

### [Episode 3 - Jury Fairness and the Charter]

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**Cheryl M.:** Hello, and welcome to charter a course. A podcast created by the David Asper center for constitutional rights, at the faculty of law at the University of Toronto. I am your host, Cheryl Milne, and I am the executive director of the Asper Center.

Our podcast focuses on leading Canadian constitutional cases and issues, highlighting strategic aspects of constitutional litigation, and some of the accomplishments of our faculty and alumni.

It is our hope that over the course of this episode, whether you are a law student, a lawyer, or curious person, that you learn about an aspect of Canadian constitutional law and litigation that interests you, so let's get started.

I wish to first acknowledge this land from which our podcast emanates. For thousands of years, it has been the traditional land of the Huron Wendat, the Seneca, and the Mississauga's of the credit. Today, this meeting place is still the home to many indigenous people from across Turtle Island, and we are grateful to have the opportunity to work here.

Today, our constitutional conversation focuses on section 11 of the Canadian charter of rights and freedoms. Unlike sections 1 and 7, which we discussed in other episodes. Section 11 provides a list of rights for persons charged with a crime.

These include, but are not limited to, the right to be tried within a reasonable period of time under section 11b. The right to be presumed innocent until proven guilty under section 11d, and the right to the benefit of a trial by jury, where the maximum penalty for the offense is imprisonment for five years, or even more severe punishment, under section 11f.

We will be focusing on jury selection, and the impact of the Supreme Court's decision in R versus Chouhan . We will also consider the way in which the court's current understanding of jury selection informs the right to a jury that is representative of the community.

We are privileged to be joined by two guests, who find themselves very much involved in litigating and scholarship on charter issues, Kent Roach and Christa Big Canoe. Kent Roach is a professor at the University of Toronto, faculty of law.

He earned his law degree at U of T, and his masters of law at Yale University. Professor Roach was appointed a member of the order of Canada in 2015. His research focuses on constitutional and criminal law. Professor Roche has won awards for his pro bono work with respect to human rights advocacy in Canada.

He has represented public interest groups in several landmark Supreme Court cases, including Chouhan which we will be talking about today. Christa Big Canoe is the legal advocacy director at aboriginal legal services.

She is familiar with many pressing legal issues facing Canada's indigenous communities. Christa formally served as the lead council for the missing and murdered indigenous women and girl's national inquiry.

She has likewise represented aboriginal legal services in several landmark supreme court cases, including the Kokopenance case, which was about who makes up the pool of people that could be selected for jury duty.

With the help of Kent and Christa in this episode, we will explore the Supreme Court's recent reasons in Chouhan, addressing steps parliament has taken to alter the jury selection process.

Additionally, looking at the Kokopenance case, we will examine the relationship between section 11 and the right to a representative jury, particularly in respect of first nations. Lastly, we will briefly explore the section 15 equality issues linked to jury representation.

In this episode's legal practice corner, we will also look at some of the practicalities of jury selection from the perspective of a criminal defense lawyer. Welcome Kent and Christa, so great that you're with us today.

**Kent R.:** Thanks a lot, Cheryl.

**Christa:** Thank you.

**Cheryl M.:** The case of R versus Chouhan recently made its way through the courts. Chouhan focuses on the range within which peremptory challenges during jury selection are acceptable. For the uninitiated, Kent, can you explain what is meant by a peremptory challenge?

**Kent R.:** So a peremptory challenge basically allows either the defense or the prosecutor to say, I don't like the look of this juror, I don't want this juror on my jury. Depending on the seriousness of the offense, the accused and the crown may have 4, 12, 20 peremptory challenges.

**Cheryl M.:** So what was the Chouhan case about?

**Kent R.:** Well, in bill c-75 parliament abolished peremptory challenges in large part, because of their use to keep five visibly indigenous people off of Gerald Stanley's jury in the case where he was charged with the murder and manslaughter of Colton Bushie, 22-year-old indigenous man.

The issue was, did this violate the accused charter rights? Their rights under sections 11d, 11f, and 7 of the charter? And could it be applied retroactively to Mr. Chouhan's case.

So the case went up to the supreme court, where all but two judges held that the statutory amendments could be applied, and only one judge held that they were unconstitutional, that they basically took away the rights of the accused under the charter.

**Cheryl M.:** So I'm wondering, in the supreme court of Canada decision, what you think of Chief Justice Wagner's remark, that despite the subjective benefit of such challenges, in that the

accused feels more involved in proceedings when they get to have a choice about who sits on the jury. That the true value of such challenges was actually doubtful.

What was the justification for peremptory challenges without cause? So without some reason having to be explained, and is that justification still relevant today?

**Kent R.:** Well, I mean, I think and this was what interveners argued that it was important for the accused to have some participation in the makeup of the jury.

So the accused should not, if he or she received a dirty look from a prospective juror or something like that, they should be able to throw them off. I represented the Asper Centre, and Christa represented or is part of aboriginal legal services, and we took a different view.

That view was that there was a history of using peremptory challenges in racist ways to produce all-white juries or juries without any indigenous representation in cases involving indigenous victims or indigenous cues.

So I think what the chief justice was saying was that when peremptory challenges are used in this unexamined, because you don't have to justify them, including in discriminatory and racist ways. That they have little value. That was a contested issue in the Supreme Court. But that's the way the Supreme Court came down on that issue.

**Cheryl M.:** Christa, what would you say, what would you add in terms of what aboriginal legal services position was on behalf of indigenous accused and communities?

**Christa:** Right. I mean, when you first asked the question about the justification still being relevant like that previous thought of a subjective benefit. I would suggest our question, if it ever was really relevant or beneficial all along.

So aboriginal legal services was one of the interveners. We were represented by Caitlyn Kasper, and she quite eloquently explained that essentially while the accused thought,

subjectively, that their participation in weeding out jurors are identifying by looking at them, whether they would be pro-accused or not.

That the actual reality is that this subjectively holds a ton of implicit bias against people who are and what they are like. So for example, the stereotypes that we have often seen historically before the courts such as stereotypes of drunk welfare, indigenous people that they're lazy, that they're uneducated. So there really is no subjective benefit.

**Cheryl M.:** So Justice Cote in the dissent points out the pivotal role that peremptory challenges have played in jury trials for over 700 years.

She argued that the section 11's utility is rooted in its inclusion of certain core attributes that a jury must possess and that peremptory challenges are one of those core attributes given the fact that they allow accused persons to be more directly involved in the trial process.

What are, in your view, the core attributes of section 11? And are peremptory challenges really among them?

**Kent R.:** First of all, I think it's important to realize that under section 11, you only have a right to a jury trial if you face five years imprisonment or more.

So I think she was appealing to an English and American and Australian history, where the jury trial plays a bigger role. For me, the crux of section 11 is to have a fair trial, which is not necessarily the trial that is most advantageous to the accused.

So whether it's on this, or issues of sexual violence where the courts are slowly recognizing that stereotypical reasoning has no place. It seems to me that with respect, I disagree with justice Cote that peremptory challenges are at the core.

Having said that, right? The defense bar feels that this is really the only say that they have on who is the jury.

We know that provinces don't always do a very good job in getting a random cross-section into the jury room, and we know that judges have been reluctant to allow defense lawyers to question prospective jurors about whether they're biased, right?

So I would think that the challenge for cause is central to section 11 and a fair trial, and we do have that challenge for cause and the numbers are unlimited, right? Because we don't want a person who is impartial.

So my argument would be that bill c-75 probably made the system fairer, by saying that it's the trial judge's responsibility now to determine whether jurors are impartial. Now, of course, the defense and the crown, the prosecutor, have to do a job in bringing those forward. But for me, when I look back at the Gerald Stanley case, it's completely shocking.

Obviously, that his lawyer and Mr. Stanley used the peremptory challenges to keep five visibly indigenous people off of the jury.

Less well-known, but equally as shocking, is the fact that the crown did not ask to question jurors about whether they would be biased, because of racist stereotypes about Colten Bushie as a young indigenous man who was on Mr. Stanley's property.

Or because of racist social media, that happened in part because of the way the RCMP publicized the arrests after the incident. So for me, challenge for cause is essential to a fair trial, peremptory challenges are not.

**Christa:** I agree with Kent, absolutely 100%. The challenge for cause is really what protects the rights at stake.

When we're talking about a fair trial, some of the interveners talked about the fact that it was that subjective view of the accused or from the accused perspective was the way they receive a fair trial, when they have a say in the final composition of the Petitory to reflect their own background.

But ALS, and this has been our position for a long time, is that the idea of a full and fair trial extends beyond the accused to the community's perception itself, and without a doubt, the lack of indigenous representation is this massive gap.

It's a reflection of the crown and the accused biased against indigenous people, and I mean Kent already spoke about what that meant in the Colten Bushie death, and the prosecution of the accused in that case.

You have to reflect a representation of the community. So again, one of the things that Miss Casper actually said during her submissions which I thought was like really poignant, was the reality of how peremptory challenges have played out in Canadian law substantiates our position that these challenges are being used by both sides to ensure indigenous jurors are screened out. It's just another type of discrimination. So eliminate the discrimination by eliminating the peremptory challenges.

**Kent R.:** I agree with, Christa. It's probably also worth mentioning that Colten Bushie's family intervened also, and they were on the same side as the Asper Centre and aboriginal legal services.

Although, there were groups representing other racialized groups, as well as defense lawyers and the advocate society who were on the other side.

**Cheryl M.:** So Chief Justice Wagner expresses concern that public confidence in the justice system would be undermined if trial judges stand aside jurors to actively promote diversity.

Is jury diversity a necessary condition for a representative jury? Or should just randomness of this election take priority? And are they mutually exclusive?

**Kent R.:** That's really interesting. In my view, I actually think that the trial judge should use these new powers to stand aside jurors, to actively promote diversity.

But even though the chief justice's comments did not command a five-person majority on the court, I think that they will be influential in the justice system. I think that that's unfortunate.

I think the criminal justice system has been resistant to theories of substantive equality, which accommodate affirmative action for want of another term, to promote diversity.

So I think that although this issue has not technically been resolved by a five-person majority, I think accused and crowns are going to have an uphill battle, trying to convince judges to use this new stand-aside power, which is related to public confidence in the administration of justice, to increase diversity.

For what it's worth, I testified before parliament, that parliament should give judges more of a lead, and to say public confidence is related to representation on the jury of those groups like indigenous and black people, who are represented in the criminal justice system. But parliament in its wisdom did not make the amendment that I proposed.

**Christa:** Again, I agree with Kent. A couple of quick things though I would like to add. When you take into context, like the system itself has been geared in this colonial context that hasn't taken into account indigenous perspectives or people, is one of those starting points, right?

So where is the public confidence of indigenous people who are mostly before the court as accused, but also very often as victims.

So there's almost like an exclusion of consideration of the public confidence that indigenous people would have in the system.

So set-asides would allow, for example, there to be a reconciliation of sorts for the indigenous people who are feeling the impact of the justice system more. So I would suggest they're not mutually exclusive as per your question, and I'd also point out that it's not revolutionary.

Research for a number of years has told us, diverse juries deliberate longer, they discuss more facts, raise more questions. They will discuss race, and the racial composition of a jury pool can affect jury outcomes.

Most of that academic literature comes out of the United States, where there's been a lot more work done as it relates to black accused and black juries. But we know this in Canada too, like the A.J.I the aboriginal justice inquiry of Manitoba way back in 82, told us that at the jury selection stage, it's common practice for crown attorneys and defense counsel to exclude aboriginal jurors.



So the examples they provide are compelling, and that particular inquiry looked at specific deaths and stuff.

So this happened as long ago as in the Helen Betty Osborne case, when there were six aboriginal people called for it, where peremptory challenges were used for all of them, right? Up to Colten Bushie.. So we're talking 30-40 years where this is known as shouldn't be controversial, and it's about time for some changes.

**Cheryl M.:** So that leads nicely into the next case that I wanted to talk about, which is the case called Kokopenance that made its way also up to the Supreme Court of Canada.

There, an indigenous man who resided in Grassy Narrows first nation was found guilty of manslaughter at trial for stabbing and killing another man in a fight. His conviction was appealed upon finding that the creation of a jury role for the district may have inadequately included the districts on reserve residence.

So left out a huge portion of people that want to have otherwise been eligible. This potentially undermined the representativeness of the jury, and thus the fairness of the trial.

So the decision considered sections 11d and f, and the supreme court actually set out that representativeness is a necessary component of the accused section 11f right to a jury trial. However, they found that he wasn't treated unfairly in that regard, and there was quite a diverse opinion between the majority of the court and the descent.

So the majority held up there was no right to a jury role of a particular composition, nor to one that proportionately represents all of the diverse groups in Canadian society.

That the state must make reasonable efforts to compile a representative jury role, and if those efforts are rebuffed by a subset of a population's refusal to participate, which was one of the factors that was raised in the case.

That this will not violate an accused right. Can you provide us with some background on the relationship between section 11 and the right to a representative jury?

**Christa:**

One of the first things to start with is the right to a representative jury that's found within section 11d, the right to fair and public trial as well as 11f, which is the right to trial the jury of the charter.

So as such, an accused has no right to a jury of a particular composition, including particular number of members of a certain race or ethnicity. This is kind of like the representativeness relates to the process used to compile the jury rule, the list of persons from which the jury is selected.

This is really the crux of the issue in Kokopenance, because there's entire first nation communities in Ontario. In this case, the facts of the case that are excluded from the jury role, because they use a municipal role, instead of something like health card.

So from the get-go, the facts demonstrate an exclusion. So interestingly in Ontario, former Justice Iacobucci conducted an independent review and released a report in the first nations representation on Ontario juries, and that came out back in February 2013.

So it's interesting because there was a lot of work done at the same time as the litigation was moving forward, and there seemed to be a lot of sitting and waiting to see who was going to release what first.

The reason I want to contextualize this or connect it is the right to representative jury, and what the court found, the majority decision the Supreme Court as opposed to the minority decision. I continue to feel like it was not a great decision.

What they do is they focus on the effort that the state put in to create that jury rule, and in Ontario on the facts, it was generic letters dear chief and counsel, please answer this letter.

This isn't a context where some of these first nation communities are in constant crisis without clean drinking water, in evacuations due to unsafe circumstances or fires. In acute poverty, and quite frankly a generic letter from a low-level government person saying please answer your jury rule.

The way they characterize the first nations response like an intentionally not answering was so inaccurate, and it just demonstrated to me, the continued misunderstanding and

bias that exists, and just quite frankly some ignorance on how first nation communities operate in Canada.

So as a starting point that the connection, like if I draw this back to your question about section 11 and the right to a representative jury. Again, I think if we look at this solely in a Canadian legal context with the colonial legacy that exists, we miss an entire part of the picture, which is a liberality of indigenous people in this country, and in particular in this case, in Ontario.

**Kent R.:** I agree. The majority's decision, I think is regrettable, it ignores the history of colonialism. It also ignores substantive equality.

So it basically says if government goes through the motions, they can point to something, then we don't care what the results are. Even if you have a jury panel that drastically under represents indigenous people, while at the same time, indigenous people are drastically over represented among accused and victims, that's fine, right?

So it seems to me that the majority went off track once they kind of said section 15 had no relevance. The minority I think at least speaks to those issues.

**Cheryl M.:** Christa, you made reference to the sort of adequacy or inadequacy of the government sort of collecting the names or the people the list of people who should be on that jury role.

What is the meaning of these reasonable efforts necessary for the crown to compile a representative jury role?

**Christa:** That's a great question. But let me just take one quick step back, because I think it answers it better. Again, not controversial, this has been well known as an issue for a number of years specifically out of the, again, aboriginal justice in Korea, Manitoba.

But also covered **again in our cap, the** royal commission on aboriginal people. What we know about the barriers for indigenous people are actually being part of jury process, and becoming part of that pool, is that they're high.

The barriers are high. Summons are sent by mail, not everybody has regular good access to mail. Individuals living on reserve often don't have access to those mail services, or things were being sent on the fax of this case to the general delivery service, so they weren't going into people's boxes.

So individuals living on reserve don't have the same level of telephone services, the internet services and to follow up on a summons is difficult. So that's what we know even before this particular case.

So what do we know now? Well, we've seen some examples. So as a result of the first nation's representation in Ontario jury's report, some of the recommendations that came into place included the indigenous law division, with the minister of the attorney general.

Then you could actually see better communications with first nation communities not these generic letters, like true follow-up and engagement in a process. So when the work was actually done, when there was effort put into building relationships to ensure inclusion, then inclusion occurs.

So what we need to see is ignorance has to stop prevailing. We need to take actual tangible steps, so that we can be more inclusive. When I think of the case, one of the things that always kind of stung me a lot was we were dealing with a crown that kept referring to the issue as an aboriginal issue, when this is clearly a first nation.

So they didn't even have enough knowledge about the communities impacted to understand or distinguish that this was only applicable to first nation's people, and they were the only ones being excluded.

So their mischaracterizations throughout the whole process were quite frankly offensive. So once they reach a level of education, once they have a division that demonstrates the ability to communicate well and build relationships, you have better outcomes, you have a more representative jury role. Is it perfect? No. But has there been strides? Yes.

**Kent R.:** I mean one thing that I would add is that we need to increase juror pay child care accommodation, and transportation if we're dealing with the North.

Because these jury trials have traditionally been held only in the largest city, so if we're not going to move the jury trials to the communities, we have to provide funding for the communities to come.

Regrettably, what Christa said, I also found in doing research for my book on the Stanley / Bushie case, that in Saskatchewan they still sent jury notices, general delivery, and so forth. I also think we have to understand that for many first nations' people, or really for all, this is an alienating and threatening criminal justice system.

So there are many good reasons why indigenous people do not want to serve on juries in a colonial criminal justice system that has repeatedly failed them, both as prisoners and as and as victims of crime.

So there's an uphill battle. Again, I mean if you take a substantive equality approach, you realize that you have to work with the communities in order to have people even want to serve.

I mean, one of the issues was should we allow volunteer jurors to participate? There may be people in indigenous societies, perhaps they're older and willing to take on these responsibilities.

Again, I think that's something that you can accommodate within an equality-based framework, where if you proceed with this kind of colonial view, this is the way we've always done it, and that's good enough.

Then you're going to continue to have chronic indigenous underrepresentation on our juries.

**Cheryl M.:** So it's interesting that both Kokopenance and Chouhan have the same kind of aspects of bias and discrimination, but at different levels.

I just wondered how you viewed, how the two fit together, and whether the court's interpretation of one in an application to the other really makes any sense.

**Kent R.:** I think that they are at tension, but only because what Chouhan is demonstrating a degree of judicial deference to a step that parliament took to pursue substantive equality.

Whereas, the majority in Kokopenance takes a kind of random selection approach while ignoring issues of substantive equality and colonial discrimination.

So, I mean, I certainly felt that Kokopenance is one of the contributing reasons to chronic under representation. Which really all of the interveners were agreed upon. So I thought it was a little rich that the court kind of said well, once we've gotten rid of peremptory challenges, we're going to have representative jurors.

Because the problem with representation starts upstream. I mean, it starts upstream in Kokopenance with provincial efforts to get the community to serve as potential jurors. What I recommended to parliament was overruling Kokopenance, I mean this is part of my general schtick.

That just because something is consistent with the charter, doesn't mean that it's good enough. I don't see any reason why we couldn't overrule Kokopenance as a matter of law, to require more proactive efforts to have underrepresented groups on jurors.

One thing that could help in many of the cities is, I don't see that there's any reason why someone has to be a Canadian citizen to sit on a jury. You don't have to be a Canadian citizen to be a lawyer.

We know that permanent residence in a lot of our urban centers are going to be racialized people who have relatively recently come from Canada. I don't see any reason why those people couldn't be on jurors.

But I think that we're going to have to look to parliament first, for that reform, and then have to be prepared as we were and were successful in Chouhan in fighting a defensive battle to preserve those parliamentary reforms.

**Christa:** I agree with him, totally. The one thing though too, like in addition to looking at it from like a legislative versus just litigation making its way up as a result of like the original criminal proceedings.

Is that, well, first of all, I would have loved the dissent in it, which was written by Justice Cromwell, representing him and the chief, actually recognizing. So obviously, the dissent would have been a more favorable outcome.

I don't think it's perfect, but I think it would have been a more favorable outcome. But this goes back to, and I keep talking about it, and this is what always shocks me, I'm always talking about stuff from 1982, because that's when we first see it in reports, but it's stuff that people knew.

A good example of this, and I'm not trying to get us too far straight, but a good example of this is what we're seeing with the residential school and the burial grounds. So the first thing that comes out is 215 and Kamloops. So let me give you this analogy, I'll bring it back, I promise.

So 215 and the first thing I say is please, let's not go by numbers, because we already know based on the TRC that was released in 2015, a whole volume, that there's way more unknown, and that there are actual calls to justice.

71 through 76, that speak to this issue, and we get a lot of shocked Canadians, who are like I didn't know this was happening. It's almost like a type of willful blindness. So this analogy I'm using is 215, and then we see 751, and the numbers only going to increase.

But here's the crazy thing, even before the TRC, indigenous people have been saying, for a very long time, very loudly and in their art and in their poetry and in their stories and in their novels, and in their communities, that this is the harm we experienced and it wasn't believable.

It wasn't until little bodies were found, that indigenous people are believed for the truth they experience. So there's my analogy. We know these issues for a long time, so I go back to the A.J.I the aboriginal justice inquiry that in 82 told us what we already know, right?

In particular about this particular point. What's the correct interpretation? I don't think we're there yet. I'm like Kent, I wish there was a way that either legislation or litigation would reverse the Kokopenance decision.

Did we get some ground in Chouhan? Absolutely. But what the A.J.I told us was the two biggest barriers one, is the peremptory challenge, but the second is what I was just talking about, the same facts as accompanies when you have to rely on mail service when you don't have the same access.

When indigenous people aren't believed, and they don't trust the system. So we need to start thinking about the longer-term implications.

So that probably will play out in legislation, as opposed to or hopefully will play out in legislation, and returning back to my analogy or that story that starts with the 215 in Kamloops, is we kind of have some public will, and we have some political will as a result of these tragic circumstances that is compelling people to actually listen to what indigenous people have been saying for a long time.

So hopefully, that's enough to push a number of these issues before legislation, so that we can actually do some corrective and level playing fields with substantive equality in mind.

**Cheryl M.:** That last piece about substantive equality is something that Kent, you've been talking about and talking about section 15, and Christa, you bring it up now.

Kokopenance briefly explored the role of section 15 in the context of jury representation, it was the position that the Asper center in partnership with LEAF, the women's legal education and action fund.

We did a joint submission on that, trying to get the court to listen to the equality rights of the prospective jurors and how they were treated.

As you've said, the majority did not agree with that particular argument, and really didn't want to deal with the equality rights that were being argued there.

But I wonder if, I mean we've seen some other movements around section 15 being brought up in the criminal law context, and it is one that, Christa as you say, substantive



equality within the criminal justice system, particularly from the perspective of indigenous accused jury members victims, is a really significant and serious issue that we have to grapple with, and we've been told that for many years.

So just wonder what you think a successful claim might look like, or a successful arguments in the criminal justice system around that issue, that the courts are now maybe more open to than they might have been in the past.

**Kent R.:** In courts, I think it's important that interveners continue to make the substantive equality a point, and I think that that's one of the values in interveners, and maybe the courts are slowly recognizing it.

But I also think that we need to look to parliament because if you look at section 15, section 15-2 is a recognition that courts should get out of the way when parliament pursues substantive equality.

So one of the issues that I thought about in light of the all-white jury, in the Gerald Stanley, Colten Bushie case is we actually have a history of structured juries in Canada, I'll go back to Louis Riel.

One of the reasons why Louis Riel was tried and hanged in Regina, was that if he had been tried in Winnipeg, he would have had a right to a mixed jury of six francophone and six Anglophones.

Now that wouldn't necessarily have included Metis people, but it would have responded to some of the tensions. He also would have had a right under the common law to have a jury of six Canadian citizens and six non-citizens, because of the mixed jury, which has its origins I think in the 14th century in London.

So I think that we also have to think about these sorts of issues. If we were to seriously think about, and I think we're a long way away from reconciliation.

But if we were to seriously think about that, I don't see why drawing inspiration from the treaties, the number treaties, many of which contemplate first nations giving aid and assistance with peacekeeping, that why can't we have a jury of six indigenous people, and six non-indigenous people.

Or in sexual violence, why can't we have a jury of six women and six men. They'd have to agree to have a verdict, so this isn't just kind of identity politics.

This is actually I think an optimistic position where we would actually, as Christa said, force people, to confront their implicit biases and their stereotypes before reaching a verdict.

**Christa:** So no surprise, I agree with Kent. When you first ask this question, I'm like what are the circumstances? And it's funny because your mind as a litigator goes to things.

I think of a case in Ontario, I thought I had the perfect case for what I was trying to achieve, and so it was something in relation to criminal injury compensation board, and a case called sweet that says if you have a criminal background, then the board can take into consideration your criminal like the trajectory, and determining whether or not.

So they might say you're a victim of crime, but they may not compensate you. But that's a craziness, because when you talk about Indian residential school survivors or those that were put into other schools or into other institutions simply because they were indigenous, where their trajectory changed because of the way they were treated as indigenous people in those institutes.

So I thought I had the perfect case that demonstrated the harm the individual experienced, actually created his criminal trajectory, and of course, I lost the decision at the superior court of justice, but I thought I had all of the things, the right things in place because I could demonstrate so many things.

So when you ask a question like what are the circumstances you think you have, you really try as a litigator not to put the wrong facts or the wrong circumstances before a court, because you don't want a bad decision that's going to impact adversely too many other people.

So we're particularly careful as an indigenous legal service organization or as an indigenous lawyer representing indigenous rights, not to put the wrong facts or circumstances before a court.

Because if you get a decision that's not good, then when I look back, I think how elated we were after the court of appeal decision in Kokopenance versus the supreme court of Canada's decision, and the impact or long-term impact it might have.

So I'm always a little apprehensive when I'm asked that question, like what are the right circumstances.

But I do agree with Kent, the right circumstances is really more focused on the outcome, and that substantive equality, in achieving substantive equality and he referenced section 15 too, which is supposed to allow for a meteorization of particular rights or special rights.

So I think there are sort of creative ways, and I can't say specifically what I think it might look like.

But I think if you address the systemic and underlying issues head-on, that you have better outcomes, that you change or move the needle when you prioritize, like you look at section 15 and substantive equality, when you include the things and maybe we will see more and more judiciary taking if, at minimum, the section 15 lens into consideration.

**Cheryl M.:** Great, thanks both of you. I'd like to sort of wrap up by asking both of you, what is it that you're working on? What is it that you'd like our audience to know about in terms of the next level of either advocacy in this area, or just more generally?

**Christa:** Certainly, we always have so many things on the go. We do have a number of matters before court of appeal and the Supreme Court very often related to gladue factors but also related to other issues.

Our daily work actually is about keeping people housed and receiving social benefits, and in COVID, that has created a very difficult time. So we have spent a lot of energy assisting individuals that experience poverty.

So it sounds very like 101, but understanding indigenous community and the barriers that they're experiencing, not just in one aspect of the criminal justice, but like throughout their lived reality, I think is one thing I always encourage people to do.

Another great project, we have so many things on the go, we've expanded so much in the last number of years, we have like over 70 staff and they all do amazing work within the community.

But one of the other projects we're working on right now is, for lack of a better term, we're calling it suitcase for kids.

But when kids age out of care, so state care, often they're handed a garbage bag and they're told to pack up, and that's not good enough, we can do better than that as a society.

When we're on the national inquiry, we heard that across the country. All these kids aging out, how they're treated when they leave, and they're left to fall and fail, and then we wonder why the trajectory results in individuals being before criminal justice systems.

So a number of organizations, and with some law foundation, granting we're going to have the opportunity to wrap some legal information and resources for youth aging out of care, and wrap that in dignity, give them suitcases give them backpacks so that they don't have to pack their life in garbage bags.

So we have great programs like that at A.I.S all the time or like our key weight in a nung program. So I could go on and on and I know we don't have time. But I think the work that our staff does every single day, in terms of keeping people housed, receiving social benefits.

Making sure they're not stuck in unsafe circumstances, like as a homeless person in the city of Toronto, not having space, because the city won't put the beds beyond two meters. Those type of things, those little daily wins that's what really I think is moving the needle.

So it's fun to do the supreme court stuff and to sort of change law, but the on the ground, boots on the ground every day is where we see sort of the most direct impact to indigenous community.

**Cheryl M.:** Thanks Christa, that's excellent. How about you, Kent? What are you working on these days?

**Kent R.:** The stuff that's relevant. I have an article in the Canadian bar review on juries and miscarriages of justice. I'm doing a little bit of judicial education on all of the changes in bill c-75.

I mean, it's very important not to see law reform as kind of static and achieved at one time it really is a process. I'm also helping out Justice Harry Laforme, and Justice Juanita Westmoreland Traore in consultations, hopefully leading to the creation of a new commission that will have powers to make references back to the courts about miscarriages of justice.

So obviously, juries often get off easy when it comes to our understanding of miscarriages of justice. If you have an unrepresentative jury that doesn't understand either the accused or the victim, and may actually be hostile towards them, that's a recipe for miscarriages of justice.

We know given the over-representation of indigenous men, and especially women and youth in prison, that they are the population that is most at risk in Canada of miscarriages of justice.

**Cheryl M.:** Great. Well, that's a wrap, I think we've covered the topic in-depth, and thank you so much for your time and for the incredible work that both of you are doing in this area. I think that we're all grateful for the changes that both of you are helping to make happen.

**Kent R.:** Thanks a lot, Cheryl.

**Christa:** Thank you. [Inaudible 00:45:26.25]

**Cheryl M.:** I'm pleased to welcome Janani Shanmuganathan to our practice corner for this episode. Janani Shanmuganathan is a criminal trial and appellate lawyer in Toronto.

She earned her undergraduate and master's degrees in criminology, and her law degree from the University of Toronto.

Janani has extensive experience arguing criminal appeals and conducting criminal trials, many of which have involved constitutional arguments including R v Nur, the leading supreme court of Canada appeal that found a mandatory minimum sentence to be unconstitutional.

But today, we are drawing on Janani's trial experience to learn more about jury selection, from the perspective of the lawyers in the courtroom. So welcome, Janani.

**Janani S.:** Thank you for having me.

**Cheryl M.:** Earlier in this episode, we heard from Professor Kent Roach and lawyer Christa Big Canoe about constitutional aspects of jury selection, and in particular, the Kokopenance and Chouhan cases.

Janani you represented the South Asian bar association of Toronto as interveners in the Chouhan case, who took a position that was different from the Asper centre and aboriginal legal services. Can you describe the perspective that you took?

**Janani S.:** The perspective that we took was rooted in our experiences as racialized counsel appearing in court, as well as our experiences representing racialized accused appearing in court.

So the perspective we took is that the Kokopenance decision from the Supreme Court of Canada that said, juror impartiality is required by section 11d. We felt that that decision didn't go far enough, because all that decision requires is diversity among the jury pool.

Are the juror members that are appearing in court, are they a diverse bunch? But it doesn't ensure that diversity actually makes its way onto the jury itself.

We felt that by eliminating the peremptory challenges that was one less tool that defense counsel and racialized accused had, in order to ensure impartiality on the jury.

**Cheryl M.:** So in this practice corner, I want our listeners to get a sense of what it is like to select a jury. So we'll get back to what peremptory challenges are.

But what is it like? Can you sort of walk us through what jury selection looks like when you're acting on behalf of an accused person?

**Janani S.:** So we start off in a courtroom that's quite big, and there is the entire jury pool that's in the courtroom. What the judge starts off by doing is the judge starts off by pulling numbers out of a drum, and as juror numbers are called, they form smaller groups. Sometimes this practice varies depending on each jurisdiction and each court has.

But as these smaller groups are created, the judge may ask at that juncture, is there a particular reason why you can't serve on this jury?

Do you have some sort of hardship? It may be then that the juror says well, I can't get time off of work, I have young children. I have some sort of accessibility issue that prevents me from being on the jury, and that person may be removed as part of the jury pool.

So we go from a large group of people to smaller groups of people, and the judge tells these smaller groups to come back at a certain time. A smaller group shows up in the courtroom, and that's when we begin the process of actually selecting the jury.

If there's a challenge for cause question, which is something I know we'll go on to talk about later in the podcast, that question gets asked at that time.

If the juror gets selected to be on the jury, they get selected to be on the jury, and then we go through that process over and over again until we selected the 12 jurors.

**Cheryl M.:** So what are you looking for when you're making those selections on behalf of your client?

**Janani S.:** It's so hard to know who is going to be a good juror, or who is going to give my client a fair shake, because what can you really know from meeting a person for a few seconds?

But I think it's really important while you're sitting in the courtroom to observe the people around you. Is this person looking at my client? Is the person smiling at my client?

Are they smiling at me? If a person is up there and they're scowling at my client, or refusing to look at my client in the eyes, maybe they're just nervous. But maybe they just don't like my client.

I find that the process of jury selection is really trying to make my client feel as comfortable as possible about the people that are going to decide their fate.

**Cheryl M.:** Great, thanks. We discussed with Professor Roach and Christa Big Canoe, peremptory challenges. These challenges were eliminated by the government in amendments to the criminal code. How would defense counsel use those challenges in the past?

**Janani S.:** So I can only speak from my own experience using peremptory challenges, and I see it as having two purposes.

The first one is what I described before, which is trying to pick people that are giving positive verbal cues to my client, who my client feels they're going to give them a fair shake in the trial.

It may just be that my client is sitting next to me, and they just get a vibe from a person that oh, I don't think this person likes me. Even if they're wrong about that, I think it's important to listen to the client so that they at least feel like they've participated in the process of the people that are going to determine their fate.

The second way I try and use peremptory challenges is to try and increase diversity. So if you have 11 juror members that have already been picked, most of them are Caucasian, and the next person that shows up that could potentially be picked on the jury is also Caucasian.



The hope is that if you use the peremptory challenge on that person, the person that follows who would have been the 13th juror is a person of color. So if you get rid of one Caucasian person, the hope is that you'll try and get a non-Caucasian person, a racialized person onto the jury.

**Cheryl M.:** So bringing this back to the charter, section 11d gives an accused person the right to a fair public hearing by an independent and impartial tribunal, and under section 11, the right to be tried by a jury for certain serious offenses.

So fairness and impartiality has been held in earlier cases to include representativeness, and absence of racial or other discriminatory biases. The Asper Centre and ALS took the position in the Chouhan case that the concerns about racial bias and the jury ought to be dealt with by a challenge for cause, rather than the peremptory challenges.

Can you walk us through how those challenges are conducted? In the past, I know that we don't really know how they're going to be conducted under the new rules, but can you just give us a sort of an explanation of how they have worked so far?

**Janani S.:** Sure. So there is the before and after, so prior to the changes in the criminal code, the challenge for cause question was asked by defense counsel. If it's a challenge for cause question based on race, it was typically rooted in what we call the parks challenge.

What the question typically is would your ability to judge the evidence in the case without bias, prejudice, or partiality be affected by the fact that the person charged is black, and if the victim was white, and the deceased is a white person.

So the defense counsel would ask this question to the juror member, and the juror would then respond.

Based on the response by the juror, prior to the changes to the criminal code, it would be the two triers and the triers are two jurors that are part of the jury, the two triers would decide, did this person give a suitable answer or not.

Now following the changes to the criminal code, the challenge for cause question is asked by the trial judge, the juror responds and the trial judge him or herself decides whether it's a suitable juror or not.

**Cheryl M.:** Do you think this might work to prevent racial bias on the jury?

**Janani S.:** I don't, because it's essentially asking a juror are you racist? And this person needs to respond to that question in front of a courtroom full of people, and who's actually going to say yes? Yes, I am.

I think what we also forget is racial bias isn't always obvious, and people don't always realize that they have these racial biases. So asking the question in this way isn't really getting at the underlying biases that all of us have.

**Cheryl M.:** Is there any way that challenges for cause can be improved to better prevent this kind of bias in the jury?

**Janani S.:** There's been a lot of literature, including Canadian literature by Professor Scott Wortley, that talks about how to improve the challenge for cause question, by asking the question not as a yes or no answer, but as multiple choice questions, where you give a person different things to consider.

This way, they're really stopping to think about things like is it a, is it b, is it c, they're stopping to analyze their own ways of thinking. It's not just one question, but it's a series of questions that they are forced to then work through their ways of thinking.

So I think if we were to evolve the parks question from a yes or no answer, to questions that really probe into a juror's mind, then maybe we would be able to eliminate racial bias, or at least jurors that have racial bias.

**Cheryl M.:** Now, is that something that could be instituted by a particular judge? Or is that going to require more legislative amendments to the criminal code?

**Janani S.:** So the Chouhan decision itself only came out in June, and there is a few good paragraphs that talk about how, if the focus is on eliminating racial bias that we could try to incorporate that through the challenge for cause question.

So I'm hopeful that following Johan as we start to have more and more jury trials resume, that there will be some litigation about modifying the challenge for cause question, and incorporating these types of multiple-choice questions, or reframing the challenge for cause question so that it can actually do what it's supposed to do.

**Cheryl M.:** As we heard earlier on this podcast, there's a genuine concern about the underrepresentation of indigenous peoples on juries in Canada, and how that is a particular problem for first nations people living on reserve.

What is your experience though with more general representativeness of juries in Toronto, for example?

**Janani S.:** So I think it's not great, unfortunately, and in the juries that I've picked, it has been mostly Caucasian, and it has mostly been older people.

When you stop and think about the requirements of jurors serving on jury duty, it's difficult you have to take time off of work, if you have young children, it's difficult to handle that.

If you're in school, if you have a job, you're not always able to do this there's only really a certain group of people that have the time, and the money to be able to serve on a jury.

So because of that, there is not a lot of diversity, there's obviously going to be I think more diversity in a place like Toronto than say a smaller town somewhere else in Ontario. But I think there's still a long way to go to actually ensure there are diverse juries in Toronto.

**Cheryl M.:** Is there anything else you would like to add to further describe the role of jurors or what it's like to conduct a trial before a jury?

**Janani S.:** I think what people forget is it's really scary to leave your life in the hands of 12 strangers. I think that was what I was really trying to explain to the supreme court of Canada and Chouhan is when you have a racialized accused, and you walk into a courtroom and so many people don't look like them, it's really scary.

So trying to give them some ability to participate in the jury that ultimately decides their fate is really important.

**Cheryl M.:** I think so as well. Thank you very much for this today. To close, I'd like to ask you if you think there is one constitutional case that has had the biggest impact on you in your practice as a criminal defense lawyer.

**Janani S.:** I think it would have to be Stinchcombe, the case that requires the crown to provide defense counsel and accused with disclosure.

I cannot imagine a world where you walk into a courtroom expecting to do a trial, and not know what the witnesses have said, not know what investigations have taken place. It would just be so unfair.

So I'm really grateful for the Stinchcombe decision, because I think it's giving accused people a much fairer shot at actually defending themselves.

**Cheryl M.:** Great. Well, thanks, maybe we'll do a future episode focusing on that case. Thank you for taking the time to speak with me about this fascinating area of law. Many of our listeners will have only seen this side of criminal trials through misleading television shows.

So I thank you for giving us a more factual version of what happens. I have been talking to Janani Shanmuganathan, partner with Goddard Shanmuganathan in Toronto, and graduate of U of T faculty of law.

Thank you listeners for tuning in to this episode of charter a course. We have been discussing the rights under section 11 of the charter to be tried by a fair and impartial jury, and how those juries are selected.

I also wish to thank our previous guests on the episode Professor Kent Roach and Lawyer Christa Big Canoe, who discussed equality rights, jury representation, and the experiences of indigenous people when it comes to juries.

Looking ahead, we will continue to explore various sections of the charter including the development of equality rights under section 15 with constitutional lawyer Mary Eberts, and religious freedom under section 2 with Professor Howie Kislowicz.

You'll be able to find our episodes on Apple Podcasts, Spotify, and other popular platforms, as well as on the Asper Centre website, so check back in soon.

Lastly, we'd like to thank our law students Szymon Rodomar and Flint Patterson who have helped produce this episode, thank you.

**[End of Recorded Material]**