[Episode 6 - Section 15 of the Charter]

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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.

It is our hope that over the course of this episode, whether you are a law student, a lawyer or care deeply about how our laws can support social justice, that you learn about an aspect of Canadian 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, we focus on section 15 of the Canadian charter of rights and freedoms, which states that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination.

In particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

The supreme court of Canada in Fraser versus Canada has articulated the test under this section, in that you must prove a violation of section 15, and claimant must demonstrate that the impugn law or state action on its face or in its impact creates a distinction, based on the enumerated or analogous grounds and imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage.

Adverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground.

The court stated that the norm of substantive equality underpins the equality jurisprudence. To decipher what all of this means, we are privileged to speak to two distinguished guests today, Mary Eberts and Jonathan Rudin. Given the breadth of the

topic we are discussing, we won't have time for our usual practice corner, but Mary and Jonathan both bring significant litigation experience to bear.

Mary Eberts is a Canadian constitutional lawyer, and a former University of Toronto, faculty of law member. She was active in securing the present language of section 15 of the charter and is a founding member of the women's legal education and action fund.

In 2017, Mary was elected an officer of the order of Canada. She has written extensively on constitutional law, and in particular, equality rights under the charter, and has appeared many times before the supreme court of Canada on constitutional matters.

Jonathan Rudin is the program director at aboriginal legal services, an organization that he helped to establish in 1990. He has written and spoken widely on issues of indigenous justice.

His book, indigenous people and the criminal justice system, was released by Emond Publishing in 2018 and won the Walter Owen book prize from the Canadian foundation for legal research in 2019. A second edition of the book will be published in 2022.

Both Mary and Jonathan have been constitutional litigators in residence at the Asper Centre; welcome to both of you.

Mary E.: Thanks very much.

Jonathan R.: Hi.

Cheryl M.: So Mary, I wish to begin with you and some of the history of section 15 of the charter. Section 15 underwent numerous revisions before parliament finally enacted the provision in its current state.

You've previously written about the tremendous influence that social justice advocates had on the development of the provision; these include women's rights advocates like Doris Anderson and Beverley Baines. Lesbian and gay rights advocates like Svend Robinson, disability rights advocates like Yvonne Peters and Jim Dirksen, and advocates for the rights

of people of color like Daniel G. Hill. Could you give us an overview of the social context in which these advocates were responding?

Mary E.: I think the best way to do that is to focus on a date, which is only ten years before this charter began its way through the process, and that is 1970. In 1970, we were only two years beyond where Trudeau issued his white paper.

In that paper, he said that the treaties had more or less died and were no longer of any use and the Indian Act should be repealed, and Indians should become just like ordinary Canadians with tiny plots of land somewhere.

At the same time as that was going on, two courageous women Yvonne Bedard and Jeannette Lavelle were taking the government to court under the Canadian bill of rights to try to challenge discrimination against them under the Indian act as Indian women.

In 1970, the royal commission on the status of women came out with its report, documenting a whole swath of discrimination against women, and in 1972, there was a bare beginning with some human rights legislation that protected women.

It was only in the 1970s when Ontario, for example, started releasing persons with a mental disability into the community. Prior to that, they had been locked up inside these giant fortresses, which we used to call the Ontario hospital, and they had been without society, without people around them for many years, some of them most of their lives.

When they started into the community, then they joined with others with a disability, and as Jim Dirksen said to me once, we could begin to come out of our parent's addicts and start to work on these issues.

As far as people of color were concerned, it had been only a short time before that, that we had the Canadian government finally allowing persons from China to come into Canada as immigrants.

Prior to that, they'd been under a ban, and there had been a huge head tax on them. Persons of color from the Caribbean, for example, were still working as maids and coming to Canada on visas that did not allow them to bring their families and their children with them, ever. That's just a snapshot.

Cheryl M.: It doesn't sound very good as a snapshot. So what in your view were the biggest missed opportunities in terms of the version of section 15 that was ultimately decided on?

Mary E.: Well, I think the biggest missed opportunity was that a great number of the advocates wanted equality as a central principle of the constitution that would be right up there near the front, near where section one came to be, and there were various kinds of submissions about that.

Many people didn't get that anywhere, and women got it in section 28, which has been barely litigated and barely invoked since then, and section 35 of the constitution on indigenous rights was a pretty substantial afterthought to the whole constitutional process.

So that's what we really missed, was the giant statements of principle that Canada is an egalitarian country and means to abide by that.

Cheryl M.: You've argued that the supreme court jurisprudence on section 15 has bogged itself down too much on the term discrimination that's in the section, without due regard to the rest of the words. What in your view does this approach do wrong, or where does it go wrong?

Mary E.: The section 15 language has four rights in it, the right to be equal before and under the law, and the right to equal protection and the equal benefit of the law without discrimination. For too long, courts would just skim right by the description of the four rights and just get to discrimination.

Then they would kind of indulge in their own ruminations about what being protected from discrimination means, and they would do that without the benefit of textual language like the language found say in human rights codes, they would just kind of

pre-associate about what discrimination meant, and how they should deploy it in the courts.

So it really took a long time to begin to have any serious jurisprudence under section 15; what we got mostly was a reflection of judges individual beliefs about the idea of discrimination.

Cheryl M.: So when section 15 was being drafted, social justice advocates like yourself and Doris Anderson proposed a far broader list of grounds of discrimination than were actually enumerated, and since then, the courts have recognized a number of analogous grounds. Can you explain how the courts have done this?

Mary E.: The language of section 15 right at the end refers to the concept of what we have come to call analogous grounds. The grounds of discrimination listed in section 15, they're not closed; it's not a finite list.

The language contemplates the possibility that there could be other grounds, and this is what happened during the drafting process for section 15; advocates for gay and lesbian rights wanted them included in section 15.

There was a tremendous amount of political hesitation to do that, and they were kind of, people attempted to fog them off with the idea that oh, well, you could be included one day.

Sure enough, I mean, they worked like anything, they worked so hard to bring cases and do other things, and finally, yes, they did get a case that said that sexual orientation was included in section 15. But all of those inclusions had to be done by judges.

Cheryl M.: So, Jonathan, I want to bring you into the conversation now. As one of the first times that the supreme court of Canada recognized what the term analogous grounds meant and what was involved a case by an indigenous woman.

Can you give us some background to the history of section 15 and indigenous peoples in Canada?

Jonathan R.: Well, the history of indigenous people in Canada will take a bit longer than you have for the podcast.

Cheryl M.: In relation to section 15.

Jonathan R.: I think before we get to the charter, if it's okay, we need to go back a little bit. So before there was the charter, Mary referred to the Canadian bill of rights, which was enacted in the 1960s. In 1969, the supreme court of Canada issued probably one of the very few positive decisions under the Canadian bill of rights, and it was a case called Drybones.

Drybones was about a first nations man in the northwest territories who was found to be intoxicated off the reserve. There weren't any reserves in the northwest territory, so any first nations person who was intoxicated would have been off reserve. As a result of being intoxicated off the reserve, he was jailed.

He challenged that law because, obviously, non-indigenous people didn't face those sorts of restrictions, and he won under the Canadian bill of rights; it was found to be discriminatory, and this was seen as a great victory.

Then a few years later, Mary spoke about the case of Lavelle. In 1973, the supreme court issued their decision in Lavelle, and it's probably one of the worst decisions in supreme court history, and it's a case that even they have now sort of said we made a horrible mistake on.

This was the case about what happens when an indigenous woman or a non-status Indian woman used the proper terminology here. When a status first nation woman married a non-status man, and in those cases, the status Indian lost her Indian status. However, if a status Indian man married a non-status Indian woman, she got status.

So the case under the bill of rights was well; clearly, this is a violation of equality because status Indian women are being treated differently than status Indian men. The supreme court found a way to say that this was okay, that it was not discriminatory, and I'm not going to try and explain how they did that because it makes no sense.

Because of that decision, it basically condemned the bill of rights to the scrap heap, and no one really wanted to rely on it anymore. So then there was a charter in 1982, and section 15 came into force in 1985, and there are a number of cases about section 15 involving indigenous people.

The first is Corbiere, which was a decision in 1999, and that was a case about an analogous group, and the analogous group, in this case, were first nations people who lived off reserve. The large number of those people were first nations women.

The issue, in this case, was that in a number of first nations communities, in order to vote for chief and council, you had to live on reserve. So these individuals said they were being discriminated against because they couldn't vote, and the discrimination was on the basis of what they called aboriginality residence, and the supreme court found in their favor.

Then, a year later, there was a case called Lovelace, and Lovelace, like a number of the cases I'll be talking about, pitted two indigenous groups against each other. Lovelace was a case brought against the Ontario government by non-first nation groups, who wanted to get a share of the proceeds from Casino Rama, which only went to first nations groups.

In that case, the non-first nations groups, the Lovelace group, lost, the court found that was not discriminatory. Then, in 2008, there was a case called Kapp, and Kapp was one of these cases where the supreme court tried to come up with a test for equality.

Kapp was the case brought by non-indigenous fishers who were charged with fishing out of season, and they said, but indigenous fishers can fish out of season, why can't we? We're being discriminated against.

The supreme court developed this test that was fairly impenetrable and hard to figure out. But which found that there was no discrimination in that case. Then, in 2011, there

was a case called Alberta and Cunningham, and this is a case, again, largely pitting two indigenous organizations or people and organizations against each other.

The Cunninghams lived on Metis settlements in Alberta, and the Metis settlements are recognized in law in Alberta. They were kicked off the Metis settlements because it was said they no longer were Metis, and they challenged that, and they challenged that under section 15, they said they were, in fact, Metis, they lost that case.

Then most recently, there's the case of Kahkewistahaw First Nation and Taypotat, that was also a case involving an indigenous man living on the first nation, who wanted to run for chief but couldn't because the rules allowing people to run for chief in that first nation required an education requirement that he couldn't meet.

He challenged this under section 15, and he lost. The supreme court, in deciding that case clarified a lot of the issues that they had sort of confused in cap and earlier decisions.

So basically, there's a long record of indigenous people using equality rights under the bill of rights and using section 15 of the constitution to try to enforce their rights both against the government and sometimes against other indigenous people and other indigenous groups.

Cheryl M.: So I just want to take us back a little bit to also this whole notion of analogous grounds, and you talked about Corbiere.

Just for our listeners, sort of explaining what we mean by analogous grounds, and how it worked particularly in that case because that's really set what that meant.

Jonathan R.: Section 15 of the charter lists a number of grounds that are prohibited to just; you can make distinctions based on those grounds. But it also leaves open the possibility that there will be other grounds that can be recognized as basis for discrimination; this was the case in Corbiere.

So as I mentioned, the law said, in a lot of first nations, the rules were that you couldn't vote if you didn't live on the first nation. On the one hand, that might seem like a sensible

law because if you cared about your first nation, you'd live on the first nation. If you choose not to live on the first nation, maybe it means you don't care.

But the issue is, and this is what the evidence talked about in the case, is that many people don't actually choose to leave their first nation; they've been forced off their first nation. One of the reasons that many people were forced off their first nations arose from the implications of the Lavelle case that I spoke about earlier. It would be a status Indian woman marrying a non-status Indian man.

She loses her status; she has to move off the reserve. Even though many of those women and families got their Indian status back when section 15 came into force, they couldn't move back onto the reserve because there wasn't room for people on the reserve.

Other people don't live on their first nations, not because they don't want to, but because they need to leave for education, because they don't have education, they don't have high schools there or universities, they move for employment.

So the argument was not being able to vote in the first nations election on the basis of where you live was discriminatory, and the court looked at this and said, okay, we understand that in this case there is discrimination, and the discrimination is on the basis of this notion of aboriginality residence.

You're taking first nations people, so two sets of people, both of whom belong to a first nation, and you're treating one differently than the other because of where they live. That is seen to be a form of discrimination.

That determination was made in part because of the context, so the court understood that the reason people were not living on the reserve was not often because they made a choice but because choices were made for them.

So one of the lessons from Corbiere is that there's a lot of room to develop analogous grounds with the court, but also that you have to provide information to the court about the particular context of the group claiming discrimination in order to show discrimination based on analogous grounds.

Cheryl M.: So I want to kind of bring us now up to a case that both of you really are interested in talking about, and that is the case of R versus Sharma, and I want Jonathan for you to give us the background to that case. But I think that also, there's this long line of cases in relation to first nations, Metis and Inuit people in terms of our criminal justice system. How section 15 has just not and equality rights, have been there in the background, but the courts have been reluctant to embrace that as an argument.

So if you could just tell us a little bit about what Sharma is about, what that case is about when it's still being in the process of being heard, it's got leave at the supreme court of Canada, so there will be more arguments to be made. But if you could just give us the background of that, that would be helpful.

Jonathan R.: Yes, no problem. Cheyenne Sharma is a first nations woman, and she got off a plane at Pearson airport in 2015, coming from the south and she had with her 1.7 kilograms of cocaine in her bags, and she was arrested when she arrived for importing drugs into Canada.

She never denied that she had the drugs, and she pled guilty to the offense of importing drugs in 2016. We were first contacted at aboriginal legal services to write a Gladue report for her, to talk about her circumstances and what her life was like.

After we wrote the Gladue report, we were contacted by her lawyer because her lawyer read the report, and after he read it, he felt that the mandatory minimum sentence that was in place for importing drugs, because there was a mandatory minimum, which was two years, he felt that was just wrong, that was inappropriate for her given what had happened to her in her life.

In fact, he thought that the most appropriate sentence was a conditional sentence, and a conditional sentence is a sentence that's available to people if they receive a sentence of less than two years, and they can serve it in the community.

The problem that Ms. Sharma faced was in addition to the mandatory minimum, there was also a restriction on access to conditional sentences, based on the maximum penalty

for a particular offense, and in this case, the maximum penalty for importing drugs meant that she couldn't get a conditional sentence.

So her lawyer called us back and asked if we could help him with a charter challenge to the two pieces of legislation that we're standing in the way of her getting a conditional sentence. Because we had done these sorts of challenges before, we were very happy to help. So we launched two charter challenges, one to challenge the mandatory minimum sentence for being cruel and unusual punishment.

Then the second was charter challenge under section 15 under the equality rights provision because she was not entitled to receive a conditional sentence. Now the argument under section 15 was a bit different than many section 15 arguments because the law in question here, the restriction on conditional sentences, applied to everybody equally. The law didn't single out indigenous people in any way.

But prior to 2016, the supreme court of Canada and the Ontario Court of Appeals, in a number of cases, had found that the criminal justice system discriminates against indigenous people. It discriminates systemically, and it discriminates directly against indigenous people.

These weren't section 15 cases, but they were cases where the supreme court said the system discriminates against indigenous people. So it was our feeling, and it's been our feeling, and is still our feeling, that if the criminal justice system discriminates against indigenous people, then there has to be a role for section 15 in remedying that discrimination.

So that was the argument that we made at the Ontario superior court in appeal. Initially, we were successful in getting the mandatory minimum sentence struck down for being cruel and unusual punishment. But we were unsuccessful in challenging the restrictions on conditional sentences.

So the matter was then appealed to the Ontario Court of Appeals; Ms. Sharma had counsel for that appeal. We intervened in the case; there were many other interveners, including the Asper Centre, whose intervention was very welcome.

At the Ontario Court of Appeals, the court found that yes, indeed, the restrictions on access to conditional sentences do violate the equality rights of indigenous people. They

struck down those restrictions, and they said that the sentence Ms. Sharma should have received was a conditional sentence.

In light of the decision both the initial decision at the superior court and at the court of appeal, the federal government is introducing legislation to repeal the mandatory minimum sentence and the restrictions on conditional sentences, but they've done this before, and it didn't go ahead, so we'll see what happens with that.

But at the same time, they're also appealing the decision from the Ontario court of appeal in Sharma on the section 15 issue, and that will be argued in March 2022.

Cheryl M.: So Mary, you wanted to talk about the Sharma case. So why is that decision, we're now at the Ontario court of appeal level, but why is that decision so important to you?

Mary E.: There are a couple of reasons for that, Cheryl, and one of them is that this is the most recent in a little series of decisions of the supreme court of Canada, one of them being tape taught, and one being Fraser and so on.

Well, it's going to the supreme court. But that recent jurisprudence of the supreme court has started to straighten up the jurisprudence, which had been wandering around quite a bit.

It was wandering through the judge's individual senses of what discrimination was, and then it got hung up for a long while in the case of Nancy Law, where Justice Iacobucci devised an incredibly intricate series of steps someone had to go through to prove a section 15 case.

One of his specialties when he was an academic and a professor was tax law, and the proposal in the Nancy Law case about how we were supposed to prove a section 15 violation was very much like a tax code.

So we didn't get rid of that until the case that Jonathan was talking about, where there was a challenge to indigenous fishing rights on the west coast, and there, the judges

managed to get us back into at least the statutory language and got rid of all the add-ons that had been in the Nancy Law case.

So that's one thing, but the other thing that I really like about this case is that with those tools of goods judicial interpretation of section 15, the court in the Sharma case is analyzing legislation that was put in place to relieve against the discrimination against indigenous peoples in the criminal code, that is the Gladue rules.

The impact on the Gladue rules of the minimum sentencing rules. Really that in doing that, they are turning their attention to what a legislature does, in order to try to relieve against discrimination and equality, because the legislature had put the Gladue rules in place, and then another legislature with a different prime minister had those mandatory minimum sentences.

So the court really was tackling the issue of what happens when a legislature passes a law that's meant to relieve against inequality, and some other legislature tries to cut that back. Maybe not directly, but certainly indirectly with a powerful punch.

What it said about those meetings of equality promoting legislation and other legislation is that if a law takes away the protection of the legislation that was passed to ameliorate inequality, that takes away in a way, in a manner that will exacerbate or make worse or bring back inequality.

Then in itself an inequality, it violates section 15. This is a degree of maturity in the section 15 legislation that I am really happy to see come about because courts were very loath to tackle the whole idea of legislation designed to ameliorate against inequality; they just kept hoping I think that it would never come before them.

So it's really a step ahead in jurisprudence, not to mention righting a terrible wrong to this individual woman.

Cheryl M.: It also gets back to sort of what we talked about at the beginning and describing what the test is under section 15, and what the court most recently said in Fraser, which is that, they stated that as the norm of substantive equality, which underpins the equality

jurisprudence, and one can argue whether the court has been really effective in really upholding that norm in every case.

But in many ways, Sharma furthers the efforts to realize substantive equality for indigenous people in Canada, and in particular, in her criminal justice system. So, Jonathan, you've been involved in many of those earlier cases. You made reference to Gladue; Ipeelee comes to mind as well. Can you explain their importance and how this has been part of a long-term effort, particularly as it relates to our criminal justice system?

Jonathan R.: The language in Gladue was really quite striking for a court; I mean, the indigenous people knew that the criminal justice system discriminated against them in a substantive sense. In a direct sense, for many years, and many commissions had reached the same conclusion.

But to hear the supreme court say that the criminal justice system discriminated against indigenous people is really significant. In other jurisdictions, in Australia, in other places where there are large indigenous populations who are overrepresented in jail, courts are okay saying bad things were done, and we have to deal with the impact of the bad things that were done.

But Gladue and Ipeelee say not only were bad things done, but we are continuing to do those things. So those cases made it very clear the discrimination was still locked into the operations of the criminal justice system.

The challenge that we faced, and we've been bringing these sorts of section 15 cases against specific sections of the criminal code for over ten years. The challenge is, we were trying to say the court is, well, what do you do about it?

Like if you say that people are facing systemic discrimination, then surely there has to be some remedy for that, and that remedy has to be found in section 15. So normally, when you challenge a criminal law, it's cruel and unusual punishment, or it violates your notions of liberty; it doesn't involve equality.

I think we were trying to put equality front and centre and say no; this is what you said. You, supreme court, said indigenous people face systemic discrimination; here are a series

of, in each of the cases we brought, here's an example of that systemic discrimination, what are you going to do about it?

Eventually, with Sharma, and then subsequently with the case we're involved with called Turtle in Pikangikum. Courts have now started to use section 15 to address this fundamental inequality. I think that's really important because that speaks, that's the court speaking to the injustice that indigenous people face and giving them the remedies that they need constitutionally through the section that should most apply, which is the equality rights section.

Cheryl M.: Mary, you've previously criticized the courts for taking a narrow view of section 15, and that focuses on what you've talked about is individual villains and claimants because that type of analysis does not really allow for the kind of systemic discrimination analysis that Jonathan's talking about.

So how have the courts historically grappled with this systemic as opposed to direct or individual discrimination? How would you like to see them address it going forward?

Mary E.: I think we see most of all, are most clearly, in the cases involving that criminal law system, that individuals have been invoking in their own cases, the systemic discrimination against their people or against people like them, to challenge a particular law.

Within the charter context, you can challenge a particular law and get it struck down, or you could challenge a particular law and just get it to be not applied to you. There are a couple of things about this approach that individual accused persons are using, and one of them shows up a lot in Sharma because the trial judge misused it very badly.

That was you have to be able to say to a court; there is systemic discrimination against my people, so I want to get section 15 weighing in on my side. The cases like Gladue and Ipeelee and a couple of others before that were really clear, as Jonathan said in their declarations or in their acknowledgments, that the criminal law system had been discriminating systemically against indigenous peoples and tracing that back to our colonial roots.

So it almost got to the point as the majority in the court of appeal said, that now, you can kind of take it as judicial notice that the criminal law system discriminates in that way. The trial judge in Sharma kind of fell afoul of that by asking poor Ms. Sharma to present him with statistical evidence that people in her very narrow category are prejudiced by this mandatory minimum law, and the court of appeal chastised him for doing that.

But one of the things that has always bothered me is that the court is very bold in acknowledging systemic discrimination in the criminal law system. Yet, we have not yet had cases that invoke section 15 directly against systemic discrimination.

I ask myself, where are the class actions, where are other kinds of mass litigation which would take a run directly at the systemic discrimination. All we get now under section 15 is the chance to challenge the pernicious effects of systemic discrimination in an individual life and an individual occurrence. I want to go bolder.

Cheryl M.: Jonathan, I want to now connect the dots between addressing systemic discrimination and the concept of reconciliation in Canada with indigenous people.

One of the problems that you have noted with indigenous and aboriginal rights litigation is that the jurisprudence has wrongly treated reconciliation as the process of fixing past problems while simultaneously declining to address the ongoing effects of those past problems, as you've already alluded to.

So, on the one hand, many settlers, both in the general public and the legal community, speak about reconciliation as a matter of dealing with these past atrocities, such as the residential schools.

They are assumed to be kind of accomplished facts. Yet, as you've said with Williams, Gladue and Ipeelee all acknowledge this ongoing bias and discrimination going forward. So how in your view does reconciliation and substantive equality relate to each other? What should we be doing going forward?

Jonathan R.: If you read the truth and reconciliation commission report. I know you have read the, certainly, if you haven't read every volume, you should all read the executive summary, which is 300 pages; it's a fascinating and important read.

The TRC, in their report, talks about the over-representation of indigenous people as one of the legacies of residential school, one of the legacies of colonialism. Their recommendations on addressing over-representation fall in what they call the legacy portion of their calls to action. So the TRC's calls to action have legacy and reconciliation.

So getting rid of the discrimination in the criminal justice system, not the historic, the current discrimination the criminal justice system, that isn't reconciliation, that is a precondition to reconciliation. We have to get to a place where the discrimination is gone, and then we can think about what reconciliation looks like.

Cheryl M.: So, Mary, I just want to give you an opportunity to weigh in on what Jonathan has said and what you think about what needs to be done going forward.

Mary E.: Well, I have an article in the UNB law journal, taking off on the title of a popular song, it's called still colonizing after all these years. I find that there is an enormous amount of active colonization still underway. It affects not only what's going on now, but it is imprinting itself on the future and here's an example.

One of the big issues now in self-government and other contexts like that is the question of the recognition of indigenous legal orders and incorporating indigenous legal orders and their functioning, and how they'd solve problems and so on into a contemporary society. Not just indigenous, but more broadly.

One of the areas where I think it is gravely necessary to incorporate indigenous law is the criminal law system. But what the criminal law system in Canada has done is it's just kind of cherry-picked a couple of little aspects of indigenous principles in this area.

For example, it set up sentencing circles; you can have a sentencing circle once a person has been convicted or pled guilty. You can summon the elders and others and figure out what to do about that person.

That is kind of beside the point. The whole point is maybe that person doesn't deserve to be convicted at all. I was dismayed to learn a couple of years ago that in the documents that Canada has put out about how it's negotiating modern-day treaties and self-government agreements, that one of the things that they will never ever give up in negotiating a modern treaty is the jurisdiction over criminal law.

They will continue to assert that as a Canadian national priority and possession into the future in their future dealings with indigenous peoples. I thought that really was not just imposing criminal law system on people now in a very invidious way, but it's really kind of building a future where Canadian criminal law can still terrorize and oppress indigenous peoples.

Cheryl M.: So Jonathan, I'd like to know what you think is the future of section 15? Particularly in the criminal law context. Courts have been slow to recognize the systemic discrimination inherent in the criminal justice system in a concrete way, but that seems to be changing.

Where do you think the courts will go now that the initial steps have been taken with cases such as Sharma?

Jonathan R.: I think we need to be careful about putting all our eggs in the court basket. Courts are not ever at the vanguard of social change. They're slow; that's just the way they are; they're slow.

I mean, the supreme court didn't use colonialism in the context of criminal law until Ipeelee in 2012. I mean, it takes a long time for judges to get to those things. It's not a good or bad thing; it just simply is the way it is. We're not going to dismantle the criminal justice system through section 15.

Sharma is a very specific case, where you're able to say here's someone who should not have gone to jail, and who but for the provisions of the criminal code would not have gone to jail, and now is going to jail. So that clearly is making the situation of over-representation worse, to pick up on Mary's point about how the supreme court's now looking at these things.

But it's not as though if you're an indigenous person, you can go to court and say, look, the supreme court in Ipeelee said the system systemically discriminates against me, you have no ability, you have no jurisdiction over me, the courts will never accede to that. So going to the courts is a way of getting a few small steps and then moving them forward.

Today as we're recording this podcast, the minister of justice has announced he's reintroducing bill, what was bill c-22 in the last parliament is now bill c5, and it's a bill that's going to get rid of a bunch of mandatory minimums, but not all of them, and remove a lot of the restrictions on access to conditional sentences.

That's a much better approach than trying to tackle these things one at a time in the courts. So if we really want change, if we want more substantive change, and this is minor change compared to what Mary was talking about. But if we want even that change, it's not going to come from the courts.

What the courts will do is in the right case, they will strike laws down, and they will push governments then to respond. It's incremental, and it's slow, and it takes a ridiculous amount of time to do. But I think it's worth it, but it's not the only way; it can't be the only way.

Mary's concerns, very real concerns about the federal government's feelings about we won't negotiate criminal justice in a new treaty. Courts are not going to change that. That's going to change when public attitudes change and when people do the work they need to do to get that social change to occur.

So I see section 15 as helpful for the discussion. I think one of the reasons that we see bill now c5 is because courts have now said these laws discriminate against indigenous people, that changes the way we think about it.

When we know that the state is actively contributing to discrimination, it pushes the state to respond in a way that it doesn't, if someone finds a law to be under section 7 grossly disproportionate, because who the heck knows what that means? But we know what equality means; even if we don't all agree what it means, we all have a sense that inequality is bad.

So these cases help illustrate that question. We had a case recently, in case Turtle in Pikangikum, about the fact that if you live on a remote first nation, it is impossible for you

to serve a sentence on weekends, which means you serve your sentence, if it's a mandatory minimum, you're doing the 60 or 90 days. That was struck down under section 15.

Again, that in and of itself isn't going to dismantle the justice system, but it's forcing people to think about what are we doing in the far north with our fly in courts; how do we do things differently? That's where I think section 15 can be helpful.

Cheryl M.: I think even though you say that litigation isn't really good at pushing things forward, especially with criminal legislation. We have these flip-flops all the time with governments.

You have a pro-criminalization, a tough-on-crime government come in, and all these mandatory minimums get enacted. Then we have a more smaller liberal government come in, and they get revised.

But at least with the litigation, it's a backstop. It stops backsliding too much. So going forward, it's going to be very hard for the tough-on-crime crew to actually put back these mandatory minimums, as much as they might like to.

Jonathan R.: I will note that the current leader of the conservative party who may not believe this anymore. But when he was running to be the leader of the conservative party, promised to use section 33, the notwithstanding clause, to reimpose some of these.

But this does reinforce the debate, and I agree. You mentioned Sharma; Sharma is going to be heard in March at the supreme court. Even though the federal government says and probably will be able to pass this legislation, and I agree, it is significant assuming that Sharma is successful; it's significant if the supreme court says you can't do that because that will make it more difficult.

But I'll just say this, all this fight around Sharma has been to bring things back to the way they were 20 years ago. Like we're spending a huge amount of time not really to go forward, but to stop going backwards. So section 15 is helpful, but it's not moving us; it's just maybe getting us back to a place that we liked better.

Cheryl M.: So to shift things a little bit, but also on this theme of moving forward and whether the courts are actually progressive in respect to section 15. In the last couple of decades, the courts have been increasingly declining to recognize new grounds of discrimination.

So we have this analogous grounds jurisprudence that allows for things that aren't listed in section 15 to be recognized as discriminatory. Sexual orientation being one of the big ones. But a particular note, for example, despite numerous attempts to consider the issue, courts have declined to recognize poverty and its proxies as ground of discrimination.

So Mary, do you think that we've exhausted the list of potential grounds for discrimination? If not, why do you think the courts have been so reticent to recognize new grounds?

Mary E.: Well, I think that they have a particular caution about recognizing poverty as a ground. It's really so extreme that I think of it as a sort of one of the last holdouts of the doctrine of parliamentary supremacy.

When we passed the bill of rights, a charter of rights, we were kind of in many ways saying okay, parliamentary supremacy except for section 33 is now going to have to give way in favor of an over-mastering constitutional document of rights.

The courts are really loath to recognize that. In those cases where poverty is an issue, it's really striking that the courts don't simply say, oh yes, well, under section 15, we recognize there's a differential treatment, and it's a violation of section 15. So now, we're going to go to section 1 to ask for its justification, no.

What the courts do is they won't even recognize that discrimination has occurred in these cases, and I think it's because they still are unready to give up the idea that in our system, it is the legislature that has the power of the purse. They will not give the courts the power of the purse.

Even in cases where they will recognize that certain programs discriminate, for example, they don't provide adequate access to the hearing impaired for hospital treatment. They'll say something like, well, remedying this by way of the court solution is just doing a minor thing.

So they kind of say it's all right, we can do it because it's just really small. But in any major challenge involving economic interests, they really choke, and it's I think because of that. So I'm actually not worried that it is contagious and will affect other potential grounds.

I think in the area of marital status, for example, which is one that's in most of the human rights codes, they may not have had a good case, or they may have been able to deal with it on the basis of gender.

But it would be interesting for them to get a case which produces that as an analogous ground. I can't think of others, but I'm sure there are inventive litigators already hard at work doing that. I'm not going to discourage them because I think it's a good thing.

Cheryl M.: So before I shift to a slightly different topic, I just want to give both of you an opportunity to conclude around section 15, anything important that you think we haven't touched on, that you think are essential to the kind of work that you do.

So, Jonathan, I want to start with you. Is there anything else you want to add to our discussion?

Jonathan R.: There is a very long, rich history of government reports that keep saying over and over again how indigenous people are discriminated against, have been treated badly and continue to be treated badly.

Often very good reports, but you wonder what the point of them is. Well, part of the point is that they help you when you go to court because you can say, well look, here's a royal commission, and judges sort of listen. When it's a royal commission, they sit up and take more attention.

So I think this is something that people should think more about. I think there are more pieces of legislation that affect indigenous people under section 15. I would like to see section 15 used a lot more in the criminal justice system.

Certainly, we're contacted a lot by lawyers across the country representing indigenous people who want to bring similar challenges, and we're very supportive. We are equally

supportive for other racialized groups or other groups who think that there are section 15 arguments. I think we're at a place where courts are willing to realize that a statute like the criminal code that appears to treat everybody the same, we're now mature enough to realize that it doesn't, and we need to do something about that.

To pick up on Mary's last point, maybe that's a place where poverty gets recognized. Boudreau, which was the case, which was not the site under section 15, but Boudreaux, which was about the victim's fine surcharge, recognized poverty as the impact of poverty on the way people have dealt with the criminal justice system.

I think with the right case; section 15 can be used to bring poverty in that way. Again, it's not changing the world because judges don't like to change the world. Some do, but most certainly at the higher levels aren't really excited about that, but it is in keeping with existing decisions, and I encourage people to think about that.

Cheryl M.: Mary, over to you. Is there something that you wish to add?

Mary E.: Well, I've already told you about my hope that section 15 will start being used in a more direct way to challenge systemic discrimination. I think that one of the places where that might be done quite fruitfully is in the area of class actions. I'd like to see that pick up.

Cheryl M.: I just want to add that one of the things that we really haven't touched on, but what Jonathan was saying reminded me of it, which is just the issue of intersectionality, and how poverty fits in with that and with the different grounds of people with disabilities, and other sort of markers of the grounds under section 15, and how that compounds their circumstances.

So that's for a future episode, I think. Now I said that at the beginning that we did not have time for a practice corner, but both of you have extensive experience acting for interveners in the very cases that we've been discussing.

So, Jonathan, I would venture to say that the few successes that you are now seeing with respect to the rights of indigenous peoples in Canada have been because of the role of

interveners, and often, aboriginal legal services in those cases. Could you just tell us a bit more about how this has come about?

Jonathan R.: We've been involved in these sorts of cases, always at the invitation of counsel. So because it's a criminal law case, the people we're working with have criminal lawyers who have their skills as criminal lawyers.

When they think this is an equality issue, many lawyers say maybe we need some help; this is not an area of law that they regularly engage in. So, they'd like to see another pair of eyes. We have been able in all the cases that we've been involved with to help find experts, to bring expert evidence before the court.

We've started to be involved in these cases at first instance. So the lawyers are contacting us when the matter's coming before court for the first time, which normally, as an intervener, you come in at the appeal court, and you're not allowed to raise new issues. But we're coming in right at the beginning, and we're saying here we are, we're going to raise the issues.

So that's why we become involved, and that's been, I think, helpful for everybody. In some cases, the criminal lawyers have their own section 15 arguments they want to make, and we make our arguments. In some cases, we are carrying the section 15 arguments. But I think we do play a really important role, and I think there are other organizations that can do the same.

Where they have the expertise, and frankly, you know we have the time. We're busy people, but it's not like we have a busy criminal practice. So we can spend some time on some of these issues.

So the reason we accepted these cases is because we were very frustrated. When we would intervene in cases that the court of appeals, the supreme court, the information really often hadn't been gathered and hadn't been properly presented to the court.

So if we get involved, we'll make the thing last longer, and there'll be hundreds and thousands of pages of documents. But it grounds the decision by the trial judge; it's not enough to say there's systemic discrimination; you have to fix it. You do need to go beyond

that, and we're able to help. It's been a real privilege and honor when counsel asked us to assist in that way.

Cheryl M.: Yes. I think it's safe to say that some of the more recent cases, and I'm thinking of the case of Morris, which is a sentencing case. Where one of the parties, and in the cases that you're talking about, interveners have actually been able to put in evidence.

So the court, instead of just having to take judicial notice of something, and then put it, then move it aside, have actually had to face the facts in a more concrete way. I think that's one of the big contributions that aboriginal legal services has done as an intervener.

Mary, I lost count trying to tally the number of times that you have been at the supreme court of Canada on behalf of interveners. What can you say about the impact that interveners have had and what you might see them being able to do going forward?

Mary E.: Well, I always think of the case of Nancy Law when I think of the role of interveners at the supreme court because there were no interveners in that case.

There was no one before the supreme court of Canada to put a different flee in their ear about equality, and we wound up with that incredibly cumbersome and challenging test for equality, which lasted far too long.

But moving away from that particular story, I have always enjoyed being in cases with interveners, because for one thing now, I think the interveners bar in this country is very talented, it's very diverse, and it brings almost like messages from another world to the bench.

The reality of living in different circumstances and having different things on your mind, and the court is very isolated, and interveners bring a different perspective. They bring a lot of talent and a lot of willingness to push the limits of legislation or case law. And to turn up things that maybe a lawyer who was trying to just win or avoid a big loss might not be prepared to gamble on.

They would just want to focus their main attention on a few issues that are probably going to produce a winning argument across them.

One or the other is going to produce something, but interveners will dig away at some particular points and often bring forward real gold, and I'm just thinking recently, the city of Toronto case, I've had a chance over the last two or three weeks to review in some detail, the court of appeal and supreme court Canada decisions.

I was really struck by the fact that the majorities in both courts fighting so valiantly against the outpouring of textualism in the majority decisions. Both seized upon the intervener factum of the Asper Centre to help inform them about what an election really was and what was going on in an election.

I thought, wow, they wouldn't have that had it not been for your presence in that court, and it really made a big difference because I think that the minority decisions in those cases are actually going to be the ones that live and live on and influence the law.

Because the majority of decisions are just occupying too small and too tightly packed expanse of space, let's hope, but I don't think they have a long survival value. So there, it is one example where an intervener really did influence the discourse in the court, and I love to see that when it happens, and I'd love to see the court acknowledging it.

Often too, and quite aside from what happens in court, interventions give bright beginning lawyers the chance to have their first case in the supreme court or a court of appeal, for a lot of minority lawyers, who may be in big firms but are certainly not getting the opportunities in the big firms that would be best for their career development and for people in small practices.

That is a very valuable career changer to be able to say that you were arguing in the supreme court of Canada. So I love interventions for that reason as well; it is an amazing kind of development of talent and provides opportunities for talented young lawyers that they might not otherwise have.

Cheryl M.: Thank you both again for this great discussion.

Jonathan R.: It's been a lot of fun; it's good to see you again, Mary.

Mary E.: Well, thanks very much for inviting me, Cheryl, and for doing this podcast. It's a wonderful way of getting information and enthusiasm out into the world.

Cheryl M.: We have been speaking with constitutional litigators Mary Eberts and Jonathan Rudin about the interpretation and application of section 15 of the charter and a little bit about interveners in constitutional litigation.

This is the last episode of charter, a course for 2021. I am pleased to tell you that we have been given funding to continue our podcast through 2022, with the continued sponsorship by the University of Toronto's affinity partners, TD insurance and MBNA. You can discover the benefits of affinity products at affinity.utoronto.ca.

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