[S2E3 - Disability Rights under 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. I'm Cheryl Milne, the executive director of the Asper Centre.

Our podcast focuses on leading constitutional cases and issues, highlighting strategic aspects of constitutional litigation, and some of the accomplishments of U of T's faculty and alumni. It is our hope that over the course of this episode, whether you are a law student, a lawyer or thinking of launching your own constitutional challenge, that you learn some aspect of constitutional law and litigation that interests you.

Today, we will focus on disability rights and the Charter. In this podcast episode, we adopt the definition of disability from the United Nations Convention on the Rights of Persons with Disabilities. Which recognizes that people with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers, may hinder their full and effective participation in society, on an equal basis with others.

In 1982, disability was included as an enumerated ground of discrimination under section 15 of the Charter. Since then, disability rights activists have pursued constitutional litigation on a range of issues, including the availability of sign language interpretation in hospitals, funding for autism treatment programs, and inclusive education for students with disabilities, to remain in classes with their peer without disabilities.

However, challenges remain in litigating disability rights under the Charter. This podcast episode examines the successes and remaining challenges in having disability rights recognized within the Charter. We'll be chatting with David Lepofsky and Anita Szigeti, who are lawyers specializing in disability rights.

In our practice corner, we will be speaking with constitutional litigator, Stephen F, on their experiences as a constitutional litigator. We will also hear about practicing law while living with a disability, and ways to remove existing barriers within the legal profession, to make the practice of law more accessible.

Now turning to our first guests, David Lepofsky is a lawyer and disability rights advocate. He completed a law degree at Osgood Hall law school, and a Master of Law from Harvard Law School. While he was still as a law student, David testified before the special joint committee on the Constitution in 1981, successfully advocating for the addition of disability as an enumerated round of discrimination under section 15 of the Charter. He then became counsel with the Crown Law Office civil of the Ontario Ministry of the Attorney General, counsel with the ministry's Constitutional law and policy division. Counsel with the Crown Law Office criminal, being eventually promoted to the position of general counsel, the highest promotion in the Ontario public service. He has appeared more than 30 times in the Supreme Court of Canada, and some 200 times in the Ontario Court of Appeal.

He has published and lectured extensively in various aspects of constitutional and administrative law, human rights and disability rights. He is the current chair of the accessibility for Ontarians with Disabilities Act Alliance, and has been awarded both the Order of Canada, and the Order of Ontario for his disability rights advocacy.

He is now the part-time visiting professor of disability and legal education at the Osgoode Hall law school.

Anita Szigeti is a lawyer at Anita Szigeti Advocates and is one of a handful of recognized experts on the law of mental disorder, both in the civil and criminal justice streams. All of her clients by definition have experienced some serious mental health issues and come into contact with the law. Anita is often Counsel on high profile inquests and has appeared on hundreds of appeals, both in the court of appeal for Ontario, and more than a dozen times in the Supreme Court of Canada. Anita joined the criminal lawyers Association in 2009.

In 2020, she rejoined the criminal lawyer’s association's board as the women's director. Anita is also the founder and president of an umbrella advocacy association of lawyers, the law, and mental disorder association, LAMDA, which brings together civil and criminal lawyers who practice mental health law. In January of 2022, Anita and her colleagues formed women in Canadian criminal defense, a National Organization for Women and gender non-conforming criminal defense lawyers. Welcome both of you to our podcast.

David L.: It's great to be here.

Cheryl M.: So let us begin by talking about the inclusion of disability as an enumerated grant in section 15 of the Charter. David, as you were involved in this successful advocacy, could you share how disability came to be included in section 15 of the Charter?

David L.: This was the result of efforts 40 plus years ago, by a number of us all working very much in isolation from each other. We had no internet, we had no social media, we had no email, we didn't even have personal computers. So we had to deal with things by telephone or snail mail. When Pierre Trudeau brought forward the proposed Charter in October, 1980, it included section 15 and equality rights provision, and it included an exhaustive list of the grounds of discrimination that would be treated as unconstitutional, disability wasn't one of them.

A number of organizations working very much on their own went and advocated to the federal government to try to change this, to get disability added. I was in the bar admission course, and I had the opportunity as volunteer to speak for the Canadian National Institute for the Blind, three organizations got to appear before the joint special committee in Ottawa. I spoke for CNIB, there was a coalition of disability groups, now known as Council of Canadians with Disabilities.

And there was the organization now known as the Canadian Association for Community Living, then called, this is quite dated, the Canadian Association for the mentally retarded, all pressed for the disability amendment. Initially, the government was reluctant and resistant, I'm actually writing a piece on this history right now as we're recording this.

But if you look at the Hansard, it looked like the then Justice Minister, a guy named Jean Chretien he had a political future ahead of him, was resisted based on the nervous nellies working in the Justice department worried about adding this.

But eventually, Pierre Trudeau was so busy trying to make the Charter, and his patriation package popular with the public over the head of eight of the premiers who were resisting the whole thing. That thankfully, they ultimately agreed to include disability.

Cheryl M.: Okay. Well, in the text of section 15 of the Charter, the enumerated grounds of discrimination include both mental and physical disability. Anita, based on your extensive work on mental illness within the civil and criminal justice systems, could you discuss how individuals living with a mental disability, either alone or in combination with a physical disability, experience discrimination?

Anita S.: Thank you, Cheryl. And let me just say I'm really honored and privileged to be here, so thank you for the invite. And I'm particularly honored to be here with David from whom I've learned so much already just in these last few minutes. So talking about mental health and discrimination, this is a big and important question.

Let's start by looking at the macro level, so from a really high bird's eye view, the first thing to appreciate is what happens to persons with serious mental health issues, that does not happen to any other member of our society? And that is simply that by dent of a diagnosis of mental disorder, an entire group of people is subjected to separate legislative regimes both in civil and criminal justice. Legislative regimes that are coercive and liberty depriving in ways the rest of society does not endure.

So civil commitment legislation allows a physician to remove a person who is at risk of certain behaviors from society, and detain them against their will, potentially indefinitely.

We don't do that to any other group of individuals. Lots of people who live in our communities pose certain risks to themselves or to others, but it is only those with a psychiatric diagnosis or label who may be segregated into secure facilities, and kept detained other than upon a criminal charge or conviction. Having a psychiatric diagnosis exposes a person to grave and substantial risks of losing their liberty, and being forcibly confined by means of involuntary psychiatric committal.

Similarly, decision making capacity, with respect to treatment, is often removed from people with psychiatric diagnoses. Where an identically situated person without that label, would retain their ability to decide their own treatment course. Having a psychiatric diagnosis can expose a person to loss of decisional autonomy or control over their body, or what is done to it. For example, community treatment orders can result in someone being forced to take psychiatric medications under pain of a threatened involuntary

hospitalization. We don't force anyone else, a person with physical illness who doesn't have a mental health issue to comply with treatment recommendations or be detained.

Now on the flip side in criminal justice, those found unfit or NCR may be detained in jail-like settings and secure psychiatric hospitals indefinitely. Whereas other than dangerous offenders, those convicted of criminal acts will have a time limited sentence that they serve in prison.

This is again a situation whereby dent of mental disorder, the person is subjected to a completely separate stream of legislation, and practical consequences than if they did not have that psychiatric diagnosis or label. All of these things are aspects of systemic discrimination that some scholars argue are in contravention of the CRPD.

On an individual level, in terms of the human rights context, persons with serious mental health issues are routinely discriminated against in employment, in education, in housing, in accessing medical care, always on the basis of recognized stereotype thinking or other biases whether express or implicit.

I'll just briefly highlight three of the most prevalent stereotypes about persons with mental health issues, that persons with serious mental health issues are one, dangerous, and of course, the ultimate violation of constitutional rights that results from this prejudice, is that persons in crisis are shot and killed by police in hugely disproportionate numbers. Next, of course, their indefinite detention is unfit or NCR accused.

The second most prevalent stereotype is that persons with serious mental health issues are cognitively impaired. This stereotype leads to reduced access to educational and vocational opportunities, where higher education providers and employers do not choose the candidate, because they wrongly presume mental illness is accompanied by cognitive decline or impairment. Mandatory leave policies at universities when someone's experiencing a mental health crisis or a discriminatory practice that is based on this assumption for example.

And finally, that persons with serious mental health issues are unable to make their own decisions, or take care of themselves, or determine what is in their best interest. And you see this prejudice play out most often actually in the provision of legal services, where lawyers either won't take on clients who have mental health issues for fear, they won't be

able to make decisions in their interest, or will be difficult clients to manage once the person's retained. The lawyer might substitute their own judgment for what should happen in litigation.

Persons with mental health issues are often deprived of services, to facilitate their participation in their own health care or in their legal proceedings, and persons who have mental health issues who also have serious physical illnesses are too often denied medical care based on prejudices. So those are just some of the big ones.

Cheryl M.: Thanks, Anita. I mean, this podcast focuses on rights under the Charter of rights and freedoms, but it's important for us to recognize that people with disabilities are greatly overrepresented within the provincial, territorial and federal human rights systems.

For example, of the 13 possible grounds of discrimination enumerated in the Canadian Human Rights Act, the Canadian Human Rights Commission has reported that 60 percent of all the human rights complaints are received are related to disability, either alone or in combination. So David, could you explain for our audience the difference between the disability rights within the human rights regime and the Constitutional system?

David L.: Anti-discrimination legislation like human rights codes cover both the public and private sector, whereas the Charter only governs either the public sector, government, or private organizations, like hospitals that are delivering government programs like health care. As well, the human rights codes being discrimination in a spectrum of specified economic activities employment, access to a place to live, accommodation, access to goods, services and facilities.

So you can't discriminate in relation to those, on grounds that are enumerated in human rights codes like disability. The Charter as I said only governs the public sector or the private sector to the extent to which it's implementing a government program, but the scope of the Charter, section 15, equality rights, governs the content of legislation or the implementation of legislation or other government programs. When you read court

decisions on section 15 or academic writings, they often talk about legislative distinctions, as if that was the core focus of section 15.

Discrimination on the face of legislation is only a tiny part of where section 15 reaches, and it reaches to all aspects of government operations. Whether it's in the wording of legislation, or just the operation of government programs or programs delivered, public programs delivered by private sector organizations.

The other big difference is how you enforce them. If you want to bring a Charter claim, if you say think your Charter rights are in infringed, typically you've got to go to court. The other option is, you might be able to raise your Charter concern before an administrative tribunal, if that tribunal otherwise has jurisdiction over that issue, and over the case. And if you can figure out the shifting ground of supreme court authority about when an administrative tribunal can rule on Charter issues.

For that, I prescribe a large bottle of Tylenol. For human rights codes, have traditionally since, the first one was enacted in 1962 in Ontario, have been enforced through the administrative law regulatory world. Decisions after adjudication are made by tribunals called human rights tribunals, they previously had other names. In some provinces, and federally, there's a public law enforcement agency that's supposed to receive complaints, investigate them and decide which to bring forward and then litigate the ones they choose to, and try to mediate others.

They're called human rights commissions. In some provinces like Ontario, that power was taken away from our human rights commission back in 2006. I should say over the strenuous objection of many of us who advocated from a disability and other perspectives, so that now you take your case to the human rights tribunal, but you have to investigate it yourself, lawyer up yourself and litigate it yourself.

Cheryl M.: Yes, it's a heavy burden. I want to turn a bit into the case law now, and before we talk about the Eldridge case, you've mentioned jurisdiction and I just want to mention one of the first cases that I appeared on with Anita, which is the Conway case, which talked about the jurisdiction of tribunals and administrative bodies to hear Charter cases. It did involve an individual with a significant mental health problem, an NCR, designation. Anita, can you

just tell us a little bit about that case and its significance? And then I'll turn to you David about the Eldridge case?

Anita S.: Conway started out as a very small little niche case about Paul Conway, who's a consummate litigant, who saw it as a remedy an absolute discharge from the Ontario review board for various alleged violations of his Charter rights including the staff were smoking. I think, or that he'd been held in a seclusion suite for a period of time, there was construction noise interfering with his sleep, a host of difficult situations he faced while detained.

And I don't think we were certain that the Supreme Court would even hear the issue, and then all of a sudden, it became the case of the year, essentially suggesting that tribunals were the jurisdiction to consider section 24. One remedies had not been expressly removed, would have that jurisdiction. But of course, at the end of the day, as David pointed out, and the Tylenol should be coupled with other remedies that you can find. Because at the end of the day, we're back to the beginning.

So the implementation of it all still leaves us with if it's not a remedy, that was within the tribunal's jurisdiction in the first place, then having Charter jurisdiction doesn't really confer additional powers, or jurisdiction on to the tribunal. So at the end of the day for us, before the review board, the promise of Conway was huge, and it appeared to us that we could bring Charter cases and seek Charter remedies of the tribunal all the day long, because there was no cause depriving the board of that jurisdiction, and it was entitled to consider general questions of law, and the world was our oyster.

And today, I think we're left with nothing. Systematically, one by one, each potential Charter remedy was removed by the court of appeal or the review board considering the issue, because for example, the Supreme Court itself said unless Mr. Conway was no longer a significant risk to the public safety, and regardless of how much his Charter rights were interfered with by the entertaining facility.

He was still not entitled to get that remedy. So the remedies still determined by the circumscribed authority and jurisdiction of the tribunal, so I don't know how helpful that is. But it seemed really great at the time and I think lots of tribunals rejoiced. But over time, it's been clawed back quite a bit case by case.

Cheryl M.: Yes. I think it sort of echoes what David is saying about the limits of when governments can legislate away those powers, at those tribunals, but also, the courts are taking away. It happened to be one of the first cases at the Asper centre ever got standing in, it was the first case.

And we were seeing it as a big access to justice case, and it's unfortunate it hasn't really bared fruit the way that we had hoped. But David, I want to turn now to the Eldridge case. Today, or this year marks the 25th anniversary of the Supreme Court of Canada's decision in Eldridge and British Columbia. Could you introduce our listeners to this decision, and its significance for the rights of people living with disabilities?

David L.: Eldridge is the second major time the Supreme Court got to speak on section 15, disability inequality. Earlier, just months before the Supreme Court had rendered its decision in Eaton versus Brant County Board of Education. Emily Eaton had a disability, wanted to go to school with her peers in the same class, with her peers who didn't have disabilities.

The Brant County Board of Education said no, got all the way to the court of appeal, and a majority of the court appeal, in an opinion by Louise Arbour, before she ended up on the Supreme Court of Canada, rendered a landmark decision, which was by far the strongest, most principled implementation of disability, equality in the first decade that we had section 15 disability coverage.

Finding that separate but equal education for kids with disabilities is presumptively unconstitutional, and that the school board had to justify segregation of the child under Charter section one.

Well, when that got to the Supreme Court of Canada, the Supreme Court unanimously overturned it in about 12 hours after it heard oral argument. It was a huge, and I might add, appalling decision, a setback for people with disabilities. But just months later, the Supreme Court, in significant ways, eclipsed Eaten by deciding the Eldridge case, the Appellate was Eldridge or the claimant was pregnant and with staff. She went to a hospital in BC to give birth prematurely, and the ambulance presumably was paid for by the state if she took one.

The hospital was paid for it by the state, the doctors and the nurses, they provided everything needed to deliver her, the health care services she needed with one exception, they didn't provide sign language interpretation.

And how do you get effective medical services if you can't effectively communicate with your doctor? So she brought a Charter claim, she said this violated section 15 based on disability. The government responded and went all the way up to Supreme Court of Canada said oh, this is not governed by the Charter, she should have filed the human rights complaint.

She won, and the Supreme Court of Canada did two things. First, in a decision that I think has far more impact potential than it's had impact, in fact, the court said that the Charter applies not only to public institutions or government bodies, but to private organizations like hospitals when they're delivering a public program like health care. It was a significant expansion of the reach of section 15 and a commendable one.

The second thing they found is that the core of section 15 guaranteeing people with disabilities, includes the duty to accommodate our needs and the duty to make sure our needs are taken account in the design and operation of government programs. This on the one hand led to extremely sluggish response by governments. On the one hand, it took a long time, and some might argue it's still taking a long time to ensure effective sign language in hospital emergency rooms.

But what didn't happen, and what should have happened 25 years ago is government should have been reviewing all their programs to make sure they were Eldridge compliant. Because they didn't, and because they haven't, this was important fuel for the campaign for provincial disability legislation. Ontario started our campaign in 1994, I had the privilege of leading it for a decade, and it led to the enactment of the Accessibility for Ontarians with Disabilities Act.

Since then, four other provinces and the federal government have passed comparable, though in some ways, weaker comparable legislation. But they're all ultimately aimed at implementing the vision of Eldridge, of more systematically rooting out the barriers facing people with disabilities, we say without having to litigate it one at a time. Section 15 inequality to people with disabilities on its own, and as applied by Eldridge were a huge

driving force behind the movement to lead to the enactment of disability specific accessibility legislation.

Cheryl M.: And the other thing that Eldridge is really known for, and those who are arguing for more positive obligations on government under the Charter is that it's, one interpretation of it is as a positive rights case, which is that governments have this obligation to provide in a sense of service, that makes the health care system more accessible. So that there are positive obligations on governments when discrimination is taking place.

David L.: I may not win a popularity contest, but I have always found the negative rights, positive rights distinction to be kind of, at least, I'll be charitable, unhelpful and I've never bought into it.

To me, Charter rights are Charter rights, and the characterization of the positive or negative, which I know is not your creation, you're just echoing what people tried to do with it. But those who say well, the Charter doesn't guarantee positive rights, they're wrong. I don't think that the differentiation between the two categories, it helps us at all.

Cheryl M.: Yes. I don't think I disagree with you there; I think it's the courts that have pushed us into that kind of corner in some ways. I want to turn now to a more, another case that I appeared on with you, Anita, acting for different interveners. It was just in 2020, the Supreme Court of Canada released a similarly monumental decision on equality rights for individuals living with a mental disability, who were found not criminally responsible.

And again, a lot of the cases around mental disability that reach their way up to the Supreme Court of Canada happened to be with that particular population, I think, because the stakes are so high in terms of how they're being treated. Could you discuss the Supreme Court of Canada's decision in Ontario attorney general versus G, and the significance for individuals living with a mental disability?

Anita S.: Well first, let me say, Cheryl, that we have been up there together quite a few times, and it seems to me that my client's success rate is heightened when you're there. So maybe I should just determine to only go.

Cheryl M.: I think it must be like I'm a lucky penny or something.

Anita S.: Yes, you're my good luck charm. So thank you for asking me about G, this is one of those cases that is very near and dear to my heart, for a few reasons. First of all, as you know, I was counsel for the intervener, the empowerment council in this case, and they are advocates for persons with serious mental health issues, who also all self-identify as people with lived experience of such issues.

In the judgment, one of the empowerment council submissions is specifically cited and attributed to them, and that was a really big deal for this client. A group of consumer survivors with lived experience, who've been involved in litigation for a long time. This was the first time that something that they said was specifically acknowledged and relied upon on by our top court, so we were all very proud about that.

The other thing is G decides finally an issue that I've been personally excited about and involved in litigating from the Ontario court of justice up for at least 15 years. It is such an important case, because it was decided really on the section 15 issue, which is so rarely seen in mental health matters. The underlying judgment, the court of appeal judgment was written by Justice Doherty, and it was a very powerful, very clear and very helpful judgment that was ultimately upheld.

By way of background for our listeners, in summary, G was an NCR accused who was put on Ontario's sex offender registry which is Christopher's law automatically as the criminal code required, because he had committed a sexual offense, by sexually assaulting his wife while in a manic state of a bipolar illness. After he was discharged absolutely by the Ontario review board, he still remained on the sex offender registry.

There was no way for him to seek removal from the registry, even though an expert tribunal had declared that he no longer posed a significant risk to the safety of the public.

Unlike NCR accused, individuals who are convicted of sexual offenses have opportunities either to avoid inclusion on this sex offender registry, should they receive a discharge on sentencing, or to be removed from the registry once they receive a pardon or record suspension.

These exit ramps, however, were not available to NCR accused. Instead, NCR accused face certain inclusion on this registry, and had no hope of ever escaping the sex offender label. The Supreme Court agreed that the impugned law discriminates on the basis of mental disability, instead of acknowledging that NCR accused or vulnerable individuals who have not committed a crime, Christopher's law branded them as presumptively and irredeemably dangerous sex offenders.

Once caught by Christopher's law, NCR accused could never get out, even if they had been treated, rehabilitated and fully reintegrated into the community. Christopher's law treated NCR accused who lacked moral culpability for their actions on account of mental disorder actually worse than those who had chosen to commit sexual offenses. Those who did have an exit ramp available to them. The court also agreed that the only way for Christopher's law to be constitutionally compliant, both with sections 15 and 1 of the Charter, was for the legislative scheme to provide an eventual opportunity to escape registration.

The Supreme Court had long recognized, in its jurisprudence on part 20.1 of the criminal code, that NCR accused cannot be presumed dangerous. This was affirmed in G. The court determined that in order to achieve substantive and quality under section 15, and minimally impair the rights of absolutely discharged NCR accused under section one, Christopher's law must provide an exit ramp for NCR accused who do not pose a risk of sexual reoffending.

The court also upheld the suspension of the declaration of invalidity for 12 months, to allow the government to craft legislation for NCR accused to seek exemption or removal from the registry once they receive that absolute discharge from a criminal code review board.

The court did, however, and this was somewhat controversial dissent, the court did uphold an individual remedy of removal from the registry to G, given his unique circumstances. So, I'll just say that in your show notes, we've provided you G and the most important paragraphs for our purposes run from 65 to 68, and I'll just encourage our

listeners to go to those paragraphs that address the double stigma of people labeled mentally ill, not criminally responsible and a sex offender.

So it was an important case, I'm still very happy about it. We win very rarely, but when we do, I bask in the glow of that for as long as humanly possible.

Cheryl M.: Yes. The Asper Centre's intervention in that case was specifically about the remedy, and the overuse of the suspended declaration, but also that there ought to be an individual remedy for the individual who's had to take the case all the way to the Supreme Court. So we were very happy with the results of that as well.

Anita S.: So is Mr. G I expect.

Cheryl M.: Yes, I imagine. So far, we've only discussed disability rights in the context of section 15, and actually, G is a unique case, in that the court decided the case only on section 15 and did not deal with the section 7 arguments It's usually the reverse.

So with respect to section 7 of the Charter, which safeguards the right to life liberty and security of the person. In the context of disability rights, why do you think litigants with disabilities have thus far had limited success in achieving recognition of disability rights under section seven? Let's start with Anita, and then David you could jump in.

Anita S.: I think this is going to make for a very interesting discussion, because on balance, I agree with what David has already said, surely agreed with about positive rights. But in the mental health law context, I think the answer does lie in part in the reluctance to recognize positive rights, like the right to recovery in the community or to remain in the community and so on, as part of life liberty and security of the person. And that's due in part to what we've already discussed and we say see in other related contexts, which is a reluctance to mandate expenditure of resources. However, there is an additional Wrinkle in mental health law cases.

A recognition of any positive right to treatment must be restricted to a right to treatment that the individual wants, because otherwise, recognizing positive rights to receive treatment risks leading to others trying to assert those rights over the objection of the subject of the treatment of services. Which is a big huge problem in mental health law litigation. Whereas section 7 very clearly in its analysis and mental health law specifically, focuses on the right against such forced treatment and against interference with bodily integrity and autonomy.

As a result, most mental health litigation tends to focus itself primarily on section seven or even nine, before it resorts to section 15. And because there's some significant tension there, in the event the right to treatment were subsumed under section seven, we worry the approach could arguably lead to more forced treatment of persons with psychiatric histories, than to safeguarding their autonomy against unwanted interference by forced administration of powerful psychiatric medications.

However, on some analysis, of course, section 15 and 7 and 9 whereas they work against each other in some mental health context, there are many examples where section 7 and 15 arguments go hand in hand and should be considered through that intersectional lens. Much of this debate rests on the contested nature of mental health legislation, and I won't go through it in any detail, there are papers you can refer to.

But the contest is between beneficiates and parens patriae jurisdiction of the state, to implement legislation different purposes of safe keeping and treating individuals with mental health issues, versus the policing approach to mental health issues, which is allowing for the detention of those who are dangerous. Both these theories of mental health laws come under attack for being based on different stereotypes.

The first on people's inability to determine their own treatment, the second on dangerousness as we've discussed linked to mental health. But I'll just draw your attention to two cases that considered section 7 and 15 and mental health litigation, good example is Thompson V. A. G. Ontario and that we provided that in the show notes, the application judge in that case dismissed section 7 and section 15 claims for overlapping reasons. He relied on the purportedly individualized nature of expanded committal criteria under the mental health act, so-called Box B, and the community treatment order provisions, to find

that the impute provisions are not over broad or discriminatory. Court of appeal didn't even engage with the section 15 analysis, simply finding that no false stereotypes were created by community treatment order regime or expanded committal criteria.

And our court of appeal rejected the submissions that were made by ARCH in this case as an intervener, which I think were really important submissions, that in the context of forced community treatment orders, there's a significant interplay and overlapping in the intersecting nature of section 7 and 15 claims of persons with mental health disabilities. The court did not endorse the submission that for persons with serious mental health issues, the breach of one right may trigger or exacerbate a violation of another right.

This idea of an intersecting lens through which we should view Charter rights did not find favor with the court on this occasion. However, this is to be contrasted with the same court's treatment of the same issue of intersecting lens and the intersection of section 7 and 15 in PS and Ontario. The court in PS under a specific heading entitled interplay between section 15 and section 7, stated that the section 15-1 violations increased the gravity of the section 17 violations.

And PS was, of course, a case of someone who'd been held for 30 or 40 years, I can't remember, decades long as an involuntary civilly committed patient at what used to be Oak Ridge is Nav Waypoint, maximum secure psychiatric facility in Penetanguishene, and he had not been provided despite being deaf with any ASL or deaf interpretation, and he required both. He had not received those interpretation mechanisms during any assessment, or most of the assessments of his mental status, and was despite all that, detained continuously for decades.

And the court found that had he been provided with ASL and deaf interpretation during the psychiatric assessment interviews, the duration and severity of the conditions of his detention may have been reduced or ameliorated. He may have attained community reintegration sooner, and the failure to accommodate his disability and the resulting section 15 breach exacerbated the section 7 violations that delayed his recovery, rehabilitation and progress in the mental health care system. So on the one hand, PS was a really good case, for seeing how these things interplay and exacerbate and affect one another these

breaches, whereas in Thompson, that court flat out refused to even start the dialogue in making the connection.

Cheryl M.: Well, and PS also just shows the extremes circumstances that can happen with that kind of discrimination. David, over to you, in terms of the interplay between section 7 and 15, and you've already commented that you don't like this categorization of positive negative rights, but how do you see section 7 playing out with respect to the discrimination claims that normally fit within section 15.

David L.: Where do I start? I start for the fact that I have serious problems with the way the Supreme Court interprets section seven, and I think they've gone kind of rudderless by the way they've interpreted the principles of fundamental justice, meaning empty concept like arbitrary or overbroad and that's just a license for American style substantive due process, and dressing it up as objective legal principle, and I think it's nonsense. But in this particular context, I'll give you two examples where the court decided disability rights cases that were screaming section 15 cases and violations. And they did them under Section seven.

Now to the lot of the public, and even our audience is like who cares, they strike the law down, if they got the wrong section, who cares? But it's symptomatic potentially of a bigger thing. So Anita talked about how we have a two-tier system in our criminal justice system, how we treat mentally distorted alleged offenders, alleged, as compared to those not so labeled.

Before 1992, that dichotomy was even worse, because the criminal codes provisions governing fitness for trial, and what was then called the management of people found not guilty by reason of insanity, the old term, was that you were locked up at the pleasure of the lieutenant governor, under a lieutenant Governor's warrant, which the lieutenant government never lifted no matter how serious or not serious your offense.

You could be locked up for the rest of your life for purse snatching, and there was a tribunal created to give advice on whether you should be released, but it did not have due process obligations and the lieutenant governor didn't have to listen to it. It was a

Kafkaesque 19th century system. This was decided in the case called R v Swain in the early 1990s.

And it did a good job of finding it unconstitutional, but it did it entirely as a section 7 case, without seeing this thing as this regime, as entirely wreaking of disability discrimination that should have driven its decision, influenced the decision, affect its decision. As well, when the Supreme Court has twice looked at the issue of doctor facilitated suicide, I know they call it medical assistance in dying, but I don't because I think that's a candy coating and Rodriguez in the 90s.

And then a couple of decades later, in Carter. They first upheld it using section 7 analysis in Rodriguez, and then struck it down in the 2019s, in Carter, both viewing it through the lens of section seven. The total ban on medically facilitated suicide I thought should have been analyzed as a disability discrimination issue, because a person without a disability is capable lawfully of committing suicide.

Whether we think that's a good thing to have going on in society or not, they could do it, and some do. But if you had a disability that was so severe that you physically can't do it yourself, then this criminalized a doctor accommodating your wish and need, to be assisted. Now why I say it that this matters, is because for one thing, if you view it through that kind of disability lens, the remedy would have been much more narrower, and what we've got instead has been new legislation, well judicial rulings, and then new legislation were medically facilitated suicide is utterly running amok.

Much to the consternation of a number of us in the disability rights world, where it's permissible and under circumstances that are deeply worrisome. And the ultimate crushing irony, is that the due process, you want to talk section seven, the due process that is required for an individual to voluntarily surrender their liberty by a guilty plea, for a sentence of five days in jail, is dramatically more rigorous than the due process to voluntarily surrender your life through doctor facilitated suicide, does that make sense?

And that's in a world where the only people eligible for doctor facilitated suicide are people with disabilities. Somebody who wants to end their life for any other reason, and wants a doctor to make it easier or to help them with it, but who doesn't have a disability,

they don't qualify. This issue needs to be seen through a disability lens, but also, this section 7 analysis of it has failed us kind of so, we've lost kind of on both fronts.

Cheryl M.: Yes. I mean, I think that to some extent the court just kind of skirted the issue. There were disability seeking groups or rights, seeking groups on both sides of that case, and it's like they just avoided that topic when they rendered their decision, unfortunately.

I think that we certainly looked at that, I mean we're looking at that issue about when there was a section 7 and a section 15 argument, and the court's just abdicating ruling on one of them because there is then this real neglect of some of those issues that even like legislators should be looking at, so they don't have to really deal with it.

So I think that's a really interesting take on it, David. Looking forward, what do you perceive to be the future of disability rights under the Charter? What are the areas related to disability that you expect or hope that the courts will engage with, and potentially, expand constitutional protections too? So again, starting with Anita and then moving over to David. What are your thoughts on those questions?

Anita S.: So my hope is that at some point, we can engage in a meaningful and thorough exploration of the legality of psychiatric civil detention, premised on the presence of mental disorder, and linked with feared harm, including low levels of harm. Like I really don't think people should be logged up for the prospect of overtime, substantially mentally deteriorating, that's all of us, and that's the current law we have today. And any of us could qualify for a committal at somebody else's behalf.

My hope Is that we could, and would eventually engage with, and consider an equality analysis using section 15, where the opportunities to recover in the community and be supported adequately while living in the community, including with housing and income maintenance supports, food security, mental health supports, become rights that clients who are now otherwise detained and forcibly treated would actually have and enjoy.

My hope is that we would reconsider enacting the so-called capping provisions into part 20.1 of the criminal code. These provisions were there gray shaded for many years, if not

decades. The idea was that people found NCR should not be detained in secure psychiatric hospitals for longer periods, than had they simply been convicted of the criminal offense with which they were charged, that ultimately led to the finding of NCR.

In the short term, what I know will be looked at in the mental health context now is British Columbia's deemed consent provisions in their mental health legislation, as a result of, and Cheryl, you and I, so of course the case was won, I never mind the other 22 interveners or whatever Cheryl and I were there.

AGBC and Council of Canadians with Disabilities, we know that CCD will be able to carry that litigation forward, so that's at least something that will finally be examined after many decades, and that case will determine whether section 15 permits individuals with a psychiatric diagnosis to be deprived of any process, to determine their capacity and deprived a principled decision making by a designated substitute decision maker of their own choice, who must take their prior capable wishes into account, for example.

Unless at the end of the day, that too gets decided on section seven and everything else is bypassed. But there is a very strong, as David says, that case screams section 15 in so many ways.

Cheryl M.: Yes. And that case was, up at the Supreme Court of Canada on the issue of standing, and whether or not the CCD could proceed with the case, even though individuals who had been affected by the legislation were no longer part of the litigation, and so the court said that they could. So David over to you, what about the future?

David L.: Let me offer you four points, the first point is I think that the area of equal rights and equal inclusion in education, where the Supreme Court dropped the ball so desperately 25 years ago, did a better job in a human rights case called Moore, more recently, cries out for action. We have a school system that is publicly funded and yet is designed principally for kids without disabilities, and treats kids with disabilities an afterthought, calling them exceptional pupils, and that's not meant as a compliment, it's meant they're weird.

And treats them with something called special education which is totally an afterthought, it's not equality. I think a second area is one that you've touched on in a couple of contexts, we all have and that's in the health care system. We've just come through, and are still in a pandemic, but where governments, including the government of Ontario allowed a disability discriminatory protocol to be embedded in our hospitals, and doctors trained up to use it on who would be refused critical care if our emergency rooms and intensive care units were overloaded.

We were able to document thoroughly, that it was disability discrimination. The government didn't even answer questions about it, and getting media coverage was uphill. It wasn't litigated for a whole bunch of procedural reasons; you can't get there. The government would have just said oh, we haven't proclaimed it yet, and you can't show someone was actually died under it.

But what we've ended up with is systematic mainstreaming of disability discrimination, a decision over medical rationing in our hospitals, it's deeply troubling. So that's point number two.

Point number three is, this conversation, a lot of it's been about, mostly about cases. The fact is most people with disabilities most of the time will never be in a position to litigate most of the barriers they face that violate section 15, including demonstrably obvious ones, like that critical care triage protocol, to which I referred, and which you can find on the Aoda website, AOD Alliance website at www.AODAalliance.org/Healthcare.

But what we need, what we've been doing for the past 25 plus years has been advocating for disability accessibility legislation, to get systematic solutions created to remove the bears we face, and prevent the new ones we continue to face them that are being created, without us having to go through the process that most people with disabilities can't afford. And that's chartered litigation, we're indebted to folks like you two and the teams that you represent and reflect, that are able to take some of these cases.

But even if we made you immortal and cloned you a hundred times over, both of which I'd welcome a chance to do, but it's above my pay grade, you wouldn't make a dent in all the barriers we face. So that's point number three.

Point number four is, we're talking today to lawyers, law students, law professors, we need to address the systemic barrier that makes it harder to make progress, and that systemic barrier starts right in law schools. Our legal education system, it does I think a decent job of training law students, how to become lawyers serving clients without disabilities. Now that's not because somebody conspired to have that way, and I think legal educators when I say that would respond by going that's awful, and I think they mean it.

But the result wouldn't look any different had it been the result of a conspiracy, had it been planned and deliver it. The fact is most people in law school, most of the time will be learning about the law as it applies to people without disabilities, even though people with disabilities need lawyers too. Commendably, I was engaged by the Osgoode Hall law school as a part-time visiting professor of disability rights and legal education, to try to address that.

I'm doing a couple of things. One is I've been giving guest lectures for several years, in a wide range of different courses and in disability content. You're learning family law, what if one of the spouses in a marriage breakdown, has a disability? What if one of the kids does or more than one of the kids? How does that affect decisions over custody and access over support payments and so on? Tort law, tort law is all about disability, but we don't necessarily teach it that way and so on.

So I've been able to come up with ways to do that work with my colleagues on expanding this on a one-off kind of basis. But the second thing that happened is my former dean now, Justice Lorne Sossin of the court of appeal, had the vision to assign me to create a report for Osgoode on what the law school could do to systematically rectify this situation.

I rendered that report in January of 2022. I've also converted into a Law Journal article; it'll be tied to the show notes and is going to be published in the Windsor yearbook on access to justice. It gives examples of fully 40 I think courses, 39 or 40 courses in which disability content could be added, and I give examples of what could be added in footnotes to resources that could be used. But the other thing is law schools aren't a top-down organization, a law dean can't just turn to their faculty and say you shall teach this, it's just not the way they work. They have complex governance systems, and so I offer a series of recommendations, how that governance system could make progress in this area. To its

credit, I think our legal education has responded commendably to the call of the truth and reconciliation commission, to increase legal education on indigenous law and indigenous issues.

There's certainly more to be done, but we've seen a real transformation in legal education over the past few years expanding that, and I think we should grab on those coat tails, learn what was done right, and expand it to also include expanded curriculum on how to serve clients with disabilities, and address their legal needs. Because as my articles are titled, people with disabilities need lawyers too.

Cheryl M.: Thanks, David. I hope that law students who may be listening, I hope their ears have perked up and they're looking for that as well.

David L.: And by the way, if law students are listening, one thing I'm going to tell you, I'm a grassroots community organizer. If you think that makes sense and you want to learn more about this, tell your profs, tell your dean.

There has been progress in legal education on equity issues in part because of that kind of bottom-up pressure, but it never hurts to say in questions, well, how would this issue play out if one of the parties had a disability in one of your courses? Or in a legal ethics course, what are the ethical obligations of a lawyer to clients or other lawyers with disabilities? Ask the questions, ask them to cover this, why not?

Cheryl M.: Well, now that we're talking about law students, I have another question for you that sort of pertains to that. Is that for our practice corner, we'll be interviewing a lawyer living with a disability to discuss their experiences as a constitutional litigator in particular. But I want to extend the invitation to both of you, do either of you have any messages or advice you'd like to share with students considering the legal profession or young lawyers living with a disability? Anita, I'm going to start with you.

Anita S.: Okay, I'll focus on lawyers and law students with serious mental health issues. I would say to the students and new lawyers that they should know this, you are not alone. There is a very significant percentage of lawyers who have very serious mental health issues. This is true in all sections of the bar, but it's especially true in criminal defense and even more so in mental health justice practice.

The stigma around these issues remains strong, however, in very recent years, a great deal of progress has been made. Prominent lawyers like Orlando De Silva, Beth Beatty, and others have spoken openly about their own very serious lifelong mental health conditions, including depression, anxiety and bipolar disorder. A lawyer named Erin Durant did a lot of good on this issue with her book on lawyer burnout, and how big law has mishandled such situations.

Doron Gold has been vocal on social media about the help that's available through members assistance program, through the Law Society and Homewood Health. Chief Justice of Ontario, chief justice George Strathy, has been speaking openly about his own mother's serious mental illness and his concerns for the mental health of the profession. Things are slowly, but surely getting better. Best thing you can do is surround yourself with supports and community.

My association, law and mental disorder association, LAMDA, supports our lawyers and our law students with serious mental health issues with mentoring and check-ins. We have confidential and supportive meetings to check in. If you can be open about the issues, you face and challenges you have with mental health issues, I do and I would encourage you to do so.

But I also caution, it's important to understand it is not mandatory. While we're all pushing to self-identify and disclose and share our stories, it's a lot easier for someone 30 years at the bar like me to say it's even hard for me, but sometimes, I talk about it. But it's easier for me given the career I've had to do it than when you're a student or a new lawyer to come out and start telling your story.

So you should not feel any pressure of any kind to disclose or not to disclose. It's all your personal health information, and you have control over it. You have that right to privacy. And in the back of your mind, you do need to be mindful, and this is the universe we live in

with mandatory reporting provisions through our Law Society. That we do have a mandatory reporting requirement for lawyers if they become aware that your mental health issue is substantially interfering with your ability to practice law.

So in talking about these issues, just keep that in the back your mind, but access supports and health, and access confidential supports in community, and the community is out there, we're out there, and lawyers with mental health issues make great lawyers, and you're not alone.

Cheryl M.: David, what additional advice would you offer law students and young lawyers?

David L.: I have been blind all my adult life, and had low vision before that. In my experience, the capacity of blind people to practice law well before me existed, and has become easier and easier and easier and easier with the advent of technology like computers that can read what's on the screen, document scanners, heck, if you hand me a document in court, I can use my iPhone and snap a picture of it and have it start reading it to me in a split second. Building on Anita's very helpful comments, let me offer these points.

Number one, disabilities don't come in silos. We tend legally to talk about mental health issues or some of the other issues in analytical compartments, because that's sort of the way they've come up. But disabilities don't come in silos. People can have a mental health issue and can have vision loss, or can have hearing loss or any other disability, or a combination of disabilities.

And the best thing is to take the advice that Anita gave, and generalize it. There is an informal network of visually impaired lawyers, I started one years ago and let it lapse, I apologize. But an excellent young lawyer, Ben Fulton, has kick-started it, to share advice and experience. And there are two, count them, two national organizations of blind lawyers in the states.

So if you want to go to a conference and meet a whole bunch of them, that helped me early in my career. There is an organization available, you can find it on Facebook called the Canadian Association of lawyers with disabilities C-A-L-D which is yet another way to

network. And if there isn't a network in an area that matters to you, create one. Just get on Facebook, spread the word.

You can set up a closed Facebook group so your exchanges can be unavailable to the public to view, but it is clear that through that kind of networking, you can learn from those of us going before, but you can also blaze your own trail. Two other thoughts, one is you're going to want to know about the duty to accommodate people with disabilities, and I'm going to make sure that in the show notes, I haven't sent this to you already, Cheryl.

I recorded a video of a lecture I gave at Osgoode, it's just an hour long, which is an introduction of the duty to accommodate people with disabilities. Give it a watch, and share it with others who might be working with you if you think they need to know it. It's aimed at just making it clear, it's not a case law review, it's a how to do it sort of thing.

And the other thing is systemic solutions are also being worked on. I've had the privilege since 2007 of sitting on a body called the Ontario courts accessibility committee. It's a committee of judges, government officials, lawyers and disability organizations, working on trying to remove the barriers in the court system that face court participants with disabilities whether they're witnesses, parties, lawyers or others, it's co-chaired by the assistant deputy attorney general for court services.

And a friend of mine, a good friend of mine and former colleague of mine when I was working, and now the associate chief justice of Ontario, Michal Fairburn, who is totally a superstar on a million fronts, but this is one of them. And through their work, there are efforts being made to systematically find out what the barriers are and to remove them.

In fact, a link in the show notes is also going to be a survey that we are now doing that's available online about what are the barriers in the court system facing people with disabilities, please, fill it out.

Cheryl M.: Well, thank you very much, both Anita and David for all of this. We're going to conclude this portion of the episode on disability rights in the Charter with giving both of you an opportunity to talk about any new project you're working on, or would like to share with our listeners. Anita, what would you like to leave our listeners with?

Anita S.: Well, let me just first say that I have actually reviewed that one-hour video that David made on the duty to accommodate, and I really encourage our listeners to take that hour. It is a very simply plain man with his characteristic good humor, put in a way that's unforgettable and particularly enjoyed his enumerated list of, I'll just say nonsense defenses, I think he might have called it something else. But I really encourage everyone to watch it, it's invaluable information.

So what with respect to upcoming projects, and this ties into what David has also had to say about disability in every course, equally, I think mental health has a place in in every law school course, but it is currently not generally included other than in mental health law courses. My colleague and good friend, law professor, Dr. Ruby Dhand, who teaches mental health law at Thompson Rivers University in Kamloops, and I have a new book coming out.

She and I are the general editors, we have authored most of the chapters but there are seven contributing authors as well. Proud to say that almost all of them are women. The book is a case book for law students and new lawyers, all about mental health law. It's called law and mental health in Canada, cases and materials. It will be available in digital copies at the end of this calendar year, shipped and print, January 2, 2023.

It covers all aspects of mental health in Canada both civil and criminal. It covers a lot of mental health adjacent, practice areas as well. Like Coroner's inquests into police shootings, for example. It is a very unique product that I think will help many law students and new lawyers become passionate about mental health justice. I hope that it raises a new generation who want to represent clients with serious mental health issues, because it is a truly exciting and rewarding area of practice.

And I'll just pause here for one more second, to say David's advice about creating an organization if there's a gap. I really, I endorse that. Every time I get excited about something and don't find the community, I need to help me advocate on a systems level, I just create a new group. I've done it three times over 30 years. I learned it from Dan Brodsky's father, the late great Greg Brodsky, who found that his letters were answered more quickly by government actors when he signed them president of the trial lawyers of

Manitoba, which at that point contained one person, I think, than when he just put Greg Brodsky in.

And honestly, I really encourage you to you consider that. If there's a community that needs building that can advocate on important issues that affect people systemically, take that initiative. So I'll stop there.

Cheryl M.: David, over to you. You've been doing so much. Anything else you want to add to the long list of projects?

David L.: In the show notes, there will be contact information. You want to know what we're up to in the grassroots of fighting for equality for people with disabilities? Please, sign up to get email updates from the accessibility for Ontarians with Disabilities Act Alliance. The link will be in the show notes, but spoiler alert, it's one heck of a spoiler, it's www.AODAalliance.org.

And there's a sign-up link, and you can get our updates, hit reply, send us your feedback and we'll give you action tips on how you can help if you want to take action. Also, feel free to follow me on Twitter, I can be a prolific tweeter, especially when politicians are at the other end of the tweet.

My Twitter handle is @Davidlepofsky my name with no dots. And the other spoiler alert which I hinted earlier, is I'm working on a memoir retrospective on the fight to get disability into section fifteen 40 years ago, and I hope to have something available in the next few months.

Cheryl M.: Okay. Well, thank you to both of you. It's been a pleasure talking to you, both of you are people that I've long admired for the advocacy work that you do, and so this has just been a delightful discussion, and very challenging and interesting for our listeners. So, thank you.

David L.: It's an honor to be on with both of you, and it's really a privilege, thanks.

Anita S.: Thank you so much, Cheryl. It's just been a beautiful conversation, and feels so enriched.

Cheryl M.: So we've been speaking with David Lepofsky of the Accessibility for Ontarians with Disabilities Act Alliance, and Anita Szigeti of Anita Szigeti Advocates about the recognition of disability rights in the charter.

Welcome back to our podcasts practice corner. I'm going to turn over hosting duties to Caitlin Salvino, who has been the Asper Centre's research assistant this past summer. Welcome Caitlin.

Caitlin S.: Thank you, Cheryl. My name is Caitlin Salvino, and I'm a JD candidate at the University of Toronto and summer research assistant at the Asper centre. I am the current co-president of the University of Toronto disabled law students' association, as well as a board member of the disabled women's network of Canada. On today's practice corner, we'll be speaking about disability within the legal profession.

According to a 2016 survey by the Law Society of Ontario, about four percent of Ontario lawyers live with a disability. At the University of Toronto, faculty of law, in 2021, approximately 16 percent of students identify as having a disability, of this group, less than one percent identifies as having a physical disability. Despite this low representation of lawyers and law students living with disabilities, people living with disabilities are overrepresented in the criminal justice and human rights complaint systems.

For example, the Canadian Human Rights Commission has reported that 60% of all discrimination complaints they receive are related to disability. The Centre for addiction and mental health also known as CAMH, presents the people living with mental illness are overrepresented in the criminal justice system. They state studies from 2012, which found that 36 percent of federal offenders were identified at admission as requiring psychiatric or psychological follow-up.

And 45 percent of male inmates, and 69 percent of female inmates received institutional mental health care services. Therefore, as it currently stands, in the Canadian legal system, people with disabilities are underrepresented in the profession and over-represented in the system. There remains much to be done to increase representation of lawyers living with disabilities in the legal profession.

Today, I will be speaking with a lawyer and constitutional litigator, Stephen Aylward, about disability in the legal profession. Stephen Aylward is a lawyer with Stockwoods LLP, his practice includes white collar crime, administrative and regulatory law and commercial litigation. Following undergraduate studies at McGill University, he completed a JD from the University of Toronto faculty of Law, and a law degree from the University of Oxford, where he studied as a Rhodes scholar.

In 2014, Stephen served as a law clerk to The Honorable Justice Thomas Cromwell at the Supreme Court of Canada. More recently, Steven has taught as an adjunct professor of contract law at the University of Toronto's global professional LLM program, and his academic writing has been cited by the Supreme Court of Canada. He is also extensively engaged in community work, including currently acting as a director of fighting blindness Canada. Canada's leading division research charity. Welcome, Stephen.

Stephen A.: Thanks Caitlin, it's a pleasure to be here.

Caitlin S.: As this podcast is on the Charter and constitutional litigation, we will begin by asking about your extensive experience litigating constitutional issues.

A lot of law students who work with the Asper Centre, and likely many who listen to this podcast are interested in becoming constitutional litigators. Could you share your journey in becoming a constitutional lawyer? As a lawyer in private practice who practices both civil and criminal litigation, what percentage of your practice is constitutional law?

Stephen A.: Yes. So thanks for having me on the show, it's a pleasure to be here and to talk about, both my practice in constitutional law, as well as my experience as a lawyer living with vision loss. I always loved constitutional law. it was one of the reasons that I went into law school and wanted to pursue that.

And coming out of my clerkship, I was really thinking what can I do as a practice area where I'll get to do some of that work at a high level. And I didn't want to focus too narrowly, and there's a lot of pressure to specialize in litigation, I've always resisted that. I find there's a lot of benefit in terms of just personal enrichment and understanding the law, but also cross-pollination and understanding how different areas of the law interact.

And so, I've always tried to maintain a bit of a broader practice that includes as you mentioned, on the civil side as well as administrative law and some criminal defense work in there as well. And so, I've really tried to find a way to work on constitutional issues within the framework of a private practice, and there have been a few different ways of getting there.

For one thing, criminal practice is probably the easiest and most direct way to end up doing constitutional litigation, those issues arise constantly and even the most routine criminal matters you can have. Issues whether it's ranging from 11b issues in a simple unreasonable delay case, to really intricate digital search and seizure issues under section 8, where you're looking to exclude evidence or into challenges to mandatory minimum penalties under section 12 of the Charter.

These are all issues that arise every day in criminal practice. And it really helps to have a grounding in criminal procedure and understanding of those cases, because they make up such a significant proportion of the caseload of the appellate courts and of the Supreme Court of Canada in particular, I found it's very helpful to understand the context in which those cases arise, and to be able to apply that into other areas.

The other part of my practice that lends itself to constitutional litigation is the administrative regulatory side of the practice. So I act for and against a number of different administrative and regulatory agencies, and that goes across a pretty wide range of regulated activity. Everything from professional discipline, to elections law, to securities regulation. And there when you're dealing with state action and regulating particular

industry, you get into some often very interesting and intricate Charter issues. And over time, administrative tribunals have gotten more involved and more active in adjudicating some interesting Charter issues at that level.

So I'd say those are the two biggest areas for me that have fed into my constitutional practice. And I'd say ballpark, may be 25% of my cases have some sort of a constitutional issue. So it's not like I'm doing exclusively constitutional law the way that someone working at the constitutional law branch of the Ministry of the Attorney General may be doing, but I'm still doing a pretty significant volume of constitutional. And the last thing I'd say on this is there's an aspect of path dependency too, right?

Once you become known as a constitutional lawyer with some experience in that area, and that can come about from various things. I mean, one great way to get exposure on constitutional law issues is through interventions, which obviously, the Asper Centre is very familiar with as a concept. But for me early in my career, that was a great way of getting some appellate level experience and constitutional cases, academic writing and speaking on these issues here.

You can build bit of a profile and then people come to you with constitutional questions, so that's a process, that takes time. And I'm just sort of, I'm now eight years into practice and I'm at a point now where I'm starting to get files coming to me, where people have constitutional issues that they are looking for advice on. Whether it's an appeal or just a discreet aspect of another case.

But yes, so there's certainly lots of different pathways into constitutional law, but those are a few ways that have led to me getting involved in those issues anyway.

Caitlin S.: Great, thank you so much for providing that overview. I know I went to U of T law, because I was really interested in practicing constitutional law. But now as I'm preparing to go out into the professional world, it doesn't seem as straight a path to practice that, so it's really helpful for you to provide that, that overview for myself, but also everyone else who's listening.

And most recently, you represented the claimant in the crown and Sharma, where you argued that the sentencing provisions of the criminal code, which bar conditional sentences unjustifiably infringe section 7 and 15 of an indigenous female offender's rights.

I know you won't be able to discuss the Sharma case, because it's currently under consideration at the Supreme Court of Canada. But could you speak generally about your experiencing litigating constitutional rights, and how this is different than other forms of litigation that you might do?

Stephen A.: Well, say just at a general level, being involved in the Sharma case has been the greatest privilege of my career to date. It's been an incredible case to be involved in, and Nader Hasan, he and I were retained at the court of appeal level in the Sharma cases, and so we've been involved in it for several years now, through the court of appeal and up to the supreme court hearing which took place this March.

And this is a case that takes aim at a central plank of the Omnibus crime bill that the Harper government introduced in 2012, and apart from that, it's a case that's rooted in the facts of the experience of one particular woman, a young indigenous single mother who was really failed by Canadian society at every level, and left in a very difficult position in which she committed a drug crime, in circumstances of economic desperation.

The situation struck us as being an injustice, and it really resonated with us and has been a very strong motivator in working on the case and pulling it all together through both levels of the appeal process.

This major constitutional challenge, like this, is a huge project. It took a lot of time to pull everything together and frame the argument just in the way that we wanted to, and how we thought it would be most compelling to the court. This was also, professionally for me, this was my first time at the Supreme Court of Canada as a counsel to a party.

As I mentioned, I've done a number of interventions and those were very valuable experiences as well, but it's a different experience to be there for a party and to have the responsibility of an individual's case at the Supreme Court to squarely on your shoulders. Was also in the aftermath of the court of appeal decision, in which they struck down these

provisions, the limits on conditional sentences that the Harper government had brought in, the current minister of Justice tabled legislation Bill C5, what's now Bill C5, in the House of Commons and specifically referenced the Sharma case in tabling that legislation. So that was sort of a surreal moment for me watching that speech in which the legislation is being introduced by reference to a case that I'd been involved in.

And that legislation is pretty advanced now actually, currently sitting at the committee stage before the Senate, that's where it left before parliament broke for the summer, and so hopefully we'll see some progress on that in the fall, and that's a legislative solution where they'd be looking at repealing the provisions that are under a challenge at the Supreme Court.

So it's a different route to the same outcome. And this is a case that Aboriginal Legal Services was involved from the get-go, from a very early stage, they were involved in writing the Gladue report. and I believe you've had Jonathan Rudin on here to talk about his perspective and involving, in getting that involved, but they did a terrific job in getting this case put together, and in framing it well at an early stage, and making sure that all of the pieces were there to carry it forward through the Appellate process.

In terms of your specific question about what's it like working on a major constitutional case like this, as compared with some others. I mean, for one thing, one aspect of it that's unusual for me is working with a team of interveners like this, including the Asper centre both at the court of appeal and at the Supreme Court. Normally, we don't work on huge teams. The vast majority of the cases that I work on it'll just be our firm on for one party, and another firm on for another party.

But in this case, that was a really great aspect of the experience, is working with these great lawyers who made a tremendous contribution both at the court of appeal and the Supreme Court, and spotting issues that we hadn't, delving into issues that we hadn't gone into in the same level. And just having the perspectives of so many different lawyers brought to bear. When we have issues of broad importance to the country as a whole, it's really so critical to get those different perspectives in there.

Another interesting aspect of constitutional litigation where you're doing, public interest litigation that's going likely going and, in this case, did go all the way up to the Supreme

Court, is you have to be thinking of vehicle issues, that's a term I think it's more common in the U.S they talk about this. But having a case that is procedurally sound enough that you're going to get all the way on the substantive issues, without getting derailed by procedural niceties. And that could be questions of mootness or standing, or whether all the arguments that you want to make were made at the trial level or if they were preserved through earlier stages of appeal.

We had a couple of minor issues along the way on Sharma with that, that were dealt with at the court of appeal. But by and large, this case really was a good vehicle for bringing these issues before the Supreme Court of Canada, because it distilled the legal issues in a very clear way, in a concrete way that were easy for people to understand, and easy to get past anything specific about the case and into the broader constitutional issues.

And then just the last thing I would say about that would be just the magnitude of the issues. I mean, I take all my client files very seriously, no matter what the case is. But when you're dealing with a constitutional case at the court of appeal or the Supreme Court of Canada, it's just a whole other level in terms of responsibility.

We've been hearing from lawyers across the country about how they have clients in very difficult situations who were helped by having conditional sentences be available to them. In other words, they were helped out by the decision of the court of appeal striking down the limits on conditional sentences in the Sharma cases. So that was both very gratifying, but also made for a real sense of responsibility for us as the council team and working on the case.

Caitlin S.: Great. Well, we are certainly looking forward to both the Supreme Court of Canada's decision on Sharma, and also the progress on C5 within the legislative process that you discussed. And these are certainly really important issues, that hopefully both the judiciary and the legislature are able to respond to.

Turning now to the practice of law and disability, how has living with a disability impacted your perspective and approach to practicing law? Do you have any advice for prospective law students who live with a disability and train the profession?

Stephen A.: Yes. So I got my own experience, I am legally blind and that's not a surprise to anyone who's met me in a courtroom. I carry a white cane, and have for years. It's a result of a genetic condition called retinitis pigmentosis, it's been in my family and it's always been part of my life. I had a cataract surgery in 2016, that was in the second year of practice for me that went awry, and left me with a significantly worse vision than I had going into the surgeries.

That was a sort of a very traumatic and difficult experience for me early in my career, and it left me, I've been able to read print material before the surgery and afterwards I was not. So it was a pretty significant break as far as a practicing lawyer early in his career. But fortunately, I've found ways to adapt and to continue on and practice, and that's, I still have some central vision and with proper accommodation on a computer screen, I can do my reading there, and so that's how I do all of my work

And in terms of how that's affected my career, it's done so in a number of ways. I mean, I think three different broad categories, one is in terms of accessibility of information, so much of being a lawyer is processing huge volumes of documents, cases, getting through material and doing so efficiently is a big part of the job. The pandemic has been really good for this actually, in getting more material online and getting the courts onto case lines for which is the online document management system. The Superior Court uses in Ontario for hearings.

Having things be online makes it a lot easier to run them through computer software, accessibility software to make it more accessible, so that's been a huge Improvement. There are also mobility challenges in terms of just getting around to far-flung court houses, navigating new environments.

Adaptive technology there as well has helped, but also, I think the bigger one there has been clear communication, and being able to ask people for help. People are usually pretty good pointing you in the right direction and so on, as long as you can explain clearly what it is that you need and as long as it's a reasonable ask.

Then the other, the third category of challenges has been more in terms of social challenges. People don't know what to make of you sometimes as a lawyer with a disability,

it's still not very common as you pointed out in terms of the statistics. It's outside of the normal, and so people don't always know how to react. I find when, if you're able to people at ease, and make them feel comfortable about it, that goes a long way. But it is still a bit, there are ways to go here. I've had situations where I've been, in one case I was in a courtroom, gowned standing with my client who was in a suit, and the court staff assumed that he was the lawyer and that I was the client.

I mean, why am I wearing this get up? But those sorts of expectations are there and there's something to be navigated. And part of that is education and awareness, and hopefully things will continue to improve as there are more and more people who don't fit the cookie cutter mold of what it means to be a lawyer who are in practice.

In terms of advice to lawyers with disabilities, I would say for one thing look for mentors. It really has helped me to see people like David Lepofsky who blazed a trail, and shown what lawyers with vision loss in our case can do. And it helps I think others as well to have a frame of reference for that, and it's not to mean that you can't blaze new trails yourself. But it helps to know what's been done before, and where people are.

It's still a situation where people with disabilities are someone underrepresented in the legal profession. And as well, disability isn't a single concept, it obviously covers a wide range of different situations that people find themselves in. And so, finding someone who's in exactly your situation, doing exactly the kind of work that you want to do is probably going to be difficult. But you can find people in adjacent areas, or with similar experiences. And I've personally found that to be very helpful.

It's meant both on a psychological level of understanding what's been done before, but also more practically, just in terms of getting tips about different software that can be used that's out there, different practical tips and tricks for navigating different court situations and that sort of thing.

So I would say look for mentors, and also look for opportunities to mentor. You're speaking with law students or younger lawyers with disabilities for me has been a real opportunity to reflect on my own experience, in a way, day to day I don't spend a whole lot of time reflecting on these issues, I just go about doing my job. But it is helpful to have time

set aside where you do think these things through, and where disability is factored into practice. And what can be done to make the profession more accessible.

Caitlin S.: Thank you very much for sharing, Stephen. I know as myself, as a law student with a disability, when I went to U of T law, I really felt like there were no mentors, especially in the school for a young law student with a disability. So for me at least, I felt like I had to turn to the community and really seek out mentors there.

And I'm so grateful and so appreciative for all the lawyers who are sharing their experiences, who are trying to challenge the stigma that exists in our profession. And also, challenge the structural barriers that currently result in less people with disabilities being able to enter the profession. And so, I'm very grateful.

As a final question for the podcast, what steps can be taken to increase the representation of lawyers living with disabilities in Canada?

Stephen A.: That's a big question, obviously, and I think it's a very important one. I think part of it is awareness, and dealing with this stigma issue that you just mentioned. I think actually probably there are more lawyers living with disabilities than the figures are reflecting, and people aren't comfortable self-identifying in that way.

And I think it becomes counterproductive. I think the more people who are open about the fact that they're living with disabilities, the more that visibility exists, and people understand that we're not all coming to work with the same physical abilities, and that it's possible to be a great lawyer using different techniques or working styles and methods.

It also means unfortunately, your disability is often left out of a lot of discussions about equity diversity and inclusion, it's I think part of it is just the numbers that it doesn't affect the same number of people at some other EDI issues do. And so, it sometimes gets left on the sidelines. But it is an area where as a society, we have a lot of work to do in increasing workforce participation across the board, but in the legal profession in particular as well.

I think there's a role here for really the profession as a whole, whether that's firms, the courts, the government, we have to get better at adapting or models and expectations from a one-size-fits-all model to one that's more flexible and accommodating of how people are going to be able to best deliver on their skills. And again, that's been something that I think there's been a lot of progress on during the pandemic, I mean, with working from home, but also alternative work setups. And so that's promising development.

And then one final thought on this, this is something that I've sort of been, an idea that I've shared around a bit in the past, is I think it would be, and this is a more modest proposal, but I think it would be an important symbolic one. That currently in the rules of professional conduct, there's an obligation on lawyers to follow the Ontario Human Rights Code. But the Human Rights Code applies to relationships you have with your clients and your employees, it doesn't apply to relationships as between lawyers.

I think it would be helpful to have a rule of professional conduct that specifically extends a duty of reasonable accommodation from one lawyer to another as members of the profession. And in practice, I've never had an issue with someone providing a reasonable accommodation. And this could be an example like someone walking into court with the book of authorities on the morning of hearing, with 10 cases in it. And if that's the first time that I've seen that book of authorities and reading it in paper, that'll be a challenge for me on the morning of.

Whereas if they had just sent me the list of cases the night before, even if not the full authorities, just the sites that I knew was coming I had a chance to look it up, that's going to be a huge advantage. And that happened to me early in my career, and since then, I've been pretty good about trying to anticipate that, and making sure that other lawyers understood the situation, and they've universally been receptive to that.

I just think symbolically, it would be useful to have an actual rule there, that underlined a common commitment as a profession to work towards accessibility and accommodation for lawyers with disabilities that didn't just turn on the kindness of individual lawyers.

Caitlin S.: Absolutely. Thank you so much, Stephen, for being here today. And speaking with us about your extensive experience in constitutional litigation, and also your experiences

practicing law with a disability. And with recommendations both for future law students, and for the profession as a whole.

Stephen A.: Thank you so much, it was a pleasure to be here.

Cheryl M.: Great job. Thank you so much, Caitlin, for all your work on this episode, and for facilitating a wonderful and thought-provoking conversation. And thank you to Stephen Aylward, for joining us in the practice corner.

And with that, we have come to the end of our episode about the Charter and disability rights, thanks for listening. Charter: A Course is proudly sponsored by the University of Toronto's Affinity partner, TD Insurance. We would like to thank our sponsor, and you can discover the benefits of affinity products at Affinity.Utoronto.Ca .

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