

Lawyered – Episode 71
Freedom of Expression ft. Abbas Kassam
Episode Transcript

HUSEIN 00:03

This is episode 71 of Lawyered. I'm Husein Panju. And this week we're speaking about the area of freedom of expression law with Abbas Kassam from the Ryerson Center of Free Expression. First, I will speak about a Supreme Court case out of Quebec that relates to the limits of expression in the context of stand-up comedy. This unique set of facts involving a child with disabilities is beginning new questions about the role of dignity, and discrimination.

Next, we'll be speaking about the highly controversial restructuring of Toronto City Council. Back in 2018, the provincial government took steps to redistrict the ward structure shortly before the election itself, and Supreme Court of Canada recently ruled on this matter, and provided some helpful guidance on the boundaries of political speech. We'll also learn about some updates regarding motions that are designed to address strategic lawsuits against public participation, also known as SLAPPs.

And finally in our Ask-Me-Anything segment will go through a lightning round of questions based on questions submitted by members of a Patreon community. All that and a lot more is coming up in just a bit. This is Lawyered.

Hello, everyone, and welcome to another episode and another season of the Lawyered podcast. It's nice to be back on the microphone after a bit of a break. And I'm glad to have you back as our listening audience. Some of our astute listeners will notice that we started the season a bit later in the year compared to past years, you know, typically we start the season closer to the springtime, it's been a bit of a unusual time on my end, for last few months for a number of reasons, some personal and some professional.

Rather than go in detail on the show, I will always say that fortunately things are back to normal or as normal as they can be expected. And I wanted to wait until I could deliver the season of the podcast in a quality that's respectful of your time. And we're back on track now. And we've got 10 or so episodes lined up over the next few months. And I'm really excited to share some new interviews with you about some new timely topics featuring a variety of insightful guests as always.

One of the other changes that you'll notice as of late is that we've uploaded a whole bunch of episode transcripts from last season, which was season seven, and you know, its own pursuit and making the show more accessible. And, of course, we'll be releasing more transcripts as this season progresses. I'm mindful of the fact that this is primarily an audio medium - being a podcast. But I also recognize that not everyone has the ability or the resources, or the time to listen to the full duration of the show.

Lawyered – Episode 71
Freedom of Expression ft. Abbas Kassam
Episode Transcript

And so as you know, a portion of the Patreon funds have been going towards making these transcripts in order to make the show more accessible. You can check those out on our website and we'll be linking them in our show notes as well.

Now, the interview that you're about to hear is about the topic of freedom of expression, obviously a very important topic and, by virtue of its nature, a somewhat controversial in the year 2022. It's been especially controversial over the last couple of months. And on this episode, we've got a guest who is very well-versed and passionate about this specific area. And I think it makes for a very lively and (hopefully you'll agree) informative interview as well. And so without further ado, here's our interview with Abbas Kassam.

And on today's show, we're very happy to have Abbas Kassam. Abbas is a Toronto based lawyer practicing intellectual property litigation and privacy and he graduated with a law degree from the University of Toronto and was previously a judicial law clerk at the Federal Court. He is passionate about freedom of expression, whistleblowing and accountability issues. And he's been involved in Ryerson University's Center of free expression since its inception in the year 2016.

Primarily, he works on various ongoing projects, including identifying and assisting with litigation that falls within the senator free expressions mandate, and he frequently blogged about freedom of expression issues on the Center of Free Expression's website as well. Abbas was co-counsel to an intervener in the case of *Toronto Star v. Attorney General of Ontario*, which dealt with applying the open core principle to administer tribunals in Ontario, as well as in *R. v. Vice Media Canada*, which dealt with journalist source protections. And in his bio, Abbas has written that his main goal growing up was to be featured on the Lawyered Podcast. I'm not sure if that's a joke or not, but I'll take that as a compliment nonetheless. So, Abbas thanks for joining us on the show today.

ABBAS 05:12

Thank you - dreams do come true!

HUSEIN 05:16

Well, I'm glad that one of ours is...! I also wanted to just recognize that, you've been a very generous and active supporter of the show and been following it since literally season one. So I really appreciate your support in that respect.

ABBAS 05:31

Yeah long-time listener, first-time caller.

HUSEIN 05:34

Yeah, absolutely - first-time guest as well! All right, so let's get into it. We've got a number of interesting topics to speak about in this area of freedom of expression law, the tension between freedom of expression and human dignity is nothing new. But a new Supreme Court case provides some new clarity about how to balance these two important interests. And this case involves a Quebec comedian, who allegedly mocked the physical attributes of a young child with disabilities. And the outcome is presenting a new legal test, but also some new questions as well. I know that our guests are probably familiar with the Canadian Charter of Rights and Freedoms. But this case is more specific and talks about the Quebec charter. So we don't need go into all the details, but can you just give us a sense of what the difference is between these two documents for the purpose of this provision?

ABBAS 06:29

Sure. So I understand that Quebec Charter of Human Rights and Freedoms is the Quebec equivalent of provincial Human Rights Code. So human rights codes are generally applied in the context of employment, housing, or the provision of goods and services available to the public, whereas the federal Charter is just about binding government action. So the relevant provisions were, first of all, section 10 of the Quebec Charter, which is essentially an equality provision.

Every person has a right to full and equal recognition and exercise of his human rights and freedoms without distinction exclusion or preference based on several enumerated grounds, including one of them is handicap. It will be similar to Section 15 of the Charter, and I believe the various provincial human right codes but have a similar provision, as well. But this difference is that section 10 in the Quebec charter is in the context of the other freedoms, guaranteed amongst guaranteed in the Quebec charter. And so it was, this case was about section 10, in combination with section 4 of the Quebec Charter, which is the right to safeguard one's dignity, honor and reputation.

HUSEIN 07:43

So let's talk about the case itself. So the case is called *Ward v. Quebec* and it got appealed all the way up to the Supreme Court and the citation for those listening, it's 2021 SCC 43, you walk us through the relevant facts, that'll be helpful to understand for this case.

ABBAS 08:00

Mike Ward is a comedian. He's known for, you know, what you call as dark comedy. And the Quebec Human Rights Commission is the other side of this, but they're bringing this case on behalf of Mr. Gabriel, who at the relevant time was a child. He was born with something called Treacher Collins syndrome, which causes certain malformations in his head. And he has to have like a certain hearing aid that has allowed him to sort of speak and sing and he's learned to speak and sing publicly and became quite famous, giving various concerts.

Lawyered – Episode 71
Freedom of Expression ft. Abbas Kassam
Episode Transcript

So Mike Ward, noting this, the popularity of Mr. Gabriel, in a couple of his comedy routines, mocked Mr. Gabriel and mocked others that he called sacred cows in the Quebec artistic community. I think his parents brought a complaint to the Quebec Human Rights Commission, and they initiated a complaint to the Quebec Human Rights Tribunal. And then there was a decision out of the tribunal, and it got appealed all the way up to the Supreme Court of Canada.

HUSEIN 09:12

So when this got up to Supreme Court, how did the Supreme Court find on these issues?

ABBAS 09:18

So it was, again, the five four majority minority split pretty much the same as the City of Toronto case. The court went through a lot of the background on similar cases. It noted that there is case law on a right to dignity. I think what's interesting for me in this case, is that they did spend some time discussing humour and comedy in the context of freedom of expression. And they made a couple of points I think that are that are interesting.

First is that expression that attacks or ridicules people may inspire feelings of disdain or superiority in relation to them but it doesn't generally encourage the denial of their humanity or their marginalization. And that will be required for a finding of limiting free expression. And the second point was humor, even in bad taste, they found rarely has the spillover effect needed to give rise to an attitude of hatred and discrimination amongst third parties, again, another part of whether freedom expression should be limited. I think that's quite helpful.

The court in this case was specifically attuned to the nature of Mike Ward's comedy, in that it was dark humor, in that I believe his style is to make his audience uncomfortable. And then what do you do when you're uncomfortable? A lot of people start to start laughing. And then the court was attuned to that specific type of comedy brought, like, very briefly, the majority found that the test was not made out by the Human Rights Commission and Mr. Gabriel in that Mike Ward didn't base his comedy on Mr. Gabriel's disability per se, but on the fact that he was famous, and because that was not based on a prohibited ground – fame is not a prohibited ground under Section 10 of the Quebec Charter - that there was no infringement on his right to safeguard dignity.

HUSEIN 11:24

So just the court here provide any clarity on going forward in terms of how courts or tribunals can resolve this tension between freedom of expression on one hand and this right to dignity on the other.

ABBAS 11:37

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

So he didn't - Mr. Gabriel didn't make out the test. But after that, if he did make out the test, then there would be that balancing between his right to safeguard dignity, and Mr. Ward's right to freedom of expression. And they do make comments on that on the balancing between the two. And they make two points. And there are kind of two factors to consider.

The first is whether a reasonable person aware of the relevant context and circumstances would view the expression targeting the individual or group as inciting others to vilify them, or detest them, to detach their humanity on the basis of a prohibited ground of discrimination. And this is this is taken from *Whatcott* what caused the previous Supreme Court of Canada case that dealt with hate speech laws, and the balancing of hate speech versus free expression. And the second point is that it must be shown that a reasonable person would view the expression again, considering this context, as likely to lead to discriminatory treatment of the person targeted.

HUSEIN 12:43

One of the relevant sections of this Quebec Charter is hold protection of dignity provision, which I know is not something that's repeated in the Canadian Charter. Would you have any thoughts on that provision and whether those same concepts will or ought to be transferred to other cases where the specific Quebec dignity provision is not there?

ABBAS 13:11

Yet, you can argue that it's similar to defending one's reputation in the context of a defamation claim. My specific concerns, this is, again, my concerns with the concept of a right to safeguard of dignity, is that dignity is highly subjective. And I understand the tests are what a reasonable person would view. And this is just this is just my opinion, but as long as we understand that the reasonable person is always a judge. And even though it's...

HUSEIN 13:40

Modified, subjective objective,

ABBAS 13:44

Right, but look like if it's, if it's an objective test, the evidence is still subjective a plaintiff is still gonna is still going to put forward how they felt their dignity was violated. And to be honest with you, where a plaintiff more closely resembles the background of a judge that subjective evidence seems more objective. And that's kind of my concern with it.

HUSEIN 14:09

What is your concern exactly, that this will just be too subjective going forward?

ABBAS 14:15

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

I don't think that it can be applied fairly. That's what I'll say. If you look at if it's if the more closely a plaintiff resembles a judge, I think the more likely you'll find a violation of a right to safeguard to dignity but if you're looking at someone who's from a minority with a cross section of another minority, who's very far removed from what the judiciary looks like you it's less likely you'll find that their dignity was infringed upon. And to me the answer isn't too well, partially it is to make the judiciary more look like the public but that isn't the answer from freedom of expression perspective, the answer there is so right to safeguard dignity shouldn't be a basis to infringe on freedom of expression protections.

HUSEIN 15:13

One of the most high profile issues that happen in municipal politics for the last couple of years relates to the city of Toronto. And in particular, there was a provincial statute that slashed the number of Toronto's municipal wards, from 47 to 25. And this bill was passed during the campaign period of the 2018 election, and was highly controversial to stakeholders from across the political spectrum.

And while there are obvious municipal law issues at question the City also challenged this bill on the grounds of freedom of expression, which triggers important questions about the limits of political speech. So Abbas, I know there's a lot to say about this. And I know that this thought appealed all the way up. But I want to start by telling us a little bit about this bill that kind of started at all.

ABBAS 16:03

Sure. So in May of 2018, the City of Toronto commenced a campaign for an election on October 22 2018. By the close of nominations, in around July, there was over just over 500 candidates registered to run in the 47 wards that you mentioned. That same day, on the close of nominations, the Ford government announced its intention to introduce Bill 5. And on August 14 2018, Bill 5 came into force, reducing the number of wards from 47 to 25, based on the boundaries of federal electoral districts, it was a unique situation in where the election campaign had already commenced.

Candidates had already been nominated to run; they had been exercising their political speech in their various wards. And then after or on the close of nominations, the intention to change the wards was announced. It introduced a lot of uncertainty into the process you're gearing up to campaign and in this particular ward, and the lines get redrawn. So you know, there may be situations where you're spent a lot of time in one area. And it turns out that that area is no longer the ward that you're campaigning in.

HUSEIN 17:26

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

Now that we're clear about what this bill is, was there anything else you wanted to mention about why this is causing so much concern?

ABBAS 17:33

Sure, I can frame it in the in the perspective of the city, which was the one that was appealing to the Supreme Court of Canada. And they made several arguments about the bill. Essentially, they adopted part of the findings of Justice McPherson, in the Ontario Court of Appeal, which basically said that Bill 5 diminished the value of all past expression that was framed around the 47 election wards. As we discussed, candidates could no longer run in the wards where they have spent considerable time and money and energy campaigning, which demoralized many and caused some of them to drop out of the race.

The timing of the bill caused widespread confusion and uncertainty. They also argued that it deflected attention from the important issues; it triggered this legal challenge and jeopardizes the viability of administering the election on time. It restricted candidates and volunteers, voters, donors, commentators from continuing to express themselves within the established terms of an ongoing election campaign. So these are kind of all the different arguments that the City kind of made.

HUSEIN 18:44

So when the city is making these arguments for freedom of expression, what is the question specifically that they're concerned about? Is that like the campaign materials that they're making is what they're saying to voters, or is it something else?

ABBAS 18:57

It's this is a little bit more complicated of a freedom expression case. Classically, you'd think that freedom expression is about the content of the expression. This is a bit more about the form of the expression, which is what expression can be had in a certain election period with redrawn electoral districts. So it wasn't specifically about any specific content, but the form of that of that expression.

HUSEIN 19:25

Okay. And I know that part of the commentary in this case was distinct from positive claims and negative claims. Can you tell us about what that distinction means and how that's relevant here.

ABBAS 19:36

Sure, so the majority focused on this distinction, a lot of positive versus negative obligations. And it relied on this previous case of *Baier v. Alberta*. And it makes a distinction between like a classic negative obligation. A negative obligation is where government action prevents some form of expression and a positive obligation is where action that requires governments to

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

actively protect or assist with a certain type of expression. In this case, they found that was a positive obligation, it was access to a specific statutory regime in that the city wanted access to that 47 Ward campaign districts instead of the 25 or so it was access to a specific form.

That that's what the, that's what the majority found. It's not what the minority found. Using this *Baier v. Alberta* test, there's there was essentially three factors that are satisfied under the test. The first is, is the claim grounded in freedom of expression, rather than access to a particular statutory regime.

The second is has the claimant demonstrated the lack of access to a statutory regime that has the effect of substantial interference with freedom of expression or the purpose of infringing freedom of expression?

And third, is the government responsible for the inability to exercise that fundamental freedom? So under this test, versus the classic, you know Irwin Toy test? If you do find that there's a court does find that there's a positive obligation, that onus is much higher in that they have to have a substantial interference with freedom of expression? So this is kind of where the majority versus minority are different in this case.

HUSEIN 21:24

In terms of substantial interference, is there any guidance and what how substantial is interference has to be?

ABBAS 21:30

So on the specific facts of this case, the Supreme Court said that it was possible for this on these facts to have substantial interference, essentially, what it found was, because they changed the words with 69 days left in the election, and that 69 days is longer than a usual campaign period for most federal and provincial campaigns. The court, the majority held that wasn't a substantial interference, but they do make some comments in obiter about how if it was, for example, they do this with two days to go in the election that may constitute a substantial interference, right?

HUSEIN 22:11

Because I presume it's like you're even if it is interference, you have enough time to correct course, within this 69 day period. Right.

ABBAS 22:18

Right. Right. So that was that was part of the majority's finding is that there was enough time to get renominated to raise money, and then to campaign in the various in the 25 wards. And they found that several candidates did that. And obviously the election went forward. And that happened.

HUSEIN 22:36

So going forward, is there any guidance on what this means?

ABBAS 22:40

I think what this case is going to mean going forward. Is it reinvigorates I guess that that Baier test or applies it to the context of like, for example, political speech, in this case. So I think what you're going to see is courts, and those who love to limit free expression, will look to the Baier test to determine whether there's a positive obligation or a negative obligation.

And if they can force more into the kind of positive obligation and the substantial interference test, you're going to see a weakening of free of expression, given the fact that this was the majority's decision was based on this Baier positive obligation distinction, I think that you're going to end up seeing courts do that more often. For me, I think there is a concern specifically, where there could be a case where prima facie, it looks like a positive rights claim. But in effect, it's functionally a gag or a negative obligation.

So I've been thinking about this a lot when preparing for this. And I was thinking; let's take this exact fact pattern, where 69 days to go and election and the wards gets cut down from 47 to 25. What happens if that exact same fact pattern happens, but the 25 districts are, for example, gerrymandered in a manner that undermines you know, certain minority community votes? So let's say there's a minority community that's split amongst several different districts, and now with a redistricting, they're stuck in one district. So effectively, they can only swing one Ward instead of let's say, five...

HUSEIN 24:25

And in the US, is not even that hypothetical, right?

ABBAS 24:28

It's not hypothetical.at all. It happens in the US the word the term gerrymandering is an American term. It is something that's done obviously, that didn't happen in the city of Toronto case, because it was the federal districts and that wasn't an allegation, but I could see in effect where you know, something like that happened, having weakened the claim to freedom of expression by trying to force it and trying to use the City of Toronto case as a precedent?

HUSEIN 24:50

Do you think that this test for freedom of expression claims should be applied differently for political speech as opposed to non-political speech?

ABBAS 25:01

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

Well, political speech generally deserves the highest form of freedom of expression protection, because it's the lifeblood of democracy. Political freedom expression is engaged directly with democracy and the systems of government in place and elections. And it's absolutely necessary that that be protected. I think what's unique about this case is that it was a content neutral matter. And by that, I mean, it wasn't about the content of a specific expression, but the form access to a certain ward. I'm not saying that that's a good reason to limit freedom of expression. But I think that's what this distinction in this case - not so much the type of speech (i.e. political speech) but the form of speech.

HUSEIN 25:56

Over the last several years, numerous Canadian provinces have implemented laws to crack down what are known as SLAPP. Now, a slab is an acronym for a strategic lawsuit against public participation. And these statutes are designed to deter parties from filing defamation lawsuits for the sole purpose of silencing their critics. And British Columbia's anti-SLAPP legislation was recently used for the first time and the SCC will soon be ruling on the applicability of the public interest factor. So Abbas, can you just tell us a bit more about what these are and how they work.

ABBAS 26:33

So SLAPPs - strategic lawsuits against public participation - are essentially lawsuits that are initiated against individuals or organizations that speak out or take a position on an issue of public interest. They're generally initiated by plaintiffs who want to engage the court process not as a direct tool for harm suffered, or a *bona fide* claim but as an indirect tool to limit the freedom of expression of another party.

HUSEIN 27:04

This stereotypical example, that I'm familiar with are these big bad corporations who get called out by the media or other people and they threaten to charge them with defamation. And ultimately it's these people who are speaking out can't afford to fight. Right. So we simply quiet themselves down. Is that the general idea?

ABBAS 27:26

Yeah, so there's, there's the classic kind of case, I can tell you that from the case law is not always the classic cases that that get litigated! So, anti-SLAPP laws are designed to allow defendants to try and have a SLAPP suit dismissed at a very early stage. The concept being that defendants shouldn't have to put in the time, effort and expense of defending, essentially, what is a gag, or a case that's brought not for a *bona fide* purpose. The anti-SLAPP legislation, for example, in Ontario; the default rule is that if a tenant is successful in an anti-SLAPP motion, they would get full recovery of their legal costs.

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

And normally, for the lawyers, you usually only get 50 to 60% of your legal costs. So in an anti-SLAPP motion, you can get kind of two unique factors. One is the time and you can get the case dismissed at a very early stage. And the other is the costs, in that you get up to 100% of your legal cost. So it's a prima facie, powerful tool in the hands of a defendant.

HUSEIN 28:35

I guess it's meant to deter people or the stereotypical big bad companies from launching defamation claims, right?

ABBAS 28:44

Right. Yeah. It's supposed to be deterrence. It's supposed to help with preventing the chill that large plaintiffs attempt to enforce by initiating SLAPP suits against the little guy, little guy defendant.

HUSEIN 28:59

So before we get into it, why don't you give us a sense? So what are the tests or how does the framework work for someone who wants to claim that there's been an anti-SLAPP motion?

ABBAS 29:09

Sure. So the anti-SLAPP framework has a three stage analysis. The first stage is the public interest threshold. At this stage, the onus is on the defendant who's trying to have a lawsuit dismissed to show that the plaintiff's claim arises from an expression relating to a matter of public interest. The second stage is the merits-based analysis. Here the defendant, if they meet the public interest threshold, the onus shifts to the plaintiff to show there are grounds to believe the plaintiff's case has substantial merit, and the defendant has no valid defense. And the last is the public interest hurdle, where the plaintiff must show the harm likely to have been suffered, and the corresponding public interest in permitting the lawsuit to continue, outweighs the public interest in protecting the expression Sure.

HUSEIN 30:00

So the case we're going to be talking about is the BC case recently decided the British Columbia Court of Appeals – the case is called *Neufeld v. Hansman*, the citation there is 2021 BCCA 222. I believe Supreme Court has recently granted leave, but there's just not out at the time of this recording. So Abbas, can you give us a sense of what the relevant facts are for, for this case.

ABBAS 30:23

Sure, so, so broadly, the appellant Barry Neufeld is a public school trustee, who in some Facebook posts made negative comments about BC education program, designed to teach children about sexual orientation and gender identity that was being implemented in the schools.

Lawyered – Episode 71
Freedom of Expression ft. Abbas Kassam
Episode Transcript

The respondent on the on the appeal Glenn Hansman, was the then-president of the BC Teachers Federation and he was very critical of Mr. Neufeld statements when he was interviewed in the media and give you a taste of kind of, of the of the back and forth. So, in an initial Facebook post from Mike Neufeld. He said something like a few years ago, the Liberal Minister of Education instigated a new curriculum, supposedly, to combat bullying, but it quickly morphed into a weapon of propaganda to infuse every subject matter from K through 12 with the latest fad, gender theory. And then Mike Hansman, was interviewed multiple times in the media and made several statements and all the details to that he said things like he's creating a school environment for both our members and students that is discriminatory and hateful.

HUSEIN 31:36

Okay. So then how did we get to the courts?

ABBAS 31:41

So it got in the court because Mr. Neufelds commenced an action for defamation against Mr. Hansman. That the at the initial trial level, it was dismissed under the anti-SLAPP under anti-SLAPP motion, and then Mr. Neufeld appealed to the BCA and was successful.

HUSEIN 32:00

So for this specific case, which part or parts of his tests are the courts really basing their findings on?

ABBAS 32:11

So the first novel issue is the requirement that the plaintiff show some sort of link between the alleged defamatory expression and any harm they suffered in the context where several other people, apart from the defendant, have made similar defamatory comments about the plaintiff. So like, in the context of social media, if you know, several people make allegedly defamatory tweets, for example, you only see one of them, can the case go forward?

And then the second one more novel, part of this analysis is the British Columbia Court of Appeal appears to have included an analysis of whether the chilling effect on the plaintiff should play into the weighing analysis and the final stage of the anti-SLAPP framework. Classically, it's the concern with the chill on the defendants and those similarly situated to the defendants, not the plaintiff, but the British Columbia Court of Appeal focused on potential chill on the plaintiff.

HUSEIN 33:17

And for like for the purpose of this case, just remind us who was the plaintiff and who's the defendant.

ABBAS 33:22

The plaintiff is Mr. Neufeld. Neufeld is the alleged bigot and the defendant is Mr. Hansman. And Hansman is the, his is the alleged guy who calls out the bigot. Right. So using those terms colloquially, I hope I don't get sued by any of those two guys...!

HUSEIN 33:40

Okay, well, that's could be for our next episode we can talk about it...! So it sounded like the case was primarily about how to apply this whole public interest aspect of the test. Is that accurate?

ABBAS 33:56

I think the really novel part of it the public interest piece of the third stage is the weighing between the plaintiff's rights and the defendant's rights. Again, an anti-SLAPP motion. it's a powerful tool that's meant and designed for defendants to protect defendants and the chill on their expression.

Like I said, you can bring an anti-SLAPP motion in a very early stage and even potentially get full costs if you're successful. It's really about protecting defendants and those similarly situated defendants. What's unique in this case is the BC Court of Appeals seems to have put a lot of emphasis on trying to even consider the plaintiff speech and the protection of his speech, which is not really what an anti-SLAPP motion is about. And that's ostensibly what the Supreme Court will comment on when they hear the case.

HUSEIN 34:49

So I know that we're still waiting for the Supreme Court's decision on this, but what impact do you think that it will have whether they uphold or overrule the appellate court decision?

ABBAS 35:01

Anti-SLAPP motions are fairly new, we've seen a couple of provinces introduced them. We've seen a couple of cases go to the Supreme Court of Canada. I think the tension that needs to get resolved (and I don't think it has been resolved) is that it doesn't appear that anti-SLAPP motions are, in effect working like the powerful tool that they're supposed to be. I think generally courts and judges are a little remiss to get rid of cases at a very early stage before there's a full record of evidence remains to award full costs, because that's not the norm. An anti-SLAPP motion is a powerful tool. And by cases like this, I think it's being weakened. They're considering the plaintiff's expression, when it's not about the plaintiffs' expression and anti-SLAPP motions are not about the plaintiff's expression. There are other cases in the lower courts where I don't think that they awarded full costs, even though it's not a requirement, but it's like it's available. And that's what it's meant for. There's a hesitation to use this powerful tool. There's a concept in law that everyone should have their day in court. But I guess when that day comes too early, and the

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

stakes are too high, at an early stage judges get a little nervous. And I hope that the Supreme Court comes down and strongly and does and does try and put some more teeth into using this tool.

HUSEIN 36:35

Okay, and before we wrap up, we're getting to our last segment, which is going to be our Ask-Me-Anything segment with Abbas. As listeners of our show will know, one of the bonus rewards from members of the Lawyered Patreon community is the opportunity to submit questions that they want to hear our guests answer on the show, which can be questions about anything at all within reason, so long as they're not asking for legal advice, as our guest will know, or as our patrons know, we used to call for these questions about a week or so before the recording.

So if you want to learn more about how you can become a patron, and submit your own questions for upcoming guests, you can find out more on our website, which is lawyeredpodcast.com/patron. That's lawyeredpodcast.com/patron for more information.

Okay, so we got a number of interesting questions in our inbox. So we're gonna go a bit out of order. But the first I just want to ask is, historically, comedians have been at the forefront of freedom of expression challenges. For example, in the 1960s, Lenny Bruce was convicted of obscenity-based jokes that he told onstage. So the question is, from your viewpoint, what role if any, do you think comedians have in informing the limits of freedom of expression?

ABBAS 37:47

Well, let me let me start by saying I love comedians, I love watching stand-up comedy. And I think that they are at the vanguard of informing the limits of freedom of expression. And I think that what we just discussed, for example, with Mike Ward, he went all the way up to the Supreme Court of Canada to protect his freedom of expression rights as a comedian. And to be honest, I don't think that Mike Ward was specifically trying to discriminate against Mr. Gabriel. I think he was pushing the boundaries of the comfort level of his audience.

And I think that's completely appropriate under freedom of expression. And I think that it's set to the backdrop of a change in our culture about trying to protect certain segments of society. And I think that that's fine. I just think that it's not always freedom of expression. That's the tool that should be limited in that regard.

HUSEIN 38:43

But there are limits, right or not?

ABBAS 38:46

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

There are all limits. Of course, there are limits. You know, in that case, there was a 5-4 decision before the Supreme Court of Canada. So obviously, four judges of the Supreme Court of Canada felt that Mike Ward crossed the limits. You know, there's the classic limits of hate speech. And that's, that's a very common issue in our current society. I can think of also like in, you know, in more popular culture, I can think of like, for example, Dave Chappelle and his issues, for example, with the with the trans community.

And I think that he's he's engaging with certain issues. And he engages with, you know members of the trans community and opposes some of their political positions. And in response, some people seek to label him as anti-trans and try to like de-platform him, and I think that he's pushing the boundaries of free of expression, whether you agree with him or not, and I wouldn't I would support comedians continuing to do that.

HUSEIN 39:43

Do you think that - I can think of some examples which those communities just try to see the most sensational things to get a reaction without concern for who they're offending or whatnot. So, do you think that there should be any rules or any loosening of rules for situations like that where people are getting offended by people who are trying to do just that?

ABBAS 40:07

Well, the rule is that they're, they're free to make that expression. I think that by trying to shut them down- like I never knew Mike Ward was the story of the Supreme Court of Canada case, this case made Mike Ward a lot more famous. I didn't know who Mr. Gabriel was. I don't live in Quebec. I was under completely unaware of Mr. Gabriel's notoriety and his appearance and that sort of thing.

So this, this is a classic example, you're taking a situation where his parents and the commissioner have tried to effectively silence Mike Ward, and made the issue a lot more prominent than it was. So I think if someone's trying to say something sensational, that you don't particularly agree with or like, I'm sorry, but sometimes like, ignoring it is more effective than trying to shut it down.

HUSEIN 41:00

So especially we have is, recent policy proposals have engaged questions about how speech laws ought to apply in the online digital space. And for listeners, we actually spoke about some of this in a recent episode about internet law. Do you think that there should be any differences in the way that speech laws ought to apply in the online context, as opposed to in the non-online or physical context.

ABBAS 41:28

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

So in theory, there shouldn't be a difference between free expression online and free expression in real life. However, I do recognize in practice, there are practical differences between online speech and regular speech, including online speech, a lot of time can be anonymous. And the speed at which a message gets sent online is extremely rapid. You know, you can have a tweet, and within minutes, it can be around the world and gone viral, so to speak. There have been proposals all over the world in Europe and Australia that seek to limit expression online. But to date, I don't think they've proven to be effective.

For example, like if you take, for example, hate speech, there's some there's some sociological studies on this, like, if you look at a group of bigots are racists and their ability to organize through social media, prominent social media, like Facebook or Twitter, or chat group, if you shut down that platform. I think there's a paper out of *Nature* that showed that it's kind of like a beehive. You're breaking that congregation but they reform somewhere else. And sometimes even more angrily, so to speak. It's not an effective Whack a Mole strategy.

It's honestly, it's the worst forms of that the hate speech that you're trying to, to combat and by de-platforming, and you do two things, you force it underground. So you can't actually monitor it. And in certain situations, you actually make certain individuals feel like they're martyrs, and they're more likely to take action. But I don't have a good answer to this; I realized that this is a hot button issue. I think if I had a good answer, I'd be in government or something!

HUSEIN 43:28

It's a complicated issue. And reasonable people can disagree about it. And speaking of controversial issue, the next question we have is: the Freedom Convoy, and the recent spin-off called Rolling Thunder are movements that have brought national attention in Ottawa, and other major cities around the world. The question is, do you anticipate these movements changing the conversation, or laws regarding freedom of expression,

ABBAS 43:54

I think the Freedom Convoys and similar types of movements around the world have already shifted the conversation on freedom of expression, I think it's become a common tactic for certain types of groups like Neo-Nazis and the alt-right and all that kind of stuff, to take a not very well characterized message, and then package it with simplistic prima facie non-controversial statements like “we're for freedom” or “we're for freedom of expression.”

HUSEIN 44:23

Canadian flags...

ABBAS 44:28

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

Yeah, Canadian flags. And unfortunately, the proponents and opponents of such movements kind of buy into the same framework, in that the opponents of the movement say, look; you're trying to limit my freedom. And the opponents say, yeah, no, we should limit your freedom. You're terrible. You're a Nazi, or this or that. And look, I'm not I agree that we shouldn't have Nazis and that kind of thing. But I don't think limiting freedom is necessarily the answer for it.

And I think buying into that conflation, I think is problematic and I think with respect to the Freedom Convoys. Specifically, I can give an example. But I understand part of the message for the Freedom Convoy was they were anti mask mandates, right. And freedom as I would define with respect to a mask is the choice to wear a mask or not to not be required by a mandate to wear one or not to wear one. But I've seen reports of people who attend or observe the Freedom Convoy wearing a mask and being harassed saying, well, they're not for freedom, because they're wearing a mask.

No, the freedom would be the choice to wear a mask or not wear a mask. So it's not really about freedom. It's about being anti a specific policy. And I think that by conflating it with the issue of freedom, and then trying to limit freedom, it's problematic. Look, the Freedom Convoy had no issue with access to speech, right? It was an extremely prominent movement that was heard around the entire world.

And if we limit the speech, or the expression of that convoy through some law, or legislation, or some new way of applying law and legislation, it sets a precedent. And that precedent will more often than not be used against marginalized communities. And I think that's the danger. I think that's a real problem. It's not so much - I'm not so much concerned with the freedom of the Freedom Conway, I'm more concerned about if we limit their freedom, how does that affect others that don't have that same platform?

HUSEIN 46:27

So what about things like the Emergencies Act, and which other powers of the government implemented in Canada to try to reduce the spread of these issues?

ABBAS 46:38

I think it's setting a very dangerous precedent. And I would, I would, I would, there's a simple test that I use, it's not a legal test. It's just like a mental test. If there's a cause you're opponent to the Freedom Convoy, and you're okay with using the Emergencies Act to prevent it, are you also okay with using it against a movement that you support? Like if there was a pipeline blockade? Would you be okay with, with the Emergencies Act being used there? And if the answer is you're okay with it in one situation, but not in another? I think that's problematic. And I think you need to consider the dangerous precedents that it does set.

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

Now I'm not saying that shouldn't have been used in this case. I'm not commenting specifically on the Freedom Convoy. I'm just saying that you're asking about whether the conversations should be shifted and then and what to consider. I'm just saying that that's a consideration to be had.

HUSEIN 47:36

Right. Okay. The last question we have is, as we've talked about, in the course of his interview, and in your bio, you've been involved, personally in a number of freedom, expression issues throughout your professional and your extracurricular involvement. So what is it about this specific area that gets you so amped and interested?

ABBAS 47:58

I think it started with a very romantic view of these old school, investigative journalists who expose government and corporate corruption and now they always are advocating for the most robust freedom of expression protections. I think that's the spark.

HUSEIN 48:20

Post-Watergate?

ABBAS 48:21

Yes. Yes. Well, it's I'm I was born in post-Watergate. But look, I read some of those investigative journalism essays to this day. Like I've read some stuff.

There's a there's a book I really love. It's called, Tell Me No Lies. It's a collection of journalistic essays. And I absolutely love that stuff. But that's the pinnacle of free of expression. I don't think anyone kind of disagrees with that view of freedom of expression.

When not everyone's a top notch journalist and freedom expression includes the right to be wrong. I think what I find very fascinating, on a personal level, is that freedom of expression is a mechanism through which one can pursue truth. So if there's, you know, free expression and the corollary to that is free access to expression, you enable individuals to pursue truth by having access to various different opinions. That's how democracy works. That's how I think history works. That's how I think you really do learn.

HUSEIN 49:28

You mentioned that the pinnacle is this investigative journalist but surely, like all the cases you've been involved with don't involve the same level. Sometimes, you or other people are advocating for things like this comedian, right, or this blogger or whatever. So how do you reconcile that in terms of, you know your interests in this area when it's not really always just ideal scenario?

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

ABBAS 49:53

It's similar to what criminal defense attorneys say. They're not necessarily I'm agreeing with the actions of their clients that are committing a crime. They are protecting a client's right to a fair process. They're protecting the rule of law. I think protecting freedom of expression is protecting democracy. It's the lifeblood, it's the way that ideas get exchanged, and how we improve. So, like I said, a lot of times, these cases are about individuals who didn't have an issue with access to expression.

But, by protecting their access, you're also protecting access of those, I hope, that that don't have that access. You're preventing chill in other situations. And that's how that's how I view it. I can tell you that when we look at cases, at the Center for Free Expression, sometimes cases come across our desk where it's an individual can't afford to litigate an issue, or to defend against an issue.

But you know, you for every one of those, there's a few that can and you know, even if you don't necessarily agree with the content of their expression, you agree with their right to make that expression. I think, in our current society that's become controversial, but I don't think historically that is controversial. And I don't think it should be controversial. I don't think it's I don't think it's that complicated to protect the expression of someone that you disagree with.

HUSEIN 51:31

All right. So Abbas, I want to thank you so much for taking the time to be part of the show. Again, I know you've been a longtime listener and supporter, so it was nice to have on you as a guest proper. And yeah, the issues that we spoke about today are very top of mind - it's not everyday you have all these Supreme Court cases that are coming to light, so it'll be interesting to see how these issues are changing and evolving in context and what happens afterwards as well. So really thank you for your time and look forward to stay in touch in the future.

ABBAS 52:00

Thanks for having me. I really enjoyed it. And I look forward to listening to it and all your other guests and podcasts.

HUSEIN 52:14

And that's a wrap on this episode of lawyered. Thanks for listening. Our guest for today was a **ABBAS Kassam**. And you can learn more about him and the Center for expression at Toronto metropolitan university. At the website, which is cfe.ryerson.ca and 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 ***lawyeredpodcast.com***.

Lawyered – Episode 71

Freedom of Expression ft. Abbas Kassam

Episode Transcript

And next time on lawyered, we'll be speaking about the area of Legal Ethics and Professional Conduct featuring our guest, Brooke MacKenzie. And that obviously, we're going to be speaking about a number of issues involving lawyers' special obligations, and the regulation of the profession. So we'll be chatting about how a lawyer's duty of confidentiality applies to their spouses, as well as a potential new duty of technological competence.

And we're also going to discuss a recent huge case of client conflicts involving the US and Canadian branches of the same law firm. If you want to help to improve the show and get some meat affordable legal awards, like the opportunity to submit your own questions for the program, it would be really nice if you could check out our Patreon website and become a patron of the show this our crowdfunding campaign and it really makes the show a lot better and more accessible as well.

The website for that is lawyeredpodcast.com/patron. I'll give a shout out to a number of our generous patrons, including Sujoy Chatterjee, Urooj Zaman, Vasileios Tsianos and Samantha Chen - thanks so much for what you do to make the show so helpful and more accessible for the general public. And to make sure they never miss another episode of learning. Go ahead and subscribe to this podcast for free on iTunes or wherever you get your podcasts and also follow the show on Facebook, LinkedIn or on Twitter. Our Twitter handle is @lawyeredpodcast.

So editing work was managed by Solomon Krause-Imlach. Theme music was provided by Ben Swirsky, and our website is maintained by Steve Demelo. And of course please be advised while the show is aimed to be helpful and informative, it is not legal advice. And if you want legal advice, please reach out to a lawyer directly to help you with your particular situation. And with that, we will see you in two weeks and till then, keep it legal.