[Charter: A Course Podcast, Episode 2 - Covid-19 and the Charter]

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Cheryl M.: Hello, and welcome back to Charter a course. A podcast created by the David Asper center for constitutional rights at the University of Toronto, faculty of law. My name is Cheryl Milne, and I'm the executive director of the Asper Centre.

Our podcast focuses on leading constitutional cases and issues, highlighting various aspects of constitutional litigation and some of the accomplishments of U of T law faculty and alumni involved in these cases.

It is our hope that over the course of this episode, whether you are a law student, a lawyer, or just a fan of the charter of rights and freedoms, that you learn about an aspect of constitutional law and litigation that interests you.

I wish to first acknowledge this land from which our podcast emanates. For thousands of years, it has been the traditional land of the Huron Wendat, the Seneca, and the Mississauga's of the credit.

Today, this meeting place is still home to many indigenous people from across Turtle Island, and we are grateful to have the opportunity to work here.

Today, our episode focuses on various charter rights in the context of the COVID-19 pandemic.

Subsection 6-1 of the charter of rights and freedoms confers the right to enter, remain in, and leave Canada upon every citizen of Canada. Subsection 6-2 provides citizens a permanent and permanent residence with the right to move and take up residence and to pursue a livelihood in any province.

Over the past year, some provinces, including Ontario, have restricted movement across provincial borders. Other legal responses or lack of responses from government might also implicate section 7 rights to life, liberty, and security of the person. While vaccine mandates raise questions about equality rights under section 15 or freedom of conscience and religion under section 2a.

Arguments have been made that restrictions and gathering affect those rights, as well as the right to assembly under section 2c or association under section 2d.

We'll hear about the complicated relationship between our charter rights and the COVID-19 pandemic from Abby Deshman and Nathalie des Rosiers. We'll also hear a bit more about a topic we have recently covered, section 1 of the charter, particularly whether the Oakes test is too strict in the context of an emergency such as the COVID-19 pandemic.

To close things off, we will hear from two recent U of T law graduates regarding their experience participating in the law school's grand moot earlier this year, which was on the topic of the constitutionality of mandatory vaccinations.

Nathalie des Rosiers is the current principal of Massey College at U of T. Before joining us; she served as minister of natural resources and forestry under former premier Kathleen Wynne.

Nathalie has been inducted into the order of Ontario and the order of Canada for her civil rights and francophone advocacy. She attended law school at the University of Montreal and holds a master of laws from Harvard University.

Abby Deshman is the director of the criminal justice program at the Canadian civil liberties association, CCLA. Abby has advocated in a wide range of constitutional contexts, from freedom of expression to police powers and oversight.

Abby received her law degree from the University of Toronto faculty of law and her masters of laws from New York University. So thanks for joining us, Abby and Nathalie. The COVID-19 crisis upended Canadian lives for over a year, beginning back in March 2020.

In the global north, the state played a large role in responding to the crisis through legal mechanisms that enforced compliance with safety measures and created intricate vaccine distribution frameworks.

Given the substantial role of government over the past year and a half, this crisis offers a unique opportunity to understand how constitutional law plays a role in enabling and constraining government action.

And what role a constitution ought to play in a crisis. So, Nathalie, you taught an intensive course this year at the law school called pandemics and the law, and I'll begin by asking what prompted you to teach this course.

Nathalie: Well, I believe that legal academics, lawyers, and law students have an essential role in discussing and the management of a crisis.

A crisis, an emergency, be it a war, a national security threat, or a pandemic, creates a little bit the epitome of tunnel vision in governments. We're all frightened, and we focus typically on only one set of data.

In the pandemic, obviously, it was how many cases per day, sometimes it was how many deaths per day, and sometimes it was also the number of people admitted to intensive care units.

It's only a one set of data, and we assess government because are they able to manage? Are they doing well on that set of data? We know that when you have tunnel vision, you forget other things. This exacerbated sense of fear may lead the governments to actually do massive injustice because nobody's paying attention.

During the war, it led to the internment of Japanese Canadians, for example. I wasn't there during the war, but I was there at 9-11, and I remember the massive changes that occurred within our security system, and that created injustices to Muslim communities, and we continue to live with it.

So I think you always worry that if there are not enough lawyers, bad habits of governance will emerge, and we will have a tough time getting rid of these bad habits of governance. Finally, I just want to say the other thing is this course was very much about law reform as well.

We know that crisis create demands for change, so lawyers are essential not just to be in the moment but also to think about what are the legal reforms that are necessary that will be asked for in the future.

Cheryl M.: So Abby, how has your experience at CCLA shaped your perspective on sort of the enforcement of compliance with COVID-19 restrictions, or the comments that Nathalie has made about why we need to study this?

Abby: Yes. So most of my work for the past couple of years has focused on the criminal law. So policing, criminal courts, sentencing, and jails and prisons.

I mean, I immediately started to think about the disproportionate impacts of all of these new measures of new enforcement powers of really punitive new fines and legal restrictions on the communities that we know are now most subject to the impacts of the pandemic.

So racialized communities, people who live in crowded apartment buildings. People who don't speak English as their first language, families that police officers assume are not families, because they don't meet the stereotypical vision of what a family is, and are out walking in the parks.

Drug users, people who are experiencing homelessness. All of these communities are subject to not only the brunt of health crisis in many ways but also the most negative impacts of law enforcement and restrictive laws.

So that was the lens that immediately came to my mind. My particular first thought, right at the outset, was about the prisons, right? We started to hear these stories at the end of the pandemic about the cruise ships; the Canadians confined to their rooms and the cruise ships.

The size of a cruise ship room is often the size of a prison cell, and prisons are not cruise ships, right? The health care in our prisons is abominable. People are detained there, mostly pre-trial in our provincial institutions, lots of double and triple bunking.

It's just both a health care crisis and a humanitarian crisis. So that was the lens that I was approaching a lot of the early measures through, was those populations that were most at risk both in terms of their health but also in terms of all of the negative impacts of new laws and enforcement measures.

Cheryl M.: Is there a particular case that stands out for you? Looking back over this past year, year, and a half?

Abby: I'll do one success and one failure. As I said, prisons were top of mind for me, and very early on, we started to mobilize to push our prisons and jails, our bail courts, correctional authorities to release as many people as they possibly could.

Many thousands of people can be perfectly, safely supervised in the community and do not need to be confined to a dangerous prison during a time of a public health crisis, which makes the people who do remain in prison safer because those institutions are less crowded, and you can actually have a hope of doing some kind of physical distancing.

Obviously, makes the people who were released safer. So we started to monitor that, and the federal government really was not releasing people provincially. We did see incarceration rates decrease mostly through the work of the bail system.

But federally, which is sentenced people, we didn't see them coming out of the institutions in anywhere near the numbers that we would have expected. So we launched a case, right?

We launched a challenge to a failure and to keep people in a safe and healthy environment, and which is required under the statute required into the charter, and it took way longer. The course of the litigation was just no match for the course of the pandemic, right?

We knew we needed evidence, so we put in a lot of evidence. And then the government wanted to put in a lot of evidence, and then they wanted a lot of cross-examinations. By the time we were ready, and we pushed as fast as we could. But by the time the court was ready to hear our interim injunction, people were starting to be vaccinated, right?

There was new evidence about airborne transmission. It's very difficult to effectively litigate on a large scale during a crisis, for lots of reasons, some of which we'll get to. But one of them is just the speed of our courts and the process, and it just takes time, and a pandemic moves faster.

So that was litigation we actually withdrew. There were some, I'd say, very small successes on the prison front, like individuals who got released. One individual who got released after they got lawyers to threaten a judicial review but really did not see a lot of success from litigation in prisons.

Then the other example I'll be quicker on was a Thunder Bay order. So there was an order that came out of Thunder Bay that everybody released from the Thunder Bay jail had to proceed immediately to the isolation center and essentially was mandatorily detained in an isolation center upon release from the jail.

Didn't matter if they had a place to go, didn't matter if they had an isolation plan, didn't matter if they had not been tested positive for COVID; every single person was detained walking out of that jail.

Detained in a shelter that was the site of active outbreaks, right? So if they hadn't been infected by the overcrowded jail, they were going to a shelter where it was very likely that they'd be facing risk of COVID-19 infection.

So that was when where we were all geared up to litigate, we thought it was an illegal detention order and sent to demand letter and immediately saw the order go away, and they backed down.

They said it wasn't because of our demand letter, and in the impending litigation, they said it was because they no longer needed this emergency matter measure.

But there's been a couple of times where we've seen those types of smaller, really say clearly unconstitutional orders fall by the wayside after we've brought attention to them or geared up for litigation. So there have been successes; some of them have been quiet, though.

Nathalie: Well, we could see that as well in the initial ban, against all visitors and long-term care.

There was a threat to the litigation, and suddenly the government realized well actually, the threat of the litigation has forced them to reevaluate their policy and essentially recognize that some people were dying in the long-term care because their families were not there to provide the care that was needed.

So they had to adapt, and we saw changes both in Ontario but also in other provinces that adopted a more nuanced approach. That is usually what we want; it's a way of testing the government, again, in this tunnel vision to say no exceptions, no nothing with recognizing that they have to have a more tailored approach, creating some exemptions.

One example that I wanted to discuss is the way in which humanitarian exceptions needed to be put forward, and we saw that internationally, in some cases where the courts were forcing the governments to have an approach that provided some ways of responding to humanitarian plight of people.

So I think it's important to litigate these cases because they create a discipline within the government.

Cheryl M.: So what we saw was, as things were changing on the ground, and information is changing about what we know about the pandemic. Is that you've got government, sometimes not acting quickly enough, so the courts somehow intervening, even just the threat of court intervening to make them shift.

So there is this kind of balancing back and forth. So your perspective Nathalie, and as being an MPP, I mean how has that sort of shaped your views and as a scholar, just how those work either symbiotically or not in the kind of emergency powers that were being exercised?

Nathalie: Well, my experience in government is interesting because I was a member of a majoritarian government, and then I was in the opposition, so I saw both sides. It's classic to say that politics is the art of the possible, but it is also the science of communication.

We live in a deliberative democracy like you need to create the narrative of the stories, not just because of elections. In between elections, you really want people to trust their government. So they have to know what's going on, and they have to have a sense that what is being deployed is reasonable and makes sense, and so on.

So my worry during this pandemic was the narrative was very much a middle-class narrative, and I think Abby spoke about this. It was very much stay home, as though you had a home, as though you had a safe home.

You had a home big enough for everyone to be there to work, play together. So there was this assumption that indeed, the key messages and the key narrative was let's protect the people who are in the middle class and let's not talk very much and let's not worry about the people for whom these orders make no sense.

So that's why the litigation that was brought by CCLA, by others about the homeless being affected by the curfew in Montreal way differently than if you have a nice house where you can go and watch Netflix at night.

So there's that sense in which the narrative of a government can avoid difficult clientele. I think that's why we need to have a legal system that is responsive. I agree with Abby; I think we saw in other countries faster returns.

In Israel, there were some orders that were challenged, and the courts were able to respond within a few days. We're not used to that here, and I think that's one of the lessons of the pandemic, I think, is that probably the court system, if it wants to play its disciplining role, it must get on board and be faster. So I think that's going to be one of the lessons learned I think.

Cheryl M.: We saw early on a focus on limitations on Canadians mobility rights. This is a global pandemic, so there were limits on traveling in and out of Canada. But also as well as between provinces, travelers were required to quarantine for 14 days upon arrival from another country, and provincial travel was considerably limited earlier this year.

To some extent, again, that's focusing on more of the middle-class rights as you mentioned, might be the people who can travel or want to travel to visit family, etc.

As a former legislator, if you could put yourself in the shoes of the federal and provincial legislators, how do you think mobility rights were addressed in the development of these restrictions, if at all, Nathalie?

Nathalie: Yes. First of all, the issue of mobility is interesting because it does evoke the idea that it's a medical class problem, but it not always. In a way, what was interesting is even at the architecture of public health, at the highest level, like the international health regulations do posit that the restrictions to travel must be only as necessary.

They must be the least intrusive ones. The reason for that is that travel and mobility is not always just a luxury; sometimes, it is a humanitarian necessity. People escape violence, and there are some humanitarian aspects to it, visiting a dying relative, family reunifications, particularly when it's a long pandemic like it's 14 months and so on and 18 months now.

So I think what was interesting, and I'm sure that Abby may talk about the Taylor case that this CCLA brought. I want to draw attention to one interesting case from New Zealand, the Christensen case in New Zealand.

When this guy arrives in New Zealand, he's forced to go in isolation for 14 days, and he asked to be relieved to end his isolation earlier early on because his father is actually dying, is really dying. He's able to convince the court that indeed the failure of the government to have a more nuanced approach, a more individual approach is wrong.

So I think that was to me an interesting aspect, that's because this failure case is a little bit the same way. That public health assess risks in a global way, in a collective way. Where some people, and the message there was you need to provide individuals the ability to manage the risk in a more nuanced and tailored way.

So I thought that was interesting. I think that will be another message of the future pandemics, is that you cannot just have these blank orders that everybody's the same. Life is messy, and we should demand indeed a more sophisticated approach to respond to individual cases.

Cheryl M.: So Abby, how did CCLA they view the mobility restrictions when they came into effect, and how were these concerns, if any, addressed?

Abby: Yes. I mean, we were quite concerned about the mobility restrictions, and from the outset, and this will be familiar to people who are unfamiliar with like constitutional thinking. I mean, our focus was on are these justifiable restrictions? Are they based on evidence?

Are they rationally connected? Are they minimally impairing? Are they proportionate to the risk? Particularly with the Newfoundland ban, which was what we directly litigated, we didn't think it was.

We just didn't see the evidence that this type of measure was necessary, and it was certainly having really devastating personal consequences for people.

So I agree entirely with Nathalie; the people who bore the brunt of this were the people who had to travel because they had to move away from their families for work, or they were seasonal workers who all of a sudden couldn't easily get back in to see their kids.

Also, people who had double properties and wanted to spend their summers in Newfoundland, right? But those weren't really the heart of where our concerns lay. The co-applicant, in our case, needed to go back to bury her mother.

She had spoken to her mother every single day, visited her mother every year, had a plan about how she was going to self-isolate, had worked out with a funeral director, and that her mother's body was going to be held for 14 days to allow her to self-isolate, and was still denied permission to go back and bury her mother.

So for us, not only there was there a lack of evidence, that self-isolation requirements were not effective, that people were really going to prejudice public health by breaking the rules about self-isolation.

But also an inflexibility, in terms of what government officials saw as necessary travel for individual's lives. Just to give some context on Newfoundland, what was happening in Newfoundland? When that law was passed, there were about 17 cases of COVID-19 in the province, right?

This was not at the height of a wave of COVID; this was after their medical experts had declared that they had crushed the first wave. It also followed a very public incident where people thought that there were tourists whale watching off of the coast of Bonavista.

So there was a public outcry, police were called, no tourists were ever found, the incident was never confirmed. But that was in the background of the political discussion that was occurring before the travel ban came into effect.

It just raises this very disturbing and well-worn trope during an emergency, that outsiders are the risk, right? How many times in past and current emergencies have we seen people say we're safe here, we're concerned about the people from there. We're concerned about the foreign element, and it is something that we need to vigorously resist.

It is so corrosive; it is so damaging. We've seen it come up multiple times in this public health crisis, with really intensely negative impacts for individuals. There are sometimes when a travel ban might be justified; we haven't litigated the travel bans in the North.

We've asked questions about them, but the North is in a different context in terms of their health care system, their ability to manage a COVID crisis than some of the southern jurisdictions in Canada.

But it is something that needs to be really actively questioned when you see those types of narratives justifying laws and restrictions.

Nathalie: It is also important to say that it's the other is always the threat, that's correct. But also, there's a way in which government wants to establish that they're doing something. And that's why we need to have, to create this discipline of being there and requiring constitutional responses, responses that are rooted in evidence, that are actually not going beyond what is necessary.

Because there is a risk, particularly in a pandemic, where there's uncertainty, we know that there's going to be new cases and people just want a response.

And there's an escalation because there's more risk around because the spread of the disease is happening, the spread of the virus is being seen, and then you just want more. Be stronger, just be more restricted on and on and on. So it's that escalation that needs to be resisted.

Abby: The other thing that comes along with it, every time you create a new law, there's enforcement. So this wasn't just a travel ban; this was new powers given to inspectors as defined by the minister in Newfoundland to conduct warrantless searches, gave the police the right to remove individuals to a point of entry, like an airport or a ferry terminal.

So every time a law is created, there is an automatic turn to think about okay, well how are we going to enforce this? What powers do we need to give to people to enforce it? We know that those powers are open to abuse?

Every time you create a new police power, you create the ability for police and other law enforcement actors to use it in ways that you didn't intend.

Very frequently, the discriminatory background that underlies all these systems comes into play to inform who actually is targeted by these new powers.

Cheryl M.: Well, I know that CCLA was very much vocal about the creation of offenses from use of public places, and bylaw offenses and the fines that sort of thing. We had curfews and closing of public parks.

Can you tell us a little bit more about what was most concerning about that, or what you saw in terms of, as you've mentioned, the sort of quality rights that come in disproportionate reinforcement or enforcement of those offenses?

Abby: Some of the early offenses, some of the early laws that came in, were just poorly drafted, to be frank. Things were happening very fast, and maybe that's a charitable view, and many would say that's an overly charitable view of government.

I've spent a little time in government; I sometimes know how these things get drafted. There were laws that came in that didn't make sense.

So in Nova Scotia, you had a provincial order saying no one could be within six feet of anybody else outside. It didn't matter if they were your kids, didn't matter if there were emergency services being given; it was just a blanket ban on being in close contact within six feet of anybody.

That is just a very poorly drafted law, and the response of the government was, well, we trust police to figure out who should actually be punished under this law and who shouldn't.

Which, of course, is an entirely inappropriate way to think about the rule of law and who should bear the brunt of enforcement actions. In other jurisdictions, there were bans on all in-person religious ceremonies regardless of if it was happening in your house, with your own family.

So very knee-jerk reactions quickly drafted sloppy laws, very poor communication at the outset, as well in Ontario was very confusing what you could and couldn't do in a park. Park benches were off-limits, soccer fields were off-limits. Even if they weren't marked, but green spaces were open.

In Ottawa, you could only walk through the green space; you couldn't stop and linger in the green space. So people were receiving $880 tickets. One woman went into an area of High Park in downtown Toronto; she was collecting greens because she was on a fixed income.

She was elderly, her community garden had been closed, and she needed to supplement her food. She happens to be in an unmarked off-leash dog park in High Park, and she received an $880 fine.

We had mixed-race couples who were racially profiled because the officer did not believe that they were a couple, and followed them, followed the black man, called the police.

At one point, this person, this black man, sat down in the middle of a road in High Park and put his hands above his head because he was so concerned that he was going to be shot and killed by multiple law enforcement officers who were following them.

We had lots of people with English as a second language, who didn't understand all of these complex rules who were receiving thousands of dollars in fines because they let their kids play on playgrounds that didn't have any indication that they were closed right there, and certainly there hadn't been any translation of the signs.

So really broad laws, very poorly drafted, and really with the brunt of the effects being felt by people who have always been under increased scrutiny by the police, or who needed this public space, and these amenities that we call them.

They weren't amenities for a lot of these people, right? They were essential outlets. They had to sit on a park bench because of a medical condition, or they had to get out into public space because they live in a very small apartment. I'd say the second wave of COVID laws were much more tightly drafted.

We had complained a lot; we tracked enforcement, there were some provinces that relied heavily on enforcement, some didn't. But we did see; although some of those early mistakes were remedied, there were still provinces that turned to very restrictive laws and doubled down on COVID policing as their primary public health response.

So Quebec is a very obvious one that turned to a province-wide curfew that mandated the police, told the police that they were going to be going and knocking on doors, they were going to get access to Tula warrants.

An astronomical number of tickets have been issued in Quebec. Originally, the response of the government was yes; this applied to the homeless and people who are experiencing homelessness as well, no matter that they didn't have a safe place to go. Yes, this curfew was going to apply to them.

So I think it's changed through the pandemic, the way that these laws are drafted. In some of the early concerns, we have had waned in some jurisdictions. But we have definitely seen some provinces deepen their reliance on very broad, very restrictive laws coupled with really punitive enforcement that impacts marginalized populations the most.

Cheryl M.: So I want to bring this back to the charter because we're talking about how some of these laws were poorly drafted, or they seemed sort of unfair. I think that I mean, let's start with section seven.

That many of the laws that you've described, one could say, impact at least liberty rights. So Nathalie, I just want to turn to you and say, so how does that work if you were to apply section seven to some of these.

I recognize that we weren't able to. Actually, we didn't have the time to challenge some of these laws in the court because of the long time it would take to get a court case through. But how would you apply section seven?

And a lot of people don't realize that section seven has two parts, that isn't just about interference with life, liberty, and security of person. There's this other part about principles of fundamental justice. If you could just explain how that might apply to the kind of laws that Abby's talking about.

Nathalie: My sense, and I want to bring it also to section one eventually, because most of the litigation, the government was relying on section one to justify its intervention.

I would say a lot of cases, the court provided lots of leeway to governments, and it's understandable because it's particularly early on the pandemic, the courts were kind of judging governments as being, well, what's a reasonable government in a pandemic does?

As opposed to the reasonable government that we expect outside of a pandemic? So that's, I think, the flexibility of section one. I think that's it's role, it's role is to adapt to circumstances, so I was not surprised by that.

I continue to believe that it's important that courts demand some form of accountability. I mean, it's a form of accountability section one; it's our right to rational decision-making. It's a form of demanding a government that they explain what they're trying to do and what choices they had and share information that they have.

So it's an important forum not just because of the results, whether you win or lose, it's the process itself in our democracy. As Abby says, to worry about the ones, the people that will be affected, that may not have been intended.

So the idea of expanding the range of consideration that a government is paying attention to is also part of it.

So my sense is that the courts were responding and using precautionary principles, they were really giving lots of leeway to government, but that changed over time as we got better information, as there was a sense in which well there's a role here, that should not be abandoned.

It's a role of accountability; just you should not give a blank check to government; it's important that governments have their feet to the fire, not only in the legislature but also in the courts. Otherwise, there are too many mistakes that will take place.

Cheryl M.: Yes. We had our first episode of this podcast, we spoke with Professor Jacob Weinrib about the way that the charter places limits on the way the state can actually limit our rights, and talked about the Oakes test.

So, Abby, I'm just wondering, based on what Nathalie is saying, is that to think that the onus placed on government by section one as established by the Oakes test held its own with respect to the rights protection over the course of the pandemic?

Or do you worry about a trend where the onus weakens in the long term, just because people say, well, it's a pandemic, so government can limit rights in a more dramatic way as Nathalie is talking about?

Abby: Definitely, the latter. I am worried about the long-term repercussions of some of the decisions that are coming out in the course of emergency. Emergencies are very specific times, but we know that the impacts of the emergency extend far beyond just that moment in time.

I think that some of the tension in the Oakes test during emergency is this idea; the public health response works on a precautionary principle. It is we don't know what the risk is; we don't know all the answers.

Our science isn't there yet; we need to take these measures in order to prevent the worst-case scenario. We need to be cautious and put in place more measures than we might need so that we don't get to a place where we can't claw things back, where we have massive loss of life, where our hospitals are overrun.

That really does not jive with section one of the constitution, which requires that the government prove demonstrably justify based on evidence, that their limits are justifiable, that there are laws that they've put in place that limit people's rights are actually based in

evidence. I think there is, and there should be extra latitude given to government to legislate during an emergency.

You cannot wait for the results of peer-reviewed double-blind studies when you're in the midst of a pandemic; science is not going to keep up with the pandemic if that's the proof you're waiting for.

I do think that the challenge is how do you make sure that your rational framework is limited to that particular emergency. I see it in other areas of law, cases that have nothing to do with the pandemic, where this idea of there is an uncertain risk out there.

In order to confront that uncertain risk, we need to have very sweeping restrictions on a whole bunch of people because we can't figure out when that risk is going to materialize. That's not a narrative that's limited to a pandemic; that's a narrative that government tries to use in a lot of different constitutional cases to justify their actions.

There's a Supreme Court case right now, where the government is saying yes, let us put restrictions on this whole group of people because we don't actually know who in this group of people presents the real risk.

Science can't tell us, so we should be justified in limiting the rights of everybody in this group. So that is the really pernicious line of reasoning that may make sense in a very time-limited emergency but has a real risk of flowing over into other areas of constitutional adjudication and other areas of public health, frankly. Because we do have other epidemics that are raging, right?

We do have crises, overdose public health crisis that disproportionately impacts people who are jailed.

When I think about mandatory public health orders requiring everybody exiting a jail to self-isolate, and be subject to supervision, the most dangerous time for people in terms of their life and their health is when they exit jail because so many people overdose after they're released.

So there are other public health crises, there are other very pressing problems that our government is responding to.

I think it's very important to maintain a really rigorous constitutional framework in all kinds of areas of life, and there's a danger that this will start to water down what we expect from government when it comes to dealing with other pressing problems.

Cheryl M.: Some of the concerns have focused on that element of the Oakes test that really talks about minimally impairing the rights. So that when you may have the right justification, and the pressing, a substantial objective of the public health objective.

But are these measures actually minimally impairing, and the government gets this margin of error or latitude in coming up with those measures.

So Nathalie, how do you think that sort of minimal impairment test has been really applied or considered in some of these measures that government has put in place?

Nathalie: I think it's been a long time since government have been given lots of leeways under minimal impairment.

It's not only in the pandemics, so that trend had begun before. I'm with Abby on this; we should continue to demand better evidence and more rigor, not just because it's constitutionally required, but it leads to better government, it leads to better governance.

The fact that a government would have good evidence to support their action, and design in a more tailored fashion, the way in which they should accomplish their objectives helps us all. It helps us in ensuring that number one, they measure the right things and not the wrong ones.

That they look at the impact generally on every one of their measures, and not just on the tunnel vision that they're trying to succeed.

So I think it just leads to better governance overall. So my sense is that we will continue to resist this; I think we need to have a legal community that is prepared to constantly be asking for better laws and asking for better evidence for the restrictions that are imposed. It's just a good discipline to have.

So to me, I don't think the pandemic will have changed that much; I think it's just going to be a constant struggle. It is a constant struggle for the legal community and for the constitutional lawyer to continue to articulate well.

What are the ways in which you ought to look at minimal impairment? I'll just add one last point is, I think we should also be more focused a little bit on trying to have laws that it's not all of nothing.

It's not as though the entire mobility ban was going to be lifted; it was demanding that it be done in a way that was responsive to the variety of circumstances, and be more nuanced, more tailored, have appeal processes, maybe for people that can be heard, some speed in decision making.

So all of these tools that are good governance tools, that we should ask that, that should become a little bit part of the analysis in section one. You could also demand government that they re-evaluate their policies every so often.

A sense of duty to learn, a duty to share information, being more transparent, duty to consult. All this could be kind of built into a richer section one analysis that demands more of government, and that's the role of section one.

Cheryl M.: So we'd be remiss if we didn't talk about vaccinations because that is the current sort of hot topic at the moment, with the majority of Canadians being vaccinated at this point.

We have a very vocal small minority of people who are adamantly opposed to vaccinations, and the notion of, I mean we hear the word passport, vaccine passports, proof of vaccine, vaccine certificates all of those sort of things in order to be able to participate.

So just wonder how the charter applies to these laws that are now coming in province by province, in terms of mandating or whether they're mandating and making people have vaccines, as some people would phrase it.

Or at least restricting their activity if they're not vaccinated. How might the charter apply to this?

Nathalie: Well, certainly, I think I would argue that the charter applies when the government makes the decisions that will have discriminatory impact in access to services.

Even if it's non-essential services, it does create a discrimination based on a choice of health medication and health.

It is normal for people to worry, it's normal for lawyers to worry about both the enforcement and about the design of a vaccine passport, and the privacy infringement that can occur when government accumulates information about you and distributes it, uses it.

I mean, we know historically that identity cards were used eventually in the Rwanda genocide because people were identified either as Hutus and Tootsies. It became a tool of oppression and a tool of the genocide.

So we always worry that when government is creating ways of categorizing people, it could be used against them eventually. Now maybe the vaccine passport could be used not as an identity card but as a nexus card.

It facilitates it; it makes it quicker for you to access services. So if you don't have the vaccine demonstration, then you will be asked a whole bunch of questions. You will be subject to a much as to a COVID testing, for example.

So there are ways in which we can justify a vaccine passport that could be reasonable in a free and democratic society, provided that it has the proper exemptions, it has the ability for people to debate or be heard on to why it is that they cannot or will not be vaccinated.

So I think it to me, it's exactly the same problem as we had with mobility, violations, and so on. The question is about the tailoring; who are the exemptions? Will there be an exemptions for religious freedom?

Certainly, there will be an exemption medically contraindicated. But will there be other types of exemptions that will look at the particular circumstances of people? So I think we're early on in trying to assess how they're developing them and the type of vaccinations passport that will exist.

I think we should demand that there'll be as little information in it for privacy protection. You don't want your entire life to be disclosed constantly just to access the restaurant.

So there are lots of issues, and it's normal, and it's a good thing to ask questions of government and in the implementation and the development and the rolling out of this vaccine passport.

Abby: I'll just add, I think we shouldn't underestimate the privacy and the impacts that this might have on people's lives. I've seen policies where you have to send your exemption or your vaccination status to your direct supervisor, and there are a lot of people who feel extremely strongly and have very strong opinions and views on people who are not vaccinated.

Even if they have a medical exemption, even if they have very strongly deeply held religiously, there is a lot of emotion and sometimes hostility that comes with this issue. I've also seen policies from employers who require unvaccinated people to wear masks at all times in the office and do not require the same thing of vaccinated colleagues.

That kind of measure, for me, really starts to get away from public health because we know there's a risk of transmission if you're vaccinated or unvaccinated. And opens people up to an enormous amount of individual prejudice and pushback, and it's unnecessary, right?

You don't need to give that information to your direct supervisor; there are HR processes that should be in place, especially in larger companies and institutions, where you fire while that type of sensitive information and the types of accommodations and the medical information from your direct colleagues and your supervisors.

That really will have an enormous impact on people's ability to fully participate in really important aspects of their life, including work. We did see during the summer when there were some people who, for various medical reasons, were not able to constantly wear a mask.

At CCLA, we certainly got many emails about the hostility, anger, violence that those individuals faced for daring to walk into a store without a mask when they had a very important and valid reason not to do so.

I think that there's a lot at stake for people if companies and governments don't get this right.

Cheryl M.: There's a lot of stake and a lot of anger on both sides. I mention the sort of strong views of the people who are adamantly anti-vaccination, and protesting in front of hospitals and blocking people getting in and out of hospitals has been something that people have seen as being aggressive and troubling.

I wonder, to some extent, I hear the caution that both of you are expressing in terms of how something like this gets rolled out. But we've had vaccination requirements for children in schools, and for other kinds of like smallpox and other kinds of diseases and viruses in the past.

So what makes this different? So just kind of commenting on whether or not, having some kind of, at least some kind of element of compulsion I guess if you will on vaccination, whether that it could withstand the section one test or even just the principles of fundamental justice under section seven.

Nathalie: Well, I think the questions that you're raising will depend a little bit on the evidence that you're able to establish. Now just on children having to be vaccinated to go to school, there are exemptions.

Parents can say I don't want my kid to be vaccinated, and provided they take a course that most of the time alleviates their fears or not.

Again, there is an incentive to be vaccinated, it's a demand to be vaccinated, but there are exemptions. They are a recognition that some people may need to be accommodated. So that will be one issue I think that we will all look to, is the way in which it is being rolled out with concern for the people that may be badly affected.

The second point I think in your question that is interesting is in the context where we were supposed to look for herd immunity, which was to have a certain percentage of people having been vaccinated was going to be sufficient to deal with the pandemic in some fashion.

We're no longer talking about herd immunity, or the [Inaudible 00:49:43.18] is always rising. So it's interesting that at some point you someone may want a government to establish why herd immunity is no longer a valid concept or is not sufficient.

So it's okay to ask these questions and ask the government to come with the answer why it is. So my sense is that yes, probably some vaccine compulsion, some vaccine incentivization, may be able to be approved under section one, may be viewed as a reasonable and necessary because it is a pandemic.

But the way in which it is formulated, it's the attention to details, the type of enforcement, and so on. Those are all questions that ought to be considered. We ought to continue to pay attention to them.

Maybe there would be a range of lawsuits that will take place, one after the next. So that we continue to make sure that there's no overzealousness in mandating vaccine for other things after that.

That's what people worry; you may be in favor of vaccines. Certainly, I am, and so on. But you may still worry about how often will that create a precedent so that every year, people that are not vaccinated with the flu are suddenly being prevented from accessing certain services. So it's okay to be concerned about bad habits of governance cycle.

Cheryl M.: I want to thank both of you for taking the time today to walk us through some of the charter rights issues raised by our government's responses to the pandemic.

We've been speaking with Nathalie Des Rosiers, legal scholar and the current principal of Massey College at U of T.

And Abby Deshman, a lawyer with the Canadian civil liberties association. To close or to sum up, what would either of you consider the most pressing constitutional rights issue that has arisen during the pandemic?

Nathalie: Well, I want to see what frightens me the most in this pandemic; besides everything that we've talked about is also the lack of accountability.

I mean, we've had some statutes that are being put forward to say, well, from now on, you can't sue if you feel that the government has as badly behaved or if long-term care has not followed the rules.

So I worry a lot about this trend of diminishing the role of the courts in managing and playing its important role in our democracy. So to me, that's a threat. I would actually want people to worry about that. We need the courts to play their role, and we need them to be present; it helps us all.

Abby: I'll pair that with the degradation of parliamentary democratic accountability. So an emergency, the invocation of emergency powers concentrates an enormous amount of power in the executive.

So the premier, the ministers, they are given sweeping powers to enact lots of rules very fast. At some point, this emergency has to end. At some point, those powers have to flow back to the legislature as a whole, we have to undo a lot of the concentration of power that we have, and we haven't seen that yet.

One of the risks of an emergency is that power remains concentrated. We have seen the shutdown of legislative debates on the basis that we can't debate vaccine passports; we can't discuss the details of these initiatives because it's too dangerous to the public discourse at this time for us to be having a nuanced discussion about this.

Those types of democratic deficits are particularly concerning the longer they extend and the longer we see ourselves in a state of emergency.

So we'll really be watching to see do these powers come back down as the public health crisis wanes, or as this becomes the new normal, how are we going to reassert democratic checks and balances over the really extraordinary executive powers that are being used right now.

Cheryl M.: Great. Well, thank you very much. I think we'll be watching what happens through our courts and from government as things shift and change as they will.

Let's cross our fingers and hope there isn't some new variant that makes things even more frightening for people out there. I want to thank you again for taking this time with us.

Abby: Thank you. It's been a pleasure.

Cheryl M.: In our practice corner today, we are going to change things up a bit and focus on the perspectives of law students.

So today, we will be speaking with Hana Awad and Geri Angelova, two recent graduates of U of T law, who took part in the school's grand moot this past year. In which the topic was the constitutionality of mandatory vaccines.

We want to explore what it was like for these law students to construct their legal arguments and what a moot looks like. So our practice segment is about the preparation and the conduct of a constitutional appeal, but as a simulation exercise at law school. So thank you, Geri and Hana, for joining us today.

I want to start off by asking you to describe the mooting process for non-law students and non-lawyers, and what kind of skills does it help you build, and why did you decide to participate in the grand moots. So over to you, Hana.

Hana: Thanks, Cheryl. So mooting is kind of a fictional usually appeal that law students participate in, either in the form of a competition that's most common, where you compete against teams from other law schools or from your law school.

Occasionally, like with the grand moot, it's kind of an exhibition where there's no competition. It's a performance and advocacy for your community and your school. The primary skills that the mooting helps build are kind of concrete advocacy skills.

So usually, the students who moot have to construct their arguments and write out the written advocacy component, usually a factum. They have to do all the research involved in that; they have to kind of come up with the best angles and the most sympathetic version of events for their side.

They also have to work on their oral advocacy skills because that's kind of the bread and butter of mooting. And be able to present a compelling presentation of their side and answer the questions that the judges will inevitably have for them.

Cheryl M.: So you both participated in different moots at the faculty; I know I've coached Geri in the Wilson moot, which focuses on section 15 of the charter. What makes the grand moot different, Geri?

Geri: Well, so the grand moot being internal to the University of Toronto and not having that competitive component to it, I think, allows students to take more creative liberties in drafting their arguments.

I mean, aside from the pressure of having everybody's eyes on you, you can really take more time to develop arguments that wouldn't fly in other circumstances.

You might be more judicious about what you would say in a competitive moot, but I think in the grand moot, what we were told is to have fun with it, really try to push the envelope on certain legal arguments. So I thought that was a really fun aspect of the grand moot in particular.

Cheryl M.: You're doing this in front of real judges?

Geri: Yes, no pressure.

Cheryl M.: No pressure, yes. I mean, usually, there's a supreme court of Canada judge that sits on the panel, as well as from the court of Appeals or lower court. So it actually feels very real, doesn't it?

Hana: Yes, it definitely does. The judges are always very engaged; they're always kind but definitely won't let you get away with a bad argument. So you really have to prepare quite a bit.

Cheryl M.: Now, our segment today was about the charter and COVID. So how did you find the research process for the issue of mandatory vaccinations? Did you find it to be a novel issue? Or was there plenty of material available for you to work with?

Geri: Well, we hear this time and time again; we're dealing with unprecedented times. So I mean, when I started conducting research on this issue, I think the most analogous case I could find was one from 1905 from the U.S Supreme Court, and that was dealing with mandatory vaccines for smallpox outbreaks.

So, in that case, we're dealing with the 14th amendment, so it's not directly applicable to charter litigation here. But something that stood out, in that case, was that real liberty for all cannot exist, where people are free to make choices that will affect the liberties of others.

So that's where we started framing our overall theme about the common good. The challenge with doing that in the scope of section 7 is that section 7 is fundamentally designed to focus on the individual.

So that for me was challenging because I had to effectively argue that we need to think about common interests when we are framing these section seven analyses, particularly under the principles of fundamental justice.

So that part was challenging. But Hana's experience doing section one also balanced that out nicely.

Cheryl M.: So I was wondering if you could each briefly describe the fact pattern and the arguments you gave addressing those facts during the moot.

Hana: Sure, I can talk quickly about the facts. So the grand moot is always a fictional fact pattern; it's not based on, usually, not based on an existing case.

In this case, the problem was about a fictional pandemic that's eerily similar to the one we are living through now, in the fictional state of Flavelle, where the government responded by imposing a mandatory vaccine policy, the vaccination act on all individuals, requiring everyone who is medically able to get vaccinated.

The vaccination act did not include an exemption for religious or conscience-based beliefs, and it attached both monetary penalties and the possibility of imprisonment to the contravention of the vaccination act.

So Geri and I were the respondents, we were defending the government's right to pass this legislation, and our teammates Teodora Pasca and Olivia Eng were representing the applicant who had been fined under the act and was challenging the constitutionality of the act under section seven.

Cheryl M.: So what sorts of strategies do you have prepare translating a factum, which is the written legal argument, into a coherent and persuasive oral submission in the context of a moot?

What does the day of the move look like from your perspective? And how do you translate what is written on the page into something that you think might persuade the judges?

Geri: So from my perspective, I think what you want a moot to look like as a mooter is a dialogue that flows between yourself and the adjudicator; the last thing you want to do is just repeat what was written in your factum because they've read it, they're very well prepared for these things most of the time.

So what you're there to do on the day of is to answer those lingering questions that they may have and dispel any outstanding concerns that weren't directly addressed in your factum.

So the way I like to prepare for these things is to really sit with the material and come up with analogous real-life circumstances that kind of reflect what's happening here, to really ground your position in something that's more tangible.

So, for example, one of the arguments that I had to rebut was the reason why this vaccination act didn't have a personalized risk assessment for each individual and the odds of that individual transmitting the disease themselves.

So this was a blanket sort of mandatory vaccination without that individualized risk assessment. So I had to think about that and say, well, why do we do that in other contexts?

So, for example, we know that we can't have drinking and driving; that's a blanket prohibition.

Even though we do know from time to time that some drunk drivers do make it home safely, so having these sort of concrete real life examples to bring back to show the judges why in your circumstance, this law makes sense is really a useful way to engage with the material beyond what's already written in the factum.

Hana: I'll just add that I think that it's very tempting; I certainly felt tempted by this when I first started mooting to focus oral submissions on the strongest points and the strongest arguments for your side.

And really what you want to focus your oral submissions on are the things that the judges are going to have the most trouble with, because the 10, 20 minutes that you have up at the podium are your opportunity to help the judges work through these difficult,

unfavorable points for your side, and help them see things from your perspective or from your client's perspective.

Cheryl M.: So I have to say that one of the common comments from the judges who are sitting on the other side of the podium, for the grand mooters and certainly for the top mooters in the competitions, is that the students have worked so hard that they're actually as good as many of the senior lawyers who appear before them all the time.

I think just your words of advice about how to prepare for a moot is not different than what lawyers would do in a real-life setting, as opposed to a moot. You've actually described what appellate lawyers do all the time.

Now, of course, in this case, you were mooting something about mandatory vaccines in the sense of people were being forced to actually be vaccinated, which is not the case we have, I mean in real life.

We haven't actually gone that far, although we're seeing a different form of mandate, which is the vaccine passports or certificates in order to do certain activities.

You just have to remember that the legislation you're talking about was fictional; that was the purpose of the moot.

Seeing you both are articling now, do you find yourselves drawing from the skills you built during your mooting experiences frequently? Or finding practice considerably different?

Hana: I think the thing that feels most similar or most applicable is gravitating towards the holes in your argument more quickly. I think that if I hadn't had mooting experiences, it would be easier to kind of focus on the strong points of your argument in practice, and I think that I'm better at anticipating what the other side is going to say, what the judges are going to have trouble with because I mooted in law school.

I think also that mooting is a team sport, and one thing that has really carried forward for me is being able to work very closely with different kinds of people, with people with

different working styles, and be able to create something together that has one voice, as far as the judge or the panel is concerned.

Cheryl M.: Geri, how about you?

Geri: I find that a lot of the research assignments and tasks that I do get as an articling student now are the kinds of questions that don't have clear-cut answers.

If there was a clear-cut answer, they wouldn't be asking you to dig into it for hours trying to figure out what the solution is here.

I think mooting has helped me sort of reason by way of analogy that way, to try to find something like it, but not necessarily directly on all fours with the facts that we have at hand, and reasoning through those differences and trying to make a compelling argument well as Hana noted, noticing the weaknesses in your argument and then being able to rebut them effectively, has been a transferable skill that I picked up from mooting.

Cheryl M.: Great. Well, thank you, Geri and Hana, for taking the time to chat with us today. We wish you the best in your articling year and in your legal career.

As someone who coaches moots at the law school, I can say that both of you are off to a great start. Once again, I want to thank legal scholar Nathalie Des Rosiers and constitutional lawyer Abby Deshman for their contributions to this episode that has focused on the charter during a pandemic, and thank you again to Geri and Hana.

Geri: Thank you.

Hana: Thank you for having us.

[End of Recorded Material]