

S3E5 – Asper Centre 15<sup>th</sup> Anniversary FULL TRANSCRIPT

***\* Transcripts are auto generated \****

Music:

Charter a course, I will charter a course, if we can just get the country to trust us. Charter a course, south, east, west and north, and along the way we may find justice.

Cheryl:

Hello and welcome back to Charter a Course and to this special episode, which is also the final episode of season three of our podcast. I'm Cheryl Milne, your host. The Asper Centre recently marked its 15th anniversary.

Cheryl 00:29:

And to celebrate, we convened a live recording of this podcast, with the tables turned to start and a number of special guests. U of T Law's Dean Jutta Brunnée interviews me in the first half of the podcast, and then four amazing Asper Centre alumni discuss their experiences with the Centre and their current legal practices. But first, we wanted to share a special message that was sent to us by the Minister of Justice and Attorney General of Canada.

Cheryl 00:57:

the Honorable Arif Varani, an alumnus of the faculty and apparently a fan of the Asper Centre. We were delighted to receive his video message in kind words on the occasion of our anniversary. We played the video live at our anniversary event last month and the podcast recording started right after. So here goes...

Minister Virani 01:27:

Good evening. I'm Arif Virani, the Minister of Justice and Attorney General of Canada and a proud graduate of U of T Law, the class of 1998. It's a privilege to address the 15th anniversary celebration of the David Asper Centre for Constitutional Rights at my alma mater. I'm speaking to you from Ottawa on the traditional and unceded territory of the Algonquin Anishinaabeg Nation. When I was a student at U of T Law 25 years ago, I loaded up on classes like constitutional litigation and comparative constitutional law. I did not have the benefit then of the David Asper Centre as a resource. Your success is a testament to the vision of the university and of David Asper himself. You saw the need to focus on constitutional rights and their central place in our legal discourse in Canada. David put it well back in early 2008 when he said, quote, it takes deep commitment to test, study, and evaluate our state of freedom on an

ongoing basis. Many of you will know my interest in constitutional law. Before I entered politics, I spent a dozen years working in the constitutional law branch...

Minister Virani 02:25:

at the Ministry of the Attorney General of Ontario. My time here at U of T Law would have been immeasurably enriched for having had the opportunity to work with the Asper Centre's legal clinic on important constitutional law cases. There's no question that being able to take in lectures from the constitutional litigator in residence would have been incredibly valuable. And a shout out now to Ewa Krajewska for taking on this role for this current academic year. Thank you. Thank you very much. In my day, Mary Eberts would have occasionally joined Lorraine Weinrib's Constitutional Litigation class to provide us with the benefit of her insights. But having a formal litigator in residence takes this to the next level and is invaluable to both the school and its students. For students, the Asper Centre's resources provide priceless preparation for life in the law and a chance to work with some of our best legal minds on the seminal issues of our time. For faculty, the Asper Centre creates space for work outside the lecture hall and....

Minister Virani 03:24:

For practitioners, people like Ewa, it's a place where our best lawyers can give back to our profession, as well as learn from both students as well as faculty. It's an extraordinary resource at what I will selfishly say is our country's best law school. Once again, thank you for giving me the opportunity to say a few words this evening and congratulations on your 15th anniversary. Thank you.

Jutta Brunnée 03:51:

Well, I don't think I could have kicked us off better. This really was a wonderful introduction and a wonderful tribute to the Asper Centre. So many thanks to Minister Virani for doing us this honour. But I want to join Cheryl and the Minister in welcoming you all to our 15th anniversary celebration of the David Asper Centre for Constitutional Rights. I'm Jutta Brunnée, I'm the Dean of the Faculty of Law, and I'm delighted to be able to play a little part in this event in hosting the first segment of tonight's proceedings. And the event as a whole, which is why we are sitting here with these quite elaborate microphones, is being recorded for a podcast that the Asper Centre has been producing, a podcast series entitled Charter, A Course.

Jutta:

This podcast and today's event and everything at the Asper Centre emanates from our location at the University of Toronto Faculty of Law on the traditional lands of the Huron-Wendat, the Seneca and Mississaugas of the Credit River. 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 and learn and debate on this land and also to celebrate the Asper Centre's accomplishments here tonight.

Jutta:

Now as many of you are going to be aware, the Asper Centre was started with a generous endowment given to the Faculty of Law by David Asper and he has continued to provide his support throughout the 15 years of the Centre's existence. We are proud of the accomplishments that this gift has enabled and the benefit it has bestowed on the students, faculty, and broader community. And I think we just heard a very wonderful capture of what the Asper Centre has been able to do with this support. Let me just give you a few highlights to illustrate. Over its 15 years of activity, the Asper Centre has participated in 38 interventions in cutting-edge constitutional cases at all levels of court....

Jutta 06:06:

most frequently at the Supreme Court of Canada. It has hosted 54 constitutional roundtables with leading academics and constitutional practitioners. It recruited 11 constitutional litigators in residence who've shared their expertise with clinic students. It supervised 45 student working groups and these groups have researched and prepared legal positions, research memos, and public legal education materials. The Asper Centre has also created 37 publications, including policy briefs, papers, and books, such as Public Interest Litigation in Canada, and the forthcoming Equality Rights Litigation in Canada, which are the product of two symposia of scholars and practitioners, again organized by the Asper Centre.

Jutta:

And relevant to today's event, there have been by now, I'm told over 20,000 downloads of the charter a course podcast, which is now in its third season. And so, you're here for the live event. And if you're thirsty for more information about all the things that the Asper Centre does, there's a wonderful snapshot of this in the 2022-23 Annual Report of the centre, which was actually just put up on the faculty website, I believe, yesterday, or at least it's hot off the press, so it's there for you to take a look at, and it really is most impressive. Now, so we're going to start with a chat that I will have with Cheryl Milne, the Asper Centre's Executive Director throughout the centre's tenure at the faculty, and then the second half of the event will be a panel discussion.

Jutta 07:50:

In case you're wondering who all of these chairs were for. And that discussion will be moderated by our constitutional litigator and residence, Ewa Krajewska, and we're very much looking forward to that. So let me start to warm you up a little bit, Cheryl, with a few questions to get our conversation going. So I've already suggested that you were the inaugural executive director of the Asper Centre. And so here you are now. 15 years later, it probably seems both like a long time, but also a kind of like a blink. What was it like getting the centre off the ground? Because I imagine that's no small feat.

Cheryl 08:36:

It was pretty daunting at first, I have to say, because I think it wasn't clear really what the centre was going to be. It was something new, it is something unique in Canada, I think, and we looked at other kinds of centres, even around the world, and there wasn't anything at that time. It was quite like what we were doing. We kicked it off with what we called a working dinner, where we solicited...

Jutta:

That's a very nice way to kick something off.

Cheryl:

We solicited the expert views of leading constitutional lawyers in the country and our own constitutional law faculty, and it was followed by the following day, a colloquium on strategies for successful charter litigation. So that's what we started. So, I had this influx or infusion of all of this expertise to try to help me guide what the centre was going to be doing. So much planning went into which cases we would undertake and how we want to situate the centre in respect to constitutional arguments and scholarship. We came up with case selection guidelines that we wanted to focus on, access to justice as a key element of the cases that we got involved with. But one of our first events was for a more general public. It was a much watched and attended panel on the prorogation controversy that brought to light issues of unwritten constitutional conventions. So it was more of a political science debate really, but one that had significant implications for how parliament was governed when then

Cheryl 10:09:

Prime Minister Stephen Harper, prorogued parliament to avoid facing difficult questions about handing over Afghan detainees to face torture and abuse. So that was our first event and it was sort of oversubscribed. We, and it was one of the first ones that we did where we actually had it remote as well as in person. And so things are much smoother now here at the faculty. We do a lot of things online, but that one, there were. It was one of the first times we did that. There's a hilarious photo of me that was taken when we were, the faculty was doing some promotional photos for an alumni magazine, and they asked me to pose in a boat that was perched on stairs going down to the old, the old part of this building before it was renovated. It was never used, but it was supposed to actually depict the turbulent waters of the prorogation. And it's quite funny, and someday I may put it up, but it's all that's kind of been kept secret. But it was, it really, but it's kind of ironic that that was sort of the first picture taken of me for it because now we have the podcast Charter, of course, which is actually sort of coming around full circle to that theme.

Cheryl 11:33:

In subsequent years, we followed that panel with the workshops that you mentioned about public interest litigation, as well as, but other things that were also related more generally to the state of Canada's constitutional democracy. We actually published reports, but our work has always been a combination of advocacy, research, and education. Those have been the main things.

Jutta:

Well, thank you. I mean, I have to say, I'm very curious about that picture. I'm going to think it has to appear somewhere at some point. And so then you did get off the ground, though relatively quickly, and swung into full action. Your first intervention, if I'm not mistaken, before the Supreme Court of Canada versus HMQ was in 2010?

Cheryl 12:25:

We actually appeared in 2009. So, it was within the first year. So the decision came out in 2010.

Jutta:

The decision came out in 2010. That's pretty amazing. So can you tell us a little more about that?

Cheryl:

Well, first we have to thank the Criminal Lawyers Association and then President Frank Addario, also an alum of the faculty, who allowed us to join and represent them in a case that seemed to perfectly represent what we wanted to do in our interventions. And so the focus really in that case was on access to justice, it was about the constitutional jurisdiction of the Ontario Review Board, which reviews the treatment of persons found not criminally responsible for crimes under the Criminal Code of Canada due to mental illness. And at issue was the board's jurisdiction under Section 24.1 of the Charter to find a charter violation and provide appropriate and just remedies.

Cheryl 13:24:

So I thought, first of all, that it was best to join with an established intervener, to essentially introduce us to the court, because who are we and what is our history? And so that's why I thank the Criminal Lawyers Association. And it was also sort of the first partnership that has continued throughout the 15 years with Professor Kent Roach and his expertise on remedies that really kind of helped. He helped draft the legal argument and then conveniently for me, was out of the country on the day that the case was to be argued. So it allowed me to represent the Asper Centre on our first appearance at the Supreme Court of Canada.

Jutta:

You clearly left an impression. There's been several decisions in which the Supreme Court of Canada made specific reference to Asper Centre arguments. Can you tell us a little bit about that?

Cheryl 14:23:

Well, I want to start by saying it's not usual for the Supreme Court of Canada to reference intervener arguments directly. You're usually left combing the reasoning, hoping to see snippets of your factum that you filed. However, we have been directly referenced in support of decisions in three cases. The first direct mention was Bedford v. Canada. And the Bedford case was about a challenge to the provisions in the criminal code relating to sex work. We took a very unusual or sort of different approach than many of the other interveners. We argued about stare decisis. That was the requirement to follow precedent in constitutional litigation. And we were represented by Joseph Arvay.

Cheryl 15:17:

who was our inaugural constitutional litigator in residence and myself, so I worked with him. And I will talk a little bit more about Joe later, but it was an issue that he had addressed in writing and it's one that I found felt very appropriate for the Asper Centre as well. We sometimes take on the kind of issue that seems more academic, seems a little less accessible, a little more difficult, but has an essential element that is really important. So, in this case, it's whether or not a trial judge coming upon new evidence, a new situation, has to follow a precedent from 20 years ago that was decided under a different set of circumstances. And the, we were mentioned because the court, and it was the then Chief Justice...

Cheryl 16:15:

Beverly McLaughlin that agreed with our approach. And I'm just going to quote, so I have some papers here in front of me so I don't forget some things, but also so I can quote. So, she says, the intervener, the David Asper Centre for Constitutional Rights argues that the common law principle of stare decisis is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as mere scribes creating a record and findings without conducting a legal analysis. I agree, is what she said. So that was really nice.

And she goes on further, I'm not going to go, but quoting from our factum, but that was really a nice... Intent to say, oh, go on.

Cheryl:

I can go on for another one. So the second time this happened was the case of Ontario and G. And it's going back to a remedies case. And again, the expertise of Professor Roach. And another case involving the Ontario Review Board. But this time the issue was the constitutionality of legislation related to the sex offender registry and the equality rights of a person who was found not criminally responsible due to mental illness once again, but then subsequently discharged. And the court rendered a declaration of unconstitutionality to the provisions that didn't allow him to be removed from the registry...

Cheryl 17:42:

but suspended it to allow the government time to amend the legislation. It also allowed the applicant to receive a constitutional exemption from the period of that period of time of the suspension and an immediate removal from the list. So, there was a really compelling personal story that went along with that and his rehabilitation. And so, this is the quote from that case. It says, I would accept the Asper Centre's invitation to articulate a principled approach to remedies for legislation that violates the charter. Kent Roach argues, and he cites one of Professor Roach's articles, and the intervener, the Asper Centre, submits that charter remedies should be granted in accordance with principled discretion, a middle ground between strong or pure discretion, which would give judges free rein to fashion remedies as they say fit, and rule-based discretion...

Cheryl 18:40:

which would tightly constrain judges from hard and fast rules. I agree. Once again, those very nice words to hear when you're on the side of an intervener trying to get the court to listen to you. And then there's one last one. A third case is the most recent example, was the constitutional challenge to the Safe Third Country Agreement. It's the case of the Canadian Council for Refugees versus the Attorney General of Canada. We joined with LEAF, the Legal Education and Action Fund, and West Coast LEAF to argue that the failure of the judge at the trial level in that case, at the federal court level, to address the Section 15 argument that was made by the claimants was an error and not appropriate judicial restraint. So, the federal court of appeals said it was fine. The judge at the first instance actually made a finding that the provisions related to the Safe Third Country Agreement did contravene Section 7 and said, well, we don't have to go on about Section 15. But while the Supreme Court of Canada upheld that finding about the Section 7 breach, that there was no Section 7 breach, it cited our arguments to grant the appeal on Section 15 grounds and send it back to the federal court for a hearing on the merits. So, we're now in the process of working with the applicants in the case and considering...

Cheryl 20:04:

once again in partnership with those organizations to intervene again in that case. And that's one of the other things that we partnered with the Criminal Lawyers Association early on in a sense to bring credibility as an intervener, but we've continued to follow that pattern where it's about expertise and

about pooling resources and about not duplicating so that in an appropriate case, we will intervene with other interveners so that we can really present a very robust argument.

Jutta:

Well, this is really quite remarkable. And you were saying a moment ago that you were conscious at the outset that you needed to be introduced and gain credibility, but it does sound a little as if you now no longer need any introduction, but lest it come across as if we've rigged this all to just make it look glowing, there were also some not so positive comments, if I'm not mistaken. Is there something you can tell us about that?

Cheryl 21:02:

Well, the role of interveners, I think, is to push boundaries and to make arguments that situate the parties' arguments themselves into more, a broader context. And so sometimes we get pushback from the court. And I'll just talk about a recent decision. I mean, we haven't been criticized too harshly in cases, but they don't always pick up our arguments and sometimes they ignore them completely. But in a recent decision of the Supreme Court of Canada...

Cheryl 21:30:

a case called McGregor and Her Majesty the Queen. We were not mentioned by name, but simply lumped together with other interveners who with us were invited by the court to revisit a previous decision related to the territorial reach and limits of the charter. This is, we were asking for the court to look again at the case of R versus Hape. And there's been a lot of academic criticism about the way the court has....

Cheryl 21:59:

articulated the test about the reach of the Charter beyond the borders of Canada. Surprisingly, we were granted intervener standing based on those proposed arguments. You don't get into a case unless you tell the court what you intend to argue. They want to hear, it's not a full argument, but they want to hear fairly clearly what you intend to argue. And so that's what we said we intended to argue. But then, you know, once we got in, they then told us that we should not have asked them to reconsider Hape because the parties had not done so. And sometimes the parties won't actually ask the kinds of questions that interveners will because it's not in the interest of their clients. And we will sometimes push. And sometimes you get pushed back on those things. But I think that's just part of the role of being an intervener.

Jutta 22:50:



Yeah, it would be a little bit unusual if none of this were to happen. Now let's turn to another really important part of what the Asper Centre does. So it does all of the things that you've described really well, but a really important part of the Asper Centre activities also is student involvement. So, students have been given and are given the opportunity to work on all of the interventions through the clinic and over the summers. And so maybe you can tell us a little bit more about how the clinic teaches students experientially.

Cheryl 23:21:

So, like most clinical education settings, the students learn by doing and working on our actual cases. Unfortunately, the levels of court that we are appearing in, students can't appear. So, unlike Downtown Legal Services, where students are actually appearing on behalf of clients, the cases that we are involved in, for the most part, students can't do that because the rules don't allow them to. But they work in teams that we put together within the clinic to gather the background and do the drafts of the arguments and we'll do drafts of factums for us on those cases. It's a pedagogical approach that involves the application of actual theory. There's a David Kolb's theory of experiential learning is what is applied in the clinic setting. There's a four-stage process to that. One is concrete learning, so that is working on the actual cases and doing the work that needs to be done.

Cheryl 24:16:

Then reflective observations. So, the students have to, in the clinic, write reflections on a regular basis on the work they're doing and on what happens in the clinic setting. There's a next step is abstract conceptualization where they take that reflection and the work that they do and sort of turn it around to say, well, how can I do things better or different the next time around? And then they engage in this active experimentation. Now the students are only in the clinic for one term, so there's not a lot of room for doing that. So we try and do simulations of factum writing, memo writing, and that sort of thing to at least model that. But one of the key things that I find both as a teacher, I think it's important to do this, and my background is also in social work. So, this is a model that's used very regularly in social work settings, has been for many years...

Cheryl 25:12:

Law is a little more new to it, but I think this reflection is really key. But I also really thoroughly enjoy reading the students' reflections. And their thoughtful approach to their own learning is really something that I find inspiring.

Jutta 25:32:

Fantastic. And so, we already mentioned the Constitutional Litigator in Residence program. This was created, I believe, also to enhance student learning, actually or at least in part. And so maybe you could tell us a little bit more about how this was started and who's been participating over the years.

Cheryl:

So, Joseph Arvay, who died in December, 2020, quite sadly, he contacted us to suggest that he come and work with the Asper Centre for a month in 2012. And for those of you who are not familiar with, with Joe Arvay, he was an exceptional constitutional litigator, committed to human rights in Canada and counsel in a number of the most important Supreme Court of Canada cases, not just the charter, but also sort of Aboriginal rights and just other kinds of public interest litigation more generally. He represented us, as I said, in the Bedford case and we developed that argument around stare decisis together. And I think he felt very strongly about the importance of that.

Cheryl 26:37:

That decision in Bedford was then carried forward to the next really big case called Carter in Canada. And Carter was the challenge to the provisions of the criminal code that prevented medical assistance in dying. We did not intervene in that case, but the reasoning in Bedford was then carried forward in terms of stare decisis, because there had been a previous case called Rodriguez in which the court had said that those provisions were constitutional. And as many people know, in the Carter case, they struck those provisions down, and we now have a regime of medical assistance dying in Canada. And it was an issue that Joe Arvay felt very strongly about. But he was the inspiration for the continuing role that has been incorporated into our teaching and advocacy. So, I thought, this is a great idea that Joe, I want to do this more, and I want to work with more of these...

Cheryl 27:34:

inspiring litigators. And since then, we have had John Norris, now Justice John Norris of the federal court, Mary Eberts. You heard Mary Eberts being mentioned by the attorney general. She's also an inspiring and profound litigator herself. Raj Anand from Weir Foulds. Janet Minor, who was with, retired from the constitutional law branch for the Attorney General of Ontario. So, we were able to have her come because there wasn't a conflict. So normally it's hard to get a government lawyer to come into the clinic because we're often against government in our interventions. But with Janet, she had retired, and she was able to bring that perspective to the students. Breese Davies, who is now also Justice Breese Davies, so they're there and who had brought criminal law perspective. Susan Ursel. Nader Hasan. Jonathan Rudin from Aboriginal Legal Services. Jessica Orkin was our constitutional litigator last year from Goldblatts and this year, Ewa Krajewska, who's working with the students and working with me.

Cheryl:

And so, the way we conceive of it is that they co-teach the clinic with me. So, bringing that another perspective than just mine, I mean, I do have my own litigation perspective. For many years I was a litigator at Justice for Children and Youth before I came here. I did do some of the constitutional cases from that clinic, but I worked for a very specific kind of client. And so by bringing in other constitutional

litigators, the students get the benefit of a range of approaches and individual expertise that is also, and it's also just great for me too, because they're just wonderful people to work with.

Jutta 29:25:

Yeah, this really sounds fabulous. So we've talked about litigation, we've talked about the involvement and the teaching of the students. What other sorts of projects or events have you organized over the years? Maybe give us a couple of examples.

Cheryl 29:41:

Sure. Over the years, we've hosted a series of symposia that have aimed at bringing academic perspective together with the practical. So strategies for successful charter claims, social science evidence and charter litigation, constitutional remedies, those kinds of topics. We're proud of the two publications that we have, the Public Interest Litigation in Canada that actually produces royalties, which is surprising for an academic book, and the forthcoming Litigating Equality in Canada, which will be published in 2024. So, we're just going through the, we'll be going through the proofs very soon. And we host constitutional roundtables for academics who come.

Cheryl 30:22:

And we have two Law Foundation of Ontario funded projects. Actually, one is a guide to police complaints, which is kind of in a holding pattern because the government of Ontario has not yet passed all the regulations. So the students have worked really hard on creating that guide and we're just waiting for the regulations to pass before we can make it available online. And I'm working with a prominent litigator in the area of child welfare, Dr. Barbara Fallon on a child welfare toolkit, which is marrying the law around child welfare with the evidence in an area that people don't often see as being an area of constitutional rights, but they are profound rights in terms of the family and has been recognized by the courts. And I just want to say that we have a number of student working groups and...

Cheryl 31:13:

About eight years ago, we hired a program coordinator, Tal Schreier, who has really helped to expand the kind of work that we do and who works closely with our student working groups and helps to put together a lot of our events. And she's an essential partner in everything that's being done. It's not just me.

Jutta:

What are the plans going forward? I assume you have some, given everything we've heard so far. Well, we do have a formal strategic plan that you can find on our website. It has the kind of language that you

would expect in a strategic plan, we want to maintain our reputation, which is something I'm quite proud of. And we want to strengthen the Centre's core competence of education, constitutional expertise, and collaboration, and of course, to expand the Centre's capacity. So that's your usual sort of strategic plan speak. But practically speaking, I would like to see us take on more ground level cases, such as our voting age challenge. I haven't mentioned that case, and we might hear more about it from our...

Cheryl 32:13:

alumni who are going to be speaking. But that is a case in which we are representing 13 young people from across Canada in partnership with Justice for Children and Youth on a challenge to the voting age in Canada. And I think that's one of the legacies of Joe Arvay's legal practice, was to take on those ground level cases. A lot of constitutional litigators are quite happy to just intervene, and we have been quite happy to do that too. But I think we need cases to intervene in, and so it's important that we do some of those ground level challenges. And there's a lot out there where people can't get representation. I would also like to target legislation and policy advocacy to have more meaningful input before litigation becomes actually necessary. And as I said before, we continue to work productively in partnership with other organizations.

Cheryl 33:05:

and we tend to sometimes bring organizations together to talk about certain issues, and I want to continue to do that. And particularly because I think that helps to further our access to justice mandate by making sure that we're working together to further these initiatives. I'm also really proud of our intervention in the Mathur case, which is the climate change case here in Ontario, and we are being represented by Ewa in that case and that, but that along with the voting age challenge represents sort of, I think, cutting edge litigation and it's critical really both of them to how our democracy works and who is included and so I think that they're really important cases. And so just to sort of sum up, when Tal Schreier joined us, we were able to increase the work that we did. David Asper has continued to be generous with the centre and we, but we've also had to look...

Cheryl 34:03:

for two other sources of funding as well. We'll continue to do that. So it's my hope and expectation that we can offer opportunities for work with the centre through fellowships and academic partnerships that will further expand our impact in the near future. And to continue, and you'll hear a little bit about that in our second half of the programme of reaching out to our alumni who now are quite experienced litigators after 15 years. And we're reaching out to them to do some of that pro bono representation and representation of the centre in the interventions. And I want to continue to do that so that we're not just training the students here while they're here, but that we're also providing opportunity for junior and so not so junior counsel to be representing the Asper Centre in addition to myself. I always like taking cases on myself too.

Jutta 34:58:

Wonderful. Well, you've really given us an amazing set of highlights of the work that has taken place over the last 15 years. I really sort of it's like a tableau, a panorama of all kinds of remarkable accomplishments. And so, I think before we introduce the second half of the evening's proceedings, I thought this is a good moment to give a round of applause to Cheryl and the entire team at Asper and the Asper Centre for all of this work that you've described so well.

Jutta 35:40:

All right, so this is a very nice setup to turn the event over to the constitutional litigator and resident, Ewa Krajewska, who will chat with some of the alumni of the Centre's clinical program. Ewa has practiced civil litigation for 14 years, specializing in public and constitutional law. And she practiced at Borden Lardner Jave for 12 years before joining Heinen Hutchison-Robitaille LLP in 2022. She's appeared at all levels of court, including the Supreme Court of Canada on important constitutional matters. We're delighted once again that you're the constitutional litigator in residence. We're delighted you're here and I'm thrilled that you will now be introducing the panel guests and having a conversation with them.

Ewa Krajewska 36:29:

Hi everyone. Good evening. We have, it's my great pleasure to introduce our panel of alumni of the David Asper Centre. And I've actually had the pleasure of working with two of these alumni on other constitutional and public law issues. So, they've definitely taken what they've learned at the David Asper Centre into their practice. So why don't we go from oldest in law years to youngest. Neil Abraham has a general practice in public law in Ottawa at Olthuis van Ert, a boutique litigation firm in Ottawa and Vancouver. After he graduated from U of T, he clerked at the Federal Court of Appeal and the Supreme Court. And before his law times, he worked as an environmental economist at the Federal Public Service. So next in law years, Geetha Philipupillai. She's an associate at Goldblatt Partners in Toronto. Her practice includes employment, professional regulation and constitutional litigation.

Ewa 37:29:

And I've had the opportunity to litigate with Neil when we were both at BLG. And I've had the opportunity to litigate alongside Geetha on student politics matters, which was lots of fun. Who's next in Lawyers? I'm not really sure, you both graduated the same year. Okay, well, Keely Kinley. Keely is an associate at Lenczner Slaght in Toronto. She has a broad litigation practice in commercial disputes, corporate governance, and professional liability issues and she was not just a student at the Asper Centre, but also worked as a research assistant. And then Ryan Deshpande is counsel at Litigation, Extradition, and Advisory Division at the Department of Justice of Canada. So, he's on the other side of matters sometimes, but he has the opportunity to practice with a focus on constitutional law, administrative law, and civil litigation. And he also clerked at the divisional court. So, let's just get started.

Ewa 38:28:

The first question to help you get to know them a little bit better is, what was the work that you did at the Asper Centre and how does it relate to what you do now? So why don't we start from this side this time? Keely, do you want to begin?

Keely Kinley:

Sure. So, I started at the Asper Centre when I was in 1L, and I was in a student working group that did some of the police accountability and police kind of rights guides as a 1L student. And then the summer after 1L, I worked as a research assistant at the centre and did everything that was truly the highlight of my law school, I would say, was that summer. And then flowing into being in the clinic course when I started my second year of law school, where I worked on the voting rights, kind of building that case up just in the early days of it. And then I also led a student working group in my second year. And so I kind of did quite a lot with the Asper Centre and really enjoyed it. And now I'm just doing kind of general litigation using a lot of the skills that I picked up at the Asper Centre.

Ewa: Ryan?

Ryan Deshpande 39:42:

So, I was involved with the Asper Centre all three years of law school. In my first year I was a member of the Immigration and Refugee Law Working Group, where I provided research support for the Safe Third Country Agreement Challenge that Cheryl mentioned earlier. And in 2L and 3L, I co-founded and led the Sex Workers' Rights Working Group, where we provided research support to what became the Canadian Alliance for Sex Work Law Reform Challenge, as well as building partnerships with community organizations at the time.

Ryan 40:10:

And in 3L, I was a clinic student where I helped develop the record for the Mathur case with Nader Hassan as the constitutional litigator in residence at the time. And my Asper Centre work is directly on point to what I do now in the sense that Canada is a respondent on several of the cases I just mentioned. This also means I'm conflicted out of working on those cases, but that's not something I'm too upset about. I was really proud of the work that I did for the Asper Centre in those cases and watching them progress through the courts has really been valuable. And in general, though, as a junior constitutional litigator, the work is very, very similar to what I did at the Asper Centre as a law student. So much of my work involves charter-based constitutional research and case building, and that's something I got to do as an Asper Clinic student, and I continue to do it now.

Ewa:

Geetha?

Geetha Phillipupulai 41:04:

So, I took the clinic in 3L and the case that I worked on was Frank in Canada, which was a case about the voting rights of non-resident Canadians. And so, I worked on the motion to intervene when I was in the clinic and also worked on researching and the factum as well. But ultimately what happened was, and I don't recall exactly why, the hearing was postponed and it happened after I had graduated. But yeah, my experience working on that case, actually funnily enough, the Asper Centre was represented in that case by Louis Century, who's a colleague of mine, and that's actually how I got to know Louis, and how I actually kind of have the job that I have now at Goldblatt Partners. So definitely had a huge impact on my career and my work.

Ewa:

Neil?

Neil Abraham 42:01:

I was a clinic student in my second year of law school here at U of T, and I was very fortunate that the clinic schedule that year aligned perfectly in that the Asper Centre had just been granted leave to intervene on a case called Henry. I showed up in the clinic and the case was ready to move forward to the Supreme Court. So, I think we're probably one of the rare situations where the students, just because of the timing, were able to work on the intervention and then actually go to the hearing of the case, which was a great opportunity for me. And I would say the main thing I...

Neil 42:30:

I've taken from my time at the Asper Centre was learning that critical skill as a constitutional litigator of being able to take big and difficult and complex ideas and distilling them in writing to something that is as straightforward as possible, as palatable as possible for judges and really sort of that translation exercise. And that is my favorite part of being a litigator and it's something that I definitely saw the kernels of when I was a student at the Asper Centre.

Ewa:

Okay, so now I want to take you back to when you were a student and you were doing your course selection. Why did you choose to do this course? What were you looking for from the clinical experience and how did that, how did this experience fit into your general law school experience? Can we start with Ryan this time?

Ryan 43:23:

Sure, so I had always been interested in human rights, constitutional law, but also big picture issues like public policy and international law. And I really tried to dedicate my law school experience to that. So, the opportunity came up for the Asper Clinic. Actually, I was going to go on exchange, and then it was canceled because of Covid. So, when I had to redo my course selection, I was very excited that I was able to do the Asper Centre Clinic and get the practical experience of being a constitutional lawyer. But it was really impactful for me at the time, largely because it solidified my desire to practice constitutional law. You know, there's a lot of financial and social pressure to go into big law and pay off my debt as quickly as possible, but doing the clinic actually helped me realize that I want to do what I like as a career.

Ryan 44:20:

And constitutional law was something that I really liked doing. And so I made the choice to try and find a career where I could practice constitutional law as much as possible. And doing that with the government is one of the best ways to do it. I like pretty much 60% of my workload is constitutional law and like big picture issues. And I'm really lucky to be able to do that.

Geetha:

I was really drawn to the opportunity to do practical legal writing and to work on an ongoing case. I sort of structured my third year in this way where I did an intensive at DLS and I did the Asper clinic and so I wasn't actually in school very much, which is something I regret now because I didn't take things like tax law or trusts.

Ewa 45:12:

But still it was... Do you practice in tax?

Geetha:

You know, as an employment lawyer, it's actually really important to understand income tax, which I regret not learning. But it's one of those things where I think that, you know, it's so hard to pick what you're going to do in law school. And I still feel really grateful that, like, that this was the opportunity that I got. And that it's something that I do feel confident when an intervention comes across my desk now. And I have done interventions as a lawyer.

Geetha 45:42:



And you can't learn everything in law school. You're always going to have to learn some things or learn a lot while you're in practice. But it was really great to work with professors and sort of like the case group that was thinking about the case, see another lawyer work on it, and how they thought about it, how they approached it, how they sort of took the big picture and narrowed it down into a fact and that sort of stuff. So I definitely really appreciated that opportunity.

Keely 46:10:

So I think, as I said, I had been working at the clinic or at the centre as a research assistant the summer before. So I kind of knew what was coming down the pipe a little bit when it was time to apply for a spot in the clinics. And I was super excited about what I knew they would be working on, which was this youth voting age stuff. And I was really interested because I think up to that point in law school, like, you know, as a one-all, you're reading cases and you're kind of thinking about things only the way that an appellate level court thinks about them. But this was this opportunity to kind of think from truly ground zero, okay, who would even be the litigants in this case? Who would our representative person be? Where do we find young people who might be interested in this and want to be involved? What types of arguments could we...

Keely 47:05:

dream of making, which ones would be more reasonable. So, we had people doing that research. We had people doing social science research, looking at studies that would maybe give us something to think about in terms of cognitive abilities at different ages. And we were doing consultations with stakeholders. And Cheryl was just quarterbacking this whole thing. And I had never thought about all of these things as pieces that would you know, anyone would need to think about when you're putting together a challenge like the one we were thinking about. And so, I had a feeling that it was going to be a great semester. And so yeah, I was very lucky to be involved in that. And it kind of is something that can, even when the clinic ended, I had the opportunity, you know, we spoke to the CBC about the work that we had done and people still every so often, I think, well, I'm sure all the time for the centre, reach out and want to talk about this. And it's continuing to move through the courts. So just a really, really different side of litigation that I had not imagined, you know, happen. So, yeah.

Ewa:

Right. And probably more analogous to what you do now, which is building a case.

Keely:

Definitely. Definitely. Yeah.

Ewa:

Neil?

Neil:

So, I was very lucky to have recently retired Professor Rodgeron as my one-hour constitutional loved it from day one of that course and I thought this is, I want my practice to involve this in some way. And so I actually just went to her office hours one day after class to get her sense of what I should do while I was in law school to try and help that happen as much as possible. And she said, go work at the Asper Centre for Cheryl Milne. And so that's what I did.

Ewa 48:58:

If only everyone can make our life decisions for us that way. Okay, so we're going to shift a little bit to your time post-Asper. Neil and Geetha, you both have had the opportunity to work for the Asper Centre and work on cases for the Asper Centre since graduating as lawyers. Can you talk a little bit about the cases that you've worked on and that experience? Neil, do you want to start this time?

Neil 49:26:

Sure. So, the work is ongoing. I, along with my co-counsel, Meghan Stephens, who is a renowned litigator here in Toronto. She was the former head of the Crown Law Criminal and the executive director in LEAF, et cetera, et cetera. And we got together to approach the Asper Centre to see if they would be interested in working on a case called Power out of New Brunswick. And it's a case about the availability of charter damages under section 24-1 where the losses claimed are due to the operation of an unconstitutional law. So, I won't go into the nitty gritty of it all, but there are cases about personal remedies under 24-1 in the nature of damages in situations where someone has been affected by a discretionary decision made by a public actor. This case is really about what happens if the law itself is creating the loss and are damages available in those circumstances? And so we...

Neil 50:27:

I believe we started in the spring or summer with our application for leave to intervene, so worked on that process and were granted leave, dealt with some strange procedural decisions from the court about those applications for leave and timing. And the hearing is at the beginning of December. So, we, along with a few other public interest interveners, will be participating along with every possible state intervener in Canada, well Attorneys General, as well as speakers of the Senate and all kinds of other legislature representatives. So, it'll be an interesting hearing. And when I heard about the case, I thought the David Asper Centre is the perfect place to look at this, primarily because of its history dealing with constitutional remedy issues and Kent Roach's expertise.

Neil 51:26:

But also, it's an important case that really comes down to what is the charter trying to protect in Canada? There is a fundamental question in this case about if charter rights can be abandoned, in what circumstances can we abandon them? And the appellant in the cases is the Attorney General of Canada, and they're trying to say that in all cases where the legislature is involved, we don't have to worry about charter rights and individual losses. And there are lots of other organizations, including the David Asper Centre, that don't think that's the right approach to constitutional law and charter law in Canada. And I'm thrilled to be involved in the intervention.

Ewa:

I'm going to look up the date of that hearing and watch it live on the webcast.

Neil:

Well, it's going to be a long hearing. It's going to be a long one. It sounds like it's going to be a long one. Because they got more interveners than I think they were planning and they haven't rescheduled to two days. So. It'll be a long day. Yeah, I might be there. I might be giving submissions at 8 p.m. for all I know, but looking forward to it.

Ewa:

Geetha, what about you?

Geetha:

I worked on Morris, which is a case at the Ontario Court of Appeal, which considered when and how criminal sentencing judges should take into account background factors and systemic factors specifically relating to the impact that systemic racism has had on offenders generally and in particular on black offenders. And I worked on that case. I juniored for Nader Hassan, who was actually one of my professors when I was in law school. As compared to my experience as a student on Frank, I definitely played a much larger role not only in the intervention motion but in drafting the factum with Nader's guidance.

Geetha 53:21:

And I think it was a great opportunity because it's a case that draws upon, even though I don't practice criminal law, I'm really interested in the intersection of equality rights and the criminal law. And I was always really passionate about Section 15. And it was a great opportunity to work with Nader, who has done so many interventions and really knows how to approach an intervention. He's ambitious in what

he wants the court to say in terms of accepting a position that is client is advancing, but also kind of practical in terms of what you think you can get a court to do. And so even though there, I think the decision, you know, was disappointing in some ways, but actually the position that the Asper Centre advanced, which is that a black offender shouldn't have to demonstrate a causal link...

Geetha 4:17:

between the background factors and their offense in order for the background factors to be considered. That position was accepted by the court. Yeah, and it has also led me to do other interventions for the Black Legal Action Centre now, but learning from what I was able to observe, junioring for more experienced constitutional litigators.

Ewa 54:46:

Okay, so Ryan, even though you now work on the other side, experience and time of the Asper Centre? How does it inform your work now?

Ryan:

So, I wrote out a mini essay in response to this question.

Ewa:

Oh boy.

Ryan 55:13:

I'll keep it brief. But it just speaks to it having a very big impact on me. I do think my Asper Centre experiences have made me a better lawyer and a better public servant too. I believe that government lawyers have special ethical duties on them that private sector lawyers don't necessarily have. And I think a lot of my colleagues share that view. Of course, our primary duty is to our client. But in a constitutional case, that means defending the laws of parliament as they exist. But we also have to consider this concept of the public interest in our work. And it's very elusive. And it differs from case to case. And it differs from lawyer to lawyer.

Ryan 55:41:

But my experience at the Asper Centre helped me develop a very broad understanding of the public interest in a way that I apply daily and in a way that I hope benefits Canadians. There are practical examples of that. So, when the DOJ receives a constitutional lawsuit, we as the litigators are the first stop

in developing the government's position. And that process is heavily influenced like in any situation by our experiences, our understanding of the law and our perspective on what the public interest requires. So, in my time at the Asper Centre, I was considering very unique interests: youth, sex workers, refugees. I needed to empathize with groups that I often had little or no connection to. And that, but to develop a position that actually benefits them and protects their rights. Now as a government lawyer, I am usually...

Ryan 56:36:

Not always, but most of the time on the other side of things. But the practical experience of empathizing with a group and understanding how the law affects them in a particular situation has a profound influence on how I formulate positions in response to lawsuits that we get and how I argue cases. Of course, everything we do is subject to very lengthy approvals, but the initial development and the final product is really driven by that. And as has been mentioned, my Asper experience also helps me understand how to build a constitutional case in a way that really helps me hit the ground running as a junior litigator. I understand what goes into building a record and having a solid factual foundation to support my position. And that's something that's not easy to do when you're dealing with issues that affect the whole country. You need expert evidence, individual evidence, legislative histories.

Ryan 57:32:

And this thinking also helps with my non-constitutional files. So, for example, I'm working at a case at the Environmental Protection Tribunal of Canada, where the tribunal will be interpreting the regulations, prohibiting microbeads for the very first time. And this could have huge impacts on the environment and health, but I feel prepared for that, largely because of my Asper Centre experience, which has helped me think big, but also think practically when developing cases.

Ewa 57:59:

And Keely, I'm sure you have a very broad general litigation practice and the best tradition of Lenzner's. How do you feel you use your experience at the Asper Centre in your practice today?

Keely:

Yeah, I think the main thing that I bring from the Asper Centre into the work that I do now is maybe just the kind of like, it's going to sound silly to say, but like the joy to be litigating. And I think it's not the same subject matter. But just the kind of approach where it's like, how lucky are we to sit down and be talking to colleagues and picking apart ideas that we have and thinking about how to turn it into arguments. Like as Ryan said, thinking about, okay, and so this is our idea, we're all really excited about it. Okay, now we've got to build a record and we've got to think about what research needs to be done. I really think that it would not be.

Keely 58:53:

an over statement to say that I don't know that I would be in litigation if I hadn't had the experience I had at the Asper Centre. I don't think I really knew what litigation involved that much until I got to watch these amazing lawyers and like work with other students doing this type of thing that I thought, oh, okay, if you will get to do this as you know, as their job, and this is something that I would love to do. And so, I think that really, aside from the practical skills, and I was reflecting back before this event today, I think that we had a session in the clinic where Justice Feldman came in and was helping us work on factums and think about what an overview should look like. So, they were for sure practical skills. I think my first introduction to docketing was through the clinic also. And so, things like that have been so helpful, but really it's just this kind of view of litigation that it is something creative and collaborative and aspirational and you know, if you can find a little bit of that in, and you can find a little bit of that in every case that you touch, even if it's not, you know, like the amazing pressing social constitutional issues of the day, you can find a little bit. And so I try to do that. And I think that that's an ask for centre kind of legacy.

Ewa:

Right. And like at the beginning of the course, we talk about how to work and we talk about collaborative learning. And I think, in litigation, working as a team and collaboratively working on things is essential. So to just, as you say, very early on in law school, kind of learn that that is a really good approach of building a case is wonderful to have and take with you into your practice. Wonderful. Well, thank you all very much for your insights and your thoughts and sharing your experiences today.

Cheryl 01:00:52:

Well, that's a wrap for this episode and for the third season of our podcast. We're already looking forward to working on another season next year, so be sure to catch up on all of the episodes you've missed until then, and even give us a follow so you won't miss season four. Thanks again to Ewa Krajewska and the impressive Asper Centre alumni who shared their reflections on their time as students at the clinic and what it meant to and still means to them.

Cheryl 01:01:19:

Speaking of students, I want to give a last special shout out to all of the U of T students who have worked on the podcast this season and in the previous seasons too. Our students help generate ideas for episode topics, they develop the ideas, do background research, help find guests, draft scripts, and in the process make great connections with members of the legal community. We couldn't make this podcast without their significant contributions. So thank you very much. Lastly, thanks to you, our listeners for continuing to tune in and we wish everyone a peaceful and happy holiday season ahead.

Music:

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