[Episode 4 - Religious Freedom & Interventions in Constitutional Litigation]

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

Our podcast focuses on leading constitutional cases and issues, highlighting strategic aspects of constitutional litigation and some of the accomplishments of U of T's faculty and alumni involved in these cases.

It's our hope that over the course of this episode, whether you are a law student, a lawyer or just love to talk about the Charter during family dinners, 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 Mississaugas 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 freedom of religion and the role of interveners in landmark cases concerning religious freedom. Section two of the Charter sets out that everyone has four fundamental freedoms.

One of which is freedom of conscience and religion in clause 2a. We will learn about the different ways in which the court has viewed freedom of religion in the past and the implications of those different views from University of Calgary Professor Howard Kislowicz.

In the practice corner, we will talk about the process of intervening in appeals at the supreme court of Canada with lawyer Adriel Weaver.

Let's introduce our first guest. Howard Kislowicz is an associate professor at the University of Calgary, faculty of law. Howie received his LLM and SJD at the University of Toronto, faculty of law.

His research concerns constitutional and administrative law, with a particular focus on religious freedom. Howie's work is published in leading law journals, and he has presented at national and international conferences, welcome Howie.

Howard K.: Great to be here, Cheryl.

Cheryl M.: Before we get to the main topic for our discussion today, I want to ask you about your musical side hustle.

Those of you who pay attention to the show notes will be aware that Howie co-created the Charter a course theme song, which we played for a little bit longer, this time at the beginning of the episode.

Tell us a bit more about what you've been doing musically and how this law shanty came into being.

Howard K.: Well, thanks, Cheryl. I'm speaking to you today from Treaty 7 territory here in Calgary. Music has always been a huge and important part of my life, ever since I was a little kid. I had bands from high school all the way through law school, and I still make music with my songwriting partner.

This particular project that led to the Charter a course song at the beginning of the pandemic, when we were all just learning to be stuck at home and feeling a little isolated and feeling a little powerless.

I thought, well, what's something I can do? I knew from reading the news that the food banks all over the country and in Calgary as well were really struggling. That's a cause that always touches my heart.

I love to cook and eat and feed people, and the idea of people not having enough to get by is always something that really troubles me. So I thought, well, what if I just put out on Twitter, I'll write and record you a song if you make a donation of any size to a food bank, and there was quite a bit more response than I expected.

I think it led to 20-something songs in the span of just a few weeks. I don't know exactly how much money we raised because I didn't want to ask people how much they were donating, so everybody would feel like they could participate, whatever they could afford to donate.

But just from people sending me screenshots of their donation receipts, I know that we've raised thousands of dollars over the course of this project. It's a really special thing; a lot of the songs that ended up coming out of that project were songs for people's children or pets.

As the songwriter, you see the person who asked you write the song, see their love of their child or pet reflected in song and come to life in that way, and there's this really magical moment that sometimes happens there.

So after writing a few of these songs, also around the same time, there was that big tick-tock sea shanty craze, where people were doing sea shanties of various types, and I thought, huh, a Charter sea shanty would really work.

I knew our colleague Rob Currie, who teaches out at Dalhousie; I know that he's a fantastic traditional Atlantic musician. He's a singer, songwriter, a guitar player, and he has this beautiful voice, and we had kind of met each other over Twitter.

I reached out to him, and I said, hey, what if we wrote this sea shanty about the Charter? He said, well, you sea shanties are usually in six-eight; that's the time signature and the word notwithstanding really works in six-eight, so let's do it.

From there, it just took off. I put out another tweet saying anybody who wants to lend their voice to the shanty, we'd love to have you, and lots of people did. Some people I knew, some people I didn't know.

I think one of my favorite contributions was a lawyer in Ottawa who I hadn't met but was a friend of one of my former students who brought the tweet to her attention. She's a lawyer in Ottawa, but she has a music degree in performance, and she's a trained singer.

So she sent me this lovely four-part harmony that really brings the chorus to life and makes it full. So it turned out to be a little community builder. I think it brought a smile to some people's faces.

Then when you reached out to me and asked to use the music in the podcast, I said, well, maybe we can make some more good out of this and find another way to donate to a food bank, and you're very gracious, and you made a very generous donation.

So all of the performers who contributed their voices to the project were really delighted that we could do a little bit more good.

Cheryl M.: It's a great addition to our podcast, for sure. It's also a little bit of an earworm. I find myself singing it in my head a lot now that we're doing the podcast.

Howard K.: My apologies.

Cheryl M.: I was listening to another Canadian law podcast this weekend that uses your music, Stereo Decisis with Robert Danay, Hilary Young and Oliver Pulleyblank. It covers more general legal topics. Are there others?

Howard K.: There's a couple; somehow, my music seems to fit the podcast medium, maybe. One of them is my songwriting partner has his own podcast that he does with his sisters; it's a pop culture podcast called Friday night movie. He used a little instrumental piece that we did together, and I think works really well.

There's one other, somebody who I met as an undergraduate student and then lost touch with. He reached out to me at one point because he was doing a podcast about board games; it's called so very wrong about games.

He wanted to use a song from one of the albums that my band, what does it eat, had recorded as his intro music, so we were happy to let him do that. So I guess if there are any podcast creators out there listening, and you need music for your podcast, I work cheap, so reach out.

Cheryl M.: You work for donations to good causes. So let's turn to our topic for today; religious freedom underpins Canada's multicultural roots; it forms an important part of the constitution's role as a bulwark against the tyranny of the majority, if you will.

But religious freedoms can at times come into conflict with other legitimate, legal and constitutional objectives such as safety and security in schools. These conflicts can stir controversy, and we would like you to sort of guide us through these murky waters that surround religious freedom.

So I want to begin by asking you a broad question, how has the supreme court approached the concept of freedom of religion? Are there any examples of where in your view, the court has ever gotten it right? If not, why is this the case?

Howard K.: One of the first things that we could note about the supreme court of Canada's approach to religion is that it's highly subjective. So the touchstone for establishing a religious freedom claim is the sincere belief of the claimant.

So as we'll talk about, I think in a bit more detail, that means if you're making a religious freedom claim, you don't have to prove that what you're doing, your religious practice is accepted by other members of your religious community, or somehow, an authoritative or authentic expression of a particular religious tradition.

Rather, you just have to prove that you sincerely believe that the practice or belief has a nexus with religion. I think this is generally good because it leaves open a wide variety of practice.

But this approach can sometimes overemphasize the individualistic aspects of religious freedom and make it harder for courts to see the collective aspects of religious freedom.

Now, this seems to be changing; in cases called Loyola and the Trinity western decision, I think we're starting to see a reflection from the supreme court that there are collective aspects to religious practice that also deserve some kind of protection.

One area where we have a little bit of a gap in how we define religious freedom or how we approach religious freedom is that if you're making a religious freedom claim, you have to show that the interference with your practice is more than trivial or insubstantial, that's

the language that the supreme court uses. But what exactly that means is, in my view, under-theorized.

We don't really have a good picture of it. When the court says it's trivial or insubstantial, does that mean it's some kind of major part of your religious practice, of your religion? Or does it mean that the consequences for choosing your religious practice that are secular consequences, that those are trivial?

I think we see a bit of both. At the supreme court, they've never really looked into this. At the lower courts, you get a bit of a patchwork, but it's mostly a reasonableness test, and that to me has the potential to, I think I put this in a paper, there's a Tom Waits line where he says "the large print giveth and the fine print taketh away."

So if the first step is highly subjective, but then the triviality step uses a reasonableness test which is somewhat objective, then we risk courts making their own decisions about what matters most in a religious tradition, which according to the first step should really be up to the claimant to determine.

Another aspect of the way we do religious freedom is that because the right is cast so broadly, it leaves most of the heavy analytical lifting to section one, which I know you've talked about on a previous podcast.

In my view, this has put a lot of pressure on the section one reasoning to be more forgiving to government justification. Because there is this pressure on section one, what we see is courts giving more of the benefit of the doubt to government justifications of rights infringements.

In terms of when the supreme court of Canada has gotten religious freedom right, to me, the Multani case really holds a lot of promise for being an example.

As we'll talk about later, one of the things that impresses me so much about that case is that the court shows a real willingness to question some common assumptions about the way many or even most of us see the world.

I think this is part of the transformative potential of religious freedom litigation, that is, the ability to understand other ways of understanding the world around us.

Cheryl M.: Multani also doesn't actually use that kind of reasonableness approach that came up much later in the Doré case in terms of assessing the Charter values and Charter breaches.

I mean, Multani used a section one analysis. You speak a lot about cross-cultural communication in your work; can you break that concept down for the audience?

Howard K.: Sure. This aspect of my work really is inspired; much of my thinking has been by the work of Benjamin Berger, who's a Professor at Osgoode Hall law school, who's written really expansively about this area, and for me, inspirationally about this area.

One of the things that he says is that when we witness religious freedom litigation, one of the things we're witnessing is a cross-cultural encounter. What does he mean by that? Well, very broadly speaking, a culture is a way of symbolizing and understanding the world around you.

In his view, Canadian constitutionalism, Canadian constitutional law is its own cultural system, and in religious freedom litigation, we're watching it come face to face with a religious way of understanding the world.

That has its own symbols and its own way of determining what's important and what's good.

So we have this encounter, and in my view, it's not only an encounter, but the parties are actually communicating with each other. So not only are they presenting their own view of the world, they're attempting at least to create shared meanings across cultural boundaries.

This can be more challenging than communicating with someone who shares your culture, right? Who shares your basic assumptions about how the world works, what's important, what's expected?

What makes this particularly challenging in the litigation context is that one of the partners in communication, that is, the court or the judge, has a lot more power than the other.

So what we have is a kind of asymmetrical communicative relation. What that means is that parties are incentivized to win the ear of the court, and in order to do that, they have to make their practices intelligible to people who might not have familiarity with them.

So one example in the Amselem case, which we'll talk about in more detail later, the practice at issue was the building of Sukkah. Sukkah is a little structure built by some orthodox Jews or some practicing Jews in a holiday that actually just happened; it's a fall harvest holiday.

One of the traditions, one of the obligations that some Jews observe during this holiday is to gather a series of plants that are native to the middle east, and shake them in particular ways and offer particular blessings.

Now, if you came across somebody doing this, and you had no familiarity, it would probably be a completely unintelligible practice for you. Yet, if this is your culture, you understand exactly what's going on, right?

You understand why this person is shaking a palm leaf up and down and left and right. So to make those practices intelligible, the parties have to do some work and contextualize those practices.

Cheryl M.: In your 2014 article on cross-cultural communication, you assess the supreme court's reasoning in three cases against two values of cross-control communication, respect and self-awareness.

Before we discuss that in more detail, I just wanted us to provide a quick overview of those cases, some of which you've already alluded to; so the first one is the Multani case, where you've described that being a really good example of how the court, in your words, got it right.

Multani addressed a situation where a 12-year-old student wore a Kirpan under his clothes to school. In the applicant's orthodox belief system, one must always wear a Kirpan under your clothes, and it resembles a metal dagger.

So the blade must be made of metal. The school and the parents agreed to conditions under which the Kirpan could be worn at school; one of those conditions involves sealing it within the child's clothing.

The board refused to ratify that agreement and, citing article 5 of their code civi, prohibiting the bringing of weapons to schools. The board decided that the Kirpan could only be worn in the form of some sort of pendant or made from some other dull material such as plastic or wood.

Multani saw a declaration that the decision infringed his freedom of religion and was therefore of no force and effect. The majority of the supreme court held that the board's decision infringed Multani's religious freedoms and that the infringement was not justified under section one.

Howie, perhaps you could then also outline a little more the Amselem case that you've also referred to, so we can set up our background for the discussion going forward.

Howard K.: Sure. One more thing about the Multani case, I mean, there's so much going on in this case. As I said, to me, the reasoning is really, in a lot of ways, exemplary.

But one little footnote, which is not a footnote for the participants in the case, is that the participants they had won at the Quebec superior court and then they lost at the court of appeal.

So Gurbaj Multani never went back to his public high school; he ended up going actually to a seventh-day Adventist school that allowed him to wear his kirpan. By the time he got his decision from the supreme court of Canada, he had just about graduated high school.

So he ended up finishing out at the same private high school that he had started in, so the victory was important for future students who wanted to wear a kirpan to school. But it reminds us that the people who lend their names to our cases, the consequences for their lives are not always exactly as they appear when we read the decision.

Now moving on to Amselem, in that case, there was a group of orthodox Jews who were what's called divided co-owners of units in an apartment complex in Montreal. In Quebec, civil law that's the rough equivalent of a condominium basically functions very similarly.

They were subject to an injunction and filed the syndicat, that's like the condo board. So they were the respondents in the case.

So they were owners were subject to an injunction barring them from erecting sukkot on their balconies for the purposes of fulfilling this biblically mandated obligation of dwelling in Sukkah, which is a small enclosed temporary hut during the annual holiday of sukkot, the same name.

So what happens is that this syndicat alleges that the structures violate the apartment complex's bylaws, which prohibit the erection of any structures on balconies and terraces. They offer the co-owners an opportunity to set up a single communal sukkah in the complexes gardens as an alternative.

While this looked to be a promising avenue of negotiation, ultimately, the orthodox Jewish residents refused this accommodation, saying that that would run contrary to their beliefs, which for various reasons, they said called for individual sukkot. Now the majority of the supreme court, and I'll emphasize here, was a narrow majority.

This was a seven-member panel, and it was a 4-3 decision. So one of the interesting, maybe challenging things about the Amselem case is that actually, if you add up all the judges who decided the case. So the single judge at the superior court, and then the three judges at the Quebec court of appeal.

There were more judges who sided with the condo board than there were with the claimants. But because it was the right four, right? The four at the supreme court of Canada who sided with the co-owners, they were ultimately successful.

In doing so, the majority of the supreme court set out the basic framework for determining whether an action violates religious freedom, and it's a framework that has been very stable even until today.

The other important thing that gets said in the Amselem case is that the court says that the state and the court should not be involved in the legitimization of religious dogma. So they said that a claimant doesn't need to demonstrate that there was an objective religious obligation.

So what happens in the trial level, in this case, is that each side brought its own rabbi as an expert witness, and so the condo board's rabbi says there's no such Jewish obligation to build one's own Sukkah, and the orthodox Jewish claimants, they have a different rabbi who says yes, there is in certain circumstances an obligation to build one's own Sukkah.

The court says we don't want the state courts to be involved in the determination of which rabbi is right on Judaism. So instead, its way around this conundrum is by favoring a personal or subjective understanding of freedom of religion.

So for the majority, the court's analysis is only concerned with accessing the sincerity or honesty of a claimant's belief. So to the extent that expert witnesses are brought in, they are only there, at least according to the supreme court, to add evidence about the sincerity of the claimant's belief. Is this person telling the truth?

Well, if an expert witness says that this is consistent with other practices in the community, well, that makes us more likely to believe them. But additionally, there must be some nexus with religion, and as I said before, some degree of non-trivial interference with the practice.

So ultimately, what happens is that the court holds the injunction was a non-trivial interference with the orthodox Jewish resident's religious freedoms under the Quebec Charter, and the court also makes clear that everything it's saying about religious freedom under the Quebec Charter of human rights and freedoms applies equally to the Canadian Charter of rights and freedoms.

Cheryl M.: I think we see then a shift in the next case I'm going to talk about, which is the Hutterian Brethren case. Again, sort of much of it focused on section one.

But there, the court addressed a conflict between a photo requirement opposed by the province of Alberta on all driver's licenses and the religious group's objection to being photographed.

Until this universal requirement was put into place, the province had permitted an exception for objecting religious groups like the respondents, the Hutterian Brethren. A

majority the supreme court found in favor of Alberta, determining that although the regulation infringed the religious freedoms.

So did accept that they are honest, sincere belief, the court said that they were justified under section one of the Charter.

So the Hutterian Brethren were deemed to have sincerely believed that the second commandment prohibited them from having their photograph willingly taken.

In section one of the analysis, the majority found that Alberta successfully demonstrated the requirement was rationally connected to the integrity of the licensing system and that an exemption would materially increase its vulnerability to fraud.

The regulations were held to be minimally appearing because no meaningful alternative was identified. Finally, the majority found that the benefits of exempting the Hutterian Brethren from the photo requirement did not outweigh the security benefits of the regulation.

This was based on a finding that the additional economic cost on the colony of the group, stemming from an inability to drive and a compromise to their self-sufficient tradition, would not be prohibitive.

They basically really discounted that aspect of what was the impact of this breach on the group. So let's start with your perspective on that latter case, you say the court's judgment represents a communicative failure, and you specifically mentioned the proportionality analysis at the section one stage; why?

Howard K.: Well, one of the reasons that the Hutterian Brethren case focuses so much on section one is that the government had actually conceded the religious freedom infringement. So basically, all the argument was about section one.

So I think what happened was the government looked at the test in Amselem; they looked at the facts of the case. What happened was the significant facts in this respect were that the Hutterian Brethren who objected to having their photos taken said that it was a violation of their understanding of the ten commandments.

So they read the prohibition on graven images very strictly and maybe more expansively than other people who use the bible as that sacred text. For a subset of Hutterian Brethren, they interpret the prohibition on graven images to prohibit all representational artwork.

So if you go into this particular Hutterian brother and colony, you won't see any artwork on the walls at all because they understand those all to be graven images. For them, this extends to photographs.

So this religious prohibition was, I think, relatively easily understood by the court because you can make sense of it on an individual level. I as an individual, if I'm a Hutterian who believes this, I can't have my photo taken because of this particular interpretation of the prohibition on graven images.

But there was actually a second argument, a second kind of religious freedom infringement that the Hutterian Brethren raised. They said it's interconnected with the first.

So one of the fundamental lifestyle commitments that really emanates from the religious commitments of the Hutterian Brethren is this belief in having a communal and collective lifestyle.

So on these Hutterian farms, everything is communally owned, right? And that's not by accident; this is an outgrowth of their understanding of what their form of anabaptist Christianity requires.

So they say the problem with requiring us to have our photos taken is not just the photo requirement, but it means that we can't have members of our community do the driving for our agribusiness, which is how we sustain ourselves.

So that compromises our ability to be self-sustaining, which is an aspect of our communal lifestyle. So we're to have to hire outside drivers or drive with expired licenses because we can't have our photos taken.

So what the Hutterian Brethren were arguing was that there really are two infringements going on here, or two kinds of infringements or two kinds of religious problems for them. One of the disagreements between the majority and the minority, and

the dissenting minority, in this case, was at what stage do we consider that second infringement.

For the majority, what they call the impact on the community is only to be considered in the proportionality stage. But for the majority, it's both; it's relevant in both because we need to understand the nature of the infringement in order to properly appreciate and properly do the proportionality analysis.

In fact, those ideas of collective ownership are very hard to understand in the dominant Canadian cultural understanding.

So Hutterite communities generally have to use the vehicle of the corporation in order to instantiate their ideas of collective ownership. So ultimately, what the court says is, well, what's going to happen is that they'll have to hire these outside drivers; well, that turned out to be an inaccurate prediction in some ways.

So from my interviews, where I interviewed people on two different colonies. In one colony, they did submit to having their photos taken because it was more important to them to have a communal lifestyle than to observe the photo prohibition.

In the other, they had their members still do the driving but drive with expired licenses. So they opted at least for a time to violate the law. So the court got that completely backward because they didn't understand what was important to the Hutterites.

Cheryl M.: Could you contrast the court's approach in religious freedom in the Hutterian Brethren case with the approach it took in Multani? Why or what was it that you thought that the court caught right in Multani?

Howard K.: Yes, that's a good question. For me, it's not really about the application of any particular test or the selection of any particular test; it's about how the court saw the issue and how the court understood the evidence.

One of the potentially challenging arguments in Multani was that what the Multani claimants were arguing was that the Kirpan, even though it's in the shape of a dagger, is not a weapon.

So even though the schools could divi prohibited weapons, the Multani argument was, but that doesn't apply to the Kirpan because it's not a weapon and it's actually an object of religious significance, and that's how to best understand it.

What we see in Multani is the majority of the court saying, well, it's not only that we shouldn't see this as a weapon, but we should zoom out and be more self-aware about the already dangerous things that are routinely allowed in schools, right?

Well, what about baseball bats and geometry compasses and knives that are in the cafeteria? Each of these objects is potentially dangerous. I bet if you did a search of the criminal law cases in Canada, you'd find plenty where baseball bats were used violently to commit crimes or to threaten violence. But yet, we routinely allow these in schools.

So what I think is so impressive about the Multani reasoning is that the court is able to make that leap, right? It's able to A, respect the narrative of the claimants who say the Kirpan is best not understood as a weapon but as an object of religious significance.

B, to be self-aware and say it's not only that we see the Kirpan as a non-weapon as something other than a weapon, but we see our own practices in a new light because of our engagement with the Kirpan.

Cheryl M.: Yes. It helped that they couldn't really demonstrate any cases in which the Kirpan had been used as a weapon.

Howard K.: That's right. Another really important or a really interesting aspect of this case, I learned by going back to the transcripts at the supreme court of Canada, and Multani had really fabulous counsel, Julius Grey was on for them, who is a very experienced civil liberties litigator.

One of the things that he did, which at first is a bit of a head-scratcher. He talks about the value of sexual equality in Sikhism when he's presenting the practice of the Kirpan. He

says, well look, in Sikhism or at least the version of Sikhism that my clients subscribe to, obligations are shared equally by men and women.

So it's not just that men have to carry a kirpan, but it's every baptized Sikh has to carry a kirpan. He talks about how they value sexual equality, but also other forms of equality, and what does this have to do with the case? Nothing, right? There's no question of sexual discrimination in the case; it's not at all relevant.

But what I think the reason this is so successful is he's building a bridge, right? He's using that as a kind of cross-cultural communication to say Sikhism actually shares a lot of values with Canadian constitutionalism.

So if we can build that bridge, then maybe you can start to see the Kirpan in a different light. So to me, that cross-cultural communication is successful by the court, but I think there's a lot going on the council side to make that happen.

Cheryl M.: Now you say that the cross-cultural communication is thin by contrast in the Amselem case. Could you elaborate on that and how it is demonstrated by the decision?

Howard K.: Right. So one of the implications of this very subjective approach to religious freedom is if all we're concerned with is the sincerity of the claimant, then we don't really care why the religious practice is significant to them.

All we care is that it is significant to them. Now that approach really has its benefits, right? It leaves a real zone of freedom for the claimant because they don't have to bring all of this evidence, and when I was talking earlier about the rabbis who were brought as expert witnesses, there's a real contrast there, right?

When there isn't an obligation to bring an authority from your religious background, then you as an individual have more of a zone of autonomy to say, well, this is religiously significant to me.

But it does end up treating religion as something of a black box, right? We don't want to look inside it; all that matters to us is the claimant says it matters to them. What this

means, and I don't think this is a fully bad thing, I just think that we need to take a moment to appreciate what this does to litigation.

As I said in the example that I used before, of counsel in Multani presenting the values of sexual equality and Sikhism, that's actually an incentive that we might want to be concerned about, right?

If religious freedom is in part about creating or safeguarding the religious diversity in Canada, when we incentivize council to present their client's religious traditions in ways that are constant with Canadian constitutionalism and its liberal ethos, then we're really asking them to fit their religion into a box and a set of categories that might not really apply.

This wasn't a challenge for the claimants in Amselem; we don't see them recoiling at describing their practices in these individual terms. In fact, their version of Judaism might actually have a lot in common with the liberal tradition; the judges of the supreme court would have been steeped in their legal training.

But that option was not really on the table in Hutterian. The failure that we saw in Hutterian was, I think, a failure to understand the importance of the collective lifestyle to the Hutterian Brethren, and that doesn't really jive very well with a more individualistic, classical liberal understanding of religion.

Cheryl M.: Now for sort of a slightly different point. Does the court's observance of the sort of vacillating nature of religious belief sufficiently explore the nuances of religious experience? Is this a step in the right direction?

Howard K.: I think this is actually a positive feature of the jurisprudence, right? It allows individuals to change and grow in their religious lives without worrying. Well, if I'm inconsistent over time, is that going to come back to haunt me so that I can't really change my practices when my life calls on it?

So I think that that's a benefit, and it doesn't require the individual to show their consistency of belief with some authoritative tradition. There's this fantastic book by an American scholar called Winifred Fullers Sullivan.

She describes a case in Florida; what was the issue in the case was a regulated cemetery; I think it was publicly owned cemetery. One of the rules in the cemetery was that you couldn't add ornamentation to the gravestones because of the way that the grounds were maintained.

So I think in this particular case, the gravestones were level with the ground so that the grass could be mowed just by running the lawnmower over top of them.

But there were a group of catholic visitors who had relatives and close people buried in the cemetery who would come and visit, and they would add ornamentation to the graves as an expression of their grief and their communion with their departed loved ones.

So the question that arose in the case was, well, is this the kind of practice that ought to be protected. The judge ultimately determined that this isn't an expression of Catholicism. They say they're catholic, but this isn't really a catholic practice, so it doesn't get protected. That to me is really troubling, right?

Because one of the ways that people express themselves in terms of their devotion and religiously might be what Sullivan says is that religion is a bit like jazz.

We have a basic structure, but each of us improvises on top of that structure in ways that are meaningful to us. The approach taken in that case doesn't allow that kind of improvisation.

This leads Sullivan to the conclusion that religious freedom is really impossible in law because we can't really define religion in a way that will be satisfying. In Canada, maybe we have found a way to use another biblical metaphor to split that baby, right?

That if we allow for this vacillating nature of religious belief, and we say you don't have to show that your practices are consistent with some authoritative version of your religious tradition, then we protect a wider array of practices.

By the same token, we have to recognize that this is part of a deliberately thin approach. So we just have to ensure that when courts approach religious practices that they're thin and thick in the right places, right?

So that if it's thin in allowing individuals to define what matters to them, well, that's a positive feature of the jurisprudence in my mind. But we also need to be thick enough to understand exactly what the problem is. Otherwise, we run into problems like Hutterian.

Cheryl M.: You talk about or referenced to the case involving burial grounds, is a nice segue into the 2017 religious freedom case that intersects with aboriginal rights, under section 35 of the constitution, to Ktunaxa Nation against British Colombia.

The Ktunaxa are a first nation whose traditional territories include an area in British Columbia that they call Qat'muk. Qat'muk is a place of spiritual significance for them because it's home to the grizzly bear spirit, a principal spirit within Ktunaxa religious beliefs and cosmology.

Glacier resorts sought government approval to build a year-round ski resort in the area, and the supreme court of Canada held in that case that the decision to allow the development did not violate the Ktunaxa section 2a Charter right to freedom of religion.

You have said that this decision is problematic and how it treats indigenous spirituality. So it's a sort of an extension of what we've been talking about religious freedom more generally; why is this case problematic?

Howard K.: It's a really good question. It was one of those cases that a lot of us who are interested in this area were watching and figured that the Ktunaxa nation had a really strong argument going up to the supreme court of Canada.

Ktunaxa nation is exceptional in a couple of ways; one of those ways is that, as I said before, in general, our approach to 2a at the supreme court of Canada has been to cast the right really broadly, which ends up putting a lot of pressure on section 1.

Ktunaxa nation is exceptional in that way because the work that the majority did was on the definition of the right, and what it takes to infringe the right, what is included and is excluded from the right of religious freedom.

The court does something pretty surprising in that it comes to a decision that, as far as I can tell from going over the records, no one argued, right? So this wasn't an argument that was subject to the adversarial process as far as I can understand.

What the court says is while the right of religious freedom protects your ability to believe and to practice, it does not protect what they call the spiritual focal point of worship, right?

So if we want to put this in terms of an Abrahamic faith, the right of religious freedom protects your right to worship your god, but it doesn't protect your god itself, okay. Now we might understand like what's going on in the back of the court's mind here.

It would be maybe a problem of religious neutrality if the state was going out and protecting the deities of various religious groups. There may be practical problems that were motivating the court here.

So one example that I thought might have been in the back of the court's mind, I don't know for sure; this is conjecture, is the Muhammad cartoon controversy in Denmark.

Where there was this question of a magazine presenting satirical illustrations of the Prophet Muhammad, and one of the problems with that for certain Muslim people is that there's an interdiction on the depiction of the prophet, right?

So they were complaining on that basis. So the court might be saying, well, you have a right to think and believe and worship how you want surrounding Muhammad, but you can't control what other people do about Muhammad.

Another potentially practical concern that might have been underlying the court is related to the indigenous population here on turtle island in Canada because of the importance of land to so many indigenous cultures.

If this claim was recognized, there may have been a lot of claims that could have been recognized. Anywhere that indigenous populations have lived, they likely have some important spiritual connection to the land.

That might create a problem to resource management, other kinds of government decisions that we expect to follow certain processes but likely not engage with religious freedom concerns.

Cheryl M.: Yes. I mean, this case is significant in how it treats sacred sites. I think people would be surprised to hear that churches or particular religious sites are not protected in some way.

But as you say, if it's indigenous spirituality, it's a broader sort of landscape that may be affected. But I think that there's some concern about the knock-on effect of this decision.

Howard K.: Well, for me, and I'm glad you raised this question of churches. For me, that illustrates the inequality inherent in framing the test this way.

Because most churches, especially for dominant religious groups in Canada, Catholics in Quebec and protestants outside Quebec, they don't need to rely on a religious freedom right to protect their churches because they own the churches.

So they can rely on their property rights instead, and that covers off whatever religious uses they want to make of the territory. What's even more troubling about this is that those dominant groups, historically, they got that land from the crown as a gift, right?

So you have a church of Notre Dame in Montreal is more than 300 years old, and it's always stood on the same site, and it got that land from the French crown. You could say similar things about churches very close to where you're sitting, Cheryl in Toronto.

That land in the glebe land of those St. James cathedral in downtown Toronto, that was given by the crown to that congregation, right? So it's not only that they can rely on the property right; they got that property right from the state.

Where we see the precise inverse with respect to indigenous communities, whose rights to be on the land are never presumed. Whose ownership and relationship with the land was often compromised by the state.

So to the extent that religious groups have sacred sites or important places, physical places in Canada, this framing of the test, I think, is likely very much to work to the disadvantage of indigenous groups.

So one of the problems with this test is its inherently likely unequal effects to the detriment of indigenous groups. The other problem with this test is that it's unstable. So in the piece that I think you're talking about is when I wrote with Senwung Luk, who's a practitioner at an indigenous rights litigation firm in Toronto. As we were thinking about it, we came to this example of the eucharist.

So the theology of the eucharist differs between Catholics and protestants, right? And broadly speaking. So for Catholics, the eucharist really is the body of Christ because of the doctrine of transubstantiation.

Whereas for protestants, it's more symbolic usually, right? So is the body of Christ the spiritual focal point of worship? If the answer varies depending on whether you're catholic or protestant, that seems a bit strange to us.

So it seems to us an internally unstable test that is also likely going to draw courts into exactly the kind of determinations they sought to avoid in Amselem. Where they're making determinations of what is the religious meaning of this particular physical thing in the world.

The court is not supposed to be the arbiter of religious dogma, according to Amselem, but how can they avoid that if they have to determine what exactly is the spiritual focal point of worship.

Cheryl M.: Yes. So a more consistent approach in Ktunaxa might have been to use the sort of section one analysis, rather than finding that there was not a substantial interference with the religious belief.

Howard K.: So there was a minority view that did exactly that, and it shows another troubling aspect of the jurisprudence in a different way, right?

So he says yes if the government is going to strip a location of its religious value for a community, that is a religious freedom infringement. To hold otherwise would be to say religious freedom for some, but not for others.

But then he very easily comes to the conclusion that the violation is justified. So how can the complete annihilation of a right ever be justified? I don't think he's wrong; I mean, he uses the doorway reasonable in this framework.

But I don't think he'd even be wrong on section one as it's currently understood. So one of the things that happens that we alluded to earlier in the Hutterian Brethren case is to me when I read it, the goalposts move a little bit on the minimal impairment analysis.

As far as I can see, the minimal impairment step of Oakes is really the only one that ever matters, right? Not to disagree too much with your previous guest, Professor Weinrib, I think his understanding of section one is true to Oakes, but I'm not sure that it's true to practice, right?

Because I can't remember the last time, I saw a case where a court says that objective is not pressing and substantial, sufficient to override the right. Or even that objective is not rationally connected to the means.

So we're already two steps into Oakes that the government wins almost every time. The last step of Oakes at the supreme court level, to my knowledge, has never made a difference, right? That overall proportionality of effects or the salutary deleterious step, it always follows minimal impairment at the supreme court level.

To my knowledge, there's only one appellate case in Canada where it's made the difference. That third step in Hutterian, what we see from the supreme court of Canada do is to say, well, if there is a valid objective, then the government must be allowed to substantially complete that objective.

So in step one of Oakes, if we say yes, that is a valid objective sufficient to override rights, then the government must be allowed to substantially complete it. To me, that changes the minimal impairment analysis as it was understood prior to Hutterian.

In one of the dissenting views of justice Abella's in Hutterian brethren she says, actually, there can be more of a back and forth, right? We can force the government to compromise a little bit on its objective in order to safeguard the right, but the majority doesn't say that.

So I think Justice Moldaver's view Ktunaxa is faithful to that Hutterian Brethren understanding of proportionality.

But that makes us scratch our heads to say, well if we're casting the rights broadly, we're going to put more pressure on the section one analysis, and if we're going to want governments to complete collective goals and give them a bit more leeway, then are we undoing all of the infringement work by allowing the justification work to be a little bit more forgiving.

Cheryl M.: Well, I want to turn now to something different in terms of the work that you're doing. So you have been working on addressing the impact of interveners in religious freedom cases, and most of these cases that we've been talking about, I think Multani was probably the exception.

But most of them had numerous interveners involved at the supreme court of Canada level; we've seen a real growth in that over the last few years. The Asper Centre itself has been involved in its fair share of interventions.

For listeners who might not be aware, intervenors in constitutional cases tend to be public interest organizations that the court permits to make legal arguments relevant to the issues in the case.

The idea is that in public interest litigation, it helps the court to hear from a broader spectrum of groups who might be affected by the court's decision.

So based on the research that you've been doing, in your view, how have intervening organizations contributed to the legitimacy or quality of supreme court decisions, particularly in the freedom of religion area?

Howard K.: Well, I am glad you raised those two ways of evaluating, so the quality and legitimacy. So these are theories that say why should we bother allowing interveners in? There's a real downside to allowing interveners in.

First of all, it takes more time for the court; courts are public resources. If the judges have to take more time on one case, it might mean that they can't hear other cases, right? Especially the supreme court of Canada, where rates of leave are particularly low.

The other thing is that it might actually be a hardship on the parties, because now not only do they have to respond to the arguments of the adverse party, they might have to respond to a dozen other arguments that they hadn't even contemplated, and that's going to cost them more because it's going to take more time for their council, right? So there are these potential drawbacks of allowing in interveners.

The arguments in favor of allowing our interveners to participate are exactly those you've identified, right? One, we might get better decisions because the judges of the court are exposed to a wider range of arguments.

Two, it might make the decisions of the court more legitimate because a broader range of actors have had the opportunity to participate.

So we were trying to look in the specific context of religious freedom litigation, and I should say the we that I'm talking about is myself and Katherine Chan, who's a professor at the University of Victoria's faculty of law, who's just a dream research partner.

She's so brilliant and such a critical thinker; it's really a treat for me to get to work with her. So we were trying to say okay, well in our little corner of constitutional delegation in religious freedom litigation, what do we see in practice? Is the allowance of interveners prevalent? And what does it do for legitimacy and quality?

So in our sample, which we took about a 20-year sample. We bookended the two trinity western cases, a 2001 decision and the 2019 decision. We see that just about everybody who wants to participate at the supreme court of Canada gets to.

I think there was only one application for leave to intervene that was denied in our 20 cases, and there's a huge number of interventions; we're talking about 150 interventions

in just 20 cases. In terms of legitimacy, this is something that's really hard to measure because which kind of legitimacy?

Are you trying to measure the opinion about the supreme court of Canada's decisions in the general public? Well, that's a kind of a survey-based method that you'd need that was kind of beyond our capacities.

What we did look at is the range of participants, and is it really attracting a broad spectrum of participation? Our finding was that there are a few organizations who are repeat players who participate over and over again in all these cases because it's an issue that's important to them.

But there is a pretty broad range of different number of religious groups who are represented and different numbers of issue groups who are represented. So one of the frequent participators is the CCLA, Canadian civil liberties association.

And they often have something interesting to say about religious freedom as they do about other civil liberties. But we do also see some one-time players, so for example, in the Ktunaxa case, there was a chamber of commerce that was represented because of their interests in the development of this proposed ski resort.

So we do see a pretty broad spectrum. Where our research got a little bit more in-depth was when we were looking at the so-called quality of the decisions. Now at first, we say look; when we talk about quality in contrast to some other scholars, we're not talking about optimal decision making because, for us, that's really a question of perspective.

How you think the religious freedom jurisprudence should look is a normative question, it's not to us a question that you can measure in terms of outcome in an economic way until you first articulate what your normative preference is. But what we were looking for was influence, so were the interveners getting through?

One of the recent critiques of intervention is that because just about everybody is allowed to play, the court has decreased the amount of time everybody gets in oral argument and decrease the number of pages that they're allowed to fill when they submit their written arguments.

Cheryl M.: We get five minutes. Five minutes is the standard oral argument now for interveners.

Howard K.: That's right, five minutes and ten pages, right? Probably you could do more in ten pages than you can do in five minutes, so I would imagine that puts more of a premium on the written advocacy that you can do.

But we've probably been talking for many five-minute increments already, and a lot of the cases were just scratching the surface, right? As you say, it's hard to say something in five minutes.

So the question for us is, well, if it's a mile wide but an inch deep, how can the interveners get through? Is this a meaningful exercise? Or is it some kind of inefficient use of court resources? Or not really worth doing anymore? What we said was well; let's look for some general indicators of influence.

So what we looked for were cases and academic materials that were only incited in intervener materials, not cited in party materials. We found like a good number of those references make their way into the supreme court decision.

So something is getting through, right? We have actual evidence of that getting through, and there are also a small number of cases where interveners are referenced directly by name in the decisions of the supreme court.

So those were what we see as kind of general indicators, and we say there's actually pretty good evidence there. Then what we tried to do was do a deep dive on a single theme in this already small world of religious freedom litigation because this kind of work really takes a long time and is really painstaking.

So what we did was we looked at all of the factums of the interveners and the parties in our data set, and we coded them thematically. Then we chose one theme that appeared over and over again, which was this idea of collective religious freedom. We tried to see is there evidence of influence?

Are the arguments getting picked up? Is the language getting picked up? What we see in general is that in the majority of reasons, you don't see a very strong evidence of

influence. One maybe significant exception is in the crafting of the Amselem test itself, which has come to be, as we've said, the dominant frame for religious freedom litigation.

There are sources cited only by interveners that are cited by the majority of the supreme court in crafting the test, so that's maybe one direct line of influence that we can see. But where we see stronger evidence of supreme court opinions picking up on the language and ideas of interveners is in minority opinions and dissenting opinions.

So we have a couple of examples, one in the trinity western decision, there is a minority of you by justice Rowe, where some of the language that used tracks very closely with two different interventions.

Now you might say, well, these are minority opinions; they don't really matter. But we have seen over and over again how minority and dissenting opinions come to exert an influence on future cases.

So if you think about, as we do, if you think about interveners as norm entrepreneurs, people in groups who participate in litigation because they want to shape Canadian law in a particular normative way, then we do see some evidence of success.

One last finding that we made was in keeping with what I said about Ktunaxa; there are moments when the supreme court comes to a decision of law that nobody argued. Ktunaxa case is probably the strongest example of that; this spiritual focal point of worship test that the court lands on, never have been brought up by any of the parties or interveners.

Also, a Hutterian Brethren, where the majority says impacts on the community are only to be considered in the proportionality analysis, nobody really directly made that argument.

So it reminds us that as much as parties and interveners might be norm entrepreneurs, it's the court that has the final say, and the power relationship is asymmetrical.

Cheryl M.: Now, you've identified in your research that interveners are becoming more involved in the lower courts, namely at the fact-finding stage of cases, at the trial level, as well as at the provincial courts of appeal. What's the significance of this trend?

Howard K.: So one of the interesting things when you think about intervention is that interveners are put in a bit of a tight spot because they have to convince the court that they have something unique and interesting to say that will shed some light on the case. But they're not allowed to raise new facts or issues.

It's not exactly like this, but it's kind of like the court is saying tell me something new, but don't tell me something I haven't heard before, right? So that's a bit of a tight spot. What we see is sometimes interveners push of those boundaries, right?

Sometimes they make factual claims in their arguments because you need those facts in order to understand, right? Why does the supreme court care what the world sick organization has to say about trinity western university right? It's not the same community. Well, it cares, or we think it should care because it needs to think about how its general holdings of religious freedom are going to impact different communities in different ways.

But how can the world sick organization explain how it's going to impact his community without talking about its religious practices? Well, those are facts not in the record.

So those kinds of interveners who need those additional facts to explain why their voice is important and why they're saying something new, they kind of have to bend the rules about facts and issues in order to make their arguments intelligible.

What we might be seeing is involvement at the lower stages gives a bit more flexibility and allows the interveners to contribute to the creation of the record that only happens at trial, and the appellate courts are kind of stuck with that factual record.

So the more they can participate at an early stage, the more they might have influence there; they might see pushback from judges, right? So we see at the federal court of appeal, for example, some justices are trying to narrow the range of interveners who participate in certain kinds of cases.

So going contrary to the trend that we see at the supreme court of Canada, where pretty much everybody who wants to gets to intervene at least in our data set.

To me, this participation at earlier stages, those interveners are going to be able to exert at least some influence on the factual record, which can be determinative on questions of proportionality which is always meant to be contextual and fact-based.

Cheryl M.: Right. Well, we'll be talking a little bit more about the practice of interveners when we speak with Adriel Weaver in our practice corner in this segment.

I want to thank you for this rather wide-ranging and interesting discussion today. To close out our time together, do you have a particular project that you're working on that you would like to share with us?

Howard K.: I'm on research leave this term, so I have a little bit more time to think and play. Given that next year is the 40th anniversary of the 1982 Constitution act, I'm working with two colleagues.

We are gathering a group of scholars to think about the way that the 1982 constitution act has been surprising in it's 40 years of existence. So we're calling the project the surprising constitution.

Our plan is to meet later this year, sometime in November, and workshop papers and hopefully put together a book that will come out in time for the 40th anniversary of the Charter next year.

So I'm thinking in particular about what's called the supremacy of god clause. So in that preamble to the Charter, there's this reference to Canada being founded on the supremacy of God and the rule of law.

The way I think about it is that clause has done very little of any work in the 40 years of the Charter's jurisprudence. I think imagine that you just turned 40, and the way that you've been introducing yourself to everybody for 40 years has been completely meaningless because that's how the preamble starts.

So I'm trying to think about that's a bit surprising on its own that it's done so little work, but what capacity does it have to surprise us in the future.

Cheryl M.: Well, that sounds fascinating. I can think of a number of ways the Charter has been surprising, so I can't wait to see what comes out in this book.

We've been speaking with professor Howard Kislowicz of the faculty of law at the University of Calgary about religious freedom under the Charter.

Next up in our practice corner, I'll be speaking with Adriel Weaver of Goldblatt partners in Toronto about representing interveners in constitutional cases. So thank you again for joining us.

Howard K.: It's been a pleasure; thanks for having me.

Cheryl M.: We now turn to our practice corner with Adriel Weaver. Adriel is a public law litigator; her clients include criminal defendants, prisoners, immigration detainees, human rights claimants and public-interest organizations.

She was counsel to the Asper Centre in our intervention in R vs. Sharma at the Ontario court of appeal. Adriel also represents faculty associations, as well as professional associations and unions in the health care sector. So welcome, Adriel.

Adriel W.: Thanks so much, Cheryl.

Cheryl M.: So we've been discussing in this episode religion and interventions and constitutional litigation. I want to start with your connection to both through your intervention work.

You represented an intervener in the Ktunaxa case, but I would really like to start with Trinity Western. Can you tell us about that case?

Adriel W.: Sure. Trinity Western was, in fact, two cases arising out of decisions of the law societies of British Columbia and Ontario to deny accreditation to a proposed law school at trinity western university or TWU.

TWU is an evangelical Christian institution, and it requires it's students to sign and adhere to a community covenant agreement. That covenant prohibits sexual intimacy that "violates the sacredness of marriage between a man and a woman, even when students are off-campus and in the privacy of their own homes."

So it creates a significant barrier for LGBTQ students in particular, who would effectively be required to deny or refrain from expressing a crucial component of their identity in every aspect of their lives in order to receive a legal education at TWU.

So they would have to do that for the entire three years of law school. Now the law societies are charged with regulating the legal profession in the public interest, and both held that broad public interest mandate included fostering diversity and excellence within the bar and promoting equal access to legal education, and ultimately the legal profession.

On that basis, on the basis of that broad conception of the public interest, the law societies declined to approve TWU's proposed law school. That meant that any law degree granted by TWU would not be recognized as qualifying a graduate for admission to the bar.

So obviously, high stakes for TWU, high stakes for students who might wish to attend that law school. So they brought applications for judicial review of these decisions.

Those decisions on judicial review were appealed; ultimately, the cases made their way to the supreme court. In both, the majority of the supreme court held that although the law society's decisions limited the religious freedom of members of the TWU community, they struck a proportionate balance between that freedom and the statutory objective of regulating in the public interest broadly conceived.

Cheryl M.: Many might attribute the current treatment of interveners by the supreme court of Canada to the avalanche of interventions in that case, and I don't think I'm exaggerating when I use that word.

Adriel W.: Yes. I think avalanche is entirely accurate, and it's a really fascinating story, at least to law nerds. So there were more than two dozen organizations who sought leave to intervene or one or both of these appeals.

Justice Wagner, as he then was, initially granted leave to nine of those organizations and dismissed the rest of the applications, including those of every single LGBTQ organization that had sought to intervene, as well as some religious groups.

So that order was issued on a Friday. It was immediately met with outrage and incredulity at the exclusion of LGBT groups and perspectives from the appeal, and there was continued discussion on social media over the weekend.

This was a very hot issue among legal commentators and activists. By the following Monday, the court had clearly become aware of this controversy and Chief Justice McLaughlin, then Chief Justice McLaughlin, took the unprecedented step of varying Justice Wagner's original order, adding a full additional day of hearing and granting leave to every proposed intervener.

Then Justice Wagner took the equally unusual step of engaging in an on-the-record discussion with the globe and mail, in which he explained that he felt the groups to whom he had originally granted leave would effectively represent the views of the LGBTQ community.

He also indicated that after he was made aware of those concerns, he sought out the chief justice to discuss how the court might respond.

They agreed it would be best to set a second day for hearing so that other interveners could participate. Then the supreme court itself issued a news release on the intervention decision.

Which stated that while the court doesn't normally give reasons for it's decisions on intervention applications, the concerns raised by LGBTQ plus groups and others here really called for a response.

So we see a clear indication of the court's sensitivity to the perception that certain voices had been excluded, and that release also noted that scheduling constraints had informed Justice Wagner's initial decision.

It indicated that when considering intervention applications, the court always strives to ensure that it will hear a wide range of voices while also managing the court's time efficiently.

So putting it in that context of judicial economy and judicial efficiency. The trinity western case, this debate, this discussion, this shift in the orders provided what is really a very rare glimpse into both the court's internal processes, as well as it's obvious concern for it's perceived receptiveness to a variety of perspectives. Ultimately, its legitimacy perspectives and ultimately its legitimacy.

Cheryl M.: And its sensitivity to the media in all forms, including Twitter, and just the mainstream media, in particular the globe and mail.

Adriel W.: Absolutely.

Cheryl M.: So I watched with great interest the day of interveners in that case and was very pleasantly surprised at just how well it proceeded.

I was concerned with five minutes and 26 interveners, whether or not there would really be effective advocacy. I thought the interveners played an essential role in the arguments?

Adriel W.: That was very much my impression, too, as someone who had the privilege of actually sitting in that incredibly packed courtroom. There was obviously some overlap in the general orientation that various interveners brought to the case.

But I thought that each provided a truly unique perspective on particular issues engaged. Both the majority and dissenting judgments reflected many of the submissions that interveners made.

So I think they had an impact on the substance of the decision that was ultimately rendered. I would also say that the role played by interveners went beyond their contributions to the arguments here.

I think that's probably true in most, if not all, cases, but it was especially apparent in these appeals, given that procedural history we've just been discussing. So since the advent of the Charter, there's been a great deal of debate about the role of the court.

We often hear complaints, especially though not exclusively on the right about so-called judicial activism, unelected and unaccountable judges making decisions about fundamental rights that are based not on precedent or legal doctrine but their own political agendas.

The court itself is obviously live to those debates; it's mindful of how it's perceived. So I think there's a communicative and a legitimating function to a culture of intervention. My colleague, Dan Sheppard, has argued quite persuasively in my view that interventions can support core democratic values of respect for difference, protection of minority rights and interests and participatory decision making.

So interventions by groups representing marginalized communities help to ensure that the needs and concerns of those communities are taken into account.

And more generally, greater public participation through interventions serves to democratize the court's process and further legitimate not only its decisions in individual cases but its broader constitutional review function. Cases like TWU really underscore the democratizing and legitimizing function of interventions.

So these were appeals that had attracted considerable media attention, considerable public debate. They were generally framed in that discourse as involving a conflict of rights between religious freedoms on the one hand and equality on the other. Both core aspects of identity.

I think they felt quite personal to many people, both members of religious communities and members of the LGBTQ community, and perhaps, particularly to those who are members of both. The questions engaged are challenging ones that go to the heart of a pluralist democracy.

How far does religious freedom extend? Can it limit the rights of others? How should a proportionate balance be achieved? Whatever your view is of the court's answer to those questions, I think there was incredible value in that answer only being reached after a lengthy public hearing in which multiple perspectives were represented.

By multiple perspectives, I mean not just the religious perspective and the LGBTQ perspective, but a range of views and approaches within those groups. So there was a real richness to the interventions in this case that I think was quite instructive and quite illustrative of the role that interveners can play.

Cheryl M.: I want to ask you now no longer about the TWU case itself. You've intervened in a number of different cases or acted for intervener groups as counsel. When you are acting for an intervener, what are you trying to do?

Adriel W.: So fundamentally, I think you're seeking to broaden the court's lens beyond the immediate controversy between the parties. That can take multiple forms.

So you might be seeking to ensure that the rights and interests of individuals and communities who are not directly before the court or otherwise before the court but who will be affected by its decision are represented and inform the court's deliberation.

You might be seeking to locate the particular legal question in a larger jurisprudential context. So how have other jurisdictions approach this issue? What does international law say?

What are the consequences of taking a particular approach to the questions engaged in this case for the development of legal doctrine more generally?

So ultimately, you're trying to assist the court in making the best decision possible, and I think that's necessarily one that is live to those broader societal and legal contexts.

Cheryl M.: Interveners get to file both written submissions as well as make oral arguments. The supreme court has really significantly limited those to ten pages and five minutes.

In your view, how important is the written submissions versus the oral arguments when it comes to intervenors?

Adriel W.: I wouldn't say that one is more important than the other; I think they play very different roles. So when you're drafting your written submissions, you have the benefit of the appellant's factum.

You have the benefit of the leave applications of other interveners, and so you have some indication of what others intend to argue, and you can prepare your arguments accordingly.

But you don't yet have the respondent's factum, so you don't know precisely how the issues have crystallized as between the parties. Even more significantly, you don't have any indication of which issues and arguments the court is going to find particularly engaging or particularly vexing.

So ideally, you want to preserve some time in oral argument, to pick up on the points judges have made, offer alternative or additional answers to questions they've posed to other counsel, and of course, answer any questions that they pose to you.

It can be extremely challenging at first not to be able to follow your carefully crafted script, especially when you've managed to get it down to that five-minute allotment. But questions are a sign that the court is meaningfully engaged with your argument.

I think it's ultimately much more effective to have a conversation than to deliver a rehearsed speech. So oral argument gives that opportunity for a more dynamic engagement; your written submissions obviously give an opportunity for a much more nuanced and precise engagement.

Cheryl M.: So you represented the Asper Centre at the Ontario court of appeal in the Sharma case. How do interventions differ depending on the level of court?

Adriel W.: So interventions at the trial level can provide an opportunity to contribute to and shape the evidentiary record. That can be essential to advancing certain arguments, both at trial and in any subsequent appeal.

That Sharma case is a perfect example of the value of trial-level intervention. So just for some background, that case concerned a young indigenous woman Cheyenne Sharma, who was convicted of importing cocaine.

She's an intergenerational survivor of the residential school system who experienced considerable personal hardship growing up.

When she committed the offense, she was behind on rent, she was facing eviction with her young daughter, and she agreed to retrieve these drugs, import them to Canada in exchange for twenty thousand dollars from her boyfriend in order to avoid homelessness for herself and her daughter.

She was 20 years old at the time; she had no prior criminal record. Were it not for amendments to the criminal code introduced by the Harper government; she would have been eligible for a conditional sentence?

A sentence she could serve in her community, crucially while continuing to parent her daughter. But the enactment of the safe streets and communities act in 2012 made conditional sentences unavailable for certain categories of offense, including drug importation.

Aboriginal legal services intervened in Ms Sharma's sentencing hearing, so at that first level of court, arguing that the criminal code provisions, making conditional sentences unavailable, violated Ms Sharma's rights under sections 7 and 15 of the Charter.

They filed expert evidence on the relationship between colonialism, anti-indigenous racism and the criminalization of indigenous women, as well as the impact of restricting the availability of conditional sentences.

The court of appeal relied heavily on that evidence in finding that a section 15 breach had been established. So when the Asper Centre and leaf intervened in that appeal, we were able to rely on additional data and findings from government bodies from commissions of inquiry.

We were, of course, also able to make submissions on how section 15 ought to be interpreted and applied. But we would not, at that stage, have been able to supplement the record with that crucial expert evidence.

So one of the challenges in intervening at appellate courts is that the record is fixed, and often, it lacks the kind of social scientific or other evidence that would ground arguments you might otherwise want to make.

It's a very different exercise at the appellate stage and one that often requires some degree of ingenuity in figuring out how to anchor the perspective you want to contribute in the existing record.

Cheryl M.: So, what are some key practice tips that you think are essential to a good intervention?

Adriel W.: A good intervention is, in my view, one that both provides a truly unique perspective and is actually of assistance to the court in deciding the questions before it. There are often multiple interveners, as in the trinity western case that we've been discussing, whose interests are broadly aligned. Not identical, but broadly aligned.

So in practice, you have to coordinate with other interveners to ensure that you're not duplicating one another's submissions. You also, I think, have to take care to ensure that your submissions aren't too esoteric or obscure, that they're not focused on issues that are of potentially quite significant academic interest.

But ultimately, tangential to the matters to be decided. So you really want to be focusing on what the court is actually going to have to grapple with, right? What are the questions that it has to answer?

That said, you also want to provide a perspective that transcends the interests of the parties.

As we've described, that could be about the potential implications of deciding the case one way or another, for communities or interests that aren't otherwise represented, or for the development of the law more generally.

So it's a bit of a balancing act. You want it to be responsive to the issues engaged but also go beyond.

Cheryl M.: Can you describe some situations in which interveners have made a difference, good or bad?

Adriel W.: Absolutely. I think one of the most compelling examples of interveners making what is, in my view, a very good difference is the Asper Centre's intervention in the Bedford case.

So Bedford was a constitutional challenge to provisions of the criminal code that criminalized various activities related to sex work, including keeping a common body house that's a place kept or used for the purposes of sex work and communicating for the purposes of sex work.

The claimants there argued that these provisions put the lives and the safety of sex workers at risk by preventing them from taking steps such as establishing a secure indoor working environment or effectively screening clients.

But those same provisions had previously been considered more than two decades earlier in the prostitution reference, and there, the court upheld them as constitutional.

So that previous finding engaged the principle of stare decisis, and that was the focus of the Asper Centre submissions. So the Asper Centre frequently does this kind of meta-level intervention that isn't just about the particular legal issues but about how courts ought to go about exercising their role.

Cheryl M.: Yes. Similarly, we did one in the Barton case, which was a criminal case in which we argued about the role of interveners in cases.

Adriel W.: Yes. I think that intervention was also incredibly useful and very compelling. In the Bedford case, the Asper Centre argued that the common-law principle of stare decisis is subordinate to the constitution.

So the court cannot be required by this principle to uphold a law which is unconstitutional, and the court agreed. It specifically cited the Asper Centre submissions in its reasons. I can say from my experience how incredibly gratifying it is to be cited as an intervener and to know that you had an impact in that way.

But what's particularly interesting about the Bedford case, I think, is that that decision laid the groundwork for the court's determination in Carter that the prohibition on medical assistance in dying was unconstitutional.

Despite similarly having reached the opposite determination in the Rodriguez case, some 22 years earlier. So that's an example where an intervener made a significant difference, not only in the case at hand but beyond, really shaped the law and shape the court's approach. I think interveners can also make a difference in ways that can't be fully discerned just from reading the decision itself.

My former colleague Cynthia Peterson represented EGALE in its intervention in Egan. So that was a constitutional challenge the opposite-sex definition of spouse in the old age security act.

The challenge itself was unsuccessful, but I think it's generally seen as a significant victory for LGBTQ communities because the court unanimously, and for the first time, in that case, recognized sexual orientation as an analogous ground under section 15.

Cynthia's intervention on behalf of EGALE was specifically cited by Justice Iacobucci in his dissenting opinion. He would have found not only that the provision violated section 15 but that it couldn't be saved under section one.

But what's really interesting to me about that intervention is this, when Cynthia, who's now Justice Peterson, was appointed to the bench. We at Goldblatt partners had a going away party for her, and our managing partner played what I'm pretty sure was a VHS tape of her submissions.

These were made long before the days of webcasts. Those submissions were not surprisingly really cogent, compelling, legally sophisticated. But what really struck me was that when most other people in the courtroom were referring to homosexual couples and homosexual relationships, Cynthia said gay and lesbian.

When she spoke about the gay and lesbian community, she said we, not they. I think that's an instance where the difference an intervener made was not just in the fact that it directly affected equality-seeking group was represented. But also in the manner in which that representation was undertaken.

Cheryl M.: So, going back to practice issues and restrictions that we have been basically given by the supreme court of Canada. Do you think we are stuck with the 10-page factum and the five-minute argument for interveners?

Adriel W.: I'm sorry, I jumped on the end of your question there because yes, yes, I do. Unfortunately, at least for the foreseeable future, I think we're stuck with ten pages and five minutes.

Perhaps, this is a bit Pollyana-ish, but I think it's really interesting that interveners adjust their strategies in response to limits.

So historically, we often saw interventions by coalitions of organizations, and I think that's potentially less likely going forward, not because organizations aren't working collaboratively, but because they prefer to apply separately, get 20 or 30 pages if there are two or three of them to work with, and then craft complementary submissions.

Cheryl M.: The five-minute argument, I think, is what's the hardest part about it is ten pages I think we've lived with for quite some time.

Adriel W.: Five minutes is really difficult, especially if you begin to get questions early on. I've certainly had the experience where you sit down feeling like you didn't make any of the

submissions that you had intended to make because you were so busy trying to answer questions and address issues as they arose.

That can be incredibly frustrating. We talked earlier about the value of multiple perspectives being heard, and I think particularly, when you are there representing a particular community, you want to feel like you have, in fact, brought that perspective to light, that it has meaningfully been heard, and five minutes doesn't always afford that opportunity. So I think that is quite unfortunate.

Cheryl M.: Many people don't realize that in constitutional cases, in particular, the most frequent interveners or government, who actually do get more than five minutes. Just wondered why that is, and how do their interventions differ from public interest organizations?

Adriel W.: So where a notice of constitutional question is stated, any attorney general may intervene simply by filing a notice of intervention. They don't have to seek leave. So attorneys general aren't subject to that initial gatekeeping process that applies to public interest organizations.

While public interest organizations are generally limited to 10 pages of written submissions, as we've just been discussing, attorneys general have up to 20 pages. It can be slightly unbalanced.

There are cases where many attorneys general intervene, and the cumulative effect of that is that you have a lot more space, a lot more air time given to interventions by government than interventions by public interest organizations or citizens groups.

Cheryl M.: Now you were talking about just this tendency toward interveners going in on their own as opposed to in coalitions given those restrictions. Do you think that that has led to too many interveners at the courts these days?

Adriel W.: I don't think there are too many interveners. I obviously have my own biases that I bring to that question, and I'm not a judge. But it seems to me that the cost-benefit analysis is pretty straightforward.

There's no requirement that courts address intervenor submissions in their decisions. So I think at worst, an irrelevant or unhelpful intervention requires at least at the supreme court level, whatever time is necessary to read a 10-page factum and an additional five minutes of hearing time.

There's, of course, some additional administrative burden; I don't mean to discount that. But overall, I think the cost to the court's time and its efficiency can fairly be said to be low.

On the other side, there is the potential for any given intervention to really enhance the court's analysis, to complicate its approach or to clarify its approach, to contribute to better outcomes, to make better law.

There's also the value, as we've been discussing of a culture of intervention, to the court's deliberative processes and public perception. If I were a judge, I don't know why I wouldn't want as much assistance as could possibly be provided in grappling with some of these very complicated questions.

So from my perspective, a robust culture of intervention is something to be celebrated and fostered.

Cheryl M.: Well, thank you, Adriel. We're going to leave it at that. We've been speaking with Adriel Weaver of Goldblatt partners about intervening in public interest litigation and hearing about the various practice tips, as well as the benefits of interventions.

Today's episode began with Professor Howard Kislowicz speaking about, in particular, freedom of religion and sharing a bit more about his musical endeavors and our theme, sea shanty.

Future episodes to be released before the end of 2021, we'll be covering equality rights with Mary Eberts and Professor Martha Jackman. As well as the Charter and climate change litigation with Nader Hassan and the return of Professor Kent Roach. To close this episode, you'll be treated to more of our theme shanty Charter a course.

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