Charter: A Course

A podcast by the David Asper Centre for Constitutional Rights

S5E1 – Charter History – FULL TRANSCRIPT

Transcripts are auto-generated*

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Cheryl Milne:

Hello, and welcome back to a new season of Charter a Course, a podcast from the David Asper Center for Constitutional Rights at the University of Toronto Jackman Law Faculty. I'm Cheryl Milne, your host, and the Executive Director of the Asper Center. In this fifth season, we continue our exploration of Canadian constitutional law, looking closely at the cases, arguments, and ideas that shape how the Charter is interpreted and applied today, through conversations with leading scholars, litigators, and advocates.

We aim to unpack not just what the law says, but how it works in practice and why it matters. Each episode is co-produced by a Jackman Law student, who helps shape the topic, connect with guests, and develop the questions for our conversations. Whether you're a law student, a practitioner, or simply interested in how rights and freedoms are understood in Canada, we hope this podcast offers insight, clarity, and perhaps a few new questions to consider.

Before we begin this season of the podcast, I would like to acknowledge the land from which our podcast is recorded. For thousands of years, this has been the traditional territory of the Wendat Nation, the Seneca, and the Mississaugas of the Credit. Today it remains home to many Indigenous peoples from across Turtle Island, and we are grateful to live and work here. As you listen from your own location, I invite you to take a moment to reflect on the land you are on and the indigenous communities connected to it, both historically and today.

Music:

Charter, A course, I will charter, a course. If we can just get the country to trust us. Charter, a course, Southeast, West, and North. And along the way we may find justice. Charter, a

course, I will charter a course. If we can just get the country to trust us. Charter a course, Southeast, West, and North.

Cheryl:

A quick note about this episode to start. We recorded it last fall when the Hak case, better known as the Quebec Bill 21 Appeal, was before the Supreme Court of Canada. Since then, the court heard the appeal over four days in March of 2026. And as of the release of this episode, we're still waiting for a decision. And we expect to hear sometime before the end of November.

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We're thrilled to drop this first episode of season five about the history of the charter, which sets the tone for the conversations to come. Both of our guests discussed the Hak appeal and the constitutional questions surrounding Quebec's Bill 21, which includes a discussion about section 33 of the Charter, also known as the Notwithstanding Clause. We hope you enjoyed this conversation, which still remains more timely than we could have anticipated.

For the broader topic of this episode, we're turning to the roots of our podcast. The origins and development of the Canadian Charter of Rights and Freedoms. Before we had a charter, what did rights protection look like in Canada? What were the conditions that led us to create a charter of rights in the first place? And how was that charter made?

Joining us to discuss these questions and many more is Professor Adam Dodek. Professor Dodek is a full professor at the University of Ottawa's Faculty of Law in the Common Law section. He has earned degrees from McGill University, Harvard Law School, and U of T Law.

And is a recipient of the Fulbright Scholarship, which he used to research Israeli constitutional law while clerking for the Supreme Court of Israel. He has also completed clerkships at the US Court of Appeals for the Ninth Circuit, as well as here in Canada for Justice Claire Luro de Bay at the Supreme Court of Canada. Before academia, he worked in the public law working group in Borden Ladner Gervais LLP's Toronto office and served as Senior Policy Advisor and as Chief of Staff to Ontario's Attorney General.

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Adam, welcome and thank you so much for joining us.

Adam Dodek:

It's great to be here, Cheryl. Thanks so much for the invitation.

Cheryl:

Before delving into how the Charter came to be, let's begin by looking at the history of modern rights protection in Canada before we had a charter. How were rights protected prior to the Charter?

Adam:

So when Canada became a country in eighteen sixty seven, we in in our constitution.

What was then known as the British North America Act and now is known as the Constitution Act eighteen sixty-seven, the preamble said that we would have a constitution similar in principle to that of the United Kingdom. And what that meant is that rights would not be protected under a Bill of Rights, like in the US, but they would continue to be protected under the common law, by Parliament, or

in our case by parliament and provincial legislatures and by the courts. And so that's the direction that we went in in eighteen sixty seven.

Cheryl:

So we had sort of federal acts like the Canadian Human Rights Act and the and we think of Ontario, the Human Rights Code, but there was also this Canadian Bill of Rights. What were was I mean the the difference or the main difference between the Canadian Bill of Rights and what we now have as a have as the Charter?

Adam:

So, the Canadian Bill of Rights was enacted by the Parliament of Canada when John Diefenbaker was prime minister in nineteen sixty. It was almost a hundred years after Confederation. And in that almost a hundred years, there had been dissatisfaction that had grown with the methods of rights protection that I had just laid out. There had been the internment of the Japanese Canadians during World War II.

There was a recognition of the horrors of the Holocaust in Europe and discrimination against minorities. There had been discrimination against religious minorities such as the Jehovah's Witnesses in Quebec. And so there was a move to entrench Bill of Rights to form to more strongly protect rights in Canada.

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And the Canadian Bill of Rights was adopted in nineteen sixty. People were very excited at the time, but it was limited in a number of respects. First of all, it was a federal act that only applied to the federal government and only to federal legislation. Second, it was limited in its content. And third, it turned out to be given a very, very limited application by the Supreme Court of Canada. There was only one instance.

in nineteen sixty nine in a in a case called Drybones, where the Supreme Court actually struck down a piece of federal legislation as inconsistent with the Canadian Bill of Rights. Far more frequent were very deferential decisions to the courts, from the courts to the legislatures allowing discriminatory action or discriminatory legislation to stand. And some of those cases

A case called Lavelle in nineteen seventy-four, that some of your listeners from other seasons might be familiar with, that was involved a discriminatory provision of the Indian Act that took away status for indigenous women who married non-indigenous men but didn't apply the other way. That was sustained. And another infamous case in nineteen seventy-eight called Bliss, where Stella Bliss, a woman from Vancouver who

lost her job when she got pregnant and she had worked long enough to qualify for regular uninsurance employment insurance benefits, but l not long enough to qualify for maternity benefit. And she said that that was discriminatory. And the Supreme Court, in a unanimous decision, infamously said, No, if there's any discrimination in this case, it's not on the basis of law, it's on the basis of nature.

So the Canadian Bill of Rights turned out to be quite disappointing in its application. And that that motivated people to push for stronger protection in a Charter of Rights and Freedoms that would apply across Canada.

Cheryl:

And as you mentioned, our original constitution of the British North American Act was this act of of the British Parliament as opposed to something that was Canadian. And so that

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You know, what this whole project was more than just the charter, it was also this new constitution that would be we call patriated. And so I wanted talk a little bit about what led to that. Little fun fact about myself that I mentioned to you earlier, Adam, was that when I was in high school, I graduated in nineteen eighty, I participated in a mock parliament where the major project was passing the Charter of Rights and Freedoms. So we actually passed one in nineteen seventy-nine.

but it wasn't that that came out of thin air. There certainly there had been some thinking about creating our own charter, as you said, some of these cases, but also the whole constitutional project. Can you speak to the political and social dynamics of the decades leading up to the charter that provided support for this idea of repatriating or taking back our constitution?

Adam:

Sure. So the enactment of the Canadian Charter of Rights and Freedoms in in 1982 was at least six decades in the making. We we've got to go back till at least nineteen twenty-six to a British imperial conference and a report known as the Balfour Report that recognized the

independent legal status of the Dominions. And the Dominions at the time were Canada, New Zealand.

Australia and the Irish Free State. And at that Imperial Conference, the British government said that the Dominions were free to legislate for their own and that the British Parliament would no longer legislate for the Dominions unless they were requested to do so. That led to the statute of Westminster in 1931 that that put that into enacted that into law.

And starting in nineteen twenty-seven, then there were attempts by successive Canadian governments to patriate the Constitution, right? To take the British North America Act, which was an act of the British Parliament, and to make it to make it an act of Canadian Parliament, an act of Canadian law, and to have a domestic amending formula. Those were the two necessary parts to constitutional reform.

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And then there were always at different points a third possibility or or other things. And the idea of a constitutional bill of rights was one of those other things. So between 1927 and 1982, there were 13 failed attempts to patriate the Canadian Constitution with a domestic amending formula. Some of those had proposals for limited

Constitutional Bill of Rights. Most of them didn't. And all of that sort of led up to the charter. And really the driving force where things got very, very serious in terms of proposals for a constitutionally entrenched Bill of Rights was when Pierre Trudeau came on the federal scene in 1965. He enters federal politics, along with two of his colleagues from Quebec, and he has a clear

Agenda. It's a time of a rise of Quebec nationalism. And Trudeau's agenda was to enact a Canadian Charter of Rights and Freedoms that would that would create more of a Canadian national identity to counter the forces of rising forces of nationalism and then separatism in Quebec. And when Trudeau becomes Minister of Justice in 1967, one of the first things that he does is he goes to the Canadian Bar Association.

gives a speech and says, I want to enact a Charter of Rights and Freedoms. And a few months later he releases a discussion paper called the Canadian Charter of Human Rights, which is a blueprint and looks very similar to the Charter that we eventually have. Trudeau's biographers have called his focus on enacting a constitutional bill of rights and patriation his magnificent obsession.

because it spanned, he becomes prime minister in nineteen sixty-eight and he continues to to push forward. In nineteen seventy-one, there is an agreement at Victoria for patriation, an amending formula, and a limited bill of rights. That agreement breaks down within a couple of weeks. And then 1976, the Parti Quebec was elected for the first time in Quebec with an agenda to take Quebec out of the Federation. And

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In nineteen eighty, there is the first Quebec referendum, and Trudeau campaigns against the referendum for the no side and promises a renewed federalism for Quebec. And all of that is background for the real push that then takes place on the fourteenth effort from nineteen eighty to culminating in the successful enactment of the Charter in nineteen eighty two.

Cheryl:

Well with that historical context, next now let's turn to the actual drafting and creation of the Charter. Your book, The Charter Debates, which is fascinating in terms of its overview of that background, the political machinations, and also how in those thirteen failed attempts, how there was this political inertia at times. It would get to a certain point and then it's like, we're not so interested in pushing this, but that Trudeau really drove it. But it lays out those pivotal moments f from

The special joint committee on the constitution that was struck, whose members made key contributions to the charter we know today. Chapter two of your book, this is the book, The Charter Debates, describes this committee's cast. For our listeners, could you give us sort of a high-level overview of this committee's key players and their motivations?

Adam:

Sure. So this was, as you mentioned, this was what's known as a special joint committee.

Of the Senate and the House of Commons. Most committees of Parliament are either of the Senate or of or of the House of Commons. Special Joint Committee is an ad hoc committee. It's not a permanent committee, and has members both from the Senate and the House of Commons. This was not the first special joint committee on the Constitution. The others in there were others in some of those 13 attempts that had failed. Often, especially these days, I think.

nothing particularly exciting tends to happen at committees. And that was the plan for this committee as well. It was but timing is everything in politics, and for a number of reasons, the work of this committee became much, much more significant than certainly anyone envisioned or intended. In in terms of the the players.

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It was co-chaired by the liberals were in government. Trudeau was the Pierre Trudeau was the prime minister. The co-chairs were two liberals, senator, a liberal senator from Alberta named Harry Hayes. He was about 70 years old. And obviously represented the old Canada, older generation. And then his co-chair was a much younger member of the House of Commons named Serge Joyal. And they were both mavericks. I'm not sure that in today's politics.

People like them would be appointed to chair a committee that were where important things were supposed to happen. There were 25 people on the committee, 15 from the House of Commons, 10 from the Senate, 15 liberals, eight conservatives who were the official opposition, and two NDP members. And certainly the liberals on the committee were influential, but so were the opposition members.

And they really made a difference. The conservatives who were on the committee, first of all, the conservatives then were progressive conservatives. And almost all the members, all the conservative members on the committee were were what were known as red Tories.

Red Tories are socially progressive and fiscally conservative. And they were headed up by Jake Epp, who

was a very influential conservative. And the conservatives had just in pa been in power with Joe Clark. So almost all the conservative members had just been in government. They knew the files really, really well. And the two NDP members were Lauren Nystrom from Saskatchewan and Sven Robinson from BC, Canada's first openly gay member of parliament. And all of them

were you know made a difference, contributed. And you know, this I argue, which is why I wrote a book on this, that the committee was where the charter that we have today was really forged. And there were a lot of changes that took place at this committee.

Cheryl:

It's really interesting how the dynamics worked and just how many of the sort of amendments that were proposed came from these progressive conservatives that were really rights protecting, which is really fascinating to read about.

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Compared to many other legal developments in Canadian history, it seems that the joint committee was also really able to engage a much more diverse range of participants. So that the public got engaged and there were many, many submissions by individuals and groups that helped to formulate the these amendments and the final charter. How do you think this was achieved?

Adam:

Well it's really interesting. I was reflecting on this. You know, we live in an age of populism. And we often use that term today in a negative sense. The joint committee process reflected populism or popular engagement of a different type. And you know, I said that timing is everything in in politics. This was a time where the for the first time the public was allowed to significantly be involved in

Constitutional discussions. Before this, we talk about executive federalism, where everything was decided at federal provincial conferences between the premiers and the prime minister. And this is why the politicians thought that nothing would happen of substance at this committee, because nothing ever really had before. But again, this was different because Canadian society was changing and

There were a hundred different witnesses who appeared at this committee, and there were a thousand, more than a thousand written submissions to this committee. there were ad hoc constitutional groups that sprung up across the country, and there was really a popular movement and a popular interest in the constitution for the first time. people tend to think of the Canadian Constitution as, that's boring.

It certainly wasn't boring to the vast majority of Canadians in the early nineteen eighties. There was something called the Constitution Express from Indi Indigenous Canadians that started in on the West Coast and made their way to Ottawa in order to appear before the committee to have their voices heard. And indigenous Canadians, Indigenous groups made up the largest number, about 17 of those 100 witnesses that appeared.

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Women's groups were very influential because they were really concerned about the decisions like Lavelle and Bliss that had failed, where the courts had failed to protect women from discrimination and failed to provide a guarantee for equal rights. And this was the first time the media covered this committee and covered what was going on. There was a vibrant media at the time. It was covered in the

Written press, print, and it was covered on television. This was the first time that a parliamentary committee was ever televised. It was a less partisan atmosphere than you have today. the members of the committee socialized with one another, there was less party discipline, there weren't political staffers orchestrating the committee proceedings the way you often see today. And all of that combined.

To create an atmosphere where public voices could be heard, would be listened to, and the government was open to accepting changes proposed by those groups and also open to considering and accepting amendments proposed by the opposition.

Cheryl:

Those amendments are really significant and it was really something interesting to see that

the government was willing to entertain those changes. So if it's possible to narrow it down, could you provide an overview of the biggest changes made to the charter by the joint committee?

Adam:

Sure. And I'll have to just summarize here because again, this goes back to my point about the charter that we have today, ninety-five percent of it comes from the joint committee. But it looks very, very different. The the charter that came out of the joint committee looks very different from the one that the government tabled

Originally back in October 1980, significant changes to Section One, to the Limitations Clause, making it much more stringent than originally proposed. Women's groups and other groups pushed for big changes to Section 15, the equality provision, because of Lavelle and Bliss, and also disability was added.

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That was an amendment proposed by the Conservatives, supported by the NDP and then accepted by the government. Section twenty-four, the remedies or enforcement clause, didn't exist in the original draft tabled with the committee. It was added. Section seven to fourteen on legal rights, the right to interpreter for the deaf was added. New Brunswick being recognized as an officially bilingual province, that was added.

And one of the interpretive clauses that can't that the charter should be interpreted in accordance with Canada as a multicultural society, that was added. Those are big

changes, those are just some of the biggest. That gives you a sense of the scope of the changes that were made at the committee.

Cheryl:

Yeah, I mean, just thinking about the remedies clause being a huge, huge sort of strengthening of the charter itself. You know, we've covered the work of the joint committee, which is, as you've pointed out in your book, greatly strengthened the charter in terms of effect effectively protecting our rights and freedoms. However, we know the story didn't end there. After the joint committee submitted their final report, what followed?

Adam:

So the joint committee sat from October nineteen eighty till February nineteen eighty one and it submitted its report to the to Parliament in February nineteen eighty one and things really got testy in the House of Commons for

a couple of months. And and that's because it was it's not because the conservatives who are the official opposition or the NDP were upset with the contents of the charter. What they were fighting and trying to block was Pierre Trudeau's attempt to unilaterally patriate the Constitution. That's what they were opposed to. And so they were trying to slow down the debate around the constitutional package to

fight Trudeau on that front. Ultimately after three or four months, they did the House of Commons and the Senate did adopt a proposed constitutional act. They made a couple of significant changes. One of the most significant changes as women's groups sort of moved from the joint committee to Parliament to

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To lobby was the inclusion of section twenty-eight and also the preamble. That was added in Parliament. So these debates also ultimately led to court challenges.

Cheryl:

So, courts in Quebec, Manitoba, and Newfoundland all considered whether provincial consent, as you said, that sort of unilateral patriation was required so that that that the all the provinces were required to or they were arguing that all the provinces were required to be on side for the for them to

legally pre patriate the constitution. These eventually culminated in a reference to the Supreme Court of Canada known as the patriation reference. In your view, how was this case significant in the evolution of our Charter and Constitution?

Adam:

Well first of all, as as you know our our former colleague Peter Russell, one of Canada's greatest political scientists from the University of Toronto said, it had the decision had real important political consequences.

Right, because the Supreme Court of Canada said, yes, it was legal for the federal government to amend the constitution unilaterally, but by constitutional convention had to get the consent of substantial consent of the province. And politically, what that did was force the federal government to go back to the negotiating table with the provinces. And I'll just sort of put that to the side for a moment.

In terms of our constitution, for the first time the court recognized, if they said it it's a constitutional convention, that substantial consent is necessary, they had to define what a constitutional convention is. And so they did that. And so the patriation reference becomes an important case for not just about the patriation of the constitution, but what constitutes a constitutional convention, how it's recognized.

What the significance. So that's one of the enduring impacts of the patriation reference that obviously extends beyond the patriation of the Canadian Constitution in nineteen eighty.

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Cheryl:

So that renegotiation with the provinces led to something that we haven't touched on yet, which is the a key provision of the charter that has gained a lot of prominence recently, and that is the notwithstanding clause. Can you speak to how this provision arose out of the what's known as the One Last Time Conference?

Adam:

So in the the first week of November nineteen eighty one, there was a what was known as the one last time or the last chance federal provincial conference took place in in downtown Ottawa at the old conference center, the train station, now the Senate. And Trudeau needed to get the substantial consent of the provinces in to abide by the Supreme Court's decision. And for the provinces,

One of the things they were concerned about, the amending formula, there were other things they were concerned with, but one of the prices for their approval was the idea of a notwithstanding clause, which was also known as an override, also a non-abston clause. And so there had never been in none of the drafts by the federal government had there ever been a notwithstanding clause. It had been something that had been in the air.

Had been talked about at some of these federal provincial conferences by some of the premiers, most notably by conservative premier, Progressive Conservative Premier Peter Loede from Alberta at conferences in the 1970s and early 1980s, but it had never appeared in a draft. And there was no nobody, there were no groups calling for it at the joint committee.

there were only a couple of government witnesses. I'm not sure if there was, you know, out of there were over 250 hours of testimony. I don't know if it was mentioned in passing even twice, perhaps once by by one of the government representatives. But so there was very little discussion about this. It comes out, it's drafted and agreed upon. there's

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Discussion about what rights it's going to apply to. It doesn't apply to all of the charter. It only applies to section two, say only in quotation marks, to section two, fundamental freedoms, to section seven to fourteen, legal rights, and and to section fifteen, equality rights. Importantly for Trudeau, it did not apply to official language rights, to minority education.

language rights and it doesn't apply to democratic rights, sections three to five or or mobility rights. So there's very little as opposed to the discussion, you know, in in my book I've got I had to edit the discussion about freedom of expression or freedom of religion or indigenous rights and what ultimately becomes Aboriginal rights in section thirty five or legal rights.

Or discussions about equality, because there was so much discussion in those 250 plus hours at the joint committee, and there had been previous discussion. but with the notwithstanding clause, there was none of that. There was very little discussion. and I I think people in the government were also confused about it. There was a model in it's not like it just came out of thin air.

There was a notwithstanding clause, a similar clause in the Canadian Bill of Rights, but it never had to be used because the courts, with the exception of one case, never struck down any legislation. So there was, you know, there was some writing about the idea. Paul Weiler, a Canadian who went on to a very distinguished career at Harvard Law School, had written an influential article about it, but there was

Very little discussion about the notwithstanding clause.

Cheryl:

There was I mean I'm in your book there there is this a moment where it looks like the notwithstanding clause is going to apply to section twenty-eight of the charter, which is the provision that is now very much a center of a case that's going before the Supreme Court of

Canada about guaranteeing the equality rights between men and women and that that somehow the the notwithstanding clause applying to that, women's groups were extremely

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Extremely worried that that was just going to wipe out any of the gains that they had made in that joint committee.

Adam:

Yes. So that was it appeared that that had been agreed to, that the notwithstanding clause would apply to Section 28, that that had been agreed to by the Prime Minister and nine of the ten premiers at the last chance conference in November, but due to strong lobbying by women's groups.

by their supporters, that then they changed that agreement. there had also been an agreement to limiting the scope of indigenous rights, and that was also withdrawn due to lobbying by indigenous groups and their supporters.

Cheryl:

And I think that one thing that we haven't really mentioned that that requires a l at least some noting is that those people who agreed

Perhaps that it should apply to Section twenty-eight, for example, or to indigenous rights, were primarily all white men, that there was very little representation of women in terms of the decision makers.

Adam:

Absolutely. I mean that th that was the nature of executive federalism, and that was the makeup of the Prime Minister and the Premier's at the time. All white men. And that's also why the

the joint committee process was far more representative and their influence was important because it was much more representative of Canadians than than certainly the leaders of governments were at the time.

Cheryl:

So we mentioned how Section 33, the Notwithstanding Clause, has taken on greater prominence recently with its use by provincial governments and calls to limit it by many organizations, including the Canadian Bar Association and leading civil liberties and human rights organizations across the country.

What do you make of what's happening right now with section thirty-three?

Adam:

Well, I guess I'm surprised that it's taken so long for there to be a serious debate about what the scope of this clause should be. You know, I said that there there was very little debate in nineteen eighty-one when it was agreed upon and inserted into the charter when Jean Crétien, who was the minister of justice, explained these this change.

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in the House of Commons, he explained that, you know, this isn't a big deal. This will just be used for noncontroversial things like to correct like a technical error. Like as if you know if the Supreme Court makes a you know a spelling mistake or something like this, we can we can override that. So it was unclear how

This clause would have worked, what it was intended to be, again, because there was so little discussion about it and there's so little precedent. The Supreme Court in 1988 decided a case called Ford, which is the only case that the Supreme Court where the Supreme Court has ever commented on the notwithstanding clause. And it wasn't, people don't realize, it was not.

The core issue in that case. Ford was a companion Ford is really a freedom of expression case. It was argued at the same time as Irwin Toy. Irwin Toy becomes the landmark, the the paradigmatic first freedom of expression case. Ford is a companion case. And the discussion about the notwithstanding clause can't be

Can't even be five pages in the decision. And it what surprises me is that there had been no subsequent cases about the notwithstanding clause. And there's n there aren't other areas of the charter where I see this sort of one and done approach. Right? It's been 36 years since Ford, and it's only now that we're seeing the second case.

And when you think about other sections of the charter, you know, section one, like how many cases have there been since Oaks in nineteen eighty-six that refine and change the the Oakes test? Or section fifteen, how many different toing and frowing have there been about section fifteen and what the test is under section fifteen? But for section thirty-three, the Ford case is the only

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case where there's any discussion and it's very limited. You know, there's very limited academic writing that's referred to, very limited precedent. So it's certainly ripe to to talk about what, if any, judicial limits should be placed on it.

Cheryl:

And I guess part of that is because there's been politically reluctance across the country with the exception of Quebec to use the notwithstanding clause. there tends to there has tended to be public outcry when politicians have floated the idea of using it. and we're what we're also seeing right now is its use to really impact minority groups in a way that I think people are finding really disconcerting that that wasn't necessarily what

wit one thought that clause should be used for, or it was always that there there should be like there was this unwritten kind of parameter around it, which was we're not going to use it to to harm people.

Adam:

Yeah, I think that's right. I think that there was outside of Quebec until 2017, it was almost like a political taboo to use it. there were a number of instances after high profile Supreme Court decisions, after Vriend

Where the court recognized same-sex rights under sa section fifteen, where, you know, Premier of Alberta Ralph Klein said, Well, I'm thinking about the notwithstanding clause, and there's so much backlash. You know, within a couple of days he said no. similar thing when the government of Alberta around the same time, and this is you know the 1990s, was thinking about enacting legislation to prohibit compensation for forced.

victims of forced sterilization said we're gonna use the notwithstanding clause, strong public reaction, and the government retreats. We've seen since two thousand seventeen, not just in Quebec, but in Ontario and also in Saskatchewan, a willingness of governments to use the notwithstanding clause. I'd say with limited political backlash.

Cheryl:

so Adam, thank you for that immersive deep dive into how we got the charter we have today. Obviously your book is an even deeper dive.

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one takeaway I think our listeners might glean from this conversation is how much the charter rights we have today are rooted in the time in which it were they were drafted, and this is evident in your book, where you mentioned many topics that were seldom discussed at the joint committee, including things like prisoners' rights in the legal rights section, as well as freedom of peaceful assembly. There's not been much in in terms of court discussion of some of these and association.

In the fundamental freedom sections. So we're now forty plus years on. What charter development developments do you think would surprise the drafters? Or are there any early surprises in charter litigation that come to mind?

Adam:

First of all, I would say that many of the drafters and many of the participants would have been surprised by how quickly the Supreme Court embraced the charter. Right? One of the main points of discussion, Peter Russell was

was a witness at the t at the committee and he said he told the committee you know if you do this you're gonna be transferring a lot of control over decision making regarding big public policy issues to the supreme court and there's a real question he said this and other people said this as well whether the Supreme Court's up to the task that was a big question hanging out there like we can have this fancy nice charter

But if the Supreme Court gives it the same sort of interpretation that it gave to the Canadian Bill of Rights, then it will be essentially dead on arrival, or it'll be words on a piece of paper. And there were certainly judges who were holdovers from that era that were inclined to give the charter that sort of narrow interpretation, as opposed to Chief Justice Brian Dixon and some of the newer colleagues who in Hunter and Southam said, we're going to give the charter a large and liberal interpretation.

So I think first of all, a lot of the people involved would be surprised, probably pleasantly surprised, by how quickly and warmly the the Supreme Court embraced the charter. I think many of the people involved would be sur would be and were surprised at the decisions relating to abortion and capital punishment under section seven.

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And that's because Jean Cretien, as Minister of Justice, went before the committee and said, Don't worry, this section won't have anything to say at all about abortion and about capital punishment. Now, we all know that charter comes in in nineteen eighty-two. Six years later in Morganthaler in nineteen eighty-eight, one of the biggest decisions of the Supreme Court at that time and still to this day.

Is the Morganthaler decision where the Supreme Court does strike down the criminal code prohibition on abortion. Surprisingly, I don't think that the committee members would be all that surprised about the recognition of same sex rights under the charter. And that may be surprising, and they also wouldn't be surprised about the open-ended nature of section 15.

Because they certainly, that was their understanding and intention that Section fifteen, the list of protected groups or recognized groups, enumerated groups under Section 15, would be open. And when the NDP put forward an amendment to add sexual orientation, the government opposed it. And Chretien was asked about, said, Well, you know, could the Supreme Court

recognize sexual orientation as a protected ground under section fifteen. And Cretchien did not blink and said, absolutely, they could recognize it the day after, you know, the first charter case. Now it took a few more years for the Supreme Court to do that, but that was something where Kretchen's prediction and I think the understanding of people involved in in the charter, in the making of the charter was was accurate.

Cheryl:

So to tie our conversation together, I'm also curious to know what you think the next forty years of chartered litigation might look like. Where's your crystal ball on that?

Adam:

Well, I think you're seeing with you know, we've talked a little bit about section thirty-three, and I think the case coming up to the Supreme Court of Canada from Quebec on section thirty-three is not only sort of opening up the

(44:03.052)

the discussion for the second time in you know in forty years about section thirty-three. It's also raising questions about section twenty-seven and what section twenty-seven means. And there's been very little jurisprudence or discussion about those interpretive provisions. Section twenty five, section twenty-six, section twenty-seven, and section twenty-eight. So I think you're gonna see more litigation around that. We're also seeing a we've seen

Since nineteen ninety, a lot of litigation around section thirty-five and indigenous rights. I've been surprised that we haven't seen more about section twenty-five. Section twenty-five mentions in this strange roundabout way the Royal Proclamation, which I think is a really important document, a really interesting document. It's mentioned in our Constitution, but it hasn't been recognized as part of the Constitution. So, I would suspect in the next forty years there'll be some litigation.

arguing that the Royal Proclamation should be recognized as part of the Constitution itself.

Cheryl:

Fascinating. We do talk about section twenty five in a episode from last season when we talk about the Gwuntut and Dixon case, where that's very central to what the legal arguments were in that case. So well thank you so much, Adam. This has been really, really fascinating. And for those who are who are interested in our charter and how it came to be this is

Great, we probably should have done it in our very first season to start things off, but I'm glad we're starting it in our talking about this in our first episode of this season. But before we let you go, is there anything else you'd like to highlight, either about this topic or about your work for our listeners?

Adam:

Sure. So why I you know, I was fascinated when I discovered this joint committee and the people involved in this committee. And part of the subtext or the argument in this book is that people matter.

Right. We live in this world where of great sort of cynicism. Why should I get involved? How can I make a difference? I'm just one person. And the stories that I tell in this book show that individuals can really make a difference. I don't know if disability would have been added to the charter if not for David Lepofsky. That's a real, you know, a real question, a real

counterfactual. He had real, real influence. The women's groups, the individuals, the indigenous groups, etc., they all

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Made a difference. And those individual parliamentarians who were willing to work together made a difference. And so I believe that people matter in law, not just the decisions that we teach our students. And so my next project is a book called Constitutional Challengers: The Heroes, Villains, and Crusaders behind some of Canada's biggest cases. It profiles the individuals in some of the cases we've talked about, like Stella Bliss, Frank Roncarelli.

Henry Morgenthaler, Terry Jean Bedford, Oakes. Nobody even knows the first name of Oaks. It's David, Keegstra, Daniel, Sparrow, Van der peet, Marshall, and that book's coming out in January 2026.

Cheryl:

That's fascinating. I I could see us do a whole season podcast just talking to you about all of those names. I think people would love that. But thank you again, Adam. This has been a really great introduction to hHow we got to have the charter that we have that people are so proud of in Canada. Thanks so much.

Adam:

It's been a pleasure talking to you, Cheryl.

(47:36.546)

Cheryl:

Welcome back. For this episode's Practice Corner, we will delve deeper into the origins of our charter by chatting with someone who was instrumental in its drafting, Mary Eberts. Mary received her legal education like me at Western, but not like me, also at Harvard Law School. She taught for several years at the University of Toronto Faculty of Law, now

Jackman Law, and has held the Gordon Henderson Chair at the University of Ottawa and the Ariel Sallows Chair at the University of Saskatchewan.

She practiced law as a partner at a Bay Street law firm before starting a small firm specializing in the charter and other litigation. She's appeared as counsel to parties and interveners at the Supreme Court of Canada, the Court of Appeal and Superior Court of Ontario and other several other provinces, and the federal court and court of appeal. She was active in securing the present language of Section fifteen of the Charter and is one of the founders of the Women's Legal Education and Action Fund, known as LEAF.

She's an officer of the Order of Canada and has received the Law Society Medal, the Governor General's Award in honor of the person's case, and several honorary doctorates. Mary, thank you for joining us.

Mary Eberts:

I'm very pleased to be here. Thanks for asking me.

Cheryl:

Mary, you were last on our podcast all the way back during our very first season to discuss to discuss the history of Section fifteen and its developments in Canadian jurisprudence. I encourage our audience to listen to that episode as well. But why don't we start by returning to our first topic from that episode? The history of section fifteen leading up to its enactment in the Charter. Can you give us a little bit of a precise of that?

Mary:

Well, I think that one of the main features of the Charter that pleased the women's movement was that it was an entrenched constitutional protection for equality.

We were very disappointed in the result in the la case of Jeanette Lavelle and Yvonne Bedard with the Canadian Bill of Rights and came to see that our only possibility for some really strong protection was through entrenchment. And of course, we were also witnessing what happened with the women in the United States when they tried to get a constitutional protection.

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after their constitution had been established and they worked for what fifty seven years to get that and it didn't work. And so we were very pleased to be in on the ground floor as it were and determined that we would take the language of the draft charter and try to make it more powerful in favor of women's rights.

Cheryl:

So thank you for recapping that for our listeners.

While our season one episode on this topic did touch on the drafting, I really commend people to to go back and listen to it. I was wondering if you could delve into your specific contributions to Section 15 and the drafting of the charter in more detail as a witness at the special joint committee. You of course made many significant submissions to the joint committee, especially with regards to disability rights as an enumerated ground, reasonable distinctions, affirmative action, gender equality.

And the three-year delay for Section 15 coming into force. And to start, one interesting fact about the drafting of Section 15 relates to the two-tier formulation you brought forward, which was quite different from some alternatives proposed by the Human Rights Commission, for example. Could you walk us through those differences that the joint committee considered?

Mary:

Well, we developed a two-tier system of rights to replace what was in Section 15 because first of all, Section one was such a huge disappointment and we had the terrible feeling that a court reviewing a piece of legislation under section fifteen would so easily find a justification under section one as it was then written, because it said no that Canada could justify a departure from the Charter on grounds that would be reasonable in a parliamentary democracy.

Well, as we made the point before the committee, a legislature passes a law by a majority. And so when you go back to see whether it's acceptable to a parliamentary system of

government, yes, because they just passed it. So it was a total dead end as far as justification was concerned. And so we thought that we had to build more intersection fifteen, and we decided that we would

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Try to capture in section fifteen the divisions that had emerged in the United States in judicial review under the Fourteenth Amendment. There were some grounds that were subjected to strict scrutiny and had to have a very high level of justification. There were some that were just regarded as justified on reasonable grounds. Women's discrimination fell somewhere in between. The courts couldn't decide whether it was a

terrible thing or just an ordinary thing. And so they varied. We decided that we had to put women in with the category of grounds that were subject to strict scrutiny. And so we suggested in section 15 that there would be a defense that there would be reasonable grounds for the discrimination under the law, but we itemized several

bases upon which they couldn't make a reasonable grounds defense and one of them was gender, one of them was age, one of them was religion, and so on. We had a whole list of of grounds that we'd subject to the strict scrutiny test. And we did that because section one was such a disappointment.

Cheryl:

So related to this and looking back, would you perhaps decide differently on which grounds should have been specifically mentioned in section fifteen rather than being captured as an analogous ground?

Mary:

Well, that's a very interesting question. There were some at the time that where we didn't really think there was the political head of steam to have a ground specifically named in the charter, and that was on the ground of gay and lesbian differences, etc. One that did get named, and I think we should have named.

as a a highly protectable ground was disability. I'm sorry we didn't do that in our roundup. And you know, given that it was a women's organization seeking equality, we should have we should have mentioned gender difference, but we didn't. So those are the two things that we didn't put in that we should have.

Cheryl:

So but speaking of analogous grounds, w back in our last episode we discussed

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your criticism of courts taking a rather narrow view of section fifteen since that since it was enacted. It was interesting to reflect on your comments there in light of your submissions to the joint committee on this topic, where you expressed, and I'm quoting you, hope that Canadian courts will employ not just the simple reasonableness test, but also the idea that some bases for distinction are invidious and should be subject to strict scrutiny by the courts, upheld only when the government can show a compelling

State interest for requiring the distinction. So this is getting back to what you were saying about the two tiers. Now the Section 15 framework has undoubtedly evolved and will continue to evolve, but I I want to hear your reflections on that comment in light of the evolution of Section 15 over the past 40 plus years.

Mary:

Well, what seems to have happened in part because of the language in Section 15 and in Section One.

As it appears in the final version of the Charter. The language, especially in section one, is vastly improved. And to go on from there, we were very anxious when the Andrews case came up before the Supreme Court of Canada because our hope throughout, and I think we said this at the joint committee hearings, our hope throughout was that there would be actual substantive equality protected in section 15.

And not just procedural equality or same treatment or whatever. And so the Women's Legal Education and Action Fund went as an intervener in the Andrews case and argued in favor of an interpretation of Section 15 and Section 1 that would ensure the protection and the provision of substantive equality. And we're very pleased to say that they.

accepted that, the Supreme Court accepted that in Andrews. And not only did they accept it in Andrews, but they also specifically mentioned in the decision that this was being the language of the charter had emerged from people's great disappointment with the fate of Jeanette Corbiere Laval and Yvonne Bedard. And so that was a wonderful victory both with respect to the drafting and also with respect to the interpretation.

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And since then, the interpretation of section one or the application of section one has had its ups and downs. And the long sort of detour into the human dignity addition to section 15 is, I think, one of the downs. But right now there is an interpretation that seems the language in which it's described is very open, and the courts seem to be doing a reasonably good job of finding the

what needs to be protected and imposing fairly strict tests of justification. I'm pleased about that.

Cheryl:

Another area of Section fifteen development that you contributed to surrounds affirmative action. Before the joint committee you discussed the need for the affirmative action function of Section fifteen to not be too sweeping, given its function as a special and heavy duty remedy against discrimination.

How do your comments on this aspect of Section 15 line up with modern jurisprudence on Section 15 too?

Mary:

I think that as I reread my comments on Section 15, many of them were tempest in a teacup and based on the experience to date as of nineteen eighty-two with affirmative action programs, they've become much more professionally developed now, and where a government

Is prepared to countenance them or put them in place, they seem to be taking into account a lot of the factors that one would want to have taken into account. And so I think that, you know, we were overly worried about affirmative action at that time. Our big problem with affirmative action now is that not enough people are doing it. But to the extent that they do it, they seem to be preserving charter rights quite well, furthering them quite well.

Cheryl:

Yeah, you don't see a lot of litigation on Section 152 really.

Mary:

No, there hasn't been a lot of litigation on it. But I think that's a result of two factors. One is that you don't look a gift horse in the mouth. And secondly, there are programs that have a whole lot of flaws in them because the personnel pe that

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set them up are very much more sophisticated than they were in 1982.

Cheryl:

So going back to your comments about Section One, because of course a a conversation about Section 15 and any really right under the Charter has to incorporate comments about Section One and the reasonable limits. I found it interesting how in discussion at the Joint Committee on the right to vote, you link our democratic rights with Section 15 equality rights. And in particular you said

Problems arise with the restrictions that might, according to this charter, be placed on the right to vote, to hold public office, and to per participate in referenda. At the moment, the Charter simply says that these are not subject to unreasonable limitations, and we think that we have a list of unreasonable limitations in section fifteen that should be applied to those clauses. Could you expand on what you meant by this linkage of these rights?

Mary:

Well, I think that one of the issues in voting always is the age at which people become eligible to vote. And I think there are moves now to have the age lowered and with some justification because you know, people the age of sixteen or eighteen or however low they want to put it, do have

A lot more background than many of the old-time voters had at 21. And we wanted to make sure, and this again is at a t at an age in the charter development when Section One was not very good and not very strong. But we wanted to ensure that there would be protections in the development of the right to vote and other political rights.

Protections like those in Section 15 so that people couldn't be disqualified from voting and that people could seek broader qualifications to vote on the basis of Section 15. And I think, you know, because section one turned out to be a lot better in the result than was expected from the original proposal, we needn't have been so worried, but at least now we do have a situation where

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Political rights are protected in section fifteen and can be judicially reviewed under the Charter. And the other thing I notice that the framers did s get right, if they were insisting on putting section thirty-three into the Charter, at least they didn't make it applicable to the political rights, which is very important.

Cheryl:

Extremely yeah. And as you know, the Asper Center is involved in representing a group of young people who are

fighting to lower the voting age. and I think that that that what the courts have done with section one and the voting rights and equality have made it really clear that if a government wants to disenfranchise somebody, they have to have a very good reason and equality is very much part of that discussion. And we saw that in the Sauve case and in more recently the expat voting case as well.

Mary:

Well that's that's a very important development. A very important set of protections that we need very much.

Cheryl:

You also made some very critical contributions to Section One in itself, and we've been talking about it. you've been raising Section One throughout our conversation. At the time you listed many rights that in your view should never be interfered with, no matter how grave the emergency and voting and the democratic rights must be included in that. Could you walk us through your reasoning as well as your reaction to the final draft of Section One?

Mary:

Well the worry that we had, and I think the worry that a lot of people had was that section one was so weak that a legislature could put on any kind of restriction on any kind of right, and there was a very strong chance that it could be justified under section one. And so I know the National Action Committee on the Status of Women said that women were going to be worse off under.

the charter than we were before. And there were other comments on Section One that were pretty disparaging, although we were told when we appeared, that is the status of Women Council, that we w we had made the most devastating attack on Section One that they had heard to date. But I think that the improvement in Section One has really eliminated the need to make a special section of

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specially protected rights. And that is also the the result of the way the courts have responded to section one. They don't seem to be making a distinction between different grounds and developing a test for justification that is stronger or weaker depending on the ground. They apply the same test for justification to all the grounds that come up, whether they're named in the charter or whether they're

not named in the Charter, but are, you know, sort of rights that are similar to those in the Charter and therefore should be protected. And that's another virtue of section 15, the way it was left open, so that these other grounds that were not named in the Charter could be raised and assessed on the same basis as grounds named in the Charter would be. First of all, you had to establish that what you were basing your case on was an analogous ground and that it was.

as important or as valuable or as vulnerable as those protected in the charter. But once you've done that, you were entitled to have the same level of scrutiny applied to it. I think, you know, whether it's because of the amendments or in large measure because of the court that was in in place when Section 15 began to be analyzed after 1985, that we did develop with some false and detours as an effective test.

Cheryl:

Yeah, I mean I you mentioned nineteen eighty five is sort of fun fact about me is that I graduated law school the year that the section fifteen came into force. So I sort of linked my entire legal practice to Section fifteen.

Mary:

You radiated your whole legal career then.

Cheryl:

That's right. But also you know I think it also speaks to the I mean it's it's really interesting how during the Oaks test has been. That that the court, you know, developed that test for

Section One and it really hasn't deviated from that. It's been, you know, it's holding government to account if they are going to limit rights. And it's a really straightforward test that ke that is applied. And that goes back to also we did a whole segment on that with in one of our very first segments in the podcast about how Section One operates. But I think that that's part of the an an interesting

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Aspect of the charter and how Section One operates.

Mary:

Well, I remember when the Andrews case was decided and when it came out, when the decision was issued, I was at a lodge out in the country. It was snowing and we were surrounded by you know big falls of snow and big drifts of snow. And this lodge had one little fax machine, and I was being sent the Andrews decision by fax.

I was hanging around in the lobby of this lodge reading one page after another as it came out, and finally found the decision with the test in it. I was just cheering and raving all over the lodge. I remember that as a a big moment in my section fifteen life, that if we hadn't succeeded in getting a good test for section for violations of the Charter, then we would have not done much at all.

Cheryl:

So we've got section one, we've got it, you know, interpreted fairly strictly by the court and holding government to account if they're going to in t in order to justify a limit on a right. But then we've got section thirty three. So we you know, it at as we know from Professor Dodic's portion of this episode, the f the first half of the episode, Section thirty three ha was not yet a part of the charter at the time of the joint committee.

We discussed Section thirty three a bit in our season one episode, but I'm curious what was your reaction to the inclusion of what is known as the notwithstanding clause in light of ongoing litigation, including the hack case, which that is currently before the Supreme Court of Canada?

Mary:

Well, when the when section thirty three was put into a charter, into the charter, there was another kind of women's charter drive all across the country. In addition to the original

drive to get the language of section 15 and section one strengthened. Women took again to the podium and to the streets, literally, to get section 33 off section 15 and off Section 28. Section 28 was the section that declared that men and women are equal. And given that men in our system had the highest level of

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constitutional stature, as it were, to say that women were equal to men was indeed a kind of realization of women's longtime drive to be recognized as full persons in the law. And when section 33 was conceived of and put into the charter, there was a movement across Canada by women's groups, once again taking to the podiums and to the streets and to the telephones and whatever.

To have Section 33 removed from Section 15 and Section 28. We were successful in having it taken off Section 28, but not off Section 15. And that's now a problem. It arises, for example, in the Hak case about Bill 21 in Quebec, where huge numbers of the people affected by the provisions of Bill 21, which require that people in public.

employment not wear religious symbols are actually women as they're Muslim women who want to wear the hijab. And so the fact that section fifteen is under section thirty-three means that you can't use section fifteen directly to attack the laicization requirements of Bill 21. Jews can't use it, Muslims can't use it, women can't use it. And so

There's been a huge amount of discussion about whether Section twenty eight could step into that gap. Would it ever be recognized by the courts as a substantive guarantee instead of an interpretive provision? And that remains to be seen because the Hak case is going up to the Supreme Court of Canada, but we don't know when yet.

Cheryl:

And that's certainly something that parties and many interveners are arguing about the

impact of section twenty eight and also the ability of a court to declare to issue a declaration as to whether something infringes people's rights regardless of section thirty three. And I'll say that you and I are counseled for the Asper Center and our intervention on on that is that our issue as well. So I once again, Mary, I want to thank you so much for joining us and for giving our listeners a look at how the Charter came to be through a drafter's perspective.

(01:11:39.638)

I have just been speaking with Mary Eberts, an active contributor to in securing the present language of section fifteen of the charter, and a witness before the special joint committee that played an instrumental role in securing our constitutionally enshrined rights and freedoms, among her many other accolades. Thank you, Mary.

Mary:

Thank you very much for the discussion.

Cheryl:

We hope you enjoyed this first episode of season five, and that you will join us for more conversations to come. And a special thank you to our student producer, Romina Hajizadeh who helped produce this episode. And to our producer, Tal Schreier, for all her work behind the scenes. Thanks again for listening, and we'll see you next time on Charter a Course.

Music:

Charter, a course, I will charter a course. If we can just get the country to trust us. Charter a course, south, east, west, and north. And along the way we may find justice. Charter, a course, I will charter a course. We just get the country to trust us. Charter, a course, South, East, West, and North...