

[Episode 5 - Climate Change Remedies and Section 7 of the Charter]

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Cheryl M.: Hello, and welcome back to Charter A Course. A podcast created by the David Asper Centre for Constitutional Rights at the University of Toronto, Faculty of Law. My name is Cheryl Milne, and I'm the executive director of the Asper Centre.

It is our hope that over the course of this episode, whether you are a law student, a lawyer, or gathering interesting facts for trivia night, that you learn about an aspect of Canadian constitutional law litigation that interests you. I wish to first acknowledge this land from which our podcast emanates.

For thousands of years, it has been the traditional land of the Huron Wendat, the Seneca, and the Mississaugas of the Credit. Today, this meeting place is still the home to many indigenous people from across Turtle Island, and we are grateful to have the opportunity to work here.

Today, we focus on section 7 of the Canadian charter of rights and freedoms, that every person has the right to life, liberty, and security of the person, except in accordance with the principles of fundamental justice.

But we are looking at it in the context of climate change in government action and inaction. We are privileged to speak to two distinguished guests today, Nader Hasan and Professor Kent Roach.

For a change, Professor Roach will be joining us for our practice corner to talk about constitutional remedies as a core aspect of charter litigation.

Section 7 is ubiquitous when it comes to charter issues. It is central to debates about physician-assisted death, procedural fairness, immigration detention, and our topic for today, environmental protection. With the help of Nader in this episode, we will explore the meaning and purpose of section 7 as it relates to protecting the environment for future generations.

In doing so, we will discuss the implications of the Mathur litigation in its early stages, as well as the supreme court's decision at Gosselin. Nader and I will discuss other potential

legal avenues by which environmental interests can be projected, namely judicial review and equality rights.

Nader Hasan is a partner at Stockwoods LLP barristers who practices criminal, regulatory and constitutional law. He was the Asper Centre's constitutional litigator in residence in 2020, and he's counsel for the applicants in the Mathur versus Ontario litigation which we are eager to discuss with him. Welcome, Nader, and thank you for joining our conversation today.

Nader H.: Thanks for having me, looking forward to it.

Cheryl M.: So section 7 was in its early years focused on the penal system and the administration of justice. But section 7 guarantees go beyond mere procedural guarantees; they are substantive as well.

Broadly speaking, the section 7 inquiry has been twofold, one whether life, liberty, or security of the person has been infringed or impacted. Number two, whether that infringement is consistent with the principles of fundamental justice, such as that the limit is not overbroad, arbitrary, or grossly disproportionate, which are the legal terms that we use.

So, Nader, I want to start off by asking in your view what the meaning and purpose behind section 7 is.

Nader H.: That's a big question, Cheryl. As you've alluded to, section 7 is probably the most open-ended and perhaps most often discussed provision of the charter.

If you want a thorough answer to that question on the purpose of section 7, obviously, one should turn to the seminal supreme court of Canada cases from BC Motor Vehicle Reference, Singh, Suresh, Gosselin, Carter, to name a few.

Having said that, at its core, I think the purpose of section 7 boils down to a very simple idea; it's to prevent the state from behaving unfairly to people in forums in which the

stakes are high. What are those high-stakes forums? Any context in which life, liberty, and security of the person, or security of the person rather is engaged. Of course, there's abundant case law on when those thresholds get triggered.

Now unfairness, I've said it's whenever the state behaves unfairly where stakes are high, and unfairness, of course, is a very broad term. But principles of fundamental justice are also broad, and that's been clear since the BC Motor Vehicle Reference, if not earlier.

Violations of the principles of fundamental justice are not a closed category; it includes specific enumerated rights like the right against self-incrimination, but also principles that bind the manner in which the state can make laws and engage in government action.

That, of course, includes the proportionality triumvirate that you've made reference to, the principles of arbitrariness overbreadth and gross disproportionality, which the Supreme Court has recognized as principles of fundamental justice since the Clagia case if not earlier.

So whenever an individual is in a high-stakes forum, that is where life, liberty, security of the person is engaged, and the state acts in a manner that is arbitrary, overbroad, or grossly disproportionate, section seven is violated.

Now relatedly, section seven also serves a gap-filling function; that's another important purpose of section seven. As Justice Lemare pointed out in BC Motor Vehicle Reference, sections eight to fourteen are emanations of principles of fundamental justice that just happened to be enumerated in the charter, but they are not exhaustive of the principles of fundamental justice.

New section 7 rights, as a result, will be recognized when necessary to fill a gap and to ensure that the state does not engage in unfair conduct in situations where the stakes are high for the individual.

Cheryl M.: So just for our listeners, the sections 8 to 14 are often referred to as those legal rights. So the kind of rights you have if you're facing a criminal prosecution, for example, or the state sort of detaining you or questioning you, and that's a very generalized description.

But just so that our listeners know what you're talking about. These principles of fundamental justice, which I think a lot of people forget that section seven has these two parts.

So for laypeople, often they just think about life, liberty, and security of the person, and they forget that yes, the state can interfere with those rights, but they must do so in accordance with these principles.

Nader H.: Yes. It's as you point out, it's always a two-stage inquiry. In some contexts, for example, when you're in the criminal context, liberty and security of the person are necessarily engaged. We, as lawyers, we skip that step, and we go straight to okay.

Is this being done in accordance with the principles of fundamental justice? But outside of the criminal context and outside of contexts in which the state puts you in a situation where life, liberty, and security of the person are necessarily engaged, section 7 may well be triggered.

But there is going to be perhaps an evidentiary burden on the individual to establish that the state is involved in triggering a life, liberty, or security of the person's interest. So that's one of the issues that has to be proven, for example, in climate change litigation.

Cheryl M.: Yes. So I was going to say with that in mind, what is this nexus between section 7 and environmental protection? More specifically, how does stewardship of the environment intersect with life, liberty, and security interests protected by section 7?

Nader H.: So it's not hard, of course, to show a nexus between life, liberty, and security the person and climate change. Climate change, of course, is an existential threat to lives, liberty, and security of the person of every single person living on this planet today, and that existential threat is likely to materialize in our lifetime.

This isn't a remote or distant possibility. I think there is near-unanimous scientific agreement that we have less than a generation to reverse course, or we're looking at a future in which extreme heat events kill thousands annually, rampant infectious disease,

proliferation, rampant wildfires, and certain cities, islands, and even countries literally underwater. So there's clearly a nexus between climate change and life, liberty, and security of the person.

There's the obvious threat to our lives, but even beyond the existential threat, the psychological harm and anxiety, the stress of impending doom also trigger a security of the person interest and liberty interest as well.

The threat posed by climate change narrows choices in the future narrows the choice of future generations on where to live. It also narrows how future generations and future governments allocate resources. If they're left fighting this existential threat, that limits how else they can maximize resources down the road, and that affects liberty.

There's a very clear and, some would say, obvious nexus between climate change and life, liberty, and security of the person. The more interesting question for constitutional litigators is, well, what does government have to do with it? That has been one of the roadblocks in certain climate change cases around the world, and that's one of the reasons why we started with Ontario.

Because in Ontario, the nexus is very clear. Ontario, under the previous government, actually used to have a pretty good climate change mitigation plan, and that was called the climate change mitigation and low carbon economy act. Under that plan, there was a fairly ambitious target.

A target that would have put Ontario on a path towards meeting its fair share of greenhouse gas emissions. Under the old plan, the target was to reduce Ontario's greenhouse gas emissions by 45% vis-a-vis 2005 levels. A fairly ambitious plan. When the current Ford government came into power, they repealed that plan and replaced it with a target that was woefully inadequate.

Now the target is 30% below 2005 levels. Just to put that in concrete terms, that's equivalent roughly to emissions from seven million cars annually. So the new plan means that up to seven million cars annually, the emissions from those cars are permitted under Ontario's new plan and that new plan was going to put Ontario offside its proportionate share of greenhouse gas reductions under the Paris agreement.

In so doing, would put us on the path to climate catastrophe. So, in this case, perhaps unlike some other climate change cases in Canada and elsewhere, there's that very clear nexus between climate change and government action.

Cheryl M.: So tell us a little bit more about the Mathur and Ontario litigation. Who are the litigants? What is the focus of the actual legal arguments that you're making?

Nader H.: Yes. The litigants are seven young women. They range from ages 13 to early 20s, who were climate activists and advocates in their own right, and who have teamed up with our legal team, which is composed of lawyers from Stockwoods and Ecojustice to take on the Ontario government so that's the legal team.

So what the lawsuit does, it's asking a court to declare Ontario's current climate plan unconstitutional under section 52 of the constitution act. Also, to implement muscular prescriptive remedies with respect to the types of greenhouse gas emissions reductions that Ontario must undertake as a matter of constitutional law.

Cheryl M.: Has there been comparable litigation outside of Canada?

Nader H.: Yes, there have been more than a thousand climate-related cases filed since 2015. These cases include cases filed both in domestic courts and international bodies, including U.N bodies and international courts.

Many would point to 2015 as a starting point for this kind of litigation; that was the year the Urgenda case was decided. This was a case that had been filed in 2013 on behalf of almost 900 plaintiffs, including children in the Hague, Netherlands. In that decision, the Hague district court ordered the Dutch government to take action to lower domestic greenhouse gas emissions by at least 25% by the end of 2020, as compared with 1990 levels.

That case worked its way up through the Dutch court system, and ultimately in 2019, the Dutch high court dismissed the government's appeals. In the United States, there is a well-known Juliana versus United States decision. In 2019, a federal district judge dismissed that claim, but they're amending that claim, and there's no sign that litigation will stop.

All over the United States, there are climate-related lawsuits being filed. There have been recent decisions in apex courts in Ireland, in France, in Germany, and in Pakistan, and a lot of the action has happened in European courts and the North American courts. Where civil society has more resources, but not exclusively so.

In the global south, there's an increasing number of climate-related cases being filed as well, at least 60 cases filed since 2015. There's sure to be more in the coming years. The various climate change cases around the world, many of them draw on public law, constitutional law principles, but not exclusively so.

Administrative law, judicial review type applications aimed at curbing the regulation. We've seen a number of those, particularly in the United States, as well as non-constitutional private law claims being launched against climate change's worst offenders like oil companies around the world. There's a proliferation of those lawsuits as well.

Cheryl M.: So Mathur actually overcame an initial hurdle, which was an application to have the whole case struck at an early stage.

There's another case in Canada called La Rose out of British Columbia that didn't actually meet that hurdle, and just for context, in La Rose, 15 young plaintiffs alleged that Canada's GHG emissions were incongruent with a stable climate, thereby violating the charter rights of the plaintiffs and future generations.

They sought a declaration establishing a duty on the part of government to act in a manner compatible with maintaining a stable climate system. An order requiring the government to implement a climate recovery plan with judicial oversight. So quite a broad-ranging remedy that they were being sought.

So can you just explain to the listeners what that stage was that Mathur got through, and just how that compares to the La Rose litigation? Which is still ongoing; there are appeals of that initial decision.

Nader H.: The governments in both La Rose and Mathur brought a motion to strike, or motion to dismiss, which is a procedural mechanism that defendants used to try to get rid of a lawsuit at an early stage.

Essentially, the argument that the defendants and such motions make is that even if you accept the facts as pleaded as true, there's no way that the plaintiffs can't win because their arguments are untenable as a matter of law.

So both in La Rose and in Mathur, the respective government lawyers brought motions to strike. As you pointed out in La Rose, the government was successful, and Mathur, they were not. So the question, of course, is why. The La Rose case has many things in common with the Mathur case, but some notable differences.

The La Rose case is a case against the federal government exclusively, and the Mathur case is a case against Ontario. The La Rose case was brought in federal court, which historically has been a bad forum for progressive test case litigation, and I say that with the utmost respect for that court.

The Mathur case, by contrast, was brought in superior court of justice in Toronto, which we perceived as a better forum for this kind of litigation. But the legal theories overlap substantially as between both cases, La Rose and Mathur.

I think one thing that's important to bear in mind with respect to La Rose is that although the government did succeed in having the case dismissed, they didn't run the table in La Rose. Indeed, the government was unsuccessful on a number of the arguments it raised in La Rose. Indeed, in the Mathur case, Justice Brown, in dismissing the government's motion to strike, relied on many aspects of La Rose.

One issue that La Rose and Mathur courts agreed on was on this issue of whether or not the claims were capable or incapable of proof, and both the Mathur and La Rose courts rejected that. The Mathur court also relied on the La Rose decision in rejecting Ontario's

argument that this was a novel positive rights case, and as a result, the court should dismiss it, and the courts in both those cases said no. Gosselin left open the door to positive rights claims in the appropriate case, and this may well be that appropriate case.

So the hang-up that the court had in La Rose was on the question of justiciability. Because the court there found that the plaintiffs were not really challenging a law or statutory regime.

But a constellation of government action, which the court in La Rose found to be too amorphous to be justiciable. By contrast, in Mathur, the court found that the claim was justiciable because of our focus on specific government conduct. Namely, the repeal of earlier pretty good legislation and replacing it with this woefully inadequate plan.

Cheryl M.: So how would you respond to arguments that perhaps, we should not get the courts involved in matters of complex public policies such as climate change policy?

Nader H.: Frankly, I don't think that's a compelling argument. I think it's an excuse that the governments throw up when they're trying to defend the indefensible. But you're right; the government does make that argument in the climate change context.

The government's argument seems to be that no matter how bad things get, the courts are powerless to act, and people are powerless to hold their governments to account through the courts.

Because science is complicated, and courts shouldn't do complicated things. I think people need to understand how problematic this argument is. Imagine if a giant meteor was hurtling towards the earth at warp speed, and if it connected with the earth, it would wipe out Toronto.

Imagine that the government, and the government alone, had the tools to stop the meteor and avoid certain calamity. But for whatever reason, the government was refusing to act. Would we be saying in that circumstance that the courts are powerless?

Or that the people are powerless to hold their governments to account through the courts? Climate change is that meteor hurtling towards the earth at warp speed. Now the

horizon for climate catastrophe is not tomorrow, and maybe not even next year. But it is a matter of years only, probably less than a decade.

The effects of climate change are virtually certain. I think that's what perhaps some people fail to appreciate when it comes to climate change.

It's that the window for climate action is closing and that when it is closed, there is no going back in order to have a chance of likely stabilizing global temperatures, to avoid the worst effects of climate catastrophe that is limiting global warming to 1.5 degrees Celsius above pre-industrial levels.

The global remaining carbon budget is 420,000 megatons of CO₂, that's worldwide for all of humanity, for all eternity. That may sound like a lot when we use terms like megatons, but at current rates of CO₂ emissions, the world is going to blow through that budget in less than ten years.

Once we exceed that 420,000 megatons, there's no going back. It'll be too late because the effects of climate change will be locked in, and it will be irreversible.

So, in other words, once we get past that 420,000 megaton threshold, even if we act to reduce greenhouse gas emissions at that point, it's going to be too late, and massive floods, infectious disease, extreme heat, mass extinction will be the norm and life on this planet as we know it will be over.

That's why it's an emergency, and to say that hearing constitutional challenges to deal with this emergency should be beyond the reach of the courts, that sounds both defeatist and utterly unprincipled.

Cheryl M.: Well, we are actually seeing some of the impacts of climate change. I mean, the news today filled with the significant rains and flooding, and landslides in interior British Columbia right now.

Last year, last summer, we heard much about fires across North America and sort of in Canada as well as the United States. But that being said, the focus really does seem to be on future generations freedom from threats to life, liberty, and security, the person in the Mathur and La Rose litigation.

In the case of Gosselin, which we referred to earlier, then Chief Justice McLaughlin set out that section 7 required a claimant to show that the state is actively making them worse off. So Mathur and La Rose, of course, concerned challenges to legislation and policy that purported to make future generations worse off due to their impact on climate stability.

The chief justice left open the possibility that one day, section 7 may be interpreted to provide for positive obligations on the part of the state. Justice Arbour's dissent set out that positive rights are viable by mere inaction on the part of the state.

Do you envision section 7 taking a turn toward positive rights? If so, do you believe that such a turn will make climate change, related charter litigation more effective?

Nader H.: I'll start with the last question first because it's the easier one. Yes, it will make climate change litigation more effective because some of the jurisdictions in which climate change litigation has been most successful are those jurisdictions where they don't have this rigid distinction between positive and negative rights.

The harder question, whether or not section 7 will ultimately take a turn towards positive rights. I think the answer is maybe, as long as we don't call them positive rights. I've always found that distinction between positive and negative rights to be rather unhelpful.

The reality is that the charter protects both positive and negative rights. Some of the most uncontroversial and established charter rights are positive rights, the right to vote, that's a positive right.

The right to counsel, that's a positive right. The right to have the state facilitate access to counsel, that's a positive right as well. So the charter's chock full of positive rights, and some rights, they can be positive or negative, depending on how you frame it. Is section 15 a right against discrimination?

A negative, right? Or is it a right to substantive equality? It clearly includes both if our recent section 15 jurisprudence has taught us anything. So labeling it a positive or negative right seems to be more of a matter of semantics. Despite this, when we're litigating

section 7, the government says, oh, that's a positive right that the plaintiff is making, so you shouldn't recognize it.

I think when you really drill down on it, it's not positive rights that seem to scare some people; historically, I think it's social and economic rights for poor people that seem to scare off the courts and governments.

That's how I read Gosselin, Tanudjaja, which is another case dealing with section 7, and in the context of homelessness and the government's inaction on homelessness. So both Gosselin and Tanudjaja happen to deal with the economic rights of poor people, which the government labeled as positive rights and then argued that positive rights shouldn't be recognized.

So I do, at the end of the day, think that this positive negative rights distinction in the section 7 context is a bit misleading. When it comes to the environment, are we talking about a right to a safe environment or a right against the government screwing up the environment even further and making it unsafe?

They're really two sides of the same coin. Now having said all that, there is a very compelling case that we are in a negative rights paradigm because there's very clear government action and not just inaction when it comes to climate change. I think this is something the government and its arguments has really misconceived.

The government misconceived the role of governments local, provincial, and federal with respect to co2 and other greenhouse gas emitting industries.

Businesses, all businesses from oil companies to transportation companies to mining companies manufacturing even mom-and-pop shops, none of them can do business without a host of permits and licenses to do those businesses and many of which authorize activity that is greenhouse gas emitting.

Each time the province issues a vehicle to authorize a gas-powered vehicle, they are contributing to climate change; they are involved in causing and furthering climate change. So the state is already in the business of regulating and affecting climate change, and really all we are asking is that they do so in a manner that respects charter rights.

Cheryl M.: So in the context of youth groups challenging the repeal of legislation, in this case, protecting the environment or even like claiming as is in the La Rose case, asking for a better plan in a sense.

How difficult is it going to be for these groups to achieve an appropriate remedy, considering the comprehensive responses that the government is mounting to their challenges?

Nader H.: Yes. As you pointed out at the outset of this program, Cheryl, figuring out the right remedy is one of the key challenges in constitutional litigation, perhaps the most important question in constitutional litigation.

It's no different here in the context of climate change litigation because, ultimately, any remedy is going to require government action in an area that melds public policy, law, and science.

We certainly don't want a situation where you get a declaration that constitutional rights have been breached and some wonderful language in a decision, but then the government fails to act and do anything to mitigate the effects of climate change. Then we'd be no better off than we were before, and that would really be a peric victory.

So what you want in these cases, and what we all want in these cases, is a prescriptive muscular remedy. Now the good news is that our constitutional framework is robust enough to accommodate this. Section 24-1 of the charter provides courts with a broad range powers to implement constitutional remedies.

The language of section 24 sub 1 says the court can provide for a remedy it considers appropriate and just in the circumstances. It's difficult to conceive of a broader remedial power, and the Supreme Court has written time and time again, the section 24-1 remedy is crafted in broad terms because it's meant to be broad.

The supreme court of Canada, on occasion, has used section 24-1 to fashion creative and robust remedies. The case of Doucet-Boudreau and similar cases following it in the minority language context.

Those were cases in which the courts ordered government to build more French language schools, and in Doucet-Boudreau, the trial judge, in that case, retained jurisdiction to keep up to date and to monitor the status of those efforts to implement the claimant's section 23 language rights.

So it can be done, and it has been done before, and it may be that in the climate change context, a court maintaining some kind of a supervisory rule going forward to implement the remedy, it may be that is what is called for. Having said that, ongoing court supervision may not be necessary if the remedy is sufficiently prescriptive.

As some courts in Europe and elsewhere have ordered governments, how much co2 emissions they must cut. So in the Urgenda case, which we talked about earlier, which is widely credited in the western world for getting the ball rolling. The district court, the Hague, ordered the Dutch government to reduce emission levels by 25 percent by 2020 vis-a-vis 1990 levels.

I think that a remedy like that, co2 emissions reductions by specific amounts, by certain deadlines, strikes the right balance between giving a meaningful remedy and giving government sufficient leeway to figure out how to achieve that goal.

So you're providing the ultimate goal that has to be reached, but the court's not saying okay, you have to get there by cutting oil subsidies or by requiring that we only drive electric vehicles, no.

Within that remedy and within that framework, it's up to government to decide how to achieve that goal, those emissions targets, and they have broad discretion to do so. While it is a prescriptive and helpful remedy, it does leave the policy-making in the hands of government.

Cheryl M.: Professor Roach will delve further into those remedy issues for us in our practice corner coming up. But Nader, you've acted as counsel for the young applicants in Mathur, and they're also a group of young applicants also in La Rose. But I wanted to know what it was like working on such I think you would admit novel litigation; it's something we are pushing the bounds of constitutional law to some extent in this case.

Also, especially what it's like to work with this group of youth claimants, what can the legal profession do to help youth get more involved in these kinds of constitutional issues and litigation?

Nader H.: Working with this group of talented young people has been great. It's a nice reminder that these aren't academic or theoretical issues only. Young people are concerned about climate change because the threat is real and it's immediate, and it affects them, just like it affects my kids too.

Young people don't need convincing when it comes to climate change; many of them are already galvanized and ready to act. In this case, we didn't have to look too hard to find partners in this litigation; to find plaintiffs, many of them came to us.

If you Google some of our applicants in the Mathur case, you'll see that these are young people who already had a track record of activism and advocacy on matters relating to climate change.

We just really brought them together and armed them with the legal arguments to generate constitutional arguments that we recognized in a court of law. I mean, climate action is in many ways tailor-made for young people because I think they appreciate just how much it affects them, and the reality is it does affect them more than anyone else.

So it's not difficult to get young people interested in climate change, and certainly, not difficult in getting them interested in climate change litigation. I think the lesson for litigators is, let's not underestimate young people.

Many of these folks have done far more in their young lives than people decades their senior when it comes to taking meaningful action on climate change. So let's not underestimate them, they have the greatest stake in our future, and they will bear the harshest consequences of climate change.

So it's important, in fact, essential that we give them a voice in the process. That's why it was so critically important at this case, and I know that counsel and La Rose felt the same way, that it'd be young people that be driving this litigation and not just the stuffy lawyers.

Cheryl M.: Thank you very much. We've been speaking with Nader Hasan about the climate change litigation involving section seven of the charter. The case is Mathur versus Ontario, and this has been an excellent sort of overview of this kind of litigation and sort of an exciting thing to be looking forward to.

As we close, Nader, I just want to ask you. I mean, you've talked about the urgency of this kind of litigation and the urgency about governments acting now around climate change and curbing our emissions.

But constitutional litigation is long and drawn out, so can you give us an estimate about how long you think this will take before we get a definitive answer, and will it then be too late?

Nader H.: Well, I certainly hope it won't be too late; we never know. Having said that, this case is going to be argued in September of next year; we have three days set aside. One of the reasons we brought this as an application rather than an action was to ensure that it could be heard as quickly as possible.

So we have three days set aside in the superior court in mid-September when it will be argued, and I hope the court decides quickly. Because as you point out, even a quick decision may not be quick enough.

Cheryl M.: Thank you very much. We'll be watching it very carefully and very closely and keeping people apprised of what's happening with the litigation. Next up on our practice corner will be Professor Kent Roach talking about the remedies in these kinds of cases in further detail. I wish to welcome back Professor Kent Roach for our practice corner for this episode.

Kent Roach is a professor at the University of Toronto faculty of law. His research focuses on constitutional and criminal law. Professor Roach was appointed a member of the order of Canada in 2015, and he has won awards for his pro bono work with respect to human rights advocacy in Canada.

Most importantly, he is here today because he is the author of constitutional remedies in Canada and has recently published an article on remedies in climate change litigation internationally. So Ken, thank you for joining us again.

Kent R.: Oh, thank you for having me, Cheryl.

Cheryl M.: We wanted to ask you about the remedial aspect of charter litigation. So if a claimant is successful in challenging the constitutionality of a piece of legislation, what can they get at the end of the day?

Kent R.: Well, sometimes they'll end up with just a suspended declaration of invalidity, and the Supreme Court has given us two recent rulings on that. So you'll have to think about whether it's prospective or retroactive. Sometimes, there can also be individual remedies.

So this is what I call a two-track approach to remedies, is I think it's important for courts to give remedies for the litigants that are before them. Of course, we saw this in the aftermath of the Carter assisted dying cases.

But sometimes, there may be valid reasons why they want to give parliament, or the provincial legislature an opportunity to choose among a range of constitutional options. It's also possible to get damages, but there is a qualified immunity when the damages are caused by legislation.

So you basically have to show not only that your charter rights were violated, but the government was at fault, and that's a pretty high barrier. Of course, the Asper Centre fought against extending that qualified immunity to all government policies, and we were successful with that in a recent French-language schools case from British Columbia.

So if there's not legislation, if it's just policy, or if it's just an act of the executive, you basically have to prove that damages are necessary to compensate, vindicate or deter charter violations. Then it's kind of up to the government to prove that damages are not necessary or that they'll harm social interests.

One thing that I think is important is that the court thinks in some cases about retaining jurisdiction. It does retain jurisdiction when it suspends declarations of invalidity. It retains jurisdiction when it orders injunctions, whether they're before trial or after trial.

But we know from cases like little sisters that when it simply issues a declaration and assumes that everything is fine. Unfortunately, that's not always the case.

Cheryl M.: So when we talk about a declaration of invalidity, a lot of people refer to that also as striking down the legislation, so it has no force in effect. As you said, we have these things that the court will sometimes order, like a suspension of that, so it doesn't take effect immediately.

Then we have this issue of whether it takes effect from the date that the legislation was enacted, so it was always unconstitutional or whether it has to go forward. Mostly, that's based on section 52 of the constitution that says that all legislation has to comply with the charter, and if it doesn't, it's invalid.

So the other remedies you're talking about come from another section of the charter which is section 24. So what is kind of the practical difference between the two from the point of view of the litigants?

Kent R.: One of the practical differences usually with section 52, there's a much broader standing, there's public interest standing, and you may also have to give notice that you're challenging legislation.

Because the idea is that the attorney generals say in a criminal case, the attorney general of Canada should be given an opportunity to defend the constitutionality of the law. So a section 52 case is really about the general public interest in constitutionality, where a section 24-1 case is generally, although not always, about your own particular rights or the rights of a class of which you are a part of.

Cheryl M.: When I teach constitutional litigation at the Asper Centre clinical course, I always tell the students that any litigation begins and ends with the remedy. You start by asking your

client what it is they want to get out of the litigation. So why is it so important to begin there?

Kent R.: Well, because I think that just as a practical matter, judges don't decide rights without worrying about remedies.

So one of the things that I always teach is it's pretty clear from the historical record in Brown versus board of education that the U.S. supreme court really couldn't get around to saying that segregated schools were unequal and unconstitutional until they had figured out a remedial strategy.

Now that remedial strategy was perhaps too deferential, it was the all deliberate speed strategy, and it wasn't decided until a year after the court decided in 1954. So often, when I'm involved with a case, I'm very aware of the challenges, particularly when you're talking about innovative rights claims.

So a lot of it is trying to convince the judge that the remedy is manageable, without watering down the remedy, so that it's meaningless to the client.

Cheryl M.: If the claim lacks clarity about the remedy being sought, what could go wrong?

Kent R.: Occasionally, even in Canadian courts, despite operation dismantle, they can hold it to be non-judicial, and of course even an operation dismantle. Although the court reviewed the decision to test cruise missiles, it found no violation because there was nothing kind of specific to attach to.

So some of this is also an interest that the courts have to deal, I think, with multifaceted or polycentric problems, but they also like to have something that they can grab a hold of or sink their teeth in.

So this is what I'm increasingly calling a kind of two-track remedial strategy, is that you need to think about some particular government act or piece of legislation that you're going to challenge, and zero in on that.

But also, be aware and invite the court or the legislature and the executive, perhaps in consultation with the parties, to try to remedy those larger systemic issues so that we don't keep repeating the same violation.

So when I was writing my new book, remedies for violations of human rights, I was really struck by how international courts often take what I call this two-track strategy.

Although, they call it specific measures, which is what they give to the individual, usually damages, because international courts can't strike down legislation and general measures, which are invitations for states to take steps to prevent the repetition or reoccurrence of the particular violation that the litigant has suffered.

Cheryl M.: The Asper Centre intervened in a case a number of years ago called *tanudjaja*, which was around the issue of lack of housing and housing strategies for the homeless in Canada and in Ontario.

What happened in that case? How does it kind of illustrate some of the problems with the kinds of remedies that one might want in social justice cases more generally?

Kent R.: Well, I mean, I think what that case demonstrates is a reluctance of the court to kind of construct from the start a housing policy that will deal with, of course, the very real problems of homelessness and under housing in our country.

So we were asked, and both of us were involved at different stages; we were asked to kind of provide remedial support, and we did our best, but I can't help thinking that the courts recoiled from recognizing the right in part because there wasn't a kind of specific remedy that attached either to a particular government action or a particular piece of legislation.

So I'm not saying that should be the only remedy, but I am saying that without that, I think many judges have a hard time getting their minds around what they often see as intruding on the executive or legislative function.

Cheryl M.: So we've been talking in this episode with Nader hasan about the Mathur and Ontario case, and we've talked briefly about the La Rose case, which is a case out of British Columbia. Could you just talk about the main difference between the two in terms of the remedy?

Kent R.: Yes. Well, the La Rose case, in some ways, is a climate change form of Tanudjaja, in that, like Tanudjaja, it was struck down as disclosing no reasonable cause of action.

It went for what I saw as a kind of remedial home run, like Tanudjaja did, asking for the government to prepare a climate policy where the second case attached to a specific piece of legislation, albeit legislation that was repealing certain climate change.

And that second case, Mathur, really follows I think in the footsteps of international cases that I write about in my article, judicial remedies for climate change, which has just been published by U of T's journal of law and equality.

In that article, I look at both Netherlands courts and a very recent case by the German constitutional court, which of course, is one of the world's perhaps most renowned courts.

Essentially, as I read the German case, of course, I should add in translation, it was essentially a kind of suspended declaration of invalidity because the litigation attached to climate change mitigation legislation that had been enacted in Germany, but basically said you're going too slow, and you're not achieving generational justice.

So didn't prescribe what the legislature should do, but said what you're doing now is simply going to narrow the window too much for those who are living in 2030, which is not that long from now, as they attempt to deal with reductions.

So once that decision came out, the German government, and it was a suspended declaration, so it gave the government quite a bit of time to respond. But the government responded quite quickly.

So I think that it's a little bit of a paradox because, in some ways, it's going to be easier to litigate climate change where there is concrete legislation that attempts to take it on. But I think even in cases where there isn't, I think climate change litigators should think about what I describe as a two-track approach.

So take on a specific issue, which is going to contribute to global warming, challenge that, but then also try to get the court to at least invite people to institutions to deal with the broader issues. I think a lot of this is that we know that public law litigation is not won exclusively in the courts, or perhaps even mainly in the courts.

I think that this is not a bad remedial strategy generally because I think the public becomes engaged when they can see and get their minds around a particular issue. Whether it's a pipeline, or whether it's a person who's being flooded out or whatever.

Now obviously, providing a remedy for that person is not going to deal with all of the systemic issues. But I've increasingly see it as a mistake to take what I call a one-track approach, whether it's asking simply for systemic remedies or simply for individual remedies, I think we really need both, and we have to realize that courts are going to be more comfortable when it comes to more tailored and individualized remedies.

But we can't let courts off the hook for dealing with the more systemic issues. But we also can't let the support structure that lies behind public interest litigation off the hook. Of course, this goes back to my long-standing interest in dialogue, and why I think all civil society groups and why it's a mistake was some political scientists have called them the court party.

But any kind of civil society group that I've worked with worth its salt is prepared to work both in the courts and in the media and in parliament to achieve change. I think they realize that both have to be mutually reinforcing.

That's a tough lesson, because it means that even when you win in court, you can't say well, our work is done. But it also means that if you lose in court, you also get a second chance. So that's been kind of my approach for quite a while now.

Cheryl M.: So it speaks to the multifaceted approach to charter advocacy more generally, so that you're not just putting all your eggs in one basket being the court basket, and hoping that judges will provide the remedies.

Especially given the history of suspended declarations which drag things out over periods of time, or even just the fact that a declaration itself may not give you the kind of results that you hope.

You mentioned international cases; you entered the German case, are there other international cases that can provide guidance in the Canadian context?

Kent R.: As I say, I mean, I'm actually fairly optimistic about the recent evolution of suspended declarations, because it does allow this two-track approach, where even in the most recent case that came down last week, the Supreme Court said we can provide section 24-1 remedies during a suspension.

So we can both care about the institution, the individual, and perhaps give parliament a finite amount of time to get its act together. I think now the government has been put on notice that they have to justify how long a suspension is, and they have to justify if they don't want it to be retroactive.

I think what's missing, and here I look at separate national courts, is what I've called the declaration plus, and that is the idea that a court can remain seized of a matter without necessarily issuing an injunction.

Because the Supreme Court has told us that injunctions need to be really clear, and because they are kind of a mini criminal statute, because if you violate an injunction, you can be held in contempt of court.

I think that since *Doucet-Boudreau*, this has meant that especially outside of minority language rights, judges are often feel that they're not in a position to say okay, well, there's only so many hours of lockdown, or you have to do this to respond to COVID in the prisons.

The result has been that we tend to rely upon other remedies that are often not effective. I mean, damage claims class actions may get a lot of money, but they're not doing anything to prevent future violations of harm.

So what I've always argued is what we need is a declaration plus, so it would be in, imagine a case like little sisters, the court decided they didn't have enough information to tell customs exactly what to do.

But why couldn't it retain jurisdiction, and if the plaintiffs felt or even if customs felt that they needed the court's guidance, they could go back to the court for further declarations. Of course, this is what the European court of human rights, the inter-American court of human rights, does all the time, in part because they really can't order injunctions; they don't have that power.

But they often ask for reporting back, and they allow it to be done in an adversarial and transparent and fairway, which is really what the judge did in Doucet-Boudreau.

Even though it was only upheld by five judges, so that's probably now for well, about the last ten years, I've been trying to create a new remedy and called the declaration plus. There's a chapter in my new book on it, and so far, the courts haven't bit but got to keep trying.

Cheryl M.: It sounds like the sort of thing we need in the kind of litigation that we're seeing in terms of climate change, given the ongoing and long-term effects, and the many different facets to the contributions that countries have made to are making and people are making to climate change.

So that doesn't sound like the right approach. I acknowledge that this has been just a brief discussion on remedies, which can be a more complicated topic. I want to thank you for distilling what has been many years of examination of this topic into sort of a bite-sized summary.

As I mentioned in the introduction, you've written an entire book on constitutional remedies in Canada and now a second book on remedies in human rights cases. So I think we may need to dedicate a future episode entirely to this topic. But thank you very much for being with us and explaining this.

Kent R.: Well, Cheryl, I'd like to take this opportunity to thank you and the Asper Centre because this work that I've done on remedies I think has really been fueled by being able to participate in some of these cases and being able to look at it in kind of a larger context, which I think the Asper Centre and the clinical program continues.

Part of what I've tried to do academically is pay more attention to remedies because often, it seems like courts and litigators alike run out of steam, and they're perhaps not given the attention that they deserve. So I'd like to thank you for allowing me to represent the Asper Centre in quite a few remedies cases.

Cheryl M.: Thank you very much, Kent. We've been speaking today about climate change and charter rights, with originally at the beginning Nader Hasan, counsel in the ongoing case of Mathur and Ontario.

A challenge to the Ontario government's repeal of the climate change act, and Professor Kent Roach of the University of Toronto, on the remedies available in constitutional litigation.

Our next two podcasts will focus on section 15 of the charter. Due to scheduling, we'll be dropping those episodes on a more relaxed schedule. So be sure to subscribe to the podcast to be notified when they are available.

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