

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

HUSEIN
00:04

This is Episode 73 of Lawyered. I'm Husein Panju, and on this week's episode, we're speaking with Maanit Zemel about current issues in the area of social media law. First stop will be to discuss the new common law tort of online harassment. The Ontario courts have recently established a new cause of action that specifically cracks down on outrageous conduct on the internet. And we'll get into how this will play out across jurisdictions. Next up, we'll speak about the right to be forgotten. Many countries around the world now allow individuals to have their names deindexed from Google search results, and we'll discuss how Canada may follow suit. We'll also be speaking about Canada's anti-spam legislation, and what a recent constitutional challenge will tell us about the future of this statute. And in our Ask-Me-Anything segment, we'll be speaking about a bunch of issues ranging from how governments should or should not regulate social media, as well as some specific practical considerations for Instagram influencers. All that and a lot more's coming up in just a bit. This is Lawyered.

[music]

HUSEIN
01:20

Hello there and welcome to another episode of Lawyered the podcast. Appreciate you joining us on the show from wherever and however you're listening to this episode. So I believe this episode's going to be released in early August or so of 2022. I don't know if this is a spoiler or not, but I don't record the episodes live. There's a bit of production work that goes into it. So at the time of this recording, like I'm speaking right now, we're in like late June of 2022. And one thing that I wanted to share that was really exciting was I was recently invited to attend one of the Ontario call to the bar ceremonies. This is the fancy ceremony where lawyer candidates who recently graduated from law school and finished their practical articling requirements are officially inducted into the legal profession. And I was selected to attend the ceremony on stage as a representative of a bunch of diverse legal organizations. And yeah, it really-- I mean, I could go on for a while, but what I will just say is that these steps really go a lot in terms of just the symbolic aspect of recognizing diversity in our profession. It's not a secret that there's a lot of room to go to getting to where we need to be, but steps like these really show that at least the profession is taking some active consideration to recognizing that there's more work to be done. And I've only been in the profession for 10 or so years, but it's great to meet and see a lot of the new calls, and it's encouraging to see that we're making some incremental change in having a profession that's getting closer to reflecting the diversity of our overall country.

HUSEIN
03:17

And it was great to meet some of the new calls and the future of our profession. So if you're one of those people who's listening to this, welcome to the bar and we look forward to your contribution. One of the other funny things I'll just share is that-- so as part of kind of the marketing and the management of the show, I have some alerts set up

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

for the use of the word lawyered on Google and on search engines and our social media and whatnot, just to make sure I know if the podcast's being referenced to in other venues. And I've been noticing that more so than any other graduation year, I'm getting a lot, like a lot, of notifications about people using #Lawyered to say, "I'm at call to the bar #Lawyered, or, "Congratulations to so-and-so #Lawyered." I'm getting like 20 or 30 in the span of a day or so or more. And then when I was at the ceremony myself, I realized that as part of their address, the Treasurer of the Law Society encourages the attendees and the graduates to use this exact hashtag. So I'm sure it was not intentional to cause confusion. But what I will say is that I wonder how many people who are listening to the show got here by virtue of that hashtag. So if that's helping the podcast, so be it. Regardless, it's great to see so many new members of our profession, as well.

HUSEIN
04:42

With respect to the podcast specifically, I just wanted to say that I thought our last episode was a really interesting one. Speaking of the Law Society, that episode was about the area of legal ethics and professional conduct. And our guest for that episode was none other than Brooke McKenzie, who's a fairly prolific writer in terms of legal issues and also a practicing lawyer, as well. We spoke about some exciting issues in this area, including a high profile case involving the Canadian US branches of the firm Dentons, and some conflict issues there. We spoke about confidentiality in terms of what lawyers can or cannot speak to their spouses about. And we also spoke about a new potential duty of technological competence and what that means for lawyers in the profession. And like I mentioned in that episode, even if you're not a practicing lawyer, a lot of these issues kind of cross-pollinate. If you're working at a consulting firm, for example, there's issues about conflicts there that you may want to be aware of in terms of how that may impact your own practice. And yeah, it's also an interesting way of looking at your own work in terms of the ethical considerations about how you practice and what that means for not just yourself, but how they reflects on the profession, as well. So it's a great episode. If you want to check that out, that's Episode 72 in our archives.

HUSEIN
06:13

Today's episode has been one that we've been hoping to record for a while. It's been repeatedly requested whenever we do a call out for topic suggestions. So the area of social media law. If you're listening to this, I am quite certain that you have some sort of a social media presence, intentionally, most likely, perhaps unintentionally, as well. And there's a lot of issues that are changing in this area. In the last couple of episodes, we've been speaking about some issues in terms of Canada's regulation of this area. And some of these issues pop up in this conversation, as well. I would say that we have one of the most prominent experts in social media law as our guest in this area. She writes about this. She speaks about this area. She's widely consulted about this area. And I'm sure that you'll get a lot of value out of her

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

insights in this episode. So with that, here is our episode with our guest, Maanit Zemel.

[silence]

HUSEIN
07:14

And on today's show, we're very excited to have Maanit Zemel, who is a founding partner of Zemel van Kampen LLP, which is a technology law and litigation boutique firm in Toronto. Maanit has over 16 years of experience in internet and social media law and in commercial, regulatory, and civil litigation, with a particular expertise in online defamation, cyberbullying, Canada's anti-spam legislation, and privacy law. She is the sole Canadian member of the Internet Law Leadership Summit, which is an international organization of leading lawyers with expertise in internet law. And she's successfully represented clients before all levels of courts, including the Supreme Court of Canada. And her extensive litigation experience earned her a position as a former member of the Ontario Landlord and Tenant Board, where she adjudicated disputes between residential landlords and tenants. And in addition, Maanit teaches internet law and business law at the Toronto Metropolitan University, formerly known as Ryerson University, and the University of Toronto. So Maanit, thanks for joining us on the show today.

MAANIT
08:21

Thank you. Thank you for having me.

HUSEIN
08:23

At the time of this recording, we just had a pretty wild thunderstorm across southern Ontario and Quebec. So glad to see that you're doing okay, as well, from that.

MAANIT
08:35

Yeah. Thank you. You, too. I hope the internet holds off. You never know since the storm.

HUSEIN
08:41

We will find out, certainly. Great. So we have a number of interesting topics to speak about, in one of your areas, especially, which is social media law. And the first one relates to a new civil tort of online harassment. Now, in 2021, the Ontario Superior Court of Justice broke new ground by creating a brand new common law tort of online harassment. And this new ground of action was designed in response to a unique set of facts that involved cyberstalking and cyberbullying. And while there is some similarity between this new tort and the existing tort of defamation, it's yet to be seen how common this kind of action will become in the Canadian legal system. So Maanit, before we get into the case, I know that this case involves cyberharassment, which is unfortunately not uncommon in the social media context. So when people talk about online harassment, can you give me some examples of how this typically manifests itself?

MAANIT
09:40

It's not just a few postings online, but it's really a set of persistent-- so it's an intentional harassment of the plaintiff or anyone associated with the plaintiff - so it could be their family members, their colleagues, their

friends - through just horrible postings, emails, texts, whatever it is, which anyone would consider to be harassing using the internet. And I think Justice Corbett went on to explain why this tort needs to be recognized in Canada, but in particular why it's unique to the internet, how the internet creates this tort by its character. He says, "Online harassment has a unique effect on those who have been subjected to it, both in regard to their mental health and in regard to violations of their legal rights. Online harassment differs from other forms of harassment because it is an unstoppable intrusion. Perpetrators of online harassment do not allow their victims to escape their harmful action by entering their home or private domain. The victim cannot escape the harassment in the haven that is his or her own home. Moreover, the perpetrator can perform the harassment from anywhere remotely." And I think that's what really makes this tort unique, because what Justice Corbett said is while the harassment offline, you're being harassed, there are ways for you to protect yourself. You can walk away, right? You can go to your home and you can shut the door. Online, you cannot do that, right? In fact, you are mostly harassed while you're at home because you can't avoid being on the internet. The internet is part of our lives.

HUSEIN
11:25

But I think another aggravating part about this is it can be very public, as well. Like the nature of online harassment is you can post on someone's social media profile on Facebook or Instagram or whatever, and it can be witnessed by a large amount of people, which can, I'm sure, cause its own toll on the victim as well, right?

MAANIT
11:42

Oh, 100%. And, I mean, it's not just a lot of people. It's also global, right, in its reach. So it could reach potentially millions of people all over the world, right? So it's really unique in that way. Absolutely.

HUSEIN
11:58

Absolutely. So why don't you tell us about this case. The case name is called *Caplan v. Atas*. And the citation is 2021 ONSC 670. Can you just give us a summary of what the relevant facts were in this case?

MAANIT
12:10

Sure. So the defendant, Nadire Atas, she had spent years - and this is many years - harassing, defaming, and stalking the plaintiffs - and there's about 70 of them - online through various forms of whether it's posting to social media, postings on these unique third party websites that are intended to harass. Their purpose is to harass and to defame. And it went on for years and years. And what was unique about it is that most of the people she targeted were individuals who she had very little interaction with, usually she had some past grudge against. And then she took it to the next step where she'd start targeting not just the actual individuals whom she had a grudge with, but their family members, their friends, their colleagues. Then of course, the next step, and what made this-- so the plaintiffs took it and really just thought this through was the fact that she started targeting their lawyers. So most of the plaintiffs were actually lawyers. So it's sort of-- the number of the victims kept growing as the litigation process continued. And eventually

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

it culminated in this decision, the summary judgment decision, where Justice Corbett found her liable for defamation as well as for this new tort. Yeah.

HUSEIN
13:37 So you mentioned earlier on in the description that there was parts of this which were-- some of the comments were harassing and defaming. So can you tell us a little bit about why you thought the court made this distinction between the defamation aspect and the harassment aspect?

MAANIT
13:50 Yeah, absolutely. So there are several reasons. So all of it was defamatory, right? There was all these awful postings online. But many of the people who were being defamed were not the actual named plaintiffs. They were family members of the plaintiffs, their kids, their spouses. Again, they were colleagues, the lawyers, associates at their firms. And when it comes to defamation, the tort of defamation, it's a very technical tort. But one of the main elements of it, the first element of the tort of defamation, is that the defamatory statement at issue has to refer to the plaintiff. And so had Justice Corbett confined his findings to a tort of defamation, the problem was is all these other victims who were not named as plaintiffs would now have to start their own lawsuit, and it would just become sort of this growing lawsuit that never ends. In addition, one of the things that Justice Corbett said, quite correctly, in my view, is that by defaming these other victims, the nonplaintiffs, Ms. Atas was harassing the plaintiffs.

HUSEIN
15:02 It's like a cycle, right?

MAANIT
15:04 Yeah. It's more than a-- it's almost like this wave. It just went on and on and on. And as far as I understand, it's still going on. And, I mean, in that case, yes.

HUSEIN
15:16 So we have this new tort that's been created from this case. So what is the legal test that going forward? If a plaintiff wants to make out this tort, what do they need to prove exactly?

MAANIT
15:27 It's a very strict four part test. The first thing first is because it's an intentional tort, the plaintiff must establish the intentional element that the defendant had either maliciously or recklessly engaged, too engaged in communications conduct, so outrageous in character, duration, and extreme in degree so as to go beyond all possible bounds of decency and tolerance. And then again, another intentional element is that they have to prove that she or he, the defendant, had did so with the intent to cause fear, anxiety, emotional upset, or to impugn the dignity of the plaintiffs and the plaintiff suffers such harm. So again, it's not an easy standard to meet. It wouldn't be applicable to just a regular - I don't know - one or two Facebook postings, for example.

HUSEIN
16:19 I imagine a big challenge or issue with social media law, or not law, is jurisdictional issues, because in some cases, you might have comments that are posted to social media or internet platforms that are outside

the jurisdiction of Ontario court. So how do you see this playing out when we have this new court which is introduced, but the jurisdictional concerns, as well?

MAANIT
16:39 Right. And so, I mean, and that issue arose in the Atas case. In fact, I should say from my experience is that jurisdictional issues apply to almost every case involving the internet, especially these types of cases involving defamation or harassment and privacy. The first question that must be asked is whether or not the court has jurisdiction. And if not, where should you bring the case? So that's just a basic question that has to come up, because when it comes to the internet, there are no borders, right? So anyone posting from anywhere in the world may be subject to any jurisdiction depending on their test for jurisdiction, right? And so that's the first question regardless, But--

HUSEIN
17:22 And sorry. Just to that point, so I'm sure the answer is very complicated, but how does someone fall under the jurisdiction of Ontario if you can be posting it? Does it matter if you're an Ontario resident, or do you need to have been in Ontario at the time? Or how does it work exactly?

MAANIT
17:38 Okay. So yeah, it is a complicated issue. But the case we have that deals with that is the-- it comes out of online defamation context. And that's the *Haaretz.com v. Goldhar* case from the Supreme Court. I think it's 2019?. No, 2017. So that case set out the test for the online tort of defamation and jurisdictional issues. And in that case, on the at least the first part, which is the real and substantial connection test, because that's always the first issue in civil actions, the court said that if the plaintiff has a -- sorry. Step back for a second. If the statements, the statements at issue, have been read, accessed, or downloaded by anyone within the province, so let's say in Ontario, then there's a presumption of jurisdiction in that jurisdiction, sorry, in that province, right? So let's say again, these are postings online, and you can demonstrate that there were people in Ontario who read it or accessed it, then at least there's a sort of prima facie presumption that the tort was committed in that province. That's the majority of the court. The minority in that court said that what matters is where the reputation of the plaintiff lies. So it's not where the plaintiff resides, but where their reputation exists. So that's for defamation.

MAANIT
19:04 For this tort, the harassment tort, it's hard to tell, because again, the issue is where was the tort committed? It's not about where the defendant - assuming the defendant resides outside of Canada. It's really where the tort was committed. And I can only guess because it's, again, one of those issues that haven't been determined. I can only guess that a court will apply something similar to the defamation context by saying if it was read, it was accessed, or the reputation was damaged, or there was other form of harm that was caused to the plaintiff in the province, then there's jurisdiction.

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

HUSEIN
19:43 I know this is a fairly new case, but as someone who works in this space, what impact do you think this might have on lawyers who practice in the social media or internet law space?

MAANIT
19:54 For me, when I practiced in this area, it gives me another tool. So up until this case came out, I would in situations involving serious defamation online, where it's consistent and persistent and significant and I would represent the plaintiff, then I would be limited to pleading defamation and possibly one of the invasion of privacy torts. But now if it's significant, if it's significant defamation and it really is what you refer to as gone viral and it's continuous - and more often than not there is some kind of an intentional element to it - then it gives me another tort to plead. And also, again, it takes me outside a little bit of the defamation context, which, when defamation, again, is a very technical complex tort. So it's just another tool.

[music]

HUSEIN
20:59 Now one of the most controversial social media topics of last few years has been the right to be forgotten, which relates to the ability to have private information about oneself removed from internet searches and other digital sources. And this specific issue has been hotly debated and legislated in countries all around the world. And last year, the Federal Court of Canada released a consequential decision that may bring some new clarity to how and whether this right to be forgotten applies in the Canadian context. So Maanit, I was hoping before we get into the decision, you start by just providing us with a bit more discussion about what this right to be forgotten is and what this means on a practical level.

MAANIT
21:41 Sure, absolutely. Okay. So when we talk about the right to be forgotten, it arises out of the privacy law context. And it really applies to situations where there is personal information about an individual out there on a website that is subject to privacy law, right? And that privacy law protects that personal information for different reasons, for example, because it's subject to the requirement to give consent and consent wasn't provided, or the consent to disclose or use this information has been withdrawn, whatever it is. Most of the time, in the practical sense, it comes out of situations where there's a website that has some true personal information about an individual which the individual wants removed from the internet because it's either embarrassing, it's outdated, it harms their reputation for some reason. And an example would be a bankruptcy from many, many years ago that is affecting them still financially, or some very embarrassing photograph that was taken of them when they were young and doing something silly or whatever it is. It could be anything that is of personal information that is protected by privacy law.

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

MAANIT
23:04

And so the point is, they have the right to be forgotten, which originates from Europe, from the European privacy law, is the right to have that personal information removed from the internet, and in the context especially of search engines. So the idea that that information might still exist out there, but won't be picked up by a search engine or what we refer to as deindexed, right? So we use Google as an example. You Google your name, and that website with that information wouldn't come up in search results because Google has deindexed it, removed it. That's what the right to be forgotten refers to effectively.

HUSEIN
23:42

Okay. So the case that we're going to be speaking about, it's a case called-- it's a reference regarding the Subsection 18.3(1) of the Federal Courts Act. The citation is 2021 FC 723. And by the way, all the case links are going to be on our website and on the podcast. You don't need to remember it if you're driving or jogging or whatever. So Maanit, I know that this case was initiated by a complaint against Google. Can you tell us a bit more about how this even got to the court in the first place?

MAANIT
24:11

Sure. Okay. So our federal privacy regime, which applies across Canada, is the Personal Information Protection Electronic Documents ACT, PIPEDA, or sometimes people refer to it as PIPEDA. What PIPEDA says very generally-- there's various rules and principles, but generally speaking, an organization, a for-profit organization in Canada, cannot collect, use, or disclose personal information of individuals without their consent. And our Canadian regulatory body is the OPC, the Office of the Privacy Commissioner. And so what happened was is some individuals, Canadian individuals, filed a complaint with the OPC, because they can do that, for violations of PIPEDA. And the complaint was against Google, arguing that search results of them that came out of Google contained personal information which they did not consent to having collected, using, or disclosing. And so these individuals went to the OPC, filed a complaint. The OPC investigated and came up with a draft report saying they believe that Google is in fact violating PIPEDA. But there was this sort of big question mark whether or not PIPEDA even applied to Google. That was sort of the big issue. Does it even apply? So that's why they brought this reference to the court.

HUSEIN
25:43

And so I know that when we go up the Federal Court, the court was asked to rule on two questions. Can you tell us what those two questions were and how they define it?

MAANIT
25:52

The first issue is, does PIPEDA apply to Google search results? Basically, is Google as a search engine required to comply with PIPEDA? The application question is basically simple. It's "Does Google collect, use, or disclose personal information of Canadians in the course of commercial activity?" That is the test. And the answer was, yes, it does. It was that simple. It collects, uses, and discloses personal information when it collects and then post these search results, right, because they

contained personal information from other websites. The other question, of course, was, was it doing it in the context of commercial activity? And the federal court said, "Yeah, Google makes money, a lot of money, from a search result." It actually went on and talking about how much money it makes and how it's one of the most lucrative I guess intermediaries or operators, website operators, internet operators. Google said, "Well, okay, fine. Even if it does apply, we're subject to the journalistic exemption, right, the idea being that we do not have to comply with PIPEDA because we are collecting, using, or disclosing this information for journalistic purposes. And the court said, "No you are not. You are not a media. You're simply not," right, and for different reasons, one of which of course, the media is required at least to do something to verify the accuracy of the information. There are certain standards that journalists apply, right? Google doesn't do anything. It just has its algorithm pick up websites and have them indexed. So--

HUSEIN
27:31 Right. And Google has no control over the content of the search results themselves.

MAANIT
27:36 No. None, whatsoever. No control. And so that's why they-- and don't do anything to verify their accuracy. Again, they just pick up the website and index them. And then they appear in search results.

HUSEIN
27:49 And now I know this decision is currently under appeal. We haven't yet got a decision from the Federal Court of Appeals. So this is what we had so far. But once we get some more clarity, what impact do you think this decision might have, like in this instance case, but also more generally for people who are practicing?

MAANIT
28:05 Okay. So assuming it's upheld in appeal-- and I'm going to say this right now. The Federal Court Appeal has not heard the appeal yet. I will assume, and I will bet, actually, if there is anyone taking a bet, that regardless of the result, it would be leave to appeal to the Supreme Court will be most likely, and I would say potentially granted, but certainly there'll be leave to appeal. So we have years away until we have a final conclusion on this issue. But let's assume it's upheld all the way up to the top. What it basically means is it means that Google must comply with PIPEDA, which means that the complainants, these individuals who want these search results removed, can then file a complaint with the OPC and then ask them to have these search engines-- to find that Google is not complying with PIPEDA because it's not removing these search results. That being said, it's about the law. From a legal perspective, it would require Google to comply, but it's more likely that Google will fight this, and because they don't really have much consequences. Our law right now is lacking in enforcement power. That being said, there are some amendments proposed by the federal government that are in the works. And one of them would be to give a lot of significant enforcement power to other regulators. And so if those pass, whenever they pass - who knows? - probably before a

final decision happens on this case, there may actually be some consequences. And in fact, when that happens, we will have a right to be forgotten in Canada if that happens. Just so we're clear, anyone can submit a request to Google, and just like in Europe, Google will have to deindex and remove the search results.

HUSEIN
30:04 In jurisdictions where this right to be forgotten is a thing, is it as simple as that, just following your request to get something removed and then automatically it's removed the next day?

MAANIT
30:17 Well, I don't know if it's the next day, but if you are an EU citizen under the GDPR, you have that right. And so any EU citizen can go-- and Google has actually set up this whole mechanism for deindexing. It's actually quite simple. You go. You fill out the form. You say you live-- and so Google will verify it. It will go to their hundreds of moderators all over the world. And if it meets the requirements for removal under the GDPR, yeah, they'll deindex. And they have to do it I believe within 48 hours, like pretty quickly. I'm going by memory. Don't quote me on this, because I'm not a EU lawyer. But as far as I know, pretty quickly. So yeah, if you are a EU citizen, you can have your search results that contain personal information about you removed quite quickly.

[music]

HUSEIN
31:13 If you've noticed that you've been getting less email spam in your inbox over the last eight or so years, it might be at least partly due to Canada's new anti-spam legislation, also known as the acronym CASL. Now this federal legislation broadly limits the ability of companies to send email spam to their mailing list with the threat of serious fines. And relatively speaking, this law is quite new. But a recent Federal Court of Appeal decision has provided some new guidance on the applicability and the constitutionality of this anti-spam law. So Maanit, I know that this legislation is not exactly new, like eight or so years, but can you give us a summary of some of the key components of this anti-spam or this CASL law?

MAANIT
32:01 Absolutely. Okay. So in general terms, CASL regulates a variety of commercial online activities with a particular focus on the regulation of commercial electronic messages, which we refer to sometimes as CEMs, which is what you would consider to be spam. But it's much more than that. It's much more broader. It's basically any electronic message sent that has a commercial character and that is intended to promote, in one way or another, commercial activity. And what makes it unique in the western world for anti-spam laws is that it is an opt-in regime. What does that mean? It means that for any of these activities, the person, the organization-- sorry. The business or the organization that is engaged in these activities has to have received consent from the person to whom those activities are being made. So if you're sending an email, you have to have consent from the recipients before you click

Send. And that consent has to be clear. And there's specific requirements on how you get that consent.

HUSEIN
33:12 All right. And so I know that the case we're going to be discussing is known as the CompuFinder decision, which is fairly recent. I know that part of this case was about the constitutionality of this very law. Could you tell us a little bit more about how the court came down on whether this law was constitutional or not?

MAANIT
33:32 Absolutely. So there were several constitutional challenges that CompuFinder raised. Just sort of step back for a minute. CompuFinder was-- it's an interesting case from a factual perspective because they were a small Quebec based company, very small, like small, small, company that was providing CPD training for professional development purposes. And they were the first business and organization to be facing a notice of violation by the regulator under CASL. It's also the largest one. It was \$1.1 million, which for a small company was significant. It ended up being reduced to a few hundred thousand dollars by the actual commission sort of when the CompuFinder challenged it. But by then, it put them out of business. They were basically bankrupt. And so it was the first time and the only time that the Federal Court of Appeal had to consider this legislation. And CompuFinder and their lawyers threw basically everything at it, right? So they started with challenging the constitutionality. The Federal Court of Appeal held the legislation constitutional. So on the constitutional issues, the first issue was the division of powers. And what CompuFinder argued is that CASL being a federal legislation was *ultra vires* the provinces, it was-- the regulation of commercial electronic messages, these CEMs or spam, should have been something that was within the provinces' exclusive jurisdiction.

HUSEIN
35:15 Was it this property and civil rights section?

MAANIT
35:17 Yeah, property and civil rights. Right. The CRTC, the regulator, argued that it falls under the power of trade of commerce. The court agreed with the CRTC, with the regulator, and held that it was constitutional and it was within the jurisdiction of the federal government. When I discuss internet law, I keep saying -- you can't really regulate the internet or internet activities provincially because there is no border to the internet, right? And that's basically what the court said, right? It says, "The artificial impediments of provincial borders are similarly irrelevant when speaking of the internet, email, and the digital economy. In fact, relative to corporations, spammers may enjoy an even greater facility for transcending provincial borders in order to conduct their activities. In these circumstances, provincial legislation is simply inadequate to the task of regulating unsolicited CEMs." And that's really the point, right? You're sending emails. The chances that they stay within the province are very small, right? They're going to go somewhere.

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

HUSEIN 36:20 Well, on that point, if we accept that the provincial borders are kind of artificial, aren't like the federal borders equally artificial?

MAANIT 36:29 Oh, yeah, 100%. But at least on-- and that's something that comes up on the international level, right? That's why there is international jurisdictional issues, sort of jurisdictional disputes, all the time. But at least from a constitutionality perspective, right, the federal government has the exclusive jurisdiction over international trade, right, interprovincial international trade. So at the end of the day, as between the provinces and the federal government, the federal government is more appropriate to regulate that aspect. I think that was-- leaving this to the provinces would make it very, very messy, really messy. And the other part which was more significant - and in fact, I was quite surprised by the results, or somewhat surprised, I guess - is the Charter challenge, because what I find, at least in my opinion, was concerning about CASL is how it violates the freedom of expression, because there really are very significant consequences for sending electronic messages. I mean, we're talking about millions of dollars. And the Federal Court of Appeal agreed that it may violate Section 2B, but it was saved with the Oakes test.

MAANIT 37:42 And then the other sort of I found interesting argument that CompuFinder made is they argued that it violated Section 11 of the Charter, which is the section that provides constitutional protections in the criminal context. And what CompuFinder was arguing is this legislation is cloaked in a regulatory context, but it's really a criminal-- it should be criminal and it should be considered to be criminal law because of criminal offenses, because, again, the penalties are so significant. The court said, "No, this is a regulatory regime. It's not criminal. No one's going to jail." And it's not as penal as it should be if it was in the criminal context.

HUSEIN 38:25 If Section 11 was triggered, that would provide for your rights to a trial, like presumption of innocence, those sorts of things.

MAANIT 38:30 All that stuff. Right. And of course the standard, right, beyond a reasonable doubt, right? Now the standard is on the balance of probabilities. Technically there is no mens rea, right? It's strict liability, all that stuff that applies in the regulatory context.

HUSEIN 38:43 So I know that beyond the constitutional guidance, the court also provides some clarity in terms of some of the specific components of CASL. One that I think is especially interesting is the B2B exemption. Can you tell us a bit about what that is and how the court found on that?

MAANIT 39:00 There is several exemptions to the requirements to obtain consent when sending commercial electronic messages. One of those exemptions is called referred to colloquially as the B2B, business to business. And what it says-- and it's quite ambiguous, but what it says is that an organization does not have to obtain consent to send electronic

messages to another organization or business, right, where there is a business relationship between those two organizations and the content of the message is relevant to the recipient's business's role, etc. So what happened with CompuFinder - I should step back - they were-- what they were sending out is they were spamming, so to speak, these emails to professionals and executives in all these organizations trying to sell these professional development courses. And what they said is basically-- CompuFinder argued. It was like, "Well, some of these recipients, okay, these executives in these companies, we had a business relationship with them, not necessarily with the recipient, but with their employer." Right? "We may have sold them-- one of their employees may have attended one of our professional development sessions." So for example, let's say you're a law firm and you receive-- whatever. Your associates receive an email from CompuFinder saying, "Hey, take this course about real estate law." And CompuFinder will argue, "Well, one of the lawyers at this firm had already taken one with us, therefore, we have a business relationship with them, and we can rely on the B2B." That's what they were arguing.

HUSEIN
40:45

Right. And then that associate immediately regrets signing up in the first place, I'm sure!

MAANIT
40:48

Yes. Yeah, exactly. That's right. That's right. Well, but then the Court of Appeal said no. The Court of Appeal said, "That is not what the B2B exemption is meant to provide." And in fact, it made it very clear that this exemption should be applied very narrowly. An organization should not just use it as a blanket exemption. Very narrowly applied. And what it says is, "Contractual relationships comprehending a very limited number of transactions affecting very few employees do not constitute relationships for the purposes of the B2B exemption." That doesn't necessarily help us to say, "Well, where do you draw the line? What is it?" But what they're basically saying is just having a few transactions, it's not enough. You got to have like some kind of an ongoing relationship, whatever that is, right? So that's one of the helpful interpretations that the court provided. And in fact, for me, when I advise clients personally, I often say, "The B2B exemption, you have to be very careful with it." Like, "You just can't--" clients love to rely on the B2B, "Oh, we're only sending it there. It's a business." But no, you got to be very clear that this has to be a ongoing relationship and you have to apply it narrowly."

[music]

HUSEIN
42:10

And before we wrap up our episode, we're going to do our Ask-Me-Anything segment with Maanit. As our listeners know, this is one of our bonus segments where we invite members of our Patreon community submit questions that they want to hear answered on the show related to our guest's subject matter expertise. If you want to find out more about how you can become a patron and submit your own questions, there's a lot more information on our website, which is

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

lawyeredpodcast.com/patreon. So Maanit, we got a bunch of questions for this episode, I think, given how pervasive social media is in general. So one of the questions that was submitted relates to Instagram influencers. And the question specifically is, "What are some legal issues for prospective Instagram influencers to consider in their own marketing?"

MAANIT
42:59 Okay. So there's so many issues, right? And I would start always by saying talk to a lawyer before you start doing anything. But you got to start first of all with our advertising and marketing laws. Under our Competition Act, there is very clear requirements to avoid any form of misleading advertising or marketing. And that would include if you're selling something, you got to let them-- let them know that you're-- as an example, I would say to avoid in any way being misleading. Not to mention the fact that if you are actually getting paid to influence, then you'd need to disclose that.

HUSEIN
43:37 I know a lot of times you'll see posted with like #ad thinking that it's an advertisement. Is that kind of sponsored content that you're talking about?

MAANIT
43:45 I would say, yes. I would think so. Again, it depends. Every case is different. But again, you got to be as clear as possible. And it's really the misleading part that you have to be very careful about, right? What does misleading mean? There's lots of case law on that. So I would get some advice. The other thing of course is CASL, as we mentioned earlier. So postings online are not necessarily subject to CASL, like an Instagram post. But DMs, instant messages, might be, might be considered a commercial electronic message. And I'm saying might because that's one of the issues we're unclear about. So if it does, you need to be aware of that and comply with CASL's requirements for consent and subscribing, that kind of stuff. And finally, and then something I see in my practice, is there is a lot of disputes. A lot. There's potential for disputes that arise between influencers and others regarding intellectual property. So for example, who owns the social media accounts? If someone takes over the social media account, if they sell it, if they sell information, there's all kinds of different issues that arise. Copyright issues, trademark issues. So that's things to consider, as well. And so, yeah, get a lawyer to advise you.

HUSEIN
45:02 Absolutely. Next question is, "Do you have any practical tips for lawyers and/or law firms who are hoping to incorporate social media as part of their own practice?"

MAANIT
45:12 Oh yeah. For sure. So first of all, I support it. There's some lawyers that still shy away. I'm surprised to hear in 2022 that some lawyers still refuse to use social media because it scares them or they're not sure. So I use social media to promote, to market and network, but I'm very careful on what platforms I use. And I'm not going to say one or the other, but I have my choice based on what I consider to be more private

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

accounts. So be aware of that. But overall, using social media to network, to promote your services, is fine, but there's quite a few things you need to be aware of. First of all, your professional conduct rules, right, under your law society. So there are, at least here in Ontario and I believe across Canada, very strict rules about what you can and can't do in the advertising of your services. And that would apply to social media. And so you got to be careful with what you actually post there. Some lawyers would hire a marketing firm, a social media marketing firm, to post on their behalf. Be very careful, because they are marketers. They like to just write whatever they want, but you are liable for that. And if you are not in compliance with very strict advertising rules, you may face some issues with your law society. So be careful.

MAANIT
46:37

Second of all, online reviews. So a lot of lawyers these days like to promote themselves through reviews. They'll go to clients and ask them to post reviews, whether it's on Google reviews or on their website or on their social media account. Be very careful about those. Very careful. There are several reasons. First of all, again, they are sometimes referred to as testimonials. There is some decisions out there, and I'm not going to get into them, but decisions out there about when testimonials can be non-compliant with the advertising rules of the law society. So you got to be careful with that. You also have to be careful about including any confidential information of the clients in those reviews. So be very careful. And then of course, if you're opening yourself to reviews, you're also opening up yourself to negative online reviews, which could be extremely harmful to your practice. I get calls from lawyers all the time to help them with that. Just very generally, that's one of my areas that I focus on. And generally speaking, negative reviews are defamatory and can give rise to a tort of defamation. So be aware of that. Certainly be careful about posting actually positive reviews about yourself.

MAANIT
47:54

That's a huge no-no. Believe it or not, people do that. Again, they hire companies to do that. Be very careful. That is very bad on so many levels.

HUSEIN
48:04

Are there any specific examples you've seen of lawyers doing a good job or a poor job in terms of their own social media marketing?

MAANIT
48:12

Yeah. And I'm not going to name, but I definitely know some lawyers who have been active in this space and do an excellent job.

HUSEIN
48:21

So what does that look like if you're doing an excellent job in this?

MAANIT
48:24

At least I can say-- I can talk about myself. I'm not saying I do an excellent job. I could do it much better, a much, much better job. But my focus has always been in being regularly online on whatever platform you prefer, whether it's LinkedIn, Twitter, or Facebook, Instagram, whatever. So be active. Be consistent. Focus on the facts.

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

Like I, for example, make comments about case law. So focus on case law or policy or whatever it is. Avoid saying anything negative about others, because you can open yourself up to defamation. And to the extent possible, don't identify clients. And again, respond to things, be very professional, be courteous. Lawyers get into these Twitter fights sometimes and I--

HUSEIN
49:18

Oh, yes.

MAANIT
49:19

--read them and I go, "Oh, my God." So as long as you stick to the fact, you stick to the law, stick to the fact, showing your expertise, talking about your successes, absolutely. Why not? Just, again, think about it. Think about anything you post before you actually post. And that's really the number one advice. Think before you post.

HUSEIN
49:38

Yeah. And it sounds intuitive, but I mean, I find that sometimes lawyers and even non-lawyers forget that it's your own reputation at the end of the day. So legality aside, if you post something one day and that's written in pen or whatever they say, it's going to remain for years to come. And that will come back to haunt you, or come back to help you, as it may be.

MAANIT
50:00

Oh, absolutely. And I can say, I mean, again, it's an excellent tool. I actually have made some really long-term excellent contacts, whether it's just in terms of referrals or actual clients, over the years through my social media engagement. And so there's really a lot of opportunity there. But you have to be careful and you have to be aware. Again, think before you click. And think about the fact that if you-- I would say if you wouldn't put it in - I don't know - a advertisement on TV, or you wouldn't put it in a brief for a court, or in a letter to whatever opposing counsel, or whoever it is, then don't put it online. That's what it is.

HUSEIN
50:47

That's a sensible approach. Next question, in a completely different direction, Elon Musk's recent purchase of Twitter is reviving some discussions about the role of government as it applies to regulating social media company. So the question is, "Do you see this role changing in Canada or the US? And if so, how?"

MAANIT
51:08

Well, absolutely. First of all, in Canada, there's a lot coming down, I would say, coming down the pipe. So it hasn't happened yet, but it's all on the table. So from what I can tell, the Trudeau government, the federal government at the moment, is considering quite a few legislative-- whether it's new legislation or amendments that would focus on regulating, and like I say, I call it platforms. It's not just social media companies. It's basically any intermediaries, right, whether it is in the-- and in all areas. In all areas. So the Trudeau government is really focused on that. And I see that as almost like a policy coming out of the government. And so at least as a practitioner in this area, I'm constantly having to check what's new out there, because it can happen any day.

So whether we have the Bill C-11 that is proposed, which is the regulation of online streaming in the context of regulating the Netflix and Amazons of the world, in the same way as you regulate the CTV, right, so sort of similar that way. There was an article that came out that the government is considering more regulation of platforms in the context of cybersecurity. Sorry, not platforms, but the internet service providers. So there's an issue about targeting the Huawei, the Chinese company, and the 5Gs. And so they're talking about maybe passing regulation in that context. So there's a lot, a lot coming down. The government is really considering it from all aspects, focusing on what we refer to as the intermediaries, those organizations that control the internet.

HUSEIN
52:50 As someone who's been practicing in this area, do you think this is the sensible approach to be more active in regulating these platforms and ISPs or whatnot?

MAANIT
52:59 Let's put it this way. On the spectrum of for regulation versus against regulation, I fall on the for side more. And there's like a 50-- I'm not 100%. I don't think regulation-- I'm not looking at full regulation, but I think there has to be some. Obviously, there's got to be a balance. But based on my experience, I think regulation is necessary, because at the moment, at this time, the internet is a wild, wild west. It's almost impossible to regulate or to control activities over the internet. It just is, for all the different reasons we discussed today. And there's a lot of potential for harm out there. I mean, just look at the idea of the fake news, disinformation, the issues, how it affects elections. So there's a lot of significant harm versus without regulation. And so there's got to be regulation. Obviously, it can't be unlimited. It has to be limited. And as long as it complies with our constitutional protections, then I am for it. I absolutely am for it. So yeah, I fall on that side of the spectrum.

HUSEIN
54:12 And what about in the EU? How does that compare to Canada's approach?

MAANIT
54:16 So, yeah. So the EU has sort of been ahead of us. They certainly have focused a lot on regulation in the last, I'd say, decade, and certainly in the last couple of years two, three years, whether it's, again, the GDPR, their privacy laws are the strictest in the world, at least in the western world. They are focusing, again, on online harms. There's all kinds of new rules and regulations that are coming out of the EU regarding regulating intermediaries. So they're focused on that. And I think Canada is sort of a few steps behind, but it's watching the EU.

HUSEIN
54:50 The last question we have actually links back to a number of topics we've already spoken about today about jurisdiction. So the question is, "How enforceable are legal challenges in the social media law landscape, given the complex geographic and jurisdictional issues?"

MAANIT
55:08

Enforcement is a big challenge, okay? It's a challenge. And that's because, again, the internet has no borders. So you can be a court in Canada applying Canadian law, right, where you're protecting Canadians -- with the remedy for Canadians. And at the end of the day, you get a judgment or an order, and that's a piece of paper. But if you can't enforce it, it doesn't mean anything. And the perfect example of this case is the Google and Equustek case. So the Equustek case that came out of the Supreme Court of Canada a few years back - it was 2017, I believe - was one of the leading cases in internet law from the Supreme Court. And what basically it involved-- it was almost like a right to be forgotten. It came out of the intellectual property context, but the idea was is that Equustek being a BC company obtained an injunctive order against Google to deindex, to remove these search results of these websites containing confidential information about it, like websites that infringe on their intellectual property rights. Google had refused to do that outside of Canada, meaning Google said, "We will only the deindex. We will only remove search results from results on google.ca. So google.com? Still there. Okay? And--

HUSEIN
56:30

The biggest version of Google?

MAANIT
56:31

Yeah. But it could be any other. google.il, google.eu, whatever. Google has created these-- on its domain name-- it effectively divided into various jurisdictions based on what it believes to be jurisdiction. It creates these superficial borders. The plaintiff took this all the way to the Supreme Court, arguing, "Well, that doesn't have any practical sense because anyone, even in Canada, can just look it up on google.com and find it." And the Supreme Court of Canada agreed with the plaintiff and they said, "Yeah, that doesn't make sense. The internet is borderless. You can't just create the superficial borders. Google, deindex globally. You have to deindex from all search results." Now, that was the top decision of the top court in Canada, right, ordering Google to remove search results globally. Google then went to a California court and obtained a finding from the California court saying it does not have to comply with the Supreme Court of Canada's decision in the US, so protecting it from finding a contempt in the US. So all good and fine. We got an order. You're Equustek. You get an order. It's a judgment. It's a piece of paper. But Google just legally can choose to ignore it, okay, and because it's protected in the US. And why is that? That's because of the Communications Decency Act, or it's often referred to Section 230 in the US, where for different reasons-- it's a little complicated, but generally speaking, it's a piece of legislation in the US that says that any internet service providers, host, anyone online, effectively, platforms, are protected from liability, from civil liability, for anything posted on their-- or anything that appears on their sites that they haven't authored, right, so anything posted by their users. And so that effectively protected Google, as well, in California.

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

HUSEIN 58:24 Is it hard to be optimistic, then, in terms of practicing in this area, because, I mean, there's jurisdictional issues in all types of law, but for this particular, it seems like it's so common. I'm trying to think of a nicer way to say this, but how does anything get done if you're always fighting about jurisdiction?

MAANIT 58:43 No, that's a very good question. How does it get done? Well, it's difficult. It's challenging. That's why I love it. That's why I do it, because it's--

HUSEIN 58:53 I'm not disparaging your area of work--

MAANIT 58:54 No.

HUSEIN 58:55 --by any means. It was a--

MAANIT 58:55 [crosstalk].

HUSEIN 58:56 --genuine question.

MAANIT 58:57 And it's an excellent question. It's challenging. You have to be creative. You have to work with lawyers in other jurisdictions, like I regularly work with lawyers in the US, for example, all the time, that have expertise in this area. And I'm going to say this now, and it's not because I'm touting my own expertise, but if you as a lawyer, a practicing lawyer, has a case that comes onto your desk that involves some internet law issues, whether it's defamation, privacy, whatever, call an expert. I regularly being consulted by lawyers and they're shocked to find out that the advice they gave their client is great and fine legally, but will have no practical implications, because you do not want to be the lawyer who advises your client to go ahead, bring this case, go all the way to the Supreme Court, and then be left with a piece of paper that means nothing. And that happens a lot. And so I know personally from my experience in this area is that the first conversation I have with a client is, "Here's the law. Here's what we can do for you. But it's all limited by the practicalities of the internet."

MAANIT 01:00:02 Now, another example of that, less from a jurisdictional perspective, but purely from practicalities, is the Atas case that we talked about earlier, where Nadire Atas was ordered, the defendant was ordered, to remove all these postings from the internet about her victims. But they haven't been removed for different reasons. One of which she just, from a practical perspective, doesn't have control over these postings. It's the websites that control it and their websites have no interest in removing it. And even if it did, she's still out there, as far as I understand, posting. So, I mean, I don't know if she is, but point being is

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

that it's going to be very difficult to then say, "She's the one that's posing." There could be more posts and who knows who they are, who's doing that, as well. So there's a lot of issues that's-- it's just extremely difficult to practically enforce for all these different reasons.

HUSEIN 01:00:57 I imagine that these issues are also what keeps the area interesting for you and other practitioners.

MAANIT 01:01:01 Oh, 100%. All the time. Not to mention the fact that the law keeps changing and evolving. But I find it very intellectually stimulating.

HUSEIN 01:01:11 All right. So Maanit, I want to thank you so much for taking the time to speak to us today about these issues. I mean, as we were just saying, these issues are constantly changing and are very relevant to all Canadians, whether you yourself are active on social media or not. So we really appreciate your time. I'm looking forward to staying in touch in the future, as well.

MAANIT 01:01:29 Thank you. Thank you so much, Husein. Thank you for having me.

[music]

HUSEIN 01:01:39 And that's going to be a wrap on this episode of Lawyered. Thanks for listening. On today's episode, our guest was Maanit Zemel, and you can learn more about her and her practice at her firm's website, which is canadatechlaw.com. And true to form, Maanit is also very active on social media herself. You can throw her a follow at her handle on Twitter and LinkedIn, as well. And for more about today's show and links to all the cases that we spoke about today, you can find those on our website, which is lawyeredpodcast.com. In a couple of weeks, our next episode guest will be Isaac Peng, who's a prominent lawyer in the area of planning law. And we'll be speaking about a number of topics including housing affordability, heritage planning, and ministry zoning orders, all of which have been very much in the news in the last year or so. Some of you may know or recall planning law is an area that I used to work in back in the day. So I can confirm that these are issues that are of very wide importance, whether you practice in the area or not.

HUSEIN 01:02:43 If you're liking this podcast and want to help to improve it and get some neat and affordable legal rewards for your own, including the opportunity to submit your own questions for our upcoming episodes, it'd be great if you could check out our crowdfunding campaign and become a patron of the show. You can find out how to do that at our crowdfunding website, which is lawyeredpodcast.com/patron. That's lawyeredpodcast.com/patron. I want to give a shout to a couple of our patrons, including Conner Coles, Donald Bourgeois, and Ethan Marx. Thanks so much for all of your help and support. Really appreciate it. To make sure that you never miss another episode of Lawyered, do us a favor and subscribe to our podcast. It is free on iTunes or anywhere else that you get your podcasts. You can also follow us on social media at

Lawyered – Episode 73
Social Media Law ft. Maanit Zemel
Episode Transcrip

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