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January 24, 2022

The Honourable Madame Justice Suzanne Côté
Supreme Court of Canada
301 Wellington Street
Ottawa ON K1A 0J1

Dear Madame Justice Côté,

Re: Improving transgender, non-binary and gender diverse inclusivity at the Supreme Court

We are writing on behalf of the Sexual Orientation and Gender Identity Community Section (SOGIC) and the Supreme Court Liaison Committee of the Canadian Bar Association (CBA Sections) to follow up on our discussions about gender inclusive practices in the Canadian justice system. We appreciated the opportunity to discuss gender inclusive practices at the Bench and Bar Committee meeting in June and, at your request, we write with suggestions to improve the practices at the Supreme Court.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. SOGIC addresses the concerns of LGBTQI2S members in the CBA and provides a forum for the exchange of information, ideas and action on legal issues relating to sexual orientation and gender identity. The Supreme Court of Canada Liaison Committee serves as a link between the Court and the Bar on issues of mutual concern.

Transgender, non-binary and gender diverse people face significant barriers to access to justice, which reinforce their ongoing social and systemic marginalisation. Redressing these require multifaceted and long-term measures. As a first step, we have identified simple yet effective changes that courts can make immediately to improve trans access to justice. Trans is used here as an umbrella term for all people whose gender identities differ from what they were assigned at birth, including most people who have non-binary gender identities.¹

¹ People who do not identify exclusively as male or female and may identify as neither.

Several courts have updated their introduction procedures with a view to treating people of all gender identities² and gender expressions³ equally.⁴ While the approaches vary, they all promote education and facilitate parties proactively specifying the gendered pronouns and titles to be used when referring to them in the proceeding. These changes reduce harmful misgendering, highlight the requirement to respectfully address all parties, and signal that people of all identities are to be accorded equal dignity before the court.

We suggest that the Supreme Court introduce similar changes and consider education for Justices and Court staff on trans issues. Taking these steps would not only improve the experience of trans people who appear before the court, but also influence the justice system more broadly. Leading in this manner would demonstrate that trans people are to be accorded equal access and respect, including in our highest court.

Below we briefly set out the harm these changes help mitigate and summarise initiatives that we encourage the Supreme Court take.

Misgendering and inequitable access to justice for trans people

Trans people experience a higher rate of justiciable legal problems than the general public, but have less access to, and trust in, legal service providers and the courts.⁵ In addition to overt anti-trans behaviours, a significant contributing factor is the failure to acknowledge and respect the identities of trans people within the system. This manifests in many ways, including frequent misgendering.

Misgendering is when the wrong gendered language, such as titles and pronouns, is used to refer to someone. It happens when assumptions are made on the gendered language to use based on characteristics such as appearance, name or voice. While these assumptions can be wrong for any person, they are most frequently wrong for trans people.

Misgendering has a profoundly stigmatizing and marginalizing impact.⁶ It signals to trans people that their identities are not seen or respected, and that they may not be in a place where it is safe to be themselves. When this happens in court, it becomes a barrier to equal access to justice.

² Terminology associated with sexual orientations and gender varies over time and among cultures and languages as people find ways to express who they are and their experiences. We note some definitions here for ease of reference, but suggest reviewing additional material, such as the CBABC FAQ [<http://cbabc.org/pronouns>]. **Gender identity:** A person's internal perception of themselves as being male, female, neither ("agender"), a combination of genders, and/or non-binary.

³ **Gender expression:** The totality of a person's appearance and behaviour, including clothes, mannerisms, haircut, etc., that are associated with a gender. It is sometimes said that gender expression is feminine, masculine, or androgynous. Gender expression is independent from gender identity: a woman can have a masculine gender expression.

⁴ PD-59 [Forms of Address for Parties and Counsel in Proceedings](#) (bccourts.ca); NP 24 [Form of Address for Parties and Lawyers](#) (provincialcourt.bc.ca); [practice direction - may 27 2021 english-1.pdf](#) (manitobacourts.mb.ca); [NSCA Identification of Pronouns](#) July 5, 2021 (courts.ns.ca); Statement from the Chief Justice of Ontario and the Associate Chief Justice of Ontario Regarding Submissions from Counsel - [Court of Appeal for Ontario](#) (ontariocourts.ca).

⁵ TRANSforming JUSTICE [[TRANSforming JUSTICE – Trans Legal Needs Assessment Ontario Project |HALCO](#)].

⁶ Kevin A. McLemore, "Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals" (2015) 14:1 *Self and Identity* 51; Kevin A. McLemore, "A Minority Stress Perspective on Transgender Individuals' Experiences With Misgendering" (2016) 3:1 *Stigma and Health* 53; Stephanie Julia Kapusta, "Misgendering and Its Moral Contestability" (2016) 31:3 *Hypatia* 502; Florence Ashley, "Qui est-ille ? Le respect langagier des élèves nonbinaires, aux limites du droit" (2017) 63:2 *Service social* 35 at 37-38. KC Clements, "[What Does It Mean to Misgender Someone.](#)" [Healthline](#) (19 October 2017).

Misgendering unfairly takes the person's focus off the proceedings and onto questions of whether they are safe, have equal standing before the court, and whether to make a correction.⁷ This is a uniquely distracting and dehumanizing burden on top of the already stressful circumstances of appearing in court. These consequences are magnified when the misgendering comes from a person in authority, such as a judge or a lawyer, and on the open public record. The result is a strong disincentive for trans people to participate in proceedings and an impediment to free and full engagement for those who do.

Suggestions

1. Education

Education of Justices and court staff on trans identities is central to any change in court practices and policies. Understanding why these changes are important equips them to internally assess their own practices for misplaced assumptions and unanticipated harmful impacts.

The CBA Judges Section is offering training on trans competency and intersectionality for judges only on **February 4, 2022**⁸. The CBA has offered this training to other courts and it has been well received. This session is free for CBA member judges and open to non-CBA member judges for a modest fee. It will also be available on-demand. The CBA can facilitate additional training for judges and staff who are lawyers, on request. Training is available through other providers for non-lawyer staff.

2. Updating introduction procedures

As a practical step to reduce misgendering in court and improve trans inclusivity, we suggest that the court update its standard practices to include pronouns⁹ and titles¹⁰ when participants are introduced in court¹¹. As noted, several other courts have taken this step. In assessing which approach is appropriate for the Supreme Court, we encourage the court to consider the following:

- Changes that apply to all participants are better at reducing barriers faced by trans people. If trans people are the only ones introducing their pronouns, they are still singled out and the burden of the change falls on those who are marginalised.
- Pronouns are used to refer to all people in court. Having everyone identify which to use in reference to themselves is a simple way to avoid errors, treat everyone equally, and signal that it is not appropriate to assume anyone's gender.
- If the changes are permissive, strongly encourage their use and have staff and Justices model the change. Having people with authority who are never misgendered proactively specify their pronouns creates space and safety for those who are often misgendered to do the same. It also underlines that assumptions about gender are discouraged.

⁷ CBA National | [No need to guess](#) (nationalmagazine.ca); [Challenging "Compelled Speech" Objections: Respectful Forms of Address in Canadian Courts](#) – Slaw.

⁸ CBA, [Access to Justice Through a Transgender and Intersectional Lens](#) (cbapd.org).

⁹ Most commonly she/her, they/them, or he/him, though some people use alternative gender-neutral pronouns such as ze/zir.

¹⁰ Most commonly Counsel, Ms, Mr, or Mx., which is an increasingly common gender-neutral option used by non-binary people.

¹¹ CBA National | [Respecting pronouns is a professional responsibility](#) (nationalmagazine.ca).

- Ensure that the pronouns and titles specified are those “to be used in the proceedings,” or similar language. Some trans people may not be “out” about their identity or may not feel safe in the context of a particular proceeding to use the pronouns they use in their private life. The intent of the change is to know how to respectfully address participants in a proceeding, not to forcibly out people.
- Whichever approach is adopted, publicise the change so that other courts, lawyers and the general public learn from it and have the opportunity to follow the Court’s lead.

3. Additional changes to consider

In addition to education and updating introductions, other areas of policy and practice could be reviewed to improve trans access to the Court:

- Rather than continuing the use of gendered titles for counsel, adopt Counsel as a title for all lawyers appearing before the Court. Consider adopting gender-neutral language for official court positions to avoid gendered alternatives, such as “Madame Justice” or “Madame Clerk”, creating a safer environment for gender-diverse individuals who want to be appointed to court positions, or potentially come out at work. These proposed changes align with the shift from My Lord and My Lady to gender neutral titles for Justices.
- Ensure that precedents and writing style guides are gender neutral and gender inclusive.
- Assess courthouse facilities for safe, accessible washrooms and robing rooms for trans people, particularly non-binary people who do not identify exclusively as men or women.
- Review internal communications policies to ensure that all emails going in or out of the court include pronouns.
- Review hiring practices for staff and clerks to ensure that gender norms do not lead to the exclusion of qualified trans candidates.

The CBA Sections appreciate the opportunity to comment. We trust our comments are helpful and would be pleased to offer further clarification.

Sincerely,

(original letter signed by Véronique Morissette for Alan Rankine and Jonathan Griffith)

Alan Rankine (he/him)
Chair, Supreme Court Liaison Subcommittee

Jonathan Griffith (he/him)
Chair, Sexual Orientation and Gender
Identity Community Section

cc. Barbara Kincaid