

# COMMUNICATION INTERMEDIARIES IN JUSTICE SERVICES

**Access to Justice for Ontarians who have  
Communication Disabilities**



**Communication  
Disabilities Access  
Canada**

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Communication Intermediaries in Justice Services: Access to Justice for Ontarians who have Communication Disabilities

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Disclaimer: The views expressed in this report represent the opinions and interpretations of CDAC and do not necessarily reflect those of the Law Foundation of Ontario.

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## About Communication Disabilities Access Canada (CDAC)

Communication Disabilities Access Canada (CDAC) was founded in 2001 as a national, non-profit organization to promote human rights, accessibility, and inclusion for people who have speech, language and communication disabilities that are not primarily caused by vision or hearing disabilities. CDAC is project funded and brings together perspectives and expertise from a wide range of stakeholders, including people who live with speech, language and communication disabilities, family members, speech-language pathologists, augmentative and alternative communication clinicians, legal professionals, bioethicists, educators, healthcare providers, accessibility consultants and disability advocates.

*“Our vision is an inclusive society where people who have communication disabilities can meaningfully exercise their full rights of citizenship.”*

CDAC provides:

- Research on a range of communication issues relating to social inclusion
- Education and resources to advance communication access to goods and services
- Consultation on communication accessibility policy and legislation

Core assumptions:

At the heart of CDAC’s work, we believe:

- People with communication disabilities have a legal right to full and equal access to all goods and services
- Communication is a two-way, interactive process between two or more people with responsibilities on all parties
- People with communication disabilities have a right to accessibility accommodations and supports to reduce barriers and effectively communicate when using services

CDAC is a recognized provincial, national and international leader in the field of communication access for people with speech, language and communication disabilities. In 2016, CDAC was the recipient of the David C. Onley Award for Leadership in Accessibility in Ontario.

For information on CDAC and its projects, please refer to [www.cdacanada.com](http://www.cdacanada.com)

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## Glossary

**Communication** refers to interaction between two or more persons, where information is provided, sent or received. Communication occurs in face-to-face interactions, over the telephone, in groups or public consultations, and through reading and writing.

**Effective Communication** is the successful joint establishment of meaning between two or more people where information is correctly exchanged and accurately understood by all parties.

**Communication Disability** refers to disabilities that impact a person's ability to speak, hear, read, write, and / or understand what is being said. For the purposes of this document, communication disability does not include disabilities caused by hearing or vision loss. There are many disabilities that can affect a person's ability to communicate. See **Appendix A** which contains a brief description of these conditions.

**Communication Barrier** is any obstacle that prevents the effective exchange of ideas, thoughts and questions in face-to-face, group or telephone interactions, and via reading and writing. Obstacles include human behaviours on the part of a speaking person that are not conducive to supporting effective communication with a person who has a communication disability, lack of vocabulary or communication methods to communicate, lack of time and opportunity to communicate, and lack of appropriate communication assistance.

**Communication Accommodations** for people with communication disabilities include - but are not limited to - picture, symbol or letter boards; speech-output devices; voice amplifiers; hearing aids; plain language, easy reading, and alternate-format documents.

**Communication Supports** refers to strategies that a service provider can use to make communication go smoothly when interacting with a person who has a communication disability, for example, giving the individual more time to communicate, asking questions in ways he or she can understand and answer or reading the words the person points to on a communication board.

**Communication Intermediary** is a professional who holds a Master's degree in Speech-Language Pathology, has at least two years of clinical working experience and has specialized training to facilitate two-way communication between a victim, witness, or accused person with a communication disability and any participant in the justice system in order to ensure that the communication is as complete, accurate, and coherent as possible. A Communication Intermediary is impartial and neutral and is not an advocate, family member, support person, advisor, mediator, counselor, or expert witness.

The Communication Intermediary's paramount duty is to the court.<sup>1</sup> In Canada, Communication Intermediaries are trained by CDAC and are listed on the Communication Intermediaries Roster maintained by CDAC.

**Justice Services** refers to police and court services as well as legal services, including but not limited to:

- Services provided by the police to victims of crime
- Police services directed at the accused person
- Criminal court services for both victims and accused persons from pre-trial preparation to completion of the sentencing phase of the trial
- Family and civil court services from preparation of court documents to completion of a case, including mediation and pre-trial conferences
- Participation in tribunals and hearings, such as human rights, special education, landlord and tenant, small claims court, Criminal Injuries Compensation Board
- Accessing legal aid services in either criminal or family court

**Mental Disability** is embedded in Canada's constitution. The s.15 Right to Equality under the *Canadian Charter of Rights and Freedoms* guarantees that: "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 **mental or physical disability**" (Emphasis added). "Mental disability" is not a defined term in the Constitution. The Supreme Court of Canada has noted that disability "means vastly different things depending upon the individual and the context."<sup>2</sup> In this paper, the term "mental disability" is used as an umbrella term to reference constitutional rights and applies broadly to any impairment, disability, or limitation that may hinder an individual's communication abilities and full and effective access to justice. The term is not used to describe a mental health issue, although many people with communication disabilities may also have a mental health illness.

**Service Providers** encompasses all professionals working within the justice sector, including, but not limited to:

- Members of the judiciary, police officers, victim services, crown attorneys, judicial officers, duty counsel, defense lawyers, court accessibility coordinators, tribunal members, lawyers and paralegals.

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<sup>1</sup> In England and Wales, entitlement to access to a communication intermediary by various defined vulnerable witnesses is codified by statute. The Youth Justice and Criminal Evidence Act 1999, provides for the assistance of a Communication Intermediary where the "quality" of the evidence of a witness with a physical or mental disability is "likely to be diminished" because of disability. "Quality" of the quality of a witness's evidence is defined as "quality in terms of completeness, coherence and accuracy; and for this purpose "coherence" refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively." (s.16(5) *Youth Justice and Criminal Evidence Act*, <http://www.legislation.gov.uk/ukpga/1999/23/part/II/chapter/I> (downloaded on June 17, 2017).

<sup>2</sup> *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at para 69

## Foreword

As the Government of Canada moves forward to develop and implement national accessibility legislation for people with disabilities, it is both significant and timely for us to produce this legal memorandum, which addresses access to justice services for Ontarians who have communication disabilities. This memorandum builds on findings from a national study that we conducted in 2010, highlighting serious barriers to justice services for this population and the lack of qualified, impartial professionals to assist people communicating in these situations.

Since then, with limited one time funding from the Department of Justice Canada and The P and L Odette Foundation, Communication Disabilities Access Canada (CDAC) has trained and established a national roster of 250 communication intermediaries to facilitate people with communication disabilities to communicate with service providers within the justice system. Seventy-nine of these intermediaries are in Ontario. The purpose of this memorandum is to inform police, legal and justice professionals about the role of communication intermediaries and how they can be utilized to reduce barriers and make justice services accessible for people who have communication disabilities.

This memorandum is intended to be a source reference document and should be cross-referenced with our online resources at <http://www.access-to-justice.org>

We sincerely hope that this memorandum provides you with the rationale and information you need to recognize and accommodate the accessibility needs of victims, witnesses and accused persons who have communication disabilities when using justice services in Ontario.

We welcome your comments and questions and invite you to email us at [admin@cdacanada.com](mailto:admin@cdacanada.com).

Respectfully submitted by:



Joanna Birenbaum



Barbara Collier

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## **Executive Summary**

People with speech, language and communication disabilities do not have equal access to the civil or criminal justice system in Ontario and Canada. Without the appropriate accommodation, barriers to communication may make it difficult or even impossible for individuals with communication disabilities to report crimes to the police or testify at trial.

This paper addresses a critical gap in the provision of accommodation and supports for persons with communication disabilities in Ontario and proposes that the services of a Communication Intermediary be institutionalized in the justice system in Ontario.

### ***Communication Barriers to Access to Justice***

Over 165,000 people in Ontario have speech, language and communication disabilities, not caused primarily by Deafness or significant hearing loss. A person's ability to speak; understand what is being said; or read and write can be affected by many different type of disabilities, such as cerebral palsy, autism spectrum disorder, Down Syndrome, learning disability, cognitive disability, acquired brain injury, aphasia after a stroke, dementia, head and neck cancer, Amyotrophic Lateral Sclerosis, Parkinson's disease, or Multiple Sclerosis.

There is ample research that attests to the vulnerability and high incidence of abuse, crimes and violation of rights of people with communication disabilities. Yet, people with communication disabilities can experience serious and often insurmountable barriers when they attempt to access the justice system, whether as victims of a crime, as accused persons, as participants in civil administrative proceedings, or in providing instructions to legal counsel. Compounding these barriers is the lack of communication accommodations and support services to assist people when communicating in these situations.

### ***The Communication Intermediary***

Since 2012, Communication Disabilities Access Canada (CDAC) has trained 250 Speech-Language Pathologists to work as Communication Intermediaries within the justice system in Canada. Seventy-nine of these communication intermediaries are based in Ontario. Similar to other communication support services, such as a sign language interpreter for people who are Deaf, an intervenor for people who are DeafBlind or a translator for people who do not speak English or French, a Communication Intermediary facilitates people who have speech, language and communication disabilities to communicate as effectively as possible when accessing police, legal and justice services.

This paper argues that people with communication disabilities have constitutional and statutory rights to communication accommodations and supports so they can communicate as accurately, completely and coherently as possible when accessing police, legal and justice services. The authors propose that

where there is any question about the communication process for a victim/ witness or accused person who has a communication disability, the justice service must provide a Communication Intermediary. A Communication Intermediary is an impartial, qualified professional who has additional training to facilitate two-way communication between a victim/witness or accused person with a communication disability and a justice professional (e.g. police, prosecutor, private legal counsel). The role of a Communication Intermediary is exclusively to facilitate the witness/victim or accused person in understanding what is said or asked of them, and to assist the witness/victim or accused person in conveying their responses to the justice professional. The Communication Intermediary is not an advocate, counselor, coach or support person. Neither is the Communication Intermediary an expert witness who can comment on the witness' competence to give evidence or opine on the truth or reliability of the witness' communications.

### ***Goals of this Paper***

Although Communication Intermediary services are well established in other jurisdictions, such as in England and Wales, they are a relatively new service in Ontario and Canada.

The purpose of this document is to assist those working in the legal system to understand and utilize the services of the Communication Intermediary to reduce barriers and support access to justice for people with communication disabilities.

This document:

- Explains the training and role of the Communication Intermediaries;
- Provides a step-by-step overview of how the Communication Intermediary works to support access to justice in a report to the police, at trial, and following trial;
- Provides sample reports with recommendations for best facilitating communication;
- Provides a basic overview of the constitutional and statutory bases for the institutionalization of the Communication Intermediary in the justice system.

As a first step towards making justice services accessible for people with communication disabilities, and to address the current inequity of accessibility supports within the justice system in Ontario, Communication Intermediaries must be treated as an essential accommodation and made widely available to victims/witnesses and accused persons who have communication disabilities.

Persons who need sign language or other language interpretation are provided these services as a matter of constitutional right. A victim/witness (or accused person) who is Deaf and uses sign language is provided a sign language interpreter; a victim/witness or accused person who is DeafBlind is provided a trained intervenor; and a victim/witness or accused person who does not speak or understand English or French is provided a language translator. In the same way, a victim/witness who has a communication disability and who requires the support of a Communication Intermediary should be provided the service.

## Introduction

There are approximately 165,000 people in Ontario who have communication disabilities (“Communications Disabilities”), not caused primarily by Deafness or significant hearing loss. The range of disabilities that can impact on a person’s ability to communicate varies widely.

Individuals with communication disabilities can experience serious and often insurmountable barriers when they attempt to access the justice system, whether as victims of crime (in reporting to police or testifying), as accused persons, as participants in civil and administrative proceedings (family, estates, landlord tenant, social benefits, employment insurance, etc.), or in providing instructions to legal counsel in a wide variety of settings, including powers of attorney, property, insurance, contracts and family law, to list only a very few examples.

This publication has been developed to assist service providers working in the legal system –lawyers in all practice areas, police, crown attorneys, judges, and court staff – to understand and better utilize the services of the **Communication Intermediary** to reduce barriers and support access to justice for this often very vulnerable, marginalized and excluded group of Ontarians.

The publication will focus in particular on the role of the Communication Intermediary to support access to justice for persons with communication disabilities who may report to the police as victims. This focus has been chosen for four reasons:

1. The high rates of victimization of persons with communication disabilities makes urgent the need to give effect to the constitutional and statutory rights to access to justice and protection of the rule of law for this group;
2. There is well established international precedent for the role of the Communication Intermediary to support victims in the criminal justice process;
3. The role of the Communication Intermediary will arguably be subjected to greatest scrutiny in the criminal process, where the complainant/victim’s evidence may lead to a criminal conviction and the loss of liberty of an accused person; and
4. Victims must give a statement to the police and testify if charges are to be laid and proceed, whereas an accused may remain silent. CDAC does, however, recognize the domestic and international research that clearly attests to the over-incarceration of

persons with disabilities.<sup>3</sup> Increased understanding in the justice system of communication disabilities, as well as the role of the Communication Intermediary, will benefit both victims and accused. The techniques used by a Communication Intermediary to facilitate communication are the same, whether the individual in question is a victim or an accused. There may be serious risk of misleading and inaccurate information (including false confessions) provided by persons with communication disabilities if they are questioned by police or other justice system without the appropriate accommodations and supports. The precise mechanism for the state (and particularly police) to facilitate access to the service for accused persons is, however, beyond the scope of this publication.

While the focus of this publication is on the criminal justice process, the role of the Communication Intermediary applies directly to a wide variety of other legal settings, in relation to civil or administrative issues or proceedings, or to assist a person with a communication disability to retain and instruct counsel.

The publication is organized as follows:

- Part A – Provides an overview of the barriers faced by persons with communication disabilities and the need for Communication Intermediaries to facilitate access to justice;
- Part B – Provides an explanation of the Communication Intermediary and their role in the criminal justice system;
- Part C - Discusses the constitutional and statutory foundations for the Communication Intermediary to support access to justice for persons with communication disabilities;
- Part D – Explains the need for protection of the privacy and equality rights and interests of victims in their personal information when a Communication Intermediary is engaged, particularly in cases of sexual assault. This section identifies Independent Legal Counsel’s role in protecting these rights and offers other recommendations for protection should legal counsel not be available; and
- Part E – Briefly discusses the history of various criminal code amendments and evidentiary developments to address the *Charter* rights of victims. This history provides further foundation for the proactive engagement and use of Communication Intermediaries in Canada.

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<sup>3</sup> K Bryan, J Freer & C Furlong, *Language and Communication Difficulties in Juvenile Offenders*, (2007) 42:5 Int J Lang Commun Disord 505; Prathiba Chitsabesan et al, *Learning Disabilities and Educational Needs of Juvenile Offenders*, (2007) 2:4 Journal of Children’s Services 4; Karen McIsaac et al, *Association between traumatic brain injury and incarceration: a population-based cohort study*, *cmajo* 4:E746-E753; published online December 8, 2016, doi:10.9778/cmajo.20160072; Shereen Hassan & Robert M Gordon, “Developmental Disability, Crime, and Criminal Justice: A Literature Review” (May 2003) Simon Fraser University, Criminology Research Centre Occasional Paper #2003-1; BC Ministry of Health Services, *Mental Disorder, Substance Use and Criminal Justice Contact* (2005); Jessica Jones, “Persons with Intellectual Disabilities in the Criminal Justice System” (2007) 51:6 International Journal of Offender Therapy and Comparative Criminology 723; Svetlana Popova et al, “Fetal Alcohol Spectrum Disorder Prevalence Estimates in Correctional Systems: A Systemic Literature Review” (2011) 102:5 Can J Public Health 336; and Canadian Bar Association, *Resolution 13-12-A: Accommodating the Disability of FASD to Improve Access to Justice*, 2013.

## **PART A:**

# **The Population and the Need to Access Justice Services**

### ***People who have Communication Disabilities***

There are approximately 165,000 people in Ontario who have speech, language, fluency, voice and communication disabilities that are not caused primarily by Deafness or significant hearing loss. This number is extrapolated based on the incidence figures that are typically cited world-wide (i.e., 12 per 1,000). (Beukelman & Ansel '95). There are many different types of disabilities that have an impact on an individual's ability to communicate. Some are life-long, developmental disabilities, such as cerebral palsy, autism spectrum disorder, Down Syndrome, learning disability, or cognitive disability. Others are acquired communication disabilities, that may be caused by brain injury, brain tumor, head and neck cancer, aphasia after a stroke, dementia, Amyotrophic Lateral Sclerosis (ALS), Parkinson's disease, Multiple Sclerosis. Some mental health disabilities may also affect a person's communication abilities. Having a communication disability can affect a person's ability to speak, and/or to understand what others are saying, and/or to read and write.

People with speech disabilities may have slurred or unclear speech; or they may have no speech and communicate using gestures, pictures, letter boards, communication devices or assistance from a person who knows them well. They may use a voice amplifier if they have a weak voice. People with language disabilities may hear but have difficulty processing or understanding what another person is saying. For example, people who have aphasia after a stroke or accident may have difficulty in understanding others, and in speaking, reading and writing. People who have intellectual disabilities from birth or who acquire dementia or Alzheimer's disease later may have problems remembering, learning, understanding, or problem-solving, making communication challenging.<sup>4</sup>

In addition to having communication challenges, many people have dual or multiple disabilities. For example, people who have cerebral palsy, who are unable to speak, may also have difficulty walking, or physically manipulating objects. People who have autism may experience challenges learning and using language, as well as interacting with other people. It should be noted that while some people with communication disabilities may also have a cognitive disability, many people with communication disabilities do not have cognitive impairments and can understand and make their own decisions. Similarly, some people may have a hearing loss that impacts on their ability to hear what others are saying.

Some communication disabilities are easily observable (e.g. where a person cannot speak and uses a device to communicate), however, other disabilities may have no overt physical symptoms. For example, a person who has had a minor stroke or who has a learning disability may not appear to have a communication disability, however these conditions can have a profound impact on a person's ability to comprehend spoken language or express their own messages.

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<sup>4</sup> Communication Disabilities Access Canada, *Accessibility Includes Communication*, online: (2014) < [http://www.communication-access.org/wp-content/uploads/2015/07/CDAC\\_Booklet\\_SR.pdf](http://www.communication-access.org/wp-content/uploads/2015/07/CDAC_Booklet_SR.pdf)>.

In this paper, the wide ranges of disabilities that may affect communication are referred to collectively as “communication disabilities.”

See **Appendix A** for a list of disabilities that can impact on communication.

### **Contextual Risks and Rates of Victimization**

People with physical and communication disabilities, are two to six times more likely to suffer physical, mental, and sexual abuse as a result of their inability to communicate. The risk of sexual abuse increases with the severity of the disability experienced.<sup>5</sup>

In a study of 40 people who cannot speak and who use pictures, letter boards or devices to communicate, 39% of the respondents indicated that they had experienced unwanted sexual touch, 22% reported that they were forced to have sex, and 17% said that they were forced to touch someone sexually (Bryen et al., 2003, Carey & Frantz, 2003).<sup>6</sup> However, the full extent of the problem amongst people who have communication disabilities is not known because they may have no communication method to disclose abuse and crimes to police; police, legal and justice professionals may not understand or believe what they are communicating, and/or they may have no professional assistance to support them communicating in these situations.<sup>7</sup>

Girls and women are more likely to be victims than are men. It is estimated that 83% of women with disabilities will be sexually abused in their lifetime; 40-70% of girls with intellectual disabilities will be sexually abused before the age of 18; women with mental disabilities are up to ten times more likely to be sexually assaulted than women without a disability; fewer than 25% of incidents of sexual assault are limited to one episode; abuse of women with disabilities is frequently ongoing and the perpetrator is often a caregiver or someone who accesses the woman through her caregiver.<sup>8</sup>

For both sexes, research indicates that offenders are most often known to their victims and hold positions of trust and authority; for example, caregivers, attendants, family members, and drivers.<sup>9</sup>

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<sup>5</sup> Sobsey 1994 *Violence and abuse in the lives of people with disabilities: The end of silent acceptance*. Baltimore, MD: Paul H. Brookes.

<sup>6</sup> Bryen et al, 2003; Diane Nelson Bryen, Allison Carey & Beverly Frantz, *Ending the Silence: Adults who Use Augmentative Communication and the Experiences as Victims of Crimes*, (2003) 19:2 *Augmentative and Alternate Communication* 125;

<sup>7</sup> B Collier et al, *Reducing the Risk of Sexual Abuse for People who use Augmentative Communication* (2006) 22:1 *Augmentative and Alternative Communication* 62.

<sup>8</sup> Public Health Agency of Canada, *Violence Against Women* (Ottawa: Minister of Public Works and Government Services Canada, 2009); Miriam Ticoll & Melanie Panitch, “Opening the Doors – Addressing the Sexual Abuse of Women with an Intellectual Disability” (1993) 13 *Canadian Women’s Studies*, 84; D. Sobsey & T. Doe “Patterns of Sexual Abuse and Assault” (1991) *Sexuality and Disability* 243; Sobsey D. *Violence and Abuse in the Lives of People with Disabilities: The End of Silent Acceptance?* (Baltimore: Paul H. Brookes, 1994) at 67-75; Roeher Institute, *Harm’s Way: The Many Faces of Violence and Abuse Against Persons with Disabilities* (North York: Roeher Institute, 1995).

<sup>9</sup> Brown & Miranda, 1997; Bryen et al, 2003; Sobsey, 1994; Sobsey & Doe, 1991).

It is critical to understand the social context of disability in understanding the increased risks for abuse among members of this population. Social context includes factors such as, inaccessibility, reliance on support services, poverty, and isolation.<sup>10</sup>

### ***Barriers to Justice***

People who have communication disabilities may experience one or more of the following barriers to accessing the justice system:

- They may not be able to communicate using speech and may use gestures or other forms of communication;
- They may not understand questions posed to them;
- They may be asked questions by the police (or other legal professional) in a manner that is inappropriate to their ability to process information, understand or respond;
- It may be assumed by the police (or other legal professional) that they have a cognitive impairment when they do not have any such impairment;
- They may be overwhelmed or affected by the physical or emotional setting (such as a police station) in a manner which interferes with their ability to communicate.<sup>11</sup>

Findings from a national study on access to justice disabilities, (CDAC in 2012), found inequity of treatment within police, legal and justice services for people with communication in all provinces in Canada.<sup>12</sup>

Another barrier to access to the criminal justice system arises when police (or other legal professionals) rely on caregivers, family members or other support persons to communicate for the individual with the disability, because these support persons are not independent and neutral. Retaining the services of a Communication Intermediary, who is an arm's length expert and specially trained to remain neutral and independent, is necessary in order to support the person with the communication disability.

The role of the Communication Intermediary is particularly critical, having regard to the very significant risk that the person with a communication disability may well be victimized by those closest to him or her, or by those on which that person is most dependent (including possibly the person who is assisting them in reporting to the police or communicating with legal counsel).

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<sup>10</sup> Powers et al, 2002.

<sup>11</sup> Communication Disabilities Access Canada. Retrieved June 20, 2017 from <http://www.communication-access.org/make-your-service-accessible/justice-services/>.

<sup>12</sup> Communication Disabilities Access Canada. Retrieved June 20, 2017 from <http://www.access-to-justice.org/resources/feasibility-study-on-communication-intermediaries/>.

## **Identification of Communication Needs**

A victim/witness/accused person may require a Communication Intermediary if they:

- Speak in a way that is difficult for others to understand
- Communicate using a letter, picture, symbol board or device
- Have difficulty finding the words they want to use/say
- Have difficulty understanding questions and instructions and/or have difficulty understanding questions if they are posed in particular ways
- Repeat back information to the police (or other legal professional) or are highly suggestible or compliant with persons in authority
- Respond inappropriately or inconsistently to questions
- Have difficulty attending to, focusing or retaining what is being asked
- Identify as a person with a disability that affects communication
- Request the service knowing they will be able to communicate more effectively if a Communication Intermediary is present.

## **Communication Access to Justice Services**

The young and vulnerable are targeted precisely because of their vulnerability; for the same reason, they may be denied access to justice.<sup>13</sup>

It goes without saying that there can be no access to justice if a person is unable to effectively communicate their evidence because of a disability. Effective communication is essential in all steps of the justice process. Successful communication is a two-way process in which messages are correctly and unambiguously understood by parties, the victim/witness (or accused person) and the police, legal or justice professional.

This paper argues that where there is any question about the communication process, then a neutral, independent professional with expertise in the disability of the victim/witness must be engaged to assess the required communication accommodations and/or to provide direct communication support.

There is no question that a victim/witness (or accused person) who is Deaf and uses sign language, requires a sign language interpreter; a victim/witness or accused person who is DeafBlind requires a trained intervenor; and a victim/witness or accused person who does not speak or understand English or French requires a language translator. In the same way, a victim/witness/accused person, who has a communication disability, may require a Communication Intermediary.

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<sup>13</sup>Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System* (Bristol: Nuffield Foundation, 2015) at p.4.

## **PART B:**

# **The Role of a Communication Intermediary**

### ***What is a Communication Intermediary?***

A Communication Intermediary is a trained professional who facilitates two-way communication between a victim/witness (or accused person) with a communication disability and a justice professional (whether police, prosecutor, private legal counsel).

The role of the Communication Intermediary is firmly established in other jurisdictions, and in particular in England and Wales, where Communication Intermediaries are officers of the Court, retained by the state in criminal proceedings to ensure that “best evidence” is obtained from vulnerable adult and child witnesses.

The function of the Communication Intermediary is succinctly summarized in the English Department of Justice Registered Intermediary Procedural Guidance Manual (2015) as follows:

In practical terms, the central part of the intermediary’s role is to assist in communication in its widest sense; in other words, to assist the court, both prior and during giving of evidence by the witness by facilitating two-way communication to allow the witness to give their best evidence.<sup>14</sup>

The Communication Intermediary is an independent and neutral professional who utilizes his or her professional skills to facilitate communication – similar in some ways, yet different in other ways to the role of a sign language interpreter, intervenor or translator.

In some other jurisdictions (such as England and Wales) there exists a national, state vetted and approved roster of Communication Intermediaries, most of whom are trained Speech-Language Pathologists.

Over the past four years in Canada, Communication Disabilities Access Canada (CDAC) has trained 250 Speech-Language Pathologists as Communication Intermediaries in Canada, of which 79 are based in Ontario. Provincial rosters of CDAC trained Communication Intermediaries<sup>15</sup> can be found on the CDAC website at <http://www.access-to-justice.org/communication-intermediaries/roster/>

CDAC trained Communication Intermediaries in Ontario:

- Have a minimum of a Master’s degree in Speech-Language Pathology
- Are eligible for membership with Speech Language and Audiology Canada

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<sup>14</sup> English Department of Justice *Registered Intermediary Procedural Guidance Manual* (2015), at Chapter 3, para. 3.9.

<sup>15</sup> Communication Disabilities Access Canada. Retrieved June 20, 2017 from <http://www.access-to-justice.org/communication-intermediaries/roster/>

- Have at least two years of clinical speech-language pathology experience
- Have attended CDAC trainings
- Work as independent practitioners and set their own professional fees

The Communication Intermediary is not an advocate, attendant or a support person for the witness. The Communication Intermediary does not coach the witness, victim or accused in how to respond or provide any legal or procedural information to the witness, victim or accused. The Communication Intermediary is not a second interviewer for the police.

The Communication Intermediary is not an expert witness for the Crown or defense in a criminal proceeding, or for the witness/party in a civil proceeding. Although a Speech-Language Pathologist may be required to be an expert witness in some cases, when they function as a Communication Intermediary, they cannot:

- Comment, advise or give an expert opinion on the victim, witness or accused person's competence to give evidence; and
- Express an expert opinion on the truth or reliability of what a victim, witness, or accused person has communicated.

The Communication Intermediary is impartial and neutral at all times. Their role is limited exclusively to facilitating communication, using their professional background as a Speech-Language Pathologist within the context of assisting the witness in understanding questions posed to them by a police officer, lawyer, court official and in communicating their responses and evidence.

Where the Communication Intermediary has been engaged at an early stage (which is the best practice, as set out below), their role includes working with the police in advance of the witness giving a statement, to ensure that the police know how to frame questions that are understood by the witness and the witness is able to respond.

Although there are important analogies between a Communication Intermediary and an interpreter, the Communication Intermediary is distinct from an interpreter, in that the Communication Intermediary engages strategies and methods to facilitate communication but does not provide a direct (word for word) translation (like from Spanish to English). The techniques and strategies used by the Communication Intermediary may vary greatly depending on the individual's communication needs and supports (see **Appendix B** for examples). However, from the perspective of access to justice, there is an important parallel between the role of interpreter and the role of Communication Intermediary, in that without the facilitation of the Communication Intermediary, the victim/witness (or accused) is unable to fully or accurately (or fairly) give their evidence in court.

## ***How Does a Communication Intermediary Work?***

An overview of the steps taken by a Communication Intermediary and their participation in the criminal justice process to facilitate communication is as follows.

### ***Step #1: Assessment***

The first step in the work of the Communication Intermediary is to assess the communication needs of and appropriate accommodations for the victim/witness. This should occur as early in the process as possible. This means that in the case of a victim reporting to the police, the Communication Intermediary should ideally be engaged before the victim/witness gives his or her statement to the police.

The retention of a Communication Intermediary can occur in several ways. The victim/witness or accused may request that the police engage a Communication Intermediary, or the police may identify that the victim/witness appears to require support in communication and, with the consent of the individual, may engage the Communication Intermediary for this purpose.

Police services should engage a Communication Intermediary via CDAC's Communication Intermediary roster at <http://www.access-to-justice.org/communication-intermediaries/roster> and pay for these services in the same way as they pay for other accessibility services, such as sign language interpreters or translators.

As will be discussed further below and in section D of this paper, where a Communication Intermediary is engaged for a victim in the context of the criminal justice process, it will be important to protect the privacy and equality rights of the witness/victim in respect of their private and personal information. For example, in some contexts, a Communication Intermediary may request access to highly private reports or information (such as psychiatric or psycho-educational reports or records), that might contain information about a person's communication status and needs. This paper will suggest a number of ways to protect the privacy of witnesses with communications disabilities, who are frequently an over-documented population.

Once engaged, the first steps that a Communication Intermediary undertakes are as follows. The Communication Intermediary will:

- Meet with the witness and/or their family or support person and explain the role of the Communication Intermediary.
- Identify the communication needs of the victim/witness by asking them what accommodations and supports they may require. While some people with communication disabilities will be able to identify their communication needs, others will not be able to do that and will require a communication assessment to determine how to pose questions in ways the witness

(or accused) can understand, and to identify what supports the victim requires to respond to questions and communicate their evidence. Such assessment may include assessing the individual's need for communication aids and the individual's ability to understand question forms, such as: where, what, who, when, why and how; positional words; and time concepts.

- With the consent of the victim/witness and as deemed helpful by the Communication Intermediary, receive information from other sources about the individual's communication needs and appropriate supports for the victim/witness, including copies or parts of copies of reports from and/or discussions with medical professionals, caregivers or support persons, family members, teachers, or others (as they relate to supporting communication).
- Where third party reports are shared with the Communication Intermediary, it is important that the privacy and equality of the victim/witness be carefully considered and protected. Below is a more detailed discussion related to this concern, particularly in sexual assault cases.
- Third party reports (such as psychiatric or psycho-educational reports) shared with a Communication Intermediary should be vetted/redacted to remove any personal information unrelated to communication (and thus unnecessary for the Communication Intermediary to review) prior to the report being provided to the Communication Intermediary. Depending on the case, such information may relate to sexual history, childhood or other fears, judgment or opinions about the person that are unrelated to communication (and may exceed the expertise of the observer), and dated or irrelevant descriptions of trauma or events.
- Conduct all interactions with the victim/witness in the presence of the investigating officer, independent legal counsel, or other independent third party.
- In order to maintain the Communication Intermediary's independence and neutrality, the Communication Intermediary will not discuss the evidence related to the charge or alleged offence with the victim/witness or any other person (any such questions by the individual may be directed to the police officer/independent counsel/other independent party present in the assessment); and
- Will prepare a report outlining the communication needs of the victim/witness and making recommendations for facilitating communication.

The above concern, with respect to privacy, stems from the reality that particularly in respect of some disabilities, therapeutic and other highly personal information unrelated to communication, is often included in the categories of records that may be useful to a Communication Intermediary, such as a psychological, psychiatric, or psycho-educational assessments or reports. If private information is included in records or information given to the Communication Intermediary, it may not be possible to prevent disclosure of this information (or the underlying records) to the accused and/or accused's counsel. As recognized by Parliament and the Supreme Court of Canada since the mid to late 1990s

(and discussed in more detail in Part D of this paper), the risk of the invasive and exploitative use of such personal information is particularly high in cases of sexual assault.

There are a number of ways to protect privacy and equality in personal information, while ensuring that the Communication Intermediary receives the information he or she needs to properly assess the victim/witness and prepare the Communication Intermediary's Report.

The first, and arguably the best way and most effective way to protect privacy and equality for victims/witnesses, is for independent counsel to be retained by the state when third party records are required by the Communication Intermediary. Independent legal counsel's limited role would be to vet records so that there is no risk of private information being compelled in the criminal trial due to its having been reviewed by the Communication Intermediary (even if the Communication Intermediary did not refer to or rely on the private/irrelevant information in the assessment report). The role of Independent Legal Counsel is explained in more detail in Section D below, as are proposed methods to protect privacy where legal counsel is not retained or available.

If it is not possible for independent legal counsel to fill this role, the following are other best practices:

- Communication Intermediaries are and will be trained to identify information that is private and irrelevant to communication, with a particular sensitivity to the kinds of information that is used for discriminatory purposes, particularly in sexual assault cases.
- Communication Intermediaries should ask the victim/witness, their family/caregiver(s) and/or health care providers (as appropriate) to remove (redact) personal information unrelated to communication needs prior to providing information or a copy of a report to the Communication Intermediary.
- Where a Communication Intermediary receives a report that contains private and irrelevant information, the Communication Intermediary should return the document to the victim/witness, health-care provider, or caregiver (as appropriate) and ask for a redacted copy with the paragraphs or sections in question redacted.
- The Communication Intermediary should be careful not to include or refer to personal information in his or her assessment that is not relevant to communication needs;
- It may be helpful in the Communication Intermediary's report to explain the specific information relevant to communication that the Communication Intermediary relied on from any third party records reviewed.
- Any medical or other third party report received by the Communication Intermediary in the preparation of his or her assessment and report, should not be provided to the police or the Crown. While the reports themselves may be listed in the Communication Intermediary's report, copies should not be attached. Such reports should be producible only pursuant to a third party records application, and thus attract the legal protection that such records would otherwise attract in law for any victim/witness.

## **Step #2: Preparation of Report**

Based on the assessment above, the Communication Intermediary's report will address the individual's communication needs and will make recommendations about what the witness needs in order to understand questions and communicate their evidence.

Sample of recommendations in a report may include:

- A witness finds it difficult to verbally communicate that they do not understand a question and requires a visual card that they can point to in these situations.
- A witness has difficulty understanding long sentences and is much more able to understand when information is provided in short sentences with one point of no more than six words with a pause between sentences.
- A witness experiences significant stress which detracts from their ability to attend and communicate responses to questions and will require adaptation to reduce stress levels such as frequent breaks and a soft toy to hold and squeeze.
- The witness has difficulty with time concepts and will need a visual aid, such as a timeline, featuring neutral but familiar events, to refer to when things happened and in what sequence they happened.
- A witness cannot understand abstract concepts and requires questions to be in plain, concrete language.
- A witness is confused by complex question forms and requires questions that do not involve "tags" suggesting the answer, such as "it was raining, wasn't it?"
- A witness has difficulty with changes of topic and requires questions containing a single point, for questions to be asked in a chronological order, 'signposting' changes of subject.
- A witness with reduced literacy requires a set of pictures showing sexual activities from which they can select to communicate their evidence.
- A witness who selects symbols with their eyes to communicate, requires photographs of the people in their life – family members, neighbors, support staff and others – in order to answer "who" questions.
- A witness with aphasia requires key written words to understand and respond to questions.
- A witness, who communicates by pointing to pictures, requires assistance to reformulate and validate their intended meaning. For example, he/she points to a generic picture of a man and then a picture of a hospital, as their way of communicating about a male who works in a hospital. In this way, they direct their listener to suggest some possibilities, such as doctor, male nurse, and physiotherapist.

Attached as **Appendix C**, are sample Communication Intermediary reports which provide examples of findings and recommendations from Communication Intermediary assessments.

### **Step #3: Police Interview**

As explained at Step #1 above, where an individual requires the services of a Communication Intermediary, it is best practice for the Communication Intermediary to be retained, an assessment completed, and a report prepared, prior to the individual formally reporting to the police. As also explained above, the Communication Intermediary is generally retained either because the individual (or their representative or family member) identifies the need for the service in the initial communication or outreach to police, or because the police, in their initial contact with the individual (or her family, representative, etc.), identify the service as being appropriate and of assistance.

If the Communication Intermediary is in fact retained prior to any formal report to police (as is best practice), the Communication Intermediary and investigating officer will have discussed the report recommendations in advance of the interview, so as to assist the officer in planning the interview. In England and Wales, the police officer will typically attend the assessment, which increases the officer's understanding of the individual's communication abilities and needs.

In the police interview, the Communication Intermediary will generally attend the interview with the witness and may intervene to support communication, for example by asking the investigating officer to rephrase a question if it is worded in a manner that is difficult for the witness to understand or respond to, or facilitating the witness' communication of their answers to questions posed by a police officer.

In such circumstances, however, it is important to be clear that the Communication Intermediary does not speak for the witness and does not coach the witness in how to respond. The Communication Intermediary only facilitates communication between the victim/witness and the justice professional in order to ensure that communication is understood and is as complete as possible.

Where the Communication Intermediary is engaged to facilitate communication in a report to the police:

- The assessment report is provided to the police.
- Where possible, the police will have reviewed the report in advance of the interview and discussed it with the Communication Intermediary in order to prepare for the police interview with the witness in accordance with recommendations contained in the report. In so doing, the officer may ask questions about how to implement the recommendations in the report.
- When present at the police interview, the Communication Intermediary will make a declaration or oath in which they promise to facilitate communication to the best of their abilities and to keep all information confidential<sup>16</sup>.

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<sup>16</sup>The Declaration used by CDAC is as follows: "I swear/affirm that I will accurately convey all questions put to the witness (es) and his /her/their answers thereto, and all such matters and things as shall be required of me, to the best of my skill and understanding"; the Declaration made by Registered Intermediaries in England and Wales pursuant the Youth Justice and Criminal Evidence Act 1999, is as follows: "*I solemnly, sincerely and truly declare [or I swear by Almighty God] that I will well and faithfully communicate questions and answers and make true explanation of all matters and things as shall be required of me according to the best of my skill and understanding.*"

- During the police interview, the Communication Intermediary will facilitate communication in accordance with the report and planning discussion. Such facilitation may include asking the police officer to reword questions or, if appropriate, rephrasing questions and/or explaining questions (and answers) as expressed using communication aids.
- The services of the Communication Intermediary will be transparent and recorded on the videotaped statement.
- The Communication Intermediary's report will be disclosed to the accused.

#### ***Step # 4: Participation at Trial***

Prior to and at trial, a Communication Intermediary will play a similar role in terms of providing the Court and the parties with an assessment of the witness' (or accused's) communication needs and recommendations as appropriate, including with respect to the physical space, use of communication aids, duration of testimony, and approach to questions to ensure that the witness (or accused) is able to give his or her evidence.

#### ***Pre-Trial Procedures***

Where a Communication Intermediary is engaged in advance of trial, the following steps will best facilitate the Communication Intermediary's role:

- The engagement of the Communication Intermediary and the proposed methods to best facilitate the evidence of the complainant/witness as outlined in the Communication Intermediary's report should be canvassed at a judicial pre-trial.
- The Crown should bring a pre-trial application to obtain an order of the Court in advance of trial (this may be contested or on consent of defense counsel).
- On the voir dire the Communication Intermediary, in her role as an officer of the Court, may explain his or her qualifications, role and recommendations to facilitate communication.
- The Communication Intermediary should not be asked questions that relate to private or personal information about the complainant/witness that is not relevant to the Communication Intermediary's assessment or report (nor should the Communication Intermediary be asked questions about the witness' capacity or competence to give evidence or veracity/reliability in giving evidence)<sup>17</sup>.
- The Court's order on this pre-trial application is in the form of directions, to ensure that all counsel (and the witness) is clear on the appropriate structure of the questioning at trial and the nature and scope of accommodations to be provided.

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<sup>17</sup> It is also noted that sometimes other persons, like a parent, will be seen to speak "for" or on behalf of a person with a communication disability. It is not the role of the Communication Intermediary to answer questions like "do you think the mother accurately conveyed what the victim/witness said or meant."

In accordance with the Court's inherent jurisdiction (if the matter is heard in the Superior Court) and/or the Court's statutory jurisdiction to control its own process, the *Charter* rights and values of victims with communication disabilities, and s.6 of the *Canada Evidence Act* (discussed further below), the Court may make orders as it sees fit to ensure that a witness with a communication disability gives evidence "by any means" that makes that evidence intelligible.

Such orders may be detailed and may include direction with respect to the kind of questions that may be asked of the victim/witness and the form of the questions, framing the length or structure of cross examination, as well as direction/orders as physical or other supports (like communication aids, CCTV, presence of a support person<sup>18</sup> (in addition to the Communication Intermediary). The order may also include direction with respect to the Communication Intermediary's facilitation of communication in conjunction with augmentative and alternative communication methods, such as picture, symbol, letter boards and speech generating devices.

### ***At Trial***

If there has been no pre-trial application with respect to the services of a Communication Intermediary, the above pre-trial steps will occur at trial.

The difficulty, however, is that a Communication Intermediary cannot simply be called-in at the last minute to assist with communication at trial. The above steps, with respect to the Communication Intermediary assessing the victim/witness (or accused), are essential. Accordingly, if a Communication Intermediary is only engaged at trial or on the eve of trial, this may well require the trial to be adjourned in order for the Communication Intermediary to assess the witness, understand the witness' communication needs, prepare a report, and otherwise obtain the information necessary to permit the Communication Intermediary to fully and effectively perform his or her role in facilitating communication at trial.

A further disadvantage of the Communication Intermediary being engaged late in the day is that neither the court nor defense counsel or the Crown will have had the opportunity to consider the Communication Intermediary's report, request the Communication Intermediary's advice and prepare in advance for appropriate questioning of this witness.

### ***International Examples of Accommodations at Trial***

In England and Wales, where the use of communications intermediaries has been codified in statute (for child and vulnerable witnesses), the Courts increasingly frequently engage in a process whereby counsel prepare and submit their proposed examination and cross examination questions to the Court and the Communication Intermediary in advance of trial. In *R. v. R.L.* [2015] EWCA Crim 1215,

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<sup>18</sup> A support person is not impartial and is not a qualified Communication Intermediary.

questions were submitted to the judge in advance who, with the assistance of a Communication Intermediary, “ruled that a number of the proposed questions should not be asked because they were either unnecessary or repetitious, or because he regarded them as inappropriate having regard to the age of the boy concerned. He ruled that the form and wording of a number of other questions must be amended, for example, so as to avoid the inappropriate format of what is commonly known as a tagged question...”

A discussion of whether such an order in Canada would balance the constitutional fair trial rights of accused persons with the equality and other rights of victims is outside the scope of this publication.

It is helpful, however, to be aware that appellate Courts in England and Wales have upheld convictions in trials where the nature of questioning by defense and Crown counsel was supervised by the Court in order to prevent injustice. The Defense was not limited from putting its case to the witness, but the format may be required to be accommodated, for example, to prevent or limit leading questions on cross examination of vulnerable witnesses. The underlying rationale being that the truth-seeking function of the criminal trial is advanced (and not undermined) in accommodating and adjusting the questioning to the needs and abilities of the witness.

In England and Wales, the Youth Justice and Criminal Evidence Act 1999, provides for the assistance of a Communication Intermediary where the “quality” of the evidence of a witness with a physical or mental disability is “likely to be diminished” because of disability. The “quality” of a witness’s evidence is defined as “quality in terms of completeness, coherence and accuracy; and for this purpose “coherence” refers to a witness’ ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.”<sup>19</sup>

So too, in Canada, the role of the Communication Intermediary, and any court orders providing directions with respect to the victim’s giving of evidence, respects and advances the fundamental right of persons with disabilities to give complete, coherent and accurate evidence to the best of their ability, as discussed further in the next section below.

### ***Following Trial***

It is noted that in some cases, the role of the Communication Intermediary may not end at the conclusion of trial. A Communication Intermediary may continue to play a role, for example, in the case of a criminal conviction, facilitating a victim impact statement and/or providing input through the victim witness program into sentencing and/or the terms of probation or a conditional discharge.

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<sup>19</sup> s.16(5) *Youth Justice and Criminal Evidence Act*, <http://www.legislation.gov.uk/ukpga/1999/23/part/II/chapter/I> (downloaded on June 17, 2017).

## PART C: Constitutional and Statutory Human Rights

There are two primary hurdles to the increased use of Communication Intermediaries in the criminal justice system in Ontario and Canada:

1. Awareness of the role and services of Communication Intermediaries by Justice System actors (Police, Crowns, Defense Counsel, Judges); and
2. Openness and comfort by police in working with Communication Intermediaries in criminal investigations with persons with communication disabilities and by judges in receiving evidence facilitated by a Communication Intermediary (and making orders with respect to the structure of questions asked of the witness by the Crown and defense counsel).

It is anticipated that an additional hurdle may be resistance by defense counsel to Communication Intermediaries, including on the basis of the accused's rights to cross examination as an incident to the right to full answer and defense.

This paper will briefly highlight and address some of the *Charter* and statutory human rights and interests of victims to establish the strong foundation for use of Communication Intermediaries, including where this might mean that the content or form of cross examination must be limited or directed by the Court. (This issues paper does not purport to develop a comprehensive *Charter* or statutory human rights argument).

### ***Constitutional Rights of Persons with Communication Disabilities***

Barriers to access to justice involving the state engage the *Charter* rights of persons with communication disabilities. Specifically, the constitutional guarantees of equality (s.15), life liberty and security of the person (s.7), and to language interpretation in court (s.14) of the *Charter* provide a constitutional obligation on state actors to ensure that persons with communication disabilities may access justice through the support of a Communication Intermediary.

There is no dispute that the Courts are subject to the *Charter*. In his concurring reasons in *R v Rahey*, La Forest J stated that “as custodians of the principles enshrined in the *Charter*, [Courts] must themselves be subject to *Charter* scrutiny in the administration of their duties.”<sup>20</sup> Thus, the approach taken by the Courts in addressing possible barriers to receiving the testimony of a complainant with disabilities must conform to the *Charter*.

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<sup>20</sup> *R v Rahey*, [1987] 1 SCR 588, [1987] SCJ No 23 at para 95. See also *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573, [1986] SCJ No 75 at para 36.

## **Section 15 of the Charter: Equality**

Section 15 of the Charter guarantees that:

“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 based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

Persons with communication disabilities are denied equal protection and benefit of the law if they are unable to make a report to the police or testify (or meaningfully testify) at trial.

In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1552/index.do> the Supreme Court of Canada accepted that “effective communication is an indispensable component of the delivery of medical services” (at para. 72) and that the failure by the British Columbia Medical Services Commission and hospitals to provide sign language interpretation, where it is necessary for effective communication, violated the s.15 Charter equality rights of deaf persons.

Effective communication is equally necessary to access justice. For the purposes of this paper, this means that where a witness seeks to benefit from the services of a Communication Intermediary and/or where a criminal justice system actor (police officer, Crown) identifies a complainant/witness as having a communication disability, the system must work to facilitate Communication Intermediary supports.

More generally, substantive equality demands that groups “suffering social, political and legal disadvantage” should be included, not excluded, and laws and procedures should not be interpreted and applied in a manner that perpetuates and exacerbates the situation of disadvantaged groups.<sup>21</sup> The failure to provide, or the denial of the support of a Communication Intermediary, may in many cases, effectively exclude persons with communication disabilities from giving evidence, or meaningfully or fully giving evidence to police or in court, and thus denies them equal protection and benefit of the law and, as discussed further below, exposes them to further risk of violent or other victimization.

In *R v. Pearson* 1994 CanLii 8571, a case involving the admission of hearsay evidence to support access to justice for a sexual assault complainant with a disability, the British Columbia Court of Appeal held (at para.36):

“We must, of course, ensure that those with mental and physical disabilities receive the equal protection of the law guaranteed to everyone by s. 15 of the Canadian Charter of Rights and Freedoms. This will sometimes require that their evidence be presented along

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<sup>21</sup> See *Eldridge*, *supra*; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para.35; *Eaton v. Brant County Board of Education*, [1997] 2 S.C.R. 3, and in particular para.65; and *R. v. M.H.*, [1999] 2 S.C.R. 3 at para. 65.

with the evidence of others who are able to explain, support and supplement it, so that, to the extent that this is possible, the court will receive the account which the witness would have given had he or she not been disabled.”

This issues paper, of course, argues that the evidence of a witness with a disability must first and foremost be heard by the Court from the witness themselves with the support of a Communication Intermediary (rather than by being presented by “others”). The above statement in *R. v. Pearson* is relied on here only insofar as its recognition of the importance of the equality *Charter* rights of victims with a communication disability and as an example of a case where the Court upheld a conviction where in the Court’s receipt of evidence was adapted to ensure those *Charter* rights were respected.

### ***Section 14 of the Charter: The Right to an Interpreter***

Particularly for witnesses who have very limited language, their s.14 *Charter* rights are also arguably engaged if they are unable to communicate (meaningfully or at all) without the support of a Communication Intermediary, for example, because their means of communication is through symbols, pictures or gestures.

*Section 14 of the Charter guarantees that:*

“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.”

Section 14 recognizes that a deficiency in language is not to be a barrier to a witness providing evidence in a proceeding. It follows from this that a witness who, due to disability, has trouble understanding the language used during direct and cross examination has the right to the presence of someone who can assist the individual to understand the questions being asked and can convey them into language the complainant can comprehend and respond to. In the case of a person with a speech and language disability, this would be the role of the Communication Intermediary.

Even if s.14 of the *Charter* doesn’t apply strictly, its spirit and intent is that those who appear in Canadian Courts should not be shut out by virtue of a communication barrier.

### ***Section 7 of the Charter: Right to Life, Liberty and Security of the Person***

The right to life, liberty and security of the person under s.7 of the *Charter* also protects the rights of victims, particularly vulnerable victims of crime, in accessing justice.

## **Exclusion from Access to Justice Increases Risk of Victimization**

First and foremost, as discussed above, exclusion of victims with disabilities from the criminal justice system makes them persons who can be preyed upon with impunity. This undeniable risk engages their rights to physical and psychological security of the person.

In *R. v. D.A.I.* the Supreme Court of Canada raised the specter of impunity for offenders if the persons with disabilities are unable to access the justice system (at para.67):

“To set the bar too high for the testimonial competence of adults with mental disabilities is to permit violators to sexually abuse them with near impunity. It is to jeopardize one of the fundamental desiderata of the rule of law: that the law be enforceable. **It is also to effectively immunize an entire category of offenders from criminal responsibility for their acts and to further marginalize the already vulnerable victims of sexual predators. Without a realistic prospect of prosecution, they become fair game for those inclined to abuse.**” (Emphasis added).

In *Canada (Attorney General) v. Bedford* 2013 SCC 72, the Supreme Court of Canada held that various criminal code provisions which prevent prostitutes/sex workers from taking steps to protect their physical safety and/or reduce their exposure to violence or the risk of violence, breached their rights under s.7 of the *Charter* in a manner inconsistent with the principles of fundamental justice. In *Canada (Attorney General) v. PHS Community Services* 2011 SCC 44, the Supreme Court similarly held that “where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out. Where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer.” (at para.93).

In *AC v. Manitoba (Director of Child and Family Services)* 2009 SCC 30 the Court held that “Section 7 is implicated when the state restricts individuals’ security of the person by interfering with, or removing from them, control over their physical and mental integrity” (at para.100). Barriers to access to criminal justice by the state failing to support the use of a Communication Intermediary for a victim with a communication disability, interferes with the person’s physical and mental integrity and otherwise puts their health and/or physical security at risk.

## **State-Imposed Psychological Harm**

A failure to support meaningful communication in criminal justice situations also arguably imposes psychological trauma and stress on a victim with a disability. In *Blencoe v British Columbia (Human Rights Commission)*,<sup>22</sup> Justice Bastarache found that security of the person protects both the physical and psychological integrity of the individual, and encompasses “serious state-imposed psychological stress.”<sup>23</sup>

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<sup>22</sup> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307.

<sup>23</sup> *Ibid* at paras 56.

Exclusion in and of itself may engage s.7 rights and interests in the sense of the psychological harm of being unable to participate in the justice system. As the Supreme Court of Canada recognized in *R. v. D.A.I.*: “the inability to prosecute such crimes and see justice done, whatever the outcome, may be devastating...to the victim.”<sup>24</sup>

While not referencing *Charter* rights, the British Columbia Supreme Court captured the implications of exclusion from the justice system arising from the inability of a witness with a disability to withstand examination and cross examination at trial:

“What I find enormously disturbing about the present circumstances is that we have a young woman who has a complaint...who by her condition and disabilities and because of the nature of the process of this court will be denied opportunity to have a full and fair hearing on that complaint. Effectively she will be denied access to the Courts because of her inability to participate in the process.”<sup>25</sup>

### ***Victims’ Rights to a Fair Trial***

The constitutional right to a “fair trial” should not be understood as exclusively the right of an accused person. Section 7 interests of victims, as well as accused, have been recognized as being engaged in the criminal trial. As Justice L’Heureux Dube held in *R. v. Seaboyer*<sup>26</sup> (dissenting in part), in the context of the criminal trial, s.7 rights must be understood to protect interests beyond those of just the accused, and encompass the rights of victims, as well as society’s interest in the reporting and prosecution of serious crimes (in that case sexual offences) and in ensuring that the truth seeking function of criminal trials are not subverted. In this regard, Justice L’Heureux Dube held that the “exact nature” of s.7 *Charter* rights are “not confined to the narrow interests of the accused” and that the interests engaged by s.7 include that of “[t]he complainant, and indeed the community at large... in the reporting and prosecution of sexual offences.”

Similarly in *R. v. Mills*<sup>27</sup> (citing *R. v. Seaboyer* with approval), the Supreme Court of Canada held (at para. 72) that “fundamental justice embraces more than the rights of the accused” and that “an assessment of the fairness of the trial process must be made “from the point of view of fairness in the eyes of the community and the complainant” and not just the accused”; and that “the principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns.”

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<sup>24</sup> *R v DAI*, 2012 SCC 5, [2012] 1 SCR 149 at para 67.

<sup>25</sup> *R v. Wyatt*, 1977 CanLII 12488 (BC CA) at para. 32.

<sup>26</sup> [1991] 2 SCR 577.

<sup>27</sup> *R v. Mills*, [1999] 3 S.C.R. 668.

Section 7 *Charter* rights must inform, and be informed by *Charter* equality rights under s.15 and s.28 (which confirms the equal application of rights to men and women).<sup>28</sup> In the context of the evidence of the high rates of victimization (especially sexual victimization) of persons with disabilities (particularly women and girls with disabilities), a “fair trial” must be understood as one which ensures equality, inclusion and access to justice for persons with disabilities and specifically women with disabilities.

In their article, *Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases*, (2012 ) 50 Osgoode Hall Law Journal 1, professors Janine Benedet and Isabel Grant provide an excellent summary of the law which supports the “fair trial” for witnesses/complainants with disabilities. They note that the boundaries of full answer and defense should not be considered in the “abstract” and must be understood in relation to the rights and interests of the complainant and society. Specifically, they argue that:

**105** Our view is that an abstract consideration of the boundaries of the right to make full answer and defense through cross-examination is unhelpful. The Court recognized this in its discussion of the admissibility of hearsay evidence in *R v Khelawon*:

... the constitutional right guaranteed under s.7 of the Charter is not the right to confront or cross-examine adverse witnesses in itself. The adversarial trial process, which includes cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved. Trial fairness embraces more than the rights of the accused. While it undoubtedly includes the right to make full answer and defense, the fairness of the trial must be assessed in the light of broader societal concerns. [2006 SCC 57 at para.48].

**106** Those concerns include recognition that in the context of sexual assault, sections “15 and 28 of the Charter guaranteeing equality to men and women, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant ... .”

[*R. v. Osolin*, [1993] 4 SCR 595 at 669]

**107** Where the sexual assault trial involves a witness with a ... disability, the right to equality must also include consideration of disability and sex as intersecting grounds of discrimination. Taking steps to ensure that witnesses with ... disabilities give as full and candid an account as possible enhances the fairness of the trial and the search for the truth. As one Australian judge has noted:

The difficulties encountered by complainants in sexual assault cases in the criminal justice system have been a focus of concern for several decades. Judges play an important role in

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<sup>28</sup> *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at para.72; *R v. Mills*, at para. 21.

protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance. [*R. v. T.A.* [2003 NSWCCA 191 at para.8].

Although professors Grant and Benedet's article was focused specifically on fair trial rights of women with disabilities, these arguments apply more generally.

The purpose of the Communication Intermediary – which is exclusively to facilitate the best evidence of persons with a communication disability – advances access to justice, inclusion, the truth seeking function of the criminal trial and public confidence in the administration of justice.<sup>29</sup> For persons with a communication disability, the support of a Communication Intermediary may be essential to a “fair trial.” The denial of the service and/or refusal by the police or the court to accommodate the needs of this vulnerable group of victims may give rise to a denial of constitutional rights. Put more positively, the support of a Communication Intermediary in the criminal investigation and trial is consistent with respect for the fundamental human rights and constitutional rights of persons with disabilities, including the intersecting rights of women and girls with disabilities.

### ***Inherent Jurisdiction of the Court***

The Superior Court of Justice has inherent jurisdiction to make an Order appointing a Communication Intermediary to facilitate the evidence of a witness with a communication disability. The above *Charter* rights and the statutory provisions below support the exercise of inherent jurisdiction in such circumstances. Crown attorneys are encouraged to request such an order where a witness identifies as having a communication disability or would benefit from the assistance of a Communication Intermediary and one has not yet been engaged at the police reporting or subsequent stages.

The Ontario Court of Justice has no inherent jurisdiction, but does have broad jurisdiction to control its own process. A Justice of the Ontario Court of Justice, therefore, can similarly make an order appointing a Communication Intermediary to facilitate the evidence of a witness with a disability, so as to ensure that the preliminary inquiry, trial (or other aspect of the criminal trial process) before the Court proceeds fairly and with a view to facilitating the best evidence of all witnesses before it. As will be set out below, both levels of court may also make such an order pursuant to s.6 of the *Canada Evidence Act*.

### ***Statutory Rights for use of a Communication Intermediary***

The discussion below reviews some of the federal and provincial statutory support for the Communication Intermediary.

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<sup>29</sup> Where the accused has a communication disability, in addition to the rights under ss.7, 14 and 15 discussed above, their rights as accused persons to life, liberty and security of the person and to a fair trial pursuant to ss.7 and 11 of the *Charter* are also fundamentally engaged.

Since this paper is intended to assist those who are lawyers, as well as non-lawyers, the discussion includes reference to some of the provisions of the relevant statutes. The discussion of the Criminal Code (which is a federal statute) provides some detail on a number of specific measures codified in the statute to assist vulnerable witnesses (and in particular children).

### **Canada Evidence Act**

The *Canada Evidence Act* sets out some of the rules of evidence as they apply to criminal trials. Because criminal law falls under federal jurisdiction, it is the Canada Evidence Act that applies. Provincial evidence acts apply to court proceedings under provincial law. The Canada Evidence Act, as explained below, has an important provision that specifically contemplates that judges and Courts may be proactive in ordering measures to facilitate the evidence of persons with disabilities. It is remedial legislation which should be understood liberally.

Section 6 of the *Canada Evidence Act (CEA)* provides that:

1. If a witness has difficulty communicating by reason of a physical disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.
2. If a witness with a mental disability is determined under s.16 to have the capacity to give evidence and has difficulty communicating by reason of a disability, the Court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.<sup>30</sup>
3. The Court may conduct an inquiry to determine if the means by which a witness may be permitted to give evidence under subsection (1) or (2) is necessary and reliable.

The *CEA* is worded in the broadest possible terms: **“the witness may be permitted to give evidence by any means that enables the evidence to be intelligible.”** (Emphasis added). The statute demonstrates Parliament’s clear intention to facilitate access to justice for persons with communication disabilities and provides clear and unequivocal jurisdiction and support to Courts to broadly permit (and encourage) the use of Communication Intermediaries as a *means* to do so.

The statute also makes clear that people with speech and language disabilities may use a method other than speech to communicate, including by gesture, picture, alphabet board, speech output device or human assistance.

### **Criminal Code of Canada**

There are a number of provisions of the Criminal Code which are intended to support access to justice and provide accommodations for vulnerable victims/witnesses. These provisions include the power

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<sup>30</sup> *Canada Evidence Act*, RSC 1985 c C-5, s 6.

of the Court to order: that a witness' videotaped statement to the police be presented in Court as the evidence of the witness (s.715.2(1)); that a witness give evidence by way of closed circuit television (CCTV) (s.486.2); and that a witness may give evidence with the assistance of a support person (s.486.1).<sup>31</sup>

These provisions are referred to in this paper because they were included by Parliament in the Code to ensure that the evidence of young persons and persons with disabilities is heard by the Court.

In particular, ss.486.1 and 486.2 of the Code reflect the clear intention by Parliament to support orders in criminal trials that will facilitate the best evidence of witnesses with disabilities. These provisions specifically consider measures to ensure that the witness is best able to provide a "full and candid account."

Excerpts of the Criminal Code provisions are reproduced below. A support person does not and cannot fulfill the role of a Communication Intermediary. The recommendations of a Communication Intermediary, however, may include accommodations such as a support person (who may provide comfort to the witness while that person gives evidence with the assistance of a Communication Intermediary) or a recommendation that the person give evidence outside of the courtroom by way of CCTV.

### ***Evidence of victim or witness who has a disability***

715.2 (1) In any proceeding against an accused in which a victim or other witness is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

Support person – witnesses under 18 or who have a disability

486.1 (1) In any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years, or who has a mental or physical disability, or on application of such a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

(2) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that a

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<sup>31</sup> *Criminal Code of Canada*, RSC 1985, c C-46 ss. 715.1, 486.1(1), 486.2.

support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies if the judge or justice is of the opinion that **the order would facilitate the giving of a full and candid account by the witness of the acts complained of** or would otherwise be in the interest of the proper administration of justice. (Emphasis added)

Testimony outside court room – witnesses under the age of 18, or who have a disability

486.2 (1) Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years, or who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, or on application of such a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

Other witnesses

(2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that **the order would facilitate the giving of a full and candid account by the witness of the acts complained of** or would otherwise be in the interest of the proper administration of justice. (Emphasis added)

Section 486.1 mandates that the judge shall, on application by the Crown or the witness, order a support person to be permitted to be present while the witnesses are testifying, unless the judge is of the opinion that the order would interfere with the proper administration of justice.<sup>32</sup> Further, s486.1(2) states that a support person may be ordered when the Justice is of the opinion that “the order would facilitate the giving of a full and candid account by the witness of the acts complained, or would otherwise be in the interest of the proper administration of justice.”<sup>33</sup> Factors to be considered in determining when a support person would facilitate the giving of a full and candid account of the witness include “the witness mental or physical disabilities” and “society’s interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process.”<sup>34</sup>

Similarly, under s.486.2 (1) and (2), in deciding whether to exercise her discretion to permit a witness to testify behind a screen or outside of the courtroom, the judge must consider whether the order would interfere with the proper administration of justice and whether the order “is necessary to obtain a full and candid account from the witness of the acts complained of.”

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid* s486.1(2).

<sup>34</sup> *Ibid*, s486.1(3)(b) and (f).

The language of “necessity” makes the threshold for ordering testimony behind a screen or outside of the courtroom somewhat high. In sexual assault and other cases involving complainants who are under the age of 18, however, this order is made almost as a matter of course on application by the Crown (and usually on consent of counsel for the accused). For complainants/witnesses with a disability, however, the culture has occasionally been somewhat different. There are examples where the accused has opposed the application, although generally trial judges have nevertheless granted the application either with or without expert evidence on the complainant’s disability. See for example: *R. v. Alam* 2006 ONCJ 593; *R. v. Aikoriogio* 2004 ONCJ 96; *R v. Lanthier*, [1997] O.J. No. 4238.

### ***Provincial/Territorial Evidence Acts***

Each province and territory has its own evidence act, however only one provincial act specifically addresses witnesses with disabilities. Section 13(1) of Saskatchewan’s Evidence Act provides that “if a witness has difficulty communicating evidence because of a mental or physical disability, the court may permit the witness to testify by any means that enables the evidence to be intelligible.”<sup>35</sup> This is the same provision as provided by s.6 of the *Canada Evidence Act* (with the inclusion of persons with a physical disability).

### ***Human Rights Legislation***

Provincial human rights statutes apply directly to the provision of policing services to persons with disabilities and accessibility to the Courts.

The *Ontario Human Rights Code* (the “Code”) is quasi-constitutional legislation that requires services offered to the public (like police and court services) to be provided in a manner free from discrimination.

The *Accessibility for Ontarians with Disabilities Act* (AODA) requires entities (like police and the Courts) who offer services to the public to comply with accessibility standards developed by regulation.

Neither statute is determinative of a decision by a judge to receive or exclude evidence of a witness supported by a Communication Intermediary. The statutes, however, are helpful insofar as they further entrench the importance of access to justice for persons with disabilities who testify in court.

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<sup>35</sup> *Evidence Act*, SS 2006 c E-11.2 at s13(1).

## ***United Nations Convention on the Rights of Persons with Disabilities***

The inclusion of a Communication Intermediary in the Canadian justice system is also supported by and consistent with the United Nations Convention on the Rights of Persons with Disabilities.<sup>36</sup>

Article 13 of the Convention provides as follows:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Effective access to justice for persons with a communication disability means access and entitlement to procedural and disability appropriate accommodations.<sup>37</sup> For many persons with a communication disability, particularly those who may not be in a position themselves to explain and identify the appropriate accommodation(s), these can be identified and provided with the assistance of a Communication Intermediary.

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<sup>36</sup> UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106, available at: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html> [accessed on 18 June 2017]

<sup>37</sup> There is a rich international literature on accommodating persons with disabilities in the courtroom in accordance with the Convention. See for example: E. Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2015); see also S Primor and N Lerner, *The Right of Persons with Intellectual, Psychosocial and Communication Disabilities to Access to Justice in the Criminal Process* (Jerusalem: B'zchut, 2015), downloaded at: <http://bizchut.org.il/he/wp-content/uploads/2015/01/Booklet-The-right-of-persons-with-disabilities-to-access-to-justice.pdf> & <http://dsq-sds.org/article/view/51/51>

## **PART D: Protecting the Privacy and Equality of Victims/Witnesses**

As discussed in Part B above, in conducting an assessment of communication needs and appropriate accommodations for a witness with a communication disability, it may be necessary or appropriate for the Communication Intermediary to review various forms of private records, including psycho-educational or other assessments, medical and psychiatric records, counseling records, and so on.

In the civil process, legal counsel for the witness/party will obtain these records on behalf of the witness and remove or redact from the records any information that is unrelated to communication needs and accommodations, and that is personal and irrelevant, before providing the records to the Communication Intermediary.

In criminal proceedings, however, the complainant/witness rarely has their own legal counsel.

Accused persons who receive the assistance of a Communication Intermediary, are entitled to keep information that is private and irrelevant to communication strictly confidential from the Crown and police. Generally it is the accused's counsel (or duty counsel) who will interact with the Communication Intermediary.

For victims, third party records, such as educational, employment, institutional, and therapeutic records are not normally records accessible to police, absent express consent of the witness (which consent must be fully informed).<sup>38</sup>

Over the past approximately twenty years, the common law has developed, and in the case of sexual offences, the Criminal Code of Canada (the "Code") amended, to protect the privacy and equality rights of victims of crime in their personal information and records. These amendments were necessary as a response to the practice by defense counsel to compel highly private records of sexual assault complainants (such as counseling and psychiatric records) in order to dissuade them from reporting the assault or from proceeding to trial. The records were also used for discriminatory purposes, such as to mine the records for sexual history or to suggest that because of diagnosis or treatment, a witness was less credible and reliable.

In 1997, section 278.1-278.91 of the Code was enacted, which sets out a detailed procedure for ensuring that the privacy and equality of sexual assault complainants is protected (while balancing these rights with the fair trial rights of accused persons). The procedure requires the accused person to meet an evidentiary and legal threshold before the records in question are reviewed by the Court or produced to the accused.

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<sup>38</sup> *R. v. Plaunt*, [2006] O.J. No. 2175 (S.C.).

In criminal cases involving charges other than sexual offences, third party records are similarly not generally accessible to police absent a consent (or a warrant), but the regime for the Crown or defense to obtain a court order for production of these records pursuant to Supreme Court of Canada cases (*R. v. O'Connor/R v. McNeil*)<sup>39</sup> is less stringent than in sexual offenses.

When a Communication Intermediary is engaged, it may be appropriate for the Communication Intermediary to review intensely private records of the individual, including documents prepared by doctors, counselors, social workers, teachers, etc. Since these documents were generally prepared for purposes other than to identify communication needs, will often contain personal details (including possibly with respect to sexual history, reports of abuse involving others, etc.) that have nothing to do with communication.

The concern is that even if a Communication Intermediary does not rely on or refer to this personal (and irrelevant and potentially highly prejudicial) information in his or her assessment or report, the very fact that the Communication Intermediary has read or had access to the document may either:

1. make the document subject to production to the accused under what is referred to as the test for disclosure in *R v. Stinchcombe* [1991] 3 SCR 326; or
2. make it “likely relevant” (the evidentiary test) for production to the Court or the accused under the third party records provisions of the Code (or at common law).

Accordingly, as much as possible, steps need to be taken to ensure that the privacy and equality rights and interests of a victim with a communication disability are given the same protection as persons who do not require an accommodation. Put differently, persons with a communication disability should not be forced to waive privacy as a condition to access justice on account of their disability.

The most reliable method for protecting these rights is through Independent Legal Counsel retained for the victim/witness at the same time as a Communication Intermediary is engaged. Counsel could be retained in the same manner (and as automatically and funded through Legal Aid Ontario) as counsel are currently retained when a third party records application is made in any criminal proceeding in Ontario.

The independent legal counsel’s (“ILC”) role would be to:

- Review and vet any third party records (educational, psychiatric, therapeutic, etc.) of the complainant/witness to remove any personal information unrelated to communication needs and supports prior to disclosure of the reports to the Communication Intermediary;

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<sup>39</sup> *R. v. O'Connor* [1995] 4 SCR 411; *R. v. McNeil* 2009 SCC 3.

- Attend all meetings of the Communication Intermediary with the complainant/witness and, to the extent that the complainant/witness has questions about the criminal process or the evidence during these sessions, the Communication Intermediary leaves the room and those questions are answered by the ILC only.

As indicated above, there is already precedent for the ILC being engaged for witnesses/complainants when their private information is at risk of being disclosed. Where Crown or defense counsel in a criminal proceeding bring an application to obtain third party records of a complainant/witness in Ontario, that witness is entitled to his or her own representation and the government (either through Legal Aid Ontario or the Ministry of the Attorney General) funds counsel, regardless of income eligibility of the complainant/witness.

The need for the protection of privacy in records that may be provided to a Communication Intermediary is particularly critical in sexual assault cases. The above set of records may frequently contain a wide range of personal information unrelated to communication needs and accommodations, including sexual history, medical diagnoses (past and current), judgments by persons who may not be trained to make certain assessments (such as in CAS or educational records) and other perhaps non-prejudicial but still private information (such as relating to a person's childhood or relationship with parents).

If the Communication Intermediary has reviewed and relied on only redacted records in the preparation of the Communication Intermediary's assessment report, there is less risk of private information being disclosed. Should the defense or Crown seek production of any of the redacted information contained in any background reports/records relied on by the Communication Intermediary that would be done in the ordinary course through an application to the Court under the third party records regime (at common law or under ss.278.1-278.91 of the Code) described above.

Other steps may also be used to protect privacy and equality rights of victims/witnesses in their personal and private information where ILC is not engaged:

- The Communication Intermediary should be trained on the kinds of information that is used for discriminatory purposes, particularly in sexual assault cases;
- The Communication Intermediary should be careful not to include or refer to personal information in his or her assessment that is not relevant to communication needs;
- Any report received by the Communication Intermediary in the preparation of his or her assessment and report, should not be provided to the police or the Crown. While the reports themselves may be listed in the Communication Intermediary's report, copies should not be attached;

- It may be helpful in the Communication Intermediary's report to explain the specific information relevant to communication that the Communication Intermediary relied on from any third party records reviewed;
- Records reviewed in the course of the Communication Intermediary's preparation of his or her report, should be treated as third party records, which may only be produced to the accused with the expressed consent of the individual or by order of the Court;<sup>40</sup>
- If accused persons take the position that any report provided to the Communication Intermediary should be treated as records subject to disclosure, police/Crowns should take the strong position that they are third party records.

The above protections, whether through vetting and redaction by ILC, or by other measures discussed above, are necessary. The price for access to justice by this already disadvantaged group of witnesses should not be reduced protection of and respect for their privacy and dignity as compared to victims/witnesses who do not require the support of a Communication Intermediary to access the criminal justice system.

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<sup>40</sup> Where a Communication Intermediary has relied on other records, these should be listed in the Report, and are effectively notice of the existence of these records in a manner similar to s.278.2(3) of the *Code*.

## PART E: Rules of Evidence and Balancing Charter Rights in Criminal Proceedings

It is anticipated that, depending on the extent to which a Communication Intermediary recommends that examination or cross examination of a complainant/witness be curtailed, counsel for an accused may strongly resist on the basis that such curtailment impedes the accused's constitutional rights to a fair trial and to full answer and defense.

The history of amendments to the Criminal Code which have affected the laws of evidence and cross examination (for example, the rape shield legislation, the third party records provisions discussed in the section above, and the amendments to the Code permitting children and persons with disabilities to testify behind a screen or outside of the Courtroom) have all been met with *Charter* challenges by defense counsel.<sup>41</sup>

Supreme Court of Canada jurisprudence, however, is clear that the rights of accused persons to cross examine as an incident to a fair trial are not without limit, and that the rights and interests of victims and of society in the administration of justice, also play in the balance.

As the SCC held in *R. v. Mills* (at para. 72):

“... the principles of fundamental justice do not entitle the accused to “the most favourable procedures that could possibly be imagined”: *R. v. Lyons*, [1987] 2 S.C.R. 309, per La Forest J., at p. 362. This is because fundamental justice embraces more than the rights of the accused. For example, this Court has held that an assessment of the fairness of the trial process must be made “from the point of view of fairness in the eyes of the community and the complainant” and not just the accused: *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, per Cory J., at p. 198.” In a similar vein, McLachlin J., in *Seaboyer*, *supra*, at p. 603, stated:

“The principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns. Section 7 must be construed having regard to those interests and “against the applicable principles and policies that have animated legislative and judicial practice in the field” (Beare, [[1988] 2 S.C.R. 387], at pp. 402-3 per La Forest J.). The ultimate question is whether the legislation, viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice.”

In *R. v. Levogiannis* [1993] 4 SCR 475, the Court held that the goal of the trial process is “truth seeking, and to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth.”

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<sup>41</sup> *R v. Seaboyer*, *supra*; *R. v. Mills*, *supra*; *R v. Levogiannis* [1993] 4 SCR 475; *R. v. Darrach*, [2000] 2 S.C.R. 443, *R v. S.(J.)* (2008) 238 CCC (3d) 51; *aff'd* 251 CCC (3d) 1 (SCC);

In enacting s.6 of the *CEA*, Parliament expressed its intention to balance the rights and needs of persons with communication disabilities to give evidence in “any manner” that will make that evidence intelligible, provided the mechanism to do so is necessary and reliable. To the extent that s.6 of the *CEA* is limited in the accommodations that can be ordered, including by the words “intelligible”, the *Charter* rights of persons with disabilities and the societal interests in access to justice for this group, expands the jurisdiction and obligation of the Courts to facilitate the evidence of persons with disabilities in a manner that elicits their best evidence in accordance with their ss.7 and 15 equality rights and the truth seeking function of the criminal trial.

In terms of equality rights, substantive equality demands that laws are developed and interpreted so as to “remedy” and “prevent” discrimination against “groups suffering social, political and legal disadvantage”; not exacerbate it.<sup>42</sup>

As discussed in the section on *Charter* rights above, and particularly in the context of the enforcement of the criminal law, the rights of persons with disabilities to access the criminal justice system to hold predators accountable, must surely engage their physical and psychological integrity and security.

In *R. v. L.(D.O.)* [1993] 4 S.C.R. 419, the Supreme Court of Canada emphasized “the criminal justice system’s responsibility to seek the truth.” In that case, which upheld the constitutionality of s.715.1 of the Code (referred to above – permitting the Court to accept the child witness’ videotaped statement as the witness evidence in chief), the Court balanced fair trial rights against accommodations for vulnerable witnesses and held that the development of rules of evidence must be flexible to ensure that witnesses are heard and the truth exposed:

“Whilst the primary purpose of s.715.1 may be the attainment of truth, the section is particularly focused on the needs of children and the special protections that they require in order to expose that truth. Children, for example, find it stressful to face their perpetrator while they are testifying and to tell their story in front of strangers. It is these types of concerns at which s.715.1 is aimed. In the words of Kerans J.A. in *R. v. Meddoui*, [1991] 2 W.W.R. 289 (Alta. C.A.), s.715 is “a modest modification of the existing law of evidence to recognize the difficulties some child witnesses have in the articulation of their testimony.” (p. 295).

The Court concluded that the “goal” pursued by s.715.1:

“... was, and continues to be, the protection of child witnesses and the attainment of the truth through the mechanism of videotaped statements.”

In the case of witnesses with communication disabilities, this reasoning applies with equal force. Where the role of a Communication Intermediary supports and advances access to justice for an excluded group and the attainment of truth, s.6 of the *Canada Evidence Act* and the *Charter* rights of these victims/witnesses must be interpreted and applied so as to best permit and facilitate the use of the Communication Intermediary.

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<sup>42</sup> *Withler v. Canada*, *supra*; *Eaton v. Brant County*. *Supra*; *Eldridge. British Columbia (Attorney General)*, *supra*;

## CONCLUSION

The need to mobilize Communication Intermediary services is illustrated in the case of MGW, Toronto Star June 22, 2017, which raised serious questions about access to justice for people with developmental disabilities who have compromised communication abilities. As MGW's father notes in that article, "It seems incomprehensible to me that the justice system is not prepared to offer a disabled person who has suffered an alleged sexual assault a voice of her own in court." Despite the fact that there are seventy-nine communication intermediaries available in Ontario, none was engaged to facilitate communication between MGW and justice professionals. Clearly these services need to be provided if the justice system is to be made accessible for people with compromised communication abilities.

Krystine Donato, a woman who has a communication disability, also states the need to improve access to services for people with communication disabilities when she said "The justice system as it is now, is not accessible for people with communication disabilities. We're not heard and oftentimes, we are afraid that if we do say something, we're not going to be understood or taken seriously. I know a lot of people with communication disabilities who don't report crimes or abuse because of this. It is very sad and it needs to be fixed". (Retrieved June 26, 2017 from CDAC at <http://www.access-to-justice.org/videos/>)

This paper concludes with the words and recommendation of UBC law Professors Janine Benedet and Isabel Grant:

It is time for Canada to take a serious look at what can be done to improve access to justice for witnesses with... disabilities, as other common law countries with a commitment to fair trial rights for the accused have done in recent years. Reforms should include the use of intermediaries, provisions that require judges to disallow improper questions, and the continuing education of all participants in the criminal justice system to increase their ability to treat witnesses with mental disabilities equally and fairly.<sup>43</sup>

For over five years, CDAC has developed the expertise and trained Communication Intermediaries across Canada and in Ontario. The service is available and the time to act is now. This is not only an issue of respect for human rights, for many persons with a communication disability, access to justice is a matter of fundamental physical, emotional and psychological safety and well-being.

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<sup>43</sup> *Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases*, (2012 ) 50 Osgoode Hall Law Journal 1 at para. 113.

## **Appendix A**

### **Communication Disabilities**

This information is provided here as a reference to support police, legal and justice professionals in understanding how different disabilities can affect a person’s speech, language and communication abilities. It is by no means a comprehensive list and is not intended to replace professional assessments, diagnoses and treatments by health care professionals.

Some of the disabilities affect a person’s ability to understand what others are saying, which involves listening, attention, memory and processing abilities. Some disabilities affect how a person can communicate their message through speaking, pointing at pictures, writing, letter boards or devices.

People can also have dual and multiple disabilities that affect more than their communication skills. For example, some people may also have an intellectual disability, a physical and mobility disability, hearing loss, visual impairment or a mental health disability.

It is important to note that everyone is unique and disabilities affect people in different ways.

<b>Disability</b>	<b>Possible effects on communication</b>
Cerebral Palsy	Cerebral palsy is a disorder that affects a person’s movements. Their speech might be slurred, unclear or they may have little or no speech and communicate using pictures, letters, symbols or a communication device. The person may or may not have difficulty walking and physically manipulating things. Most people who have cerebral palsy have no difficulty understanding what people are saying and making their own decisions. However, some people who have cerebral palsy may also have an intellectual disability.
Autism Spectrum Disorder	Autism spectrum disorder (ASD) is a life-long neurological disorder that can affect the way a person communicates and relates to the people and world around them. ASD can affect behavior, social interactions, and one’s ability to communicate verbally. ASD is a wide spectrum disorder, which means that while all people with ASD will experience certain difficulties, the degree to which each person on the spectrum experiences these challenges will be different.

<b>Disability</b>	<b>Possible effects on communication</b>
Fetal Alcohol Spectrum Disorder (FASD)	Fetal Alcohol Spectrum Disorder (FASD) is a general term that describes the range of neurological and behavioural challenges that may affect a person if the person's birth mother drank alcohol while she was pregnant. Individuals with FASD may have difficulties with learning, memory, attention span, problem solving, speech, and hearing.
Intellectual or Developmental Disability	Intellectual or developmental disability is a disability that can be caused by any condition that impairs the development of the brain, before birth, during birth, or in childhood and adolescence. The condition may be caused by genetic or inherited factors such as Fragile X Syndrome, Down Syndrome or other chromosomal abnormality; problems during pregnancy such as maternal infection, or maternal alcohol ingestion; problems at birth, such as premature delivery or oxygen deprivation; childhood diseases or head injury. Developmental disabilities can be mild, moderate, severe or profound. They are characterized by significant limitations in both intellectual functioning and in adaptive behavior. Intellectual functioning refers to learning, reasoning, and problem solving skills. Adaptive behavior is the collection of conceptual, social, and practical skills that are learned and performed by people in their everyday lives such as communication, literacy, money, time, number concepts, self-direction, safety, ability to follow instructions and other areas. People with intellectual disabilities may require support to understand questions and communicate their messages.
Dual Disability or Multiple Disabilities	People can have co-existing conditions. For example, people with intellectual or developmental disabilities can also have motor, hearing and visual impairments, or mental health illnesses.
Speech disorders	Speech disorders affect how a person pronounces words. There are different types of speech disorders. Apraxia affects how a person moves and sequences their lips and tongue when speaking. Dysarthria is a weakness of muscles and can result in slurred speech or no speech.
Stuttering	Stuttering affects the fluency of speech. It is characterized by disruptions in the production of speech sounds.

Disability	Possible effects on communication
Aphasia	Aphasia results from damage to the parts of the brain that contain language. Aphasia may cause difficulties in speaking, listening, reading, and writing, but does not affect intelligence. Aphasia is most often caused by stroke. However, any disease or damage to the parts of the brain that control language can cause aphasia. These include brain tumors, brain injury and progressive neurological disorders.
Amyotrophic Lateral Sclerosis (ALS)	ALS, sometimes called Lou Gehrig's disease, is a progressive brain disease that attacks the nerve cells that control muscles. ALS can result in a person having unclear or no speech. A person with ALS may use a communication device. ALS does not affect a person's intelligence, memory or the ability to understand what is being said.
Dementia	Dementia is a group of symptoms related to memory loss and overall cognitive impairment. People with dementia may have difficulty processing what is being said to them, remembering, finding the words they want to say, attending to conversations and problem solving. There are different types of dementia such as Alzheimer's Disease and Vascular Dementia.
Huntington's disease	Huntington's disease is an inherited disease that results in difficulty in movement, thinking and behavior. Speech may be slurred or the person may have little or no speech. A person may need to use a communication display or device. Communication difficulties may also cause problems with memory, sequencing, and problem solving.
Brain Injury	There are different types of brain injuries. These injuries can be caused by a stroke, tumors, infection, and traumatic brain damage. Depending on the location and severity of the damage, communication functions that can be affected include speech, understanding of language, attention, memory, perception, reasoning, organizational skills, social interactions, insight, and problem solving, behavior, reading and writing.
Stroke	A stroke can cause paralysis or muscle weakness, loss of feeling, speech and language problems, memory and reasoning problems, swallowing difficulties, problems of vision and visual perception. Communication deficits may include difficulty in understanding or producing speech correctly such as in aphasia; slurred speech due to weak muscles and/or difficulty in programming oral muscles for speech production. Cognitive deficits may include difficulties in attention, awareness, orientation, memory, problem solving, and reasoning skills.

Disability	Possible effects on communication
Selective Mutism	Selective Mutism usually happens during childhood. A child with selective mutism does not speak in certain situations.
Head and Neck Cancers	Cancers that affect a person’s mouth, larynx, esophagus or throat can affect their ability to speak. Brain tumors can affect how a person can attend and process language.
Cleft lip and palate	Children can be born with a variety of cleft types and with variable severity. In a cleft lip there is a separation of the sides of the upper lip. A cleft palate is an opening in the roof of the mouth in which the two sides of the palate did not join while your baby was developing in utero. Most clefts are surgically repaired. Speech may or may not be affected.
Hearing Loss	There are different types of hearing loss that can make it difficult or impossible for a person to hear what someone is saying and sometimes their own speech may not be easily understood. Many people wear hearing aids and want speakers to do things that make it easier for them to hear and understand what is being said. However, if a person is Deaf and uses sign language, they require sign language interpreting services, not the services of a Communication Intermediary.
Learning Disability	People with learning disabilities have challenges with reading, spelling, and/or writing. In addition, many people with learning disabilities have difficulty expressing their messages in a clear manner, understanding questions and following directions, reading and comprehending material.
Attention Deficit / Hyperactivity Disorder (ADHD)	ADHD is a condition of the brain that affects a person’s ability to pay attention. A person with ADHD may have difficulty staying in one place, and may be restless and agitated. They may have difficulty concentrating, staying focused, planning, organizing, completing tasks, and learning new things. They may be impulsive and have difficulty thinking before acting.
Voice Disorders	There are different types of voice disorders that can result in a weak voice that makes it difficult for a person to speak loudly or be understood. Some disorders result in hoarseness, breathiness, quivering, jerkiness, or a rough sounding voice. Some people may be able to speak for a short period of time.

Disability	Possible effects on communication
Multiple Sclerosis (MS)	MS is currently classified as an autoimmune disease of the central nervous system (brain, spinal cord). MS can cause symptoms such as extreme fatigue, lack of coordination, weakness, tingling, impaired sensation, vision problems, bladder problems, cognitive impairment and mood changes. Speech may be weak and unclear.
Parkinson's Disease	Parkinson's disease (PD) is a neurodegenerative brain disorder. People with Parkinson's may have unclear, hoarse, quiet and monotonous speech. People may misinterpret an individual's mood due to reduced facial expressions, altered hand gestures or changes in postures.

## **Appendix B**

### **Sample Communication Accommodations and Supports**

Depending on the individual's communication needs, they may require a number of communication accommodations and supports.

Examples of some communication accommodations and supports include:

- Rephrasing, chunking and pacing questions and information to accommodate the person's comprehension.
- Using specific question styles to accommodate the person's comprehension and expression.
- Using everyday language, avoiding jargon and terminology.
- Avoiding concepts/vocabulary that a person does not understand.
- Checking for comprehension.
- Adjusting response timing to allow the person to process information and formulate a response.
- Using prompts and anti-stress techniques to reduce anxiety.
- Using strategies to focus a person's attention and assist them to stay on topic.
- Providing visual props, such as pictures, diagrams, maps, calendars, time lines, pain scales, dolls and other items to support comprehension and expression.
- Repeating or echoing a person's unclear speech.
- Prompting for clarification when speech is unintelligible.
- Speaking aloud a person's selection of items on a visual display.
- Using partner-assisted scanning techniques to elicit a person's selection as required.
- Assisting a person with minimal expressive language to communicate their intended message.
- Interpreting gestures, body language and unique signals.
- Flagging the need for breaks to accommodate attention span and fatigue.

Future examples of communication accommodations and supports can be viewed at:

- Advocate's Gateway <http://www.theadvocatesgateway.org/>
- Lexicon Ltd. <http://lexiconlimited.co.uk>

## Appendix C

# Sample Communication Intermediary Assessment Reports

### Report 1: MS

#### Qualifications

I am registered with the College of Speech-Language Pathologists and Audiologists of Ontario. I have over 27 years of clinical experience working with individuals who have complex communication disabilities and who use ways other than speech to communicate. I am on the roster of Communication Intermediaries provided by Communication Disabilities Access Canada ([www.cdacanada.com](http://www.cdacanada.com)). My role as a Communication Intermediary is to assist communication between a witness and justice professional. In my capacity as a Communication Intermediary, I do not function as an expert witness. I cannot give an opinion on the accuracy of a witness' recall of the facts in a case, nor can I give an opinion on whether a witness is telling the truth. My role is to provide assistance to facilitate communication of the witness' evidence and advising justice professionals on how this can be best achieved.

#### Informed Consent

The purpose of this report was explained to MS. He used his Yes response (eye lift) to give consent and requested his brother to assist him to sign the consent form with an X.

#### Reason for Assessment

MS was referred for a Communication Intermediary assessment by Independent Legal Counsel to determine if he required communication supports to give evidence about an alleged sexual assault.

#### Assessment

I assessed MS communication needs over three sessions – each session was an hour. With his permission, I also spoke with his augmentative communication clinician and his brother about ways to facilitate his communication. All sessions were conducted in the presence of an Independent Legal Counsel.

#### General Findings

- MS is a 30 year old man who has cerebral palsy and is unable to speak. He uses a wheelchair which he operates using switches positioned around his head. He lives in a supported housing unit with 24 hour attendant services who assist him with daily activities such as dressing, personal hygiene, meal preparation, eating, drinking and going out.

- MS communicates “Yes” by looking up. He communicates “No” by looking down to his right side. He communicates “Maybe” by looking down on his left side.
- He uses augmentative and alternative communication (AAC). AAC refers to ways other than speech that people use to communicate and includes gestures, body language, pictures, symbols, written words and letters which are provided in communication books or on devices. In MS case, he had approximately 90 pictures, taken from Picture Communication Symbols (PCS), which is a frequently used picture vocabulary software program for people who use AAC. MS and his augmentative communication clinician selected the pictures in his communication book to reflect his daily conversation needs. These included pictures of people in his life, places he goes, his pastimes and interests.
- MS pictures are arranged in a communication book. He selects pictures using a process called partner assisted scanning whereby the person with whom he is communicating points to an area on the page and asks him “is it in this area”. MS looks up to signal “Yes” if it is in the area. He does not respond if it is not in the area. Once the partner determines the area, he or she points to each picture in the area until MS signals “Yes” when they point to the one he wants to communicate.
- MS was unable to communicate about communication supports that he would need.
- MS could identify 90% of the items in his communication book.
- MS vocabulary was severely limited. He had no pictures in his communication book to communicate about body parts, sexual activities, or feelings. He also had no access to a communication device.
- MS had limited educational opportunities and cannot read or write functionally.

## **Understanding**

- MS has limited life experience and may have difficulty understanding terminology and complex language, however, he generally understands most of what is said and should be able to follow questions which are posed in everyday language.
- MS is aware when he doesn’t understand and will look confused. He needs his comprehension to be checked – “Do you understand?” and he will answer “Yes” or “No”. It is more difficult for him to use his response pictures rather than answer a Yes and No question with his signals.

## **Questions / Responses**

- MS cannot answer tag questions or questions that contain negatives in them – such as “you didn’t see the car, did you?”

- MS cannot answer multiple questions posed in one question such as “Did he come in on Saturday or on Sunday?”
- MS finds it easier to answer Yes and No posed questions.
- MS had no difficulty understanding questions beginning with who or what. He found How and Why questions more problematic.

## Expression

- MS can answer Yes and No type questions using his signals of looking up for yes, down to the right for no and down to the left for maybe. In addition, a picture response card would be useful for MS and should contain pictures for “I don’t know”, “I don’t remember” and “that’s wrong.”
- He will also indicate when he wants to add his own information by looking towards his communication book or by raising his left arm.
- MS requires picture that he can use to communicate about sexual assault. Without knowing details of the allegation, and in the presence of Independent Legal Counsel, the intermediary provided MS with picture sets relating to these topics. These picture sets are available at <http://www.cdacanada.com/crimes/communicating-about-abuse/picture-displays>. MS required a combination of visual (the picture) and auditory scan (the spoken word paired with the picture) to identify the pictures. He identified all items using this technique. Picture sets included body parts, time words, staff names, words about sex.
- All picture sets included an item “The word I want is not here.”
- MS typically respond to questions using one picture selections and rely on the person with whom he is communicating to fill in the blanks. MS is not able to put pictures into sentences or to use grammar.

## Recommendations

Strategies to be used	Rationale
Ask straightforward questions using plain language. Check for comprehension of a question by asking: Do you understand?	MS will look confused if he does not understand. He will use his Yes and No responses to indicate if he doesn’t understand.
Avoid tag questions, double negatives and multiple questions embedded in a sentence.	MS relies on limited responses, usually Yes, No and Maybe. He cannot respond if questions are ambiguous.

Strategies to be used	Rationale
<p>Ask yes and no questions or questions that can be answered with a single word/ picture selection. Avoid questions starting with how and why.</p>	<p>MS typically answers Yes and No questions. He cannot put pictures into sentences. He typically uses one picture at a time and replies on his listener to use the context to “fill in” or suggest what he might mean through a series of Yes and No questions.</p>
<p>Use of communication pictures relating to body parts, people, sexuality and abuse to be available to MS.</p>	<p>MS requires pictures to communicate about what happened, when, where and who.</p>
<p>Assistance to MS to communicate his responses by echoing what he is communicating and by using partner assisted scanning on his communication board.</p>	<p>MS requires a skilled Communication Intermediary to use partner assisted scanning in order to communicate his messages. By echoing his Yes, No and Maybe responses, MS knows that everyone accurately knows what he communicated.</p>
Other Accommodations	
<p>The Communication Intermediary and victim services should arrange a visit for MS to determine optional positions for testifying and communication facilitation</p>	<p>MS should be positioned in a place where he can see and be seen.</p>
<p>The Communication Intermediary can provide input on recordings and transcripts.</p>	<p>If visual recording is to be done, camera should be positioned in front and to the side to show eye gaze. Shots should also show his selections. Transcripts should identify the intermediary as well as MS communications.</p>

## **Report 2: LH**

The following redacted report has been contributed by a Registered Intermediary, who is accredited by the Ministry of Justice, UK operating within the Witness Intermediary Scheme.

### **The purpose of this report is:**

To summarize my involvement with LH so far, and to comment on whether LH has the communicative ability to give evidence during a trial.

### **In order to compile this report I have:**

- Spoken to the Head Teacher, Speech and Language Therapist, Clinical Psychologist and classroom learning support assistant from LH's school and met LH while I was there.
- Spoken to LH's Social Worker who has known him for a number of years.
- Read a number of reports given to me by the school including the special educational needs report dated 8.5.14 and other reports from school planning and reviewed meetings.
- Met LH's Social Worker.
- Been present during video recorded interview.

### **Background**

- Intermediary assessment was requested because LH was due to be questioned during video recorded interview.
- Summary of Findings and Recommendations.

### **I have found that:**

- LH is fourteen years of age and has an autistic spectrum condition.
- He attends a school which specializes in supporting children who have that condition.
- He shows anxiety and is emotionally vulnerable.
- If the case proceeds to trial he will find the language used difficult to understand, unless the level of language is modified appropriately for his age and ability.
- He is able to talk about what happened in the past.
- He was able to engage well during his interview and answer questions in the calm environment of the interview room.
- LH has the communicative ability to give evidence during a trial.
- Special measures, including the use of an intermediary, would be necessary for LH to appear at a trial.

## **I recommend that:**

- A Registered Intermediary is used prior to and during a trial to enable effective communication and improve the quality of the evidence.
- I would be able to act as the intermediary. I am a qualified Speech and Language Therapist and have specialized in developmental speech and language delay and disorder for 25 years. I have an MSc in Human Communication. I was trained to be a Registered Intermediary in 2003 and have considerable experience working as such since 2004.

## **Chronology**

- 29.12.14: I received a call from the National Crime Agency.
- 9.1.15: I contacted the officer in the case, DC WJ, to arrange when I would meet LH.
- 23.1.15: I visited LH's School and then met LH later at the interview suite at S Police Station.
- 3.2.15: I was present during video recorded interview at P Interview Suite.

## **Assessment**

### **Medical Conditions (including Physical Conditions)**

- LH has an autistic spectrum condition.
- Autism is a lifelong developmental disability that affects how a person communicates and relates to other people. It also affects how they make sense of the world around them. It is a spectrum condition which means that while all people with autism share certain difficulties their condition will affect them in different ways.
- LH is described as having a degree of learning difficulties particularly with receptive and expressive language.
- He is described as being emotionally volatile and he expresses his emotions expansively.
- He is described as not having age appropriate social skills and can misinterpret situations.

### **Behaviour, listening and attention**

- LH is happy to engage in activities and talk about what he is doing if they are of his choice.
- He was co-operative on both occasions when I met him during assessment and interview.
- Before his interview, he was asked how anxious he was on a scale of 1-10, 1 being the least anxious. He said he was at least at seven or eight. When the interview was over he said that his anxiety had not become any less and he was tearful.

- He is helped by having visual reminders of what is expected.
- He is helped by having visual support for asking for breaks.

### **Understanding and expressive language**

Assessment consisted of free conversation and observation to assess LH's ability to respond appropriately to the language spoken by others. I was able to gain insight into LH's ability to understand and use expressive language, to understand words such as who, why and when and to understand what people imply in what they are saying.

### **The following observations were made during the assessment and interview:**

- LH does engage in conversation when it is important to him. He talks about topics of his choice but this disguises an underlying difficulty with understanding and processing language appropriately for his age.
- He is described as having moderate to severe impairment in understanding of language and a mild to moderate delay in using language.
- He takes time to process what is said to him and needs instructions broken down into short chunks.
- When given time, he is able to respond to questions and talk about events in the past, present and future.
- He responded to questions which began with what, where and who.
- He does respond approximately to questions to do with time and when something happened in the recent past. He may have more difficulty when asked about the distant past.
- He can find it difficult to explain what words mean. In spite of speaking fluently about some topics he could not explain the difference between truth and lies. However, when given a story about a boy saying that he did not break a window which he did break, it was clear that he did know the difference. He just could not explain it. He is described as having word retrieval difficulties which means he cannot always think of the word he wants to use.
- LH can go off topic at times and if he is finding it difficult to respond to what is said to him, he talks about something completely different. For example, I asked him how often he did something and for how many weeks. He did not give an accurate response and started to talk about something different.
- He is described as having a poor working memory. This is to do with LH's ability to hold in his mind and process detailed information. This is particularly the case if the information is given to him verbally. He finds it difficult to hold enough information in his short term memory

to understand and respond to it appropriately for his age. This is different to long term memory. It is not the Intermediary's role to say whether he can remember events that happened in the past.

- He can answer questions more easily if he has visual support. He may be able to talk about an event if he is asked to draw it. He enjoys drawing and often doodles while talking.

## **Conclusion**

LH was able to engage and talk about events that had happened in the past during video recorded interview. However, his anxiety and emotional vulnerability, behaviour and language skills are such that he will require the language during a trial to be modified appropriately. In a stressful environment, he may become anxious and be less efficient with his responses if he does not understand the questions. Being in an unfamiliar environment and heightened anxiety may reduce his ability to communicate effectively.

## **Recommendations**

During a trial, LH's evidence is likely to be diminished without special measures with regard to the Youth Justice and Criminal Evidence Act (1999) (i). I strongly advise the following:

- A website called the Advocate's Gateway is available. Relevant toolkits giving recommendations about questioning young witnesses and those with an autistic spectrum condition can be found at [www.theadvocatesgateway.org/](http://www.theadvocatesgateway.org/). A film has also been produced which can be found on the same site under the heading Training Film.
- A booklet, Autism: A guide for criminal justice professionals can be found on the National Autistic Society website [www.autism.org.uk](http://www.autism.org.uk).
- If the case goes to trial the Intermediary should have an opportunity to meet LH again to re-establish rapport and re-assess his communication skills and emotional state at that time. An addendum to this report would be written which would include recommendations for strategies which could be used during a trial.

## **Report 3: Mr. X.**

### **Qualifications**

- I am registered with the College of Speech-Language Pathologists and Audiologists of Ontario.
- I have over 25 years of clinical experience working with individuals who have sustained acquired brain injuries and illnesses, and related neurogenic cognitive-communication,

language, and speech disorders. I provide direct intervention as well as community reintegration and academic/vocational rehabilitation services.

- I am on the roster of Communication Intermediaries provided by Communication Disabilities Access Canada ([www.cdacanada.com](http://www.cdacanada.com)).

My role as a Communication Intermediary is to assist communication between a witness and justice professional. In my capacity as a Communication Intermediary, I do not function as an expert witness. I cannot give an opinion on the accuracy of a witness' recall of the facts in a case, nor can I give an opinion on whether a witness is telling the truth. My role is limited to providing assistance to facilitate communication of the witness's evidence and advising justice professionals on how this can be best achieved.

### **Informed Consent**

The purpose of this report was explained to Mr. X. Mr. X gave verbal and written consent and was advised that he could withdraw his consent for the assessment and release of this report. He was also advised that he could stop the assessment at any time and he could also choose another Communication Intermediary, should he wish.

### **Referral Information**

Mr. X was referred by XXXX, who requested an appraisal of the communication accommodations and supports Mr. X would require to be able to communicate evidence in court.

### **Purpose of Assessment**

- To identify Mr. X's communication needs and to determine if he required any communication supports to give evidence.
- To indicate whether the use of a Communication Intermediary would be required to assist Mr. X in providing accurate and reliable evidence.
- To make recommendations as to justice professionals on how to accommodate Mr. X's communication needs.

### **Summary of Conclusions and Recommendations**

Mr. X presents with aphasia, a language impairment, which interferes with his ability to understand spoken and written language and express himself verbally and in writing. If specific verbal accommodation strategies are used, he can understand and express himself, and engage in conversation and other verbal interactions. Given the nature of his communication disability, Mr. X. was unable to communicate about his specific needs and a communication assessment was required.

A Communication Intermediary will be required to assist Mr. X in understanding and expressing verbal information. A Communication Intermediary will use accommodation strategies from an evidence-based method called Supported Conversation for Adults with Aphasia. This method includes techniques to ensure both the understanding and expression of verbal information through specific procedures, detailed in the communication assessment section.

## **Assessment**

Mr. X attended two assessment sessions, each of forty-five minutes' duration. These sessions occurred in an office setting, with minimal background noise and no significant visual distractions. Mr. X's son was present at the assessment sessions.

## **General Findings**

- Mr. X participated in the assessment sessions independently. He demonstrated a genuine interest in the assessment tasks, was fully engaged throughout each session, but was visibly fatigued after 30 minutes.
- Mr. X was generally aware of his communication difficulties, although he did not identify his errors in the moment. He knows that he has more to say than he can express and he stated that he needs someone to assist him when communicating.
- He demonstrated difficulties in concentration, both on verbal and visual tasks. He seemed unaware that his attention had wandered, but responded well to redirection.

## **Understanding of Spoken and Written Language**

- Mr. X has significant difficulty in understanding spoken language, especially if the sentences are long and complex, and when there were no pauses between sentences. He followed short spoken instructions, but failed to follow the 2-3 instructions when they were presented in one sentence. If the sentences were broken up into short segments and the language was as basic as possible, he could understand the meaning.
- When asked a question, Mr. X needed approximately 15 seconds or more to process and formulate a response.
- He had no difficulty understanding questions beginning with Who or What. He found How and Why questions more problematic.
- He benefited from having the essential key words written down so that he could refer to them to support his understanding and use to facilitate his expression.
- Mr. X was able to read words and short basic sentences. He was not able to follow the meaning over a series of sentences, so paragraphs were not understood.

## Expressive Language

- Mr. X demonstrated frequent word-finding difficulties and produced words that were not actually words, e.g. “flib” for “trip”. He was often unaware that he had produced a ‘non word’ and appeared frustrated when he was not understood. Further questioning usually resulted in him being able to clarify his intended meaning.
- Word-finding difficulties were prevalent. Techniques that were helpful in eliciting the intended word included having him write the first letter, and pointing to a written word from a short list corresponding to the question topic.
- Yes/No questions were helpful in the place of open-ended questions. A written Yes/No card was helpful to verify the accuracy of the Yes/No response; he pointed to the written Yes/No when asked.
- Mr. X did not write most words or sentences correctly. There were spelling errors and ‘non words’ produced.
- He was often able to produce the first letter of a word correctly, which assisted in determining a word he was trying to find.
- Writing should be considered to be an assistive modality, but not a communication channel that can be used independently. Writing is not as accurate as speaking for conveying meaning.

## Conclusions

- Mr. X has shown that he is able to give evidence if he is questioned in a manner that takes account of his severe limitations processing and producing language. The use of a Communication Intermediary would improve the completeness, consistency and accuracy of Mr. X’s evidence.
- Mr. X is likely to be less resilient under stressful conditions due to the effort he needs to process information and express his responses. He will need to be observed for signs of tiredness or stress. A Communication Intermediary can assist the court in recognizing when Mr. X requires a break.
- Questions should be as short and direct as possible. Avoid questions starting with “how” and “why” and any tag questions such as “*You saw a dog when you went to the shops, didn’t you?*” He may say ‘yes’ to this in response to going to the shops, or seeing the dog, not necessarily both.
- Mr. X would benefit from visual support both to understand and answer questions. A Communication Intermediary could write key words for questions and topic areas.
- Mr. X must be given time to formulate his answers and respond. He should not be interrupted whilst trying to give his answers as this is likely to cause anxiety and reduce his ability to think and answer questions accurately.

- If necessary, a Communication Intermediary can alert the court to any communication difficulties that may arise by raising their hand and asking the judge to ask counsel to rephrase questions according to the recommendations made in this report.

**Other Recommendations**

- I recommend that a Communication Intermediary facilitate communication for Mr. X in Court. I also recommend that the Intermediary meet with the judiciary and other justice professionals to review recommendations in this report, to answer questions and to clarify their role as a Communication Intermediary for Mr. X.
- Mr. X should visit the Court beforehand to familiarize himself with the setting. He will need a table in front of him for any written words he needs to point or read for communication purposes. He will need good lighting to be able to read the words. He will need his left side free to allow him to use his left hand to gesture. The Intermediary will need to sit on his right side to facilitate his communication.

Strategies to be used	Rationale
Allow at least 15 seconds or more for Mr. X to process and formulate his response to a question	Mr. X has aphasia and requires more time to understand spoken language
Avoid complex language and long sentences. Avoid questions posed as statements or starting with How and Why.	Mr. X is more likely to understand short sentences of 6 words or less. He has more difficulty answering complex questions such as those starting with How and Why as these questions involve more effort to formulate an answer.
The Communication Intermediary should write down key words of a question posed to Mr. X to support him understanding spoken language.	Mr. X requires visual aids to facilitate his understanding. The use of key written words provides a context and another mode of communication that reinforces meaning.

Strategies to be used	Rationale
<p>Mr. X should have a note pad and pen available to him to write first letters of a word that he has difficulty saying. The Communication Intermediary should also provide a list of topic words that he can select from to facilitate his word finding. Mr. X should also have a card with Yes, No, Maybe, I don't know, I don't understand and I forget, on it to facilitate his responses to questions.</p>	<p>Mr. X has difficulty finding the words he wants to say. He knows what he wants to say but can't think of the correct word. Sometimes he can write the first letter which facilitates him in saying the entire word. Sometimes if he sees the word he wants, he can point to it. Sometimes he can gesture or mime what he means to say. He needs a variety of ways to communicate.</p>
<p>A Communication Intermediary is required to give feedback and support to Mr. X when his speech is not understood.</p>	<p>Mr. X occasionally uses non words and is not aware of when he does that.</p>