PREVENTING MISGENDERING IN CANADIAN COURTS: RESPECTFUL FORMS OF ADDRESS DIRECTIVES

Samuel Singer and Amy Salyzyn*

Trans people face significant access to justice barriers and regularly experience discrimination within the Canadian legal system. In this context, respectful forms of address directives seek to prevent the misgendering of courtroom participants by having lawyers and parties proactively identify their titles and pronouns. Multiple Canadian courts have now introduced such directives.

This article situates forms of address directives as simply another control on courtroom speech that contributes to the fair, orderly, and efficient administration of justice. Drawing on examples, including the honorifics used for judges and the evolution of oath and affirmation requirements for witnesses, we detail how courtroom rules have evolved to reflect societal change. The article argues that forms of address directives are an important procedural tool to advance the administration of justice by facilitating equal access to the courts for trans people, providing consistency with the broader legal system's recognition of trans rights, and facilitating the efficient and orderly administration of justice.

The article then counters arguments that forms of address directives constitute improperly "compelled speech" in violation of constitutionally guaranteed free expression rights and addresses concerns that these directives may limit a lawyer's ability to zealously advocate for their clients.

* Samuel Singer is an Assistant Professor and Amy Salyzyn is an Associate Professor at the Faculty of Law, University of Ottawa. Samuel Singer's contributions draw from research funded by the Law Foundation of British Columbia and the OBA Foundation Chief Justice of Ontario Fellowship in Legal Ethics and Professionalism Research and from research conducted for the Canadian Human Rights Commission, see Samuel Singer, "Trans Rights in Canada: Canadian Case Law and Legal Scholarship from 1973 to 2019" (Ottawa: Canadian Human Rights Commission, 2020). This article builds on a blog post by the authors, see Amy Salyzyn & Samuel Singer, "Challenging 'Compelled Speech' Objections: Respectful Forms of Address in Canadian Courts" (14 December 2021), online (blog): Slaw <www.slaw.ca/2021/12/14/challenging-compelled-speech-objections-respectful-forms-of-address-in-canadian-courts/> [perma.cc/G6DM-HRSJ]. The authors thank Florence Ashley, Monica Cheng, Robert Leckey, Vanessa MacDonnell, Carissima Mathen, Jena McGill, Lee Nevens, Stephen Pitel, Sylvia Rich, Adrienne Smith, and the peer reviewers for their comments on earlier drafts. They also thank Gabriella Brown, Eryn Heidel and Kristina Schmuttermeier for their research assistance.

We conclude that forms of address directives are a simple and important mechanism to help address misgendering in courts while emphasizing that much substantive work remains to address trans people's legal needs in Canada.

Les personnes trans qui ont affaire à la justice au Canada se butent à d'importants obstacles et sont régulièrement victimes de discrimination au sein même du système. C'est donc dans ce contexte que plusieurs tribunaux canadiens ont pris l'initiative d'adopter des formules d'adresse respectueuses, afin d'éviter le mégenrage des personnes qui participent aux audiences. Il s'agit pour les parties et leurs avocates et avocats d'indiquer d'emblée le titre et les pronoms d'adresse à employer à leur endroit.

Les auteurs considèrent les directives de formules d'adresse comme un simple mécanisme d'encadrement du langage parmi d'autres qui contribue à l'équité, à l'efficacité et à l'administration harmonieuse de la justice. À l'aide d'exemples, notamment les titres honorifiques attribués aux juges et l'évolution des règles du témoignage sous serment ou par affirmation solennelle, ils expliquent comment les protocoles en salle d'audience ont changé dans le sillon des transformations sociétales. Ils avancent que ces directives sont un important outil pour l'appareil de la justice comme elles favorisent l'égalité des personnes trans devant les tribunaux, systématisent la reconnaissance des droits liés à la transidentité dans l'ensemble du système judiciaire et facilitent l'administration efficace et ordonnée de la justice.

Puis, ils répliquent à l'argument voulant que les directives sur les formules d'adresse, en « contraignant » indûment le propos, vont à l'encontre des droits constitutionnels se rapportant à la liberté d'expression, et à la crainte qu'elles ne limitent la capacité des juristes de représenter leur clientèle avec diligence.

En guise de conclusion, ils posent les directives de formules d'adresse en mécanismes simples mais importants pour éviter le mégenrage dans les tribunaux, et soulignent le travail considérable qu'il reste à faire pour répondre aux besoins juridiques des personnes trans au Canada.

Contents

1. Introduction

Trans people have a wide range of pressing, well-documented, and unmet legal needs, yet they face significant access to justice barriers and regularly experience discrimination within the Canadian legal system.[1] Trans lawyers also regularly confront justice system actors who lack awareness about trans people and individuals who are hostile towards trans people's identities and existence.

[1] See e.g. James J et al, "TRANSforming JUSTICE—Trans Legal Needs Assessment Ontario" (2018), online (pdf): <www.halco.org/wp-content/uploads/2018/09/TransFJ-Report2018Sept-EN.pdf> [perma.cc/6EAY-23GN]; William Hébert et al, *A Qualitative Look at Serious Legal Problems: Trans, Two-Spirit, and Non-Binary People in Canada* (Ottawa: Department of Justice, 2022); Canadian Bar Association, HIV & AIDS Legal Clinic Ontario (HALCO) & TRANSforming JUSTICE: Trans Legal Needs Assessment Ontario (TRANSforming JUSTICE) Research Team, "Access to Justice for Trans People" (September 2022), online (pdf): <www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/CBA_AccesstoJusticeforTransPeople.pdf> [perma.cc/MH2G-M8WK]. See also *Hansman v Neufeld*, 2023 SCC 14 at paras 84–89 [*Hansman*].

This article examines one set of measures that aim to improve access to justice and the courtroom experience for trans and non-binary individuals: respectful forms of address directives.[2] These directives seek to prevent the misgendering of courtroom participants by having lawyers and parties proactively identify their titles and pronouns. Misgendering in courts happens regularly and, for trans people, being misgendered causes significant harm. As elaborated later in this article, misgendering is not only psychologically distressing but can also have serious negative implications for the physical, financial, and social well-being of trans individuals. When misgendering happens in a courtroom, "[it] is not only discriminatory, but [acts as] a strong disincentive for trans people to participate in the legal system and an impediment to free and full engagement for those who do."[3]

The negative access to justice impacts of misgendering occur in a context in which trans people have significantly higher rates of legal needs than non-trans persons in critical areas such as housing, medical treatment, employment, housing and disability benefits.[4] Trans people already experience significant barriers to getting help for their legal needs, given that they are more likely to experience economic and social marginalization.[5] Misgendering in court contributes to the exclusion and marginalization of trans people.

Multiple Canadian courts have now introduced respectful forms of address directives. While many legal stakeholders welcomed forms of address directives as a step towards recognizing trans rights and improving access to justice, others have objected to these measures. Objectors have argued, among other things, that the requirement to identify one's own forms of address and to respect the forms of address of others amounts

---

2 Please note that in this article, we generally use the term "trans" to refer to trans and non-binary people. We note, however, that many of the concerns related to misgendering in Canadian courts also apply to gender diverse people more broadly.

3 CBA, HALCO & TRANSforming Justice, *supra* note 1 at 21.

4 With respect to economic marginalization, a 2015 study reported that trans Ontarians have a median income of $15,000 (Greta R Bauer & Ayden I Scheim, "Transgender People in Ontario, Canada: Statistics from the Trans PULSE Project to Inform Human Rights Policy" (June 1, 2015) at 6, online (pdf): *Trans PULSE* <www.transpulseproject.ca/wp-content/uploads/2015/06/Trans-PULSE-Statistics-Relevant-for-Human-Rights-Policy-June-2015.pdf> [perma.cc/93R5-5ECG]. Moreover, as Samuel Singer has noted, "significant data now exists about the high levels of discrimination and systemic exclusion experienced by trans people in Canada," see Samuel Singer, "Trans Rights in Canada: Canadian Case Law and Legal Scholarship from 1973 to 2019" (Ottawa: Canadian Human Rights Commission, 2020) at 7 [Singer, "Trans Rights in Canada"].

5 *Ibid*.

to an unconstitutional speech restriction and/or interferes with a lawyer's professional obligations to their clients.

In this article, we present an affirmative case for respectful forms of address directives. In short, we frame these directives as one of many speech controls in Canadian courtrooms that facilitate the proper administration of justice and which have continually evolved in order to keep pace with social change. As elaborated below, Canadian law already recognizes the importance of protecting trans individuals from discrimination so that they can fully participate in public life. It is well settled in our legal system that gender identity and gender expression are fundamental parts of human identity that are expressly recognized and protected in law.[6] Protecting trans individuals from the harms of misgendering in court is consistent with this broader regime of legal recognition and protections. Additionally, we refute arguments that forms of address directives violate freedom of expression guarantees under s. 2(b) of the Canadian *Charter of Rights and Freedom* or could prevent a lawyer from meeting their obligation to resolutely advocate for a client who refuses to respect a trans person's gender identity.

This article proceeds in five parts. Part 1 details the introduction of forms of address directives in Canadian courts and reviews the public commentary in response to those directives, focusing particularly on criticism that the directives improperly mandate "compelled speech". Part 2 then situates respectful forms of address directives within the backdrop of the many existing court speech controls that aim to facilitate the proper administration of justice. The history of court speech practices evolving to improve inclusivity and respond to broader social and linguistic developments is also reviewed. Part 3 argues that forms of address directives advance the proper administration of justice through: (1) facilitating equal access to the courts for trans individuals, (2) providing consistency with the broader legal system's recognition of trans rights, and (3) facilitating the efficient and orderly administration of justice. Part 4 rejects arguments that forms of address directives constitute improperly "compelled speech" in violation of *Charter* guaranteed free expression rights. While respectful forms of address directives engage "expressive activity", we argue that a court is unlikely to find an infringement of s. 2(b) given that the directives have not been introduced with the purpose of controlling speech and are unlikely to have an adverse effect on expression that is constitutionally cognizable. In the alternative, we argue that any violation of s. 2(b) would

---

[6] See e.g. *Dawson v Vancouver Police Board (No 2)*, 2015 BCHRT 54 [*Dawson*]; *Vanderputten v Seydaco Packaging Corp*, 2012 HRTO 1977 at paras 65–66 [*Vanderputten*]; *Nelson v Goodberry Restaurant Group Ltd dba Buono Osteria and others*, 2021 BCHRT 137 at para 84 [*Nelson*]; *EN v Gallagher's Bar and Lounge*, 2021 HRTO 240 [*EN*].

be saved under s. 1. Part 5 then refutes arguments that respectful forms of address directives impede lawyers' obligations to zealously advocate for their clients and argues, additionally, that these directives help to advance lawyers' professional duties in other areas, including in relation to civility, discrimination and harassment, and the administration of justice. The article concludes that forms of address directives in Canadian courts are a simple, justifiable, and important procedural tool to help address misgendering, but emphasizes that much substantive work remains to address trans people's legal needs in Canada.

2. Forms of Address Directives

To set the stage for our affirmative case, this Part details the introduction of respectful forms of address directives in Canada. We also outline the legal community's responses to these directives, particularly focusing on events in British Columbia, where two lawyers filed a resolution at the provincial law society's annual meeting in opposition to the new directives.[7]

A) The Introduction of Court Directives about Forms of Address

British Columbian courts were the first to introduce respectful forms of address directives in Canada.[8] In October 2019, the British Columbia Court of Appeal issued an amended practice directive "providing direction to counsel and litigants on … conveying their preferred form of address (e.g. Mr., Ms., Mx.)." [9] Just over a year later, in December 2020,

---

[7] Law Society of British Columbia, "2021 Annual General Meeting of the Law Society of British Columbia, Notice to the Profession" (17 September 2021), online: *Law Society of British Columbia* <https://www.lawsociety.bc.ca/about-us/news-and-publications/news/2021/2021-annual-general-meeting-%E2%80%93%C2%A0second-notice/> [perma.cc/3F28-V7HP] [Law Society of British Columbia, "Notice to the Profession"].

[8] In the few years preceding the directives described in this paragraph, several Canadian adjudicative bodies had amended their documentation to allow participants to indicate their pronouns or list "Mx." as a gender-neutral manner of address. For example, beginning in 2017, British Columbia's Civil Resolution Tribunal "has included optional questions during the intake process, asking about participants' pronouns and chosen names, to ensure participants are addressed respectfully throughout the CRT process." (Civil Resolution Tribunal, "The CRT's Commitment to LGBTQ+ Inclusion" (6 August 2021), online: *Civil Resolution Tribunal* <www.civilresolutionbc.ca/blog/the-crts-commitment-to-lgbtq-inclusion/> [perma.cc/W6Y6-Z74V]).

[9] British Columbia Court of Appeal, "Court of Appeal Announcements Archive: October—December 2019", online: *The Courts of British Columbia* <www.bccourts.ca/Court_of_Appeal/archived_announcements/2019/Oct_Dec_19.aspx> [perma.cc/4N5X-P6N5]. Note that in March 2023, the British Columbia Court of Appeal released updated directives which now explicitly provide that the parties and counsel may advise the court of

British Columbia's Provincial Court and Supreme Court each issued directives requiring parties or lawyers, when introducing themselves or other courtroom participants such as witnesses, to provide "the judge or justice with each person's name, title (e.g. "Mr./Ms./Mx./Counsel Jones"), and pronouns to be used in the proceeding."[10] These notices further indicated that, if such information is not volunteered at the beginning of a proceeding, the party or lawyer will be prompted to do so by the court.[11]

In explaining the rationale for its new policy, the British Columbia Provincial Court stated that the information solicited by the practice direction "[was] important to:

- improve experiences within the legal system for gender diverse parties and lawyers
- identify correct pronouns and forms of address by adopting one practice that applies equally to all
- avoid lawyers or parties having to raise the issue only after incorrect titles or pronouns are used
- support a shift in professional practice towards asking all people how they should be respectfully addressed, acknowledging that this should not be assumed based on name, appearance or voice."[12]

In developing its policy, the Provincial Court stated that it received assistance from the executive of the Canadian Bar Association (British Columbia Branch)'s Sexual Orientation and Gender Identity Committee (SOGIC).[13] More generally, these new forms of address directives followed

---

"their pronouns (optional)." See also British Columbia Court of Appeal, "Appearing before the Court" (14 March 2023), online: <www.bccourts.ca/Court_of_Appeal/practice_and_procedure/civil_and_criminal_practice_directives/PDF/(CandC)Appearing_before_the_Court.pdf> [perma.cc/DBB8-SZY5] [British Columbia Court of Appeal, "Practice Directive"].

10 Provincial Court of British Columbia, "Notice to the Profession and Public: Forms of Address for Parties and Lawyers" (16 December 2020), online: <www.provincialcourt.bc.ca/downloads/Practice%20Directions/NP%2024%20Form%20of%20Address%20for%20Parties%20and%20Lawyers.pdf> [perma.cc/32R6-6596].

11 British Columbia Court of Appeal, "Practice Directive", *supra* note 9.

12 Provincial Court of British Columbia, "A Change in How Parties and Lawyers Should Introduce Themselves in Court" (16 December 2020), online: <www.provincialcourt.bc.ca/enews/enews-16-12-2020> [perma.cc/RE6Q-92UW].

13 *Ibid.*

years of work by trans communities, advocates, scholars, and lawyers advocating for a more trans-competent justice system.[14]

Other Canadian courts soon went on to introduce their own directives regarding court participant pronouns and titles. In 2021, Manitoba trial courts issued new practice directions similar to those introduced in British Columbia.[15] The same year, other courts, including the Courts of Appeal in Manitoba, Nova Scotia and Ontario, issued directives encouraging or welcoming parties and their lawyers to provide their titles (e.g., "Mr./Ms./Mx./Counsel Jones") and pronouns.[16] In 2022, the Supreme Court of Canada requested, and received, suggestions from two Canadian Bar Association committees about improving gender inclusivity at the Court.[17] Listed among the suggestions sent was for the Court to "update its standard practices to include pronouns and titles when participants

---

14 See e.g. Samuel Singer, "Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice" (2020) 35:2 CJLS 293 [Singer, "Trans Rights are Not Just Human Rights"]; William Hébert, "Trans Rights as Risks: On the Ambivalent Implementation of Canada's Groundbreaking Trans Prison Reform" (2020) 35:2 CJLS 221; Samuel Singer, "Trans Competent Lawyering" in Joanna Radbord, ed, *LGBTQ2 + Law: Practice Issues and Analysis*, (Toronto: Emond Publishing, 2019) [Singer, "Trans Competent Lawyering"]; James J et al, *supra* note 1; Florence Ashley, "Don't Be So Hateful: The Insufficiency of Anti-Discrimination and Hate Crime Laws in Improving Trans Well-Being" (2018) 68:1 UTLJ 1.

15 Provincial Court of Manitoba, "Forms of Address for Parties and Counsel of the Provincial Court" (17 June 2021), online (pdf): *Manitoba Courts* <www.manitobacourts.mb.ca/site/assets/files/1175/practice_directive_-_forms_of_address_for_parties_counsel_provincial_court_of_manitoba.pdf> [perma.cc/P5BL-DD42]; Court of Queen's Bench of Manitoba, "Forms of Address for Parties, Counsel and the Judiciary of the Court of Queen's Bench" (17 June 2021), online (pdf): *Manitoba Courts* <www.manitobacourts.mb.ca/site/assets/files/1152/practice_direction_-_forms_of_address_for_parties_counsel_and_the_judiciary_2021_june_17.pdf> [perma.cc/6EEM-TM2N] (n.b. these practice directives were issued on June 17, 2021, but stated to be in effect on September 13, 2021).

16 Manitoba Court of Appeal, "Practice Direction: Forms of Address and Pronouns" (27 May 2021), online (pdf): *Manitoba Courts* <www.manitobacourts.mb.ca/site/assets/files/1139/practice_direction_-_may_27_2021_english-1.pdf> [perma.cc/Z9J6-MDTZ], Court of Appeal of Nova Scotia, "Identification of Pronouns and Titles by Court of Appeal Participants" (5 July 2021), online: *The Courts of Nova Scotia* <www.courts.ns.ca/sites/default/files/courts/Court%20of%20Appeal/NSCA_Identification_of_Pronouns_July_5_2021.pdf> [perma.cc/QX6Q-VSL4] and Court of Appeal for Ontario, "Statement from the Chief Justice of Ontario and the Associate Chief Justice of Ontario Regarding Submissions from Counsel", online: *Court of Appeal for Ontario* <www.ontariocourts.ca/coa/how-to-proceed-court/statement-regarding-submissions-from-counsel/> [perma.cc/QXL5-YFG2].

17 Letter from Alan Rankine & Jonathan Griffith to the Honourable Madame Justice Suzanne Côté, "Improving Transgender, Non-Binary and Gender Diverse Inclusivity at the Supreme Court" (24 January 2022), online (pdf): *Canadian Bar Association*

are introduced in court."[18] In 2023, the Federal Court of Appeal issued a consolidated practice directive that "invites counsel and parties to provide information about the correct pronunciation of their names (phonetic or syllabic spelling), titles (Dr., Mrs., Mr., Ms., Miss, Mx., etc.) and pronouns (she, he, they, etc.)."[19] Guidance has also been developed regarding identifying pronouns and titles in the context of virtual hearings.[20]

B) Public Response

New court practice directions do not normally attract much public attention. However, the British Columbia court directives proved to be an exception to this rule and were the subject of significant commentary in the months following their introduction. We note that this attention came within a larger context in British Columbia at the time, in which trans rights cases were attracting significant media attention, including a case involving discrimination against a trans political candidate, the right of a trans youth to consent to gender-affirming healthcare, and the repeated misgendering of non-binary employees.[21]

<www.cba.org/CMSPages/GetFile.aspx?guid=47e5a20d-20e1-4f9a-87c2-cc605ec2cc9a> [perma.cc/F8WN-TPNZ] (sent on behalf of the CBA Sexual Orientation and Gender Identity Community Section and Supreme Court Liaison Committee for the Canadian BarAssociation). These committees also wrote to the Federal Court and Federal Court of Appeal to share the same suggestions (see Letter from Guy Régimbald & Jonathan Griffith to the Honourable Paul Crampton "Improving transgender, non-binary and gender diverse inclusivity at the Federal Court" (28 January 2022), online (pdf): *Canadian Bar Association* <www.cba.org/CMSPages/GetFile.aspx?guid=99ee265e-e2ea-4917-a570-dcc78ab9007a> [perma.cc/CX5T-PVNE]; and Letter from Guy Régimbald & Jonathan Griffith to the Honourable Marc Noël, "Améliorer l'inclusion des personnes transgenres, non binaires et d'identités de genre diverses à la Cour d'appel fédérale" (28 January 2022), online (pdf): *The Canadian Bar Association* <www.cba.org/CMSPages/GetFile.aspx?guid=90dfb2f4-a4bf-4654-a4f1-520b8b435159> [perma.cc/F9FT-67MS]).

[18] Rankine & Griffith, *supra* note 17 at 3. See also Canadian Bar Association, "2023 Gender Identity Resource Guide" (24 January 2022), online (pdf): *The Canadian Bar Association—Alberta Branch* <www.cba-alberta.org/getattachment/Publications-Resources/Resources/Handbooks-Reports/Gender-Identity-Resource-Guide/gender-identity-resource-guide_may2023.pdf> [perma.cc/B5B6-FHHN].

[19] Federal Court of Appeal, "*Consolidated Practice Direction*" (1 June 2023), online: <www.fca-caf.gc.ca/en/pages/how-to-proceed-in-the-court/consolidated-practice-direction> [perma.cc/V246-Q79P].

[20] Ontario Superior Court of Justice, "Virtual Courtroom Etiquette"(19 April 2022), online: *Superior Court of Justice* <www.ontariocourts.ca/scj/virtual-courtroom-etiquette/> [perma.cc/27SY-7CVY].

[21] See e.g. *AB v CD and EF*, 2019 BCSC 254; *AB v CD and EF*, 2019 BCSC 604; *AB v CD*, 2020 BCCA 11; *Oger v Whatcott (No 7)*, 2019 BCHRT 58 [*Oger No 7*]; *EN*, *supra* note 6; *Nelson*, *supra* note 6. For related news articles, see Andrew Weichel, "B.C. Dad Jailed 6 months after Repeatedly Exposing Transgender Son's Identity, Despite Publication Ban"

Public commentary in support of the British Columbia courts' directives largely reaffirmed the courts' own rationale for the policy change. This commentary expressed, for example, support for introducing measures that "aim to make courtrooms more inclusive of transgender, non-binary, and other gender diverse people"[22] and which contribute "to easing the discomfort that trans and gender non-conforming people experience with disturbing regularity in institutional spaces."[23] The British Columbia courts were lauded for adopting "a common sense solution to the chronic problem of misgendering trans and non-binary court participants,"[24] "reaffirming the human rights and dignity of transgender, non-binary, and other gender diverse people,"[25] and taking an "important step toward creating a more equitable, diverse, inclusive and safe legal profession."[26]

The new British Columbia court directives also generated negative commentary. It was argued that, through the directives, British Columbian

---

the Canadian Bar *CTV News* (16 April 2021), online: <www.bc.ctvnews.ca/b-c-dad-jailed-6-months-after-repeatedly-exposing-transgender-son-s-identity-despite-publication-ban-1.5390847> [perma.cc/2TL9-LXGA]; Douglas Quan, "Court Hears Transgender Teen's Anguish—and a Father's 11th Hour Regrets—Over Public Campaign against Treatment" *Toronto Star* (14 April 2021), online: <www.thestar.com/news/canada/court-hears-transgender-teen-s-anguish-and-a-father-s-11th-hour-regrets-over-public/article_27d5ab9c-b521-5ee0-8d66-0921c430df8b.html> [perma.cc/9E33-ENT6]; Robyn Crawford, "B.C. Human Rights Tribunal rules in favour of transgender politician" *Global News* (27 March 2019), online: <www.globalnews.ca/news/5104689/bc-human-rights-tribunal-rules-in-favour-of-transgender-politician/> [perma.cc/93KX-8NLX].

22 Federation of Asian Canadian Lawyers (British Columbia) Society, "BC Courts' Pronouns Practice Directives: What You Need to Know" (30 April 2021), online: *Federation of Asian Canadian Lawyers (British Columbia) Society* <https://faclbc.ca/news/10416646> [perma.cc/XS56-RRQ8].

23 Women's Legal Education and Action Fund, "LEAF Statement on Pronoun Use and British Columbia Courts Practice Directions" (9 February 2021), online: *Women's Legal Education & Action Fund* <www.leaf.ca/news/pronoun-use-and-british-columbia-courts-practice-directions/> [perma.cc/2T25-T6GX].

24 Brad Regehr & Jennifer Brun, "In Defence of B.C.'s Pronoun Practice Directives" (3 March 2021), online: *Law360 Canada* <www.law360.ca/articles/25077/in-defence-of-b-c-s-pronoun-practice-directives-brad-regehr-and-jennifer-brun> [perma.cc/7YKA-J6LB].

25 Dustin Klaudt & Lee Nevens, "No Need to Guess" *National Magazine* (11 February 2021), online: <www.nationalmagazine.ca/en-ca/articles/law/opinion/no-need-to-guess> [perma.cc/827G-XYYJ].

26 Samantha Peters, "Respecting Pronouns is a Professional Responsibility" *National Magazine* (8 January 2021), online: <www.nationalmagazine.ca/en-ca/articles/law/opinion/2021/respecting-pronouns-is-a-professional-responsibili> [perma.cc/9G3E-AMCJ].

courts are "insisting that litigants say things they may not believe,"[27] "flirting with compelled speech in court,"[28] and "degrad[ing] the speech rights not only of judges and witnesses, but especially of advocates."[29] The directives were also characterized as interfering with judicial impartiality on the basis that they involve "taking sides in a legal, political, and philosophical dispute."[30]

The controversy reached a peak when two British Columbia lawyers submitted a resolution at the October 2021 Law Society of British Columbia Annual General Meeting on the topic of the province's forms of address directives.[31] Concerns about compelled speech were raised in the resolution's preamble. More specifically, it stated "that the Directives arguably amount to compelled speech, contrary to s 2(b) of the *Charter,* which protects everyone's right to 'freedom of thought, belief, opinion and expression.'"[32]

The member resolution sparked swift rebuke from several quarters. The Canadian Bar Association (British Columbia Branch) issued a statement noting that it was taking the "exceptional step" of commenting on the resolution, taking the position that the resolution was "not a benign resolution on the merits of open debate" and was "an attack on the principles that underpin the Practice Directives: that transgender and non-binary people exist and deserve equal respect and dignity when interacting with our justice system."[33] Several lawyers associations also

---

27 Bruce Pardy, "B.C. Courts Asking for 'Correct Pronouns' is State-Mandated Identity Politics" *National Post* (9 February 2021), online: <nationalpost.com/opinion/bruce-pardy-b-c-courts-asking-for-correct-pronouns-is-state-mandated-identity-politics> [perma.cc/N5SE-77Z9].

28 Shahdin Farsai, "British Columbia's Practice Directions on Preferred Gender Pronouns in Court are Problematic", Canadian Lawyer (5 February 2021). Two days after its publication, this opinion piece was taken down by the publication's editors, see Canadian Lawyer "An article posted on our website has been removed" (7 February 2021), online: *Canadian Lawyer* <www.canadianlawyermag.com/news/opinion/statement-regarding-a-recent-opinion-posted-on-our-website/337574> [perma.cc/UBJ4-APGH].

29 Donald G Gislason, Letter to the Editor, *The Advocate* (4 July 2021) 485 at 618, online: <www.the-advocate.ca/emag/issues/2021/July/page_140.html> [perma.cc/8CVN-W5ER].

30 Pardy, *supra* note 27.

31 Law Society of British Columbia, "Notice to Profession", *supra* note 7.

32 *Ibid.*

33 Canadian Bar Association (British Columbia Branch), "Message to CBABC Members: Law Society of BC Resolution 1" (17 September 2021), online: *The Canadian Bar Association (British Columbia Branch)* <www.cbabc.org/News-Media/Announcements/2021/Message-to-CBABC-Members-Law-Society-of-BC-Resolu> [perma.cc/5RZP-3Q2D].

issued statements opposing the resolution.[34] Ultimately, the resolution was defeated at the AGM with approximately 58% votes in opposition.[35]

It is within the context of this public debate that this article sets out an affirmative case for respectful forms of address directives.

3. Controls on Courtroom Speech

Before setting out our affirmative case, this Part contextualizes forms of address directives within the broader context of many existing courtroom rules and practices which control and direct speech. We explore how the common underlying purpose of court speech controls is to ensure the proper administration of justice. We also highlight how courtroom rules about speech have always responded to changes in our legal system and our broader social context.

Viewed within this background, respectful forms of address directives can be seen as just one of many continually evolving speech controls in Canadian courtrooms that facilitate the proper administration of justice.

A) The Extent and Purpose of Court Speech Controls

In courtrooms, speech is highly controlled. Individuals are only permitted to address the court at specified times and from specified locations. Witnesses are required to recite specific words before testifying (i.e., take an oath or giving an affirmation)[36] and, once giving testimony, they must answer the questions asked of them (assuming such questions are proper). Lawyers can only ask questions that are deemed legally relevant,[37] and they

---

[34] Vancouver Bar Association, "On October 5, 2021, the Law Society of British Columbia will hold its 2021 Annual General Meeting", posted on *Vancouver Bar Association*, online: *LinkedIn* <www.linkedin.com/posts/vancouver-bar-association_on-october-5-2021-the-law-society-of-british-activity-6846129646480752640-JGXT> [perma.cc/2S78-AK59]; Federation of Asian Canadian Lawyers (British Columbia) Society, "FACL BC Statement on Resolutions 1 and 2 of the Law Society of BC 2021 AGM" (4 October 2021), online: *Federation of Asian Canadian Lawyers (British Columbia) Society* <faclbc.ca/news/11138342> [perma.cc/45HU-H8UG].

[35] Law Society of British Columbia, "2021 Annual General Meeting voting results" (6 October 2021), online: *Law Society of British Columbia* <www.lawsociety.bc.ca/about-us/news-and-publications/news/2021/2021-annual-general-meeting-voting-results/> [perma.cc/9U9H-6H2M].

[36] *Canada Evidence Act,* RSC, 1985, c C-5, ss 13–17.

[37] See *R v Osolin,* [1993] 4 SCR 595 at 665 (discussing limits on cross-examination and the need for adherence to the basic principle that "all evidence must be relevant in order to be admissible"). See also *R v Fabrikant*, [1995] QJ No 300, 1995 CarswellQue 4 (QC CA), leave to appeal to the SCC refused (self-represented defendants should be given reasonable latitude, but is still required to limit themselves to asking relevant questions).

must refrain from questioning which amounts to abuse or harassment of a witness.[38] Sarcasm and editorializing are considered to be inappropriate.[39] The form of questions is also subject to rules. For example, a questioner is generally not permitted to ask their own witness a leading question.[40] Judges are required to be referred to with honorifics, such as "Your Honour".

Together, these speech controls operate to advance the proper administration of justice and the integrity of the legal system. For example, requiring witnesses to take an oath or affirmation is aimed at eliciting truthful testimony from witnesses and, in so doing, supports the truth-seeking function of the adversarial system.[41] Constraints on how lawyers can pose questions also have a similar function. The general rule that a lawyer must refrain from asking leading questions of their own witness "arises from a concern that the witness, who in many instances favours the party who calls him or her, will readily agree to the suggestions put in the form of a question rather than give his or her own answers to the questions."[42]

In addition to furthering the truth-seeking function of the courts, speech controls also allow for the orderly and efficient resolution of disputes. The Supreme Court of Canada has characterized rules relating to civility as necessary to protect the proper administration of justice, recognizing that "[c]onduct that may be characterized as uncivil, abrasive,

---

38 See e.g. *R v Bouhsass* (2002), 62 OR (3d) 103 at para 11, 165 OAC 247 (critiquing the tone of the Crown's cross-examination as "often sarcastic, personally abusive and derisive"); *R v Lyttle,* 2004 SCC 5 at para 44 (stating that, in cross-examination, "[c]ounsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness."); and Federation of Law Societies of Canada, *Model Code of Professional Conduct*, r 5.1-2(m) (stating "[w]hen acting as an advocate, a lawyer must not … needlessly abuse, hector or harass a witness").

39 *R v Singh,* 2010 ONCA 808 at para 42.

40 *R v Rose* (2001), 53 OR (3d) 417 at para 9, 143 OAC 163 [*Rose*]:

> It is trite law that the party who calls a witness is generally not permitted to ask the witness leading questions. The reason for the rule arises from a concern that the witness, who in many instances favours the party who calls him or her, will readily agree to the suggestions put in the form of a question rather than give his or her own answers to the questions.

41 *R v B(KG),* [1993] 1 SCR 740 at 789, 61 OAC 1:

> There remain compelling reasons to prefer statements made under oath, solemn affirmation or solemn declaration. While the oath will not motivate all witnesses to tell the truth (as is indicated by the witnesses' perjury in this case), its administration may serve to impress on more honest witnesses the seriousness and significance of their statements, especially where they incriminate another person in a criminal investigation.

42 *Rose, supra* note 40 at para 9.

hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice."[43] Even more mundane rules relating to court speech, such as those relating to the order in which parties speak or requirements to introduce oneself, can be seen as furthering the efficient administration of justice. If everyone is talking over each other and the judge does not know who is speaking, the judicial process risks becoming mired in confusion and delay.

Beyond advancing truth-seeking and the orderly resolution of disputes, existing speech controls also seek to further justice system values relating to access to justice and equality. Civility rules, for example, have an important role in countering behaviour that could discourage some from participating in court processes.[44] The scope of questions that may be asked of complainants in sexual assault trials has been expressly constrained out of concern for the equality (and privacy) rights of complainants.[45]

B) Rules Evolve to Reflect Social Change

The courtroom speech context is not only characterized by a significant number of speech controls, it is also characterized by continual evolution. As understandings of what the proper administration of justice entails and how we might facilitate it have evolved, so too have approaches to speech in court.

Notably for our purposes, there is a history of courtroom speech controls evolving to reflect more inclusive practices. For example, while witnesses in court proceedings were historically required to provide assurances that they would tell the truth via an oath or solemn affirmation, some courts have now broadened their practices to allow Indigenous witnesses to take legal affirmations using a sacred eagle feather.[46] Another

---

43 *Groia v Law Society of Upper Canada*, 2018 SCC 27 at paras 63–64, quoting KA Nagorney, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999) 12:4 Geo J Leg Ethics 815 at 817 [*Groia*].

44 *Ibid* at para 66 (stating, "incivility adversely impacts other justice system participants. Disparaging personal attacks from lawyers — whether or not they are directed at a witness — can exacerbate the already stressful task of testifying at trial").

45 See e.g. *R v Shearing,* 2002 SCC 58 and *R v Barton*, 2019 SCC 33. For further discussion, see Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018).

46 "Eagle Feathers in the Nova Scotia Courts", online: *The Courts of Nova Scotia* <https://web.archive.org/web/20211017105106/https://courts.ns.ca/News_of_Courts/EagleFeathersinNSCourts.htm> [perma.cc/WA87-VJYV]; Jana G Pruden, "Eagle Feathers, Like the Bible, Now an Option for Swearing Oaths in All Alberta Courts", *The Globe and*

example is that, after years of criticism, the *Barristers Act* in Ontario was amended in 2021 to remove a section which had used seniority (i.e., year of call) to establish the speaking order of lawyers in court.[47] Critics of this section had argued that it, in effect, led to "indirect discrimination" as "[y]oung, visible minority—and some female lawyers—[were] left cooling their heels for hours in the courtroom while older, often white, male counsel [were] allowed to speak to their matters first."[48] Also, in 2021, the Court Services Division of the Ontario courts noted that language used in the courtroom was "being updated to remove barriers and ensure all justice participants feel welcomed and can fully participate in proceedings" and provided the example that "announcements, such as 'all rise' are being updated to 'all rise, if you're able to.'"[49]

There is also a recent trend towards greater inclusivity in how individuals are addressed in court. For example, in November 2021, courts in British Columbia directed counsel to refrain from addressing justices using the terms "My Lady", "My Lord", "Your Ladyship" or "Your Lordship".[50] This directive followed criticism that such forms of address were antiquated and problematic.[51] More specifically, it was argued that these honorifics excluded non-binary people, and were classist, colonial,

---

Mail (17 November 2019), online: <www.theglobeandmail.com/canada/alberta/article-eagle-feathers-like-the-bible-now-an-option-for-swearing-oaths-in/> [perma.cc/8PZ2-H9LA].

47 *Barristers Act*, RSO 1990, c B3, s 3, as repealed.

48 Melody Izadi, "Balance Needed in Deciding What Order Cases are Handled" (29 May 2019), online (blog): *Caramanna, Friedberg LLP* <www.cflaw.ca/blog/post/83/balance-needed-in-deciding-what-order-cases-are-handled> [perma.cc/4S2Z-KFGP]. See also Sean Robichaud, "The Barristers Act in Ontario Has to Go" (26 February 2016), online (blog): *Robichaud Law* <www.robichaudlaw.ca/the-barristers-act-has-to-go/> [perma.cc/Q694-ARKW] (stating, "what this means in effect is that as the Court, or Crown prioritizes matters on a docket list, it leaves women, indigenous people, and racialized lawyers sitting waiting while older white men all move to the front of the line for no reason other than their seniority that is inherently skewed to their advantage").

49 Ontario Ministry of the Attorney General Court Services Division, "Inclusive Language and Procedures in Courts" (1 June 2021), online (pdf): *Ontario Bar Association* <www.oba.org/CBAMediaLibrary/cba_on/pdf/Notice-Updates-to-Inclusive-Language.pdf> [perma.cc/5X9M-KV6R].

50 The Supreme Court of British Columbia, "Practice Direction: Form of Address" (18 November 2021), online: *The Courts of British Columbia* <www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/PD-60_Form_of_Address.pdf> [perma.cc/MR2M-AD2F].

51 Douglas Quan, "The Push Is On to Make Canadian Courts More Inclusive—Here's What Some See as the Next Step" *Toronto Star* (18 June 2021), online: <www.thestar.com/news/canada/2021/06/18/my-lady-and-my-lord-lets-drop-the-classist-gendered-language-when-addressing-judges-advocates-urge.html> [perma.cc/H4C3-6DMC].

and "out of step with the goal of reconciliation."[52] In August 2022, the Court of Queen's Bench of Alberta announced that the title "Master in Chambers" is replaced by "Applications Judge", describing the former term as an "antiquated, ambiguous, and confusing term which carries negative associations for many people."[53] The Supreme Court of Canada and the Court of Appeal for Ontario, among other Canadian courts, similarly instruct counsel not to use the terms "my lady(ship)" and "my lord(ship)".[54]

Such changes are part of a much longer history of changing language rules and norms in our legal system. One example is that lawyers had to learn new honorifics to respectfully address the first women judges. As Constance Backhouse recounts, when Madam Justice L'Heureux-Dubé was appointed to the Superior Court of Quebec in 1973, she

> objected to being addressed as Monsieur le juge, the term most often blurted out by the lawyers who appeared in her courtroom. "I said, 'You can do anything to me, but don't change my sex,'" she recalled. Instead, she selected Madame le juge, a combination of gender opposites. "It took a long time before they got used to calling me Madame le juge," she added. "I was called Monsieur le juge for years."[55]

Backhouse describes the similar experience of Justice Mabel Van Camp, the first woman appointed to Ontario's Superior Court in 1971, who

> objected to the customary title 'Mister Justice.' Because she was unmarried, some suggested she be called 'Miss Justice.' This struck others as a short slip away from 'injustice' and Van Camp had settled upon 'Madam Justice' without an 'e.'[56] (p. 207)

---

52 Lee Nevens, "'My Lord' and 'My Lady' Reconsidered" (April 2021), online (blog): *BarTalk* <www.cbabc.org/BarTalk/Articles/2021/April/Features/My-Lord"-and-My-Lady"-Reconsidered> [perma.cc/L863-G6U9].

53 Your Alberta, "Modernizing Titles in the Justice System" (30 August 2022), online (video): <www.youtube.com/watch?v=LBfU9uxnK28> [perma.cc/5QRC-LT7S].

54 See Supreme Court of Canada, "Frequently Asked Questions", online: <www.scc-csc.ca/contact/faq/qa-qr-eng.aspx> [perma.cc/7AG4-ZPL9]. See also Court of Appeal for Ontario, "Practice Direction Concerning Civil Appeals at the Court of Appeal for Ontario" (1 March 2017), online: *Court of Appeal for Ontario* <www.ontariocourts.ca/coa/how-to-proceed-court/practice-directions-guidelines/practice-direction-civil/> [perma.cc/K4Z9-3VHB].

55 Constance Backhouse, *Two Firsts: Bertha Wilson and Claire L'Heureux-Dubé at the Supreme Court of Canada* (Toronto: Second Story Press, 2019) at 177.

56 *Ibid* at 207.

These historical examples reflect the reality that language is constantly evolving and has certainly done so with respect to gendered forms of address. For example, upon its introduction, there was resistance to the term "Ms." but it serves an important purpose (allowing women to be addressed independently of their marital status).[57] It is now commonplace. Many non-binary people use the pronouns "they" and "them", which is now reflected in legal decisions,[58] style guides,[59] and leading dictionaries.[60] Mx. is also increasingly common as a gender-neutral prefix (pronounced like the word "mix"), and has been recognized by the Oxford English Dictionary since 2015 and the Merriam-Webster Dictionary since 2017.[61] In French, pronouns like "iel" and "ille" are used by non-binary people,[62] and the term "iel" was recently added to a major French dictionary, Le Robert.[63]

In facilitating appropriate pronoun and title use, respectful forms of address directives stand within a backdrop of evolving court speech practices that seek to improve inclusivity and respond to broader social and linguistic developments. They also stand beside the many other current court speech controls that aim to facilitate the proper administration of justice.

---

57 Ben Zimmer, "On Language: Ms.", *The New York Times Magazine* (23 October 2009), online: <www.nytimes.com/2009/10/25/magazine/25FOB-onlanguage-t.html> [perma.cc/M3DD-R55T].

58 *EN, supra* note 6; *Nelson*, *supra* note 6.

59 Chelsea Lee, "Welcome, Singular 'They'" (31 October 2019), online (blog): *APA Style Blog* <www.apastyle.apa.org/blog/singular-they> [perma.cc/9SJF-XQB2]. See also "Transgender Coverage Topical Guide" (2022), online: *Associated Press Stylebook* <www.apstylebook.com/topical_most_recent> [perma.cc/2MBD-BM9U].

60 Amy Harmon, "'They' Is the Word of the Year, Merriam-Webster Says, Noting Its Singular Rise" *The New York Times* (10 December 2019) online: <www.nytimes.com/2019/12/10/us/merriam-webster-they-word-year.html> [perma.cc/Z3AK-3KKQ].

61 James MacDonald, "Gender-Neutral Title Mx Added to Oxford English Dictionary" (27 August 2015), online: *Out Magazine* <www.out.com/news-opinion/2015/8/27/gender-neutral-title-mx-added-oxford-english-dictionary> [perma.cc/R4VQ-7VNJ]; Merriam Webster Dictionary, "A Gender-Neutral Honorific, Mx: Words We're Watching" online (blog): *Merriam Webster* <www.merriam-webster.com/words-at-play/mx-gender-neutral-title> [perma.cc/GE76-RL8C].

62 Florence Ashley, "Qui est-ille? Le respect langagier des élèves non binaires, aux limites du droit" (16 May 2019) online: *EdCan Network* <www.doi.org/10.7202/1046498ar> [perma.cc/ZXR3-YJ8Z].

63 Charles Bimbenet, "Pourquoi Le Robert a-t-il intégré le mot «iel» dans son dictionnaire en ligne?" (17 November 2021) online: *Le Robert Dico en Ligne* <dictionnaire.lerobert.com/dis-moi-robert/raconte-moi-robert/mot-jour/pourquoi-lerobert-a-t-il-integre-le-mot-iel-dans-son-dictionnaire-en-ligne.html> [perma.cc/JPV7-23JS].

4. Respectful Forms of Address Directives and the Proper Administration of Justice

In this Part, we outline our affirmative case for respectful forms of address directives by detailing the connection between these measures and the proper administration of justice. We argue that the directives advance the proper administration of justice through: (1) advancing equal access to the courts for trans individuals; (2) providing consistency with the broader legal system's recognition of trans rights; and (3) facilitating the efficient and orderly administration of justice.

A) Equal Access to the Courts

Respectful forms of address directives are consistent with, and advance, an important justice system value: equal access to the courts. "Equality before the law" is foundational to the rule of law and the proper administration of justice. Our commitment to equality before the law is recognized, for example, in Supreme Court of Canada case law,[64] our constitution,[65] lawyer professional conduct rules,[66] and ethics guidance for judges.[67] By preventing misgendering, forms of address directives help to facilitate trans individuals' access to the courts and their participation in the justice system.

Misgendering in Canadian courtrooms happens regularly. We know this from reported case law and first-hand accounts from trans lawyers.[68]

---

64 *Ontario (Attorney General) v Clark,* 2021 SCC 18 at 63 (stating, "the rule of law requires equality before the law").

65 *Canadian Charter of Rights and Freedoms,* s 15(1), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (stating, "every individual is equal before and under the law") [*Charter*].

66 Federation of Law Societies of Canada, *supra* note 38, r 5.6-1, commentary [2] (stating, "a lawyer must encourage public respect for and try to improve the administration of justice … Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice").

67 Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: CJC, 2021), s 4.A.1 (stating "the law's strong societal commitment places concern for equality at the core of justice according to law").

68 For case law, see e.g. *Protection de la jeunesse—0968*, 2009 QCCQ 3146, a Québec court refused a trans youth's request to be referred to as male on the grounds that the youth was legally female; in *Oger No 7, supra* note 21 at paras 258–262 a respondent in a human rights complaint and his counsel repeatedly misgendered the complainant—referring to her as a man and using male pronouns—even after being ordered by the Tribunal not to do so (at paras 258–262) and in *Montoya Martinez v Canada (Minister of Citizenship & Immigration),* 2011 FC 13, the Federal Court judicially reviewed a Refugee Protection Division decision that mistakenly described the claimant as a trans woman, when the claimant was a trans man. On trans lawyers being misgendered in court, see

And, of course, trans individuals experience misgendering in courtrooms at a rate far beyond that captured in self-reporting from lawyers or in case law. Dustin Klaudt and Lee Nevens have observed that "absent the proactive introduction of pronouns and titles, non-binary people are almost never correctly addressed in court."[69]

Serious harms flow from misgendering. Research details the significant, negative impacts of being misgendered on the health and well-being of trans people.[70] As Chan Tov McNamarah explains: "misgendering … is a critical stressor that is experienced as humiliating, stigmatizing, psychologically distressing, and dehumanizing."[71]

Misgendering has especially negative impacts in a courtroom. The prospect of being misgendered can create "a strong disincentive for trans people to participate in proceedings."[72] In addition to dignitary harm, there can be major safety issues when misgendering occurs in a court proceeding: when the private gender history of individuals is disclosed on the public record, trans people do not only face "a public airing of their legal issues" like others who come before the court, but also the outing of their private gender history, and as a result, an increased "risk to their social, financial, and personal security."[73]

When trans individuals do find themselves in court—either of their own choice or when they are involuntarily pulled into a matter—their ability to participate fully can be compromised by misgendering. Singer has written that "to be referred to by a name or gender that is not your own will evidently impact one's ability to participate fully in proceedings,

---

Klaudt & Nevens, *supra* note 25, and Ian Mulgrew, "B.C. lawyers won't debate courts' new pronouns policy as 'hateful' resolution fails" *Vancouver Sun* (05 October 2021), online: <vancouversun.com/opinion/columnists/ian-mulgrew-b-c-lawyers-wont-debate-courts-new-pronouns-policy-as-hateful-resolution-fails> [perma.cc/45MU-4Z92].

69 Klaudt & Nevens, *supra* note 25.

70 See e.g. Greta R Bauer et al, "Intervenable Factors Associated with Suicide Risk in Transgender Persons: A Respondent Driven Sampling Study in Ontario, Canada" (2015) 15 BMC Public Health 525; David Matthew Doyle et al, "Identity-Related Factors Protect Well-Being Against Stigma for Transgender and Gender Non-Conforming People" (2021) 50:7 Arch Sex Behav 3191.

71 Chan Tov McNamarah, "Misgendering as Misconduct" (2020) 68 UCLA L Rev 40 at 61.

72 CBA, HALCO & TRANSforming Justice, *supra* note 1 at 21, citing Rankine & Griffith, *supra* note 17.

73 Singer, "Trans Rights Are Not Just Human Rights", *supra* note 14 at 310–311. See also, CBA, HALCO & TRANSforming Justice, *supra* note 1 at 32 (stating, "misgendering and misnaming clients in court or tribunal spaces can also lead to outing trans clients in public domains, thereby jeopardizing their safety").

and to be fully heard and understood."[74] As Canadian Bar Association committees have further similarly noted, "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."[75]

In some cases, deliberate misgendering in the courtroom is part of a strategy to intimidate and harass trans parties or counsel—a disturbing phenomenon that McNamarah and other scholars have reported on.[76] This phenomenon was also highlighted in a recent Canadian report on access to justice for trans people which observed that "trans identities and misgendering are sometimes weaponized by opposing counsel and parties in court proceedings."[77]

By intimidating trans parties and forcing them to spend time and energy defending their right to basic respect rather than advocating for their case, intentional misgendering clearly undermines the proper functioning of the court. In a 2019 decision, the British Columbia Human Rights Tribunal stated the following regarding the misgendering and other harassment experienced by a trans complainant during the hearing:

> [T]ransgender people often find their very existence the subject of public debate and condemnation. What flows from this existential denial is, naturally, a view that trans people are less worthy of dignity, respect, and rights. In the hearing room for this complaint, we were witness to repeated, deliberate and flagrant attacks on [the complainant] based on nothing more than a belief that her very existence is an affront.[78]

The negative equality and access to justice impacts of misgendering are all the more concerning given the reality that, in Canada, trans people have significantly higher rates of legal needs than non-trans persons in several "high stakes" areas, such as medical treatment (22% trans people vs. 3% general population), housing (22% vs. 3%), disability benefits

---

74 Singer, "Trans Rights Are Not Just Human Rights", *supra* note 14 at 311.

75 Rankine & Griffith, *supra* note 17.

76 McNamarah, *supra* note 71 at 62; Leigh S Goodmark, "Transgender People, Intimate Partner Abuse, and the Legal System" (2013) 48 Harv CR-CLL Rev 51.

77 CBA, HALCO & TRANSforming Justice, *supra* note 1 at 32. In some cases, this behaviour has included opposing parties inappropriately asking for independent medical examinations, see e.g. *Oger v Whatcott (No 2),* 2018 BCHRT 13 at paras 25–26 (noting that the request for medical records and an independent medical exam are "overly intrusive" into the complainant's privacy", "not at all relevant for the disposition of this complaint" and that "the basis for the requests is questionable").

78 *Oger No 7*, *supra* note 21 at para 61.

(16% vs. 2%) and discrimination (43% vs. 5.3%).[79] Trans people also face significant obstacles to getting help for their legal needs as they are more likely to experience economic and social marginalization.[80] In 2023, the Supreme Court of Canada recognized that "[t]he transgender community is undeniably a marginalized group in Canadian society" with a "history … marked by discrimination and disadvantage."[81] When misgendering dissuades or disrupts trans people from seeking justice, it creates yet another barrier to trans people having their legal needs addressed.

For lawyers who are misgendered in the course of their work, misgendering is harmful and distracting. It is also a barrier to equity and inclusion in the legal profession. Dustin Klaudt and Lee Nevens describe the challenges that a lawyer faces when misgendered in court:

> They must decide whether to correct the misgendering or let it stand, sacrificing either their submissions or their dignity. Being misgendered in court, whether by the judge or by other counsel, signals to a transgender lawyer that there is no place for them. The stress and pain of this public and professional indignity is an added gender-specific career impediment and a disincentive to practice law, particularly litigation.[82]

Respectful forms of address directives work to prevent the harms of misgendering in several ways. Such directives can help courtroom participants avoid unintentional misgendering. When individuals indicate their appropriate titles and pronouns when introducing themselves, this helps others avoid unintended errors based on unfounded assumptions. Forms of address directives can also combat intentional misgendering. By signalling that the courtroom is a place where trans individuals are to be treated with respect, forms of address directives signal the unacceptability of misgendering. Obviously, in cases where a courtroom participant obstinately refuses to address individuals respectfully after being made aware of how to properly address them, further judicial action will be required to appropriately control the courtroom.[83]

---

79 James J et al, *supra* note 1 and accompanying text.

80 With respect to economic marginalization, a 2015 study reported that trans Ontarians have a median income of $15,000 (Bauer & Scheim, *supra* note 4 at 6. Moreover, as Samuel Singer has noted, "significant data now exists about the high levels of discrimination and systemic exclusion experienced by trans people in Canada" (Singer, "Trans Rights in Canada", *supra* note 4 at 7).

81 *Hansman, supra* note 1 at para 84.

82 Klaudt & Nevens, *supra* note 25.

83 For example, in *Oger No 7, supra* note 21, the tribunal held at para 262:

B) Consistency with Broader Trans Legal Rights and Protections

Respectful forms of address directives, by protecting trans individuals from the harms of misgendering in court, are also consistent with the broader regime of legal rights and protections for trans persons in Canada. Collectively, the *Canadian Charter of Rights and Freedoms* and federal and provincial human rights legislation recognize that trans people are protected from discrimination when they interact with government institutions, and in key social areas, like housing, employment and services. Other areas of law also protect trans people, such as education legislation that explicitly seeks to protect trans children and youth within schools,[84] and the recognition under privacy law that a trans person's gender history can be protected personal information.[85] Promoting consistency in the courtroom with these existing legal protections for trans people should be viewed as part of the proper, equal, and consistent administration of justice.

At a constitutional level, s. 15 of the *Canadian Charter of Rights of Freedoms* has been interpreted by the courts to include protections for trans individuals. In *CF v Alberta (Vital Statistics),* the Alberta Court of Queen's Bench held that a trans women's s. 15 rights were infringed by the province's *Vital Statistics Act* insofar as the law did not permit a birth certificate to be issued to her which recorded her sex as female because she had not undergone surgery on her "anatomical sex structure."[86] The Court held that legislation created a discriminatory distinction on the basis of sex (a listed ground under s. 15(1)).[87] More recently, in *Centre for Gender Advocacy c Attorney General of Quebec,* the Quebec Superior

---

> [the respondent's] conduct in persistently referring to [the complainant] as a man throughout the hearing and the duration of this complaint was improper. It was in direct and deliberate violation of this Tribunal's orders and ran contrary to the purposes of the Code and the protection it confers on transgender people. It undermines public confidence in this Tribunal's ability to deliver its services in a discrimination-free environment. It interfered with the integrity of the process and warrants an order for costs.

84 *Education Act,* RSO 1990, c E2, ss 1(1) ("bullying"), 169.1(1)(a.1).

85 *Edmonton Public School District No 7 (Re)*, 2016 CanLII 82100 (AB OIPC) [*EPSD No 7*].

86 *CF v Alberta (Vital Statistics),* 2014 ABQB 237 at paras 5–8.

87 *Ibid* at para 39. The Court also held that, in the alternative, if "sex" in this context "is interpreted so narrowly as to exclude the characteristics of transgendered persons that make them transgendered, then, at very least, the distinction is made on a ground analogous to sex."

Court confirmed that gender identity is an analogous ground under s. 15.[88] This case also engaged Quebec's *Charter of Human Rights and Freedoms*, which includes gender identity and gender expression under its equality provision.[89]

Quasi-constitutional human rights law has long recognized that trans people are protected from discrimination.[90] A significant body of case law finds that trans people are protected from discrimination under the grounds of sex and, more recently, gender identity or gender expression, following their addition to human rights legislation across Canada.[91]

Human rights case law also establishes the importance of respecting a trans person's gender identity, even when their identity is not legally changed.[92] In 2012, the Ontario Human Rights Tribunal found in *Vanderputten v Seydaco Packaging Corp* that an employer discriminated against a trans woman when it refused to treat her as a woman without legal or medical documentation confirming a sex change.[93] Surgical requirements for changing legal sex have been removed across Canada, following an Ontario Human Rights Tribunal decision in 2012 and

---

88 *Centre for Gender Advocacy c Attorney General of Quebec*, 2021 QCCS 191 at paras 104–111 [*Centre for Gender Advocacy*]. Note that co-author Samuel Singer is a co-plaintiff in the case. See also *Hansman, supra* note 1 at para 88, citing *Centre for Gender Advocacy*'s conclusion that gender identity is an analogous ground under section 15, and other cases showing the growing "judicial recognition of the plight of transgender individuals in Canada."

89 *Charter of Human Rights and Freedoms*, CQLR c C-12, s 10.

90 See Singer, "Trans Rights Are Not Just Human Rights", *supra* note 14 at 296, 300–301; *Commission des droits de la personne et des droits de la jeunesse (ML) c Maison des jeunes À-Ma-Baie Inc,* [1998] RJQ 2549, 1998 CanLII 28 (QC TDP); *Sheridan v Sanctuary Investments Ltd,* [1999] BCHRT 43, 33 CHRR D/467.

91 See e.g. *Ferris v Office and Technical Employees Union, Local 15,* [1999] BCHRT 55, 36 CHRR D/329; *Mamela v Vancouver Lesbian Connection,* [1999] BCHRT 51, 36 CHRR D/318; *Kavanagh v Canada (AG),* [2001] CHR 21, 2001 CanLII 8496 (CHRT), *Canada (Attorney General) v Canada (Human Rights Commission)*, 2003 FCT 89; *Nixon v Vancouver Rape Relief Society*, 2002 BCHRT 1; *Nixon v Vancouver Rape Relief Society*, 2003 BCSC 1936; *Nixon v Vancouver Rape Relief Society*, 2005 BCCA 601; *Waters v British Columbia (Ministry of Health Services)*, 2003 BCHRT 13; *Montreuil c National Bank of Canada,* 2004 CHRT 7; *Hogan v Ontario (Minister of Health & Long-Term Care),* 2006 HRTO 32; *Magnone v British Columbia Ferry Services Inc,* 2008 BCHRT 191; *Montreuil c Forces canadiennes*, 2009 CHRT 28; *Vanderputten, supra* note 6; *Salsman v London Sales Arena Corp,* 2014 HRTO 775.

92 See e.g. *Dawson*, *supra* note 6; *Vanderputten*, *supra* note 6; *Nelson, supra* note 6 at para 84; *EN, supra* note 6.

93 See *Vanderputten*, *supra* note 6 at paras 65–66.

a similar conclusion by an Alberta court in 2014.[94] In 2015, the British Columbia Human Rights Tribunal found that it was discriminatory for police officers to refer to a trans woman by her legal name and sex when the officers were aware of her chosen name and gender identity.[95]

Protections against the discriminatory treatment of trans people include non-binary people.[96] For example, in 2019, the Manitoba Human rights board awarded $50,000 to a non-binary complainant seeking a birth certificate without "male" or "female," noting that "the plight of trans and non-binary individuals is and was well-known" at the time of the complainant's application, and the government "knew or ought to have known that people living as trans or non-binary are already facing multiple barriers in society."[97] In 2021, in *Nelson v Goodberry Restaurant Group Ltd*,[98] the British Columbia Human Rights Tribunal found that it was discriminatory to repeatedly misgender a non-binary employee despite the employee's repeated requests to stop doing so.[99]

In addition to human rights legislation, education law also codifies protections for trans children and youth in schools. For example, Ontario's *Education Act* defines bullying as harmful behaviour that "occurs in a context where there is a real or perceived power imbalance between the pupil and the individual based on factors such as … gender identity, gender expression."[100] The Act also requires school boards to proactively "promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any … gender identity, gender expression."[101]

Privacy law has also been a source of protection for trans students and adults. In 2016, Alberta's Privacy Commissioner found that a school board violated the province's privacy legislation when a student was repeatedly outed as trans by the disclosure of their legal name.[102] In 2020, the Office of the Privacy Commissioner of Canada found that a trans employee's privacy was breached when her employer, a federal institution, "shared

---

94 See *XY v Ontario (Government and Consumer Services),* 2012 HRTO 726; *CF v Alberta (Vital Statistics)*, 2014 ABQB 237.

95 *Dawson*, *supra* note 6.

96 See e.g. *Centre for Gender Advocacy*, *supra* note 88; *TA v Ontario (Transportation)*, 2016 HRTO 17.

97 See *TA v Manitoba (Justice)*, 2019 MBHR 12 at para 80.

98 *Nelson, supra* note 6.

99 *Ibid.*

100 *Education Act, supra* note 84, s 1(1) ("bullying").

101 *Ibid*, s 169.1(1)(a.1).

102 *EPSD No 7*, *supra* note 85.

the fact that she is transgender with her supervisor and colleagues despite an explicit expectation of confidentiality."[103]

Courts are an important and, indeed, an essential part of public life in Canada. The above discussion demonstrates that protecting trans persons from discrimination in the courtroom context, through simple procedural adjustments like forms of address directives, aligns courtrooms with protections found in other facets of public life, like education, employment, and the marketplace. Moreover, protections contained in the *Charter*, human rights legislation, and other sources reflect a recognition that trans people should be protected from discrimination emanating from the legislative and executive branches of government. Protecting trans people from discrimination when interacting with the third branch of government—the judiciary—is a congruent and important extension of these existing protections.

C) Efficient and Orderly Administration of Justice

Case law recognizes that the public has an interest in the efficient and orderly administration of justice.[104] Unnecessary disruptions in court proceedings distract the judge and other court actors from their core task of resolving the dispute at hand. As noted above in Part 2, many current speech controls in courtrooms aim to promote the efficient and orderly administration of justice, ranging from procedural rules regarding speaking order to substantive obligations in relation to civility.

Forms of address directives facilitate the efficient and orderly administration of justice in several respects. Having courtroom participants indicate at the beginning of proceedings how they are to be addressed avoids any need to stop the ordinary flow of proceedings to ask or clarify how to address a particular person. Further, to the extent that forms of address directives help to avoid unintentional misgendering, they also avoid the potential delay and derailment of proceedings that can come when a correction needs to be made. Finally, insofar as such directives signal the court's commitment to respect trans individuals, the significant disruption that can be caused by intentional misgendering may be avoided. As noted by the Supreme Court of Canada in the *Groia*

---

[103] Office of the Privacy Commissioner of Canada, "Employer's disclosure related to a transgender individual was contrary to the *Privacy Act*" (17 November 2020), online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-federal-institutions/2020-21/pa_20201117_rcmp/> [perma.cc/HB29-6GFM].

[104] For a recent judicial statement on this topic, see *Canada (Transportation Safety Board) v Carroll-Byrne,* 2022 SCC 48 at para 99 (stating "there is a public interest in the fair and efficient resolution of all disputes").

decision, "[t]rials marked by strife, belligerent behaviour, unwarranted personal attacks, and other forms of disruptive and discourteous conduct are antithetical to the peaceful and orderly resolution of disputes we strive to achieve."[105]

5. Forms of Address Directives Do Not Unconstitutionally Compel Speech

In addition to setting out our affirmative case for respectful forms of address directives, we also aim in this article to refute the most common arguments against such measures. As set out in Part 1, it has been repeatedly argued that respectful forms of address directives are improper because they violate the freedom of expression rights of courtroom participants by compelling speech. While acknowledging that these directives engage "expressive activity", we set out in this Part why a court is unlikely to find a constitutional infringement.

In Canada, free expression rights are found in s. 2(b) of the *Canadian Charter of Rights and Freedoms*.[106] Performing a detailed s. 2(b) analysis of forms of address directives is complicated by the fact that the multiple directives in place differ not only in their content but also in their source of authority.[107] For this reason, we do not propose to provide a detailed analysis of the constitutionality of each form of address directive that has been introduced in Canada. Instead, we provide some more general observations.

Before setting out this analysis, we also, however, note the prevalence and tenacity of compelled speech arguments in response to equality gains. As Joshua Sealy-Harrington observes, "'liberty' claims are an age-old rhetorical tactic to resist equality measures."[108] Brenda Cossman has

---

105 *Groia*, *supra* note 43 at para 2.

106 *Charter*, *supra* note 65, s 2(b) (stating "Everyone has the following fundamental freedoms: …

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication").

107 As a general matter, court practice directions can be issued pursuant to the courts' implicit or inherent authority to make orders to protect the judicial process and the rule of law (See e.g. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 39 [*Criminal Lawyers Association*]). In some cases, this implicit or inherent authority to issue practice directions has become codified in specific statutory or regulatory provisions, see *Provincial Court of British Columbia Criminal Caseflow Management Rules*, SI/99-104, r 3(1) (stating "The chief judge of the Court may issue practice directions consistent with these Rules and their purpose').

108 Joshua Sealy-Harrington, "Twelve Angry (White) Men: The Constitutionality of the Statement of Principles" (2020) 51:1 Ottawa L Rev 195 at 221–22.

outlined how opponents of trans human rights protections in Canada used freedom of expression arguments as a "legitimating constitutional discourse."[109] Sealy-Harrington asserts that compelled speech arguments, which were central in a successful campaign to repeal a Law Society of Ontario requirement that lawyers draft an annual statement about their legal and professional responsibilities to promote equality, diversity, and inclusion, "obscured the apparent motivation for sustained resistance to the modest … requirement, namely, opposition to diversity and denial of systemic racism."[110] In speaking about "compelled speech" arguments advanced by lawyers protesting the Law Society of Ontario requirement and also about those objecting to a requirement attached to a federal government jobs program which required applicants to "attest to several statements, including that the job and the applicant organization's mandate respected individual human rights, *Charter* rights and reproductive rights," Richard Moon observes,

> I suspect when the complainants in these cases raise concerns about compelled speech they are searching for a legally cognizable form in which to express their general objection to the state's policy in these areas. Behind the complaint in job grants case is a deeper opposition to public policy concerning reproductive rights. Some conservative religious organizations are refusing to make the required attestation about their mandate, even when that mandate says nothing about abortion or other reproductive issues. Some of the lawyers who have objected to the law society's "statement of principles" requirement appear to have broader concerns about the law society's policy of taking affirmative action to increase diversity in the profession. Others, seem to object on libertarian grounds to a requirement that they support or indicate support for the diversity policy. In both cases though, the objection to compelled speech, is standing in for other concerns that on their own will not support a constitutional challenge.[111]

In the United States, recent campaigns to legislate against critical race theory in education and against trans rights have similarly regularly framed their objections in relation to American constitutional free speech protections.[112]

---

[109] Brenda Cossman, "Gender Identity, Gender Pronouns, and Freedom of Expression: Bill C-16 and the Traction of Specious Legal Claims" (2018) 68:1 UTLJ 37 at 79.

[110] Sealy-Harrington, *supra* note 108 at 202–3.

[111] Richard Moon, "State Compelled Expression: Two Recent Cases" (27 June 2018), online (blog): *Centre for Free Expression* <www.cfe.torontomu.ca/blog/2018/06/state-compelled-expression-two-recent-cases> [perma.cc/2AKR-PSMZ].

[112] See e.g. The Heritage Foundation, "Protecting K-12 Students from Discrimination" (18 June 2021) online: *Heritage* <www.heritage.org/article/protecting-k-12-students-discrimination> [perma.cc/HZ6Q-XADE]; American Civil Liberties Union,

While good faith arguments may be made regarding the intersection of free expression and equality concerns, caution is warranted in taking compelled speech arguments at face value as being driven by a genuine concern for speech rights. In some cases, "freedom of expression" is invoked simply to provide rhetorical cover for an equality-regressive agenda. In other cases, opponents of trans rights are willing to limit free expression rights where such expression challenges their stated beliefs.[113]

A) Application of the Charter

Because forms of address directives are court-driven, a threshold question arises as to whether the *Charter* even applies to such initiatives.

Section 32 of the *Charter* states that the *Charter* applies to "the Parliament and government of Canada" and "the legislature and government of each province."[114] Courts are not listed as an entity to which the *Charter* applies. In an early *Charter* case—*RWDSU v Dolphin Delivery Ltd*—the Supreme Court of Canada held that the *Charter* did not apply to a court order.[115]

However, as observed by Peter Hogg and Wade Wright, subsequent decisions by the Court "have, in effect, repudiated [the] ruling in *Dolphin Delivery* that the word 'government' in s. 32 excludes the courts."[116] For example, in the *British Columbia Government Employees' Union v British Columbia,* the Supreme Court held that the *Charter* applied to an order made by the Chief Justice of the British Columbia Supreme Court to enjoin picketing outside courthouses in the province.[117] In finding that

"Defending Our Right to Learn" (10 March 2022) online: *ACLU* <www.aclu.org/news/free-speech/defending-our-right-to-learn> [perma.cc/LST9-AZZB].

[113] A recent Supreme Court of Canada decision, *Hansman v Neufeld,* dealt with a case where a school trustee, Neufeld, opposed the provincial curriculum about sexual orientation and gender identity. He described the curriculum as "a 'weapon of propaganda' that teaches the 'biologically absurd theory' that 'gender is not biologically determined, but is a social construct'" and teaches "that heterosexual marriage is no longer the norm". Hansman, a teacher and former teachers' union president, spoke out in response, asserting that Neufeld's comments were bigoted and hateful, and in response Neufeld sued Hansman for defamation. Neufeld was ultimately unsuccessfully in seeking to limit Hansman's speech rights.

[114] *Charter*, *supra* note 65, s 32.

[115] *RWDSU v Dolphin Delivery Ltd,* [1986] 2 SCR 573, 33 DLR (4th) 174 [*Dolphin Delivery*].

[116] Peter Hogg & Wade Wright, *The Constitutional Law of Canada*, 5th ed (Scarborough, ON: Thomson Carswell, 2007) at §37:11.

[117] *BCGEU v British Columbia (Attorney General),* [1988] 2 SCR 214, 53 DLR (4th) 1 [*BCGEU* cited to SCR]. More specifically, the Court held that the injunction breached s 2(b) of the *Charter* but was justified under s 1.

the *Charter* applied, the Court distinguished *Dolphin Delivery* as involving a "purely private dispute" and noted in the case at hand that "the court is acting on its own motion and not at the instance of any private party. The motivation for the court's action is entirely 'public' in nature, rather than 'private.'"[118] The *Charter* will thus apply to court orders "where the court acts of its own motion in some matter, thus acting as part of government, or where the court is subject to the natural application of particular *Charter* provisions."[119]

Similar reasoning would presumably apply in the case of forms of address directives, particularly if enforced by a subsequent court order in a case of non-compliance.[120] Courts have previously engaged with *Charter* challenges to court rules and policies, including specifically on s. 2(b) grounds. For example, in 2011, the Supreme Court of Canada found that rules of practice made by the judges of the Quebec Superior Court did not infringe s. 2(b) in their limitation of media activity in relation to court proceedings.[121] In a 2020 case, *R v Moazami*, the British Columbia Court of Appeal held that its "Record and Courtroom Access Policy" did not violate s. 2(b) by infringing the open court principle.[122]

The specifics as to how the *Charter* would apply to forms of address directives will differ between directives in different jurisdictions, as some may be proclaimed pursuant to enabling statutes and others pursuant to courts' inherent or implicit jurisdiction.[123] The specifics of the answer may also differ depending on the nature of the challenge. More particularly, does the challenge involve a person challenging the directive itself or is the challenge to a judicial order made in response to a failure of an individual to abide by the directive? As a general matter, however, there is a strong case that the *Charter* applies to forms of address directives and their application for the reasons given above.

---

118 *Ibid* at para 56.

119 Halsbury's Laws of Canada (online), *Constitutional Law (Charter of Rights*), "Charter Application to Governmental Actors" II.3.(2) at HCHR-12 (2023 Re-issue).

120 Indeed, Hogg and Wright note that where "a court order is issued on its own motion for a public purpose … the *Charter* will apply to the court order" (Hogg & Wright, *supra* note 116 at §37:11). See also, Andrew K Lokan & Michael Fenrick, *Constitutional Litigation in Canada* (Carswell, 2006) at §2.20 (observing that "it would appear that the courts (contrary to the early dicta in *Dolphin Delivery*) may be caught by the *Charter*, at least where they are acting on their own motion or when acting in a criminal case.")

121 *Canadian Broadcasting Corp v Canada (Attorney General),* 2011 SCC 2 at para 14 [*Canadian Broadcasting*].

122 *R v Moazami,* 2020 BCCA 350 [*Moazami*].

123 *Criminal Lawyers' Association*, *supra* note 107 and accompanying text.

B) Is there a section 2(b) violation?

In cases involving questions of "compelled speech", courts have broken the s. 2(b) analysis into three questions: (1) whether the activity that the claimant is being forced to engage in is expression; (2) whether the purpose of the impugned measure is aimed at controlling expression (if so, then a finding of a violation of section 2(b) is automatic); and (3) if the purpose of the impugned measure is not to control expression, then the claimant must show an adverse effect on expression and that the meaning they wish to convey relates to the purposes underlying the guarantee of free expression, such that the law warrants constitutional disapprobation.[124]

1) Is Announcing Pronouns and Titles to a Court "Expressive Activity"?

Looking to the first question in this analysis, it is likely that the subject matter of respectful forms of address directives—informing the court of one's pronouns and titles (or the pronouns and titles of others associated with you, like clients or witnesses) —would be found to be expression for the purposes of s. 2(b).

Under s. 2(b), "expressive activity" has been interpreted very broadly by the courts, "excluding only activity that conveys no meaning or violent

---

124 *McAteer v Canada (Attorney General),* 2014 ONCA 578 at para 69 [*McAteer*], summarizing the test found in *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy* cited to SCR]. See also *CCLA v Attorney General of Ontario* 2020 ONSC 4838 at para 4 [*CCLA*] and *Right to Life Association of Toronto v Canada (Employment, Workforce and Labour),* 2021 FC 1125 at para 152 [*Right to Life Association*]. We note that the governing test from *Irwin Toy* is articulated in the case law as a two-part test: see e.g. *Toronto (City) v Ontario (Attorney General),* 2021 SCC 34 at para 124,

> *Irwin Toy* established a two-part test for adjudicating freedom of expression claims. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee. The second part asks whether the government action, in purpose or effect, interfered with freedom of expression.

The effect of the test is the same. We have chosen to use the three-part characterization as this has been the framing in the recent cases dealing with compelled speech in particular.

activity."[125] For example, the act of "squeegeeing",[126] and parking a car (for the purpose of protesting parking regulations)[127] have been framed by the courts as constituting expressive activity for the purposes of s. 2(b). As reflected in these examples, the act of conveying "meaning" is not understood as limited to voicing one's beliefs or opinions.

Previous jurisprudence has specifically confirmed "expressive activity" under s. 2(b) includes compelled speech. In an early *Charter* decision, *National Bank of Canada v Retail Clerks' International Union,* Justice Beetz observed that the guarantee for free expression included "prohibit[ing] compelling anyone to utter opinions that are not his own."[128] A few years later in *Slaight Communications Inc v Davidson,*[129] the Supreme Court considered, among other things, the constitutionality of a labour arbitrator's order that a former employer provide a letter of recommendation (with certain specified content) for an employee that the arbitrator held was unjustly dismissed. In his reasons in *Slaight*, Justice Lamer recognized that s. 2(b) can be inclusive of measures requiring one to express "certain objective facts."[130] Moreover, he held that "there is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do."[131] Similarly, in two different cases, the Supreme Court found that government-mandated health warning labels on tobacco products engaged the *Charter*'s guarantee of free expression.[132]

---

125 Ryder L Gilliland, "Supreme Court Recognizes (a Derivative) Right to Access Information" (2010) 51 SCLR (2d) 233 at 239, summarizing the test set out in *Irwin Toy*, *supra* note 124. See also *CCLA*, *supra* note 124 at para 46 (stating, "the definition of expressive activity for the purposes of the section 2(b) guarantee is extremely broad"). See also Hogg & Wright, *supra* note 116 at §43.8 (stating, "Is there any activity that is not expression under the Court's definition? The answer is not much, because 'most human activity combines expressive and physical elements'; what is excluded is that which is 'purely physical and does not convey or attempt to convey meaning'").

126 *R v Banks,* 2007 ONCA 19 at para 113 (stating, "While words may not be spoken and although a service is provided, I accept that the driver of the stopped vehicle understands full well that the squeegee person is requesting a donation. I am satisfied that squeegeeing, when considered in its real-life context, is an act that conveys essentially the same meaning as begging").

127 See *Irwin Toy*, *supra* note 124.

128 *National Bank of Canada v Retail Clerks' International Union*, [1984] 1 SCR 269, 9 DLR (4th) 10.

129 [1989] 1 SCR 1038, 59 DLR (4th) 416 [*Slaight* cited to SCR].

130 *Ibid* at para 95.

131 *Ibid.*

132 See *RJR-MacDonald Inc v Canada (Attorney General),* [1995] 3 SCR 199, 127 DLR (4th) 1 [*RJR-Macdonald* cited to SCR]; *Canada (Attorney General) v. JTI-Macdonald Corp,* 2007 SCC 30 [*JTI-MacDonald*].

A different outcome at this stage of the analysis occurred in *Lavigne v Ontario Public Service Employees Union,* where it was held that being required to pay union dues that are used, in part, for purposes not directly related to collective bargaining did not constitute expressive activity for the purposes of engaging s. 2(b).[133]

More recently, several trial and provincial appellate courts have found that "expressive activity" under s. 2(b) is engaged in other compelled speech cases, including challenges to requirements to: recite specific words swearing allegiance to the Queen during a citizenship oath;[134] publicly disclose the results of a food premises inspection;[135] place provided stickers referencing costs resulting from a federal carbon tax on gasoline pumps;[136] and attest to statements, as part of an application for a government summer jobs grant, regarding respect for individual human rights (including reproductive rights).[137]

In the case of forms of address directives, the question at this stage would focus on whether announcing pronouns and titles in a courtroom can be said to be an activity that "conveys meaning". A court is likely to answer this question in the affirmative, given that the purpose of pronouns and titles is to convey meaning about a person's gender identity. Thus, the low threshold to find expressive activity at the first stage of the s. 2(b) test is likely to be met.

2) Is the Purpose of Respectful Forms of Address Directives to Control Speech?

There is, however, a strong argument that a court will fail to find that the purpose of respectful forms of address directives is to control speech.

The mere fact that a legal measure engages expression or speech is not sufficient to find that the measure's purpose is to control speech under a s. 2(b) analysis. As cautioned in *Irwin Toy Ltd v Quebec (Attorney General),*

> When applying the purpose test to the guarantee of free expression, one must beware of drifting to either of two extremes. On the one hand, the greatest part of human activity has an expressive element and so one might find, on an objective

---

133 See *Lavigne v Ontario Public Service Employees Union,* [1991] 2 SCR 211, 81 DLR (4th) 545 [*Lavigne* cited to DLR].

134 See *McAteer*, *supra* note 124.

135 See *Ontario Restaurant Hotel & Motel Assn v Toronto (City)*, [2004] OJ No 190 (Ont Div Ct), aff'd [2005] OJ No 4268 (Ont CA) [*Ontario Restaurant Hotel*].

136 See *CCLA*, *supra* note 124.

137 See *Right to Life Association, supra* note 124.

> test, that an aspect of the government's purpose is virtually always to restrict expression. On the other hand, the government can almost always claim that its subjective purpose was to address some real or purported social need, not to restrict expression.[138]

In the citizenship oath case—*McAteer v Canada (Attorney General)*—the Court of Appeal for Ontario held that the purpose of the oath was not to control expression and indeed, "rather than undermining freedom of expression, the oath amounts to an affirmation of the societal values and constitutional architecture of this country, which promote and protect expression."[139] In the gasoline pump stickers case—*CCLA v Attorney General of Ontario*—the court drew a distinction between *compelling* and *controlling* expression and concluded:

> Since the impugned legislation and regulation compel the Sticker message but nowhere deprive one of the ability to disavow it or dissociate oneself with it, the law is designed to compel expression but not to control it in the constitutionally understood sense. There is, accordingly, no automatic violation of section 2(b) as there would be for government action which both compels and controls expression.[140]

More summarily, in both the summer jobs attestation case (*Right to Life Association of Toronto v Canada*) and in the food premises inspections notice case (*Ontario Restaurant Hotel & Motel Assn v Toronto (City)*), the courts found that the purposes of the impugned measures were not to control speech.[141]

In the Supreme Court of Canada's earlier jurisprudence on compelled speech, the Court moved quickly from finding that expressive activity was involved to a s. 1 analysis and did not, at the s. 2(b) stage, engage in a meaningful consideration of the purpose of the impugned measure.[142] However, as the above discussion demonstrates, a consideration of purpose has been central in recent lower court decisions addressing the constitutionality of compelled speech provisions. Overall, this more

---

138 See *Irwin Toy, supra* note 124 at para 49.

139 *McAteer*, *supra* note 124 at para 74.

140 *CCLA*, *supra* note 124 at para 52.

141 See *Ontario Restaurant Hotel, supra* note 135; *Right to Life Association, supra* note 124.

142 We note that *Slaight* was heard prior to *Irwin Toy* and, thus does not incorporate the test set out there (albeit the reasons in *Irwin Toy* were released a few days prior to the reasons in *Slaight*). That said, both tobacco cases were heard subsequently and also did not meaningfully engage with a purpose analysis at this stage (in *RJR-MacDonald*, the Attorney General conceded a s. 2(b) violation but in *JTI-Macdonald*, the infringement was not conceded and there was no explicit analysis of purpose at the s. 2(b) stage).

recent case law has reflected a reluctance on the part of courts to find that measures challenged on the basis of being compelled speech have the purpose of controlling speech for the purpose of a s. 2(b) analysis.

In considering the purpose of respectful forms of address directives, the analysis that a court will take will, no doubt, differ depending on the specific directive at issue. As noted above, some courts' forms of address directives are permissive—that is, they "welcome" or "invite" lawyers and self-represented litigants to identify their own pronouns and titles and those of persons associated with them, such as clients or witnesses. It is difficult to see how a document stating that people are permitted to announce pronouns and titles in a courtroom could be argued to have the purpose of controlling speech. Silence remains an option.

In the case of mandatory directives, like those found in British Columbia and Manitoba trial courts, lawyers (or self-represented litigants) are required to provide information to the court about how they and others (such as clients or witnesses) should be addressed. However, as reflected in the above discussion, a recognition that certain speech is required does not, in and of itself, answer the question of whether the *purpose* of respectful forms of address directives is to control speech.

Stated most basically, the purpose of requiring courtroom participants to identify their titles and pronouns is to ensure that these participants are identified clearly and correctly by other courtroom participants. Notably, the purpose is not to control *which* pronouns and titles that a courtroom participant introduces themselves with. Those subject to mandatory forms of address directives are able to introduce themselves in court with pronouns and titles of their choosing.

Some have argued that mandatory forms of address directives may compel someone to identify their title and pronouns against their will and thus compel them to reveal personal information that they would otherwise keep private.[143] The underlying argument here is that this dynamic reflects a material control on speech (i.e., people have to say something they don't want to say) and that this sort of control can have negative consequences. Indeed, for trans persons, forced outing can "have serious repercussions on employment, economic stability, personal safety or religious or family situations."[144] On this issue, however, the context in which courtroom introductions are made is highly relevant. In almost all cases, a person in a courtroom will be referred to, at some point in the proceeding, using *some* title or pronoun—the default is not a title/pronoun-free zone. Forms

143 Shahdin Farsai, *supra* note 28.

144 CBA, HALCO & TRANSforming Justice, *supra* note 1 at 43.

of address directives give individuals an early opportunity to personally identify what these titles and pronouns should be. Instead of having an identity assumed or disclosed by others, the directives provide courtroom participants with the agency to decide how they will be addressed.

Additionally, this is not a case where an individual is forced to express or engage with specific pre-determined government messaging. Notably, even in cases where individuals were required to engage with particular government messaging—like, for example, the recent lower court decisions about various compelled speech provisions discussed above—such measures were not considered by the courts to be measures instituted *for the purpose of* controlling speech.

In our view, following the most recent decisions on s. 2(b) and compelled speech, there is a strong likelihood that a court would not find that the purpose of respectful forms of address directives is to control speech. Voluntary directives do not, by their nature, aim to control speech because they are voluntary. While mandatory directives require individuals to say *something,* they do not have the purpose of having individuals say any particular thing or express any particular message. The content of the speech remains in the hands of the speaker. We acknowledge that for some people, the need to identify one's pronouns may be uncomfortable. But, again, the overall default in the courtroom context is that titles and pronouns will be used. The directives do not, in themselves, associate titles and pronouns with people; they simply direct people to choose which titles and pronouns should be associated with them in an environment where it is highly likely that titles and pronouns will be used.

3) Do Respectful Forms of Address Directives Have an Adverse Effect on Expression?

However, even if a measure does not have the purpose of controlling speech, a court will still examine, at the third step of a s. 2(b) analysis, whether the measure has an adverse effect on expression. In our view, there is, again, a strong argument that a court will answer this question in the negative and fail to find that respectful forms of address directives have an adverse effect on expression.

At this stage, recent lower court decisions involving compelled speech have a divergence in outcomes (i.e., some find an adverse effect while others do not). In *McAteer,* the court held that "the oath has an incidental effect on expression in that it compels prospective citizens to say the words of the oath in order to attain the status of Canadian citizen" but that this effect was not worthy of constitutional disapprobation for several

reasons, including that there is an ability for oath takers "to freely express their dissenting views as to the desirability of a republican government" and because "purposively interpreted, the reference to the Queen of Canada is a symbolic reference to our form of government, a democratic constitutional monarchy, which promotes Charter values."[145] On this later point, the court noted "the fact that the broader public interest is furthered by the oath strengthens [the] conclusion that there is no s. 2(b) violation."[146]

In the *CCLA* case (gasoline pump stickers), the court looked to *McAteer*'s analysis of the citizenship oath at this stage and noted, "there is one crucial difference between the compelled speech in *McAteer* and the compelled speech [at issue in this case] and that is that the speech at issue in *McAteer* was of a nature that fostered the rule of law whereas the speech at issue here arguably countermands the rule of law."[147] In *CCLA*, the court found that the stickers amounted to "a partisan message aimed at an opposing political party" and that "[b]y using the law for partisan ends, the Ontario legislature has enacted a measure that runs counter to, rather than in furtherance of, the purposes underlying freedom of expression."[148] As a result, the court held that the measure's effect on freedom of expression warranted constitutional disapprobation and, on this basis, a s. 2(b) violation was found.[149]

In *Ontario Restaurant Hotel & Motel Ass v Toronto (City),* the court found that the requirement to post the results of a food inspection was not a s. 2(b) infringement because "the effect of the by-law does not effectively associate a restaurant owner with a message with which the owner disagrees, nor does it deprive an owner of the right to disavow the message contained in the notice and express a contrary opinion."[150]

Finally, in *Right to Life Association of Toronto*, the court found that the effect of the summer jobs program attestation in that case was a form of compelled speech. The court emphasized, among other things, that while, theoretically, persons who made the attestation could express their views in other forums, "from a practical perspective, expressing a contrary view would call into question the honesty and credibility of the organization."[151]

---

145 *McAteer*, *supra* note 124 at para 86.

146 *Ibid.*

147 *CCLA, supra* note 124 at para 54.

148 *Ibid* at para 65.

149 *Ibid.*

150 *Ontario Restaurant Hotel, supra* note 135 at para 48.

151 *Right to Life Association*, *supra* note 124 at para 155.

In each of these cases, the courts drew from Justice Wilson's reasons in *Lavigne* where she emphasized, after reviewing *National Bank* and *Slaight*, among other cases, that "this Court has already accepted that public identification and opportunity to disavow are relevant to the determination of whether s. 2(b) has been violated" and endorsed these two factors being considered,

> because both are directed to preserving and promoting the fundamental purpose of the s. 2(b) guarantee, namely to ensure that everyone has a meaningful opportunity to express themselves. If a law does not really deprive one of the ability to speak one's mind or does not effectively associate one with a message with which one disagrees, it is difficult to see how one's right to pursue truth, participate in the community, or fulfil oneself is denied.[152]

In the case of forms of address directives, it is not facially obvious what "message" those opposed to such directives are protesting being publicly identified with. Their own complaints are stated in general terms; for example, objecting that the directives "tak[e] sides in a legal, political, and philosophical dispute"[153] or require "litigants [to] say things they may not believe."[154] Notably, in making a constitutional claim that a measure is invalid because it has the effect of violating freedom of expression, the burden is on the claimant to "demonstrate that such an effect occurred" and they must state their claim "with reference to the principles and values underlying the freedom."[155]

Slightly more specificity about what "message" opponents object to can be found in the resolution advanced at the 2021 Law Society of British Columbia AGM, which appears to focus on the idea that the BC trial court directives require courtroom participants to identify with the message that it is not possible to "assume what pronouns to use for others based solely on their 'name, appearance or voice.'"[156]

We disagree that a directive which accepts that one cannot assume everyone's pronouns embeds a political or ideological message. It simply reflects the reality that no one can be fully confident in assuming another's gender identity by name, appearance or voice. That this is an objective fact is reflected in the regularity with which unintentional misgendering occurs in daily life—to both trans and cisgender people—when people operate under such assumptions. A directive that ensures that individuals

---

152 *Lavigne*, *supra* note 133 at 595.

153 Pardy, *supra* note 27.

154 *Ibid.*

155 *Irwin Toy*, *supra* note 124 at para 53.

156 Law Society of British Columbia, "Notice to the Profession", *supra* note 7.

are referred to accurately and efficiently within a formal setting does not impose a viewpoint on a person.

Taking the critics' argument at its strongest, however, even if a particular "message" is involved in these circumstances, there does not seem to be a convincing argument that courtroom participants who state their pronouns and titles, upon mandate by the court, are somehow "publicly identified" with any particular message (one of the two *Lavigne* factors highlighted above: "public identification" and "opportunity to disavow").[157] As Chan Tov McNamarah observes:

> By that logic, nothing can be said without expressing some element of support or approval. And that is certainly not true. To the contrary, many everyday interactions call for agreeable behavior, without expressions of underlying agreement. By addressing a judge as "Your Honor," for instance, we do not normally mean to convey any messages about the honorability of the individual we address. Instead, the honorific is merely used to denote respect or courtesy.[158]

As discussed in Part 2 above, courtroom participants are already required to say and do many things. Compliance with courtroom rules is unlikely to be viewed by others as an affirmation that those complying are personally endorsing any message that may be underlying such rules. Previous s. 2(b) jurisprudence has rejected the idea that mere compliance with a law can be plausibly construed as an expression of support for any message conveyed by the law.[159] As observed by the Court of Appeal for Ontario in *Rosen v Ontario (Attorney General),* "freedom of expression guarantees our right to express disagreement with government regulation; it does not guarantee the right to be free from government regulation with which we disagree."[160]

In terms of the second *Lavigne* factor—the "opportunity to disavow"—courtroom participants maintain the ability to publicly reject the premise that one cannot assume everyone's pronouns. The fact that they must introduce their title and pronouns in court does not detract from their ability to otherwise express an opinion that pronouns can always be assumed. Indeed, some British Columbia lawyers proved this point when they introduced and debated the resolution about the forms of address directives at the October 2021 AGM. Notably, outside of court, there *will be* law that constrains, in certain contexts, how individuals speak about

---

157 *Lavigne*, *supra* note 133 at 595.

158 McNamarah, *supra* note 71 at 48.

159 *Rosen v Ontario (Attorney General)* (1996), 131 DLR (4th) 708, 87 OAC 280 (ON CA).

160 *Ibid.*

and address trans persons, but this is a function of the human rights legal regime and not due to the existence of the directives.

Even if respectful forms of address directives were found to have an adverse effect on expression, a court may still proceed to consider a further hurdle in cases involving compelled speech allegations: whether any such effect is "worthy of constitutional disapprobation."[161] This issue was addressed in both *McAteer* and *CCLA*. In *McAteer*, the citizenship oath was found *not* to warrant constitutional disapprobation in part because the oath was characterized as promoting *Charter* values, "the unwritten constitutional principles of the rule of law and democracy" and the "broader public interest."[162] In contrast, in *CCLA*, an opposite conclusion was reached on the basis that the gasoline pump stickers amounted to a "partisan message" and that "it is essential to the concept of the rule of law that the law does not serve political leaders, but rather political leaders serve the law."[163]

The invocation of *Charter* values, the public interest, and the rule of law in these cases is notable in considering the constitutionality of the measures at issue here. If critics are arguing that respectful forms of address directives, by requiring them to announce pronouns and titles, adversely affect their ability to act as if trans and non-binary individuals do not exist or are not worthy of basic respect, it will likely be difficult to convince a court that these measures warrant constitutional disapprobation. Part 3 above highlights how respectful forms of address directives advance the *Charter* value of equality, the public interest in the proper administration of justice, and help prevent harm to trans persons. Again, in considering the proper analysis here, it must be emphasized that it is well settled in our legal system that gender identity and gender expression are a fundamental part of human identity that are expressly recognized and protected in law.[164]

To be sure, it is at this third stage of considering effects that a court's approach is arguably the most uncertain. None of the case law is squarely on point to the facts here. Additionally, some constitutional law scholars have criticized some of these cases, as well as what they see as a more general weakening of freedom of expression protections due to a

---

161 *McAteer*, *supra* note 124 at para 75.

162 *Ibid* at paras 74, 86.

163 *CCLA*, *supra* note 124 at para 65.

164 See e.g. *Dawson*, *supra* note 6; *Vanderputten*, *supra* note 6; *Nelson*, *supra* note 6 at para 84; *EN*, *supra* note 6.

"preoccup[ation] with the content of expression and whether expressive activity is deserving of Charter protection."[165]

That said, for the reasons given above, we conclude that there is a strong argument that no s. 2(b) infringement will be found on the basis of adverse effects.

We also note, as a matter of background context, Jamie Cameron's recent study of all the decisions that the Supreme Court has rendered under s. 2(b) since 1982 to the present. In that study, Cameron observes that, notwithstanding s. 2(b)'s "relatively low threshold for breach," the empirical data "qualifies a widespread impression that establishing a violation of s. 2(b) is an easy matter"—in almost 25% of the s. 2(b) cases that it heard, the Court found no s. 2(b) infringement.[166] While this data is, obviously, general, it helpfully sits beside some of the lower court case outcomes discussed above to undermine any knee-jerk reaction that a court finding a s. 2(b) infringement should be taken as a foregone conclusion in the case of forms of address directives.

C) Section 1

And, of course, even if a court found that respectful forms of address directives infringe court participants' free expression rights, a s. 1 analysis is still necessary. As detailed below, there would also be strong s. 1 arguments to justify an infringement of s. 2(b), if found.

The subject matter somewhat complicates a consideration of how s. 1 would apply. Some previous jurisprudence has held that court practice directions do not "have the force of law."[167] There have also been questions in the case law as to whether court directives meet the "prescribed by law" requirements under s. 1. In *R v Moazami*, the British Columbia Court of Appeal noted that the parties disputed whether the Court's "Record and Courtroom Access Policy" was prescribed by law such that s. 1 would apply.[168] Ultimately, however, the Court declined to make a determination

---

[165] Jamie Cameron, "Big M's Forgotten Legacy of Freedom" (2020) SCLR (forthcoming) at 22, online: *Osgoode Digital Commons* <digitalcommons.osgoode.yorku.ca/scholarly_works/2800/> [perma.cc/NWH5-SDAF]. See also Leonid Sirota, "A Parade of Horribles" (15 August 2014), online (blog): *Double Aspect* <www.doubleaspect.blog/2014/08/15/a-parade-of-horribles/> [perma.cc/86HC-J6PY].

[166] Jamie Cameron, "Freedom of Expression and the Charter: 1982–2022" (2023), online: *Osgoode Digital Commons* <digitalcommons.osgoode.yorku.ca/reports/228/> [perma.cc/UXH5-65HW].

[167] *R v Sharpe,* 1999 BCCA 668 at para 12; *R v Gowenlock,* 2019 MBCA 5 at para 43; *Huitt v Huitt,* 2021 ABCA 235 at para 7.

[168] *Moazami*, *supra* note 122 at paras 115–119.

on this issue because it had found no s. 2(b) breach.[169] In contrast, the Supreme Court of Canada held in 2011 in *Canadian Broadcasting Corp v Canada (Attorney General)* that a directive limiting media activity in a courthouse met the "prescribed by law" requirement citing the fact that the directive had similar characteristics to related rules of practice and had "normative" rather than "interpretative" content given that it "imposes standards of behaviour on the users themselves by placing limits on information-gathering methods and ensuring that respect is shown to individuals who are participating in the judicial process in one capacity or another."[170]

There is some question, therefore, as to how a s. 1 analysis would play out in the question of respectful forms of address directives. It is likely that the analysis would again differ as between directives in different jurisdictions given that some directives may be proclaimed pursuant to enabling statutes and others pursuant to courts' inherent or implicit jurisdiction.

Practically speaking, however, the status of court directives under s. 1 may be largely moot. Any enforcement of a respectful term of address directive would presumably come through an order by the court to comply. In *Moazami,* the Crown observed that regardless of the characterization of the policy at issue, "s. 1 may nevertheless be available to support any order of this Court which follows the Access Policy as it forms part of the common law."[171]

Assuming the application of s. 1, any breach of s. 2(b) is likely to be found to be justified under the *Oakes* test in these circumstances.[172] Preventing misgendering is a "pressing and substantial objective"—it promotes equality, prevents serious harm to a vulnerable group, and enhances access to justice.

Trans people's access to justice barriers were explicitly recognized by the Supreme Court of Canada in *Hansman*, which noted that "transgender people occupy a unique position of disadvantage in our society"[173] and that

> Transgender people have faced discrimination in many facets of Canadian society. Statistics Canada has concluded that they are at increased risk of violence, and report higher rates of poor mental health, suicidal ideation, and substance abuse as

169 *Ibid.*

170 *Canadian Broadcasting*, *supra* note 121 at paras 58–63.

171 *Moazami*, *supra* note 122 at para 116.

172 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

173 *Hansman, supra* note 1 at para 85.

> a means to cope with abuse or violence they have experienced (see *Experiences of violent victimization and unwanted sexual behaviours among gay, lesbian, bisexual and other sexual minority people, and the transgender population, in Canada, 2018* (September 2020)). Studies have concluded that they are disadvantaged relative to the general public in housing, employment, and healthcare (Department of Justice Canada, *A Qualitative Look at Serious Legal Problems: Trans, Two-Spirit, and Non-Binary People in Canada* (2022), at p. 10; *XY v. Ontario (Government and Consumer Services) (No. 4)*, 2012 HRTO 726, 74 C.H.R.R. D/331, at paras. 164-66). And despite encountering a higher incidence of justiciable legal problems, studies have also found that transgender people have traditionally faced greater access to justice barriers than the broader population, in part due to a lack of explicit human rights protections.[174]

Respectful forms of address directives are clearly rationally connected to increasing access to justice for trans people by preventing misgendering, and the means (announcing pronouns and titles at the beginning of court proceedings) is minimally impairing.[175]

On the question of minimal impairment, the law is clear that impugned measures need not be the least impairing means available, so long as they fall within a range of reasonable alternatives.[176] Although permissive respectful forms of address directives are presumably less impairing than mandatory ones, this does not oust mandatory directives as justifiable policy choices. Permissive directives are unlikely to be as effective at preventing misgendering as mandatory ones. A circumstance where *everyone's* pronouns and titles are known because they are announced by all at the beginning of a proceeding will lead to less confusion and mistakes than a procedure that relies on volunteers. A voluntary procedure also risks being less inclusive, as it may result in trans individuals being "singled out" if such individuals feel more need than others to announce their pronouns and titles.

Finally, under a s. 1 analysis, there is proportionality between any effects of the directives on free expression rights and their objective of preventing misgendering. As outlined in Part 3, misgendering is a serious harm that impacts the ability of individuals to fully participate in court proceedings and, as a practical matter, judges and lawyers need to know how to identify people in court in order to provide for the efficient and orderly administration of justice. Requiring people to announce their pronouns and titles, once and at the beginning of court proceedings, does not seem disproportionate.

---

174 *Ibid* at para 86.

175 *Ibid.*

176 See *RJR-MacDonald, supra* note 132 at para 160.

6. Forms of Address Directives are not Inconsistent with Lawyers' Professional Obligations

Except for cases involving self-represented litigants, those required to comply with respectful forms of address directives will be lawyers. In this Part, we reject arguments, previously made by critics of forms of address directives, that such directives are inconsistent with lawyers' professional obligations. We also further outline how directives, in fact, assist lawyers in complying with their ethical duties.

The fact that lawyers are the main subject of respectful forms of address directives requires consideration, but, ultimately, does not meaningfully change the analysis above. As noted in Part 2, lawyers are already subject to a myriad of speech constraints in court. Moreover, the Supreme Court of Canada has explicitly recognized that "speech is not sacrosanct simply because it is uttered by a lawyer."[177]

The Supreme Court has also recognized, however, that, in a courtroom, "lawyers' expressive freedom takes on additional significance … [because] [i]n that arena, the lawyer's primary function is to resolutely advocate on his or her client's behalf."[178] One corollary to the objection that respectful forms of address directives amount to improperly compelled speech is the assertion that the directives may impede a lawyer's ability to represent their clients with zealous advocacy.[179]

Lawyers advancing this argument may argue that complying with such directives, insofar as the directives' underlying aim is to prevent misgendering, is in tension with their zealous representation of a client who does not want to acknowledge the existence of gender diversity. Not only does such an argument have the logical difficulties discussed above—that is, conflating compliance with a rule about introducing oneself with being forced to advance a particular "message"—it also seems to misunderstand a lawyer's obligation of zealous advocacy. A lawyer's obligation of zealous advocacy is not unconstrained; "the lawyer's role is zealous advocacy within the bounds of legality, not zeal unbounded."[180] Lawyers are subject to a plethora of rules and limits from legislatures, law societies, and courts when they advocate for clients, including the many speech constraints outlined in Part 2.

---

177 *Groia*, *supra* note 43 at para 117.

178 *Ibid* at para 116.

179 Farsai, *supra* note 28 and accompanying text.

180 Alice Woolley, *Understanding Lawyers' Ethics in Canada*, 2nd ed (Toronto: LexisNexis, 2016).

To the extent that critics argue against respectful forms of address directives on the grounds that they preclude the subsequent misgendering of individuals in the courtroom, such an argument again misunderstands the nature and limits of a lawyer's zealous advocacy obligations. Intentional misgendering is, among other things, harassment. To state the obvious, a client's right to legal representation does not include the right to a lawyer who harasses others in a court proceeding. Nor are lawyers, of course, permitted to harass others in court as a matter of free expression. Indeed, courts have specifically acknowledged that the "freedom of expression guarantee in the *Charter* cannot be used as defense against otherwise harassing conduct."[181]

Additionally, lawyers have several affirmative ethical obligations that require respectful use of pronouns and titles—a requirement which is advanced by respectful forms of address directives.[182]

First, rules of professional conduct require lawyers to "be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings."[183] In court, these obligations mean that lawyers must treat other participants politely and refrain from ridiculing them or launching unwarranted personal attacks. Given the harms associated with misgendering, respectful use of titles and pronouns is an essential part of a lawyer's civility obligations.

Second, lawyers have a positive obligation to refrain from discrimination and harassment. In an October 2022 update to its *Model Code of Professional Conduct,* the Federation of Law Societies of Canada emphasized that these obligations require that lawyers "respect the dignity and worth of all persons and to treat all persons fairly and without discrimination"[184] and refrain from harassing conduct "that might reasonably be expected to cause humiliation, offence or intimidation to the person who is subjected to the conduct."[185] In recent work, Daniel Del Gobbo has made a compelling argument that such obligations should be given a "broad and purposive" interpretation to include a requirement that lawyers "promote substantive equality in their professional life and work."[186] On either a narrow or broad interpretation, however, it is clear

---

181 *Bremsak v Professional Institute of the Public Service of Canada*, 2014 FCA 11 at para 27.

182 Singer, "Trans Competent Lawyering", *supra* note 14 and Peters, *supra* note 26.

183 Federation of Law Societies of Canada, *supra* note 38, r 5.1-5.

184 *Ibid*, r 6.3-1, Commentary 1.

185 *Ibid*, r 6.3-2, Commentary 1.

186 Daniel Del Gobbo, "Legal Ethics and the Promotion of Substantive Equality" (2022) 100:3 Can Bar Rev 439.

that these provisions require lawyers to refrain from misgendering in the courtroom.

Finally, lawyers have an obligation "to try to improve the administration of justice."[187] As outlined in Part 3, respectful forms of address directives advance the proper facilitation of justice in multiple respects. Commentary to professional conduct codes also independently emphasizes that this obligation includes "a basic commitment to the concept of equal justice for all within an open, ordered and impartial system."[188] Respectful pronoun and title use is one way that lawyers can demonstrate this commitment. As Sealy-Harrington has argued in his work, for lawyers, "reasonable mindfulness of barriers to equality-seeking groups is an established legal obligation."[189]

7. Conclusion

In this article, we argued that respectful forms of address are an important procedural tool to help prevent the harms of misgendering in Canadian courts. We demonstrated that forms of address directives are simply another form of control on courtroom speech that contributes to the respectful, orderly and equal administration of justice. Drawing on examples such as the honorifics used for judges, particularly women judges, and the evolution of oath and affirmation requirements for witnesses, we detailed how courtroom rules evolve to reflect societal change.

We then asserted that forms of address advance the administration of justice by facilitating equal access to the courts for trans people, promoting consistency in the legal system by reflecting established trans rights, and promoting order and efficiency in the courtroom. We countered arguments that forms of address directives violate free expression rights under s. 2(b) of the Canadian *Charter of Rights and Freedoms*. Finally, we demonstrated that forms of address directives align with lawyers' professional responsibilities and do not hinder a lawyer's ability to advocate zealously within the legal and ethical constraints on lawyers' behaviour.

Across Canada, legal stakeholders are working to improve the legal system. Their efforts include increasing access to courts and to the legal profession and making both more inclusive. Forms of address directives are a concrete way to move this work forward, providing a "common-

187 Federation of Law Societies of Canada, *supra* note 38, r 5.6-1.

188 *Ibid*, r 5.6-1, Commentary 2.

189 Sealy-Harrington, *supra* note 108 at 212.

sense solution to avoiding harms against gender diverse participants and others in the justice system."[190]

The Supreme Court of Canada recently noted that "[t]ransgender people have faced discrimination in many facets of Canadian society" and endorsed observations from lower courts and tribunals that trans people "remain among the most marginalized in our society" and continue to live their lives facing "disadvantage, prejudice, stereotyping, and vulnerability."[191] There is much work to do to respond to trans people's legal needs.[192] We must move beyond time-consuming arguments about trans people's right to be addressed respectfully and focus on the substantive work required to improve trans people's lives and build a more trans-competent legal system.

---

190 Klaudt & Nevens, *supra* note 25.

191 *Hansman, supra* note 1 at paras 86, 89.

192 See e.g. Trans Pulse Canada, online: <www.transpulsecanada.ca> [perma.cc/9U2V-MZCG]; James J et al, *supra* note 14 at 9; Department of Justice Canada, *supra* note 1.