized in Canada, England and Northern Ireland by using examples from case law, information from the *CDAC Report* and resources provided by the non-profit organization, The Advocate's Gateway.

Finally, to fulfill its ultimate purpose, this article will discuss possible ways for increased collaboration with CIs when people with communication disabilities enter into the criminal legal system. CIs are Officers of the Court

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9 Birenbaum & Collier, *supra* note 1 at 31.

10 See Thanh & Jonsson, *supra* note 5 at 57; Singal, *supra* note 5 at 96.

that can help an accused person with a communication disability achieve equal protection and benefit from the law. They do this by ensuring that the individual not only understands the charges and proceedings before them, but they are also able to communicate their own needs, thoughts and truths accurately throughout the process. Communication is a multi-party event and so the idea that all parties have the tools they need to hear one another's stories accurately is crucial to uncovering the objective truth, which is a primary goal of any justice system. This means that collaboration with CIs will take Canada one step closer to equal access to justice for everyone, including people with communication disabilities, especially when they are accused of a crime.

II. What is a Communication Disability?

It is impossible to generalize any disability in a way that does justice to the individual who lives with it. Just like a person with a visual impairment may benefit from accommodations varying anywhere from a pair of reading glasses to a service dog, the needs of people with communication disabilities also lie on a vast spectrum.

According to CDAC, approximately 1.5% of Canadians live with a significant communication disability.[11] CDAC defines a communication disability as "disabilities that impact a person's ability to speak, hear, read, write, and/or understand what is being said."[12] Notably, the Canadian Government does not specifically track speech and language abilities in the health data that they regularly collect through Statistics Canada. Their scope covers the categories of pain, flexibility, mobility, mental health, seeing, hearing, dexterity, learning, memory, development and unknown.[13] This presents one of the primary challenges in advocating for those with communication disabilities: they come along with a wide array of physical and mental conditions, and are often present as secondary effects of a condition's defining symptoms.

Some of the conditions that may result in a person having a communication disability include cerebral palsy, autism spectrum disorder

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[11] Communication Disabilities Access Canada, "People who have communication disabilities" (last accessed 15 February 2024), online: <cdacanada.com/resources/communication-disabilities/statistics/> [perma.cc/AZ6N-QES2].

[12] Birenbaum & Collier, *supra* note 1 at 6.

[13] Statistics Canada, "Canadian Survey on Disability" (last modified 28 November 2018), online <statcan.gc.ca> [perma.cc/R8M8-C94N].

("ASD"), fetal alcohol spectrum disorder ("FASD"), intellectual or developmental disabilities, speech disorders, selective mutism, head and neck cancers, learning disabilities, attention deficit hyperactivity disorder ("ADHD"), multiple sclerosis and Parkinson's disease.[14] The known prevalence of several of these diagnoses in accused and incarcerated populations calls for wider awareness of how communication disabilities can be accommodated.

In terms of specific data, the Advocate's Gateway ("TAG"), a volunteer-run organization operating in England and Wales, reports that at least 15% of those caught in their respective criminal justice systems operate with a "specific language disability", which their literature says includes "specific language impairment, dyslexia, dyspraxia, dyscalculia and AD(H)D."[15] Another necessary consideration when contemplating what parallel Canadian statistics may look like is that TAG has not included FASD in their data. This factor would contribute greatly to a fulsome Canadian statistic. Canadian studies conducted between 1999 and 2015 have estimated that, at any given time, somewhere between 9.9% to 23.3% of inmates live with FASD.[16] All this to say, while there may not be a concrete statistic available to quantitatively prove the point, CDAC is not wrong in identifying research from around the world "that clearly attests to the over-incarceration of persons with disabilities."[17]

The nature of communication disabilities can make them difficult to detect. When giving testimony in a *voir dire* in the Manitoba Provincial Court, Clinical Psychologist Dr. Dell Ducharme told the Court that language disorders are not usually apparent to those who are not trained to find them.[18] In fact, Ducharme brought to light the most challenging aspect of recognizing language disorders: people who have them often go to great lengths to hide them, spending much of their lives "pretending" to understand.[19] This is why, while some communication disabilities present overtly and immediately, they are also known to remain almost completely

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14 Birenbaum & Collier, *supra* note 1 at 48–52.

15 The Advocate's Gateway, "Planning to question someone with 'hidden' disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and AD(H)D" (15 December 2015), online (pdf): <theadvocatesgateway.org> [https://perma.cc/TY97-N6BY] at 4.

16 See Thanh & Jonsson, *supra* note 5 at 57; Singal, *supra* note 5 at 96.

17 Birenbaum & Collier, *supra* note 1 at 13–14.

18 *R v Soulier*, 2020 MBPC 40 at para 16 [*Soulier*].

19 *Ibid*.

hidden to anyone not actively assessing the individual's communication needs.

Among the plethora of educational resources available on CDAC's website is a list of indications that a person may require a CI.[20] These indications include explicit disclosure through a person's use of words, through a card carried by the affected individual or by communication through a third party.[21] But there are more subtle signs a person may have a communication disability as well, such as having difficulty finding their words, responding to questions appropriately and consistently or just generally being understood.[22]

Even still, there are persons with communication disabilities interacting with the criminal system that are so well hidden that they can only be spotted and labelled as such by those who have been trained to do so.[23] The *Charter* entitles those with invisible disabilities to equal benefit of and protection from the law. Though, how can an opportunity for equality be provided if its absence has not been identified? If it is so difficult to know what communication disabilities *look* like, it may be a more reasonable exercise to explore what a communication disability may *feel* like. In *Soulier,*[24] the evidence of the accused is his own description of how it feels to live with the language capabilities that he has.

In the previously mentioned *voir dire,* Dr. Ducharme specifically spoke of what he referred to as Mr. Soulier's "language disorder", differentiating it from an intellectual disability.[25] Soulier had been diagnosed as such by a school psychologist when he was a teenager.[26] In this case, the same testing that confirmed the language disorder found him to have a low IQ of 70, but this did not result in the diagnosis of a cognitive disability.[27] In his own testimony, Mr. Soulier described how his language disability feels from his point of view:

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[20] Communication Disabilities Access Canada, "Guidelines for Justice Professionals Working with Accused Persons who have Speech and Language Disabilities" (2015), online (pdf): <cdacanada.com> [perma.cc/2W7C-6LX6] [*CDAC Guidelines*] at 6.

[21] *Ibid.*

[22] *Ibid.*

[23] The Advocate's Gateway, *supra* note 15 at 8.

[24] *Soulier*, *supra* note 18.

[25] *Ibid* at para 12.

[26] *Ibid* at para 8.

[27] *Ibid*.

> Q Okay. And does your disability affect anything other than schoolwork?
>
> A Public, I guess.
>
> Q Okay. What do you mean by that, public?
>
> A Like, sometimes I don't know how to talk for myself.
>
> Q Okay. Sometimes you don't know how to talk for yourself?
>
> A Yeah.
>
> Q Okay. Can you tell the Court a bit more about that, how you — how you don't know how to talk for yourself?
>
> A I might say something wrong, or something differently.
>
> Q Okay. And — and do you know why you say something wrong or different?
>
> A I answer too fast.
>
> . . .
>
> Q Can — can you give an example when you — an example of when you answered something wrong?
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> A Not good at giving examples either.[28]

Soulier testified that the reason he said the wrong things, that he sometimes felt he did not know how to speak on his own behalf, was that he answered too fast[29]. This phenomenon could be described as an impulse driving the body to speak an answer to a question before the brain has had an opportunity to consider what it wants to say. It may feel like the mind has a rolodex of possible responses to a question being asked but the entries are not sorted, though the body has an urge to answer immediately, so it either shouts the response on the current page or frantically flips to a random one and hopes for the best.

The reason the Court implied that Soulier's disability had a detrimental effect on his ability to convey what he intended in his *voir dire* testimony was that he was nervous and his nerves compounded the effect of his disability.[30] Of course, nerves are universally expected when testifying in court, so it is acknowledged that any person would not be communicating to the best of

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[28] *Ibid* at para 21.
[29] *Ibid.*
[30] *Ibid* at para 34.

their ability, not fully understand what is being said to them and have difficulty conveying their own messages. But this article is not about technicalities in the courtroom; protecting an accused person's *Charter* rights protects their dignity. Being treated with dignity is a reasonable expectation of any citizen interacting with state authorities. Soulier's emotional state while being interviewed at police headquarters was described by Dr. Ducharme as "obvious and excruciating psychological distress."[31] As a result of his experience, Judge Devine concluded that, due to Soulier's circumstances, his statement to police could not be considered voluntary and would not be admissible as evidence:

> Given the severe language disorder of the Accused, I accept that on a both a subjective and objective basis, that Mr. Soulier told police of his involvement in a sexual assault in an effort to go home and as a result of the threat and inducement offered by Detective Kendel, in combination with the earlier somewhat oppressive conduct of the arresting officers. The actions taken by the police may not have resulted in the will of a suspect being overborne for the vast majority of adults, but in this case, given Mr. Soulier's particular circumstances, they did. He had just turned 18; he was a young, Indigenous man from a remote, northern, Indigenous community who had been in the city only a short time. He had a severe language disorder and problem with his working memory which drastically affected his ability to understand what was being said to him and how to respond, particularly when dealing with a stressful situation. He had never been arrested before. He was in police custody over 6 1/2 hours, and in the interview room for approximately six hours. He was cold in the room.[32]

While altogether these factors make up a unique situation that is unlikely to be repeated, some of these conditions would be universally detrimental to people with communication disabilities stemming from various health diagnoses. If this behaviour would not constitute a *Charter* breach for "the vast majority of adults", it suggests a need to consider again the prevalence of known communication disabilities in the criminal system, and subsequently factor in that it was not determined that Mr. Soulier's disability entitled him to a different experience than he received.[33] Mr. Soulier did not receive adequate accommodations to ensure that he was being afforded equal protection from and benefit of the law because the default assumption was that he did not require any.

Mr. Soulier is but one example of an accused person whose disability was overlooked until it was too late. There are a variety of ways that

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[31] *Ibid* at para 62.
[32] *Ibid* at para 80.
[33] *Ibid*.

communication disabilities hide in plain sight. Take, for example, spectrum disorders like ASD, where a person's ability to comprehend and express language may vary significantly depending on situational or environmental factors.[34] Within the experience of one individual, the experience of their autistic traits differs depending on the sensory stimuli around them. This is not the same as saying that people are in stressful situations when they are arrested resulting in them not processing information optimally. Obviously, nobody is having their *best* day if they are being questioned by police. Many people with ASD experience physical pain when exposed to loud noises, certain lighting, certain textures, or smells. Combine a sensory trigger like flashing lights from a police cruiser and the sound of traffic passing by with a police confrontation and an autistic person may go from passing as a neurotypical person to having a meltdown, disassociating, and ceasing to absorb any information whatsoever.[35]

For me, life changed when I learned that I had been living with autism and there was a medical explanation for three decades of awkward communication. Not knowing how neurotypical people think and feel, I assumed that everyone dealt with the same processing challenges that I do. I am among many who describe learning this information as finally being handed the rule book to football halfway through the game. Not only did I not know there was a rule book, but I was under the impression I was supposed to be golfing. Being aware of this discrepancy has allowed me to adjust the way I communicate significantly, and as such, there has been a tangible difference in the ease with which I navigate the world around me. One noticeable change has come from being empowered to inform people that I may need some time before I answer a question or continue a conversation because what I say in the moment may completely misrepresent my intended meaning.

I will repeat this sentiment a few more times, but a person cannot know what they do not know. The nature of a disability involving communication means that people affected by them may be completely oblivious that they communicate differently from the world because, to learn that information, an initial accommodation would need to allow for this understanding.

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[34] Birenbaum & Collier, *supra* note 1 at 48.

[35] The Advocate's Gateway, "Planning to question someone with an autism spectrum disorder including Asperger syndrome" (1 December 2016), online (pdf): <theadvocatesgateway.org> [perma.cc/YNC7-TPER].

A. Section 15 Equality Rights

The meaning of section 15 of the *Charter* could not be clearer:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[36]

Every individual is equal. This article argues that the criminal legal process does not always afford equal protection from and benefit of the law to people with communication disabilities. The sections that follow will reference other *Charter* provisions to demonstrate that this is the case. Each of the sections examined below will present case law that calls into question whether a person's *Charter* rights have been violated. These violations may be a result of conscious or unconscious discriminatory practices or actions while people accused of crimes were in the care and control of the state. Generally, no decent person is making the argument that people with disabilities should *not* be treated as equal before and under the law. As such, the section 15 argument explores when a person is disabled *enough* to be protected. The argument this article is making is that it is a logistical necessity to recognize that every ability exists on a spectrum, and there will be a threshold where individuals are at a considerable disadvantage. At this point, the law must intervene and constitutionally compensate the affected individual.

Logic also dictates that you cannot rightfully assess if a person understands you by asking them if they understand you, unless you are first certain that the person understands what you mean by understand. It is a constitutional edition of Abbott and Castello's "Who's on First", except there is nothing funny about the cluster-what of a human rights dilemma this version of the song presents. Therefore, logic dictates that a rights-based approach to communication disabilities demands that we do a better job of screening for them early on in incidents relating to criminal law. Otherwise, there is no way to know whether an individual would truly benefit from the services of a CI.

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[36] *Charter*, *supra note 7*, s 15(1).

B. Section 10 Rights Upon Arrest

A typical journey through the criminal legal system starts with an arrest. At this point, police inform the accused person of the reasons for their detention or arrest and ask the accused if they would like to speak with a lawyer, as is required by section 10 of the *Charter*. The officer then will ask the accused if they understand.

In 1987, the Supreme Court of Canada ("SCC") held in *R v Braig* that, if an accused has answered the officer's questions in the affirmative, the burden of proof lies with the accused to prove they have been denied any further rights.[37] There is a flaw in the logic here though. In *R v Smith*, the SCC reminded us that section 10 requires that an accused person has an "awareness of the consequences" of their charge for them to legally waive their right to counsel.[38] How is it humanly possible to determine another person's level of comprehension of what is before them with a yes or no question? The *Smith* decision goes on to specify that ". . . the degree of awareness which the accused may be reasonably assumed to possess in all the circumstances may play a role in determining whether what the police said was sufficient to bring home to him the extent of his jeopardy and the consequences of declining his right to counsel."[39] The Former Chief Justice McLachlin continued:

> What is required is that he or she be possessed of sufficient information to allow making an informed and appropriate decision as to whether to speak to a lawyer or not. The emphasis should be on the reality of the total situation as it impacts on the understanding of the accused, rather than on technical detail of what the accused may or may not have been told.[40]

If the consequences are not strictly laid out, and the accused has not demonstrated understanding except for parroting the caution right back, police are left to guess, based on their very first impressions of a human, that person's capacity to understand their current circumstances immediately upon arrest. Again, one cannot know what they do not know, so, unless police are provided with the necessary tools to assess comprehension, they

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37 *R v Baig*, 1987 CanLII 40 (SCC) at para 6.
38 *R v Smith,* 1991 CarswellNS 29 at para 27, [1991] 1 SCR 714 (SCC).
39 *Ibid* at para 50.
40 *Ibid* at para 28.

are at risk of unknowingly violating the rights of people with communication disabilities.

Returning to *R v Soulier*, the accused produced evidence of a language disorder that was corroborated by an expert witness and ultimately led to the exclusion of his statement to police.[41] Here, Judge Devine followed *R v Oickle*, reiterating that when determining if a statement made to police was voluntary, all surrounding circumstances, including the particular circumstances of the accused, must be taken into account.[42] In *Soulier*, the accused was 18 years of age, had no previous police involvement and was Indigenous from a remote Northern Community.[43] In excluding Mr. Soulier's statement from evidence, Judge Devine wrote:

> Given the severe language disorder of the Accused, I accept that on both a subjective and objective basis, that . . . [t]he actions taken by the police may not have resulted in the will of a suspect being overborne for the vast majority of adults, but in this case, given Mr. Soulier's particular circumstances, they did.[44]

Looking to the previously discussed statistics surrounding communication disabilities and their involvement in criminal legal issues, this article respectfully proposes that those same actions would *not* be in line with respecting the *vast* majority of adults. In fact, the assumption that they would endangers the *Charter* rights of those with communication disabilities.

Former SCC Justice Ian Binnie speaks to systemic difficulties surrounding FASD and section 10 *Charter* rights in his 2018 paper titled "FASD and the Denial of Equality."[45] While communication disabilities are often not the only challenges that folks with FASD face, Binnie speaks to section 10 rights specifically when he discusses the propensity of folks with FASD to give false confessions to police.[46] Binnie gives the example of *R v Charlie*, a case out of the Yukon Territorial Court.[47] In this case, Charlie did not have an FASD diagnosis, but it was suspected.[48] Binnie describes

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41 *Soulier*, *supra* note 18 at para 81.
42 *Ibid* at paras 68–69.
43 *Ibid* at para 80.
44 *Ibid*.
45 Ian Binnie, "FASD and the Denial of Equality" in Ian Binnie, Sterling Clarren & Egon Jonsson, eds, *Ethical and Legal Perspectives in Fetal Alcohol Spectrum Disorders (FASD)* (Cham: Springer International Publishing, 2018) 23 at 35.
46 *Ibid* at 28–32.
47 *Ibid*.
48 *Ibid*.

Charlie's potential interactions with the legal system following arrest.[49] He explains that one of the characteristics of a brain with FASD is its people-pleasing nature, an instinct that operates to the point where a person may not realise that they still possess agency of choice.[50] In this, he stumbles onto the conundrum of treating suspects in crime equally, versus treating them equitably. Binnie presents the example of *R v Singh*, where the record states that the accused told the interrogating police of his desire to remain silent 18 times, and the Court held that it was within Mr. Singh's capacity to hold his own and remain silent, though he did not and confessed).[51] Binnie posits that Charlie would not have had that same capacity.[52] Furthermore, Charlie would not have that capacity because of a legitimate disability, thus being afforded unequal protection of the law on account of his disability.

Binnie acknowledges that accused persons with FASD have been treated variably by the courts, comparing the situations of the accused in three cases: *R v Henry*, *R v Oickle* and *R v Bohenier*.[53] *Henry*, which Binnie differentiates as a case out of the north, involved an accused who was known in the community and by police to be "mentally challenged" and so was treated with care and afforded the benefit of a forensic psychiatrist expert opinion.[54] This is a case where the court said of law enforcement:

> The officers treated Joey with sympathy, understanding, and patience. With some people, regrettably, there is only so much that can be done to assure compliance with s. 10(b) of the Charter and to assure voluntariness.[55]

Despite very complimentary words to the officers involved, Justice MacCallum found reasonable doubt that Joey Henry's statement was voluntary, therefore making it inadmissible.[56] One of the reasons given for the decision to exclude the evidence was the testimony of the forensic psychiatrist who was able to expertly confirm that the accused sometimes

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49 The actions are described as potential as Binnie J is speculating, given that there was insufficient detail given in the territorial decision.

50 Binnie, *supra* note 45 at 29 (Binnie J engages in a thorough discussion of moral blameworthiness and the FASD offender as well, which is another issue of extreme importance in the Canadian criminal system, but which is outside the scope of this article).

51 *Ibid* at 30

52 *Ibid*.

53 *Ibid* at 31–32; *R v Oickle*, 2000 SCC 38 [*Oickle*]; *R v Henry*, [1996] YJ 39, 1996 YKJT 39 [*Henry*]; *R v Bohenier,* [2002] MJ No. 313.

54 *Henry*, supra note 53 at paras 12, 36.

55 *Ibid* at para 33.

56 *Ibid* at paras 35 and 42.

claimed to understand things when he did not. [57] This is another example of a person being unable to know and communicate what they do not know and understand.

In all, Joey Henry's situation is an example of a best-case scenario encounter with police, and still, a judge found that the accused's section 10 *Charter* rights had been violated as a direct result of his disability.[58] This case demonstrates that even when everything goes right and no individual within the system makes a technical or moral error, the system itself still fails people who have communication disabilities. Binnie comments to this effect as well, saying that "in general, police work is not a game in which prizes are given out for sportsmanlike conduct",[59] offering the perspective that the adversarial nature of the legal system does not offer space to prioritize those idealistic values of sympathy, understanding and patience within the context of criminal investigations.

In *Oickle,* police administered a polygraph to the accused, informed him that he failed the polygraph and then proceeded to question him for nearly ten more hours, at which point he began to sob and then confessed.[60] At trial, the confession was found to be voluntary and therefore included in evidence at trial, but it was thrown out by the Nova Scotia Court of Appeal.[61] However, with a 6-1 majority, the SCC overturned the decision once again, determining that based on the absence of objectionable misconduct by the police, Oickle's confession was voluntary after all.[62] The distinction between *Oickle* and *Henry* is how the respective courts weighed the level of accommodations given. For Oickle, his confession was considered a legitimate breakdown of the accused's will to remain silent, whereas Henry's confession considered his communication disability as a factor.[63]

The cases above demonstrate a critical need to recognize that communication disabilities may be invisible and must always be contemplated as a possibility when a person's *Charter* rights are at stake.

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57 *Ibid* at para 39.
58 *Ibid* at para 41
59 Binnie, *supra* note 45 at 32.
60 *Oickle*, *supra* note 53 at paras 6–10, 127.
61 *Ibid* at paras 13 and 20.
62 *Ibid* at para 8.
63 *Ibid* at para 72; *Oickle*, *supra* note 53 at para 41.

C. Section 11(d): How to Make a Trial Fair

In many ways, the pursuit of justice runs hand in hand with the pursuit of fairness. This is reflected in section 11(d) of the *Charter* which dictates that "[a]ny person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."[64] If so, it stands to reason that, for a person with a disability, a fair trial will require that some accessibility accommodations be made. The 2017 decision out of the Ontario Superior Court of Justice in *R v Mazia* provides some obvious but essential points around the principles of accommodating disabilities in court, with the issue being whether or not Mazia, who was legally blind, should be entitled to Legal Aid on account of his disability.[65] It was not an outrageous finding that when a case stands on video evidence and the accused is legally blind, requiring the accused to defend himself would result in an unfair trial.[66] Mazia had specifically made a Rowbotham application, which when approved, granted him access to a Legal Aid lawyer[67]. But he also argued on this appeal that if the trial judge had rightfully rejected his Rowbotham application, he still should have been provided appropriate accommodations as an "unrepresented accused with a visual impairment."[68] This second question was not considered by the court as his conviction was set aside and a new trial ordered when the Rowbotham application was granted,[69] but it raises the question of whether or not providing a Legal Aid lawyer will always be the best option in accommodating disabilities. This question will be discussed shortly.

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64 *Charter*, *supra note 7*, s 11.
65 *R v Mazia*, 2017 ONSC 312.
66 *Ibid* at para 20.
67 *Ibid* at para 6.
68 *Ibid* at para 2.
69 *Ibid* at para 24.

D. Section 14 Right to an Interpreter

Once a matter has reached the point where it will be heard in court, section 14 *Charter* rights are triggered. Section 14 reads:

> A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.[70]

Following what has already been established about the importance of parties fully comprehending the proceedings in which they are participating, section 14 further enshrines those rights into Canadian constitutional law. Just two years after the *Charter* was introduced, the Ontario Court of Appeal held in *R v Petrovic* that:

> [a] person may be able to communicate in a language for general purposes while not possessing sufficient comprehension or fluency to face a trial with its ominous consequences without the assistance of a qualified interpreter. Even if that person speaks broken English or French and understands simple communications, the right constitutionally protected by s. 14 of the Charter is not removed.[71]

While *Petrovic* was a case addressing an accused who spoke English as an additional language, the decision still establishes that someone who understands simple communications, yet does not possess sufficient comprehension skills to understand the complexities of a trial, is entitled to an accommodation that allows them to understand.[72] Encouraging the use of interpreters, the court went on to say that "[i]t would require cogent and compelling evidence for a trial judge to conclude that the request for an interpreter is not made in good faith, but for an oblique motive."[73] In short, what reason would somebody have for requesting that accommodations be provided to assist them in comprehending proceedings? So long as a reliable and competent translator can be solicited, it is very unlikely that the translator could do anything oppositional to justice, so there is no good reason to reject a party's request for translation or interpretation.

A decade later, in the often-cited *R v Tran*, the SCC also assumed that the defendant's request for a translator was made in good faith, and set the qualitative standard for translations provided in court, holding that the

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70 *Charter*, *supra note 7*, s 14.
71 *R v Petrovic*, 1984 CarswellOnt 63 at para 14, [1984] OJ No 3265 [emphasis added].
72 *Ibid*.
73 *Ibid*.

quality of translation provided must be "one of continuity, precision, impartiality, competency and contemporaneousness."[74] Following this logic, if a person's language skill in their mother tongue does not allow them to follow proceedings continually, precisely, competently and contemporaneously, they should be entitled to an accommodation under section 14 of the *Charter.* The *CDAC Report* looks at section 14 rights from the point of view that CIs are able to perform essentially the same function in a court as a translator or interpreter.[75] With that said, it would then become an obligation to provide a CI for any person whose language skills are such that they are unable to follow the legal proceedings at the level of the standards set in *Tran.* So then, what exactly is a CI?

III. What is a Communication Intermediary?

Like any disability, the level of support needs for people with communication disabilities varies widely, and CIs are professionals that are available to assist in identifying and communicating those support needs to relevant third parties.[76] CDAC describes CIs as professional speech-language pathologists ("SLPs") that have been trained to facilitate two-way communication between parties interacting with one another in criminal legal contexts.[77] CDAC provides training for SLPs with at least two years of experience in the field already, and some CIs may also bring additional experience related to communication and disabilities.[78]

A CI is there to aid with direct communication throughout the process.[79] It is important to note that they are neither an interpreter nor a translator, though they sometimes support by repeating or rephrasing what has been said for the sake of facilitating comprehension.[80] While a CI will support the needs of the person with the communication disability, they are still a neutral and impartial officer of the court.[81] They will not testify, provide opinions on testimony or weigh in on legal issues, like capacity to consent,

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74 *R v Tran*, 1994 CarswellNS 24 at para 80, [1994] 2 SCR 951 (SCC).
75 Birenbaum & Collier, *supra* note 1 at 34.
76 *Ibid* at 21.
77 *Ibid* at 19.
78 *CDAC Guidelines*, *supra* note 20.
79 *Ibid* at 6.
80 *Ibid.*
81 *Ibid.*

and they are not there to influence a person's testimony.[82] The CI is there to help break down the known barriers to justice that people with communication disabilities face.

The first part of a CI's process is an assessment of the person's communication abilities and needs.[83] Their involvement may end with them submitting a report of the findings, which will detail the level of support a person may require, as well as provide instructions for others to shape their communications with this person throughout the process.[84] Suggestions provided by a CI may include asking justice professionals to provide visual cues (especially when dealing with abstract concepts like timelines), speaking in short sentences with pauses in between, avoiding turns of phrase and metaphors, or advising parties of the specific language the accused person is familiar with and responsive to.[85] The CI's involvement may continue up to and include their presence in the courtroom, where they would provide consistent and contemporaneous support.[86] Every case will look different and that is why it is crucial for people to be assessed by a CI early in the criminal process and have their *Charter* rights protected.

IV. How Have CIs Been Used in Canada?

A recent example of a CI providing services at trial comes from *R v Doncel,* heard by the Ontario Court of Justice between 2021 and 2022.[87] Prior to this case being heard, a *voir dire* was held to determine if the complainant, who lives with communication and cognitive disabilities, would be capable of testifying.[88] After she was, the Crown brought an application to have the complainant testify with the assistance of a CI.[89] The application outlined the individual accommodations that would be provided to the complainant, including the types of visual aids, gestures and verbal check-ins.[90] The judge used the information in the application to design a procedure that could be understood and followed by everyone in the courtroom.[91] As a result, the

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82 *Ibid*.
83 Birenbaum & Collier, *supra* note 1 at 23.
84 *Ibid* at 27.
85 *Ibid* at 38.
86 *CDAC Guidelines*, *supra note 20* at 6.
87 *R v Doncel*, 2022 ONCJ 514.
88 *Ibid* at para 12.
89 *Ibid* at para 18.
90 *Ibid*.
91 *Ibid* at para 19

judge wrote that he was "satisfied that the evidence [he] heard represented the complainant's own narrative of events", and that, in his view, "the communication intermediary was a valuable addition to the trial process and did not compromise trial fairness."[92]

The Ontario Court of Justice recently released a ruling on means of testimony in a sexual assault trial, where the complainant had survived a stroke that made her unable to speak when she was a teenager.[93] In this case, the Crown applied to have the complainant testify using an iPad and keyboard.[94] The reason the CI was not explicitly required at trial was that this complainant had been through a thorough communication assessment for another case, and the Court already had a list of suggestions to facilitate her testimony. These were:

(1) Keep word choice short and to the point;

(2) Keep complex sentence structures to a minimum;

(3) Use everyday language;

(4) When asking a yes/no question, begin by stating a yes or no answer is required;

(5) Provide sufficient time for the Complainant to communicate her answer;

(6) Ask for further information if the complainant provides a one-word answer;

(7) Verbally direct the Complainant to stay on topic and redirect her back to task;

(8) Use a visual display of the topic/subject of the question whenever possible.[95]

It is clear from the means of testimony ruling that the court expects this testimony to take significant time and that has been noted as what is required for the matter to be heard fairly.[96] It is a refreshing sentiment to hear in relation to accommodating disabilities, as too often the reasons given for not granting equal access to goods, services, justice, etc. are cited to be time and money. Justice Pratt gives heart to those rooting for disability justice with the words:

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92 *Ibid*.
93 *R v DN*, 2023 ONCJ 60.
94 *Ibid* at para 14.
95 *Ibid* at para 12.
96 *Ibid* at para 10.

> Members of the public must be able to come to court to have their voices heard. The manner in which those voices are heard is immaterial. Courts have an obligation to accommodate all persons, regardless of their limitations, to ensure they are full participants in their justice system.[97]

The message is not any different from the core purpose of the *Charter*. Canada prides itself on a justice system built on the tenets of equality, and with that, justice professionals have a responsibility to preserve that, even when it is costly or inconvenient.

V. How to Improve the Integration of CIs into the Criminal Legal System

While the case did not involve a Communication Intermediary, the *voir dire* ruling in *R v Soulier* examines some of the issues that arise in court when an accused has a communication disability. The case ultimately resulted in a mistrial, but in the *voir dire,* the defence sought to admit expert evidence of Dr. Del Ducharme, a Clinical Psychologist who specialized in the Interpretation of Intelligence Test Reports.[98] What Dr. Ducharme was able to convey to the court about the accused's capability to communicate without accommodations was deemed enough for Judge Devine to exclude his statement to police from evidence.[99] Why did this even become an issue though? How is it that the accused's reportedly severe language disorder was disregarded until the proceedings got to this *voir dire* stage?

The CDAC Guidelines provide a solution to this injustice, outlining a procedure that spreads the responsibility of protecting the *Charter* rights of those with communication disabilities to every law enforcement and justice professional involved in the procedure.[100] The suggested procedure requires first that the accused is screened for a communication disability, as discussed earlier. Every person who interacts with an accused should know what to look for and always be mindful of how easily communication disabilities can hide. If a communication disability is identified, the next step is determining the level of support needs for this person.[101] This is where a CI comes in. CDAC recommends asking if the person would like help

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97 *Ibid* at para 11.
98 *Soulier*, *supra* note 18 at para 2.
99 *Ibid* at para 80.
100 *CDAC Guidelines*, *supra note 20* at 6
101 *Ibid* at 6-7.

communicating, explaining why you are asking them and then determining if there is already a person who provides this for them.[102] Likely due to the impartiality requirement of CIs in a judicial context, an external CI will need to be engaged. Conveniently, Communication Access to Justice maintains a registry of CIs who have been trained by CDAC and can be contracted to provide services at any stage of the criminal legal process.[103]

VI. Conclusion

Canadian jurisdictions have the constitutional responsibility to integrate better accommodations into the legal system for accused persons with communication disabilities. Canada has the opportunity to build a system, incorporate and modify methods that have worked in other jurisdictions, and create profound change in the way people communicate with one another in court. How can there be justice if the parties do not understand one another? How can the parties understand each other if they do not even know if they are speaking the same language?

The solutions are in front of us. Justice professionals and law enforcement are not trained to read minds, so it is impossible to rule out communication disabilities unless we intentionally screen for them. What would it look like if a person's first point of contact in the system offered some quick screening questions to screen for a communication disability before doing anything else? If there are any red flags, bring in a CI for an assessment. This may slow down the investigation process, but what would it look like if everyone in the courtroom truly understood one another? Communication is a two-way street. If people are able to access the tools and resources necessary to understand what the justice system is asking of them, they will also be able to express their own needs, thoughts and messages in a way that will allow courts to hear their voices as well.

It stands to reason that people with communication disabilities have been misunderstood their entire lives. To receive just treatment, a person needs to be understood. Being understood is a gift most of the population takes for granted because they naturally communicate with one another in similar ways. However, the right to life, liberty and security of the person belongs to everyone equally, even if they are disabled. It is a blunt message,

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[102] *Ibid* at 7.
[103] *Ibid* at 5.

but perhaps it needs to be. Communication disabilities are not rare, but they do hide. CDAC has done incredible leg work toward developing a system that offers an opportunity for mutual understanding. It is in this understanding that we will eventually find equality, and we ought to not let that work go in vain.