

[00:03] HUSEIN: This is Episode 91 and the Season 10 premiere of Lawyered. I'm Husein Panju. And on this week's episode, we're chatting about activism and social justice law with our guest, leading litigation lawyer, Alexi Wood.

[00:18] First up, we'll chat about a new court decision that has struck down parts of a bill known as the Ag-Gag Legislation. And this bill would have made it illegal for activists to secretly film or gain access to farms under false pretenses. And this decision is prompting new questions about where to draw the line in issues of free speech, as well as the ability to investigate and report on matters of public interest.

[00:39] We'll also speak about a concerning trend known as retaliatory litigation, which involves the use of litigation tactics to silence survivors and advocates who speak out about sexual violence. We'll speak about the uses in detail, as well as things that lawyers can do in response. And later, we'll discuss a new article that calls for civility on a broad scale and focus on what lawyers can do to encourage civility within the bar and between clients.

[01:05] And finally, in our Ask Me Anything segment, we'll relay the questions submitted by our listeners about a range of topics, including public interest litigation, systemic racism, as well as what the profession can do to address new challenges. All of that and a lot more coming up in just a bit. This is Lawyered.

[Music Break]

[01:29] Hey, everybody. Welcome back to the podcast and welcome to another year, another season of Lawyered. I hope you all have been keeping well since we last spoke or you last heard me on the podcast and that you're having great summer so far. I miss publishing episodes and sharing this content with you. So it's a real treat to be back on the mic again to kick off Season 10.

[01:49] And before we dive into this episode, I do have an important announcement to make. This will officially be the final season of the Lawyered podcast. Yeah, you heard that right. After a very satisfying and tremendous run, I now believe the show is reaching its natural conclusion.

[02:08] And so by the end of this season, knock on wood, we will have produced over 100 episodes of standard episodes over the span of 10 years— which I'm really proud of as an accomplishment. Podcasts often experience this trend called 'pod fade,' where they start off a lot of enthusiasm, but then fade out after often less than 10 episodes. So, the fact that we've sustained this show for a decade is a real testament to the dedication support of our amazing audience, which includes you, if you're listening to this episode right now.

[02:46] And I've got to say that making the decision to end the podcast was extremely difficult because, to be honest, producing this show has been one of the most enjoyable projects that I've ever been involved with. I love every part about it, from finding the guests to recording the episode, all the production aspects of it, engaging with the audience and learning so much along the way. And I'm really proud of the impact that we've had on the

legal community, on the podcasting space, and even how people consume legal information.

[03:15] You know, at the time I started this, there weren't really any podcasts of this type in the Canadian sphere. And, you know, now there's some new joiners. That said, this is the season premiere of our final season. So there's a lot more episodes lined up to share with you for this year. So I hope you'll stick around as we bring this series to a strong finish. And I want to thank you all again for your unwavering support along the way.

[03:40] And we're going to be starting off our season with a really strong episode about the era of social justice law. As you are likely aware, we're recording this in mid-2024. There's a lot of political activism going on in various issues right now around the world, including in Canada, and it's bringing to bear a lot of questions about the legal boundaries of activism and protesting and many other issues on the same landscape.

[04:08] So we thought it'd be no better time to produce an episode about this same topic. We have a wonderful guest who is very well versed in this space, done a lot of work advising and representing people who are seeking social justice in numerous facets and thought would be a great guest lead off for Season 10. And so without further ado, here is our guest for this episode, Alexi Wood.

[Music Break]

[04:34] Alexi is the founding lawyer and partner at St. Lawrence Barristers and represents clients at all levels of court in Ontario, frequently appearing in the Divisional Court and the Court of Appeal. And she's also appeared as counsel at the Supreme Court of Canada on numerous occasions. Her practice includes a wide range of commercial litigation, administrative and regulatory disputes, and professional regulation, both at trial and on appeals.

[04:58] And she also acts for clients on tort matters, including issues related to health law, defamation, harassment, and privacy, including online harassment and the non-consensual distribution of intimate images. She also frequently acts on a pro bono basis for social justice and environmental organizations, including the Canadian Civil Liberties Association and Sea Shepherd Conservation Society before various administrative bodies and courts, including the Supreme Court of Canada. And Alexi is also an adjunct professor at the University of Toronto Faculty of Law, where she teaches in both the JD and LLM programs and is a co-chair at the U of T Tribunal, which is a post she's held since the fall of 2019. So, Alexi, thanks so much for joining us on the show today.

[05:40] ALEXI: Thanks for having me.

[05:41] HUSEIN: Yeah, of course. So, we've known each other, I think, socially for the last couple of years-

[05:45] ALEXI: Yes.

[05:45] HUSEIN: -But one thing I was hoping you could tell our listeners about is kind of your origin story. I know you had a fairly non-traditional path into the private practice you now found.

[05:58] ALEXI: Correct. So, I went to law school. My stated goal when I joined law school was to work in international aid and development. I had no intention of ever being in private practice. In fact, adamantly was opposed to being in private practice. And then did do international aid and development for a couple of years, then came back to Canada, which is in Toronto, where I grew up and started working for the Canadian Civil Liberties Association but as a policy advisor and project director, not as a lawyer, because I wasn't called yet.

[06:30] And then after being there for five years, so seven years after graduating law school, then decided that private practice might not be so bad and articulated at that point. So that was pretty interesting. We've experienced article seven years after having graduated law school. And then articulated at McCarthy Tétrault, got hired back and stayed in private practice. And then in 2017, opened my own law firm.

[06:56] HUSEIN: Do you feel like this was where you were meant to be? Do you see that in your values and the kind of work that you do?

[07:03] ALEXI: It's a great question. I think part of my idealism in the 'I'm never going to be in private practice' idealism, was born out of the fact that I didn't really know what lawyers did. I didn't have any lawyers in my family. I'm not from that kind of a family, so I don't think I really knew what lawyers did. I think I thought of lawyers in private practice as, you know, suits type lawyers, you know, acting for big, bad companies.

[07:30] And I never thought of the lawyers who could actually help people and do social justice. And I thought that that really wasn't an option for me. And then when I was at CCLA and started seeing lawyers who were engaged in social justice work and who were doing that kind of work, I realized that there might be a path for me in private practice.

[07:52] And so now having my own firm where we can really focus on the types of files we take and the clients we take, yeah, this firm definitely meshes all of my values and beliefs and idealism. We are able to do commercial litigation at an excellent level, but also have carved out a really special practice for social justice and important social activist type of litigation as well.

[08:18] HUSEIN: Fantastic. I'm glad it worked out. I know a lot of our community feel the same way. So, we've got a bunch of interesting topics to speak about in your area of social justice law. And the first involves a very controversial bill known as Bill 156, also known as the Ag-Gag Law. Now, this past April, an Ontario court struck down parts of Bill 156, which made it illegal for activists to secretly film or gain access to farms under false pretenses.

[08:52] And this bill was aimed to protect farms from activists' undercover investigations, which had often revealed animal cruelty. And this decision provides some helpful case law and guidance about the charter right to free expression, including whether

misrepresentations are covered by the law. And before we get into it, I should note for transparency that Alexi was representing one of the interveners at the court on hearing on the same matter.

[09:14] So Alexi, a lot of these cases revolves around this Bill 156, which is the Security from Trespass and Protecting Food Safety Act. And the bill is quite lengthy, but I was hoping you could walk us through some of the most important and consequential parts of the bill.

[09:28] ALEXI: Absolutely. So I think one of the reasons I was so excited to talk about this case is it's a great example of the type of work that we do at STLB. As you mentioned, we're acting for one of the interveners. We acted for the Centre for Free Expression, and we really focused on whistleblower protection and free expression.

[09:51] So the legislation, as you said, it's known as—the official name is Security from Trespass and Protecting Food Safety Act, also known as Ag-gag, so Agricultural Gaggling Orders. And Ag-gag is becoming more of a thing. We're seeing this type of legislation passed in other provinces, and it's seen in some of the U.S. states as well.

[10:14] And the legislation prohibits people from going undercover and doing undercover exposes. This Ag-Gag legislation also had some restrictions on employee whistleblowers as well. And so if an employee wanted to investigate and look at some potential abuse situations, anytime that they used any misrepresentation, whether it was to gain access to another part of the plant where they wouldn't normally have access, any type of misrepresentation at all, if they used that misrepresentation in the course of exposing any of this abuse, the legislation prohibited that type of investigation.

[10:58] HUSEIN: And when we're talking misrepresentations, what kinds of things are we talking about?

[11:52] ALEXI: Yeah, and that was actually part of the problem with the legislation and part of the reason why punchline it ended up being struck down, was that it was so vague in what it would prohibit, what the misrepresentations could be. In the legislation, the hypotheticals that we used the hearing were things like, you know, misrepresentation about whether or not you belonged to an animal rights organization. So if on an application you hid the fact that you had been a member of an animal rights organization at some point, that would probably be a sufficient misrepresentation.

[11:37] If you were an employee and you normally didn't have access to one part of the plant, but you said, "Oh, my shift has changed and now I want to be in the side of the plant," that misrepresentation. So any misrepresentation like that, that then was used as part of the gathering of the information, that arguably could have been sufficient to put you offside the legislation. So the very broad restrictions and very narrow exceptions, and that was really part of the problem with the legislation and part of the issue for why Justice Conan struck it down.

[12:17] HUSEIN: So, tell us more. So I know there's a challenge at the court for largely the same reasons you explained. And then how did the court come to the conclusion that this bill ought to be struck down primarily?

[12:28] ALEXI: The main challenge brought by the main applicants, which were Animal Justice, an undercover journalist, and an animal rights activist, were all centered around charter challenges. So arguing that the legislation was unconstitutional because it violated section 2B, which is the free expression provision of the charter, and violated section 2C, which is the freedom of assembly provisions of the charter. So those were really the two main grounds that the applicants argued made the legislation unconstitutional. So obviously for the journalists, you know, journalism is very strongly protected under the charter. There's very strong protection

[13:07] And undercover exposés, journalist exposés, happen not just in the agricultural industry, but in a lot of industries. We always see the W5 exposés and the CBC exposés, Marketplace, all of those things, they do exposés. That's kind of one of the things journalists love to do. And this legislation really targeted that specifically, and would have made it very difficult for undercover journalists to ever engage in this type of activity.

[13:36] So there was the challenge based on that kind of activity. There was whistleblower expression and protection that was challenged as unconstitutional. All of those things were challenged as violating section 2B and section 2C. The government, Ontario, initially their first argument was that section 2B, freedom of expression, wasn't even engaged. They argued that...They didn't say yes, it's engaged, but it's justified restrictions. They said section 2B isn't even engaged. This isn't even a free expression case because all of this is private. It all happens on private property. It happens as part of a private employment. So this legislation doesn't even engage section 2B.

[14:17] Justice Conan said, "No, we know that there are certain private spaces when government tries to restrict expression, even if it's in a private space, we can step in and decide something's unconstitutional." So he handily dismissed that piece of it, said, "Yes, section 2B is in fact engaged." And then for some of the restrictions that we were talking about, he said they can't possibly be justified and found that the exemptions were simply too narrow and that you couldn't justify them.

[14:52] HUSEIN: So they wouldn't pass the section one test.

[14:55] ALEXI: It didn't, it did some of them. For some, there were section 2B violations, but they were justified under section one. And then for the bulk of them, they were violations of section 2B that could not be justified under section one.

[15:10] HUSEIN: Got it. And what do you think, as someone who was an interviewee in this matter and works on social justice issues, what do you think about this whole misrepresentation aspect? I can see on the face of it that there is like a policy parameter to not have people lie generally. But what do you think about this being used in this bill in this context?

[15:32] ALEXI: So I think particularly for the whistleblower and the journalist provisions, that the misrepresentation piece went too far. Lying is not, you know, it might be morally wrong. We could discuss the morality of it. But from a legal perspective, from the government coming in and saying this is against a piece of legislation, I personally have a real problem with that. I think that people for various reasons, misrepresent things all the time. And I think that that is a government overreach that can become very problematic.

[16:10] You know, if lying about the existence of the Holocaust is—we've never said that that, well, we tried to say that was illegal, we stopped and we said, nope, you cannot prohibit somebody from lying about the existence of the Holocaust, then surely, we are not going to prohibit somebody from saying, oh, no, I've never been a member of an animal rights organization. Like, those two things cannot exist in the same space. So, I think that if we are going to say that you can lie about the Holocaust, then you have to be able to say you can lie about whether you're part of an animal rights organization.

[16:45] HUSEIN: I know the decision is being challenged soon. Is that correct?

[16:50] ALEXI: So the Superior Court decision came out in April. The Ontario government is appealing. And so there will be an appeal to the Ontario Court of Appeal. The appeal at this point, the schedule has the appeal being perfected sometime in September, I believe.

[17:05] HUSEIN: Okay. And so regardless of the outcome of that appeal, what impact do you think this case will have on social justice lawyers like yourself or even social activists like the protesters or activists here?

[17:16] ALEXI: I think this case is a great example of social justice litigation. It was brought by a journalist, an activist and an organization. And it also had some great interveners. And as a lawyer who regularly asks for interveners, I think this is a great case that showcases the necessity of interveners in litigation.

[17:39] Here, the Center for Freedom of Expression talked about whistleblower protection and the need for whistleblower protection and why whistleblowers are so important, the valuable position they can hold in society. And if it hadn't have been for the Center for Freedom of Expression's arguments about whistleblowers, that space, that angle really wouldn't have been addressed by the main applicants.

[18:01] That wasn't their focus. And the interveners were able to add that lens, that additional element of the importance of whistleblowing. And so I think it's a great example of why interveners are so important and can help shape litigation, particularly in social justice causes.

[Music Break]

[18:28] HUSEIN: Now, one of the recent developments in civil litigation has been the rise of SLAPP suits. And SLAPP is an acronym for Strategic Lawsuits Against Public Participation. And over the last several years, we've seen a concerning trend in this space known as retaliatory litigation, which refers to the use of litigation tactics, such as defamation or

malicious prosecution claims in the context of silencing survivors and advocates who speak out about sexual violence.

[18:54] And this trend is having a significant impact on both the legal profession and the society at large. So, Alexi, I know that this trend of retaliatory litigation is fairly recent. It was also the subject of a new book by an academic named Mandy Gray. So can you just tell us a bit more context about what this term is and how it works in practice?

[19:16] ALEXI: Absolutely. In our practice, we act for women, primarily women or people who identify as women, who have been the victims of sexual abuse and sexual assault. And one of the things that we started to see, you know, maybe five years ago or so, was an increase in litigation against these—and again, it's primarily women, it's not always women, but I will say women because it's primarily women who had brought forward allegations of sexual assault and then several years or shortly after are sued by the usually men who abused them.

[19:55] HUSEIN: When you say that they're bringing forward these claims, in what context are we talking about?

[19:59] ALEXI: We're talking about women who go to the police. We're talking about women who might report it in their workplace. We're talking about women who might say something on social media, part of the sort of MeToo movement of exposing and social media abusive behavior. Maybe it's some blog post or it's a journal entry or something that's often gets published online.

[20:24] It's women who are coming forward within some form of structured system like that, whether it's college campus, employment, social media, police. They bring forward a complaint of sexual abuse and then find themselves being a defendant in a civil suit for either defamation or malicious prosecution. Those are usually the ones that we see.

[20:47] And if you backed it up sort of eight years ago before we started seeing a rise in these cases, we probably would have told these women that if they came forward and went to the police, they'd be protected from civil litigation for defamation because availing yourselves of those channels tends to protect you. And there is some kind of protection. There's a privilege or an immunity or some kind of protection when you go to the police, when you engage in workplace investigations, when you do all of these things, there should be protection. There is. And that's why we started calling these things retaliatory litigation. That's why we consider these things to be SLAPP suits.

[21:25] HUSEIN: So, what are the protections that are available for people who are in this situation?

[21:30] ALEXI: So normally in a situation, if a woman goes to the police and reports a sexual assault, she's protected from defamation because there is an immunity, a protection that applies to the expression when you go and report a crime to the police. Because our courts have said it's important for people to go to the police. It's important for people to report to

your employer or to your university campus when a crime or an abuse or an assault happens. It's important. This is activity we want to protect as a society.

[22:05] So we are going to say that we're going to protect that expression of going to the police and say that it's not amenable to a defamation claim. What that statement fails to capture is the fact that then someone who has been the victim of sexual assault now has to hire a lawyer, defend themselves against a defamation case, bring a motion to get it dismissed, will likely get it dismissed on summary judgment or on a SLAPP motion, will likely get the case dismissed. But all of those steps have had to happen, and that burden is on the person to do that.

[22:39] HUSEIN: Yeah. And someone who's already gone through significant hardship already.

[22:43] ALEXI: Already gone through hardship, already gone through an abuse and assault and now has this litigation. It's one of the worst parts of my practice now. If I have a woman who is coming to me and saying, I've been the victim of sexual assault, sexual abuse, I've had this horrible thing happen to me. What are my options? What can I do? I now have to include in my menu of options that are available to her. I have to have the caveat of if you do this, you may get sued for defamation or malicious prosecution. I will be likely able to have that case dismissed, but you will pay me to defend you in that and you will pay me to bring a motion and I am not going to be able to recover 100% of your legal costs.

[23:31] And so one of the things Mandy Gray talks about in her book and sort of the one of the main theses of her book is to say that this litigation isn't actually about, these types of retaliatory litigation, isn't actually about the expression itself. It's a way for these people to perpetuate further abuse. And using a "legitimate process," i.e. the civil litigation process, is another legitimate path for these, usually men, to continue to exert power over the women that they have abused and assaulted in the past.

[24:08] You know, it's a bit of a warning sign for other women. Hey, don't come forward because if you do, these men might sue you for defamation. So don't come forward with claims of sexual assault and sexual abuse.

[24:20] HUSEIN: So tell us about how these motions work. I know that there's kind of like this anti-SLAPP motion that you can pursue. Can you explain at a high level what this looks like?

[24:28] ALEXI: Sure. So, the Ontario government passed legislation, it's actually an amendment to the Courts of Justice Act, that on its face says that litigation that is meant to be an abusive process, that is meant to prevent someone from bringing forward a matter of public importance, that type of litigation is considered an abusive process and the courts should dismiss it at an early stage.

[25:02] Unfortunately, the reality is that the common law that we have evolved on this makes these motions very complicated. It makes these motions hefty and big and cumbersome to bring. And they really now start to look like a summary judgment motion.

And oftentimes we're faced with the question of whether we just go for summary judgment or whether we try for SLAPP.

[25:26] And a lot of the times we end up just recommending for summary judgment because judges are more comfortable with summary judgment. They know the summary judgment case law better. And the motion record that you have to put together to get a case dismissed on SLAPP, looks an awful lot like a summary judgment motion anyway. So you might as well go for what the judge is more comfortable with, which is summary judgment and not SLAPP.

[25:48] HUSEIN: Is there any room for optimism in terms of how these cases can be dealt with in the future?

[25:53] ALEXI: It's a great question. I would like to think that there is going to be more of a recognition on the bench that this kind of litigation is improper and should not be brought. I personally would like to see courts exercising their costs muscle a little more strongly. And that's been one of the real areas where I've been very disappointed in the bench. I haven't seen strong costs awards for abusive litigation like this. And I think if judges started to award heftier costs against people who are bringing this type of retaliatory litigation, who are bringing improper litigation, that would be a disincentive to lawyers and to litigants to bring forward these types of meritless cases.

[Music Break]

[26:54] HUSEIN: The concepts of civility and democratic values are often referred to as foundational principles of Canadian law. And a recent Globe and Mail article by former Supreme Court Justice, Rosalie Abella, has implored Canadians to reclaim these values to make the world safer for future generations. And this article has special relevance to lawyers and social justice lawyers in particular, who have an important role in upholding these principles in our day-to-day work.

[27:21] So, Alexi, this article has been making the rounds, especially in legal space, and is largely informed by Justice Abella's background as someone who grew up shortly after World War II. And I know that she often refers in the article to the erosion of international law and justice. So, can you tell us about what role, if any, you think her background informed her perspective on this particular issue?

[27:44] ALEXI: I think Justice Abella is very upfront about the fact that her origin story, her childhood, is front and center in her current position and her current beliefs. She is the child of Holocaust survivors, and she was born after the war. Her parents did survive the concentration camp, but the rest of her family on both sides was wiped out. And her father then, and something that's very prominent in the article, was involved in Nuremberg and in the repatriation of the German people after the war.

[28:28] And that optimism and idealism that was born out of post-World War II and coming out of the Nuremberg trials, I think Justice Abella is very clear that that informed her beliefs

and has left an indelible mark in her beliefs, her legal theories, and her legal concepts. And so I don't think they can be separated, and I don't think she would say that either.

[28:51] HUSEIN: Yeah, absolutely. And there's a lot in the article, but one thing that I found especially captivating is there's a line here that talks about incivility. And the quote that I'm referring to, it says that the extremes have occupied the middle, and the middle is polluted by bombastic and demagogic incivility from the extremes. So what do you think about this issue, particularly in the space that we work in?

[29:16] ALEXI: I think she's absolutely right. So this article really struck me, and it was one of those things, I read the article, and I thought about it for a couple of days, and I went back to it, and I read it again. There may be some things with which I disagree in terms of the origins of international law. I also think she has some parts of the article that are problematic in the sense that I think there are a lot of scholars and legal theorists and jurists out there that would say as much as we would like to think there was a global ideal following World War II, it's not a global ideal that these international norms, the UN, the UN conventions are very much a White Western global ideal, and so there is that lens to it. There is a lot of colonialism and settler law that goes into forming the UN and the UN declarations and the UN conventions, and I think that does need to be said.

[30:24] The rest of the article, while it's based in that, is talking about how we are at a situation, we're at a time when we have very loud spoken, very extroverted, as you read the quote, bombastic discourse, and there's a lot of noise and there's a lot of people pounding tables, and if you don't fall into one of those camps of table pounding, it can be very hard to have a civil discourse in the middle. And it's something that I think we see on a global scale, on a national level, it's something I'm seeing within the profession, and it's something that I'm finding particularly troubling that table pounding and bombastic dialogue has become accepted and has become the norm.

[31:21] HUSEIN: You mentioned the profession, I don't expect you to use names but what have you seen in the last couple years that's kind of brought this to bear?

[31:39] ALEXI: I've been in practice for about 15 years, 17 years now I guess, so it's long enough to see trends. And one of the things that I see now is people don't just pick up the phone and talk about stuff, and there is a real—it seems to me that I am seeing an increase in people bringing whatever motion they can. If there's a motion that can be brought, it will be brought. And so just in the last couple years, I've seen a rise in motions for particulars, which is a motion on a pleading that says, "Wait you haven't said exactly this, this, this, this, and this."

[32:17] And it's such a procedural thing. Yes, there are times when those procedural motions are necessary and useful, but also I think lawyers have stopped being able to think strategically about certain things, because just because you can bring a motion doesn't mean you need to or should or that it's going to help get to the ultimate point, which is finding out what happened, getting to the end of the litigation.

[32:47] HUSEIN: I've been on the other end of that, and some of my colleagues who are listening will know the case I'm talking about, that the other side brought motion particulars that actually ended up delaying the case and made it more difficult for their client.

[32:59] ALEXI: Well that's it, both these cases with the demands for particulars, the emails that accompany them from opposing counsel are just, you know, they're full of all kinds of difficult language and they're just unnecessary and it makes our job really difficult and hard and it's unnecessarily hard. One piece of advice that I always talk about was this very dear mentor to me. I had gotten a notice of application in and there were all these failings with it. It was a private company but there was a charter claim and it was, you know, things were wrong and it shouldn't have been an application. It was in the wrong, you know, statements were incorrect, and I marched into her office with, "You know, we can bring this motion and we can move to strike this notice and we can do this."

[33:43] And she looked at me and she said, "Or you can just take all of those mistakes, use them to your advantage and when you get to the hearing of the application, point them all out and win the damn application," which is exactly what we did. And it's that, you know, there's so much noise out there and this idea of these bombastic extremes, just, it's noise.

[34:07] And at a time in particular when our court system is struggling and you cannot get motion dates, you cannot find a court time, to be threatening litigation and threatening motions and threatening all of this stuff, it's just delaying things. It is an access to justice issue because if you can't advance a case and you can't move things forward, whether it's to advance the case for your client's interests to vindicate their rights or to dismiss a case that should not be brought and get a meritless case gone, either way your client has an interest in seeing this case through to a successful conclusion.

[34:47] If you're just bogging it down in procedural motions, that's adding cost, it's adding time, it's an access to justice issue, it's adding to court. It's a problem and this article for me really struck at some of these things that I've been thinking about in terms of civility of the profession and I need to get back to this idea that these motions just are weighing our system down and are creating an access to justice problem.

[35:14] HUSEIN: So what can be done like within our bar, let's start there, to promote civility, including but not limited to this motion issue you're speaking about?

[35:25] ALEXI: One is, as advocates, as lawyers, yes, our job is to advocate for our clients, but our job is not to do everything our client asks of us. We are counselors, we are advisors, and just because a client says, "I want to, you know, burn them down, I want scorched earth, I want to do all this," that's not giving our clients good advice. And we need to give our clients good advice about the strategy of litigation, about how to get to the end of the litigation. And so I think as advocates and lawyers, that is definitely a start.

[36:05] ALEXI: Also, just to remember that everyone that's involved in litigation is doing their job. This does not need to be and should not be personal. We are all here to do our jobs, and our clients have their positions and their interests, but that doesn't make it personal between the lawyers. That is why we are here. We are the piece in between the

personal side of litigation. And it doesn't need to be and should not be personal between the lawyers.

[36:33] And I feel like we've often forgotten that as well. And so I think those are two very easy, concrete things that our lawyers and members of the profession could and should be doing.

[Music Break]

[36:53] HUSEIN: And to wrap up our episode, we're going to do our Ask Me Anything segment with Alexi. And as our listeners will know, one of the bonus rewards for members of our Lawyered Patreon crowdfunding community is the opportunity to submit questions that they want to hear our guests answer on the show. These can be questions about anything within our guest's area of expertise, so long as they're not asking for legal advice.

[37:14] And we usually do a call for the questions about a week before each recording. So if you want to learn more about how you can become a patron and submit your own questions to our upcoming guests, you can find out more on our website, which is www.lawyeredpodcast.com/patron. That's www.lawyeredpodcast.com/patron for more information.

[37:30] Okay, so Alexi, a lot of interesting questions in the mailbag this week. And the first question is: "What are some ways in which lawyers can get involved with legal issues involving social justice, particularly if the lawyer primarily works in a corporate commercial practice, like someone not working at a firm like yours, for example?"

[37:47] ALEXI: I love this question. I love talking about the answer to this question. So I started my practice on Bay Street. I was at two Bay Street firms before I started St. Lawrence Barristers. And I was always really involved in social justice work, even at those firms. So there are lots of different ways that lawyers can do this as litigators, also as non-litigators. So most of the big firms will have a pro bono committee, they will have files that you can take on through the pro bono committee. Those are really great opportunities.

[38:26] A lot of the big firms will take on some pretty fun, challenging pieces of work— litigation and non-litigation, because social justice organizations need articles of incorporation, they need boards of directors, they need constating documents and motions for their boards. There are all kinds of corporate law work that can be done for social justice organizations that's so important. So, from corporate governance, to employment, to litigation, all those different areas.

So, Bay Street firms will often take on those types of clients, and there's lots of good work that can be had there. There are also all kinds of things that can be done outside of your law firm. So whether it's sitting on a board yourself, lawyers are always really in demand for sitting on boards. And I am a big, big, big proponent of sitting on a board. I've sat on boards, my colleagues sit on boards. I think those are great ways to get involved in the community and to use your legal skills to help an organization that isn't necessarily going through your law firm, but can still use your skills.

[39:39] And then there's other stuff that is through our profession. So Legal Aid Ontario does programs—this is mostly for litigators, but they do programs where people can give summary advice, for example, at small claims court or in other programs like that. So there are some additional programs like that, where lawyers can use their skills that aren't necessarily working for a client of a firm.

[40:09] HUSEIN: Yeah, absolutely. And what I've found, both personally and from other people I've spoken to, is that these opportunities give you opportunities you may not have gotten otherwise. You can kind of build your resume and your skill set in case you want to move in a different direction afterwards.

[40:22] ALEXI: Absolutely, absolutely. And whether it's doing the summary advice type of work that can give you good litigation skills and stuff like that. But also the sitting on boards, it helps build your network, it helps to increase your visibility and your profile. There's a lot of other benefits that can come from sitting on boards. And I often encourage people to find board positions.

[40:49] HUSEIN: The next question we have is: "How have you found that public interest litigation has changed over the last several years?"

[40:57] ALEXI: The good thing that I see is that the role of interveners has expanded considerably in the time that I have been in practice. So when I started in practice in 2007, there would usually be one or two interveners in a big charter case that would be at the Court of Appeal or the Supreme Court. And the role of an intervener was kind of unknown at the time.

[41:21] I started with the Canadian Civil Liberties Association before I joined private practice. And then when I was in private practice, I continued to act for them as an intervener. And we would often be one of a handful of interveners.

[41:34] HUSEIN: And is that because there was only that many that applied for leave or because the Court only granted so many?

[41:40] ALEXI: It was a bit of both. We didn't see as many applications for leave to intervene. And back in 2007-2010, the Court did deny leave, whether it was the Court of Appeal or the Supreme Court of Canada, was denying leave. You weren't guaranteed to get leave to intervene. So it was a bit more work to put that application together. The Court of Appeal actually used to ask you to have a "draft factum." It's just such a thing as a draft factum. You're either going to do a factum or you're not. You're not going to hand up a piece of garbage to the Court of Appeal.

[42:15] But I intervened in a case at the Court of Appeal where they wanted a draft factum before they would decide whether or not you got leave. So it was a lot of work to become an intervener. I think organizations have figured out the role of interveners and we're seeing more organizations apply for leave to intervene. And at the Supreme Court in particular

now, we're seeing a lot of interventions being granted. So now we'll see a list of 15 interveners on a big case. And it's a bit of a victim of its own success, I think, at this point.

[42:53] You're seeing so many interveners that I think the impact of interveners, particularly at the Supreme Court, is unfortunately diminishing. Also, the Supreme Court passed a rule a few years ago that interveners can only have five minutes of time, which is not a lot of time. When I started in practice, you get 10 minutes and you can do some good argument in 10 minutes. At the Court of Appeal, you get a little more.

[43:21] And at the five-minute time, now you very rarely get questions as an intervener. You might get one question, but you don't have time for an exchange and a dialogue with the bench. And I think that that is—again, it's a bit of a victim of its own success.

[43:41] HUSEIN: I've also heard situations in which the court will look at the list of interveners and see if there's overlapping issues and might have to make difficult choices picking one over another. Have you seen that as well?

[43:53] ALEXI: Yeah. Organizations being sort of lumped together through coalitions. These organizations are granted leave together for a time together. And again, it can dilute the message and it can be difficult for the organization.

[44:11] HUSEIN: Are there certain considerations or strategies that associations should employ in light of this diluted impact that they would have otherwise been able to make?

[44:19] ALEXI: Yeah. So when I've been acting for interveners now at the Supreme Court, my advice to my clients is to be very strategic about what you're going to say. Whereas before, we might have wanted to be a bit broader with our position. Now I think organizations need to pick one, maybe two, but preferably one main point and really narrowly laser focus in on that one point that can be a strategic advantage and benefit to the court. And I think that that's the challenge for an intervener now, is where can they really zero in on something narrow and specific that is not addressed by the other parties that can get them the highlighted prominence that they would want as an intervener.

[45:06] HUSEIN: Yeah. That's helpful. Next question we have is: "Do you foresee any upcoming shifts in the manner in which the law addresses issues of systemic racism?"

[45:14] ALEXI: I may be being idealistic here. So I mean, the first issue is our courts need to, and our bar and our legal system needs to just acknowledge that there is systemic racism. Yes, this is a thing. It exists. It's real. This is not some made up issue that the woke left has come up with. This is a thing. It exists. We're not having that discussion.

[45:44] HUSEIN: Yeah. Some courts have only taken judicial notice very recently on that, right?

[45:46] ALEXI: That's exactly it. And I am cautiously optimistic that we're starting to see some of that acknowledgement in decisions. Courts are taking judicial notice of it. They are acknowledging that it exists. We argued a case here in our firm back in 2021 that was a—we

acted for a defendant in a defamation case where she had called out some systemic discrimination in her workplace. And Justice Shaw in her decision and I call her out on purpose because it's such a great decision. So the case was chew and soul cleaning and it was written by Justice Shaw.

[46:30] And at a couple paragraphs towards the end of the decision, Justice Shaw calls out her own recognition of her own White privilege. And she said, "When I approached this case at first, I did not understand this thing that is important to this racialized defendant. And this was why I didn't understand it.

Council explained it to me. And we as a profession need to recognize our own privilege and our own lack of understanding of the issues that systemic racism can have on other people."

[47:05] And it is an amazing decision from that perspective. And I give her such credit for having the courage to say that in a judicial decision. It's fantastic. And so they're little steps, I know, but when we see those glimmers, they are just—they're really fantastic. And I personally get a lot of hope out of seeing those little glimmers like that.

[47:30] HUSEIN: Yeah, absolutely. So, do you have room for optimism that we may get to a place where this is maybe not entirely corrected, but in a better place we are in right now?

[47:40] ALEXI: I do have optimism. I'm seeing those types of comments like that case from Justice Shaw. I'm seeing some really great appointments from good judicial appointments, people being appointed to the bench from really great, diverse, different backgrounds. We're seeing people of color on the bench in a way that we have not seen before. And that diversity of background and experience, I think, is really a nice glimmer of optimism that we can see from the bench.

[48:15] HUSEIN: Fantastic. Last question we have is: "What are the primary barriers that you see regarding access to justice for marginalized communities? And what can the legal profession do to address these challenges?"

[48:25] ALEXI: So I think, you know, one of the things is, again, just we have to acknowledge that our system is based on a system that perpetuates power in a lot of ways. It perpetuates advantage. And there is systemic racism and systemic marginalization that exists in society. And we as a profession, I think, need to be aware of that, because if we're just denying its existence, denying the existence of systemic racism, denying the existence of perpetuation of marginalization, then we're just going to obviously perpetuate it. And so that is point one that has to happen.

[49:18] But the barriers to access to justice, I think our litigation system is crumbling under itself, in particular, the litigation and the court system. It takes so long to get anything heard. The resources that are necessary to bring litigation forward are astronomical. And it breaks my heart to regularly have to tell people, yes, something horrible has happened to you. And here are the steps that we'll have to go through to vindicate what has happened to you. And that we are, unfortunately, at a situation where people often have to decide whether they can commit their resources to vindicate their rights.

[50:02] And by resources, I don't just mean money. Resources, it's cost. There's a cost in time. There's a cost in money. But there's a cost in emotional drain and energy. These cases take years to fight. They are hard to fight. People have lives, they have jobs, they have children, they have families, they have parents, they have commitments to their communities. And they might just not have the space in their world to take on litigation. And so it's just a recognition that our system is very cumbersome to navigate. And there is a huge cost associated with it.

[50:43] So I think that is the primary barrier to access to justice for marginalized communities, is having the resource space to be able to get cases forward and to move cases forward.

[50:57] HUSEIN: And so I know there's not one solution, but what are some things that you think could be done? I know one thing you're always saying, well, hire more judges. But I'm sure it's not as simplistic as that, right?

[51:07] ALEXI: I don't think it's as simplistic as that. And I think judges are, you know, from what I hear from people that I know that are on the bench, judges are working really hard. They are working more than they've worked before. They have less support than they had before. So I don't just think it's a matter of hiring more judges. I think our profession needs to think about the impact it is having as a profession on access to justice with every motion that it brings.

[51:37] Because your motion may not affect a marginalized person or community directly. But the more we clog up the system, the more we explode litigation for all litigants, that is having an impact universally on clogging up our litigation system and on making litigation harder and harder to access. And I think we as a profession need to think about that.

[52:00] I think judges need to think about it from a cost perspective. When they see abusive motions that are being brought, when they see frivolous things that are being brought, you know, what kind of cost consequences can be imposed to help send a message that that is not how we litigate. That is not how we need to do things. And we need a concerted effort to winnow away useless motions and the noise that's happening around litigation. We need to really be focusing on getting to the end of the case.

[52:31] And again, your case itself may not be addressing a marginalized community, but the more we balloon the system, the harder it is for everyone to access it. And when you're in a marginalized community, you're starting behind anyway. And so your barriers just become more and more and more to get into that system.

[52:52] HUSEIN: So Alexi, thank you so much for joining us on the show today. Again, we've known each other for quite a while. I've had the opportunity to work with you on a couple of projects. So it's very rewarding to get to know you in this context to talk about these important issues. All the issues we talk about are very live issues. I'm sure we'll see developments changing in the next couple of months. So I appreciate you taking the time to walk our listeners through what's going on and we look forward to staying in touch in the future. So thank you again.

[53:15] **ALEXI:** Thank you so much, Husein. It was great to see you.

[Music Break]

[53:24] **HUSEIN:** And that's going to do it for this episode of Lawyered. Thanks for listening. On today's episode, our guest was Alexi Wood. If you want to learn more about her and the excellent work that she does at her firm, St. Lawrence Barristers, at her firm's website, which is www.stlbarristers.ca. And for more about today's show, and for links to all the cases that we spoke about today, you can find those on our website, which is www.lawyeredpodcast.com.

[53:49] **ALEXI:** And on our next episode, we're going to be speaking about the area of professional regulatory law with our guest, Rebecca Durkin. Rebecca is one of the foremost leaders in this space, and we're going to be speaking about a bunch of live issues, including trauma-informed regulation, the importance of charter values, as well as British Columbia's proposed change to the regulation of the legal profession.

[54:13] This area of professional regulatory law is very near and dear to my heart, because as many of you know, that's the area that I practice in on a day-to-day basis. And even if you don't practice in this area, as your bread and butter, there's going to be a lot of takeaways, especially given that many of us work either in or adjacent to a profession that is regulated in one way or another. So keep an eye out for that one.

[54:36] And if you want to help us improve this show and get some neat and affordable legal awards, including the opportunity to get early access to our episodes, and to submit questions for our show, it would mean a lot if you could become a patron of our show. We just got our live season right now that we're in. You can find out more about how to do that on our crowdfunding website, which is www.lawyeredpodcast.com/patreon. That's www.lawyeredpodcast.com/patreon.

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[55:23] And finally, please be advised that while the show is aimed to be helpful and informative, that it is not legal advice. However, if you do want legal advice, please reach out to a lawyer directly to help you with your particular situation. And with that, we will see you back here in two weeks' time. Until then, keep it legal.