[S2E1 - Section 28 of the Charter and Feminist Law Reform]

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Cheryl M.: Hello, and welcome back to a second season of Charter: A Course, a podcast created by the David Asper Center for Constitutional Rights at the University of Toronto, Faculty of Law. My name is Cheryl Milne, and I am the executive director of the Asper Center.

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. It is our hope that over the course of this episode, whether you are a law student, a lawyer or someone looking for an interesting topic to discuss at the dog park, 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 the home to many indigenous people from across Turtle Island, and we are grateful to have the opportunity to work here. And we are grateful to be back for a second season.

Today, we will focus on section 28 of the charter, which guarantees that notwithstanding anything else in the charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. Section 28 is unique, because on its face, it seems to duplicate section 15, the general equality provision that we talked about in season 1. Section 15 prohibits discrimination on the basis of sex.

As our guest, Professor Kerri Froc will tell us feminists and legal scholars have been fighting for decades to show that section 28 has its own special and important meaning. We will discuss the history of section 28, how it has been interpreted in the decades since patriation, and how Quebec’s bill 21 may provide an opportunity for section 28 to shine. Because the nature of its relationship with section 33 of the charter, the more well-known notwithstanding clause.

Also, this season, we dive into a full discussion of that section and its controversial usage. But first, let's talk about section 28 and introduce our guest. Kerri Froc is an associate professor at the University of New Brunswick, faculty of law and a Trudeau and Vanier

scholar. She received her PhD in law from Queen's University in 2016, and also holds a Master of Laws from the University of Ottawa, a bachelor of laws from Osgoode Hall Law school, and a bachelor of arts from the University of Regina.

She has taught courses at a wide variety of Canadian law schools, with a particular emphasis on feminist legal theory and public law. Prior to obtaining her doctorate degree, Kerri spent 18 years working as a civil litigator, a staff lawyer for LEAF, the women's legal education and action fund. And a staff lawyer in the areas of law reform and equality at the Canadian Bar Association.

She currently serves as the chair of the steering committee for the National Association of Women and the Law, a committee that I also serve in, so I know Kerri well through that. And she's published extensively on feminist legal issues, and section 28 of the charter in particular. So welcome, Kerri.

Kerri F.: Hi Cheryl, it's nice to be here. And section 28 of all the things that I study is my top tier. So I'm really glad that we're able to talk about it today, and inform people about it, because it's not well known even among lawyers.

Cheryl M.: Well, thank you so much for joining us. And let's begin by talking about how and why section 28 came to exist in the first place, because it wasn't always going to be part of the charter. So how did it get there?

Kerri F.: Yes. It was a bit of a long and winding road to quote the Beatles. What happened was, is we had some really terrible cases concerning sex equality under the Canadian bill of rights.

People probably know the Bliss case, where the Supreme Court said that discrimination against pregnant people was not sex discrimination, and any discrimination was due to nature and not the legislation. We had the Lavell case, which essentially did not use the Canadian Bill of Rights to impugn the marrying out provisions of the Indian Act which are now gone as a result of the charter litigation that's unfolded as well.

And that case essentially said that as long as indigenous women are treated equally badly, the Canadian Bill of Rights doesn't have anything to say about it. So we had some really terrible decisions interpreting equal protection under the Canadian Bill of Rights. And at the same time, we had some troubling aspects under the U.S Bill of Rights concerning sex equality.

They too found that pregnancy discrimination wasn't sex discrimination, but perhaps, also equally troubling was the fact that they were really inconsistent. They adopt a tiered approach to discrimination, where racial discrimination gets the most rigorous scrutiny, things like age, just as long as the legislation was reasonable, it passed, and they said sex discrimination received intermediate scrutiny.

And it was a bit fuzzy about what that really meant, but we knew that it was lesser than other kinds. So coming into the draft of the Charter that was tabled before Parliament in October 1980, women were like what the heck? Basically, the section 15 wording is the same wording as under the Canadian Bill of Rights, because politicians were really ambivalent about having a discrimination, an anti-discrimination or an equality guarantee to begin with.

So they really didn't pay it much mind, let's just throw in the wording from the Canadian Bill of Rights. And women were really concerned that section 15 wouldn't be up to the challenge of enforcing sex equality. So there's a longer story, but that's kind of the preface of it.

Cheryl M.: Well, I mean, it's funny, like even for those of us in constitutional litigation like myself, we've generally not heard very much about section 28. It's rarely used in the case law, and as you've argued in the past, has been mischaracterized by the cases that have used it. Can you explain to us why section 28 has been underutilized?

Kerri F.: Right. In part, that kind of continues on from the section 15 story. So as the televised hearings of the special committee on the Constitution happened, lots and lots of criticism over section 15. So that got fixed up to be kind of the broad wording that we see today, to

try to cover off all of these narrow technical arguments that judges were making under the Canadian Bill of Rights in that text.

But women were still super suspicious that section 15 would not be interpreted properly. And as Mary Lou McPhedran, one of the ad hoc women who advocated for section 28 said it was really meant to pull up the socks of section 15, and make sure that sex equality, notwithstanding anything else had to be respected by governments.

And the other aspect of it was that we didn't know what the Charter was going to do for sex equality, so it was really meant to be kind of this umbrella of sex or gender equality over the entire Charter, to make sure, because judges were going to be given a lot of power to strike down laws, that all the other provisions couldn't further entrench women's inequality and in fact, the opposite. They were supposed to be viewed through a gender equality lens.

Now what happened after 1982, and in fact, three years after that, so section 15 was not in force for another three years, allegedly because politicians and legislatures in parliament needed that time to fix up their legislation. They did approximately zero anyway. But section 15 turned out to not be as bad as perhaps feared. We didn't adopt the tiered level of scrutiny, we didn't say that it required absolutely no distinctions in treatment, it was meant to be genuine or real equality.

So in Andrews, in 1989, it was all that good stuff. So with respect to section 28 kind of being this prophylactic, to make sure that section 15 didn't go astray, that wasn't necessary, but that wasn't all it was supposed to do. Remember I said that there was supposed to be this gender equality lens over the entire charter. But really, I think judges didn't really know what to do with it. Also, I should mention that there is just this massive deluge, this litigation by men coming out of that.

So women's groups were really put back on their heels, women's groups obviously don't have a ton of money to litigate, it was really men carrying the ball for litigation. And when women challenge laws using section 15, usually it's about wanting inclusion.

They want government to act in a way that is going to assist them in becoming equal members, evil participants in society. Men often used section 15 and 28 to roll back protections for women. We can argue about whether they were good, bad or indifferent, there were sometimes even when they did good things, they were paternalistic.

But that's what happened, and we got some really bad section 28 jurisprudence right off the bat. Things that said we can't pay any attention to social context, section 28 is different from 15, and it means that there can be absolutely no distinctions in the law. So judges just entirely misinterpreted it. And when you couple that with the absolute nature of section 28, there can be no distinctions, and we can't resort to section 1 and that was some of the early laws, because it's notwithstanding anything.

So judges that were concerned with women's position in society, and women's equality, thought oh my god, this is a bad section that says that we can have absolutely no distinction. So laws protecting, for instance, single moms, and maybe giving them some small benefits, those are going to be under threat. Or even a case like Hess, where what was being attacked was provisions under the criminal code that prevented men from predating upon girls. All of that stuff is going to be suspect.

So they kind of interpreted a way section 28 to mean well, it doesn't really mean anything, because if it means something, it means this really bad thing. And progressive judges didn't want to jeopardize those protections.

So we had that, and then coming into the 90s, of course, Kimberlé Crenshaw, with her 1989 work that introduced intersectionality, really important. And even though the advocates for section 28 envisioned it, and were really sensitive, even though they didn't have a word for it the position of indigenous women, lesbians, working-class women, women that potentially were getting divorced, all of these different intersections they were sensitive to, and section 28 refers to whole women, right? It's not sex.

But there is a thought in the early 90s that section 28 was privileging gender, and it was really a white woman's vision of what sex equality was. And feminist groups started taking a step back and saying well, we really have to examine not only ourselves, but the kind of tools that we're using in litigation.

And I think there is also a bit of reticence to rely on section 28, and give it some independent power for very good reasons. But it didn't kind of do section 28 any favors, in terms of nudging judges or having them see how section 28 could actually promote an intersectional analysis of rights violations.

Cheryl M.: So is it fair to say that to some extent, it's been interpreted in a way that kind of locked in a formal equality approach. Whereas section 15, even we could quibble about whether it has actually been effective, but at least, the courts have been talking about it entrenching substantive qualities. Is that a good way of summing that up?

Kerri F.: I would say yes. But it's interesting that it only was used in this formalist way when men were challenging laws. So men are saying like look, this makes a distinction on sex, so it violates section 28.

But when girls and women tried to say the same thing, for example, there was a case called Blainey, Justine Blainey, who is this massively talented hockey player. Apparently, she's a chiropractor now, I looked her up.

Cheryl M.: And a motivational speaker, actually.

Kerri F.: Oh yes, great. So this super talented girl, she was welcomed onto boys hockey teams, but when it kind of got to the oversight body, they said no, she can't play with the boys on the boys hockey teams. So she wanted to challenge that under the Ontario human rights law. And lo and behold, she found that athletic programs, they're shielded from sex discrimination claims.

So she tried to challenge those provisions using section 15 and section 28, and the judge said no, those things that we said under this other litigation really section 28 that has no power here. So because of reasons for, I think they said public decency, that was the lower court ruling. But the Ontario court of appeal just kind of ignored section 28, neutralized it and decided that on other grounds.

But yes, so there's this formalist approach, but only it's kind of a one-way ratchet, it only applied to men's litigation. And then when we see the Hess case go up to the supreme court, Justice McLaughlin essentially said that if section 28 has power, it means no distinctions and Wilson from the majority basically neutralized 28 and said it really has no role here as well,

because she wanted to, at least, not have an interpretation of sex equality that potentially would say because there's gender distinctions, therefore it discriminates.

She used section 7 to strike down the law, but really wanted to preserve sex equality and potential differences in the law where it made sense for the emancipation of women. So again, she kind of fell into this trap that the other judges did of trying to neutralize 28.

Cheryl M.: A lot of the conversation out there about section 28 focuses on what its role is with respect to the rest of the Charter. So I mean, you've talked about it's been essentially neutralized. Other legal scholars have argued over whether section 28 is interpretive or substantive.

So you would say that mostly the courts have not found it to be substantive, but essentially, this gets out to whether section 28 is only meant to guide judges in courts and understanding the other provisions of the charter, or whether it stands on its own with the power to actually provide rights in and of itself. So what is your opinion on this debate? And how would you describe section 28's rule aspirationally or to date?

Kerri F.: Yes. Well, I don't know if it's aspirational, because the text and history indicate that it should be interpreted in a certain way. And even if judges have been mistaken, it is what it is. And really what section 28's role, there's a couple of things it is. It can be used in an interpretive fashion, the same way that the court has said that section 15 is the broadest of all guarantees, it informs other rights, even though it's a substantive right, right? So section 28 does have that interpretive rule.

It kind of asks judges to use a gender equality lens when it comes to interpreting and applying the other provisions. So whenever there's a doctrine that is developed by a court, they should be almost doing like a gender-based analysis like the government does, to think asking the woman question as some people have put it. Like how does this implicate women? Does it equally mean that women have access to this guarantee, for instance? So that's thing one.

But it's not merely interpretive. We know very well that, and the framers of the Charter knew very well how to signal an interpretive provision, an interpretive clause, because they did that with sections 25 and 27. So we have to give some significance to the fact that in section 28, they didn't use words like shall be construed etc. And indeed, section 28 is really unique, because it's probably the only section in the Charter that was basically nearly entirely drafted by not government lawyers, but the women advocate themselves. They would have been absolutely apoplectic at the idea that section 28 was interpretive.

Some people say well, it's lumped together with 25 and 27, how do you explain that? Well, the way that it was explained to the women drafters when they were trying to get the purpose clause as they put it, the gender equality purpose clause before section one, department of justice said well, it's really better that it be near the end, because as an interpretive matter, that really solidifies it as influencing all the other rights.

So that's where we're going to put it. There is no kind of agreement or understanding that, that was meant to be where the interpretive bits go. It was just this kind of quirk of history that it ended up there.

And as you alluded to in the introduction, it really didn't come into the draft charter until third reading. We never see changes like that when I worked for the Canadian Bar Association and did lobbying, we never see that. So that shows how unusual it was, and indeed it was, and many people might not know that it was the first notwithstanding clause.

It was way before section 33 came into being, that was part of the Kitchen Accord in November 1981, Section 28 was April, 1981. So if you're looking at the interpretation of section 33 and the notwithstanding clause and which came first which has priority, it has to be 28. It was there before, and it should be interpreted to modify or influence section 33.

Cheryl M.: So I want to move us into its relationship to section 33. But just before we do that, just for our listeners, if you could just briefly kind of explain what sections 25 and 27 do, and why they are different from section 28.

Kerri F.: Right. So section 25 essentially protects Indigenous rights from being eroded or derogated from by other provisions of the Charter. Section 27 says that the Charter shall be interpreted in light of Canada's multicultural heritage. So again, it's really different than that. I talked about its interpretive power, but I didn't talk about its independent power, to essentially block provisions that would derogate from sex and gender equality. And that was really part of the whole purpose. So at the time that section 28 was inserted, we didn't have 33, as I mentioned.

But it was meant to shield sex equality and women's equality, anything that would potentially result in unequal rights. So what could result in unequal rights? Well, when you have a sex discriminatory law for instance, that's justified under section one. And we've seen this in a few cases, like the NAPE case, where sex discrimination was justified on a pay equity matter. And we saw that again in Central des Syndicats, another pay equity matter.

And that would have been again anathema to the drafters. Even the very senior government drafters I interviewed, people like Fred Jordan and Roger Tesse, who are unfortunately not with us, said that yes, it was absolutely clear that section 28 was meant to block section one when it would result in unequal rights or sex discrimination.

Mary Dawson said I warned the politicians about that, I warned them that this meant that section one wouldn't apply, and they went ahead and did it anyway, so everyone knew. And it's not necessarily an originalist argument that I'm making like oh, the intention was that section 28 would block the use of section 1. This is really about what does notwithstanding anything mean? Does it mean notwithstanding anything except section 1 or section 33? Or does it mean what it says, notwithstanding anything?

So this lore just kind of reinforces. The text is pretty straightforward, the history just reinforces that meaning. So when you look at the meaning of notwithstanding anything, that it was meant to protect or shield gender equality from the operation of any other provision that would result in unequal rights. Even though section 33 didn't exist at the time that it was inserted, it's pretty acceptable that you would see it as blocking section 33.

And there's another fight that I haven't mentioned yet, where after the kitchen accord, they tried to make section 28 subject to the notwithstanding clause. And the women across Canada were just absolutely outraged, the minister on the status of women was outraged.

In truth, the drafters of the kitchen accord just forgot about 28. So after there was like this flurry of activity, what about 28.

Joe Clark was needling Pierre Trudeau in parliament saying well, what about this section? Is it covered by the kitchen accord or not? Are you going to betray women or not? Ultimately, Trudeau kind of capitulated and said, well, that's the price of a deal, and then the women of Canada were outraged by that.

And so Trudeau said well, if you can get the unanimous consent of the premiers to remove 28 from 33, then we'll do that. And they managed to do that. There's some fun newspaper footage of women just hurling insults at Allan Blakeney in the cold November weather outside the Regina legislature, which I think is kind of fun.

So ultimately, they did get that unanimous consent, and everyone was very concerned about section 28 being subject to 33. So we have to give those events some significance when we're talking about the notwithstanding clause, and whether or not it applies to 28. History shows that there was a lot of effort to making sure that section 28 was outside the scope of 33.

Cheryl M.: And it being only 40 years ago, it's recent history. It's not like we're looking at 200 years ago and what forefathers were thinking when women didn't have any rights at all. I mean, now I want to move into the Bill 21 in Quebec because I think that's really illustrative of what you're talking about. And as I’m sure many of our listeners know, this law in Quebec prohibits the wearing of religious symbols by civil service employees and positions of authority, and by teachers in the public sector in the province of Quebec.

It quite clearly discriminates against Muslim women, who are being prohibited from wearing the hijab and their places of employment are banned from freely exercising their religious beliefs, in a way that it has a disproportionate impact. Although, men are also, as we address in one of our other episodes, men are also affected.

In response to significant backlash surrounding bill 21, the Quebec national assembly invoked the notwithstanding clause or section 33 of the Charter as we've been talking about, in an attempt to pass the law without having to engage in judicial battles. And

despite their desire to avoid that, the law has already been challenged multiple times, and we have a case called Hak and the attorney general of Quebec going before the Quebec court of appeal in the fall.

So some interveners and parties in the Hak case have attempted to utilize section 28, and explain how the section works with respect to bill 21 and the notwithstanding clause. Can you sort of describe what those arguments are, and what your views are on that?

Kerri F.: Sure. And I'll give a plug to my paper that I recently put on SSRN that's called A Law in Rupture, which gives the full analysis. And it's important to mention that Chief justice as she then was, Duval Hesler, was the reason that the parties were addressing section 28.

They didn't before that, but there was an injunction application to freeze certain sections of the law before the main trial, and that was denied. It went up to the court of appeal and at a pre-trial, she's the one that said what about section 28.

After that, then the Canadian Civil Liberties Association amended their pleadings, other parties came in. But the argument is that as you mentioned, there's been a trial now. The trial judge made some really great factual findings that will be really hard if anyone attempts to try to overturn them on appeal. He said that women are disproportionately affected, and in fact, close to all women who are affected are teachers that wear the hijab.

So if you look at it from that perspective, yes, notionally, it talks about visible religious symbols, which could be the kippah for Jewish men, the turban for Sikh men, but that was never number one the target, and that's not who is being affected primarily. And of course, the reason that we're talking about this is because the Quebec national assembly did a preemptive strike before a court could hear it, and section 15 is covered by the notwithstanding clause, as is freedom of religion.

So by allowing a law to continue to operate that violates in a disproportionate way women's religious freedom, that results in unequal enjoyment of religious freedom amongst men and women in Quebec, male and female persons in the words of section 28. So that's the status quo right now. And because the trial judge found that as a fact, that is a violation of section 28.

Now we can also talk about the fact that it's discrimination on the basis of sex as well, as the judge found, and whether or not sex discrimination is something section 28 can protect against, given that section 15 is covered. But at the very least, what we can say is there's unequal enjoyment of freedom of religion as between men and women in Quebec in this year 2022, and ever since bill 21 was proclaimed. So the question is, you have unequal rights, this is a violation of section 28. Section 28 says notwithstanding anything, rights are guaranteed.

So section 33 has nothing to say about section 28, quite intentionally so as I mentioned. So section 28 in a violation of equal rights, should allow judges to do their ordinary thing under section 52 and strike down offending provisions, and that's how the argument goes.

Cheryl M.: So how has the court dealt with it so far though?

Kerri F.: In Hak, what the court the trial judge said is that well, he kind of adopts what I call a net rights interpretation of section 28. And by that, I mean, he says section 28 comes in after 33. And what section 33 does is almost neutralize the laws that it applies to. So judges are to employ a legal fiction, and it's as if sections 2 to 7 to 15 don't exist. So he says there's nothing for Section 28 to equalize, these rights don't exist.

They're neutralized by virtue of 33, and people like Gregoire Webber, not talking about Hak specifically, but he says you know to say that 33 neutralizes or treating these rights as if they don't exist, that's not what the text of 33 says. 33 says that laws are allowed to continue to operate notwithstanding these rights.

These rights still exist, it's just that these laws continue on. And if you look at the text of section 28, it says that the rights referred to in the Charter, are to be guaranteed equally. Just because section 33 is invoked, doesn't mean that the Charter ceases to refer to particular rights, right?

Cheryl M.: Yes. It does seem like a very strange kind of orchestration of an argument, to just kind of say this section 33 just basically creates these blank spaces in the Charter.

Kerri F.: Yes. And some of that I think is because of blues talk, we talk about overriding rights and that kind of thing. But really, that's not what section 33 does. It just allows, it's like live and let live this law, laws are continued to be allowed to live. It's kind of the reverse of in federalism, with paramountcy, and rendering laws inoperative.

As I tell my students, it's not that the laws cease to exist or are rubbed off the books or go away, they just go to sleep for a while, but they continue to exist. So I think it's both a misinterpretation of 33 that leads to a misinterpretation of 28 as well. So that is something I hope the Quebec Court of Appeal will get sorted out, because it seems like a rather straightforward interpretation to me. But to be continued, I suppose.

Cheryl M.: Well, and I think it's fair to say that there's a strong chance this is going to make its way up to the Supreme Court of Canada, given that it's one of the most significant cases to really look at.

Both the notwithstanding clause, we haven't seen that being interpreted by courts since the Ford decision which was many years ago. And section 28, which also is not something that has been, even if it's been pleaded by parties to cases, it's not been actually drawn upon by the courts.

So how might litigants challenging Bill 21, or sort of using section 28, how might they strengthen that argument going forward? What would you say is the way to bolster what section 28 does?

Kerri F.: Well, I think that we really have to have a principled approach towards using text in history. I'm kind of the duckbill platypus of constitutional interpreters, because I do call myself a feminist originalist. Mainly to freak people out, because I think it gets people's attention.

Cheryl M.: That's a very colorful image there now.

Kerri F.: Yes. But really, what I'm saying is, and I'm heartened by some of the recent jurisprudence from the court, that talk about using history in a more principled way. And that's really what I'm saying, is I'm all for purposive interpretation, but what I'm saying is you have to use history and text in a particular way. You can't use living tree to depart from what the original meaning was, you can use subsequent developments to kind of influence the doctrine.

But when it boils right down to it, things like notwithstanding anything, you have to respect the original meaning of that term to mean what it says, it means anything. As Judy Erola, the Minister for the status of women said at the time, section 28 says you can absolutely not do anything that results in unequal rights between men and women, and we really mean it. There's nothing that can derogate from that.

So you can't deviate from that, if you give a principled approach to what the text says, the referred to in it, the notwithstanding anything, also male and female persons. This isn't just about sex, this is about male and female persons as whole persons. So there's a bit of irony in the fact that we're dealing with the case that involves intersecting inequalities, I call it gender islamophobia.

And that section 28 there is some reticence expressed about it being able to be up to the challenge of that. And this is absolutely the kind of case that section 28's mothers would have anticipated where it would kick in, and protect women, especially women that are marginalized according to a number of vectors in intersectional cases.

A good case for Section 28 to show it stuff. What the courts really have to be mindful of, if section 28 can't speak here, where can it speak? They're essentially relegating 28 to the dustbin if it doesn't speak in this case, I think.

Cheryl M.: Well, it'll be interesting to see what some of the, for want of a better word, the texturalists on our Supreme Court would do with this, as they tend to be a little more conservative. Yes,

what we are really talking about in this textual interpretation is really a more progressive interpretation of section 28 than what has been afforded to date. So that'll be a really interesting tension, we'll see at the court.

Kerri F.: Yes. It's kind of feminist Jiu Jitsu.

Cheryl M.: Well, we're looking forward to seeing section 28 in action and reading your book tentatively called the Gendered Constitution, I understand that you are working on a book about gender equality. Can you tell us a little bit about that?

Kerri F.: Well, my editors are kind of mad at me because I'm a very slow worker. For instance, the Law and Rupture article on Section 28 and Bill 21, I think it took me three years to complete, so that just goes to show how long it's taken me for the book, and I have various mentors needling me just saying get it out.

Cheryl M.: Well, now we're mentioning it on the podcast, so now it's out there.

Kerri F.: Yes. Now it's going to light a fire under me. But really, what that's meant to do is to provide a full historical analysis of the different cases that influenced, and that brought section 28 into being. I found some really interesting historical stuff, for instance, on the Morgan Fuller case, and the women that were at the center of that case that we didn't never hear about.

And other gender equality cases like Irene Murdoch's case, the farm wife that was denied, I mean equal share of the farm, horribly abused women, that was one of the impetus for making sure that we have really strong sex and gender equality guarantees etc. So that I think and I hope will make an important contribution.

Cheryl M.: I very much look forward to reading that book, when you finally finish it. So thank you so much, Kerri, for explaining section 28 to us. I think that it has been a section that's been a little bit neglected or ignored, and it's going to be really interesting watching this go forward.

We've been speaking with Professor Kerri Froc, at the University of New Brunswick, faculty of law, about gender equality under Section 28 of the charter, and its application to the ban on religious symbols in Quebec. Thank you, Kerri.

Kerri F.: Thanks very much.

Cheryl M.: Next up in our practice corner, we will see how an online course is putting the spirit of section 28 into practice by educating and inspiring a new generation of feminist advocates. I'm speaking with Professor Martha Jackman about her role in the creation of feminist law reform 101, which is available for free through the National Association of Women and the Law's website. Martha Jackman is a professor of constitutional law at the University of Ottawa.

She's a graduate of Queens, U of T and Yale, and specializes in the area of constitutional law, with a particular focus on issues relating to women and other marginalized groups. She joined the French common law program at the University of Ottawa in 1988, she publishes primarily in the areas of socioeconomic rights, equality and the Canadian Charter. She appears regularly before law reform bodies and parliamentary committees, and has acted as legal counsel in Charter test cases at the trial, appellate and Supreme Court levels.

She is a former member of the equality rights panel of the Court Challenges Program of Canada, and of the board of directors of the women's legal education and action fund, LEAF. Importantly for today, she is a national steering committee member, and past chair of the National Association of women and the Law, with whom she has worked since 2007.

Welcome Martha, it's great to have you in the practice corner today. Can you tell us more about your work with NAWL, and what inspired you to get involved?

Martha J.: Thanks Cheryl, it's a real pleasure to be here, and have the chance to speak with you and to reach out to your audience. I have always been indirectly involved with NAWL. Like many women law students, I started when I was at law school.

And I did do volunteer work with NAWL over the years, but it was really when the Harper conservative government defended women's organizations after they were elected that I realized it was going to be really important for NAWL to have an active volunteer board, since the organization lost its amazing paid staff. And so that, it was Allison Dewar who spoke to me about that, and that is how I came on board in 2007.

Cheryl M.: So what is feminist law reform 101? Can you explain the course to us and tell us how it came about?

Martha J.: Absolutely. And ironically, it's another child of the Harper decade. What I and other feminist activists, especially in Ottawa that work at the federal level realized, after a couple of years of the Harper conservative government federally, is that they actually didn't really want to hear from women's and feminist activists at all.

And where under previous conservative and liberal government since I arrived in Ottawa in the late 80s, I was a frequent traveler down to Parliament Hill to appear as an expert for parliamentary and Senate committees and to meet with MPs, and sometimes government staff. Over the course of the Harper decade, I think I was invited to be held twice, in both cases there were 99 gun advocates and they needed one gun control advocate to speak in counter voice, and that was me.

And what I realized was that the skill of engaging active feminist advocacy on the hill really wasn't being developed through just doing it, which is how most of us learned, was going down to the hill and doing it. And because of that long period where women and feminists were not welcome on the hill, I was concerned that the skills and the confidence was being lost.

So the question I asked myself along with Julie Sugarman, who was also a longtime supporter of NAWL, was whether it would be possible to actually teach some of these skills in the classroom, rather than by doing. And that was the genesis of the course.

Cheryl M.: So before the pandemic, there were a number of in-person workshops that NAWL conducted across Canada in a number of different cities. Will there be in-person components again in the future?

Martha J.: Absolutely, there will. Although, I have to say that one of the silver linings of the pandemic was, I was forced in the course to pivot online, as was true at many law schools across Canada. And what that did enable us to do was to have guests that were simply in Ottawa. So the last couple of iterations of the course were super interesting because of my ability to have speakers come and meet with the students from all across Canada.

My intention with the course isn't simply to go back to in person mode. But the National Association of Women and the Law has planned a series of actual weekend long workshops in a couple of Canadian cities over the fall and winter, starting in Whitehorse in September. So we're very excited about that.

Cheryl M.: Well, I have to say that the course being online has made it really accessible, and I assign it regularly to the Asper Center students when we're talking about doing law reform. So can you just give our listeners some of advice from the course about how to start engaging in feminist law reform. Give us a taste of what the course is actually about.

Martha J.: Absolutely. And again, as I mentioned, the course really is designed to offer a combination of skills and confidence. So especially at law schools, we spend a lot of time focusing on law reform before the courts, where in fact most of us will maybe never appear in a court, and even less likely so before The Supreme Court of Canada.

So a lot of our curriculum focuses on influencing judges to reform the law, but not necessarily as much as there should be in my view on influencing legislators directly. So those are the skills the course tries to convey. And these are skills some of which are pretty easily acquired, and I think it's especially imperative for feminist law students to really dip their toes in the water, and to start to draw and do some of this work.

You can start small, you can start by writing a letter to the editor, or perhaps writing a letter to your MP or to a minister, or even to the Prime Minister. Ideally, concisely expressing what it is you think is wrong and how it should be changed. Once you've done that, well consider trying to meet with your MP in person. And my experience especially with the current Trudeau government is that they love youth, they like to hear the voice of youth and undergraduate and law students are very welcome.

I've had a number of MPs explain to me that personal letter and in person contact is really going to have a lot more weight on many issues than online petitions or other sort of more popular forms of advocacy. You can start by getting in touch with your MP at her or his constituency office, because of course, an MP needs to be re-elected and they're going to be very attuned to what their constituents think.

But if for example you're in Toronto or in Ottawa, and you're not at home and you're riding, you can ask to meet with the MP in her or his office at Queen's Park or on Parliament Hill. And again, you want to be well prepared when you go, you want to be able to clearly express the issue that you're concerned about, and ideally, you want to be able to propose concrete solutions. And once you've had an opportunity to meet with an MP, well you might consider okay, how about departmental staff or even a minister?

Now this can be a little bit more challenging if you're just an individual, and it really helps if you can align yourself with an organization of other feminists with like-minded views. There are student in all caucuses, women in the law caucuses of most Canadian law schools, there are all kinds of other intersecting groups with feminist advocacy agendas that you can join from the area of environment, housing. I mean, most universities and law schools are really rich in student associations.

You can join those, and gather together with your fellow travelers, and try and get an appointment with even a minister or a deputy minister, a departmental staff. And then the

final thing, and this is really something that we emphasize quite a bit in the course. And it's something that lawyers can be particularly good at, because we are trained to argue, written and orally, in a really concise, clear, structured way.

Well, if you know that there is a bill before either the legislature or the House of Commons or the senate for that matter, on an issue that you think is important that you have something to say about, consider trying your hand at writing a brief and asking, connecting with the clerk of the committee that is hearing witnesses on that particular bill, to ask to be invited. And again, you can approach your MP, you can approach a member of the opposition.

It usually takes some phoning around and some dogginess. One of the most gratifying things that a number of my students have been able to do over the years is to actually get involved with the women or feminist organization, volunteer to help them write a brief and then in some cases, to actually participate in presenting the brief.

And then the final thing that I would strongly suggest that law students in particular try their hands at is op-ed writing. And so I've mentioned writing a letter to the editor, well, an op-ed is really a glorified letter to the editor, it's an opinion editorial, usually six or seven hundred words. Again, newspaper editors are often very pleased to get well written, concise, persuasive submissions from law students. And they're not the usual suspects. And my students have had incredible success over the years having op-eds that they've submitted to national and local media published.

And so this winter's iteration of the course for example I had, I'd say at least half the students were able to get their op-eds published in newspapers, the national magazine, a whole bunch of other fora. And that includes students that were taking the course from Calgary, Saskatchewan, Ottawa, Toronto all over the place. So bottom line, just go for it.

Cheryl M.: Well, the students at the University of Ottawa do have the benefit of the course that you're teaching in person. But the online course is great for those who don't have that opportunity. It's full of tips.

One of the things that strikes me about what you're saying is that both kinds of writing, writing briefs as well as writing op-eds, are very different kinds of legal writing than what students are used to. They have a different style, and a different tone. Can you just tell us a little bit about that? How do they differ from the kind of legal papers or factum writing that students might encounter in law school?

Martha J.: That's a super question. And I can still remember one of a low point for me when I was myself a graduate student, and I proudly gave my mother a copy of my major research paper that I thought was absolutely brilliant, and she dutifully as my mother read it through and at the end she said that's the most boring thing I've ever read. So I think the real difference is a plain language, accessibility.

The strengths of good legal writing be it a factum or a really in-depth research paper is good research, good structure, concision. Well, those attributes are really necessary for a good op-ed and a good brief too, but the big difference is that you're really targeting a non-legal audience, and things that you might assume that your professor will readily understand, a well-educated reader isn't necessarily going to be up to speed onto the same degree. So it's really important for the writing to be clear, to be accessible and also to be interesting.

So Shari Graydon, who runs a very really successful and influential organization Informed Opinions on her website also has a number of pointers for writing good op-eds, and one of the tips that she gives is a good hook. So when you're trying to write an op-ed and to get it published, it's really important for it to tie into some issue that is in the public eye. And that is another aspect of op-ed or brief writing that may not be so true of conventional legal writing.

You need your reader to read the title, find it interesting and be motivated to continue reading. And by the end, ideally, in the same way a good factum you hope will persuade the judge, by the end of your six or seven hundred words of op-ed you hope you've convinced the reader.

Cheryl M.: The course is also great for the number of experts that you bring in, both online and in your class. Can you talk about just some of the guests that you have had who can also provide their expertise to law reform?

Martha J.: Yes. And this is really my favorite part of the course, because of course I teach it year in year out, and some of these skills I've developed myself, and the skills building maybe wouldn't be so interesting if I were just listening to myself drawn on, but each year, we have really fabulous guests. So I usually try and get one or two very active members of parliament. I will always try to get one or two senators, some of the most interesting guests are journalists, feminist journalists who have a really interesting perspective, because they are experts at how to attract public attention.

They're often very active in terms of political watches, and so they can often give really good tips about how to make really concrete, effective use of the media and advancing a feminist law reform agenda.

My other favorite guests are lobbyists, and believe it or not, there's some very really highly accomplished, highly successful feminist lobbyists that are on the hill, who generally are really generous in sharing their insights and skills. We've been really lucky in recent years to actually have former cabinet ministers, both from the federal and provincial level, and they too often have some really excellent insights about how you can be effective when you actually manage to get time with someone that influential.

And then the final types of speakers that I always try and secure for the class are people who work within the parliamentary system, so committee clerks, researchers at the library of parliament, these women and men are also really excellent source of insight on how to be effective when you're engaging with the legislative process.

Cheryl M.: So now I have a more substantive question for you, in terms of what, in your opinion, are the most important laws or policies in Canada that are in need of feminist law reform activity?

Martha J.: And I think I am going to buck the hypothetical in this one, and what I would say is there are so many areas that are really crying out for feminist reform, and you just have to open the newspaper today to see everything from sexual assault and non-disclosure agreements in the Canadian Hockey Association.

The inquest on the femicides here in the Ottawa area. I mean, violence, missing and murdered indigenous women, gendered racism, reproductive choice with what's happening in the states. I mean, you just look around housing homelessness, criminalization of drugs, like there's no shortage of issues that really are crying out for feminist analysis.

But what I would say is equally important in terms of reform agenda isn't just the substance, but it's the process. And one thing that's been really disappointing in recent years is the extent to which the current legislative process often seems to be happening by the seat of the pants. So there is lip service often paid to consulting feminist experts and feminist organizations on issues that are important to women, and to other people in Canada. But so often, we're called upon this morning to be there, tomorrow legislation often seems half baked.

There isn't really genuine consultation necessarily. So what I would really like to see apart from any substantive change, in any substantive area of law, is a real close look at the way the law reform process is currently operating. I think both at the federal and provincial level, in the same way that there's been a lot of commentary about erosion of democratic participation, I think meaningful participation within the legislative process it requires goodwill more than lip service.

And that I think is as much of a concern for me at the moment than any particular substantive issue is. The degree to which governments are actually really prepared to listen and to consult, and to enact law reforms that are in tune with what feminist organizations and experts are calling for, rather than simply lip service.

Cheryl M.: Now, I can't express more strongly how important it is for students of public interest law, in its various forms, how important it is for them to actually not just look at litigation as a way for change, but also to look at the this kind of law reform measures.

I think this course that's offered both online and at the University of Ottawa is really critical for all law students who care about changing the law, as opposed to just learning about the law. Is there anything else you want to add about the course? Any kind of tidbit that you think is essential?

Martha J.: Well, what I would like to add is a pitch to your listeners, especially your law student listeners, is that law school administrations to some degree are, they're going to try and provide the law school education that students want.

And so if you're at a law school where this type of course doesn't exist, and unfortunately that's most Canadian law schools at the moment. It's quite likely that you might have a professor who would be willing to take it on, all the resources are easily available on NAWL's FLR 101 website, and I'm certainly more than willing to provide support to anyone who wants to give it a go.

So put some pressure on your Law School administration to actually offer this course in person to students. And as I say, if you've been unable to do that, there have been really successful examples including as I mentioned, most recently in Whitehorse of a group of feminists who've simply gotten together, and done the course kind of in the format of a reading group.

And that can be really motivating as well, but I really would like to see the course picked up in other law schools, ideally in every law school. As I say, no law school would think that it would be offering a credible curriculum if there weren't mooting and trial ad programs.

But yet, this type of course which for most of us is actually going to be a skill that we really will be needing much more than as I say Supreme Court litigation skills. And I think for them to be more widely available, the pressure has to come from the clientele, you the law student, so that's my pitch.

Cheryl M.: Well, anyone interested in taking the feminist law reform 101 course, which is not restricted to law students or lawyers, can find it on NAWL's website, under the tab FLR 101, and there will be a link in the notes for this show. It is a fantastic resource for social justice

advocates and community groups hoping to learn more about feminist legal form and advocacy, and thank you Martha for speaking with us today.

Martha J.: It was a real pleasure, Cheryl. Thanks very much for having me.

Cheryl M.: We've been speaking today about section 28 and feminist law reform with Professors Kerri Froc, and Martha Jackman. Be sure to check out the show notes for links to the court cases we have discussed in this episode, along with relevant articles and links to the feminist law reform program mentioned by our guests.

Our next episode will focus on our constitution's notwithstanding clause, section 33 and an upcoming litigation that challenges its use. Topics for other episodes this season include the right to vote under Section 3, socioeconomic rights and disability rights among other charter topics.

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