

[S2E4 - Freedom of Expression & Association]

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Cheryl M.: Hello, and welcome back to Charter: A course, a podcast created by the David Asper Centre for constitutional rights at the University of Toronto, faculty of law. My name is Cheryl Milne, and I'm the executive director of the Asper Centre .

Our podcast focuses on leading constitutional cases and issues, highlighting strategic aspects of constitutional litigation, and some of the accomplishments of U of T's faculty and alumni involved in these cases. It is our hope that over the course of this episode, whether you are a law student, a lawyer or someone looking for an interesting topic for your debating team, you learn about an aspect of constitutional law and litigation that interests you.

I wish to first acknowledge this land from which our podcast emanates. For thousands of years, it has been the traditional land of the Huron Wendat, the Seneca and the 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, we are discussing the rights under section two of the Charter, and in particular, freedom of expression, peaceful assembly and freedom of association. In our first segment, we focus on the right to protest in Canada, which is protected by several distinct rights laid out in the charter. To set the context, we in the recent past, there have been protests in Ottawa by the so-called Trucker Convoy.

But also, First Nations protests have blockaded rail lines and roads leading to lands that First Nations wish to protect. For example, the Wet'Suwet'En protests in British Columbia, and some time ago, the dramatic G20 protests that were made so by the actions of law enforcement and led to subsequent class actions.

Today, we will talk about the legal limitations on the freedom to protest, the charter sections protecting that freedom, and the relationship between rights and duties in that context. In our practice corner, we turn to those same sections of the charter in relation to labor law with our conversation with lawyer, Steven Barrett.

Turning now to our guests, David Schneiderman is Professor of Law and political science at the University of Toronto, where he teaches courses on Canadian and U.S constitutional law, comparative constitutional law and International Investment law.

He's the author of over 80 articles and book chapters, and in addition, the author or editor of over a dozen books, including resisting economic globalization critical theory, and International Investment law. Red, white and kind of blue, the conservatives and the Americanization of Canadian constitutional culture, and investment laws alibis, colonialism, imperialism, debt and development in 2022.

Professor Ashwini Vasanthakumar is an associate professor and Queen's National scholar in legal and political philosophy at Queen's law school. Her research explores political authority, membership and obligation. Current research projects include privatization and legitimacy in border control, victim's duties to resist their oppression and transitional justice as transnational justice.

Welcome both David and Ashwini, thank you for joining us. There has been a lot of discussion about the freedom or right to protest this year in the wake of the freedom convoy demonstration in Ottawa. Protesting is an activity that many say is vital to the healthy functioning of a democracy. The right to do so is widely recognized and protected in both international and domestic law. Perhaps, we should start by looking at the domestic Canadian context.

David, how exactly is the right to protest protected within Canada's Constitution? And what are the individual rights or freedoms that make up the right to protest?

David S.: Well, the right to protest, one might trace back to parliamentary traditions, so the common law recognized, to some degree, a right to protest though, associated with a right to freedom of expression. But that was of course more easily limited without an entrenched Bill of Rights in our constitution.

After 1982, the charter section 2(b), freedom of expression, incorporated a right to protest dissent. This could have actually been incorporated under freedom of Association or freedom of assembly under section two, but the freedom of expression cases early on

took on this question of protests associated actually with the right to assembly, dissent and Association. And so almost everything gets adjudicated under the charter section 2(b) freedom of expression.

Cheryl M.: So it's important to be precise that when using terms like right or freedom, the two terms have different connotations in the legal context, perhaps. And the charter refers to the fundamental freedoms of expression, assembly and association. What are the implications of entrenching these protections as freedoms rather than as rights?

David S.: I don't think there are any implications. This distinction really doesn't do much work in Canadian constitutional law, and indeed, what is one to make of the 1789 Rights of Man and citizen in France, incorporating both what might call rights, what one might call freedoms.

Cheryl M.: Well, there's been lots of sort of discussion about freedoms and that's what's been the rallying cry at some of the more recent protests.

David S.: Right. And that's an interesting thing, right? That the convoy protesters rang out the slogans of freedom at the top of their lungs repeatedly, is an interesting phenomenon. Because the discourse of freedom is not something that's prevalent in Canadian constitutional history, or Canadian constitutional culture I would say. Even though the language of freedom is in the Charter, it doesn't ring and have the same resonance as it does in the United States.

And it seems to me that the convoy protesters were appropriating discourses of freedom that are prevalent in the United States. They might have been using slogans like liberty or liberty or death, and that would have drawn out from the American experience. So the discourse of freedom, and I did a little digging around this, is not common to Canadian constitutional discourse, but very common in America.

Cheryl M.: So in Canada, the right to protest, or the right to protest is litigated through the lens of freedom of expression. Can you just describe what that means, and how that works in the Canadian constitutional context?

David S.: Sure. So we have a very robust protection under Section 2(b) of the charter, freedom of expression. And famously, in the case of Irwin Toy, which had to do of course with the advertising of toy manufacturers, under the right to commercial expression as it's called.

The Supreme Court of Canada declared that under 2(b), every expression of the heart and mind, including physical activities like parking a car, conceivably can fall under constitutionally protected expression.

Now, if that's the case, shouting freedom at the top of your lungs is a constitutionally protected expressive activity. So given this wide open door available to claimants under section 2(b), freedom of expression, almost all of the work around expression, and in particular, the right to protest gets done under section one, the limitations clause.

And it's there that courts both value the expression, is it valuable expression, and also determine whether there are other competing interests that might justify government limitations such as causing harm to others, or circumstances where the government's mediating between the claims of competing groups. So there's both the valuing of the expression in section one, that's not done in 2(b), it's a wide open door.

So the door closes under section one, depending on the value of that speech and obscene speech, for instance, is not valuable, isn't going to be given a great deal of protection. And then also, the harm or other mitigating circumstances that might justify government limitations, and those work to close the door and limit protest activities if they're considered to be not valuable or cause harm.

Cheryl M.: How does the freedom of assembly work, within the concept of freedom to protest, or the right to protest?

David S.: Well, we don't have much in the way of freedom of assembly cases, because freedom of expression has cannibalized those activities. So much of the early jurisprudence had to do with section 2(b). Whether it be commercial expression, obscene speech, public for us. So using government space for protest and expressive activity, all got run through 2(b).

And the courts I think regrettably didn't consider other candidates, perhaps better equipped or might just have, sort of, might warrant a different kind of structure of analysis than they would use for hate speech or obscene speech. So almost everything gets run through 2(b), and all of those formative early cases have basically laid down the groundwork for all analysis having to do with protest.

So imagine in the late 80s, early to mid-90s, much of this doctrine is now pretty well settled, and there's not a lot new to be learned, unless the Supreme Court of Canada for instance wants to take things in a different direction.

We, for instance, had some new jurisprudence, new as in in the last eight years around defamation and libel, and so that kind of activity which might very well be incorporated in protest activities, are now given some semblance of protection, while previously the court was disinterested in protecting that form of expression, because reputation was everything. The court valued that over free speech.

So we might get some modification at the margins, but the doctrines pretty much lay down under freedom of expression.

Cheryl M.: So I want to turn now to Ashwini. So what David has laid out is that we have this Charter protected freedom to protest that is largely built on the expressive content and function of protests, so under freedom of expression.

Protesters however are often driven to protest through a sense of duty or moral obligation, it's time-consuming, labor-intensive and often risky. So you have written about the ethics of oppression and resistance, and how does this bear in the role of protest in Canadian society?

Ashwini V.: Thanks a lot, Cheryl. So I think if we think about the perspective of protesters, two sets of ethical questions arise beyond the question of what the law permits. So there's the question of whether or not citizens ought to engage in protest, and then the question of what forms of protests they should engage in. So I'll focus, I think for now, on why we might think citizens have a duty to protest, and what kinds of functions protest performs.

So citizens have moral duties which are to be clear not legal duties, but just moral duties as citizens to protest injustices that fellow citizens are subject to, and also, to protest the injustices that they themselves are subject to. I think in protesting, citizens protest I think performs a really essential democratic function.

So it can correct for institutional failings in representative politics, where some issues don't get on the agenda or some groups are marginalized and don't really have a voice. And so in this case, protest acts as a way in which these voices can actually be heard.

I think to just echo something that David said, it's really important to see that protest performs a function beyond political expression. So protest is actually really intrinsically valuable to associational life. It builds a sense of community amongst like-minded citizens, it can catalyze the articulation of political aspirations and ideals, and protest actually is often a way of putting into practice the ideals that protesters want to realize.

So for example, the Occupy Movement, was really against hierarchies in society. And so it structured itself as a non-hierarchical protest movement.

Cheryl M.: If we understand protesters as sometimes operating under this duty to protest as you've described, this moral duty. What might we understand as the role of the state? So as David mentioned, the charter guarantees the freedom to protest through freedom of expression, but it's subject to the limits under section one.

What duties might the state have, and how might the state better navigate the relationship between protesters as duty holders, and the people they represent?

Ashwini V.: I think protesters are also people that the state represents. So often, what this state might be doing is mediating as you said, between different groups of citizens. I think if we take protests as performing this really essential democratic function, then it might be that the state has a duty to enable protest. And we often do see that states provide security, they provide space etc. for individuals to gather and protest.

But I think this partly depends on the extent to which we think the state is a neutral actor. So often, protest challenges the actions of the state. It highlights structural limitations in existing democratic practices, or it resists the way in which some groups are disadvantaged to the benefit of other groups.

So in this case, we might worry that the state is policing the protest of some citizens on behalf of others. So for example, property holders, damage to private property is often seen as a really huge constraint on protest.

Maybe the state is acting on behalf of large corporate interests, or maybe it's sympathetic to certain racial and religious majorities and not minorities. So I think again, it depends on your picture of how well functioning the state is, which I think protests typically throws into question.

Cheryl M.: Okay. I think we see, if we look at the G20 that was now quite a number of years ago, that the actual response of police and the state really ramped up when they thought that they were actually responding to breaking of windows, and I think a trashing of a police car, and things kind of ramped out of control.

I mean, protests are often disruptive of the rights of others, I think that's part of an effective protest sometimes, and people are uncomfortable. I recall a protest in the gay pride parade in Toronto, that really disrupted the parade and people were upset by that. But it was also the purpose, was to disrupt the parade, to argue for inclusion of other groups within the pride movement.

But some might argue that protests must necessarily disrupt others to be effective, but under section one of the charter, the state has the power to limit this freedom to protest. We have seen the law impose limits in cases like the freedom convoys, David's already

mentioned in response to indigenous land protectors, and in the example I just gave, the G20.

How does this law limit the freedom to protest? And what requirements does the state need to meet in order to impose those limits?

David S.: As I mentioned, the section 1 analysis invites courts to weigh government or public interests or harms to private individuals. But Ashwini said something interesting about, and I think really insightful about the state and how we might view the state and its role preferring some forms of expression over others. So the G20, which you mentioned, Cheryl, is a really nice example of that.

Where it wasn't the breaking of windows that warranted a massive police presence, rather, it was the fact that it was a G20 meeting, and the expectation that there would be protests. There were some 20,000 police in attendance in the city of Toronto. I recall in particular, somebody capturing on their cell phone conversation with a police officer who said the charter doesn't apply here.

So that was the mindset of the police who were trying to deter anyone from being anywhere near that. Downtown Toronto was being closed down, recall the convening of protesters in the rain, being held without charge for at least 24 hours probably in many cases. And the Canadian civil liberties association going to court, to try and secure an injunction prohibiting the police from using sound cannons against protesters. And Justice Brown then of the superior court, now on the Ontario Court of appeal saying this is all speculative. Well, it wasn't.

But what Justice Brown's decision reveals, and he did so repeatedly actually through a number of idol no more protests that he adjudicated and occupy protests that he dislocated from a park downtown. What he reveals is a pension for judges simply not to be that solicitous towards speech that's considered not sort of normal, not what most people would want to see, right?

And I want to distinguish that from the convoy, which was the occupation of Parliament Hill and downtown Ottawa for a couple of weeks. Which dislocated many people, and was

threatening for many people who live in downtown Ottawa, distinguish that from the occupy protesters in St. James park downtown who were occupying a park.

And Justice Brown, the only harm that Justice Brown found and competing interest was that people wanted to use the park for dog walking, for instance, for strolling. Those were the competing interests that Justice Brown identified to remove the occupy protesters, who've been there admittedly for probably 30 days. He thought that was enough.

So I think in Canada, we should be attentive to the ways in which both government and their agents, the police forces reveal a tilt, an ideological tilt that just favors those who are upsetting the status quo. And they might be well in the case of Justice Brown's decisions, I don't know more occupying CPR railway tracks the private property that Ashwini mentioned, they were promptly removed by order of the court.

Or other indigenous protesters at Ferry Creek, Wet'Suwet'En, elsewhere Occupy, were treated gingerly for quite a while and rightly so, all over Canada, but all of the Court judgments that were issued in the wake of Occupy by judges at first level, all ejected the protesters who'd been there in the Court's view long enough.

So in Canada, we've got a right to freedom of expression as constitutionally protected and we get to adjudicate these rights, but the preference it seems of the State, Police and courts is to not offer much solicitude towards protesters that are upsetting the status quo, upsetting the values or opinions of what are understood to be the majority of Canadians.

Cheryl M.: So Ashwini, I want to give you an opportunity to talk about this from, I mean, David has talked about what's happened with the courts and the legal response. I'm interested in your take on it in terms of the moral duties and responsibilities on either side, and how can we reconcile the duty to protect some citizens versus the freedom to protest, and the moral obligation protesters bear with respect to other oppressed people?

Ashwini V.: So I sort of agree with absolutely everything David said. And I think the narrative that David gives us really sort of challenges this idea of everything is ticking along pretty well, and then there are these rabble rousers, disrupting peaceful relations. And so I think

absolutely, even if you have a duty to protest, there are going to be constraints on how you discharge that duty. And you'll always have a duty to respect the rights and interests of others.

And so one thing that this tells in favor of if you're a protester, is that you try to exhaust other ways of affecting political change, or political expression before you resort to disruptive protest. I will say that I think in some cases, protest seems to be the only way to express appropriate indignation and outrage.

So for example, when there's a brutal police killing, actually, it seems to me appropriate that there is a large demonstration as opposed to a sort of letter writing campaign, right? So there's something inherently expressive about protest, which might mean that it's really the only appropriate way to respond to a certain injustice or event. But I think as you noted earlier, there's this inherent tension with disruptive protests.

The reason it works is because it is disruptive, and it forces people to pay attention. But if it's too disruptive, or if it isn't conducted in a particular way, you risk alienating people, right? And I think this is a dilemma that protesters have to navigate. So they have to be disruptive enough to get attention from complacent majorities that are very happy to ignore the claims that they've been agitating for.

But if they're too "disruptive", then they might get dismissed or ignored. So we often talk about the duties of protesters, and I think it's really interesting to think about the duties of the non-protesters, right? So I love walking my dog and my dog loves going for walks. But I really think that maybe that's just the kind of inconvenience to tolerate, because a very important form of political expression and assembly is taking place.

So I think something has gone awry when we think a pretty peaceful movement has to be displaced because well-heeled citizens want to walk their dogs. And so here, I think there's a question about what are the duties of people who aren't protesting, and it might mean that they have to think about paying attention to inconvenient truths, paying attention to injustices that are really well documented and have been discussed, but nothing has been done about.

Because I think one of the reasons we need protest is because ordinary citizens haven't actually done what they ought to have done. And so it sort of, I think bears reflection on

what should we do. If we want to prevent protests, it might be that we need to actually be much more actively engaged citizens more generally.

Cheryl M.: So David, I want to give you an opportunity to jump in on this a little bit, in terms of how does that play into sort of the obligations on government. Where both they have obligations under section one in terms of limiting protests, but also, not creating the context in which protest is necessary as Ashwini has described.

David S.: So it's an excellent question. I would suggest that we begin by considering the report of Justice Hughes that arose out of the APEC event in Vancouver at UBC. You may recall that in 1997, UBC students were protesting the APEC meetings being held on site, in particular, Indonesian president Suharto's presence. And the RCMP proceeded to not only keep the students at bay, they're so far away from the site of the meetings, but also, just for a more generous response pepper sprayed all of them.

Or at least, those who are in the vicinity of the fencing that they had put up. So Justice Hughes said that this was entirely improper use of force by the RCMP in that instance. And he said in future cases, it should be the case the protesters should be given an opportunity to be seen and to be heard by the subjects of their protest. So I think that's wise counsel on really the first consideration in any public protest, where the state is considering responding in some way. And then so that's the duty of government, and it's also it seems to me the duty of those in positions of power, or those who are being protested against in a free society, to tolerate, right? And not consider it intolerable.

Suharto thought it was intolerable to be able to see or hear protesters at the APEC meeting, and that just is unacceptable. It seems to me in a society like Canada's, with a tradition if a bit weak of freedom of expression, and constitutionally protected rights and freedoms.

Cheryl M.: I guess the last question I really want to ask you is about what you see is the future of protest in Canada? And where do you think the courts will go, David? And where do you

think, Ashwini, some of the issues that are the current issues of today might go. Either one of you jump right in.

David S.: I'm happy to begin, Ashwini, you can give it some thought maybe. But as we've noticed with the freedom Convoy in Ottawa, and actually the leadership race for the conservative party reveals divisions, I think a Canadian public opinion that certainly have been existing for a very long time, but are deepening and perhaps even widening.

And that's really the Trump effect, I think the Republican Party being taken over by Donald Trump in the United States, they have no policy position it's whatever Donald Trump believes, and he of course, stokes the fires of division even of physical violence in the United States. It seems to me that that's having some spillover effects, not surprisingly in Canada where we consume American television, books, magazines, we're overwhelmed by American politics.

And so it's not surprising that that's having an influence here, there's always been a sort of presence of sort of American public opinion having a presence in some of the Western provinces. I'm thinking of Alberta, where I lived for almost 10 years. But one might be worried that this is deepening, and even creating greater fissures than previously.

And as a consequence, I think we might expect more of the same of what we saw in Ottawa. That there'll be more kind of protests with vehicles, or other imaginative forms of protest in Canadian urban centers, at borders, as we saw initially during the freedom Convoy. Inconveniencing, right, the so-called silent majority.

And the question is how do we respond to that, right? How does the state respond to that? How do citizens respond to that? And I would encourage citizens, and this plays into Ashwini's point she made earlier about duties, that citizens should tolerate that. They should in some instances and in some degree welcome dissent in our society. It's part of healthy public deliberation of important policy questions.

Now, there of course will be limits, those limits were reached early on in Ottawa, right? Parking your car in the middle of Parliament Hill, eventually, right, Runs afoul of provincial Highway regulations, among other things. So there were many illegalities associated with

the freedom convoy that were not enforced, that might have been enforced, that would have mitigated some of the damage that was caused.

And that would have still meant that the freedom convoy protesters would have got their message across, right? I mean, they got their message across that first weekend, pretty effectively to the Canadian public, through the news media. They were confused about who they should meet with, they're wanting to meet with the governor general apparently at first.

So there's low levels of constitutional literacy in Canada. Be that as it may, we should be welcoming more debate, more dissent, that doesn't mean it's open season, but that means that we shouldn't react negatively in every such instance. So I foresee many more flash points around protest and dissent in the future.

Aswini V.: Thanks, that's a really big question, and political philosophers usually don't have to make predictions. So I think a lot of what David has said really resonates. Like I think there is, the greater that there's polarization, and the less trust there is, that actually that's common ground among citizens, that citizens are actually listening to each other, that politicians are listening to anyone, protests would be resorted to, because it's a way of sort of circumventing what looks like institutional blockages in how we communicate with each other.

And I think that can be used by charlatans, but I also think there's no avoiding that, and I don't think that means that we should not realize the enormous importance of protest for not just marginalized communities and viewpoints, but I also think issues that simply don't run the electoral cycle.

So climate change is one of these issues, why has it been so hard to get action on it? Well, that's because elected officials are thinking about a very short time frame, and protest is a way of highlighting issues and entities like the environment that can't vote, that simply aren't going to be on the agenda in that way.

One thing that has really struck me during this brief conversation is the number of examples we've drawn from the 90s and early 2000s, and I really can't help but think gosh,

if only we'd heeded those protesters. If only their protests had prevailed, we might not be in what doesn't feel like the most optimistic place for the world. I think the only note of optimism I'll end on, and I think this goes to the kind of intrinsic value of protest.

I think for a lot of citizens, their experience at the G20 summit was like a real eye-opener, right? Because they thought they were living in a liberal democracy. And then they discovered oh, maybe this isn't quite how power works. But it was a real sort of transformative moment, and actually I think has encouraged a lot of people to enter politics.

So what we might at least be looking at is a generation of people who entered into politics because they actually really care about things like justice and rights and the future, and not because their career as politicians, and they've had these really formative experiences in and amongst protesters.

Cheryl M.: I think it leaves one question hanging though, which is even though this right to protest through freedom of expression is protected under the charter, and we are talking about how important it is for people to protest to the point of a duty, is that does protest work when given the power structures in our societies? And they think that the protests by young people around climate change has certainly got a lot of attention, and has raised some people up to celebrity status, not wrongfully so. I mean, I think that we could admire the voices that have come out strongly, but has much changed, is it really just the planet is burning up is actually what's motivating more people as opposed to the protest itself.

So I want to give each of you a chance to talk about what it is you are working on these days. So tell us something interesting that you're working on that our audience might want to know about.

Ashwini V.: I'll go first, because I'm working on something I think related to what we've been discussing. So I'm working on my next book, which is looking at the roles that victims of oppression play in responding to that oppression.

So thinking about the duty to protest, and the forms that that protest should take is really something that I've been thinking a lot about. I think this idea of despair, which Cheryl, I think you may have inadvertently articulated, is something that I think that every individual or group railing against what seems to be unchangeable structures has come up against, and I think there's no option but to attempt, right?

So the alternative, which is just to accept is not actually an option, and it's not an option for many people. So I think protest works, sometimes it's unclear how it's going to work and you don't really see the effects of it until much later. But I think we have no option but to try, and sometimes, protest is the right way of trying.

David S.: So the book that you mentioned on investment loss Alibis, and two other things that are in the works are both having to do with International Investment law. Which for those of our listeners who don't know much about that, that's basically the constitutional rights, or constitutional like rights for foreign investors.

So not working specifically on protests, dissent or expression, although, always envisaging doing something more popular around this question. But for those folks who are interested in my work around this, I would suggest they read a lengthy chapter that my colleague, Kent Roach and I co-authored on freedom of expression in Canada, in a book entitled Canadian Charter of Rights and Freedoms, in the fifth edition. Edited by Mendes and Beaudoin.

And also the book Red White and Kind of blue that I published in, I think it's 2015, having to do with the Americanization of Canadian constitutional culture, and touches on actually some of the things I mentioned here though, not specifically around free speech, but more having to do with reforms of parliamentary institutions like elected senate, supreme court nomination hearings, and a separation of powers doctrine that the Stephen Harper government was promoting. That looked very much like that which exists under the American Constitution.

Cheryl M.: Thank you. I think we'll also be hearing more about these issues in terms of the government's invocation of their emergency powers in relation to the protests in Ottawa, with the freedom convoy. More to come on that, I assume.

But we've been speaking with Professors Ashwini Vasanthakumar and David Schneiderman about the right to protest, and the freedom of expression and other freedoms in the charter that protect that protest rights, as well as the duty to protest. I want to thank you both for spending the time with us today.

Ashwini V.: Thanks a lot for having us.

David S.: My pleasure, thank you.

Cheryl M.: Hello, and welcome back to our practice corner. I'm speaking with lawyer and managing partner at Goldblatt Partners LLP, Steven Barrett on the role of freedom of association in labor and employment litigation. Welcome, Steven.

Steven B.: Thank you. Good to be here.

Cheryl M.: In this practice corner, we want to discuss how the rights of freedom of expression and freedom of association factor into labor and employment litigation. Let's start off with setting the stage for our listeners. Can you please talk a little bit about your practice, and what kind of cases you typically see.

Steven B.: Well, in terms of constitutional challenges, I've spent much of my career litigating the scope of the freedom of association guarantee under the charter, and whether or not it extends to the right to bargain and the right to strike. I just spent two weeks in front of

Justice Conan, acting for a coalition of OFL unions challenging Bill 124, which is the one percent wage restraint legislation.

And last weekend, I spent four days before the labor board in the illegal strike application that the minister of Education brought in the CUPE education bargaining. And so I do a fair amount of charter litigation, interventions in the Supreme Court of Canada, direct challenges. I also am involved in other public interest litigation, particularly around public health care. I have a class action practice, mostly employment-based, unpaid overtime in banks, being prominent in that area.

Into a fair amount of appeals in judicial review, and my practice also involves a lot of collective bargaining and interest arbitration in the broader public sector. So University faculty, CUPE Hospital workers, government lawyers, government unions, judges and firefighters and other broader public sectors. So that's sort of the general shape up.

Cheryl M.: Great. I mean, generally charter rights and guarantees allow individuals to challenge government actions, and some of the things that you've been talking about are really more disputes between private parties like employers and employees. But can you walk our listeners through how the charter actually applies in some of those cases?

Steven B.: Sure. I mean, the most obvious way is when the government has enacted legislation that interferes with collective bargaining or with the right to strike, so Bill 124, wage control legislation. The recent Bill 28, is sending education workers, reporting to end their strike and imposing terms, although that was both governed by an notwithstanding clause, which as your listeners probably know, poses its own challenges. But it was also repealed.

So legislation, the who's included in collective bargaining legislation, limits on the scope of bargaining, so legislation in the traditional way that the charter applies. Secondly, because when it acts as an employer, government is still government and bound by the charter. So there's the ability to bring direct challenges against government actions as employer, even without legislating.

So for example, I acted for a group of legal aid duty counsel lawyers, who legal aid refused to bargain with. We took the position of legal aid Ontario is part of government, and that they had a direct obligation to bargain in good faith with legal aid lawyers. We ended up settling that litigation where there was a vote held among the lawyers, and they voted to unionize from the society of professionals represents them and now they have a framework bargaining relationship outside of legislation.

But that's directly because of the charter. I'm actually acting now for civil lawyers in British Columbia, who are arguing that their exclusion from the right to have their own Union and be represented by their chosen association, by government and by legislation, violate section 2(d).

Although, obviously a more limited application in interpreting legislation that impacts on associational freedoms or expressive freedoms. There's the role of charter values in trying to promote an interpretation that is more consistent with the charter. And those of your listeners who watched the YouTube labor board hearings saw a lot of arguments about charter values in the Bill 28 context.

Cheryl M.: Yes. We want to hear more about that later, I know I'll certainly be asking about that. But for now, I mean, in our main segment we discussed how the freedoms of association, assembly and expression are, were all engaged when people protest. But the main issues and disputes often focus on freedom of expression, in those cases. When do the rights of, freedom of association and assembly play a larger role in labor claims? And what are the litigators thought process in developing arguments based on section two?

Steven B.: Right. So I have to say that freedom of assembly has not really played a major role either in expression claims, or in association claims. It's sort of the forgotten section two freedom, so I'm not going to say much about it. Although, in the bill 28 context, we argue that in preventing CUPE workers from protesting and assembling, not only was 2(b) and 2(d) engaged, but also freedom of assembly.

So in the context of freedom of association, the main role that it plays is in, while we begin with workers that are excluded from the protection of collective bargaining legislation. So in the, although, in some of their early cases like *Delisle*, where the Supreme Court of Canada upheld the exclusion of RCMP members from collective bargaining legislation. By the time MPAO, the mounted Police association case rolled around in 2015.

The court actually found that excluding RCMP members from collective bargaining legislation was itself, had the effect, if not the purpose of violating freedom of association. There's issues around choice of bargaining agent, which was an issue in the MPAO case, where the federal government had imposed on RCMP members a sort of company union representational structure.

And the court found that violated freedom of association. There's issues sometimes around bargaining units structures, which employees are included or not included in bargaining units. There's issues around restrictions on the scope of collective bargaining including through wage controls, that's the bill 124 challenge currently before the courts in Ontario. There's restrictions on the right to strike, and that can arise in a number of ways.

There was Saskatchewan Federation of Labor, where the government could designate employees as essential and take away their right to strike, which was held in and of itself to violate the right to strike. There's back to work legislation that is often challenged is violating the right to strike.

And then obviously, Bill 28, which we'll talk about more fully later, where you have a direct interference in collective bargaining education sector. Not only taking away the right to strike, but imposing terms, that obviously gives rise to freedom of association concerns.

So from the moment of inclusion under collective bargaining schemes, to resolving collective bargaining impasses, freedom of association now plays a significant role under the charter, as it ties in international law, which the court has drawn on in refining and expanding its conception of what freedom of association protects.

Cheryl M.: Great. We have a podcast coming up around international law in the charter context, so our listeners will have the benefit of that as well in future episodes. You've been involved

in, as you've said, many cases before the Supreme Court of Canada that have expanded or at least discussed the scope of the right to collective bargaining, and address whether Canadians have a right to strike as you said.

Can you talk a bit about the importance of recognizing the constitutional rights to collective bargaining, and striking? And what obstacles you have faced in having a court recognize these rights?

Steven B.: So initially, there's been a real sea change in the Supreme Court of Canada's understanding, conception of freedom of association that comes to collective bargaining. In its original reasons, there was a trilogy of cases in 1987. The court, and the most famous one is the Alberta Reference case.

And in that case, chief justice Dixon dissented, he actually, as the Justice Wilson and they both held that freedom of association embraced both the right to bargain and the right to strike. But the majority of the court adopted a very restrictive and narrow approach to the scope of freedom of association.

Unlike, for example, the approach that it was taking in *Irwin Toy*, a very broad approach to freedom of expression, a very narrow conception. And there were a few reasons the court gave in the Alberta reference case, they described the rights to bargain collectively and to strike as merely statutory or modern rights created by legislation, and not fundamental freedoms.

They were concerned that holding that freedom of association protected the right to bargain, or strike would preclude the government from being able to regulate labor relations, and they were nervous about the court and broiling itself in labor relations matters, when for example, in the administrative law context, they've come a long time towards deference in labor relations to the decisions of administrative tribunals.

Now, of course, with *Vavilov*, that may have changed somewhat. They viewed protection of collective bargaining as somehow extending to protecting the objects of an association, rather than its processes or activities. And they thought that the charter was very much an

individual rights instrument, and therefore, really what collective bargaining would expand protection beyond individual rights.

I think it's fair to say that traditionally, as Harry Arthurs has pointed out, there's been judicial hostility towards collective labor rights, and traditionally, legislatures have been more protective of labor rights. I think that's changed, but that was generally the view at least going into the 1950s and 60s as we got to leave the Wagner Act model and our modern collective bargaining legislation.

I think that all led the court to take a very restrictive view. But I think over time, it became apparent that not only was that a restrictive approach out of step with the more purposive and generous approach taken in the interpretation of other charter rights and freedoms, at least supposedly taken in the interpretation of other rights and freedoms. But it was also out of step with the international law recognition including treaties that Canada is signatory to, ILO conventions.

That what freedom of association is about mostly, is about the right to collectively bargain, and the right to strike. And so beginning with the Dunmore case, which we might well talk about. And then in health services, the court recognized that the reasons they had previously given for denying protection to the right to strike didn't really hold up, that the right to bargain, the right to strike aren't just modern statutorily creative rights, workers have been engaging in withdrawal of their services since the beginning of labor.

Although yes, there's a balance to be drawn between the courts' role in protecting charter rights, and the legislature's role in regulating labor relations. A complete abdication, like what they call a no-go zone or a black hole for labor rights, it really couldn't be sustained. They came to recognize that protecting collective bargaining and the right to strike is about protecting not the ends, but the processes through which workers seek to protect and improve their terms of condition of employment.

There's no guarantee they're going to be successful, but it's the associational activity that is their only mechanism to meet on a collective basis, the power of the employers they're bargaining with. And they recognized actually explicitly, in the MPAO case, that the charter doesn't just protect individual rights. It also, in many other areas, including freedom of association, has a collective component.

So all of the reasons the court gave in the Alberta reference for rejecting protection, the court came to see in-house services couldn't really be sustained. And then finally, in the Saskatchewan Federation of Labor case. And Health Services, the court was very careful to say well we're holding the collective bargaining is protected, that was 2007. We're holding the collective bargain is protected, but we've never held it the right to strike is protected.

But that the logic of protecting collective bargaining compels the conclusion that the right to strike is also included, that's what chief justice Dixon said in the Alberta reference, in his dissent, which has now become the view of the majority. And so that culminated in the Saskatchewan Federation of Labor case, where the court held that really you couldn't have meaningful collective bargaining without workers having the power to withdraw their labors. It was the powerhouse, the engine of collective bargaining.

And that didn't mean you were protecting the objects of unions, but simply this fundamental right almost not to be conscripted to work under terms, conditions of employment that aren't acceptable.

So the court has come around, although, there's still a number of areas where we don't know exactly how far this protection goes. There are a number of appellate cases even after the Saskatchewan Federation of Labor case that have upheld wage control restrictions, that are temporary in nature, somehow found that those don't violate freedom of association, that's very much an issue in the 124 challenge that is currently before the Ontario courts.

And some courts have said that well, if you're just imposing terms that have been freely negotiated elsewhere, that's not a violation of freedom of association. I have to say I don't quite understand that logic, and obviously, that doesn't apply in the bill 124 context. And Justice Conan will have to deal with this, but it doesn't apply, because the government imposed these one percent limits when others were negotiating significantly more than one percent. But anyway, that's sort of the evolution of the case law.

But as I say, obviously, the composition of Supreme Court of Canada changes from time to time. I think there's still judicial reluctance to get involved in collective bargaining and labor relations. And so that initial deference that made them hold, that drove the court in 1987 to hold there was no protection still manifest itself, I think unjustifiably in the courts

giving a more restrictive interpretation to whether legislation interferes with collective bargaining.

Let me give you one example, and it comes out of Dunmore that the court says the threshold for proving a violation of interference with collective bargaining or the right to strike is substantial interference.

Now if that simply means non-trivial interference, well, that's the general law. But in the freedom of association context, for some reason, it's been given, it's viewed as a higher threshold that applicants unions and workers have to meet. And so that's one way in which the court has restricted it's progress, somewhat grudging acceptance the collective body and the right to strike is protected by freedom association.

Cheryl M.: So you mentioned about meaningful process, and sort of taking a deeper dive in some of the cases. I want to talk a little bit right now about the OPSEU case. So you were part of the team representing the elementary teachers Federation of Ontario, in that 2016 case that you've referenced.

And at the Ontario superior court of justice, that was a very important case for Ontario educators as the court held that bill 115 infringed on section 2(d) by limiting the workers right to meaningful process, of collective bargaining, and then that could not be saved under section one.

For the context of our listeners, bill 115 required that any collective agreement made between the school board and the teachers union, had to be consistent with a memorandum of understanding made between the government and the Catholic School Board.

And what does this case say about the right to a meaningful process? And how did you go about demonstrating that right was unjustifiably infringed?

Steven B.: So I think what Justice Lederer held, and the case actually was in appeal, is that it can't be a meaningful collective bargaining process where the so-called agreement is actually an

imposed term, that isn't actually bargained. And for example, in that case, where another union's priorities, OECTA, had the Catholic teachers union had entered into a memorandum agreement that the government then imposed on others.

What you can't impose one union's priorities on another union, without allowing that union to actually engage in a meaningful process, a barley. So I think it was a pretty straightforward case. We actually in terms of proving the violation, and helping the court understand the impact, we actually led expert evidence from Sara Slinn at Osgoode, who's a legal law professor there and an expert in education collective bargaining.

Expert evidence about the history and importance and the structure of collective bargaining in Ontario's education sector. And we all, when it comes to section one in these cases, there's always a fight between economists. David Dodge is a very popular witness for the government.

We led our own expert evidence, and the way that Justice [Inaudible 00:54:03.20] dealt with that is to simply say there was, leaving aside the economic and fiscal context, allowing bargaining to take place was itself a reasonable alternative.

So that case it's sort of ironic, because Bill 28, the education worker back in position of terms legislation of the government passed, and has now repealed in the last week, that also imposed, in there, it wasn't even another outcome that had been freely bargained, but it was actually the government's last offer which they unilaterally, legislatively sought to impose.

So one would have thought that if the Justice [Inaudible 00:54:41.11] decision in the OPSEU case was correct, it would be even more the case that imposing term terms on education workers would be a violation of freedom of association. And presumably, that's why they, that among other reasons, is why the ford government included the notwithstanding clause.

Cheryl M.: Yes. So what has changed in Ontario's employment law landscape since OPSEU? Have you noticed many changes? I mean, we do have this really dramatic case over the last couple of weeks.

Steven B.: Right. Well, I don't think so much has changed. I mean, after OPSEU, the Supreme Court of Canada itself decided another case called the BC teachers federation case. And that's one of those cases where the Court's reasons are substantially in agreement with the dissenting reasons below, and so you don't know which aspects of the reasons are really the Court's reasons. And as it turns out, that was a case where the BC government had overridden class size protections in teachers' collective agreements in BC, and prevented unions from bargaining over class size.

And the lower courts had found that was a violation of freedom association following health services, it interfered with collective bargaining. And the government then sort of reenacted similar legislation after consulting with the union. And the big issue in that case was whether consultation was enough to meet the requirements of section 2(d). And Justice Donald's reasons suggests that well in that case, the consultation actually hadn't faith.

So even if that was the test, that standard hadn't been met by the government. But he also goes on to recognize that after SFL, and the recognition of the importance of the right to strike, where you reach a collective bargaining impasse, consultation itself may not be enough.

So there's an ambiguity arising out of that case. So it turns out in the bill 124 case, the Ontario government argued before Justice Conan, we don't have a decision yet, that actually, they're not obligated to consult, that the charter, that imposing a consultation obligation on government before legislating is inconsistent with our constitutional norms.

And to that extent, my clients, the unions and the government agreed, that consultation can't be enough. But some governments are still arguing that it is in these wage control challenges. And the other way that since OPSEU, one of the big issues as I noted earlier is this argument that even where legislation interferes with the right state of bargain over wages, that interference has to be substantial in order to constitute a breach of section 2(d).

And so in the bill 124 case, the Ontario government has argued that well, because you could still bargain over non-monetary matters, there wasn't substantial interference with collective bargaining.

And of course, we think that's a preposterous proposition, since what the Supreme Court of Canada has said is that if you can't bargain over an important term and condition of employment, that's what 2(d) protects. And although, there are many important terms, conditions of employment, compensation is clearly one of them especially when inflation is running at seven percent or, and a sustained seven percent.

And so the other thing that of course has changed in the landscape since OPSEU is an increasing willingness to resort to the notwithstanding clause, including in labor relations matters.

But I think what we've just witnessed in Ontario actually is going to make it harder for governments to use the notwithstanding clause, because they've seen how it will be received not just by the labor movement, and not just by people on the left of the political spectrum, but people on all ends of the political spectrum. But that's obviously another threat to section 2(d).

Cheryl M.: Well, this is a good time to talk about that case, and explain to the listeners what has happened the past couple of weeks in Ontario. There were negotiations going on between the educational workers including educational assistants, caretaking and other support staff. Some of the lowest paid workers within the education sector.

And following their strike notice, the Ontario government enacted legislation that declared a strike illegal and forced a settlement under the government's terms. And they used the notwithstanding clause in doing so. Declaring the legislation to operate notwithstanding both the charter and the human rights code. So if you could explain a little bit more about what's going on in that case, and then what happened?

Steven B.: Right. Well, I think you've got it, the union's top priorities was protecting their members who were among the lower income workers, not just in the education sector, but in the

broader public sector generally. And in securing additional funding for services in that sector. The party reached an impasse.

I think it's fair to say, and this is one of the points that we made before the labor board when the government applied for an illegal strike declaration and for relief, that the government had been clear from the outset of bargaining that they were not going to allow workers to exercise their constitutional right to strike.

They didn't quite put it in those terms, they simply said the schools will remain open no matter what. And so when the union served its strike notice, the government did what it had said it was going to do, and they introduced legislation that not only said that they couldn't go on strike, but imposed the government's last offer, and said that the legislation could not be challenged as violating section two or section seven or section fifteen invoking the notwithstanding clause.

Now, we're not going to debate now what the notwithstanding clause means. But clearly, it was understood by the union and the public to mean that there couldn't be a challenge brought to the constitution of the legislation, despite the Supreme Court of Canada clearly now holding that 2(d) protects the right to bargain and the right to strike.

And that legislation as you point out, not only said that the charter didn't apply, but it also said that the terms and conditions that have been imposed couldn't even be challenged as violating the human rights code. And the CUPE educational workers are highly predominantly female, highly racialized.

The wages are suppressed and low, and there obviously are possible human rights challenges especially after that Ontario midwives decision in the court of appeal. And so, they were certainly covering off all their bases, the government. They may have over covered though. And then they went to the labor board, and at the labor board, they sought a declaration of the strike was illegal, and they wanted to restrain the strike from happening and force union leaders to recant, and to call off the strike.

We acted for CUPE at the labor board, the union, and we readily conceded that these union members were engaging in a large-scale political protest, and the only way that made any sense when their terms and conditions have been imposed on them, which is to

withdraw their labor. And obviously, were joined by others. The problem was that the override meant that we couldn't directly challenge the legislation itself.

In fact, the labor board was prohibited from even inquiring into the constitutionality of Bill 28. But we made the argument, we made two main arguments. The first is that bill 28 prohibited strikes, but that the definition of strike came from the labor relations act, and the labor relations act had not been overridden under the charter override for section 33 provision.

And we argued that the definition of strike, to the extent that it applied in this unique circumstance, that is where the employee had been, were on the verge of going on strike to negotiate their collective agreement, the very thing that's protected by Saskatchewan federation of labor. They had terms imposed on them which is completely inconsistent with the OPSEU case, with the protection of collective bargaining.

And they had no other means legally to challenge that legislation, which made this case unique, because of the invocation of the notwithstanding clause. That the strike definition in the labor relations act, both as a matter of interpretation, as a matter of charter values, and as a matter of constitutionality couldn't extend to preclude these workers from withdrawing their labor, where the very premise of the act, which is that you strike to negotiate an agreement, have been undermined.

And where unlike any other case the labor board had dealt with, the Union couldn't even go to court to challenge the constitutionality of the legislation. So that was our first argument. And our second argument was that the board has a discretion to decide whether or not to declare a strike to be illegal, and whether or not to grant injunctive relief of the kind that it typically does in the legal strike applications, where it finds a strike is illegal.

And we argued that both the government's conduct, in everything that it had done leading up to the legislation, but also charter values should inform the exercise of discretion.

In overriding a challenge to bill 28, the labor board was acting under its own statute, the labor relations act. The government had not purported to override that, and so that

discretion very much should be informed by charter values of freedom of expression, freedom of assembly, freedom of association.

As I said to someone, nothing brings public and private sector unions together like the threat of extinction, and this was an extinction-like attempt to completely obliterate collective bargaining, the right to strike. And so the determination of the labor movement across Canada, the political protesting, when you have Andrew Coyne and others saying that this is wrong, Marcus Gee, you know that you've poked society in a way that isn't acceptable.

And so they agreed to repeal the legislation, and they reached that agreement before the labor board issued its decision, and so they then withdrew their application to the labor board, and so we'll never get a decision. And now the parties are as you know back at the bargaining table, and as of this morning, as you and I do this podcast, the union has indicated that it's given a further strike notice. And so hopefully, we'll see how that all plays out.

I think the government has learned though that invoking the notwithstanding clause in labor matters, and I think this government and governments across the country have learned that actually, I'm not sure we yet have risen to the levels of constitutional convention, but I think political reality dictates that is not something governments will do.

And I want to say one other thing, although much of the focus of the public outcry was about the invocation or the imposition of the notwithstanding clause. The other thing that was really abhorrent about this legislation from a constitutional and labor relations point of view, is usually, even assuming that there was justification, which obviously, I don't accept and the union doesn't accept, for prohibiting the right to strike.

The government's argument is we've just been through a pandemic, kids should be in school. Even assuming that case could be made, what the supreme court of Canada has said is that if you're going to say that workers activities are essential to the public interest, and therefore like firefighters, hospital workers, police they can't strike, you don't impose terms, you have to provide for independent arbitration. Because otherwise, you've completely taken away any ability of workers to shape, to be involved in the shaping and determination of their employment conditions.

And so both in the Alberta reference case and chief justice Dixon's dissent, in the SFL, Saskatchewan Federation of Labor case, the court is clear that where you take away the right to strike, you can't impose your last offer or impose terms, you have to have some neutral independent fare arbitration process, and that was not the case with Bill 28, it was sort of in that sense, unprecedented.

And I think this government and others have also learned that you can't simply impose terms, and try to insulate challenges from the notwithstanding clause, but even the imposition of terms is not acceptable in a free and democratic society. And so we'll see how this, if there is a strike, we'll see how that shakes out. But I'd be surprised if the government were to resort to imposition of terms, rather than finding a fairer outcome.

Cheryl M.: Well, I think also in this case, there was a group of workers that the public actually had a lot of sympathy for.

I think there was a lot of information about how poorly they were paid and generally treated, and I think that they're, it wasn't just that union, but it was other unions, but also the general public who were certainly concerned about schools being closed, but also wanted to see the people working with their children were actually adequately compensated as well, so.

Steven B.: I think that's right, I think that was another factor that led to the public outcry. But really, whether these were low-income workers or middle-income workers or even higher paid workers engage in collective bargaining, imposing terms insulating that from challenge under the charter shouldn't be acceptable in any society.

Cheryl M.: Well, we'll hear more about the preemptive use of the notwithstanding clause in other cases that are winding their way up, in particular, the bill 21 case coming out of Quebec.

Steven B.: There's another interesting issue, I think, and I can't say I'm as expert as some others are in this. Although, it may have to be at some point in my career. There's another interesting issue about whether the notwithstanding clause can be used retrospectively or retroactively.

And in the bill 124 case, for example, which is the challenge of the wage control legislation. There was some concern that if we're successful in that case, there's been some talk, well, the government will just use the notwithstanding clause and override the court's decision. I think there's a legitimate issue over whether you can do so, and use the notwithstanding clause to retroactively change one's constitutional rights.

So hopefully, we'll be successful in that case, and they won't resort to the notwithstanding clause. But I think yes, I think the next to right, I maybe should become a notwithstanding clause lawyer.

Cheryl M.: Well, we do have a previous episode with Professor Weinrib.

Steven B.: I'm going to listen to it.

Cheryl M.: Talking about the history of the notwithstanding clause, and her views on its use. So I commend our listeners to turn back to that episode. I want to thank you so much for joining us.

Before you go, could you please tell our listeners about any upcoming projects that you have on the go, or any interesting work from other organizations that you would like to amplify.

Steven B.: Well, I have to say at the moment, I've been somewhat possessed and obsessed by the bill 28 and the bargaining that's going on in the education sector. The Supreme Court of Canada just refused leave and granted leave in two cases.

They refused leave in a wage control case coming out of Manitoba, where the Manitoba court of appeal upheld wage control legislation is not violating freedom of association, which was disappointing. Granting or not granting leave doesn't necessarily mean the court agrees or doesn't agree with the result.

But they have granted leave in a case involving Casino employees in Quebec who are managerial, and they're arguing that freedom of association protects their right even though they're managers, to engage in collective bargaining. And historically, managers have been excluded from the right to collectively bargain, on the theory that they're really the employer.

But the workplace has evolved to a large extent, and these people are sort of caught between the corporate employer, and the employees, the people that everyone agrees are employees. And the question is whether managers have associational rights to engage in collective bargaining. So that's a case that I think court will again have to grapple with the scope of freedom of association. We'll see how that turns out.

Cheryl M.: Great, thanks very much. We've been speaking today with Steven Barrett about labor rights and freedom of association and expression under the charter.

In the first part of this episode, we spoke with Professors David Schneiderman, and Ashwini Vasanthakumar about freedom of expression, association as it relates to the freedom to protest.

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