

[00:03] HUSEIN: This is Episode 92 of Lawyered. I'm Husein Panju. And on this week's episode, we're speaking with professional regulatory lawyer, Rebecca Durcan, about the licensing, conduct, and discipline matters involving regulated professionals.

[00:19] First up, we'll speak about British Columbia's Bill 21, which would create a new single regulator for legal professionals and is prompting new questions about the meaning of an independent regulatory body while maintaining procedural fairness. We'll chat about a new global trend known as trauma-informed regulation. And while protection of the public is a primary focus of regulation, this new approach seeks to inject some more sympathy and kindness into the process.

[00:46] And we'll chat about how lawyers can use this tactic to create a more equitable landscape. Next, we'll speak about a new Supreme Court decision that emphasizes the need to consider charter values, even in cases where charter rights are not directly infringed. And we'll find out how this new guidance will impact regular decision-making processes going forward.

[01:06] And finally, in our Ask Me Anything segment, we'll cover a bunch of questions submitted by our listeners on a range of topics, including how to handle freedom of speech issues, in the culture wars, decisions regarding prosecutions, and what it really means to be a modern regulator. All of that and a lot more is coming up in just a bit. This is Lawyered.

[Music Break]

[01:27] Hey, everybody. Happy August! And welcome to another episode of Lawyered. I appreciate you joining us here again for another episode. As I mentioned on last week's episode, we are currently at the beginning of the final season of the podcast. That's right, we're going to be capping things off at the end of season 10.

[01:52] And I want to just thank everyone who's reached out for the very kind words. And as I mentioned last time, that although this is the final season of the podcast, I'm really dedicated to making this season the best one yet and finishing strong as we've been doing so far.

[02:06] On our last episode, we had a really great season premiere where we talked about the area of social justice law. And we had an incredible lawyer, Alexi Wood, who walked us through the topics. For those who may be unfamiliar, Alexi is the founder of a boutique firm called St. Lawrence Barristers here in Toronto. And amongst other things, is especially well known for social justice work.

[02:31] We talked about a bunch of hot topics in the area, including Ag-Gag legislation. There was a high-profile decision earlier this year in which the court struck down a big part of a bill that would have restricted the ability for activists to comment on and make representations relating to their activist work in the firm context. We also spoke about retaliatory litigation, which is a very specific type of SLAPP suit.

[02:59] And we also had a really insightful dialogue about civility in our profession, or lack thereof. And we talked about some things that lawyers can be doing to help improve the way that we practice for our clients' benefit and at a broader scale as well. And one thing that I found especially powerful as part of that final topic is the reminder that we all have the role that we play in being responsible to make action justice a priority.

[03:27] Now, this term is often thrown around in different contexts, and there's things that can be done at a large and smaller scale. And one thing that Alexi spoke about is the obligation that we have to not clog up our court system with frivolous matters, things that could be easily settled outside the court process, and even silly motions that don't need to be brought. Because we currently have a serious active justice issue in terms of so many matters, so many meritorious matters, but not enough court time, one thing that we spoke about is that even for every motion that is taking up time in the court setting, that's time that could be better spent for other matters that actually deserve the court's attention.

[04:15] So it's a great discussion, so I encourage you to check that out. That's Episode 91 in our archives. Today's episode is another one that I'm especially proud to share. It's about the area of professional regulatory law. And as some of you know, this is the exact area that I work in. I've been working as a counsel for a regulator for the last five or so years, and I really enjoy it.

[04:39] People ask me pretty regularly, you know, friends and family and others, "What do you do for a job?" And I often find it a bit cumbersome to explain because it's not kind of a typical lawyer job that you hear about. So, I'm especially glad to have this episode to walk people through what it is that I do as part of my job. And we have a guest who's very well-suited to speak about this.

[05:04] You know, this isn't necessarily the kind of work that makes the headlines or, you know, the Twitter feeds, but this area of law has a significant impact on public protection and public interest, and also ensuring that industries and professionals are operating at a high standard. The guest we're going to hear from today is easily one of the foremost lawyers in this field. I've actually gone to her on a few occasions when I've needed guidance or a second opinion on a tricky matter.

[05:30] She not only acts regularly as a lawyer for regulators, but is also a venture on Law Society of Ontario, which is the regulatory body for lawyers in our province. So I could go on, but I think you'd much rather hear it from her. So, without further delay, here is our episode with the wonderful Rebecca Durcan.

[Music Break]

[05:51] Rebecca is the co-managing partner at Steinecke Maciura LeBlanc, also known as SML, which is a boutique firm in Toronto that specializes in the area of professional regulation. Rebecca acts as general counsel, prosecution counsel, and independent legal counsel to several Ontario regulators. And she's also an elected Bencher of the Law Society of Ontario and serves as an adjudicator at the Law Society Tribunal.

[06:15] She's also co-authored several notable textbooks, including the Annotated Statutory Powers Procedures Act, as well as prosecuting and defending professional regulation cases. And finally, Rebecca is also an adjunct professor at the University of Toronto Faculty of Law and regularly speaks about regulatory issues at various conferences across Canada. So Rebecca, thanks for joining us on the show today.

[06:35] REBECCA: Thank you so much for having me.

[06:37] HUSEIN: Yeah, absolutely. So, one thing I want to chat about before we get started is, and I've gotten to know you a little bit in the last couple of years, and one of the things that I think separates you amongst other lawyers, in addition to being very busy, is you also have a very active running, I don't know if practice is the right word, but a very active running hobby. So, can you tell us a bit more about what that is exactly and then kind of your interest in that area?

[07:01] REBECCA: Sure. I am not a natural runner. There are those gazelles out there, those natural born runners. That is not me. I am a plodder. And I've always been a bit of a jogger, casual jogger, but during COVID, I think with the opportunities to actually work from home and fit in some long runs in the morning, I really, really caught the bug.

[07:25] So it has been, to be frank, such a huge part of my mental, probably more mental health than physical health. I'm a big supporter of encouraging lawyers to really find, whether it's running, yoga, walking, something that really provides you with solace and health, ideally out in nature, because this can be a stressful job. It can be a set entry job. So, incorporating any aspect of moving and health, I think really does actually benefit you in so many ways, including your legal career.

[08:04] HUSEIN: And are there parallels you see between running and the practice of law without stretching too much?

[08:10] REBECCA: Well, I think there's those natural lawyers that came out of the womb and just were these inherent, beautiful legal brains. And that was never me. That was never me. I've always been a worker. I've always had to work hard to grasp, to understand. And so there are, for me, that effort, that putting the time in, whether it's my chosen profession or my chosen outlet, applies the same. At the risk of tooting my own horn, I've actually done pretty well. I always say one of the beauties of getting older is that the qualification times as a runner increases. So I've been able to actually qualify for some really cool runs because I've put the work in and I'm older, so there you go. Get excited to get older.

[08:49] HUSEIN: Well, there you go. Well, I mean, don't you run like 10 kilometres a day or something?

[08:51] REBECCA: Yeah, I run around between 7 to 10 every weekday morning. And on the weekends, I'll do a longer run. When I'm training for a marathon, I'll have to increase that. But it's great. Honestly, it's...And maybe another parallel. The more you do it, the easier it gets, like a lot of lawyering. So if you told me 10 years ago, I'd be doing this every morning, I would have laughed. Now it's, yeah, it's part of a course.

[09:17] **HUSEIN:** Yeah, it must be rewarding to see like your progress over time.

[09:20] **REBECCA:** Yes, really, really, really is. So you're never too old to get into this world. I am testament to that. So yeah, find your passion, find your health outlet.

[09:33] **HUSEIN:** Fantastic. Great. So we've got a bunch of interesting topics to speak about in this area of professional regulatory law. And the first we're going to speak about is the bill that's coming out of the province of British Columbia. Now, one of the most controversial issues in BC involves Bill 21, which would significantly change the regulation of the legal profession in the province. And in particular, it would create a single regulator for lawyers, notaries and paralegals, and also restructure the board of directors. And the law society has sort of challenged this provincial bill, which has prompted new questions about what it means to have an independent legal profession.

[10:09] And before we get into this, as you mentioned at the outset, I should mention that Rebecca is a benchler or a director of the Law Society of Ontario. And so, of course, in this segment on this episode, just not to be in her capacity on this or for any of the other topics of the episode. So, Rebecca, I know that this bill is getting a lot of lawyers talking, both in BC and across Canada. And before we get into the controversy, I was hoping we can start by briefly explaining you say they regulate lawyers, what does that actually mean?

[10:42] **REBECCA:** Great question. So, to regulate, there are certain professions or certain jobs, if you will, that are regulated, which means that you have to gain entry into the profession or the job, that you have to meet certain standards to remain within the job that you can be complained against. There's an accountability provision when you're within that job or the profession.

[11:06] So, the term regulation, and you said at the outset, I'm involved in professional regulation, my role is to assist regulators. So, those regulators who regulate certain identified jobs. In our world, you can't just call yourself a lawyer in any Canadian jurisdiction. You have to be admitted into a law society and the law society is the regulator. But in British Columbia, the current regulator, the Law Society, only regulates lawyers.

[11:40] The proposal is intended to increase the scope of that and include two other legal professions, notaries and paralegals. Again, you touched on the other change would be the board of directors, the governance model, if you will. Currently, the board of directors—and lawyers love terms—so, the convocation is currently composed of 25 lawyer benchers, directors. That's the term we like to give to directors, being benchers. And currently, it has six benchers that are appointed by the government.

[12:16] Okay, so that's the current board. Those lawyers that I mentioned, they are elected by the profession. And what Bill 21 is proposing to do is to shake that up, is to say, okay, right now, you have 31 people around the table. There is a concern that that's too many. That's not necessary. And the composition isn't perhaps where we want it to be. So, what the government is proposing is saying, okay, let's change this up. Lawyers, you can elect five lawyers, okay? So, you're not going to elect 25 lawyers. Lawyers, you can elect five lawyers.

Notary publics, you can elect two notary publics to be on the board. Paralegals, you can elect two paralegals. And there's a bit of a wiggle room that paralegals can either be elected or appointed.

[13:02] HUSEIN: I know a lot of people are talking about this bill, and there's concerns that are being raised about the independence of the law society. So, what does this term mean to you in this particular context?

[13:12] REBECCA: So, I'll say right off, I think it's really important for regulators and for regulated professions to understand that the term 'independence' is a bit misleading. We talked about these different regulators. All regulators, statutory regulators, come about through, you guessed it, statutes. Statutes are enacted by the various legislative assemblies. Governments can change legislation.

[13:38] I use the City of Toronto as a classic example. The size of the council in the City of Toronto was drastically reduced, and people said this cannot occur. And of course it could occur, because the composition of that council was set out in legislation. So, you hear a lot of regulated professionals, doctors, architects, opticians, naturopaths, lawyers, say, my regulator is independent of the government. And flat out, that's not accurate. There's always a regulator comes about through legislation.

[14:10] In every piece of legislation, there is some accountability measure towards the ministry, towards the government. And that makes sense, right? A profession only becomes regulated if they pose a risk to the public. And so, yes, the government decides we are going to allow the profession to have a huge voice in how it's regulated.

[14:27] We are going to create, through legislation, these various regulators. But there has to be some form of accountability measure, and that will always exist. So, pure independence does not exist. And what, just to follow up, I think the real concern, what I'm hearing out in British Columbia is there is a concern that taking away some of the votes for lawyer directors strikes at the heart of what they believe is their independent voice, their independent right to be free from government intrusion and, I guess, government interaction whatsoever.

[15:08] HUSEIN: And so, I know that the BC Law Society has announced that they're challenging this bill. And at the time of this recording, it's early July. So there's not an outcome just yet. Can you tell us a bit more, based on what you know, about what is the basis of their legal challenge?

[15:20] REBECCA: So, I think, one, as I mentioned, there's a real concern that by reducing, not eliminating, but by reducing the number of lawyers that can be elected, that they're somehow thwarting the voice of the lawyers in the profession. From what I can read, there's also a concern that allowing paralegals and notary publics around the board table is also perhaps winnowing away the independence of the legal profession.

[15:53] For a lot of professions, they don't have the interaction with the government that lawyers do. You know, let's be frank. It's lawyers that challenge the government. It's lawyers

that defend people who are being charged by the government. So there clearly is, I would agree, a special sort of bubble that lawyers occupy. But despite what I've heard, challenge-wise, the concern that this proposed change would attack the independence of the profession, I don't see that.

[16:25] The legislation, in and of itself, enshrines the importance of the independence of the legal profession. But to say that the profession is independent is one thing. To say that the regulator is independent is, again, can be a bit misleading. The regulator still needs to be accountable to the government. The regulator still needs to reassure the public that they're there to serve and protect the public interest.

[16:47] HUSEIN: So, again, we're very far from a decision yet. But what impact do you think this decision will have, regardless of how the court finds on this issue, about whether Bill 21 should remain as it is or should be modified or struck down?

[16:59] REBECCA: There has been a strong encouragement for the Law Society of British Columbia and for the profession in British Columbia to really ask, will you incorporate paralegals into the four walls? So, I think it really does perhaps communicate the—at least in British Columbia—the NDP government's desire to increase the number of regulated legal professionals. And you might say, well, who cares what regulated or not? But as I said, a big part of regulation is accountability.

[17:30] So I think that's been the genesis. I think it's a good reminder that regulators are, need to ensure that they're listening to government's requests. Clearly, regulators can say no. You know, if the government asks you to do something, they don't have to say yes. Clearly, the government can mandate it and authorize it through legislation.

[17:51] But I think it's really important for regulators to listen and enter in those dialogues with governments to see rationales, understand different rationales. If it's successful, I think this is going to be a real pushback. And perhaps looking at, you know, if it's not successful, it'll be a situation where perhaps the government has overreached, perhaps that there is a concern, is there, as alleged, some sort of constitutional violation that's occurred here? So it'll be really, from a wonk perspective, from a regulatory wonk perspective, I'm really interested to see how that plays out.

[18:22] But I think it's either going to be a bit, maybe a bit of black eye on the regulators saying, you know, read the room, let's ensure what we're doing our job, or it's going to be government, you overreached, you know, your intents might have been great, but you mucked this up. So, it's probably not going to be great either way, if I'm totally honest, because I think someone might emerge from this with a black eye.

[Music Break]

[18:55] HUSEIN: Many Canadian regulators engage in investigations and inspections of professionals who are within their mandate. And while protection of the public is a primary concern, a recent global trend has led to a shift towards trauma-informed regulation, which seeks to inject more sympathy and kindness within the regulatory process. And these new

changes may lead to a more equitable landscape, but also trigger some new questions about procedural fairness and regulatory responsibilities. So, Rebecca, I know that this trend of trauma-informed regulation has done a lot of traction in places around the world, including the UK and Australia. So why don't we just start by defining what this term means?

[19:27] REBECCA: Sure. So, the term trauma-informed regulation, the term compassionate regulation, has also been bantered about. And essentially what it is, it's a movement towards recognizing the impact of regulation, both on the licensee or registrant and other players, if you will, complainants, witnesses to hearings.

[19:53] There has been a real uptake in recognition that, whether we're talking about the licensing process, the investigation process, the discipline process, is incredibly stressful, can take a large toll on all of those players that I just mentioned. So, in light of its role, which is to serve and protect the public interest, what regulators are doing is saying, how can we achieve these outcomes to protect the public in a way that does not leave such a heavy toll on the licensee that's been investigated or prosecuted or the complainant during the investigation and prosecution process? So, it's really just trying to take a step back and focus on your outcomes and how do we get there in a more direct and more compassionate way.

[20:39] HUSEIN: Can you just give some colour about what this toll really looks like on the registrant side?

[20:45] REBECCA: Sure. So, England has done quite a bit of studies focusing on the fact that a number of physicians have actually died by suicide during investigations and prosecutions, that a lot of registrants or licensees will actually quit during an investigation because whether it's the shame or the stress of the investigation per se. So those obviously are not desired outcomes. So those are two sort of extreme examples.

[21:16] And the other, if we're looking at the complainant public interest perspective, if a matter takes far too long, if a complainant feels that they've been traumatized all over again during the investigation or prosecution process, you've lost the confidence of a pretty vocal member of the public. So, the stakes are quite significant.

[21:35] HUSEIN: And is this specific to professional regulation? I can imagine a lot of cases in which an administrative body or government body is investigating a workplace environment. Maybe it's not a regulator.

[21:48] REBECCA: You nailed it.

[21:48] HUSEIN: Or even in the criminal or quasi-criminal aspect, there's a lot of inspections that are done in various contexts. Is there something specific to this professional regulatory realm that makes this particularly unique in this respect?

[22:04] REBECCA: Short answer to your question, no. The regulatory world kind of kept its ears and eyes open and started to know, and you nailed it, from workplace investigations processes, other investigations. And I think it's real genesis really focused on the toll of investigations per se. But they realized and they looked at, there's something that we can

learn here. And I think what's really important, there's been fascinating studies, is saying that taking this approach, this compassionate approach, this trauma-informed approach, and you use even the word 'kindness' approach, in no way derogates or dilutes the regulatory mandate to serve and protect the public interest.

[22:43] Studies have demonstrated that actually regulators can achieve their desired outcome, obviously protect the public and treat the registrant fairly with this approach much more effectively than not using these approaches. So there's a lot of fertile ground here.

[22:58] HUSEIN: I know that the literature has been fairly extensive lately about what things that can be done. Based on your review of this, what are some examples of tangible things that can be done by regulators to apply some of these principles of trauma-informed regulation?

[23:11] REBECCA: It doesn't need to be very expensive or very dramatic. So as a regulator, look at your website. Have you put as much information about the licensing process, as much as possible, timelines, steps, things that are required out there, so that anyone who's interested in perhaps licensing with your organization can find that out.

[23:31] Investigations - set out exactly what occurs or what can occur during investigation, that you will be contacted, that you will receive a complaint, that in certain situations, certain regulators have the ability to send an investigator out to search and take information from your clinic directly. Providing as much as possible upfront so that a registrant does not have to hire a lawyer to maneuver through this. When a complaint is received and you send it, whether it's through mail or email, a lot of regulators now are doing a follow-up phone call with the licensee or registrant just to confirm that they've received it, if they have any questions.

[24:08] We're seeing a lot of regulators actually also then provide with that notice of a complaint resources for mental health, resources to go out and seek assistance, and also providing those same services to the complainant. So really, again, taking a sort of a person-centered approach, not being the big mean machine, recognize that you're dealing with people, that receiving a complaint can be incredibly stressful. Filing a complaint can be incredibly stressful.

[24:37] So providing resources that assist the people get through the process while, of course, still not confusing or blurring the boundaries that the regulator there is to protect the public. It's not a gotcha. We're not out to get you. This is not we're hired gun for a complainant, but an impartial, and we want you to get through this strong. We want you to be able to not be traumatized by this and taking a look at their own process. Are we unintentionally making this more traumatic than it needs to be?

[25:05] HUSEIN: I can see some regulators hearing this and thinking, well, you know, we have some small percentage of registrants who are actively causing consumer harm, public harm, you know, harms of different type. And they might see this approach as being a bit,

you know, like bending over backwards to accommodate these people who are doing these terrible things. What do you say to that?

[25:27] REBECCA: I think having clarity of mandate and clearly and transparently communicating to whether you're speaking to the registrant, whether you're speaking to the complainant is going to be key. What I'm sensing is that there is sort of a recognition that ensuring that your registrants and licensees have access or awareness of resources that can assist them through an admittedly stressful process is not blurring your mandate, is not confusing. And to be clear, I think that's going to be key. If you are viewed by members of the public or complainants as, you know, helping out, actively helping while you're also supposed to be investigating and possibly prosecuting, you can understand the confusion that can occur. Devil is going to be in the details.

[26:12] But I think the days of saying, no, this is not an area for us. We don't need to engage in this. We don't need to provide these services or at least alert them to these services. I see that kind of crumbling. I see more of a recognition that a healthy profession, a profession that trusts the regulator, that has confidence that they're going to be treated and this is not a gotcha, which unfortunately some registrants do believe. I think any of the way that you can kind of demonstrate that this is not a gotcha, that we want to ensure that you're fully informed and aware, can only benefit the profession, the regulator and ergo the public.

[26:47] HUSEIN: And I know that regulatory lawyers, being lawyers who work for regulators, have a big role in this, whether they're the ones actually litigating this or providing advice to the organization. What is it for them to consider when they're trying to strike this balance between dealing with complainants and dealing with registrants to this tension you're speaking about?

[27:05] REBECCA: Great question. You're a lawyer representing a regulator. You're basically the face of the regulator. The hyper-aggressive, there is no room for any sharp practice. There has to be utter confidence that the person that you are arguably prosecuting knows that A, you're the face of the college and you're going to be treated fairly. There's that prosecutorial expectation upon regulatory lawyers that prosecute. So, there's a whole other level of responsibility.

[27:31] And I think it's really also important [to recognize] that a lot of registrants are self-represented. Irrespective of the profession, a lot of them are self-represented. So there will be an expectation on you as lawyer. Again, you can't provide legal advice, but you're going to make abundantly clear that that person is fully informed, fully aware, recognizing you're going to have to provide more information. It's a different beast.

[27:53] This is not your traditional civil lawsuit. You're not out there to win. It's not a gotcha. You are representing a regulator that has to, has to at all times, really demonstrate the standards, the characters, the expectations that the regulator has of its own members. So if you're a regulator hiring a legal shark to prosecute people, it can sometimes come back to bite you because you might be undermining the very message that you're trying to communicate.

[28:22] HUSEIN: And these principles, I would say, help enhance this public interest mandate of the organization, right?

[28:27] REBECCA: I agree. And getting back to that kindness, Zubin Austin from the University of Toronto worked with the Australian regulators and he did generate this paper and he expressly states that actually using that through, that is the lens. If a regulator views its role through that kindness lens, you know, recognizing that a lot of people are not neurotypical, there's a lot of neurodiversity, rigidly imposing certain standards, certain timelines on people that might not be able to do so because of social stressors, family situations, again, neurodiversity, that you're under, if you focus on the desired outcome here, i.e. get your registrants to comply and understand the standards, injecting a bit of kindness is going to get you there as opposed to that rigid, rigid approach.

[Music Break]

[29:18] HUSEIN: It's a well-established that tribunal decisions need to be alive to the rights enshrined in the Canadian Charter of Rights and Freedoms. However, a recent Supreme Court decision emphasizes the need to also consider charter values in its decision making, even when charter rights are not directly infringed. And the decision will be significant for regulators and there's a need for thorough decision making that balances statutory objectives with constitutional values. So, Rebecca, before we speak about this new case, I'm going to be able to speak about the Doré framework, which provides some context for this.

[29:50] REBECCA: Lawyers that are listening are going to be very familiar with the Oakes test. The Oakes test is this lovely sort of test that we utilize to see, okay, is a law or policy contravening the charter? The Oakes test doesn't really work when we're considering administrative decisions. What emerged to assess the constitutionality of administrative decisions was the Doré test, the Doré-Loyola framework, if I'm being completely honest, and essentially it was a two-step test.

[30:20] And this first step is one, is a Charter protection engaged by the administrative decision? So, equality, mobility, expression. So does it fall within one of those zones? If yes, then what the administrative decision-maker is required to do, and the courts will look to whether or not this occurred, has the decision-maker proportionately balanced the Charter protection and the administrative body's objectives?

[30:52] So within the regulatory world, as I've just said, regulators are there to serve, protect the public interest. When a decision to investigate, when a decision to prosecute, when a decision to refuse licenser or registration occurs, and if a Charter value has been raised, what the regulator now needs to do is to ensure that they have considered that Charter value, and whether or not the balancing between the regulator's objectives and the Charter value has been considered.

[31:25] HUSEIN: So, it's not as strict as the Oakes test?

[31:26] REBECCA: Not at all.

[31:29] HUSEIN: Okay. So, the case we're going to speak about that's new, this case that's called *Commission Scolaire Francophone des Territoires du Nord-Ouest v. Government of Northwest Territories*, and the citation there is 2023 SCC 31, and we'll put the citation on our show notes as well. Rebecca, can you tell us a short description of what this case was about and why it matters?

[31:50] REBECCA: Great. So the Charter section that was relevant to this case was Section 23. And Section 23 is that Canadian citizens have a right to have their children receive primary and secondary school instruction in English or French. And what occurred in this case is that five parents asked the Minister of Education of Northwest Territories to exercise her discretion to allow their children to a French first education program.

[32:28] Now, these parents, they were not Canadian citizens, and French is actually their second language. So, in the case, the Minister reviewed a recommendation from an organization that said, yes, you should be admitting these children. It would increase French within the Northwest Territories. But the Minister looked to her ministry created directive, and she determined that these children did not meet that directive. So irrespective of the recommendation, irrespective of Section 23, that didn't apply because we're talking about non-citizens. She said, "No, Section 23 doesn't apply, so let's go on."

[32:52] And essentially, parents weren't happy. So, they sought review and the Supreme Court said, "Sorry, your decision, Minister, was unreasonable." And it said that the Doré framework that we just talked about clearly applied here and you didn't apply it properly. They were concerned that there were no reasons set out in the Minister's decision, that there was no evidence of any balancing between this charter value, as I said, to encourage and to promote French speaking languages and communities within Canada, that no consideration was given to this case. But what the courts made very clear is, we're not just talking about charter rights. Just don't focus on the wording of Section 23 and or any of the rights. It's the value, the value that underpinned Section 23.

[33:40] And that is what the Minister should have been considering, that this sort of rigid ministerial approach, this checklist approach simply didn't cut it. And so the values embodied in the charter needed to be considered by the Minister. So this really has impressed upon administrative decision-makers because the courts have said, Doré is the test here, that's clear. But it's not just looking at rights. You really have to consider, what are the values underpinning these charter rights, these charter almost aspirations? And then that balancing had to occur, which it didn't, just didn't.

[34:19] HUSEIN: Got it. So obviously the case here is about those language rights, but it expands to all parts of the charter.

[34:26] REBECCA: Exactly. Oh, yes. This would be applicable to all elements of the charter.

[34:29] HUSEIN: So how is a decision-maker, a regulator, supposed to assess which charter values are relevant? Because the rights are, you know, there's room for interpretation, but at least they're there in writing in the charter, right? But the values can be a bit less defined.

I agree. So, what's a regulator supposed to do? So I think, and we're somewhat in uncharted territories here, but I think a couple of things are going to be happening.

[34:50] One, and this might sound silly, but just really reminding regulators and its various committees, ensuring that they know what rights are set out in the charter. Because there's no point even thinking about values if you don't understand the charter rights. So really ensuring that these committees have familiarity, having a copy of the charter in their package so they can review, they can discuss.

[35:10] And then if there is an inkling, right? And I'm going to be honest, I think a lot of licensees and registrants are getting quite savvy. Freedom of expression is the classic one that you see quite triggered and cited. So even, I don't think there's going to be too many breadcrumbs required to start thinking, even if it isn't a pure right that's triggered here, what are the values under freedom of expression? What is freedom of expression intended to promote and consider?

[35:34] HUSEIN: Do you see an example of like how freedom of expression could get triggered in a regulatory decision?

[35:40] REBECCA: Well, classic example is Dr. Peterson. So Dr. Peterson, Jordan Peterson, sought judicial review of a complaints committee decision that basically said, "Dr. Peterson, you need to take a course on professionalism because of the way you communicated and it wasn't professional." And he said, "How dare you, regulator? You are contravening my charter rights of freedom of expression. You have waited out of your lane, stay within. If I made these comments to a patient, so be it. But I was making these comments on a blog or on Twitter or on a podcast."

[36:10] So that was a classic case where, and we're seeing this more and more, to be frank, especially since October 7th and COVID, where people said to regulators, you can't tell me how to think, you can't tell me what to say. And of course, regulators can't tell people how to think per se, but how they express themselves, the courts have been quite clear that actually, yes, regulators can, if they balance, if they ensure that they are minimizing and limiting charter rights as minimally as possible, they can in fact respond and tell regulated professionals that's simply not appropriate and we are going to respond in kind.

[36:50] The values I think are going to be pretty evident. I think what's going to be more important is for regulators to A, really ensure their clarity on what are those charter rights. I think what you're going to start to see is regulators reaching out to complainants and licensees or registrants saying, hey, our complaints committee, our investigation committee is either through your own submissions or our own little work are concerned that perhaps this issue, this charter value may be infringed, can we hear from you?

[37:18] So reaching out, actually proactively reaching out, getting submissions and in their reasons, reassuring the complainant or the licensee or any reviewing court that they did consider it and they threw their reasons, they demonstrate the balancing. I think what that is, again, it's not going to be too far afield. I think what you're going to be seeing is people just perhaps not ascribing the black letter, very literal interpretation, more of a contextual

approach. I'm stealing language from the courts here. Really applying a contextual approach. So it's not going to be, I don't foresee something very far afield, something completely unrelated, something completely remote. That would be, to be frank, too far to owners and regulators.

[38:00] What I foresee is regulators really saying, okay, even if the black letter ambit of the right is not triggered here, let's take a step back and just out of an abundance of caution, ensure if the intent here is to recognize that people do have the right for freedom of expression, do have a right to freedom of mobility. You know, is there any concern that our standard, that this complaint triggers something that perhaps underpins that right? That's what I think you're going to see. So again, I'm not too concerned that the values per se, because I think you're just going to get more of a contextual approach from regulators saying, hey, this might be within the zone, let's reach out and ask.

[38:41] It's going to be really reassuring the two parties, if you will. And to be frank, the courts, I think there's going to be a lot more judicial scrutiny here, that these issues were considered, they were properly and proportionally balanced, and that the reasons demonstrate as such.

[Music Break]

[39:05] HUSEIN: We are going to finish with our Ask Me Anything segment with Rebecca to speak about questions involving professional regulation. One of the bonus awards for members of our Patreon campaign is the opportunity to submit questions that they want to hear answered on the show, which can be questions for anything at all within the area of expertise, as long as they're not asking for legal advice. We do our callouts for questions about a week or so before each recording. So, if you want to learn more about how you can become a patron and submit your own questions to upcoming guests and get a bunch of other fun rewards, you can check out our website, which is <http://www.lawyeredpodcast.com/patron>. That's www.lawyeredpodcast.com/patron for more information.

[39:42] Okay, so Rebecca, a bunch of interesting questions to speak about for this segment. And the first one is this: Some regulators have various powers, including the authority to discipline, revoke licenses, and/or charge them with quasi-criminal offenses. And we spoke about this in passing in a previous segment today. So what are some considerations that regulators should take to assess which approach or approaches to take?

[40:05] REBECCA: As you've identified, a lot of regulators have a lot of powers, right? They can look to their statute and they have this whole host of powers, whole host of tools. But utilizing every tool in every situation really doesn't make sense. So what regulators are really looking at now is, okay, what is the risk of harm here? And really viewing and continually reassessing what is the risk of harm to the public, in my experience, helps guide the appropriate tool that the regulator takes out.

[40:36] So sometimes I do see regulators taking them all out. Everything's unholstered. Everything is because that risk of harm is so pressing. Other times, again, looking at the

situation, there is a determination that this is not rising to the risk where a full discharge of regulatory powers. In fact, sometimes no regulatory powers. Sometimes it's picking up the phone, making a phone call and having a discussion with the registrant just achieves that the desired outcome. So, if I had to really distil it down, a sophistication on the issue of harm, and not just at the outset, is really ensuring that regulators continually reassess the harm. Because as we've seen that as a matter progresses, the harm can increase or decrease. Submissions from the registrant, information from third parties.

[41:20] HUSEIN: And some of this can be like a moving target, like the culpability or the harm at the beginning might look very different closer to the actual hearing, right?

[41:29] REBECCA: Definitely. I have seen dramatic changes occur over a very short period of time. I've seen dramatic shifts occur over a much longer protracted period of time. So really reminding regulators, the one and done on the assessment isn't sufficient. You have to continually be reassessing because things can change.

[41:47] HUSEIN: Absolutely. Next question is kind of a comparative analysis. So the question is: "How does Ontario compare with other provinces or jurisdictions in terms of the degree to which professions are regulated?"

[41:58] REBECCA: I heard someone tell me once that Ontario was one of the most highly regulated jurisdictions in the world when it comes to professions. Now, the recent sort of disbandment at the Ontario College of Trades, where trades were relatively recently regulated, that the disbandment at the college maybe has lessened the numbers somewhat, but we've also seen an increased the behavioral analysis. People are being incorporated to more professions are being now regulated.

[42:26] I have noticed again that other jurisdictions in Canada are playing catch-up. So, for example, psychotherapists are now being regulated in more jurisdictions other than just here, Ontario. So, I would say comparatively, we're probably one of the more highly regulated professions. What that says about us, I don't know. I'll leave it to people smarter than me. But I'm seeing a bit of a catch-up in other jurisdictions to professions that we already have regulated.

[42:51] HUSEIN: Do you have any thoughts about why Ontario is as regulated as it is right now?

[42:57] REBECCA: I don't know. Part of me thinks, like what we talked about at the outset, do Ontarians really take comfort in knowing that there is an accountability measure, whether it's for their architect or their homeopath, or do they take comfort? Do they want that? Do they need that? Is there a concern that too many people were holding out and doing things that were improper? And was there harm as influenced? I don't know if it's in our DNA. Back during the McGuinty regime, there were five new health colleges added to the then 21. So, we have a lot of regulation, both health and non-health. But barring any independent data, I just wonder if Ontarians like to be able to pick up the phone and complain about someone. Maybe it's as simple as that.

[43:52] HUSEIN: The next question is: How do regulatory bodies balance the right to free speech with maintaining professional conduct and standards, particularly in light of current issues involving the culture wars?

[44:01] REBECCA: I spoke earlier of Dr. Jordan Peterson, where the College of Psychologists came in after, I think, if you look at the record, they weren't trying to, but they felt that they had to because of the numerous statements that Dr. Peterson had made. And again, they did not refer him to discipline, but they said, "Listen, you're a regulated professional. And yes, you have charter rights. We all have charter rights, but you have to understand that in certain situations, back to our Doré analysis, there are going to be limits."

[44:30] And so as a regulated professional, whether any type of regular professional to say, I'm the exact same person I was before I crossed the stage and obtained my certificate or my license, that's naive. You have to realize that with your protected title, with your bump in society, with your potential to earn a lot more money because you're a regulated professional that comes with certain responsibilities. I often mention these. I have three little boys, well, three boys, not little boys, but the Spider-Man rule, right? With great power comes great responsibility. And so you have to really appreciate that, that there might be certain things you want to say, do, but you have to ensure that you're doing so in a way that accords with the expectations of your regulator.

[45:09] HUSEIN: And so what about regulatory bodies who are trying to maintain some sort of decorum in terms of how the registrants are dealing with the public or their patients or consumers, but also want to be mindful of not overstepping into the charter right or value or freedom of expression? What are they to do?

[45:28] REBECCA: So, I kind of getting back to what we talked about, I'm seeing a lot of those balancing discussions and seeing a lot of really frank discussions and quite, and it's been quite a refreshing, transparently sharing with their membership through newsletters, through reasons, reminding licensees or registrants that, the little newsflash, regulators do not want to be investigating its members all the time. They do not want to be getting into the minutiae. They do not want to be micromanaging. There is an expectation that professionals are just that, professionals, that they are going to be able to discern. They don't need a directive from every regulator on every topic that they're going to be able to discharge their insight, their knowledge, their judgment to maneuver through.

[46:05] So regulators really, genuinely believe that of their licensees or registrants. And I think really instilling and reminding regulated professionals that they are just that, they are professionals, they are trusted to make certain decisions. I'm seeing colleges really communicate that quite clearly. That being said, again, we've seen a host since COVID, a lot of challenges, a lot of perhaps beliefs communicated, perhaps in unprofessional ways.

[46:36] And I think it's really important for regulated professionals to remember the point of regulation is—yes, there are a lot of privileges that are attached to it, but the point of regulation is because the profession in and of itself, because of its power, because of its scope, because of the vulnerability of the people through which we interact, there is a huge, huge power differential and there's a potential for harm.

[46:55] We're not saying that all lawyers, all doctors, all architects are harmful. Not at all. The potential for harm is there. And that is why the profession's regulated. There's no point to regulate if there's no harm. And so when you recognize that and understand that, and that is why the regulator wants to ensure the public has confidence in every doctor or lawyer that the public goes to, that then hopefully by understanding that rationale, it'll help regulated professionals understand why it's so important that regulators do, in fact, step in when necessary.

[47:26] HUSEIN: Yeah, excellent. The next question we have is: What obligations, if any, do regulators owe to the professionals who they are regulating?

[47:32] REBECCA: Fairness. They most definitely owe fairness and they need to ensure that they curry and they maintain the confidence of those that they regulate. If the profession does not have confidence that their regulator is treating them fairly, the house of cards is going to fall apart. It might take some time, but that erosion can have serious, serious consequences. And my sense, my experience is that if a profession...No one loves the regulator—new flash! If you're a regulator looking to be loved, it's not going to happen. No one loves their regulator. But if a regulated professional feels that they're being treated fairly through their fees, through information, through expectations, that is the key.

[48:17] Now, quite often, sometimes a bit of a disparity as to what level of fairness. You and I both know from an investigation perspective, a lot of regs say, I want everything up front before I talk to you. And the regulator will say, well, no, that's not what we're going to do. We're going to talk first and then we'll give you everything to respond to. So, I still see a lot of sort of confusion on the level of fairness that is owed. But when I talk about public interest, I always remind regulators, if you are not treating your registrants or your licensees fairly, you've lost the plot. That is baked into public interest because the public is not served if regulators are not treating registrants and licensees fairly.

[48:59] Other thing I would add to that is clarity, because I think, unfortunately, far too many regulated professionals look to the regulator and say, what have you done for me lately? Like, what do I get for my fees? And the actuality is, you get to be licensed, you get to be registered. That's what you get for your fees because it takes a lot of money to float this regulatory boat: to investigate, to do all of these things. So really ensuring that regulated professionals understand the role of the regulator. They are not there to advocate for them. They are there to treat them fairly and to do just that, to regulate them.

[49:31] HUSEIN: For this clarity, what are some things that regulators can do to make sure that there's some clarity about the work that they're doing to justify their fees?

[49:38] REBECCA: Consistency, consistency, consistency. So, on your website, on your materials, really ensure that they are aware in normal speak, not in our regulatory speak, because we all speak in code, newsflash, regulators speak in code. We get the acronyms. We understand what we're talking about. But the average licensee or registrant or average member of the public doesn't get it. So, you have to very clearly and consistently and repeatedly remind them what is the role of the regulator and what is the role or name of

their various associations that they can go to if they're seeking advocacy. I think that would be really, really important.

[50:14] Just really quickly on the clarity, it's a great story that a certain regulator, a medical regulator, was updating his website and they brought in people to look at their website and wanted feedback. And after the feedback, after the review, they were struck by how many members of the public were aghast at the number of doctors that really were not good doctors. And so they probed, they said, "What do you mean?" And they said, "When we looked at the website, there was a tab that said Referrals. And every doctor we looked up said no on the referrals." And so the regulator said, "Well, yes, that means that there have been no referrals to discipline."

[50:48] And members of the public said, "We thought that meant that the doctor was not allowed to refer a patient to another doctor." So really drives home, we speak in code, we have to ensure speaking to licensees or the public that there's absolute clarity on what's being communicated.

[51:03] HUSEIN: Yeah, 100 percent. I mean, Lawyer's got a reputation already for being like legalese.

[51:08] REBECCA: Yep.

[51:10] HUSEIN: Great. And so, speaking of terms, the last question is about a different term. The term is modern regulator. And so in your opinion, what are some attributes that make an organization a "modern regulator?"

[51:20] REBECCA: I think there's a lot happening, whether it's governance reform, whether it's this compassionate, regulation lens. But if I had to distil it down to my anecdotal experience, if a regulator has insight and awareness that they're never fully baked, that if they're completely just satisfied with how things are going and they're not continually assessing where can they improve and where can they change? That's where I think things start to fall apart.

[52:00] All of the really, I would say, successful regulators are continually looking for opportunities to improve communications with their various, whether it's complainants, whether it's patients, whether it's clients, whether it's licensees, whether it's applicants, continually assessing, looking at data as to where can we improve, identifying objective outcomes so they can actually measure how they're doing, not being afraid to try something and fail. Those are the regulators that really, really are shaking things up and are really exciting to watch.

[51:31] HUSEIN: If a regulator wants to try to shake things up, what are some things that they could be doing?

[51:35] REBECCA: So, I would say the big thing is data. I think a lot of regulators are still sort of being somewhat aspirational instead of identifying what is the data of our investigation times? What is the data of our prosecution times? What sort of feedback are we getting

after a complainant has gone through an investigation? What sort of feedback are we getting through an applicant when they've applied to become a member? Let's get some data there. Where can we really reaching out and looking at people and saying how can we improve?

[53:05] The governance front is another big issue. A lot of regulators have really seized on this and said there's simply too many people around the table. We need to reduce the number of people around the table because it makes us much more cost effective and efficacious. There are some regulators that do not want to do that at all. What I've heard, if it ain't broke, why fix it? Which I think is a bit unfortunate because if anything is shown, there's so much data out there to demonstrate that things are really changing really quickly, not just on the professions, but on the regulatory world.

[53:41] And so if you're not really curious to say how can we improve...And to be clear, not every suggestion, not every recommendation is going to fit for every regulator. Completely agree on that front. But to really...If you sort of inhibit that curiosity as to how we can improve, that seems to be a bit of the death knell. That seems to be a bit of where the decay comes in and the opposite of the modern regulator.

[54:07] HUSEIN: Yeah, I think it's a mindset shift as well, right?

[54:10] REBECCA: Agreed, agreed. And again, without getting a little too controversial here, the election process, using elections to select the professional members that sit around the table. And people might say, this is a bit rich coming from her, but who traditionally wins elections, right? Is it the people who are the best directors or is it the people who are known the most, who are the loudest, who are able to spend and put your face in front of everyone? Is that the best person? Is that the most competent person to be sitting around regulatory tables?

[54:42] So there's a real sort of analysis thing. If these regulators play such important roles, if we want to maintain the professional voice at the regulatory table, are we getting the right people around that table? And so I think that's going to be a big, huge issue for a lot of regulators to examine.

[54:59] HUSEIN: So, Rebecca, I want to thank you again for taking the time to speak to us about these issues. I consider you like a friend and mentor in the professional regulatory space, so it's nice to speak to you in a more structured format about these issues. And again, I think you touched on this, that there's so many parts of our society that are regulated, some that people may not even realize. So these issues, whether you are working for a regulator or not, are going to have significant impact on how things proceed both in the law and in policy. So we want to thank you so much for your time and look forward to staying in touch in the future.

[55:26] REBECCA: Thank you so much. This has been so enjoyable.

[Music Break]

[55:35] HUSEIN: And that's a wrap on this episode. Thanks for listening. On today's episode, our guest was Rebecca Durcan. And you can learn more about her and the work that she does at her firm, Steinecke Maciura LeBlanc at her firm's website, which is www.sml-law.com. And for more about today's show and all the links to the cases and articles that we spoke about, you can find those in our website, which is www.lawyeredpodcast.com.

[56:01] On our next episode, we're going to be speaking about the area of startup law with our guest Mark Asfar, who's a lawyer with Denton's in the Corporate and Venture Technology and Emerging Growth Companies group. There's a ton going on in this very active space. We're going to be speaking about a new case involving reasonable expectations of company founders and corporate governance. This is a decision underscored that honouring founders' agreements is important for maintaining fairness and trust within the company. And we're going to be speaking about, as well, a bunch of new developments in AI and how lawyers can use insurance for M&A agreements.

[56:39] And if you want to help to improve the show and get some neat and affordable legal rewards, including the opportunity to get early access to our show and also to submit questions for our show as well, it'd be really helpful if you can become a patron of our show and make the show more accessible for more people. You can find out more about how to do that on our crowdfunding website, which is www.lawyeredpodcast.com/patreon. Again, that's www.lawyeredpodcast.com/patreon.

[57:03] And I want to give a shout out to a bunch of our patrons, both past and present, who've been supporting the show, including Abbas Kassam, Aman Kalra, Andrew Monkhouse, and Brian Osler. Thanks so much for supporting the show and keeping it available. And to make sure you never miss another episode of our show, you can go ahead and subscribe to our podcast for free on iTunes or wherever else you're listening to this show. You can also follow the show on Facebook, LinkedIn, or on Twitter at our Twitter handle is @lawyeredpodcast.

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