[00:04] HUSEIN: This is episode 99 of Lawyered. I'm Husein Panju. And on this week's episode, we're speaking about public law and government decision-making with our guest Zain Naqi, a Toronto litigator who has an extensive public law and appeals practice.

[00:29] First up, we'll speak about the recent application of the doctrine of Crown Immunity. A recent Superior Court decision involving the Ontario Place lands may signal a greater willingness to allow governments to immunize their own decisions from litigation, and we'll find out how that might apply at a broader level.

[00:37] Next, we'll speak about a new legal test for recognizing Aboriginal rights under Section 35 of the Canadian Charter. The current framework, known as the Van der Peet test, has been repeatedly criticized as being outdated, and this new test may demonstrate a more progressive shift towards acknowledging Aboriginal rights based on the traditional legal systems of Indigenous communities.

[00:59] And later on, we'll speak about an upcoming Supreme Court appeal that will provide some further clarity on the scope of Section 7 of the Charter and the context of sex work. 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 the Notwithstanding Clause, Public Interest Scanning, and the separation of powers within the Canadian framework. All that and a lot more is coming up in just a bit. This is Lawyered.

[Music Break]

[01:33] HUSEIN: Hey, everybody. Welcome to episode 99 of the show. We are in our penultimate episode. We've got one more. So technically, we have two more episodes left. We have one more substantive episode which is going to come out in two weeks from now. And then after that, we have a very special episode that I'm really looking forward to and encourage you to check out as well. And that's it. That's going to be the end of our series. So on the one hand, sad that we're wrapping up our time together, but very happy with how this farewell tour is going. And I'm really appreciative for all the support that we've been getting from other podcasters, other lawyers, everyone who listens. Really appreciate it. It really means the world.

[02:13] I also wanted to share a really cool update on something neat that I've been working on. Now, just a couple weeks ago, I was really fortunate to be accepted into this program called the Business Leadership Program for in-house counsel. It's a really unique program. It goes for about 10 months, and it's offered in conjunction with the CCCA, which is the Canadian Corporate Counsel Association and the University of Toronto Rotman School of Management. And the program itself is kind of dubbed a competitive mini MBA, and it's designed to help in-house counsel really level up their skill. So, it's a mix of in-class programs. There are also some individual modules that you do. We have some virtual programming coming up. There's a lot of content, and we only just started recently.

[03:04] As many of you know, I've been working as in-house counsel for pretty much my entire career. And I really enjoy this area of work and that you get to touch a lot of different types of industries and the law. But on the flip side, I felt that there's always this

expectation that in-house counsel lawyers are expected to also know all these areas of the law, despite the fact that most of them, including myself, have not been formally trained in numerous areas.

[03:32] And the program itself really goes into depth and providing us with the skills that we need, including those that are not covered in law school. Already, we've had some great lectures from our professors about the areas of strategy and what that really means and how to implement that. We had a really engaging day that was focused on negotiations and the different types of negotiations and ways to make it kind of a win-win scenario for all parties involved.

[03:58] And then there's a whole bunch of modules that are coming up on a bunch of areas of law that I've not formally been trained in so far, things like merchant acquisitions and insolvency and governance. And it's really neat to learn a lot of these concepts from some of the best professors. So, as many of you know, Rotman is internationally recognized as one of the best business schools in Canada. And we've got a really interesting class. We have a very diverse group of people, people from all across Canada, people from all areas of the law, public sector, private sector, big departments, small departments, everything you can think of. And it's really nice to be back in this in-class environment after so long. So, I want to thank everyone from the CCCA who's helping to make this program available to so many people. And I look forward to seeing how the program continues as well.

[04:49] Now, on our last episode, that was episode 98, we had a very interesting episode. We spoke with Enda Wong, who is the Montreal leader of the business law group at Macmillan LLP. So, truly going across the country for the last couple episodes. And that was the episode about private equity law. And that was a topic that I knew next to nothing about before the episode, but learned so much during the episode. And I've heard some great feedback from a lot of listeners as well about this.

[05:17] We spoke about some recent cases that speak about accomplice of interest and shareholder rights. And this really interesting tool called continuation funds, which I gather is not necessarily a new tool, but has had new breadth added to it in recent years, where managers of funds can essentially create new funds to buy funds from itself, which sounds complicated, but it makes more sense when you hear the episode. And it presents some numerous interesting issues about conflicts and how that's going to work on a compliance standpoint to ensure that everything is all above board. So, really great episode.

[05:55] Enda also speaks about some of the benefits of working in this particular space, including the opportunity to work with business leaders from all across industries. So, that's something that you're remotely interested in, definitely consider that as a listener, and that's episode 98 about private equity law. Today's episode is one that I've been looking forward to for some time. It's about public law, which I think is a lot of just law generally. So many of us, whether you work for a government body or otherwise, are dealing with public law on a day-to-day basis. And in fact, so much of what we do, government actions, whether it's at the federal, provincial or municipal level, and there's a lot of meat to go into.

[06:35] So, I'll flag the outset. We're not going to cover every single topic within public law that is hot right now. There's too many to pick, but very happy with the topics that we have land on. And also, very happy with the guests we land on, is a friend and also a very impressive lawyer who covers all sorts of law as part of his day-to-day practice, and especially known for his interesting work in the public law space. And so, without further ado, here is our interview with our guests, Zain Naqi.

[Music Break]

[07:06] Zain is a partner with Lax O'Sullivan Lisus Gottlieb LLP, which is a boutique litigation firm in Toronto. And Zain's practice encompasses all aspects of business litigation. And in addition to his commercial disputes work, Zain always provides extensive public law and appeals practice. He represents clients at all levels of court in Ontario, the federal court, the competition tribunal, and the Supreme Court of Canada. And his mandates include significant appeals, judicial reviews, and multi-week trials and hearings. He's represented local and regional municipalities across Ontario, Aboriginal groups, as well as individuals and corporate clients in administrative and constitutional litigation. He's also developed expertise in judicial review proceedings before the Divisional Court, successfully obtaining extraordinary remedies against public authorities.

[07:55] And in his pro bono work, Zain has always contributed to cases for the Canadian Civil Liberties Association, including a precedent-setting case on the scope of crown liability. Early in his career, Zain clerked at the Supreme Court of Canada and worked at a leading New York firm on class actions and regulatory investigations, and he's always a co-author of the *Chamber's Global Practice Guide for Litigation in Canada.* So, Zain, thanks so much for joining us on the show today.

[08:20] ZAIN: Thanks for having me, Husein.

[08:22] HUSEIN: Yeah, of course. For people who are listening, Zain and I actually got to know each other just about a year or so ago. We had the opportunity to work together through an initiative as part of the Canadian Muslim Lawyers' Association, where we actually retained Zain to advocate for us on a really important matter involving police accountability. I really liked how that went, and I'm really happy to have you on the show as well.

[08:46] So, before we get into the topics, I was hoping to learn a bit more about you. I know that a lot of people say that they like movies, but I understand that you're something of a cinephile. Can you tell us a bit more about this very active interest in movies?

[09:04] ZAIN: Yeah. I mean, I am a movie geek, and I have been probably since I was about 16 years old. And when I say movie geek, I mean I've watched hundreds, thousands of movies. And I got into it through a friend of mine in high school who had a fabulous selection of films from all eras and genres and countries and I just got the bug, and ever since, I've been obsessed.

[09:51] HUSEIN: And is there a particular genre of movies that you're into that some people might find surprising?

[09:58] ZAIN: I love horror movies of all kinds, and I especially like the really gory ones. And particularly the ones from the 70s and 80s. There's a really cool line of films like *Evil Dead* and others that kind of captivate me.

[10:28] HUSEIN: And what is it about those movies that gets you that interested in them?

[10:33] ZAIN: I like the almost slapstick aspect of those movies. They kind of verge on to melodrama. And I think that it's really neat because they're scary, but they're also funny at the same time.

[10:48] HUSEIN: Okay, awesome. And then I know, obviously, you're a lawyer right now, but I know you had a bit of an unconventional path to get here. Can you tell us a bit more about how you ended up in this line of work?

[11:03] ZAIN: Yeah. I fell into law school, as maybe many other people do. I wasn't planning that. I did my undergraduate degree in economics, and I thought I was going to work in economics and policy. I worked at the Central Bank after my undergrad. And I thought the more that I worked with economists, no disrespect, the more I actually needed to do some kind of practical problem solving. And so I applied to law school thinking that that would be an answer to a problem. And then it became maybe a series of other problems. But I really enjoy my work, and I feel lucky to be able to do it. And

[12:05] HUSEIN: And do you ever find your economics background comes in handy in the work that you do? I know you do a lot of commercial work, right?

[12:12] ZAIN: Yeah, I'd say it does in the cases, and just knowing something about how businesses work and how economic cycles work, it's useful when you're dealing with complex businesses in your day-to-day.

[12:34] HUSEIN: Yeah, fair. I know economics is all about decision-making. And I know in our era of practice, we're making hundreds of decisions over the course of one plan, right?

[12:45] ZAIN: Yeah, I mean, for sure. And I think we're responding to the realities of a given market in economics. And we also have kind of polycentric decision-making to do as lawyers, litigators, a bunch of inputs. And you have to come up with a strategy or approach that makes sense.

[13:16] HUSEIN: Yeah, yeah, 100%. Great. So, we've got a bunch of interesting topics to speak about in this area of public law. And I'll note that public law is an enormous area of law. So, it was not practical to cover every single aspect of public law, but I think we have a pretty good sampling of topics that are fairly representative of the topics that come up within this broad realm.

[13:36] ZAIN: And the first issue we're going to speak about involves the doctrine of crown immunity. Now, in recent years, one of the most controversial trends has been the increasing willingness of government bodies to pass laws that protect themselves from court challenges regarding their future actions. And this concept, known as crown immunity, has emerged across the country and was recently at the center of a court case in Toronto involving the redevelopment of the area known as Ontario Place. And although there is limited case law on this particular issue, the outcome of this case may serve as an indicator of how courts and governments will interact in the future. So, Zain, can you tell us a bit more about this doctrine of crown immunity and what we've been seeing broadly speaking?

[14:22] ZAIN: I won't get into the history lesson, but historically, the crown enjoyed immunity from civil suit, and that's kind of well known. And in the 1950s or so, you see federal and provincial governments enacting statutes that allow claims, particularly claims in tort, against the crown. And the question that arises in the case law is, what is an operational decision versus a policy decision? Crown is immune from policy decisions, but when it's actually affecting that policy, the crown can be found liable.

[15:02] And what we're seeing increasingly is a resort to a new species of crown immunity. And that's what I like to call kind of targeted immunity provisions. And those are provisions that are aimed at a particular individual or class of individuals or a particular government action.

[15:26] HUSEIN: Okay. So, as I mentioned in the introduction, we have a recent case study regarding Ontario Place. And again, we'll put the citations on our website. The style of cause is Ontario Place Protectors and Ontario. And the citation is 2024 ONSC 4194. And Zain, I know that this case began with a judicial review application and it led to the government enacting a new statute. So, can you tell us more about the facts?

[15:55] ZAIN: Ontario Place is a recreational area in Toronto. And historically, it's been an amusement park and a variety of other things. And the government has decided to redevelop it. And there was a lot of controversy because a lot of people are attached to Ontario Place in Toronto.

[16:21] HUSEIN: And I know this is not like a public affairs podcast, but I understand there's a lot of controversy as well because there's this perceived privatization of the lands and how it's meant to be, how it might be used in the future.

[16:55] ZAIN: Right, exactly. And in response to the government's redevelopment plans, there was a judicial review application that was brought. And the argument that was made was the government has sidestepped all kinds of environmental regulations, environmental assessments, etc. And the government responds by passing a new piece of legislation called the Rebuilding Ontario Place Act. And what the new legislation does is it vests all of the lands in the province, and then it exempts the redevelopment of Ontario Place from environmental assessments, heritage rules, all kinds of other legislation. And the kicker is that it also creates a broad immunity provision that essentially immunizes the crown from any lawsuit or claim relating to any conduct in relation to the redevelopment.

[17:34] And in the case, the applicant says the immunity provision is a violation of Section 96 of the Constitution Act because it effectively bars any meaningful access to the court or to getting at the reasons for the government's decision.

[17:52] HUSEIN: All right. And I know that, like, on the face of it, I think the application was struck due to a lack of standing. I think that the applicants here were this coalition of heritage and environmental groups. But notwithstanding the standing issue, can you tell us a bit more about the court's finding on the merits of this?

[18:11] ZAIN: The court says that Section 96 does protect the core jurisdiction of the superior courts, which we've always known, but that that protection is not limitless. And what the court really gets at is the legislature has wide latitude to enact legislation, even legislation that might be perceived by some to be draconian in nature, to limit causes of action, to limit remedies in court, to extinguish property rights, because the government might well have legitimate reasons for doing that.

[18:45] And the court says, you know, as a matter of the separation of powers, we have to respect those legislative choices. And if there is a remedy at all, the remedy is likely at the ballot box. The focus of the court's analysis is really on this Section 96 issue because that's a constitutional constraint on the power of the government to enact legislation.

[19:09] HUSEIN: And what do you think, someone who's been practicing public law for many years, what do you think about the court's finding on this matter regarding Section 96?

[19:20] ZAIN: Yeah, so the court kind of, it's a bit dissatisfying of a decision, I'd say.

[19:29] HUSEIN: I think a lot of people would agree with that.

[19:34] ZAIN: Yeah, the court says, okay, there's this core jurisdiction of the superior courts that's protected, but it doesn't necessarily protect access to the court in individual cases. In other words, it might protect access to the court at large, but in individual cases, the government can basically say no access, no remedy, right? And that kind of begs the question in a way, is the question about the number of people who are impacted by an immunity provision, does it have to be that the court has been shut down entirely for there to be a violation of Section 96? Can you target individuals and groups and restrict their access to the court? Maybe that's the ultimate conclusion because we live in a society where the legislative decisions subject to the charter, subject to division of powers are paramount.

[20:37] But there's something a little troubling about that, because if you take that to its logical conclusion, you could imagine the government using this as a tool in case after case after case. And then it actually does become a Section 96 problem, right?

[20:56] HUSEIN: Are there any legal remedies for groups who are opposing government actions when governments are using this crowd immunity clause on a blanket wide basis?

[21:08] ZAIN: Yeah, I don't think that Ontario places the end of the road on this. I do think that these questions are going to get appellate treatment at some point. And they're troubling and they're difficult questions because governments can have very legitimate reasons for enacting policies through legislation and then trying to protect themselves against myriad lawsuits when they might have laudable goals, right? Sometimes governments do have to make decisions that upset entrenched interests.

[21:50] HUSEIN: So what are public advocacy groups to do that?

[21:53] ZAIN: I think they need to keep litigating Section 96. Section 96, I think, is one of the most interesting provisions of the Constitution because so much that is not in the language of that provision has been read into that provision over the years. And it seems like now that there's been some treatment of it by the court that's been favorable, it's probably going to get used more, not less.

Music Break

[22:26] HUSEIN: A recent decision by the Quebec Superior Court may represent a pivotal moment in Canadian Aboriginal and treaty law. The court significantly revised the legal test for recognizing Aboriginal rights under Section 35 of the Canadian Charter of Rights and Freedoms, grounding its reasoning in Indigenous law. And although this new approach is not yet binding across Canada, it does signal a progressive shift towards acknowledging Aboriginal rights based on the traditional legal systems of Indigenous communities, rather than limiting them to practices that existed before European contact. So, Zain, I know that this new case that we're going to speak about impacts something that's known as the Van der Peet test, but it's been the standard for this area of law since at least the late 1990s. Can you tell us briefly what this test means?

[23:16] ZAIN: Sure. So, the Van der Peet test is the test for establishing Aboriginal rights. And what it does is it sets a framework that requires an Aboriginal group or Indigenous group to show that the activity that they're seeking protection for is a practice or custom or tradition that was integral to their culture prior to contact with Europeans.

[23:53] HUSEIN: If something is an Aboriginal right, what is the implications of that?

[23:56] ZAIN: So, take the example of fishing rights, which is what some of these cases are about. Typically, if you want to fish in kind of open waters, you need a fishing license, right? And there's an entire regulatory regime around fishing in Canada. And so, these cases were partly intended to establish those rights in a way that they weren't interfered with by that construct that was a kind of colonial or kind of post contact construct. The difficulty, of course, with a test like that, and it's been widely criticised by academic practitioners, is that it takes a very colonial view of Aboriginal groups, right? It effectively freezes their rights in time rather than acknowledging that their societies and cultures are in constant evolution.

[25:02] HUSEIN: So, the case we're going to be speaking about is a case called R. v. Montour & White. And, of course, we're going to be having the citation and the links all on our

website, but the citation there is 2023 QCSC 4154. Can you tell us about the facts of this case?

[25:22] ZAIN: Yeah. So, the fact is straightforward. Montour and his co-accused, White, are both members of the Kanyen'kehà:ka Mohawk First Nation. And they were charged with offences under the Excise Act for failing to pay taxes on large quantities of tobacco that had been imported from the United States. And the issue in the case was whether those charges should be stayed on the basis that they were in violation of Section 35, including a right that they were claiming to trade in tobacco and to freely pursue the economic development of their First Nation.

[26:15] HUSEIN: So, they were claiming that that was an Aboriginal right. Is that right? That's exactly right.

[26:22] ZAIN: Okay. And then, when this got to the Quebec Superior Court, how did the court find on this matter? So, the decision is remarkable in a number of respects. The court does a very lengthy examination of the peace and friendship treaties between the British and the Haudenosaunee.

[26:44] And ultimately, the court concludes that those treaties do protect a right to trade, and in particular, a right to trade in tobacco. And what's even more interesting than that is that the court says beyond a specific right to trade in tobacco, the First Nation has a right to freely pursue its economic development by whatever means necessary. The court comes to these findings by way of a new test for Aboriginal rights, which is, I think, the most remarkable aspect of the decision.

[27:30] HUSEIN: So, can you tell us the differences between the Van der Peet test that you mentioned earlier and this new test that comes out of White & Montour?

[27:40] ZAIN: Yeah. So, the Van Der Peet test focuses on the period of contact with the Europeans. And that's been widely criticized, as I said. And the court is very candid in acknowledging those criticisms and reckons with them. And the conclusion that comes out of the case is that a new test is required. And the new test establishes that you can prove an Aboriginal right, a right to trade, for instance, as in this case, as a collective right, as long as that right is one that is recognized and protected by an Indigenous legal system.

[28:30] And so, that's pretty groundbreaking in this area because, typically, the perspective that the courts have historically focused on is trying to take part of the European perspective or colonial perspective, part of the Aboriginal perspective, and try to determine what the rights are. This says focus on Indigenous legal tradition, focus on the Indigenous perspective. And if it's borne out by the Indigenous legal tradition, that such a right exists, then that right should be protected.

[29:19] HUSEIN: Got it. And how would a claimant here go about establishing that something was, in fact, protected by the traditional legal system?

[29:27] ZAIN: So, that's an interesting question because the proof exercise in these cases has been difficult, right? Like, when you traditionally approach these cases, and I've litigated land claim disputes, you're very deep into the historical record. And that partly is a historical record that's a, I'm going to say, paper record that is kind of Eurocentric. But there's also a lot of emphasis, increasingly, as there should be, on the oral traditions of Indigenous peoples. And oral traditions are, you know, the laws and customs that have been passed down from generation to generation.

[30:22] And so what Montour is really telling us is we have to take the idea of those oral traditions much more seriously. And those oral traditions may well prove to be a lot more important than they have been in the past in proof of aboriginal rights claims.

[30:45] HUSEIN: I know that this decision is still getting appeal to the Quebec Court of Appeal, but regardless of the outcome, how do you think this line of cases is going to impact those who practice in public law or Indigenous or aboriginal law?

[31:00] ZAIN: I think it opens the door for some very ambitious arguments in future aboriginal cases. And the focus of a lot of aboriginal law jurisprudence in Canada has been around this idea of reconciliation. But reconciliation, in a lot of the cases, the premise of it has always been this idea of reconciling aboriginal peoples to the fact of crown sovereignty, right? And what this decision says or strongly suggests is that we need to rethink that approach. And the approach has been shifting to the idea of aboriginal peoples having broad sovereignty over their own lands, over their own futures, in a nation-to-nation relationship with Canada. And we see that reflected in self-government agreements. We see that reflected in recognition of aboriginal rights to self-govern in the areas of child and family welfare. Like, there's all kinds of instances of that. And Montour is kind of the logical conclusion of that.

[32:25] So I think there's going to be a lot more litigation arising out of this case. And a councillor on acting for aboriginal peoples are going to be invited to and encouraged to make some pretty strong arguments about what reconciliation actually is.

[Music Break]

[32:55] HUSEIN: The scope of Section 7 of the Charter, which guarantees the right to life, liberty, and security of the person, may soon be further defined due to a recent appellate case involving the area of sex work. An Alberta Court of Appeal decision recently ruled that several criminal code provisions related to sex work, including those concerning individuals who receive a material benefit from it, are unconstitutional. And this ruling is now setting the stage for a potential Supreme Court decision on the same hearing. Now, Zain, I know that this decision itself relates to some provisions of the criminal code that came through an enabling statute that's called the Protection of Communities and Exploited Persons Act. Can you tell us a bit more about the background of the provisions that we need to know to understand what's going on?

[33:40] ZAIN: Yeah. So the background to this current regime around the criminalization of sex work is the Supreme Court's decision from 2013. So Bedford is a case that a lot of

people who know Section 7 will know well. But it struck down a series of provisions relating to what we then called prostitution under the criminal code. And the core reasoning behind the Supreme Court's decision in that case was that the criminal provisions around sex work didn't actually criminalize the purchase and sale of sexual services, but all of the activities around it. So, communication for the purpose of obtaining sexual services, operating what was called a body house, living on the avails of prostitution.

[34:40] And that by criminalizing those things, it made sex work unsafe and dangerous conditions for sex workers. And so that was the basis on which the Supreme Court struck down those provisions.

[34:54] HUSEIN: So, where does that take us to now?

[34:56] ZAIN: So, that led to this current regime in PCEPA, which was enacted in 2014 as a response to Bedford. And this regime is a bit different because it actually criminalizes the purchase of sexual services and it targets the purchaser of sexual services and then criminalizes a bunch of other activities around sex work, including enacting a material benefit offense. And that's the key offense that is at issue in this case. And that offense makes it a crime to receive a financial or other material benefit knowing it was obtained as a result of a purchase and sale transaction for sex.

[35:45] **HUSEIN:** The case that's being appealed is the felon causes R.v. Kloubakov. Citation there is 2023 ABCA 287. Can you give us an overview of what this case is about?

[36:00] ZAIN: The facts are pretty straightforward. The two co-accused were drivers who worked for an escort agency. And so their job was to drive sex workers who worked for the agency from and to their appointments. And the two drivers were charged under the criminal code for the material benefit offense. The provisions at first instance were challenged under Section 7 of the charter. And the claim that was made was that similar to Bedford, that this regime, PCEPA, and particularly these provisions violate the right to life, liberty and security of the person of sex workers.

[36:48] So although the case is actually about these third parties who are drivers, it's much more focused on whether the regime itself basically compounds and continues the problems from the Bedford regime in terms of creating dangerous conditions for sex workers.
[37:12] HUSEIN: Can you explain a bit more what that means?

[37:14] ZAIN: In the court in Bedford says the regime prevents sex workers from accessing certain services that would make sex work easier. So, one of those things is hiring security guards, a receptionist. Another aspect of it is the ability to work from an indoor location. And so what the court says in Bedford is any regime that prevents sex workers from being able to avail themselves of these safety supports, that regime won't pass muster under Section 7 of the chart because it creates dangerous conditions. And so the argument that was made was although the new regime purports to fix those problems, it actually in practice on the ground doesn't fix them at all.

[38:19] HUSEIN: Okay, I know this is we don't yet have a decision on this matter, but how do you think this might play out when it gets to the Supreme Court?

[38:28] ZAIN: So the way that the Crown has argued this case is that the purposes of the statute or the objectives of the statute are much more focused this time on deterrence and denunciation of the commodification of sex. So, this follows on what's called the Nordic regime. It's followed in other jurisdictions where the idea is that you should enact a regime that criminalizes the purchase of sex because it has bad societal implications, particularly for women and girls.

[39:14] So what the Crown is saying is the purpose of this regime is to prevent the commodification of sex. And that's exactly what this scheme achieves. And so when you're thinking about the Section 7 analysis, if you measure up the statute against its purpose, it does meet that purpose. And it does provide that sex workers can access these safety supports. And the counterargument to that is, is by criminalizing sex work, you've effectively pushed it underground again.

[39:57] HUSEIN: Right. And I know that, like, I think the trial judge found that the provisions were overly broad because they could apply to, like, non-exploitative behavior. So I was wondering, from your standpoint, how do courts typically approach this concept of over-breath in situations like those?

[40:14] ZAIN: Well, it's interesting because the Crown's theory is that any commodification or commercialization of sex is necessarily exploitative. And so what that does is it kind of answers the question, right? Like, it actually doesn't allow for any debate as to whether or not the reality on the ground allows for safe sex work. And that's what the sex workers organizations and the appellants are arguing in the case. If you frame the statutory objectives in a certain way and say, well, the commodification or commercialization of sex work is in and of itself exploitative, then you've answered the question even before it's been asked.

[Music Break]

[41:28] HUSEIN: To wrap up our episode, we're going to do our Ask Me Anything segment with Zain to ask questions submitted by our listeners about the area of public law. As our listeners will know, one of the bonus rewards for members of our Lawyered Patreon crowdfunding community is the opportunity to submit questions that they want to hear answered on the show. We are nearly done the series, so we're no longer taking Ask Me Anything submissions, but we appreciate everyone who submitted questions for this episode and before that as well. So, Zain, a lot of questions about this topic that kind of run the gamut in terms of public law issues. And so the first question we have is, what impact do you think recent decisions on public interest standing will have on access to justice? And if you want to start by explaining what public interest standing means, I think that would help.

[42:20] ZAIN: Sure. So, there's an established test for it. And public interest standing is the idea that a party that doesn't directly have an interest in the case can get standing to basically bring the case on behalf of itself or another group to litigate the issue.

[42:45] HUSEIN: Were the courts landing on this question of public interest standing?

[42:50] ZAIN: You know, I think we went through a period when the test on public interest standing was kind of fleshed out by the courts, where I felt that the courts were perhaps being more generous in granting public interest standing. And I'm starting to feel like we're in a period of maybe retrenchment or stinginess with respect to public interest standing. And I'm not sure exactly what the reason for that is. I think part of it has to do with the resources of the court and a broader access to justice problem, which is the court's pockets are full of cases that already can't be addressed by parties who are asserting their own rights, as opposed to asserting rights on behalf of others.

[43:55] HUSEIN: So, do you see this shifting back in the near future?

[44:01] ZAIN: I don't know. I mean, I think the answer to that is there will always be room for public interest cases that are brought by sophisticated, informed and engaged parties. And the court is not going to be so stingy as to prevent those cases from happening. I do think that our seeking public interest standing would be well advised to put their best foot forward.

[44:38] **HUSEIN:** When you say putting the best foot forward, what are things that public advocacy groups can do to best position themselves to get standing as a public interest party?

[44:48] ZAIN: Yeah. So, I mean, in the Ontario case that we were talking about earlier, that's a case where they were denied standing. And part of the reason for that was it wasn't an established organization that had actually had a body of work in relation to an issue. And so the entities that often get public interest standing are those that can demonstrate that they have been at the forefront of an issue, whatever the issue happens to be, for a long time. And so if you're a party that is seeking public interest standing, you want to be able to show the court that you're not just showing up. You've been there the entire time.

[45:40] HUSEIN: All right. That's it. That's helpful insight. Next question we have, and we actually talked about this issue in passing during our first segment about crowd immunity. So, the question is, what are your thoughts of increasing invocation of Section 33 of the Charter, which is the notwithstanding clause by provinces and the constitutional limits of its use?

[46:00] ZAIN: So my personal view on it is it's a travesty, and my more complicated view on it is that it is a fundamental feature of our constitutional architecture. And so it has to be given effect, even though some of us don't like it. I think the real rubber hits the road in how it gets given effect. And so a lot of the discussion right now is around how do you prosecute charter cases where you know that the government might well pull the trigger on the notwithstanding clause? And what is the place of the court to still say something about the violation of fundamental rights and freedoms?

[47:03] And the question, though, is can Section 33 prevent the court from pronouncing on the rights of the parties? So if the government invokes the notwithstanding clause, does that also muzzle the court and prevent judges from saying, absent the notwithstanding clause, this would be a gross violation of people's rights. And I think the court should still be able to say that. The court should always be in a position to grant some form of declaratory relief and to make determinations notwithstanding the notwithstanding clause.

[47:42] HUSEIN: So there's a lot of case law that's being developed in this area in real time. So hopefully we'll have some direction fairly soon. Next question is a bit of a comparative question. The question is, the United States has increasingly faced challenges in the general discourse regarding the politicization of the courts, including the lack of separation of powers between the judiciary and the executive branches of government. The question is, how has the Canadian experience been in comparison?
[48:15] ZAIN: I mean, the U.S. Supreme Court has just had its most politicized year this past year, I think, in recent memory.

[48:26] HUSEIN: For the uninitiated, can you explain why?

[48:29] ZAIN: Yeah. I mean, primarily because of the Dobbs decision, which overturned Roe v. Wade and set back rights in the state in a fundamental and horrific way. And so I think the idea of the politicization of the courts is really front and center. The United States, as it often is, you know, I think back to like Citizens United, other cases, this is a continuing debate about the U.S. courts. I don't think we see that in the same way here. And thankfully so, by and large, our court is nonpartisan.

[49:23] And, you know, when you hear from U.S. litigators who litigate up at the Supreme Court, they show up and they basically know who's going to vote which way on their case, but for maybe one swing vote. And that's not even the case anymore, really, because you have six conservative judges and three liberal judges. I don't think most Canadian litigators who have been up at the Supreme Court can say the same about the judges on our bench.

[49:55] HUSEIN: And why is that? Because I know that for both countries, the executive branch is the one who appoints the judge. So why do we not see the same level of predictability in terms of the decisions?

[50:11] ZAIN: Perhaps because we don't have as polarized a political culture here.
That's my working theory as to why. Maybe I'll be proven wrong about this. I like to think that most Canadians share certain bedrock beliefs, particularly when it comes to fundamental rights and freedoms. And so we have consensus or kind of more consensus in a lot of areas than is probably the case in a more divided country like the U.S.

[51:00] HUSEIN: All right. And the last question we have to wrap up is, I know we spoke about a number of important cases already in today's episode. The question is, what are some other public law developments that you anticipate courts will be facing in the near future?

[51:13] ZAIN: That's a good question. I think we're in a period of a lot less ambition in terms of charter rights. I think the courts right now, particularly the Supreme Court, after a long string of really remarkable decisions in the 90s and well into the early 2000s, on charter rights that fundamentally kind of changed the law, I think we're in a period where courts seem to feel like they're tweaking around the edges. And that's partly why I think some of the developments that we've seen on Section 35 that we talked about earlier are so remarkable and interesting.

[52:07] And I think they reflect an ambition for the charter that we haven't seen in a very long time. So, my guess as to where we're headed is, I think we're going to see a switch back, I hope, towards more ambitious arguments around the charter. And one of the areas that I think is right for that is Section 15, because our equality jurisprudence has been swinging back and forth for a really long time. We're increasingly seeing a lot of economic disparities and how those disparities actually play into outcomes for people. I think that there's going to be another push in the next five to 10 years on socioeconomic rights.

[53:07] HUSEIN: Yeah, for sure. And we're recording this episode in the fall of 2024, so it may be proven otherwise. But if there's a change in the federal government, that may also impact the kind of laws that are introduced and consequently the ones that are challenged as well, right?

[53:21] ZAIN: Yeah, I think that's right. So your guess is as good as mine, probably, but there are still large unexplored areas of the charter. And the task will be for thoughtful and engaged people to come up with those arguments.

[53:47] HUSEIN: So, Zain, I want to thank you so much for joining me on the show today. It was really great to chat with you about your area of expertise. As I mentioned at the outset, there's so much to cover in the area of public law, but I think you did a great job of capturing so many of the highlights that are going on in this area. Recognize that a lot of them are yet to be developed, so I appreciate you taking the time to walk us through these topics. And of course, we look forward to staying in touch in the future.

[54:12] ZAIN: Thanks so much, Husein. It was a lot of fun.

[54:20**] HUSEIN:** And that's going to be a wrap on today's episode. Thank you so much for listening. On today's episode, our guest was Zain Naqi. You can learn more about him and his practice at the firm called Lax O'Sullivan Lisus Gottlieb at their firm's website, which is www.lolg.ca. And to learn 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.

[54:45] And on our next episode, which is our official/unofficial finale, there's going to be one more big bonus episode coming out shortly afterwards, it's going to be episode 100, and we're going to be speaking on that episode about Section 11B involving criminal law delay. And our guest on that episode is going to be none other than Daniel Brown. As many of you may know, Daniel is one of the most renowned criminal defense lawyers, not just in Toronto, but in Canada. So, it's a real treat to have him to wrap up our substantive content for the podcast. And on that episode, we got some big topics we're going to cover. We're

going to speak about a new federal bill that would exempt certain offenses from the Section 11B time limits.

[55:29] I'm going to speak about the role of interlocutory motions in the calculation of delay time. And I'm going to wrap up by talking about some proposed systemic reforms to make progressive change in the criminal law context. So, we've got a big one to wrap up this series, so please make sure to keep an eye out for that episode.

[55:47] And although we are wrapping up the show imminently, I encourage you to subscribe to this podcast if you haven't already for free on iTunes and mostly anywhere else to get your podcasts. You can also follow the show for free on Facebook, LinkedIn, or on Twitter, and our handle there is @Lawyeredpodcast.

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