

[00:03] HUSEIN: This is episode 97 of Lawyered. I'm Husein Panju. And on this week's episode, we're chatting with BC lawyer Chilwin Cheng about the high-profile world of white-collar criminal law. First up, we'll be speaking about an ongoing litigation matter that involves secondary liability. While directors and officers can always have been found liable for failing to take reasonable care to prevent the corporations from committing offenses, a new series of cases is now questioning the mens rea or mental element that is required.

[00:35] Next, we'll speak about some new judicial guidance about reasonable expectations of privacy as they relate to IP addresses. The Supreme Court has recently ruled that the police now need warrants to access an individual's IP address, and this new development could impact both investigations and the general collection of personal information.

[00:55] And later on, we'll also speak about a new Supreme Court decision that holds that project owners retain health and safety obligations even when they hire contractors to manage projects. And finally, in our Ask Me Anything segment, we'll cover a bunch of questions submitted by our listeners on a wide range of topics, including money laundering, insider trading, and how to bridge the gap between white-collar crimes and the impacted victims. All of this and a lot more is coming up in just a bit. This is Lawyered.

[Music Break]

[01:34] Hey, everybody. Welcome again to Lawyered. Thank you for joining us on this episode. It is hard to believe, but we are now in the back half of the final season of the show. Very happy with how it's going so far. But yeah, it's hard to believe it's becoming real, that we are nearly winding up the show.

[01:51] One thing I wanted to mention is that I'm recording this episode in early October 2024, and I was just invited the other day to participate in the opening of the courts in Ontario. This is a really fancy event where the Chief Justice of Ontario and the Chief Justice of the Ontario Supreme Court of Justice and the Chief Justice of the Ontario Court of Justice jointly hold an event that officially marks the start of the new year in the legal community and courthouses as well. It was really great to connect with so many judges and lawyers and paralegals and other stakeholders in the legal community. I really enjoyed it. Really nice to be included. So thanks again for the invitation to the judges for this fantastic event.

[02:38] The last episode that we published was really interesting. We spoke about the area of transportation law, and our guest was Heather Devine, another in our council. She's the Chief Legal Officer of TRAFFIX, which is a third-party logistics provider for the North American transportation industry. We spoke about a bunch of different areas in that episode. We spoke about something called carrier confirmation sheets, which is kind of the industry standard in terms of confirming the logistics of what is going to be delivered.

[03:10] We spoke about the new changes to the Competition Act merger notification thresholds. We also spoke about something called the Towing and Storage Safety and Enforcement Act, which is a new piece of legislation that's been rolled out over several years. I really enjoyed that topic in particular. As some people may know anecdotally, there have been some issues in the news and otherwise about people who encounter some

incidents on the road and require their car to be towed, I always swear, and then they encounter all the difficulties trying to retrieve this later on. And due to those issues, in part, the Ontario government introduced this new bill that would essentially crack down on these practices and regulate this industry as well. And I think Heather had some really interesting points about how that might actually work out in practice, and even some creative tools that the law could use to make this even more meaningful.

[04:10] And we also talk about a bunch of things about the logistics and transportation space that you may not think about, because a lot of it happens fairly invisibly in terms of how Amazon deliveries actually take place between you placing the order and the order actually happening. So, we cover a lot of ground, believe it or not, pun actually not intended there, cover a lot of ground in that episode, recommend you check it out. That's episode number 96 in our archive.

[04:36] Today's episode is about a completely different area of law, but I would say at least as interesting. We're talking about white-collar criminal law, which is a topic that's been submitted and requested by a number of listeners over the years. I'm really happy we found a lawyer to speak about this. It's a lawyer out of BC. He's got a lot of experience in this particular area of law and does a lot of speaking and practicing as well, and he's got a really interesting backstory. I think you'll enjoy the episode. I really enjoyed the discussion. And so without further ado, here is our interview about white-collar criminal law with our guest Chilwin Cheng.

[Music Break]

[05:12] Chilwin is the lead principal of Ascendion Law, which is a boutique commercial litigation and regulatory and white-collar defense firm based out of Vancouver. Chilwin has leading experience in complex administrative and regulatory legal issues, white-collar criminal defense, constitutional challenges, challenges of government authority, expropriations, and complicated multi-party, multi-stage, and multi-jurisdictional business litigation.

[05:38] Chilwin is also a frequent conference chair, panel speaker, and guest lecturer at conferences, professional development panels, and training for law students and young lawyers. And he's also a lawyer in the law practice innovation and is a pioneer in adapting proven quantitative modeling approaches to litigation assessment and management to forecast outcomes with high confidence and develop practical solutions that can avoid unnecessary litigation and resources.

[06:05] He's also the founder and chair of the Continuing Legal Education Society of British Columbia's biannual conference entitled "Regulatory Offenses and Criminal Prosecutions" and is a regular faculty member at CLEBC. He chaired the 2023 conference on securities litigation and was a faculty member in commercial litigation on the issue of damages and equitable remedies.

[06:26] And prior to founding Ascendion Law, Chilwin served as the chief counsel of the regulator of Canada's public equities markets and trading systems, a prosecutor with the BC

Securities Commission, and as Crown counsel. So, Chilwin, thanks so much for joining us on the show today.

[06:41] CHILWIN: Thank you so much for having me here today.

[06:45] HUSEIN: Yeah, happy to. So, before we get into the topics, I know we're chatting offline about, in addition to having this prolific legal career and starting this firm, I know that you also are kind of a big deal in the boxing space. Can you tell us a bit more about those?

[06:58] CHILWIN: Yeah. I started off, I am a registered athlete with Boxing BC. That means I actively train and participate in bouts. I think I have recently hung up my gloves because I'm getting into my 50s now and it's really hard on the body.

[07:15] HUSEIN: I don't think it's hard at any age.

[07:17] CHILWIN: Fair enough. Up until last year, I was actively competing and I've been involved in martial arts my whole life. As a kid, I started off with martial arts just because I wanted to be like Bruce Lee and just wanted to learn to do the chop stocky thing. But probably in the last couple of years after my kids were born, I needed to find a way to get in shape. And the gym where I would train offered some kind of box fit type lessons and box fit turned into actually learning how to box, learning how to box turned into doing an exhibition, doing an exhibition turned into, hey, I'm going to register.

[07:55] I also sit on the adjudicative part of Boxing BC, so athlete complaints, discrimination, human rights complaints, scoring complaints are brought to this adjudicative body. And up until just a couple of months ago, I was on the policy and governance committee of Boxing Canada.

[08:16] HUSEIN: I know you're a litigator as well. Does this serve as some more constructive stress relief from the work?

[08:23] You know, it's not just stress relief. I would say about any organized theory of conflict, that's all it is. So litigation is a theory of conflict. And martial arts, whether it's Western martial arts, swordplay, or boxing, we all have two arms, we all have two legs with a head in the middle and a trunk as a body. We may call it different names. We may organize the system of thought in different ways. But I'm shocked when I meet practitioners in other disciplines, how similar the concepts are.

[09:03] And similarly with litigation, right? Like there are certain stories that run through our lives, whether it's family law, criminal law, like there's still greed and love and dishonesty and a desire to do better. And they all tend to, if you believe in Jungian archetypes, there are certain stories that run through our lives. And legal cases usually organize themselves around those ideas. And so litigation is just another theory of how to deal with conflict. And so there's a lot of, like when I teach my young lawyers, you know, in boxing, sometimes I'll throw what's called a jab. It's just a very simple kind of punch, but I'll throw a jab, not because I want to hit the opponent. I actually just want to see how the opponent's going to react.

[09:53] And so I'll tell my juniors, I'll say, you know, in a cross-examination, depending on your comfort level, sometimes you want to ask a question because you don't care about the answer, but you do want to see how the witness reacts. It's the same idea.

[10:08] HUSEIN: Yeah. I know that boxing is more mental than physical as well, right?

[10:10] CHILWIN: Thousand percent. It's a chess game that's physical.

[10:14] HUSEIN: Yeah. Awesome. So we've got a bunch of interesting topics to speak about in this area, which has been requested by a few listeners about white-collar criminal law. The first I'm going to speak about is actually a case that I know you've served on and has gotten some attention out of BC. The concept of secondary liability allows directors, officers, or agents of a corporation to be held liable for the actions of the corporation. And while this legal principle has long been used to encourage individual responsibility, recent rulings by the British Columbia courts have provided new insets into the mens rea requirements for these offenses.

[10:48] And before we get into the discussion, I will note for full disclosure that Chilwin acted and acts as legal counsel for the defendant in this litigation. So, Chilwin, I mentioned secondary liability in the intro, but can you provide a bit more context about what this concept entails, particularly when we're talking about white-collar and regulatory law?

[11:07] CHILWIN: Absolutely. I think the biggest people that need to pay attention to secondary liability is management of a company, because oftentimes, managing the company, you're involved with supervising and ensuring compliance of the operations of your company, even though you may not be actually involved. And so, if you're an oil and gas company, and you're being allowed to release effluent into the environment, for example, like, say, for testing requirements or something like that, I mean, you're not literally carrying the bucket of oil and putting it into the environment, but you are the CEO of the company that, ostensibly, one would guess, has all the policy procedures and management and culture of the people who are literally holding that oil and dumping it in.

[12:00] HUSEIN: And the authority over them as well, presumably, right?

[12:02] CHILWIN: That's right. And so secondary liability attaches potential liability to you, even though you're not the one holding the bucket.

[12:11] HUSEIN: The issues surrounding the mining operations of Banks Island Gold and BC have been very prominent in recent years. And there's a bunch of decisions that come from this, but the one that I think is most relevant for today's discussion is 2024 BCPC443. So, tell us what we need to know about the facts.

[12:29] CHILWIN: Sure. There were two basic incidents. Let's just say, again, for the sake of keeping it short, they both involved releases of deleterious substances into the environment. Banks Island Gold was charged with offenses under the Federal Fisheries Act,

as well as the Provincial Environmental Management Act and Mining Act for breaching of their permit.

[12:57] The findings of fact of the trial judge was that the employee, that there was a breach, there was an offense committed by the corporation, but that there were findings of fact that the Crown had failed to prove that the chief executive officer of Banks Island Gold knew of anything that was happening on the ground when those events leading to the offenses occurred. So that's critical.

[13:27] HUSEIN: I know that part of this liability issue that comes up through the decisions is about the mens rea test for these individuals. So in this case, it's Mr. Mossman, right? So tell us more about how that played out.

[13:43] CHILWIN: So we have to start from the basic proposition that a "pure criminal offense," like anything under the criminal code, you have to be, it's a constitutional principle that there's the actus reus and the mens rea. There's the physical act of the crime, and then there's the intent to commit the crime. But regulatory offenses are often ones in which the Crown only has to prove the physical act. And because of a decision called Sault Ste. Marie, kind of the old chestnut for Crown, once the Crown proves the physical act, then the court is willing to infer the intent of the act. And then the burden shifts to the accused to disprove it by showing that they exercised what's called due diligence.

[14:35] HUSEIN: So I know in this case, part of the question was what is the mens rea that's required for the individual directives of the corporation?

[14:44] CHILWIN: Exactly.

[14:45] HUSEIN: So, how did the court rule on that?

[14:47] CHILWIN: This decision is under appeal on this very issue. The secondary liability occurs because it's a clause that's found—it's a section in the Environmental Management Act and the Fisheries Act and the Water Act and the Mining Act, as well as just about every other regulatory statute all across Canada, where it says it'll say something along the lines of if a corporation commits an offense, then a director, officer, agent, contractor, employee of that corporation also commits the offense if that person "permits, authorizes, or acquiesces to that offense."

[15:31] And so the idea is what the heck does that mean? Does that encapsulate the mental element required of the officer or the agent or the director of the corporation? Or do we treat it as part of the act of acquiescence or the act of going along with the corporation? Is it actus reus or the mens rea? And there's a real debate in the case law of what that actually means. With the Crown often taking the position of, well, Sault Ste. Marie tells us that these are strict liability offenses. Therefore, the Crown is not required to prove what these words, you know, prove that these are mental elements. But if that's true, then what meaning are you supposed to import into those words, right?

[16:28] There are decisions across other parts in Canada that say, no, the Crown must affirmatively prove that the director, officer, employee did, in fact, permit, authorize the offense. To date, after a couple of different tries, the Court does acknowledge that the Crown needs to prove affirmatively, permit, authorize, or acquiesce.

[16:50] HUSEIN: When you say definitively, is there an intention or knowledge element?

[16:52] CHILWIN: It's interesting. In British Columbia, the Court has sidestepped this issue and simply said, they don't say whether it's a mental element or the actus reus. They simply say it's in the statute. You've got to prove it. So that decision is under appeal, and we'll see where that goes.

[17:10] HUSEIN: What impact do you think this decision is going to have on the bar or those who are practicing in this area, regardless of which way the court manages that decision.

[17:19] CHILWIN: Yes, that's right. Well, so if I'm defense counsel, I've got to make... Oftentimes in regulatory or white-collar crimes, right, the first play in the playbook is usually, do I call my client affirmatively? Do I put them in the stand and risk cross-examination, and all the admissions that can come from putting them in the stand? Because I bear the burden of proving due diligence, that I actually have to prove that they made some effort in ensuring that the offense, whatever, didn't occur.

[17:50] But now, if I'm being charged under secondary liability provision, I might have another defense, which is, no, I'm going to force the Crown to affirmatively prove that my guy actually permitted, authorized, or acquiesced the offense. Now, that will change if the Crown is not relying on secondary liability. If they're going to say, no, this person was a principal offender, or abetted, or counseled, or acquiesced, or abetted or aided the offense, that's a different matter. But if they're going to rely on the secondary liability provision, I've got this extra defense available to me.

[18:28] HUSEIN: Are there any other considerations that you think this might have, broadly speaking, in terms of what the test is for secondary liability? Will this impact the way that lawyers counsel their clients?

[18:39] CHILWIN: One day. One day. Not in this case, because the issues are not engaged, but there's going to be a presumption of innocence. Section 11D might come into play when one considers whether that, if it's found the defense has to disprove that they authorized or acquiesced to an offense, is that going to be treated the same way as a due diligence defense?

[Music Break]

[19:11] HUSEIN: This year, the Supreme Court of Canada made a significant addition to the case law, considering Section 8 of the Charter. And in particular, the court ruled that the police must obtain a search warrant to access IP addresses due to the reasonable expectation of privacy, recognizing that these digital identifiers can reveal more personal information about an individual's online activities.

[19:33] And this decision clarifies the differences between digital and physical spaces, and can also affect how private businesses collect and share IP addresses. As I mentioned, this case is largely about the reasonable expectations that relate to IP addresses. So before we get into the case law, can you just explain what an IP address is and how this is used in this context?

[19:54] CHILWIN: So, if you think about the way the internet works, it's highly decentralized. You have a lot of these businesses or not-for-profit organizations that run these computers, these servers. They're like large telephone directories. They enable one computer to look up how to connect with another computer. And sometimes you put a bunch of these servers together, and you need to go through three or four different servers to get to the end result. So these IP addresses are like a phone number or an address. They point to another location, a digital location, at which someone else might be listening on the other side, whether it's another server to pass on the eventual message or it's the end user.

[20:46] HUSEIN: Got it. So then how does this come up? How would the police use this in their work?

[20:49] CHILWIN: Oftentimes in an investigation, if you know the IP address, you usually can tie that to a computer or to a location, where then you can make the inference that a certain person is frequently at that location, using the computer, committing whatever digital offense that they're committing.

[21:00] So let's pretend some kind of fraud or stock manipulation is done from a computer, and there needs to be some... Let's pretend there's not a great way using account names to locate or identify the person who committed that digital online crime. One of the ways that the police or law enforcement agencies might want to tie the person, the alleged accused person, to the crime is to say, someone is using a computer to commit the crime. We're going to use the IP address, which is tied to a location, which is usually tied to a computer port and tied to a computer that committed the crime. So we can say this computer was involved in committing the crime, and this person is the one who normally uses the computer. Therefore, that's the person who committed the crime. That's how the IP address can be used to investigate an offense.

[21:57] HUSEIN: So the case we're going to speak about is called R and Bykovets, and the citation there is 2024 SEC 6. And we're putting the link and the citation on our website and show notes as well. Can you tell us what happened in this case?

[21:13] CHILWIN: This was a prosecution of a liquor offense, someone engaging in fraudulent liquor transactions. The offenses themselves, frankly, are quite minor, but it's the investigation where the police went to the online liquor business, got then identified and isolated the transactions, identified where the ISP provider that facilitated the entry of those transactions. They didn't use the production order, but they didn't use a judicially ordered search warrant. And that's the key, right?

[22:47] So Section 8 is premised on the idea that ultimately, the gold standard of fairness when conducting a search of a place or a person's affairs is a judicial third party who says, yes, there is something here. We will allow the state to intrude on someone's privacy. That's the gold standard. What happened was they did not get a search warrant to search the internet service providers kind of directory of numbers.

[23:17] **HUSEIN:** Got it. Okay. So I know that this was the main question that went to the Supreme Court, right?

[23:21] **CHILWIN:** That's right.

[23:22] **HUSEIN:** Whether there's a warrant required. And I know there was a split 5-4 decision just for the interest of time. We'll focus on the majority decision. What was the majority decision and what was the rationale?

[23:32] **CHILWIN:** The majority found that a warrant was required. The police did not violate the Section 8 by proceeding by way of production order rather than getting a judicially authorized search warrant, which was required under Section 8.

[23:47] **HUSEIN:** And what was the rationale for that?

[23:49] **CHILWIN:** The court fundamentally held that every person has a constitutionally protected privacy interest in their ISP number. And this is where it's really important to understand where the court is signaling it wants to go in the digital age. That a person's ISP number is a way of tying that person's activities to a whole host of activities that happen on the internet. The court said that an ISP number is integral to a person's access to the internet. And a person's access to the internet in the modern day is so pervasive that you can find out so much about a person by looking at their internet activity in theory. In theory, you could look at their online shopping habits. You could look at what they do and figure out what they do on all their social media channels.

[24:57] You could, in theory, look at what websites they visit and all that type of thing. In theory, you could go to Google and say, hey, what kind of searches does this person do using their ISP addresses? In theory. And so, because of that, all of this activity is so integral to a person's private personal activities that a person reasonably objectively has a sense of privacy in their online activities. And therefore, we will protect those ISP numbers as if they were integral to a person's personhood, attracting charter protection.

[25:42] **HUSEIN:** What do you think of this decision?

[25:44] **CHILWIN:** I think it's right in one sense, and I think it's problematic in another. I think it's correct because it extends the idea that a person's privacy does extend beyond just the physical spaces where we think about—we would first think about dwelling houses, right? Your own house. And then we would say, well, there's other places where we have a reasonable expectation of privacy, like a locker, right? Or another room or your car that belongs to you. And then we started talking about cell phone, like your cell phone messages, and cell phone communications.

[26:21] HUSEIN: This is the first time where we have moved beyond just a physical item, but to a completely conceptual concept, right? Like, think about that. That's a fascinating concept. That's something that is a completely imaginary human-created concept now attracts a privacy interest because it allows access to so many things that we do in our lives. And I think that is incredibly notable that the court was willing to extend constitutional protection to that notion. But it also sets up, I think, a real problem that the court's going to need to figure out later on.

[27:03] HUSEIN: Sure. So what are white-collar criminal lawyers like yourself going to be thinking about now in light of this decision?

[27:11] CHILWIN: Well, we'll be looking at, you know, information to obtain a lot closer, right? Because usually you're going to have some kind of search warrant at the end that might rely on information sources that previously we may not have looked at, but now we'll be looking at, especially when the investigation involves purely, like, digital investigations. So that's the obvious first step. I think the next piece, I think a creative lawyer, in the right case, will might extend the logic of Bykovitz beyond just internet service.

[27:49] So, here's an example. The big email providers will often require you to get a search warrant anyways, just as a matter of policy. But it might be that, for example, my Gmail account name is also the way that I access a whole bunch of services, right? It's the way, like, my newspaper subscription, my financial accounting, my stock trading accounts, they're not necessarily tied to my ISP number. I act like, as a user, I know in the background, if I'm working, if I'm accessing these services from home, my ISP number is what's probably more relevant.

[28:36] But for me, as the end user, it's actually my email account. A creative defense counsel might start looking more closely at how, if the police are going to be asking third-party providers of information services, I might be looking more carefully about how those services are being accessed. And if they're being tied to something as personal as an email account, or something like that, I might start attacking the police going after these third-party computer or service vendors for giving information to police officers without a warrant.

[Music Break]

[29:24] HUSEIN: In 2023, the Supreme Court of Canada delivered a landmark decision resulting in a 4-4 split regarding the legal responsibilities of project owners under the Ontario Occupational Health and Safety Act, also known as OSHA. And this decision indicates that even when a project owner hires a contractor to manage a project, the owner still retains certain obligations as an employer to ensure the health and safety of workers. And this ruling represents a significant shift imposing greater responsibilities on project owners, not only in Ontario, but perhaps across Canada as well.

[30:00] Chilwin, I know this case relates to this Ontario OSHA Act, and pretty much every province has some sort of equivalent rule. So can you give us a high-level description of what these rules look like?

[30:13] CHILWIN: Sure. Like every other workplace safety legislation in Canada, employers are the ones that bear the responsibility for ensuring safe workplaces. That's your golden rule. Lots of provinces will have different articulations of that rule, will have different policies about how they administer that rule, but the golden rule is employees have some responsibility, but the primary responsibility, the ultimate responsibility for workplace safety is the employer. Employers pay insurance premiums into a large insurance fund, usually provincially administered, and it's that insurance fund that pays out workers who might be injured on the job.

[30:56] I think the debate in the Supreme Court of Canada turns on the definition of what an employer means. And in the Ontario statute, it's not just that traditional master-servant contractual employment law relationship. It also includes independent contractors, suppliers of services, as opposed to employment, labor provided by employment.

[31:23] HUSEIN: Okay. So in the case we're going to discuss, the style of causes are in Greater Sudbury City. The citation there is 2023 SCC 28. Here we have a unique scenario where there's a 4-4 split, and I understand that a majority of the court is required to overturn a lower court decision. So in this case, the majority upheld the court of appeal decision. So you just tell us more about what the majority found in this case. What was their finding?

[31:52] CHILWIN: So City was doing some construction work. They hired through an independent contract, not their own in-house kind of construction and engineering services unit, an outside contractor. As a result of that engagement of the work site was allegedly and was proven not to have been safe. Someone was killed. Another worker was killed while working at that site. The independent contractor, as a result of an investigation, was charged with an offense under that workplace safety legislation.

[32:30] But interestingly, so was the City of Sudbury, even though they did not directly manage the site or the project itself. They were like a homeowner hiring someone else to do the work. While I know this case has been within the construction industry and within the workplace safety bar to be a very important decision, my perspective is a little bit perhaps more circumspect because at the end of the day, I think it really turns on a principle of statutory interpretation.

What the court did is they rejected the City's defense.

[33:12] The City was trying to argue that the concept of employer required proof that they had some form of control over the workplace site or control over the contractor that they hired. And the Supreme Court of Canada rejected that defense and really looked at the plain language of the statute. The plain language of the statute said whether through common law employment or through a contracting relationship, if someone is doing work for you under either of those two, you are responsible as an employer under that statute.

[33:59] HUSEIN: What role does control have in all this?

[34:01] CHILWIN: As Supreme Court of Canada, the majority perhaps what they'll be criticized for in some circles is they said it has no role. The statute says employment as an employer or an independent contractor, and that's it. The concept of control doesn't even appear in the definition of what employer means.

[34:23] HUSEIN: So it's more about the employment relationship than the control?

[34:25] CHILWIN: That's right. I can see the insurance industry going apoplectic over this because now you've got the number of relationships that has just potentially opened up has just exploded now in terms of potential liability for workplace safety.

[34:44] HUSEIN: You mentioned this is causing a lot of uproar amongst quote employers or people who realize they don't have employers. What do you think this is going to mean for lawyers who are practicing in this space, including the white collar space?

[34:56] CHILWIN: As a person interested in the law, I actually would say not much change because at the end of the day, all the Supreme Court of Canada did was it interpreted the statute. It applied well-known, well-established principles of statutory interpretation and said, look, this is the definition of what it means to the employer. The hidden message, the implied message is, hey, industry, if you don't like it, talk to your MLA or your MPP and get it changed. This is what it literally says.

[35:27] HUSEIN: What do you think about this shift now that pushes more stringent health and safety obligations on these project owners?

[35:35] CHILWIN: That's interesting because that's a policy argument. As many things of regulation, it's a policy argument. This puts the responsibility and the cost and the burden of squarely within the employer's—the project initiator, if I could really use that high-level language. People who engage independent contractors, you can't contract out safety anymore. You're going to need to make sure that you are looking over your employer, your independent contractor to make sure that they are also complying with the law. You can't contract that out anymore.

[36:25] All the Supreme Court of Canada did was affirm statutory interpretation. I think the relevance for white collar and for the regulatory bar is a re-emphasis that the policy arguments like the city tried to do, they don't work, not with this particular court. If you have a problem with risk allocation within an industry, go talk to your legislature or go to your lobbying firm. The courts will not help you here.

[Music Break]

[37:05] HUSEIN: Now it's time for our latest installment of our segment, our Ask Me Anything segment or AMA with Chilwin. As listeners of our show 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 answered on the show. This can be

questions for anything at all within our guest area of expertise, as long as they're not asking for legal advice. We still have a couple more weeks left on the show, so if you want to be a patron and ask some questions for upcoming episodes, you can find out how you can do that on our crowdfunding website, which is www.lawyeredpodcast.com/patron. That's www.lawyeredpodcast.com/patron for more information.

[37:43] Chilwin, a lot of questions came in this week about this area of law. For obvious reasons, it draws a lot of interest. The first question is, what are some of the differences that a lawyer faces in representing a person accused with "white-collar crimes" as opposed to other sorts of crimes?

[38:02] CHILWIN: First of all, in terms of the actual practical pieces, they're usually far more document-intensive, by magnitudes. An assault, simple assault, will be two witness statements or one witness statement from the victim, and you go to court over testing credibility of that statement. Whereas even a simple credit card fraud can involve a number of different documents, much more focused on the documentary provisions of the Provincial and Federal Evidence Act.

[38:36] HUSEIN: So what does that mean for you, then, as a lawyer who's working on a file like this that's so document-intensive?

[38:41] CHILWIN: Sure. Well, you need to be the type of lawyer that, you know, you're almost like a civil lawyer. Like, you just need to be more comfortable that your case and your preparation and the work is about going through documents as opposed to a live witness that you can attack. Once the documents are lined up from the Crown's perspective, you've proven your case, and then you look to the defense to try to raise reasonable doubt by calling a case, as opposed to worrying about whether a witness is going to deliver the goods.

[39:09] HUSEIN: So that's the first thing. The second thing is, usually for my practice, I'm usually dealing with CEOs and owners, and so they worry a lot more than just defending themselves, right? They're worried about reputation. They're worried about how long is this going to take. They're worried about, oh, what if my suppliers or my bankers find out about what's going on? Or let's do a plea deal. Let's get rid of this. But can we find a way to plead to something much more innocuous? So usually, instead of a fraud, it was a compliance failure, instead of instead of a market manipulation, it was something much less, like a constructive misrepresentation, something like that.

[40:00] Not just because they don't want to go to jail or something, but it's because they have to worry about how do they sell it? How do I go to my communications, my public relations professional? How do I sell it to the public?

[40:16] HUSEIN: Yeah, because sometimes for the companies, at least that's important in the legal outcome, right?

[40:23] CHILWIN: Frankly, in many cases, especially if they're not dealing with people who might go to jail, but just companies who might face a fine and some kind of agreement to do

some remedial action, that PR piece is probably even more important than how much money is at stake.

[40:37] HUSEIN: The next question is about a different part of white collar criminal law. The question is, Canadian provinces seem to have taken very different steps to combat money laundering. And so I was hoping you can tell us about the B.C. experience in terms of the steps that have been the most effective, and whether you think there should be a national standard across all provinces on this matter.

[40:56] CHILWIN: So money laundering is the taking of profits from illegal activity and finding some way to mingle it with legal activity, and therefore cleaning up that money. So usually it involves taking a cash-based business that frequently turns its inventory over like a convenience store or a laundromat, for example, and investing illegally gotten proceeds into that business or inserting the cash into that cash pool for the business's float, and therefore then turning that money into "proper money."

[41:42] That would be money laundering. The B.C. experience has been unique in my perspective. I cannot speak to what's going on in the rest of the country, but in B.C. over the last 10 years, you see massive changes because you've had literally a commission inquiry into the gaming industry here in British Columbia, where there were questions raised about, does the fact that B.C. has some of the highest registered property values in the country, is it tied to illegal gaming? And there's a suggestion that there is.

[42:14] Investments, stock bubbles, all of these kinds of things are being tied to money laundering activities, often through the gaming industry. But a lot of other actors, real estate agents, mortgage brokers, lawyers, and accountants are all being implicated as facilitating a lot of this activity.

[42:37] HUSEIN: So what are the steps that have been taken to address money laundering in B.C.?

[42:41] CHILWIN: The number of rules governing anti-money laundering, client verification, accounting and reporting for money sources and money targets where money is being paid to, the requirement for professionals, accountants, brokers of all kinds of assets, and lawyers, rules around the need to account for the movement of funds has gone up substantially. Not just linearly, but it's like a whole scale of new regulations. So I think that what's happened is that the professions, the enablers of activity, business activity, the rules are tightened for them. I think in a way, it's a testament to our provincial system regulation that it's easier for provinces to tighten the rules on individual professions than it is to amend the criminal code, which requires the House of Commons to agree across the country on what the new rules should be.

[43:43] HUSEIN: For sure. And it can be a bit more granular about the two rules you're trying to change, right?

[43:46] CHILWIN: Exactly. Now, that said, the Financial Institutions Commission, the FINRAC, that records and monitors for large cash transactions and large monetary transactions. You

see them being much more active. I don't think they're the federal government's number one priority because they're always talking about being underfunded. There's always much more they can do. But I have seen that body being much more active as well.

[44:14] HUSEIN: All right. That's good to hear. Next question is this: Now, given the perception of insider trading, is being offered the option of employee stock options a good benefit? And what are some things employees should be mindful of when this option is presented to them?

[44:30] CHILWIN: If I'm counseling an employee who's got stock options, I would say don't do it. I know it. Don't exercise those options just because you learn something. Because that's insider trading, right? That's just insider trading. You know something that is not available to the general public.

[44:49] HUSEIN: So you should just never sell your shares while you're employed?

[44:52] CHILWIN: No, no, no. You've got to be really careful. And usually, if you're offering stock options, you really should be talking to your chief financial officer. Like, if you're a public company, that's the only time that these options make any sense is if the company's gone public. And I know, because the exchanges require them to have it, every public company needs to have a chief financial officer. So, there is someone within the company that will be able to counsel you on when it's okay to sell your shares. Usually, because internally, there are policies. I've yet to see a public company that doesn't have proper policies about when certain shares can be sold into the market. Because the companies don't want to be implicated in insider trading, right? Depending on who I'm counseling, my advice would change.

[45:40] If I'm the company saying, we need to find a way to make sure that our employees don't engage in insider trading, or we don't want to be engaged in insider trading, then I would say do what a lot of companies do and set up escrow accounts. Like, yes, I'm going to give my employees stock options, but everyone's got to hold them in various escrow accounts that I monitor to make sure that no one's going to be selling stuff when they shouldn't be during blackout periods, right?

[46:06] HUSEIN: All right. Fair enough. Next question is about a very, I think, principled issue. So, the question is, the popular perception of white collar crime is often that wealthy criminals can pay their way out of crimes, especially in the U.S. The question is, is this really the case, or do we just not see the instances where white collar criminals are actually delivered, quote, justice that's appropriate with the crimes?

[46:32] CHILWIN: That's a very loaded question. I'll answer it by saying this. I think white collar crime and regulatory offenses are woefully, woefully under-prosecuted here in Canada. The police are not given the resources to properly investigate these crimes. Prosecution units are funded to prosecute criminal code offenses and not white collar.

[47:03] HUSEIN: Do you have any theories about why that is?

[47:05] CHILWIN: Yeah, because no one's died. No one's getting hurt. There's the idea in society, well, it's just money, right? Do you know what I mean? And so...

[47:19] HUSEIN: But people, there is a financial harm that often results, right? Like these Ponzi schemes, for example, that...

[47:24] CHILWIN: I say all of this, and you talk to every person who's a victim of a stock market fraud, and you just listen to their stories about how devastated they are. For some reason, as a society, we say that that is worth less accountability than a simple assault. It's a loaded question because it reflects our value as a society as well, right? So, Bo Diddley is often credited with the phrase, "You can steal a lot more money with a pen than you can with a gun," right? And I don't know if that's actually true if he said it, but I think it does speak to the idea of, like, if I can manipulate a stock by a couple of pennies, I know to many people, what's the big deal about a couple of pennies? But if it's a publicly traded stock, that manipulation of pennies can result in hundreds of millions, if not billions of dollars of market value. And that's value in people's RSPs, in their retirement savings, in, you know, things that actually do matter to people.

[48:28] When I allow cash from money laundering activities to infect the real estate market, even a 1% or 2% increase in the average value of a house precludes regular middle-class people from being able to achieve their dream of owning a home. It's the notion that you hear in journalism, if it bleeds, it leads, right? We just don't treat, as a society, financial crimes just as a norm, as seriously as a violent crime, period.

[48:59] HUSEIN: And so beyond, like, the under-prosecution of these offences, is there anything you can say about whether the perception has any merit that these, like, "wealthy criminals" are paying their way out of crimes?

[49:14] CHILWIN: See, that's the part where I would—I'm not sure they're paying their way out of crimes, because I'm not sure that we have fully tested the powers of the state to go after these individuals in the first place. The fault is with taxpayers and voters for not telling politicians to take this issue seriously. That's my honest opinion.

[49:33] HUSEIN: Okay, the last question is also another principled question. So the question is: Marginalized people often suffer the consequences from white-collar crime and cannot afford to take their case to the court, allowing white-collar criminals to continue to break the law with impunity. And tools that are in place to report criminal activity, like government hotlines, are typically barriers to entry and are marred with poor service and long wait times. So the question is, how can we bridge the gap between white-collar crimes and the people who they impact?

[50:03] CHILWIN: I think I'll have to turn to my last answer, because whoever asked that question, I entirely agree with them. The number of times I get a call from someone who's been defrauded in some way, and not just small claims, I mean real money in the tens of thousands of dollars, and they'll say, "Well, the police won't take my complaint because they're saying that they don't have the resources and I should treat this like it's a civil

matter.” But in many cases involving dishonesty, it’s not a civil matter. It’s a crime, right? The fraud in and of itself, like pure fraud, is in fact a criminal code offense.

[50:41] Fraud over \$5,000, which hasn’t been changed despite inflationary pressures over the last 50 years, is still on the books as an indictable offense, just like murder. But for some reason, we don’t resource the police enough to take in these complaints, nor do we treat them as seriously. And so nothing will change until we as a society start telling our politicians, treat financial crimes as seriously as violent crimes.

[51:12] HUSEIN: So, if the government has the wherewithal to take this more seriously, what are some practical things that they can do besides investing money into programs?

[51:20] CHILWIN: It starts with the policing agencies, whether it’s the RCMP or local police forces, of saying, we take this seriously. It means hiring officers with backgrounds and education and expertise to investigate paper crimes as opposed to physical crime scenes. And it involves also funding prosecution offices who can also just put in the time to go through the paper and properly determine whether the paper lines up and charge and lay the information or lay the indictments to advance these prosecutions.

[51:59] HUSEIN: All right, so I want to thank you so much for this great conversation about these very fascinating issues. I learned a lot. I think we all, lay people or people who don’t run into the area, hear a lot about white collar criminal law and have some perception of what that means. But I think you did a great job of level setting about what this area of law looks like as someone who practices in this area and a lot of the issues that are coming out from it. And I know you’re a boxer. So it’s cool to have this spark match with you as well. So thank you a lot for your time and looking forward to staying in touch in the future.

[52:29] CHILWIN: Husein, I want to commend you on the contributions you’ve made to the Canadian legal framework. I don’t know when a listener may be listening to this podcast, but I understand that you’re going to be taking an undefined, indeterminate break from this podcast in a couple of weeks. And I wish you well, the legal community wishes you well. You’ve undertaken a project that is critical to our democracy and our stability in society, which is making the law accessible to everyone. So, thank you for doing that and thank you. It’s an honour to be on the show during this time.

[53:02] HUSEIN: I much appreciate it. Thanks for saying that.

[53:04] CHILWIN: Thank you.

[Music Break]

[53:11] HUSEIN: And that’s going to do it for this week’s episode of Lawyered. Thanks for listening. On this episode, our guest was Chilwin Chen. You can learn more about him and his firm at his firm’s website, which is www.ascendionlaw.com. That’s spelled A-S-C-E-N-D-I-O-N law.com. And to learn more about today’s show and all the cases and citations that we spoke about today, you can find those on our website, which is www.lawyeredpodcast.com. And on our next episode, we’re going to be heading across the country to speak about a

different type of financial legal topic. We're going to be talking about private equity law. And our guest is going to be Enda Wong, who is the Montreal leader of Macmillan LLP's business law group.

[54:03] And we've got a bunch of interesting topics to speak about on that episode. We're going to chat about the growing use of a tool called the Continuation Fund. And we're also going to explore some recent appellate cases that provide some new guidance, first about companies of interest, and then secondly, about minority shareholder rights.

[54:18] And if you want to help to improve the show and get some neat and affordable legal awards, including the opportunity to submit questions for our show and the ability to get early access to our episodes, it'd be very helpful if you could become a patron of our show and find out more about how to do that on our crowdfunding website, which is www.lawyeredpodcast.com/patron. That's www.lawyeredpodcast.com/patron.

[54:37] I want to give a shout out to a bunch of our patrons, which include Jacob Roth, Jeff Lang-Weir, Lisa DeMarco, Mark Asfar, and Michelle Koerssen. Thank you so much for keeping the show going over all these years. And if you're not already, you can also subscribe to our podcast for free on iTunes and virtually all other podcast platforms. You can also follow our show on Facebook, LinkedIn, or on Twitter. Our Twitter handle is @LawyeredPodcast. We get sound editing help from Solomon Krause-Imlach, our theme music was brought in by Ben Swirsky, and we get website help from Steve DeMelo.

[55:13] And finally, please be advised that while the show is aimed to be helpful and informative, that is not legal advice. However, if you do want legal advice, please reach out to a lawyer to help you with your situation. And with that, we'll see you back here in two weeks. Until then, keep it legal.