S4E2 Practice Corner Episode on Criminal Law Remedies with Megan Savard

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Megan Savard (pull quote):

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Well, that's exactly it. Like I said, charter litigation for all of the benefits that it conveys to defendants has also contributed to the ballooning of criminal cases from procedures that took a matter of weeks or months to procedures that can sometimes take years.

Intro Music:

00:27

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 Milne:

Hello and welcome to the fourth season of Charter a Course, a podcast created by the David Asper Centre for Constitutional Rights at the University of Toronto. I'm Cheryl Milne, your host...

00:57

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. For today's episode, we're changing things up a bit. Last episode, we chatted with Professor Kent Roach on the broader concept of constitutional remedies.

01:27

Our regular listeners will know that we normally include a practice corner where we chat with lawyers about practical aspects of litigation related to the main segment's topic. This time we decided to release the originally planned practice corner as a separate episode, and once you listen to it, I think you'll understand why. This episode, which we'll just call a practice corner episode, is a

fantastic master class in charter remedies in criminal law by criminal defense lawyer Megan Savard.

01:54

Please listen to Professor Roach's episode from last week for a deeper dive into the range of charter provisions that govern the granting of remedies where a court makes a finding of unconstitutionality. But with that, it is my pleasure to introduce my guest for today's episode, Megan Savard. Megan is a partner at Savard Foy LLP, where she practices criminal, constitutional, and regulatory law.

02:17

A seasoned trial and appellate litigator, she is recognized by best lawyers in Canada as one of the country's leading appellate practice in criminal defense lawyers. But most importantly, Megan is one of the Asper Center Clinic's first alumna, being member of the very first clinic. I'm not going to actually say how many teens of years ago it was, because it sort of ages me, but I want to really welcome you back in a sense, and thank you for joining us, Megan.

Megan Savard:

02:43

Thank you, Cheryl, and thank you for not aging me as well.

Cheryl Milne:

So before we start talking about the remedies themselves, could you give our listeners a sense of what kind of charter breaches typically arise for criminal defendants?

Megan Savard:

So I'll pause to note right at the outset that I think it's interesting to challenge the premise that criminal defendants are a category who suffer a unique type of charter harm.

03:08

at the hands of the state, sometimes they do, right? Certain rights are engaged only when you are detained, arrested or charged, but some rights, like the right to privacy and the right not to be arbitrarily detained, are rights that we all have and that all of us are in danger of having breached. And it's there the criminal defendants are simply unique and either lucky or unlucky, depending on

your perspective in the sense that they are the ones who simply have the avenue to complain about it, because it's given rise to a proceeding in criminal court.

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So that said, I think there are three broad buckets of state misconduct that tend to harm criminal defendants. The first is the enactment of unconstitutional criminal law and policy by the legislative or executive branch. So that could be substance in that a thing is criminalized, an offense-creating provision is made that criminalizes something that's not criminal or criminalizes too much innocent conduct.

04:05

or it can be a matter of procedure. So, the way in which Parliament has said that cases should be prosecuted or a particular issue should be handled violates the charter. And that state conduct, even though it isn't at the hands of the judiciary or anyone who's in the courtroom, is subject to review by the judiciary. Second, there's misconduct at the hands of what I'd say is the investigative arm of the state. I think for shorthand I'll say police, but it can encompass a number of organizations beyond that.

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Some of the obvious ones there would be the right against unreasonable search and seizure. We all have no-go zones where the state cannot interfere without either an emergency situation, exigent circumstances, or judicial authority. And then there's a procedural component. If our privacy is being invaded by the state, it has to be done in a reasonable way. And other types of breaches that the investigators, the police might.

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Breached treachery rights would be when it comes to arbitrarily detaining or arresting someone, questioning someone who is suspected of a crime. We all have the right to silence, and that right is never more important than when you are at risk of being conscripted into giving evidence against yourself. And then there are the rights triggered by arrest or detention that are a little more specific like the right to counsel and the right to be told of the reason why you're being detained and the right to review in the way of habeas corpus.

05:34

And then the third bucket is really misconduct by the arms of the state that are charged with bringing the case through the courts to completion. So there, a lot of those are encompassed by

section seven and 11 of the charter and they can get very specific, the right to a trial by jury in serious cases, the right to an impartial tribunal, the right to reasonable bail, and then more broadly of the right to life, liberty and security of the person under section seven, which when you are charged

06:04

You are entitled to a fair trial, you're entitled to a fast trial, and you're entitled to make full answer and defense at that trial. That's a component of trial fairness. And that large bucket contains a number of smaller sort of danger zones for the state that I suspect we'll get into as we move through.

Cheryl Milne:

So these are all those, certainly that latter bucket are all geared at making sure that

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these procedures are fair to people, that you're up against the state, you're up against the government, you're up against law enforcement, and you're just an individual, and so it's a bit of a balancing. And they're longstanding, right? They came into the Charter when the Charter was enacted, but these are also rights that we've had in Canada through the common law and through other legislation for many, many years, and they've just been kind of fine-tuned and solidified in the Charter.

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But once we've determined that your client's charter rights might have been breached, or once you've kind of looked at a scenario with a client that comes in and you say, hey, something seems to have gone wrong here, what's the next step?

Megan Savard:

It's very practical, actually. And this is where I think maybe practitioners would differ from academics in their approach. I think first and foremost, you have to figure out if it matters, right? Charter violations, if you want to...

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determine the breach, determine your right to a remedy, that's a whole piece of litigation separate from the criminal trial, at least notionally. But it costs money, it takes time, it can delay the hearing of a trial on the merits, and you only want to do that both as an officer of the court and for your client's sake if the breach matters. And what I mean by that is, has the breach given rise to any kind of opportunity for a remedy that could make a difference?

07:52

in the larger litigation, right? We're talking by and large about people who have been charged with crimes or who endanger being charged with crimes. And so, if the police have breached your client's rights by doing something, let's say refusing their right to counsel and then asking questions, eliciting a, or potentially eliciting a confession. If the confession comes out, the usefulness of applying for a remedy relating to getting that confession out of court or neutralizing it in some other way is obvious, but

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If your client refuses to answer the questions or answers the questions in a way that's exculpatory, that actually helps his or her defense and doesn't actually generate any useful evidence for the state that you would need to neutralize, then you take a hard look at whether or not it's worth complaining about the state conduct, right? The purpose ultimately of criminal defense work is defense. You're not going on the offense against the state. You're looking at how to get your client out of a situation. So look at whether or not....

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the breach and the possible remedy could do that. You don't want to go to court, find yourself in a position where you've proven the state's misconducted itself, then your trial judge says, the dreaded question, so what? And then you have no answer. Third, let's imagine we get through that part, you have a meaningful breach, then part of that analysis is figuring out that in fact you do have an available remedy and client buy-in, then you figure out how to raise it with the court, both as a matter of evidence and procedure.

09:19

You look at things like timing, you look at things like your evidentiary record, and then of course you look at the law and try and figure out, you know, how to most persuasively argue that your client is in fact entitled to the breach finding remedy that you seek.

Cheryl Milne:

And it just really demonstrates how the remedy in some ways really drives the procedure, like what you are going to advise your client and what you're going to do, because if the remedy isn't going to result in them being acquitted, for example, because the evidence is pretty clear.

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or if you challenge the legislation, but they're still guilty of a piece of it, even though the criminal code could be read down or an aspect of it is unconstitutional, but they're still going to be found guilty, or still sentenced. We see that with the sentencing cases where they're still going to get the maximum sentence or the mandatory minimum, it's still going to be above that. You might not want to go to all that expense.

10:16

And another factor I would guess is where if your client has not got bail.

Megan Savard:

Well, that's exactly it. Like I said, charter litigation for all of the benefits that it conveys to defendants has also contributed to the ballooning of criminal cases from procedures that took a matter of weeks or months to procedures that can sometimes take years. And

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whether or not we think that the right to reasonable bail is being systemically respected. What we can say is there are a lot more presumptively innocent people, particularly in provincial jails, than there are people serving sentences and that's because they're waiting so long for their trials. So, in those circumstances it may be your client has interests far removed from the academic legal interests that you have as counsel and those interests favor.

11:04

getting to a trial on the merits or an outcome on the merits as soon as possible. I will add a whole other category, and I find this the most frustrating, is when the breach is clear, but it doesn't, it only generates things that help you. So, in a sense, and this is something any defense lawyer will tell their clients when the client's first arrested, anything good you have to say for yourself, doesn't matter. That's not admissible in court.

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because it's a prior consistent statement. Anything good you offer, the prosecution can choose not to introduce. So, if the police run roughshod over your rights, if they contribute to your disrespect for the justice system because of how they've treated you, and then the case goes to trial and nothing about their conduct is ever litigated or scrutinized by the court, and then you're acquitted, it sometimes feels like there's a bit of a missing piece there. And part of that, I think, is, I do think a lot of people approach

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criminal defense work, the concept of a criminal trial in the same way as other forms of litigation where you're seeking some sort of positive outcome, right, vindication or the opportunity to say you're the winner. And that's rarely the case, right? One thing that both draws me to criminal defense practice and also makes me, I think, a little sad during it is no one is there because they want to be. And the best outcome is escaping with your liberty. And so those cases where you don't get to hold the state to the count.

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the state to account, I should say, knowing that they should be held to account at some point for the conduct that you've seen, those can be the most frustrating.

Cheryl Milne:

I can say that when I was practicing criminal defense on behalf of young people many years ago, that winning a trial where the young person really was innocent is one of those kinds of victories that it's hard to celebrate because you've just dragged that person through the trial.

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when they were innocent from the beginning. And so, it's hard for them to see that as, yay, I won. It's really, I shouldn't have been here to begin with. And it's a hard one. Let's now dive into the remedies themselves. So can you give our listeners an overview? I mean, you've talked a bit about them in generally, but can you talk a bit in a little more detail about the kinds of remedies that are available and what, you know, how they can be meaningful?

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for the accused person?

Megan Savard:

Sure. So, the first broad remedy creating provision would be, of course, Section 52 of the Constitution Act. It applies equally in criminal cases as an avenue by which applicants can seek to have unconstitutional legislation, either struck down or read down or interpreted in a way that is helpful to them. And the benefit to a defendant is...

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Typically this, if you can prove that the law you are charged under either criminalizes innocent conduct in whole or in part, or doesn't actually say what it criminalizes, meaning it's unconstitutionally vague and no one knows what the rules are, then it can be struck down and if that is the only provision that you are charged under, then you are free to go. It effectively ends the prosecution.

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And a subcategory of remedy there would also be reading in or reading down. So if you are confused about what exactly it is that the state has to prove under this provision, the application for a declaration of invalidity, even if it's not successful 100% can often give rise to jurisprudential clarity on a provision that is unclear on its face, but which has maybe been interpreted different ways by different courts.

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And then two other remedy creating provisions are in the charter itself. There's 24.1 of the charter, which is very broad. Anyone whose charter rights have been infringed can apply to a court of competent jurisdiction to obtain any appropriate remedy in the circumstances. It's meant to be a very broad remedial provision, and it can encompass anything from a declaration that rights have been breached on the one hand to a full on stay of proceedings on the other.

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from least effective and meaningful to most effective and meaningful, typically for the defendant's perspective. And there's no limit theoretically to the types of remedies you can encounter under that section. Some of course are more commonly or routinely, some than others. And then another, the specific remedial provision, section 24-2 of the charter that criminal defendants get to deal with, I think the most, is the provision that provides explicitly for the exclusion of evidence.

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And that says that anyone who is facing proceedings and evidence is being prosecuted using evidence that was obtained in a manner that infringes their Charter rights, then that evidence shall

be excluded if admitting it would bring the administration of justice into disrepute. And that is by far the most common remedial provision that's invoked in criminal cases. To illustrate by way of example, if the

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police build the case against you by running roughshod over your rights, then that piece of the case is not something the prosecutor is entitled to rely on.

Cheryl Milne:

So, at what point do you decide which remedy to seek? Can you modify the remedy as you go along, as more evidence comes out about what's happening? Or are there different points in the process where you might seek a particular remedy?

Megan Savard:

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So, I think going back to my earlier answer, I usually have a sense of what the remedies or at least the possible remedies are right up front, because if I don't have a remedy, I'm not going to go down this road in the first place. But I will say two things. First of all, at the beginning of a case, you may not yet know all of the different ways in which you might be able to argue for a breach or a remedy. And secondly, you may want to change your remedy once certain developments.

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occur in the case so it's not just you arguing this issue in a vacuum and on a fixed record it's you defense counsel arguing this before a judge who's going to be making some decisions and against a prosecutor who is hopefully performing their quasi ministerial duty and adjusting to some of the claims or complaints that you've made as they come up and so often what I will do is a practical matter is and I think most lawyers are familiar with this

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strategy is identify the main remedy, sort of the ideal remedy, and then alternative remedies that I could ask for. Whether or not I identify the alternative remedies to the court when I'm seeking my primary remedy is a judgment call. It really is. It really depends on what those remedies are. It's useful to at least go through with your client all of the different possible remedies so that when you go to court, even if you're not putting all your...

18:07

cards on the table at once, your client knows what some of the possible counter offers or alternative considerations are and one reason for that is many of the remedial analyses, especially for some of the more extreme remedies that are available in criminal law, do require as part of the legal analysis a consideration of alternates. And so being prepared to address those, whether or not you raise them in your initial materials or your initial complaint, is I think part of competent charter work in this area.

Cheryl Milne:

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Can you give us an example?

Megan Savard:

Yeah. Okay. So let's imagine for a moment, and I'm going to speak here about 24.1 and 24.2 of the charter because I do want to kind of come back to some of the creative things you can do under 24.1. So let's imagine you're going to trial and it's a gun trial and there's a gun and some forensic analysis was done. Right? Gun has been sent to CFS for fingerprint and DNA analysis. Trial date's coming up.

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and you don't know whether your client's fingerprints and DNA are on the gut. That's a pretty important piece of evidence. Section seven of the Charter, the broad fair trial right, encompasses the right to full disclosure. That's been in place since the case of Stinchcomb was decided in 1991, and that would include CFS disclosure, right? Anything that the Crown might marshal in evidence against you, including your client's DNA and fingerprints should be provided to you so you know the case to meet and you are not surprised at your trial.

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Obviously if those analyses have not been done, then your trial date is approaching and you find yourself unsure about what remedy, if any, to seek. And there are a few different solutions. And the two things that you'll want to consider are number one, what is the evidence? What is the issue? And number two, what does your client want? Right, so in this scenario, where we don't yet know if your client's DNA and fingerprints are on the gun.

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and you have reason to believe that the CFS material would be exculpatory, then you would want to apply for disclosure and an adjournment. And if the adjournment takes you into unreasonable delay territory, then you would eventually want to apply for a stay. And you may actually want to identify the fact that you're anticipating applying for a stay based on the absence of this material in your original materials. So you would identify adjournment.

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disclosure and stay as your three different Charter remedies and just see which one is attractive to the court. There are also different ways that the same relief can be framed. Alternatively, if you have reason to believe that this evidence would not be helpful to your client, you may choose to do nothing. And then if on the eve of trial or partway through trial, those results come in, seek a remedy on the basis of delayed disclosure for exclusion of that evidence because the Crown has

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commenced its case and you started defending it on the basis of an understanding of the prosecution that has now fundamentally changed. So that would be an example of all the different types of remedies that you could apply for in response to one piece of what we'd say is state misconduct, which is non-disclosure.

Cheryl Milne:

So it does require a very strategic approach to defending your client, thinking about all the permutations as it goes along.

Megan Savard:

Yeah, it does. I think...

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Charts are my friend, as are tree graphs.

Cheryl Milne:

And so that gets into the next question, which is what are all these kinds of considerations that go into the decision of which remedy to seek? As are there other aspects that you can describe for us?

Megan Savard:

Yeah, so I think it again depends on the type of breach and how serious it is, right? With respect to the type of breach, then you would divide it further into the question of whether the misconduct has already occurred.

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Or is the mischief something ongoing? Or is it something that would occur going forward? If the misconduct has already occurred, then you may be able to access 24-2 remedies, right? The state has already obtained evidence in a manner that has infringed rights, and now exclusion under that section is available. For prospective breaches, so to, nothing wrong has happened yet, right? The police may have legitimately collected evidence.

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but to use it in a trial would violate your client's rights in the future, we would call that a prospective breach. And then your focus shifts to 24-1, right? The broader remedial provision to figure out how to prevent the state from doing something wrong, even though they haven't yet. In terms of what type of remedy to seek as well, 24-2 really does kind of make that analysis easy. It's got a forcing function, and that exclusion of evidence is the only remedy there. But of course, it's limited by the fact that...

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It's only state misconduct that results in the seizure of evidence that can trigger that remedy, and the misconduct has to have already happened. The other thing you want to look at too is the seriousness of the misconduct. So, the availability of 24-2, I should say, as the narrow remedy seeking provision, it doesn't prevent you from seeking relief across the board. So, I think an obvious example would be a confession that is the product of state torture. That is evidence...

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obtained in a manner that violates your rights in an obvious way, and it is vulnerable to exclusion under 24-2, but in those circumstances, the seriousness of the breach would also cause you to turn your attention to 24-1 and say, is there something more that I'm entitled to here? Whether it's an order for costs, which is typically ordered only in extreme circumstance, a stay of proceedings, which is in fact...

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the default response in the few cases of torture that we have seen come before our courts. And the reasoning there is the misconduct, although it's already happened and it's done, is so bad that the

entire proceeding is now tainted. And continuing it on any terms would result in an entire separate breach, an endorsement by the state that says, it is okay what happened to you at our hands here.

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And so, the seriousness is a really important thing in deciding whether you want to settle for a lesser remedy. And then of course, if you're into 24-1, you also have to think creatively, right? Just because a remedy hasn't frequently been granted or hasn't been granted to your knowledge before doesn't mean you can't ask for it. The question is always again, you're guided by what helps your client the most, right? And I think that probably the best illustration of that would be the example I gave you with...

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with the missing information, right? Does it serve you better to have an adjournment to get the information, or does it serve you better to just let the breach stay? And then if the gap in disclosure is filled to your detriment down the road, let the delay be the basis for an entire separate remedy of exclusion.

Cheryl Milne:

So I'm going to move now to how this all looks at court. Can you paint a picture of how...

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These issues are typically adjudicated. What does it look like? When is it raised? What is the process by which the court has to consider these?

Megan Savard:

So, the first time you would normally be speaking with anyone about this besides your own client would be at a judicial pretrial. So there are a number of scheduling appearances that happen before anything substantive can occur in a criminal law case, and that includes substantive decisions on charter rights.

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So, you would raise this with the court and the crown attorney if you know about it in advance. Together you would decide when to schedule the argument and the hearing on this issue. On a

charter application, it is an application, a form of motion. So it's not the trial itself. It really operates generally and obviously with exceptions as a bit of a trial within a trial called a voir dire.

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And on that voir dire, the defendant bears the burden. So, once you've identified the issues and everyone's agreed on when this application can be brought, then you as the applicant have to decide what evidence you want or whatever evidence you need to introduce to support the argument both that a breach happened and that you're entitled to a remedy. And that evidence that you decide on, you put forward during this mini trial called a voir dire. The voir dire itself,

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really looks at three things. First and foremost is whether or not your client's rights are engaged in the first place. Right? A defendant cannot complain about state misconduct that breached some third party's rights that have nothing to do with him. And that seems straightforward, but there are lots of complicated scenarios where that line gets blurry. So I think a very

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A public recent example is there was a project case, so a big drug and gun conspiracy case involving lots of defendants. Those get prosecuted in groups. There's a group of four defendants proceeding to trial, and two of them are directly connected to a location where drugs are found. They're charged in relation to those drugs. Partway through the life of the prosecution, we, all of us, find out. It's reported widely in the media that one of the investigating officers

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stole a bunch of the drugs and overdosed in the parking lot of the division. And that became a really big story. It ended up resulting in a stay for two of the four defendants, the two who were directly tied to that location. But it raises the question then of whether or not these other two defendants have a remedy. They have no connection to the location. They're not said to be owners of the drugs. They are alleged to be co-conspirators who assisted these other two.

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Do they nonetheless get to complain about this officer's conduct because of the degrees to which their prosecutions were linked to the two that were stayed? And the answer is we don't know. At the trial level, it was no, they don't get to complain about this but stay tuned. I expect that at some point in 2025, we'll have an answer from the court of appeal on whether or not they had what we call

standing, the right to raise this issue in the first place. The second stage, so let's imagine you get past that stage, everyone agrees that the rights are engaged.

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The second stage is to determine whether they've been breached. And that is a matter of calling evidence. I think practically speaking, a challenge for the applicant, because it's often a matter of calling evidence from, we'll say, adverse witnesses. You're calling the very actors whose conduct you're complaining about. And I think practically speaking, what you'll find is that the prosecutor, as both a matter of law and convention, depending on your circumstances, may be required to assist you...

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in gathering it, disclosing it, and putting those witnesses on the stand. And what this stage looks like really depends on what you're arguing. Some charter applications have their own discrete record that have nothing to do with the merits of the case and may be argued on paper. They may even be argued conventionally by different counsel than those involved in the trial itself. Others are of necessity blended into the trial, either because there's overlapping evidence, and it just makes sense to call it once...

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or because the outcome of the charter application will be determined of the trial or both. So, again, to take maybe an obvious example, if your client is caught red-handed with a gun and charged with possession of a gun, but there's an argument that the gun was seized illegally from your client, then the outcome of that charter complaint, which may or may not result in the exclusion of the very gun from evidence, will likely make or break the trial...

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And then finally, I would say there are a few charter applications that really require the judge to look at the record as a whole, meaning the record on the merits as a whole, and those are decided often at the end of the case and often with an agreement by all counsel that the evidence from the trial will just be imported into the charter record. If you can establish your breach, then you get to remedy. And that can sometimes be a separate hearing.

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It can sometimes be blended into the question of whether there's a breach and they are overlapping questions, both an application under 24-1 and an application under 24-2 typically, even after you've

established the breach, require a second look at the conduct. How serious is it? How much did it actually affect your client? How systemic is it? Is it just your client or is it others? And what does society really want to happen here? And that...

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You can imagine how that evidence would overlap, but you can also imagine the ways in which it's different, right? If the police say, deny your client a right to counsel in a particular way, or record a solicitor client-privileged phone call, then it may not make a difference at the breach stage, whether they've done it to others, but it definitely makes a difference at the remedy stage, where you look at the public interest and the broader interests of the system, that they've been doing it to every defendant who comes through that division for the last 10 years.

Cheryl Milne:

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And I guess, I mean, we've been talking about really how the timing of things, like when you seek the breach, and one of the things that you might seek after the trial are challenges to sentencing provisions. Are there other timing issues that you haven't mentioned yet that need to be considered?

Megan Savard:

Yeah. So generally speaking, anything that involves admissibility should be raised at the outset and argued before trial.

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That doesn't mean you have to disclose all of the evidence you think is going to give rise to your breach finding. You can be circumspect in your materials, but you have to at least identify the section of the charter that's been breached and the remedy you're seeking. And then that would always be dealt with before trial. Same thing with any applications for disclosure, any applications for adjournment. Some applications for stays of proceedings are appropriate to argue at the outset of trial because if they're successful, frees up a bunch of time...

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as a result of the stay of proceedings. End of trial, there are a few different things that necessarily have to wait till the end of trial. And a couple of those we get to even before we get to sentencing, and those, the two most common end of trial charter applications we see in criminal law are,

number one, applications to stay proceedings for entrapment, and number two, applications to stay proceedings...

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because of the loss of important evidence. Entrapment is one that I think you referenced at the outset of this, Cheryl, really, we're just importing common law principles into our articulation of charter rights and remedies. Entrapment is a great example of a remedy that is still often framed as a common law remedy, but which is now also covered under section seven of the charter and the principle that we don't...

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invite the state and we don't reward the state for inciting and manufacturing crime. And lost evidence relates to a situation where all the evidence is heard, and only then can the trial judge consider the fact that the prosecution or the police may have lost an important piece of it and put that important piece into the context of what's come before. Finally, you get to sentencing and then we've got an entire second suite of charter opportunities.

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One, I think that's the most common, would be challenging mandatory minimum sentencing provisions or other, what we would say in the defense bar are unconstitutionally cruel punishments. A good recent example that doesn't involve mandatory minimums, but a broader application of the charter principle against cruel and unusual punishment would be consecutive sentences for murder. And separate and apart from that, and I think an important thing for

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all lawyers to remember is the fact that you can then, you can re-litigate charter breaches that haven't yet given rise to a remedy and ask for them to contribute to a sentence reduction. So, let's imagine, again, we're in that scenario where the police have maybe breached your client's rights while questioning them. Your client hasn't actually confessed anything, but they've been subjected to some pretty awful treatment during the 12 hours that they were detained and maybe they were...

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you know, they didn't get to bail court within the 24 hours that they're required to bring them before a justice in... All of this happens, a judge hears the application for a stay and says, no, you know what, I don't think this is the right case for a stay. You can invite the judge to reconsider that mistreatment, all of that evidence again, at the sentencing stage and say that it's connected to...

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essentially is part of the punishment your client has already suffered and what would otherwise be an appropriate sentence should be reduced because of what's happened at the hands of the state. So that's an important additional sentencing charter remedy that's available.

Cheryl Milne:

Another charter breach that can lead to a stay of proceedings and you've alluded to this and you've talked about is the unreasonable delay which violates section 11b right to a trial within a reasonable time.

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The most recent Supreme Court of Canada decision, and that is Jordan, there was one back in the 90s that led to a whole sort of suite of stay proceedings. Jordan did that again more recently. But the court was really clear that delays are presumptively unreasonable after 18 months for provincial court trials and 30 months for superior court trials, which is the more serious criminal offenses.

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Can you tell our listeners about how Jordan delay cases proceed in practice?

Megan Savard:

Yeah, I'd say it's the most commonly litigated type of stay application that we see. And it's tempting, I think, because it's more commonly litigated and more frequently successful, to view it as a lower threshold. But I think my takeaway point here for the listeners would be that it's not.

36:02

The whole point of a stay of proceedings and the only reason it's ever appropriate is because something has already happened that cannot be fixed by continuing with the proceedings on some other terms. And so, yes, some of those examples are egregious in a way that is salacious and publicly written about. It involves torture, it involves solitary confinement, it involves major breaches of the state's obligations to look after...

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individuals, but the reality is that taking too long to get to trial is itself something where once it happens, it can't be undone. The very concept of proceeding with an already unreasonably delayed trial so as to pursue a lesser remedy is antithetical to the finding that this has already taken too long. And I would say the fact that these remedies are increasingly common, at least in the last couple of years.

37:00

is not symptomatic of the minor nature of the breach, but rather symptomatic of the state's failure to respond to what our courts have said since the 90s and reiterated in Jordan is a profound violation of defendants' rights and a major letdown for everyone who is interested in seeing cases proceed through the justice system. So with that pitch for everyone to recognize, 11B, the timely trial right of the real right,

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I'll go on and say this, typically in Canada, cases take much longer to proceed to their conclusion than in a lot of other jurisdictions. It's actually kind of funny to go back and read case law from the 80s and 90s, where you see the courts outrage at the idea of a matter getting put over for two months or six weeks. It is not uncommon now for cases to be prosecuted right under the Jordan deadline of 18 months, which again,

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30, 40 years ago would have been seen as not just unacceptable, but unheard of. And nonetheless, our courts are that backed up. So, we often know well in advance if we're in an unreasonable delay situation. And typically, like any other case, it's the defendant who bears the burden, decides whether or not to take it before the court for a stay remedy and has to build the record and show that this was entirely the result of state and Crown action and not any contribution of their own.

38:29

Once the defendant does that, usually by filing transcripts of court appearances and a record of what's happened procedurally up till that point, if they can show that they have exceeded the Jordan ceiling, which is a very arbitrary ceiling by the way, maybe something for another podcast, but the Supreme Court of Canada populated almost exclusively by non-trial judges, just pulled those numbers out of the air during the oral hearing at Jordan, 18 months and 30 months.

38:55

And they've become extremely important, right? As soon as you can show you've gone over that threshold, the burden flips to the prosecution. It's now no longer your charter application, it's the prosecution on their back foot trying to explain why it was okay that this prosecution took so long in your particular case. And that can be really hard for the prosecution to do, either because some of the evidence they might rely on implicates a much broader set of third-party privacy interests...

39:25

Or information about the inner workings of the state that maybe they don't want to file an open court, but also because they have to show that anything unusual or different or unexpected that happened was not just something out of their control, but something they couldn't even mitigate, something that they couldn't even have anticipated at the outset. And that can be a hybrid. One easy example of something none of us could anticipate, of course, was COVID. And so...

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I think there's a sense that maybe COVID has given rise to some of the 11b problems in our courts, but the reality is that it really, I think, showcased how flexible the Jordan analysis is. It immediately became common for Crowns to argue and defendants to concede that a certain additional period of delay was acceptable due to the fact that none of us could have anticipated COVID and the closure of our courts. As time has gone on, however, that presumption...

40:17

that COVID has affected the trajectory of a particular case, has diminished in force. We're now back, I think, in the pre-COVID world, by and large, where the prosecution would have to prove in the individual case that it made a difference. And I think really the bigger issue that contributes to what we now see as some very public delay-related stays of proceedings now is the fact that I would say it could be a secondary effect of COVID in the sense that it's a human resources problem.

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But the reality is we just don't have enough people performing any other roles in the criminal justice system. There aren't enough Crowns, there aren't enough senior Crowns prosecuting serious cases. The senior Crowns who do prosecute senior cases get appointed to the bench, resulting in the adjournment of those serious cases. And if they don't get appointed to the bench, then we're left with a bunch of judicial vacancies that prevent cases from being heard. The last successful 11b application I ran was in a jurisdiction that had seven judicial spots...

41:15

and only four of them were filled the entire time that this case was moving through the system and sure enough, a stay of proceedings. That has nothing to do with COVID, directly at least. It has everything to do with the fact that resources aren't being allocated in a way that stops this profound breach from occurring. And it's something everyone should be concerned about, not just criminal defendants, many of whom would have preferred to have a trial on the merits a year earlier.

Cheryl Milne:

41:42

And we sometimes forget about the impact on the complainants and the people who allegedly have been harmed by the defendant's actions. They don't get to have their matter from their perspective dealt with either and memories fade and there's all kinds of reasons for having these, having a reasonable timeframe. It isn't just about having this hanging over the defendant for so long. It's hanging over everybody for a very long time as well.

Megan Savard:

That's exactly right.

Cheryl Milne:

42:11

So I want to thank you so much for taking our listeners through the practical aspects of pursuing charter remedies. But before I let you go, I want to ask you about some of the gaps or areas where you think the system needs to improve to ensure people secure meaningful remedies when their charter rights are breached.

Megan Savard:

It was very strategically smart of you to put this right at the end when I had a limited amount of time to expand on it. I would say two things. First of all...

42:40

I think that judges in general underuse and under recognize their power under 24-1 of the charter to order injunctive, prohibitive, or mandamus-style relief. Mandamus meaning the power to force the state to do something positive to supervise its future handling of an issue. I mentioned in an earlier answer that oftentimes the search for a remedy requires

43:08

the parties in the court to delve into and make findings about the systemic nature of misconduct. And I think one of the dissatisfying pieces of this, not for my clients who, if they win, they win, but for me as an officer of the court, who has to then go back and argue the next case is that this evidence, sometimes very powerful evidence of a systemic failure only ever does result in individual retroactive remedy. I think that, uh, while judges are understandably cautious...

43:37

about maintaining jurisdiction over a case to ensure that things happen better next time or to ensure that the defendant is subject to proper treatment in future. While I appreciate the caution required and the dangers involved in perhaps compelling other branches of government to spend money and resources on certain problems. I do think it's something that has been historically treated as categorically unavailable and I don't think it is. There's one case...

44:06

that I think is a good example of this power being used creatively, which if listeners are interested, I'd encourage them to pay attention to. And it's from Justice Pomerance, as she then was, right before her elevation to the Court of Appeal out in London. Superior court case, dangerous offender finding. And she was sentencing potentially and ultimately to an indeterminate sentence, a man who was profoundly psychiatrically ill.

44:32

And there was a record before her that his particular condition was not being addressed in standard federal custody. And so, she ordered as a 24-1 remedy, not just that he be sentenced, which is the usual beginning and end of a trial judge's jurisdiction, to make orders that affect the correctional service of Canada, but also that he be detained specifically in a psychiatric facility that had the means to address his needs.

45:00

And what she found was that that was necessary in order to prevent a breach of his section 12 and section 7 right against cruel and unusual punishment because it would otherwise be setting him up for failure. He would be subject to an indeterminate period of detention with no possibility of ever getting out because he had no possibility of ever addressing the needs that would have enabled him to seek parole down the road. So that's one example. You can see the equities. You can also see how...

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If this goes too far, it could give rise to some potential heartache on the part of other state actors. But it's the kind of thing I think that judges do, maybe they aren't asked to in fairness. I think a lot of people don't ask them to turn their minds to it, but they also don't use that power when it is available. And I think this is a good example of an area where it's not just available, but just to do so. Last thing I'll say, and now I'm being strategic in the sense that I'm not...

45:57

giving you a chance to grill me with follow ups. I do think that in recent charter litigation at the Supreme Court level, we have seen a watering down of the availability of charter remedies, particularly under section 24-2 of the charter. I think there is an unfortunate results-oriented flavor to some of the jurisprudential material that's coming out of the court. But as Kent Roach said, Charter remedies exist in part to prevent the state from doing bad things in the future. And if everyone knows...

46:27

that these breaches have almost no shot at being remediated. If everyone knows that there is no consequence for breaching the law and bringing people before the courts, then that incentive does disappear. And so, I am hopeful that the trend towards narrowing the availability of remedial jurisdiction under 24-2 is something that reverses itself as time goes on.

Cheryl Milne:

Well, thank you once again for joining us on the podcast, Megan, and giving...

46:54

our listeners that look at how charter remedies operate in the criminal defense practice. I know you have so much more you could say about this because we can't, you know, it is something that is, I mean, it's a whole law school course about criminal procedure that, but as I've always said to clinic students in respect of charter remedies is that the remedies is a main driver of the litigation. Like you kind of start with that.

47:21

And so, you know, we're ending off with this, but where it's a nice segue with what Kent Roach has said both things that you're saying about retaining jurisdiction, but also in this messaging going

forward to ensure that state actors really actually honor the charter. So, I just want to thank you again for sharing your expertise with us.

Megan Savard:

Thank you, Cheryl, for having me.

47:47

That was Megan Savard, partner at Savard-Foy, LLP, and former Asper Center Clinic student from many, many years ago. Don't forget to listen to episode one of this season where we discussed all aspects of constitutional remedies with Professor Kent Roach. Following quite nicely from today's conversation with Megan, our next episode will be covering section 12 of the charter, the right to be free from cruel and unusual treatment or punishment. Thank you to Kate Shackleton, Asper Center Law student who worked on this episode.

48:16

And thank you as always to Tal Schreier, our podcast producer. And in the meantime, we invite you to check out our past episodes, which are available everywhere you listen to your podcasts and on the Asper Center's website. See you next time.

Outro music:

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

48:46

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.**

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