

[00:03] HUSEIN: This is episode 98 of Lawyered. I'm Husein Panju, and on this week's episode, we're speaking about private equity law with Enda Wong, the Montreal leader of the Business Law Group at McMillan LLP. First up, we speak about the rising trend of continuation funds in the private equity space. These funds are created by the same managers of the original fund to buy investments from itself, and this tool triggers important documentation and transparency considerations.

[00:33] Next, we'll speak about a new Court of Appeal decision that establishes that shareholders can waive their dissent rights even if these waivers are not contemplated in the shareholders agreement, and we'll discuss how this might signal future changes in this space, and how this could impact the drafting of future unanimous shareholder agreements. And later on, we'll also speak about another appellate case that speaks about the legal revenues that are available to limited partners in situations where a conflict of interest arises.

[01:00] And finally, in our Ask Me Anything segment, we'll cover a range of questions submitted by our listeners on a host of topics, including due diligence, provisions for negotiations, and mitigating risks in cross-border transactions. All this and a lot more is coming up in just a bit. This is Lawyered.

[Music Break]

[01:33] Hello everybody, and welcome to another episode of Lawyered. Thanks again for joining us for another installment of the show. This episode is coming out at the end of October in 2024, and I just wanted to call out that I was really fortunate to be invited to speak last week at the Ontario Regulatory Authorities conference. This is one of the real highlights of the year for me, where a bunch of the Ontario regulatory bodies and authorities and agencies and commissions all get together to share best practices in this area of law, of professional regulatory law, and I was fortunate to be invited back this year to speak about the 10 most important cases, subjectively, from this space.

[02:19] I really like this opportunity because I enjoy doing this podcast, of course, but this regulatory space is kind of an area where I've established somewhat of an expertise and focus on, so it's kind of nice to do some deeper research on that and share my findings as well. If you're interested in those cases, I posted them on my LinkedIn last week, so you can find out what those cases were as well as some brief highlights. So, thanks again for the invitation. Thanks to everyone for coming out and for the feedback as well.

[02:57] On the last episode of the show, we spoke about white-collar criminal law, and this is an episode that's been requested for many years, and we've been trying to find the right guest for this episode. I'm really happy with the guest who was selected. His name is Chilwin Cheng, who's a really fantastic lawyer out of BC and runs his own practice, doing, I would say, a mix of white-collar criminal law and regulatory law as well. He spoke about some of the new issues in that space, including a new Supreme Court decision that rules that search warrants are now required to access IP addresses.

[03:23] We also spoke about a new decision that rules that project owners have ultimate responsibilities as employers when developing projects, even if they contract with a third party. And we also spoke about a case that Chilwin was actually personally involved in as council, involving secondary liability. And I think that a lot of us have a general concept of what this term means, being that if you are the director and officer of a corporation, that you can be held liable in a quasi-criminal context. And so, there's some development case law on this particular issue that I found especially interesting.

[04:02] And the thing that I really enjoyed from this discussion was, in the ending segment, we talked about this, I would say, perception. Someone submitted a question about how there's this perception that people who commit these white-collar crimes suffer less consequences than those who commit conventional crimes. And you'll have to listen to the discussion to get the full response, but Chilwin gave some really insightful responses about how these sorts of crimes, for various reasons, simply aren't prosecuted enough, given the degree of harm that they really incur, relative to more conventional crimes that you might see in the criminal code. So, it's a really interesting discussion, both from a legal lens and a policy lens, so I really encourage you to check that out. That's episode number 97 in our archive about white-collar criminal law.

[04:51] I'm really happy to share with you another episode today from another part of the country. We're talking with a lawyer from Montreal about private equity law, which is very different from the episode that we spoke about on the previous episode, but I'd say equally interesting. This is a dynamic and fast-paced area where transactions can move pretty quickly, and as you'll hear about, doing well in this area really requires exposure to a wide range of industries.

[05:15] And so as we speak about this discussion, it's really helpful to understand how the law is developing in different areas, especially given the fact that these compounding issues that come up in private equity law can have overlapping effects. So, I hope you enjoyed this episode, and without further ado, here is our interview about private equity law featuring our guest, Enda Wong.

[Music Break]

[05:39] Enda is a partner with McMillan LLP, where she's the Montreal leader of the Business Law Group. Her practice focuses on mergers and acquisitions, as well as private equity and venture capital investments. Enda handles a variety of regional, national, and cross-border transactions, practicing both common law and civil law. And acting on behalf of private enterprises, institutional and private equity investors, and non-profit organizations, Enda provides counsel on commercial, regulatory, and compliance-related issues, including in respect of services agreements and compliance with the Charter of the French Language.

[06:15] Enda has also been repeatedly recognized by Best Lawyers in Canada, and Luxembourg as a leading lawyer in M&A, corporate law, and private equity, and was a winner of the Luxembourg 2021 Rising Star Awards as a leading lawyer under 40. Enda is also co-author of the 2024 International Comparative Legal Guide under Private Equity Canada chapter. So, Enda, thanks so much for joining us on the show today.

[06:38] ENDA: Thanks for having me.

[06:39] HUSEIN: Yeah, of course. So, before we begin the show, a few things I want to chat about. One is, I know you, again, Montreal leader of the Business Law Group in McMillan, and I know you also have some roots in Quebec as well, is that right?

[06:53] ENDA: Yes, correct.

[06:54] HUSEIN: Yeah, so tell us more about that.

[06:56] ENDA: Well, I'm born and raised in Quebec, so I actually grew up in this small town, and I think it's always surprising to people because I always say it in such a way that I don't expect people to know where it is.

[07:09] HUSEIN: Okay, what's the name of it?

[07:10] ENDA: Sherbrooke.

[07:11] HUSEIN: Okay, I've heard of that. There's a university there, is it there?

[07:13] ENDA: Yes, there is, actually. Someone put it on the map, but I always think of it as a small town, right? And everyone's like, "I know where that is." And I'm like, "Oh, okay, so not so exotic after all."

[07:27] HUSEIN: And so, was it always kind of a foregone conclusion that you would end up practicing in Quebec as well?

[07:32] ENDA: No, you know what, the irony is my friends...So I actually went to an English high school, which is quite not the usual route, I would say, for most people in Quebec who was born in the years that I was, because of, you know, all the French language laws that kind of came into effect. So, actually, the going joke between me and my friends were always that we would get out of this province so quickly. Yet, here I am, and here a lot of them are still. So, I mean, there's some wonderful things about this province that kind of keeps us here.

[08:06] HUSEIN: So then what happened in between? Like, you went to English high school, so were you thinking of perhaps leaving the province at some point?

[08:13] ENDA: Yeah, you know what, I think I was. But then I ended up going to Cégep and then going to McGill for undergrad and for university as well. My husband is a Quebecer, so really, you know, it just seemed to make sense to stay, I suppose. Life kind of had certain plans, I suppose.

[08:33] HUSEIN: So before we get into the topics, when we're talking about private equity and private equity funds, can you explain at a very basic level what we're talking about?

[08:43] ENDA: Yeah, so I think the most simple way of putting it is private equity funds are basically, they're in the business of fundraising and investing in different businesses. So basically, your typical private equity fund will go out and scope out interesting prospects and look for opportunities to invest in it. So how this has kind of changed the M&A landscape is previously you basically had, you know, these one-off M&A transactions, and now you basically have these—basically their business is buying and selling businesses.

[09:15] HUSEIN: We've got a bunch of exciting things to speak about in your area of private equity law. The first is a new emerging trend in the area of continuation funds. Due to recent economic conditions, the use of continuation funds in private equity has significantly increased. These funds are created by the same managers of the original fund to buy investments from it, and this setup allows investors to either transfer their best performing assets into the new fund or to cash out. However, the growing use of continuation funds is bringing additional compliance and documentation challenges for similarities that are involved. Can you tell us a bit more about what this continuation fund really means?

[09:53] ENDA: Yeah, for sure. So, the funny thing is continuation funds have always been around. It's just, it's kind of been repurposed a bit. So previously, it was seen as a last resort to manage underperforming assets in an otherwise successful fund. So, you can just imagine where you have a situation where a fund has many different businesses. One is not doing well, others are doing well, and basically, they just need to find another strategy for managing that asset.

[10:23] So what has actually happened in the last five years is that these funds have been repurposed. So basically, this fund, a continuation fund typically involves a sponsor setting up a new fund to purchase one or more assets from an existing fund. I think the reason for this is probably due to how volatile the market has been. With COVID and everything, I think everything kind of got— nothing was as expected. A lot of funds kind of sat on money for longer. They thought everyone was sort of like in this race to buy everything at one point. And then there was all these predictions that everything was going to crash. So I think really this has been one way to kind of re-strategize how to manage different businesses.

[11:10] HUSEIN: So you have this fund that has this underperforming business, right? And then what happens next?

[11:16] ENDA: Yeah, I mean, it could be well performing as well, but it might be that it hasn't achieved its full potential, right? So basically, what you have is, you have this fund that has this asset in it, and typically, the sponsor would go ahead and set up a new fund in order to purchase that asset from it. And it would be managed by the same sponsor. Then in terms of your existing investors, you might offer them to roll over their existing equity into the new fund. In certain cases, you'll ask for, to preserve some of their, preserve some of the rights due to the fact that they initially invested. In other cases, you might also ask for them to make further commitments.

[11:58] HUSEIN: What is the appeal of using this structure?

[12:01] ENDA: Yeah, so you know, your traditional private equity fund basically has like a very limited lifespan. So a fund basically invests, it sells, it does certain things during the life of the fund. So basically, when the life of the fund comes to an end, it's not supposed to further fundraise, it's not supposed to sell, it's not supposed to, you know, it's supposed to have disposed of its assets, really, right? So you might hear it sometimes when people are kind of, you know, sometimes we joke about real closing dates versus not real closing dates. But when you have a fund, that's life is coming to an end. So typically, each fund is around seven to 10 years. When the fund closes, you know, when they have to close a transaction, they absolutely need to close.

[12:43] I think the appeal would be that let's say you have...So basically, by the time you close a fund, you would have made some money in the fund. But let's say you have this underperforming asset or this asset that might not be underperforming, but actually has a lot of potential to grow even more. You might want to hold on to it, right? You don't want to dispose of it. So, the advantage of doing a continuation fund would be that it would allow you to kind of do that, but in a new fund.

[13:08] So, you're already familiar with this business, you're already familiar with the pros and cons. It might have been, there might be a recession or some other reason why you can't recover the investment or where you could have better profits if you held on longer. So the advantage of a continuation fund would be to kind of give you that option.

[13:29] HUSEIN: In a typical transaction, there's transparency obligations, especially where there might be a perceived conflict of interest. These cases sound like the sponsor selling an asset might always be the one that's buying the asset as well. So, does that trigger any special transparency considerations for the lawyers who are helping in the background?

[13:50] ENDA: Yeah. So I think it's always kind of tricky because basically what you have is a situation where there's unequal information, right? Obviously, if you're both seller and buyer, you obviously know this asset very well. You're going to go to market and solicit other investors. Some of your investors might be existing investors, so maybe they have more or less some information about it, but maybe not as much as you do, depending on what their investment interest was. And then you basically go out to market and you also solicit maybe some new investors. And so I think there's always going to be a gap between what you know and what others know. So part of the key is basically trying to be very forthcoming with your disclosures and trying to make sure that everyone has equal information.

[14:39] HUSEIN: There's a group called the Institutional Limited Partner Association that's also published some guidance material about it. Can you tell us, like, just some of the high points that have come out through that?

[14:50] ENDA: So, a lot of it surrounds more detailed disclosure by sponsors. So some of the recommendations are just making sure that there's a detailed plan in place before even moving forward with a continuation fund. Making sure that everyone receives equal information. Ensuring that there are minimal time periods in place for which existing investors can decide whether or not they want to take advantage of investing in this

continuation fund or not. Just being very clear on what the opt-in and opt-out periods are. You know, putting in place structures that help manage conflicts of interest. Helping to manage conflicts of interest when they occur. And surprisingly, I thought this was surprising, but one thing that they did say was not to anticipate what everything is going to be, but to actually manage the conflicts of interest as they arise in real time.

[15:48] HUSEIN: Right. And so on that point, are there certain things that lawyers can do to help manage this conflict of interest when they do arise?

[15:59] ENDA: I think some of the things that they can do is just make encouraging seeking of independent legal advice. I mean, you have some situations where everyone seems to think that they're aligned in terms of interest. And so they're like, "No, no, it's fine. We're good with going with you," or whatnot. And it's just like, "No, I think each party should probably seek their own independent sort of representation."

[16:19] Other things that they can help is kind of set up independent advisory committees. I think that's more on the institutional side that they would do that, but a lawyer can definitely give that recommendation that, look, this is kind of getting sensitive. This is what you should do. They can probably get ahead of potential issues. And whenever there's a doubt as to whether or not something is a conflict of interest or not, basically just attacking it head on and just coming up with a mitigation plan.

[16:56] HUSEIN: You mentioned that continuation fund concept is not new, but it's recently emerged. Do you see this trend continuing at the rate it has been right now?

[17:02] ENDA: That's a good question. Probably because I think if anything, like as parties become more sophisticated, like one of the challenges with these funds is like, it's just it's more complex. I think you have to think through what are the tax implications, what are the structural implications? What kind of conflicts of interest can we encounter? How do we disclose all of these things? But then as parties kind of get used to it, it becomes normal course, right? They know how to do it. It becomes more commonplace. And so due to the flexibility of having these funds in place, why not use it as another tool in your repertoire to invest?

[Music Break]

[17:45] HUSEIN: Typically, when a company is liquidated, shareholders have the right to dissent or challenge that decision. However, a recent ruling by the Ontario Court of Appeal established that shareholders can waive the dissent rights to contractual agreements, even if the shareholders agreement doesn't explicitly state such waivers. And this new appellate decision is the first of its kind to uphold these types of contractual waivers, which may signal similar future changes as well.

[18:12] And this case that we're speaking about, it's called Husack and Husack, the citation there is 2024 ONCA 117. And I know that this case deals with a liquidation scenario and the waiver of shareholders statutory rights. So before going into the nuts and bolts of the case,

or just kind of give us a sense of what sorts of rights we're talking about in these liquidation situations.

[18:38] ENDA: Yeah, for sure. So dissent rights for shareholders are triggered, not necessarily just in a liquidation sort of scenario. These kinds of rights are typically triggered when there's like a major change to the company. So for instance, like a sale, a lease or exchange of all or substantially all the assets of a corporation that's outside the ordinary course of business. Let's say, outside of a liquidation scenario, a very common scenario in my world is basically the sale of all or substantially all the assets of a company.

[19:10] So, in that case, typically corporate law requires that you get certain consents from the shareholders. In corporate law, it's typically two thirds of voting shares. However, a shareholders agreement can actually change that, right? You could actually ask for a higher percentage of voting shares to actually agree to that. So, where that's required, you typically have to go through the procedures, get the consents from the shareholders in order to proceed. If that does not happen, then quite frankly, dissenting holders have a right to demand that their rights weren't respected and they can compel the corporation to repurchase their shares at fair market value.

[19:49] HUSEIN: Got it. And like this right to dissent does not necessarily mean that the shareholders have like a unilateral right to like shut down the process, right?

[19:57] ENDA: No, exactly. No, they don't have a right to shut down the process, but if they feel like they're being treated unequally, they can demand that the corporation buy them out before they proceed.

[20:07] HUSEIN: Got it. Okay. So again, this is we're talking about Husack and Husack. Before going to like the court's rationale, can you give us a brief summary of what the facts were in this one?

[20:16] ENDA: Yeah. So in this case, it was basically a family-held corporation. The shareholders were Donna Husack. She was the applicant in the case. And also her mother, Evelyn, who was the trustee of the estate. And also the other shareholders were her three siblings. So basically, in this case, after the father had passed on, the family decided to liquidate the company. All of the shareholders voted in favor of that. However, Donna was opposed to it. The shareholders agreement had like two provisions in there that were kind of key to the decision. One basically was a provision that granted the state the right to unilaterally decide when to sell the assets of the company.

[21:00] So basically, that it kind of took away the procedures that had to be in place and basically said that the state, which was controlled by Evelyn, the mother, would be able to decide on their own when it would be appropriate to do so. The other provision basically provided that even if there's a conflict with the Business Corporations Act, it is the intent of the parties that they abide by the agreement and that they should resolve issues as amongst themselves and not with the black and white letter of the law in the Business Corporations Act.

[21:44] HUSEIN: Got it. So, I know this got up to the Ontario Court of Appeals. So what was the court's finding in this matter?

[21:49] ENDA: So the court's finding was that even though the unanimous shareholders agreement did not provide explicitly that the shareholders waived their rights, they did implicitly and explicitly do it. So even though we did not mention dissent rights in the letters of the shareholders agreement, it still had that effect because all the parties signed and they all basically conveyed their intent that they wanted to act as though this agreement was a governing law amongst them.

[22:29] HUSEIN: I know these USAs, as they're called, are very common in these corporate structurings, right? So how do you think this decision might impact the way that private equity lawyers like you deal with these sorts of agreements?

[22:45] ENDA: I think really at the end of the day, it gives some assurance that even if you're not very technical about waiving dissent rights, you don't need to be. So, there's some saving grace there. But really, I would say that as a transactional lawyer, we basically approach all our shareholders agreements in the same way, as though the governing law really is the shareholders agreement. So typically, it's not uncommon that you'll see provisions in our shareholders agreements that basically say, to the extent permitted by law, the parties agree, X, Y, Z, right? And you basically legislate what the parties agree. So, I would say it's good. It kind of reaffirms what we're doing in practice anyway. But it probably won't change things substantially.

[23:33] HUSEIN: Got it. And so if shareholders are sending into these agreements, does that mean that they necessarily are waiving their rights to challenge your process later on down the road?

[23:44] ENDA: I think it really depends on the intent of the parties. There are boilerplate provisions in your agreements as well, right? Which basically people kind of ignore a little bit until things break down. So sometimes you might have an entire agreement clause that could inform this decision. So, for instance, if you had an entire provision clause that actually referred to other agreements, and you had some ambiguity there as to what governed, that could have been a door that basically opened the way to the court finding something different. So you're not necessarily waiving it. And I think it really depends on how you structured it.

[24:20] I think here, you had some clear provisions that basically—you had two provisions that basically went for the finding that the court found one being that the state basically had discretion to do what it wanted to. And another one that basically said that the parties agree that this is what they intend to abide by this agreement, and they don't care what it says in corporate law, right? This is, their intent is that this agreement should govern to the extent that's not illegal.

[24:48] HUSEIN: Are there any other like drafting considerations that lawyers might take from a case like this?

[24:57] ENDA: Yeah. So, I think some drafting considerations that you might want to take into account is that if it is a case that you are worried about dissent rights, you may want to explicitly call it out. So, in a provision in the agreement that basically says something to the extent of the parties agree that this agreement is the governing law between the parties. And to the extent that there's a conflict in corporate law, the parties agree that this should govern. You might want to say, including without limitation, to the extent that there are any dissent rights granted by corporate law, the parties explicitly waive this, right?

[25:28] So, I mean, that would always be better. I mean, this court decision says that you don't have to do that. So that's helpful, but you can envision other scenarios where perhaps the court hasn't had a finding in this favor. And I think really at the end of the day, you also prevent these challenges from shareholders who kind of come back and say, well, no, I didn't mean that this provision isn't precise.

[25:51] So if you actually had that in the agreement, an explicit waiver of dissent rights, I don't even think it would have gone to court. It would have been very explicit that that was what was meant. The thing to just keep in mind is like, even though this court actually found in favor of the fact that you don't have to be super precise, it's always better for you to be as precise as possible, right?

[Music Break]

[26:18] HUSEIN: Given the complexity of private equity operations, there is a high potential for various conflicts of interest to arise. And a recent decision by the Ontario Court of Appeal provides some important guidance on this issue, particularly on the types of legal remedies available to a limited partner when such conflicts occur. And as I mentioned in the introduction, this case we're going to speak about is primarily about conflicts of interest in the private equity sector. I think we spoke about this earlier on about continuation funds. Just tell us a bit more about generally how conflict of interest can manifest in your space.

[26:50] ENDA: Yeah, for sure. So I think you're right. We did talk about a type of conflict of interest that could arise in the context of continuation funds. In this case, though, there's a very particular conflict of interest that could arise quite often as well with respect to private equity funds. So, a lot of private equity funds their raison d'être is basically to buy and invest in businesses, grow them, and then sell them, right? And so you can envision that private equity funds at a certain time hold a lot of different portfolios or hold a lot of different businesses within their portfolio.

[27:27] HUSEIN: So, for instance, you could have a situation where a particular fund goes and purchases a manufacturing business. And then perhaps in its portfolio, it also has a supplier of a certain product that is used by the manufacturer. So, you could have a situation where for whatever reason, the board is basically controlled by the private equity company, and they decide that, okay, we need a of this product. Let's go to our supplier that we actually have in our portfolio as well and use that as a supplier.

[28:08] And then you can envision all sorts of situations where maybe that supplier's pricing isn't as competitive as someone else on the market. Maybe they want to sell the supplier

down the road in very short term, and they want to drive up the profits, right? And here's another way to do it. We just bought this manufacturing company. So let's just get supply from them.

[28:26] HUSEIN: I imagine that it's as much about the perceived conflict than the actual conflict, right?

[28:29] ENDA: Correct, yeah. Exactly. And I mean, you could have a very rational reason for using that supplier. I mean, even if the pricing isn't great, right? Maybe the product is just superior because you know that, right? But that is correct, that there could be a perceived conflict of interest, even so.

[28:47] HUSEIN: So the case we're going to speak about, it's called Binscarth Holdings LP v. Grant Anthony. We'll put the case link on our website and show notes, but the citation there is 2024 ONCA 522. Can you start by giving us a brief summary of what happened in this case?

[29:05] ENDA: Yeah, absolutely. So Binscarth Holdings LP was set up as a limited partnership. When you have a limited partnership, the typical structure is you have a bunch of limited partners that invest in the partnership, and you can think of them as sort of silent partners. They really have a say in the day-to-day of the business. And typically, the limited partnership will have a GP or a general partner. The GP is basically the mind of management of the limited partnership. So basically, it will go out and make decisions. Whenever a limited partnership is entering into contracts or anything, you typically have the GP acting on behalf of a limited partnership.

[29:50] HUSEIN: So then what happened here in Binscarth?

[29:53] ENDA: Yeah. So basically, in this case, you basically had a limited partnership structure. All the limited partners were basically corporations that were owned or held by different members in the, I guess, Anthony family. There was this one gentleman called Grant Anthony, he also had a corporation that was a limited partner. But at the same time, he also incorporated a number co that was the general partner for the limited partnership. He was the sole shareholder of that one, and he was also the sole director. So basically, he made the decisions on behalf of the GP, but for the limited partnership in general.

[30:37] HUSEIN: So it seems on the face of that, there might be a conflict of interest, right?

[30:41] ENDA: Yeah, already. But that in itself is not, right, you could typically have that. I guess what kind of really created an issue was that Grant Anthony entered into a management agreement with another corporation that he was also a shareholder of, and that his common law spouse was also a shareholder of. And so they entered into this company, I think it was to sell real estate property that the limited partnership had. And so really, at the end of the day, they were kind of acting in conflict of interest. And some of the limited partners kind of challenged whether or not he was acting impartially on this basis.

[31:23] HUSEIN: So, another part of this sequence is that these limited partners tried to bring this derivative action against Mr. Anthony, right?

[31:32] ENDA: Mm-hmm. This is basically like I said, something that was recognized and entrenched in a lot of provincial corporate statutes. However, limited partnerships are not governed by corporate law. Ontario actually has a limited partnership act. Quebec is actually governed by the civil code. Different provinces have different limited partnership acts. So, until this case, I don't think derivative actions was really recognized as something that limited partnerships could pursue.

[32:02] HUSEIN: So, what's the main takeaway then from this case?

[32:05] ENDA: So, the main takeaway is that really, at the end of the day, there are certain ways that a limited partner structure behaves like a corporation. And so to the extent that the test that is found in the case law that has been developed for derivative actions over the years for corporations, exist in a certain set of circumstances for a limited partnership, you can also raise it. Binscarth found that if you can satisfy the court, that the majority refused to pursue a proposed action, the proposed action is brought in good faith and the action is prudent in the limited partnerships interest, then the court will actually allow for a limited partner to pursue a derivative action.

[32:55] HUSEIN: Given that, what are things that lawyers can do to help mitigate or prevent conflict of interest before they do arise?

[33:04] ENDA: So one thing that you can always do is basically whenever there's a potential conflict of interest, you can always advise the client to declare it, and I would even say go a step further. Some corporate statutes actually provide for it, but other corporate statutes do not. But I would say that if you want to be really careful, you should probably refrain from voting on that decision. So, for instance, if the board had to vote on a transaction with a company that you are also an owner of, perhaps refrain from that decision and let the other board members vote.

[33:40] HUSEIN: Let's say if there is a common interest that's alleged, one partner is saying this is a conflict and the lawyer gets involved. What is something the lawyer can do once something is already kind of like midstream?

[33:51] ENDA: Yeah. So, I think one of the things is you can always, you know, you basically need to...Like as directors, directors are supposed to act in the best interest of the corporation. So there are certain fiduciary obligations that come with that as well. And there are certain defenses that are available to directors. So, for instance, the fact that you relied on opinions or the fact that you acted in good faith, the fact that you did your due diligence, you did whatever, you weren't just basically acting on one measure. So, I guess another idea would be just to be very—just make sure that everything's in writing, right?

[34:38] HUSEIN: If you think something is a good transaction for the corporation, actually have the backup to support that to the extent that you seek external advice on whether or

not to do something, make sure that that information is readily available in case you have to defend against an action that you took.

[34:56] HUSEIN: What impact do you think this decision might have?

[34:59] ENDA: It might give some, I mean, we have a lot of I guess foreign investors who kind of come in and invest in different structures and whatnot. So, it might give some sort of assurance that there is this other available remedy to the extent that there is a potential conflict of interest. They could actually get this derivative action remedy that wasn't previously recognized. I don't want to speak for all private equity funds, but I like to think that they're not...They tend to not be in the business of suing, like they don't like to have a sort of reputational risk.

[35:37] HUSEIN: So really at the end of the day, if there's acrimony, they'll find another way out. I really think that at the end of the day, if you get to a point where the relationship is so acrimonious that you want to sue, whether it's a derivative action or another type of action, you're going to find the way to go forward. So I really think the best advice is like a really good exit strategy. So to the extent relationships break down, just make sure that you can walk away.

[Music Break]

[36:08] HUSEIN: Before we wrap up, we're going to do our latest instalment of our Ask Me Anything segment with Enda. One of the bonus awards for members of our Lawyered Patreon crowdfunding community is the opportunity to submit questions that they want to hear answered on our show. This can be questions about anything within our guest's area of expertise, so long as they're not asking for legal advice. We have about a couple more weeks left on the show.

So, if you want to join our community and submit your own questions, there's still time to do that. We do our call outs for questions about a week or so before each episode. So, if you want to learn more about how you can become a patron and get other awards, you can find it more on our crowdfunding website, which is www.lawyeredpodcast.com/patron. That's www.lawyeredpodcast.com/patron for more information.

[36:55] Okay, so Enda, a lot of interesting questions to speak about for this segment. And the first one is a fairly basic one. We spoke at the beginning of the episode about what private equity means. But you can tell us here about—the question is, what does the work of a private equity lawyer typically look like? I know there's no like typical day. Every day is probably different. Can you give us a sense of like when you tell people you're a private equity lawyer, what do you tell them?

[37:21] ENDA: So I kind of make this joke that basically I just answer emails and help on calls all day. So that's a lot of it, to be quite frank. But I think really every day is a little bit different. So, from the outset I think different stages of a transaction kind of entail different tasks. So at the beginning, it depends on when your client gets you involved. But you can be involved from the bidding process or you can be involved pretty late in the process in certain cases as well.

[37:55] But really the main nuts and bolts of it are pretty much anticipating certain things that kind of come up on a regular basis. And what's nice about the private equity space, nice and not nice, I suppose, is that there's a lot of market types of standards. So part of it is kind of knowing what is market and what isn't market.

[38:18] HUSEIN: And what does that mean?

[38:19] ENDA: So basically, there's a lot of negotiated positions. And so over time, because these private equity funds have been basically in the business of buying and selling, there are certain things that become acceptable as what's within the range of what's acceptable in terms of risk. So, for instance, a very typical thing would be time periods for when representations and warranties expire. Like you have a typical time frame. You might have outliers, but everyone in the private equity space basically knows that if you're in this jurisdiction, it typically runs from this length to this length. And usually, you can get lower or higher, but there would be extraneous circumstances.

[39:00] So part of it is just advising clients on market differences, especially for our cross-border clients. Some of the times things are not exactly the same. So as much as I joke about emails and calls, there's a lot of that. There's drafting as well. There's project management. There's anticipating all of the little things that might come up and just trying to get ahead of it. And the other thing I love about this is just learning about different people's businesses. So, it's rare that you get to be in this profession where you get to speak to a bunch of specialists who are leaders in their field and basically learn a little bit.

[39:45] So the going advice when we're younger was always like, oh, you want to specialize, you should specialize, it's better, it's easier, etc. But I kind of like being an M&A, like really, really do love being an M&A lawyer and being a private equity lawyer, because you have this opportunity to actually learn a little bit about employment law, learn a little bit about tax law, learn a little bit about foreign investments and the risk of you know, these filings that you need to do that you wouldn't necessarily be exposed to otherwise.

[40:17] HUSEIN: So the next question that's come up is what are some strategies that private equity lawyers can employ to streamline the due diligence process?

[40:26] ENDA: Our involvement comes up when you're about to buy something, I would say. But this being said, sometimes if you're on the sell side, it could come up preparing to sell. But really, I think the clients are actually more involved in it much, much earlier. So, they typically do like more of a financial quality of earnings type of diligence before we're even involved in the legal side. They typically go by stages, and by the time that they get to legal, they're kind of certain that the economics kind of line up for them.

[40:56] HUSEIN: So, is there anything for the lawyers to do at that point?

[41:00] ENDA: For diligence?

[41:00] HUSEIN: Yeah.

[41:01] ENDA: That's when the work starts for them, I guess. So, there's like a whole host of things to do. So, it's just making sure that the risk can be mitigated and kind of separating out the different recommendations. What are actually the red flag items? What are things that the client should consider not going ahead with the transaction? What are the things that maybe they go ahead, but they should renegotiate price? And what are the things that we can deal with on a post-closing basis?

[41:32] HUSEIN: Are the things that you found are more helpful than others in terms of managing this process?

[41:39] ENDA: Yeah, I think so. So, I think one of the things is actually just being very clear, because I mean, the type of diligence that we do these days basically involve more than just the transactional team. So we actually have our specialists do a lot of digging. So, one of the things that really helps is just making sure that everyone has a clear picture of what the transaction is and making sure that they're aware of the evolution of the transaction.

[42:02] So, for instance our specialists will flag certain key risk. This is a very basic example, but they'll flag a key risk in a share acquisition. And then suddenly the client basically says, "Oh, no, actually, for whatever reason, for tax planning purposes, we'd rather do an asset purchase agreement." And then you don't communicate that to your specialist. And then basically all the risks that are flagged are no longer relevant. So that, I think, is helpful in just making sure that the deal, like the whole team is super aware of what's going on at all stages.

[42:34] HUSEIN: Yeah, makes sense. Okay, so the next question we have is, what are some of the key clauses or provisions that a lawyer should be considering when negotiating an investor's rights in a private equity agreement?

[42:47] ENDA: So, it depends on whether or not you have a majority position or an equal type of position or a minority position. So basically, how you approach different provisions will really depend on what your interests are. So, if you hold a majority interest, then basically the provisions that you care about will basically compel the minority to come along with you. Whereas when you're in a minority position, then your whole outlook would be to kind of protect yourself. So, there's going to be certain things that you want to negotiate in that you have a beetle right on.

[43:25] So, it won't be everything because your negotiation power isn't as strong. But there might be a couple of very important things that you want to make sure that you have a say. And if you don't have an individual say, then at least you can group with another minority holder and basically together create a block.

[43:40] HUSEIN: Is there anything that's particularly unique about the negotiations in the private equity space?

[43:47] ENDA: I think the concerns are more streamlined. So maybe that's what's unique about it, because every time we're doing sort of these owner/operator kind of M&A

transactions, like the topics that people hone in on are a really depends on the seller. So, I guess if you're representing on a selling side of a private equity transaction, you should be aware of these things and you should be willing to take negotiations beyond just market. Because I do think it's easy when you're like amongst private equity players to be like, this is market, this is the market. It's like, okay, but it doesn't matter if it's market or not market, right? Like, for this particular seller, he really cares about this thing and he doesn't care that in 95 percent of your transactions, you do it this way. This is super important for him. So, I think something that you need to balance is the uniqueness of what the private equity space negotiations look like versus when you're basically buying a company that is not in the private equity space. So that might be something that's a little bit unique.

[44:56] HUSEIN: Yeah, that's interesting. Our next question we have here is this: With Canada's tightening foreign investment review process, particularly under the Investment Canada Act, how are private equity firms adapted to mitigate risks in cross-border transactions?

[45:12] ENDA: When you sell a business, if you're selling to ultimate beneficiaries that are not Canadian entities, it could trigger a review by the national government to see if that investment triggered certain thresholds and whether or not there were certain risk factors. And in a lot of cases, a lot of transactions, if they're under a certain monetary threshold, you basically only need to file post-closing to mention that you did this transaction.

[45:44] There are exceptions, of course, with respect to particularly sensitive areas. But really, that's the case. And then in other cases where you trigger where you're above a certain monetary threshold, in those cases, you would typically file before you actually close a transaction.

[46:04] HUSEIN: In the private equity space, how is this industry adapted to this changing process?

[46:11] ENDA: So one way that it's adapted is basically by kind of taking a proactive view of certain industries that are more sensitive and kind of looking at also the investors, because there are certain investors that are kind of flagged as being more risky by the Canadian government as well. And in some cases, just not proceeding, where an investor is seen by the government as possibly being a risky jurisdiction for them to come in and invest in.

[46:32] So I think it's just, you know, not that much have changed, but a couple of things have changed, if that makes sense, in the sense that you're kind of doing the same process, but maybe doing it a little bit earlier and just being more careful about who you're letting bid on the transaction.

[47:03] HUSEIN: Right. And what about pre-filing? Is that like a...?

[47:08] ENDA: Yeah, so that's certainly a mitigation strategy. So, like I said, not every transaction needs to be filed in advance. But where you get into these kinds of tricky industries or whatnot, or where you have an investor where it could possibly be tricky, you might want to do a filing. So, you basically structure your transaction as a separate sign and

close transaction. And so basically you sign the agreement and then you basically send in a filing and wait for the pair to expire before you actually close. So that actually gives you some reassurance that there won't be an issue after the delay expires.

[47:48] HUSEIN: Makes sense. Okay, so the last question we have here is—and I know we spoke about a bunch of recent developments in this area of law, but the question is, what are some of the upcoming changes that you foresee private equity lawyers and private equity firms will be grappling with in the years to come?

[48:04] ENDA: I think it's all the talk about AI, generative AI, all of that. So that for sure is one thing, how to be more efficient in using AI. I think there's an expectation that that both private equity players and their advisors use it. But then there's also these concerns about confidentiality and efficiency and knowing how to use it properly and also whether or not by doing that, you basically expose the firm and basically the client to a whole bunch of other things.

[48:41] Certainly, I think maybe it might be a little bit more jurisdiction-specific. But one thing that has been coming up a little bit is more that we're seeing a lot of smaller investments. So, I think now it's kind of shifting back over to major transactions. But like in smaller cap transactions, we actually saw like a huge rise in that when the U.S. markets were a little bit quieter. It turns out that like particularly in Quebec, but in Canada in general, there's a lot of smaller companies where a lot of smaller firms can actually do an investment and it's actually worthwhile without investing like hundreds of millions of dollars. So, we saw a rise of all these smaller cap transactions over the last two years, I would say.

[49:30] HUSEIN: Okay, interesting. And do you see this continuing?

[49:33] ENDA: I think so, because I think there's always a market for that. I do see it growing again. Like, yeah, I do think that there will be like as people get more confident, they'll still invest in the bigger transactions as well. But I do think that there is this right market for these like startup kind of companies selling for the first time or whatnot. And since the market was ripe for that, I think you don't go back, you just go forward.

[50:04] HUSEIN: Okay, so, Enda, I want to thank you so much for joining us on this show today. I think you gave a lot of great insights in an area that a lot of people probably don't know that much about or the perceptions may be different from reality. Clearly, this is an area where there's a lot going on, a lot that's happening in the future as well. So I want to thank you so much for sharing your insights on this topic. And we look forward to staying in touch in the future.

[50:24] ENDA: Thanks very much. I enjoyed being on the show as well.

[Music Break]

[50:33] HUSEIN: And that's going to be it for this week's episode of Lawyered. Thank you so much for listening. On today's episode, our guest was Enda Wong, and you can learn more about her and her business law practice at McMillan LLP at her firm's website, which is

www.mcmillan.ca. And for more about today's show and links to all the cases that we spoke about today, you can find those on our website, which is www.lawyeredpodcast.com.

[50:37] and on our next episode, we're going to be speaking about the area of public law with Zane Nucky, who is a high-profile litigator here in Toronto. We've got a bunch of big topics to cover on that episode, including crowd immunity clauses, a new appeal regarding the criminal law for sex workers, and a new shift in the legal test for recognizing Aboriginal rights. It's going to be a really special episode, so please keep an eye out for that one.

[51:22] And if you want to help to improve this show in our final few weeks and get some neat and affordable legal awards, including the opportunity to submit questions for our show and to get early access to all of our episodes and access to all of our bonus content, it would be very helpful if you could check out our crowdfunding campaign and become a patron of our show. You can find more about how to do that on our crowdfunding website, which is www.lawyeredpodcast.com/patron. That's www.lawyeredpodcast.com/patron.

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