

Charter: A Course S4E5: Section 32(1) of the Charter – Charter Application to  
Quasi-Government Bodies

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

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**Susan Ursel** (pull quote):

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In working on these cases, well, the most odd thing is how long entire sectors can go without having a case decide the applicability of the Charter or not and how we manage to navigate the problems. But eventually, eventually they come to a head, and they have to be addressed. And so, you know, it's always amazing to me that it took so long for a case to come forward like this.

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given the fact that it's been bubbling around for four decades...

**Intro Music:**

Charter a course, I will Charter a course, if we can just get the country to trust us.

00:31

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

01:02

**Cheryl Milne:**

Hello and welcome to the fourth season of Charter of Course, a podcast created by the David Asper Centre for Constitutional Rights at the University of Toronto. I'm Cheryl Milne, your host and the Executive Director of the Asper Centre. We focus on current Canadian constitutional law issues, highlighting aspects of constitutional litigation...

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and exploring the meaning of our rights under the Canadian Charter of Rights and Freedoms. Whether you are a law student, a lawyer, or a curious person, we hope you'll learn about an aspect of Canadian constitutional law and litigation that interests you. Today our conversation focuses on section 32 sub one of the Canadian Charter of Rights and Freedoms, which provides that the Charter applies to the parliament and government of Canada in respect of all matters within the authority of parliament.

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and to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. In particular, we will be exploring when and how the charter applies to quasi-government bodies, such as schools, universities, colleges and hospitals. We are privileged to be joined by Susan Ursel, who was the Asper Center's constitutional litigator in residence in 2018. Currently, she is a senior partner at the progressive law firm Ursel Phillips....

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Fellows Hopkinson, LLP. Over the years, she has represented clients in a variety of labor, employment, and human rights issues. Notably, she has appeared before the Supreme Court of Canada in several landmark cases concerning LGBTQ plus rights, including Egan, Nesbitt, and Chamberlain. Her achievements have netted her many awards, including the prestigious Law Society of Ontario Medal in 2019, and she holds an LLB from Osgoode Hall Law School and a BA from the University of Toronto.

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In this episode, we will begin by understanding Section 32, quasi-government institutions and the limits of the Charter's scope. We will then dive into Susan's work on a case that she represented the Asper Centre on that is one of the most recent decisions that the Supreme Court has rendered in terms of the application of the Charter. So, Susan, thank you so much for joining us for this conversation.

**Susan Ursel:**

Well, thank you for having me, Cheryl. It's nice to be here.

**Cheryl Milne:**

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03:11

For someone who is familiar with the law, what are quasi-government institutions and why might the Charter not apply to them?

**Susan Ursel:**

So, this is a really interesting area of Charter application and one that has increasing relevance in modern society. And one of the things that we have to understand about the Charter is section 32 explicitly says it applies to governments. So, we know what applies to parliament and we know what applies to provincial legislatures and their actions as well as their legislation.

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The question becomes a more difficult one for us as lawyers and practitioners when non-governmental actors step into the shoes, in effect, of government and carry out governmental functions. So, a quasi-governmental body might be one that's set up by statute to carry out a government function. It might be a private actor involved in a private-public partnership with government, and they are distinguished by the fact that they are...

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either heavily regulated or they're carrying out some delegated government functions or both and when that situation arises then the courts take a very close look at whether or not the Charter will apply.

**Cheryl Milne:**

So, in practice how have courts historically determined whether these institutions like universities, colleges, schools are considered government for the purposes of section 32?

**Susan Ursel:**

So, um...

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There's been an evolution over the years in attempts by the courts, notably the Supreme Court of Canada, who we're going to focus on today, in how they look at these quasi-governmental actors,

like school boards on the one hand, or universities and colleges on another, or hospitals. The way that they have looked at distinguishing them is whether or not they are government controlled, or whether they are performing government functions.

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and so for example uh... if we look at the university sector the large number of cases from the Supremes in the university sector say they are not government control than they are not generally seen as government actors notwithstanding that they get government money and a government person may sit on the board of trustees or board of directors they're not seen as explicitly controlled in that way on the other hand community colleges and school boards as other educational actors are seen or at least...

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have now, it's been clarified in this recent case we're going to talk about, are seen as government actors and quasi-government actors and they're seen as bound by the Charter. And the way they look at it is they look at the locus of control, whether the government has significant control over the activities. And if the government doesn't have significant control over the activities of the entity, they then take a secondary step and they look at whether or not the entity is still carrying out a government function of some kind...

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And, those two kinds of questions, they can draw that entity into the ambit of the Charter in some cases.

**Cheryl Milne:**

So, there's some case examples of that. So for example, there's McKinney and the University of Guelph, which dates all the way back to 1990. That was the one that says that the Charter doesn't apply to universities. And as you said, that's because of their independence, I guess, and their autonomy? Is that...

**Susan Ursel:**

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That's right. The university cases and McKinney and University of Guelph dealt with mandatory retirement rules and whether or not those mandatory retirement rules could be challenged by the

Charter. And the court took a really close look at the governance of the University of Guelph, and it found that they're relatively independent from government.

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There was only a minority of government appointees on their board and really they functioned very much as a private institution notwithstanding there was some government involvement there wasn't enough government involvement and aside from their funding which you know in part came from the government that government really had very little control over the actions of that university so they were seen as non-governmental entities the Charter didn't apply to them.

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So that was the result in that case. On the other hand, when they came to look at the Douglas College case in the same year, the Douglas Community College was established under a statute. It had a governance structure that was very different. It was very much under the control of the government, including the minister. The minister had extreme government authority over the conduct of the business of the college. And they directed the government's operations, sorry, they directed the college's...

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operation so in that case in contra distinction to the university the community college was seen as a quasi governmental institution as a governmental actor and was bound by the Charter and once you're seen as that kind of an actor and bound by the Charter you're actually all your actions are governed by the Charter including your actions in employment contracts or labor relations so the tests that emerge from this is the first question is...

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Is it a government body you know in its very nature, is it acting as such in respect to the conduct that we're trying to apply the Charter to and the secondary set of questions is the entity performing tasks that would normally be assigned to the government are those duties part of the government's responsibilities for to fulfill and so we know we see those two different approaches and you know frankly historically because I work in the education sector and my labor relations practice...

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historically universities have been private institutions so it's not surprising that the courts continue to see them as private entities primarily but community colleges have often been established by statute not all of them but a lot of them and especially in our province in Ontario and so historically

they've emerged in different contexts too so it's not kind of surprising to see the court take cognizance of those two origin stories for universities on one hand and colleges on the other so

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Those are how the tests emerged over time. And then, of course, there are other contexts, and we're going to look at some of those other contexts a little later on and see how the law was applied or how it might be applied or see where the questions arise about how it could be applied.

**Cheryl Milne:**

And these aren't just academic questions. I mean, most recently, that issue of whether the Charter applied was brought to bear in the case about the encampment at the University of Toronto.

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and where the court, and this is at the trial level, so it hasn't gone to the Supreme Court of Canada, but basically found that it's private property. The university can decide, and the Charter doesn't necessarily apply.

**Susan Ursel:**

That's right, the court explicitly looked at the line of cases about universities and said, you know what?

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We have consistently held that these are private actors in the Charter doesn't apply to them so any arguments that the the occupiers might have had about Charter rights applying to them on that property on that piece of property were found not to have a fact weren't found for net we know where we're not accepted by the court uh... because they continue that line of authority that says universities are predominantly private actors

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And so, the case, you know, fell to be decided on a variety of grounds, but the court did deal with that Charter application question as well.

**Cheryl Milne:**

So that brings me to the other entity that you talked about, because we've been talking about educational entities, and this is like the school boards, where we're talking about public schools and schools that are teaching those under 18 primarily. I know you worked on the case for the Asper Center that may develop it in this area, even though we didn't actually.

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argue about this. That wasn't our intervention.

**Susan Ursel:**

We tried to argue about it.

**Cheryl Milne:**

We tried to argue about some aspect of it. Can you tell us about the York Region District School Board case?

**Susan Ursel:**

Absolutely. The York Region District School Board case was brought by the Elementary Teachers Federation of Ontario. It's a classic labor arbitration case where two teachers got disciplined for their insubordination.

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and uh... they were disciplined because of private communications that they were having about a situation in school in which they said some rather unflattering things about school administrators among others, but they were having it in a private discussion app that was only available to them through their laptops their principal access one of their laptops without their permission and discovered the communications and they were subsequently disciplined for it...

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The substantive questions revolved around those teachers' right to privacy and to be secure from unreasonable search and seizure and unauthorized search of their private laptops and their private communications. And the way you would make that argument is by referencing the Charter rights against the Charter right to be free from unreasonable search and seizure. And those kinds of arguments were advanced in the case. The arbitrator at first instance didn't buy them. The case went to the divisional court. The divisional court didn't buy them.

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But then it reached the Ontario Court of Appeal, and the Court of Appeal said, no, wait a second, the Charter does apply to the school board. These rights do exist in your employees. And the arbitrator was wrong. They should not have been disciplined because the source of the discipline was an unauthorized accessing of information. Then it went up to the Supreme Court of Canada and the Supreme Court of Canada agreed with the Court of Appeal and started to clarify the law around school boards.

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and we can talk a bit more about that but the important thing about the York region case was it clarified a point that had been an odd point in labor arbitration history which is we always sort of thought the Charter applied to school boards but we didn't have the definitive case from the supreme court saying it applies to school board so it helped very much in clarifying that and we can sort of unpack how they did that in a minute but...

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But that's the background to the case. And it's kind of, you know, it's classic labor arbitration. Somebody was disciplined, did they have the right to discipline them? Did they go about it in the right way? And then the question became the Charter's application to that situation.

**Cheryl Milne:**

And the Asper Center intervened on a different issue, which was really the administrative law aspect of the case and whether a previous standard set by the Supreme Court of Canada in a case called Dore...

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should apply in terms of how Charter values get interpreted. And we have a previous episode where we talked with Professor Richard Stacey from the law faculty about that. He certainly advised us and worked with us on our intervention, but the court wasn't interested in that. We said they went straight onto the Charter replies and in admin law, that has a pretty significant impact.

**Susan Ursel:**

Yeah, it has a really significant impact. I mean, the Dore aspect of the case was interesting because if they had not...



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decided that the Charter had application directly to the school board the Dore analysis would have remained as another way of a up infusing kind of work that those kinds of decisions with Charter values but the court went directly to the question is the school board covered by the Charter and it said yes the court applied a two-step test from uh... that was enunciated in Eldridge hospital case...

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it can be that the entity is government itself because of its very nature for example provincial legislatures by their very nature their government or because of the degree of government control over it that makes it a keen to government and that's you know sort of where they focused their tension if they hadn't found that

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that degree of government control over school boards was sufficient to make them akin to government they probably would have gone on to that second step I told you about looking at the individual tasks but they didn't go there they were that court found that school boards are government by nature which doesn't surprise me when you think about the history of school boards they're elected representatives they govern our education. Education is part of the provinces duties and responsibilities and the Constitution Act...

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So, it's not surprising that they found that given the structure of school boards, given their origins, given the division of powers, you know, given the entire history of the entity, unlike a university that's established as a private corporation, school boards are established as an arm of government. So, it's not surprising that they found they were an arm of government, exercising powers conferred on them by the provincial legislature, powers and functions that they explicitly said, if the school board wasn't doing it, the legislature would have to.

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In provinces like BC the legislature is much more involved in the direct provision of education uh... in that way but in Ontario is sufficient to see that delegated power and authority and responsibilities and uh... and the court did have reference to the constitutional division of powers and uh... and uh... and the discussion of education in the constitution so they said once we find that they're government...

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it follows that all their actions of the school board are governed by the Charter including the principal's actions who acted as an agent of the board in their employment relationship with their teachers so he was governed by the Charter he was subject to the that the restrictions about unreasonable search and seizure as well and he violated those restrictions in his obtaining of the evidence that he purported to discipline them with. So, I think...

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they also went on to talk about the arbitrators jurisdiction and confirmed as we know with administrative tribunals that they are competent in our task with adjudicating Charter issues first whether the Charter applies second if it does apply how audit to apply and they confirm that it has to be uh... reviewed on the correctness standard, all of which seems unsurprising when you know what a school board is...

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but this is the first time they'd articulated it so clearly. So, it was very important to those of us who work in that sector, but also who work in a lot of other sectors. And, you know, this has ramifications. It ripples through other sectors like health and like transportation, transit, and so on. I can talk a bit about those things, but that's what happened with the case.

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And for a labor relations practitioner like myself, who represents trade unions, it's kind of like, phew, we were right all along, it does apply. You know, they are bound by it. They do have to comply with the Charter. And it just gives us a more solid base for analysis of a problem in that context.

**Cheryl Milne:**

And it has even bigger ramifications for those people who are...

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in school boards because they're compelled by law to be there, and I'm talking about the students. So, the students' relationship with principals and teachers who are exercising their roles vis-à-vis the students are also bound by the Charter. Now, a lot may happen under sort of Section 1 and reasonable limits because it's a school context, but I can think of previous cases where it was a little bit muddier in terms of how the Charter actually applies.

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There's been searches done by police where they said, well, the police were doing it, so therefore the Charter applied. But that now also applies to principals and teachers so that section eight can apply in the school context, also freedom of expression. I think there's lots of interesting knock-on effects from the point of view of students as well.

**Susan Ursel:**

There's a ton, because when you think about a school board community, it's not just their teachers and their employer...

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...you know management staff it's not just the labour relations it's also in the service provision and whereas we've known for a long time that the human rights code in Ontario applied to that service provision we now have the Charter applying to that so equality rights, expressive rights, conscience, assembly, association you know if the uh... rights that we might more often associate with criminal law like life liberty and security of the person and...

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freedom from unreasonable search and seizure. All of these can have implications in the service provision part of the work that school boards do too. And that's vis-a-vis the students, their parents, the community at large and so on. So, it introduces a note of clarity in a way that also introduces some complexity to the nature of the relationship and some new ways to look at that relationship. And I think...

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I think that's going to actually, and I think that's healthy. I think that's healthy for our education sector to be thinking about those things.

**Cheryl Milne:**

I agree. And it also brings me to, that service piece also brings me to my next question, which is really about how that reasoning extends to other quasi-governmental entities, such as hospitals, that are in the business of providing service to patients.

**Susan Ursel:**

Yeah, and we think of...

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hospitals and the health sector as similar to the education sector because A, they're providing a service, it's a public service, it's mandated by the division of powers, and it's funded by the government. The case law in that sector has been a little more divided though because, and this harkens back to our discussion about the universities, when you think about hospitals, although they are public institutions now, many of them originated in a quasi-private

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setting and if not explicitly private or even religious setting because we have a number of Catholic hospitals as well in our province and in other provinces so the origin story of hospitals also plays into how the courts going to look at that and they get they apply the same test, is it governed by nature they do not find it to be government by nature but are they actually controlled by government well...

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In the Stoffman case from 1990, boy there was a lot of action in 1990, they found that the members of the hospital board or some majority of them were appointed by the province, but the Charter didn't apply because routine control of the hospital and operation of the hospital was not within the provinces control. And so, they found that they had, although they had a board dominated by provincial appointees...

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the board itself functioned autonomously from government and that is actually the structure of how hospitals have functioned now we see a lot of problems these days with that structure and funding and so on that's another story but they looked at the functionality of the hospital and said that's not functioning like an arm of government that's functioning like an independent entity on the other hand in the Eldridge case which I mentioned before...

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so the first question got answered negatively but then they went on and they said oh but they're implementing a government program or statutory scheme in this case provision of health care to disabled persons but it was only subject to Charter review in respect of implementing that government program for the government and so you see that you know sometimes they're not going to find it's a government entity but they're going to find that they're doing a delegated...

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task or series of tasks for the government and then the Charter does apply to those tasks not broadly not to labour relations not to their general relationship with the public but to the task they've been assigned. I think that this area is still ripe for a lot more thought by the Supreme Court and it will depend on the cases that come forward and I think there are several challenges going on in our health care sector right now that...

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make the whole sector kind of ripe for a renewed discussion about just you know what is it that the health care sector is supposed to be doing. Who actually has direction control and are they covered by the Charter are they violating it any Charter rights and so on. I think given funding given staffing and so on in the broader health sector and long term care sector and so on these questions are kind of bubbling up to the surface again.

**Cheryl Milne:**

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And at the center of that is also the issue about health care being something that's publicly funded, publicly available, and that fight between the public-private aspect of it. So, we've had cases where the Charter has come into play when the government has said that doctors can't provide services privately in charge for them. So, it's a different issue, but it all kind of shows the complicated layers.

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The interesting thing to me about Eldridge is that, so the facts in Eldridge is about the provision of emergency room services to someone who is hearing impaired and the need to have sign language interpretation so that the person can access the services. So, the government, and it was a Section 15 case, it's been held as one of the, sort of a leading Section 15 case, even argued that it's a Section 15 case that shows a positive obligation under Section 15...

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That is the positive obligation to accommodate and provide that interpretive services. Although the reason I say it's interesting is that I'm not sure that interpretive services for people without hearing is available at every emergency room door these days.

**Susan Ursel:**

I'm pretty sure it's not. I'm pretty sure it's honored more in the breach than the observance these days because of funding restrictions and because of...

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of the crisis that we're seeing in our healthcare system, topic of a whole other podcast, but I think that's right. I mean, Eldridge was a high watermark in Section 15 litigation, and it represents the best principles and the best application of those principles, but it's coming smack up against the realities of what we choose to make our priorities in terms of government funding and where we choose to put our government money, which is essentially our money, the commonwealth of the province, the commonwealth of the nation.

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And so those kinds of contradictions going on right now inside the system and those kinds of stresses and strains inevitably attract Charter attention because the Charter is the fundamental law of the land. And it's designed to ensure the best development of our laws, the best application of our laws. So naturally people turn to it when they want to challenge something that isn't quite right, whether they're.

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Whether they're going to win, that's a different question. It's a tool that's designed to be used for exactly that purpose.

**Cheryl Milne:**

So how would you essentially sum up the law in this area when the Charter does or does not apply?

**Susan Ursel:**

So, okay, I was trying to think of how to boil it down. You have to look at the nature of the entity. So you have to look at, and when you're looking at the nature of the entity, you're asking yourself these two questions. One is it by its very nature, is it governmental? Legislature is governmental, parliament is governmental.

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I'd argue it was pretty transparent that the election, the elected board of trustees of a school board makes it governmental by nature because it's subject to democratic control and it regulates a function of government. That's not the end of your inquiry though because it may not be elected. It may not be plain and obvious to us that it is governmental in nature. So, then you look at the degree of control the government has over it and that the government has a significant control over...

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the actual functioning of the not a single program within it, but the entire functioning of the organization then it can also be seen as a government entity and subject to the Charter so that's your first branch. Your second branch is if you can't succeed there you look at the specific programs and you try and understand their nature are they delegated from the government controlled by the government funded by the government and so on because there may be an angle in there that at least in the provision of those programs...

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the entity is governmental or at least subject to the Charter to the extent of those programs. So, it's, you know, it's like, it's going to be one of two things. Thereafter, how we analyze the Charter problem, especially if it's just an activity that's delegated to them and not the entire entity itself, can get more complicated. And I gather you've talked about Dore elsewhere, but that's, you know, that's a place where Dore would start to have application or at least be considered.

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Yeah, I think it's really funny. It's kind of like the court is saying to us, I'll know government when I see it, which was something that courts have said about other things. But then they give us some guidance. They really do. They look at the functionality and the degree of control. So, I don't know if that makes sense to your listeners. I hope it does.

**Cheryl Milne:**

No, I think that actually sums it up very well and gives us a better understanding of how section 32 operates.

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What are some of the challenges that come up? You've alluded to some of them in terms of the level of regulation versus sort of over regulation, under regulation, the nature of the services. What are some of the challenges that come up?

**Susan Ursel:**

Well, you know, I was thinking about that because in terms of proving that they're covered by the charter, the challenge becomes in establishing the degree of, you know, the nature of the entity, how it's set up and so on. These are all matters of public record.

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But when we go, when we take this analysis and we start to look at other areas of governmental activity and we start to move into areas where there are public-private partnerships, for example, in the field of transportation or in public health administration and so on, there becomes a real tension, a real push and pull between an argument that the entity is not governmental...

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and wants to maintain its independent and semi or a totally autonomous status vis-a-vis the government versus it is controlled by the government. And many entities, especially ones involved in public-private partnerships, are going to insist that they are private entities and no matter that they're carrying out a task for government, for example, building a new rail corridor between Quebec City and Windsor...

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even though they're carrying out you know the extension of the great project that is Canada which is tying us all together with railroads they're going to insist, I'm sure whoever the public partner the public private partnership is done with the goodness is their relationship is strictly contractual but it's not going to be that clear when it's an infrastructure project that is financed almost solely with public dollars, where it's for a public service and a public good, where it is for the benefit of the nation as a whole.

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It's going to become less transparent that it's a contractual relationship and it's going to become a more vexed question I think about whether or not there is a relationship there that means that the private partner using some way subject to the Charter because it is carrying out so thoroughly carrying out a delegated governmental function that it that it must be seen as bound by the Charter for whatever purposes we might I'd see that you know when we saw examples of questions about

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whether or not activities of public health authorities in the pandemic were an action of an autonomous regulator or a branch of the government and there were contradictory decisions about that and it remains a hotly contested area partly informed by the hotly contested nature of the public health issues like vaccinations and masking mandates and so on but also because...

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Some of these entities like public health units are supposed to function semi-autonomously. They're not supposed to be subject to government or political interference. Like the police, they're supposed to be, you know, there to ensure the public good and not be subject to political control or interference. So, you know, there's a good reason to resist finding them as an arm of the government because they weren't set up to be exactly like that. They were set up to be autonomous or semi-autonomous in the interests of public health.

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So those kind of vexed questions about the function of the entity, its origin story, what we really think it will function optimally like, those become entwined in our questions about whether or not the Charter applies. And a lot of them remain to be answered as our society gets more complex. You know, there's a lot of stuff going on.

**Cheryl Milne:**

Do you see any potential changes in how Section 32 will be interpreted with regards to these

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entities or institutions?

**Susan Ursel:**

You know, I think we will get a more sophisticated appreciation of how governments and the private sector relate to each other. In the interpretation of section 32. I'm really curious, notwithstanding that we made no headway on the Dore arguments in the York Region case, I'm really curious about the legacy of Dore. Like, where does it stand and how would we use it?

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and do we still need it if it's either a government entity or not a government entity or it's either carrying out delegated tasks or not carrying out delegated tasks. Dore was designed to fix a gap in

the jurisprudence, to fix an analytical gap in things. I wonder if, you know, decisions like York Region District School Board don't fill that gap in a little bit more firmly, tell us a little bit more firmly how to look at the problem and what the lasting legacy of Dore will be.

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My wish would be to see the Charter apply more extensively to public-private partnerships because I think that's the only modern and Constitutional way to look at those partnerships. Because when a private actor decides to get into business with the government, then they, you know, as we see in the human rights code, there's contract compliance provisions in the human rights code. If you contract with the government, you have to comply with the human rights code.

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And I think that analysis also applies to lucrative public-private partnerships, which have enormous benefit for private enterprise, but involve taking on a role in fulfilling the public trust. So, I do think that there's room for expansion in our concepts under Section 32. Remains to be seen if the courts have an appetite to do that, and whether the cases that come forward sort of evoke that appetite, make them want to get involved.

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So, but that's where I see, that's where I see some potential for change and development, yeah.

**Cheryl Milne:**

I'm curious about your own experience in court with Section 32, whether specifically concerning the Charter's application to colleges, hospitals, or other entities, what have you run up against?

**Susan Ursel:**

Before the York Region case, you know, when we tried to argue,

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I can remember having discussions, this is kind of anecdotal, but I remember having discussions with counsel and I'm going, of course the Charter applies, it's self-evident the Charter applies. And they would of course say, no, it's not, because they were employer counsel, and they didn't want to be bound by the requirements of the Charter. They didn't want their client to be bound in any case. And yet there was this kind of...

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acceptance that even if the Charter didn't directly apply they really should comply with it in large part especially around equality rights and freedom of expression, wearing of badges and pins during protests and so on there was this kind of grudging acceptance that the Charter applied and this kind of well it was almost a Dore kind of what we...

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we don't have a definitive word from the Supreme Court of Canada on whether it applies or not but we're going to do a Dore kind of analysis and so you could see where Dore filled that gap in, gave some certainty to how people ought to behave and how they ought to conduct their business and so on. So, I have lived for 40 years almost in that kind of does it apply, doesn't it apply, is it or isn't it? And this decision I think...

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made a lot of us who have said well it always applied to a pretty good part of the global analysis uh... you know it's been uncertain and i think I'm glad of the certainty now because we can more correctly analyze problems and come to better solution in in our labour relations context and in the educational context writ large.

**Cheryl Milne:**

36:01

Now we've been referencing Dore throughout this. Can you just, for our listeners' benefit, just give a very sort of brief synopsis of what Dore said?

**Susan Ursel:**

Oh, I knew you were going to ask me to do that. So, Dore was the development of a concept of the application of Charter values to administrative adjudicative decisions of entities. And it was designed to fill in the gap where it wasn't really that clear....

36:28

that the entity was a government actor. So, our recent example of that would be Trinity Western University and the fact that that university, a Christian university, sought accreditation from our law

society in Ontario and was denied it on the basis that the covenant they forced students to agree to and staff to agree to prohibited non-heterosexual relationships and marriage. It was basically an anti-LGBT policy.

36:55

The law society he introduced decision on balancing the rights of the of the students to have religious freedom in their institution in the university versus the harm to the LGBT community including LGBT students who were attending that university I mean it the covenant notwithstanding there is a significant LGBT community in that university...

37:18

and it balanced the harms and looked at the proportionality and came to a conclusion using a classic Dore analysis that was endorsed by the supreme court of Canada that it that that the harms outweighed the benefits and that uh... they would not a credit and the supreme court of Canada upheld that decision not finding that the law society was an agent of the government per se or an arm of the government or a kin to the government although it is a statutorily created regulator it's a regulator of private

37:47

enterprise by lawyers and um... it found that the decision could be justified under Dore and that's an example of you know like maybe it's not a governmental actor and maybe it's accreditation activity is not exactly a delegated function from the government of Ontario because they don't exactly a credit law schools the law societies do show that was an example of where there's a gap except

38:16

the gap needed to be filled because it really did need to be infused with a Charter analysis because it's public, it's about our laws, it's about how we educate our lawyers, it's about how the foundational rule of law in the society is upheld through regulators like the law society. So, you know there was a very fundamental activity going on that's fundamental to a functional democracy.

38:45

that was a place where the court clearly saw a need for the Dore analysis, which is essentially an analysis employed when there is an obvious breach of one or more Charter values or Charter rights and the balance has to be struck and an analysis of the balance of the proportionality of the breach

versus the good that it might do has to be weighed and assessed and that's how Dore fits in that gap.

**Cheryl Milne:**

39:13

And the Dore case also happened to involve a law society that was disciplined. A lawyer who had written a letter that was quite rude, actually, criticizing a judge very loudly. And so he was disciplined. So the question was whether his freedom of expression was impacted by that discipline and sort of the weighing of the purpose of what the law society, in the sense in Quebec, the Barreaux...

39:38

in Quebec was doing. So, it's not surprising that there's another analogy with or another similar case with TWU.

**Susan Ursel:**

It's amazing how lawyers manage to create these cases out of their own experience. Andrews versus the Law Society is, you know, foundational for Section 15. We seem to be, we seem to have a cottage industry and figuring out problems and bringing them to the court. But I mean, that is our job, so.

**Cheryl Milne:**

Now, my next question was going to be, what has been the most surprising or significant thing you've learned

40:07

you're working on these cases and not necessarily that lawyers are the thick of it both as claimants and as the uh... as counsel...

**Susan Ursel:**

No no I mean in working on these cases well the most odd thing is how long entire sectors can go without having a case decide the applicability of the Charter or not and how we manage to navigate the problems...

40:36

But eventually they come to a head and they have to be addressed and so you know it's always amazing to me that it took so long for a case to come forward like this given the fact that it's been bubbling around for four decades on the other hand in the labor sector anyway we were extremely practical so we look for practical answers and I think people were looking for practical answers all the way along and trying to solve the problem for themselves which is something to be commended.

41:05

So that's part of the reason why it doesn't always bubble up as fast, because people look for a practical, workable, good solution, and if they can find one, they solve it for themselves.

**Cheryl Milne:**

Well, it's a pretty expensive endeavor to take a... I mean, in the York Region Board case, the discipline was a letter that was on file that was removed...

41:27

well before this case ever went to the Supreme Court of Canada, so it disappeared. So, it's not everyone would have the resources to litigate something that is that minor.

**Susan Ursel:**

That's right, that's right. I mean, you know, and that comes back to the practicality I'm talking about. Even trade unions, you know, have limits on their resources and where they're going to apply them. But I think in this case, the trade union decided that, you know,

41:53

we need an answer to this and notwithstanding that it's a relatively minor form of discipline that's you know overtime will be resolved by sunset clauses and the letter will be removed we need to know this because we can't go on in a sophisticated diverse complex society and not know the answer to this question. And here's a here's a little case you can look at court and figure out whether it applies I think that's a real argument in favor of entities like trade unions who have

42:23

as their goal, the protection of their members, the advancement of their members' rights, but also the capacity to litigate about these things in a coherent and a relatively sophisticated manner I must say. They've been able to contribute to the legal discourse I think in some very productive, very helpful ways that have clarified law where an individual with their own individual resources may not have been able to.

**Cheryl Milne:**

42:52

So just by way of sort of wrapping up our conversation today, I just wondered if you had any advice for lawyers litigating on these Charter application issues or if you had any last thoughts on Section 32 or specific points that you want to highlight that we haven't discussed yet.

**Susan Ursel:**

You know, for lawyers approaching these problems, I'm going to state the obvious, which is look at the case law and look at what kind of facts are driving the courts to their conclusions because...

43:22

A lot of the time I see, you know, these sort of recipes, if this, then that, if that, then this. And there's kind of this lockstep application of them. But when you get into court, you'll find the judge will be going after the nuances and the sophisticated little bits of facts, you know, that you thought, oh, that's not that important. It may be important to the judge. So, it's really important to understand the factual context that drives a court to a decision.

43:46

and it's the factual context of the entity itself, the activities that are impugned, the actions that are impugned, and it's very important to have a grasp of where the equities might lie in the court's analysis. What will attract a court to find in your favor on these kinds of cases? Because they are factually, they're heavy fact cases, notwithstanding that we have an analytical framework. And as for Section 32,

44:12

I'm constantly amazed at how these sections that we thought we knew all about, what they meant, turn up surprises for us all the time. And we think we know what they mean, but we don't know

everything about them. And they keep coming to the top in terms of things that have to be further discussed and thought about. And Section 32 is one of them.

**Cheryl Milne:**

And thank you, Susan, for explaining all of this. I think that we sometimes jump past.

44:38

these kinds of fundamental aspects of the Charter to go to while my rights been breached without even knowing whether, does it even apply to us? We've talked in a previous episode about application to, like, which people are part of the Charter in terms of their rights. And this is at the other end of it, who has to actually apply the Charter in their actions.

45:04

Most of us regularly receive services from Canadian education and health care institutions, but how often do we consider what laws govern them? So, I think this has been a really useful conversation about that.

**Susan Ursel:**

Well, I've enjoyed participating, and it certainly made me think about wither Section 32 and just, you know, what's on the horizon for us all in Canada. And I think there are a lot more questions to be answered.

**Cheryl Milne:**

45:32

Well, I've been speaking with Susan Ursel, labor, employment and human rights lawyer, graduate of Osgoode Hall Law Faculty and friend of the David Asper Center.

45:46

Welcome to this episode's Practice Corner. Following up on our previous conversation about the application of the Charter to quasi-government organizations, we are turning now to universities with research lawyer Jennifer Taylor. Jennifer is a lawyer at Stuart McKelvey in Halifax, Nova Scotia. Jen graduated from Dalhousie Law School in 2008 and was called to the bar in Ontario in 2010 and



received her LLM from the University of Cambridge in 2011. With her colleagues, the Honorable J. Michael McDonald...

46:16

and Katherine Mack, she is also the co-author of Strengthening the Pillars, also known as the McDonald Report, which is the recent external review report for Toronto Metropolitan University, in which we're going to talk a little bit about today. So, to begin, welcome Jennifer to our practice corner.

**Jennifer Taylor:**

Thank you so much Cheryl for having me.

**Cheryl Milne:**

I want to take a step back before we go into the McDonald Report and ask you about your practice.

46:42

Your title at the firm is research lawyer. So tell us a little bit about what your role is and how it differs from other lawyers in the office.

**Jennifer Taylor:**

Sure. So, I first joined Stuart McKelvey in 2013 after I finished my clerkship at the Nova Scotia Court of Appeal. And I would say it's been 11 years. My role has evolved quite naturally over time. These days, the research lawyer title certainly captures a big chunk of what I do, but not all of it.

47:09

I'm often brought into files when there are, let's say, more complex issues that require a bit of a deep dive. So that could be constitutional law, health law, admin, insurance, some of the many random interesting questions that can come up in commercial litigation, you name it, really. And I would say while the subject matter can be quite varied, which keeps me on my toes, keeps me interested, the work will typically involve researching the law, drafting memos, drafting opinions, submissions...

47:39

and providing strategic advice as well. And you asked about how my role is different. There are definitely a few ways it's niche compared to some of my colleagues. For one, I have chosen not to be on the partnership track, so it's a bit different in that way. And my clients are generally the other lawyers across the firm, my colleagues. Although, obviously, I really do enjoy dealing directly with the firm's clients whenever I get the chance.

**Cheryl Milne:**

48:06

That's very interesting. So, I know that there are lots of different ways to practice law, and it's great for our listeners to hear that. So as mentioned in the introduction, you were involved in the review of an incident at Lincoln Alexander Law School at Toronto Metropolitan University, TMU, as we call it. What can you tell us about the controversy?

**Jennifer Taylor:**

Well, I would start off with a bit of a sensitivity note, if that's OK.

48:31

because the situation at Lincoln Alexander has had very real ramifications for the university community and really the broader community. And of course, the whole situation arose because of incredibly serious events in the Middle East, including the October 7th attacks in Israel and the ongoing war in Gaza. And I just don't want to lose sight of that background as we talk about the external review.

48:57

So, the external review was appointed to look into a letter that a group of Lincoln Alexander law students sent to their administration on October 20th, 2023. The letter expressed solidarity with Palestinians, denounced Israel's actions against Palestinians, and made several demands of the administration. The letter became public right away, and as many people will know, it quickly spread online, and that is how the controversy erupted.

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Immediately there was an intense and widespread backlash against the students who participated in the letter and that's covered in our report. Many critics interpreted the letter as endorsing the October 7th attacks and minimizing the pain of Jewish students and community members. So, on

October 23rd, which was three days after the letter was dated, the law school administration issued a statement which characterized the letter as containing...

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quote, sentiments of anti-Semitism and intolerance, unquote. And as we said in our report, this statement did not call the controversy and TMU soon announced that an independent external review would be conducted. So, in early November of last year, TMU appointed my colleague, the honorable J. Michael McDonald as external reviewer. And his task was to determine whether any of the students who participated in the letter had breached TMU's student code of non-academic conduct.

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This was framed as a complaint by the university against the students who participated in the letter. And as I'm sure you know, Mr. McDonald ultimately found that none of the students breached the code. Although he considered the letter to be troubling and even harmful in some respects, he concluded that the students' participation in the letter was a valid exercise of their expressive rights and protected under TMU's policy framework. And I believe we'll talk more about freedom of expression in a moment, so I'll leave it there for now.

**Cheryl Milne:**

50:53

Just tell us what your role was in this review.

**Jennifer Taylor:**

Sure. Mr. McDonald is counsel to my firm. He joined us after he retired as Chief Justice of Nova Scotia. And obviously, he hasn't been fully retired because he also chaired the Mass Casualty Commission. He's used to dealing with some of the most difficult subject matters that come up. So, his terms of reference from TMU allowed him to determine what legal services he would need...

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and he invited me and my colleague, Katherine Mack, to join him on the external review team. Of course, Mr. McDonald was appointed as the decision maker. He was the sole decision maker, but in all other respects, we operated as a three-person team. This involved an intense amount of work from last November until the end of May, and we had to really design our process, essentially, from the ground up, and we had to communicate that process.

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So that was the first phase of the external review. And as part of that phase and throughout, transparency was really one of our guiding principles. So, this involved a lot of communication with not just the students who were respondents to the complaint, but with the whole Lincoln Alexander student body. And then an entire phase, a critically important phase of the review was devoted to meeting with the respondent students themselves.

52:18

These meetings were mostly held in January and February of 2024. And after that, we held a series of stakeholder meetings, which were also fundamental to the review. Then it was really crunch time, time to write our public-facing report, as well as the confidential student decision letters. And as you mentioned, our final report, Strengthening the Pillars, it was released on May 31, and it's available on the TMU website.

**Cheryl Milne:**

52:44

In the first part of today's podcast, we were talking about the application of the Charter to quasi-governmental organizations, which in some cases can include post-secondary institutions. But there are also values that universities uphold, such as freedom of expression and academic freedom, as you've been making reference to in your description of this particular report, that sound very similar to the Charter rights of freedom of expression and conscience.

53:10

Can you tell us how these concepts differ or are the same when it comes to the university setting and the setting that you were investigating in?

**Jennifer Taylor:**

Yeah, the external review was focused on freedom of expression. So, I can do my best to speak to that particular right. And honestly, I think there is a good deal of similarity. TMU's policies, and I think this is the case for many university policies.

53:35

refer to students having the right to freedom of expression. They actually use that language. And they also talk about limits. And for talking about rights and limits, that kind of approach is very similar to a traditional Charter analysis. And in fact, in the recent U of T encampment decision, Justice Conan found it was more appropriate to apply the university's extensive policies on freedom of expression in a manner consistent with Charter values.

54:02

than to actually determine whether the Charter applied, although he did that in a bit of an appendix in the decision, which is an interesting read. And in that case, the University of Toronto had agreed that protestors had similar rights under university policies and under the Charter. So again, I would say there is a decent amount of overlap between a freedom of expression analysis under a university policy versus under the Charter, at least when it comes to defining the scope or breadth of the right to freedom...

54:31

of expression. I would say in the university context at least, when you are or you're advising a first instance decision maker, it can be a bit more challenging to figure out how the limits play into the analysis. And just to give one example, during the external review, several students argued that the university's complaint or the external review itself constituted inappropriate limits on their freedom of expression and other rights.

55:01

And it's all detailed in our report. Mr. McDonald did not accept those arguments, finding that to do so would have actually bypassed the decision-making process that had been delegated to him. But in terms of limits, if he had imposed any sanctions, I think those would have had to be reasonable and proportionate in the terms of cases like Doré and Commission Scolaire. But again, no breach was found, and no sanctions were ultimately imposed. That was just one of the many ways...

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it became a bit challenging to try to apply these concepts in practice. And on that note, one of our recommendations in the report was for the university to more explicitly reconcile the various policies that relate to freedom of expression and clarify how they apply particularly to written advocacy.

**Cheryl Milne:**

Yeah, I mean, on the advocacy point, I know that I mean...

55:54

What this incident, as well as the incident and the encampments at U of T, show is that, yes, there are these rights to freedom of expression, to some extent. There are limits, as you mentioned. But there are also consequences, even if there aren't limits. And one of the things that Mr. McDonald reflected in the report was on how to advocate effectively as a law student and a lawyer. So, what advice can be drawn from the report for legal advocates?

**Jennifer Taylor:**

56:23

I would really encourage listeners to review part 11 of the report. I know our report is long, but part 11 is only a few pages, and I think, I hope, it might be worth a read. It includes comments on the student letter as a form of written advocacy, as well as a personal reflection, as you mentioned, from Mr. MacDonald himself, really applying his decades of experience from being a lawyer, a trial judge, an appellate judge, chief justice, and commission chair. He has seen a lot of advocacy in his time.

56:52

And it was important to our team to include this section, but also to make sure it was separate and came after the actual decisions under the code. I think we wanted to make clear that advocacy does not have to be quote unquote effective to be a protected form of expression. At the same time, from an advocacy perspective, we did want to offer a bit of advice, coming from a place of humility as much as possible. This advice is really a good reminder for all of us. It wasn't just us.

57:22

up on a high horse trying to talk down to anybody. We were trying to remind ourselves of these principles. So, number one, I would say for lawyers, our ethical obligations act as guardrails on our advocacy. And this is admittedly not always easy to figure out. And the TMU report, for example, acknowledges that it can be difficult to find the balance between civility on the one hand and zealous advocacy. We have both of those obligations and those can be...

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tough to balance in practice. But we suggested that when law students and lawyers are advocating for a particular outcome, provocative language, that might be the goal, but it's not always going to be productive in terms of achieving the desired result. So, if you want your advocacy to be

productive and help you achieve a result, we did offer some suggestions, things like leading with empathy and nuance and defining any terms that may be contentious...

58:18

seeing your advocacy as an educational opportunity, really engaging with counter arguments and the complexity of the moral issues involved, thinking about how your advocacy is going to be received, like how is it going to land, and making realistic demands. And again, Mr. McDonald's personal reflection really talks about how the art of persuasion requires humility. And I think that again, is an important reminder for all of us as legal advocates.

**Cheryl Milne:**

58:49

It's no small coincidence that the Dore case that you made reference to, which is about Charter values, was also about freedom of expression, in which a lawyer in Quebec had written a letter advocating their position against a judge that they felt had treated them unfairly, but again, using terms and language that was considered to be offensive. So, the lawyer was actually disciplined. And so, the Dore case about how you...

59:19

weigh this right to freedom of expression with the limits that one has as a lawyer is really what has given us that Charter values and analysis that runs through the cases now.

**Jennifer Taylor:**

Absolutely. It was helpful to go back to Dore when we were working on the report, for sure.

**Cheryl Milne:**

So how can lawyers and advocates run into trouble when advocating for a cause?

**Jennifer Taylor:**

59:45

Social media is obviously a big trouble zone and our report included some advice for the legal community, really focused on those who fueled the social media backlash against the students

who participated in the letter. Jumping on social media to, I would say, name and shame or even blacklist our colleagues is just not going to contribute to a more...

01:00:12

civil and empathetic and healthy profession. And I definitely include law students as our colleagues in the profession. Another challenge is that I think our ethical parameters, well, we talked about Dore, but they're relatively clear when we're advocating on behalf of a particular client. It's harder when you're engaged in, I would say extracurricular advocacy or maybe something more personal as in the Dore case.

01:00:38

And you know this is challenging for me too. We are all involved in causes outside of our day jobs, and we really have to be aware of our workplace policies and our rules of professional conduct around advocacy on issues that might be outside the four corners of our particular file for a particular client. At the same time, I think we as lawyers have such a valuable platform that we shouldn't take for granted, and we also have our own personal values. So, I don't think we want to be scared into silence either.

01:01:08

I would say, and I hope the TMU report really advances this goal, as a general rule of thumb, I think we're less likely to run into trouble if we operate from a place of empathy, and especially when it comes to the most contentious and sensitive of topics.

**Cheryl Milne:**

We can really sort of see how in this area of human rights, Charter rights, that there are strong views, and sometimes we do have to raise our voices when injustice.

01:01:36

is something that you see, but I think the advice from the report and what you've been talking about really give people the right kind of approach or some tools to think about how to do it effectively as opposed to just railing against the powers that be.



**Jennifer Taylor:**

I hope so. It really would be an honour if that was one of the impacts of the report.

**Cheryl Milne:**

So, thank you, Jennifer, for taking the time to talk to us about your work and the nuances of advocating for passionately held beliefs.

**Jennifer Taylor:**

01:02:06

Thank you for having me.

**Cheryl Milne:**

And thank you listeners for tuning in to this episode of Charter a Course, where we have been discussing the application of the Charter to quasi-governmental institutions, such as school boards and hospitals, via section 32.1 of the Charter. I wish to thank our guests on this episode, Susan Ursel, who discussed the Supreme Court's approach on when the Charter applies and does not apply to these institutions, as well as her personal experience working as an intervener on behalf of the Asper Center, I might add...

01:02:35

in the York Region District School Board and Elementary Teachers Federation of Ontario case, and to Jennifer Taylor on the values of freedom of expression and academic freedom that apply in the university setting, but which have particular nuance for law students and legal advocates. Thank you to law student Leon Xu, who helped research and develop this episode, and thanks to our podcast producer, Tal Schreier. You'll be able to find our episodes on Apple Podcasts, Spotify, and other popular platforms, as well as on the Asper Centre website.

01:03:05

Until next time.

**Outro Music:**

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

course, if we can just get the country to trust us. Charter a course, southeast, west and north, *and along the way we may find justice.*

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