

Lawyered – Episode 100

Right to Trial within a Reasonable Time ft. Daniel Brown

[00:05] HUSEIN: This is episode 100 and the series finale of Lawyered. I'm Husein Panju. And on today's show, we're speaking with criminal defense lawyer Daniel Brown about Section 11B of the Charter and the right to a trial within a reasonable time.

[00:22] First up, we speak about a proposed federal bill that would allow the government to exempt certain types of offenses from the reasonable time limits of criminal trials. This bill has significant controversy and we'll talk about the practical and constitutional considerations that could arise. Next, we'll talk about a recent Ontario Court of Appeal decision that provides some new guidance on the reasonable time frame for trial calculations and how that's impacted by interlocutory and other motions that may occur during a trial. And this ruling could significantly impact how criminal proceedings are conducted overall.

[00:59] We'll also take a broader look at some of the systemic issues within the criminal justice system and canvass some reforms that could afford some greater fairness and justice for all parties involved. 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 cultural bias, thorough investigations, and the specific impacts of judicial vacancies. All that and a lot more is coming up in just a bit. This is Lawyered.

[Music Break]

[01:34] Hello, everybody. Well, this is it. We are at Episode 100 of the podcast. We've done 100 episodes, 100 substantive episodes over 10 years, and this is it. What I will say off the jump is that while this is the substantive season finale, you know, we've done a bunch of bonus episodes to go through. This is Episode 100, but there's going to be one more bonus episode that's going to be released in two weeks' time. And that episode is going to be an overall reflection on the show.

[02:09] So, I'm actually going to be the guest on that show, and the host is going to be Fatema Dada, who many of you may know is an absolute superstar, superwoman in the legal space, does a bunch of stuff. I consider her one of my true mentors. And so on that episode, she's going to be asking me the questions.

I'm going to be talking about what the show has meant to me and some of the behind the scene stuff that people may or may not know about how this show operates. Some of the common questions that I've gotten over the past 10 years. I'm really looking forward to it.

[02:44] So, if you're looking for that mushy, self-indulgent, reflective content, that's not coming in this episode. It's coming in a different episode, which I've not recorded yet, but I'm really excited to record and for you to hear it as well. So don't unsubscribe from the show after today's episode. Just wait two weeks. I think it's going to be worth your time. For now, let me just say, jokes aside, it's been an absolute honour to host and produce the show and be your curator over the 10 years and 100 substantive episodes.

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[03:21] As I hope is clear and been clear, I'm really grateful to all of you for trusting me with your time over this period. And I hope that I've made it valuable and provided some insights about the world of Canadian law, the diversity within it as well. So I've learned a lot through doing the show and hope all of you have as well.

[03:43] And I spoke about this briefly on our last episode, but I also wanted to call out something related to this new program that I've been doing called the Business Leadership Program for In-House Counsel. Yes, I'm back in school, proverbially speaking, as a student in this really neat 10-month program that's offered through the CCCA, which is the Canadian Corporate Counsel Association, as well as the U of T Rotman School of Management. And we've had a bunch of classes so far.

[04:13] And as I mentioned as well, this is a program that's specifically designed for In-House Counsel, hoping to level up their skills, get a lot of content over a 10-month period. And it's a professional program, which means that most, if not all of us are working full-time alongside the program. And one of the highlights of the program is that we have a very diverse class of people from literally all over Canada, different industries, different departments and sizes of departments.

[04:44] And I speak a lot about networking and there's different ways to network. Certainly, there's a bunch of social media, online communities, there's networking within your profession, at your workplace. And even though the program's only just started, I feel like I've already been brought into this really great network of a bunch of different lawyers with so many different skill sets.

And I gain a lot of value from them already. Many of us have created WhatsApp groups and other communication mechanisms to really share our knowledge and become better contributors to our own organizations. So, if that's something that you're seeking as an In-House Counsel, I encourage you to check this program out.

[05:25] And if it's something that you're seeking in general, I encourage you to seek out those opportunities where they're available. As I say time and time again, our legal communities are very welcoming and inclusive. And so if you are able to take that initiative to find those spaces where you can learn from others, while also learning formally through our program, I highly encourage you to do that. So, thanks again to everyone who's part of this great program, all the classmates, and of course all the faculty and organizers from the CCCA and from Rotman as well.

[05:55] Okay, some other housekeeping stuff. On our last episode, which was Episode 99, two weeks ago, was another banger, to be honest. This was an episode about public law, featuring Zain Naqi, who is a very prominent litigator here in Toronto. And we had a lot to cover, given the breadth of the topic. So, we spoke about the doctrine of crown immunity and how that may or may not immunize government decisions from litigation.

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[06:27] We spoke about an upcoming case called Kloubakov that's going to provide some guidance on the scope of Section 7, particularly in the area of sex work. And we also spoke about this interesting case called White and Montour, which, if it goes as projected, may provide a new test for identifying and recognizing Aboriginal rights, and perhaps might operate in place of the Van Der Peet test. A really insightful episode, and I know it may seem like I say that a lot, but this episode was especially so. It's really great to take such a broad lens in how public law works. And I think that we got a good sampling of different topics as well.

[07:13] And Zain has done a lot of work—a lot of appellate work, actually, in this particular area. So, it's great to get his insight on how things may or may not be moving. So, a really great episode, if you either work for government or interface with government in any way. That's Episode Number 99, Public Law with Zain Naqi.

[07:32] Today's episode that you're about to hear is with one of the best. He's one of the most selfless people and lawyers who I know. And as you'll hear about in a moment, he was actually one of the few people who really took me under his wing about 10 years ago, when I was still kind of finding my footing in the profession, he provided me with a lot of mentorship and tips and contacts and inspiration that I still use to this current day. He's an absolute force in the criminal defense bar. He's a very savvy and well-respected professional who has one of the most respected criminal law firms in the country.

[08:13] And if you speak to anybody in the criminal law space, crime or defense, they only have good things to say about this guy. And so, without further ado, here is our series finale interview with our guest, Daniel Brown.

[Music Break]

[08:28] Daniel is a criminal defense lawyer and lead counsel at Daniel Brown Law, LLP, which is consistently recognized as one of Canada's 10 best boutique criminal law firms. And since his call to the bar in 2005, Daniel has devoted his practice to criminal, constitutional, and regulatory law, and has appeared at every level court in Ontario and at the Supreme Court of Canada. He's also a past president of the Criminal Law Association, certified by the Law Society of Ontario as a specialist in criminal law, and acts as review counsel for Innocence Canada. And in 2023, Daniel was appointed by the federal government of Canada to sit on the federal Judiciary Advisory Committee for Toronto and the GTA.

[09:11] He's also co-authored the textbook called *Prosecuting and Defending Sexual Offense Cases* from Iman Publishing, and also contributed a chapter to the textbook called *Social Media and Internet Law, Second Edition*, from LexisNexis. Outside the courtroom, Daniel also mentors young lawyers and frequently lectures at continuing legal education programs hosted by the Crown and Defense Bar, and he also teaches advanced criminal law at Queen's University's Faculty of Law.

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[09:38] At Queen's, he also created and supervises the law school's upper-year criminal appellate apprenticeship program, which allows law students to gain credits towards their degree by working with appellate lawyers across the province on public interest criminal appeals to the Court of Appeal for Ontario and the Supreme Court of Canada. So, Daniel, thanks so much for joining us on the show today.

[09:57] DANIEL: Hey, thanks for having me, Husein.

[10:00] HUSEIN: Yeah, absolutely. It was a real treat to have you on the show, and really special to have you on as our 100th guest on the show. Daniel, as I mentioned, does a lot of mentorship for young lawyers, and I actually consider myself one of those young lawyers. When I was freshly called, again, was very generous in allowing me the opportunity to work with him for a couple months. He really mentored me and took me under his wing. I really appreciate everything he's done, both back then and to date as well.

[10:26] DANIEL: Well, that's kind of you to say. Thanks so much.

[10:27] HUSEIN: Of course. Of course. So, one thing I wanted to ask, relatedly, and I'll say back...This was, I think, around 2014 or so. I had the opportunity to work with you, and I think it was pretty much you, one other lawyer at the time, and now it's about 10 years later. And not to flatter you, but your firm is now the most established, or at least one of the most established, defense law firms in the country. So I was hoping you could just walk us through what happened, how did this growth happen for those who are open to do something similar?

[11:03] DANIEL: Yeah. I mean, I don't think there's really any playbook. It's sort of a surprising thing that criminal lawyers would stay together in a group and sort of form a firm. A lot of the reasons why people become criminal defense lawyers is that they don't like sort of the traditional environment of the big Bay Street law firm. So here we were, just start off myself. I added one lawyer, and it sort of grew organically over time. There was no particular size in mind. There was no goal in place. And I really think that's the best way to sort of expand is not to do it not to be too deliberately, not to be too planned about it.

[11:43] Yeah. And I mean, while it's sort of terrible to say, one of the best things that happened for us as a firm was the COVID-19 pandemic, because not only did courts across the country have to adapt to a new way of dealing with cases in the justice system when the courts weren't open, it also meant that the way people found lawyers changed. So rather than finding lawyers by attending the courthouse and seeing the law office right next door to the courthouse, or perhaps finding the lawyer in the courtroom hallway, you were instead sort of forced to go online and find lawyers, because much of that sort of interaction that people were typically having at the courthouse was now moved online.

[12:28] So people turned to Google, they were searching for lawyers. And we just happened to be sort of in that environment, in that space. So we were perhaps early adopters of

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websites and made sure we were sort of visible there. And it just gave us an opportunity to expand when that environment changed.

[12:46] HUSEIN: As you mentioned, the criminal law firm model doesn't really lend itself to having these large firms. I know it's fairly common for people to maybe start out at one of those and then start their own practice. But I know at yours, you have a lot of very well-established lawyers. So, what is it that's keeping them there at your firm?

[13:07] DANIEL: I think it's the idea that criminal lawyers sort of hold this idea that they can't charge too much money. They can't be like a Bay Street law firm. They have to charge less and do more. And really, I think we've turned that model on its head. We sort of have great clients who want us to spend a lot of time on their cases, who want us to work really hard to get good outcomes. I think we realized that that's what sort of required for us to be successful. And so as we sort of invested more time in each individual case, it sort of generated success. And that success sort of carried us forward to other referrals and other clients.

[13:47] So sort of the idea is just really not to limit ourselves in the types of sort of clients we were looking for or the types of cases we were looking to take on. And so we're really lucky to sort of be in this situation where we have a great team here and people that sort of work with each other and work really well together.

[14:03] HUSEIN: That's great to see and great to hear as well. So, we've got a bunch of interesting topics to speak about. Today, we're going to be talking not just about criminal law, but specifically about Section 11B of the Charter, which relates to delay issues and trials within a reasonable time. We've got three topics to speak about. And the first topic is about what's called Bill C-392. Now, the seminal Supreme Court decision in *R. v. Jordan*, established strict time frame limits for criminal trials to ensure that they're completed within a "reasonable time."

[14:40] And in May of 2024, the Bloc Québécois party introduced a new bill that, if passed, would allow the government to exempt certain types of offenses from these time limits. And this bill has sparked significant controversy, particularly due to concerns about its potential unconstitutionality. So, Daniel, this theme or this concept of trial within reasonable time is going to be a theme for the majority of the episode. So, can you tell us more about the relationship between this section, Section 11B of the Charter and the *Jordan* decision?

[15:07] DANIEL: Yeah, I think quite often we have an awareness of this particular constitutional right, the right to a trial within a reasonable time, because people are often reading in the newspaper or hearing on the news that some really serious charge has just been thrown out of court because the case is taken too long. They feel bad for what they perceive as a victim of crime who never got their day in court. They think an accused person

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got away with something. When we look at this right itself, this right to a trial in a reasonable time, it's only 40 years old.

[15:40] It was in 1982 when these rights were enshrined. And over the first sort of 10 years of its existence, there were some early decisions in the Supreme Court that helped to sort of shape and define what a reasonable time limit would be. In 2016, the Supreme Court came out with the *Jordan* decision, which really was a landmark decision in this area of law. And they set firm ceilings. They said 18 months for any case that takes place in the provincial court system and 30 months for any case that takes place in the higher level of court. And that would include homicide cases to shoplifting cases, meaning regardless of the type of case, the ceilings were the same.

[16:23] And regardless of the type of prejudice a person faced, whether they were in custody or out of custody, the time limits were the same. Once these ceilings are breached, there's very little a crown attorney can do to save a case at that point. And that's causing a lot of strife in the justice system because it seems unfair when one person has their case thrown out because it took too long, especially when there were a number of factors at play that led to that result.

[16:49] HUSEIN: For sure. And I think it gives lawyers and litigants a bit more certainty about what the numbers are as well, right? Rather than having to argue this and just hoping for the best.

[16:58] DANIEL: Yeah. And that was the point. Now, I often field calls from people, prospective clients that will say to me, "Well, my case has taken more than the ceiling. It's taken 30 months when it should have only taken 18 months." But then after you speak with the client, you learn that they were responsible for a lot of the delay cause. So any delay that the accused person causes directly is excluded from the delay analysis. It doesn't form part of that 18-month ceiling, but really almost everything else does, whether it's the fault of the police, whether it's the of the court system, whether it's the fault of the crown attorney, a resource issue or something else. And the only exception is that it has to be some sort of exceptional event or exceptional circumstance that was completely unforeseen and unavoidable and couldn't be remedied with the benefit of hindsight.

[17:54] HUSEIN: I mentioned a brief summary in the intro, but there's this new bill that's currently before the House, Bill C-392. I know there's a few components of this, but I'm going to talk about the component that's kind of creating the most uproar within the legal community.

[18:10] DANIEL: Yeah. So, I mean, what the bill really suggests is that we just pull certain offenses completely outside of the arms reach of this delay protection. I would presume that what these legislators had in mind would be that the offenses they would least like to see thrown out of court. So we can imagine include homicide cases. It would include sexual

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assault cases, other serious violent crimes. These are the types of cases that would be under their legislation excluded.

[18:42] But as I said in the beginning, every single offense gets the protection of this delay rule. So it means that any legislation that's crafted would be automatically unconstitutional, and it would require the government to really sort of opt out of the constitutionality, really sort of ignoring the constitutionality of the legislation and pretending like it just wasn't a problem.

[19:08] HUSEIN: I think I have some suspicions, but what are your thoughts on this bill?

[19:10] DANIEL: Well, I think if we look at what happens right now when cases aren't prioritized in the justice system, we can only imagine what would happen to criminal cases that wouldn't be prioritized for delay. So we know right now that when it comes to criminal offenses, these types of cases are prioritized over other offenses like family law cases, like civil law cases, state litigation, those cases get put on the back burner. And we hear from these types of lawyers, they can't get into court to settle a dispute because all the resources are being consumed by criminal prosecutions.

[19:50] So, what would happen if we excluded particularly serious offenses? These cases just wouldn't get tried. They would be put on the back burner in order to triage the cases that are still following the delay rules and still have to meet these delay ceilings. So, one can imagine like the most serious cases would be people in custody likely waiting for their trial and never having a trial date and never having any way to force a trial on. So, they would perhaps spend indefinite amounts of time in custody without any particular remedy to ensure that their trial was heard in an expeditious way.

[20:26] But it would also be bad for victims of crime who want their day in court, who want a chance to confront the person who they say has harmed them. And you can imagine somebody who is so many years removed from a criminal offense would have a hard time testifying about it in an accurate way. So it's not just good for an accused person to have timely justice. It's good for victims of crime as well to have access to timely justice. And this bill doesn't solve the problem of timely justice. It just excuses it.

[20:55] HUSEIN: And to say nothing of the resources already, like our court system is already very backlogged as it is, right?

[21:01] DANIEL: Yeah. As I said, this does nothing to improve the speed in which cases get to trial. It sort of encourages an environment of complacency, which was the whole purpose of the Jordan decision in the first place. And I think there's lots of opportunities being missed when we're looking at finding ways to excuse delay rather than resolve delay.

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[21:21] HUSEIN: The last question I want to ask was, the bill would trigger the notwithstanding clause, basically overriding Section 11B. So, I was wondering, what do you think about the use of the notwithstanding clause in this criminal law context?

[21:33] DANIEL: I know it exists, but it's sort of there...Well, it's there for a reason. It's rarely used. I think it's highly problematic to use it in something like this to say that we think that we should draft unconstitutional laws to keep people in jail longer or to prevent people from having their day in court is highly problematic. I mean, there's reason why this isn't already the law.

[21:57] And if we decide that we no longer want speedy justice, the answer isn't to opt out of the Constitution. Go revisit whether or not there's sort of incentive for the government itself to change the Constitution, whether there's sort of a significant support for that. I don't think there is. And I think these laws are there for a reason. These protections are there for a reason. And they're there to protect all of us because you never know when anyone might be dragged into the justice system.

[22:29] We had that example just a few months ago where Umar Zamir was tried for a homicide. It really sort of showed at the end that he was factually innocent. But the threat that he could have spent an indefinite amount of time behind bars awaiting a trial that may never happen because these rights don't exist anymore or they've been opted out of, I think is a really scary thought.

[Music Break]

[22:57] HUSEIN: The case law from and following the Jordan decision has provided valuable guidance on how to calculate the time that's elapsed after a charge to determine whether it exceeds the reasonable time limit as mandated by the Charter. And a new Ontario Court of Appeal case is now addressing the issue of what happens when interlocutory and other motions occur during the trial itself. And this ruling could significantly impact how criminal proceedings are conducted overall.

[23:23] So, before we get to this new Court of Appeal decision from 2024, I'm going to start, Daniel, by telling us what we know so far about how courts should be calculating this Section 11B time frame.

[23:37] DANIEL: Yeah. So talking about when does the clock start is important. We know it starts at the time a person is charged and brought into the court system. When does it end has been a subject of some question. The Supreme Court in a case called KGK several years ago said that the delay clock stops or pauses once all the evidence is in and all the legal arguments are made. So really, it's from the start of the trial to the end of the trial. But it doesn't include the period where a person is deliberating and where the judge or the jury is deliberating about the verdict. So we know that that's where the clock stops.

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[24:19] That doesn't mean that delay doesn't have a place once the evidence is before the court and all the legal arguments are made. It's just a different type of legal analysis that takes place from that point forward. Rather than considering anything that comes after that as part of this 18-month or 30-month ceiling, it's sort of looked at in a different way. And the question then becomes sort of: did that deliberation time take markedly longer than it reasonably should have in all of the circumstances of that case?

[24:49] **HUSEIN:** Does that give judges license to take months to come to a decision?

[24:55] **DANIEL:** Well, judges are certainly entitled in some cases to take months, but it doesn't give them the right to take indefinite amounts of time. A year or beyond, for example, would likely in almost any case be considered markedly longer than is what is reasonably necessary in the circumstances. But it just goes to show that it isn't part of that 18-month delay ceiling that the court in Jordan set out as a firm deadline.

[25:22] And that's because the idea of it was really intended to focus on the time that a case gets from the beginning of the charge to the end of the trial, not the time it takes to get a judgment. Because really, the way that the Supreme Court saw it in these cases, that wasn't where the delay was occurring. It wasn't occurring on the back end; it was occurring on the front end. And so, all these cases are sort of designed to encourage front-end efficiency, not back-end efficiency.

[24:49] **HUSEIN:** So, the case we're going to speak today, it's called *R.v. Mengistu*, and we'll have the link on our show notes as well, and the citation is 2024 ONCA 575. So, can you start by just walking us through what happened here.

[26:03] **DANIEL:** Yeah, this is one of those cases that really shows where the rubber meets the road. It's a very serious allegation, a dangerous driving where somebody gets run off the road. It resulted in serious driving accusations, attempted murder accusations, and it's the type of case you expect will be prosecuted. But in this case, by the time it ended up at trial, it had exceeded the delay ceiling by about just over two months.

[26:33] Now the Crown Attorney had an opportunity when the defense lawyer brought a delay application to say that some of this delay should not be part of the delay ceiling. And one of the areas where they focused their arguments was to say that the time that the judge spent deciding some of the preliminary motions during the trial, some of the evidentiary issues, that that time should be excluded from the delay calculus in the same way that the court excluded the deliberation time after a trial from the delay calculus.

[27:02] **HUSEIN:** Can you tell us more about what kinds of motions we're talking about here?

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[27:06] DANIEL: Interlocutory motions could include just about anything, whether a piece of the evidence should be admitted in trial or excluded from trial, whether a statement was taken the right way, whether a prosecutor's motion to tender a particular legal argument would be valid. Sometimes, for example, a Crown Attorney might want to demonstrate that a person is acting in a way that's similar to how they've acted in the past, that they've sort of have an MO in the way that they conducted a crime and that this crime is similar to how they've done it in the past.

[27:43] This requires a special legal application that a judge at some point needs to decide on if there's a dispute about it, but the court just wasn't having any of it. This 18-month ceiling is already exceedingly high or the 30-month ceiling is already high and takes into consideration the time that a case makes its way through the court system and all the challenges and all the deliberation that is required to get to the end result.

[28:11] The court just wasn't prepared to also interpret this charter right to include or to exclude that deliberation time from the overall calculus, because it really would sort of negate the purpose of these firm ceilings is that we would have certainty, we would know exactly when a case is taken too long. But if we start subtracting these micro events throughout the whole case, we lose any certainty and it sort of undermines the efficiency of the whole regime. Really, what we're dealing with is what is just the ordinary course of a trial. And so just like there are delays in receiving evidence, delays in obtaining court time, this is just one more of those delays that's part of that delay ceiling.

[28:55] What is clear though, if the defense lawyers are bringing frivolous motions, motions that don't have any chance of success, those things are excluded from the delay calculus because that sort of falls in that category of sort of deliberate defense delay, which we've talked about isn't acceptable. But a legitimate opposition to a motion or bringing a legal application is part of this.

[29:21] And one of the ways that judges can guard against accruing delay towards this delay ceiling, whether it's the 18-month ceiling or the 30-month ceiling, is to deliver a bottom line outcome. The evidence is or isn't admissible and deliver an explanation as to why that is after the trial is over or perhaps later on in the trial to prevent there to be excessive delay in the case.

[29:46] We certainly saw this in some very famous cases. One was the Peter Nygaard case where the judge gave a bottom line ruling on the admissibility of an expert witness's testimony and provided his reasons almost a year after that initial decision was rendered. So that's one way that the courts have balanced the right to a reasonable trial time with the need to sort of produce important rulings that can be tested on appeal later down the road.

[30:19] HUSEIN: Can you tell us more about what impacts you think this case will have going forward for criminal lawyers, whether it's on the Crown or the defense?

[30:27] DANIEL: I think this case really speaks to the Crown in a way that says to the Crown attorney that they need to consider whether or not the juice is worth the squeeze when they bring a particular legal application or oppose a legal application. They have to ask themselves, is this the type of thing that's worth spending time on? Will this result in a lot of time that the judge might take deciding the issue? Are there ways that we can work together with the defense and find common ground? Maybe there's a bit of horse trading. I'll agree that this motion goes in if you agree that this motion or this piece of evidence stays out.

[31:04] There are lots of solutions that really require everyone to work together, which is the goal of the Jordan decision in the first place, is to have all parties collaborate, find common ground, and look for efficiencies in the justice system rather than ways to make cases take longer and expend more resources on a particular criminal case.

[Music Break]

[31:31] HUSEIN: Excessive delays in the courts are prompting new calls for systemic reforms in the ways that the criminal justice system operates. With large caseloads and not nearly enough resources, several commentators are calling governments and Crown attorneys to adjust their policies and ideologies to ensure a more functional system. Now, Daniel, I know that there's a bunch of issues to talk about in this, but one live issue that's often discussed in this area relates to the screening criteria that the police use when determining whether or not to lay charges. Can you tell us more about how this works?

[32:10] DANIEL: So when the police officers are deciding to lay charges, a lot of policies exist now that give them very little discretion when a charge cannot be laid. The police took a lot of heat in the past for not laying charges where they thought a case was not likely to be successful in court, even though it sort of met the minimum screening threshold. The screening threshold that the police apply is reasonable and probable grounds to believe an offense has been committed. So that reasonable and probable grounds standard maybe is sort of akin to a—it's more likely than not that something happened based on the evidence that they have in front of them.

[32:55] The problem becomes that that's a really low standard and the standard ultimately in court to prove a criminal offense is proof beyond a reasonable doubt, which is generally equated with sort of proof to a near certainty. And so there's a big leap between something is more likely than not to have happened to get to this ultimate proof beyond a reasonable doubt standard by the time the trial completes.

[33:22] And what's even more challenging is that the standards that the Crown attorneys use in deciding whether to prosecute a charge in Ontario, that the standard is of what they call a reasonable prospect of conviction, meaning there's a reasonable likelihood we can get there. That is again, sort of a much lower standard than the proof beyond a reasonable doubt standard.

[33:44] So we have lots of cases that come into the court system in Ontario because the police are sort of encouraged to lay criminal charges where there's reasonable probable grounds. The Crown attorneys are told, in fact, they have to prosecute a case where there is a reasonable prospect of conviction. And yet the legal standard that needs to be met at the end of the day is proof beyond a reasonable doubt to a near certainty.

[34:08] And so that sort of divergence in legal standards leads to a lot of cases coming into the court system and a lot of cases being prosecuted in the court system that will not ever meet that really high threshold needed to prove the conviction at the end of the day. And so there's a real question about whether those standards, whether it's the standard to charge somebody or the standard to prosecute someone needs to be elevated to be more akin to the standard of ultimate proof at the end of the case. Where the Crown attorney applies as reasonable prospect of conviction standard, that applies throughout the entire case.

[34:47] And whenever they get to the point where they say that we're falling below that reasonable prospect of conviction standard, they're sort of encouraged or required to, in those cases, not proceed. So that will be after they've had a chance to review all the evidence. The difficulty is that even where they think I'm not likely going to get a conviction, but I've still met this minimum threshold of reasonable prospect of conviction, they're sort of in no man's land where they're sort of forced to go forward knowing they're not likely ever going to meet that really high standard.

[35:21] And that's different in Ontario than it is in other provinces. So, for example, in British Columbia, not only do Crown attorneys review the charges that the police want to lay and approve those charges to be laid right at the outset after they've considered all the evidence and sort of thought about whether that evidence would be admissible or not, how compelling it would be, all these types of things where they apply their prosecutorial lens to it. But there's a much higher prosecution standard of, in British Columbia for example, it's a substantial likelihood of prosecution, which is very different than the much lower reasonable prospect of conviction standard we use in Ontario.

[36:03] What that does is it results in lots of cases that shouldn't be in the court system from staying in the court system. It prevents cases from coming in there in the first place and from cases staying in there before the police, the prosecution, the court system, defense lawyers, judges, everyone has contributed to consuming a lot of court resources prosecuting a case that will not ever meet that really high threshold of proof beyond a reasonable doubt. So what it does is sort of by getting rid of the cases that have no real chance of meeting that high proof threshold early on, it allows the court to focus on the cases that do. And it makes it far more meaningful when cases are in the court system. You just know that those are more righteous cases that are likely going to meet that very high evidentiary threshold.

[36:52] HUSEIN: But isn't there also room for diversion? I know that sometimes when there's a case that, you know, it's questionable whether it's going to get to a proof beyond a reasonable doubt standard and it seems like it's amenable to not take this matter to trial, Crowns will offer them some sort of diversion, whether it's community service or paying a certain amount or something else like that. So, what role do you think diversion has right now in the system?

[37:16] DANIEL: I think one of the challenges that we're facing in Ontario is that a lot of the government sort of clamour is to be tough on crime and diverting cases out of the court system, giving people counseling to treat addiction issues or to sort of treat people like human beings and to recognize their faults and to treat those faults. It's not something that sort of generates a lot of votes. And so, to be tough and to say, to prosecute everyone and prosecute them as harshly as possible, that's the type of policies we're pushing right now, it seems like in the court system in Ontario.

[38:00] And I think it's going to be to everyone's detriment because to be harsh is easy to do, but it doesn't produce a fair justice system and it doesn't produce changes in a person's behaviour when they come out. So, either we're going to be the type of province that wants to prosecute everyone, in which case we're going to need unlimited court resources to make that happen, or we're going to have to figure out a way to treat people as humans and to figure out a way to sort of divert out the cases that need not be there.

[38:32] For somebody dealing with domestic assault, there's lots of counselling programs, there's restorative justice programs that exist there for people who are shoplifting, they can do some community service, there's lots of solutions that we have to think about.

[38:46] HUSEIN: So as you said, politically, it's very advantageous to be tough on crime. So what kind of reforms do you think need to take place to reach a scenario like the one that you're describing?

[38:58] DANIEL: I think what we need to do is we can redesign a court system in a way that elevates that prosecution threshold, that's number one. I think number two, we can figure out a lot of off-ramps, how to get people out of the court system early on before they've consumed a lot of judicial resources. And by doing that, it allows us to focus on the cases that matter the most. So rather than getting hung up on the shoplifting case, we're focused on that sexual assault case that we're worried might get thrown out because the case is taking too long.

[39:29] HUSEIN: Are there any jurisdictions in Canada or elsewhere that you think have kind of struck this balance in a more reasonable way?

[39:38] DANIEL: Well, we've talked about British Columbia with the charge screening regime. By looking at cases early on, there are sort of some pilot projects all over the country that are coming up with really creative ways to deal with crime, treating addiction

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as a public health problem, recognizing systemic factors that play a role. Until we start dealing with addiction issues as a public health crisis, stop turning to the courts to sort of deal with people dealing with mental health challenges, homelessness, poverty, until we sort of figure out how to create programs that will not just be band-aid solutions, and in fact, get to the root of the problem that's leading somebody to offending in the first place.

[40:29] I think we're going to be in for this vicious cycle where people come into the court system. We spend a huge amount of money housing someone in jail, over \$100,000 a year is spent housing somebody in a provincial jail cell while they're awaiting the trial, for example. That money could do so many good things for that person and for so many others.

[40:52] It can certainly be the foundation of a community centre that keeps somebody off the streets and from turning to a crime or gang violence, all of this stuff. And what we also see is every time we sort of increase the harshness of sentences, we make it more difficult to obtain bail. We take away a person's livelihood or delay them from clearing their name. All we're really doing is contributing to the crime problem. It's a self-fulfilling prophecy.

[Music Break]

[41:27] HUSEIN: For the last time on Lawyered, we're going to do our Ask Me Anything segment based on questions submitted by our listeners. As listeners of our show will know, 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 the show. We are now at the end of the series, so we're no longer taking questions, but we appreciate everyone who's been contributing questions, both for this episode and throughout the series as well.

[41:49] So a bunch of exciting questions to speak about this time, Daniel. And the first one is this. Now, over the last few years, many commentators have been specifically criticizing the court system for its lack of judges and resources. And so the question is, from your standpoint, how do issues like the availability of court resources and judicial vacancies contribute to delays in the criminal justice system?

[42:15] DANIEL: Well, I don't want to take away from that idea that if we don't have enough judges to preside over cases, we're going to run into delay issues. If we don't have enough staff or court space to house cases, we're going to run into delay issues. But really, I think what we also have to do is ask ourselves, where is delay caused the most in the court system? And it's not in any of those areas. One of the things I see every day in the criminal justice system are poor people who cannot figure out how to pay for legal defense and who do their best to defend themselves, but consume a huge amount of resources.

[42:54] One of the biggest contributors to delays in the justice system is that people can't afford a lawyer and they can't secure legal funding to defend the types of cases where they could benefit from a lawyer. So, we have people consuming a huge amount of resources,

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spending two or three or four times as much time in the justice system trying to defend themselves because the government has made a policy decision not to provide legal aid funding to those accused persons for a fraction of the costs. Historically, we've seen that \$1 invested into a legal aid program can result in \$6 or \$8 or \$10 of value back in efficiencies.

[43:38] And again, this idea about not being kind to people accused of crimes fosters the belief that if we are harsh, people will simply plead guilty, they will accept their punishments, and they'll do it efficiently and quickly. And that couldn't be further from the truth. So we can't just invest in more Crown attorneys, more judges, more court space without also investing in legal aid funding that ensures the defendant can navigate this very complex system efficiently.

[44:11] HUSEIN: So, these criticisms about the court system being under-resourced, do you think that those are misplaced?

[44:19] DANIEL: I think it's self-serving. I think who wouldn't want additional Crown colleagues to share the work or judicial colleagues or more availability of space? I think ultimately, either we're going to figure out that if you want to lose weight, really, you have to eat less. And that's what we're talking about here. We can't continue to bring all these cases into the court system and expect that the resources that are there are sufficient.

[44:53] The more charges that come into the court system, the more resources that have to be there to deal with it. But most importantly, what we need is funding for the defendants who are navigating that court system, because they are consuming more than their fair share of resources trying to navigate the system alone.

[45:09] HUSEIN: So, the next question we have here is, and we talked about this to some extent in the previous segment, about some systemic reforms, talking about restorative justice and perhaps adjusting the screening criteria. The question is, how do you think the legal system should balance the right to a timely trial with a need for a thorough investigation and a fair prosecution? I think some may see these principles being at odds.

[45:31] DANIEL: One of the easy solutions to solving the delay problem is to remember when the delay clock starts. It doesn't start before a person's charged; it only starts after a person is charged. There always does seem to be, though, a rush to lay a charge first and then conduct the investigation afterwards. The only time we see that in reverse is when the special investigations unit is investigating a police misconduct. There they spend a significant amount of time on the front end investigating the case, and only where charges are warranted are charges laid. It doesn't compromise public safety when they do that, even when a police officer is accused of a really serious offense.

[46:12] And so by doing that, you get the benefit of a head start in the investigation. So, no one is telling the police, don't do a thorough investigation, don't explore all these avenues, don't make sure you have all the evidence you need to push a case forward. All they're

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telling the police to do is to have all of that first and then lay the criminal charge. And when you do it that way, you've cut out much of the delay. And also, there's a lot of inefficiency in the way that evidence is delivered to the defense and the way that people are brought through the court system. And so I think there's lots of ways that we can deal with investigations first, charges later, rather than backwards.

[46:58] And also find other efficiencies in the way that our court system is designed from beginning to end to ensure that these cases are brought forward in a timely way. But no one is going to take those steps when they think that there is going to be somebody at the end of the case that will excuse the delay that's caused by the inefficiency that our current system creates.

[47:19] HUSEIN: Right. I think your words about how the police tend to charge first and then investigate more afterwards. Are there any other benefits of completing the investigation before charges are laid? I don't know if there's like admissibility issues if evidence collected after the charging point.

[47:34] DANIEL: I think the problem that happens when the evidence is collected after the fact is that people aren't able to digest the evidence or understand how it impacts the case. If the police had the full picture early on in the case and had all the evidence in front of them, whether they or the prosecutors could look at the case and ask, is this really viable? Rather than spending months and months and months seeing what might turn up before they decide whether a case should move forward or not. So again, sort of making these decisions early on in the case before they're in the court system and consuming time is the best way to approach it.

[48:10] HUSEIN: So next question, and we talked about sentencing and race and the law in previous episodes as well. But the question here is, how do cultural and systemic biases within the judicial system impact the application of Section 11B, this delay issue, particularly for marginalized communities?

[48:30] DANIEL: One of the reasons why people don't plead guilty is because of the impacts a guilty plea will have on their livelihood, on their ability to travel, on their immigration status. And so somebody who comes to Canada as a permanent resident or as a student visa or as a refugee and who encounters a criminal conviction, there are very significant consequences for them. In fact, they're deported, and in some cases, deported without any ability to stay in Canada.

[49:05] And that's what often causes a person to stay in the court system, fight their case rather than accept responsibility, is not the consequence of the offense itself, but the collateral consequences that stem from it. And so, we have these policies. We say, well, apply to everyone equally. But when somebody comes and they're marginalized or they're a recent immigrant from another country, these sorts of problems are magnified for them and

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does disproportionately impact their sort of the consequences for them in a criminal charge more so than somebody who has lived here their entire lives.

[49:50] There are other sort of particular laws that have mandatory minimum sentences specifically for offenses that seem to impact particular racial or cultural groups more than others. And again, while no one will admit to this, you might say that it's deliberate that particular offenses that sort of privileged people commit, like fraud, have very different outcomes than other sort of street crimes that tend to be committed by people from particular backgrounds or someone who's coming from poverty. And so, while we say, again, that these laws apply to everyone equally, they disproportionately impact certain communities more than others.

[50:34] HUSEIN: From your experience, do this have applications for 11B as well? Do you see these delay issues disproportionately impacting racialized groups as well?

[50:44] DANIEL: I think one of the things we have to remember is that to bring even a complex legal application like this requires skill. It's not the type of thing that a person can do on their own. So, if a person can't even afford a lawyer or hires a lawyer through a legal aid program where the legal aid program won't even cover the cost of bringing a complex application like this, they could be deprived of bringing an application for a stay of proceedings because of delay, simply by the fact they just can't afford it. So, it's sort of a privilege that might be afforded to the wealthy that somebody who's impoverished or somebody who comes from a disadvantaged background is denied.

[51:31] HUSEIN: Today's episode, we've been focusing on this trial within a reasonable time issue, Section 11B. But beyond that, we want to know what are some of the other significant ways that criminal law has developed and changed over the last five to 10 years?

[51:46] DANIEL: One of the significant changes that happened was really over COVID, where much of the court system went online, and it had a lot of immediate benefits. A lawyer in Toronto could appear in a far-out jurisdiction on a case without having to travel. So, it increased an accused person's access to justice. They now had access to a wide range of lawyers outside of their own small community that maybe they couldn't have ever had access to before. Also, everything in our world is digitized now. And so what we see is a lot of additional digital evidence that didn't exist before: body worn cameras, police car cameras, station cameras, people recording interactions with the police on their cell phones.

[52:40] And I think it's really shone a light on what happens sort of in these interactions with the police. And I think it's held the police more accountable. And I think that there's a benefit for that. But there's also a consequence is that a lot of this evidence requires more cost to process and to share with the defense as the case is going through the system and can contribute to delay as well.

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[53:10] HUSEIN: I want to just circle back to those COVID issues. I think in COVID, nothing, the pandemic is over, but it's less pronounced than it was, you know, years ago. I want to ask, like, despite the benefits that you mentioned about having counsel can appear virtually across the province or across the country, I sense that there might have been some growing pains in terms of having a functional system that operates virtually. Can you tell us more about that?

[53:41] DANIEL: I think a lot of people were left behind when the court system went virtually. I think we take for granted that everyone has access to high-speed internet. Everyone has a computer to log into or a cell phone that they could zoom into court with. That's a privilege. And it's a privilege that people in northern communities don't have. It's a privilege that people from underserved communities or marginalized communities, somebody with mental health issues, someone who's unemployed and can't afford those types of access. And there wasn't really a solution for them that everything went online. And so there wasn't accommodations for people that didn't have those types of privileges available to them.

[54:30] And I think that that was a hard thing to watch, that it sort of created almost instantly a two-tiered criminal justice system, you know, those for the wealthy and those for the impoverished, and really sort of illustrated the difference of the haves and the have-nots.

[54:42] HUSEIN: Fair enough. The last question we have is, I think, a good note to end on, and the series on as well, that one of the reasons that, frankly, I started this podcast was it was meant to be an access to justice initiative. The question for you, as someone who's been very active both in your own practice and the community as well, is what are some things that lawyers can do to improve access to justice in their own communities?

[55:03] DANIEL: I think it's to do something. It doesn't need to be the same thing for everyone. For me, I've sort of focused on communicating with the public. I do a lot of media appearances, I write, I've published a textbook, I have offered to teach at a law school. These aren't the types of things you do because they are great paying. You do them because they are the types of things that really give back.

[55:30] When I started out in criminal law, I didn't know any criminal lawyers. I didn't understand what a career in criminal law would look like. And I thought it was really important for me to ensure that others had practical experience in the area, at least a taste of criminal law. Not only was I teaching at a law school, we created an externship program where people get into a real firm and see what real criminal lawyers do on a daily basis, get into court. I think once people see the excitement of it and realize how much they can help others, they're going to be really attracted to it.

[56:07] But we were only exposed to a particular idea of corporate law, this singular notion of what a lawyer is. And I think that that really did a disservice to many of us who would

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have been fantastic criminal lawyers. The criminal law bar is small, and I think it's dwindling by the day. Poor funding and not a lot of mentorship now because people just don't know how to access criminal lawyers today the way they should.

[56:40] And so my part, just really contributing to giving back in any way I can, whether that's doing a podcast like this or speaking about issues that are important or contributing to education and access to what I'm up to. I think that's something that's going to help foster the next generation of lawyers.

[57:02] HUSEIN: Yeah, 100%. And you mentioned people should just do a thing. What are some tips you would give to people who are trying to identify what the best outlet would be for them to contribute to the greater good?

[507:14] DANIEL: I think it's just finding something that interests you. There was no particular goal I had early on. I just knew I wanted to give back in some way. Even volunteering at a legal clinic, just committing to speaking to one client for a few hours for free without having to charge them for it, speaking at a church and talking about your experiences as a lawyer and the types of things you do. It doesn't matter what it is as long as it's something.

[57:46] HUSEIN: So, Daniel, I want to thank you so much for being not just the show, but the series finale. As I mentioned at the very beginning, you've been a great supporter of my own career development. So, it felt very fitting to have you on as the show is wrapping up. So, I want to thank you for walking us through these insightful issues in your typical constructive manner and looking forward to staying in touch in the future as well.

[58:07] DANIEL: Yeah. And this has been such a great experience. And I've watched you grow up as a lawyer and contribute in your own way. And I think this is a really fantastic way to do it.

[Music Break]

[58:20] And that's going to do it for our substantive series finale. Thanks so much for listening. On today's episode, our guest was Daniel Brown. You can learn more about him and the work that he does at his firm at his firm's website, which is www.danielbrownlaw.ca. And for more about today's show and links to all the cases and bills that we spoke about on this episode, you can find those on our website, which is www.lawyeredpodcast.com. And on our next episode, our bonus episode, which is also our series proper finale, it's going to be a big one.

[58:55] I'm going to be the guest on that episode, featuring one of my mentors and friends, Fatema Dada, who will be hosting and asking the questions. And it's going to be a reflective episode. We're going to be talking about the series as a whole, how it started, how it ended, everything that happened in between. We're going to be talking about some behind the

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scenes, structural kind of inside baseball that people sometimes ask about. We'll be talking about how the process works, what I've learned about it, what other people can do. I'm really looking forward to it. I hope you listen as well. That's going to be coming out in two weeks' time.

[59:30] And if you want to check through our archives, we've got just over 100 episodes for you to check out if you haven't gone through them already. You can find those by subscribing to our podcast for free on iTunes or your favourite podcast app. We also post content on Facebook, LinkedIn, or on Twitter, our Twitter handle is @LawyeredPodcasts. And on our website as well, you can post all the episodes are there. You can stream them indefinitely. And you can find more about our guests and show notes there as well.

[01:00:00] I want to give a huge thank you to all the supporters who've been keeping the show going since the beginning, including all the patrons who've been providing financial support for the show over the last couple of years. I cannot say enough about how much your support has meant to me personally, and for the show as a project. And I'll be doing a special thank you to each of you on our next episode, our last episode. So please keep an eye out for that. But thank you so much for your generosity and support, both financially and otherwise, and keeping this project going, not just this year, but for the last 10 years as well.

[01:00:41] I want to give a big shout out to a lot of my friends who've been helping with the production ends of things. Our set editing work has been largely helped by Solomon Krause-Imlach, our theme music has been provided by Ben Swirsky, and the website's been maintained by Steve Demelo.

[1:00:57] And finally, please be advised that while the show is aimed to be helpful and informative, it is not legal advice. However, if you do want legal advice, please reach out to a lawyer directly to help you with your particular situation. And with that, we'll see you back here in two weeks' time. Until then, keep it legal.