Charter: A Course S4E1 Constitutional Remedies with Professor Kent Roach

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

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**Kent Roach** (pull quote):

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At the end of the day, damage awards for governments are kind of like a tax on unconstitutional conduct and they can always increase our taxes if necessary as a means of paying it. And at some point, you actually need to enforce constitutional standards. So I'm a little bit leery of where charter damages are going, both because they're not

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for the individual, but also in a lot of these mass charter damage cases, I think it's better to deal with the underlying problem, such as how we treat people in prison, which unfortunately is often terribly.

**Intro Music:**

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

00:52

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

**Cheryl Milne:**

Hello and welcome to the fourth season of Charter of Course, a podcast created by the David Asper Center for Constitutional Rights.

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at the University of Toronto.

**Cheryl Milne:**

I'm Cheryl Milne, your host and the Executive Director of the Asper Centre. We focus on current Canadian constitutional law issues, highlighting aspects of constitutional litigation and exploring the meaning of our rights under the Canadian Charter of Rights and Freedoms. Whether you are a law student, a lawyer or a curious person, we hope you'll learn about an aspect of Canadian constitutional law and litigation that interests you.

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In today's episode, we are revisiting the topic of constitutional remedies, which we discussed all the way back in season one. When a court finds that a law or action is unconstitutional, the next step is for the court to make an order to rectify the constitutional violation. Courts are primarily empowered to grant remedies by two sections of the Constitution Act 1982. First, Section 52 sub one provides that the Constitution of Canada is the supreme law of Canada.

02:15

and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Secondly, Section 24-1 of the Charter provides that anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied, may apply to a court of competent jurisdiction to obtain such a remedy as the Court considers appropriate and just in the circumstances.

02:43

And then finally, section 24 sub two deals with the admissibility of evidence obtained from a charter breach. So to discuss remedies, we are excited to welcome back Professor Kent Roach to the podcast. Professor Roach is a professor of law at the University of Toronto Faculty of Law. His research focuses on criminal and constitutional law. He was appointed to the Order of Canada in 2015 and is also the co-founder of the Canadian Registry of Wrongful Convictions. Most relevant for today.

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He is the author of Constitutional Remedies in Canada, as well as Remedies for Human Rights Violations. Kent, thank you so much for returning as a guest.

**Kent Roach:**

Good to be chatting with you, Cheryl.

**Cheryl Milne:**

I mean, the last time you were here, we discussed remedies in the context of climate change. I encourage our audience to listen to that episode as well, but just as a reminder, let's start by reviewing a few basic points and trying to unpack all of that stuff that I just read out. First, what is the purpose of remedies?

**Kent Roach:**

03:41

Well, I think the primary purpose is to respond to pecuniary or non-pecuniary arms that the applicant has suffered. So the courts have stressed you need an effective and meaningful remedy. I think a second though is to look towards minimizing similar charter violations in the future. Looking backwards, compensation. Looking forwards.

04:10

constitutional compliance.

**Cheryl Milne:**

So from a practical perspective, why are remedies so important to the individual litigant?

**Kent Roach:**

Well, I mean litigants are going to have to spend a lot of money, a lot of psychic costs, and I think that they want to have something that is meaningful at the end of the day. Now for some people that will be a lot of money damages, for other people they may just want a declaration that their rights have been violated.

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So I think, you know, lawyers need to listen to their clients and really get a sense of what they want to get out of the litigation. What they don't want is a kind of trivial remedy that really doesn't respond to what they've experienced.

**Cheryl Milne:**

Yeah, it's what I tell the students who are taking the Esper Center Clinic that one of the first things you need to think about when you're doing constitutional litigation is the remedy that you're seeking. It's

05:07

It is a very onerous thing to take a charter case, particularly if you have to go all the way to the Supreme Court of Canada if you're not gonna get anything out of it in the end. An important theme that will permeate our discussion of remedies is the tension between the role of judges and the executive and legislative branches of government. Can you speak briefly to how remedies engage concerns about judges overstepping their role and how that impacts?

**Kent Roach:**

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Yeah, no, I mean, that's a very interesting question and probably why I got into remedies, you know, 35 years ago. I think judges don't decide questions of rights without thinking about remedies. And so the historical evidence is pretty clear that Brown versus Board of Education would not have happened unless the court had already decided to go pretty slow.

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I think many people would say too slow on the issue of remedies. And so similarly in climate change, I think a lot of litigation gets stuck at the issue of well, you know, what can we do to remedy this problem? And so that was one of the reasons why more recently I've written about remedies for climate change.

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they can't provide a remedy. But I think judges are starting to realize that they don't have to come up with all of the solutions. And, you know, this goes back to the dreaded word of dialogue with the legislature and the executive. But a recent decision of the Federal Court of Appeal in the LaRose climate change case, I think quite rightly says we shouldn't allow concerns about remedies to shut down climate.

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change litigation at a preliminary stage.

**Cheryl Milne:**

Well, you often hear concerns about judges not being the legislators. They shouldn't be drafting the legislation and are finding a remedy that looks more like what politicians would do. And so how much does that kind of concern, do you think, play out in the cases?

**Kent Roach:**

Yeah, no, I mean, certainly under Section 52, the courts have always been cautious about leaving policy choices.

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to the legislature so the courts will only use reading down or severance if they're pretty sure that parliament faced with the options that the court presents them would have done this so courts i think quite rightly say that if there's not an obvious question when you compare unconstitutional legislation with how they interpret the charter then you should

07:58

give the legislature time to respond. And it's kind of ironic that they've been criticized by this, by, you know, for engaging in judicial activism. To my mind, it has to do with their respecting institutional roles and the fact that it's up to parliament to select among multiple ways to comply with the charter.

**Cheryl Milne:**

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So that's a nice segue into my next question, which has to do with how Section 52 sub one works, which authorizes courts to issue these declarations of invalidity that render the unconstitutional law of no force in effect. So as a preliminary point though, could you kind of explain to our listeners the jurisdiction that different courts have? For example, does a case need to work its way all the way up to the Supreme Court of Canada to result in a law being declared invalid?

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Or can lower courts issue those declarations?

**Kent Roach:**

Yeah, so the actual declaration of invalidity is technically a preserve of the superior courts. Now, that's a bit, I think, of a historical anomaly because the Supreme Court, I think, has quite rightly stressed a strong presumption that all administrative tribunals, which, of course, is the law that most people get to see,

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uh... should apply the charter similarly if you're in provincial court which is not a superior court of jurisdiction that doesn't mean that you can't argue that the law that you're going to be convicted under is unconstitutional so provincial courts administrative tribunals certainly get into thinking about section fifty two but the actual

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declaration of invalidity is kind of reserved for superior courts, superior courts.

**Cheryl Milne:**

So that deals with who can make these declarations. I guess my next question is, who can ask for them? So who has standing to seek a Section 52 type remedy?

**Kent Roach:**

Yeah, well anyone charged with an offense can claim that the offense is unconstitutional, even if it doesn't

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necessarily apply to them. So, you know, you think of Big M Drug Mart as one of our first charter cases. As a corporation, they didn't really have freedom of religion or conscience, but they had no problem in getting Sunday closing laws struck down. In other non-criminal cases, you can have standing if you're directly affected, but you can also have standing

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which called public interest standing, something that really predates the charter. If you have a genuine interest and you're going to do a good job and you propose a reasonable and effective way to deal with the litigation. And so, I think this is one way that our courts have mitigated some of the access to justice questions that they allow

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groups that are perhaps better situated to claim that a law is unconstitutional.

**Cheryl Milne:**

Yeah, and I think the leading case now is the BC Attorney General and the Council of Canadians with Disabilities case that really set out that you can go ahead with this kind of declaration even when there's another case going on that is related, but also just demonstrating that you have some kind of interest.

**Kent Roach:**

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Yeah, and that goes back to the history of the Asper Center, because I think one of our first cases that we did was Downtown Eastside sex workers, where the late Joe Arvay was representing a group of sex workers in BC. And they were eventually granted standing, although it took a Supreme Court of Canada case to decide it. But of course, the Bedford litigation was already going on.

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on the merits, they beat Downtown Eastside Sex workers to the Supreme Court. And I think some people have speculated that maybe the decision and the argument would have been different had Downtown Eastside gotten to the court first or at the same time as the Bedford applicants.

**Cheryl Milne:**

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So, typically, the court will issue either an immediate or a suspended declaration of invalidity. Can you explain the difference between the two and why might a court order one and not the other? This may get at another sort of case that the Asper Center was involved in, one or two perhaps.

**Kent Roach:**

Right, right. So, I think when the charter was enacted, most people just thought the only thing courts could do would be an immediate.

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Declaration of Invalidity. But because if you read the charter, it doesn't talk about suspended declarations of invalidity in say the way the South African constitution does, which was inspired by Canadian practice. But starting with the Manitoba Language Reference, the courts have kind of come up with the recognition that sometimes an immediate declaration of invalidity will harm

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important social interests so in the matter of a language reference it would have been basically wiping out all of Manitoba's laws because they were all enacted in English when they should have been enacted in both English and French and so to make a long story short the courts now recognize that if the government can establish a really good reason

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why the Declaration of Invalidity should not take immediate effect, then the courts will give them a kind of temporary reprieve. And, you know, sometimes they're as short as six months, which seems to be the flavor of the day now. And of course, that puts a lot of pressure on Parliament to actually get its act together and come up with new...

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legislation, whether it's within a six or a 12 or an 18-month suspended declaration of invalidity.

**Cheryl Milne:**

Well, I think that it was in the Carter case, which is medical assistance and dying that they gave a one year declaration or one year suspension, but then the government ran into trouble because they didn't actually enact the legislation in time. So they had to go back and get an extension.

**Kent Roach:**

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Yeah, and you know that that has happened quite a lot. Now, you know, the Carter case and the subsequent Ontario versus G case, I think, have, you know, made that a somewhat more manageable remedy, because in both cases, it was recognized that when you suspend a declaration of invalidity, at the same time, you can give an individual remedy, especially to the person who's gone all the way to court.

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And so what we saw in Carter was although parliament was given time and extensions to deliberate on the fraught issue of medical assistance in dying, the people that met the criteria in Carter, if they went to court, could obtain an exemption from the suspension. And then

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The Ontario v. Attorney General v. G case, Justice Karakatsanis recognized that 52 and 24 shouldn't be seen as watertight compartments and that there is a case for, on the one hand, telling the legislature, you get some time to come up with a new solution. But telling the successful litigants, you've established that

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this law violates your charter rights, and we're going to give you the immediate advantage, but perhaps you only the immediate advantage of your litigation. So, you know, this is a way I think of reconciling, respecting institutional rules and the limits of the courts while also ensuring that individuals whose rights are violated receive effective remedies.

**Cheryl Milne:**

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That sort of touches on my next question, because I think if a law is unconstitutional, it's unconstitutional from the day it was enacted, in a sense. And so, what we're talking about are really either immediate but really prospective sort of effects of these declarations, but people may have suffered past harm, so there may be a retroactive aspect to the effect of the law being unconstitutional. So what's the difference between these sort of

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prospective kinds of considerations or declarations and retroactive declarations?

**Kent Roach:**

Yeah, no, I mean, it's an interesting question. I mean, I think in theory, we think of everything being retroactive.

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But starting with the Warren Court in the United States, we've made more use of perspective rulings because often the perspective ruling is made when there's a really sharp change in the law and the

court is concerned that it's just going to unsettle too much to make a declaration of invalidity fully retroactive. And so of course,

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And the courts realized that in cases like the Manitoba language reference. The Albbashir case is an interesting case because I think if you talk to the person on the street, they would say, how could a person be convicted under an unconstitutional law? Because in Albashir, the court decided that the law...

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that Mr. Albashir was convicted on was unconstitutional, yet at the same time, they convicted Mr. Albashir. And so I think if you think about it like that, it looks like an injustice. But what the court actually did in Alashir, and this is why you gotta read their law of judgment and not just get the news, I guess, from the media.

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is the court convicted Mr. Albashir because they were convinced that the constitutional defects that they identified in the legislation didn't apply to Mr. Albashir. So he was, in their view, justly convicted under the law. So, you know, on first glance, and maybe on second glance for some of our listeners, it appears like

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it's an odd decision, but the court does have a kind of rationale. And to my mind, it's the flip side rationale of the court saying on the one hand, we're going to suspend the declaration, give Parliament a year to fix the legislation, but we're going to give you an immediate remedy because you deserve it. Whereas in Albashir,

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As I read it, at least, the court was saying to the accused, you don't deserve any individual remedy because even under a constitutional offense, you would have been convicted.

**Cheryl Milne:**

Of course, declarations of invalidity are not the only available remedy when the constitutionality of legislation is challenged. Can you highlight a few other key remedies that courts sometimes opt for in response to unconstitutional legislation?

**Kent Roach:**

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Yeah, I mean, you know, one is reading down or through interpretation. And so I won't mention the Canadian foundation of children's cases, because I don't want to get your blood pressure up, Cheryl, but, you know, we, we saw that say in the child pornography legislation is rather than strike it down. What the court did was really two things. One, it read it down or interpreted it in a narrow.

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narrower way to comply with constitutional standards. And then I think it severed one or two words from the legislation that it thought was unconstitutional. So those are the remedies that are most often used. One interesting thing is our Supreme Court has fairly consistently, going back to Seaboyer and...

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Ferguson said that you can't exempt someone from an otherwise, in order to save a law from unconstitutionality. Now you can exempt someone from a suspended declaration of invalidity. But I think the interesting point there is it really is a different style of constitutional adjudication that we have in Canada.

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than in the United States because in the United States, constitutional exemptions or what Carol Rogerson, a long time called, you know, as applied declarations of invalidity are kind of the normal constitutional remedy. And so when someone like Cass Sunstein defends a one case at a time approach, it's tied to constitutional exemptions.

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Where in Canada, we can't really do a one case at a time. So, if you're dealing with a mandatory sentence, you can't simply exempt someone from it. You actually have to strike it down. Or similarly with the rape shield legislation in Seaboyer, it was struck down. Whereas what the Americans would have done is say, well, in the few cases where we think the legislation would have enough.

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constitutional effect will simply exempt the accused from the legislation. So again, I obviously think remedies are important and they help explain the style of our charter litigation.

**Cheryl Milne:**

Well, another thing that courts will do is read in. So when there's under inclusive legislation, for example, and I think probably the most famous Canadian case would be Vriend.

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where the human rights code, Alberta, did not protect on the basis of sexual orientation.

**Kent Roach:**

Yeah, no, and you're right, that's obviously a very important precedent. Some critics would say, well, that's the court legislating, reading in words to the legislation. But if you read the court's jurisprudence, they said, look,

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That was really the only constitutional option because we didn't think Alberta was so opposed to including sexual orientation that they would just repeal the entire Human Rights Act. And so there was legislation, I think two years after Vriend about the omission of same-sex couples in Ontario legislation, and the court didn't read in. They rather kicked it back.

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I think it was to the Harris government, and they didn't want to call same-sex couples, so they used that kind of distinct legal terminology, but basically extended the same benefits and burdens that opposite-sex couples have. So Vriend is an important precedent, but it's not one that should be kind of over-read, because courts will only read

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in words if they're pretty clear that that's the only constitutional answer given the legislation that has been found to be unconstitutional. So what the court's trying to do is reconcile the legislation which is unconstitutional with the Charter and in Vriend the court quite rightly felt the only way to do that.

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was to read sexual orientation into the Alberta Human Rights Code as a prohibited ground of discrimination.

**Cheryl Milne:**

I now want to move to the rather broad remedial section, section 24-1. It's also sort of the more personal remedy, as it's been called, which empowers the court to grant appropriate and just remedies, which seems like the limits are only your imagination.

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Although we touched on this in our previous discussion on remedies, could you first remind our listeners how section 24-1 differs from section 52?

**Kent Roach:**

Yeah. So, I mean, 52 is really directed to the legislature and 24-1 is directed to when an executive officer, probably most frequently a police officer, violates a person's rights. So to me, that's the big difference.

**Cheryl Milne:**

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So this language of appropriate and just, as I said, it's quite broad. What does the caseload tell us about how to define that?

**Kent Roach:**

Yeah, well, I mean, you know, 24 one is there because the Canadian bill of rights, the courts were very loathe to award remedies. And so the Canadian civil liberties association, Alan Borovoy and others really said we need to.

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have a strong remedial clause. Appropriate and just, I mean, I think there's no originalist interpretation or no textual interpretation to it. But what the court has said in Doucet-Boudreau,

which is one of our leading remedial cases decided in 2003, is to be appropriate and just, you have to look at some basic principles. So one principle.

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is you need to have an effective remedy that responds to the violation and responds to the circumstance that those whose rights are violated find themselves in. The other principles are the remedy has to respect the institutional role and it has to be fair to everyone who's affected by the remedy. So not only the applicant, but also the person who's affected.

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the defendant, which in the charter context is usually a government defendant.

**Cheryl Milne:**

So in practice, what does this actually mean for litigants? What kind of orders do courts typically make under Section 24-1?

**Kent Roach:**

Well, I mean, the go-to remedy, and you know, I think litigants need to know this going in. I mean, I think the go-to remedy is still the declaration. And the declaration is, you know the court

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says, you know, your rights were violated in the past, and they may say, this is what has to happen if you are to comply with the charter. The problem with that is it's not kind of self-executing. And so Little Sister's Bookstore, another litigant represented by the late Joe Arvay, got a declaration.

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that basically customs were violating its equality and freedom of expression rights by targeting imports from this small bookstore that catered to sexual minorities. And so they got the declaration, but once the declaration was done, the courts didn't retain jurisdiction and Little Sisters still was having a lot of problems

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getting the books that it wanted to sell imported across the border. And so it had to start a second round of litigation, which unfortunately never really got off the ground when the Supreme Court denied them advance costs because this wasn't Chapters or Amazon. This was a small bookstore in British Columbia.

**Cheryl Milne:**

So sometimes what you see under this section also are things that

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where that's ordering the government to do something or to to stop doing something. So when we're talking about government action as opposed to legislation. So how does that work for for litigants and how might that be an effective remedy under section 241?

**Kent Roach:**

Well, I mean, courts often like to use declarations because they can be fairly general about what the constitution requires. If you're asking for an injunction,

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a mandatory order because it can, at least in theory, be enforced by contempt of court and someone could be fined or even someone thrown into jail. The courts have to be quite explicit about what it is that governments can or can't do. And one of the problems is that this demand for specificity butts up against the institutional role.

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principle and it butts up against it because say in a prison case if you wanted to have a mandatory Injunction you'd have to say not that you can only lock down Prisoners when it's reasonable or even when it's necessary Because that's not enforceable you'd have to say you can only lock down prisoners for 30 minutes at a time and you know for for understandable reason

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Judges are not terribly eager and they don't feel terribly well equipped to make those kind of detailed orders that can be enforced through contempt.

**Cheryl Milne:**

I can think of an example where it was a straightforward order. It was Interim injunction where many years ago a high school student, Mark Hall, wanted to take his same-sex partner, boyfriend, to prom at a Roman Catholic high school.

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And now it was just on an interim basis, but it was really the end of the case, which was the court ordered the school board to allow him to go to the prom with his date.

**Kent Roach:**

Yeah, and we saw that in the United States in Cooper and Aaron, where the court said, you will let these black students into Central High in Little Rock, even though there was massive.

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opposition. So, I mean, I do think that there is a role for mandatory orders. But I also think that you have to think about how specific they're going to be and anticipate all of the different contingencies. But in this case, as in Cooper and Aaron, it seems to me that there really was only one right answer.

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I mean, the same thing happened with the Insight, say for drug consumption, when the minister was very reluctant to allow the Insight service to continue. At that time, the Supreme Court kind of said, well, look, on the basis of the government's own evidence, this is the only answer.

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why, because it's clearly going to save lives. And also the government's own evidence suggests that it's not making crime, that it is an increasing crime. Now, whether the court would decide that way today, because we've had more experience with these issues, I think is, you know, maybe an open question. But I think that there are some cases where justice really demands a fairly clear and sharp.

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mandatory order and if you don't follow it, then the court's going to do something about it, whether it's a finding of contempt, a fine, or even putting someone in jail until there is compliance.

**Cheryl Milne:**

And we talked about how expensive it is to actually launch a court challenge, and that sometimes what the litigant is looking for is some sort of monetary compensation. So in a case called Ward,

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and the city of Vancouver, the Supreme Court confirmed that damages are an appropriate remedy for charter violations under Section 24-1. But I think as Adam Schenck recently put in a National Journal of Constitutional Law article, which we will link in the show notes, the optimism which initially accompanied the Ward decision hasn't necessarily been borne out. What's your view about charter damages now?

**Kent Roach:**

Yeah, yeah, no. And, you know, I represented

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uh, BC civil liberties and Asper, uh, in, uh, Ward. So you might want to post next Adams, my, uh, my piece where I, you know, I think I call it a promising spring for charter damages, cause it may be that Adam was right. So Ward was, you know, a case where a civil rights lawyer, very nice person out in BC, Cam Ward, uh, was

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detained around a public protest, I think it was Prime Minister Chretien and he was strip searched in violation of constitutional standards articulated in the Golden case in 2001. And because he was a lawyer, a civil rights lawyer, he really didn't want to just lump this. And so he went to court.

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asking for damages. He wasn't looking to get rich from this. And to make a long story short, the Supreme Court of Canada laid out, I think, an excellent test for charter damages that they're not automatic. You have to establish that you need damages for either compensation, vindication, or deterrence. And then it's up to the government in a kind of mini section one way.

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to show that the damages would not be good, not good governance, and then you award a quantum. But in retrospect, I think the mistake that we made in Ward was we didn't appeal on the quantum of damages. And the quantum of damages was $5,000. Now, $5,000 doesn't begin to cover even your full litigation costs,

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awarded party and party costs. And so unfortunately, the $5,000 quantum has haunted the Ward jurisprudence. To be sure, there are some cases that go above $5,000, but even recent cases that I've been looking at are still kind of affected by this $5,000 quantum. And you know, one of the things about that...

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I did some historical research and old-time listeners may know that in the 1950s, damage awards were the way the Supreme Court really expressed its concern about the abuse of the rights of minorities in Duplessis, Quebec. And when you go back, and you look at those damages awards.

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Some of them were only for two or $3,000 in the 1950s. But think of what you could buy in the 1950s for two or $3,000. And to think that that compares with what Cam Ward could buy with $5,000 in 2010, which is where the Ward case. And I've seen a recent case where an indigenous prisoner's medicine.

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was unconstitutionally searched. So a violation of Section 8, as well as freedom of conscience. And the federal court gave him $7,500 worth of damages. Well, maybe better than nothing, but I think that kind of award really raises a question of, will that be a good thing?

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say, yeah, it was worth it. That's an effective and meaningful remedy that I got $7,500, even though most of that is probably going to go to litigation costs.

**Cheryl Milne:**

Well, it hardly serves as a deterrent as well for governments, if that's all they're having to pay.

**Kent Roach:**

Exactly. And this is why now the action in charter damages is in class actions.

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because they're really not economically viable, brought on an individual basis. And they're really brought by people like Cam Ward or Mr. Ewart, who was the successful plaintiff in the medicine bundle case. They're made to make a point. And that's an important feature, although I wish our justice system would do a little bit.

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better by these people. But I also worry about class damage awards because there's a certain commercialization in the class action bar. And I'm not sure that class action awards, which have run into millions of dollars, do they really repair time spent in solitary confinement? And so

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you know, there's kind of a basic question is at the end of the day, damage awards for governments are kind of like a tax on unconstitutional conduct. And they can always increase our taxes if necessary as a means of paying it. And at some point, you actually need to enforce constitutional standards. So I'm, I'm, I'm a little bit leery.

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of where charter damages are going, both because they're not economical for the individual, but also in a lot of these mass charter damage cases, I think it's better to deal with the underlying problem, such as how we treat people in prison, which unfortunately is often terribly.

**Cheryl Milne:**

And as you mentioned with the commercial aspect to them, it's hard not to be a bit cynical that the only people who are actually.

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gaining from it are the lawyers who are taking the cases on.

**Kent Roach:**

Yeah, well, I mean, I was too diplomatic to point that out, Cheryl.

**Cheryl Milne:**

But continuing on the damages topic, just generally, there's a recent case, again, the Asper Center was involved in that, which is the case called Power, where they held that the Crown does not have absolute immunity for the enactment of unconstitutional legislation as a case seeking damages.

40:09

Could you tell our listeners a little bit about that case and what it means for the availability of charter damages against the Crown?

**Kent Roach:**

Sure, yeah. So, I mean, as I said, the court came up with this very, I think, clear and principled analysis in Ward about how you should decide whether charter damages are awarded. But in a case called Mackin, and before that a case called Guimond, the court said,

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If you're seeking damages caused by unconstitutional litigation, then the government has what's called a qualified immunity. People may be familiar with qualified immunities. The American courts love qualified immunities. What happened in Power is basically the government in a very aggressive argument that still surprised me.

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said, not only should we not have qualified immunity, we should have absolute immunity. We should never have to pay damages caused by unconstitutional litigation. I mean, talk about turning back the clock. This is like going back to the days of the king doing no wrong.

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**Cheryl Milne:**

Rather it's like it's unconstitutional legislation, but rather than litigation, right?

**Kent Roach:**

Yeah. Sorry. Thanks. Um, so yeah, yeah. So, so, yeah. So, so, so the government was claiming absolute immunity for any damage caused by unconstitutional legislation. And what the majority of the Supreme court did was they basically had it preserved Mackin. So now if you're seeking.

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damages for that that derive not from an executive action kind of a rogue police officer, rogue prison guard violating your charter rights, but it's actually legislation or unconstitutional conduct that parliament has authorized. You have to prove not only that your charter rights are violated.

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that you need damages for compensation, vindication, or deterrence, but you have to also prove that the legislation when it was enacted was clearly unconstitutional or enacted in bad faith or in an abuse of power. One of the things that happened

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in Power, the recent case is the court made it clear that negligence with respect to charter rights is not enough. So that's a really kind of high barrier, although obviously the governments of Canada were not even happy with that high barrier. They wanted this absolute immunity, which, you know, really makes you wonder how seriously they want to take the charter when drafting legislation.

**Cheryl Milne:**

43:09

So the power case and Mackin, I mean, Mackin less so, but the Power case in particular shows us situations where there is this kind of relationship between section 52 and section 24, and that there are some, so we know that from the Supreme Court's decision in cases like Demers and Ferguson, that remedies can be granted under both sections. But what does the case law tell us about the willingness of courts to do that?

**Kent Roach:**

43:33

Yeah, well, I mean, certainly not very willing when you're actually asking for damages. I think when you're asking for another kind of individual remedy, as in Ontario versus G, the courts are more willing to do it. But you know, I guess what the courts are concerned about is governments having this kind of indeterminate liability for harms that were.

44:03

caused by unconstitutional legislation. So it's very tough. And so certainly, if you're asking for charter damages, strategically, it's much better to say, this is just a 24-1 case. This is just because one person or one department in the executive decided on their own that they were going to do.

44:30

conduct that violates the charter. If that conduct is specifically authorized by legislation, then you have a lot of hurdles to get over before you're going to get damages as a remedy.

**Cheryl Milne:**

So I want to shift now to something that, well, you've written about it in Constitutional Remedies in Canada, but also in the more recent book about remedies for violations of human rights. This is this concept of the Declaration.

44:59

Can you share with our listeners what you mean by that?

**Kent Roach:**

Yeah. So right now, you know, the taxonomy of remedies are, you know, you have damages, you have a declaration, which is a statement by the court that the Constitution has been violated and perhaps a statement of what the Constitution requires, but the court doesn't retain jurisdiction.

45:27

or you have a mandatory order, which Doucet Boudreau tells us should be clear and enforceable, and the court retains jurisdiction and is ready if the defendant doesn't follow that mandatory order to find the defendant in contempt of court. And so what I wanted to do is create a halfway house between

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the declaration and the injunction. And so I called it the Declaration Plus. And by the Declaration Plus, what I mean is the court issues a declaration, but it retains jurisdiction. And this recognizes that sometimes the parties will in all good faith disagree about what the...

46:18

meant about the declaration. It may mean that if the court doesn't retain jurisdiction, the party that establishes a charter or section 35 right is going to suffer from an inequality of bargaining power when they discuss with the government what the declaration actually entails. And so I've been trying since

46:48

about 2013 to find examples of courts doing this. And I, you know, I think I have. And I said, they're not calling it a declaration plus, but they should call it a declaration plus. That makes sense. And when I was writing my latest book on remedies, remedies for human rights violations, I did it in a more comparative way and in a way that engaged international law.

47:17

And if you think about international tribunals, that's, they do the declaration plus all the time because an international tribunal often doesn't have contempt powers, but they often will retain jurisdiction over a case and require the parties to report back about what, if anything, they are doing in response to the violation. And so,

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As counterintuitive as it may seem, I actually think domestic courts can learn something from supra national tribunals. And so that kind of solidified my thinking that, it shouldn't be used in every case. In many cases, a declaration might be enough. In some cases, an injunction is required, but at least add this intermediate declaration plus as a remedial option.

**Cheryl Milne:**

48:17

So you mentioned a case that recently has invoked this, even if it didn't call it that. And that was the British Columbia Court of Appeal invoking the concept in a Section 35 case. And you mentioned

Section 35, which is focusing, that's the provision dealing with Aboriginal rights under our constitution. In that decision, they opted to modify a trial judge's declaration of an Aboriginal right to include express

48:46

provisions that a Crown has a fiduciary duty both, then must both consult with the First Nations involved in the case and ensure that government regulation in this case of a dam is consistent with Section 35. What was your reaction to that decision?

**Kent Roach:**

Well, I mean, you know, as a little bit of a remedial entrepreneur here, I was overjoyed, and the BC Court of Appeal actually talked about a declaration plus.

49:15

Perhaps even more important was the Restoule case that just came down, I guess, this month or last month from the Supreme Court of Canada, which although they didn't use Declaration Plus, I think is a Declaration Plus in that the Supreme Court said that we're gonna give the parties an opportunity to negotiate the proper annuity.

49:42

from 1850 treaties signed in Ontario, the Robinson Huron treaties. But if the successful Indigenous applicants are not satisfied with what is negotiated or what the government awards, that will then be reviewable by the trial judge. And the Supreme Court put in deadlines.

50:08

because they said that the treaty holders had already waited long enough and the government had egregiously violated treaty rights by not increasing the $4.00 a head annuity since the 1870s. And so I think that these two decisions, hopefully, much like the Manitoba language reference, are decisions that

50:35

were driven by the facts of the particular case, as almost all judicial decisions are, but I think that they may create new remedies. And so my hope is, you know, in 20 years from now, people will look

at these cases, the Rio Tinto case from the BC Court of Appeal and the Restoule from the Supreme Court of Canada as kind of the precedents for declarations plus.

51:01

just like the Manitoba language reference is kind of ground zero for the suspended declaration of invalidity. And so hopefully that's going to be a new remedy. And to go back to, you know, 24-1, although 24-1 doesn't apply to section 35 cases, but I think its spirit does. One of the things that courts have always said.

51:31

What the framers of the Constitution wanted was creative remedies. They wanted to give courts the power to do something creative, but appropriate and just. And to me, the Declaration Plus can often be a remedy that is both appropriate in terms of observing some limits on the court's role, but also just and more just.

51:59

often than a bare declaration in that it indicates that the court's not going to abandon people whose rights have been violated, but is actually going to stick around for a while to make sure that a good remedy is formulated, not necessarily by the courts, but by the parties, the executive, and the legislature. And so if those cases do that,

52:26

I will have felt that all the ink that I spilled writing about remedies has not been totally in vain.

**Cheryl Milne:**

And I'm sure that there will be future Asper Center interventions that involve these kinds of arguments. It's certainly something that we've worked together on with you providing your expertise to the work that we've been doing on remedies. It's been a good partnership.

**Kent Roach:**

Yeah, well...

52:51

And, you know, I mean, hopefully too, this will be something that international tribunals and even other countries can learn from because, you know, the American experience with structural injunctions has not always been a happy one. And so hopefully the Declaration Plus can be something that we can talk about not only in Canada but elsewhere.

**Cheryl Milne:**

Well, thank you very much, Kent, for

53:20

explaining all of this about remedies for this podcast. It was important to dedicate a whole episode to remedies because it is so critical in constitutional litigation. Before we let you go, are there any upcoming projects of yours that you'd like to highlight for our listeners? Or is it more just declaration plus that's going forward?

**Kent Roach:**

Yeah, well, I am starting a short article.

53:48

on the declaration plus to kind of hopefully build on the momentum of these two cases. So hopefully I can get that done within the next year. And, and

54:02

site and hopefully that will help the declaration plus stick as opposed to fade into the ether.

**Cheryl Milne:**

Great. Well, thank you. Once again, thank you very much.

**Kent Roach:**

Yeah, thank you. It's been a pleasure.

54:18

I've been speaking with Professor Kent Roach from the Faculty of Law at the University of Toronto, who also happens to be the chairperson of the Asper Center's advisory group. Thank you so much, Kent. Thank you also to Kate Shackleton, JD student at the Faculty of Law, who greatly assisted with the background research and development of this episode. And as always, I thank the indomitable Tal Schreier, our producer for all episodes, for her incredible work, knitting all of this together and making me sound good.

54:48

We're doing things a bit differently to start season four of the podcast with a separate practice corner full episode coming up next week. The episode will feature criminal defense lawyer Megan Savard who will take us through a real masterclass in practical criminal defense strategies for seeking charter remedies for clients. So you don't want to miss that. Thanks again for listening and we'll be with you again soon.

**Outro Music:**

Charter a course, I will charter of course We can just get the country to trust us

55:18

Charter a course, southeast, 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, southeast, west and north, and along the way we may find justice.

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