

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

[Start]

Music (00:01.31):

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

Cheryl:

Hello and welcome to Charter a Course. I am Cheryl Milne, the Executive Director of the David Asper Centr3 for Constitutional Rights, and your host. Our podcast focuses on leading Canadian constitutional cases and issues.

It emanates from Toronto, which for thousands of years has been the traditional land of the Huron-Wendat, the Seneca, and the Mississaugas of the Credit Red River, and is currently the home to many Indigenous peoples from across Turtle Island.

Cheryl (00:49.782):

In this episode, we will focus on mobility rights in Canada. Mobility rights are enshrined in section six of the charter and include the right to individual mobility, as well as the right to economic mobility, such as the right to pursue a livelihood in any province. This episode will focus on individual mobility and the fundamental rights to enter, remain, move throughout, and leave Canada. Our first guest today is Barbara Jackman. Barbara Jackman is the founder of the refugee and immigration law firm, Jackman and Associates.

and one of the foremost immigration and refugee lawyers in Canada. She received her law degree from the University of Toronto Faculty of Law in 1976 and was called to the bar of Ontario in 1978. Throughout her career, Barbara has championed and advocated for the rights of immigrants and refugees in precedent-setting cases, appearing before all levels of court in Canada, including the Supreme Court of Canada. For her significant contributions, which have shaped immigration and refugee law in Canada,

Barbara has received numerous awards, including being invested as a member of the Order of Canada in 2019 and receiving an honorary doctorate from the University of Toronto in 2023. Barbara recently

appeared as counsel before the Federal Court of Appeal in Canada versus Bolo and one of the most significant Section 6 cases in the recent years. Welcome, Barbara.

Barbara:

Good afternoon.

Cheryl:

So it's an honor to have you here on this podcast. To begin...Could you give us a brief overview of the contours of Section 6 of the Charter?

Barbara:

Well, Section 6 looks pretty straightforward. It says every citizen of Canada has the right to enter, remain, or leave Canada, and that every citizen and every permanent resident in Canada has the right to move to and take up residence in any province and to pursue the gaining of a livelihood in every province. So, if you take the first right, the right to enter, remain, and leave Canada,

It raises different issues because it's not always that straightforward. Canada is not easy to get to. You have to take a plane or you have to have a visa to get into the United States in order to cross the border to come into Canada. So that creates other issues. What is Canada's obligation? If you have a right to remain in Canada and to leave Canada, can Canada, for example, prevent you from leaving? Can Canada keep you in the country?

Barbara (03:11.766):

That's come up in a case, in one case called Kamel. Mr. Kamel was refused a passport, so he wasn't able to travel. And the decision was upheld by the court because even though it infringed his rights under the charter, it was justified in a free and democratic society to take away his right. He had been convicted, I think, of terrorist and passport offenses in France. And that's why Canada was withholding...

the passport to him. So, Canada felt it was justified and the court agreed with Canada that it was. The other side of the coin is whether or not you can travel, you can be prevented from traveling into Canada. It says you have a right to enter Canada, but what does that actually mean? If you need a passport and Canada won't give you a passport, how can you enter Canada? Because you can't get on a plane, either to get to the United States or get to Canada. Maybe you could take a boat. Some people have arrived by boat.

But that's very unsafe and very uncommon. So, for the ordinary person who just wants to come home to Canada, flying in a plane is probably the easiest way to come back. So in Mr. Abdelrazik's case, the court recognized again that the right might be infringed, but that Canada was obligated to issue him the travel document in order to be able to travel home. In that case too, Canadian officials that had a role to play in the mistreatment he received in the Sudan.

Again, the case is one that focused on alleged terrorism, because a candidate, it looks like Mr. Abdelrazik, was placed on the US, the United Nations terrorism list and wasn't able to travel generally other than come back to Canada. So those cases are not the sort of run-of-the-mill kind of situation you would find, but they arise. And they've arisen, and I think they will continue to arise in the future.

Cheryl:

So I just want to take a step back and sort of talk about sort of the origins of this right. And so prior to the enactment of the Charter, the Supreme Court recognized that Canadians have a right to move about and reside in Canada. That mobility right arose because of the exclusive jurisdiction the federal government had over citizenship. However, when the charter came into force, the Supreme Court in the Canadian Egg Marketing Agency and Richardson case held that the mobility rights enshrined under section six were not grounded in federalism laws. So...

Cheryl (05:34.93):

Instead, it's rooted in a concern with human rights and human dignity. So why are mobility rights considered so central to human rights, human dignity, and equality? And as a sort of secondary part to that question is how do they fit with international human rights instruments and international law?

Barbara:

I think, first of all, with respect to international law, our rights really track international law. There's the Universal Declaration of Human Rights, which is not a covenant or a convention that states have signed, but it's a universal declaration and it certainly has the force in many instances of reflecting customary law that states are expected to comply with. It states in Article 13, everyone has the right to freedom of movement and residence within the borders of each state. And then if you get...

You move from there to the International Bill of Rights, the Covenant on Economic, Social, and Cultural Rights. The Article 23 guarantees a right to work in your state, and the International Covenant on Civil and Political Rights in Article 12 guarantees the right to liberty of movement and freedom to choose the person's residence. Everyone shall be free to leave any country, including his own. So those rights are the similar.

similar to the ones that we have in the Charter of Rights and Freedoms. I think it was important that the court recognized that it wasn't just because of the federal division of powers with Canada having authority over citizenship that gave people the right to be in Canada or to come into Canada, because I think it is a fundamental part of the human nature. I mean, you've got to be able to have a place to live, a family, a community.

Those are rights recognized internationally, too. Article 17 recognizes the right to privacy in the context of one's home and community and family, and not to have that arbitrarily interfered with. So if you put that sort of compendium of rights together, it's important that people be able to live in their own community, to have a right, not to be exiled or banished from it, but to be part of it and to be secure and...

Barbara (07:49.886):

in knowing that they have the right to continue to be part of it.

Cheryl:

So you mentioned earlier that Section 6 is not frequently litigated. You mentioned the Abdelrazik case and the Kamel case as two cases that may be exceptions, but we're going to talk about, I'm going to ask you a little bit more about those in a moment. But I think that what you do see litigated more often are the extradition cases where it has come up. Can you explain the extent to which extradition engages a person's mobility rights?

Barbara:

Well, if they do engage, extradition does engage a person's mobility rights, but the Supreme Court of Canada in several cases have recognized that right can be infringed. And it can be infringed where you're facing extradition to face charges in accordance with a fair process in another country. And the cases that went to the Supreme Court are interesting in the sense that if you look at the Cotroni case.

He could have been, Mr. Cotroni was charged with drug offenses, I think it was. He could have been charged in Canada because all of the, he was actually physically in Canada when he was committing the crime, even though the crime, parts of the crime were taking place in the United States. So Canada, instead of charging him and bringing him to trial in Canada, extradited him to the United States. And he complained about that saying, look, I have a right to be in Canada. You shouldn't be sending me to the United States when you can prosecute me here in Canada.

And I think these cases are important to people because the United States tends to give longer sentences, the conditions in their jails are harsher usually than conditions in Canadian jails or at least there's a perception that they may be in certain parts of the United States. So it's an important interest for them. But the Supreme Court said, you know, prosecutors have to have the ability, government has to have the ability to decide which is the best place.

there may be reasons why they're prosecuting in the United States. Maybe all the witnesses are there or it's easier to prove it there because of the access to people around and the other aspects of the crime that did occur in the United States. So they said you had to leave it to the government and that was justifiable in a free and democratic society to do that. There was a dissent where the court felt that you're supposed to minimally impair rights in that...

Barbara (10:09.17):

there wasn't really evidence that it was being minimally impaired by having the trial take place in the States instead of in Canada. The other case is the Divito case. And Mr. Divito got convicted in the United States with serving his sentence and he applied under the International Transfer of Offenders Act. We have this legislation in Canada that allows you to, if you're a prisoner serving sentence somewhere else in the world...

to apply to come back to Canada to serve your sentence. So, a lot of people use it who are convicted in the United States because if they are brought back to serve their sentence in Canada, they can be closer to family members and I think that the parole provisions may benefit some of them more than it would in the United States. But anyways, in Mr. Divito's case, he had applied under that act.

And it requires that both the United States and Canada consent. So, the United States consented and Canada didn't. So Canada was the only actor in, in the trio of actors here that didn't cooperate. So he went to court saying, look, you know, if the United States consents, Canada should be consenting to let me serve my time in Canada because I have a right to be in Canada, not the United States. And the Supreme court said, no, that it...

he was serving a sentence, there wasn't a right to serve a sentence in Canada. That's not under section 6 of the charter. You serve your sentence where you were convicted. And unless there's some kind of something untoward in relation to how that occurred or how it is occurring, the court's not going to intervene. So that's sort of where we stand on extradition.

Cheryl:

In the post 9-11 era, there's been an increase in state surveillance of individuals and what has been called the securitization of citizenship. Can you tell us a bit about the heightened state security and surveillance measures and how that has impacted citizenship practices and in particular, the mobility rights of citizens?

Barbara:

You know, it's interesting because while the courts are dealing with these issues as sort of legal rights, on the ground, people may be suffering without having legal access to a fair resolution of their situation.

Barbara (12:27.55):

I think it's fair to say that Canada upped its sharing of information with other states after 9-11 in order to ensure that whatever alleged terrorists were around were not being able to freely travel around the world and harm other people or cause harm in other countries. And they created measures like the United Nations No Fly List. Canada has a no-fly list, which it uses against Canadian citizens.

So there's a number of people who've not been able to travel for security reasons. And one of the most frustrating things about that kind of process isn't so much that they're not allowed to travel. It's twofold. One, they're not allowed to travel when they're outside of Canada so they can't come home. That's a problem. And the second one is they're not really told what it is that is the concern. They get a little notice. It doesn't really say anything. It can go to federal court, but you don't get to see the evidence.

So that part is pretty unfair too. So there's been a lot, and then Canadians have been detained in other countries. Probably the most famous case was Maher Arar, where the United States had sent him to Syria, and he spent some two years in detention there and was subjected to torture. And it was based on very flimsy, non-substantial kind of suspicions, not actually evidence that he was a terrorist, and in fact, he wasn't.

So, the stakes are pretty high for people where there's a belief that they may be a terrorist because not just Canada, other states have also been less than helpful to their own citizens who they perceive to be terrorists after 9-11.

Cheryl:

You mentioned earlier the Kamel case. Could you tell us a little bit more about that case and the facts?

Barbara:

Well, what happened in Kamel was that there was a directive that it wasn't a law, it was a directive because passports are sort of a prerogative, right? And, it outlined where a person would not be given a passport. And so Mr. Kamel came under that directive because there were concerns about security because of the terrorism allegations against him. And in fact, he had a conviction. And so I think what Kamel did was it permitted the government, it recognized the government did, may have section one justifications to infringe on the right to be free to travel and leave the country.

Barbara (14:51.314):

And It recognized that there needs to be a process, which there was in Kamel's case. Like there's a way of, you know, they tell you what the concern is, you respond. The only big problem with that is how much information you get to respond to. But it's structured, at least the considerations that would be given before a person's right to leave the country is taken away from them.

Cheryl:

You were also counsel in a case that I think is continuing to be before the courts, but the Canada and BOLOH.

one of the most significant Section 6 decisions in recent years. Can you walk us through the case as well as the decisions of the federal court and federal court of appeal?

Barbara:

Boloh is a really interesting case. In Bolo, what it is B-O-L-O-H stands for Bring Our Loved Ones Home. It's really the family members of the Canadians, many of them young people, who were detained in Syria, in northeast Syria in an area that's under the control of the Kurdish freedom or the Kurdish administration. They're in de facto control of that part of Syria. The Kurdish administration, it's called Aanes, doesn't want to have all these foreigners that it's responsible for detaining. It's in the middle of a war zone. The Turkish government don't want the Kurds there. And so in addition to having to be responsible for all these foreign persons who went over

allegedly to join ISIS and then were not able to leave and have been detained there for some of them since 2017, 2016. It goes back a long time. So there's a group of Canadians over there. But anyways, Aaens, the Kurds have asked countries to take their citizens back. So, if you look at it this way, I mean Canada has people in the country that are not nationals.

Canada doesn't want them in the country. It issues deportation orders and asks them to leave. The Kurds are doing essentially the same thing. They're saying, these are not our citizens. We don't want them

here. We're holding them as prisoners because they may be a danger. So, Canada, you and other countries come and take your own citizens back. It's not our responsibility. Canada hasn't done that. Well, they have, but they've been selective about who they do it with. So, they took all the women...

Barbara (17:13.218):

that were over there in the camps and their children, most of them except for one, and brought them back to Canada. But they won't take any of the men and they've denied one woman who's a mother of six Canadian kids the right to come back because they think she's a terrorist threat. So the issue in the cases that went before the court was whether Canada, like Abdelrazik, has an obligation to issue passports to them. And going beyond Abdelrazik's case,

to actually help them get on the flight because given the fact that they're all alleged to be part of ISIS, what Western states consider to be a terrorist movement, they're not going to have a right of passage through other countries. So, it has to be arranged. Canada would have to take a fair number of steps as they have with the women and kids to bring them back. So, both Section 7 and Section 6 were argued.

Section 6 that it's part of the right to enter and in these circumstances where it's just Canada that holds the key for these men. So, Canada wasn't responsible for their detention. Canada is, does play a role in being responsible for their continued detention because Aaens has properly said they're your citizens and nobody else's, you take them back and Canada won't take them back. So, Canada holds the key...

to ending the detention and to affecting the right to enter the country. Canada doesn't recognize that it has that right. And the federal court of appeal agreed with Canada. The federal court judge didn't agree. He felt that Canada needed to step in there and take those steps in order to bring the men home because it's not like Divito where there was a fair trial and a sentence imposed. These people are indefinitely detained. They've been subjected to cruel treatment.

They're not facing trial. They keep talking about a trial, but how fair is a trial in any event when already five or six years have passed and who knows where the witnesses are or people who could corroborate the testimony. It's a, it's a very difficult situation, but Canada has means here with the ones that have come back, Canada has put in, they've put bonds on people and orders so that they know where they are and things like that. Like there's.

Barbara (19:33.086):

mechanisms in Canada to keep track of people if they need to for security reasons. So. the argument under 6 and under 7 was that there's certainly under 7 that there's a causal connection because of the

invitation by Aaens to Canada to take their own citizens home and Canada's refusal to act in fact links Canada to the abuse going on. Aside from that, which the court sort of glossed over...

Canada's funded Aaens in order to maintain the prisons over there, which is also more like Abdelrazik in the sense that CSIS was also involved. And same with Arar and El-Madi and El-Malki, the Canadians that were detained in Syria for a number of years. The Canadian Security Intelligence Service had a hand there too. So, Canada's not completely free from some sort of influence on what's happened to the people over there.

We were successful in the federal court in front of Justice Brown. He found that section 6 was breached. And in the court of appeal, we lost. The court of appeal decided that there was no obligation to read the right to enter into Canada as requiring Canada to take steps to affect that right. The men could, if the men could get here on their own, that's fine. If Canada want to help them voluntarily, that's fine. But there was no obligation.

That's now gone to the Supreme Court. We haven't heard whether the court will hear it or not, but it just was recently filed.

Cheryl:

I mean, just going back to the Abdelrazik case that you're talking about, I mean, it didn't get appealed all the way up because Canada acted, but tell us a little bit more about the facts of that case. I think Mr. Abdelrazik ended up sort of living in very strange circumstances for a number of years, trying to get travel documents. And...

Barbara:

And he was promised travel documents. I mean, the Canadian officials over there promised them to him and then never gave him the travel document. But I mean, Abdelrazik's cases like the other cases where Canadians have been mistreated in other states and some of it's as a result of information passed on by CSIS that wasn't really justified. That the Canadian security intelligence service...

Barbara (21:49.738):

was acting on suspicion and drawing inferences that weren't justified. And that's resulted in mistreatment and torture. Abdelrazik was detained by the Sudanese because of that.

Cheryl:

And he ended up residing, was he not residing in the embassy?

Barbara:

Yeah, yeah he was because he was afraid to leave it. And Canada at least let him stay there. But then what do you do with someone who's in your embassy, who's a Canadian citizen wants to go home? I mean, what you should do is help them go.

Cheryl:

So in effect, the Federal Court of Appeal in Boloh has overturned the ruling in Abdelrazik, which was that there's this positive obligation on government to issue the travel documents. Isn't that right?

Barbara:

Well, you could view it that way. But I think that the Boloh case required that candidate take a step beyond issuing a passport. So if you go strictly on Abdelrazik, I mean Abdelrazik, there was more to it, but everybody just focuses on the fact that it was the passport issuance.

In Boloh, it's definitely not the passport issuance. The Canadians would have to go to the area and receive the prisoners. They're treating them as prisoners of war, kind of, and they would pass them over to Canada. So that was one of the concerns of the Court of Appeal. I think they hyperbolized it myself because there's been lots of people going in and out. There was recently a Canadian delegation.

Alex Neve from Amnesty International, Kim Pate, a senator, Hadiyaat Nazami, a Kurdish lawyer here, and there was one more person. Oh, Scott Heatheringson, who was a retired diplomat, Canadian diplomat. So they went over there. They went into the territory that Canada pleaded to the court they couldn't go into, and Canada went into that territory, removed the women, the women and children that it did repatriate. So...

The court of appeals concern was not justified, I think, on the facts that were before it. But I do think it's the additional part, not just the passport, that led them to make that decision. Maybe if it had just been the passport, it might have been a different decision. So we prefer to think Abdelrazik is still good law.

Cheryl:

Well, I think in my understanding in Abdelrazik, as you said, it wasn't just the passport. They needed to get him on a flight. And, at some point they were penalizing people if they provided funding for the flight.

Barbara:

Yeah, which is what happened here. Like the people that I represent, the Letts family, they haven't gone behind the BOLOH acronym. The Letts family, both of them, both parents got convicted for trying to help their son fly home.

Cheryl:

So we've been talking about being able to either remain or return to Canada under the mobility rights. The COVID-19 pandemic also the ability of governments to limit inter-provincial travel, because many of the provinces were shutting their provincial borders in the wake of the pandemic. In Taylor and Newfoundland and Labrador, the Newfoundland and Labrador Supreme Court held that the denial of an application to enter the province infringed a citizen's Section 6 rights, but that it could be justified under Section 1. And interestingly, the court found that the right to inter-provincial travel fell under Section 6, under 6.1 and that section 6.2 only included the right to travel to a province and take up residence. So what are the implications of this decision, particularly for the rights of non-citizens?

Barbara:

Well, it's interesting because what I understand with that decision is that the court of appeal didn't decide it. The court of appeal decided that it was moot and therefore it wasn't going to decide the issue. So, I don't know if they've taken it up further, but the reasoning I think is a bit problematic to read it into 6.1 instead of reading it into 6.2, which explicitly says you have a right to move and take up residence in any province. To move to, I guess it's because it's not a move. I mean, you could argue that.

Cheryl:

So Boloh seems like a very significant decision, and I know that it is on its way up, hopefully. At least the, it's being sought to be appealed at the Supreme Court of Canada. But what are the overall implications of the Bolo decision on mobility rights in Canada? What more does it add?

Barbara:

It doesn't add much. I mean, with Kamel and Abdelrazik, people have been going along, you know, fighting. One of the things in Kamel that was important was they said you could restrict the right to leave the country by not issuing a passport. But...

What Kamel had not done was take issue with the reasonableness of the decision. And so since then, at least from what I've seen of cases where people have been denied passports, you get a decision and you take it to court to argue that it's not a reasonable result, rather than arguing that they shouldn't be denying it on a constitutional level. So I think it's just move the discussion further on that kind of case.

Barbara (27:01.45):

With Abdelrazik, at least you could get the passport. And you're right, there's more that was given to Abdelrazik there, but the focus has mostly been on the passport. So I think Boloh is really important because I think most Canadians believe if they get in trouble overseas, their government's going to help them. And Canada advertises that it will provide consular assistance to people who are detained, but what they mean by consular assistance isn't helping them get home...

is to help them find a lawyer to face a trial. Where it's not a fair trial, they sort of waffle and don't say much, but they certainly don't see that consular assistance as extending beyond trying to help you get a lawyer in jail, really, while you're detained, or making sure that you're getting medical care while you're detained, or something like that, actual assistance, but in the circumstances, but not to get you out of the circumstances. So, Boloh...

affirms Canada's view, but that's not the view I think most Canadians hold. And I think that most Canadians, if they understood the Boloh decision, would be shocked, notwithstanding the allegations against the young men that are over there and the young women. Well, they're not all young, but a lot of them are.

Cheryl:

We really can contrast it to Canada's efforts with respect to the two Michaels that were being detained in China, where Canada didn't really have a lot of power because China wasn't willing to, to let them leave, but they still made a lot of diplomatic efforts to get them back. But in Boloh, the country wants them to leave. So, it's really, Canada does have that ability. Yeah. But I mean, in Canada, it sort of helped Sampson, not at the beginning, but later on when the publicity became bigger and more sympathetic towards Sampson, Canada stepped in to help him. He was another Canadian. And they helped Arar, ultimately...

because of the publicity as well. So it's sort of like if you get sympathetic publicity, they may be motivated to assist, but otherwise they're not. But what's problematic with the Boloh cases is until they denied the Montreal mom who has the six kids the right to come back to Canada, it was based on

gender. The women were coming back to Canada, the men weren't. So you almost wonder if that woman's refusal is just to make it...

Barbara (29:24.034):

to take away the gender bias argument that was there because they haven't stopped any other women from coming.

Cheryl:

It's interesting. So thank you, Barbara, for taking the time to join us today. Before we conclude, is there any project or case or advocacy issue that you're working on at the moment that you would like to share with our listeners?

Barbara:

Well, there's two things. First, Boloh also has a Section 7 component. And what we are, and I think it's really important, the Court of Appeal was very dismissive and said it wasn't really argued. We did a whole factum on it.

But I think there's a causal connection between the treatment the men are receiving and that requires in terms of the principles of fundamental justice that Canada takes steps to protect the men and the one woman who's, well actually she's not part of the case. But anyways, that Canada takes steps to protect.

The other case that we have right now is one that concerns permanent residents, where people probably are not aware of it. But in 2013, when Jason Kenney was the Minister of Immigration, they changed the law so that if a person was found to have ceased to be a refugee, they would automatically lose their permanent residence. And that's problematic in the sense that when Canada gave refugees the right to become permanent residents...

It was meant to allow them to permanently settle and become citizens in the country eventually, but to make this their permanent home. So, in the one case that's sort of the test case before the court, the man had been here 33 years. He went back to his home country for funerals and some weddings because he was the representative of the family in their culture.

And they brought steps to take away his permanent residence. I mean, to find he'd ceased to be a refugee and thereafter take away his permanent residence. He had a wife and kids all married in Canada. The kids were born in Canada. So, it has a very, very profound impact on settled immigrants who may

not have become citizens. I think in a lot of the cases we're seeing it's because they didn't think their English was good enough. So, they were waiting until they were 55 and didn't have to pass the language test.

Barbara (31:34.494):

And so they're then losing their permanent residence because they went back to their home country. That case is an important one because there hasn't been recognition by the courts, no clear recognition at all that permanent residents have a right to family and home and community in Canada. If you live here 30 years lawfully, they can't just take away your residence without looking to see if it's proportional. Did you do something wrong? None of these people did anything wrong. They didn't breach the act...

in any way at all. They're not prohibited from traveling, but they're losing their residents. It's a despicable law that destroys families actually from what we can see, for no good reason. There's no reason to take away permanent residence from someone who can be sponsored back by his wife who he sponsored. I mean, it just doesn't make sense.

Cheryl:

Thank you for that, Barbara. Certainly, the Asper Centre is looking very closely at that case and Downtown Legal Services at the University of Toronto is also representing the Canadian Council for Refugees in that case itself. So, it's an interesting one that's at the federal court level. So thanks again for joining us today.

Barbara:

Okay, take care.

Cheryl (32:50.646):

Welcome back to our practice corner. Today we are speaking with Paul Champ, whose practice focuses on employment, labor, human rights, and constitutional litigation. Paul has extensive experience litigating Charter rights at all levels of court in Canada, including the Supreme Court. He earned his LLB from the University of British Columbia. In 2009, Paul established his own boutique firm, Champ and Associates in Ottawa. In addition, Paul also teaches law courses at Carleton University and the University of Ottawa.

Thank you for joining us in the Practice Corner, Paul.

Paul:

Great to speak to you today, Cheryl.

Cheryl:

So we've been talking with Barbara Jackman about some of the cases that I know that you've been involved in. And I want to start with the Abdelrazik case as a significant and complex Section 6 case. Can you talk a bit about this case?

Paul:

Yeah, so the case of Abusian Abdelrazik, the Minister of Foreign Affairs, involved a Canadian citizen who spent three years of detention in Sudan.

He had traveled there to visit family, and shortly before he wanted to return, he ended up being detained by the secret intelligence service there. And then once he was released from custody in Sudan, he then found that he was subject to United Nations 1267 terrorist list, which banned him from traveling between countries, and therefore Canada would not give him a passport, basically leaving him stranded in Sudan away from his young children and his family in Canada.

Cheryl:

So as you said, he was stuck in Sudan. We mentioned earlier in the show that he was actually living at some point in the embassy. What are some of the challenges litigating a charter infringement when the individual you represented is stuck in another country and facing potentially really precarious circumstances?

Paul:

Yeah, it's really hard. I mean, obviously when you're bringing those kinds of cases, Canada has no direct control usually over the circumstances that your client is facing on a day-to-day basis. You're usually looking for some kind of remedy like in Khadr, you know, they were looking for Canada to ask for his transfer to Canada. And here we were asking Canada to give him a passport or otherwise facilitate his return to Canada. But the risk or challenges that we were wanting to introduce evidence about the abuses, the human rights abuses that Mr. Abdelrazik had faced in Sudan.

Paul (35:09.842):

Also the evidence that we had showing the complicity between the Sudanese intelligence agency and the Canadian security intelligence agency. And our big concern was that he might be detained again, arbitrarily, right? He never faced any charges in Sudan, ever. He was held for three years without charge or trial or anything like that and had been tortured. So obviously we were very concerned what would happen to him. And that's ultimately how he ended up in the embassy because...

What we did is shortly after we initiated the case, we did get some signs that the Sudanese intelligence had heard about the case and were maybe concerned about it. So that's why we told him that he should go into the embassy, the Canadian embassy, and seek safe haven, which is what he did. And that's where he lived for over a year while the case unfolded before the Canadian courts.

Cheryl:

So in this case, he was listed as a terrorist by the UN Security Council 1267 committee which imposed a number of restrictions on him, which all UN member states must enforce. And that, my understanding is that listing occurred even though there was no credible evidence linking him to a terrorist organization. What were the challenges and complexity of litigating this case that intersects with the international legal framework countering terrorism?

Paul:

Yeah, those international sanctions are issued by the UN Security Council or a Committee of the UN Security Council. And you know, you don't have any of the evidence or grounds. It's just, you know, here's the listing. And so, our first sort of strategic approach there was actually to try to step around it.

And we look for exceptions in the listing itself. And in the sanction that says that you can't travel, it just said that you can't travel between countries, but there was an exception for returning to your home country. So, what we did basically is in that court case, we didn't directly challenge the listing regime, although obviously we did note that there was no evidence ever presented to him or any of us that he was a terrorist or...

Paul (37:14.382):

had been engaged in any terrorist activity. So that definitely provided a backdrop for the judge, but we relied on that exception. We said, look, he's allowed to return to Canada and Canada should be providing him with assistance to facilitate his return to Canada. And we also pointed out, you know, sometimes Abdelrazik is pointed to by the courts as a case just about giving someone a passport. And you know, Canada needs to give him a passport, but actually the case was a bit more complex than that because we argued that...

long before he was listed on that international regime, the Canadian authorities, and in particular the intelligence service, had been blocking his return to Canada, that he would have been able to return to Canada long before that, and that was their goal or objective, is that the Canadian intelligence services were doing everything they could to stop him from returning to Canada, and that this was an ongoing course of conduct or pattern of conduct. So, it was a bit broader than just being on the international listing regime. And so, anyways.

To answer your question quickly. We tried to step around it for the purposes of giving him the immediate remedy that he needed, which was getting out of that precarious situation and being repatriated to Canada.

Cheryl:

My understanding was also that the rules made it difficult for others to kind of contribute to, for example, the cost of the plane ticket to get him home.

Paul:

Yeah, I mean, so that UN listing regime was also, there was also an asset freeze and not only an asset freeze, it made it a criminal offense in Canada under the United Nations Act for anyone to donate money to him. So, there was an argument as we've been along that, you know, even paying for the disbursements, you know, paying the court filing fees and court reporting fees that we as this counsel may even be in violation of that law, but we didn't see any way around it. And further...

At one point, we were able to find an airline that was willing to fly him. Like, we put to this airline, we acknowledged that he was on the list, but we said, look, here's this exception, he can fly to Canada. And they accepted that, and they gave him a listing, but then we needed to be able to buy the ticket. And we as lawyers, we weren't prepared to go that far that we were going to spend money to buy a ticket, but there was a number of activists in Canada and Canadians right across the country, coast to coast, donated...

Paul (39:29.938):

Even though on its face, it appeared to be a criminal offense to donate money. So it became quite a cause celeb at the time. And we did get that ticket. And at the end of the day, the RCMP decided not to prosecute anyone.

Cheryl:

Well, it really shows that with some of these cases, it's not just the litigation that you're responsible for, that there's a lot of other kinds of advocacy and practical steps that you need to take on behalf of your client.

Paul:

Yeah, some of these special cases, Cheryl, I mean, had it not been for the fact that the case was so high profile and by the time we were in court had garnered a lot of support, the government may well have appealed, right? Because in that case, we won, obviously, we got this great order that he had to be repatriated within 30 days. But Canada might have appealed if it wasn't for the fact that there was such a big public spotlight on the case.

Cheryl:

So, we heard from Barbara that mobility rights issues are not often litigated. But in the post-911 era, they increasingly come up, such as this case with Abdelrazik. In your view, what role do race and ethnicity play in the deprivation of Section 6 rights in Canada?

Paul:

Well, my experience and my practice, they play a big part, right? I mean, post-911 is the context to look at. We're aware of the Maher Arar case, where he was subject to extraordinary rendition...

meaning he was transferred from one country to another without any form of legal process whatsoever. And you know, that's when the CIA snatched him up in Brooklyn and then transported him to Syria, where he was held without charge and tortured for a year. And you know, his allegations that Canada was complicit in that. There's other the other cases, Ahmed al-Maliki, Ahmed al-Mahdi, like Mr. al-Mahdi, in the public inquiry that followed showed that...

the RCMP was actually trying to facilitate his, well actually in Al Malki as well, they were trying to facilitate his travel out of the country. Because then they were cooperating with these secret services in other countries where they would be detained. So, you know, you can look at it as a section 7 issue that they were looking to, you know, see this individual detained in another country without charge or, you know, and so forth. But really when you looked at underneath what was happening in those cases, and the same thing with Abdelrazik, is that the goal...

Paul (41:43.222):

or objective of those intelligence agencies and law enforcement was just to get that Canadian citizen out of the country and then block their return. So, you know, section 6 is really interesting for that. And when you look at who are the groups that were targeted, well, it was racial and ethnic minorities. And when you're talking about international travel.

You know, Canada is inherently, we're a multinational country. We, except for the indigenous peoples, the first peoples of this land, everyone is, is a settler and has traveled here from somewhere. And, you know, Canada right now, I think I forget what the percentage is now. Like it's 15 to 18%, I think are naturalized citizens. So, everyone comes from somewhere else and that's part of our fabric, right? But that also means that people will have these other relationships and other identities and they will travel.

And that's when they become suspect to, you know, by the Canadian state, the law enforcement intelligence service. So, we've seen it back then, muslim Canadians or Canadians from the Middle East, and you know, more recently we're seeing with Chinese Canadians or, you know, Russian Canadians, Iranian Canadians at different times. It's when we have these sort of inter, moral panics, if you want to call it that, where some population, some segment of populations are suspect. Or in the second world war, right? When we, you know...

third generation Japanese Canadians were interned. So, it's just a little bit of an element of that because Canadians with other identities or other nationalities in some cases tend to travel. I think the mobility power, the way governments can control mobility and regulate mobility or travel between borders, I think those are the Canadian citizens who are most at risk of the abuse of those powers.

Cheryl:

And when you bring national security interests into that. You can see how you mentioned Section 7, which is the life liberty and security of the person section of the Charter, as well as remedies. So that these issues become fairly complex. So. it isn't just the Section 6 mobility rights. From a practical standpoint, I mean, I mentioned remedies. They're often the most important part of Charter litigation. That's at least what I tell my students, that you kind of start with what is the remedy that you want to get.

Cheryl (43:56.81):

before you start taking on some litigation. In relation to mobility rights, that remedy is central. Obviously, people either want to come back to Canada or be able to leave Canada or move across Canada. As a litigator advocating for an individual's right to re-enter Canada, how do you persuade a court to adopt an innovative and effective remedy that can ensure an individual is able to exercise their mobility rights?

Paul:

Well, it's really challenging. You know, you have to take a look at what are the motivations of the government, what's really happening, because again, in the Abdelrazik case, it was clear that they'd used many different subterfuges to try to block his return. And part of our worry was that if we just got a court order and a judgment saying, oh, you should give him a passport, that wasn't nearly going to be enough. We knew there was going to be other things that...

the government would probably do to come up with these technical arguments about why they couldn't repatriate him. So, we didn't want a judge who was functus, right? So, in that case, we led the evidence of the pattern. It was central because it was central to the remedy that we knew we needed. We knew that if we just got a judge saying, yeah, give him a passport, the 1267 list doesn't prevent him from traveling to his home country, give him a passport. We knew they would come up with other ways to block his return. So in that case, we asked the judge to remain

and we asked for like a Doucet-Boudreau remedy that the court would remain seized until he was back on Canadian soil. And the evidence was such that the judge was persuaded that indeed that would happen. We're seeing it, I think, similarly in the case of the Canadian citizens in Syria, which we may talk about later, but you know, in that one, Canada has been coming up with excuse after excuse after excuse about why they can't assist those individuals to return to Canada.

But over time, those excuses have kind of fallen away. We know they're really bogus. So, it's a real challenge when the national security state has a goal or objective of keeping a Canadian citizen out of the country. How do you try to fashion a remedy that can properly address that?

Cheryl:

And just for our listeners, when a judge is functus, that means they've made their order, and they can't do anything more. It's then up to whoever they've ordered to do something to do it. And governments will say, we don't need you to order us to actually do something. You can just do a declaration and we will honor that declaration. And we saw that with Omar Khadr case where they made a declaration that his rights had been infringed. The whole idea was to bring him back to Canada, but the government didn't want to do that. So, they wrote a sort of tepid letter saying you had to bring him back to the United States. But the Doucet-Boudreaux...

remedy, which was a case involving French language schools, was really about showing a history of the government not honoring their obligations. And so that's what you've kind of described here, that they had this long pattern of frustrating Mr. Abdelrazik's rights, and so you needed to give the remedy a bit more heft.

Paul:

Yeah, I mean, the presumption in the courts is that the honor of the Crown is such that they will respect a court judgment, but I'll say it right now, it's far more frequent that the Crown acts very dishonorably. And that's why you're in court in the first place. And there's often a pattern of dishonorable conduct. And I've seen it far too often when you're dealing with human rights that Canada tries to sidestep or get around or circumvent their obligations to respect human rights. So, I think it's a really powerful remedy. Like I can talk about another context to human rights legislation. I was in the..

First Nations Child and Family Caring Society case, right? The initial decision came out in 2016. And if that tribunal had been functus, what would have happened, right? So, but as it turned out in that case, there were about eight or nine other orders after that trying to get Canada to comply. So, it's a real challenge, you know, unfortunately that the honor of the crown, I think...

It's almost time for the court to sort of, I think, abandon that principle because far too often human rights cases, we see quite plainly that the Crown is not acting honorably at all.

Cheryl:

This might be the right time to return to the Boloh case. We talked about that with Barbara Jackman as well. I understand that you are filing an application for leave to appeal to the Supreme Court of Canada in this case. Could you just tell us a little bit more about both the sort of remedial issues in this case, but also some of the...your interest in what you've been working on.

Paul (48:27.934):

Yeah, so Boloh is obviously the case involving the large number of Canadian citizens who are being detained arbitrarily in prison camps in Syria. They're suspected of being associated with ISIS, but there's no direct evidence of that. But more fundamentally, whatever they are or are not guilty of, they're being held in these prison camps by a non-state militia...

where there's no courts, there's no charges. The detention has been indefinite and prolonged. It's been five years plus for some of them. And it's also not simply some of the individuals are adults. These are Canadian citizens who also have children. So, you know, it's almost horrifying for me to kind of talk about, Cheryl, that there's Canadian children, very young children who are obviously innocent, who are in these prison camps that are...

You know, there's no proper sanitation, there's no medical care, they're highly dangerous because there are ISIS actors in there, there's people being murdered on a regular basis, there's tents being set on fire, there's torture by the militia that's holding them in some cases, it's the most deplorable type of conditions of confinement you can imagine. And here's the kicker in this case is that the militia is saying, look, we want to get rid of these foreigners, get them out of our country.

Hey, you countries of nationality, come take your nationals and get them out of here, including Canada. But Canada is just refusing, right? So here we have a situation where there's a non-state militia detaining Canadians in circumstances that clearly constitute serious human rights abuses saying, we'll let them go, you know, we'll let them go. You just have to repatriate them. And Canada is saying no.

So that's what that case is about. And it was initially started by Lawrence Greenspon here in Ottawa for a large group of those individuals. Later, Barbara Jackman got involved and they won in the federal court in early 2022, actually in January of this year. It's moved pretty fast with the courts now, obviously because of the dire conditions these individuals are facing. And the court found it was a violation of section six and ordered Canada to repatriate them. Now, interestingly...

Paul (50:44.346):

Right before the court rendered its judgment, like literally days before, the government folded its hand on the women and children, and they informed the applicants and their counsel that they would repatriate this large number of women and children. And those women and children have indeed been repatriated. And so, then the case came down to just four men. Canada said, we're not going to repatriate the four men. So, you know, and so then went on appeal, just about the men.

And the federal court of appeal ruled in June that Section 6 had not been violated and dismissed the application in its entirety. And now, it's before the Supreme Court of Canada, I've been retained by one of the families of one of the four remaining men, and I'm working closely with Lawrence and Barb. And yeah, we've just completed that application. We filed the application for leave back in August. We've got the Crown's response, and we just finished our reply earlier this week. So we're...

We're crossing our fingers for this very important case. You know, as a constitutional lawyer, I've been looking at these issues for a long time. It's a very fascinating case for me, but I mean, the lives of these individuals are at risk. You know, they're experiencing horrific conditions and torture, I can say. And we're really hopeful that the court will take up this case and we'll get to argue these important constitutional issues before the highest court.

Cheryl:

Well, it sounds like a case that we would hope the court decides expeditiously as well. We'll be watching that. I know the Asper Centre will be watching that carefully. I want to switch gears a little bit now and talk about section 6 with respect to movement across the country as opposed to in and out of the country. The COVID-19 pandemic raised questions about the scope of mobility rights and the ability of governments to limit inter-provincial travel. So, in Taylor and Newfoundland and Labrador...

The Newfoundland and Labrador Supreme Court held that the denial of an application to enter the province infringed a citizen's Section 6-1 rights, but could be justified under Section 1. Interestingly, the court found that the right to inter-provincial travel fell under Section 6-1, and that Section 6-2 only included the right to travel to a province and take up residence. What are the implications for this decision particularly for the rights of non-citizens, but also just for the people involved in this case itself?

Paul (52:59.33):

Yeah, it's a fascinating case and a great one in terms of expanding on the limited jurisprudence that we have around section six. As you pointed out, Cheryl, section six one is the fundamental right of just citizens of the right to leave Canada, remain in Canada, or enter Canada. And section six two applies to citizens and permanent residents saying that they can...

take up residence in or work in any province. And so, the issue in this case was that Miss Taylor wanted to travel to Newfoundland to attend a funeral for her mother, but it was during the pandemic restrictions making it where the maritime or Atlantic provinces, I should say, had created their bubble and were preventing any travel at that time. So, she argued that this was a violation of her section six rights, but the tricky thing was that she wasn't traveling...

to take up a residence, like to move to Newfoundland, nor was she traveling there to work. She was traveling there to visit for a very important personal decision, but still it was that. And so, the way it ended up being argued and the way the court ruled was that just general mobility of Canadian citizens for any reason to travel between provinces was actually protected first and foremost under section six one.

And the court went through an analysis to say, well, remain in can also mean travel between provinces, and therefore there is this fundamental right of Canadian citizens to travel between provinces, and concluded that there was a prima facie infringement of the Section 6 right.

Cheryl:

We've always heard, and we heard this in one of our very first episodes of this podcast about Section 1, that the idea of something, extreme circumstances which allow for the justification for limiting rights,

pandemics are often thrown up as one of the reasons. So, I think that it's a case that also very much turns on the Section 1 analysis.

Paul:

Yeah, absolutely. It clearly was a Section 1 case. You know, the history of the mobility right, you know, which is obviously enshrined in our international treaties, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights and many people and courts actually like in highlighted that the right of mobility is also protected in the Magna Carta.

Paul (55:22.358):

And it's because this idea of mobility goes back centuries. It was one of the fundamental ways that, that sovereigns exercise control over their populations. And one of the reasons had to do with the plagues, you know, so it's interesting the history of the mobility right or the right of mobility and the restrictions on mobility between, between territories or borders.

historically was tied to issues around public health. So, it's interesting, we get stuck in the 20th century, well, 20th, 21st century sometimes, we've seen everything under the sun actually, but it's a little blip of human history. And so while constitutional protections of human rights are relatively recent, at least in the Canadian legal landscape, some of these issues, it's not surprising that they have happened in Canadian history or human history, and we're now starting to see them rise again.

I think we're going to see more litigation. There's some cases that are ongoing across the country around these issues and around pandemic restrictions, whether it's freedom of religion and so forth. But mobility was one of the big ones as well. And it's definitely a section one issue. And I'm curious to see what is the justification for government. And I think it should be a strict justification.

Cheryl:

It'll be interesting. We are in changing times. It'll be interesting to see how climate change affects mobility rights. You know, Canada's got both desirable places to be and also undesirable places to be during with climate change and temperature change affecting us. So, I want to thank you very much for this conversation. But before we wrap up, any last thoughts on Section 6 of the Charter and the importance of mobility rights in Canada? Or is there a specific mobility rights project or issue you'd like to highlight?

Paul:

You know, I guess I'd just say this. I mean, you highlighted a great point there, Cheryl, about, you know, climate change may impact mobility. And I think Section 6 could end up being, you know, one of our more important rights. It is actually one of the only charter rights that is not subject to the notwithstanding clause. People forget that sometimes. It's not subject to the notwithstanding clause. So governments are not going to be able to override Section 6 in the same way that they're doing in other, you know, in Quebec, for example, with the hijab or Crazy Scott Moe there in Saskatchewan on the rights of...

Paul (57:46.67):

equality rights of children. So, I think it's going to be interesting where we'll see a lot of section one litigation in future where we know when and if governments try to control mobility and movement of Canadian citizens and you know having to put forward good evidence and rationalizations for it and I think we're going to see a lot of section one litigation around it.

Cheryl:

We'll be looking for that. So thank you very much, Paul. It's been a great conversation.

Paul:

Thanks, Cheryl. I really appreciate it.

Cheryl:

So, I want to thank our guests, Barbara Jackman and Paul Champ for their insights and expertise. And thank you to the listeners for tuning in. I hope this podcast has broadened your understanding of mobility rights in Canada. Follow us if you want to keep abreast of new episodes as they drop. In November, we will be recording a live event at the law school for the Asper Centre's 15th anniversary, discussing the major cases that the Asper Centre has been involved in, and talking to a panel of alumni about their interesting constitutional law practices.

Music:

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

[End]